Classical Contract Law, Past and Present

This paper synthesizes and refocuses a wide range of histories of nineteenth-century contract law. It uncovers an inadvertent consensus among historians: despite significant controversies engaging rival historical schools of contract law, it is almost universally agreed that nineteenth-century law embodied an elaborate version of individualism; that the alternatives to its individualism were status and collectivism — but they functioned as external critiques and so left contract’s conceptual link with individualism intact; and that the individualism grounded in contract law was in keeping with broad cultural mores.

The consensus effectively entrenches a questionable historical artifact: the idea of a single meaning of contract at the decisive era for modern contract law’s development. This idea’s persistence bears implications for present thought as it negotiates visions of contract, and as it explores law’s constitutive effects on social consciousness.

This paper aims to generate a clear grasp of the existing historical story of contract law, together with a critical understanding of legal history’s role in keeping a dubious but powerful artifact alive. It concludes by venturing into alternative ways of engaging with the classical legacy once the artifact is shaken off, or, at least, a little shaken.

INTRODUCTION

I. STATUS-INDIVIDUALISM-COLLECTIVISM

II. CLASSICAL CONTRACT LAW

A. Individualism in Contract Histories

B. Individualistic Bias in Contract

   2. Contract as Abstraction
   3. Reification of Contract
   4. The Absoluteness of Contractual Rights
   5. Duties Prior to Contract
   6. Excuses
   7. The Market
      i. Atomism
      ii. Separate Spheres
   8. The Promising Individual
   9. The Contractual Relation

III. CLASSICAL CONTRACT’S OTHERS: STATUS AND COLLECTIVISM

A. Status and Contract

   1. From Status to Contract
   2. The Ghost of Status

B. Collectivism and Contract

   1. Collectivism as Historical Trend
      i. General
      ii. Contract as Abstraction
      iii. Reification, Absolute Rights, Pre-contractual Duties and Excuses
      iv. The Market
      v. The Promising Individual
   2. Assessing the Limits of the Collectivist Impact
   3. Collectivism as Conceptual Alternative: Internal Critique

IV. INDIVIDUALISM AS CULTURE

A. Individualism Around Contract

   1. Context
   2. Challenges to the Historical Narrative

* * *
INTRODUCTION

If you were inclined to search for ghosts in legal scholarship, classical contract law would be a promising start: an historical construct holding present legal thought firmly in its grip. This paper argues that the grip is unwarranted, and that legal history has played an unacknowledged role in its endurance. To show how, I bring together a wide range of histories of nineteenth-century contract law, and uncover the inadvertent but powerful consensus historians of classical contract law have managed to reach on the historical meaning of contract and its hegemonic cultural position in the nineteenth century. The discussion aims to generate a clear grasp of the existing historical story, together with a critical understanding which should enable a shaking-off of the sense of the past it embeds.

The approach to history here has two specific twists. First, while I go through doctrinal and theoretical points, my focus is the meaning of contract, at the core of which lie a specific image of the contracting individual (self-sufficient, rational), and a specific representation of the social context of contract — the market (a separate sphere answering to a distinct economic logic). Second, the discussion looks beyond the controversies dominating histories of contract, to flesh out points of agreement, an almost inadvertent consensus. In the link between contract's meaning and consensus among historians lies a powerful effect on the legal sense of past and present.

The points of consensus tell the following story. Classical contract law embodied an elaborate version of individualism, which controlled the meaning of contract in the
nineteenth-century. The "fall" of contract was not, for many decades, a conceptual fall. The alternatives to the individualist version of contract — status and collectivism, functioned as others, eroding contract in practice without substituting its meaning, and so contract retained its conceptual relation to individualism throughout the century. The individualism of contract law, furthermore, was of broad cultural resonance. The story effectively recognizes law's version of individualism in contract as the sole one available in the nineteenth century. Contract meant but one thing, and individualism in contract meant but one thing.

The historical debate is heated on virtually all other questions: the explanation for contract's individualist bias; how old this individualism is — here positions range along a timeline of some 600 years; and, closely related, what were the minimal features which made any particular constellation of contract rules, doctrines, or theoretical rationalizations, distinctively individualistic. It is possibly the heat of debate on so much else which renders the picture of classical contract law so vivid, and its individualism so dominant.

In histories often critical of that individualism, the normative effect of its entrenchment has gone strangely unnoticed. With few words if any, a diversified and hotly contested field of legal history has managed nonetheless to cooperate in creating a questionable historical artifact: a single meaning of contract in the nineteenth century. That artifact is still with us today, informing visions of available routes in contract, and the understanding of how law constitutes social consciousness.

Explanations for the classical construct's influence are many; whatever else they include, the role of legal history itself should be taken into account. Legal history has
closed off the possibility that other versions of contract were around, and in particular, other versions of individualism in contract.

Part I introduces the broad historical and conceptual pattern of contract law in the nineteenth century: the axis of status-individualism-collectivism. The following Parts then unpack the axis. Part II discusses classical contract law (individualism); Part III discusses status and collectivism. Parts II and III together recount contract's stable link with an elaborate version of individualism, as it emerges from legal history. Part IV reviews discussions of the wider cultural terrain of the nineteenth century, recounting the broad cultural resonance of contract law's individualism, as it emerges from legal history. In reviewing discussions of the cultural terrain after having reviewed legal developments I reverse the standard story in which “context” or “background” come first, in an effort to flesh out the nontrivial connection made by historians between the individualism of contract law and broader cultural mores. I conclude by questioning the account of a single historical meaning of contract and its individualism, and discussing the normative implications of its entrenchment.

I. STATUS-INDIVIDUALISM-COLLECTIVISM

Contract history converses with two metanarratives of the nineteenth-century. One metanarrative is the liberation of the individual from inhibiting social locations — from the categories of status. In this story contract, in its classical version, rose to prominence at the Victorian era as a conceptual alternative to status, a story memorably captured in Henry Maine's aphorism, from status to contract.1 Less celebratory versions view the

development not so much as progress, or view the disappearance of status as only partially achieved, but otherwise agree on the conceptual conflict at hand: status/contract.

A second metanarrative is the rise of the welfare state, or the move from individualism to collectivism. In this story, contract, as the preferred mode for determining social relations, rose with individualism and sank with collectivism. Here too there are alternative versions. One version doubts whether any effective socialization was achieved through these changes, at least from the narrow prism of contract. Another version questions the linearity of change (first individualism, then collectivism), and suggests a messier story. But the conceptual opposition: individualism/collectivism, in which contract is associated with the former, remains intact.

Combined, the entire move of the nineteenth century is sometimes described as status-contract-status: communally-based definitions of social relations are superseded by individually-defined ones, and back again. Whether the story is one of progress and decline, vice versa, or just an amalgam of normative visions competing for dominance, the conceptual picture emerging from history is of status and collectivism as the two historical others of the classical view of contract, each entrenched in a commanding narrative of the nineteenth century.

The classical view of contract has remained influential ever since. Its influence is evident, for one, in contemporary contract theory — which seems to always converse

---

2 The term collectivism, bearing strong ideological resonances, is somewhat misleading; I use it as a matter of practical convenience given its frequent appearance in legal writing on contract. The term is disentangled in Part III.

with the classical image. The point extends beyond theory: While debunked as neat narratives of contract history, the dualisms of status/contract and individualism/collectivism remain influential as ways to understand the alternatives faced by Victorians, and to make sense of developments which followed. Finally, the classical construct, particularly its relation to a broader cultural scene, informs understandings of the role of law in channeling social choices.

After generations of historical and normative assaults, the dominance of the classical construct remains to be explained. One point of entry into this puzzle lies in unpacking its history. And so, unpacking follows.

---

4 As Melvin Eisenberg puts it in introducing relational contract theory: "Like most modern contract theories, relational contract theory can only be understood against the backdrop of the school of classical contract law, to which it stands in opposition." Melvin A. Eisenberg, Why There Is No Law of Relational Contracts, 94 NW. U. L. REV. 805, 805 (2000).

5 As Kennedy notes, the story of the rule of individualism (in which freedom of contract was a single governing guide to legal decision-making) is perhaps mythical. Its existence is less important, because "the position itself certainly exists . . . and proponents of other views tend to treat it as polar — as one of the extreme or pure cases with respect to which they define themselves." Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 576 (1982). Kennedy sees the position as a minority position (my ellipses above); nonetheless it continues to define the alternatives. I return to this point in discussing collectivism in Part III below.
II. CLASSICAL CONTRACT LAW

Undisputed Point # 1: Contract in the nineteenth century was intimately linked with an elaborate version of individualism.

This Part first clarifies the meaning of "individualism" in historical accounts of contract law. It then reviews and refocuses histories of contract law to elaborate on its content.

A. Individualism in Contract Histories

Writers time and again relate classical contract thought of the nineteenth century to "individualism," and they do so in different ways. Some writers discuss basic ideals underlying individualism, such as contract's commitment to negative liberty (Steven Lukes' "autonomy"); others refer to specific doctrines of individualism, like the

---

6 By "classical contract law" I refer to the law of contract of the nineteenth century. The discussion covers a large number of histories, which have dealt with various aspects of law, like case law, theory, and, more broadly, legal thought or legal consciousness. I will thus refer interchangeably to "law," "legal discourse," or "legal thought."

I focus primarily on the law in England. As citations should make clear, however, these origins have been crucial for American contract law, and studies often address English and American legal thinkers together when referring to classical contract.

The term "classical" is likewise prone to different uses. For example, Atiyah focuses on a theory he interchangeably calls "will theory" and "classical theory," which, he argues, emerged by 1830. P.S. Atiyah, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). Kennedy and Kreitner, on the other hand, refer to "classical theory" as a way to distinguish it from pre-classical thought, and argue that it rose in the last three or four decades of the nineteenth century. See DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006); ROY KREITNER, CALCULATING PROMISES (2007). And indeed, Atiyah appears to collapse together ideas and writers which Kennedy and Kreitner would separate. The difference emanates from the extent to which the expulsion of relations from contract, rather than just increasing focus on the will, is perceived as the crucial moment for the contractual outlook. The expulsion of relations, note, was tied with deductivism, that is, deducing rules from first principles and critiquing rules that did not conform to principle. Given my interest in the final result, on which these and other historians generally agree, I take the move from the will theory to the classical formulation as a process of intensification; accordingly I use the terms interchangeably.

7 Individualism is a nineteenth-century term. Steven Lukes takes it apart to identify a number of underlying ideals which then appear in different combinations under different systems of thought of concrete time, place and intellectual fields. One of those ideals is autonomy. STEVEN LUKES, INDIVIDUALISM chs. 7-11 (1973).
economic individualism of the market;\(^8\) still others refer to patterns of human behavior and consciousness, like the calculating promisor.\(^9\)

The point of convergence among the various writers — the underlying concern in the varied uses of "individualism," is an ideational construct: a picture of the social order at the center of which lies a sphere of "free" competitive economic activity conducted by individual property owners who are rational maximizers of economic interest, a notion surrounded by corresponding conceptions about the role of politics (not necessarily laissez faire, but tending to view government economic activity as "interventionist," and channeling it to encourage individual competition and self-reliance), and the judiciary (viewed as a protector of rights, the goal being ensuring mutual respect of rights among individuals, and thus adequate spaces for self-realization). The diverse accounts of classical contract law all suggest, from different angles, that contract discourse assumed and reinforced this liberal world view.

Importantly, the point is not functional — at least not with all commentators; that is, the argument is not necessarily that specific contract rules, doctrines, or theoretical

---

\(^8\) For an elaboration of the doctrines, particularly economic and political individualism, see id. at 79-87, 88-92, 140-41. Economic individualism implies a presumption against economic regulation, and a justification of free trade, of competition and of private property. Economic and political individualism both purport to realize equality and liberty; that is, they both adopt the ideal of the dignity of man, and rely on some of the ideas underlying liberty. More importantly for my purposes, they are closely linked to the view of the abstract individual, and both presuppose a specific type of abstract individual — rational and calculating, utility maximizing and non-altruistic. The mode of argument in both doctrines is often identical, reasoning deductively from rational, abstract persons with determinate but conflicting wants. Both doctrines converge around economic interest, for the interests which the political individualist sees the government as protecting and promoting are characteristically individual economic interests.

\(^9\) An account set in terms of ethics of human interaction and patterns of behavior is offered by Duncan Kennedy's formulation of the content of individualism as it appears in debates about private law rules. The essence of individualism, explains Kennedy, is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interest is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. Exchange is a crucial individualist notion, being based on and structured to achieve reciprocity, with any vulnerability to non-reciprocity conceptualized as a risk. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1716-17, 1718, 1738 (1976).
accounts were indispensable or in every case instrumental for a specific social organization, for "the market," for "industrial interests" or else (though sometimes it was); individualism, as defined here, is better understood as a possible interpretation of social situations, a possible way to live in and through an evolving capitalist social order and negotiate human relations within it.

B. Individualistic Bias in Contract

Classical contract law's structures and rationalizations were closely tied to the liberal world view just discussed.\(^{10}\) The following account explains the tie. As it weaves different histories into a single account it adopts the emphases of specific historians on specific points, which might not be conceded by others. In dealing with historical details this is unavoidable, yet should not obscure the main argument: the end result, namely, the picture of contract, enjoys a wide consensus even if not every detail of how and when we got there does.


"As every contract derives its effect from the intention of the parties, that intention, as expressed, or inferred, must be the ground of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its

\(^{10}\) Not necessarily in a causal relationship, as Part III clarifies.
construction." 11 Such was Pothier's classical formulation of the will theory of contract, the basis of the English formulation of the theory. 12

The nineteenth-century model of contract had at its core the idea that contractual liability can be created, out of nothing, by a promise, conceived as an act of individual will; this act alone came to account for the legal liability. Contract under the will theory was the vehicle for giving effect to the autonomous will of private parties. The paradigm case for the theory was the executory contract — an agreement consisting of two unperformed and unrelied-upon promises exchanged one for the other.

The will theory brought about a tendency to attribute all the consequences of a contract to the will of those who made it. Contract rules were thought to be explicable by the single proposition that the law of contract protected the wills of the contracting parties. Thus, for instance, restrictions of capacity existed because some persons lacked free will; duress was the overbearing of the will, undue influence its subversion; mistake meant that the wills of the parties had miscarried; the measure of damages was defined by the will of the parties regarding the extent of liability. And so forth 13 The source of liability was the promise, whatever else happened before or after it was made, and it was to be equally protected in all cases through the expectation measure.

12 Simpson, supra note 11; Atiyah, supra note 6, at 399-400; D.J. Ibbetson, A Historical Introduction to the Law of Obligations 222 (1999).
13 Kennedy, supra note 9, at 1730 (the list appears there); Atiyah, supra note 6, at 405, 435; Ibbetson, supra note 12, at 221-42; 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) [hereinafter Kennedy, From Will Theory to Private Autonomy]; Roscoe Pound, The Role of the Will in Law, 68 Harv. L. Rev. 1, 4-7 (1954); Samuel Williston, Freedom of Contract, 6 Cornell L.Q. 365, 370-71 (1921); John P. Dawson, Economic Duress: An Essay in Perspective, 45 Mich. L. Rev. 235 (1947).
In what is considered by some a centuries-old process, and by others a revolutionary change, contract law came to reflect an interrelated set of ideals. Those, argues Duncan Kennedy, were facilitation — as opposed to regulation, self-determination — as opposed to paternalism, autonomy — as opposed to community, and formality — as opposed to informality. To reflect these ideals, a process of conceptual rearrangement took place, which dealt with many rules that reflected regulation, paternalism, community and informality. Two doctrinal developments were significant here: the rejection of the ideas of "status," "relation" and "condition" as operative sources of the great mass of contract rules, and the emergence of a specialized law of persons, and of a new category of status, which grouped together and explained the peculiar character of rules incompatible with the nineteenth-century vision of the nature of "real" contracts.\(^\text{14}\) This process is described by Kennedy as a double movement, subtracting relations from the picture, then abstracting to find will as the essence of what remained.

The specific formulation of "free will" which remained at the core of contract after subtraction and abstraction suffered from apparent logical inconsistencies explicable by the theory's individualistic bias. Take the notion of freedom: The will theory received its impetus from the ideal of freedom; the scope of contract was the scope of freedom for individual self-determination. The classical notion that contract law embodies freedom was intertwined, however, with the ideal type of the market economy, for it is the state of perfect competition which protects parties from arbitrary power in one another.\(^\text{15}\) The

\(^{14}\) **Kennedy, supra** note 6, at 184-205; see also Kretzner, *supra* note 6 (depicting the process by which non-promissory sources of contractual obligation were excluded, and promise, or individually-determined obligation, became the heart of contract).

\(^{15}\) Robert B. Seidman, *Contract Law, the Free Market, and State Intervention: A Jurisprudential Perspective*, 7 J. ECON. ISSUES 533, 555 (1973). For additional discussions of contract law's modeling of a competitive market see for example Lawrence M. Friedman, *Contract Law in America* 22 (1965) ("the law of contract was the legal reflection of that market and naturally took on its characteristics");
enforcement of contract was another aspect of diminished rather than enhanced freedom. Classical thought obscured the tension between freedom and enforcement when it posited enforcement as a protection of free will itself, cultivating a vision of secure market transactions.16

Similarly, "will": Despite the focus on individual will, the model did not attempt to pinpoint the subjective will of the parties. Instead, classical contract law adopted objectivism, imputing liability on the basis of objectively-determined manifestations of intention. While, at first glance, objectivism appears puzzling, departing from the model's commitment to the parties' will and offering instead a measure of protecting reliance, objectivism was consistent with individualistic commitments: it was part of contract's formality, and contributed to the tendencies of abstractionism — or reluctance to concretize, and the absoluteness of contractual rights (discussed below), supporting contract's compatibility with market rationality.17

---


17 Explanations offered for objectivism include the avoidance of factual inquiries and mistakes; the promotion of uniformity and predictability, tied with the limitation of the scope of jury involvement; the imposition of absolute liability in contract (limiting the range of excuses); and the limitation of judicial policing of contract through this pseudo-scientific measure of protecting reliance. See Atiyah, supra note 6, at 459-60, Morton J. Horwitz, The Transformation of American Law, 1870-1960, at 35 (1992); Grant Gilmore, The Death of Contract 44-45 (1974), and Kennedy, supra note 6, at 239-40, respectively. These explanations all point to a commitment to market security from different directions. Atiyah's explanation (avoiding factual inquiries), note, is not necessarily so intended. Atiyah seems to consider objectivism as part of the "fall" of the classical model of contract, and the re-emergence of ideas of reliance. For a view casting doubt on the dominance of objectivism in contract case law, at least in the American context, see Kreitner, supra note 6, at 111. It appears that objectivism which casts doubt on the very meaning of contract prevalent in the nineteenth century only comes in the early decades of the twentieth century, when internal critiques of contract cease upon objectivism's contradictions. Until then,
2. Contract as Abstraction

Classical contract doctrines seemed "to describe phenomena in a manner one step removed from concrete particulars of the persons and subject matters appearing in the cases." Contract law dealt with general categories: promises, wills, intentions, contracts, rather than particular relationships and transactions.

The statement of contract law at a high level of abstraction and its application to all kinds of contracts is often contrasted with an older view of contract as a status-like relationship, a view which treated different types of contracts (landlord and tenant, master and servant, principal and agent, and so forth) on different terms. At the core of the opposition between status and contract, as it was conceptualized in the nineteenth century, was a contrast between the mandatory terms of the status relation prescribed by law or custom according to the parties’ social roles, and the freely chosen content of the contractual relation. Since in contract the emphasis was now laid on the opposition between individual and communal will, content was for the parties alone to determine, and the law remained abstract, limited to specifying the general conditions under which an individually-willed content would be enforceable.

Lawrence Friedman has memorably captured the essence of the critique of abstraction, explaining that abstraction here was not hyper-technical or unrealistic. It was

---

objectivism is a practice of interpretation which, when theorized, falls back on the language and logic of the will theory which it arose to strengthen. See HORWITZ, supra, at 35-39. For a discussion of internal critique see infra Section 3.B.4.

19 ATIYAH, supra note 6, at 215.
20 ATIYAH, supra note 6, at 400; John Knockleby, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort, 93 HARV. L. REV. 1510 (1980); GILMORE, supra note 17, at 8-12; Gordon, supra note 3, at 208.
a deliberate renunciation of the particular to avoid any restriction on individual autonomy or the free market in the name of social policy.\textsuperscript{21}

3. Reification of Contract

With the will theory arose a tendency to reify contract — to treat it as a thing intentionally made by the parties.\textsuperscript{22} The nineteenth century gave rise to the rules of offer and acceptance, rules determining how a contract was made.\textsuperscript{23} Once reified, contract, and more specifically the moment of formation, of the exchange of promises, could be an independent source of rights and duties, a definitive point of reference for the entire relationship. The effect was the bounding-off of the contractual relation from the more extensive and boundless relationships which surround it.\textsuperscript{24}

4. The Absoluteness of Contractual Rights

Under the will theory, the free choice of the parties was almost beyond challenge. Contractual rights were conceived as absolute, and thus a man was not accountable for the reasons for his contractual choices.\textsuperscript{25} While concentrating on objectively-manifested choices, contract discourse dismissed accounts of contractual motivations and subjective

\textsuperscript{21} Friedman, supra note 15, at 20; see also Atiyah, supra note 6, at 402; Donal Nolan, \textit{The Classical Legacy and Modern English Contract Law}, 59 MOD. L. REV. 603, 615 (1996) (reviewing \textit{GOOD FAITH AND FAULT IN CONTRACT LAW} (J. Beatson and D. Friedmann eds., 1995)).

\textsuperscript{22} The executory model of contract — the paradigm case of the will theory, was tied with the idea of a thing created by will. The introduction of rules of set-off between plaintiff and defendant strengthened this reification by pointing to the "net" sum which represented the value of the contract-as-thing. Ibbetson, supra note 12, at 216-17.

\textsuperscript{23} Atiyah, supra note 6, at 446.

\textsuperscript{24} On "limitedness" or "bordered relationship" as one quality of contract see Arthur Allen Leff, \textit{Contract as Thing}, 19 AM. U. L. REV. 131, 138 (1970); see also Nolan, supra note 21, at 604.

\textsuperscript{25} Atiyah, supra note 6, at 405-54; Gilmore, supra note 17, at 14-15.
intentions (motives to enter a contract, to include or exclude certain terms, to insist on performance) as irrelevant for the adjudication of contractual rights and duties.

Brudner explains this phenomenon in relation to the abstractionist assumptions of the individualist outlook: this outlook assumes an atomistic individual, that is, an individual abstracted from relation to another, as a fixed and stable existence. Given this assumption, contractual rights and duties are grounded by abstracting from all concrete intentions (seen as mere subjective preferences) to the bare capacity of forming intentions — of choosing, as the only capacity worthy of respect. From this perspective, motives have no rational significance. They are not the expression of freedom but particularistic inclinations from which thought must abstract in order to arrive at a foundation for rights and duties.26

The logic of classical contract thought dismissed the relevance of motivations, and held the content of a contract to be beyond challenge. Once legally formed, content was to be adhered to, as is. This outlook could be seen, for instance, in the parol evidence rule: the fact of an agreement was given precedence over the specific motivations and underlying assumptions which prompted the agreement and which may in consequence undermine it.27 The approach was also reflected in a severe attitude to changed circumstances between formation and the time of performance: very little scope was allowed for adjustment of the parties' rights and duties.

27 Id. Under the parol evidence rule, a written contract was not to be varied by oral evidence that it did not correctly represent the intention of the parties. Atiyah attributes the formulation to Goss v. Lord Nugent [1833], 110 E.R. 713, and its affirmation in a clearly contractual context to Shore v. Wilson [1842], 8 E.R. 450. See ATIYAH, supra note 6, at 459-60.
The structure transpires in the parties' terms of interaction: the classical model was based on the principle that parties deal with one another at arm's length, each relying on his own skill and judgment, owing no fiduciary duties to the other.28

5. Duties Prior to Contract

The flipside of the absoluteness of contractual rights was the idea that no duty arises before a binding contract is entered, again explained in terms of the intentional basis of contract. These were, explains Kennedy, the two vivid states existing on the two sides of the moment of contract: just as before contracting parties were allowed to treat each other as perfect strangers, after contracting they were bound to their obligations absolutely, even if ruined. The logic was one: neither party had to share losses nor gains (unless contracted for), and each was free to increase his own gains on the other's account.29 In Gilmore's words, "[t]he theory seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything."30

The absence of pre-contractual duties and the absoluteness of contractual rights focused the contractual outlook on the moment of formation as the crucial point in contract, thus contributing to, and emanating from, contract's reification.

6. Excuses

Excuses, we have seen, were formulated in terms of defective will — they were part of the question of formation; their function was to serve as outer limits of contractual liability, defining when was and when was not the will expressed in contract a free will.

28 ATIYAH, supra note 6, at 403.
29 KENNEDY, supra note 6, at 227-28. For a later formulation see Kennedy, supra note 9.
30 GILMORE, supra note 17, at 14.
At the classical era, a narrow formulation of excuses held sway. Now, a narrow formulation suffers from a potential internal contradiction, for the ideal of the absolutely free will seems to justify a liberal interpretation of excuses if these represent cases of defective assent, or unfree will.

The formulation of excuses, however, was in line with individualism, as a number of accounts suggest. On one account, against freedom of the will worked another concept of freedom — freedom of the market. And since the classical model of contract was based on the marketplace, in which pressures were a normal part of scene, pressures were narrowly construed, and only exceptional pressures were deemed relevant; this point ties into the intertwining of the idea of freedom in contract with the ideal market. Another account relies more abstractly on the basic individualistic position which seeks to enlarge the sphere in which a person may act in a self-interested fashion. The contraction of the initial liability in contract (its limitation to intention) leaves greater areas for people to behave in a self-interested fashion, but liberal rules of excuse have the opposite effect: they oblige the promisee to share the losses of the promisor who is unable to perform, rather than act self-interestedly. Narrow excuses were also part of the limited sphere for pre-contractual duties: if they were not readily available, parties did not need to worry about disclosures and pre-contractual assistance to prevent later denials of liability. Notably, a narrow formulation of excuses reinforced the idea of absolute contractual rights, for excuses were a route into subjective motivations undermining the objective fact of an agreement. Finally, a narrow formulation of excuses was part of the

32 See supra note 15 and accompanying text.  
33 Kennedy, supra note 9, at 1735.
reluctance to concretize, to bring into the abstract picture specific weaknesses of specific persons in specific circumstances. Holding persons responsible for whatever they contract required much less incorporation of social context than releasing them; the latter could only be performed using concrete information, except in peripheral cases like selling what had never existed, or contracting under a threat to one's life. The point returns to abstraction in contract.

7. *The Market*

"[E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals."[34]

As the discussion so far suggests, contract law assumed a specific social context for its application: the economic sphere of trade — the market. That context however, rather than being given and obvious, was up for grabs, like much else in the nineteenth century; legal discourse was not simply referring to a preexisting reality, but, rather, was implicated in its construction. This Section considers in more detail the historical picture of the market grounded in contract law, in two steps: first, I explain the notion of atomism in the history of contract law. Second, I explain the notion of separate spheres, which in effect linked the atomistic view of society to the market.

---

[34] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 8 (1986). Unger's broad argument is that any such theory will inevitably fail — doctrine will be condemned to self-subversion, a point discussed at the end of Part III.
i. Atomism

Atomism is invoked in relation to classical contract law on two levels: as a view of the social structure, and as a view of the individual.

At the level of the individual, the construction of contract law on the basis of individual free choice implied an atomistic view of the human condition for which the individual is self-sufficient. The point is developed in the next section. For now it is noted in order to draw attention to its role within a view of the social.

The centrality of contract rested, argues Atiyah, on an atomistic picture of the social structure. Under this view the individual is the basic unit of reference for the entire structure.

An atomistic view of the social structure includes both a claim about the reality of Victorian society, and ideology, combined in Walter Houghton's account, and echoed in Atiyah's. Houghton describes the sense of isolation felt at the Victorian era under the disintegration of the feudal structure and a unifying belief: "Men and classes were no longer integral parts of a Christian-feudal organism where everyone had his recognized place and function and was united to Church and State by established rights and duties.

To this sense of isolated existence now add the ideological content of liberal theory: "In the new liberal theory all men were free, politically and economically, owing no one any service beyond the fulfillment of legal contracts; and society was simply a collection of individuals, each motivated — naturally and rightly — by self-interest."35 Experience and ideology combined, individuals appear to stand at the core of society, and obligations freely chosen by individuals are of the strongest normative appeal.36 Contract, in its

36 ATIYAH, supra note 6, at 230, 456.
classical formulation, is the paradigm of this outlook, and achieves unrivalled significance.

The role of ideology in this view of society should be emphasized, for accounts of atomism sometimes collapse together the structural or "real" aspect of atomism and its specific ideological orientation, making it sound as if theory merely mirrored reality: the negative premise that old extra-individual structures had lost their organizing force, is collapsed with the positive premise that individuals remained naturally isolated, and in turn free from obligations other than their chosen ones.37 However, atomism might equally be understood as an ideological representation of an interdependent society, as critics of individualism have pointed out.38

The view of contract in law grounded a picture of its social context as lacking cohesive extra-individual organizing principles or institutions, in which members — as the basic units (atoms) of organization — choose their relationships and their content rationally, self-interestedly, and are obligated only to those choices. If numerous bilateral

37 This view of individuals means we cannot reduce the atomistic view of society to methodological individualism, though it is that too. Methodological individualism takes individuals to be the "rock-bottom" explanatory units for social phenomena. It does not necessarily rely, however, on self-sufficient individuals as its explanatory units. The centrality of self-sufficiency for contract discourse, in other words, goes beyond methodological individualism to ground specific individualistic values. See Robert B. Ahdieh, Beyond Individualism in Law and Economics 12 (Emory Law & Econ., Research Paper No. 09-48, 2009), available at http://ssrn.com/abstract=1518836 ("Methodological individualism . . . requires no normative embrace of individualism, nor even any ontological conclusion as to the actual place of the individual in the social and economic order."). (For Lukes, when self-sufficient individuals are not assumed, methodological individualism is uninteresting (because question-begging). LUKES, supra note 7, at 110-22, 140. Ahdieh seems to make a similar point when he argues that to the extent that methodological individualism is sustained by endogenizing social effects into individual utility functions it is unhelpful. Ahdieh, supra, at 21-22.)

38 See, e.g., Mensch, supra note 16, at 765 & n.37. Marx's explication of commodity fetishism is a story of a society of interdependent individuals who conceptualize their labor as private and independent, and are not disillusioned when their interdependence is manifested in their exchange of products. Rather (and paradoxically), precisely because social relations are manifest only in this form, fetishism arises and is confirmed. See 1 KARL MARX, CAPITAL 163-77 (Ben Fowkes Trans., Penguin Classics 1990) (1867); see also Duncan Kennedy, The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, 34 AM. U. L. REV. 939, 968-88 (1985); LUKES, supra note 7, at 76 (discussing Marx's critique of the view of isolated individuals, which reached its peak when social interrelations were at their highest state of development). See also my discussion of Godwin infra note 39.
ties between atoms create a complex whole of interdependencies, classical contract thought underplayed this implication in its concentration on discrete individual choice.  

**ii. Separate Spheres**

A separate-spheres outlook is a second aspect of the view of society implicit in classical contract thought. It denotes the separation of human experience into distinct spheres answering to distinct logics.

Contract law construed separate spheres on two levels. First, law assumed a distinction between state and civil society as two separate spheres of action. The state/civil society distinction is associated with the rise of the notion of a self-regulating market which began with a premise of a sphere in which the state was somehow uninvolved. The distinction relied upon a clear division between public and private

---

39 The one acknowledgement of interdependence lies in the story of the elevation of promise keeping into a fundamental norm in atomistic contractual society. Such elevation is almost a logical necessity to sustain the story of independence. More generally, the story of a background of "trust" seems to go hand in hand with a view that seeks to discuss social interaction through the prism of discrete individual choices.

Atiyah mentions William Godwin as the sole objection to the importance of promise keeping at the Victorian era. *Atiyah, supra* note 6, at 353 n.63. This lone exception is indeed telling. Godwin refused to uphold promise keeping because for him there was little room for promises in an interdependent world in which each action must be conductive to human happiness, or stir mischief. Each action had a moral standing independent of promising. Promises either obscured a moral reason for action, replacing it by a motive "precarious and temporary," or worked against it. An area of indifference did not exist, for "[a]ll things in the universe are connected together." This, note, when "[t]he universe is no more than a collection of individuals." 

William Godwin, *An Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness*, bk. III, ch. 3 (1793), http://dwardmac.pitzer.edu/anarchist_archives/godwin/pj3/pj3_3.html. This analysis exemplifies the same point at its extreme: in a social world made up of individuals, one could either acknowledge interdependence explicitly (and accept promises as part of it, or, as Godwin did — reject them altogether as either superfluous or harmful), or insist on independence and resort to the notion of promise keeping as a background assumption.

sources of law-making; bodies of laws were sorted into identifiable categories; contract law was an area in which individuals were making their own law.  Contract was seen to belong wholly to civil society, to occur within its boundaries, with the state's role being merely facilitative.

The model of contract, centered as it was on the primacy of the individual will, as opposed to the will of the community, served to ground the private/public distinction. The distinction emerged in a re-arrangement of areas of law, with law representing the involvement of communal will, like tort, status, and quasi-contract, banished from the contractual zone, with contract rules rationalized through the notion of individual will, and with remaining rules incommensurate with the vision of contract conceptualized as exceptions, counterprinciples detached from the operative sources of contract.  The separation of spheres, variously formulated as market versus home, business versus family, exchange versus gift economy, and so forth, imports with it a basic contrast in both norms of conduct and structure: rational, calculative, self-interested action, based on abstract freedom and formal equality in the former, are contrasted with

---

41 Kennedy shows how the private/public distinction ran through every level of doctrine. Kennedy, From Will Theory to Private Autonomy, supra note 13, at 107-08. For the historical evolution of this idea see KENNEDY, supra note 6; see also Seidman, supra note 15, at 554-56.

42 An elaborate study of the process is KENNEDY, supra note 6. See also KREITNER, supra note 6 (discussing consideration doctrine's role in the creation of separate spheres). For a detailed discussion see my article ____________.
altruistic, fluid, compassionate action in an often more dependant and hierarchical context, in the latter.

Rules of classical contract law expressed, as Roberto Unger argues, a reluctance to allow contract law to intrude upon the world of family and friendship and destroy their communal quality.43 The distinction between market and family not only protected the communal quality of the latter, but injected content into the former: action in the market was not just private, but self-interested and rational.44

The two levels of separation assumed in contract law created a rigorous version of the market. While the separation between public and private spheres created the market as a free realm of private interaction, the one between market and non-market private relationships rendered it economically rational. Contract law marginalized relations which were not individually chosen and shaped, and relations not adhering to a strict rationality and rigid allocation of rights and duties, sustaining a view of compartmentalized social life, and constituting the market as a competition among rational economic agents who owe one another nothing beyond their chosen contracts.

The separation of spheres at the same time elaborated a corresponding view of the individual to which I now turn in more detail.

43 UNGER, supra note 34, at 62-66. Unger notes for example how norms of interpretation reverse the presumption of intent to be legally bound in family and friendship contexts.
44 Consider the non-enforceability of promises to make gifts, for example, a rule within consideration doctrine reversing the enforceability of promises in contexts of exchange. The rule expresses the inappropriateness of contract to contexts in which gifts are given. But why? One answer is that unreciprocated transfers raise the spectre of economically irrational social transactions, which the legal vision of the market denied. KREITNER, supra note 6; see also ATIYAH, supra 6, at 451-52 (explaining that liberality or beneficence (which are the ground for a gift) were considered a good cause but not sufficient consideration. Atiyah, however, does not discuss the constructive effect on views of the market emerging from this distinction, but rather seems to think that consideration was gradually stripped of any important role in contract law). Note that leaving gifts outside contract did not entail only a conceptual separation between market and non-market relationships, but one which made family and friends inferior contestants in fact when they happened to compete with market creditors. See W.R. CORNISH & G. DE N. CLARK, LAW AND SOCIETY IN ENGLAND 1750-1950, at 207-08 (1989). For further discussion see __________, supra note 42.
8. The Promising Individual

Classical contract thought established a view of a choosing individual standing in opposition to society — an abstract, self-sufficient person, who, when contracting, is rationally self-interested.

Lukes explains: the abstract individual is a self pictured abstractly as given, with given interests, wants, purposes, needs and so forth. The crucial point is that the relevant features of individuals determining the ends which social arrangements are held to fulfill, whether these features are called instincts, faculties, needs, desires, or rights, are assumed as given independently of social context. Charles Taylor critiques givenness as a vision of self-sufficiency: on this vision men can develop their human capacities independently of society; that the development of rationality, or becoming a fully responsible, autonomous being, can somehow be achieved outside society. The givenness of fixed human psychological features leads to an abstract conception of the individual who is seen as merely the bearer of those features, which determine his behavior and specify his interests, needs and rights. Abstract, self-sufficient persons ground the atomistic view of society.

And this individual was indeed at the heart of legal discourse: classical contract thought took free choice, epitomized in the idea of promise, as the basis for its entire analytic structure to the exclusion of other sources of obligations. Underlying the idea of individual choice as a necessary and sufficient principle was the abstract individual: the promisor did not require society in order to become a meaningfully-choosing person.

45 CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 2, at 189-90 (1985). The competing view is "man as a social animal."
46 LUKES, supra note 7, ch. 11.
Being self-sufficient, the promisor knew his own interest best. Being self-sufficient, he did not, at least not by definition, owe any duties except those he first chose to owe to his promisee. He preceded society in terms of significance and conceptual structure.

The notion of a self-sufficient individual bears a close relation to the opposition between self and society, in which the social is pictured as a threat to individual development. In this, the vision of self-sufficiency mirrors the private/public distinction.

The second building block of the individual mirrors the family/market distinction: as Kreitner describes him, when contracting, the individual is calculating and calculable, a person with a market consciousness. The formulation of classical contract theory, argues Kreitner, was an investment in the idealization of such an individual.\textsuperscript{47}

The concept of the abstract, self-interested individual emerges in a contracting party independent in terms of his contractual ends. The parties need not discuss or agree on ends or values; they can achieve complex interdependence in production and consumption without acknowledging any interdependence as moral beings.\textsuperscript{48} Even shorter of moral interdependence, the practical interdependence within contract had no conceptual role to play in classical contract discourse. The preeminence of the individual over any relationship meant that the emphasis remained on contract as an expression of individual, separate wills. That these wills happen to refer to one another gave rise to rights and duties, but they too were conceptualized in terms of each party; each party was

\textsuperscript{47} Kreitner, supra note 6, at 228-35. Note that Kreitner refers specifically to contract theory, while contract case law (in the American context) was a site of a much more complex cultural negotiation. For an argument distinguishing legal ideology from judicial discourse in case law in the English context see R.B. Ferguson, The Horwitz Thesis and Common Law Discourse in England, 3 Oxford J. Legal Stud. 34 (1983). Ferguson argues that case law was not clearly transformed by formalistic jurisprudential ideology. While his argument is focused on legal formalism (and its relation to industrial capitalism) rather than the more specific concerns of this paper, the possibility that case law complicated theory and so also the overall vision of classical discourse seems plausible; its main aspects are covered in the discussion below of status and collectivist influences on contract.

\textsuperscript{48} Kennedy, supra note 9, at 1767-71.
an independent person, bearing rights and subject to duties to the other which were the
product of his own will and which could be discussed and understood in terms of his ends
alone.

The presocial construction of the individual was the basic unit of thought, on top
of which a specific rationality informing the behavior of that person was added, both with
the aid of separate-spheres thinking.

9. The Contractual Relation

What is the picture of the contractual relation so far? The relation represents a meeting
point between two distinct individuals with separate interests. Each of them is a person
able to choose for himself, who rationally chooses what can best serve his own economic
interest. The meeting point is achieved through the exercise of each person's will. That
exercise, or the moment of formation is the core of the analysis. The analysis proceeds on
the assumption of supreme significance and exclusive meaningfulness of this core,
viewing it as an exhaustive source of information about the relation. The analysis
identifies minimal inter-party rights and duties, before and after the moment of
formation.49 More importantly, the discourse of rights and duties, seeking to describe
what one party need or need not do for the other, is or is not entitled from the other, relies
on the unbroken distinction and even opposition between the parties, before, at, and after
formation, focusing attention time and again on each of them in isolation rather than on
the fact of their relation.50 The same discourse relies on the isolation of both parties from

49 Eisenberg interestingly reads these aspects through a temporal dimension, attributing them to the static
(as opposed to dynamic) nature of classical contract law. Eisenberg, supra note 4, at 807.
50 In his critique of interest-based accounts of contract, Durkheim forcefully pushes the point of opposition:
"[T]his total harmony of interests conceals a latent or deferred conflict. For where interest is the only ruling
a broader social environment. Their contract belongs to a separate economic sphere ideally composed of such persons and the relationships they in fact choose, and of nothing else. This picture, finally, is of general applicability, ideally representing any and every contract.

### III. CLASSICAL CONTRACT'S OTHERS: STATUS AND COLLECTIVISM

Classical contract law was never a clean analytical structure, nor an exclusive ideological construct. Mounting histories of the nineteenth century have made this conclusion inescapable. This Part reviews histories of classical law's others: status and collectivism, the two "social" alternatives to classical law's individualism.

Histories of status and collectivism can be thought of through three frameworks. The first, most familiar, and possibly most broadly accepted analysis, draws a generally linear story of historical change: once there was status, then there was contract, then came the welfare state. A second type focuses on contradictions in practice, finding status and collectivist influences throughout the nineteenth century, in a sophisticated variety of the law in books/law in action argument. A third framework resists the linearity of the story by exposing conceptual contradictions in classical contract thought.

Despite important differences, histories of contract's others establish points of agreement. **Undisputed Point #1(a):** The conceptual alternatives to classical contract in the nineteenth century were, predominantly, status and collectivism. **Undisputed Point #1(b):** In the nineteenth century these alternatives did not represent alternative meanings

---

force each individual finds himself in a state of war with every other since nothing comes to mollify the egos and any truce in this eternal antagonism would not be of long duration. There is nothing less constant than interest." EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 203-04 (George Simpson trans., Free Press 1933) (1893).
of contract, but alternatives to contract. Together, these points of consensus identify one kind of individualism in contract (the alternatives were something else than individualism), and allow that that one individualism was the only thing considered contractual in the nineteenth century, at least in its latter part — after the classical construct had been firmly established. Together, these points speak to the persistent conceptual link between contract and individualism with which this part began.

A. Status and Contract

1. From Status to Contract

For, what is the peculiar character of the modern world — the difference which chiefly distinguishes modern institutions, modern social ideas, modern life itself, from those of times long past? It is, that human beings are no longer born to their place in life, and chained down by an inexorable bond to the place they are born to, but are free to employ their faculties, and such favourable chances as offer, to achieve the lot which may appear to them most desirable.51

Thus celebrated Mill the historical decline of status. The new conceptual category which allowed free men to achieve the lot appearing to them "most desirable" was contract.

As we have seen, the classical model of contract invested in a distinction between status and contract. Contract represented a set of freely chosen, self-imposed obligations of abstract individuals, unlike status, representing obligations imposed without an individual's consent, tied instead to a social position.52 Kennedy explains the change in the operation of status categories in contract law: First, status came to exist as the

---

52 The notion is broader than the place into which one is born; it includes the generation of rights and duties based on social role or group belonging.
opposite of rights in the abstract, rather than the medium for the organization of rights in
the particular; second, the elements composing particular statuses were fragmented and
dispersed, rather than treated as the elements of operative wholes. Both of these
developments, argues Kennedy, were influenced by, and appeared to confirm, Maine's
generalization.

Indeed, the analytical distinction in legal discourse between status and contract
often emerges from history as an echo of a wider socio-political implication: contract's
meaning as "not status" was part of Victorians' search for an alternative system to
traditional hierarchies, the readiest mode, as Dicey said, of abolishing a whole body of
antiquated institutions. Maine's aphorism invoked contract as a proxy for the refined
(and progressive) essence of nineteenth-century social reality of industrialization and the
market. I will return to the relation of contract to a wider terrain in the next part.

2. The Ghost of Status

The construction of contract in opposition to status — self- versus societally-imposed
obligations, of a socially-disembedded versus an embedded individual, meant that status

---

53 Kennedy, supra note 6, at 186-94. In fragmentation of status Kennedy refers for instance to the
relegation of the law of persons to the peripheral categories of "abnormal persons", quasi-contract and
special instances of tort liability, while denying a connection between the various categories which could
serve for deduction in specific cases. See also Singer's account of classical thought's emergence in
opposition to status, which became the exception: an abnormality. Singer, supra note 40, at 477-82.
54 Pound, supra note 3, at 209-10.
55 Albert Venn Dicey, Lectures on the Relation Between Law and Public Opinion in England
During the Nineteenth Century 151 (Macmillan 2d ed. 1962) (1905). For a similar understanding in
the American context see Amy Dru Stanley's discussion of William Graham Sumner, who believed that the
ascendance of contract would destroy bonds of personal dependence based on status, law and custom. Amy
56 Maine, supra note 1, at 296. The critical tone in which contract law's individualism is often described,
here and elsewhere, should not obscure the genuine self-understanding of supporters, within their historical
moment, as removers, opponents or at least non-supporters of entrenched forms of oppression. This aspect
sometimes gets buried under the rapid developments of market society which followed — developments
which seemed to confirm some of the market critics' worst predictions, and thus paint the entire classical
endeavor in rather bleak colors.
did not serve, in nineteenth-century legal thinking, as a conceptual source for defining contractual relations; it was a conceptual other. Yet, the story of the triumph of the classical model of contract has been challenged by histories which identify status categories as operative sources for contractual practice and for contract law. While never acknowledged conceptually, status remained, according to these histories, a challenge to the nineteenth-century idea of contract.

Thus, histories of credit contracts, doubtless central to the socioeconomic developments of the era, show their entanglement in social relations, particularly class and gender. Margot Finn describes the experience of personal credit contracts in England from the onset of the industrial and consumer revolution to the outbreak of World War I, and claims that the autonomous individual model of political economics did not gain prominence and coexisted with the model of the social individual, who gained rights and responsibilities by virtue of his status and connections. Finn shows, for instance, how both tradesman and legal institutions confirmed differences in the social-hierarchical position of debtors in the way they handled and responded to credit contracts, and how gender identities played a role in contractual exchange. Finn’s review of county-courts litigation reveals that county-court judges urged the continued need to moderate legal obligations by equitable considerations, most notably those of gender and class, rather than promoting a transition from status to contract.57 Erika Rappaport similarly depicts consumer credit’s cultural role and its entanglement with social positions, both class and gender, defying the supposed rationality of the market.58

Employment contracts are another site in which status-like regulation never lost its grip. Thus, though, as John Orth argues, the reconceptualization of labor in terms of contract — completed by mid nineteenth century — was a major factor in the reorientation of the common law as a whole in the direction of contract, it was no sooner established than it began to be undermined.59 Historians suggest that the new priority accorded to property and contract in Victorian England was qualified, as far as labor contracts were concerned, by a continuing role for status-based forms of regulation.60

The legal treatment of promises of marriage has also been challenged as a site of abstract contract principles answering to the classical formulation. Ginger Frost, for instance, disputes the understanding of breach-of-promise-of-marriage cases as extreme sites of the triumph of individualism and abstraction in contract. Instead, she argues, these actions demonstrated that judges, despite formalistic contractual language, brought social, gender- and class-aware values to bear on contractual issues.61

Such histories, pointing to social locations and social roles as relevant, operative sources for contract practice and law, read alongside histories of the move from status to contract, clarify two points which historians repeatedly raise, from a variety of perspectives. First, status, or group-based constructions of contractual obligations, had never disappeared and had remained a social alternative to the individualistic construction found in the classical model. Rights and duties based on social locations found their way into contractual relations and complicated abstraction. But second, and at

60 Id.; see also, e.g., Gordon, supra note 3; Simon Deakin, Legal Origin, Juridical Form and Industrialization in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company, 7 Socio-Economic Rev. 35 (2009).
the same time, the meaning of contract as not-status was triumphant; the classical construction of contract proved conceptually resilient to status-based definitions. For the most part, status was not discursively, analytically, or theoretically acknowledged as part of what contract was, even though it influenced contractual relations.

Nor could it, it was what the classical model came to replace. As my discussion of collectivism below clarifies, the point is not simply a distance between discourse and practice, or ideology and reality. It reaches deeper, for all of these levels could and did accommodate status — only, not as part of contract. My concern is with what could and what could not be considered contractual. Once the classical idea of contract took hold in legal discourse, its alternatives became, and remained, external to its meaning, and so served to strengthen that meaning even as they threatened its operative relevance.

B. Collectivism and Contract

Collectivism, unlike status, is considered part of the Age of Contract; part of the story of the evolution of modern contract law, rather than its abandoned past. Indeed, individualism and collectivism are customarily depicted as two ideological currents influential on contract, and modern contract law is time and again portrayed in terms of the contest between them.

The general tension between individualism and collectivism is a persistent point in analyses of contract on two levels. As a matter of historical account, the story of the rise-and-fall, individualism-and-collectivism, laissez-faire-and-state-protectionism, industrial-revolution-and-consumer-revolution, individual-based-and-corporate-based-

---

62 For an analysis of liberal responses to the threat of status in the context of the promise of marriage see my article __________________.
economy, and so forth, is a dominant narrative of the nineteenth century, and legal accounts of contract converse with it.

When collectivism is analyzed as a historical trend, it generally denotes historical attempts, periodized from mid-nineteenth century onwards, to mitigate the unwanted effects of unrestrained pursuit of self-interest when those became discernible, whether as part of a radical or a liberal outlook. Either way, in the pursuit of its goals in contract, collectivism reacted to individualism and functioned as a palliative rather than a full-fledged alternative. References to "collectivism" in histories of contract thus do not generally point to a consistent program, despite the positive ideals of egalitarianism and the advancement of positive freedom identified with it.

But references to collectivism do not denote only a historical development; they also denote a conceptual possibility and ideological tendency, a possible route of action existing from the start within classical contract doctrine.63

Sub-section 1 synthesizes accounts of collectivism as historical trend to consider its impact on classical contract. I briefly revisit the tenets of classical contract discourse reviewed in part 1 to clarify how they changed under the collectivist impact. Sub-section 2 then discusses the limited influence of collectivism on the legal conceptualization of contract. Sub-section 3 discusses collectivism as conceptual possibility developed by the internal critique of classical contract. The overall aim is to show how the history of collectivism in fact confirms the relation of contract and individualism in the nineteenth century.

---

63 Examples follow. To get a sense of the dominance of this argument see Brudner, supra note 26. Brudner offers a theoretical reconstruction of the common law of contract (and common law more broadly), beginning precisely with the individualism/collectivism conceptual tension which threatens law's unity. (Brudner views the tension's irresolvability as the key to law's intersubjective quality.)
1. Collectivism as Historical Trend

Unlike invocations of "individualism" in contract, which can be more or less related to identifiable commitments, "collectivism" of late nineteenth century was more dispersed and its uses in history are likewise less coherent, invoking radical and liberal programs, as well as accounts of isolated and conceptually hazy trends. This is part of the reason for collectivism's limited impact on the meaning of contract, discussed in the next section. This section concentrates on changes in law associated with collectivism, whatever its conceptual underpinnings were.

Accounts treating collectivism as a historical trend generally rely on the story of change, in which first individualism rose to prominence, and then (even if almost immediately), it was eroded by collectivism, that is, by changes which together added up a more “interventionist”, welfarist legal regime. Such for example was Dicey's account, later confirmed by Atiyah. Consider the impact of collectivism on contract law as it emerges from history.

i. General

No alternative theory of contract was formulated in the nineteenth century. The impact of collectivism in contract was to be found in case law and in legislative activity.64 This alone had much influence on keeping the individualistic outlook on contract intact in legal discourse.

---

64 ATIYAH, supra note 6, at 764, 771; see also infra notes 73-81 and accompanying text.
But contract law’s commitment to individualism was more than a lack of textbook theory. The collectivist outlook worked against a backdrop of a conception of contract's meaning the plausibility of which it little disputed.

**ii. Contract as Abstraction**

The core of contract in legal discourse remained a highly abstract description of promissory relations. However, legislative activity began to apply special rules to types of ordinary contracts (labor, corporate, consumer etc.) on an ever increasing scale. These were becoming, for legal thinkers, specialized bodies of law, no longer conceived as part of general contract law; areas in which the parties' rights and duties were understood as determined by state law, not by contract.

**iii. Reification, Absolute Rights, Pre-contractual Duties and Excuses**

Under collectivism, contract remained reified in legal thought as a "thing" created by the parties, capable of being analyzed in isolation. The important difference was an increasing willingness to forgo the assumption of equality (or acquiescence in inequality), or, in another formulation, to forgo the assumption that parties were under all circumstances the best arbiters of their own interest, which, at the classical period, was uncontested; instead, there was now an increasing willingness to protect the weaker party in the relationship from his own creation and to prevent ad hoc injustice between parties.

---

65 The idea of equality under individualism contained two elements: equality of operation of legal precepts — equality before the law, and equality of opportunity to exercise one's faculties and to employ one's substance. Pound, supra note 13, at 11-12.
The individualist outlook limited any relevant social context to that revealing itself within the defined relation, relying on the fact of the binding promise(s) and the content of the promise. The collectivist impact had been to add to this list the relative power position of the parties to the promise vis-à-vis one another. In addition, judicial inquiry began to consider contractual motivations and post-formation circumstances, in order to prevent abuses emanating from strict adherence to literal contractual content.

The effect of this concern about inter-party justice and equality was relaxation in the absoluteness of contractual rights: terms of contracts became more susceptible to judicial intervention to achieve these goals. And yet, the effect of these changes on the individualist view of contract was limited, due to the framework within which they operated.

Scrutiny of party motivations is a development which almost surely belonged to the twentieth century. In the nineteenth century, the more observable types of judicial intervention were equitable adjustment of contractual rights and duties based on circumstances arising after formation, holding parties to duties more demanding than the arm's length formulation, or a molding of remedies to achieve a fairer result. These circumstances, however, were never linked together as a general principle.

Protection of pre-contractual reliance also became more acceptable, mitigating the individualist view which little acknowledged pre-contractual duties. Cases, however, were confused and, as Atiyah puts it, "bogged down in a mass of technicalities . . . and anyhow did not adequately reflect the essential point that justifiable reliance depended on

---

66 ATIYAH, supra note 6, at 736-37.
68 IBBETSON, supra note 12, at 258.
a much wider set of factors." What seemed clearer was an increase in reliance-based liabilities under tort law — under something perceived as other than contract.\textsuperscript{69}

A similar trend toward inter-party justice and equality was found in a liberalization of excuses.\textsuperscript{70} Fraud, for instance, was redefined in terms of unconscionability of the defendant's conduct, though still cast in the language of the will theory.\textsuperscript{71}

The framework informing this process is worthy of attention. The construction of contract which informed legal changes was the same one used in classical discourse, over and above the lip service paid to the will theory: contract was predominantly seen as a site of meeting between distinct and antagonistic wills. It was formed by parties who assessed each his own interest and was understood and analyzed in terms of individual competing wants. The difference was that one party was perceived as less able than the other to take care of himself, a situation now legitimately calling for state assistance through the judiciary, or more directly by prohibiting and imposing contract terms under "other" laws.

Now, a party's weakness was an instance acknowledging individuals' interdependent existence. The collectivist outlook on contract, however, was little able to accommodate contract to its own insights; the parties' mutual interdependence was acknowledged only to the extent one had a power to overbear the other, whether prior to contract's formation, using his existing advantages, or after formation, relying on his contractual ones.

\textsuperscript{69} ATIYAH, supra note 6, at 772-74.
\textsuperscript{70} GILMORE, supra note 17, at 80-81.
\textsuperscript{71} IBBETSON, supra note 12, at 252.
Similarly, parties' interdependence on a larger social context was relevant only in terms of their power contest — in terms of its influence on their relative vulnerability within the antagonistic contractual relation. The changes in the approach to contract were, in other words, inner-looking: they represented an effort to make contract fairer as between the contracting parties, an effort beginning with their chosen content. A corollary point is that these changes did not undermine contract's reification, its construction as a thing created by and existing between two parties in isolation from a greater world. The core remained the individual choice which created the contract. The liberalization ending up in parties achieving something less or more than they had ostensibly intended, empowered or weakened by the state, was done and rationalized against that core, maintaining both the consensual idea and its attendant independence of parties as cornerstones. In fact, the whole process can be seen as an attempt to restore to weaker parties the independence they appeared to have risked, to reinstate classical thought's ideal image of competitive equality, to deliver on contract's promise of enabling each individual to assert himself.72

iv. The Market

The historical story of the rise of collectivism is linked with the suggestion that atomism as an account of social structure was no longer plausible. Atomism lost its hold on the imagination following the establishment of the bureaucratic state and the rise of corporations.

72 Harry Scheiber notes that the proponents of "interventionism" in contract justified interventions as necessary instruments for bringing social realities into line with the theoretical premises upon which freedom of contract was formulated. Harry N. Scheiber, Economic Liberty and the Modern State, in THE STATE AND FREEDOM OF CONTRACT, supra note 59, at 122, 123-24. See further discussion infra notes 73-81 and accompanying text.
This development, however, could not be seen from within contract legal discourse — it did not so much affect the meaning of contract in law or the way individuals came to owe duties under it, as it diminished contract's practical importance. The web made up of individually-chosen relationships was displaced in legal thought by a structure of organizations, with individual duties assigned on increasing scale through legislation applicable to individuals' relations with organizations.73 Where contract was thought to exist, the idea of control through choice held sway (with greater support at the fringes); where choice was out of control — when third parties and public interest were offended by it, contract was thought to be displaced altogether.

The ideal market construed under the legal distinction between spheres of private interaction remained one and the same sphere ruled by economic rationality, distinct from family, friendship and community, but now acknowledged as less than perfect in reality; market failures, unequal agents, and weak parties demanded support from the outside; that outside was the state. The separation on the level of state and civil society, in other words, remained intact, a significant point for the evaluation of the collectivist outlook on contract, to which I shall return.

v. The Promising Individual

Within contract discourse, the view of the promising individual as abstract and rationally self-interested remained largely unchanged. Concretizations of party and subject matter were mostly achieved by establishing separate, "different" bodies of law whose source was not promise.

73 ATIYAH, supra note 6, at 724.
Within general contract law, the abstract individual concept was undermined to some extent to consider a party's weakness relative to his partner, a change which can be read as appreciation of individuals' social embeddedness. However, this was the limited relevance of such an appreciation. By and large, when contracting, a person was assumed to be manifesting a (more or less successful) attempt at independent generation of economic plans, according to his own (more or less well-founded) perception of self-interest. All that could be done was to add patches that would help the individual achieve that goal.

2. Assessing the Limits of the Collectivist Impact

To the extent collectivism is viewed as a historical trend, it bore limited importance for the legal meaning of contract in the nineteenth century.

Nineteenth-century collectivism represents a specific stage in the historical attack on classical contract discourse. The important point about this stage is its second-degree or reactive quality. The content of the collectivist attack was the inappropriateness of the regime governed by the ideal of freedom of contract. The drama of the "fall of contract" was not a dispute about the meaning of contract in its classical formulation, but rather a dispute about contract's desirability or workability. Collectivism acquiesced in the classical view of contract, and moved to narrow its scope; or, on another reading, moved to remedy its failures in fact. The nineteenth-century critique largely left aside the possibility that the legal regime in force did not, or did not necessarily, correspond to that required by the abstraction of free contract, and instead emphasized that freedom of
contract was pernicious.\textsuperscript{74} Within this formulation, note, we might place both radical and liberal tendencies; the liberal one would find the regime pernicious in the sense that it failed to achieve its own goals.

The story of collectivism's limited impact on the legal conceptualization of contract appears in multiple histories. Lawrence Friedman, for example, explains the external quality of the collectivist impact as a characteristic of contract law, directly related to its co-extension with the free market. Contract law, argues Friedman, sought to provide legal support for the residue of economic behavior left unregulated, i.e. the free market. Accordingly it was busy defining its own boundaries — what kind of transactions were and were not contractual. Contract law, as a residual category, expanded and narrowed its applicability to human affairs primarily through a process of inclusion and exclusion. By definition, therefore, no revolution could take place within it. The most dramatic changes touching the significance of contract law in modern life, claims Friedman, came about not through internal developments in contract law, but through developments in public policy which robbed contract of its subject-matter. And the analysis has been confirmed over and over.\textsuperscript{75} The process, in essence, was one in which

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{74} See Kennedy, \textit{supra} note 5.
\item \textsuperscript{75} FRIDMAN, \textit{supra} note 15, at 21-24; see also, e.g., ATIYAH, \textit{supra} note 6, at 714: "[T]he classical model only continues to live because, by definition, anything inconsistent with it is eliminated from the sphere of contract."; E. Allan Farnsworth, \textit{The Past of Promise: An Historical Introduction to Contract}, 69 COLUM. L. REV. 576, 604 (1969): "As the state ... began to intervene through restrictions on freedom of contract ... it naturally chose those areas in which the market mechanism was thought to be inadequate, shrinking the scope of application of traditional contract law but leaving its identification with free enterprise and the competition of the market largely untouched."; James Gordley, \textit{Contract, Property and the Will — The Civil Law and Common Law Tradition, in The State and Freedom of Contract, supra} note 59, at 66, 85-86: "[T]he critique of contract law was constructed on the very premises of the will theories ... The result ... was that contract, taken in itself, was inherently impossible to reform ... Therefore, the state must intervene to protect people from contract." The case applied equally in the U.S. and Europe, argues Gordley: once contract was thought of in terms of individual will, the case for reform could not be made by appeal to norms intrinsic to the institutions of contact.
\end{itemize}
\end{footnotesize}
the classical paradigm was left intact, compelling, as Unger has argued, all other modes of thought to define themselves negatively, by contrast to it.\footnote{Unger, supra note 34, at 58. Unger, as noted, is particularly sensitive to the notion of core and periphery, which does much to set meaning in contract. For an example of core and periphery analysis of conceptions of good faith in English contract law (though not up Unger's critical alley), see John N. Adams & Roger Brownword, Key Issues in Contract ch. 7 (1995). Brudner in similar vein emphasizes the continued dominance of the classical formulation of contract, describing how "the new paradigm [collectivism] manages only to superimpose itself on the persistent vitality of the old [individualism]." BRUDNER, supra note 26, at 90. See also Nolan, supra note 21, for a discussion of the manner in which expansions of liability based and pre- and post-formation circumstances, particularly detrimental reliance, preserved the classical idea of contract. Kennedy laments the mess: "[T]he reformers failed . . . to state the social principle in a way that had 'a proper system and conceptual clarity' . . . the result was that where the social fully displaced contract, we either returned to status or to some half baked version of collectivism. In the areas where contract survived as remnants . . . it was displaced by a hodge podge rather than by something that could guide elaboration and development." Kennedy, From Will Theory to Private Autonomy, supra note 13, at 162-63 (citing where indicated Franz Wieacker, A History of Private Law in Europe with Special Reference to Germany (Tony Weir trans., Oxford Univ. Press 1995) (1967)). Atiyah explains the continued relevance of the classical system of meaning: "[T]he tendency to believe in general principles of contract law [formulated at the classical period] was not seriously affected." ATIYAH, supra note 6, at 686. Atiyah finally analyzes the "fall of freedom of contract" as a process external to contract, describing three strands — each representing a decline in the relevance of contract or in the importance of the values associated with contract: a decline in the economic importance of contract in society, a decline in the importance attached to free choice, and a decline in the importance of planning. Id. ch. 22. Scheiber likewise: "[T]he demand interventions typically have not sought to jettison the conceptual apparatus or normative content of 'contract thinking.'" Scheiber, supra note 72, at 124 (Scheiber, however, moves on to show in the American context an additional dominant doctrine of "public rights" which legitimated intervention). Pettit confirms collectivism's external quality, suggesting that the "fall" of freedom of contract did not represent a change in the strength of freedom of contract, but in the importance of policies that might collide with it. Pettit, supra note 16. See also Ibbetson, supra note 12, at 245, on the continued dominance of the will theory despite increasing criticism.}

Collectivism, historians suggest, largely failed to replace the classical view of contract; the dominant outlook influencing reform approached contract from the outside, addressing a variety of its unwanted effects. Whether its normative content was liberal or radical, its approach was external to contract.

Another prism through which we can view this point is the opposition between state and civil society. Contract, according to the classical view, was something belonging to civil society, or to a private sphere of action.\footnote{As discussed above, for nineteenth-century legal discourse private law was understood as that area in which rules of law guarantee the free exercise of individual will, subject to the constraint that willing actors respect the like rights of other willing actors. Contract law was at the heart of private law for here parties were actually making their own law to be enforced by the state.} The welfare state (or steps towards it) — the achievement of collectivism, did not challenge the opposition between

the...
state and civil society. Rather, collectivism redefined state roles: the state now had, in addition to its role of legalizing private interaction, a redistributive function and a responsibility to protect individuals against severe adversity. And because the opposition between state and civil society with regard to the source of obligations remained intact — no "private/public flip" had been performed as yet in legal thought, the controversy between individualism and collectivism within contract could be framed in terms of "nonintervention" and "intervention." The subject of intervention (or not) remained one and the same idea of contract, the debate turning on the role of the state with regard to it, most significantly with regard to inequalities in fact in contractual relations. Under this basic dichotomy of legal action according to state/individual will as the source of law, the changes effected by collectivism were necessarily understood as external to contract. The experience of those changes was not of a reconstruction of the meaning of contract but of a redefinition of its proper boundaries.

Collectivism, historians show, brought about changes in doctrine and in the scope of applicability of general contract law. While little in doctrine and scope prevented collectivists from achieving the same results from "within" contract and replace the classical construction of the meaning of contract, nineteenth-century collectivist conceptual apparatus continued to be a defensive concept working against the essence of

78 Olsen, supra note 40, at 1516.
79 The term is Kennedy's, in Kennedy, supra note 13.
80 The debate itself had a role to play in the preservation of the image of contract. As Kreitner argues, the discourse of interventionism versus noninterventionism functions rhetorically to preserve the centrality of private ordering as the contractual paradigm as against the sensed threat of societal involvement in contract. Kreitner, supra note 6, at 164. Consider also Atiyah's account of the change in the political use of the slogan of freedom of contract: it was no longer necessary, says Atiyah, to adopt the apologetic tone of making an exception to a rule. The right of the state to intervene to protect the weak, the poor, the underprivileged, was being placed on an equal footing with the desirability of maintaining the rule of free contract. Atiyah, supra note 6, at 585. The difference, then, is in the legitimacy of interference or intervention; but the very discourse of intervention as an opposition to contract kept the conceptual framework intact.
81 See discussion in the next section.
contract; its moves were conceived as encroachments on contract and as interference with contractual relations. The frame of mind, with respect to contract, remained intact. Changes were superimposed by a source largely understood as foreign, as other than contract, and otherwise worked only at its periphery, neutralized within the terminology of the will theory.

This point emerges from historical accounts of contract virtually without exception, but is too often submerged under the governing theme of the "fall of contract". Viewed from the prism of contract's meaning, however, nineteenth-century collectivism is better seen as the victory of contract, not its fall. But this would require a different normative focus.

The rise-and-fall narrative implicitly suggests that the meaning of contract is not in itself very significant; what is significant is its fate in the world. This normative position seems to be the legacy of Eugen Ehrlich, who criticized the juristic focus on unchanging legal propositions as inhibiting appreciation of actual changes in law properly understood.82 While contract maintained a stable meaning into the twentieth century, the legal world around it changed, arising in a different "social law" in Ehrlich's terms. This changing perception is the main thrust of the history of nineteenth-century collectivism and contract law.

It would be mistaken, however, to make light of the manner of change as a process external to contract — to make light of the significant stability of the meaning of contract and its individualism as those emerge from legal history. We should not make light of the image of contract both as a matter of its own history, and in terms of its continued influence. It is through meaning that the ubiquitous human practice of

---

contracting is made sense of, understood, experienced, lived, and transformed.\textsuperscript{83} And so, I ponder on the stability of contract's meaning a little longer.

3. Collectivism as Conceptual Alternative: Internal Critique

Collectivism is discussed in contract history not just as a historical trend, but as a conceptual alternative, which internal critiques of the classical model found within the model itself.

Identifying collectivism as a conceptual possibility available within classical contract doctrine represents a second stage in the historical attack on classical contract.\textsuperscript{84} This twentieth-century development had arguably rendered obsolete the earlier debate, since the social or collective principle that nineteenth-century opponents put forward as an alternative to contract turns out to have been established within contract from the start.

Internal critique is primarily the work of Legal Realism and Critical Legal Studies, which have foreclosed on the deductive aspirations and logical coherence of the classical model, showing not only that classical law could not have been created by way of logical deduction from the concepts of freedom, consent, or will without an ideological commitment, but that the same conceptual framework contained within it the seeds of the competing ideological commitment — collectivism, or altruism.

Internal critique is woven into this paper; it is internal critique, for example, which points out the contradiction between will and coercion in classical contract law; it


\textsuperscript{84} See Kennedy, \textit{supra} note 5.
is likewise internal critique which links between contract law and a specific vision of the market, rather than any abstract concept of freedom. 85

The link between contract and individualism, internal critique showed, did not lie in the basic ideals which contract supposedly protected: individual will, freedom, or choice, but more concretely in choices within doctrine which could, conceptually, go the other way just as well. The critique thus left any account of the relation of these ideals individualism a matter of bias only; that relation was not inherent in them but rather depended on the specific way in which they were put to use in legal discourse. The private/public distinction turned out to be groundless, as contract law was shown to be a principle of social order. Contract never represented a presocial order, and, as social order, did not have to represent an individualistic one.

But all of this was not available for nineteenth-century jurists. Internal critique is an intellectual move which history finds only in the twentieth century. Contract's ability to encompass within its paradigmatic core collectivist concerns, historians argue, was not entertained by thinkers of the nineteenth century. 86

When internal critique arrived, it confirmed the basic association of classical contract and individualism. Paradoxically, it may have strengthened it, for in showing the association to be contingent and unnecessary, internal critique found contract to contain not just grey areas and intermediate hues, but an antagonistic ideological possibility, one perhaps too oppositional to be openly endorsed.

85 See my discussion supra notes 16-17 and accompanying text.
86 Kennedy's histories of legal thought speak to this point. See, e.g., Kennedy, From Will Theory to Private Autonomy, supra note 13.
IV. INDIVIDUALISM AS CULTURE

I have so far focused on the first undisputed point in contract history: its close and persistent tie with an elaborate version of individualism. This part turns to the second undisputed point. **Undisputed Point #2**: The individualism of contract law was of broad cultural resonance, falling in line with economic, political and ideological currents of the era.

This part refocuses historical debates to show how they establish a sense that contract's individualism was of broad resonance, conceding, often with few words, a continuous and smooth cultural terrain, at least for nineteenth-century liberals.

A. Individualism Around Contract

At the background of historical analyses of contract's individualism lies a picture of broadly economic, political and ideological shifts in the nineteenth century.

Naturally, the broader context has been mostly elaborated by historians who consider it part of the explanation of classical contract law; but the picture is not only their work. While, as an explanation for legal developments, nineteenth-century individualism is contested, as a general backdrop it is not. I pause on controversies among historians concerning the relation between the broader context and contract law; these controversies deal with questions of causality, periodization, and internal contradiction in law. Controversies, here too, are of interest not just in themselves but because they reveal the points of consensus: Even historians who attribute the legal development largely to other grounds, view individualism as classical contract discourse's receptive cultural soil.
1. Context

"Nowhere have changes in popular convictions or wishes found anything like such rapid and immediate expression in alterations of the law as they have in Great Britain during the nineteenth century, and more especially during the last half thereof." Thus proclaimed Dicey in his famed Harvard lectures. Dicey identified three main currents of public opinion: the first third of the nineteenth century Dicey named the period of Old Toryism or legislative quiescence; the second third of the century — the period of individualism in public opinion; the last third — the period of collectivism.

The period of individualism, argued Dicey, was in fact "Benthamism of common sense" rather than strict dogma, which under the name of liberalism became the main factor in the development of English law. Benthamite liberals looked upon men as separate persons, each of whom must by his own efforts work out his happiness and well-being. They had held that the prosperity of a community means nothing more that the prosperity or welfare of the whole, or the majority of its members. From 1832 onwards, claimed Dicey, the supremacy of individualism was for many years incontestable and patent; conservatives were as much imbued with individualism as were Whigs or liberals. From Benthamite principles, English individualists had in practice deduced a corollary — that the law ought to extend the sphere and enforce the obligation of contract; such extension was conceived as an extension of individual liberty, for contract itself was understood as an expression of individual wishes.

The tie between developments in contract law and the expansion of contractual freedom, on the one hand, and individualism on the other, are confirmed by Patrick

87 DICEY, supra note 55, at 7.
Atiyah’s *The Rise and Fall of Freedom of Contract*. Atiyah attributes expansions of contractual freedom and the rise of the will theory of contract in legal thought to the ideology of individualism.

Atiyah refers to individualism rooted or given impetus primarily by utilitarianism and classical political economy, and emphasizes the relation of legal ideas to economic thought, though he does argue that individualism was asserted as a moral value throughout the nineteenth century. The new individualistic ideas of the utilitarians and political economists came to have a pronounced effect on the law from 1830, with the idea of freedom of contract seizing hold of legal thought. Both political economy and utilitarianism supported freedom of contract as a general principle, beginning with the premise that individuals knew their own interests best, and were concerned with maximizing their wealth or happiness. In the economic sphere, the emphasis was on the role of the choosing individual at the center of the free market. Other accounts identify individualistic doctrines and mores echoed in contract legal discourse.

---

88 Atiyah, *supra* note 6; see also P.S. Atiyah, AN INTRODUCTION TO THE LAW OF CONTRACT ch. 1 (4th ed. 1989). Atiyah also criticizes Dicey’s historical account, primarily for his contribution to what Atiyah calls the mythical idea of the age of laissez faire. Atiyah, *supra* note 6, at 231-37, 326, 479. The Atiyah-Dicey controversy centers on the role of government. As far as legal view of contract is at stake, the two stories share much in common.

89 A somewhat similar thesis on the change in contract thought in the nineteenth century, linking it primarily to the rise of the market economy and to the service of commercial interests, is Morton Horwitz’s, who concentrates on American law, but attributes the change to England as well. Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 ch. 5 (1977).

90 Atiyah, *supra* note 6, at 369. For the problematics of periodization based on the distinction between the will theory and classical theory see my discussion supra note 6.

91 For example, Grant Gilmore saw the rise and fall of the general theory of contract and the rise and fall of laissez faire economics as “remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.” Gilmore, *supra* note 17, at 96. Gilmore also offered some “specifically legal factors,” such as the distrust of the civil jury as one cause for the rise of the classical theory, and the jury's disappearance as a cause for its fall. Samuel Williston's account of freedom of contract drew connections between, on the one hand, freedom of contract and various doctrines of individual freedom, among them the economic doctrine of laissez faire, and, on the other hand, the social philosophy which called for the greatest individual freedom and development. Williston, *supra* note 13, at 366.
A somewhat different account of individualism and legal discourse begins interestingly with individualism outside contract but not outside the law: it begins with the individualist conception of justice at common law. Roscoe Pound describes the evolution of the idea of the end, or purpose of law, from antiquity, pronouncing the culmination of the process in the nineteenth-century "thoroughly individualist" theory of law, resting on the conception of justice as the securing of a maximum individual self-assertion, with law's function being a purely negative one of removing obstacles to self-assertion. Utilitarianism arrived, according to Pound, when individualist ideas were already firmly fixed, and in fact took its (unnecessary) individualist turn from the earlier individualist tradition, reinforced by classical economics and post-French-Revolution politics. This individualist conception of justice, suggested Pound, led to an exaggerated importance of property and contract, a preference for private over public right, and an antagonism towards legislation. Individualism at the common law, on this account, influenced both ideology outside the law and the area of contract law.

2. Challenges to the Historical Narrative

The legally-framed story of the period of individualism and its relation to classical discourse has not gone unchallenged. Yet, challenges end up reinforcing, or at least leaving undisputed, the sense of a background of individualism of the kind found in contract law.

a. Causality

---

One important challenge has been directed to the causal explanation behind the story of individualism. James Gordley argues that the will theories of contract arose as a response to an intellectual crisis within the legal discipline, namely the fall of the Aristotelian philosophical tradition. However, Gordley concedes that the will theory corresponded with, and even gave credibility to prevalent individualistic notions.\footnote{Gordley, \textit{supra} note 75, at 66; JAMES GORDLEY, \textit{THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE} (1991).} Philip Hamburger too argues that economic liberalism played a very limited role in shaping contract theory. Consensus theory specifically, he suggests, was selectively adopted by common lawyers from natural law and civilian ideas, and gradually assimilated into common law. Hamburger agrees, however, that economic liberalism was compatible with the English version of contract theory, and may have encouraged it, rendered it appealing.\footnote{Philip A. Hamburger, \textit{The Development of the Nineteenth Century Consensus Theory of Contract} 7 \textit{LAW \\ & HIST. REV.}, 241 (1989).}

To the extent that the story of individualism as context is a liberal functionalist history, critical history has challenged it by allowing a measure of autonomy to legal thought itself, thus complicating causal explanations and making room for law's indeterminacy. Duncan Kennedy's history of classical legal thought focused on the internal structures of legal consciousness, viewed as a device mediating the contradictions of experience. What contradictions? Most broadly, the conflicting pull, and relevance, of individualism and altruism, autonomy and community, or, as Gordon had put it elsewhere, "the fundamental contradiction between the needs for fusion and for individuality."\footnote{Robert Gordon, \textit{Critical Legal Histories}, 36 \textit{STAN. L. REV.}, 57, 114 (1984).} While Kennedy veered away from the "background" story,\footnote{Only committing incidentally to not denying the importance of "ideologies like laissez-faire, nor of concrete economic interests. . .,"KENNEDY, \textit{supra} note 6, at 2.} his focus on the conceptual forms of legal consciousness offered highly elaborate accounts of
historical human experience as played out in legal thought, accounts both of the individualism established at the core of contract law, and of its conceptual (altruist) alternative. The individualism of classical contract, it turns out, represented a contingent arrangement of the pieces of a contradictory existence. The point to note, from my perspective, is that the account remained silent about the possibility of other arrangements of experience actually available to historical agents. And so, what one is left with is primarily a sense of the conceptual pieces which were available for arrangement in historical consciousness, among them one ideal version of individualism.

b. Periodization

Objections centered on periodization suggest that representing the changes in nineteenth century contract law, particularly the executory contract model at its basis, as a new phenomenon, is a misunderstanding. Thus Simpson explains the change in the nineteenth century primarily in the production of systematic treatises relying on Continental writers who assimilated Roman sources. Baker too finds the executory model in earlier periods; Hamburger points to early roots of consensus theory; and Ibbetson proclaims the idea of contractual liability rooted in voluntary intentional acts as familiar to common lawyers for at least "half a millennium." None of these histories, however, contest the suggestion that the formulation of contract law and its rising importance as the center of private law in the nineteenth century bore the marks of individualism, and some expressly concede it.97

97 The rejection of executory contract and will theories as a nineteenth or late eighteenth century transformation was elaborated by Simpson in his critique the Horwitz thesis. Simpson does not, however, touch upon the relation of individualism to the reception of, perhaps, older ideas, in this period, and their formulation under the will theory of contract. A.W.B. Simpson, The Horwitz Thesis and the History of
c. Contradiction/Complexity

Cornish and Clark offer a critique of a different kind, one returning to internal contradictions in law. They emphasize the underplayed principles of nineteenth century Equity rules, which offered a competing ideology to the common law's individualism. Chancery evolved a view of contract which emphasized dependence and took a broader view of the contractual relationship, seeking to encourage trust and fairness in bargains, to protect the weak and unfortunate. This outlook was associated with the older world of status — with landed property and familial alliance. Equity's outlook, however, did not pose a threat to hegemony of common law individualism, admit the authors, and those, again, were everywhere apparent: it was only towards the end of the century that any serious challenge was made to the "ideals on which the greatest nation of the nineteenth century had been built." It was only then that Equity had to be sharply curtailed.98

* * *

Contracts, 46 U. CHI. L. REV. 533 (1979); see also SIMPSON, supra note 11. From Simpson’s review of Atiyah's The Rise and Fall, it appears he would not deny the relation of individualism to contract legal thought, at least in terms of emphasis, and he agrees that "philanthropy" or paternalism eroded the significance of private contract. A.W.B. SIMPSON, Contract: The Twitching Corpse, in LEGAL THEORY AND LEGAL HISTORY, supra note 11, at 321, 332, reprinted from 1 OXFORD J. LEGAL STUD. 265 (1981). For Baker's view see J.H. Baker, The Rise and Fall of Freedom of Contract by P.S. Atiyah, 43 MOD. L. REV. 467 (1980) (book review). For Hamburger's view see Hamburger, supra note 94. For Ibbetson's view see IBBETSON, supra note 12, at 232. Ibbetson agrees that the greater depth and weight given to the idea of the will was a nineteenth-century novelty. Maitland and Montague seem to confirm the general argument of "nothing new" in arguing that in nineteenth-century contract law more has been done to codify existing law than to introduce new principles. They suggest, however, that contract law gained in importance by a vast expansion of business. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY ch. 8 (James F. Colby ed., Lawbook Exchange 1998) (1915). (The presentation here, almost needless to say, bypasses significant historical controversies among these writers for the sake of fleshing out their position concerning contract law's relation to nineteenth-century individualism.)

98 CORNISH & CLARK, supra note 44, at 226.
There seems to be little doubt that the golden age of contract in legal discourse was in line with, if not a result of, nineteenth-century individualism. Whether a historical continuity, a historical coincidence or a historical innovation, historians seem united on the assumption that the individualism of classical contract thought was in tune with nineteenth-century individualism in general.

**B. Collectivism Around Contract**

Historians who view collectivism as a historical trend relate it to broader changes in the political, economic, and ideological scene. This sub-section reviews some accounts. I then consider how accounts of collectivism embed within them explanations for the collectivist failure to reconceptualize contract, despite the transformative effects which collectivism on nineteenth-century law as a whole. My purpose is not to provide a comprehensive account of available explanations, nor evaluate them; rather, my aim is to offer a sense that the collectivist failure to re-conceive contract is not some unexplored interpretive hunch, but rather a phenomenon which, like individualism, emerges from history as something rooted in the deep currents of the era, reinforcing the story of contract law's continuity with broader mores.

Dicey identified roughly the last third of the nineteenth century as the period of collectivism in public opinion. The period was characterized, according to Dicey, by intellectual attacks on individualism, a waning belief in general maxims, and underlying conditions which stressed collective action and diminished the importance of individual effort. The practical corollary of the rise of collectivism was a demand for restrictions on
freedom of contract. Unequal bargaining power and problems of monopoly and externalities called for paternalistic intervention in contractual freedom.99

Atiyah similarly locates the beginnings of the collectivist trend in contract law in the last third of the nineteenth century, and elaborates on many of Dicey's underlying factors. The trend, according to Atiyah, was largely attributable to the rise of a consumer society with a prospering working class, the growth of the corporate society, democracy, and the establishment of a vast governmental bureaucracy. All of these were correlated with conceptual changes. Conceptions of positive freedom, a more benevolent meaning of the state following the Reform Act of 1867, shifting notions of responsibility — from individuals to their social environment, and the egalitarian ideal, all made the classical model seem less and less adequate. Attempts were accordingly made to restore concrete equality or provide a substitute at the expense of abstract freedom of contract.100

Why, then, did contract retain its link to individualism?

Prominent in analyses of the effects of collectivism on contract law is an argument that "real" collectivism in contract appeared only in the twentieth century.101

99 DICEY, supra note 55.
100 ATIYAH, supra note 6, at 627-33; see also Pound, supra note 13, at 14-15.
101 Such is the implication of Ibbetson's argument that "real" collectivism arrived only towards the end of the twentieth century. According to Ibbetson, only then began to emerge an argument that perhaps principles of substantive fairness underlay contractual liability. IBBETSON, supra note 12, ch. 13.

Cornish and Clark likewise argue for the liberal turn and individual-based commitments of nineteenth-century collectivism, with Marxian influences awaiting another twenty or thirty years. CORNISH & CLARK, supra note 44, ch. 1, pt. 2, § 6. Scheiber similarly notes the involvement of English liberals in important "interventionist" legislation. Scheiber, supra note 72, at 125.

Such may also be the implication of Richard Epstein's claim that nineteenth-century collectivist changes were not inconsistent with laissez faire. Richard A. Epstein, Contracts Small and Contract Large: Contract Law Through the Lens of Laissez Faire, in THE FALL AND RISE OF FREEDOM OF CONTRACT 25 (F.H. Buckley ed., 1999). For Epstein, laissez faire had never entailed a commitment to full freedom of contract, including unfettered discretion to choose contractual terms. Instead, it entailed an interim individualistic commitment to the sanctity of contract once a contract was validated. Changes in the law resulting in extended contractual liability (liability which could not be attributed to the will of the parties) therefore did not imply the demise of laissez faire individualism. Eric Posner, The Decline of Formality in Contract Law, in THE FALL AND RISE OF FREEDOM OF CONTRACT, supra, at 61, supports Epstein's analysis.
Until then, collectivist influences did not offer an alternative reading of social relations; individualism reigned supreme. Cornish and Clark, for example, acknowledge the efforts made by collectivism's proponents to articulate philosophical and economic underpinnings. But, by and large, those who took an interest in social issues were in search of ways of adapting and conditioning the known world of private property and free contract, and were at least suspicious of any dramatic breach with that present. Collectivism is sometimes even reduced to a form of apologetics. Searle, for one, reads nineteenth-century paternalism as in fact the other side of the same coin, namely, the preservation of the market and liberalism as the sole source of meaning.

Furthermore, Cornish and Clark read the Judicature Acts of 1873-1875, merging the common law courts with the court of Chancery, as the triumph of the individualistic common law principles over the competing values of equity, and the next seventy-five years or so as the unequivocal ideological control of common law ideas in contract adjudication. They suggest that case law was consolidating its individualist ideology precisely because of the sensed threat of collectivist government expressing itself through legislation. Collectivist legislation on this account was not part of the general rules governing contract, at least not until mid-twentieth century. It thus failed to transform contract, and even prompted its consolidation.

An encompassing explanation lies in the broader context of the conflict. The critique of individualism in contract law was closely associated with the critique of the market; the broader struggle was not about contract law, but about market society.

102 In this they reject the view of collectivism as an un-theorized sentiment, as expressed by Dicey. Polanyi famously viewed collectivism as spontaneous, unplanned and varied response to the rise of the market, see discussion infra note 105.
103 Searle, supra note 40, ch. 11.
104 Cornish & Clark, supra note 44, at 200-26.
Collectivism was a reaction to the market, and contract in this larger picture was but one aspect. Rather than redefine it, collectivism placed limits on contract which were part of the greater protective effort. Within this process, the almost automatic assumption that contract "belonged" to market individualism remained intact.105

The stability of the conceptualization of contract in dominant legal discourse, these various accounts suggest, emanated from the what and why of nineteenth-century collectivism itself. Taken together with the broad consensus about individualism, contract law appears to have been, quite simply, part of its epoch.

V. So What?

So, history shows that classical contract was individualistic, that the social alternatives were status and collectivism, which remained external possibilities, and ideological antagonists, until well into the twentieth century if not ever since, and suggests, or does not dispute, that law's version of individualism was in tandem with the individualism of its age. And the concord of opinion here, or at least lack of disagreement, is so overwhelming in a field of heated discussion, that it must be either a certainty or a triviality.

But it is neither. In conclusion, note at least two nontrivial effects of this broad agreement.

105 Karl Polanyi examined the reaction to the rise of the market in his Great Transformation. He viewed the collectivist wave as an automatic self-preserving reaction: "The great variety of forms in which the 'collectivist' countermovement appeared was not due to any preference for socialism or nationalism on the part of concerted interests, but exclusively to the broader range of the vital social interests affected by the expanding market mechanism." POLANYI, supra note 40, at 145.

The idea of a broader conflict in which contract is but a proxy for the larger question of a social order also seems to fit with the accounts of Dicey and Atiyah.
First, the effect of agreement is a historical picture in which individualism in contract could mean but one thing — social relations based on a socially-disembedded individuality in a rational economic sphere, at least as an approximate ideal. This picture closes off the possibility that other versions of contract were around, and in particular, other versions of individualism in contract. The question is one which is never asked.

Was there an alternative? Yes, there was. I have argued elsewhere that a culturally dominant liberal alternative was available in one of the central sites of Victorian social thought — canonical Victorian novels. The broad contours of that alternative should suffice to give a sense of the blinding effects of existing history.

Canonical novelistic discourse shared with the legal one an ardent attempt to imagine and represent the new world emerging from the ruins of status; to make sense of a world which, as Raymond Williams had put it, "had no new forms, no significant moments, until these were made and given by direct human actions." Novels, like law, recognized their age as the age of contract, and are well known for their fascination with promissory relations. Contracts were central to novels as stories, but no less importantly as plot hinges, as links, as figures for representing, imagining, exploring, and constructing their world; contracts in novels were conspicuous, multiple and diverse.

The legal and novelistic attempts to construe the world after status were part of their shared liberal commitments. Novels, no less than law, have been recognized and assessed by critics and historians as part of the rise of individualism. The best-known reference is probably Ian Watt who explained the rise of the realist novel against the economic, political and ideological rise of individualism, in which, Watt noted, the idea

106 See __________, supra note 42.
of contract was central. Analyses have confirmed and reconfirmed the relation from various directions in a series of claims about the Victorian novel as supporter of bourgeoisie ideology, as the par excellence middle class art, or, beyond class relations, generally as naturalizer of a capitalistic social order and promoter of individualistic values, at times lumping novels and law together in the discussion.

And yet, novelistic individualism was not the same one found in law, and, unlike the alternatives usually recognized in legal history, that individualism served to differently conceive contract itself. Contract in novels carried a different, if individualistic, meaning.

In novelistic discourse contract was construed not as abstract individual willing but as a concrete relationship within a web of relationships, a paradigm of

109 *See, e.g., FRANCO MORETTI, THE WAY OF THE WORLD* (2000) (discussing the English novel's tendency, together with law, to legitimate the established order); DANIEL COTTOM, SOCIAL FIGURES (1987) (arguing that the realist novel was one of the major forms of the rational representation of a universal order which was in fact a projection of the newly dominant English middle class); LEO BERSANI, A FUTURE FOR ASTYANAX: CHARACTER AND DESIRE IN LITERATURE ch. 2 (1978) (arguing that the psychological readability of characters in novels served to guarantee the established social order); DEIDRE SHAUNA LYNCH, THE ECONOMY OF CHARACTER: NOVELS, MARKET CULTURE, AND THE BUSINESS OF INNER MEANING (1998) (arguing that nineteenth-century literature individuated citizens and at the same time purveyed assurances about human homogeneity, and was thus involved in the transition to middle class hegemony); Irene Tucker, *What Maisie Promised: Realism, Liberalism and the Ends of Contract*, 11 YALE J. CRITICISM 335 (1998) (arguing that the realist novel functions as a cultural instrument by which the rationalization of contingency takes place, thus enabling the agency of subjects with limited knowledge and control and sustaining the idea of autonomy, somewhat like contract); PATRICK BRANTLINGER, FICTIONS OF STATE: CULTURE AND CREDIT IN BRITAIN, 1694-1994, at 146 (1996) (arguing that novels, even when critical of the social evils of capitalism, underwrite the naturalness and stability of the social realm); W.J. HARVEY, CHARACTER AND THE NOVEL 24 (1965) ("One of the few Marxist generalizations about literature to hold up reasonably well when put to the test of detailed historical examination is the thesis that the development of the novel is intimately connected with the growth of the bourgeoisie in a modern capitalist system. From this social process derive the assumptions and value we may conveniently if crudely lump together as liberalism."); Linda Shires, *The Aesthetics of the Victorian Novel: Form, Subjectivity, Ideology, in THE CAMBRIDGE COMPANION TO THE VICTORIAN NOVEL* 61, 65 (Deidre David ed., 2001) ("[The realist novel's] hero or heroine is molded to the bourgeois ideal of the rational man or woman of virtue."); Joseph W. Childers, *Industrial Culture and the Victorian Novel, in THE CAMBRIDGE COMPANION TO THE VICTORIAN NOVEL*, supra, at 77, 77-78 ("[A] neat separation of industrialism and the novel is nearly impossible . . . . Each looked to the other for models of effecting and controlling as well as understanding change.").
interdependence between persons and among spheres of action, based on an outlook best understood as an *individualism of relations*.

The individualism of relations reverses many of the basic features associated with the classical system of meaning. The abstraction and reification of the contractual relation, the exclusion of motivation and context, of pre- and post-formation circumstances from the analysis of contractual rights and duties, or the notion of isolated agency represented in contract, all relied on a disembedded understanding of contract as a paradigm of autonomous individual willing. Novels, equally engaged with the liberal question of individual agency, took up contract as a relationship demanding a contextualized analysis as the only route to understanding the possibilities and limits of individual action in an interdependent world. On their conception, contract was not a means for individuals to assert themselves and overcome social chains, but a paradigmatic moment of a relational existence, often, and necessarily, entailing limits more than freedoms, and compromises more than self-expansion.

The deep structure of the *individualism of relations* informing the meaning of contract in novels becomes clearest through its core elements: just like the legal conceptualization of contract, the novelistic one was directly related to a picture of the individual and of the social structure.

How did novels, famed for their celebration of individual character, psychological depth, and personal uniqueness, construe individuality? Individuals in novels were *insistently relational beings*. Unlike the presocial, rational contracting person of legal discourse, the novelistic contracting individual was incomprehensible and insignificant outside his relationships. To be sure, that person was individualized: he could not be
reduced to group-identities, and was not preceded by status-like determinations, or even by relative power-positions. And yet, the novelistic contracting individual was a social creature who could not be stripped off of his relationships. He became a self through and in them. It is precisely for this reason that contract, as an embedded relationship, is central to the novelistic imagination.

The social world of novels, like that of law, was made sense of through functional differentiations among spheres of experience – through a capitalist division of labor. Yet, unlike the separate spheres of law, and particularly the atomistic sphere of the market, spheres in novels were socially-embedded. Novels replaced the consciousness of discontinuity — of boundaries between the spheres which make up the social world, so familiar to historians of contract law, with a consciousness of continuity — of porous and incoherent boundaries between loosely differentiated spheres of activity which all succumbed to a governing social logic. Relationships in different spheres, like those in the family and the market, did not ultimately rely on different logics in novels. The overarching logic of spheres of human action, whatever their function, was the broad category of the social, in which persons acted out their insistently social attributes.

The individualism of relations thus connotes a view of the social based on discrete relational contexts. The term indicates, on the one hand, a move away from abstract and large (status-like) categories of social contexts, toward particularized ones which assume prominence — hence individualism; on the other hand, the term indicates a move away from abstract, socially-disembedded individuals in specialized spheres of action, toward relational individuals acting in socialized spheres — hence relations. While novels individualized and particularized the promissory relation and its context, they insisted
that it was the fact of a relation which mattered most, and refused to isolate the individual party or the promissory logic as legal discourse tended to do. And to avoid any reduction, let us note that the individualist story of novels was neither an organic image, nor a particularly benevolent one; it was, for better and worse, more socially embedded. Novelistic discourse exposes a different idea of individualism, and a different meaning of contract, vying for dominance at the height of the age of contract.

The twentieth century, and the turn to the twenty-first, have seen discussions of relational individualism, understood as critical responses to the atomistic individualism of the classical liberal tradition. Relational ways of thinking, however, were available for liberals at the high Victorian era, in contract no less than in other sites of social significance.

But even assuming we do not know whether there was an alternative or not, the fact that this question is not on the table, that it is not an uncertainly informing the historical understanding of contract, is in itself extremely influential in guiding past and future thought.

The historical picture, too readily conceded, partly explains how the classical model remains a dominant principle, a starting point for any liberal framing of contract law. At the end of the twentieth century we still find that "[t]he challenge facing contract lawyers . . . is to identify which features of the classical law should be discarded and which retained."110 What is more, claims relying on the classicist system of meaning, for instance, a claim that contractualism is expanding because private arrangements are expanding at the expense of public ones, continue to make perfect sense.111 The

---

110 Nolan, supra note 21. at 603.
111 Id. at 604 (making such a claim).
individualism-collectivism tension, which assumes but one individualism and so identifies a single individualistic possibility for contract, making anything else seem like encroachments on an ideal (good or bad), remains the one to inform contractual thinking, the reigning framework for virtually every theory, from conservative to radical and any hues in between. Perhaps this ghost of contract would not have been so powerful had it been acknowledged, at least entertained as a possibility, that it was not quite as culturally dominant and conceptually exclusive as routinely assumed, not even for nineteenth-century liberals.

A second effect of the historical agreement is that despite an outpour of scholarship on the constitutive effect of law, the individualism of classical contract law emerges from history as reflective of what individualism could possibly mean in the nineteenth century. Classical thought might have been revolutionary within the internal history of legal thinking on contract, as a group of historians claims, but its individualism appears nonetheless to have been virtually obvious, the singly available construction for nineteenth-century liberals when they turned their gaze to contract. The possibility that there was a variety of individualisms which could, and did, respond to concerns with what, on earth, might replace the older world of status — and how the melting of old solids is to be confronted,¹¹² is closed off.

And so, the idea that law is constitutive of social consciousness remains limited to the suggestion that law is involved in diachronic transitions among social orders — from one dominant system to another (say, feudalism to capitalism), along with all other domains of social thought, all of which either cooperate or try to resist. There remains no

¹¹² The "melting of solids" was coined by KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (1848). See also MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY (1982); ZYGMUNT BAUMAN, LIQUID MODERNITY 4 (2000).
room for a more culturally activist version of constitutivism, in which legal discourse takes part in *synchronic* cultural negotiations among alternative ways of framing any emergent social order (say, English capitalism). In this version of constitutivism, law is constitutive not because it is hegemonic, but because it enforces, with the backing of hegemonic state power, non-hegemonic worldviews within cultures containing divergent and multiple worldviews. The important point here is not that law is involved in justifying or negotiating for us the dominant social order; the important point, rather, is that other justifications and negotiations might have been available, and law is involved in making choices here; that in complex cultures, as modern western cultures are – and have been for a long time – law offers a specific, and non-obvious way of understanding and experiencing the social order; that a social order is not an essential reality, but a reality dependent upon interpretations. And those interpretations are nuanced, multiple, and not necessarily ideologically antagonistic.

In the case of classical contract law, the possibility which legal history does not invite us to entertain is that historical legal thought cemented an *interpretation* of individualism in contract which was less than obvious for historical agents. The classicist ideological bias toward individualism has preoccupied history to such an extent that the content of the bias has only been examined vis-à-vis ideological antagonists (status/collectivism), keeping intact the sense of a single hegemonic idea of individualism, and a single meaning of contract entangled with it.

After all seems to have been said and done in contract history; after it has been written and rewritten for over a hundred years; after it has had its conservative, liberal, radical, feminist and perhaps some other versions; after it has expanded from theory to
consciousness, from high-court precedent to small-claims litigation, from books to practice, and has extended its idea of context in multiple directions, there remain untouched residues of agreement which might merit more attention, which create, by virtue of being unattended, a powerful sense of history informing understandings of the what and how of market society to present days. History is often normative in ways it does not acknowledge.