

## Contract as Empowerment

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*This Article offers a novel interpretation of contract law, which I call “contract as empowerment.” On this view, contract law is neither a mere mechanism to promote efficiency, as many economists suggest, nor a mere reflection of any familiar moral norm—such as norms of promise keeping, property, or corrective justice. Contract law is instead a mechanism of empowerment: it empowers people to use legally enforceable promises as tools to influence other people’s actions and thereby to meet a broad range of human needs and interests. It also empowers people in a special way, which reflects a moral ideal of equal respect for persons. This fact explains why contract law can produce genuine legal obligations and is not just a system of coercion.*

*This Article introduces contract as empowerment and argues that it offers a theory of contract with distinctive advantages over the alternatives. Contract as empowerment is an interpretive theory: it is simultaneously descriptive, explaining what contract law is, and normative, explaining what contract law should be. To establish the theory’s interpretive credentials, this Article identifies a core set of doctrines and puzzles that are particularly well suited to testing competing interpretations of contract law. It argues that contract as empowerment is uniquely capable of harmonizing this entire constellation of doctrines while explaining the legally obligating force of contracts. Along the way, contract as empowerment offers (1) a more penetrating account of the expectation damages remedy than exists in the current literature, (2) a more compelling account of the consideration requirement, and (3) a concrete framework to determine the appropriate role of certain doctrines—like unconscionability—that appear to limit freedom of contract.*

*The whole of this explanation is greater than the sum of its parts. Because of its harmonizing power, contract as empowerment demonstrates how a broad range of seemingly incompatible surface values in modern contract law can work together—each serving its own distinctive but partial role—to serve a more fundamental*

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*principle that is distinctive to contract law. These surface values include the values of fidelity, autonomy, liberty, efficiency, fairness, trust, reliance, and assurance. Although many people think that contract law must involve trade-offs between these values, contract as empowerment suggests that surface tensions between them are not always fundamental or real. So long as the complex system of rules that govern contracts is fashioned in the right way, these doctrines can work together to serve a deeper and normatively satisfying principle that is distinctive to contract. This framework can therefore be used to guide legal reform and identify places in which market regulation is warranted by the principles of contract in many different contexts of exchange—from those involving consumer goods to labor, finance, credit, landlord-tenant arrangements, home mortgages, and many others.*

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#### INTRODUCTION

As Professors Alan Schwartz and Robert Scott have observed: “Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be.”<sup>1</sup> Contract law superficially reflects a plurality of different values—like those of fidelity, autonomy, liberty, efficiency, fairness, trust, reliance, and assurance.<sup>2</sup> This Article argues that many of contract law’s deepest

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<sup>1</sup> Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 543 (2003).

<sup>2</sup> See, e.g., *id.* (“Pluralist theories attempt to respond to the difficulty that unitary normative theories pose by urging courts to pursue efficiency, fairness, good faith, and the protection of individual autonomy.”); Peter Benson, *Contract*, in *A COMPANION TO*

tensions can nevertheless be harmonized by reference to a single and normatively satisfying principle relating to empowerment. The core idea is that contract law aims to empower people to use promises as tools to influence one another's actions and thereby to meet a broad range of human needs and interests. I call this view "contract as empowerment."

This Article argues that contract as empowerment has interpretive advantages over competing theories of contract. The positive argument proceeds in three stages. Part I introduces the theory of contract as empowerment and describes its core features. Part II highlights one of the central doctrinal challenges for modern contract theory. No current theory can jointly account for three core areas of common-law doctrine: (1) the standard remedies in contract law (which focus on expectation damages and, to a lesser extent, on specific performance); (2) the centrality of the consideration doctrine; and (3) the fairly pervasive tension between some doctrines, which invite courts to defer to parties' subjective wills when determining the existence and scope of contracts, and certain other doctrines, which invite courts to deviate from parties' subjective intentions to reflect concerns for fairness, public policy, and objective intent.<sup>3</sup> Part III argues that contract as empowerment is uniquely capable of harmonizing this entire constellation of doctrines while explaining the legally obligatory force of contracts.

Along the way, contract as empowerment offers a distinctive account of the expectation damages remedy—which significantly moralizes the remedy—and suggests that it need not be understood as permitting "efficient breach," as a number of economists have proposed.<sup>4</sup> Contract as empowerment offers a novel and

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PHILOSOPHY OF LAW AND LEGAL THEORY 29, 29 (Dennis Patterson ed., 2d ed. 2010) ("[T]he world of contract theory presents itself as a multiplicity of mutually exclusive approaches with their own distinctive contents and presuppositions."); Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 831 (2007) ("[M]uch of the scholarly discussion of contract law implicitly or explicitly assumes that [a coherent normative] interpretation is impossible and that the law we have represents, at best, a collection of essentially random and disconnected choices resulting from a series of historical accidents.").

<sup>3</sup> Professor Peter Benson argues that these three questions are central to contract theory. Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118–19 (Peter Benson ed., 2001). See also *infra* Part II. I should note that I am, however, offering a slightly expanded description of the third tension in question, for reasons that I explain in Part II. Benson also attempts an alternative unification of these doctrines. Benson, *The Unity of Contract Law*, *supra* at 201–02.

<sup>4</sup> See *infra* Part III.A (offering an empowerment-based account of the expectation damages remedy, which posits additional remedies as unnecessary for empowerment and suggests that moral equals could not reasonably reject a rule that requires contract-

more compelling account of the consideration requirement than exists in the current literature.<sup>5</sup> Finally, contract as empowerment offers a distinctive understanding of the appropriate role of legal doctrines that make the scope or content of contractual obligations depend on facts other than parties' subjective wills.<sup>6</sup> Objective approaches to interpretation provide one example of this phenomenon.<sup>7</sup> This Article is, however, even more concerned with doctrines that either invite or require courts to police contracts for substantive fairness—as reflected in the modern unconscionability doctrine<sup>8</sup>—or on public policy grounds.<sup>9</sup> So long as these doctrines are fashioned in the right way and with the right limitations, contract as empowerment interprets them as direct expressions of the basic principles that animate contract law and modern market activity rather than as alien intrusions into their core subject matter. Part IV, finally, addresses some limitations and objections to the theory.

Contract as empowerment thus offers a fundamental reinterpretation of the basic principles that animate contract law and modern markets. This interpretation is novel and improves upon both classical economic and traditional philosophical theories. By establishing contract as empowerment's interpretive credentials with respect to contract law's doctrinal core, I hope to prove the usefulness of extending the theory to address a much broader range of doctrinal questions.

## I. CONTRACT AS EMPOWERMENT: THE BASIC THEORY

Contract as empowerment begins with a simple observation: people sometimes have good reasons to use promises as tools to

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ing parties to accept expectation damages and termination of a contract in lieu of performance in many circumstances).

<sup>5</sup> See *infra* Part III.B (offering an empowerment-based account of the centrality of the consideration doctrine and exposing the link between this account of consideration and the standard contract-law remedies); Part III.C (exposing the links between this account of consideration, the objective theory of intent, and certain doctrines that invite courts to police contracts for fairness).

<sup>6</sup> See *infra* Part III.C (offering empowerment-based accounts of a broad range of doctrines that invite or require courts to determine the scope or content of contractual obligations based on factors that go beyond the parties' subjective wills).

<sup>7</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981) (setting forth the modified objective approach to contract interpretation). See generally Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

<sup>8</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) ("Unconscionable Contract or Term"); UCC § 2-302 (ALI 2012) ("Unconscionable Contract or Clause").

<sup>9</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 178–99 (1981).

induce other people to make return promises or engage in various actions in return. The effectiveness of promises for these purposes will typically depend on whether the specific promisees trust the specific promisors to fulfill them.<sup>10</sup> Interpersonal trust of this kind can sometimes be generated in informal ways, but—especially among relative strangers in many modern settings—is often lacking absent law.<sup>11</sup> When this is the case, contract enforcement can therefore empower people to use promises as tools to influence one another’s actions and thereby to meet a broad range of human needs and interests.<sup>12</sup>

This form of empowerment is both personal and interpersonal. It is personal insofar as it concerns the ability of individual people to use promises as tools to meet their personal needs and interests. It is interpersonal insofar as it concerns the ability of individual people to use promises as tools to influence *other* people’s actions. Empowerment should also be understood as a type of *capability*, as Professors Amartya Sen and Martha Nussbaum have defined that term.<sup>13</sup> When contractual empowerment exists, it gives people the freedom and ability to achieve a broad range of valuable beings and doings by contracting.

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<sup>10</sup> See Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137, 137 (Mar 13, 2003) (“The crucial feature of any exchange is that the parties involved have to trust each other.”); Anthony J. Bellia Jr, *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25, 26 (2002) (“The incentive to rely on a promise exists only to the degree that a promise is trustworthy.”).

<sup>11</sup> See, e.g., Simon Deakin, Christel Lane, & Frank Wilkinson, *Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study*, in CONTRACTS, CO-OPERATION, AND COMPETITION 105, 122–23, 125 (Simon Deakin & Jonathan Michie eds., 1997) (suggesting that contract law should be sensitive to the important roles that trust and cooperation play in increasing firms’ efficiency).

<sup>12</sup> In saying this, I do not mean to suggest that it is the legal sanction that must always motivate people to respond to contracts. People who have a sense of legal obligation will often respond directly to the perceived authority of legal rules, along with those who have a sense that legal sanctions would be warranted. See Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 TEX. L. REV. 877, 880 (2006) (“[W]e are also motivated by a sense of obligation, which is not reducible to instrumental reasoning. . . . This sense of obligation gives rise to characteristic patterns in our social lives and structures a number of our interpersonal actions and reactions to one another.”). Legal sanctions can also provide an assurance of performance for those who are less intrinsically motivated by the law’s authority. As Professor Stewart Macaulay’s famous study, *Non-contractual Relations in Business: A Preliminary Study*, has shown, even commercial entities typically respond directly to perceived rights and obligations that arise from contracts and to equitable concerns that arise within the relationships created by contracts. Threats of legal sanction are typically made explicit only rarely and only when these relations break down. Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55, 60–62 (1963).

<sup>13</sup> See AMARTYA SEN, DEVELOPMENT AS FREEDOM 18–20 (2000); MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–45 (2011).

Empowerment of this kind can prove valuable in a number of different contexts, including outside the formal marketplace. Consider, for example, the famous case of *Hamer v. Sidway*,<sup>14</sup> in which an uncle used a legally enforceable promise as a tool to induce his nephew to refrain from drinking liquor, using tobacco, swearing, and gambling until the nephew turned twenty-one.<sup>15</sup> This was not an arm's-length transaction in a formal market, and the uncle's motivations in *Hamer* were apparently at least partly altruistic (to help his nephew) rather than purely self-interested.<sup>16</sup> Still, the court held that the promise was an enforceable contract, and the availability of legal enforcement mechanisms might have helped the uncle generate the trust needed to influence his nephew's actions over such a long period of time with this promise.<sup>17</sup> If so, then contract law was empowering in the technical sense used here: it enabled the uncle to use a legally enforceable promise to influence his nephew's actions and thereby to promote a real human need or interest. The contract did this even though it did not arise from a typical market transaction.

As important as contractual empowerment can be in some nonmarket contexts, it has become especially critical for human flourishing in the modern world as modern market activity and personal dependence on it have become increasingly robust, globalized, and potentially welfare enhancing.<sup>18</sup> The ability to

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<sup>14</sup> 27 N.E. 256 (N.Y. 1891).

<sup>15</sup> *Id.* at 256.

<sup>16</sup> See *Hamer v. Sidway*, 11 N.Y.S. 182, 184 (N.Y. Sup. 1890).

<sup>17</sup> Of course, one might question whether legal enforceability was needed for trust in this particular case, given that the promise arose in a family context. In most intimate and family settings, I do not believe that legal enforcement mechanisms are necessary for promises to work. See *infra* Part III.B (citing this fact as an explanation for why social and informal promises are typically not legally enforceable). Still, legal enforcement mechanisms may have been empowering in *Hamer* because the uncle was trying to induce a significant set of actions over an extremely long period of time. *Hamer*, 27 N.E. at 257–58. When the promise was made, it was not clear that the uncle would even live long enough to see his nephew fully perform—in which case the promise might work only if the nephew could trust that he had a legal right against the uncle's legal estate. This is, in fact, how the case ultimately came to court. See *id.* at 256.

<sup>18</sup> See Joseph Henrich, et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 SCIENCE 1480, 1480 (2010) (noting that evidence suggests that modern prosociality—including large-scale societies in which strangers regularly engage in mutually beneficial transactions—is “not solely the product of an innate psychology, but also reflects norms and institutions,” including modern markets and world religions, “that have emerged over the course of human history”). See also Commission on Growth and Development, *The Growth Report: Strategies for Sustained Growth and Inclusive Development* 25 (2008) (discussing markets as a necessary factor for high, sustained economic growth); *id.* at x (“[S]ustained [economic] growth enables

depend on a vast network of legally enforceable contracts to obtain numerous goods and services from the marketplace has, in fact, radically reshaped human life in many parts of the modern world.<sup>19</sup> It has allowed for much greater division of labor, specialization, and hence freedom from want for many.<sup>20</sup> In addition, people who can depend on readily available transactions with others to obtain a broad range of goods and services often find themselves much freer to develop their own specialized life plans.<sup>21</sup> This freedom can help them achieve the best lives *for them*.

It follows that promisors who seek to use promises as tools to influence others' actions have personal, instrumental reasons to favor the promises' legal enforcement. It is, however, one thing to say that people have instrumental reasons to favor contract enforcement and quite another to say that contracts generate genuine legal obligations. This difference is critical because contract law purports to generate genuine obligations and not just instrumental reasons for action. Hence, any satisfying theory of contract should explain this feature of contract law. What are some of the main differences between instrumental reasons and obligations?

Instrumental reasons are not owed to anyone else, whereas obligations are. Obligations give some other person or group the authority to demand compliance with a rule or standard.<sup>22</sup> Un-

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and is essential for things that people care about: poverty reduction, productive employment, education, health, and the opportunity to be creative.”).

<sup>19</sup> See *The Growth Report*, *supra* note 18 at 29 (“But in recent decades, economists have acquired a deeper appreciation of the underlying institutions that make mature markets work. These institutions define property rights, enforce contracts, convey information, and bridge informational gaps between buyers and sellers.”). Going in the other direction, Professor Douglass C. North has observed that “the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.” DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 54 (1990).

<sup>20</sup> For a classic discussion, see ADAM SMITH, 1 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 13–30 (R.H. Campbell, A.S. Skinner, & W.B. Todd eds., Liberty Classics 1981).

<sup>21</sup> This is a theme that Professor Milton Friedman developed at length in CAPITALISM AND FREEDOM 7–21 (1962). This work has become a cornerstone for libertarian thinking, but one need not be a libertarian to accept that markets have freedom-enhancing properties. For a discussion of Friedman’s libertarianism, see Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1359 (2006).

<sup>22</sup> Although the term “obligation” can be used in different ways, I believe this requirement is a defining feature of its core meaning. I thus agree with Professor Stephen Darwall that “[t]here can be no such thing as moral obligation and wrongdoing”—at least

like instrumental reasons, which can always be outweighed by other instrumental reasons, obligations have the authority to override or exclude some instrumental reasons.<sup>23</sup>

Because of facts like these, failures of instrumental rationality typically warrant different reactions than breaches of obligations. Failures of rationality can invite rational criticism, but no one typically has the authority to demand perfect instrumental rationality from another person.<sup>24</sup> Breach of a contractual obligation will, by contrast, typically permit not just criticism but also private demands for compliance or remediation, backed by the coercive power of the state.

If contracts are to generate genuine legal obligations, they must therefore give contracting parties the authority to demand actions from other people. These demands must have some overriding or exclusionary force and be legitimately backed by the coercive power of the state. No number of instrumental reasons can create an overriding authority<sup>25</sup> that is legitimately backed

in one core, familiar sense—“without the normative standing to demand and hold agents accountable for compliance.” STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 99 (2006). Although people sometimes use the terms “moral wrong” and “moral obligation” to refer to a wider class of phenomena, the term “legal obligation” is almost never used so widely. When I ask whether contract laws can produce “genuine legal obligations,” I am therefore asking whether they can give contracting parties the genuine authority to demand compliance with a contract that is backed by the coercive power of the state.

<sup>23</sup> This point has been made variously, and sometimes with different terminology, by many theorists. See, e.g., *id.* at 91–118; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 80–84 (1999) (describing legal obligations as generating exclusionary reasons and exclusionary reasons as having a mandatory or required aspect); David O. Brink, *Kantian Rationalism: Inescapability, Authority, and Supremacy*, in *ETHICS AND PRACTICAL REASON* 255, 259–61 (Garrett Cullity & Berys Gaut eds., 1997); H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 253 (1982) (describing legal obligations as “peremptory” and tying this to Professor Joseph Raz’s conception of an exclusionary reason).

<sup>24</sup> As Darwall correctly explains, the overriding or exclusionary features of obligation are only part of their authority, “since there can be requirements on us that no one has any standing to require of us.” DARWALL, *THE SECOND-PERSON STANDPOINT*, *supra* note 22, at 13. Darwall explains that “We are under a requirement of reason, for example, not to believe propositions that contradict the logical consequences of known premises. But it is only in certain contexts, say, when you and I are trying to work out what to believe together, that we have any standing to demand that we each reason logically, and even here that authority apparently derives from a moral or quasi-moral aspect: our having undertaken a common aim.” *Id.* at 13–14.

<sup>25</sup> See, e.g., *id.* at 14–15: “There is hence a general difference between there being normative reasons of whatever weight or priority for us to do something—its being what we ought to or must do—and anyone’s having any authority to claim or demand that we do it. If, say, God has the authority to demand that we comply with certain norms, his authority to demand this cannot be reduced to any normative reasons that the norms might themselves generate or entail, nor, indeed, to his knowledge of these.”



by the coercive power of the state, and, hence, instrumental reasons cannot explain the legally obligatory force of contracts on their own.

To explain how contracts produce genuine legal obligations, one must instead begin with a substantive account of obligation. The one I favor is called a “contractualist” account, and it reflects one of the two major branches of social contract theory.<sup>26</sup> On the version of contractualism that I endorse, ordinary people not only are instrumentally motivated but also have a sense of justice and interpersonal obligation.<sup>27</sup> This is, in fact, an integral

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It is this fact that leads Raz to propose that law’s authority to generate exclusionary reasons depends on its epistemic capacity to help people identify what they ought to do better than they could on their own. JOSEPH RAZ, *Authority, Law, and Morality, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 210, 214 (2001): “The first two theses articulate what I shall call the service conception of authority. They regard authorities as *mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason. The people on their part take their cue from the authority whose pronouncements replace for them the force of the dependent reasons.”

But I agree with Darwall that this account fails to capture the authority of interpersonal demands and so cannot be the right account of genuine legal obligations. See DARWALL, *THE SECOND-PERSON STANDPOINT*, *supra* note 22, at 12–13 n.25 (“In my view, failure to observe this distinction [between counsel and command] infects Joseph Raz’s account of authority.”).

<sup>26</sup> Speaking at the most general level, social contract theorists seek to account for some normative concepts in terms of “principles that are, or would be, the object of a suitable agreement between equals.” Stephen Darwall, *Introduction, in CONTRACTARIANISM/CONTRACTUALISM 1* (Stephen Darwall ed., 2003). There are two major branches of social contract theory: the “contractarian” and “contractualist” branches. “Contractarians take[] the [relevant] principles to result from rationally self-interested bargaining,” whereas “contractualists” take “the relevant agreement [to be] governed by a moral ideal of equal respect, one that would be inconsistent, indeed, with bargaining over fundamental terms of association in the way contractarianism proposes.” *Id.* at 4. Contractualist theories can, in turn, be specified in a number of different ways. Prominent versions of contractualism can be found in the works of Professors Stephen Darwall, Immanuel Kant, John Rawls, Jean-Jacques Rousseau, and Thomas Scanlon. See *id.* at 5–7. I myself am a contractualist about *genuine legal obligations*. I differ from some other contractualists, however, in that I employ contemporary developments in evolutionary game theory and moral psychology to specify the motives and complex forms of social life that go into responding to genuine obligations.

<sup>27</sup> A number of contractualists have suggested that most people have moral motivations of some kind. See, e.g., DARWALL, *THE SECOND-PERSON STANDPOINT*, *supra* note 22, at 151–81 (describing the psychology of what he calls the “second-person standpoint” as a feature of human nature that motivates action and that is often responsive to the perceived authority of principles and interpersonal demands—not just the desirability of outcomes); JOHN RAWLS, *A THEORY OF JUSTICE* 46 (1971). On this type of view, each person beyond a certain age and possessing the requisite intellectual capacity develops a sense of justice under normal social circumstances. In the course of their development, ordinary people acquire a skill in judging things to be just and unjust, and in supporting these judgments by reasons. Moreover, ordinarily people have some desire to act in accord with these pronouncements and expect a similar desire on the part of others. Clearly this moral capacity is extraordinarily complex. See also T.M. SCANLON, *WHAT WE OWE*

part of our evolved moral psychologies, and it animates a complex but highly familiar form of human social life and interaction. I therefore accept the contractualist view that ordinary people, who develop in normal social circumstances, typically acquire some moral motives that are not merely instrumental. But I do not accept this psychological claim on faith. Rather, I draw on contemporary developments in evolutionary game theory and moral psychology to argue for the claim and to better characterize the noninstrumental structure of these motives.

In *The Deep Structure of Law and Morality*, for example, I argue that humans have a natural sense of obligation, which attaches most people to shared rules that require self-sacrifice.<sup>28</sup> This feature of human psychology animates a complex and highly structured form of human social life and interaction that can be scientifically characterized.<sup>29</sup> The human sense of obligation

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TO EACH OTHER 191–97 (1998) (suggesting that ordinary people are motivated to act not only rationally but also in ways that they can justify to others as conforming to principles for the general regulation of behavior that others, similarly motivated, cannot reasonably reject).

<sup>28</sup> Kar, *Deep Structure*, *supra* note 12, at 918–19.

<sup>29</sup> For some examples of this scientific characterization relevant to law, *see generally id.*; JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION: RAWLS' LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT (2011); John Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS COGNITIVE SCI. 143 (2007). *See also* RAWLS, A THEORY OF JUSTICE, *supra* note 27, at 502–03: “[O]ne might ask how it is that human beings have acquired a nature described by these psychological principles. The theory of evolution would suggest that it is the outcome of natural selection; the capacity for a sense of justice and the moral feelings is an adaptation of mankind to its place in nature.”

As it turns out, this form of life is poorly understood as the mere result of individuals pursuing outcomes that they take to be personally desirable—no matter how one characterizes people’s individual utility functions. *See generally* Kar, *Deep Structure*, *supra* note 12. I have argued, instead, that the natural function of the human sense of obligation (namely, what it was naturally selected for over the course of human evolution and prehistory, and therefore what it is particularly well suited to achieve) is to allow people to resolve social contract problems flexibly. *See id.* at 878. Because of this fact, the human sense of moral and legal obligations has some (admittedly fallible) tendencies to track principles that meet a contractualist test. *See* Robin Bradley Kar, *The Two Faces of Morality: How Evolutionary Theory Can Both Vindicate and Debunk Morality (with a Special Nod to the Growing Importance of Law)*, in EVOLUTION AND MORALITY 31, 60–65 (James E. Fleming & Sanford Levinson eds., 2012) (describing these tracking features of the human sense of obligation). *But see id.* at 77–92 (describing some systematic ways that these psychological capacities apparently fail to track the right properties and instead generate what I call “moral illusions”). Hence, I accept on empirical grounds that ordinary people are motivated to treat some other people as genuine sources of obligations and to interact with them in ways that exhibit noninstrumental forms of respect.

It would be nice if these psychological facts inclined people to treat all humans in this way, but our evolutionary history appears to have generated some natural tendencies toward parochialism instead. *See* Robin Bradley Kar, *The Psychological Foundations of Human Rights*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW

allows ordinary people to cooperate in groups and to solve a broad array of cooperative problems by responding to a shared system of perceived obligations<sup>30</sup>—including contractual obligations. But this psychology is structured to include not only intrinsic motivations to follow rules but also motivations to react to deviations in ways that are perceived to be warranted.

Because of psychological facts like these, it is possible to distinguish the “reasonable” person from the “merely rational” person. Whereas the merely rational person responds solely to instrumental reasons, the reasonable person has an additional motive: she is inclined to seek out and abide by a mutually acceptable set of rules for the general regulation of conduct and treat those rules as generating genuine obligations, given an appropriate assurance that all others will, too.<sup>31</sup> Contractualists

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104, 129–34 (Dinah Shelton ed., 2013). As is evident from both world history and the psychological literature on in-group/out-group favoritism, many people are naturally inclined to limit this form of respect to perceived in-group members and deny it to some perceived out-group members. See, e.g., Naoki Masuda, *Ingroup Favoritism and Inter-group Cooperation under Indirect Reciprocity Based on Group Reputation*, 311 J. THEORETICAL BIOLOGY 8, 9 (2012). I have argued that the law (and especially the recent emergence of international law) can nevertheless promote the extension of these motivations to more human beings. See Kar, *Psychological Foundations*, *supra*, at 141–42.

<sup>30</sup> For a detailed description of how this distinctive form of human social life and interaction is structured, see Kar, *Psychological Foundations*, *supra* note 29, at 134–40. Although that article is focused on how international law can promote this form of social interaction among otherwise parochially inclined people, it describes the psychology and structure of social interaction among people with a sense of interpersonal obligation and how these psychological attitudes work to resolve problems of cooperation in great detail.

<sup>31</sup> Here, I am following, but building on, the orthodox way of distinguishing the rational person from the reasonable person. I define the “perfectly rational” person as someone who reasons only and perfectly in accordance with the rules of formal rational-choice theory—which is fundamentally instrumental in orientation. Perfectly rational persons thus aim to maximize their subjective-preference satisfaction. They accept reasons to revise their *beliefs* about the world but do not accept reasons to revise their preferences—except to meet certain formal constraints, like those of logical consistency and transitivity. Of course, the perfectly rational person does not actually exist. See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981). See also Shane Frederick, George Loewenstein, & Ted O’Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LIT. 351, 352–55 (2002). I therefore use the term “merely rational” to refer to the less ideal counterparts of perfectly rational people. These people often deviate from perfect rationality, either due to limits in rationality or to the reliance on various heuristics or biases. Still, these people are thoroughly—if imperfectly—instrumental in their approaches to life. For a description of such people, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1059 (2000) (“[P]ersons subject to the legal system are seldom ruthless optimizers of their utility; rather, they often rely on a range of decision-making shortcuts and heuristics.”).

The reasonable person is, however, wired differently. She is also inclined to seek out and abide by fair and mutually acceptable rules for the general regulation of conduct,

hold that these perceived obligations are then real when they reflect a system of obligations that no one who is similarly motivated could reasonably reject in light of the available alternatives.<sup>32</sup> If no one can reasonably reject a system of legal obligations, then the demands that arise from this system of obligations and their backing by state coercion are justifiable *to the particular subjects of the demands and coercion*—and *on grounds that they themselves cannot reasonably reject*. Hence, ordinary people have reasons to respond to these purported obligations *as obligations*, and not simply because of any threats of sanctions or reputational declines.

Like all accounts of obligation, this one is, of course, controversial.<sup>33</sup> I will, however, assume this account for now and re-

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given an appropriate assurance that all others will, too. For a classic discussion of this distinction, see John Rawls, *Kantian Constructivism in Moral Theory: Rational and Full Autonomy*, 77 J. PHIL. 515, 528–30 (1980) (distinguishing reasonable people from rational people). I further build on this orthodox distinction by specifying that the reasonable person—at least as I use the term here—treats these rules as generating genuine obligations. She is thus inclined to engage in a specific and highly structured form of human social life and interaction with other people—so long as the governing rules meet a contractualist test and there is sufficient reciprocity.

<sup>32</sup> This way of articulating the contractualist test was first developed by Scanlon—although he typically speaks of evaluating “rules for the general regulation of behavior” instead of “obligations.” See, e.g., T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 103, 110 (Amartya Sen & Bernard Williams eds., 1982) (“An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement.”). I use the term “obligation” instead of “rules for the general regulation of behavior” to emphasize two points. First, here I am taking the contractualist forms of justification to be especially appropriate for identifying genuine interpersonal obligations. Second, I believe that, when comparing different systems of obligation in this context, one must understand how the human psychology of obligation typically functions. The variety of contractualism that I am espousing is thus distinct from some others in the literature.

When using contractualist tests to evaluate systems of obligation against the available alternatives, one alternative to consider is a system of moral and legal rules that permits everything. This would be reflected in a shared view that *there are no genuine moral or legal obligations*. If, however, everyone were to accept this view, then modern human life would be more “nasty, brutish, and short” for everyone involved—as Thomas Hobbes famously observed. THOMAS HOBBS, LEVIATHAN 76 (Edwin Curley ed., Hackett 1994). Hence, in the real world as it exists today, no one can reasonably reject *some* moral and legal principles that prohibit the unbridled pursuit of rational self-interest. Both social morality and law can give rise to some genuine obligations that limit rationally self-interested action and can motivate (reasonable) people to act, independently of the threat of sanctions.

<sup>33</sup> For an important argument that this account of obligation applies to obligations that have the practical authority that is currently under discussion, see DARWALL, THE SECOND-PERSON STANDPOINT, *supra* note 22, at 300–20. For an argument that law purports to have this practical authority, see generally Robin Bradley Kar, *Hart’s Response to Exclusive Legal Positivism*, 95 GEO. L.J. 393 (2007). For an argument that contractualist forms of justification apply to a special domain—namely, to what Scanlon calls

turn to questions about its status at the end of the Article. If—as I hope to have established by then—contract as empowerment plausibly offers the best way to harmonize some of contract law’s central tensions, then this account offers—at minimum—one of the best and most plausible justifications of contractual obligations as they currently exist.

With this background in mind, let us now return to the core argument for contract as empowerment. Although contract enforcement can instrumentally promote promisors’ empowerment interests, empowerment interests can also be cited in a distinct, contractualist explanation of why some contracts are genuinely legally obligating. To see this, consider a promisor who has made a promise in order to influence another person’s actions and thereby meet a real human need or interest. If a grant of legal authority to demand compliance is reasonably needed for this influence to work, then this promisor cannot both make a promise like this and reasonably reject a rule that grants the promisee the legal authority to demand compliance. Nor can this promisor reasonably reject a rule that permits the promisee to invoke the state’s coercive powers in case of noncompliance. This is because a grant of private authority, backed by the coercive power of the state, is needed for the promisor to induce the promisee to do something of value.

At least in these circumstances, private contractual demands backed by the coercive power of the state are thus justifiable *to the particular subjects of the demands* in terms of *their own empowerment interests*. If these promises are legally enforced, then they are more than just promises: they are also genuine legal obligations, because they are governed by a system of legal rules that no one can reasonably reject.

The core idea of contract as empowerment can now be stated in simple terms:

All other things being equal, contract-law rules should be set up to empower people to use promises as tools to induce others to action and thereby meet a broad range of human needs and interests. The law should therefore construe promises as generating genuine contractual obligations when two basic conditions are met: *first*, when one party makes a promise in order to influence another person’s actions and thereby promote a real human need or interest;

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“what we owe to each other.” See SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 27, at 191–97.

and *second*, when this influence reasonably depends on granting the promisee the legal authority to demand compliance. Absent this form of justification,<sup>34</sup> the law should not enforce promises as *true contracts*.

(As with any interpretive theory of contract, this theory thus provides not only a justification and explanation of contract law but also a way of demarcating the appropriate bounds of what is appropriately deemed a “true contract.”)

In what follows, I say that contract law is “personally empowering” when it enforces promises that meet the two criteria from the last paragraph and that contract law is “equally empowering” when its rules are consistent with the equal personal empowerment of all.<sup>35</sup> If a set of contract-law rules is personally but unequally empowering, and if a more equally empowering set is available, then that fact should give some persons *prima facie* reasons to reject the less equally empowering set in favor of the more equally empowering one. To produce genuine legal obligations for all, contract law must therefore be equally empowering, unless deviations from this ideal are ones that no one could reasonably reject in light of the available alternatives.<sup>36</sup>

Despite its appearance of simplicity, contract as empowerment differs from other leading contract theories in ways that

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<sup>34</sup> I thank Professor Brian Bix for pushing me to clarify this exception in the initial statement of the theory. Because contract as empowerment is rooted in a more general account of obligation, it does not rule out the possibility of other grounds for the legal enforcement of some other classes of promises. Indeed, I outline some of those other reasons elsewhere. See, e.g., *infra* Part III.B. Contract as empowerment does, however, identify a distinctive class of empowerment interests, which can be cited in a special contractualist explanation for why most contract-law rules look the way that they do.

<sup>35</sup> I would like to thank Professor Dan Markovits for pressing me to clarify these different definitions of empowerment and the relations between them.

<sup>36</sup> This does not mean that contract-law rules must be equally empowering. Consider, in this regard, Rawls’s famous argument for the maximin principle, which endorses a principle for the regulation of the basic structure of society that endorses certain forms of economic inequality so long as these inequalities are part of a system of social cooperation that conduces to the advantage of the least well off. See RAWLS, A THEORY OF JUSTICE, *supra* note 27, at 152–57. Rawls’s argument for the maximin principle is a contractualist argument, and it suggests that certain inequalities are in fact justifiable *to each person*. In the case of contract law, it is possible that rules that are unequally empowering in some ways are still ones that no one could reasonably reject in light of the available alternatives—either because the ideal of equal empowerment is too difficult or costly to achieve in practice or because the system of rules provides those who are subject to it with advantages that outweigh the inequalities that persist. What is important about the contractualist standpoint is, however, the baseline. Deviations from equal empowerment must be *justified to each person*, viewed as free and equal moral agents. On this view, the mere fact that a system of rules conduces to the advantage of each is not enough to outweigh unequal empowerment unless every alternative set of rules that is more equally empowering is even worse for each subject of the inequality.

can have far-reaching implications. For example, unlike contract as promise, contract as empowerment does not recommend the legal enforcement of the moral obligation to keep one's promises.<sup>37</sup> It focuses instead on a more limited class of promises: those that require legal enforcement in order to empower promisors to meet a broad range of human needs and interests by influencing other people's actions with legally enforceable promises. As I will detail in later sections, contract as empowerment can thus explain why social and informal promises are not typically enforced,<sup>38</sup> why the consideration requirement is so central to contract law,<sup>39</sup> and why specific performance is not the typical remedy for breach of contract.<sup>40</sup> These features of contract law can be hard to explain if one views contract as promise.

Unlike contract as promise, contract as empowerment also offers a substantive *argument* for the legally obligating character of this subclass of promises. It therefore avoids the problem of having to explain why the morality of promise keeping should be legally enforced when some other aspects of morality (like some purportedly immoral acts that do not harm others) should not.<sup>41</sup>

Unlike will-based theories of contract, contract as empowerment does not begin with a fundamental respect for parties' subjective choices either.<sup>42</sup> It is instead concerned with empow-

<sup>37</sup> For the classic statement of promise-based accounts of contract, see CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7–27 (1981). For a more recent and wide-ranging discussion, see generally Symposium, *Contract as Promise at 30: The Future of Contract Theory*, 45 SUFFOLK U. L. REV. 601 (2012).

<sup>38</sup> See *infra* Part III.B.

<sup>39</sup> See *infra* Part III.B.

<sup>40</sup> See *infra* Part III.A.

<sup>41</sup> This is an issue because the fact that something is morally obligatory does not generally mean that it is morally permissible to use state coercion to force moral action. This fact can create special problems for normative theories of contract, because contract law typically allows expectation damages or specific performance that goes beyond what is needed to compensate parties for any harms caused by their reliance. It can therefore appear that contract remedies violate some moral limitations on the law, such as John Stuart Mill's famous "harm principle"—or the principle that the law should get involved only with moral wrongs that generate harms. See JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER WRITINGS* 1, 13 (Stefan Collini ed., Cambridge 1989). For good discussions of these issues, see STEPHEN A. SMITH, *CONTRACT THEORY* 69–78 (2004) (addressing moral objections to promissory theories). See generally Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719 (2012).

<sup>42</sup> For a discussion of the will-based theory of contract, see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94, 115 (2000) ("The will theory of contract liability states that all the rules of law that compose the law of contracts can be developed from the single proposition that the law of contract protects the wills of the contracting parties.");

erment, which is a capability to achieve valuable beings and doings. All other things being equal, contract as empowerment therefore recommends giving parties' subjective choices whatever legal consequences will best promote these capabilities in the real world and are most consistent with the equal empowerment of all. Sometimes, this will require holding parties to all of and only what they have subjectively willed, but at other times—as later sections will show—it will require holding them to obligations that do not perfectly mirror their subjective wills.<sup>43</sup> In some circumstances, the law may even have to limit some people's ability to contract to promote their empowerment.<sup>44</sup>

Contract as empowerment can thus explain cases like *Dougherty v. Salt*.<sup>45</sup> In this case, an aunt used a highly formalized written instrument to promise her nephew money because of his past good behavior.<sup>46</sup> The aunt clearly intended for her promise to be legally enforceable, and one might therefore think that its legal enforcement would be “empowering” in one sense of this word. But this is not the sense of “empowerment” that I am employing here. As I use the term, the aunt did not have any genuine empowerment interests at stake in the legal enforcement of her promise, because she was not trying to influence her nephew to act in any ways at all—let alone in ways that reasonably required legal enforceability of her promise for the influence to work. She was not seeking to influence the nephew to engage in any valuable beings or doings in reliance on a legally binding promise. She was merely rewarding him for past actions, and, hence, there were no empowerment-related grounds to treat this instrument as a legally enforceable contract. I

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Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 554–58, 575–78 (1933). The will theory was more central to nineteenth-century common-law thought than modern thought. See Max Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575, 575–77 (1943) (discussing the centrality of the will theory to nineteenth-century thought). As I explain in Part III.C.1, the importance of the will-based theory to contract law is, however, still granted *in some form* in almost all modern theories of contract.

<sup>43</sup> See *infra* Part III (offering empowerment-based accounts of, among other things, the mandatory aspects of contract remedies, the consideration requirement, the implied duty of good faith and fair dealing, the various objective approaches to interpretation, and the existence of some market regulations).

<sup>44</sup> See *infra* Part III.C.2 (offering empowerment-based accounts of certain limitations on freedom of contract that should arise in the fair-lending context).

<sup>45</sup> 125 N.E. 94 (N.Y. 1919).

<sup>46</sup> *Id.* at 95.



therefore endorse the court's holding that this was not a legally enforceable contract.<sup>47</sup>

For similar reasons, contract as empowerment differs from theories that try to reduce contract law to an aspect of property.<sup>48</sup> Property can often be alienated at will,<sup>49</sup> but not all acts of alienation seek to influence other people's actions by means of legally enforceable promises. Hence, not all acts of alienation require legal enforcement to promote either personal or equal empowerment as I use those terms. There are, on the other hand, other areas of the law that give people legal mechanisms to alienate their property without necessarily seeking to influence other people's actions. Trusts and estates provide good examples. Trusts and estates can be used to alienate property without seeking to influence other people's actions through a legally enforceable promise, and they are therefore properly governed by a different set of doctrines than contract law.<sup>50</sup> Trusts and estates are more highly sensitive to features of the will—as is reflected in the terminological distinction between “wills” and “contracts.”

Finally, unlike contract as reliance, contract as empowerment does not seek to interpret contract law by focusing on the reliance interests of promisees.<sup>51</sup> It focuses instead on the empowerment interests of promisors. As I explain later, I believe that reliance interests can still generate *non-empowerment-*

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<sup>47</sup> The court found that there was no contract because the aunt's promise lacked consideration. *Id.*

<sup>48</sup> See *infra* Part III.C.2 (offering an empowerment-based account of objective approaches to interpretation).

<sup>49</sup> Professor Stephen Smith calls these theories “transfer” theories because they seek to understand contracts as reflecting contemporaneous transfers rather than promises of transfers in the future. SMITH, CONTRACT THEORY, *supra* note 41, at 97–99 (discussing transfer theories and some problems they face). For examples of this approach, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292–94 (1986); BENSON, CONTRACT, *supra* note 2, at 47–49; Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 300–01 (1995).

<sup>50</sup> See, e.g., RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §§ 3.1–3.9 (1999) (addressing the execution of wills); RESTATEMENT (THIRD) OF TRUSTS §§ 10–16 (2003) (addressing the creation of trusts).

<sup>51</sup> For classic works that develop aspects of the view that contracts should be understood to protect promisees' reliance interests, see generally P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); GRANT GILMORE, THE DEATH OF CONTRACT (1974); L.L. Fuller & William R. Perdue Jr, *The Reliance Interest in Contract Damages: I*, 46 YALE L. J. 52 (1936). The idea that reliance interests are important to contracts goes back even further, however. For example, even before publication of § 90 of the RESTATEMENT (FIRST) OF CONTRACTS, some people—like Professor Samuel Williston—were inclined to view reliance as a substitute for consideration, thus qualifying promises as legally enforceable contracts. See A CONTRACTS ANTHOLOGY 339–49 (Peter Linzer, et al., eds., Anderson 2d ed. 1995) (representing Williston's comments from the American Law Institute debates).

related grounds to permit parties to demand legal compensation for certain harms that are caused by reasonable reliance on others' promises.<sup>52</sup> Reliance interests can therefore explain the law of promissory estoppel but not of contract. The fact that these two explanations differ suggests that claims for promissory estoppel should be treated differently from claims for breach of contract. In fact, contract as empowerment suggests that true contracts—that is, promises that are supported by legal consideration—should be treated differently both from promises that merely induce detrimental reliance and from unilateral promises of gifts.<sup>53</sup>

## II. A CORE CHALLENGE FOR MODERN CONTRACT THEORY

Having introduced the basic theory of contract as empowerment, the remainder of this Article argues that it offers important interpretive advantages over other theories of contract—both economic and philosophical. To set the stage, this Part begins by identifying a core constellation of doctrines, which crystallizes one of the central challenges for modern contract theory. I argue that this constellation offers an especially probing test for competing interpretations of contract. Part III will then argue that contract as empowerment is uniquely capable of harmonizing this entire constellation of doctrines while explaining the legally obligatory force of contracts.

When Professors Schwartz and Scott observe that “[c]ontract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be,”<sup>54</sup> what precisely is the source of the difficulty? Contract law differs in nuance from jurisdiction to jurisdiction and over different periods of time. These differ-

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<sup>52</sup> See *infra* Part III.B.

<sup>53</sup> In saying this, I am using the term “true contract” in a way that differs from how the Restatement (Second) of Contracts defines “contract.” The Restatement defines a “contract” as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). This definition is thus broad enough to include certain claims that I do *not* consider claims for true breaches of contract—for example, many claims for promissory estoppel or covenants. I use a different terminology than the Restatement because I believe that the best interpretation of these different legal claims shows them to reflect interests that are fundamentally different. It aids the understanding to keep these distinctions clear, rather than viewing every legally enforceable promise as a true contract. Indeed, keeping these distinctions clear would likely be helpful for courts as well.

<sup>54</sup> Schwartz & Scott, *Contract Theory*, *supra* note 1, at 543.

ences are not the real source of the problem, however, because as Professor Benson has recently observed:

[I]n both the common law and civil law the definitions of and mutual connections between the various principles of contract law are for the most part well-settled and no longer subject to controversy. Indeed, despite differences in formulation, the main elements of the law of contract are strikingly similar in both legal systems, and these systems, whether directly or by derivation, prevail throughout most of the contemporary world.<sup>55</sup>

Still, “[t]he same cannot be said [ ] of efforts to understand the law at a reflective level.”<sup>56</sup>

Although this problem is general, this Article focuses on contract law as it appears in common-law jurisdictions. Given the common law’s well-settled doctrinal core, Benson identifies three questions that any general theory of contract should address in this context:

[1] The first question asks why expectation damages and specific performance, the so-called “normal” contract remedies, should be given for breach of a wholly executory and unrelieved-upon agreement. [2] The second focuses on the necessity and the centrality of the doctrine of consideration: what might be the rationale for this long-established condition of contract formation? [3] And the third question asks whether contractual liberty, as embodied in the traditional principles of contract formation, is compatible with contractual fairness, as reflected in, say, the more recently developed doctrine of unconscionability.<sup>57</sup>

These combined questions offer an appropriate framework for the current analysis for four reasons. First, as later sections explain, each of these questions raises independent and well-known puzzles about the shape of modern contract law.<sup>58</sup> These

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<sup>55</sup> BENSON, THE UNITY OF CONTRACT LAW, *supra* note 3, at 118.

<sup>56</sup> *Id.* Benson further explains: “In common law jurisdictions at least, there is at present no generally accepted theory or even family of theories of contract. To the contrary, there exist only a multiplicity of competing theoretical approaches, each of which, by its very terms, purports to provide a comprehensive yet distinctive understanding of contract but which, precisely for this reason, is incompatible with the others.” *Id.*

<sup>57</sup> *Id.* at 119.

<sup>58</sup> See, e.g., FRIED, CONTRACT AS PROMISE, *supra* note 37, at 28–39, 103–09 (suggesting that the consideration requirement and unconscionability doctrines present special problems for the coherence of modern contract law); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–24 (2007) (discuss-

puzzles are central enough to the subject matter of contract law that some would say they are defining.<sup>59</sup>

Second, these combined questions reflect some of the most seemingly intractable tensions in modern contract law. Although most current theories answer *some* of these questions, they typically do so by pointing to some single value that finds regular expression in contract law—like the values of fidelity, autonomy, liberty, efficiency, fairness, trust, reliance, or assurance.<sup>60</sup> Values like these famously conflict with one another at times, and most current contract theories answer some of these three questions in ways that make it difficult or impossible to answer the rest in a satisfying manner. Together, these questions thus crystallize one of the deepest challenges for modern contract theory.

Third, the doctrinal facts that generate these core questions have proved remarkably stable, at least in some form, in all common-law jurisdictions with advanced market economies.<sup>61</sup>

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ing some puzzling features about why the standard expectation damages remedy diverges from the morality of promise); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1261–64 (1980) (discussing the puzzling nature of the consideration requirement and standard remedial rules); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472–75 (1980) (addressing the distinctive and potentially puzzling role of substantive fairness concerns in contract law).

<sup>59</sup> See, e.g., BENSON, THE UNITY OF CONTRACT LAW, *supra* note 3, at 153 (“No doctrine of the common law of contract is more distinctive of it or longer and more continuously established than the requirement of consideration.”); *id.* at 121 (“The link between consideration and the availability of the expectation measure is taken to be the central and distinguishing feature of contractual liability.”). See also DOUGLAS BAIRD, RECONSTRUCTING CONTRACTS 3 (2013) (noting that “[f]or Holmes, the law of contract revolved around three central ideas”—including the consideration requirement, the centrality of the expectation measure of damages, and the various objective approaches to contractual formation); *id.* at 5 (suggesting that “[t]he core principles that Holmes put forward [as definitive of the core of contract] are still very much with us, but their logic and limits are now much better understood,” and organizing the reconstruction of contract law around these basic principles and questions); SMITH, CONTRACT THEORY, *supra* note 41, at 387: “[T]he main reason contract theorists have devoted special attention to remedies is that thinking about remedies raises important theoretical questions. . . . [T]he analytic debate about whether contractual obligations are best understood as promises, reliance-based obligations or something else [ ] has been conducted, to a significant degree, as a debate about remedies. So too, what was earlier described as the normative debate about whether contractual obligations are justified on the basis of individual rights or social utility [ ] has frequently also been conducted, particularly in recent years, as a debate about remedies.” (citation omitted). The claim that doctrines policing bargains for contractual fairness are partly definitive of contract law is more controversial. But as I argue in Part III.C.2, history suggests that the actual rules governing contractual exchanges have typically reflected some blend of commitments to contractual freedom and fair exchange. It is thus better to consider this feature of contract law as part of the relevant explanandum.

<sup>60</sup> See *infra* Part III.B.

<sup>61</sup> See BENSON, THE UNITY OF CONTRACT, *supra* note 3, at 153.

Within the United States, for example, the standard contractual remedies (question 1) and the consideration requirement (question 2) have survived influential prophecies concerning the death of contract and numerous recommendations for reform by leading experts.<sup>62</sup> The tension between doctrines that promote contractual liberty and those that promote contractual fairness (question 3) has played itself out in more-diverse ways. Still, despite a long history of divisive debate over how this tension should be resolved, the tension has persisted in some form in all common-law systems with advanced market economies.<sup>63</sup> All other things being equal, a general interpretation of contract law that harmonizes this entire constellation of doctrines, and does so in terms of a single normatively satisfying principle, should therefore be preferred over the alternatives.

Fourth, many of the doctrines that give rise to these core questions reflect mandatory rules. Mandatory rules are rules that parties cannot freely contract around, whereas default rules are ones that parties can.<sup>64</sup> Mandatory rules present special

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<sup>62</sup> With respect to the consideration requirement, Professor Grant Gilmore prophesied its demise. GILMORE, *THE DEATH OF CONTRACT*, *supra* note 51, at 76–81. Professor Charles Fried has argued for its abolishment. FRIED, *CONTRACT AS PROMISE*, *supra* note 37, at 28–39. In 1981, Professor Charles L. Knapp noted that promissory estoppel, which eliminates the consideration requirement and allows for reliance damages, had “become perhaps the most radical and expansive development of this century in the law of promissory liability.” Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981). Yet in a review of these developments almost two decades later, Knapp suggested that a “reassessment appear[ed] to be in order” and that “1980 may have been the high-water mark for promissory estoppel.” Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1192 (1998). As for the standard contractual remedies, some theorists like Professor Seana Shiffrin have argued on moral grounds that specific performance may be a more appropriate remedy than expectation damages. Shiffrin, *Divergence*, *supra* note 58, at 722–24. Nonetheless, the standard remedy for breach of contract is still expectation damages. See RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (defining the general measure of damages as the loss in value caused by breach, plus any incidental and consequential losses, less any costs and losses that were avoided).

<sup>63</sup> See, e.g., Kronman, *Distributive Justice*, *supra* note 58, at 473 (“There are, in fact, many rules of contract law that are deliberately intended to promote a distributional end of some sort.”); Elizabeth Anderson, *Toward a Post Cold-War Political Economy*, LEFT2RIGHT (Jan 9, 2005), available at <http://perma.cc/F7XA-X6K8> (describing these tensions as integral parts of advanced capital market economies and noting that we therefore “tend to think that the economies of the advanced democracies in North America and Europe are ‘mixed’ in some kind of combination of laissez-faire capitalism and socialism”).

<sup>64</sup> See, e.g., Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2035 (2012) (defining mandatory and default rules).

challenges to many theories of contract because they appear to conflict with basic principles of freedom of contract.<sup>65</sup>

When it comes to contract remedies, parties can, for example, insert liquidated damages clauses into their contracts and thereby try to specify the damages that will ensue from a breach.<sup>66</sup> Courts will not defer to these clauses, however, if they are deemed “punitive” in the sense that they exceed a reasonable estimation of the compensation needed to protect parties’ expectation interests.<sup>67</sup> Expectation damages are the standard remedy for breach of contract. Hence, expectation damages typically have some mandatory status. But this raises an important question: How is this mandatory aspect of contract law consistent with freedom of contract?

In common-law jurisdictions, the consideration requirement is also a mandatory rule. At least in the typical case, parties cannot simply waive this requirement and turn a unilateral promise of a gift into a legally enforceable contract.<sup>68</sup> This fact

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<sup>65</sup> See, e.g., Schwartz & Scott, *Contract Theory*, *supra* note 1, at 619 (“The welfare-maximization goal that we advance . . . cannot support many of the mandatory rules that today govern much contracting behavior between firms.”); *id.* (“A normative theory of contract law that takes party sovereignty seriously shows that much of the expansion of contract law over the last fifty years has been ill-advised. Contract law today is composed of a few default rules, many default standards, and a number of mandatory rules. Most of the mandatory rules should be repealed or reduced to defaults.”).

<sup>66</sup> RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

<sup>67</sup> *Id.* (“Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”). See also *id.* § 356, cmt. a (“[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive.”).

<sup>68</sup> See, e.g., *id.* § 71, cmt. b (1981) (“[A] mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no consideration and the promise is enforced, if at all, as a promise binding without consideration under §§ 82–94.”).

There are, of course, also some real or apparent exceptions to this rule. For example, merchants can make firm offers without consideration by merely following certain formalities. See U.C.C. § 2-205 (ALI 2012). These promises often appear to involve hidden consideration, however, because they seek to induce actions that increase the chances of sale. The Restatement also suggests that option contracts might be made binding at will and through the use of certain formalities, though this has not been widely followed by courts. See RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a) (1981); Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOYOLA L.A. L. REV. 713, 719–23 (1996). In some states, there are still claims for breach of covenant. See, e.g., *Hart v. Pacific Rehab of Maryland, PA*, 2013 WL 5212309, \*18 (D. Md. Sept. 13, 2013) (noting that Maryland law does not require consideration for certain sealed contracts). All of these exceptions are, however, just that: exceptions that prove the basic rule. In addition, parties do not get to freely choose whether these exceptions apply. They either apply or not as a matter of law. In Part III.B, I provide an empower-

thus raises similar questions about the relationship between the consideration requirement and freedom of contract.

Finally, at any given time there are typically quite a few mandatory rules that require courts to determine some aspects of the scope or content of contractual obligations based on factors that go beyond the parties' subjective intentions. Some current examples in American law include objective tests for intent,<sup>69</sup> minimum wage regulations,<sup>70</sup> the right to remain free from slavery,<sup>71</sup> the duty of good faith and fair dealing,<sup>72</sup> and numerous other limitations on freedom of contract that arise from various public policies.

As this last discussion shows, contractual liberty sits in tension not only with principles of contractual fairness—as Benson rightly observes<sup>73</sup>—but also with objective tests for intent and numerous limitations on freedom of contract that are rooted in public policy. These combined tensions pose some of the deepest challenges for modern contract theory, because they force theorists to ask how freedom of contract might be harmonized with a broad set of market regulations. I would therefore reformulate Benson's third question to ask the following broader question:

[3B] How might principles of contractual liberty, as embodied in the traditional principles of contract formation and interpretation, be harmonized with a broad set of doctrines that sometimes invite courts to determine the existence or scope of contractual obligations based on factors that go beyond the parties' subjective choices? How, in other words, might principles of contractual liberty be harmonized not only with principles of contractual fairness but also with ob-

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ment-based account of the consideration requirement, which suggests that these exceptions are warranted when the basic rationale for consideration no longer applies.

<sup>69</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981) (setting forth a modified objective test for contract interpretation).

<sup>70</sup> See, e.g., Fair Labor Standards Act of 1938 § 6(a), 52 Stat. 1060, 1062–63, codified as amended at 29 U.S.C. § 206(a) (setting forth minimum hourly wages for employees). See also 26 U.S.C. §§ 207, 212, 215 (setting forth maximum-hour limitations, child labor provisions, and other employment regulations).

<sup>71</sup> U.S. CONST. amend XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

<sup>72</sup> U.C.C. § 1-302(b) (ALI 2012) (“The obligation[ ] of good faith . . . may not be disclaimed by agreement.”); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

<sup>73</sup> BENSON, THE UNITY OF CONTRACT LAW, *supra* note 3, at 119.

jective approaches to interpretation and various limitations on freedom of contract that arise from public policy?<sup>74</sup>

Importantly, these three puzzles arise in some form not only with respect to contracts between individuals but also with respect to contracts that involve corporations. In contracts between corporations, expectation damages are still the default remedy, and limitations on liquidated damages clauses still exist—despite prominent economic critiques of these limitations.<sup>75</sup> The consideration requirement is still generally applicable, and courts still use a modified objective test for interpretation. Courts still imply mandatory duties like the implied duty of good faith and fair dealing, and they continue to impose public policy and illegality exceptions to contract enforcement. Though contracts between corporations of equal bargaining power often lack the conditions needed to police bargains for fairness, as I explain below,<sup>76</sup> that is an empirical fact that explains why less market regulation may be needed in relation to some contracts between corporations. It is not a fact that will undermine the theory of contract as empowerment, because contract as empowerment can explain this distinction.

Together, questions 1, 2, and 3B thus present an especially probing threshold test for any general interpretation of contract. They reflect mandatory rules that are central to the common law of contracts and that have proved remarkably stable—at least in some form—in all common-law systems with advanced market economies.<sup>77</sup> This particular constellation of doctrines collects some of the most seemingly intractable tensions in contract law in clear form. Each question presents independent puzzles about the shape of contract law,<sup>78</sup> which partly define its core subject matter,<sup>79</sup> and no current theory can jointly account for this entire constellation of doctrines while explaining the legally obligating force of contracts.<sup>80</sup> It would therefore mark an important advance to have a single contract theory that harmonizes this entire constellation of doctrines. The next Part argues that contract as empowerment offers this needed theory.

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<sup>74</sup> See *id.*

<sup>75</sup> For one such prominent criticism, see Robert E. Scott & George G. Triantis, *Embedded Options and the Case against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1434–56 (2004).

<sup>76</sup> See *infra* Part III.C.2.

<sup>77</sup> See SMITH, CONTRACT THEORY, *supra* note 41, at 215.

<sup>78</sup> See *supra* note 58 and accompanying text.

<sup>79</sup> See *supra* note 56 and accompanying text.

<sup>80</sup> See BENSON, THE UNITY OF CONTRACT LAW, *supra* note 3, at 118–19.



### III. EMPOWERMENT IN ACTION: HOW CONTRACT AS EMPOWERMENT MEETS THIS CORE CHALLENGE

No current theory of contract can account for the entire constellation of doctrines identified in Part II, but contract as empowerment can. Contract as empowerment is, in fact, uniquely capable of harmonizing this entire constellation while explaining the legally obligatory force of contracts. The purpose of this Part is to demonstrate these claims. To do this, I proceed sequentially. In Parts III.A, III.B, and III.C, I develop three separate empowerment-based answers to the three core questions identified in Part II.

In each case, I focus on the general rules and suggest that contract as empowerment offers better answers to the questions raised by these general rules than both economic and other leading theories. By focusing on this level of generality, I offer explanations that should invite more-detailed treatments of these three doctrinal areas (as well as others) and will undoubtedly include more recommendations for legal reform. My goal in this introductory article is, however, to show the harmonizing power of contract as empowerment at the right level of generality to establish its interpretive credentials with respect to the core principles of contract law.

The whole of these three explanations will, moreover, be greater than the sum of its parts. Contract as empowerment will reveal how a broad range of seemingly incompatible surface values in modern contract law can work together—each serving its own distinct but partial role—to serve a single and normatively satisfying principle that is distinctive to contract. Contract as empowerment therefore rejects the nearly universal view that conflicts between these surface values—such as conflicts between fairness and efficiency—must always reflect zero-sum games.<sup>81</sup> It leads to a distinctive interpretation of contract law and also to a distinctive interpretation of market relations.

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<sup>81</sup> The view that I am rejecting is incredibly common, though it is probably expressed most clearly in Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 966 (2001) (arguing that “the assessment of legal policies should depend exclusively on their effects on individuals’ welfare” and that “no independent weight should be accorded to conceptions of fairness, such as corrective justice and desert in punishment”—*except* to the degree that concerns for these values arise in individuals’ welfare functions). I argue for a view in which doctrines that blend concerns for fairness and efficiency are justified because they combine to promote empowerment in the right way. The value of fairness will not depend on this value being reflected in any person’s taste for fairness. Nor will justifications of laws that reflect fairness considerations be

### A. Expectation Damages and the Standard Remedies

The first doctrinal puzzle identified in Part II asks why courts enforce purely executory contracts before there has been any reliance or harm to the victim of a breach.<sup>82</sup> Another part of the puzzle is why courts use expectation damages (and, to a lesser extent, specific performance) as the typical remedy in claims for breach of contract.<sup>83</sup> These features of doctrine can be puzzling because, absent some harm to the victim, it is unclear why the victim of a contractual breach deserves a remedy.<sup>84</sup> It can also seem puzzling why contract law allows for private, but not public, enforcement of contracts.

1. Expectation damages promote empowerment better than reliance damages.

The first point to recognize is that expectation damages promote personal empowerment better than reliance damages. If contract is about empowerment, then contracting parties must have some degree of control over the level of inducement that they seek to generate with their contracts. This Section argues that expectation damages give parties the right amount of control, whereas reliance damages are often insufficient. To demonstrate this claim, I begin with a highly stylized example. I then generalize to more-ordinary contracts.

Hence, consider the highly stylized case of a millionaire who would like to obtain the writing services of a person who, like Henry David Thoreau, is a brilliant writer but is largely disaffected by society. This writer lives a largely self-reliant life in the wilderness. Very few people know where this person is, and he likes to keep it that way. The writer is not completely self-reliant, however, and he knows that even a hermit's life in the modern age may require some dependence on the products of modern markets. He has therefore used the money from his ear-

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reducible to facts about how those laws might promote utility functions that include a taste for fairness.

<sup>82</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981); BENSON, *THE UNITY OF CONTRACT LAW* *supra* note 3, at 119.

<sup>83</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 359–60 (1981).

<sup>84</sup> This is because there has not yet been any harm caused to the victim of the breach. For a classic discussion, see Fuller & Perdue, *The Reliance Interest*, *supra* note 51, at 57–66 (discussing the purposes behind awarding contract damages, which especially include protection of reliance interests and protection from the harms caused by reliance on breached contracts); *id.* at 52–53 (“Yet in this case we ‘compensate’ the plaintiff by giving him something he never had. This seems on the face of things a queer kind of ‘compensation.’”).

ly books to set up a small trust for himself, which gives him a monthly stipend to use for basic necessities. His sister—who is an attorney—handles his legal affairs.

Assume further that this writer's trust contains just enough money for him to survive through old age but that the writer has always wanted to travel to Tibet and does not have enough money for the trip. The commercial market for his poetry is not very robust, and there is no real hope that he will ever make enough money for the trip by seeking regular employment. The writer therefore believes the trip is a pipe dream. He is not interested in engaging in any regular employment. To make the example even more concrete, assume that the writer could obtain only \$100 from the ordinary market for his poetry and that his trip would cost at least one hundred times more than that. Although he is willing to write a poem for a trip to Tibet, his poetry does not currently have that market value.

The millionaire is nevertheless willing to pay more than one hundred times the current market price for this poem. This might be for any number of reasons: The millionaire might have a special taste for the writer's poetry, which makes the much higher price well worth it to him. Or the millionaire might believe that the market is simply wrong, because this writer is an undiscovered genius whose works will go up in market value over time. Finally, this particular sum of money may be less valuable to the millionaire than to many other people, due to the declining marginal utility of money.<sup>85</sup> Hence, the millionaire might be more willing to take a risk on the writer than others would be, and he may be able to do so consistent with meeting his other aims and interests.<sup>86</sup> Regardless of his particular reasons, the millionaire is willing and able to promise the writer a trip to Tibet in return for a poem.

In these circumstances, it might disempower the millionaire if courts were to use only a reliance measure of damages. Under this standard, no matter how much the millionaire promises for the poem, the writer could expect to obtain compensation only

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<sup>85</sup> See, e.g., Joshua Greene & Jonathan Baron, *Intuitions about Declining Marginal Utility*, 14 J. BEHAV. DEC. MAKING 243, 243–44 (2001) (describing how subjective judgments about the desirability of money show that money typically has decreasing marginal utility).

<sup>86</sup> This may be because the millionaire is rationally responding to the increased liquidity and financial insurance that his other assets bring. There is now, however, a solid and growing body of evidence that poverty causes risk aversion and time discounting that cannot be attributed to the relative absence of factors like these. See generally Johannes Haushofer & Ernst Fehr, *On the Psychology of Poverty*, 344 SCIENCE 862 (2014).

for any harms—including any monetizable lost opportunity costs—caused by reasonable reliance on the millionaire’s promise. By stipulation, however, this is at least one hundred times less than what the writer needs for a trip to Tibet,<sup>87</sup> and the writer is unwilling to engage in any employment at all for so small a sum. Hence, the legal assurance of reliance damages would be insufficient, on its own, to motivate the writer to write the poem.

It would, on the other hand, empower the millionaire if courts were to use an expectation measure of damages. Under this rule, if the millionaire were to promise a trip to Tibet in exchange for a poem, the writer could trust that—in return for the poem—he would obtain either a trip to Tibet or the trip’s fair market value, which he could then use to purchase the trip for himself. The millionaire could thus motivate the writer to write the poem by making a legally enforceable promise.

The reason that expectation damages are more empowering than reliance damages in this highly stylized case is simple: they allow the millionaire to provide an assurance of more than just compensation for reliance harms, which—in this case—is needed for the promise to influence the writer’s actions. One might therefore object that reliance damages are typically *sufficient* to motivate contracting parties, and that the current argument applies only to certain highly nonstandard cases.<sup>88</sup> Professor Lon Fuller and attorney William Perdue have, in fact, famously argued that expectation damages often provide a reliable measure of reliance harms, due in large part to the fact that they can cover lost opportunity costs.<sup>89</sup>

Even Fuller and Perdue acknowledged, however, that this claim is “most forceful in a hypothetical society in which all values [are] available on the market and where all markets [are] ‘perfect’ in the economic sense.”<sup>90</sup> The case of the writer is not like this: the monetizable opportunity costs are only \$100. But because Fuller and Perdue acknowledged that it is only in the hypothetical world they described that expectation damages are

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<sup>87</sup> It may, in fact, be less, because the writer was not looking for other work and did not have any other commercial opportunities on the horizon.

<sup>88</sup> I thank Professor Robert Hillman for pressing me on this point.

<sup>89</sup> Fuller & Perdue, *The Reliance Interest*, *supra* note 51, at 60 (“[If] we take into account ‘gains prevented’ by reliance, that is, losses involved in foregoing the opportunity to enter other contracts, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched.”).

<sup>90</sup> *Id.* at 62.

perfect proxies for reliance damages, their own view was that some aspects of expectation damages (which go beyond the protection of reliance interests in the real world) must be understood as having “a quasi-criminal aspect, [their] purpose being not so much to compensate the promisee as to penalize breach of promise by the promisor.”<sup>91</sup>

The problem with this explanation is that this additional amount is highly variable, generally hard to know, inconsistently related to the magnitude of the wrong, and completely insensitive to whether a breach is intentional. Hence, this purportedly “quasi-criminal” aspect of expectation damages is poorly suited to serve the standard punitive aims of notice, uniformity, proportionality, and sensitivity to desert *and* culpability.<sup>92</sup>

Still, Fuller and Perdue were right that the real world is not like the hypothetical world in which their reliance-based account works best. Real people are not perfectly rational,<sup>93</sup> and real markets are not perfectly competitive.<sup>94</sup> Transaction costs abound,<sup>95</sup> and real market prices tend merely to approximate (and sometimes even to deviate from) the equilibrium prices that would be based on actual supply and demand.<sup>96</sup> Even when

<sup>91</sup> *Id.* at 61.

<sup>92</sup> See MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 186–87, 225–29 (2010).

<sup>93</sup> See, e.g., Daniel Kahneman, *A Psychological Perspective on Economics*, 93 AM. ECON. REV. PAPERS & PROCEEDINGS 162, 162–65 (2003) (reviewing experimental evidence of some systematic irrationality in human psychology); *id.* at 162: “No one ever seriously believed that all people have rational beliefs and make rational decisions all the time. The assumption of rationality is generally understood to be an approximation, which is made in the belief (or hope) that departures from rationality are rare when the stakes are significant, or that they will disappear under the discipline of the market.”

For an important discussion of some consequences of these facts for law, see generally Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 31, at 1051.

<sup>94</sup> See, e.g., J. Peter Neary, *Presidential Address: Globalization and Market Structure*, 1 J. EUR. ECON. ASSN. 245, 245 (2003) (reviewing the “economic aspects of globalization” and arguing “that they cannot be satisfactorily addressed in perfectly or monopolistically competitive models”).

<sup>95</sup> For a nice discussion of such costs, see Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 190 n.31 (2012): “The deeper problem with an economic defense of markets is the ubiquity of transaction costs. . . . Market actors in the real world face ubiquitous information costs, bargaining costs, search costs, and the like. These transaction costs cannot be dismissed as negligible frictions. . . . Indeed, one study concluded that roughly forty percent of the entire U.S. economy consisted of private transaction costs.”

<sup>96</sup> This point about approximation follows from two observations about microeconomic theory as applied to questions of price determination and market equilibria. The first is that “[t]he actions of buyers and sellers naturally move markets toward the equilibrium of supply and demand.” N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 77 (7th ed 2014). To the extent that markets are dynamic and real market prices are in flux, real market prices should therefore tend merely to approximate market equilibrium

market prices are in equilibrium, they sum up vast amounts of highly dispersed information and present it in a normalized form.<sup>97</sup> Market prices therefore fail to reflect the actual—and often idiosyncratic—values that many real people place on many real goods and services.<sup>98</sup> It is in circumstances like these that real parties need to compete for the attention of their contracting counterparties. For the real world, we therefore need an account of expectation damages that neither relies on their purportedly quasi-criminal functions nor reduces them to mere proxies for reliance damages.

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prices. See Jean-Philippe Bouchaud, J. Doyne Farmer, and Fabrizio Lillo, *How Markets Slowly Digest Changes in Supply and Demand*, in HANDBOOK OF FINANCIAL MARKETS: DYNAMICS AND EVOLUTION 57, 148 (Thorsten Hens & Klaus Reiner Schenk-Hoppe eds., 2009). Second, the proposition that market prices naturally move toward market equilibria is premised on several theoretical idealizations, which have been challenged in the main text—for example, that there is perfect market competition, rational action, complete information, and an absence of market externalities. See MANKIWI, PRINCIPLES OF MICROECONOMICS, *supra* note 96, at 47–88. Deviations like these need not undermine the claim that prices naturally move toward the market equilibrium. See, e.g., Aldo Rustichini, Mark A. Satterthwaite & Steven R. Williams, *Convergence to Efficiency in a Simple Market with Incomplete Information*, 62 ECONOMETRICA 1041 (1994) (arguing that some deviations between actual trading behavior and true preferences, which might otherwise undermine the efficiency of a market, tend to vanish as market size increases). Still, facts like these suggest that real market prices are better understood as tending toward approximation than toward idealization. See, e.g., Angus Deaton & Guy Laroque, *On the Behaviour of Commodity Prices*, 59 REV. ECON. STUD. 1, 4 (1992) (“For most of the thirteen commodity prices . . . the behaviour of prices from one year to the next conforms to the predictions of the theory about conditional expectations and conditional variances.”) (emphasis added). There is, finally, some empirical and theoretical evidence that market prices can deviate more sharply from those expected by ideal microeconomic theory in some contexts. See, e.g., Kent D. Daniel, David Hirshleifer, & Avaniidhar Subrahmanyam, *Overconfidence, Arbitrage, and Equilibrium Asset Pricing*, 56 J. FIN. 921, 957 (2001) (explaining that, in the context of securities markets, “misvaluation of industry or market-wide factors persists”); Pinelopi Koujianou Goldberg & Michael M. Knetter, *Good Prices and Exchange Rates: What Have We Learned?*, 35 J. ECON. LIT. 1243, 1244 (1997) (“[I]t appears that the local currency prices of foreign products do not respond fully to exchange rates.”). See also Ivana Kubicová & Luboš Komárek, *The Classification and Identification of Asset Price Bubbles*, 61 CZECH. J. ECON. & FIN. 34 (2011) (discussing the classification of price bubbles and ways to identify them).

<sup>97</sup> For a classic discussion of this normalizing function, see F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945): “The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.” See also *id.* at 526–27 (“We must look at the price system as such a mechanism for communicating information if we want to understand its real function. . . . In abbreviated form, by a kind of symbol, only the most essential information is passed on, and passed on only to those concerned.”).

<sup>98</sup> See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 521 n.25 (1986) (describing how “the market value of nonfungible property, such as a home, is typically less than subjective value”).

Contract as empowerment offers the needed explanation. Although expectation damages do not always serve as perfect proxies for reliance damages in the real world, expectation damages do tend to give promisors greater ability to choose the level of inducement that they seek to generate by making legally enforceable promises. Expectation damages are therefore typically more empowering than reliance damages.

Notice, moreover, that this explanation does not depend on any of the idealized assumptions that are needed to establish the claim that expectation damages serve as perfect proxies for reliance damages. To the contrary, it is precisely *because* of these differences between expectation and reliance damages that expectation damages are typically more empowering than reliance damages. The present account also explains contract law's focus on expectation damages in terms of personal empowerment rather than in terms of a quasi-criminal aspect to private law. Hence, the present account not only is better on the merits but also helps clarify how contract law is distinct from criminal law.<sup>99</sup>

The contract between the millionaire and the writer is therefore not as extraordinary as it might seem. It merely exaggerates certain features of run-of-the-mill contracts to make a point. The point is that expectation damages generally give private parties more control over the assurances that they can provide with their contracts than reliance damages do. In many real-world circumstances, expectation damages are therefore more empowering than reliance damages. Hence, promisors who seek to influence other private parties by entering into legally enforceable contracts have an empowerment interest in their enforcement with an expectation damages remedy. These promisors cannot both make promises like these and reasonably reject a legal rule that allows their promisees to seek expectation damages, rather than reliance damages, in cases of breach.

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<sup>99</sup> In *Contract Theory—Who Needs It?*, Professor Avery W. Katz argues that a number of recent contract theorists fail to account for what he believes is “[t]he key feature of contract law, as opposed to the other standard first-year subjects”—namely, that contract law “affords private parties the power of lawmaking.” Avery W. Katz, Book Review, *Contract Theory—Who Needs It?*, 81 U. CHI. L. REV. 2043, 2046 (2014). Contract as empowerment clearly avoids that problem. But it also goes a step further to explain why this private lawmaking power is distinct from the power to make criminal law. The present account thereby explains a further dimension of what distinguishes contract law from criminal law.

2. Empowerment offers a better explanation than efficient breach.

It is one thing to explain why contract law allows *nothing less* than expectation damages in the typical case and quite another to explain why it allows *nothing more*. Why, in other words, does contract law not allow punitive damages or specific performance as the standard remedy?

Many people think that economic theories of efficient breach provide one of the best answers to this question.<sup>100</sup> When parties who breach contracts are forced to pay expectation damages and nothing more, two consequences are said to follow. First, by virtue of obtaining expectation damages, victims of breaches are left no worse off than if the contracts had been fully performed.<sup>101</sup> Second, by requiring nothing more than expectation damages, parties who find new opportunities to increase their personal welfare by breaching are incentivized to do so—at least so long as these benefits are larger than the costs of paying expectation damages.<sup>102</sup> It is thus sometimes said, even by critics of economic theories of contract, that a “program of expectation damages, if faithfully implemented, satisfies not only the [Kaldor]-Hicks standard of hypothetical compensation but the more restrictive Pareto standards of efficiency as well: not only is there a net social gain for the contracting parties, but no one is left worse off after breach than before.”<sup>103</sup>

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<sup>100</sup> See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999) (“[T]he centrality of efficient breach to contract theory has led us to think of the obligation of contract as the choice between performing and breaching at a price.”).

<sup>101</sup> See, e.g., Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 n.9 (1988); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 281 (1970) (citing SAMUEL WILLISTON, 5 A TREATISE ON THE LAW OF CONTRACTS § 1338 (1937)).

<sup>102</sup> Craswell, *Contract Remedies*, *supra* note 101, at 634. To use the language of economics, the costs of any such breaches are thereby effectively “internalized” by the breaching parties.

<sup>103</sup> Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 3 (1989). As Professor Jules L. Coleman has explained: “We can distinguish between Pareto optimality and Pareto superiority. . . . A state of affairs S is Pareto superior to another, A, if and only if no one prefers A to S and at least one person prefers S to A. The notion of Pareto optimality is then defined with respect to Pareto superiority. A state of affairs S is Pareto optimal provided there is no state of affairs S<sub>n</sub> that is Pareto superior to it.” Jules L. Coleman, Book Review, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1516 (2003). Kaldor-Hicks efficiency is defined in slightly different terms: “One state of affairs, S, is Kaldor-Hicks efficient to another, A, if and only if the winners under S could compensate the losers such that, after compensation, no one would prefer A to S and at least one person would prefer S to A.” *Id.* at 1517.



By contrast, one might think that contract as empowerment recommends either specific performance or punitive damages as a general rule. These remedies might appear more empowering, because they provide promisees with an even greater assurance of performance than expectation damages provide.

These first impressions are misleading. A more careful look at the issue suggests that contract as empowerment offers an alternative explanation of this standard remedial limitation. In addition, this explanation, which I will now provide, turns out to have several advantages over economic explanations.

To understand why this is so, let us return to the case of the millionaire and the writer. The writer in this case was willing to write a poem for the millionaire in return for a trip to Tibet. It thus empowered the millionaire to be able to provide the writer with that specific level of legal assurance. The writer's interest in obtaining a trip to Tibet can, however, be met by handing him either the physical tickets or the money for the tickets. Expectation damages are therefore *sufficient* for the millionaire's empowerment purposes in this case.

Because neither specific performance nor punitive damages are needed for the millionaire's empowerment purposes, the millionaire could reasonably reject a legal rule that allowed for specific performance or punitive damages for breach of this contract. But he could not reasonably reject a legal rule that allowed for expectation damages—for reasons explained in the previous Section. Far from endorsing specific performance or punitive damages in the typical case, contract as empowerment thus explains why damages that exceed expectation damages can reflect morally impermissible uses of state coercion in cases like these.

This argument can now be further generalized by considering some of the facts cited by efficient breach theorists. When the millionaire made his original promise, he knew or should have known that circumstances might change in ways that would make it better for him if he could pay the fair market value of the trip and be released from the contract.<sup>104</sup> For example, the millionaire might contract for the poem and receive it. Just as he is about to purchase the ticket for the writer, however, he might learn that his long-estranged daughter will be in Tibet for a very limited time. To see his daughter, the millionaire must

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<sup>104</sup> See, e.g., Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1353 (2009) ("Involuntary breaches are often inefficient: the promisor miscalculated his ability to comply with the contractual terms to which he had agreed.").

leave immediately. But there is a catch: There is only one ticket left on the currently listed flights to Tibet. Other flights will be listed soon enough, but the millionaire will be unable to personally arrange the writer's flight to Tibet because of its remote location.

In these circumstances, should the writer really have the legal authority to demand specific performance and thereby prevent the millionaire from seeing his daughter? The writer's actual interests in this contract can be met by receiving either the ticket or its fair market value. Hence, the writer cannot reasonably reject a legal rule that limits his remedy to expectation damages. For reasons already explained, the millionaire can, on the other hand, reasonably reject a rule that allows for more than expectation damages—that is, for specific performance or punitive damages. On the present account, it would therefore be wrong—*morally wrong*—to allow the writer to invoke the state's coercive power to force performance and make the millionaire miss seeing his daughter. This type of argument is, moreover, perfectly generalizable to any case in which parties can obtain substitutes for performance on an open market.

This explanation of the expectation damages remedy cites some of the same facts that efficient breach theorists emphasize, but it reinterprets them in ways that offer three major improvements over efficient breach theory. First, as is now well-known, efficiency considerations do not uniquely recommend expectation damages.<sup>105</sup> In circumstances in which breach would be efficient, legal rules that allow specific performance or punitive damages would still allow parties to renegotiate their contracts.<sup>106</sup> At least in principle, parties should therefore be able to

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<sup>105</sup> See, e.g., Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 578–79 (2006) (discussing how combinations of remedies other than expectation damages can be “equally efficient and potentially more consistent with the other normative understandings of contract enforcement”); Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 56 (1999) (“While it is nigh-on impossible to construct a single damage rule that will induce efficient behavior along all possible dimensions, giving defendants the options of inalienability and additur leads toward more efficient plaintiff precaution and, under certain conditions, more efficient defendant reliance.”) (citation omitted); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 760–62 (1992) (demonstrating that different damages regimes would be more efficient in different circumstances). For a useful discussion, see SMITH, CONTRACT THEORY, *supra* note 41, at 120.

<sup>106</sup> SMITH, CONTRACT THEORY, *supra* note 41, at 120. (“As economists themselves have pointed out, . . . if performance of a particular contractual obligation is indeed inefficient, the relevant contracting parties will have incentives to renegotiate or ‘bargain around’ a rule of specific performance so as to reach the efficient result.”).

capture these same efficiency gains through renegotiation, albeit with a different typical distribution.<sup>107</sup>

In some circumstances, transaction costs can make one of these remedies more efficient than the others. When transaction costs are equal, however, efficient breach theory cannot be used to choose among them.<sup>108</sup> Hence, efficient breach theory cannot be used to explain the relative generality of expectation damages as a default remedy in contract law or its mandatory character. The first interpretive advantage of contract as empowerment is that it explains why expectation damages are typically favored over specific performance and punitive damages—even in many cases in which these alternative remedies would be equally or even more efficient.<sup>109</sup>

At the same time, however, this explanation is limited to cases in which the parties' actual interests can be met by obtaining substitutes on an open market at a value that is easily ascertainable by courts. That fact explains why courts allow exceptions for specific performance in cases in which items are unique or expectation damages are especially hard to calculate. When it comes to promises for unique items or promises for which expectation damages may become difficult to calculate, contract law would not be empowering absent an assurance of specific performance.

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<sup>107</sup> *Id.* at 120–24.

<sup>108</sup> See Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 YALE L.J. 829, 835 (2003) (noting that the possibility of renegotiation prior to performance has proved problematic for efficient breach theorists, because efficient performance will occur regardless of the remedy when renegotiation costs are low enough).

<sup>109</sup> Professors Robert Scott and George Triantis have, for example, argued that the rule disfavoring penalty liquidated damages and specific performance in favor of expectation damages is sometimes less efficient than one that threatens punishment or that allows private parties a greater role in assessing option prices for breach. Scott & Triantis, *Embedded Options*, *supra* note 75, at 1480–86. But as these authors have freely acknowledged, their argument suggests that the standing law of contract remedies cannot be grounded purely in efficiency concerns. *Id.* at 1428 (“[T]his Article [ ] makes the case against the expectation damages default rule.”). Professor William S. Dodge has similarly argued that efficiency considerations favor punitive damages for willful breaches. See generally William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999). But this too is not the law. Hence, to whatever extent arguments like these have merit, contract as empowerment offers a *better*, and not just an equally compelling, account of the ordinary remedial rules in contract law than efficiency theories. See SMITH, CONTRACT THEORY, *supra* note 41, at 120–23 (noting that specific performance might be the more efficient remedy in cases in which damages are either harder or more costly to measure, such that “[o]rdering specific performance avoids the possibility of undercompensation (and, for that matter, overcompensation) entirely”).

A second interpretive advantage of the present theory is that it explains why expectation damages are consistent with the legally obligatory force of both contracts and promises. Although obligations purport to override or exclude some consequentialist reasons,<sup>110</sup> the theory of efficient breach implies—to the contrary—that contractual obligations can always be breached on consequentialist grounds.<sup>111</sup> This effectively denigrates the status of contractual obligations and misrepresents the way that they figure into courts' reasoning and into the lives of ordinary contracting parties.<sup>112</sup>

To the extent that markets and promise keeping reflect two centrally important features of modern social life, perceived schisms between them can cause tensions in contemporary society. Professor Shiffrin makes the point in an especially poignant manner. She suggests that by discrediting the obligatory force of promises, “the culture created by contract law and its justifications might make it more difficult to nurture and sustain moral agency, in particular the virtues associated with fidelity.”<sup>113</sup> Two centrally important aspects of modern human social life—namely, the interpersonal morality of promise keeping and modern market exchange—can therefore appear to be pitted against one another in an unresolvable conflict.

Importantly, this problem appears to arise not simply from divergences between contract and promise (here, at the remedial stage) but rather from *prevailing economic justifications* of the expectation damages remedy—which imply that obligations can always be breached on purely consequentialist grounds.<sup>114</sup> I believe that it is damaging to modern human society, and can cause great moral and psychic tensions, if people are forced to view their moral and economic lives so schizophrenically—that

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<sup>110</sup> This is, in fact, an intrinsic feature of law's basic nature, as described differently by theorists like Professors H.L.A. Hart and Joseph Raz. H.L.A. HART, *THE CONCEPT OF LAW* 82–91 (3d ed. 2012); JOSEPH RAZ, *THE AUTHORITY OF THE LAW* 233–49 (2d ed. 2009). See also Kar, *Hart's Response*, *supra* note 33, at 435–37.

<sup>111</sup> See Gil Lahav, *A Principle of Justified Promise-Breaking and Its Application to Contract Law*, 57 N.Y.U. ANN. SURV. AM. L. 163, 163 (2000).

<sup>112</sup> See HART, *THE CONCEPT OF LAW*, *supra* note 110, at 57, 89–91 (discussing the “internal point of view”); Kar, *Deep Structure*, *supra* note 12, at 925–27 (explaining Judge Richard Posner's argument that adopting a contrarian decision posture will “result in a standard that requires us to maximize efficiency or pareto-optimal states of affairs”); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1158–61 (2006).

<sup>113</sup> Shiffrin, *Divergence of Contract*, *supra* note 58, at 712–13.

<sup>114</sup> See *id.*

is, as simultaneously prohibiting and endorsing interpersonal relations that are purely instrumental in form.<sup>115</sup>

Contract as empowerment offers an alternative justification for the expectation damages remedy, which can help resolve these tensions. Rather than implying that people can always breach their obligations to one another on consequentialist grounds, it articulates *moral reasons of obligation* for limiting contractual remedies to expectation damages in the typical case. This is because contract as empowerment is rooted in a more general account of moral obligation, which simultaneously explains the morality of promises and places moral limits on when promises should be legally enforceable. Rather than undermining the obligatory status of either promises or contracts, contract as empowerment thus gives moral promises their own space. It then construes contracts, when they exist, to contain at least two distinct legal obligations. The primary legal obligation—owed by each promisor to each promisee—is to perform, conditional on performance by the other. The secondary legal obligation—owed by each promisee to each promisor—is to excuse nonperformance in return for expectation damages in the typical case. This more complex suite of contractual obligations is justified by the fact that it is sufficiently and equally empowering to both parties in the typical case. Hence, there are no empowerment-related grounds for either party to reasonably reject a system of legal obligations with these properties.

Contract as empowerment thus reinterprets the expectation damages remedy in ways that render it consistent with both the interpersonal morality of promises and the genuinely legally obligating force of contracts. In some cases, remedial divergences will and should still persist between promise and contract. Consider, for example, the case of a father who promises his daughter that he will attend her graduation. Assume that the two are very close and have sufficient interpersonal trust for the father to influence his daughter's actions with a promise that is not legally enforceable. Influence is not really the point, however, because the daughter will go to her graduation regardless, and the father is not really trying to influence his daughter's actions in any way with his promise. He promises his daughter that he will be there in order to show his love for her, to give her some peace

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<sup>115</sup> See *id.* at 714 (“It does not follow [ ] that legal principles in these domains should be entirely insensitive to or divorced from the demands of interpersonal morality.”).

of mind, and to assure her that he values sharing this moment with her more than promoting his narrower self-interest.<sup>116</sup>

In these circumstances, it would be morally wrong for the father to break his promise to his daughter simply because a better economic opportunity has arisen. But it would only add insult to injury if this promise were legally enforceable with expectation damages and if the father felt that he was permitted to simply breach and send a check for the “fair market value” of his presence (however that might be calculated). Far from constituting an adequate remedy for this breach, this payment would signal that the father considers his presence in his daughter’s life at this important moment to be fungible for cash. But *any* legal enforceability of this promise, including specific performance to force the father to attend, might make their relationship appear too distant and dependent on legal formalisms. These attitudes and reliance on legal remedies might damage their relationship, not remedy it.<sup>117</sup>

Although this promise is morally obligatory, contract as empowerment can explain why it should not be legally enforceable—without denigrating its moral status. Because the father was not trying to influence his daughter’s actions in any way that reasonably required the legal enforceability of his promise for the influence to work, there are no empowerment-related grounds to treat this particular promise as a legally enforceable contract. Hence, the father could reasonably reject a legal rule that required him to perform or pay expectation damages. He could reasonably reject this *legal* rule, even though he could not reasonably reject a *moral* rule that gave his daughter the right to demand that he actually attend on pain of damage to the relationship.<sup>118</sup>

The important point to notice is that none of these explanations calls the obligatory force of either promises or contracts into question. On the current view, remedial divergences like the-

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<sup>116</sup> Professor Scanlon discusses this in his ground for the morality of promise keeping. See T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW*, *supra* note 3, at 86, 106.

<sup>117</sup> This is, of course, a major theme in some contract-law scholarship. See, e.g., Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 *CAL. L. REV.* 821, 823 (1997) (“[T]he world of gift would be impoverished if simple donative promises were placed into the world of contract.”).

<sup>118</sup> Professor Scanlon presents an argument that no one could reasonably reject a moral rule that requires performance in these circumstances, but his argument is rooted in the value of assurance, not empowerment. See *generally* T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW*, *supra* note 3, at 86.

se arise not from any denigration of obligations but from the fact that morality simultaneously generates promissory obligations, some limits on the state's authority to coerce moral actions, and some legal obligations (among some contracting parties) to accept expectation damages in lieu of performance. Unlike theories of efficient breach, which can exacerbate tensions between the spheres of interpersonal morality and the modern marketplace, contract as empowerment can therefore reconcile these spheres in a deeper and more meaningful way. This interpretation of contract can help relieve some of the social and psychic tensions that people feel when moving between the spheres of informal social interaction and the marketplace.<sup>119</sup> Contract as empowerment can thus help people flourish better—and simultaneously—as both moral and economic agents.

The third interpretive advantage of the present account is that it explains why, as a general rule, it is only the private parties to contracts—as opposed to third parties or public authorities—who have the legal standing to sue for breach of contract.<sup>120</sup> By making legally enforceable promises, contracting parties typically seek to influence the actions of their private counterparties—but not, at least directly, those of public authorities, third parties, or the state. Hence, contracting parties cannot reasonably reject a legal rule that gives their *particular contracting counterparties* the legal authority to demand compliance; but contracting parties *can* reasonably reject a broader rule that allows other parties (like third parties or the state) to sue. Put simply, promisors have no empowerment interests at stake in that broader type of legal enforceability.

For all of the above reasons, contract as empowerment offers a better account of the general rules governing contractual remedies than orthodox economic and philosophical accounts.

## B. The Consideration Requirement

The second doctrinal puzzle identified in Part II concerns the centrality of the consideration requirement. At least in common-law systems, the general rule is that, in claims for breach of contract, parties can enforce only promises that are

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<sup>119</sup> See Shiffrin, *Divergence of Contract*, *supra* note 58, at 709 (“[T]he legal norms regulating these promises diverge in substance from the moral norms that apply to them. This divergence raises questions about how the moral agent is to navigate both the legal and moral systems.”).

<sup>120</sup> See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 306–07 (2008).

supported by consideration.<sup>121</sup> A promise is supported by consideration if there is (1) a return promise or performance from another party that was (2) “bargained for” in the following technical sense: it was both (2a) “sought by the [original] promisor in exchange for [the original] promise” and (2b) “given by the [original] promisee in exchange for that promise.”<sup>122</sup> There are also several well-known exceptions to this requirement, but the point of this Section is to show how contract as empowerment can explain the general features of this rule.<sup>123</sup>

Although many scholars find the consideration requirement puzzling,<sup>124</sup> contract as empowerment offers a straightforward explanation of the requirement. Contract as empowerment roots contractual obligations in promisors’ empowerment interests—where “empowerment” is defined as the ability to use legally enforceable promises to influence other people’s actions and thereby meet a broad range of human needs and interests. The critical point to recognize is that this explanation is therefore limited to a special subclass of promises. Which promises are these? They are all and only those promises that promisors seek to use

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<sup>121</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

<sup>122</sup> *Id.* § 71.

<sup>123</sup> *See id.* §§ 82–94.

<sup>124</sup> Many theories are, in fact, highly ambivalent about this requirement. Promise-based theories can offer no rationale at all for consideration, because consideration limits the class of promises that are deemed legally obligatory. These theories recommend getting rid of the limitation altogether, because the doctrine is inconsistent with the idea that voluntary promises should be enforced in accordance with their terms and because there is no analogue to the consideration doctrine in the ordinary morality of promise keeping. Professor Fried has thus argued that the modern consideration doctrine is both analytically confused and inconsistent with the basic promissory rationales that he takes to underwrite modern contract law. FRIED, CONTRACT AS PROMISE, *supra* note 37, at 28–39. Efficiency theorists, by contrast, will have a much easier time accounting for the centrality of the consideration doctrine. They can begin with the observation that the legal enforcement of promises is always somewhat costly. Modern markets nevertheless produce enormous increases in wealth and social welfare. There are also good reasons to think that we must enforce promises that are parts of bargained-for exchanges if we hope to maintain the conditions of trust needed for strangers to enter into and fulfill market exchanges through promissory exchanges. Because legal enforcement of these exchanges greatly expands the bounds of our cooperation, allows modern markets to flourish, and allows larger-scale cooperative efforts and divisions of labor, the benefits of enforcing these exchanges greatly outweigh the costs. At least plausibly, however, the same cannot be said for the enforcement of unilateral promises. Unilateral promises are by definition promises that seek nothing in return and, hence, are not being used to induce others to engage in any reciprocally advantageous exchanges. The stability of modern markets in no way depends on enforcing these promises, and there are no other obvious, large-scale social welfare benefits that depend on their enforcement. The ordinary costs of their enforcement are therefore more likely to outweigh any benefits. By providing at least a plausible rationale for the consideration doctrine, efficiency theorists can thus claim a second important explanatory advantage over promise-based theories.



as tools to induce a promise or performance from someone else in return and that reasonably require legal enforceability for the influence to work.

Actually, even this subclass is too broad because not all such promises succeed at producing any influence. A promisor can reasonably reject a rule that gives promisees the legal right to demand compliance, backed by the coercive power of the state, before there has been any promise or performance in return. *But once having influenced another person's actions by making a promise like this*, a promisor can no longer reasonably reject such a legal rule. Hence, contract as empowerment recommends the legal enforcement of promises as contracts only if there is (1) a return promise or performance by another party that both is (2a) sought by the original promisor in exchange for the promise and reasonably requires legal enforceability for the induction to work, and is (2b) given by the original promisee in exchange for that legally enforceable promise.

It follows—with almost mathematical elegance—that contract as empowerment recommends the legal enforcement of all and only those promises that are supported by legal consideration in the technical sense of the word. Indeed, the Restatement states:

- (1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.<sup>125</sup>

In accordance with the primary account of contract as empowerment, I call these “true contracts” to distinguish them from other classes of promises that are legally enforceable.

Contract as empowerment recommends that true contracts—in the sense of promises that are supported by legal consideration—be legally enforceable. But it does much more than that. It also explains why parties cannot generally avoid the consideration requirement through the mere formality of stating that consideration exists.<sup>126</sup> Although courts do not typically in-

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<sup>125</sup> RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). The present theory also recommends a further limitation to promises that reasonably require legal enforcement to influence action. This recommendation rules out the legal enforceability of most social promises, and it is largely consistent with the state of the law. I will, however, discuss this limitation only later. See *infra* Part III.B.

<sup>126</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b (1981) (“[A] mere pretense of bargain does not suffice, as where there is a false recital of consideration.”).

quire into the adequacy of consideration, they *do* typically require some real consideration for contracts to be formed.<sup>127</sup> There must, in other words, be some return promise or performance that the original promisor actually sought to induce with the original promise and that the original promisee actually gave in return for the original promise.<sup>128</sup>

In the famous case of *Schnell v Nell*,<sup>129</sup> for example, the court found that a promise to devise \$200 to each of three legatees “in consideration of one cent” was not supported by consideration.<sup>130</sup> The court explained that “[t]he consideration of one cent [was], plainly, in this case, merely nominal.”<sup>131</sup> In coming to this conclusion, the court was not finding the consideration to be *inadequate*. The problem was not substantive unfairness but rather lack of an actual bargain: this promisor was not really trying to induce the payment of one cent by making a legally enforceable promise. She was instead seeking to make her subjective will legally enforceable as a contract by recasting a unilateral promise of a gift into the apparent form of a bargain. The court’s ruling that this was not a true contract, because it was not actually supported by consideration, makes sense from an empowerment perspective, because the promisor had no empowerment interests at stake in the legal enforcement of this promise. She was not really trying to induce the transfer of the penny, and that defect could not be cured either by the mere formality of stating (falsely) that consideration existed or by the attachment of unsought “consideration” to her promise of a gift.<sup>132</sup>

More generally, when promisors try to get around the consideration requirement with nominal consideration or false statements of consideration, they are trying to make their subjective wills legally effective through contract law. Parties can often achieve this result through other legal mechanisms—such as through direct alienations of their property or through trusts

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There are some exceptions to this rule, for things like option contracts, but I discuss those exceptions separately in Part III.B.3.

<sup>127</sup> See Wessman, *Retraining the Gatekeeper*, *supra* note 68, at 774–75.

<sup>128</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

<sup>129</sup> 17 Ind. 29 (1861).

<sup>130</sup> *Id.* at 30.

<sup>131</sup> *Id.* at 32.

<sup>132</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b, illustration 5 (1981): “A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for \$1000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A’s promise to pay \$1000.”

and estates.<sup>133</sup> Contract as empowerment nevertheless interprets *contract law* to be about empowerment, in the technical sense developed here, and not mere deference to the subjective will. Contract as empowerment thus explains why *contract law* generally cannot be used in this way, even if other legal mechanisms can.<sup>134</sup> The current theory also helps to explain why the consideration requirement is specific to contract law and why these other legal mechanisms typically lack the requirement.<sup>135</sup>

In addition, because the consideration requirement distinguishes promises in which empowerment interests are at stake from other classes of promises, contract as empowerment also recommends giving true contracts the *specific type* of legally enforceability needed for empowerment. Part III.A describes what this recommendation involves. Hence, the present account of consideration can now be harmonized with those earlier accounts of the standard remedies.

In particular, the authority to enforce promises that are supported by consideration through the law should typically be limited to contracting parties and should not be extended to third parties or to the state. True contracting parties should also have the legal right to demand something more than reliance damages but less than punitive damages. The “Goldilocks” remedy—or the remedy that is “just right” for empowerment in the typical case—is expectation damages (with some minor exceptions that allow for specific performance). The legal right to these standard contractual remedies should not depend on the ex-

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<sup>133</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2001) (“The controlling consideration in determining the meaning of a donative document is the donor’s intention.”). I do not mean to suggest that property is or should always be alienable through these or other means. For a classic and brilliant discussion of when property should be *market inalienable* (that is, inalienable through contract law or market mechanisms, but potentially alienable through other mechanisms like gifts, trusts, or estates), see generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

<sup>134</sup> See, e.g., RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 31.1 (1992) (“The owner of personal property may make a gift thereof to another person (the donee) by delivering it to the donee, or to a third person for the donee, with the manifested intention that the donee be the owner of the personal property.”).

<sup>135</sup> *Id.* (stating that “[a]cceptance by the donee of the gift is required for completion of the gift,” but not requiring consideration); RESTATEMENT (THIRD) OF TRUSTS § 17(2) (2003): “Except as provided in § 19, a trust is created by a will if the intention to create the trust and other elements essential to the creation of a testamentary trust (ordinarily, identification of the trust property, the beneficiaries, and the purposes of the trust) can be ascertained from (a) the will itself; or (b) an existing instrument properly incorporated by reference into the will; or (c) facts referred to in the will that have significance apart from their effect upon the disposition of the property bequeathed or devised by the will.”

istence of any reliance harms, so long as a return promise or performance has been induced.

Hence, quite a lot follows from the fact that a promise is supported by consideration. Notice, moreover, that application of these remedial rules follows from the fact that they promote contracting parties' empowerment interests and *not* from the fact that the parties subjectively chose them. On the current view, the existence of consideration establishes that empowerment interests are at stake, and *that fact* explains the structure of standard contract remedies. Contract as empowerment thus explains why both the consideration requirement and these remedial rules are mandatory rules, or rules that cannot be contracted around—even though it is generally empowering to give parties great freedom to choose whether to contract, with whom, and on what terms.

When promises are not supported by consideration, there is, on the other hand, either no return promise or no performance that a promisor sought to induce by making a legally enforceable promise, or the promisor has failed to influence any such action by making a legally enforceable promise.<sup>136</sup> Hence, there are no empowerment-related grounds to prevent people who make promises of these other kinds from reasonably rejecting a rule that gives their promisees the legal right to demand compliance.

There may, of course, still be alternative grounds to enforce some of these other classes of promises.<sup>137</sup> Nothing about contract as empowerment rules out that possibility. To the extent that these other promises lack consideration, however, there is no reason to think that these other promises should be given the special type of legal enforceability needed for empowerment. The remedial rules connected with these other promises should therefore be different, and it is better to distinguish these other classes of legally enforceable promises from what I am calling “true contracts.”

The most important example of this lies in the law of promissory estoppel. Sometimes, parties bring claims for promissory estoppel that are really disguised claims for breach of a true contract because consideration really does exist. In those cases, all of the empowerment-based arguments concerning the appropriate shape of contract law should therefore apply to claims for

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<sup>136</sup> This follows from the standard definition of consideration. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

<sup>137</sup> See, e.g., NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 6–16 (2013) (describing various theories for why contracts should be enforced).

promissory estoppel and expectation damages will be appropriate, on the present account. For cases in which there is no consideration, however, the only rationale for promissory estoppel is reliance based (and not empowerment based). There are, in fact, well-developed contractualist arguments that suggest that no one could reasonably reject a legal rule requiring compensation for harms caused by the breach of various duties, including promissory breaches.<sup>138</sup> Hence, the appropriate remedy for promissory estoppel in these circumstances should be reliance damages. Contract as empowerment does not reject these arguments. It does, however, reject the view that promissory estoppel claims of this latter kind are fundamentally contractual in nature.

### C. Freedom of Contract and Market Regulation

The third major puzzle for contract theory relates to the law's inconsistent treatment of parties' subjective contracting choices. On the one hand, contract law shows great deference to parties' subjective choices when determining the existence and scope of contractual obligations.<sup>139</sup> Contract law also gives parties great freedom to choose who their contracting parties will be. These freedoms are central enough to contract law that they are colloquially referred to as "freedom of contract."<sup>140</sup> On the other hand, contract law contains numerous doctrines that either invite or require courts to deviate from parties' subjective choices when determining the existence or scope of contracts.<sup>141</sup>

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<sup>138</sup> See SCANLON, PROMISES AND CONTRACTS, *supra* note 116, at 105–11.

<sup>139</sup> See, e.g., BENSON, THE UNITY OF CONTRACT LAW, *supra* note 3, at 131; Katz, Book Review, *supra* note 99, at 2046 ("The key feature of contract law, as opposed to the other standard first-year subjects, is that it affords private parties the power of lawmaking. Contractual obligations are primarily created by decentralized nonstate actors pursuing their own goals and plans."); Elizabeth Anderson, *The Ethical Limitations of the Market*, 6 ECON. & PHIL. 179, 180 (1990) ("The most important ideal that the modern market attempts to embody is a particular conception of freedom."); G.H.L. Fridman, *Freedom of Contract*, 2 OTTAWA L. REV. 1, 1 (1967) ("One of the fundamental dogmas of the law is that everyone is free to contract as he wishes, as long as no illegality is involved."); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 Colum. L. Rev. 629, 630 (1943) ("[F]reedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system.")

<sup>140</sup> See BENSON, THE UNITY OF CONTRACT LAW, *supra* note 3, at 198–99.

<sup>141</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (stating the unconscionability doctrine); *id.* § 201 (presenting the modified objective approach to interpretation); *id.* § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); Schwartz and Scott, 113 Yale L J at 619 (cited in note 1) (discussing the growth of mandatory rules in modern contract law).

Doctrines that fall into this latter category sometimes meet with the objection that they undermine freedom of contract.<sup>142</sup>

If contract law's primary purpose is to promote freedom of subjective choice, then doctrines that limit subjective choice are indeed incompatible with the fundamental principles of contract.<sup>143</sup> Doctrines like these represent alien intrusions into contract law's core subject matter and deviations from the fundamental principles that animate modern market activity.<sup>144</sup> But if contract is about empowerment, rather than subjective choice, then the story is more complex. This Section argues that contract as empowerment offers a general framework that can be used to harmonize many of the doctrinal tensions that fall into this third category. Application of this framework will suggest that many perceived inconsistencies among these doctrines are not real.

Four main areas of tension stand out with respect to freedom of contract. First, although contract law shows great deference to parties' subjective contracting choices through its focus on parties' mutual assent, it *interprets* this mutual assent using a modified objective (and not a purely subjective) test for intent.<sup>145</sup> In practice, this means that parties are often bound by contractual obligations that do not perfectly reflect their subjective wills. Second, contract law makes concessions to a broad range of public policies that limit freedom of contract.<sup>146</sup> Third, contract law contains doctrines that invite or require courts to police bargains for contractual fairness at times—as exemplified most clearly in the modern unconscionability doctrine.<sup>147</sup> Fourth,

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*See also* Kronman, *Distributive Justice*, *supra* note 58, at 472–511 (describing numerous limitations on contracting that arise to promote public policy or substantive fairness).

<sup>142</sup> *See, e.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003) (“According to the conventional wisdom, libertarians cannot possibly embrace paternalism, and paternalists abhor libertarianism.”); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 293–95 (1975).

<sup>143</sup> *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947 (1984) (viewing “government regulation” as in “persistent tension” with “private ordering”).

<sup>144</sup> *See, e.g., id.*

<sup>145</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 201–04 (1981) (providing principles for interpreting contracts, including the principle that when parties attach different meanings to an agreement, it will be interpreted in accordance with the meaning of one party if the other party knew or had reason to know of the meaning attached by the former).

<sup>146</sup> *See id.* §§ 178–96.

<sup>147</sup> *See, e.g., id.* § 208 (providing that courts either can decline to enforce contracts that have unconscionable terms or can limit any unconscionable terms).

as I have already described, contract law contains a number of mandatory rules, which govern remedies and the consideration requirement—among other things.<sup>148</sup>

### 1. Freedom of contract and subjective choice.

Because freedom of contract reflects one side of all these tensions, it helps to explain the commitment to freedom of contract first. For an empowerment theorist, this commitment is easy enough to explain. Contract law presumes that people can meet a broad range of human needs and interests if they are empowered to influence one another by making legally enforceable promises.<sup>149</sup> This is because people reveal their preferences through voluntary choices and because there is some correlation between subjective-preference satisfaction and personal human flourishing.<sup>150</sup> These routes to human-preference satisfaction would, moreover, often be very difficult or impossible for a centralized state planner to identify on its own.<sup>151</sup> Contracts and modern markets therefore provide important and nonduplicative mechanisms through which people can better achieve many of their highly varied personal ends. This can help people achieve better lives *for themselves*.

Through contracting, people can also seek to achieve their personal ends in a context in which they do not have to explain or justify their decisions to others.<sup>152</sup> In contract law, one typically promotes one's conception of the good life through either choice or "exit" (that is, through decisions to contract for certain items or to not contract at all) rather than "voice" (that is,

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<sup>148</sup> See *infra* Part III.A–B.

<sup>149</sup> See *supra* Part I.

<sup>150</sup> For the classic early statement of the "revealed preferences" approach to measuring utility, see generally P.A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 *ECONOMICA* 61 (1938). I do not believe that human flourishing is equivalent to subjective-preference satisfaction, for reasons elaborated in, for example, Amartya Sen, *Internal Consistency of Choice*, 61 *ECONOMETRICA* 495, 498–504 (1993). But there is no doubt that some connection exists in many circumstances.

<sup>151</sup> See Hayek, *Use of Knowledge*, *supra* note 97, at 524.

<sup>152</sup> See, e.g., Anderson, *Ethical Limitations*, *supra* note 139, at 180–81: "On this view [of freedom as embodied in modern markets], freedom is primarily exercised in the choice and consumption of commodities in private life. It consists in having a large menu of choices in the marketplace and in exclusive power to use and dispose of things and services in the private sphere without having to ask permission from anyone else."

See also Epstein, *Unconscionability*, *supra* note 142 at 293 ("One of the first functions of the law is to guarantee to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties.").

through reasoned deliberation over the good with others).<sup>153</sup> Contract laws that are empowering can thus embody one important conception of freedom: the freedom to pursue one's personal wants, free from the obligation to justify them to others. To be empowering in these ways, contract law must, however, give private parties a great degree of latitude to subjectively decide whether to contract, with whom, and on what terms. The freedom to choose the terms of one's contracts can also be empowering, because it allows one to choose the level of induction that one seeks to employ in order to influence others' actions.<sup>154</sup> Contract as empowerment thus recommends a set of rules that gives parties' subjective choices a central role in determining the existence and scope of their contractual obligations.

Contract as empowerment is not unique in this regard. In fact, all leading theories of contract provide some explanation of contract law's commitment to freedom of contract. For autonomy theorists like Kant, contract enforcement is justified by respect for autonomous choice.<sup>155</sup> For promise-based theorists like Fried, who I view as differing in important essentials from Kant, contract enforcement is conditioned on the existence of a voluntary promise.<sup>156</sup> For reliance-based theorists like Professor Patrick Atiyah, only voluntary promises that are relied on should give rise to contractual liability.<sup>157</sup> For neo-Aristotelian theorists like Professor James Gordley, the capacity for free choice is viewed as having a particular natural function (that is to say, it aims at human flourishing), but some exercise of this capacity is still needed to form a contract.<sup>158</sup> And for people who would root contractual liability in the logic of property transfer, like Professor Benson, a transfer must still be voluntary to be legally recognized.<sup>159</sup>

In fact, voluntary choice even plays a key role in the central economic justification for contract enforcement. This is because

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<sup>153</sup> Anderson, *Ethical Limitations*, *supra* note 139, at 183–84 (describing economic goods as goods whose values are best realized through market transactions, in which “exit” rather than “voice” is the primary mechanism of influence). *See also generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>154</sup> *See* Part III.A.2.

<sup>155</sup> *See* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 34–45 (2009).

<sup>156</sup> FRIED, *CONTRACT AS PROMISE*, *supra* note 37, at 1.

<sup>157</sup> P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 123–29 (rev. ed. 1983).

<sup>158</sup> James Gordley, *Morality and Contract: The Question of Paternalism*, 48 WM. & MARY L. REV. 1733, 1759 (2007).

<sup>159</sup> BENSON, *THE UNITY OF CONTRACT LAW*, *supra* note 3, at 131.



economists view voluntary choice as revealing preferences. Voluntary agreements should therefore produce information about the routes to mutual preference satisfaction, and contract enforcement should promote efficiency. To this basic argument, economists often add an important Hayekian insight: this information about the routes to human-preference satisfaction, which is produced so easily and naturally by free negotiation, is often very difficult or impossible to produce through centralized state planning.<sup>160</sup> Hence, all of the predominant contract theories offer patterns of justification for contract enforcement that apply best—or at least most directly—to terms that are both subjectively and voluntarily chosen.<sup>161</sup>

The real question for contract theory is not how to explain contract law's commitment to freedom of contract. Rather, it is how to explain this commitment in a way that does not make it impossible to interpret a number of other doctrinal facts, which seem to limit subjective choice, in a coherent manner. The following Section argues that contract as empowerment's account of freedom of contract is consistent with an equally useful account of many of the ways in which contract law deviates from pure deference to parties' subjective intentions when determining the existence or scope of contractual obligations. The fact that contract as empowerment harmonizes not only all of these doctrinal facts but also the features of remedies and the consideration requirement discussed in earlier sections suggests that the current theory has important interpretive advantages over the alternatives.

## 2. Freedom of contract and deviations from subjective intent.

Let us begin with the modified objective approach to interpretation.<sup>162</sup> The fact that courts take this approach can be puzzling because—as noted above—all of the predominant contract theories offer central patterns of justification that ground contract enforcement in features of parties' free choices.<sup>163</sup> As Professor Margaret Jane Radin has observed, the concept of free choice that is presupposed in these theories “has a subjective ba-

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<sup>160</sup> I explain this in Robin Kar, *The Challenge of Boilerplate*, JOTWELL (Sept 3, 2013), <http://perma.cc/9QEP-TG5X>.

<sup>161</sup> See *id.* This point has also been emphasized in MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 55–81 (2013).

<sup>162</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981).

<sup>163</sup> See Part III.C.1.

sis”: it is rooted in an ideal of free will that “is not a matter of community acquiescence and is not understood as dependent on community attribution.”<sup>164</sup> Courts nevertheless determine the content of contractual obligations based not simply on parties’ subjective choices but in part on what a reasonable person would take the parties’ words to mean in context. This “modified objective” approach to interpretation thus “causes a fissure in contract theory, roughly between internal and external views of intention.”<sup>165</sup>

As Radin notes, “this fissure has been known to contracts theorists,” but “it has been latent.”<sup>166</sup> Its problematic nature has not, in other words, been sufficiently acknowledged or addressed. It creates a major problem of fit between theory and doctrine, because objective approaches to interpretation are inconsistent with the normative foundations of contract law—at least as expressed in the standard theories.<sup>167</sup> This is because—as Radin notes—the standard theories offer normative justifications of contract that rely on features of parties’ subjective intentions, whereas, on her construal of the existing literature, objective tests rely on an objective theory of language and communication.<sup>168</sup>

Contract as empowerment offers a different view of the modified objective approach to interpretation. If contract is about empowerment, then contract law should show great deference to parties’ subjective choices about when to contract, with whom, and on what terms. This deference is, however, explained in terms of parties’ empowerment interests and not directly in terms of their subjective choices. If promisors want to influence other people’s actions by making legally enforceable promises, then they have empowerment-related reasons to accept legal rules that permit promisees to rely on the most reasonable interpretations of their words. Otherwise, promisors could get out of their contracts any time that they attached different subjective meanings to their terms. Hence, promisees would be unable to trust contracts, and promisors would be unable to use them as effective tools to influence action. Hence, the very same empowerment interests that I use to explain freedom of contract can be used to explain why courts should take an objective approach to

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<sup>164</sup> RADIN, BOILERPLATE, *supra* note 161, at 89.

<sup>165</sup> *Id.* at 90.

<sup>166</sup> *Id.*

<sup>167</sup> *See id.*

<sup>168</sup> RADIN, BOILERPLATE, *supra* note 161, at 89.

interpretation. Contract as empowerment addresses the fissure identified by Radin.

But how objective should interpretation be? The point of using an objective test, on the present view, is not to promote objectivity for its own sake but rather to promote empowerment. Empowerment interests inevitably manifest themselves in particular interpersonal contexts. Different industry conventions and particular shared understandings between the parties can therefore affect the reasonable interpretations that parties attach to contract terms in real contexts.<sup>169</sup> Given these facts, does contract as empowerment recommend attaching completely objective and context-independent meanings to contracts, even if those meanings differ from both parties' understandings?

It does not. Contract as empowerment recognizes that parties negotiate contracts in highly particularized bargaining contexts. It also recognizes that promises can influence people in the real world only through promisees' subjective understandings of contract terms. Hence, when the parties to a contract share the same understanding of a term, however idiosyncratic, neither party can reasonably reject a legal rule that binds both parties to that understanding. Being bound by this understanding is all that is needed for empowerment, and it would not be additionally empowering (and might even be disempowering) to be bound by something else.

Under the modified objective approach to interpretation, courts do, in fact, defer to shared interpretations like this. Courts seek a more objective interpretation only when parties attach different subjective meanings to a disputed term.<sup>170</sup>

Even in cases of dispute, moreover, courts do not simply ask what the most objective interpretation is, wholly devoid of context. They ask, instead, whether one party knew or should have known about the other party's subjective interpretation, while the second party neither knew nor should have known about that of the first party.<sup>171</sup> In practice, this so-called "modified" objective approach to interpretation favors whichever party's view was more reasonable under the circumstances, given the entire context of the trade, the course of negotiations, and the commu-

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<sup>169</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 201, cmts. a–b (1981).

<sup>170</sup> See *id.* § 201.

<sup>171</sup> See *id.* § 202(1) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."); *id.* § 202, cmt. b ("When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances.").

nications between the parties.<sup>172</sup> This is thus a *type* of objective interpretation, but only in the sense that it favors one party's subjective understanding over another's. Courts never attach objective meanings to contracts that neither party subjectively understood or fathomed.<sup>173</sup>

These doctrinal nuances can be puzzling—even for some who favor objective approaches to interpretation in the abstract. These nuances make sense, however, from an empowerment perspective. For reasons explained here, promises can influence people in real-world settings only through promisees' subjective understandings of their terms. Empowerment interests can therefore justify holding promisors to reasonable interpretations that promisees rely on but not to anything more objective than that. In practice, this rule will sometimes favor one party and sometimes another—but it cannot systematically favor any reasonable party. Hence, neither party to an actual contract can reasonably reject a modified objective approach to interpretation.<sup>174</sup>

A second major source of tension with freedom of contract arises from a diverse set of public policies that limit contractual liberty in various ways. Sometimes these limitations are explicitly endorsed from within the general law of contracts. The defenses of illegality and public policy provide the clearest examples,<sup>175</sup> though it should be noted that these defenses typically incorporate by reference laws or policies that arise from a wide array of noncontractual sources.<sup>176</sup> Other public policy limitations appear in the form of regulations that govern certain specialized bodies of transactional law, such as those relating to labor;<sup>177</sup> finance;<sup>178</sup> intellectual property;<sup>179</sup> or food, drugs, and

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<sup>172</sup> See *id.* § 202 cmt. b.

<sup>173</sup> See *id.* § 201.

<sup>174</sup> Another way to put this point is to say that the modified objective approach to interpretation is more empowering than both purely objective approaches and purely subjective approaches. With respect to purely subjective approaches, it would be significantly disempowering to require a perfect (subjective) meeting of the minds for contract formation. Agreements of this kind rarely exist in practice, and this alternative rule would therefore disempower people by making almost all contracts unenforceable.

<sup>175</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

<sup>176</sup> *Id.* § 178 cmt. a.

<sup>177</sup> See *generally, e.g.*, Fair Labor Standards Act of 1938, 52 Stat. 1060, codified as amended at 29 U.S.C. § 201 et seq. (2012).

<sup>178</sup> See, *e.g.*, Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Payment, Clearing, and Settlement Supervision Act of 2010"), Pub. L. No. 111-203, 124 Stat. 1376, 1802–22, codified at 12 U.S.C. §§ 5461–72 (2012).

<sup>179</sup> See, *e.g.*, 17 U.S.C. § 501 (2012) (establishing remedies for copyright infringement).

health.<sup>180</sup> Finally, even without the explicit endorsement of any body of transactional law, public policy limitations can arise from other sources that interact with contract law in ways that either limit or appear to limit freedom of contract. Some particularly prominent examples include laws relating to taxation (especially for redistributive purposes),<sup>181</sup> social security,<sup>182</sup> and universal health care<sup>183</sup>—all of which limit the subjective choices that people can make regarding how to dispose of their pretax income.

Because the public policies that limit freedom of contract have so many sources, this class of tensions is incredibly diverse. It is beyond the scope of an article like this one to discuss each individually. Contract as empowerment nevertheless offers a distinctive framework for deciding when public policy limitations are and are not consistent with the fundamental principles of contract.

Contract as empowerment does this by interpreting *contract* as empowerment while explaining the *legally obligating force of contracts* in terms of a more general theory of obligation. This more general, “contractualist” theory of obligation independently rules out some actions and forms of interpersonal influence.<sup>184</sup> It therefore prohibits the use of contracts to promote those actions or engage in those influences. Prohibitions like these are not inconsistent with interpreting contract as empowerment, because they *presume* it would be empowering to treat these contracts as legally enforceable instruments. They cite this fact, along with the fact that these contracts promote prohibited ends, as reasons *not* to treat these contracts as genuinely legally obligating.

To take a very simple and uncontroversial example, consider a contract for murder. If a person were to try to induce some-

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<sup>180</sup> See generally, e.g., Federal Food, Drug, and Cosmetic Act, 52 Stat 1040 (1938), codified as amended at 21 U.S.C. § 301 et seq. (2012).

<sup>181</sup> See, e.g., 26 U.S.C. § 1(a)–(d) (2012) (setting forth a progressive individual income tax).

<sup>182</sup> See generally, e.g., Social Security Act, 49 Stat 620 (1935), codified as amended at 42 U.S.C. § 301 et seq. (2012).

<sup>183</sup> See, e.g., Patient Protection and Affordable Care Act §§ 1101–03, Pub. L. No. 111-148, 124 Stat 119, 141–46 (2010), codified at 42 U.S.C. §§ 18001–03 (2012).

<sup>184</sup> See, e.g., Darwall, *Introduction*, *supra* note 26, at 4–7 (arguing that common illegal acts are inconsistent with treating others as moral equals); Rawls, *Kantian Constructivism*, *supra* note 31, at 515. See also T.M. Scanlon & Johnathan Dancy, *Intention and Permissibility*, 74 PROCEEDINGS ARISTOTELIAN SOC’Y SUPP. VOL. 301, 313 (2000) (suggesting that an action like murder is inconsistent with treating another person as possessing a form of personal authority over his or her own life that cannot be reasonably rejected).

one to murder a third party by making a legally enforceable promise to pay, then the promising party could not reasonably reject a legal rule that gave this promisee the legal right to demand the payment. That much follows from the basic account of contract as empowerment.<sup>185</sup> Still, potential murder victims—who are the relevant third parties in cases like these—could reasonably reject any system of rules that permits murder.<sup>186</sup> They could therefore reasonably reject any system of rules that empowers people to induce murders by making legally enforceable promises. It follows that promises like these should be deemed void (as they in fact are under the law<sup>187</sup>), regardless of whether they promote the contracting parties' subjective preferences. In cases like these, the same form of justification that explains why contracts should sometimes be enforced on empowerment-related grounds explains why contracts that seek to induce certain wrongful actions, like murder, should be deemed void and unenforceable.

This application of the illegality defense limits parties' freedom of contract in an uncontroversial way. Still, contract as empowerment offers a distinctive interpretation of this limitation. It suggests that there is no genuine incompatibility between the normative foundations of contract and this limitation on freedom of contract. In fact, even if a legally enforceable contract for murder would produce more subjective preference satisfaction for two contracting parties than perceived costs to a particular murder victim (who may, for example, value his or her life very little during a bout of depression), the contract could not be genuinely legally obligating on the present account. Contract as empowerment offers a different justification for limitations like these than economic accounts that seek to reduce all justifications to questions of overall or average subjective preference maximization.<sup>188</sup>

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<sup>185</sup> See *supra* Part I.

<sup>186</sup> See Scanlon & Dancy, *Intention and Permissibility*, *supra* note 184, at 313 (arguing that intentional killing is "inconsistent with the idea that each person has a special claim to and authority over his or her own life and body, an idea which [the authors] take to be itself one that no one could reasonably reject").

<sup>187</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

<sup>188</sup> Of course, the most sophisticated economists do not fall into this camp. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 35 (8th ed. 2011) ("[T]here is more to justice than economics, and this is a point the reader should keep in mind in evaluating normative statements in this book."). I thank Professor Bix for reminding me of this point.

Although it goes beyond the scope of this Article to discuss which public policy limitations are warranted by this approach, there is a large secondary literature on what contractualist accounts of obligation require.<sup>189</sup> Contract as empowerment suggests that it is this literature, and the questions pursued therein, that should be consulted to determine when public policy limitations are consistent with the normative foundations of contract. This approach can be used to test a broad range of public policy limitations, including prohibitions against contracting into slavery,<sup>190</sup> minimum wage laws,<sup>191</sup> laws governing prostitution,<sup>192</sup> and regulations of sales of various legal and illegal drugs.<sup>193</sup> If limitations like these prevent people from inducing others to act in ways that are prohibited by rules that no one could reasonably reject, then they are fully consistent with the normative foundations of contract and the basic principles of the modern marketplace on the current view.<sup>194</sup>

I turn, finally, to doctrines that invite or require courts to police bargains for contractual fairness. By “contractual fairness,” I mean something specific. I mean to refer to a form of interpersonal fairness that arises *between specific contracting parties and within specific contractual relations*. This should therefore be distinguished from fairness in the overall distribution of benefits and burdens among members of a society—or what is properly referred to as “distributive justice.”<sup>195</sup> Contractual fairness is independent of distributive justice in this sense,

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<sup>189</sup> See generally, e.g., GERALD GAUS, *THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD* (2011); JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986). See also RAWLS, *A THEORY OF JUSTICE*, *supra* note 27, at 130–36.

<sup>190</sup> U.S. CONST amend XIII, § 1.

<sup>191</sup> See, e.g., 29 U.S.C. § 206 (2012).

<sup>192</sup> See, e.g., 18 U.S.C. § 2422 (2012). For a good discussion of some of the values that are at stake in laws that regulate prostitution, see Radin, *Market-Inalienability*, *supra* note 133 at 1921–25.

<sup>193</sup> See, e.g., 42 U.S.C. § 12210 (2012); 41 C.F.R. § 60-741.24 (2016).

<sup>194</sup> I am not arguing here that any particular public policy limitations meet this criterion. That would take another article or series of articles.

<sup>195</sup> Here, I am agreeing with Professor Arnold F. McKee that people sometimes use the terms “distributive” or “social” justice to encompass three distinct forms of justice: social justice, distributive justice *properly so-called*, and the justice of exchange. See Arnold F. McKee, *What Is “Distributive” Justice?*, 39 REV. SOC. ECON. 1, 1 (1981). Distributive justice—in the sense of a fair distribution of burdens and benefits within a society among all its members—nevertheless differs from the justice or fairness of individual exchanges. I therefore agree with McKee that “the concept of distributive justice is [ ] best reserved for its old sense of sharing out community benefits and burdens to individual members.” *Id.* In any event, I use the term “distributive justice” in this restricted sense here, and I distinguish it from contractual fairness.

and it is instead concerned with the extent to which specific contracting parties treat one another fairly. It is therefore useful to separate doctrines that reflect concerns for contractual fairness from doctrines that reflect concerns for public policy (including concerns for distributive justice).

The modern unconscionability doctrine is clearly concerned with contractual fairness—at least in part.<sup>196</sup> There are, however, many other examples of this concern in modern contract law. One is the implied duty of good faith and fair dealing, because this duty essentially prevents parties from exploiting one another in unfair ways once having formed a contract.<sup>197</sup> Another example relates to the standard tests for partial, material, and total breach.<sup>198</sup> These rules determine what levels of response are warranted by different classes of breach. As a practical matter, these rules, which cannot be contracted around, work to ensure that parties respond fairly—in the sense of *proportionally*—to one another’s lapses in performance.<sup>199</sup> Yet another example relates to the different ways that contract law treats different unilateral modifications of contracts. In particular, courts will allow some unilateral modifications when circumstances change in ways that alter the fundamental nature of a transaction, so long as the modifications are “fair.”<sup>200</sup> Under the preexisting duty rule, however, courts will not allow parties to force unilateral modifications in unfair or exploitative ways.<sup>201</sup> There are also numerous statutory regimes that regulate specific markets for contractual fairness in more-particularized settings. Some ex-

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<sup>196</sup> However, the doctrine may also be concerned with more. For example, Professor Anthony Kronman clearly views it as concerned at least in part with distributive justice. Kronman, *Distributive Justice*, *supra* note 58, at 474.

<sup>197</sup> See U.C.C. § 2-103 (ALI 2012) (defining good faith for merchants as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”); RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (1981) (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”).

<sup>198</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 241–42 (1981) (setting forth a test to distinguish material breaches from partial breaches).

<sup>199</sup> See *id.* §§ 235–44 (setting forth factors for evaluating failures to perform and allowing corresponding responses by nonbreaching parties).

<sup>200</sup> *Id.* §§ 261–72.

<sup>201</sup> Compare *id.* §§ 261–72 (allowing the unilateral discharge of duties on the grounds of impracticability or frustration), with *id.* §§ 273–77 (requiring consideration or a substitute to discharge duties with the assent of the obligee).



amples include consumer-protection statutes,<sup>202</sup> certain financial and banking regulations,<sup>203</sup> and aspects of labor law.<sup>204</sup>

Contract as empowerment offers a distinctive framework to determine when doctrines that invite or require courts to police bargains for contractual fairness reflect direct expressions of the fundamental principles of contract. To understand this framework, it helps to ask when contract law should endorse legal doctrines that either invite or require courts to police bargains for substantive fairness, as reflected most clearly in the modern unconscionability doctrine. The two most extreme views on this topic are that contracts should never be policed for substantive fairness (a view that is popular on the economic right)<sup>205</sup> and that contracts should always be policed for substantive fairness (a view that is sometimes voiced on the economic left).<sup>206</sup> Contract as empowerment rejects both of these views, but its approach to this question depends on what it means for courts to police bargains for substantive fairness. The remainder of this Section explores how judgments of substantive contractual unfairness might be made. It describes and rejects one approach and then recommends another as consistent with contract as empowerment.

Hence, consider a system of rules that invite or require courts to reform all contractual terms based on their own senses

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<sup>202</sup> See generally, e.g., Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970), codified as amended at 15 U.S.C. § 1681 et seq. (2012); Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977), codified as amended at 15 U.S.C. § 1692 et seq. (2012). See also U.C.C. § 2A-104(1)(c) (ALI 2012) (stating that leases are subject to state consumer-protection laws).

<sup>203</sup> See generally, e.g., Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968), codified as amended at 15 U.S.C. § 1601 et seq. (2012). See also Equal Credit Opportunity Act § 503, Pub. L. No. 93-495, 88 Stat. 1521–22 (1974), codified as amended at 15 U.S.C. § 1691 (2012).

<sup>204</sup> See, e.g., Daniel Morton-Bentley, *Two Guiding Trends in Contemporary Labor and Employment Law: Technology and Fairness*, FEDERALIST SOC'Y (Dec. 9, 2011), <http://perma.cc/5P5K-AZTE> (observing that one of the “two primary trends guiding contemporary labor and employment law” is “increased fairness measures at the expense of legal certainty”).

<sup>205</sup> See, e.g., Epstein, *Unconscionability*, *supra* note 142, at 304 (“[C]ourts should then enforce [contractual] transactions in accordance with the general principles of contract law, without any resort to unconscionability doctrines, and without any independent examination of the ‘fairness’ of the agreement’s substantive terms.”).

<sup>206</sup> I say “sometimes” because it is rare to find people who believe that contracts should always be set aside in favor of courts’ views on the substantive fairness of an exchange. Some on the economic left nevertheless believe that there should be more, not less, room for doctrines like unconscionability. See, e.g., Kronman, *Distributive Justice*, *supra* note 58, at 510 (arguing that “contractual regulation will on occasion be the least intrusive and most efficient way of redistributing wealth to those who have a legitimate claim to a larger share of society’s resources”).

of what fair exchange is. Courts would thus substitute their own conceptions of fairness for the parties' agreed-upon terms in all cases, thereby making the parties' intents wholly irrelevant to the remedies available for breaches of contract. Under these rules, parties would be unable to fashion the level and type of inducement that they desire when contracting. These rules would thus be significantly disempowering and would make it much harder for parties to use contracts to obtain broad ranges of goods or services. In addition, without some reliable method to measure whether contracts are substantively fair,<sup>207</sup> it is not clear that these rules would ensure either fair exchanges or exchanges that are perceived as fair by the relevant parties.<sup>208</sup>

When determining whether promisors could reasonably reject these legal rules, one must therefore weigh the rules' expected costs and benefits to particular promisors and compare these rules to the alternatives. One must also consider the costs of error in light of the epistemic challenges that these rules create with respect to courts' abilities to identify exchanges that are both mutually beneficial and fair.<sup>209</sup> If the only choices were rules that always policed bargains for substantive fairness, based on courts' intuitions of fairness, and rules that never did, then no one could reasonably reject the latter rules because the latter rules would be more empowering to all. The rules might not always be equally empowering and might allow for some substantively unfair exchanges. Still, these facts cannot be reasonable grounds for rejecting these rules if the ideals of substantive fairness and equal empowerment are unreachable in practice and if the only alternative legal rules would be disempowering—and hence harmful—to all.<sup>210</sup>

There is, however, no reason to consider only the two most extreme views on this topic—namely, that courts should always or never policing bargains for substantive fairness. Whether

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<sup>207</sup> With respect to this epistemic issue, Professor Richard Epstein has suggested, for example, that “[i]t is difficult to know what principles identify the ‘just term,’ and for the same reasons that make it so difficult to determine the ‘just price.’” Epstein, *Unconscionability*, *supra* note 142, at 306.

<sup>208</sup> For reasons that Professor Friedrich Hayek has outlined, I believe that—absent robust private market activity—it is often difficult to identify exchanges that would be mutually beneficial, let alone fair. *See generally* Hayek, *Use of Knowledge*, *supra* note 97, at 519.

<sup>209</sup> For further discussion of these challenges, see generally *id.*

<sup>210</sup> Although the fact that a set of rules produces unfair allocations of goods and services can provide a reasonable ground to reject these rules, that rejection will be reasonable only if there is an alternative set of rules that is more fair and does not create too much additional harm to anyone.

people can reasonably reject a set of legal rules depends not only on the intrinsic features of the rules but also on what the alternatives are. Because these are not the only alternatives, this cannot be the end of the analysis.

Hence, consider a set of rules that invite courts to use information produced by many private market exchanges as a metric to determine whether particular exchanges are likely to be substantively fair.<sup>211</sup> Rather than relying on courts' own senses of fairness to police contracts in all cases, parties would be free—under these rules—to bargain from a perspective of self-interest in most cases, and courts would typically hold parties to their agreed-upon terms (as interpreted using a modified objective test).<sup>212</sup>

When parties enter into contracts from relatively equal bargaining positions, courts would view the resulting terms as especially good evidence of what a fair exchange is in similar cases. Courts would then use this information as a metric to test for the substantive fairness of other similar contracts—but only in certain exceptional circumstances, which I will describe momentarily.<sup>213</sup>

The first point to recognize about these rules is that they would *depend* on courts' deference to parties' voluntary agreements, as objectively construed, in the broad run of cases. It is largely by deferring to parties' voluntary agreements in the broad run of cases that courts would obtain the information that is needed to police bargains for substantive fairness in certain

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<sup>211</sup> This method would thus employ, rather than undermine, information produced by private markets. Rather than failing to acknowledge Hayek's important insights in *The Use of Knowledge in Society*, this method would take advantage of them. See generally Hayek, *Use of Knowledge*, *supra* note 97, at 519.

<sup>212</sup> I say a "modified objective test" rather than an "objective test" for the reasons explained in Part III.C.2.

<sup>213</sup> To understand this proposal, one must understand what it means to say that two parties have entered into a contract from an "equal bargaining position." I say that two parties have entered into a contract from a perfectly equal bargaining position if they have negotiated with perfectly equal capacities, perfectly equal access to knowledge of any facts relevant to the exchange, perfectly equal understandings of all of the relevant terms, perfectly equal capacities to modify all of the relevant terms, perfectly equal time and opportunity to deliberate, and perfectly equal access to the market. In addition, neither party can have induced the other to enter into the contract through misrepresentation, duress, undue influence, or manipulation of the other's voluntary choices in ways that are likely to systematically disadvantage the other party. The parties must therefore be motivated solely by their equally reliable assessments of the expected costs, benefits, and perceived market fairness (or fairness relative to other market possibilities) of the underlying exchange.

exceptional cases. Hence, these rules would not be disempowering to anyone in the broad run of cases.

When parties enter into contracts from highly unequal bargaining positions, however, courts would inquire further into their terms and test them against this metric for substantive fairness. Courts would ask whether these terms significantly deviated from those that the parties would have likely reached from a procedurally fair bargaining position. A court would invalidate or reform a contract for substantive fairness only if there were sufficient evidence both of one party's opportunity to take unfair advantage of the other party and of the realization of unfair terms in the contract.

This idea roughly matches the orthodox "sliding scale" approach to unconscionability, which inquires into both procedural and substantive unconscionability but requires less evidence of one when there is more evidence of the other.<sup>214</sup> Courts tend to find unconscionability only in exceptional cases and—with some exceptions—only when both types of unfairness are present in some form.<sup>215</sup>

The question to ask is whether parties could reasonably reject this second set of rules in favor of rules that never allow courts to police bargains for substantive fairness. The answer is no, so long as this second set of rules sufficiently preserves par-

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<sup>214</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. c (1981) ("[A] contract [may] be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable."); SAMUEL WILLISTON, 8 A TREATISE ON THE LAW OF CONTRACTS § 18:10 (Richard A. Lord ed., 4th ed. 2010) ("Thus, the fairness of the bargaining procedure—and hence, whether there is procedural unconscionability—may be of less importance if it results in harsh or unreasonable substantive terms, or substantive unconscionability may be sufficient in itself even though procedural unconscionability is not.") (citation omitted); PHILIP L. BRUNER & PATRICK J. O'CONNOR JR, 8 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 21:142 at 53–54 (2014) ("[A] number [of jurisdictions] have adopted a 'sliding scale' approach that permits a court to conclude an arbitration clause is unconscionable based on less evidence of either one of the two types of unconscionability as long as there is stronger than usual evidence of the other type of unconscionability.").

<sup>215</sup> On the exceptional use of unconscionability, see, for example, *Sitogum Holdings, Inc v. Ropes*, 800 A2d 915, 916 (N.J. Super. Chanc. Div. 2002) (noting that "[t]he common law doctrine of unconscionability has proved difficult to define and has been rarely invoked undoubtedly because, other than in exceptional cases, it has largely been viewed as grossly interfering with the freedom to contract"). On the typical need for both procedural and substantive unconscionability, see, for example, BRUNER & O'CONNOR ON CONSTRUCTION LAW, *supra* note 214, at § 21:142 ("[M]ost jurisdictions require a showing of both procedural and substantive unconscionability."). *But see* WILLISTON, TREATISE, *supra* note 214, at § 18:10 (quoting *Maxwell v. Fidelity Financial Services, Inc*, 907 P.2d 51, 59 (Ariz. 1995) ("Therefore, we conclude that under [UCC § 2-302], a claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies.")).

ties' empowerment interests while helping to ensure that contract law is more equally empowering. The relevant rules must also be operational: the doctrines cannot seek to promote an ideal of substantive fairness that is unattainable in practice, and the costs of policing must be lower than the benefits of fair treatment to parties who might otherwise be treated unfairly.

Contract as empowerment thus offers a general framework to determine when rules that invite or require courts to police bargains for substantive fairness are consistent with the normative foundations of contract. Although many theorists believe that these regulations reflect improper restrictions on freedom of contract,<sup>216</sup> this framework suggests that they sometimes promote equal contractual empowerment—the only freedom of contract that is capable of producing genuine legal obligations. On the current view, regulations like these are thus reflections of—rather than alien intrusions into—the fundamental principles of contract and the modern market. It is also important to recognize that this explanation does not depend on viewing contracts as mechanisms to promote distributive justice. Unlike contractual fairness, distributive justice may be better pursued through mechanisms like tax and transfer than through contract law.

The present framework can, moreover, be plausibly used to explain a number of potentially puzzling features of modern contract law. For example, it plausibly recommends a general interpretive principle, which suggests filling gaps in incomplete contracts (and construing ambiguities in them) so as to approximate the terms that the parties would have agreed to under circumstances of perfect procedural fairness.<sup>217</sup> The present framework also plausibly recommends subjecting certain classes of contracts, in which procedural inequalities are especially common, to special scrutiny for both substantive and procedural fairness. Some examples of laws that already do this include

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<sup>216</sup> See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 188, at 147–48. See also Richard Craswell, *Freedom of Contract*, in CHICAGO LECTURES IN LAW AND ECONOMICS 81, 81 (Eric A. Posner ed., 2000) (“Depending on one’s point of view, freedom of contract can be seen as a choice between individual liberty and heavy-handed government control, or between communitarian consensus and the worst excesses of laissez-faire capitalism.”).

<sup>217</sup> Some economists have made similar recommendations. See, e.g., STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 301 (2004) (“As a general matter, parties will want incomplete contracts to be interpreted as if they had spent the time and effort to specify more detailed terms.”). The present recommendation nevertheless specifies filling gaps in contracts not with the terms that the parties would have actually agreed to but with the terms they would have agreed to had they been bargaining from a position of perfect procedural fairness.

laws that govern fair-lending practices,<sup>218</sup> consumer-protection statutes,<sup>219</sup> the *contra proferentem* doctrine (which sometimes allows courts to interpret contractual ambiguities against the dominant parties who draft contracts),<sup>220</sup> the reasonable-expectations doctrine (which applies primarily to insurance contracts),<sup>221</sup> the law of collective bargaining,<sup>222</sup> employment discrimination and minimum wage statutes,<sup>223</sup> and a broad range of legal doctrines that invite special scrutiny for boilerplate and for contracts of adhesion.<sup>224</sup> As noted, this general framework is also very close to the modern doctrine of unconscionability.<sup>225</sup>

I do not, however, believe that current law perfectly reflects rules that promote equal empowerment (or deviate from this ideal only when no one could reasonably reject rules that are unequally empowering in light of the available alternatives). In my view, this problem is partly attributable to the absence of a plausible theory of contract that exhibits the appropriate relationship between doctrines that police bargains for fairness and the normative foundations of contract. But it is also partly attributable to modern changes in the world, including the fact that contracts are increasingly formed with the use of boilerplate, which is rarely read or understood—especially in many consumer contexts.<sup>226</sup> This is thus one of the areas in which the

<sup>218</sup> See, e.g., 15 U.S.C. §§ 1601–67 (2012).

<sup>219</sup> See, e.g., Uniform Consumer Credit Code § 5.108 (1968).

<sup>220</sup> See CHARLES L. KNAPP, NATHAN M. CRYSTAL, & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 357–58 (2007).

<sup>221</sup> *Id.* at 379–80 (explaining that, under the reasonable-expectations doctrine, the objectively reasonable expectations of policyholders will be honored even if a study of policy provisions shows that they would have negated those expectations).

<sup>222</sup> See generally, e.g., National Labor Relations Act, 49 Stat 449 (1935), codified as amended at 29 U.S.C. § 151 et seq. (2012).

<sup>223</sup> See, e.g., Civil Rights Act of 1964 § 703, Pub L No 88-352, 78 Stat 241, 255–57, codified as amended at 42 U.S.C. § 2000e-2 (2012).

<sup>224</sup> See Kessler, *Contracts of Adhesion*, *supra* note 139, at 633 (“[O]ur common law of standardized contracts is highly contradictory and confusing, and the potentialities inherent in the common law system for coping with contracts of adhesion have not been fully developed.”).

<sup>225</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); U.C.C. § 2-302 (ALI 2012); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 386–454 (5th ed. 1995). See also *Burch v. Second Judicial District Court of the State of Nevada*, 49 P3d 647, 650 (Nev. 2002) (“Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable. . . . Because the procedural unconscionability in this case is so great, less evidence of substantive unconscionability is required to establish unconscionability.”).

<sup>226</sup> See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 59–93 (2014); RADIN, BOILERPLATE, *su-*

greatest amount of legal reform is warranted,<sup>227</sup> and for which contract as empowerment might be of greatest use. I hope to develop some of these points in later applications of the theory.

Still, as the above arguments collectively show, contract as empowerment offers a unified account of some of the most puzzling and seemingly inconsistent doctrines in modern contract law. The fact that contract as empowerment can harmonize all the core doctrines identified in Part II, while explaining the legally obligatory force of contracts, suggests that the current theory has important interpretive advantages over other leading economic and philosophical theories of contract.

#### IV. OBJECTIONS AND LIMITATIONS

This Part now turns to three objections that one might raise to contract as empowerment. The first claims that the theory cannot offer a complete interpretative theory of contract because the theory has been shown to have only limited explanatory power. The second argues that even if contract as empowerment offers a complete interpretive theory, it is insufficiently distinct from economic theories to reflect a meaningful alternative. The third suggests that the theory should be rejected because it rests on a controversial normative foundation.

##### A. Completeness of the Theory

The first objection questions whether contract as empowerment offers a complete interpretive theory of contract. Even if it offers the best unified explanation of the three core areas of doctrine discussed in this Article, no attempt has been made to interpret many other rules.

This limitation is partly due to space, and partly due to my aim in this Article. My aim is to *introduce* the theory of contract as empowerment and establish that it has major interpretive advantages over leading economic and philosophical theories. As explained in Part II, the three areas of doctrines that I focus on here were therefore chosen very carefully. They collect some of the best-known puzzles about contract law, which largely define its core subject matter. The doctrines often have some mandatory status and have proved remarkably stable, in some form, in

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*pra* note 161, at 197–216. *See also* KAR, THE CHALLENGE OF BOILERPLATE, *supra* note 160.

<sup>227</sup> *See, e.g.*, RADIN, BOILERPLATE, *supra* note 161, at 243–48 (suggesting steps for NGOs, firms, regulatory agencies, courts, and lawyers).

all common-law systems with advanced market economies.<sup>228</sup> These doctrines also capture some of the deepest and most seemingly irreconcilable tensions in modern contract law, such as those among fairness, liberty, and efficiency.<sup>229</sup> Because contract as empowerment is uniquely capable of harmonizing this entire constellation of doctrines while explaining the legally obligatory force of contracts,<sup>230</sup> it has major interpretive advantages over all other leading theories of contract.

With respect to completeness, I have also shown that contract as empowerment can explain core doctrines at each major stage of contract analysis: formation (for example, the rules of mutual assent and consideration);<sup>231</sup> interpretation and construction (for example, the modified objective approach to interpretation and the implied duty of good faith and fair dealing);<sup>232</sup> performance and breach (for example, the standard rules governing tests for material breach and the reactions warranted by different classes of breach);<sup>233</sup> many of the standard defenses (for example, unconscionability and public policy); and the standard remedies (for example, private rights to expectation damages, with some exceptions for specific performance).<sup>234</sup> Contract as empowerment also explains why claims for breach of contract differ from claims for promissory estoppel.<sup>235</sup>

Although more work remains to be done, contract as empowerment thus identifies a unifying thread that runs through many varied contract-law doctrines and helps to distinguish its core subject matter. For reasons discussed, contract as empowerment also offers the best available general interpretation of this doctrinal core. Hence, at the very least, it will be worth the time and effort to extend contract as empowerment to a much broader range of doctrines. One of the central purposes of this Article is, in fact, to introduce contract as empowerment in a succinct and compelling enough manner to prompt those further applications. I hope to encourage empowerment-based accounts of a much broader range of doctrines and establish the need for empowerment-based recommendations with respect to more legal reforms.

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<sup>228</sup> See *supra* Part II.

<sup>229</sup> See *id.*

<sup>230</sup> See *supra* Parts I, III.

<sup>231</sup> See *supra* Parts III.B, III.C.1.

<sup>232</sup> See *supra* Part III.C.2.

<sup>233</sup> See *supra* Part III.C.2.

<sup>234</sup> See *supra* Part III.A.

<sup>235</sup> See *supra* Part III.B.



## B. Distinctiveness of the Theory from Economic Accounts

The second objection argues that even if contract as empowerment offers a complete interpretive theory, it is insufficiently distinct from economic theories to offer a meaningful alternative. This objection is rooted in the fact that contract as empowerment relies on some economic insights to ground some recommendations that resemble those of economic theories.<sup>236</sup>

When determining which contract rules should be legally enforced, contract as empowerment does, in fact, resemble economic theories in some ways. Unlike many traditional deontological (or duty-based) theories, it explicitly considers the consequences of legal rules when determining the appropriate shape of contract law.<sup>237</sup> Contract as empowerment can therefore absorb many of the economic and psychological insights that have given economic theories their traditional explanatory advantages.<sup>238</sup> Still, contract as empowerment considers these consequences from a special perspective, which prevents the theory from being reduced to a purely consequentialist one.<sup>239</sup> Rather than asking which rules produce the best economic consequences without more, it asks whether certain rules, with certain expected consequences, are ones that no one could reasonably reject in light of the available alternatives.<sup>240</sup> This form of justification is fundamentally contractualist, not consequentialist, in orientation. It is a deontological (or duty-based) form of justification, which can sometimes—as shown in earlier sections—produce different recommendations than economic theories produce.<sup>241</sup>

In addition, even when contract as empowerment generates the same recommendations as economic theories, it offers a fundamentally different interpretation of them. This difference is

<sup>236</sup> See *supra* Part I.

<sup>237</sup> Contractualists agree that “[c]laims about individual well-being are one class of valid starting points for moral argument.” SCANLON, CONTRACTUALISM AND UTILITARIANISM, *supra* note 32, at 108.

<sup>238</sup> See, e.g., *supra* Part III.A.2 (absorbing but reinterpreting some insights of efficient breach theorists); Parts I, III.C.1 (absorbing but reinterpreting some insights about the welfare-producing aspects of contract law and modern markets).

<sup>239</sup> See *generally*, e.g., SCANLON, CONTRACTUALISM AND UTILITARIANISM, *supra* note 32.

<sup>240</sup> See *id.* at 110 (“An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement.”).

<sup>241</sup> See, e.g., *supra* Part III.

equally important for understanding the use and distinctiveness of the current theory.

To illustrate, consider the fact that both contract as empowerment and economic theories endorse a major role for private negotiation, pursued from a standpoint of self-interest, in generating legally enforceable contracts.<sup>242</sup> Both cite similar facts for this endorsement. When, for example, private parties bargain from a perspective of self-interest, their voluntary choices tend to reveal their subjective preferences.<sup>243</sup> Contract enforcement can therefore promote exchanges that conduce to both parties' subjective preferences.<sup>244</sup> Although I do not believe that subjective-preference satisfaction equates to human welfare,<sup>245</sup> I do believe that people are different enough to have varied personal sources of happiness and welfare. I also believe that peoples' subjective preferences often provide useful—though not infallible—sources of information about their routes to personal happiness and welfare.<sup>246</sup> I believe, finally, that Professor Hayek was right to point out that private bargaining produces information about the routes to human preference satisfaction that is

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<sup>242</sup> See *supra* Part III.A–C.

<sup>243</sup> For the source of this highly influential “revealed preference” approach to measuring utility, see generally Samuelson, *Pure Theory*, *supra* note 150, at 61. Although some economists have criticized the idea that preferences can be identified simply from choice, there is no doubt that choosing something over other available options increases the likelihood of the chosen good being subjectively preferred to the other options. See, e.g., Sen, *Internal Consistency*, *supra* note 150, at 495.

<sup>244</sup> See, e.g., Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 872 (1978) (“When A and B agree to exchange A’s good X in return for B’s good Y, we conclude, in the absence of factors other than desires for X and Y causing the agreement to occur, that the exchange will enhance the utility levels of each.”); *id.* (“[T]he underlying assumption [is] that the function of a classical or neoclassical contract law system is to enhance the utilities created by choice-generated exchange.”).

<sup>245</sup> For a good discussion of some of the problems with defining human welfare in terms of revealed subjective preferences, see Robert Sugden, Book Review, *Welfare, Resources, and Capabilities: A Review of Inequality Reexamined by Amartya Sen*, 31 J. ECON. LIT. 1947, 1957–62 (1993).

<sup>246</sup> Some scholars, including Mill, have posited psychological mechanisms that shape our complex desires over the course of our experiences to better track our happiness. See, e.g., JOHN STUART MILL, *Utilitarianism*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 1, 46 (Dutton 1951): “Life would be a poor thing, very ill provided with sources of happiness, if there were not this provision of nature, by which things originally indifferent, but conducive to, or otherwise associated with, the satisfaction of our primitive desires, become in themselves sources of pleasure more valuable than the primitive pleasures, both in permanency, in the space of human existence that they are capable of covering, and even in intensity.” I believe that these types of mechanisms plausibly exist as evolutionary adaptations but that they are also prone to failure in some circumstances. There are also circumstances in which true happiness requires freedom from the bondage of self. See Kar, *Deep Structure*, *supra* note 12, at 927.

often very difficult—if not impossible—for a centralized state planner to identify on its own.<sup>247</sup> Hence, I believe that contract law provides an especially useful and nonduplicative mechanism for private parties to meet a broad range of human needs and interests through the marketplace.

These are reasons that many economists cite to explain the legal enforcement of contracts, and these are reasons that empowerment theorists can endorse.<sup>248</sup> Still, contract as empowerment interprets self-interested bargaining very differently than classical economic theories do. Instead of suggesting that people are purely instrumentally rational (or even boundedly rational<sup>249</sup>), contract as empowerment recognizes that most people have additional moral motivations. Based on a range of theoretical, evolutionary, and empirical work, it suggests that most humans have a natural sense of obligation,<sup>250</sup> which it interprets to include motives to act in ways that people can justify to others on grounds that others cannot reasonably reject.<sup>251</sup> On the current view, people need not dispense with these motives when they enter the marketplace. They can bargain with one another from a perspective of self-interest and still treat each other as full moral equals, so long as this form of bargaining is either permitted or encouraged by rules that no one could reasonably reject. Contract as empowerment suggests that bargaining from

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<sup>247</sup> See Hayek, *Use of Knowledge*, *supra* note 97, at 524; Macneil, *Contracts: Adjustment*, *supra* note 244, at 859 (“The combination of exchange with promise has been one of the most powerful social tools ever developed for the production of goods and services.”).

<sup>248</sup> See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 188, at 123–26 (discussing the economic functions of contracts, particularly with respect to consideration).

<sup>249</sup> See, e.g., Tversky & Kahneman, *Framing of Decisions*, *supra* note 31 (describing classical assumptions of rationality in economic theory and recommending their replacement with a theory of bounded rationality); Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697 (2003) (suggesting the replacement of classical rational-choice theory with a theory of bounded rationality in the social sciences).

<sup>250</sup> See generally Kar, *Deep Structure*, *supra* note 12, at 877. See also JONATHAN HAIDT, *THE RIGHTeous MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 25–26 (2012) (supplementing the two main theories from whence “morality comes from”—innateness and childhood learning—with a third theory that “morality is self-constructed by children on the basis of their experiences with harm”); MIKHAIL, *ELEMENTS OF MORAL COGNITION*, *supra* note 29, at 296–97 (noting that classical natural lawyers like Cicero and Hume believed that our “moral sense” is innate to our human nature).

<sup>251</sup> SCANLON, *WHAT WE OWE TO EACH OTHER*, *supra* note 27, at 191 (suggesting that ordinary people are motivated to act not only rationally but also in ways that they can justify to others as conforming to principles for the general regulation of behavior that others, similarly motivated, cannot reasonably reject).

a perspective of self-interest is permitted (within limits) in the marketplace but construes these bargains as generating genuine legal obligations, which engage more than just instrumental reason.

On the current view, contracting and modern market activity are therefore not simply social spheres in which self-interest runs wild. Nor are they spheres in which competition of every kind is permitted. They are rule-governed social phenomena, which generate genuine legal obligations to the precise extent that the rules are simultaneously empowering and reflective of a moral ideal of equal respect for persons. It follows that persons who interact with each other in accordance with rules like these participate in a form of moral, and not just economic, interaction. They treat one another as full moral equals—and not as mere means to economic goals or private ends.

Contract as empowerment can therefore absorb many economic insights and endorse many similar rules,<sup>252</sup> but it still offers a meaningful alternative to economic theories.<sup>253</sup> It suggests that an important moral fiber has been running through contract law and modern markets for some time now—albeit one that has often been obscured by classical economic interpretations of these phenomena. This moral fiber must be understood in any true social science of contract law and modern markets.

### C. Controversial Normative Foundations of the Theory

The third objection to contract as empowerment challenges the theory because it rests on a controversial normative foundation. Every normative theory faces this challenge in some form. Still, I believe that the normative foundations of contract as empowerment are less problematic, in this particular context, than other normative theories of contract for three reasons.

First, for reasons explained herein, I believe that contract as empowerment offers the most promising general interpretation of contract law's doctrinal core.<sup>254</sup> To the extent that this is true, it articulates the best available justification of the core of modern contract law as it stands. Even if one questions the normative foundations of contract law, the theory thus tells us something important about what those normative foundations are. They are not purely consequentialist in nature.

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<sup>252</sup> See, e.g., *supra* Parts I, III.A.2, III.B.

<sup>253</sup> See, e.g., *supra* Parts III.A.2, III.C.

<sup>254</sup> See *supra* Part III.

Second, this may be the best we can hope for with respect to justifying human constructions like the common law of contracts. In *The Two Faces of Morality*, I outline several highly general constraints that any form of justification must meet to qualify a rule as a moral (and not merely a prudential) rule.<sup>255</sup> I concede that both utilitarian and contractualist forms of justification meet these very general constraints and suggest that there *may* be no further fact of the matter as to which form of justification is more valid.<sup>256</sup> Humans nevertheless appear to have naturally evolved to engage in a particular species of moral judgment, which happens to be contractualist in form and tends to produce a recognizable species of moral life and interaction.<sup>257</sup> Unless there is some further fact of the matter as to what morality really is, which conclusively disproves contractualist accounts of the right, it may be justification for us enough to show that contract law reflects a *human* species of moral interaction.

Third, in any event, I believe that contractualist accounts of obligation are the right ones to apply to the law. Although it goes beyond the scope of this Article to argue this here, contractualist accounts have an incredibly solid pedigree. They reflect one of the two major branches of social contract theory, and some of the most prominent moral and political philosophers of our time—including Professors Stephen Darwall, Christine Korsgaard, John Rawls, and Thomas Scanlon—have argued for their validity.<sup>258</sup> In *Contractualism and Utilitarianism*, Scanlon explains why contractualist accounts better capture the intuitions about morality that lead many to feel forced to accept utilitarian accounts of the right.<sup>259</sup> I believe that Scanlon's arguments on this point are correct—at least when it comes to the realm of what we owe to one another.

There are, moreover, heightened reasons to think that contractualist approaches to justification apply to legal obligations. This is because legal obligations purport to give some other person or group the authority to demand compliance. Legal obligations are therefore instances of what Darwall calls “second-

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<sup>255</sup> See KAR, *THE TWO FACES OF MORALITY*, *supra* note 29, at 68–69.

<sup>256</sup> *Id.* at 69.

<sup>257</sup> See, e.g., Kar, *Deep Structure*, *supra* note 12, at 877; BRIAN SKYRMS, *EVOLUTION OF THE SOCIAL CONTRACT* 4–7 (1996). See also generally KAR, *THE PSYCHOLOGICAL FOUNDATIONS OF HUMAN RIGHTS*, *supra* note 29.

<sup>258</sup> For a general account of these varied views, see generally DARWALL, *CONTRACTARIANISM/CONTRACTUALISM*, *supra* note 26.

<sup>259</sup> See generally SCANLON, *CONTRACTUALISM AND UTILITARIANISM*, *supra* note 32.

personal reasons.”<sup>260</sup> In *Hart’s Response to Exclusive Legal Positivism*, I argue at length that the law is fundamentally second personal in nature and that Hart was beginning to understand that fact himself toward the end of his career.<sup>261</sup> This is true even if—contrary to Darwall—some aspects of interpersonal morality are not fundamentally second personal in nature.<sup>262</sup> But I also accept Darwall’s arguments that second personal reasons can have the authority that they purport to have only if they are justifiable in contractualist terms.<sup>263</sup> This is because they involve interpersonal demands, which are backed by the threat of formal or informal sanctions. These demands and sanctions can amount to something more than coercion only if the rules that give rise to them are justifiable to their addressees in terms that these addressees cannot personally reasonably reject.<sup>264</sup> It follows that contractualist forms of justification are particularly relevant to justifying legal obligations.

In sum, the normative foundations of contract as empowerment are—at minimum—no more controversial than those of any other theory. They provide the best harmonized justification for the core of contract law as it currently stands, in part because they explain the legally obligatory aspects of contract law

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<sup>260</sup> DARWALL, THE SECOND-PERSON STANDPOINT, *supra* note 22, at 8: “A second-personal reason is one whose validity depends on presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason’s being addressed person-to-person. Reasons addressed or presupposed in orders, requests, claims, reproaches, complaints, demands, promises, contracts, givings of consent, commands, and so on are all second-personal in this sense.”

<sup>261</sup> See generally Kar, *Hart’s Response*, *supra* note 33, at 393.

<sup>262</sup> Some have argued against Darwall’s second personal interpretation of morality. See, for example, Christine M. Korsgaard, *Autonomy and the Second Person Within: A Commentary on Stephen Darwall’s The Second-Person Standpoint*, 118 ETHICS 8, 20–23 (2007) (arguing that Darwall’s main normative conclusions follow from a first person stance on deliberation); R. Jay Wallace, *Reasons, Relations, and Commands: Reflections on Darwall*, 118 ETHICS 24, 26–27 (2007) (arguing that some moral requirements do not depend on being addressed in a second personal manner); Gary Watson, *Morality as Equal Accountability: Comments on Stephen Darwall’s The Second-Person Standpoint*, 118 ETHICS 37, 50–51 (2007) (arguing that Darwall’s arguments rely on a limited rejection of certain nonconstructivist forms of moral realism). *But see generally* Stephen Darwall, *Reply to Korsgaard, Wallace, and Watson*, 118 ETHICS 52 (2007). I take no position on these issues here, but I would like to make two observations. First, some of these arguments, like Korsgaard’s, imply that there is a first personal source for a similar contractualist approach to morality—thus providing an argument of the wrong kind to undermine the current project. Second, some of the other arguments, like Wallace’s, apply to some aspects of morality but not to law, whereas others, like Watson’s, rely on the possibility of a nonconstructivist form of moral realism—which many reject.

<sup>263</sup> See DARWALL, THE SECOND-PERSON STANDPOINT, *supra* note 22, at 29–38, 300–20.

<sup>264</sup> See *id.* at 300–20.

in ways that economic theories cannot. There are also good reasons to think that contractualist accounts of obligation are correct, especially as accounts of legal obligation. But there may be no fact of the matter as to whether contractualist or consequentialist theories of the right are true. In that case, contractualist accounts describe the species of moral action that comes most naturally to us.

#### CONCLUSION

In this Article, I have introduced the basic theory of contract as empowerment and argued that it has major interpretive advantages over both orthodox economic and philosophical theories. The theory is simultaneously descriptive, in that it explains the shape of many of contract law's core doctrines, and normative, in that it explains how contract law should look if it is to give rise to genuine legal obligations. By harmonizing a core constellation of doctrines, which would otherwise pose a powerful challenge to modern contract theory, I have argued that contract as empowerment offers the best available interpretation of contract law's doctrinal core—at least in relation to the common law. Contract as empowerment may therefore offer the missing theory of contract described by Professors Schwartz and Scott.<sup>265</sup>

Several important consequences follow. First, I believe that contract as empowerment tells us something important, and potentially surprising, about contracts and modern markets. Contracting is first and foremost a rule-governed social activity.<sup>266</sup> The rules that govern contract are complex and interlocking,<sup>267</sup> and any social scientists or philosophers interested in understanding them should therefore begin by seeking the best interpretation of this entire body of rules. Although economics aspires to be a social science,<sup>268</sup> economists sometimes bring a range of theoretical preconceptions to their studies that can distort their understandings of these phenomena.<sup>269</sup> On the best in-

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<sup>265</sup> Schwartz & Scott, *Contract Theory*, *supra* note 1, at 543.

<sup>266</sup> See *supra* Part I.

<sup>267</sup> See *supra* Parts II, III.

<sup>268</sup> See generally Daniel M. Hausman, *Introduction*, in *THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 1* (Daniel M. Hausman ed., 3d ed. 2008).

<sup>269</sup> As Professor Daniel Hausman has said: “[E]conomics is a peculiar science. Many of its premises are platitudes such as “Individuals can rank alternatives” or “Individuals choose what they most prefer.” Other premises are simplifications such as “Commodities are infinitely divisible,” or “Individuals have perfect information.” On such platitudes and simplifications, . . . economists have erected a mathematically sophisticated theoretical edifice, whose conclusions, although certainly not “necessarily erroneous,” are never-

terpretation, contracts and modern market activity do not appear to reflect rules that merely aim to promote efficiency.<sup>270</sup> They are better interpreted as rule-governed spheres of moral interaction, which produce genuine legal obligations to the precise extent that the rules are simultaneously empowering and reflective of a moral ideal of equal respect for persons. This is what contract law is—though we have thus far only dimly perceived it as such.

Second, contract as empowerment offers a distinctive framework for legal reform. It suggests that contract law should often be finely tuned to be more equally empowering to all—because this rationale is normatively satisfying in its own right, because this sort of justification is typically needed for contracts to produce genuine legal obligations, and because empowerment principles better reflect the basic principles that have animated contract law and modern markets for some time now. Contract as empowerment suggests that many commonly perceived tensions within contract law—such as the tensions among fairness, liberty, and efficiency—are not always real.<sup>271</sup> If crafted properly, rules that promote all of these values can work together so that each plays a distinctive but appropriate role in promoting the fundamental principles of contract.

In my view, the places in which theoretical misinterpretations of contract have proved most damaging relate to doctrines that invite or require courts to police bargains for substantive fairness. Debates about these doctrines have become so highly polarized and ideological in the United States that impartial assessment has become a near-dead commodity.<sup>272</sup> One reason for

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theless often off the mark.” *Id.* at 1. I should also note that I draw a distinction between theoretical assumptions that are simplifying but illuminating and ones that are distorting. I count some classical economic approaches to contract law in the latter category because—as I have argued in this Article—they fail to account for central, pervasive, highly stable, and defining features of contract law. *See supra* Part IV.B. In my view, classical and neoclassical approaches to economics therefore fail to comprehend important aspects of their own subject matter. I nevertheless accept that some other aspects of economic theory are simplifying but illuminating. In those cases, I have tried to absorb the relevant insights into the current theory.

<sup>270</sup> For a classic discussion, see POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 188, at 343 (“On occasion, common law courts flinch from the full embrace of the implications of that theory. . . . Efficiency or wealth maximization is an important thread in the ethical tapestry, but it is not the only one.”).

<sup>271</sup> *See supra* Parts II, III.

<sup>272</sup> For excellent discussions of how the moral psychology of ideological debate colors even some purely factual disputes, see HAITT, *THE RIGHTEOUS MIND*, *supra* note 250, at 41–44. *See also* Dan M. Kahan, et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 *STAN. L. REV.* 851 (2012).



this is that many people view market regulations as inherently inimical to the principles that animate modern market activity.<sup>273</sup> Another is the incredibly long hand of the Cold War, which has left us with outmoded ways of framing some of our most important debates about how markets operate and the appropriate role of markets in contemporary society.<sup>274</sup> Our current choices are not, however, just socialism, which in its most austere form is now dead,<sup>275</sup> or pure laissez-faire capitalism, which has never existed;<sup>276</sup> nor is the best question how to blend two seemingly incompatible systems.<sup>277</sup> It is time to dispense with these outdated ways of framing the debate over contract law and market regulations<sup>278</sup> so that we can identify the true principles that unify contract law and make modern markets work.

I believe that these principles relate to empowerment. For reasons discussed, contract as empowerment also offers a distinctive framework for determining when market regulations promote the fundamental principles of contract and modern market economies rather than reflect alien intrusions into the marketplace. The present theory can therefore be extended to address a range of currently heated debates about the appropri-

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<sup>273</sup> See, e.g., CRASWELL, FREEDOM OF CONTRACT, *supra* note 216, at 81 (“Depending on one’s point of view, freedom of contract can be seen as a choice between individual liberty and heavy-handed government control, or between communitarian consensus and the worst excesses of *laissez-faire* capitalism.”).

<sup>274</sup> For an excellent discussion of the Cold War, see ANDERSON, TOWARD A POST COLD-WAR POLITICAL ECONOMY, *supra* note 63.

<sup>275</sup> See Seweryn Bialer, *Is Socialism Dead?*, in SOVIET-AMERICAN RELATIONS AFTER THE COLD WAR 98, 98 (Robert Jervis & Seweryn Bialer eds., 1991) (“By now it is quite certain that Marxian socialism in its most politically meaningful twentieth-century variant, radical Leninism, is dead as a state ideology.”).

<sup>276</sup> See ANDERSON, TOWARD A POST COLD-WAR POLITICAL ECONOMY, *supra* note 63 (“There are many difficulties with this way of classifying economic alternatives. For one, the extremes on both left and right are no longer credible options, if they ever were.”).

<sup>277</sup> See *id.* (“[I]t doesn’t make much sense to represent the economies of Western Europe and North America as ‘mixtures’ of two deeply incompatible and doomed systems.”).

<sup>278</sup> For a related point, see *id.*: “It’s time we got rid of the contemporary conceptual analogue to “mixed government”—namely, the idea of a “mixed economy.” We still tend to think that the economies of the advanced democracies in North America and Europe are “mixed” in some kind of combination of laissez-faire capitalism and socialism. The idea got a lot of traction from the seeming viability of communism as an alternative mode of organizing an economy, plus a mythology of capitalism as at its most pure in its laissez-faire version. It turned out [that] both the (far) left and the right had an interest in representing “true” capitalism as laissez-faire capitalism—the former, to stress the ill fates of those who get chewed up in a dog-eat-dog economy, the latter, to celebrate the freedom to be top dog in such a system.” Although Professor Elizabeth Anderson has thought deeply about the implications of such a move for understanding systems of tax and transfer, the current Article engages in an analogous exercise with respect to contract law.

ate role of market regulations in many different markets—from those in consumer goods to those in labor, finance, credit, mortgages, and many others. By introducing contract as empowerment into contemporary debates over how best to interpret contract law, I hope to encourage empowerment-based approaches to more questions like these.