Contesting Conventional Wisdom in Contract Law

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DANIELLE KIE HART *

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 the classical system. But herein lays 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 “expanded” 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 expanded 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 contract law system.

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Introduction

Legal scholars and academics draw a distinction between “classical contract” and “modern contract” that, for the most part, turns on the differences between the two systems. For example, the classical system relied on technical and rigid rules, whereas

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

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, 16 (2004) (“Under the classical revival, formality reigns at two levels. First, the contract doctrine itself becomes more formal: ostensibly clear, rigid rules are favored over flexible standards. Second, the substance of the rules favors formality in contracting practices. ”)

[hereinafter, Feinman, Un-Making]; Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 774 (2002) (post-modern contract law “embraced with fervor all the earlier-disdained incidents of classical formalism—the ‘duty to read,’ the ‘plain meaning’ rule, a vigorous approach to the parol evidence rule, a high tolerance for ‘puffing,’ etc.—with the effect, intended or not, of reducing or eliminating any constraints on the activities of the drafters of form contracts.”)

[hereinafter, Knapp, Private]; Ralph James Mooney, The New Conceptualism in Contract Law, 74 Or. L. Rev. 1131, 1133-34 (1995) (“the 1980s and early 1990s resurrected many of the conceptualist abstractions of classical contract law. . . . By ‘conceptualism,’ I mean a style of legal thought and reasoning that emphasizes definitions, categories, and syllogistic logic.”) For internal consistency and to avoid confusion in nomenclature, however, I will refer to the contract law system that I am critiquing as “modern” contract law.

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the modern system shifted to more flexible standards. And the list goes on.

Conventional wisdom has it that: modern contract law evolved, at least in part, to remedy problems created or left unaddressed by the classical contract law system; modern contract law is different from classical contract in ways that make the current system work better than the older regime, that is, in ways that rectify some of those problems; and, therefore, the differences between the two systems are the most important part of the contract evolutionary story. Whether this conventional wisdom is true depends on whether modern contract has been successful in correcting the problems produced by the classical system. If it has not been successful, then the conventional wisdom is wrong. And if the conventional wisdom is wrong, then one could argue that at least parts of modern contract law are no better than the classical contract system that it replaced, because whatever problems it perceived in the classical system remain. I will use modern contract’s expanded “policing doctrines” to work through an analysis of this hypothesis.

undermines the contract/no contract dichotomy by not focusing so intensely on the language of writings, but instead opening up the boundaries of ‘the contract’ to substantive influences from more general commercial practices (trade usage), the prior interactions of the parties (course of dealing), and even their interactions within the contract after the written document is executed (course of performance)."

See infra part I.B.

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Modern contract law gives expanded recognition to several contract policing doctrines, 9 namely, unconscionability, economic duress and misrepresentation. 10 Each of these doctrines focuses on some type of bargaining misbehavior that produces a bad bargain for one of the parties. Each of these expanded policing doctrines then attempts to address the bargaining misbehavior by making the contract procured as a result of the misbehavior avoidable 11 or otherwise unenforceable in whole or in part. 12

9 Unconscionability, duress and misrepresentation (fraud) were all recognized by the classical legal system, if not before. See, e.g., Larry A. DiMatteo & Bruce Louis Rich, A Consent Theory of Unconscionability: An Empirical Study of Law in Action, 33 Fla. St. U. L. Rev. 1067, 1070-72 (2006) (detailing the history of unconscionability prior to codification in the U.C.C. and adoption by the Restatement (Second) of Contracts); 28 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts §71:1 (4th ed. 2003) (citing works by Pollock & Maitland and Bracton which recognize duress at English common law); See, e.g., Woburn National Bank v. Woods, 89 A. 491, 492 (N.H. 1914) (recognizing fraud). All of these policing doctrines, however, were given expanded recognition under modern contract law. See, e.g., DiMatteo & Rich, supra at 1072 (“The major impact of the codification of unconscionability in Article 2 was its transformation from a remedy-limiting device to a substantive doctrine.”); Knapp, Private, supra note 1 at 771 (unconscionability); John A. Spanogle, Jr., Analyzing Unconscionability Problems, 117 U. PA. L. REV. 931, 931 (1969) (unconscionability); 28 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts §71:19 nn. 9—15 (4th ed. 2003) (citing numerous cases from 1936 through 2002, i.e., through the modern contract period [1930s-1990s] and beyond, to demonstrate the doctrine of economic duress was recognized throughout the U.S.); see also Ellen S. Podgor & Candace Zierdt, Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing, 96 Ky. L.J. 1, 26-27 (2007) (discussing emergence of economic duress); Restrayment (First) of Contracts §470 (1932) (recognizing claim for misrepresentation); Stewart Macaulay, et al., Contracts: Law in Action at 435 (2003) (until the mid-twentieth century, courts followed caveat emptor in a broad sense in contracting and other areas of law, but noting that there have since been a number of exceptions that have morphed into modern-day misrepresentation.) [hereinafter, Macaulay, Casebook].


11 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.”)

12 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 . . . .”)
While the type of bargaining misbehavior targeted by each of the expanded 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 withholding) material information to (or from) the other party, incorrectly, improperly 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 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

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15 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).
16 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).
17 I am defining a “bad bargain” to mean one in which the terms unreasonably favor one party.
18 I am distinguishing the scenario I describe in the text from the fraud in the factum situation, where Party A, who only speaks Spanish, is told in Spanish that she is buying a refrigerator, but the written contract, all in English, indicates that she is actually buying a car; or when Party A is told she is signing a letter when the document is actually a mortgage. In cases of fraud in the factum, one party is misled into coming to the bargaining table. Contracts obtained in this fashion are void ab initio. In these situations, “the other party neither knows nor has reason to know the character of the proposed agreement,” and, therefore, “the effect of such misrepresentation is that there is no contract at all.” See Farnsworth, Contracts, supra note 8, at §4.10; Restatement (Second) of Contracts §163.
additional sale to Party A at any cost. To prevent the sale to Party A from being lost, therefore, Party B might employ sales tactics to persuade Party A to enter into the fair and reasonable contract.

So, let’s assume that Party B uses sales tactics that, unbeknownst to Party B, constitute actionable coercion, and assume further that those sales tactics 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, for example, that explicitly requires something to be substantively wrong with the contract. Legally, therefore, Party A has a claim or, more likely, a defense, against Party B for the latter’s coercive conduct. Assuming, however, that Party A wants/needs the goods or service, and the terms are reasonable and fair, how realistic is it that Party A would end up challenging the contract or not performing her end of the bargain, even in the face of coercive conduct by Party B? More pragmatically, without something substantively

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

20 See infra Part I.A.

21 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).

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

23 Even assuming Party A filed suit and won, what would be Party A’s damages? Party A, in other words, would sue to rescind the contract based on misrepresentation or duress, or to have the court find it unenforceable in whole or part based on unconscionability. Party A would not be filing a breach of contract action, and only a breach of contract claim results in damages. See Restatement (Second) of Contracts §346(1) (“The injured party has a right to damages for any breach by a party against whom the contract is enforceable . . . .”); Julien Ross, A Fair Day’s Pay: The Problem of Unpaid Workers in Central Texas, 10 Tex. Hsp. J. L. & Pol’y 117, 137 (2004) (“Generally, the nonbreaching party’s remedy for breach of contract is money damages that will put the nonbreaching party in the position it would have enjoyed if the contract had been performed.”)
wrong with the contract, what attorney would take that case? In either event, it seems highly unlikely that a lawsuit (with Party A as the plaintiff or, more likely, as the defendant) would arise.  

The only way coercion presents an actionable problem, therefore, is if it results in a bad bargain. Thus, coercion plus a bad bargain is what the modern contract law system identifies as a problem created, or at least not adequately addressed, by the classical system, and which the modern system attempts to remedy via its expanded contract policing doctrines. Otherwise, there would be no reason for modern contract law to adopt the expanded policing doctrines.

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

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

25 I need to make clear up front that I am just identifying one problem (coercion plus a bad bargain) and the solution that modern contract law came up with to remedy it (i.e., its expanded contract policing doctrines). Other policing doctrines were recognized by classical contract law, i.e., duress, undue influence, minority, and mental incapacity. See John P. Dawson, Economic Duress—An Essay in Perspective, 45 MICH. L. REV. 253, 263 (1947) (discussing development of undue influence and referring to 19th century cases to emphasize his points); 5 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 9:5 n.4 (4th ed. 2003) (noting numerous cases from as early as the mid to late 1800s recognizing the minority doctrine in contract law); id. § 10:3 n.7 (using cases from the 1880s to illustrate the rule for mental incapacity); see also supra note 9 (duress). The existence of these other (or “traditional”) policing doctrines under classical contract law demonstrates that the classical system was aware that coercion existed in contract formation and/or that contracts needed to be policed for other reasons, i.e., the status of one of the parties was entitled to special solicitude. I am not focusing on any of the traditional doctrines, however, for the following reason. Conventional wisdom says that the differences in modern contract law were supposed to correct the classical contract problems. I am therefore only focusing on the policing doctrines which modern contract gave expanded recognition to. The expanded policing doctrines, in other words, are the modern solution to the classical coercion problem. At the same time, because all of the traditional contract policing doctrines are peripheral to the core of contract, which is formation, they would all also be subject to the process problem I discuss in detail later in the article; and they, too, will be largely ineffectual in correcting the problems they are intended and/or designed to address.

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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. By leaving the core of contract intact, therefore, modern contract law has ensured that the expanded policing doctrines it adopted will not alleviate, let alone correct, the coercion problem.

Consequently, the conventional wisdom, which says in part that modern contract law is different from classical contract in ways that make the current system work better than the older regime, is wrong. Instead, the ways in which the two systems are the same is more critical, because it is the sameness that determines whether modern contract law will be successful in remedying the problems it identified under the classical system. My examination in this article of modern contract’s policing doctrines strongly suggests that modern contract will not achieve this remedial goal. So, while I do not propose a solution to the problems inherent in modern contract in this article, I do advance a proposition that I think is worth stating, namely, that the modern contract law system is not working the way in which we ourselves assert that it should be.

My article proceeds as follows. 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

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27 See infra Part II.A.
28 I will undertake to do so, however, in a later article. For right now, I am examining the question of whether the modern contract law system is flawed and/or not working well.
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 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 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. By making it easier to form a contract, therefore, 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 ostensibly adopted to remedy it. Consequently, 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 I 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.

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

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29 See infra part II.B.4.
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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. This 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 segregated was the idea of a self-regulating market.

The classical legal theorists’ model of the market assumed that value was
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subjective\textsuperscript{37} and that everything was capable and, hence, subject to the exigencies, of
money exchange.\textsuperscript{38} 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{39} 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{40} Contract law became the core of this private law system.\textsuperscript{41} 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{42} and within this realm of private
agreement, individual freedom was protected from state coercion.\textsuperscript{43} Translated, this
meant that, within the private law sphere, individuals were free to agree on whatever
contract terms they wanted\textsuperscript{44} and the state would ostensibly play no role in regulating the
substantive terms of those private relations.\textsuperscript{45} This, of course, is the very classical notion
of freedom of contract.\textsuperscript{46}

Indeed, the role of the courts under this system of private law was to enforce the
bargain of the parties as made.\textsuperscript{47} At most, courts were to ensure procedural fair play and
nothing more.\textsuperscript{48}

\textsuperscript{37} Horwitz, Foundations supra note 36 at 947.

\textsuperscript{38} Peter Gabel & Jay Feinman, Contract Law as Ideology at 500, in The Politics of Law, A Progressive
Critique, (David Kairys ed. 1998) supra note 8 at 500.

\textsuperscript{39} Horwitz, Foundations supra note 36 at 947.

\textsuperscript{40} Singer, Realism supra note 31 at 478.

\textsuperscript{41} Id. at 481.

\textsuperscript{42} Feinman, Critical supra note 2, at 831.

\textsuperscript{43} Feinman, Theory supra note 34, at (btwn nn12-13).

\textsuperscript{44} Atiyah, supra note 2, at 403; Singer, Realism supra note 31, at 479.

\textsuperscript{45} Singer, Realism supra note 31, at 479; ALR supra note 31, at 99.

\textsuperscript{46} See, e.g., Samuel Williston, Freedom of Contract, 6 Cornell L. Rev. 365, 373 (1921).

\textsuperscript{47} Gillian K. Hadfield, An Expressive Theory of Contract: From Feminist Dilemmas to a
Reconceptualization of Rational Choice in Contract Law, 146 U. Pa. L. Rev. 1235, 1262 (“law aims
exclusively to give effect to the arrangements and to protect the interests voluntarily created by contracting
parties.”) (1998); Singer, Realism supra note 31, at 479; ALR (“The Critique of the Public/Private
Distinction in American Legal Realism”), supra note 31, at 99; see also, Dalton, supra note 33, at 1010;
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{48} Atiyah, supra note 2, at 404; ALR, supra note 31, at 99; Dalton, supra note 33, at 1014 (“our principal
vision of contract law is still one of a neutral facilitator of private volition. We understand that contract law
is concerned at the periphery with the imposition of social duties . . . [b]ut we conceive the central arena to
be an unproblematic enforcement of obligations voluntarily undertaken . . . . Although we concede that the
law of contract is the result of public decisions about what agreements to enforce, we insist that the
overarching public decision is to respect and enforce private intention.”)

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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{49} That is, individuals could not be forced to enter into a contract;\textsuperscript{50} they were free to contract only if they wished to do so.\textsuperscript{51} Second, the individuals themselves were deemed to be roughly equal to each other in terms of bargaining power\textsuperscript{52} and access to information;\textsuperscript{53} they bargained at arms-length,\textsuperscript{54} and were independent and completely

\textsuperscript{49} Hadfield, supra note 47, at 1247 (“Contract law proceeds from the premise that obligation is established by the existence of voluntary and informed choice to enter into a contract.”); 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 31, 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.); Morant, Race, supra note 2, at (text b/w nn 91 & 92] (“Consensual arrangements should be enforced if the parties’ entry into the bargain was truly voluntary.”)

\textsuperscript{50} Singer, Realism supra note 31, at 479; Atiyah, supra note 2, at 403.

\textsuperscript{51} Singer, Realism, supra note 31, 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 47, 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{52} 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{53} 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.”); c.f. 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{54} 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. 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].
self-interested.\textsuperscript{55} 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.\textsuperscript{56} In other words, individuals were rational actors.\textsuperscript{57} Finally, the classical theorists believed that the self-regulating market was the great neutralizer.\textsuperscript{58} That is, free competition in a self-regulated market, one unencumbered by state interference, either in the form of legislation or court imposed obligations,\textsuperscript{59} would effectively and fairly mediate the competing and conflicting desires of these self-interested individuals.\textsuperscript{60} Implicit in this understanding of the market, therefore, was the assumption that the market itself was neutral, impartial and perfect.\textsuperscript{61}

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.”\textsuperscript{62} Here, free will prevailed against state power.\textsuperscript{63} 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.\textsuperscript{64} 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.”\textsuperscript{65}

\textsuperscript{55} Feinman, Critical, supra note 2, at 832.
\textsuperscript{56} Atiyah , supra note 2, at 403.
\textsuperscript{57} Hadfield, supra note 47, at 1236, 1255; Eisenberg, Relational, supra note 54, 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.
\textsuperscript{58} Feinman, Fall, supra note 32, at 1541.
\textsuperscript{59} Singer, Realism, supra note 31, at 479-80.
\textsuperscript{60} Atiyah supra note 2, at 404.
\textsuperscript{61} See generally, Singer, Realism, supra note 31, at 477-82 (detailing the history and evolution of the classical conception of the self-regulating market.); Eisenberg, Relational supra note 54, at 808 (“classical contract law was implicitly based on a paradigm of bargains made . . . in a perfect market.”); see also Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741, 746 (1982) (describing the 4 elements characterizing a perfect market) [hereinafter Eisenberg, Bargain].
\textsuperscript{62} Singer, Realism, supra note 31, at 481; Dalton, supra note 33, at 1012-13.
\textsuperscript{63} Singer, Realism, supra note 31, at 481.
\textsuperscript{64} Atiyah, supra note 2, at 408; Feinman, Fall, supra note 32, at 1543; Morant, Race, supra note 2, at (btwn nn73&73); Mensch, Ideology, supra note 36, at 753, Dalton, supra note 33, at 1010; Morant, MLK, supra note 26, at 91.
\textsuperscript{65} ALR, supra note 31, 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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66 Singer, Realism, supra note 31, at 479-81; Dalton, supra note 33, at 1010.
67 Singer, Realism, supra note 31, at 478.
68 These two areas of private law were essentially reconceptualized as implicating only state imposed obligations. See id. at 480.
69 Id.
the public/private distinction upon which much of classical legal thought was based.\footnote{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 15; Singer, Realism, supra note 31; ALR, supra note 31, Chap 4; Horwitz, The Transformation of American Law Chap. 6-8.}

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.\footnote{The Realists argued that coercion is ubiquitous and “lies at the heart of every bargain.” Mensch, Ideology, supra note 36, at 764; see generally Hale, Coercion, supra note 71. 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. Singer, Realism, supra note 31, at 486; see, generally Hale, Coercion, supra note 71; Cohen, Property, supra note 71; 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. Singer, Realism, supra note 31, at 486; Mensch, Ideology supra note 36, at 764; see generally Hale, Coercion, supra note 71; Cohen, Property, supra note 71; “Ownership[, in turn,] is a function of legal entitlement[,]” since it is the state who creates and protects, for example, the property right. Singer, Realism, supra note 31, at 487-88; Mensch, History, supra note 31, at 34-35; see generally Cohen, Property, supra note 71; Hale, Coercion, supra note 71. 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.} They argued, moreover, that contracts were in fact public, not private, because the state enforces them.\footnote{There are at least two dimensions to the state enforcement of private contract argument. The first involves the decision as to which contracts to enforce. The second involves the use of state force. More specifically, contract law does not enforce every promise a person makes. It only enforces some promises, leaving others to individual conscience or honor. Cohen, Contract, supra note 71, at 585; Singer, Realism, supra note 31, 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. Singer, Realism, supra note 31, at 485; see generally Cohen, Contract, supra note 71. 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 71, at 585-86; Singer, Realism, supra note 31, 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 31, at 484-85; Feinman, Critical, supra note 2, at 841-42; see generally Cohen, Contracts, supra note 71. Contracts are therefore public, not private.}

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.
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. 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.\textsuperscript{78}

So, for example, modern contract law shifts away from formal rules to legal standards.\textsuperscript{79} It also recognizes that the market is not perfect\textsuperscript{80} and, in fact, contains anomalies in the form of information asymmetries and other bargaining inequalities.\textsuperscript{81} In addition, the context within which the contract was formed\textsuperscript{82} now matters in a couple of different but important ways,\textsuperscript{83} namely, in providing interpretation for the agreed to contract terms\textsuperscript{84} or even in supplying additional terms.\textsuperscript{85}

In another specific move, modern contract law attempts to effectuate the norms of fairness and cooperation.\textsuperscript{86} Significantly, these modern norms are designed to supplement, not supplant, the classical values of personal autonomy and liberty.\textsuperscript{87} 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.\textsuperscript{88} Specifically, the concerns seem to center around coercion in the formation of contracts.\textsuperscript{89} The modern values are embodied in expanded policing doctrines recognized by modern contract law\textsuperscript{90} and the emergence of reliance and

\textsuperscript{78}See supra text accompanying notes 1-7.
\textsuperscript{79}Speidel, Domain, supra note 2, at 260; Feinman, Theory, supra note 34, at ___ (2d paragraph after n13); Knapp, Offer, supra note 2, at 318; E. Allan Farnsworth, Some Prefatory Remarks: From Rules to Standards, 67 Cornell L. Rev. 634 (1982).
\textsuperscript{80}Eisenberg, Bargain, supra note 61, at 750 (noting that “many contracts are made in markets that are highly imperfect.”)
\textsuperscript{81}Morant, MLK, supra note 26, at 95, 96 (“Anomalies of the marketplace included opportunism, the lack of perfect information, and bargaining inequity.”) (footnotes omitted); c.f. Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Maryland L. Rev. 563, 583 (1982); C.f. Mensch, History, supra note 31, at 47.
\textsuperscript{82}Professor Eisenberg would characterize “the context within which a contract is formed” to mean that modern contract law has become more individualized and subjective vis-à-vis the classical approach, which was strictly standardized and objective. See, e.g., Eisenberg, Dynamic, supra note 2, at 1756 (discussing the modern approach to consideration) and 1756-60 (discussing the modern approach to interpretation).
\textsuperscript{83}Knapp, Offer, supra note 2, at 317.
\textsuperscript{84}See, generally, Eisenberg, Dynamic, supra note 2, at 1756-60.
\textsuperscript{85}Feinman, Theory, supra note 34, at ___ (paragraph w/ n 14); Speidel, Domain, supra note 2, at 260-61.
\textsuperscript{86}Feinman, Theory, supra note 34, at ___ (text w/ n 16); Morant, Race, supra note 2, at ___ (text w/ n. 83); Knapp, Offer, supra note 2, at 318; Eisenberg, Relational, supra note 54, at 1111-12.
\textsuperscript{87}Gabel & Feinman, supra note 38, at 497 (“The principle of personal autonomy underlying freedom of contract has been supplemented by modern principles of cooperation and fairness . . . .”); Morant, MLK, supra note 26, at 97 (“While clinging to the notion of contractual freedom and bargaining autonomy, neoclassicists appreciated some fo the realities of bargaining differences.”) (footnote omitted).
\textsuperscript{88}Gabel & Feinman, supra note 38, at 497; Feinman, Theory, supra note 34, at ___ (text after n 102).
\textsuperscript{89}See Gabel & Feinman, supra note 38, at 497, 497-98; Morant, MLK, supra note 26, at 97; Farnsworth, Contracts, supra note 8, §1.7 at 21. This conclusion is also based on modern contract law’s responses to the classical system, namely, the expanded policing doctrines. See, supra, text accompanying notes 12-21.
\textsuperscript{90}Knapp, Offer, supra note 2, at 318. The traditional contract policing doctrines include minority, mental
restitution as alternatives to the traditional contract.  

The expanded contract policing doctrines include economic duress, misrepresentation, and unconscionability. All of these doctrines focus on the fairness of the bargaining process (and sometimes the resulting exchange), as well as on the interdependence of the parties in 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

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10. Contesting Conventional Wisdom in Contract Law

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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. Contesting Wisdom

The discussion in Part I represents the conventional version 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. Rearticulating the Evolutionary Story–The Sameness Is More Important

Modern contract law is not a complete rejection of the principles underlying the classical legal system. It actually retains key elements of it. Modern contract law thus represents only a partial, not a total, shift away from classical legal thought.

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].")

But see supra note 30.

99 C.f. Mensch, History, supra note 31, at 41 ("the vocabulary of modern treatises[, like Corbin on contracts] is still the vocabulary of classical doctrine—questions of justice emerge within discussions of offer and acceptance . . . The message is that we can advance beyond the silly stage of formalism while still retaining the basic structure and premises of classical thought . . . [But] Corbin . . . leave[s] unresolved the old conflict between formal rules and general standards of justice . . . .") (emphasis in original).

100 See supra text accompanying notes 10-17.

101 Feinman, Critical, supra note 2, at 833; Mensch, History, supra note 31, at 41.

102 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 34, 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.
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 the primary means of mediating the competing and conflicting desires of these self-interested individuals. Furthermore, individual liability is still premised on 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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104 Feinman, Theory, supra note 34, at ___ (text after n102)
105 Feinman, Context, supra note 70, at 739, 743.
106 See supra text accompanying notes 80-81.
107 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.

Feinman, Fall, supra note 32, at 293 (footnote omitted).

108 Feinman, Theory, supra note 34, at ___ (text before n14)
109 Id. at ___ (text w n 34); ___ (text following n 101); Dalton, supra note 33, at 1014.
110 Mensch, History, supra note 31, at 39 (“[M]odern American legal thought continues to be premised on the distinction between private law and public law. Private law is still assumed to be about private actors with private rights, making private choices . . . .”) (emphasis in original).
111 Feinman, Theory, supra note 34, at ___ (text after n 14); Morant, Race, supra note 2, at ___ (text b4 n 83).
112 Feinman, Fall, supra note 32, at 1538; Mensch, History, supra note 31m at 39, 41.
113 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>
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<tbody>
<tr>
<td>Contract law is private, meaning it is a private transaction between two private parties;</td>
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<td>Individuals act as rational actors in the marketplace;</td>
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</tr>
<tr>
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</tr>
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<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>
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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
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.\textsuperscript{114} The specific implications of this sameness for the modern contract law system are examined next.

\textbf{B. Power is In the Core, and the Core of Contract is Formation}

My argument, in a nutshell, is 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. But, 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. Thus, despite its claims and specifically because it leaves the core of contract intact, modern contract law will be unable to mitigate the coercion problem left unaddressed by the classical contract law system.

\textsuperscript{114} One could reasonably question whether modern contract law retained the classical assumption that parties bargain at arm’s length and are most likely strangers to one another, given Professor Ian Macneil’s relational contract theory. In brief, Professor Macneil’s theory assumes that a lot of the time parties are likely to have dealt with each other before and/or are likely to do so again, either in long-term evolving contractual relationships or in repeat transactions of essentially similar nature. Consequently, the parties are not necessarily strangers to one another. See generally Ian R. MacNeil, Relational Contract Theory: Challenges and Queries, 94 Nw. U. L. Rev. 877 (2000). I agree that Professor Macneil’s relational contract theory, which he has advanced since the mid-1960s, is a direct challenge to the classical and modern assumption noted above. My argument and, hence my response to the query, however, is that Professor Macneil’s theory is a critique of modern contract law’s continued adherence to the classical assumption that contracts are private and discrete exchanges between strangers. If modern contract law did not adhere to the classical assumption, that is, if modern contract law adopted Professor Macneil’s theory, it would be unnecessary to mount the critique, or continue it. C.f. Feinman, Context, supra note 70, at 743 (“If we think of relational contract as a reaction to [modern] contract, the emphasis on cooperation is a corrective to [modern] law’s retention of the core classical position of self-interest.”)}
1. The core of classical contract law is formation, literally, mutual assent and consideration.  

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, the rest of contract law is implicated 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.

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115 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.”); Morant, MLK, supra note 26, at 93 (“A basic tenet of traditional, classic contract theory requires that parties steadfastly obey the rules of bargain formation in order to have binding agreements. An exchange of promises which are ‘bargained for’ qualifies as an enforceable contract. Those whose agreements manifest mutual assent and contain consideration may expect the enforcement of their resultant agreements, barring some impediment.”) (footnotes omitted).

116 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. 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.

117 See supra Table 1.

118 See infra Part II.B.4.
2. 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.\textsuperscript{119} 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.\textsuperscript{120}

\textsuperscript{119} See Restatement (Second) of Contracts §17(1).
\textsuperscript{120} For example, the parol evidence rule applies by definition only to “a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein[,]” 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. While there is overlap between the two questions, see, e.g., Lon L. Fuller & Melvin Aron Eisenber, Basic Contract Law 393-95 (8\textsuperscript{th} ed. 2006), I think they determine fundamentally different things. But see Eisenberg, Dynamic, supra note 2, at 1756-60 (combining the contract formation and the contract interpretation questions into a discussion of “contract interpretation” generally). The first question is whether a contract was formed at all. Restatement (Second) of Contracts §200 cmts a & b; Restatement (Second) of Contracts §20. 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 disputed contract language prevails? This second question is governed by Restatement (Second) of Contracts §201. Here, the parties are now disputing what they meant when they manifested their assent to the contract. The court is called upon to decide which party's meaning prevails through the process of interpretation which, under the modern approach, draws no distinction between interpretation and construction. Farnsworth, Contracts, supra note 8, §7.7 at 440. Consequently, the process of interpretation now determines the meaning to be attributed to disputed contract language and the legal effect of that language. It is true that the process of interpretation may result in a failure of mutual assent. See Restatement (Second) of Contracts §201(3). 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. If not, if they were disputing the very existence of a valid contract, they would (or should) have argued lack of mutual assent under Restatement (Second) §20. Cf. 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
3. 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’)

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 11-12. 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.

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, “[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made . . . ., the contract is voidable . . . .” Restatement (Second) of Contracts §152 (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. 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.

121 See supra Part I.A..
122 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 32, at 481.
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 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.123

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.124 Contract formation under both, and therefore under modern contract law, is consciously made much easier.125 For example, both Article 2 and the Restatement (Second) recognize that a contract can be formed by words or conduct,126 and even though the exact moment of mutual assent cannot be identified,127 or is delayed,128 and even if there are missing, material terms.129

123 Knapp, Casebook, supra note 6, at 34; see also, Mensch, Ideology, supra note 36, at 755 (According to [the classical model of contract formation], only a voluntary exchange of promises (the traditional offer and acceptance) gave rise to contractual obligations. At the moment of exchange (and not a second sooner), a right of expectation sprang into being.”)

124 Knapp, Offer, supra note 2, at 317.


126 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.”)

127 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.”)

128 U.C.C. §2-305 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 . . . .”)
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Modern contract law thus recognizes that contracts can be formed in stages, rather than only upon the happening of the clearly identified events required by classical contract.130

4. Power is in the core (formation)

Of the two formation elements,131 power emanates from mutual assent.132 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.”133 Much has been written about the element of consideration.134 I am not

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129 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 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.”)

130 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); Eisenberg, Dynamic, supra note 2, at 1796; Farnsworth, Contracts, supra note 9, §3.5; see also U.C.C. §2-305 cmt 1; Restatement (Second) of Contracts §27 cmt a.

131 See supra text accompanying note 115.

132 Professor Melvin Eisenberg writes:

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

Eisenberg, Offers, supra note 2, at 271 (footnote omitted); C.f. Knapp, Future, supra note 125, at 947 (questioning the importance of consideration); but see James Gordley, Equality in Exchange, 69 Cal. L Rev. 1587 (1981) (reconsidering the principle of equality in exchange and arguing that remains a governing principle in determining the outcome of contract disputes, particularly those involving one-sided bargains).


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. In fact, in many business contexts, consideration is actually irrelevant, because the law will enforce a bargain even in the absence of it.

To return to the hypothetical, even though consideration is clearly present in the sale of the house, the specific terms of the sale must still be agreed to by the parties via
mutual assent. 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 defined the latter term earlier. Consequently, power in the core of contract is not located in doctrine of consideration. Rather, it is centered in mutual assent.

So, mutual assent is key, because this is where most of the material terms are decided 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, then the state effectively steps in and says that these parties are bound to that contract.

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). Mutual assent provides an excellent illustration of the mechanics of this claim.

There are several formulations of mutual assent currently espoused in law review articles and elsewhere, all of which attempt to grapple with modern day contracting

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141 See supra note 17.
142 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).
143 See, e.g., Restatement (Second) of Contracts §27.
144 Since consideration is usually present in market transactions, see, supra, text accompanying note 139, contract formation would be complete when the parties expressed their assent to the contract.
145 See infra text accompanying notes 192-93.
146 See Ho Cheol Kim, Burden of Proof and the whole Prima Facie Case: The Evolving History and Its Application in the WTO Jurisprudence, 6 RMDJGLB 245, 251 (2007) (Stating that the complaining party bears the burden of proof in a civil case); Robert Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 VNLR 1205, 1282 (1981) (Explaining that generally it is the plaintiff in a civil action who must prove his claim); Patriotti v. General Elec. Co., 587 A.2d 231, 232 (Me. 1991) (Holding that the party claiming the affirmative defense has the burden of proof); Du Frene v. Kaiser Steel Corp., 41 Cal.Rptr. 834, 837 (Cal. Ct. App. 1965) (Upholding that a party must submit evidence to prove the party’s case if seeking the affirmative on an issue or risk defeat); see also infra text accompanying notes 170-93.
147 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.
practice, like the ubiquitous use of standard forms,\textsuperscript{148} and internet contracting in the form of browse wrap,\textsuperscript{149} shrink wrap\textsuperscript{150} and click wrap agreements,\textsuperscript{151} and rolling contracts,\textsuperscript{152} to name just a few. While these formulations come from different ideological perspectives, they are all tilted in favor of finding that mutual assent exists. In other words, it is easy to establish mutual assent under modern contract law.\textsuperscript{153} This is


\textsuperscript{149}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.”)

\textsuperscript{150}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.”)

\textsuperscript{151}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.”)

\textsuperscript{152}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.”)

\textsuperscript{153}One could argue that mutual assent may not be as easy to establish as I claim, because modern contract law tries to give effect to the parties’ intent. The parties’ intent, in turn, will be determined by facts and circumstances, some of which are subjective, that the classical approach to formation simply did not take into account. Professor Melvin Eisenberg argues this approach in his dynamic theory of contract law. See Eisenberg, Dynamic, supra note 2; see also Nancy S. Kim, Evolving Business and Social Norms and Interpretation Rules: The Need For A Dynamic Approach to Contract Disputes, 84 Neb. L. Rev. 506 (2005). I agree with the general claim that it is possible under modern contract law to find that mutual assent cannot be established. But I disagree that this is a high burden, for two reasons. First, all the modern formulations are tilted in favor of finding that mutual assent exists and, in several instances, mutual assent is actually presumed. See infra text accompanying notes 156-68. Second, I agree that “subjective” elements come into play in determining whether the parties intended to be bound. For example, the court will look to see what these parties did by their words and/or conduct to manifest their assent. But the test for “intent to be bound” is still an objective one—would a reasonable person believe that the parties intended to engage in those actions? –and strikes me as so minimal that the more usual result is that such an intent would be found. See infra text accompanying notes 154, 157-60; see also Farnsworth, Contracts, supra

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especially since an objective approach governs any analysis of it, regardless of the formulation.\textsuperscript{154} Significantly, because all of the formulations make it easy to find mutual assent, they all suffer from the same problem,\textsuperscript{155} their differing ideologies notwithstanding.

Mainstream modern contract law, as expressed in contract law hornbooks,\textsuperscript{156} focuses on the parties’ intent to be bound, to determine whether mutual assent has been manifested.\textsuperscript{157} The test is straightforward; it asks: did the parties engage in actions (words or conduct) that manifested their assent?\textsuperscript{158} If so, did the parties intend to engage in those actions?\textsuperscript{159} If so, the parties’ assent to the agreement will be legally established, even if they did not intend or even understand the legal consequences of their actions.\textsuperscript{160}

Conservative theorists, like Professors Randy Barnett and Clayton Gillette, and Judge Frank Easterbrook posit the following formulations of mutual assent:

- In the context of form contracts on the internet, Professor Randy Barnett suggests 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.”\textsuperscript{161}

- Professor Clayton Gillette proposes that, “terms of rolling contracts should be considered binding as long as the process through which they emerged was one in which the nonreading, nonparticipating buyer was virtually represented in a manner

\textsuperscript{154} Farnsworth, Contracts, supra note 8, §3.6 at 115); Murray, On Contracts, supra note 153, at §30; see also Robert Hillman, Contract Lore, J. Corp. L. 505, 511-12 (2002); Joseph M. Perillo, The Origins of the Objective Theory of Contract Formation and Interpretation, 69 Fordham L. Rev. 427 (2000). To establish mutual assent under an objective approach, the law simply requires an outward and objective manifestation of it by both parties, i.e., through words and/or conduct. Farnsworth, Contracts, supra note 8, §3.1 at 108, §3.6 at 114-15. A good example of this 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.

\textsuperscript{155} See infra text accompanying notes 170-93.

\textsuperscript{156} See generally Farnsworth, Contracts, supra note 8; Joseph M. Perillo, Calamari & Perillo on Contracts (5\textsuperscript{th} ed. 2003) [hereinafter Perillo, Treatise]; and Murray, On Contracts, supra note 153.

\textsuperscript{157} See Farnsworth, Contracts supra note 8, §3.6; Perillo, Treatise supra note 156, §2.4; and Murray, On Contracts, supra note 153, at §31.

\textsuperscript{158} Farnsworth, Contracts, supra note 8, §3.6 at 115.

\textsuperscript{159} Id.

\textsuperscript{160} See Farnsworth, Contracts, supra note 8, §3.7 at 117; Perillo, Treatise, supra note 156, §2.4; and Murray, On Contracts, supra note 153, §31.

\textsuperscript{161} Randy Barnett, Consenting to Form Contracts, 71 Fordham L. Rev. 627, 638-39 (2002).
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.

Judge Easterbrook articulated a standard in ProCD, Inc. v. Zeidenberg, and Hill v. Gateway 2000, Inc., which essentially holds that a contract between a manufacturer and buyer is formed when the buyer has a chance to review any hidden terms (i.e., hidden because the terms came in the box with the goods), and assents to them by continued use of the purchased product.

More progressive formulations of mutual assent include:

- Karl Llewellyn’s 1960 proposal for standard forms 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’ §211, Standardized Agreements, which 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 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.”

All of the formulations of mutual assent have two things in common. First, they would all find mutual assent is present and, therefore, that a contract is formed. Indeed,

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162 Gillette, supra note 152, at 684 (footnote added).
163 Id. at 685-721.
164 86 F.3d 1447 (7th Cir. 1996).
165 105 F.3d 1147 (7th Cir. 1997).
167 Restatement (Second) of Contracts §211(1).
168 Restatement (Second) of Contracts §211(3).
169 Recall that consideration is usually present in market transactions. See supra text accompanying note 139. Consequently, both elements of contract formation—mutual assent and consideration—would be present.
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mutual assent is presumed under all of them. All of the formulations, therefore, leave the core of contract, i.e., formation, intact.

Second, because all of the formulations would establish mutual assent, they all suffer from what I call the “process problem.” Obviously, none of the formulations discussed foreclose a challenge to the contract term(s) and, indeed, several of them contemplate that the mutual assent so established may produce a bad bargain. A challenge (either by way of claim or defense) to the contract term(s) constituting the bad bargain would be subject to a reasonableness standard. But how is a party supposed to prove a term(s) is unreasonable? Essentially, the party faced with the bad bargain has to rely on modern contract law’s policing doctrines, like unconscionability, economic duress and misrepresentation, to prove that the term(s) at issue should not be included in the contract. Coercion in the bargaining process, therefore, has to be present, otherwise these particular policing doctrines are not

170 For example, Llewellyn’s and Barnett’s tests each contemplate that unreasonable terms may be present in the contract. See supra text accompanying notes 161, 166.

171 A reasonableness standard would govern such a challenge, because: (a) two of the formulations provide for such a standard explicitly, see, e.g. the Llewellyn and Barnett tests, supra text accompanying notes 129-130.; (b) another formulation suggests a reasonableness standard, see, e.g., the Restatement test, supra text accompanying notes 167-68. 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; and (c) yet another (Gillette’s test) would leave the determination to the courts. See supra text accompanying notes 162-63. Gillette acknowledges that some contract terms may just not lend themselves to his theory, like terms that are “sufficiently susceptible to market failures.” Gillette, supra note 152, 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.” 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.

Given that “reasonableness” is a standard explicitly and implicitly suggested by the mutual assent formulations, courts are generally familiar with it and, more importantly, already employ it in contract disputes over terms, it seems credible to suggest it for Gillette’s theory and as the applicable standard here as well. See 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); 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”).

172 Recall that, if established, each of these policing doctrines would make the bad bargain procured as a result of coercion avoidable or otherwise unenforceable in whole or in part. See supra text accompanying notes 11-12.
available. And this is where things start to get very tricky, because the burden of establishing the relevant policing doctrine is on the complaining party who, in all likelihood, is the coerced party.

So, this is how the process problem works: the burden is on the coerced party to prove that a contract term(s) is unreasonable using one or more of the expanded contract policing doctrines. But these contract policing doctrines are peripheral to the core

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173 See supra text accompanying notes 9-26.
174 See supra note 146.
175 A bad bargain in the form of one or more bad terms has to be a given, otherwise no one would challenge those contract term(s) using modern contract’s expanded contract policing doctrines. Granted, any contract could end up being a bad bargain for one or both contracting parties in retrospect, regardless of which party was responsible for including the term. So, this factor alone is not determinative. But, the party challenging a term(s) cannot, generally speaking, be responsible for the term(s)’s inclusion in the contract, because such a challenge by the including party will probably fail. If the party challenging the term is responsible for its inclusion in the contract, either because it drafted the contract or insisted on the term’s inclusion therein, it is extremely difficult to conceive of circumstances that would enable such a challenge to succeed. Under the rules of interpretation, any ambiguity in the contract would be construed against the drafter. See Carter v. Four Seasons Funding Corp., 97 S.W.3d 387, 398 (Ark. 2003); Joyner v. Adams, 361 S.E.2d 902 (N.C. App. 1987) In addition, none of the contract policing doctrines would be available to the party responsible for including the term, for fairly obvious reasons. A party usually cannot harm herself, i.e., by including the "bad" terms, and then come into court to ask for help in getting out of the bad bargain she created. Richard C. Levin & Susan Erickson Marin, NAFTA Chapter 11: Investment and Investment Disputes, 2-SUM NAFTA: L. & Bus. Rev. Am. 82, 115 n.87 (1996) (“As a general rule under the law of contracts, a party with “unclean hands” may not be released unilaterally from its contract obligations to the detriment of the other party for reasons related to its own wrongdoing.”); Kevin C. Kennedy, Equitable Remedies and Principled Discretion: The Michigan Experience, 74 U. Det. Mercy L. Rev. 609, 619 (1997) (“The clean hands maxim is most often cited in contract cases. It requires that plaintiffs seeking equitable relief must themselves be free of any unconscionable conduct. Application of the maxim is thus not restricted to illegal, void, or voidable transactions only.”) The contract risk allocation defenses would similarly be unavailable: mistake, whether mutual or unilateral, could not be argued, because the party responsible for the term’s inclusion is not mistaken as to its existence, see Restatement (Second) of Contracts §§151 & 153; 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. C.f. §153 cmt b (“The most obvious case of allocation of the risk . . . is one in which the parties themselves provide for it by their agreement.”); §261 cmt c. (in determining whether a party has assumed a greater obligation depends on, among other things, “the degree to which the other party supplied the terms[].”). Consequently, because it is highly unlikely that the party responsible for the inclusion of a term(s) could successfully challenge its inclusion in court, I conclude that it is highly unlikely that the including party would be the party subsequently challenging the term.

The task, then, is to determine which party was responsible for including the term(s). We know that coercion in the bargaining process is assumed. But coercion for what purpose? The answer here as 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.
(formation), and they are literally peripheral because they are not available to the coerced party until after a contract is formed.\textsuperscript{176} At that point, i.e., after formation, the effect of the policing doctrines is muted if not barred by practical factors, the most important of which are: (1) the huge costs of litigation;\textsuperscript{177} (2) boilerplate clauses in standard form contracts,\textsuperscript{178} like mandatory arbitration provisions, forum selection and choice of law clauses;\textsuperscript{179} (3) federally imposed limits on class actions by private attorneys\textsuperscript{180} and legal service

\textsuperscript{176} See supra note 120.
\textsuperscript{177} It is very expensive to bring a lawsuit of any kind, which would obviously include one raising the contract policing doctrines. See Scott Baker & Kimberly D. Krawiec, Incomplete Contracts in a Complete Contract World, 33 Fla. St. U. L. Rev. 725, 737 (2006) (“Litigation costs, specifically attorney fees, make it expensive to pursue a contract claim.”); F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 326 (2008) (“Lawsuits are expensive and time consuming, and therefore most individuals will not bring a suit that has little or no potential for a damages award.”); Robert Sprague & Karen L. Page, The Private Securities Litigation Reform Act and the Entrepreneur: Protecting Naïve Issuers from Sophisticated Investors, 8 Wyo. L. Rev. 167, 175 (2008) (“Filing a lawsuit initiates a long, complex, and expensive process.”); Dispute Resolution in Action: Examining the Reality of Employment Discrimination Cases: Proceedings of the 2007 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination and Alternative Dispute Resolution, 11 Employee Rts. & Emp. Pol'y J. 139 (2007) (“After all, lawsuits are lengthy, expensive, and perhaps most importantly, can be psychically damaging to litigants.”); c.f. 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.\)


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providers;\(^{181}\) and, of course, (4) the practical reality that a private attorney may not be readily available to litigate an individual claim (either as plaintiff’s or defense counsel) where the amount at stake is small.\(^{182}\) Indeed, it is widely understood that courts rarely let parties out of their contracts, regardless of the excuse advanced.\(^{183}\) And, what empirical studies there are

subject matter jurisdiction was to prevent the practice used by some lawyers of manipulating the citizenship of the named parties and/or the amount in controversy, which made it impossible for the defendants to remove the cases from state to federal court. This was facilitated by several long-standing interpretations of the diversity statutes by the Supreme Court.” (citations omitted). The purpose was to reduce the number of state court actions -- some state jurisdictions were very well known for their willingness to certify classes and award large damages. Coffee, supra at 5; Shapiro, supra at 135-36 (2007) (“One of the purposes of the Class Action Fairness Act was to end abuses by plaintiffs' attorneys who brought large nationwide class action lawsuits in a few state courts which were known to be overly favorable to class actions. By manipulating the named parties, plaintiffs were able to prevent these cases from being removed to federal courts.”); see also Class Action


\(^{181}\) See Henry Rose, Class Actions and the Poor, 6 Pierce L. Rev. 55, 59 (2007); Ilisabeth Smith Bornstein, From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action


\(^{182}\) See Allapattah Services, Inc. v. Exxon Corp., 454 F. Supp 2d 1185, 1217 (S.D. Fla. 2006) (“[F]ew firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct.”); see also Michael Heller & Rick Hills, Land Assembly Districts, 121 Harv. L. Rev. 1465, 1524 (2008) (“Because ‘small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,’ plaintiffs with small stakes might each have insufficient reason to hire a lawyer to vindicate their claims, even if the sum of their claims would justify the expense of attorneys’ fees.” (citing Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); 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.”)

\(^{183}\) Professor Robert Lloyd writes:

We spend so much time on the unusual cases where courts find a way to let people out of their bad deals that students begin to think these cases are the norm. Students are amazed when I tell them that it is virtually unheard of for a sophisticated party, or even a party only moderately
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indicate that claims based on the contract policing doctrines are not very successful when they are asserted in court. Consequently, the process problem will prevent a challenge to the contract term(s) based on the expanded policing doctrines from going to court in the first place and/or will cause most of these challenges to fail, even if they do make it through the courthouse doors.

Hence, my argument thus far is this: power in contracting is in the core, which is sophisticated, to prevail on an unconscionability argument. Yes, you can win an unconscionability case if your client is poor and uneducated, and if the other party is a sleazy organization that preys on poor people, and if you're able to afford an appeal, and if you get Skelly Wright on the bench. But absent these circumstances, the client is going to be stuck with the documents she signs.

Robert M. Lloyd, Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course, 36 Ariz. St. L.J. 257, 267 (2004). See also Knapp, Private, supra note 178, at 775 (noting that the burden of persuasion with respect to unconscionability claims “is at best difficult, [and] at worst literally impossible to satisfy.”) (footnote omitted); Morant, MLK, supra note 26, at 110 (“The existence of . . . duress, unconscionability, and undue influence cannot, by themselves, sufficiently accommodate marketplace inequities. The very dearth of cases where individuals are successful in obtaining relief through those devices substantiates this point. This result is compounded by the heavy burden of proof placed upon the claimant of such relief.”) (footnotes omitted); E. Allan Farnsworth, Developments in Contract Law in the 1980s: The Top Ten, 41 Case W. Res. L. Rev. 203, 225 (1990) (the fact that unconscionability and related doctrines did not continue to occur in the 1980s as expected made the top 10 list). Furthermore, the major push for expansion came in connection with commercial, rather than consumer, transactions. Regardless, the push was, on the whole, noteworthy mainly for its lack of success.

Robert A. Hillman, Contract Excuse and Bankruptcy, 43 Stan. L. Rev. 99 (1990) (“Notwithstanding academic writing that reports or urges expansion of the grounds of excuse, courts actually remain extremely reluctant to release parties from their obligations.”) (footnote omitted).

Grace M. Giesel, A Realistic Proposal for the Contract Duress Doctrine, 107 W. Va. L. Rev. 443, 463-65 (2005) (examining published state cases from 1996 through 2003 and finding that in “only nine of the eighty-eight [duress] cases did the court decide the matter in favor of the duress claim.” Of those nine cases, an appellate court affirmed a lower court’s finding of duress in only two.); DiMatteo & Rich, supra note 9, at 1097 (“Data revealed that in only 37.8% (56 out of 148) of the cases sampled unconscionability was found.”)

This is because of: (a) the huge costs of litigation, which are compounded by choice of forum clauses, which could very well require litigation in a foreign state; (b) the amended class action rules; and (c) the practical reality that a private attorney probably would not take such small claims, especially if those claims have a low probability of success. Mandatory arbitration provisions would, of course, also prevent such challenges from being litigated in court. These challenges would be heard, however, in the arbitration proceeding. But, because arbitration suffers from the problems just mentioned (i.e., costs, limited availability of class actions and unavailability of private attorneys), the result would probably be the same—the challenge would not be brought in arbitration, either. See Christopher R. Drahozal, Arbitration Costs and Forum Accessibility: Empirical Evidence, 41 U. Mich. J. L. Reform 813 (2008); Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L. Q. 637 (1996); Jean R. Sternlight & Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse, 67-SPG Law & Contemp. Probs. 75 (2004).

This is because of choice of law clauses, which usually adopt the law of a non-consumer friendly state to govern the dispute, and the fact that the empirical studies indicate that challenges based on contract policing doctrines, like duress and unconscionability, usually fail. See William J. Woodward, Jr., Constraining Opt-Outs: Shielding Local Law and Those It Protects From Adhesive Choice of Law Clauses, 40 Loy. L.A. L. Rev. 9 (2006); see also supra text accompanying notes 178-79.
formation; and it is particularly localized in the element of mutual assent. The current formulations of mutual assent are tilted in favor of finding that mutual assent exists.\textsuperscript{187} 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 contract term(s) is unreasonable.\textsuperscript{188} Given the “process problem” I discussed above,\textsuperscript{189} however, it seems unlikely that such a challenge to the reasonableness of a contract term(s) (either as a claim or defense), will be successful very often. 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.\textsuperscript{190}

“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.\textsuperscript{191} 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.\textsuperscript{192}

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.

\textsuperscript{187} See supra text accompanying notes 147-68.
\textsuperscript{188} See supra text accompanying notes 170-86.
\textsuperscript{189} Id.
\textsuperscript{190} C.f. Knapp, Opting, supra note 5, at 102 (discussing why the “adhering party” would be bound by all the terms of a written agreement, including any applicable default provisions. Knapp’s “adhering party” would be the equivalent of my “coerced party.”)
\textsuperscript{191} See supra note 73.
\textsuperscript{192} Id.
5. By leaving the core intact, modern contract law expands and then immunizes coercion.

There are two points worth emphasizing in this last part of my argument, both of which follow from the previous four. To begin with, leaving formation completely intact and making it easier to form a contract expands one party’s capacity for coercion. This is because formation, particularly mutual assent, is where the party with the capacity to coerce gets to impose the contract terms it wants, either through some type of negotiation process or through the use of its standard form.\(^\text{193}\) Then, upon formation, the presumption of contract (and term) validity springs up and immediately inures to the benefit of the coercing party.\(^\text{194}\) 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.\(^\text{195}\) It is extremely difficult to overcome the presumption of contract validity in practice, because of the process problem associated with bringing such a challenge.\(^\text{196}\) Consequently, the difficulty faced by the coerced party in disproving the presumption of contract validity could conceivably give the party with coercive capacity greater license (if not perverse incentive) to impose more onerous and/or one-sided terms during contract formation.

Finally, and specifically because the process problem makes it so difficult to rebut the presumption of contract validity in practice, this presumption essentially immunizes the coercion taking place during the bargaining process from effective challenge by modern contract’s expanded policing doctrines.\(^\text{197}\) This is because a challenge (either by claim or defense) to the contract based on modern contract’s expanded policing doctrines would most likely be unsuccessful, either because it was not asserted or because the challenge failed.

Existing consumer credit products,\(^\text{198}\) like payday loans,\(^\text{199}\) fee harvester cards,\(^\text{200}\)
II. Conclusion

Conventional wisdom says that modern contract law evolved to remedy problems left unaddressed by the classical contract law system. Thus, modern contract law is different from classical contract in ways that make the current system work better than the
older regime, that is, in ways that rectify some of those problems. The differences between the two systems are therefore the most important part of the contract evolutionary story. Of course, whether this conventional wisdom is true turns on whether modern contract has been successful in correcting the problems produced by the classical system.

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

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

I am not suggesting that we do away with contract law. I am not sure we could, even if we wanted to. But if conventional contract law wisdom embodies the way we believe contract law works (or should work), the fact that the conventional wisdom is wrong strongly suggests that modern contract cannot work the way we ourselves assert that it should. And this result should matter. If modern contract law cannot work on its own terms, we either need to change the rules or come up with a different way to explain away or justify this result.

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205 Id.
206 Feinman, Un-Making, supra note 1, at 12-14; Speidel, Domain, supra note 2, at 260-61; Knapp, Offer, supra note 2, at 316-19; Morant, Race, supra note 2, at (part B).
207 See supra text accompanying notes 9-26.
208 See supra text accompanying notes 1-7.
209 The sentiments Professor Charles Knapp expressed twenty-five years ago still resonate today. He wrote:

[T]here is a deep and unresolved conflict at the heart of what we call ‘Contract Law,’ a conflict visible in the variety of views advanced, particularly in recent years, by the Contracts ‘theorists.’ At its most fundamental level, this can be described as the divergence between those who see the decision to enforce promissory obligations as primarily an expression of moral values, and those who see it as promoting market efficiency. One might, of course, conclude that (a) either point of view is in any case only a rationalization for the system we have, rather than an explanation of why we have it, or that (b) whether one holds one point of view or the other is
really of little importance, since most case outcomes can be defended and/or attacked by persons
holding either view. Both of these observations have more than a little truth in them. Therefore,
does a choice at the theoretical level really matter? . . . Ultimately it does, if only as a symbolic
expression of the values of the society which has created, and is serve by, the ‘law.’

Knapp, Future, supra note 125, at 949-50.

210 Mensch, Ideology, supra note 36, at 770 (“New legal categories do not solve old problems, which lie
deep in our structures of economic and political thought. They only express them differently.”)