Contract Formation and the Entrenchment of Power

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CONTRACT FORMATION AND THE ENTRENCHMENT OF POWER

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Conventional wisdom has it that modern contract law evolved at least in part to address problems created (or ignored) by the classical legal system. Consequently, modern contract law is different from classical contract in ways that make the current system work better than the regime it ostensibly replaced. For this to be true, however, the changes made by modern contract have to be effective in rectifying the problems engendered by classical contract law. But herein lies the problem. Modern contract identified coercion in the bargaining process that produces a bad bargain as a problem serious enough to warrant a solution. The solution came in the form of new contract policing doctrines, like unconscionability, economic duress, and misrepresentation. But modern contract’s solution to the coercion/bad bargain problem has failed. Indeed, the modern system makes the coercion problem worse, because it only partially rejected classical contract, while retaining key parts of the older regime. More specifically, modern contract law leaves the core of classical contract--contract formation--completely intact. And contract formation, particularly in the doctrine of mutual assent, is where the power in contracting is created, embedded and, under modern contract law, largely immunized from effective challenge by the contract policing doctrines. Consequently, by leaving the core of contract intact, modern contract law has ensured that the new policing doctrines it adopted will not alleviate, let alone correct, the coercion problem. So, the conventional wisdom is wrong. The differences between the classical and modern contract law systems are not the most important part of the evolutionary story. Instead, understanding the ways in which the two systems are the same is more critical in determining whether modern contract law is in fact, or will be, successful in tempering the harshest aspects of the classical legal system.

Introduction

Legal scholars and academics draw a distinction between “classical contract” and “modern contract”1 that, for the most part, turns on the differences between the two

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1 Law is cyclical. That is, there is usually a period of legitimation, followed by a period of critique/deconstruction, and then a reconstruction, which is legitimized, only to be followed again by critique, etc. Contract law is no different. Schematically, an abbreviated version of the evolution of contract law looks like this: **Legitimization:** Classical Legal Thought (1860s-1930s) → **Critique:** e.g., the
systems. For example, the classical system relied on technical and rigid rules, whereas the modern system shifted to more flexible standards. And the list goes on.

Conventional wisdom has it that the differences between the two contract law systems matter. But why do they matter? The answer around which there seems to be consensus is that there were problems with the classical system, which is at least partly (if not the primary reason) why the modern system was developed. That is, conventional wisdom seems to suggest that the modern system evolved to address these problems. But have the solutions worked and, if not, what are the implications for the system as a whole? This paper will use modern contract’s new “policing doctrines” to try to answer

Progressives, Legal Realism (1890s-1940s) → Reconstruction/Legitimization: Modern Contract Law (1930s-1990s) → Critique: e.g., law and economics, Critical Legal Studies, relational contract theory, feminist legal theory, behavioral law and economics (1970s-present) → Reconstruction/Legitimization: Post-Modern Contract Law (1990s-present).

My paper focuses on part of this debate, namely, on the evolution of the classical to modern contract law systems. This is because my claims center on the contract law framework, meaning the background assumptions and rules governing how contracts work, that evolved in this time period. I argue that this framework remains in place today, notwithstanding the critiques producing post-modern contract law. Consequently, the claims I make in this article are as applicable to the post-modern contract law system as they are to the “modern” one that I specifically discuss. Indeed, my claims are probably more cogent as applied to post-modern contract law, given that this system revives much of the classical formalism rejected by modern contract. See Jay M. Feinman, Un-Making Law: The Classical Revival in the Common Law, 28 Seattle U. L. Rev. 1, 14-29 (2004) [hereinafter, Feinman, Un-Making]; Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 774 (2002) [hereinafter, Knapp, Private]; Ralph James Mooney, The New Conceptualism in Contract Law, 74 Or. L. Rev. 1131 (passim) (1995). For internal consistency and to avoid confusion in nomenclature, however, I will refer to the contract law system that I am critiquing as “modern” contract law.


3 See infra part I.B.

4 Id.

5 Feinman, Un-Making, supra note 1 at 12-14; Speidel, supra note 2 at 260-61; Knapp, Offer, supra note 2 at 316-19; Morant, Race, supra note 2 at (part B).

6 Feinman, Un-Making, supra note 1 at 12-14; Feinman, Critical, supra note 2 at 830-39; Knapp, Offer, supra note 2 at 317-19; Morant, Race, supra note 2 at (part B)

7 Id.

8 By “contract policing doctrines,” I am referring to doctrines used by courts to police contracts against, among other things, unfairness and/or bargaining misbehavior in the formation process and inequity in the resulting terms.
these questions.

Modern contract law recognizes new contract policing doctrines, namely, unconscionability, economic duress and misrepresentation. Each of these doctrines focuses on some type of bargaining misbehavior that produces a bad bargain for one of the parties. Each of the new policing doctrines then attempts to address the bargaining misbehavior by making the contract procured as a result of the misbehavior avoidable or otherwise unenforceable in whole or in part.

While the type of bargaining misbehavior targeted by each of the new policing doctrines varies, they can all be characterized as a form of “coercion,” meaning that one party is compelled or forced by another to do what her free will would otherwise refuse. So, for example, unconscionability focuses on one party’s improper use of its unequal bargaining power and/or unfair and deceptive tactics; economic duress is directed at conduct where one party causes, or at least takes advantage of, the other party’s financial distress; and misrepresentation addresses situations where one party represents (or withholds) material information to (or from) the other party, incorrectly, improperly

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10 See, e.g., Restatement (Second) of Contracts §164(1) ("If a party’s manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."); Restatement (Second) of Contracts §175(1) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”)

11 See Restatement (Second) of Contracts §208 ("If a contract or term thereof is unconscionable . . . a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term . . . .")


14 See, e.g., Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983) (other party must cause the financial hardship); accord Northern Fabrication Co. v. UNOCAL, 980 P.2d 958 (Alaska 1999); but see Rich & Whillock, Inc. v. Ashton Development, Inc., 204 Cal. Rptr. 86 (Ct. App. 1984) (finding that it is enough that one party takes advantage of the other side’s financial circumstances); see generally John P. Dawson, Economic Duress—An Essay in Perspective, 45 Mich. L. Rev. 253 (1947).
and/or fraudulently. In each of the coercive situations just described, the end result, indeed the objective of the coercive conduct, is to procure a “bad bargain.” Hence, the act to which a party is “compelled or forced by another to do what her free will would otherwise refuse” is agreeing to the bad bargain. Since a bad bargain is a necessary part of the coercion problem, it warrants further explanation.

I am assuming that the contracting parties came together for some reason—Party B has what Party A wants or needs, whether a good or service, and Party A is willing to pay for it. In other words, neither party was forced to come to the bargaining table under false pretenses or otherwise. Now, let’s assume further that the contract terms are fair

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15 See Restatement (Second) of Contracts §164(1) (which provides that a contract is voidable if a party’s “manifestation of assent is induced by either a fraudulent or material misrepresentation . . .”); Restatement (Second) of Contracts §162(1) (defining a fraudulent misrepresentation) and §162(2) (defining material misrepresentation); Restatement (Second) of Contracts §161 (non-disclosure as the equivalent of a misrepresentation).

16 I am defining a “bad bargain” to include a contract where: (1) the terms unreasonably favor one party; (2) the sum total of the contract drives too hard a bargain, that is, it constitutes such a bad deal for one of the parties that no one in her right mind would have taken it; or (3) something substantive, but somewhat minimal, is wrong with the contract, but, if aggregated, would result in a windfall for one of the parties and is the result of an objectionable pattern or practice by that party. The first two definitions should be relatively unobjectionable since they basically track the unconscionability literature. (Add cites). The third definition, however, requires some clarification.

Consider the following hypothetical: Assume that a bank intentionally overcharged one of its client $50 at loan closing for a notary, and the overcharge was duly included, but overlooked by the client, in the signed contract. The overcharge is something the client is entitled to recover from the bank. Assume that the client demands her $50 back, but that the bank refuses to refund the money.

Chances are, the amount is way too small for the client to even consider contacting an attorney, let alone instituting any kind of legal action against the bank. And, of course, no attorney would probably even consider taking such a small claim. So, given the small amount at issue, it seems fairly certain that the client would simply absorb the loss, despite her legal claim, and, conversely, that the bank would keep the overcharge, despite its wrong-doing.

If the “bad bargain” consists only of this one overcharge, then it may be easy to justify the outcome of this hypothetical by noting that, on balance, the client has not been harmed very much. The “bad bargain” represented here would result in a non-actionable claim, not because the contract was substantively beyond reproach, but rather because the economics of the situation would prevent the client from taking legal action on it. In this case, it does not seem to make sense to include the third definition in my definition of a “bad bargain.”

But assume that the bank intentionally overcharges all of its clients $50 at loan closing for a notary; and assume further that the bank closes ten thousand such loans. If the $50 for each loan is aggregated, the amount in controversy is now $500,000. Under these revised facts, individual claims would not be brought for the reasons stated above. But now we have a huge windfall to the bank pursuant to its own bad pattern and practice. Under these circumstances, the claims could be aggregated in a class action and a class action attorney might very well be interested in bringing the case.

So, while I think the first two “bad bargain” definitions will cover the majority of cases, the third definition preserves the possibility that something less egregious, but still substantively unfair, would be included.

17 I am distinguishing the scenario I describe in the text from the fraud in the factum situation, where
and reasonable. Given that Party A wants/needs the good or service at issue and came to the bargaining table willingly, why would Party B have to coerce Party A to enter that contract? Absent any coercion on Party B’s part, there is clearly no legal claim presented on these facts. An argument could be made, however, that Party B might want the additional sale to Party A at any cost. To prevent the sale to Party A from being lost, therefore, Party B might be willing to coerce Party A to enter into the fair and reasonable contract.

So, let’s assume that Party B coerced Party A to enter into the fair and reasonable contract. Is a legal problem presented? To be sure, there is always the principle at stake—people should not be wrongfully induced to enter into a contract; and, in fact, permitting this situation to occur would violate a cardinal principle of contract law, namely, that a contract is a voluntary undertaking. In addition, there is nothing in a claim for economic duress or misrepresentation that explicitly requires that something be substantively wrong with the contract. Theoretically, therefore, Party A may have a legal claim against Party B for the latter’s coercive conduct. But, assuming Party A wants/needs the good or service, and the terms are reasonable and fair, how realistic is it that Party A would end up challenging the contract, even in the face of coercive conduct by Party B? More pragmatically, without something substantively wrong with the contract, what attorney would take that case? In either event, it seems highly unlikely that such a challenge would be brought.

The only way coercion presents an actionable problem, therefore, is if it results in a bad bargain. Consequently, coercion plus a bad bargain is what the modern contract law system identifies as a problem created, or at least ignored, by the classical system, and which the modern system attempts to remedy via its new contract policing doctrines. Otherwise, there would be no reason for modern contract law to adopt the new policing doctrines.

Party A, who only speaks Spanish, is told in Spanish that she is buying a refrigerator, but the written contract, all in English, indicates that she is actually buying a car; or when Party A is told she is signing a letter when the document is actually a mortgage. In cases of fraud in the factum, one party is misled into coming to the bargaining table. Contracts obtained in this fashion are void ab initio. (cite)

18 See infra Part I.A.
19 A claim for misrepresentation, for example, includes the following elements: (1) a fraudulent or material misrepresentation; (2) the misrepresentation must have induced the recipient to enter the contract; and (3) the recipient’s reliance on the misrepresentation must be justified. Restatement (Second) of Contracts Chapter 7, Misrepresentation, Duress and Undue Influence, Topic 1. Misrepresentation, Introductory Note. The elements of economic duress are: (1) a wrongful or improper threat; (2) no reasonable alternative but to accede to the threat; and (3) the improper threat induces the making of the contract. Restatement (Second) of Contracts §175 and cmts. a., b. and c. Although Restatement (Second) of Contracts §176(2) defines an improper threat to include one where the resulting exchange is not on fair terms, an improper threat is not limited to this situation. In other words, a threat may be improper even if the resulting contract is substantively fair. See Restatement (Second) of Contracts §176(1).
20 Even assuming Party A filed suit and won, what would be Party A’s damages?
The problem is that modern contract’s solution to the coercion/bad bargain problem does not work. In fact, the modern system makes the coercion problem worse, because the modern system only partially rejected classical contract, while retaining key parts of the older regime. More specifically, modern contract law left the core of classical contract, which is contract formation, completely intact. And contract formation, particularly in the doctrine of mutual assent, is where the power in contracting is created, embedded and, under modern contract law, largely immunized from effective challenge by the contract policing doctrines. Consequently, by leaving the core of contract intact, modern contract law has ensured that the new policing doctrines it adopted will not alleviate, let alone correct, the coercion problem.

In Part I, I set out the evolution of the classical to modern contract law system. In Part I.A., I describe classical legal thought. Understanding classical legal thought is important to the rest of my paper, because it provides the backdrop against which my discussion of modern contract law takes place. More importantly, because I end up concluding that the modern system is essentially the same as classical contract in ways that undermine, if not cripple, modern contract law, I spend some time explaining the older regime here. In Part I.B., I focus on the modern system and specifically on the conventional wisdom which holds that the differences between the classical and modern systems are the most important part of the evolutionary story.

In Part II, I construct my argument that modern contract’s solution to the coercion problem will fail. In Part II.A., I dispute the conventional wisdom laid out in Part I and argue instead that the ways in which the two contract law systems are the same are actually more critical to understanding whether the modern system will be successful in solving the coercion problem produced by the classical system.

In Part II.B., I set out in detail my theory that the seat of power in contract is formation, and primarily in the element of mutual assent. Very briefly, I argue that mutual assent is key because this is where most of the material terms are decided. This is also where the critical decision is made whether to enter into the contract, or not. If the parties mutually assent to enter the contract, then a contract is formed (given that consideration is generally present in market transactions). At that point, the state effectively steps in and says that these parties are bound to that contract. “Being bound” to the contract creates a presumption of contract (and term) validity that the coerced party has the burden of overcoming. Unfortunately, this presumption is extremely difficult to

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21 See infra Part II.A.
22 E. Allan Farnsworth, Contracts §2.2 at 48 (4th ed. 2004).
overcome, because of what I identify as the “process problem.” Consequently, satisfying the elements of contract formation means that a coerced party is literally bound to the bad bargain, one that the state, at that point, will compel the coerced party to either pay to get out of or perform. Modern contract law failed to change formation, except to make it easier to form a contract. Consequently, by making it easier to form a contract, I argue that the modern system actually expands one party’s capacity to coerce her contracting partner. And, by leaving the core (formation) intact, modern contract law also largely immunizes this expanded capacity for coercion from effective challenge by the policing doctrines it adopted to remedy it.

I briefly conclude in Part III with what should be obvious even now, namely, that the modern system’s solution to the coercion problem will not work and, in fact, will actually make the problem worse. So, to the extent that coercion as identified and defined it here is a problem that needs to be addressed, the modern system’s current solution to address it will not do it. At

I. The Evolutionary Story

A. Classical Legal Thought

Classical legal thought was formulated in the 1860s and dominated most American legal institutions until the 1930s. It was characterized by abstract, formal and rigid rules that applied to all cases, regardless of subject matter or party, which meant that the context within which a transaction took place was largely irrelevant. The classical legal system was also structured around a series of dichotomies, the most important of which was the dichotomy between public and private law. The mechanism the classical legal system used to ensure that the two spheres would remain completely

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23 See infra text accompanying notes 144-77.
24 American Legal Realism, at xi (Fisher, Horwitz & Reed eds 1993) [hereinafter ALR]; Joseph William Singer, Legal Realism Now, 76 Cal. L. Rev. 465, 478 (1988) [hereinafter Singer, Realism] (setting the time period of classical legal thought as 1860-1940); but see Elizabeth Mensch, The History of Mainstream Legal Thought at 28, in the Politics of Law (David Kairys, ed.) (3d ed.1998) (setting the time period as 1885-1935) [hereinafter, Mensch, History].
26 For example, the federal government and state governments had separate spheres of authority, as did legislatures and courts.” Jay M. Feinman, The Significance of Contract Theory, 58 U. Cin. L. Rev. 1283, (sentence right after n12) (1990) [hereinafter Feinman, Theory].
27 See infra text accompanying notes 144-77.
28 Feinman, Theory supra note 27 at ___ (following after n.12).
segregated was the idea of a self-regulating market.\textsuperscript{29}

The classical legal theorists’ model of the market assumed that value was subjective\textsuperscript{30} and that everything was capable and, hence, subject to the exigencies, of money exchange.\textsuperscript{31} Thus, the function of exchange, that is of the market, was to maximize the conflicting desires of the atomistic individuals seeking to promote their own self interest.\textsuperscript{32} This idea of the self-regulating market was then incorporated into and subsumed by the private half of the public/private dichotomy.

Under the first, or private law, sphere of private action, individuals exercised rights.\textsuperscript{33} Contract law became the core of this private law system.\textsuperscript{34} To the classical theorists, contract law was a system “conceived of as a field of private ordering in which parties created their own law by agreement;”\textsuperscript{35} and within this realm of private agreement, individual freedom was protected from state coercion.\textsuperscript{36} Translated, this meant that, within the private law sphere, individuals were free to agree on whatever contract terms they wanted\textsuperscript{37} and the state would ostensibly play no role in regulating the substantive terms of those private relations.\textsuperscript{38} This, of course, is the very classical notion of freedom of contract.\textsuperscript{39}

Indeed, the role of the courts under this system of private law was to enforce the bargain of the parties as made.\textsuperscript{40} At most, courts were to ensure procedural fair play and nothing more.\textsuperscript{41}

\textsuperscript{29} Singer, Realism, supra note 24 at 477-82; see generally Morton J. Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917, 936-52 (1974) [hereinafter Horwitz, Foundations]; Atiyah, supra note 2 at 402 (noting that, “the emphasis on contract law as the law of the market was, in England at least, well established by 1870, although in America it may have been a later development.”).
\textsuperscript{30} Horwitz, Foundations supra note 29 at 947.
\textsuperscript{31} Gabel & Feinman, supra note 8 at 500.
\textsuperscript{32} Horwitz, Foundations supra note 29 at 947.
\textsuperscript{33} Singer, Realism supra note 24 at 478.
\textsuperscript{34} Singer, Realism supra note 24 at 481.
\textsuperscript{35} Feinman, Critical supra note 2 at 831.
\textsuperscript{36} Feinman, Theory supra note 27 at (btwn nn12-13).
\textsuperscript{37} Atiyah, supra note 2 at 403; Singer, Realism supra note 24 at 479.
\textsuperscript{38} Singer, Realism supra note 24 at 479; ALR supra note 24 at 99.
\textsuperscript{39} See, e.g., Samuel Williston, Freedom of Contract, 6 Cornell L. Rev. 365, 373 (1921).
\textsuperscript{40} Singer, Realism supra note 24 at 479; ALR (“The Critique of the Public/Private Distinction in American Legal Realism”), supra note 24 at 99; see also, Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L. J. 997, 1010 (1985); Atiyah, supra note 2 at 404 (“The Court’s function in all this is to ensure procedural fair play: the Court is the umpire to be appealed to when a foul is alleged, but the Court has no substantive function beyond this. It is not the Court’s business to ensure that the bargain is fair, or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of superior bargaining position.”)
\textsuperscript{41} Atiyah, supra note 2 at 404; ALR, supra note 24 at 99; Dalton, supra note 40 at 1014 (“our principal vision of contract law is still one of a neutral facilitator of private volition. We understand that contract law
The reasons for the minimalist role assigned to the courts (and the state) were threefold. First, liability could only be voluntarily assumed by the individuals themselves.\textsuperscript{42} That is, individuals could not be forced to enter into a contract;\textsuperscript{43} they were free to contract only if they wished to do so.\textsuperscript{44} Second, the individuals themselves were deemed to be roughly equal to each other in terms of bargaining power\textsuperscript{45} and access to information;\textsuperscript{46} they bargained at arms-length,\textsuperscript{47} and were independent and completely concerned at the periphery with the imposition of social duties . . . [b]ut we conceive the central arena to be an unproblematic enforcement of obligations voluntarily undertaken . . . . Although we concede that the law of contract is the result of public decisions about what agreements to enforce, we insist that the overarching public decision is to respect and enforce private intention.

\textsuperscript{42} Gillian K. Hadfield, An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law, 146 U. Pa. L. Rev. 1235, 1247 (1998) (“Contract law proceeds from the premise that obligation is established by the existence of voluntary and informed choice to enter into a contract.”); Atiyah, supra note 2 at 403 (The fourth principle of classical contract law is that, “the deal is finally struck when the parties agree, or indicate their agreement . . . . The agreement must be ‘freely’ made and ‘without pressure’ but these concepts are very narrowly interpreted, for they must not conflict with the rule of the market place.”); Singer, Realism, supra note 24 at 479 (arguing that the classical theorists “considered three principles to be central to a free contract system[,] one of which was the principle that a party could not be forced to contract against her will.)

\textsuperscript{43} Singer, Realism supra note 24 at 479; Atiyah, supra note 2 at 403.

\textsuperscript{44} Singer, Realism, supra note 24 at 479; Atiyah, supra note 2 at 408 (“The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of classical contract law.”); Hadfield, supra note 42 at 1261 (“Conventional contract logic views contract law as a realm of purely private ordering in which individuals are free to choose the structure of their relationships without interference. In this view, law does not judge the formation, performance, or breach of a contract on the basis of external juristic values; law acts only as a surrogate for the values created by the parties themselves.”)

\textsuperscript{45} See, e.g., Calamari & Perillo, supra note ___ §10-1 at 429 (“Much of the law of contracts is based upon an ethic of self-reliance . . . . The self-reliance ethic presupposes, as a model, parties who understand the legal consequences of the agreement and who have equal bargaining power or, at least, who are equally free to refuse to bargain unless their terms are met.”)

\textsuperscript{46} See, e.g., Speidel, Domain, supra note 2 at 264 (“At least initially, contemporary contract doctrine assumes, as did classical doctrine, that the parties to an agreement had adequate information and choice[].”); Atiyah, supra note 2 at 403 (The third principal of the classical model of contract law is that, “neither party owes any duty to volunteer information to the other, nor is he entitled to rely on the other except within the narrowest possible limits. Each party must study the situation, examine the subject matter of the contract, and the general market situation, assess the future probabilities, and rely on his own sources of information. He may take advice, consult experts, buy information from third parties; but if he does not do so, he relies on his own judgment and acts at his peril.”); Emily M.S. Houh, Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law, 88 Cornell L. Rev. 1025, 1042 (2003) (“In economic terms, a crucial condition of the ideal contracting environment is that all contracting parties have access to ‘full information about the nature and consequences of [their] choice[s].’”) (footnotes omitted).

\textsuperscript{47} See, e.g., Atiyah, supra note 2 at 402-03 (“The model of contract theory which implicitly underlay the classical law of contract . . . was thus the model of the market. Essentially this model is based on the following principal features. First, the parties deal with each other ‘at arm’s length’ . . . . this carries the notion that each relies on his own skill and judgment, and that neither owes any fiduciary obligation to the other.”); Melvin A. Eisenberg, Why There Is No Law of Relational Contracts, 94 Northwestern U. L. Rev.
self-interested. It was assumed, moreover, that each individual was the best judge of his own interests, knew his own circumstances, was able to calculate all risks and future contingencies, and that all of these considerations entered into the making of the contract. In other words, individuals were rational actors. Finally, the classical theorists believed that the self-regulating market was the great neutralizer. That is, free competition in a self-regulated market, one unencumbered by state interference, either in the form of legislation or court imposed obligations, would effectively and fairly mediate the competing and conflicting desires of these self-interested individuals. Implicit in this understanding of the market, therefore, was the assumption that the market itself was neutral, impartial and perfect.

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

805, 808 (2000) (“classical contract law was implicitly based on a paradigm of bargains made between strangers transacting in a perfect market.”) [hereinafter Eisenberg, Relational].
48 Feinman, Critical, supra note 2 at 832.
49 Atiyah, supra note 2 at 403.
50 Eisenberg, Relational, supra note 47 at 808 (“classical contract law was based on a rational-actor model of psychology, under which actors who make decisions in the face of uncertainty rationally maximize their subjective expected utility, with all future benefits and costs discounted to present value. In particular, the rules of classical contract law were implicitly based on the assumptions that actors are fully knowledgeable, know the law, and act rationally to further their economic self-interest.”); see also, supra, text accompanying notes 42-49.
51 Feinman, Fall, supra note 25 at 1541.
52 Singer, Realism, supra note 24 at 479-80.
53 Atiyah supra note 2 at 404.
54 See generally, Singer, Realism, supra note 24 at 477-82 (detailing the history and evolution of the classical conception of the self-regulating market.); Eisenberg, Relational supra note 47 at 808 (“classical contract law was implicitly based on a paradigm of bargains made . . . in a perfect market.”)
55 Singer, Realism, supra note 24 at 481.
56 Id.
57 Atiyah, supra note 2 at 408; Feinman, Fall, supra note 25 at 1541; Morant, Race, supra note 5 at (btwn nn73&73).
58 ALR, supra note 24 at 99.
State imposed obligations did continue to exist. But the classical theorists viewed these obligations as being largely peripheral. Consequently, the only arena in which the state was free to act was under the second, or public part of the public/private dichotomy. In this public sphere of government regulation, public officials could exercise state power, and all state imposed obligations, like quasi-contracts, torts and real property, were relegated to this sphere of influence.

The paradigm transaction under the classical legal system, therefore, was a private law transaction, one unaffected by the context within which it took place. And to recap here, that transaction was framed by all of the following assumptions:

1. Contract law was private, meaning it was a private transaction between two private parties;
2. Parties bargained at arm’s length, i.e., they were most likely strangers to one another;
3. Parties had equal (or roughly equal) bargaining power;
4. Parties had equal access to information;
5. Individuals acted as rational actors in the marketplace;
6. Contracts were the product of voluntary and informed choice;
7. Contract law was the law of the market. Implicit, but central to this understanding, were the notions that markets were neutral and impartial, but also perfect, self-regulating and largely outside of state control; and
8. The role of the state was neutral and minimal.

Perhaps not surprisingly, all of the classical legal system’s assumptions have been the subject of very long standing critiques. The Legal Realists, for example, attacked

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59 Singer, Realism, supra note 24 at 479-81.
60 Id. at 478.
61 Id. at 480.
62 These two areas of private law were essentially reconceptualized as implicating only state imposed obligations. See id. at 480.
the public/private distinction upon which much of classical legal thought was based. Very briefly, but more specifically, the Realists argued that contracts were not the product of voluntary choice (or assent) between two private parties, but were instead the product of coercion, which is ultimately created and permitted by the state. They argued, moreover, that contracts were in fact public, not private, because the state enforces them. The Realists also attacked as myth the idea of the self-regulating market by showing that the “free” market was, in reality, a regulatory structure created by the state.

64 What follows is a grossly over-simplistic summary of the Legal Realist critique of the classical legal system. For a much more thorough analysis, see, e.g., Robert Hale, Coercion and Distribution in a Supposedly Neutral State, 38 Political Science Quarterly 470 (1923) [hereinafter Hale, Coercion]; Morris R. Cohen, Property and Sovereignty, 13 Cornell Law Quarterly 8 (1927) [hereinafter Cohen, Property]; Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L. J. 704 (1931); Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553 (1933) [hereinafter Cohen, Contract]; Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603 (1943) [hereinafter Hale, Duress]; Dawson, supra note 14 at __; Singer, Realism, supra note 24; ALR, supra note 24 Chap 4; Horwitz, The Transformation of American Law (Chap __).

65 The Realists argued that coercion is ubiquitous and “lies at the heart of every bargain.” Elizabeth Mensch, Freedom of Contract as Ideology, 33 Stan. L. Rev. 753, 764 (1981) [hereinafter Mensch, Ideology]; see generally Hale, Coercion, supra note 64. In fact, every contract involves mutual coercion, because each party is legally entitled to withhold from the other what she owns, whether it be capital (i.e., land) or labor. See, generally Hale, Coercion, supra note 64; Cohen, Property, supra note 64; Singer, Realism, supra note 24 at 486. Coercion, therefore, stems from ownership. Hence, the more one party owns (in terms of quantity and/or value), the more that party will be able to dictate the terms of a contract. Hale, Coercion, supra note 64; Cohen, Property, supra note 64; Singer, Realism, supra note 64 at 486; Mensch, Ideology at 764. “Ownership[,] in turn[,] is a function of legal entitlement[.]” since it is the state who creates and protects, for example, the property right. See Cohen, Property, supra note 64; Hale, Coercion, supra note 64; Singer, Realism, supra note 24 at 487-88; Mensch, History, supra note 24 at 34-35. Consequently, since coercion is a function of ownership, and ownership is a creature of the state, the state is deeply embedded in every ostensibly private contract. Contracts are therefore public, not private.

66 There are at least two dimensions to the state enforcement of private contract argument. The first involves the decision as to which contracts to enforce. The second involves the use of state force. So, more specifically, contract law does not enforce every promise a person makes. It only enforces some promises, leaving others to individual conscience or honor. Cohen, Contract, supra note 64 at 585; Singer, Realism, supra note 24 at 485. Contract law is therefore public, under this view, because deciding which promises should be enforceable and which left to conscience, for example, necessarily requires courts and legislatures (to the extent that substantive regulation of contract terms is involved) to make policy choices. Id.; see generally Cohen, Contract, supra note 64. Once the state (through its judges and legislators), determines which contracts are enforceable, the state will then enforce those state created contract rights by literally putting the sovereign power of the state in the service of one contracting party against the other. It accomplishes this by compelling one of the parties (through its judges, sheriffs and other state agents) to either pay or perform. Cohen, Contract, supra note 64 at 585-86; Singer, Realism, supra note 24 at 483-85. Contract law is therefore public, under this view, because by choosing to enforce the contract (as opposed to not enforcing it), the state has essentially chosen between two competing moral principles, namely the right to rely on promise versus the freedom to change one’s mind about whether to perform the contract. Singer, Realism, supra note 24 at 484-85; Feinman, Critical, supra note 2 at 841-42; see generally Cohen, Contracts, supra note 64. Contracts are therefore public, not private.
state. Consequently, since the state was deeply involved in every “private” contract and because the market was itself a regulated structure created by the state, the Realists argued persuasively that the public/private distinction was an artificial construct. As a result, the role of the state in the distribution of wealth, property and power in society could in no way be deemed neutral nor minimal.

According to Jay Feinman, the “[c]ritiques [of the classical legal system] focused on the inescapable presence of policy choices which make contract law as much a realm of social ordering as other areas of law, on the impossibility of realizing a formal rules system, and on the considerable gap between the idealized vision of the world and the actual operation of contract law in society.”

B. Modern Contract and Conventional Wisdom–The Differences Matter

In response to all of the criticism, the modern legal system was developed.

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67 Classical legal theorists assumed that every action within the private sphere they had so painstakingly carved out for individual action was free and voluntary. See supra Part I.A.; ALR, supra note 24 at 99-100. Consequently, any state action, whether in the form of court decision or legislation, constituted an unwarranted governmental intrusion into that private sphere of action. See supra Part I.A.; ALR, supra note 24 at 99-100. The Realists argued that this classical assumption was “fundamentally misguided.” ALR, supra note 24 at 99. According to the Realists, our existing and developing statutory and common law created a comprehensive network of regulations. ALR, supra note 24 at 99-100; Singer, Speech at 10-11. This network of legal rules set forth minimum standards for contracting and, in so doing, effectively advantaged certain parties and disadvantaged others. Singer, Speech, at 10-11; ALR, supra note 24 at 99-100. Regulation, in other words, provided both the foundation and framework upon which the self-regulating, free market was built, operated and continues to operate. Singer, Speech at 11. In other words, absent the legal structure provided by court and/or state imposed regulation, the self-regulating, free market would be unrecognizable as a market at all. Singer, Speech at 4. Consequently, the Legal Realists argued that the market itself was a regulatory structure. Singer, Speech at 4.

68 Professor Joseph Singer writes:

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

Singer, Realism, supra note 24 at 482; see also Cohen, Property, supra note 64 at ___ (ALR at 113) (“The ownership of land and machinery, with the rights of drawing rent, interest, etc., determines the future distribution of goods that will come into being–determines what share of such goods various individuals shall acquire.”)

69 Feinman, Critical, supra note 2 at 833 (footnote omitted); see also Feinman, Theory, supra note 27 at (btwn nn 13 & 14); Eisenberg, Revocation, supra note 2 at 281-82.

70 “Neoclassical” or “modern” legal thought dates from post-Realism to the present, so, approximately from 1940 on. Mensch, History, supra note 24 at 36.
Modern law, and particularly modern contract law, is a specific attempt to resolve some of the problems that led to the collapse of classical legal thought.\footnote{Feinman, Critical, supra note 2 at 830.}

So, for example, modern contract law shifts away from formal rules to legal standards.\footnote{Speidel, Domain, supra note 2 at 260; Feinman, Theory, supra note 27 at ___ (2d paragraph after n13).} It also recognizes that the market is not perfect and, in fact, contains anomalies in the form of information asymmetries and other bargaining inequalities.\footnote{Blake D. Morant, The Teachings of Dr. Martin Luther King, Jr. And Contract Theory: An Intriguing Comparison, 50 Ala. L. Rev. 63, 95, 96 (1998) (“Anomalies of the marketplace included opportunism, the lack of perfect information, and bargaining inequity.”) [hereinafter, “Morant, King”] (footnotes omitted); c.f. Duncan Kennedy 41 Maryland L. Rev. 563, 583 (1982)} In addition, the context within which the contract was formed now matters in a couple of different but important ways, namely, in providing interpretation for the agreed to contract terms or even in supplying additional terms.\footnote{Feinman, Theory, supra note 27 at ___ (paragraph w/ n 14); Speidel, Domain, supra note 2 at 260-61.}

In another specific move, modern contract law attempts to effectuate the norms of fairness and cooperation.\footnote{Feinman, Theory, supra note 27 at ___ (paragraph w/ n 14); Speidel, Domain, supra note 2 at 260-61.} Significantly, these modern norms are designed to supplement, not supplant, the classical values of personal autonomy and liberty.\footnote{Feinman, Theory, supra note 27 at __ (text w/ n 16); Morant, Race, supra note 2 at ___ (text w/ n. 83) (1997) (footnote omitted) [hereinafter Morant, Race].} Instead, modern contract law emphasizes fairness and cooperation in an effort to mitigate the harshest and/or most extreme aspects of market exchanges produced under the classical system.\footnote{Gabel & Feinman, supra note 8 at 497 (“The principle of personal autonomy underlying freedom of contract has been supplemented by modern principles of cooperation and fairness . . . .”)} Specifically, the concerns seem to center around coercion in the formation of contracts.\footnote{See supra text accompanying note 9.} The modern values are embodied in new policing doctrines recognized by modern contract law\footnote{Feinman, Theory, supra note 8 at 497; Feinman, Theory, supra note 27 at ___ (text after n 102).} and the emergence of reliance and restitution as alternatives to the traditional contract.\footnote{See Gabel & Feinman, supra note 8 at 497; id. at 497-98; E. Allan Farnsworth, Contracts at 21 (Aspen Publishers, 2004, 4th ed.). This conclusion is also based on modern contract law’s responses to the classical system, namely, the new policing doctrines. See, supra, text accompanying notes 12-21.}

The new contract policing doctrines include economic duress, misrepresentation, and unconscionability.\footnote{The traditional contract policing doctrines include duress, undue influence and fraud. Modern contract law continues to recognize them as well. (Add cites)} All of these doctrines focus on the fairness of the bargaining process (and sometimes the resulting exchange), as well as on the interdependence of the
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parties in contract formation. If argued successfully, all of the doctrines result in the rescission or unenforceability of bargains that were coerced in some way. 

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

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

II. Rearticulating the Evolutionary Story

The discussion in Part I represents the conventional (and uncontroversial) version

83 See supra text accompanying notes 12-21.
84 See Michael B. Metzger & Michael J. Phillips, The Emergence of Promissory Estoppel as an Independent Theory of Recovery, 35 Rutgers L. Rev. 472, 475, 508-09 (1983) (noting that promissory estoppel and unjust enrichment (i.e., restitution) became separate causes of action under the Restatement of Contracts); Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1263 (1980) (the modern system permits enforcement of a promise using the principles of bargain, detrimental reliance, and unjust enrichment); Judy B. Sloan, Quantum Meruit: Residual Equity in Law, 42 DePaul L. Rev. 399, 426 (1992) (restitution is “an alternative contract remedy upon a breach or repudiation of an express contract.”); Joseph M. Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1212-15 (1973) (restitution is a substantive basis of contractual liability)
85 A traditional contract is one that satisfies the classical formation elements of mutual assent and consideration. See Restatement (Second) of Contracts §17(1) (“... the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”)
86 See, e.g., Eric G. Anderson, The Restoration Interest and Damages for Breach of Contract, 53 Md. L. Rev. 1, 12 (1994) (restitutionary awards may provide relief when a contract is or has become unenforceable because it runs afoul of legal restrictions such as the Statute of Frauds); Kevin M. Teeven, A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance, 72 Tenn. L. Rev. 1111, 1140 (2005) (strict adherence to the classical system left parties that detrimentally relied on a promise without remedy) [hereinafter, Teeven, History]
87 Add cites
88 Lon L. Fuller and William R. Perdue, Jr., The Reliance Interest in Contract Damages I, 46 Yale L.J. 52, 53-57 (1936); Teeven, History, supra note 86 at 1140 (“Strict adherence to traditional doctrine left reliance hardship unremedied. In the interest of fairness, appellate courts began granting commercial reliance relief [in some instances].”)
of the evolutionary story of contract law. Under this rendition, it is the differences between the two contract law systems that make it possible, at least theoretically, for the modern system to undo some of the potential harshness produced by classical contract. The differences, in other words, are the most significant part of the story.

But this is where the conventional wisdom has it wrong. The ways in which the two systems remain the same are actually more important than their differences. In fact, it is the sameness between the systems that dooms modern contract law to fail in its efforts to address the coercion problem I identified earlier.  

A. Contesting Wisdom–The Sameness Is More Important

Modern contract law is not a complete rejection of the principles underlying the classical legal system. It actually retains key elements of it. Modern contract law thus represents only a partial, not a total, shift away from classical legal thought. Hence, under modern contract law, the individual remains the basic unit of social interaction. The individual still acts out of self-interest and her primary goal remains achieving her own ends in the market. It is therefore important to note that, notwithstanding its recognition that the market is not perfect, the modern system, like the classical system before it, continues to rely on the idea of a self-regulated market as a, if not the, primary means of mediating the competing and conflicting desires of these self-interested individuals. Furthermore, individual liability is still premised on

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89 See supra text accompanying notes 12-21.
90 Feinman, Critical, supra note 2 at 833; Mensch, History, supra note 24 at 41.
91 Feinman, Critical, supra note 2 at 833. Feinman argues that modern contract law can be referred to as “neoclassical” contract law. He writes that, “[t]he word “neoclassical” suggests the partial nature of the accommodation, indicating that neoclassical contract has not so far departed from classical law that a wholly new name is appropriate.” Feinman, Theory, supra note 27 at __ (text surrounding n 11). I agree with Feinman on this point. But, because I have made consistent reference to the “modern” system in this article, I will continue to use that nomenclature, to avoid confusion.
92 Feinman, Theory, supra note 27 at __ (text after n102)
93 Feinman, Relational, supra note 63 at 739, 743.
94 See supra text accompanying note 73.
95 According to Jay Feinman, there is an “ideology of the market” still regnant in legal education, politics, government and social thought generally. He writes:

This ideology presents the market as the primary form of social organization, as an empirical fact and a desirable state of affairs. The market effectively enables individuals to achieve their life projects while maximizing social welfare as a whole. It arises and proceeds through a spontaneous order, obviating centralized planning or significant government intervention. All of these virtues require no more than modest correction at the margins, and the job of the law is to maintain the conditions of the market, notably through establishing the ground rules of property and contract, providing legal institutions and mechanisms to facilitate market transactions, and maintaining social order.
voluntary agreement. Modern contract law thus retains a pivotal assumption of classical legal thought, namely, that private agreement represents a distinct area of social interaction and legal processes and, moreover, the fundamental belief that contract law can successfully regulate it. In so doing, modern contract law essentially retains the public/private distinction. And, as with classical legal thought, the heart of the private law system remains freedom of contract.

In effect, therefore, the paradigm under modern law remains the private law transaction. As a result, modern law retains most of the classical legal system’s premises, but with a few modifications. Those assumptions are laid out in Table 1 below.

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Feinman, Fall, supra note 25 at 293 (footnote omitted).

96 Feinman, Theory, supra note 27 at __ (text before n14)
97 Id. at __ (text w n 34); __ (text following n 101).
98 Mensch, History, supra note 24 at 39 (“Modern American legal thought continues to be premised on the distinction between private law and public law. Private law is still assumed to be about private actors with private rights, making private choices . . . .”) (emphasis in original). Note disagreement w/ Feinman, who thinks public/private = rejected
99 Feinman, Theory, supra note 27 at __ (text after n 14); Morant, Race, supra note 2 at __(text b4 n 83).
100 Feinman, Fall, supra note 25 at 1538; Mensch, History, supra note 24 at 39, 41.
101 See supra Part I.A.
## Table 1: The Basic Assumptions of the Classical & Modern Systems

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

To summarize the table, there are only three differences in the basic assumptions of the classical system vis-a-vis the modern system. Specifically, the modern system no
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longer assumes that the parties have equal (or roughly equal) bargaining power or equal access to information. Instead the modern system recognizes these as types of market failures and, consequently, no longer assumes that markets are perfect. All the other classical assumptions, however, are retained. The specific implications of this sameness for the modern contract law system are examined next.

B. Power is In the Core, and the Core of Contract is Formation

My argument, in a nutshell, is simply this: the parts of the classical legal system retained by modern contract law leave the core of classical contract, which is contract formation, completely intact. Formation is the core, because this is where power is centered. Modern contract law kept (and continues to keep) the core of contract, i.e., formation, intact. Indeed, it is easier to form a contract under modern contract law than it was under the classical regime. By making it easier to form a contract, the modern system actually expands one contracting party’s capacity for coercion. By leaving the core (formation) alone, therefore, modern contract law not only expands one party’s capacity to coerce her contracting partner, it also largely immunizes this coercion from effective challenge by the contract policing doctrines. Consequently, despite its claims and specifically because it leaves the core of contract intact, modern contract law will be unable to mitigate the coercion problem produced under the classical contract law system.

1. The core of classical contract law is formation, literally, mutual assent and consideration.102

Formation is the core for several reasons. First, the obvious one. Formation is where contract law starts. Stated alternatively, the rest of contract law follows formation. With the exception of reliance and restitution,103 the rest of contract law is implicated

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102 See Restatement (First) of Contracts §19(b) & (c); Morant, Race, supra note 2 at __ (text before and after n 71) (“Classical or traditional theory of contract law has as its infrastructure the strict adherence to procedural aspects of bargain formation; as a result, parties who conformed to the process of forming agreements, including the requisite elements of mutual assent and consideration, gain security in the axiom that their resultant bargain would be enforced.”) (footnote omitted); id. at (text before and after n 92) (“The notion of assent relates directly to the concept of voluntariness within the bargaining process. Consensual arrangements should be enforced if the parties’ entry into the bargain was truly voluntary. This requirement comprises a credo of the classic theorists who place significant emphasis upon the manifestation of assent and the presence of consideration. If these latter two elements are present, strict enforcement of the resultant agreement must ensue.”) (footnote omitted). See also Restatement (Second) of Contracts §17(1) (“... the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”)

103 As it is, restitution is not a contract at all. There is an entirely separate body of law governing restitution. See, e.g., Restatement of Restitution. As for reliance, there is only one reliance-based claim recognized in contract law and that is promissory estoppel. See Restatement (Second) of Contract §90.
only if a “traditional contract,” that is, one formed via mutual assent and consideration, exists.

Second, formation is where all of the classical (and now modern) system’s assumptions originate and are applied. Two private actors come together voluntarily, in their own self interest and armed with enough information to make a rational choice about whether to enter into a given market transaction. Formation, therefore, is also where the classical norms of individual autonomy and liberty are given full effect.

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

2. Power is in the core (formation)

Of the two formation elements, power emanates from mutual assent. Let me explain why.

Consideration is defined as “[t]he inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.” Much has been written about the element of consideration. I am not

While contract law does include provisions for restitution and reliance damages, see Restatement (Second) of Contracts §349 (reliance damages); Restatement (Second) of Contracts §373 (restitution damages in favor of non-breaching party), the bulk of contract law—formation, interpretation, performance, and breach—all deal with a traditional contract. See, generally, Restatement (Second) of Contracts.

Professor Melvin Eisenberg writes:

The school of classical contract law placed the process of offer and acceptance on center stage. Under the teachings of that school, contract was virtually identical to bargain, and bargains were conceived to be formed by offer and acceptance . . . At the instant that a bargain contract is formed by offer and acceptance, a promisor becomes potentially liable for expectation damages even if he changes his mind a nanosecond later. Because the formation of contract has such potent consequences, much can ride on the rules that govern the offer-and-acceptance process.
arguing that consideration is unimportant to contract formation as formation is currently constructed under modern contract law; it remains one of the two elements necessary to form a contract. But modern contract law only recognizes one test for consideration, namely, the bargain-theory. So, if something is bargained for, consideration is present. To be “bargained-for” simply means that “the parties manifestations must have reference to each other, i.e., that they be reciprocal.” Using the language of the Restatement (Second) of Contract, something is “bargained-for” “if it is sought by the promisor in exchange for his promise and is given by a promisee in exchange for that promise.”

Let’s now revisit the Party A–Party B example from earlier where, if you recall, Party B has something that Party A wants/needs. Assume that Party B has a house that he wants to sell. Party A has money that she is willing to part with to get Party B’s house, and Party B is willing to part with his house to get Party A’s money. As you can see in this transaction, Party A and Party B’s manifestations refer to each other—the house for the money. Party A is seeking Party B’s house in exchange for her money, and vice-versa. Consideration, therefore, is present. Indeed, one can usually assume that consideration is present in transactions taking place in the market.

The specific terms of the sale, however, must still be agreed to by the parties via mutual assent. For example, Party A and Party B have to agree to the sales price of the house, and many other things as well. And the terms that the parties agree on via mutual assent will ultimately determine whether the bargain is a good one or a bad one, as I

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See supra note 105.

109 See supra note 105.

110 See Melvin Aron Eisenberg, The Emergence of Dynamic Contract Law, 88 Calif. L. Rev. 1743, 1754 (2000) (“A basic axiom of the classical school, however, was that to constitute consideration a promise or performance must be bargained-for - the so-called bargain theory of consideration.”); Robert A. Hillman, Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study, 98 Colum. L. Rev. 580, 585 (1998) (“By the late nineteenth century, if not earlier, the most important basis for enforcing promises was the bargain theory of consideration. To be enforceable under the bargain theory, a promise had to be supported by consideration, meaning that the promisor would receive some thing in exchange for the promise.”); Kevin M. Tzeven, Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston’s Restatement, 34 U. Mem. L. Rev. 499, 512, 524 (2004); Farnsworth on Contracts §2.2 at 47 (4th ed. 2004).

111 Farnsworth on Contracts §3.1 at 108 (4th ed. 2004).

112 Restatement (Second) of Contracts §71(2).

113 See Farnsworth on Contracts §2.2 at 48 (4th ed. 2004); c.f. Charles L. Knapp, Rescuing Reliance: The Perils of Promissory Estoppel, 49 Hastings L.J. 1191, 1195 (1998) (“Bely stressing the law’s willingness to enforce bargains per se, whatever their terms, Holmesian contract doctrine moved away from earlier equitable notions of ‘just price’ or ‘unconscionability’ toward the proposition that virtually any exchange-based bargain, no matter how lop-sided, could and probably would be upheld as consideration-supported.”).
defined the latter term earlier.\textsuperscript{114} Consequently, power in the core of contract is not located in doctrine of consideration. Rather, it is centered in mutual assent.\textsuperscript{115}

So, mutual assent is key, because this is where most of the material terms are decided\textsuperscript{116} and the contract boilerplate is added. This is also where the critical decision is made whether to enter into the contract, or not. If the parties decide to enter the contract,\textsuperscript{117} then the state effectively steps in and says that these parties are bound to that contract.\textsuperscript{118}

Being “bound to the contract” means two different, but important things. First, at the point of formation, the state creates a presumption that the contract and all of its terms are valid. Second, the state will enforce the rights contained in that contract.

The presumption of validity exists by negative implication, because upon formation, the state imposes the burden of overcoming the presumption and proving that the contract or term(s) is invalid on the party challenging the contract or term(s).\textsuperscript{119} Mutual assent provides an excellent illustration of the mechanics of this claim.

It is well established that an objective approach governs any analysis of mutual assent, regardless of the formulation.\textsuperscript{120} As a result, to establish mutual assent, the law simply requires an outward and objective manifestation of it by both parties, i.e., through words and/or conduct.\textsuperscript{121} A good example is where both parties sign the contract. The parties’ signature would be the outward and objective manifestation of their assent to enter into the contract.

There are several formulations of mutual assent currently espoused in law review articles and elsewhere.\textsuperscript{122} All of these formulations attempt to grapple with modern day

\textsuperscript{114}See supra note 15.
\textsuperscript{115}C.f. Morant, Race, supra note 2 at (sentence before n88) (“To a significant degree, a crucial element in the probability of enforcement of these bargains [i.e., bargains concluded as a result of compliance with the classical contract formation rules] is the reality and genuineness of the parties’ assent.”) (footnote omitted).
\textsuperscript{116}See, e.g., Restatement (Second) of Contracts §27.
\textsuperscript{117}Since consideration is usually present in market transactions, see, supra, text accompanying note 114, contract formation would be complete when the parties expressed their assent to the contract.
\textsuperscript{118}See infra text accompanying notes 169-70.
\textsuperscript{119}Cites re burden of proof on an affirmative claim = party asserting the claim. See also infra text accompanying notes 121-74.
\textsuperscript{120}Farnsworth on Contract §3.6 at 115 (4\textsuperscript{th} ed. 2004).
\textsuperscript{121}Farnsworth on Contract §3.1 at 108, §3.6 at 114-15 (4\textsuperscript{th} ed. 2004).
\textsuperscript{122}I am not taking a position on whether any of these formulations are right or wrong. I am simply looking for current tests or standards used to determine whether mutual assent is established on a given set of facts.
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contacting practice, like the ubiquitous use of standard forms, and internet contracting in the form of browse wrap, shrink wrap and click wrap agreements, and rolling contracts, to name just a few. For example, Karl Llewellyn articulated a test in 1960 in which he argued that parties assenting to “boilerplate,” or standard form, contracts specifically assent to a handful of explicitly negotiated terms and “one thing more,” namely, “a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form…”

The Restatement (Second) of Contracts adopts §211, Standardized Agreements. This section provides in pertinent part that: “(1) except as stated in (3), where a party to an agreement signs or otherwise manifests assent to a writing . . . he adopts the writing as

123 See Todd Rakoff, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d. Cir. 2004) (“a browse wrap license is part of the web site, e.g., license terms are posted on a site's home page or are accessible by a prominently displayed hyperlink.] and the user assents to the contract when the user visits the web site.”)
124 See Pollstar v. Gigmania, Ltd., 170 F.Supp.2d 974, 981 (E.D. CA. 2000) (“A shrinkwrap license appears on the screen when the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance.”); see also Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., Adapting Contract Law To Accommodate Electronic Contracts: Overview and Suggestions, 26 Rutgers Computer & Tech. L.J. 215, 243 (2000) (“Commonly used in software packaging, “shrink-wrap” contracts provide that an offeree accepts all provisions of the sales agreement simply by opening the software package.”)
125 See Hotels.com, L.P. v. Canales, 195 S.W.3d 147, 154-155 (Tex. App. 2006) (“Click-wrap agreements require the user to review or scroll through terms and assent to the contractual terms by clicking a button that reads “I Agree” or manifesting some other means of express assent.”); Oracle USA v. Graphnet, Inc., 2007 WL 485959, 1 (N.D. CA. 2007) (“The “click-wrap agreement” requires the potential customer to manifest his or her assent to the terms of a license by clicking a button on a dialog box or pop-up window before the customer can download the software being licensed or before the software media will be shipped to the customer.”)
126 See Stephen E. Friedman, Improving the Rolling Contract, 56 Am. U. L. Rev. 1, 4 (2006) (“Rolling contracts are contracts formed over time, with the seller presenting the terms in batches. Some terms are provided before or during the purchase or order, while others are provided later. These transactions typically give the buyer a right to return a purchased item or cancel a purchased service to avoid the transaction.”); Clayton P. Gillette, Rolling Contracts as an Agency Problem, 2004 Wis. L. Rev. 679, 681 (2004) (“These arrangements essentially permit parties to reach agreement over basic terms, such as price and quantity, but leave until a later time, usually simultaneous with the delivery or first use of the goods, the presentation of additional terms that the buyer can accept, often by simply using the good, or reject, by returning it.”)
127 Llewellyn wrote:

Instead of thinking about “assent” to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the fewickered terms, and the broad type of the transaction, but one more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of theickered terms. The fine print which has not been read has no business to cut under the meaning of thoseickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

an integrated agreement w/ respect to the terms included in the writing.” In other words, a valid contract is formed on the terms included therein where there is a manifestation of assent to that writing. The only limitation is expressed in subsection (3), which reads: “where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”

More recently, Randy Barnett posits in the context of form contracts on the internet that, “[b]y clicking ‘I agree’ I am expressing an intent to be bound by the terms I am likely to have read (whether or not I have done so) and also by those unread terms in the agreement . . . that I am not likely to have read but that do not exceed some bound of reasonableness.”

And Clayton Gillette proposes that, “terms of rolling contracts should be considered binding as long as the process through which they emerged was one in which the nonreading, nonparticipating buyer was virtually represented in a manner that satisfies the same objectives as personal assent.” He then elaborates on a complex agency theory that would allow us to reach the conclusion that non-reading buyers’ interests have been adequately represented by proxies, like sellers, courts and/or regulators, such that all of the terms of rolling contracts should be considered binding.

There are a couple of basic, but significant, problems with these formulations. To begin with, all of the formulations would find mutual assent is present and, therefore, that a contract is formed. Indeed, all of the tests make establishing mutual assent quite easy, since mutual assent is presumed under all of them. All of the formulations, therefore, leave the core of contract, i.e., formation, intact.

At the same time, all of the formulations contemplate that the mutual assent so established may produce a bad bargain. To address this situation, three of the tests impose explicit limits on the terms to be included in the contract, while the other test would leave the determination to the courts. Notwithstanding the differences among the tests, however, I think it is fair to suggest that the applicable standard governing whether a given term is included in the contract would be whether the term was “reasonable.”

\[130\] Clayton Gillette, Rolling Contracts as an Agency Problem, 2004 Wis L. Rev. 679, 684 (footnote added).
\[131\] Id. at 685-721.
\[132\] Recall that consideration is usually present in market transactions. See supra text accompanying note 114. Consequently, both elements of contract formation–mutual assent and consideration–would be present.
\[133\] See supra note 14 (definition of “bad bargain.”)
The Llewellyn and Barnett tests explicitly use “reasonableness” as their standard. Specifically, under both, the contract is formed, but only on the reasonable terms.\footnote{See supra text accompanying notes 129 -130 (Llewellyn and Barnett tests).}

Under the Restatement test, the contract is formed, but a term is not included if one party has reason to believe that the other would not agree to it. But what kind of term is this? It seems plausible to think that one party would have reason to believe that the other would not agree to an “unreasonable” term.

As for Gillette’s test, he acknowledges that some contract terms may just not lend themselves to his theory, like terms that are “sufficiently susceptible to market failures[.].”\footnote{Gillette, supra note 130 at 689, 722.} In those situations, he states that third-party intervenors, i.e., courts and/or regulators, “would be superior proxies for non-reading buyers.”\footnote{Id. at 722.} Any intervention with respect to terms that cannot be accommodated by Gillette’s theory would have to be relegated to the courts. But by what standard should a court determine whether such a term is included? Given that “reasonableness” is a standard that courts are generally familiar with\footnote{See Stephen D. Thill, Assigning Error to Viar v. North Carolina Department of Transportation and State v. Hart: A Proposal For Revision of the North Carolina Rules of Appellate Procedure, 85 N.C. L. Rev. 1799, 1834 (2007) (stating that “reasonableness is a familiar standard that is already applied in many judicial contexts”); M. Mebane Rash, The North Carolina Supreme Court Engages in Stealthy Judicial Legislation: Doe v. Holt, 71 N.C. L. Rev. 1227, 1247 (1993) (stating that “courts are familiar with applying reasonableness standards).} and, more importantly, employ in contract disputes over terms anyway,\footnote{Leach v. Tingle, 586 So.2d 799, 802 (Miss. 1991) (“in ascertaining whether a contract is sufficiently definite to be enforceable, we have accepted that the court may employ a standard of reasonableness”); Ault v. Pakulski, 520 A.2d 703, 706 (Me. 1987) (“if a contract leaves open a key term, the law invokes the standard of reasonableness, and courts will supply the needed term”); see also Enzio Cassinis, Employment Law: The Tenth Circuit’s Stance on the Evidentiary Scope of a “De Novo” Review in Erisa Benefits Suits, 80 Denv. U. L. Rev. 529 n.72 (2003) (stating that “Courts generally subject the interpretation of the contract to a “reasonableness standard”); Kathryn J. Kennedy, Judicial Standard of Review in ERISA Benefit Claim Cases, 50 Am. U. L. Rev. 1083,1999 (2001) (stating that “under a contractual standard of review, the courts generally subject the interpretation of the contract to a reasonableness standard”).} it seems credible to suggest it here as well.

That all of the mutual assent formulations contemplate that a bad bargain might result and also suggest a test, of sorts, to address the situation is a positive thing. But it simply leads to the second major problem with the formulations. More specifically, all of them ignore what I call the “process problem.”

How is a party supposed to prove a term(s) is unreasonable? Essentially, the
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party faced with the bad bargain has to rely on modern contract law’s policing doctrines, like unconscionability, economic duress and misrepresentation, to prove that the term(s) at issue should not be included in the contract. Coercion in the bargaining process, therefore, has to be present, otherwise the policing doctrines are not available. And this is where things start to get very tricky, because, to begin with, the burden of establishing the relevant policing doctrine is on the complaining party who, in all likelihood, is the coerced party.

A bad bargain in the form of one or more bad terms has to be a given, otherwise no one would challenge those contract term(s). Granted, any contract could end up being a bad bargain for one or both contracting parties in retrospect, regardless of which party was responsible for including the term. So, this factor alone is not determinative. But, the party challenging a term(s) cannot, generally speaking, be responsible for the term(s)’s inclusion in the contract, because such a challenge by the including party will probably fail. The task, then, is to determine which party was responsible for

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139 Recall that, if established, each of these policing doctrines would make the bad bargain procured as a result of coercion avoidable or otherwise unenforceable in whole or in part. See supra text accompanying note 10.
140 See supra text accompanying notes 11-21 (coercion and the policing doctrines)
141 See supra text accompanying notes 17-20 (discussing the requirement of a bad bargain.)
142 I acknowledge, of course, that there may be strategic reasons for the drafting party to bring a “bad bargain” claim that it knows will ultimately not succeed. For example, circumstances changed since contract formation and the drafting party now wants something further or different from the other party that the other party is not willing to give. (If the other party was willing to go along with the drafting party, there would be no reason to bring—or threaten to bring—a “bad bargain” claim.) Not always, but at least for some portion of the time, this kind of tactic would simply be another example of coercion by the party with the capacity to coerce. I make no comment here on whether coercion in general is good, bad, right or wrong. I simply note that coercion producing a bad bargain is a problem identified by the modern system as needing to be addressed. See supra text accompanying notes 11-21.
143 If the party challenging the term is responsible for its inclusion in the contract, either because it drafted the contract or insisted on the term’s inclusion therein, it is extremely difficult to conceive of circumstances that would enable such a challenge to succeed. Under the rules of interpretation, any ambiguity in the contract would be construed against the drafter. Add cites. In addition, none of the contract policing doctrines would be available to the party responsible for including the term, for fairly obvious reasons. A party usually cannot harm herself--by including the “bad” terms--and then come into court and ask for help in getting out of the bad bargain she created. (Add cites–clean hands; ?) The contract risk allocation defenses would similarly be unavailable: mistake, whether mutual or unilateral, could not be argued, because the party responsible for the term’s inclusion is not mistaken as to its existence; and the specific risk allocation elements of impracticability of performance (Restatement (Second) of Contracts §261) and frustration of purpose (Restatement (Second) of Contracts §265) would most likely allocate the risk of the term’s inclusion to the party that was responsible for including it in the contract. (Add cites) Consequently, because it is highly unlikely that the party responsible for the inclusion of a term(s) could successfully challenge its inclusion in court, I conclude that it is highly unlikely that the including party would be the party subsequently challenging the term. But see supra note 142.
including the term(s). We know that coercion in the bargaining process is assumed. But coercion for what purpose? The answer here as it was earlier is that the coercion is employed to procure a bad bargain. In other words, the coercion must lead to the inclusion of the term(s) that create the “bad bargain.” If this is not the case, query the reason for the coercion at all. So, which party to a contract can insist on including specific terms in the contract? The answer is the party with the ability to coerce. Hence, the party most likely to be challenging the term(s) of a bad bargain using the contract policing doctrines will be the coerced party.

Compounding the process problem is the fact that it is very expensive to bring a lawsuit of any kind, which would obviously include one raising the contract policing doctrines. It is also questionable whether an action over small individual claims will be brought in the first instance, given: the existence of mandatory arbitration, forum selection and choice of law clauses in most standard form contracts, all of which have been upheld as valid by the courts; the federal changes that make it much harder to

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144 See supra text accompanying note 142.
145 See supra text accompanying notes 11-21.
147 See Scott Baker & Kimberly D. Krawiec, Incomplete Contracts in a Complete Contract World, 33 Fla. St. U. L. Rev. 725, 737 (2006) ("Litigation costs, specifically attorney fees, make it expensive to pursue a contract claim."); c.f. Paul M. Secunda, “Arasoi O Mizu Ni Nagasu” or “Let the Dispute Flow to Water”: Pedagogical Methods for Teaching Arbitration Law in American and Japanese Law Schools, 21 Ohio St. J. on Disp. Resol. 687, 698 (2006) ("On the other hand, civil cases in the federal court that went to trial took an average of twenty-one months to dispose of in 2004, while state courts fared even worse, taking an average of twenty-two months to dispose of tort and contract cases that went to trial in 1996."); Steven B. Hantler, Mark A. Behrens & Leah Lorber, Is the “Crisis” in the Civil Justice System Real or Imagined?, 38 Loy. L.A. L. Rev. 1121, 1194 n.21 (2005) (a survey of state courts of general jurisdiction in nation's seventy-five largest counties found that [contract cases take 21.5 months to resolve.])
bring class actions by private practitioners as well as legal service providers, like Legal Aid Societies, and, of course, the practical reality that a private attorney may not be readily available to litigate an individual claim where the amount at stake is small. And, what empirical studies there are indicate that claims based on the contract policing doctrines are not very successful, even when they are asserted in court.

In addition, the transaction and, hence the lawsuit, contemplated by the classical and now the modern contract law systems is one involving two parties. But many contracts involve third parties. A common scenario much in the news recently involves mortgage brokers. Recall the hypothetical from earlier where Party A wanted to buy Party B’s house. Assume that Party A bought Party B’s house and then, later, went to a mortgage broker for a loan to remodel the house. Assume further that the broker coerced Party A, through fraudulent misrepresentations, for example, into entering a bad refinancing loan, secured by a second mortgage on the house, with one of the many lenders broker represents. Party A in this example has a claim of misrepresentation against the lender, because she has privity of contract with the lender. But, Party A would have to prove the broker’s agency to make the lender (as the principal) liable for the coercive acts of the agent broker. Agency may or may not be an easy thing to prove in a given case. The bottom line, however, is that having to prove agency adds another step, and hence more complexity and expense, to an already complicated

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150 In theory, the 2005 changes to Class Actions (CAFA) were intended to reduce the ability to bring class actions. Technically, it gave greater federal court jurisdiction over class actions under diversity jurisdiction. The purpose was to reduce the number of state court actions -- some state jurisdictions were very well known for their willingness to certify classes and award large damages. It also sought to curtail perceived abusive cases that benefited plaintiff's attorneys, but conveyed minimal benefits to the class (e.g., it restricted coupon settlements). (add cites)


152 C.f. F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 326 (2008) (“Lawsuits are expensive and time consuming, and therefore most individuals will not bring a suit that has little or no potential for a damages award.”)


154 See supra Part I.A.

155 Cites

156 Cites
process.157

Finally, even assuming that a contract claim is brought158 using one or more of the contract policing doctrines AND that the claim is successful, the contract remedy—usually rescission—comes with a hitch. Again, let’s use Party A (the home buyer) from our previous hypothetical. Assume now that Party A is in default on her second mortgage payments. Assume further that Party A successfully asserts a misrepresentation claim against the lender. Under contract law, the contract would be rescinded for the misrepresentation.159 But here’s the hitch—Party A’s remedy comes with a restitution requirement.160 That is, upon rescission, Party A would be required to return to lender the equivalent of the loan proceeds.161 If she cannot make restitution,162 Party A will not be granted her rescission.163 For this reason, the restitution requirement could actually preclude the contract claim from being brought in the first instance. Hence, this is yet another part of the process problem.

In sum, my argument thus far goes like this: power in contracting is in the core, which is formation; and it is particularly localized in the element of mutual assent.164 All of the current formulations of mutual assent are tilted in favor of finding that mutual assent exists.165 Once mutual assent is established (and the contract is formed), the parties are bound. Being bound means, in the first instance, that a state-created presumption of validity attaches to the contract so formed. The burden is then imposed on the coerced party to prove (using one or more of the contract policing doctrines) that a

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157 See supra notes 146-47.
158 This, of course, further assumes that the coerced party has the resources, i.e., the time, money, etc., to bring the claim.
159 Cite—usual remedy for misrep is rescission.
161 The law would actually require Party A in the above hypothetical to tender the restitution prior to bringing her lawsuit. Id.
162 But a successful claim based on a contract policing doctrine does not include any money damages. (Cites) Only a breach of contract claim would entitle the non-breaching party to money damages. (Cites) A party asserting a contract policing doctrine, either as an affirmative claim or as a defense, is not claiming that the other party breached the contract. Instead, she is claiming that the contract is avoidable or otherwise unenforceable because of coercion in the bargaining process. So, how is Party A, who defaulted on her second mortgage payments, supposed to make restitution? Party A would have to come up with the money from somewhere—family, friends, or, if available, by borrowing against the equity in her home. If Party A is unable to satisfy the restitution requirement, for whatever reason, she could very well be put in the unenviable position of having to choose between bankruptcy or losing her house.
163 A court could grant Party A in the hypothetical a reasonable amount of time to pay the restitution. E. Allan Farnsworth, Contracts §4.15 at 255 n.20 (4th ed. 2004). But, this does not eliminate the restitution requirement and whether such an accommodation is ordered is in the discretion of the court.
164 See supra Part II. B.2.
165 See supra text accompanying notes 126-35.
contract term(s) is unreasonable. Given the “process problem” I discussed in detail above, however, it seems unlikely that such a challenge to the reasonableness of a contract term(s) will be successful very often. In fact, the empirical studies that exist support this conclusion. Consequently, the presumption of validity that arises upon formation of the contract extends to both the contract and ALL the terms of that contract as well.

The practical consequence of all of this is that an objective manifestation of mutual assent to all the modern forms of contracting (i.e., standard forms, rolling contracts, click, shrink or browse wrap contracts, etc.) becomes assent to both the reasonable and unreasonable terms in those contracts. Practically speaking, therefore, “being bound” to the contract in the first sense means that all of the terms of the contract will probably end up being literally binding against the coerced party.

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

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

3. **Modern contract law kept (and continues to keep) the core (formation) intact.**

Modern contract law made no changes to the elements required to form a contract. Mutual assent and consideration are still all that are needed to form a valid, traditional contract. Indeed, modern contract law leaves the core alone, meaning that all the new doctrines it recognizes, and its interpretation of existing doctrines, assume that a contract is formed in the first instance.

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166 See supra Part II. B.2.
167 Id.
168 See supra text accompanying note 159.
169 See supra note 68.
170 Id.
171 See Restatement (Second) of Contracts §17(1).
172 For example, the parol evidence rule applies by definition only to “a writing intended by the parties as
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a final expression of their agreement with respect to such terms as are included therein[.]." U.C.C. §2-202; accord Restatement (Second) of Contracts §213(a), §210. In other words, a contract has to exist before the parol evidence rule comes into play.

The same is true of the modern approach to contract interpretation. Interpretation can involve two different questions. The first is whether a contract was formed. Restatement (Second) of Contracts §200 cmts a & b. In this scenario, however, the applicable rules governing that analysis are found in Chapter 3, Formation of Contracts–Mutual Assent, and primarily in Restatement §§17-20. Id. In contrast, the second interpretive question asks, whose meaning of a disputed contract term prevails? Here, the parties are now disputing what they meant when they manifested their assent to the contract. The court is called upon to decide which party’s meaning prevails through the process of interpretation which, under the modern approach, draws no distinction between interpretation and construction. E. Allan Farnsworth, Contracts §7.7 at 440 (4th ed. 2004). Consequently, the process of interpretation now determines the meaning to be attributed to disputed contract language and the legal effect of that language. It is true that the process of interpretation may result in a failure of mutual assent. See Restatement (Second) of Contracts §201(3). But this does not negate the argument that the parties were operating under the assumption that a valid contract existed. Absent such a common understanding between the parties, there would be no one disputing the meaning of contract language to determine his/her performance obligations. In other words, if the parties did not think they were bound by a contract and, hence, subject to liability for failing to perform, common sense says that no one would be asking a court to determine whose meaning prevailed, i.e., the interpretive question posed by §201. The existence of a valid contract must therefore be presumed. C.f. David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1816 (1991) ("the hypothetical bargain framework is invoked [by courts] . . . to interpret “ambiguous” language; that is, to apply the language of a contract to a particular contingency which subsequently arises, “the court [] construe[s] the language . . . so as to give effect to what would have been the intention and agreement of the parties had their attention been drawn to events as they actually were to occur.”) (footnote omitted).

The same is true for contract gap-fillers, also known as default rules and/or implied terms—they, too, presuppose that a contract is already formed. See Randy E. Barnett, The Sound of Silence: Default Rules and Contractual Consent, 78 Va. L. Rev. 821, 822-24 (1992) (discussing the evolution of the terminology and what he perceives as its significance). There seems to be general agreement that all contracts are incomplete, to one degree or another. Id. at 821. Default rules therefore supply the terms that are implied by the courts, or a statute, like the Uniform Commercial Code, to fill in the gaps of incomplete contracts. Id. at 822, 825-26; Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87, 87-88 (1989). Consequently, if default rules provide the terms that fill in the gaps of an incomplete contract, it seems quite clear that a contract has to exist. Absent the existence of a contract, in other words, there would be no need to discuss, let alone impose, a default rule, or gap-filler; there would simply be no one disputing his/her performance obligation under a contract to which a contract term would need to be implied. The existence of a valid contract must therefore be presumed. See, e.g., Charny, 89 Mich. L. Rev. at 1816 ("courts use the [hypothetical bargain] rule as one of “construction”: to supply “implied duties” in the face of a contingency that no language in the contract addresses . . . ."[W]hen supplying terms of an effective but incomplete contract a court properly picks those for which the parties probably would have bargained, had they anticipated the problem.")) (footnotes omitted).

Similarly, if established on the facts, all the contract policing doctrines, like fraud, undue influence, duress, unconscionability, and misrepresentation, either result in an avoidable contract or make a contract unenforceable in whole or in part. See Restatement (Second) of Contracts §§164 (misrepresentation), 175 (duress), 177 (undue influence), 208 (unconscionability), see also supra text accompanying notes 10-11. Clearly, only a contract that exists can later be made avoidable or unenforceable. There would simply be no reason to invoke a contract policing doctrine if a contract did not exist in the first instance.
4. The modern contract law system actually makes it easier to form a contract.

One of the hallmarks of classical contract law was its adherence to rigid and technical rules, particularly in the context of contract formation. The parties had to satisfy very specific requirements regarding contract formation, and either the requirements were met, or they weren’t. If they were met, a contract was formed. Conversely, if the rules were not satisfied, no contract was formed. Classical contract law thus envisioned the formation process looking something like this:

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

Finally, the risk allocation defenses, like mistake (bilateral or unilateral), impracticability of performance, and frustration of purpose by definition only apply to contracts already in existence. For example, the Restatement rule for mutual mistake explicitly states that:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Restatement (Second) of Contracts §152 (emphasis added). This language clearly contemplates that a contract was formed by the parties, albeit under a legal mistake. The rule for unilateral mistake contains the same language. See Restatement (Second) of Contracts §153(“Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract . . . “). The rules for impracticability of performance and frustration of purpose are even more explicit. The Restatement rule for impracticability, for example, states in pertinent part that, “[w]here, after a contract is made, a party's performance is made impracticable . . . his duty to render that performance is discharged . . . .”

Restatement (Second) of Contracts §261 (emphasis added). The rule for frustration of purposes contains identical language. See Restatement (Second) of Contracts §265 (“Where, after a contract is made, a party's principal purpose is substantially frustrated . . . his remaining duties to render performance are discharged . . . .”)

173 See supra Part I.A..
174 Morant, Race, supra note 2 at (text before and after n.71) (“Classical or traditional theory of contract law has as its infrastructure the strict adherence to procedural aspects of bargain formation[,]”); Knapp, Offer, supra note 2 at 322; Eisenberg, Offers, supra note 2 at 271; Metzger & Phillips, supra note __ at 481.
return. Or, the offeree may delay too long in accepting, so that the power of acceptance created by the offer has been terminated either by a time limit (explicit or implicit) contained in the offer itself or by the offeror’s withdrawal (‘revocation’) of his offer.\textsuperscript{175}

The classical system’s approach to contract formation can be contrasted with the modern system’s approach, which has been adopted by Article 2 of the Uniform Commercial Code and the Restatement (Second) of Contracts.\textsuperscript{176} Contract formation under both, and therefore under modern contract law, is consciously made much easier.\textsuperscript{177} For example, both Article 2 and the Restatement (Second) recognize that a contract can be formed by words or conduct,\textsuperscript{178} and even though the exact moment of mutual assent cannot be identified,\textsuperscript{179} or is delayed,\textsuperscript{180} and even if there are missing, material terms.\textsuperscript{181} In short, modern contract law recognizes that contracts can be formed in stages, rather than only upon the happening of the clearly identified events required by classical contract.\textsuperscript{182}

\textsuperscript{175} Knapp, Crystal & Prince, Problems in Contract Law: Cases and Materials at 34 (6\textsuperscript{th} ed. 2007).

\textsuperscript{176} Knapp, Offer, supra note 2 at 317.

\textsuperscript{177} Add cites re ‘consciously made much easier.” (Llewellyn, Corbin, etc.)

\textsuperscript{178} See U.C.C. §2-204(1) (“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”); Restatement (Second) of Contracts §19(1) (“The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by a failure to act.”)

\textsuperscript{179} See U.C.C. §2-204(2) (“An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.”); Restatement (Second) of Contracts §22(2) (“A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.”)

\textsuperscript{180} U.C.C. §2-305 \textit{cmt 1} (“This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that “an agreement to agree is unenforceable” if the case falls within subsection (1) of this section, and rejects also defeating such agreements on the ground of “indefiniteness”. Instead this Article recognizes the dominant intention of the parties to have the deal continue to be binding upon both.”); Restatement (Second) of Contracts §27 (“Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof . . . .”)

\textsuperscript{181} See, e.g., U.C.C. §2-305(1) (“The parties if they so intend can conclude a contract for sale even though the price is not settled.”); Restatement (Second) of Contracts §27 \textit{cmt a} (“Parties who plan to make a final written instrument as the expression of their contract necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract the terms of which include an obligation to execute subsequently a final writing which shall contain certain provisions.”)

\textsuperscript{182} See Knapp, Offer, supra note 2 at 321-22 (“the notion that the formation of a complicated contract often involves stages of agreement is by now not a novel one. Whether one speaks of a ‘contract to bargain,’ an ‘agreement to negotiate,’ or a ‘binding preliminary commitment,’ the lesson is essentially the same: sometimes contracts are formed not by flipping a switch, but by gradually turning up a dimmer.”) (footnotes omitted); ; see also U.C.C. §2-305 \textit{cmt 1}; Restatement (Second) of Contracts §27 \textit{cmt a}. 

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Contract Formation and the Entrenchment of Power

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5. By making it easier to form a contract, modern contract law not only expands one party’s capacity to coerce, it also largely immunizes this coercion from effective challenge by modern contract’s policing doctrines.

Making it easier to form a contract expands one party’s capacity for coercion, because formation, particularly mutual assent, is where the party with the capacity to coerce gets to impose the contract terms it wants, either through some type of negotiation process or through the use of its standard form.\textsuperscript{183} Then, upon formation, the presumption of contract (and term) validity springs up and immediately inures to the benefit of the coercing party.\textsuperscript{184} The easier it is to form a contract, therefore, the easier it is for the coercing party to obtain the presumption of contract validity. And obtaining this presumption is very important to the coercing party, because the burden of rebutting the presumption is then imposed on the coerced party, using one or more of the contract policing doctrines.\textsuperscript{185} It is extremely difficult to overcome the presumption of contract validity in practice, because of the process problems associated with bringing such a claim.\textsuperscript{186} Consequently, the difficulty faced by the coerced party in disproving the presumption of contract validity could conceivably give the party with coercive capacity greater license to impose more onerous (or one-sided) terms during contract formation. At a minimum, and specifically because it is so difficult to rebut the presumption of contract validity in practice, the presumption of contract validity essentially immunizes the coercion taking place during the bargaining process from effective challenge by modern contract’s policing doctrines.

III. Conclusion

The modern contract law system identified coercion during contract formation as a problem created by the classical system significant enough to warrant a modern solution in the form of new contract policing doctrines. I set out to examine whether modern contract was going to be successful in addressing the problem it identified.

As I have demonstrated, modern contract law’s new contract policing doctrines will not effectively address the coercion problem it identified. Indeed, to eliminate coercion in the bargaining process, modern contract law must make changes to the core (formation), because the core is where power in contracting is created and embedded. But modern contract did not change the core, except to make it stronger and harder to penetrate. Instead, it relies on changes it made outside of the core, like the contract

\textsuperscript{183} See supra Part II.B.2.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
policing doctrines, to achieve its goal. Because the contract policing doctrines are inadequate to the task, modern contract law will be largely unsuccessful in eliminating, or even tempering, the coercion it believes was created (or ignored) under the classical system. Significantly, the modern contract law system will also likely make the coercion problem worse.

That modern contract law will not be successful in its attempt to address the coercion problem is no surprise. As I argue in my next paper, this is because the modern contract law system as a whole is flawed. It is flawed because it is premised on several well-documented basic assumptions that are undermined by critiques from sources as diverse as the Legal Realists, Ian Macneil, the Critical Legal Studies movement, and, more recently, behavioral law and economics. If the modern contract law system as a whole is flawed, then the solutions it employs to correct contract-based problems will probably not work well in practice. Clearly, this is a hypothesis worth testing empirically, and one that I am currently gathering data on for a future paper. If the hypothesis holds true in practice, then the task will be to determine where to go from there. What are the solutions? This is the hardest question of all, but one that I plan to address in yet another paper. The prefatory answer seems to turn on where we choose to focus—should intervention come at formation or performance? Which of these stages in the life of a contract will yield the better (or preferred) results? Of course, working out new solutions presupposes some kind of consensus that the modern contract law system is either flawed or at least not working well; and my work (in this article and my next one) endeavors to make both of these points.