UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 75 ● Winter 2013

ARTICLE

PARALLEL CONTRACT

Aditi Bagchi

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

ARTICLE

PARALLEL CONTRACT

Aditi Bagchi*

This article identifies a pervasive model of contracting that is inadequately treated in existing law and theory. In parallel contract, one party enters into a series of contracts with many similarly situated individuals on background terms that are presumptively identical. In these settings, the transaction costs associated with negotiating or even unilaterally tailoring terms to individuals exceed the benefit from such tailoring. Instead, the repeat party sets uniform background terms based on facts pertaining to its contracting partners as a group, including the mean and distribution of their preferences.

Parallel contracts depart from the classical model of contract in two fundamental ways. First, obligations are not robustly dyadic in that they are neither tailored to the two parties to a given agreement nor understood by those parties by way of communications with each other. Second, obligations are not fixed at a discrete moment of contract. Parallel contracts should be interpreted differently than agreements more consistent with the classic model; in particular, the obligations of the repeat party should be understood by reference to its most recent practices and communications with any of the other parties in a given setting.

* Associate Professor, Fordham University Law School. Many thanks to Ian Ayres, Fred Bloom, Fabrizio Cafaggi, Cynthia Estlund, Jennifer Gordon, Greg Klass, Mark Patterson, Seana Shiffrin, Nelson Tebbe, Steven Thel, and Ben Zipursky for comments and suggestions. I am also grateful for feedback received at the American Association of Law Schools Annual Meeting (Section on Contracts), Regulating for Decent Work Conference at the International Labor Organization, and workshops at Brooklyn Law School, the Georgetown Law Center, UCLA Law School, the University of Pennsylvania Law School and William & Mary Law School.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

All contracts are incomplete and most contracts are not fully negotiated.[1] Few terms are negotiated at all.[2] Parties to contract are often only dimly aware of what they are agreeing to when they enter contract.[3] They come to understand the content of an agreement by way of communications received after contract, and with individuals who are not party to the agreement. These well-known facts about the typical contractual process are alarming because they are at odds with the classical picture of contract. That picture continues to motivate our reasoning about the sources of contractual obligation and the best methods of contract interpretation.

In the classical account, individuals negotiate agreements that impose discrete performance obligations on each party in an exchange, which each understands to be in its respective best interest.[4] Consent creates contractual obligations where there were none before and only after the process of negotiation and evaluation is complete. No obligations precede the moment of mutual consent and the obligations fixed by contracts are not revised unless and until there is a comparable moment of self-conscious consent to modification.

---

[1] *See* Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 821 (1992); Robert E. Scott, *Rethinking the Default Rule Project*, 6 VA. J. 84, 85 (2003); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 595 (2003).

[2] *See* Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Drafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 158 (2010) (reporting survey results that most consumers "never" or "rarely" try to negotiate terms in consumer contracts).

[3] *See* Randy Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1203 (1992) ("There is no magic moment of contractual conception at which time every right and obligation of contracting parties is unambiguously expressed."); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60 (1963) ("Many, if not most, exchanges reflect no planning, or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances. As a result, the opportunity for good faith disputes during the life of the exchange relationship often is present."); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1297 (2008) (arguing lay individuals are likely to misinterpret their contract rights but proceed with certainty that their understanding is correct).

[4] *See* P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L. Q. REV. 193, 194–95 (1978) (describing, and critiquing as antiquated, the "paradigm of modern contract" as a "bilateral executory agreement" consisting of "an exchange of promises" that is "deliberately carried through, by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

The concepts of contracts of adhesion and relational contract have each attempted to correct the classical picture.[5] Contracts of adhesion are take-it-or-leave-it contracts where one side has no opportunity to negotiate.[6] Usually, that party is also unfamiliar with many of the contract's terms before formally consenting to them and may believe she holds rights against the other party that she in fact waives under the contract.[7] Often, that party has no practical alternative to certain terms or contracts.[8] The standard form contract between a company and a single consumer is the product of a market consisting of many consumers, and consumers navigate that market with information obtained primarily from other consumers.

Relational contracts are different. The parties to a relational contract often have a relationship prior to contract; at the least, their relationship extends beyond the terms of contract.[9] The relationship is of mutual dependence and this dependence motivates each party's behavior within the contractual arrangement.[10] Contract terms are vague and open-ended; the conduct of the parties is a function of a dense network of background norms and it is unclear which of those norms are intended to be legally binding.[11] Neither the controlling norms nor the boundaries

---

[5] *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 1.3, at 5 (6th ed. 2009) ("[C]ontracts of 'adhesion' . . . constitute a serious challenge to much of contract theory."); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (describing relational contract paradigm as better fit for long-term contracts).

[6] *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.26, at 286 (4th ed. 2004); Kortum-Managhan v. Herbergers NBGL, 204 P.3d 693, 698 (Mont. 2009) ("Contracts of adhesion arise when a party possessing superior bargaining power presents a standardized form of agreement to a party whose choice remains either to accept or reject the contract without the opportunity to negotiate its terms." (quoting Zigrang v. U.S. Bancorp Piper Jaffray, Inc. et al., 123 P.3d 237, 243 (Mont. 2005))); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006) (defining contract of adhesion as "a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms").

[7] *See* Solan et al., *supra* note 3, at 1297.

[8] *See* Fiser v. Dell Computer Corp., 165 P.3d 328, 337 (N.M. Ct. App. 2007) (defining contract of adhesion as one where consumer has no market alternatives), *rev'd on other grounds*, 188 P.3d 1215 (N.M. 2008).

[9] *See* Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 345 (1983).

[10] *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1100−03 (1981).

[11] *Id.* at 1091.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

of contract are spelled out at the time of contract or at any fixed point in the relationship.

Contracts of adhesion and relational contracts are in some ways opposite to each other, since the former envisions total anonymity and impersonality while the latter suggests thick, detailed, and tailored norms.[12] Both have been important in showing a lack of fit between standard contract doctrine and certain kinds of contract, including the typical consumer contract, contracts between intimates, contracts embedded in certain closed business communities, and possibly employment contracts.

But those who wish to challenge the presumptions of (still) classical contract law have relied too much on the ideas of contracts of adhesion and relational contract. Existing models fail to describe large swaths of the contractual landscape.[13] In this article, I offer a new model that better accounts for a significant pattern in contracting: parallel contract. In settings characterized by parallel contract, one party enters into a series of contracts with many similarly situated individuals on background terms that are presumptively identical but change over time. This model of agreement is often characteristic of employment agreements, landlord-tenant leases, sales contracts in subdivisions or cooperatives, partnership agreements, franchise agreements, and investor agreements with managers or hedge funds.

Two presumptions about contract must be rejected in interpreting parallel contracts. The first presumption is that each contracting party assumes obligations to a particular other party by way of communicative acts between those two parties. A corollary of this principle is that contracts are tailored to their individual parties. These related presumptions are not fundamental to contract (given permissive rules of assignment,[14] third-party beneficiaries,[15] and trade usage of terms[16]) but

---

[12] *But see* Ian Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5 (1984); Ethan Leib, *What is the Relational Theory of Consumer Form Contract?* (2011), *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWARD MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 259 (Jean Braucher et al. eds., 2013).

[13] Relational contract theory is also guilty of sometimes claiming a universality that undermines the corrective quality of its critique of classical contract theory. *See* Ethan Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 656 (2010) (discussing counterproductive nature of claim that all contracts are relational).

[14] *See* RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981).

[15] *See id.* § 302.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

motivate interpretive rules that focus exclusively (or disproportionately) on communications between contracting parties and facts relevant to what a court might expect those two parties to have negotiated given their particular circumstances.

The second presumption of classical contract that must be rejected in cases of parallel contract is that contract terms are simultaneously set at a single moment of contract. While this view is not inconsistent with the recognized fact of contractual incompleteness,[17] it tends to cause courts to fill in gaps at the designated moment of contract by assigning discretion to one party[18] and then imposing high hurdles for modification.[19]

This article shows that the two presumptions above do not apply to an important class of contract. Contracts of adhesion implicitly challenge the presumption of a dyadic structure to contract and relational contract challenges the presumption of a discrete moment of contract, but each incorporates other assumptions that do not apply to parallel contract. In cases of parallel contract, courts should interpret parties' obligations by reference to practices that evolve across an open set of agreements.

Parallel contract is ultimately an interpretive move whereby courts adapt interpretive defaults to contractual context in order to read contracts in a manner that is more efficient and fair. The terms of a legal agreement are what contract law recognizes as binding obligations and the rules by which courts identify terms determine how well courts serve their function.

---

[16] *See* U.C.C. §§ 1-201(b)(3), 1-303 (2011). Lisa Bernstein doubts that courts actually incorporate trade usage. *See* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715−17, 777 (1999) ("[T]he pervasive existence of usages of trade and commercial standards . . . is a legal fiction rather than a merchant reality.").

[17] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 299 (2004) ("[C]ontracts are significantly incomplete.").

[18] *See, e.g.*, Perez v. Aetna Life Ins. Co., 150 F.3d 550, 558 (6th Cir. 1998) (implying discretion in health insurance contract where it was not expressly reserved); Patterson v. Caterpillar Inc., 70 F.3d 503, 505 (7th Cir. 1995) (similarly reading language to imply discretion to health plan administrator). *See also* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396 (2009) (describing and endorsing the use of discretion-conferring default rules to fill in contractual gaps).

[19] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) (normally requiring an unexpected change of circumstance to uphold an equitable modification). The earlier common law rule was more restrictive; it required consideration.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

One important aspect of the judicial function in contracts is helping parties avoid opportunistic transgression of a deal.[20] Parties entering contract lock in a particular distribution of the transactional surplus (joint gains from exchange) that reflects their respective bargaining power at the moment of contract formation. But they do not necessarily wish to lock in their substantive obligations; as in parallel contract, those may adapt to new facts that arise post-contract. Courts should make it possible for parties to lock in a bargain without locking in an inefficient transaction. The rules of parallel contract afford that flexibility by imputing an adaptive mechanism that is less easily exploited by the parties than the defaults presently favored.

Another important function of contract regulation is containing the externalities of bilateral exchange.[21] Statutory regulation of contract is common where externalities are substantial, diffuse, and consistently negative. Concentrated externalities of varied effect for third parties are less easily regulated by broad statute. The more flexible tools of ex post interpretation, which allow third parties to influence the content of transactions to which they are not a legal party but have a material interest, are an overlooked tool. The rules of parallel contract achieve this in their domain.

The article proceeds as follows. Part I describes the classical model of contract formation and the challenges to that model by the literatures on contracts of adhesion and relational contract. Part II introduces an alternative model, parallel contract, which captures the process of contract formation and execution in certain settings. It also sets forth the interpretive rules that should govern these contracts and studies its most obvious example, employment in large firms. Part III argues that the rules of parallel contract help advance two essential functions of contract regulation: limiting the exploitation of ex post shifts in bargaining power and limiting the externalities of bilateral exchange.

---

[20] *See* George Cohen, *Implied Terms and Interpretation in Contract Law*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME III: THE REGULATION OF CONTRACTS 78, 90 (B. Bouckaert & G. de Geest eds., 2000) ("[T]he problem of opportunistic behavior is perhaps the key justification for court intervention in contracts," and defining opportunism as "deliberate contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or contractual morality.").

[21] *See* Steven Shavell, *Contractual Holdup and Legal Intervention*, 36 J. LEGAL STUD. 325, 346 (2007) (identifying externalities as one of the two reasons for legal intervention in contract).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

I. THE CLASSICAL MODEL AND ITS EXISTING ALTERNATIVES

In the classical account of contract, parties to contract negotiate their agreements. Those agreements impose a specified set of performance obligations on each party, and the obligations of each are carefully tailored such that the bargain could not be improved to their mutual satisfaction. The parties meet each other in the marketplace moments before contract, and they come with no standing obligations to the other.[22] The obligations they assume are not subject to modification unless the parties reenact the process of formation.[23]

Two basic ideas about contract and its normative foundations stem from this picture. First, contracts are presumed to be robustly dyadic. One party makes an offer to a particular other party, who may accept or decline. This offer-acceptance sequence that takes place between two discrete individuals determines their respective obligations under the contract. The contract does not reflect obligations that run between persons other than the two parties. It does not inform the legal obligations or contractual behavior of either party with others.

Because of the presumption of dyadic relations, we tend to regard contracts as effectively tailored to two parties, and intentionally designed or otherwise assured

---

[22] *See* Melvin Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000) (Classical contract law "was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market."); Victor Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 J. ECON. ISSUES 45, 49 (1976) ("The paradigmatic contract of neoclassical economics . . . is a discrete transaction in which no duties exist between the parties prior to the contract formation and in which the duties of the parties are determined at the formation stage."); Robert Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569 ("In classical contract, individuals have no obligations to each other save those created by the coercive rules of the state or their own promises."); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943) (in the classic picture "[e]ither party is supposed to look out for his own interests and his own protection. Oppressive bargains can be avoided by careful shopping around. Everyone has complete freedom of choice with regard to his partner in contract, and the privity-of-contract principle respects the exclusiveness of this choice. Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole."). *Cf.* Daniel Friedman, *The Performance Interest in Contract Damages*, 111 L. Q. REV. 628, 642 (1995) (A fundamental function of contract law is "the recognition and the ordering of entitlements created by the parties' binding promises.").

[23] *See* Atiyah, *supra* note 4, at 196 ("Contracts have a chronology, a time sequence . . . . They are created first, and performed (or not performed) thereafter.") (emphasis omitted); Eisenberg, *supra* note 22, at 807 ("Classical contract law focused almost exclusively on a single instant in time—the instant of contract formation—rather than on dynamic processes such as the course of negotiation and the evolution of a contractual relationship.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

to maximize their joint surplus.[24] This confidence again derives from the process by which we envision contracts to have come about, either direct negotiations or a selection mechanism that culminates in one offeree accepting terms that another may have rejected. There is no presumption that the transactional surplus is evenly divided, because the parties come to contract with different alternatives and thus disparate bargaining power.[25] But the contract is the culmination of an efficient procedure: either an iterative market process by which an offeror locates an offeree for whom the proposed terms are optimal, or actual negotiation by which parties navigate respective preferences until they settle upon optimal terms. This process ensures that in the normal case no Pareto-superior improvement is possible.[26]

The second presumption of classical contract is that all contract terms are simultaneously set at a single moment of contract. While this view is not necessarily inconsistent with a recognition that parties have not designed the contract with an eye toward all contingencies, reconciling a commitment to a privileged moment of contract ("obligational completeness") with the fact of ("informational") incompleteness causes courts to sometimes fill in gaps by assigning discretion to one party where the contract is silent, and to impose high hurdles for modification.[27] The parol evidence rule also reflects the privileged status of the state of agreement at a particular moment in time. But while the parol evidence rule operates only in the case of written agreements, and excludes only some portion of communications that precede the magic moment,[28] the primacy of what is said at the contractual moment over what is *subsequently* said and done is more pervasive. What is said or done after the contract is created does not usually

[24] *See* Lewis Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 691 (1985–86) ("The assumptions of rationality and utility maximization provide a theory of contract formation: every clause must be 'rational' for each party. In negotiating over a particular contingency, each party will evaluate the worth (or cost) to her of contract performance under that contingency. The promisor will demand sufficient payment to cover her expected costs.").

[25] *See* ROBERT D. COOTER & THOMAS ULEN, LAW & ECONOMICS 78–80 (4th ed. 2003).

[26] The story is idealized in that no contemporary commentator would deny that transaction costs render the results of both negotiation and market sorting suboptimal from an allocative standpoint.

[27] *See* Robert Scott & George Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 190 (2005) (distinguishing "obligationally incomplete" contracts which "fail[] to describe the obligations of the parties in each possible state of the world" from "informationally incomplete" contracts which "fail[] to provide for the efficient set of obligations in each possible state of the world.").

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

speak to the parties' obligations under the given contract unless those words or events can be regarded as new moments of contract.

Contracts of adhesion, and the scholarly and judicial effort to make sense of them, have already shown us that the presumption of dyadic relations is misleading.[29] Similarly, the concept of relational contract has emphasized the extent to which it may be arbitrary and potentially distorting to privilege a static body of communications as reflective of an agreement that evolves over the course of a contractual relationship.[30] This part considers in greater detail how the classic model is represented in doctrine, and how contracts of adhesion and the notion of relational contract have challenged the classic model. In Part II, I show how parallel contract is an instance where neither of the classic presumptions hold, but which differs markedly from the models envisioned by contracts of adhesion and relational contract.[31]

A. Classic Model

No one takes the classical model of contract formation to be "true" in the sense of descriptively accurate, but judges and scholars may take the two ideas about contract that derive from that model to be normative truths. The ideas that contract is dyadic and instantaneous animate core doctrine, though the presumptions are also implicitly defeasible in light of more narrow doctrines.

The presumption that contracts are dyadic is evidenced first in the rules of offer and acceptance. Communications that are directed toward multiple individuals are less likely to be treated as binding offers that create a power of acceptance.[32] In the case of unilateral contracts, specific notice of the offer by an individual offeree is necessary to accept through performance.[33] The offer does not create a general power of acceptance when conveyed to the public in general; it only becomes an effective offer for any given individual when the elements of offer and acceptance that one would contemplate in dyadic relations are present.

---

[29] *See infra* Part I.B.

[30] *See infra* Part I.C.

[31] *See infra* Part II.

[32] *See* Lonergan v. Scolnick, 276 P.2d 8 (Cal. Dist. Ct. App. 1954) (finding form letter distributed to many prospective buyers could not be reasonably construed as offer).

[33] *See* Glover v. Jewish War Veterans of United States, 68 A.2d 233 (D.C. 1949) (notice of unilateral contract is required to accept through performance).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

The presumption of dyadic relations is most important in the rules of contract interpretation. Where a written document exists and its terms are unambiguous, there is simply no occasion to look outside of it.[34] When a document is ambiguous, the court inquires what it was reasonable for each party to believe the other intended by her words and acts.[35] The question is not what it would be reasonable for each party to believe her rights and obligations are under contract, should those differ from or simply cover more ground than her best guess as to the other party's state of mind. The words or acts of third parties or even of the parties in relation to third parties is relevant only where it helps to establish the universal meaning of a word, or the usage of a word within a trade. What others have said or have been told is important as evidence of the way words were used by the two parties to a contract, but never as direct evidence of the content of contractual obligation. Where one party is aware of the other's subjective understanding of a term, that meaning controls.[36] If there is reason to believe that one party is unaware of trade usage, the trade meaning is not binding.[37]

The second presumption that flows from the classic model is that obligations are set, even if not fully specified, at a discrete moment of contract. This presumption is fundamental to black letter law. First, there is no duty to negotiate in good faith—until there is a contract, there is no contract.[38] Statements contemplating a bargain with a particular content are not binding until there is evidence that the parties understood their agreement to be final—that is, contractual. The very fact that negotiations are undertaken with the aim of concluding a contract at a later point render commitments made in the course of the negotiations unenforceable where they otherwise might be, e.g. under promissory estoppel (the anomalous case of *Red Owl* notwithstanding).[39]

---

[34] *See* Bradley Real Estate Trust v. Dolan Assoc., Ltd., 640 N.E.2d 9, 11 (Ill. App. Ct. 1994).

[35] *See* Coast Fed. Bank, FSB v. United States, 309 F.3d 1353, 1356 (Fed. Cir. 2002)), *vacated*, Coast Fed. Bank, FSB v. United States, 320 F.3d 1338 (Fed. Cir. 2003), on reh'g en banc, Coast Fed. Bank, FSB v. United States, 323 F.3d 1035 (Fed. Cir. 2003); Eaton v. Smith, 37 Mass. 150, 154, 156 (1838).

[36] *See* RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981).

[37] *See* Frantz v. Cantrell, 711 N.E.2d 856 (Ind. App. 1999) (finding trade usage not binding where a party was not and ought not to have been aware of trade usage).

[38] *See* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 239 (1987).

[39] *See* 168th and Dodge, LP v. Rave Rev. Cinemas, LLC, 501 F.3d 945 (8th Cir. 2007); *cf.* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

Second, the view of contract as a special moment is consistent with the doctrine of consideration, which makes difficult both modification of contractual obligation and the enforcement of additional commitments as freestanding promises.[40] Although modification is now possible without consideration, it is only enforceable where it is apparently motivated by a desire to avoid losses threatened by new circumstances;[41] even new commitments that are not prima facie revisions of earlier commitments are treated as revisions of a completed bargain subject to these rules of modification.[42] Nor is it usually possible to enforce additional commitments made by one party to an agreement without reference to the previous bargain. Under promissory estoppel, the very fact of that earlier bargain will make it difficult to show that the promisee relied on the additional commitment, since reliance will often take the form of conduct that overlaps substantially with the performance obligations of the promisee under the original bargain.[43] Moreover, commitments made by a party after a contract has been formed that were contemplated by that agreement are not treated as further specification of that party's obligations but instead as exercise of discretion with respect to the fulfillment of the unspecified obligation. The effect is that the party exercising discretion retains the right to revise that commitment unilaterally at a later point so long as its later position would have been consistent with the general obligation initially assumed.[44]

Finally, because contracts are incomplete with respect to the states of the world they contemplate, courts' insistence on the legal completeness of contracts

[40] I focus here on the legal impediments to adjusting a contractual relationship. Perhaps in part because of these hurdles, in practice adjustments are unlikely to be self-consciously undertaken with the aim of revising the legal agreement. *See* Macaulay, *supra* note 3, at 61 ("[T]he creation of exchanges usually is far more contractual than the adjustment of such relationships and the settlement of disputes.").

[41] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89; U.C.C. § 2-209 cmt. (2012).

[42] Distinguish, for example, a commitment to pay $200 instead of $100 for an item from a commitment to allow time off for an employee without reducing compensation previously set by an employment agreement.

[43] For example, if an employer promises an employee a holiday bonus where the employee already operates under an employment contract, the employee may have difficulty showing that she relied on that promise given that she was already obligated to work in the relevant period under the terms of the existing contract.

[44] For example, an employer that assumes an obligation to provide health benefits might initially offer a generous plan but then unilaterally substitute an inferior one. By contrast, if the initial offering were treated as a specification of the obligation to provide benefits, once specified the obligation could not be unilaterally revised.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

leads them to construct legal obligations solely on facts available to the parties "at the time of contract." Thus, when a negative contingency arises that substantially alters the value of the agreement for one of the parties, courts cannot offer relief before asking whether it would be reasonable to assign risk of the contingency to that party under the initial agreement.[45] Where the scope of a party's obligation is unclear and the court must provide a default rule, courts usually imagine the term that the parties would have struck had they expressly bargained with respect to the contingency in question at the time of formation[46]—sometimes to the point of extending the advantage of the more powerful party on the grounds that its bargaining power would have informed bargaining on the hypothetical term.[47] Defaults may be more or less tailored to the parties, but they are never tailored to the parties as they are constituted at the moment of dispute but rather to their situations at the time of contract formation.

Thus, the classical model of how contracts are formed has concrete implications for how contracts are enforced. The claim here is not that these various doctrines are simply ideological.[48] For example, there are strong efficiency considerations that cut in favor of many of these rules. But the force of those reasons, and our confidence in them, turns on the background model of contract.[49] For example, the benefits and costs, which speak to the breadth of evidence a court will entertain, will vary depending on the availability of particular kinds of evidence and the availability of various limiting principles. The benefits and costs of imposing liability based on communications prior to or subsequent to formal execution of an agreement will turn on how contracts are normally formed and how parties behave in the course of performance. There is no straightforward way to

---

[45] *See* RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981). *Cf.* Atiyah, *supra* note 4, at 217 ("Frequently, it is the interpretation of the law which converts a simple postponed exchange into a risk-allocation exercise, rather than any deliberate intent of the parties.").

[46] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (describing tailored and untailored majoritarian default rules, but also introducing concept of penalty default rules).

[47] *See* Ben-Shahar, *supra* note 18 (advocating default rules which reflect the balance of bargaining power at the time of contract).

[48] In this important respect my claims differ from those of the critical legal studies movement with respect to contract.

[49] *Cf.* Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L REV. 496, 498 (2004) ("[F]or the past one hundred years or so the historical trend across the board has been to water down such formal doctrines in favor of a more all-things-considered analysis of what the parties may have meant in the individual case.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

deduce optimal rules from actual behavior, but the former is nonetheless dependent on the latter. When we say that contract law presumes the classical model of contract formation, we mean that the normative appeal (efficiency or otherwise) of various rules presumes that model.

Still, the presumptions that flow from that model are sometimes relaxed. We relax the presumption of dyadic relations in several doctrines that are not commonly regarded as central to contract law as a whole, including the rules of assignment, delegation and third-party beneficiaries. These doctrines are often excluded from first-year contracts courses. But a presumption that most contracts are assignable and delegable does imply that the identity of parties to contract is not sacred or essential to their bargain.[50] The possibility of vesting rights in third parties, though possible only where the parties themselves are deemed to have intended to create such an enforceable interest, also admits that contractual relations are not strictly dyadic.[51]

More importantly, contracts can be interpreted with reference to the world outside the contractual relationship. Trade usage is taken to inform how the parties themselves are likely to have used terms in a written agreement.[52] And where the parties fail to specify a term like price, courts may presume that the parties intended to contract on terms that are in line with the market in which they are situated.[53]

The second presumption, legal completeness at formation, is also relaxed in the doctrines of the duty of good faith, modification, changed circumstance, and in the significance assigned to course of performance.[54] The duty of good faith is interpreted to restrict the parties' ability to usurp opportunities they bargained away

[50] RESTATEMENT (SECOND) OF CONTRACTS §§ 317–18 (1981).

[51] RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

[52] *See* U.C.C. § 1-303(c) (1977) ("A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question."); *see, e.g.*, Ventura v. Titan Sports, Inc., 65 F.3d 725, 731 (8th Cir. 1995) *cert. denied*, 516 U.S. 1174 (1996).

[53] *See* U.C.C. § 2-305 (2011).

[54] Melvin Eisenberg relies in part on the modern interest in course of performance to observe a shift away from static to "dynamic" contract law. *See* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 2 THEORETICAL INQUIRIES L. 1, 2 (2001). However, though contract law may be more receptive to post-contract facts now than in an earlier era, the classical model and its robust presumption that contractual obligation is set at formation endure in all the central doctrines.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

at contract formation;[55] but it does allow courts to disallow specific conduct that was not addressed with particularity in the initial agreement.[56] Although the restrictive character of the rules of modification ultimately reinforces the picture of a complete legal bargain at formation, they do at least allow parties to revise that bargain where they expressly undertake to do so.[57] Where circumstances are sufficiently changed—where they rise to the level of impossibility or impracticability—parties may be excused from performance altogether.[58] Avoidance of an obligation under changed circumstance depends on a finding that the parties did not contemplate the negative contingency that materialized, and in that sense acknowledges the reality that the terms of the agreement do not cover the infinite expanse of possible events.

Finally, courts allow ex post course of performance to inform interpretation of ambiguous terms[59] and also to inform validity of a contract where there is doubt on grounds of indefiniteness.[60] Actual conduct can also result in constructive waiver of even express conditions.[61] In the doctrines relating to course of performance and waiver, courts are most clearly prepared to abandon the fiction that all rights and obligations are fixed at the time the contractual relationship is initiated. But these are relevant only where the underlying agreement is ambiguous or where there is inconsistency between the parties' actual and contemplated conduct.

The two presumptions I am imputing to classical contract law are not dogmatic, as the above discussion shows.[62] They are presumptions rather than

---

[55] *See* Centronics Corp. v. Genicom Corp., 562 A.2d 187 (N.H. 1989) (citing Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980)).

[56] The more incomplete an agreement, the larger the role played by the duty of good faith. *Cf.* Richard Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 846 (2000) (advocating expansion of duty of good faith to help parties maintain long-term relational contracts).

[57] *See* U.C.C. § 2-209 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

[58] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 261–66 (1981).

[59] *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(4)–(5) (1981); U.C.C. § 2-208 (2011).

[60] *See* U.C.C. § 2-208 (2011).

[61] *See* Clark v. West, 86 N.E. 1 (N.Y. 1908).

[62] Contract theory premised on the classic model is far more dogmatic than doctrine. *See* OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (describing the course of law as essentially pragmatic); *see also supra* Part III (discussing pure theories of contract).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

assumptions because they are defeasible. Moreover, the presumptions serve a number of useful purposes in many contexts. The contention here is neither that they have been arbitrarily adopted nor that they are categorically false. The point is instead that the utility of the presumptions, and the appropriate conditions required for rejecting them, depend on contingent aspects of the contractual process.

B. Contracts of Adhesion

The term "contracts of adhesion" describes a real-world phenomenon; it is neither an idealized model of contract formation nor a theory of contract intended to illuminate contractual practices generally. But the model of contract it describes is so radically at odds with the classical model that it both exposes *that* model as idealized (or at least, unreal) and throws into relief even those contracts which it does not describe directly.

Contracts of adhesion are standard form agreements drafted by one party who uses that form in numerous transactions.[63] The "adhering" party not only cannot negotiate, but usually has not read or understood many of the terms on the standard form.[64] Often no other terms are available on the market. Consumer assent to these transactions is not voluntary in the robust sense that voluntariness is pictured in the classic model of contract.[65]

Of course, courts could have simply declined to enforce standard form contracts as legally binding in light of their departure from the ideal process of contract formation.[66] But contracts of adhesion are never denied enforceability altogether. Courts sometimes do refuse enforcement of particular terms; more

---

[63] Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (describing seven characteristics of contracts of adhesion).

[64] *Id.* at 1179.

[65] *See* Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006) ("The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent, then to mere efficient rearrangement of entitlements without any consent or assent."); Rakoff, *supra* note 63, at 1180 ("Because contract law is rationalized in large part on the voluntary assumption of obligation—or on the reasonable appearance thereof—it cannot be applied in an automatic and straightforward manner to contracts of adhesion.").

[66] *See* Rakoff, *supra* note 63, at 1283 ("Contract law is inherently based on broad generalization about how social units interact with each other, and about what institutional forces control these interactions. When applied to the typical circumstances in which contracts of adhesion are used, the generalizations incorporated in ordinary law are far removed from the forces that actually define how the parties are situated.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

often, they either enforce them as written or enforce them within bounds.[67] This is because the idealized process from which standard form contracting departs is not only a fiction, it is not even properly taken as an ideal. The absence of meaningful assent by consumers to standard form contracts is problematic because we are not prepared to do without these contracts, or to correct even those features most at odds with the classic model and its vision of fully voluntary (and informed) assumption of obligation.[68] Instead, courts have been generally prepared to treat consumers' willingness to transact on the basis of a standard form agreement as consent to all the terms within those agreements.[69]

Although the focus of the literature on contracts of adhesion has discussed the difficulty of establishing consent to contract by the consumer, mass contracts challenge the classic model on another dimension as well: the dyadic character of the contractual relation.[70] There is nothing importantly binary about the relationship between parties to a standard form agreement. In fact, standard form contracts make the identity of at least one party to the contract (consumer) entirely irrelevant; often, it is never revealed to the other. The identity of even the drafting

---

[67] *See* K.N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law. By O. Prausnitz. London: Sweet & Maxwell. 1937. Pp. Xix, 155. 10s. 6d*, 52 HARV. L. REV. 700, 704 (1939) (book review) ("[W]here bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper."); Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 870–71 (2011) (indicating that courts often substitute a minimally tolerable term for an unacceptable one).

[68] *See* Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 939 (2006) ("Hidden product attributes over which sellers given potential buyers no choice are a commonplace, necessary, and entirely unobjectionable feature of mass markets."). Many scholars have defended terms, which initially came under attack as actually beneficial to consumers. *See* George C. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (arguing that even unfavorable warranty terms may provide information to consumers about the liability of products); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1298 (1981) ("A warranty is viewed as a contract that optimizes the productive services of goods by allocating responsibility between a manufacturer and consumer for investments to prolong the useful life of a product and to insure against productive losses.").

[69] *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 370 (1960) ("That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.").

[70] *Cf.* Baird, *supra* note 68, at 951 ("Much of the view of the problem is a view of the law that reduces everything to rights that A and B have against each other. From here, it is but a short step to view any troublesome transaction in which there is boilerplate to be the result of boilerplate and the absence of a fully dickered bargain between two equals.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

corporation may be of limited relevance to the process of contract formation—and by implication, to deciphering the meaning of terms—where the form is standardized across an industry, or where certain clauses or terms are used across markets for very different goods and services.[71]

Standard form contracts are, in every meaningful way, products of the mass markets in which they appear. They reflect the market behavior of many individuals. Individual consumer understanding of them depends entirely on their prior experience in that market, as well as their direct communications with other consumers. Contracts of adhesion are at once recognizable as contract but grossly inconsistent with the classic model of contract. The result is to demonstrate concretely the contingency and limited applicability of the classic model. In particular, it reveals as implausible the presumption that communications between parties to a contract are always important to the content of their agreement and the primary basis of their respective understandings as to that content.

C. Relational Contract

If contracts of adhesion have made salient the porous personal boundaries of contract, relational contract theory has highlighted the artificial character of the temporal boundaries of contract. The language of a "meeting of the minds" has been dismissed as implying a subjective test of assent to contract. But the picture of minds connecting has had a lasting effect. If we now see that the meeting of minds is too high an aspiration (and not the morally relevant standard), the concept itself acknowledged the improbability of subjective agreement by modestly limiting the expectation of such agreement to a passing moment. If minds can meet, they will not engage for more than a moment. We continue to speak of that contractual moment though the modern language of reasonable inference does not require it. In fact, as relational theory emphasizes, parties' reasonable understandings and expectations of each other are developed over time, over a period that begins well before the finalizing of an agreement and extends through the course of performance.

Relational contract theory rejects several assumptions in the classical model, and its primary claim could be taken to be its characterization of the contractual

[71] *See* Mark R. Patterson, *Standardization of Standard Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327 (2010) (discussing anticompetitive concerns raised by coordinated standardization by competitors); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 860 (2000) ("Over time . . . the stock of standardized terms and conventions that have been tested by judicial interpretation in contract disputes will increase.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

relationship as a meaningful relation subject to a rich array of thick norms that are not reflected in any document or even the parties' conscious understanding of their legal obligations. One of the founders of relational theory, Ian Macneil, defines relational theory to hold that "every transaction is embedded in complex relations" and requires "understanding all essential elements of its enveloping relations."[72] Although complex relations need not be positive or worthy of either deference or support, the relational picture of contract is sometimes a rather rosy one. Relationalists tend to emphasize the ways in which parties intend to cooperate with one another, even maximizing joint rather than individual utility.[73] They tend to view the norms governing relationships as jointly produced and symmetrically applied.

In calling for contract law to attend to the relationship between contracting parties, relational contract theory tends to underemphasize the hierarchical quality of many contracts.[74] Although it purports to be about actual norms, it often would seek to create relations of a sort that do not yet exist.[75] Contract law is not just supposed to pay attention to the underlying relationship; the implicit hope is that it

[72] Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881 (2000).

[73] *See* David Campbell & Donald Harris, *Flexibility in Long-term Contractual Relationships: The Role of Co-operation*, 20 J.L. SOC'Y 166, 167 (1993). Macneil views contracts as characterized by interdependence that amounts to solidarity. *See* Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatcory Apparatus*,*"* 75 NW. U. L. REV. 1018, 1032–34 (1981) ("The most important aspect of solidarity [for his immediate purposes] is the extent to which it produces similarity of selfish interests, whereby what increases (and decreases) the utility of one participant also increases (decreases) the utility of the other.").

[74] *See, e.g.*, Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 4–5 (describing long-term contracts as typically between parties of relatively equal bargaining strength who eschew formalities in part because they are familiar and comfortable with each other); Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43, 56 (1993) (listing many "relational standards" that would be relevant to relational approach to contract enforcement, including "essential attributes" of a role or status, balanced reciprocity, encouragement of trust, and "the whole range of social policies and values other than those that grow out of the relationship.").

[75] *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 857–60 (1983) (describing possibility of a utopian contract law and its alternative vision of the individual and her relations with others); *cf.* Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 772 (1981) ("Of all the legal categories which were generated, perhaps freedom of contract appealed most directly to the utopian element of liberalism—the belief in the potential of human freedom to form a basis for social organization.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

will reform it.[76] The Macaulay-brand of relationalism is more sensitive[77] than Macneil to the oppressive dimensions of many social relations that lie beneath contract, and others who have challenged the classical contract model along similar lines have emphasized the ways in which long-term relationships against a background of inequality engender special risks.[78]

Since the long-term character of some contractual relationships can be the basis for either solidarity or oppression, the relational move toward enforcing or even just taking into account the norms immanent in background relations is problematic. Even where background norms do not merely entrench hierarchical relations, those norms may depend on their unenforceability for their efficacy,[79] or they may simply be illusive to courts.[80] That said, there are surely some relations in which rich background norms reflect meaningful relations that the state would do well to support. These represent but some fraction of contractual relations more broadly. While the emphasis of relational contract theory on the underlying,

---

[76] *See* Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 756 ("[R]elational contract focuses on the necessity and desirability of trust, mutual responsibility, and connection. Not all of these bonds should be legally enforceable, but beginning analysis by recognizing them is likely to produce a broader set of obligations.").

[77] Macaulay sees contract as continuous with political struggle and is pessimistic about the ability of weaker parties to transform hierarchical contractual relations into more egalitarian ones. *See* Gordon, *supra* note 22, at 571.

[78] *Id.* at 570 ("In the messy and open-ended world of continuing contract relations, where the contours of obligation are constantly shifting, the effects of power imbalances are not limited to the concession that parties can extort in the original bargain. Such imbalances tend to generate hierarchies that can gradually extent to govern every aspect of the relation in performance. This is the potential dark side of continuing contract relations, as organic solidarity is the bright side: what starts out as a mere inequity in market power can be deepened into persistent domination on one side and dependence on the other.").

[79] Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990) ("It may be that the great lesson for the courts is that any effort to judicialize these social rules will destroy the very informality that makes them so effective in the first instance.").

[80] Richard Craswell, *The Relational Move: Some Questions from Law and Economics*, 3 S. CAL. INTERDISC. L.J. 91, 109–10 (1994) (theories that seek to give effect to parties' "tacit assumptions" require reconstruction of assumptions for which there is no direct empirical evidence); Scott, *supra* note 71, at 848 ("If . . . the state is simply incapable of supplying parties in a complex economy with useful defaults ex ante or imposing fair outcomes ex post, the better instrumental strategy is for courts to accepts the limits imposed by legal formalism and interpret the facially unambiguous terms of disputed contracts literalistically.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

holistic relationship that underpins contract may be important to understanding this subset of contract, these cases are at the periphery of contract.[81]

The more important and general implication of relational theory is that the obligations of parties are not settled at a single moment of contract. Relational contracts are characteristically long-term, and relational theorists tend to characterize the parties' responsiveness to evolving facts as mutual accommodation. But new facts can be of importance for a range of reasons, quite apart from a norm of solidarity in the face of those facts. The central insight of relational theory is that extended duration makes it especially costly for parties to specify their respective obligations ex ante.[82] This rejection of the presumption of temporal boundedness in the classical model is of profound import and has had deep influence, to the point where most contract theorists now describe themselves as relationalists—even if they would not advocate the incorporation of background relational norms into the set of binding contractual obligations courts enforce.[83]

II. PARALLEL CONTRACT

Parallel contract incorporates two key (if only implicit) insights of contracts of adhesion and relational contract, respectively. First, contracts need not be robustly dyadic; communications of either party with third parties is important to

---

[81] *See* Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709 (2011); Daniel Markovits, *Promise as an Arm's Length Relation in* PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 327 (H. Sheinman ed., 2011); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003). *But see* John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93, 127 (2000) ("[R]elational contract theory has pointed the way toward the possibility of using the law of contract to underpin the legal recognition of intimate relationships outside marriage.").

[82] Goetz & Scott, *supra* note 10, at 1090–91 ("Parties frequently enter into continuing, highly interactive contractual arrangements . . . . A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations."); Lewis A. Kornhauser, *The Resurrection of Contract*, 82 COLUM. L. REV. 184, 190 (1982) (reviewing CHARLES FRIED, CONTRACT AS PROMISE (1981) and IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980)) ("Most important among these factors are (1) the transaction extends over time, (2) parts of the exchange cannot be measured or specified precisely [ex ante], and (3) the interdependence o the parties to the exchange extends at any given moment beyond any single discrete transaction to a range of social interrelationships."); Speidel, *supra* note 56, at 828 ("Relational contracts continue over an extended time . . . . [P]atterns of interaction and expectation develop that involve more than two people and transcend the boundaries of the traditional discrete bargain.").

[83] *See* Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contracts*, 78 VA. L. REV. 1175, 1200 (1992) ("To a significant degree, we are all 'relationalists' now.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

their respective understanding of their agreement. Second, contractual obligations are not conclusively settled at a single moment of contract. Agreements are not just incomplete in the technical sense that terms were not drafted to address all possible contingencies.[84] They are also obligationally incomplete in that obligations under an agreement are not settled at the moment of its inception—not simply ill-defined, but indeterminate.

Casting doubt on the robust dyadic structure of contract should not be construed as a challenge to the bilateralism of contract law, which is characteristic of private law more generally.[85] Private law theorists of all stripes have emphasized, in contrast to economic approaches to private law, that the distinguishing feature of private law is that individuals are empowered to bring claims against particular other individuals, and courts self-consciously adjudicate those claims based on reasons that pertain to the rights and obligations of the parties to each other. Contract law does not openly resolve disputes with direct reference to the effect of litigation outcomes on actors other than the litigants in a given dispute.

However, the bilateralism of contract law, like that of private law generally, does not imply that the content of rights and duties of parties to one another are not informed by others, including their past and future conduct and their values. No viable theory of private law conceives of the rights and obligations of parties to one another entirely divorced from social context. Almost every theory will take into account, for example, whether conduct is reasonable in light of prevailing practices, or whether a legal rule is likely to make such conduct (by others) more or less frequent going forward. These considerations are usual in the tort context, even among those committed to theorizing the institution of tort in a way that is consistent with the internal perspective of tort as essentially bilateral.

Contract law is bilateral in the sense that is characteristic of private law broadly. What I challenge here is the notion that the content of rights and obligations between contracting parties is set by reference solely to the acts and words of those parties in relation to each other. The point is obvious inasmuch as we see that parties reasonably construe the obligations they assume toward one another based on the meaning of words and acts more generally. However, in theory and practice, we have been reluctant to acknowledge that what others do and

---

[84] *See* Scott & Triantis, *supra* note 27, at 190.

[85] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1 (1995); *see also* Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988) (referring to the injurer-victim structure of tort law).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

say is significant not just because it informs how parties to a given contract understand each other but to how they understand their contract with each other. This has been most apparent in the context of contracts of adhesion but the point carries to the situation of parallel contract.

Although contracts are not necessarily personally or temporally bounded in the way the classical model suggests, they are not unbounded either. Courts must have some limiting principle by which they ascertain the obligations of parties and the universe of evidence relevant to that inquiry. In this part, I propose parallel contract as one repeat model of contract with its own set of appropriate enforcement norms. First, I will describe the fact pattern typical of parallel contract. Second, I will explain the normative thrust behind recognizing parallel contract as a distinct paradigm worthy of its own interpretive precepts. Third, I will discuss employment contracts in large firms as the preeminent example of parallel contract and work out a few of its doctrinal implications in that context.

A. The Facts of Parallel Contract

Parallel contract occurs when one party ("central party") enters into a series of agreements with many other individuals ("contractees") on terms that are substantially overlapping. Certain key terms may vary but contractees expect that most of their contract terms are identical to those of other contractees.

In the contractual processes of parallel contract, the central party sets most terms unilaterally, especially those terms that the contractee comes to expect are parallel as among contractees. Terms are not typically negotiated and in fact, contractees' understanding of their rights and obligations under contract are based primarily on their communications with each other. Because the transaction costs associated with negotiating or even unilaterally tailoring terms to contractees exceeds the benefit derived from such tailoring, the central party tends to set the substance of most background terms based on facts pertaining to contractees as a group, including the mean and distribution of contractees' preferences and capabilities.[86] Those terms are then applied to all members of the group.

Contractees expect the background terms of their own agreement to be consistent with those of other contractees. The normative character of this expectation of homogeneity will be discussed further below, but the factual basis

[86] Note that the characteristic feature of parallel contract in which a central party unilaterally sets background terms does not have to reflect superior market power. Transaction costs may be adequate to explain the phenomenon.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

for this expectation is, first, the absence of reliable information on the basis of which contractees are able to draw nonarbitrary distinctions amongst themselves, and second, their belief that the central party cannot do so either (or, that it would not be economically worthwhile for it to undertake that task). Homogeneity of terms, and the expectation thereof, is thus driven by the costs of acquiring the information necessary to make nonarbitrary distinctions and by the cost of tailoring terms to numerous individual contractees. Where the information on which distinctions can be made is more readily available or where the aggregate number of contractees is smaller (or the cost of tailoring terms is otherwise lower), the expectation of homogeneity will be correspondingly weaker.

Parallel contract is not usually simultaneous. That is, contractees do not enter into contract with the central party at the same time. However, the chronological priority of a given contractee does not imply that either the central party or any subsequent contractee understands their legal obligations to be controlled by the terms of the first agreement. How then is homogeneity of background terms achieved? Each additional contractee expects her preferences and capabilities to be as relevant to the common terms of her agreement as those of any other contractee but on the margin she does not expect to be the but-for cause of any particular change in terms. Thus, the expectation will be that terms will gradually evolve as the set of contractees (and prospective contractees) and their related preferences and capabilities evolve, and as will the preferences and capabilities of the central party. The present obligations of parties to parallel contract are determinable at any given moment but are subject to ongoing revision by the central party.

Revision does not take place through deliberate modification. In fact, continuously updating the agreement in a self-conscious manner would give rise to precisely those transaction costs that the central party avoids by applying common terms to all contractees. Instead, the parties' understanding as to their rights and obligations evolves through the cumulative effect of the myriad decisions taken by the central party in the course of performance of its parallel contracts. The implication for interpretation is that communications and practices of the central party are evidence of its obligations toward contractees even in the absence of evidence that the central party specifically intended to revise its obligations toward all contractees.

B. Normative Implications of Parallel Contract

In interpreting contracts of adhesion, several commentators have suggested that courts should not just ask how consumers would reasonably construe written terms but how consumers would reasonably understand the agreement; the latter is more obviously informed by their experiences in the market, including their interactions with other consumers. Similarly, in parallel contract, courts should ask not just how localized practices within a firm may have informed a contractee's

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

understanding of the central party's words and acts to that contractee, but how communications between the central party and other contractees, and among contractees, reasonably affected a given contractee's understanding of her *agreement* with the central party. Because the obligations of parties to parallel contract are not set at the moment of contract formation, course of performance—as between central party and all contractees—is of central rather than occasional significance in interpreting the evolving substance of the parties' obligations.

Thus far, I have presumed that obligations should be construed and enforced consistent with contractees' understanding of their parallel agreements. But the principle of objectivity in contract requires that these understandings be reasonable if they are to control.[87] Given that these understandings are at odds with both existing treatment of these agreements and with some central parties' understandings of their own obligations, why regard the interpretive defaults proposed here as the most reasonable construction of the parties' agreements?

The first step is to unpack the notion of reasonableness. While a full treatment of the concept of reasonableness is beyond the scope of the present discussion, a contractee's understanding of terms may be "reasonable" in at least four respects: First, as an empirical matter, her understanding may be consistent with how most contractees would interpret agreements under comparable circumstances. Second, it may be fair to hold a central party and a contractee to those terms as a substantive matter. Third, it may be fair to privilege the contractee's understanding of terms over that of the central party, whatever their content might be. Finally, it may be otherwise desirable as a matter of public policy that obligations be construed in a particular manner.

To some extent, the reasonableness of allowing contractees' understandings of background terms to prevail in contexts of parallel contract is built into the concept of parallel contract. The paradigm of parallel contract applies to just those conditions under which contractees do in fact come to understand their agreement by reference to the words and acts of the central party in a given contractual community over the course of performance.

[87] *Cf.* West v. Wash. Tru Solutions, L.L.C., 224 P.3d 651, 653 (N.M. Ct. App. 2009) ("[B]ecause an employee's expectation based on an employer's words or conduct must meet 'a certain threshold of objectivity,' an employer may be entitled to judgment as a matter of law if the employee's expectations are not objectively reasonable.") (quoting Kiedrowski v. Citizens Bank, 893 P.2d 468, 471 (N.M. Ct. App. 1995)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

It is substantively fair to hold central parties to the meanings that their own words and acts project because of the legitimate interest of contractees in having some knowledge of their own terms, and the related legitimate expectation of consistency and uniformity that informs their understanding of what those terms must be. In the previous section, parallel contract was described as arising where contractees in fact expect homogeneity of background terms. This expectation is normative and not just descriptive where central parties purport to contract on identical background terms with all contractees and where there is no apparent method for individuating background terms in a nonarbitrary way.

It is fair to privilege contractees' understanding over those of the central party because the central party controls those terms and is alone able to contract around defaults that favor contractees; the central party knows and controls contractees' understanding, not the other way around.[88] Finally, it is desirable to enforce the understanding of contractees because the rationality of their market behavior, and therefore the efficiency of the markets in which they operate, depends on the quality of their information about the content of their contracts. As repeat contractors that control the terms, central parties are likely to operate with more accurate information about their agreements, irrespective of what the default terms may be.

To be clear, these are not offered as reasons for parties to contract on the parallel contract model, but rather reasons why a *court* should interpret agreements that conform to the fact pattern in Section A in accordance with the defaults suggested by the parallel contract paradigm. Because parallel contracts are voluntary agreements (in the particular sense that all contracts are voluntary), interpreting terms as subject to ongoing revision in light of practices and communications across an organizational setting is more reasonable if we also have an account of why *parties* would contract on such terms. And indeed, at first blush one might question the plausibility of parallel contract as a contracting strategy. First, one could ask why the parties would leave obligations open-ended at the time of contract, subject to ongoing revision. Second, one could ask why the parties would not expressly describe the central party's obligations as subject to revision in light of its practices with other contractees.[89] We rarely see express provisions to

[88] An interpretive norm that favors contractees' understandings, like the general rule of *contra proferendum* with respect to written agreements, resembles a penalty default. *See* Ayres & Gertner, *supra* note 46, at 91.

[89] For example, "most favored nation" provisions could expressly state that contractees are entitled to any benefits or rights offered other contractees.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

this effect in parallel contract and, if we did, the default paradigm proposed here would be redundant.

Obligations in parallel contract are unspecified at the time of contract formation for many of the same reasons that parties in other contexts leave their obligations vague. The costs of drafting a contract that optimally allocates obligations in all possible states of the world are high. Parties can either specify obligations that are suboptimal for some contingencies, or they may attempt to draft flexible terms that tie performance obligations to future facts. Parties must balance the ex ante costs of detailed specification against the higher ex post costs of third-party verification for vague (flexible) terms.[90]

As with many other contracts, the optimal terms of a parallel contract turn on future facts, e.g., facts related to future contractees. The costs of continuously drafting and applying background terms efficiently tailored to each contractee are excessive. Contractees may resist (e.g. retaliate by shirking) when they are given terms inferior to those offered to other contractees whom they perceive as similarly situated. Since it is impossible (too costly) to manage a regime where contractees are subject to individuated terms on grounds that are transparent and nonarbitrary, it is preferable that terms be presumptively parallel and that obligations evolve with facts relevant to the set of optimal common terms.

Although contracts are usually assumed obligationally complete at the time of formation, in fact the content of obligations often turns on future facts, such as market price or the exercise of discretion by one party. Just as a contract may fix an obligation by reference to some changing external proxy like market price, a parallel contract sets obligation subject to revision in light of the terms of subsequent agreements entered by the contracting party.

Of course, there is an important difference. In the legal treatment of parallel contract proposed here, we treat the terms of, or course of conduct under, subsequent agreements as a default for earlier agreements even in the absence of any express terms inviting parallel interpretation. Why do we not see express provisions subjecting the central party's obligations to revision in light of its subsequent practices? The reasons detailed above relating to the sensibility of leaving obligations unsettled at the time of contracting and dependent on future contracts are reasons for not specifying obligations ex ante. However, they are not

[90] *See* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 845 (2006).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

reasons for a central party to affirmatively propose or adopt an express restriction to its own discretion.

We should not be surprised that we do not see express provisions even where parallel treatment is optimal. Since under current law a central party enjoys unfettered discretion over background terms as a default, the central party has no direct motivation to propose or adopt an express provision that would require it to treat all contractees equally.[91] The express provisions that we see in commercial contracts that most resemble the default parallel treatment proposed here are most-favored nation clauses. These express terms are usually found in industries where the protected party exercises some market power.[92] In parallel contract, contractees do not usually have market power over the central party.

The central party would nevertheless adopt restrictions on its own discretion were those restrictions to lower the price it pays (or raise the price it obtains from) contractees. But contractees are likely to discount ex ante the value of protection under an express provision. The central party has more information about the probability of any change in terms, and what the drivers of such a change are likely to be. In particular, a contractee cannot know that those terms will improve for subsequent contractees such that she stands to gain from an enforceable norm of homogeneity.

Individual contractees will also undervalue express protection because the expected value of such a provision will be discounted heavily by the high cost of monitoring compliance—at least where other contractees are not already operating under a similar provision. Until a central party is obligated to maintain parity in

[91] Note that even under a default of parallel treatment, the central party controls the facts on which the content of background terms will turn. However, though in a literal sense the central party determines what it says and does with respect to each contractee, those actions are subject to more market pressure when they together form a policy. Individual actions in the absence of an enforceable policy are more opaque to contractees and prospective contractees.

[92] For this reason, most-favored nation ("MFN") provisions are often regarded as anticompetitive and raise red flags for antitrust authorities. *See, e.g.*, Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17 RAND J. OF ECON. 377 (1986) (explaining how such clauses facilitate a price-setting duopoly); Thomas Cooper & Timothy Fries, *The Most-Favored-Nation Pricing Policy and Negotiated Prices*, 9 INT'L J. OF INDUS. ORG. 209 (1991) (showing that monopoly buyer can gain from MFN clause); *see also* Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847, 878–881 (discussing anticompetitive effects of MFN clauses in agreements between health providers and insurers); Anthony B. Sanders, *Multiemployer Bargaining and Monopoly: Labor Management Collusion and a Partial Solution*, 113 W. VA. L. REV. 337, 362 (2011) ("As the labor antitrust cases make clear, [most favored nation clauses] are common in unionized multiemployer industries. They are a cartel's number one tool against employer exit.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

background terms, there is unlikely to be any infrastructure for disseminating reliable information about how background terms evolve. Thus, each new contractee would face formidable monitoring costs in enforcing a new provision that guarantees parity. She will discount such a provision accordingly.

Even individual contractees interested in express provisions about the evolution of background terms may be reluctant to reveal their preferences. By indicating their preferences or inquiring how background terms are set they may signal to the central party that they expect to be "heavy users" of any entitlements those background terms would confer.[93]

To the extent prospective contractees do not wholly discount uncertain and opaque background terms or refuse to disclose their related preferences, the central party is still unlikely to offer express protection because she faces a problem of adverse selection. The prospective contractees most likely to be interested in background terms are the ones the central party is least interested in attracting, i.e., those will use entitlements under those terms at highest cost.[94]

The central party is thus unlikely to opt into parallel contract. Again, since individual contractees are unable to negotiate background terms (because the transaction costs of individual negotiation are prohibitive), they are also ill-positioned to demand meta-terms that govern the evolution of those background terms. Proposing or negotiating an express provision that hinges background terms to subsequent agreements would be just as costly as negotiating tailored background terms directly.

The upshot is that parallel treatment can be efficient but elusive. It is efficient where it generates more value for contractees than it is burdensome for a central party, and where pre-commitment to parallel treatment avoids costly renegotiation when contractees learn of disparity. Nevertheless, parties in the circumstances of parallel contract are unlikely to affirmatively opt into such a regime on their own. The central party's private losses from such a term are likely to outweigh its share of any gain in transactional surplus.

---

[93] *See* Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J.L. ECON. & ORG. 381, 402 (1990); Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958 (1996) ("an employee who seeks an enforceable just-cause provision in the employment contract confronts a serious signaling problem regarding the quality of the employee's likely work").

[94] *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

One might argue that even if parties are unlikely to design optimal agreements in the settings of parallel contract, existing interpretive frameworks are adequate to conform a central party's actions over the course of performance to contractees' reasonable expectations.

The normal constraint on discretion created by vague terms is the duty of good faith. Unfortunately, this duty is itself notoriously vague, and unavoidably so given its application to all contracts. It operates at the most general levels as a restraint on opportunistic behavior that deprives one party of the benefit of its bargain. The duty of good faith prevents parties from exploiting shifts in bargaining power over the course of performance.[95]

Standing alone, the duty of good faith (as it is presently conceived) will not adequately police central parties in the circumstances of parallel contract. The duty is expressly backward looking and seeks to prevent a party from seizing an opportunity it specifically forfeited at the time of contract.[96] Failing to maintain parity among a set of contractees is not the kind of action that can be easily described as a breach of duty of good faith because there is no single action by which a central party usurps a forfeited opportunity. The opportunistic behavior that parallel contract seeks to control is cumulative over contracts. It would be almost impossible for a contractee to show that the failure to award/strengthen an entitlement ex post was specifically precluded by initial agreement. Similarly, a downward adjustment of an entitlement that is left under the control of the central party is likely to be viewed under existing law as a legitimate exercise of discretion.

Although existing application of the duty of good faith inadequately governs the circumstances of parallel contract, the default rules proposed here check the power of central parties in a way that would effectively operationalize the duty of good faith. They prevent central parties from abusing opportunities created by contractees' investments in their contracts and their relative lack of information about facts relevant to an optimal allocation of obligations between the parties.[97]

---

[95] *See* Centronics Corp. v. Genicom Corp., 562 A.2d 187, 191, 194–97 (N.H. 1989) (citing Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980)).

[96] *Id.*

[97] *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 532–33 (1971) (analogizing restraint on discretion on the part of the drafter of standard form contracts under vague terms as analogous to the restraint of administrative agencies' discretion in lawmaking). *See also infra* Part III.A.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

The notion of parallel contract is intended to build off the existing concepts of contracts of adhesion and relational contract. However, parallel contract departs from the descriptive picture behind each concept and presses separate normative concerns. Contracts of adhesion are distinct from parallel contracts in that the latter are (1) not mass in scale, (2) not open to all, (3) one or more terms may vary, and (4) there is no anonymity for either party.[98] The core normative challenge with respect to contracts of adhesion has been the quality of consent by consumers; by contrast, the concept of parallel contract is not intended to illuminate or solve any problem of consent. Parallel contract is not concerned, for example, with creating an opportunity for bargain, nor does it reflect angst about the fact that contracts are offered on a take-it-or-leave-it basis. While disparity in bargaining power helps motivate the interpretive paradigm of parallel contract, it is not unequal bargaining power per se. The "special rules" of parallel contract are intended to correct instead (1) the tendency of bargaining power to shift over the course of contract in ways that render contractees vulnerable, and (2) the distributive and market-distorting effect of contractees' informational disadvantage.

Parallel contract differs from relational contract in the felt absence of solidarity; relations are at arms-length, asymmetrical, and neither party trusts the other by choice.[99] Nor does parallel contract presume or show that such solidarity is the appropriate ambition of contract law. Nevertheless, the notion of parallel contract should extend certain insights from the literatures on contracts of adhesion and relational theory. Additionally, just as a few rules of formation and interpretation have adjusted to those aspects of contractual reality revealed by the concepts of contracts of adhesion and relational contract, the concept of parallel contract should dislodge interpretive paradigms that have persisted in the face of poor fit with the classical model in its particular context.

Where facts conform to the pattern of parallel contract, courts should hear evidence of a central party's communications and practices with respect to any

[98] Rakoff would disqualify the typical parallel contract as a contract of adhesion because one of the distinguishing features of contracts of adhesion in his view is that "[t]he principal obligation of the adhering party in the transaction considered as a whole is the payment of money." Rakoff, *supra* note 63, at 1177. This requirement "eliminates certain interactive relationships that might also be evidenced by standard forms used on a nonnegotiable basis, but in which the drafting party may be constrained by the continual need to generate cooperation and effort on the part of the adherent. Certain long-term business relationships and some employment contracts fall within this excluded category." *Id.*

[99] Consider the German expression "Vertrauen ist gut. Controlle ist besser." ("Trust is good. Control is better.")

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

contractees in a given setting over the entire period between the moment of contract formation and the event in dispute. Not only are events after the moment of initial contract formation relevant to understanding the terms of the agreement, later events may be more important than earlier events in ascertaining contractees' reasonable understanding of their terms. On the flip side, evidence of a central party's private communications with a contractee is not relevant unless they are specifically couched as deviations from the defaults of parallel contract.

The parallel contract model is most easily applied as an on/off model. That is, either an agreement is subject to the special rules of parallel contract, or it is not. However, the specific interpretive judgments that must be made about the content of particular agreements can be informed by the extent to which a particular fact pattern corresponds to the prototypical pattern of parallel contract and the applicability of its motivating assumptions. For example, where contractees' expectation of uniform treatment is weaker, it should be easier for the central party to deviate from the default of uniformity.

C. Employment Contracts as Parallel Contract

The best example of parallel contract occurs in the employment context.[100] Large employers enter into contracts with numerous employees without specifying all terms, such as leave or termination policies. The upshot is that employers' obligations under those terms are appropriately interpreted as they are understood by employees, in light of a practice of parallel contract. The practical consequence would be that employers should be held to consistent terms and practices regardless of whether employees can demonstrate that those practices were specifically intended by the employer to be legally binding in their individual cases.[101]

Some courts do just that. They do so primarily under the doctrine of implied contract.[102] Like the proposed paradigm of parallel contract, implied contract

[100] Other examples might include landlord-tenant leases, sales contracts in subdivisions or cooperatives, partnership agreements, franchise agreements or investor agreements with managers or hedge funds. Applicability will turn on whether contractees in these settings are in direct communication with each other, expect uniform background terms and are subject to the same informational disadvantages at work in the context of employment.

[101] *Cf.* Speidel, *supra* note 56, at 826 ("In a contract of employment, modern contract law assumes that the bargain between employer and employee is independent of context unless there is proof that the agreement is supplemented by norms and practices from the context or regulated by state or federal legislation.").

[102] *See* Jackson v. Action for Bos. Cmty. Dev., Inc., 525 N.E.2d 411, 413 (Mass. 1988) ("'A contract implied in fact may be found to exist from the conduct and relations of the parties.'") (quoting LiDonni,

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

emphasizes employers' practices and employees' reasonable expectations. The presumption of at-will employment is taken to authorize employers not only to discharge or demote at will, but also to unilaterally alter terms of employment—so long as modifications do not breach an express or implied agreement.[103] Thus, implied terms reign in employer discretion where there would otherwise be no constraint on its practices or changes to those practices.

Implied contracts arise where an employer leads employees to believe that they have certain contractual entitlements by virtue of the employer's words and acts.[104] Usually the employer communication critical to employees' reasonable expectations is an employee handbook.[105]

The communications and practices of employers are legally (and otherwise normatively) significant because they appear to account for employees' understanding of their legal rights, which seem stubbornly unresponsive to legal realities.[106] Employees operate under the belief that they can be dismissed only for

---

Inc. v. Hart, 246 N.E.2d 446 (Mass. 1969)); *see also* T.F. v. B.L., 813 N.E.2d 1244, 1248–49 (Mass. 2004).

[103] Schachter v. Citigroup, Inc., 218 P.3d 262, 269 (Cal. 2009).

[104] *See* West v. Wash. Tru Solutions, L.L.C, 224 P.3d 651, 653 (N.M. Ct. App. 2009) ("[A]n implied contract is created when an employer's 'words or conduct . . . support a reasonable expectation on the part of employees that they will be dismissed only in accordance with specified procedures or for specified reasons.'") (quoting Mealand v. E.N.M. Med. Ctr., 33 P.3d 285, 289 (N.M. Ct. App. 2001)).

[105] *See, e.g.*, O'Brien v. New Eng. Tel. & Tel. Co., 664 N.E.2d 843, 848–49 (Mass. 1996) ("[E]mployees may have a reasonable expectancy that management will adhere to a manual's provisions."); Ortega v. Wakefield Thermal Solutions, Inc., No. 035548A, 2006 WL 225835, at *3 (Mass. App. Ct. Jan. 5, 2006) ("The key inquiry is whether in light of context of the manual's preparation and distribution, as well as its specific provisions, it would be objectively reasonable for employees to regard the manual as a legally enforceable commitment concerning the terms and conditions of employment."); Woolley v. Hoffmann-Law Roche, Inc., 491 A.2d 1257, 1265 (N.J.), *modifying judgment*, 499 A.2d 515 (N.J. 1985) ("[T]he context of [a] manual's preparation and distribution [may be] . . . the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of his employment[.]"); Cabaness v. Thomas, 232 P.3d 486, 503 (Utah 2010) ("Relevant evidence of the intent of the parties usually 'includes the language of the manual itself, the employer's course of conduct, and pertinent oral representations.'" (quoting Brehany v. Nordstrom, Inc., 812 P.2d, 49 at 56 (Utah 1991))); *see also* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 747 (D.C. Cir. 1998) (holding that a statement that a handbook is not to be construed as a contract and a statement that the handbook was intended to give employees a better understanding of what they can expect from their employer were contradictory).

[106] *See* Scott v. Pac. Gas & Elec. Co., 904 P.2d 834, 839 (Cal. 1995) (explaining that under the "modern," "realistic" approach to contract interpretation, "courts will not confine themselves to examining express agreements between the employer and individual employees, but will also look to the

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

just cause, and this belief is insensitive to variations in the actual legal protections afforded by different states.[107] At first blush, the doctrine of implied contract appears to radically rework legal treatment of the employment relation. Although the doctrine is a general principle of contract law, state courts have applied it very differently. Some courts will allow employer practices to create terms notwithstanding express disclaimers in employee handbooks,[108] while others refuse even to allow for the possibility of binding terms in the absence of a written agreement for a fixed-term employment contract.[109]

Thirty-eight states recognize implied contract doctrine in employment.[110] In particular, most jurisdictions allow that personnel manuals may create binding obligations.[111] But even those jurisdictions that are theoretically open to implied employment terms vary in whether they enforce both oral and written representations by employers and the extent to which disclaimers nullify employer

---

employer's policies, practices and communications in order to discover the contents of an employment contract").

[107] *See* Pauline Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447.

[108] *See, e.g.*, Cirion Corp. v. Chen, No. 91–11792–Y, 1991 WL 280288, at *8 (D. Mass. Dec. 27, 1991) ("Although the Manual states that termination procedures are 'only guidelines and do not constitute a legal contract,' [the Company's] subsequent reliance on the Manual served to modify this disclaimer.").

[109] *See, e.g.*, Garcia v. Lucent Tech., 51 F. App'x 703, 704 (9th Cir. 2002) (holding that signed employment application stating that the employee understands and agrees that she can be terminated without notice precludes implied contract requiring good cause for termination); *Scott*, 904 P.2d at 841 ("[A] number of promises made in the employment relationship are too vague to be enforceable."); Goddard v. City of Albany, 684 S.E.2d 635, 640 (Ga. 2009) (holding that plaintiff could not show reliance on alleged promise of future employment and at-will employees in any case "cannot enforce oral promises"); Jackson v. Action for Bos. Cmty. Dev., Inc., 525 N.E.2d 411, 415 (Mass. 1988) (stating that fact that employer could unilaterally modify terms suggests terms offered were illusory and not enforceable); Dumas v. Auto Club Ins. Ass'n, 473 N.W.2d 652, 662 (Mich. 1991) (explaining that employer's words were better construed as revealing intention to boost employee morale than an intention to form a legally binding commitment to employees).

[110] *See* David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Update, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 652 tbl.1 (1996).

[111] *See* O'Brien v. New Eng. Tel. & Tel. Co., 664 N.E.2d 843, 847 (Mass. 1996).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

promises.[112] The trend is to narrow rather than expand employee protections under the doctrine of implied contract.[113]

The initial move to enforce employer commitments under a revamped doctrine of implied contract aimed to improve regulation of the employment relation.[114] Although there was new scrutiny of employers' traditional prerogatives, there was no corresponding evolution in the presumptions underlying classical contract theory. Unless substantive policy commitments were permitted to override operation of ordinary contract requirements, there was little room for maneuver given the ability of employers to expressly reserve all discretion at the outset of the employment relation.[115]

Because it falls well within the confines of classical contract theory, implied contract (1) remains wedded to the states of mind of the two parties to a contract as they have been revealed directly to each other, and (2) requires courts to identify a single moment at which terms have been offered, accepted and thereby fixed. Given these limitations, the move to implied contract in employment turned out to be a small one.

At first, the interest of courts assessing claims of implied contract promised to move beyond the subjective understandings of the parties. Consistent with the general principle of objectivity, courts stated expressly that "[t]he defendant's

---

[112] Walsh & Schwarz, *supra* note 110, at 651–53; *see also* Timothy Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 214 (2010).

[113] *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At-Will*, 58 UCLA L. REV. 1, 34–35 (2010).

[114] *See, e.g.*, *Dumas*, 473 N.W.2d at 668 (Boyle, J., concurring) ("[P]olicy considerations extraneous to the contract-as-promise analysis, such as stability and consistency in the work environment, were the judicial premises underlying the legitimate-expectations prong of *Touissant*."); Woolley, v. Hoffmann-Law Roche, Inc., 491 A.2d 1257, 1265 (N.J.), *modifying judgment*, 499 A.2d 515 (N.J. 1985) ("[T]his Court was no longer willing to decide these questions without examining the underlying interests involved, both the employer's and the employees', as well as the public interest, and the extent to which our deference to one or the other served or disserved the needs of society as presently understood.").

[115] *See* Brozo v. Oracle Corp., 324 F.3d 661, 667 (8th Cir. 2003) ("When a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable. *At most*, courts will step in when the party who would assume the role of sole arbiter is charged with fraud, bad faith, or a grossly mistaken exercise of judgment." (quoting Vigoro Indus., Inc. v. Crisp, 82 F.3d 785, 785 (8th Cir. 1996)); *Dumas*, 473 N.W.2d at 668–69 (Boyle, J., concurring) ("[U]nless there is a nonpromissory basis for imposing an employer obligation, analysis of unilateral contract claims in implied-in-fact employment cases must begin with the question whether the words or action of the defendant manifested an intention to make a commitment[.]").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

subjective intent is irrelevant when she knows or has reason to know that her objective actions manifest the existence of an agreement."[116] A few courts, as in *Woolley v. Hoffman-La Roche, Inc.*,[117] held that employees do not need to show individual subjective reliance or awareness of the employers' terms for those terms to become binding.

More often, though, the inquiry into employees' reasonable expectations turned on what those expectations were given what a particular employee had been told by her employer, rather than other acts or words by the employer that might contextualize the few direct communications between the parties to a given contract. And still more often, an employee's ability to invoke implied contract required that she show personal awareness or even belief in the employer's alleged contractual obligation.[118]

The inquiry into direct communications between the parties, as to alleged terms and a particular employee's acceptance of those terms, follows naturally from the presumption of dyadic contract relations. But it is misplaced in the

[116] T.F. v. B.L., 813 N.E.2d 1244, 1249 (Mass. 2004).

[117] *Woolley*, 491 A.2d at 1268; *see also* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925–26 (Cal. Ct. App. 1981) ("In determining whether there exists an implied-in-fact promise for some form of continued employment courts have considered a variety of factors in addition to the existence of independent consideration. There have included, for example, the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.").

[118] *See* Scott v. Merck & Co., No. L–09–3271, 2010 U.S. Dist. Lexis 126279, at *9 (D. Md. Nov. 30, 2010) ("Policy directives regarding aspects of the employment relation become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer." (quoting Dahl v. Brunswick Corp., 356 A.2d 221, 224 (Md. 1976)) (internal quotation marks omitted)); Campbell v. Gen. Dynamics Gov. Sys. Corp., 321 F. Supp. 2d 142, 148 n.3 (D. Mass. 2004) (stating that employee must know of offer contained in handbook in order to accept it); Weber v. Comm. Teamwork, Inc., 752 N.E.2d 700, 715 (Mass. 2001) ("There is no evidence that Weber assented to the terms of the progressive discipline policy as a condition of her own continuing employment."); *Dumas*, 473 N.W.2d at 664 (separating plaintiffs who have received direct assurances from those who inferred it from other facts, and distinguishing plaintiffs who received these assurances at various times); West v. Wash. Tru Solutions, L.L.C, 224 P.3d 651, 658 (N.M. Ct. App. 2009) (regarding employee's statements that he could not recall particular representations made to him directly by the employer, and statements that suggested he himself did not subjectively believe the employer's discretion was bounded, as evidence against the binding nature of the employer's commitments in the handbook); Tiernan v. Charleston Area Med. Center, Inc., 575 S.E.2d 618, 626 (W. Va. 2002) (Davis, C.J., concurring in part and dissenting in part) (complaining that the majority assumed that plaintiff had been given direct assurance of a policy of nonretaliation whereas the only evidence she proffered was a statement made by the employer to a newspaper). *But see Woolley*, 491 A.2d at 1268 (agreeing that employees accepted offer of unilateral contract by continuing employment).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

employment context in which employees' understanding of their own and their employers' obligations derives from words and acts across a bounded, but numerous, set of parallel agreements. Among the implied contract cases, *Woolley* alone acknowledges this important feature of (many) employment contracts. It expressly distinguished the case of a policy manual distributed to employees from individual long-term employment contracts.[119] General disregard of this factual predicate of most contract claims in employment is at odds with the acknowledged reality that employers make certain commitments to employees precisely to achieve, or at least to create the appearance of, fair and uniform treatment of employees *relative to one another*. Employee handbooks regularly self-describe as intended to ensure uniformity, impartiality, and fairness.[120] Courts emphasize this purpose, too, but this recognition does no work so long as the legal meaning of these documents turns on facts specific to particular employee-plaintiffs instead of facts applicable across the firm.[121]

Courts have also equivocated on the extent to which statements and acts by employers over the course of employment create or modify terms. Some courts have been willing to recognize obligations that arose after initial formation of the employment relation.[122] Some have been willing to go so far as to override an express disclaimer based on oral statements or course of performance.[123] But more

---

[119] *Id.* at 294. *See also id.* at 296 ("What is before us in this case is not a special contract with a particular employee, but a general agreement covering all employees. There is no reason to treat such a document with hostility."); Wade v. Kessler Inst., 798 A.2d 1251, 1258 (N.J. 2002) (noting that employer's manual is intended for substantial number of employees).

[120] *See, e.g.*, Strass v. Kaiser Found. Health Plan of Mid-Atlantic, 744 A.2d 1000, 1013 (D.C. 2000); *Woolley*, 491 A.2d at 1259 n.2; *West*, 224 P.3d at 654.

[121] *See* O'Brien v. New Eng. Tel. & Tel. Co., 664 N.E.2d at 848–49 (Mass. 1996); Ferguson v. Host Int'l, Inc., 757 N.E.2d 267, 272 (Mass. 2001); *Woolley*, 491 A.2d at 1268.

[122] *See, e.g.*, *O'Brien*, 664 N.E.2d at 847–48; Jackson v. Action for Bos. Cmty. Dev., Inc., 525 N.E.2d 411, 415 (Mass. 1988); Richards v. Detroit Free Press, 433 N.W.2d 320, 322 (Mich. Ct. App. 1988) ("A plaintiff in a wrongful discharge action is not required to show that he relied upon the fact that the position was terminable only for just cause in accepting the position. An employer is bound by statements of policy made after the employee is hired because the employer derives benefits from a loyal and cooperative work force."); Beggs v. City of Portales, 210 P.3d 798, 801–02 (N.M. 2009) ("[A] jury could reasonably conclude that the city not only promised to make an offer for a contract, but actually engaged in a course of conduct over an extended period of time, including use of its employee manual, in which the city both made and performed contractual commitments to its employees, thereby obligating itself into the future.").

[123] *See, e.g.*, Derrig v. Wal-Mart Stores, Inc., 942 F. Supp. 49, 54 (D. Mass. 1996); *West*, 224 P.3d at 656.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

often, an express statement affirming employees' at-will status or disclaiming legal obligation based on an employment manual are adequate to foreclose employer liability.[124] Similarly, while some courts view the evolving nature of employer practices as unproblematic,[125] others view it as inconsistent with a finding that those practices are ever binding obligations.[126] By and large, through careful statements at the time of hiring and in disclaimers accompanying official policy statements, employers have successfully avoided binding themselves to employees through other words and acts. Courts are prepared to privilege one-off disclaimers over informal statements and actual practices even though employees themselves consistently base their understanding of their legal relations with employers on the latter.[127]

The doctrine of implied contract has been unable to align legal construction of employment agreements with employee understandings because, as with express agreements, the source of contractual obligation depends fundamentally on what individual employees were told. Although course of performance is inconsistently allowed to modify the import of direct communications, most courts resist these modifications because prior statements make clear that the employer itself did not wish to assume any enforceable obligations to its employees. Some courts sense that employers wish to have their cake and eat it too, by instilling a sense of stability and mutuality in the workplace without committing to either; but implied

---

[124] *See* Trabing v. Kinko's, Inc., 57 P.3d 1248, 1254–55 (Wyo. 2002) (express disclaimer negated possibility of either modification or promissory estoppel).

[125] *See, e.g.*, Parts Depot, Inc. v. Beiswinger, 170 S.W.3d 354, 363 (Ky. 2005) ("Once an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect. If the employer unilaterally changes the policy, the terms of the implied contract are also thereby changed."); *see also Woolley*, 491 A.2d at 1265.

[126] *See, e.g.*, Dumas v. Auto Club Ins. Ass'n, 473 N.W.2d 652, 652 (Mich. 1991) ("Were we to extend the legitimate-expectations claim to every area governed by company policy, then each time a policy change took place contract rights would be called into question. The fear of courting litigation would result in a substantial impairment of a company's operations and its ability to formulate policy.").

[127] *See* Cynthia Estlund, *How Wrong are Employees About Their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 7 (2002) ("To the extent that employers act as if they must justify discharges even while they explicitly disclaim any promise of job security, those acts may speak more loudly than the words of a disclaimer."); *see also id.* at 14 ("The existence and actual operation of internal grievance systems strongly imply the need to justify discipline and discharge, and are likely to be much more salient to employees than the express disclaimer. Employees may simply credit employer actions more than they credit the words of a two-sentence disclaimer on their employment application or in the employee handbook in their drawer.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

contract doctrine is without the resources to assign legal significance to the possibility of such opportunism.

The doctrine of good faith would normally play that doctrinal role, but it too is ill equipped to control ex post behavior that is not inconsistent with the settled terms of a prior bargain. At issue in the employment context is ex post manipulation, made possible not because of implicit understandings that the parties failed to spell out at formation, but because the parties have not determined the content of their respective obligations in a substantive sense and are prepared to revise them continuously over the course of and *through* performance.

The alternative treatment of the employment relation that I propose here could be mistaken to abandon the requirement that contractual obligation be voluntary, inasmuch as employers may decline to assume obligations but then inadvertently assume them through subsequent acts or words. However, liability in these cases turns on the employer choosing to proceed in a certain manner and the employer remains capable of controlling the substance of its obligations. Little more is required to characterize its obligations as voluntary in the modern sense.

We have learned from contracts of adhesion that we can (and do) hold parties to terms based on a theory of blanket authorization.[128] That a consumer has chosen to go forward with a transaction with limited knowledge as to the specific terms of contract—but often with access to related information from other consumers or transactions with other retailers or manufacturers—is enough to validate the standardized agreement. Similarly, an employer can be understood to have consented to an employment relation in which it has not self-consciously bought into each of its specific obligations. And the content of those obligations vis-à-vis any single employee may be determined with reference to communications and events outside of that bilateral relation. Although not every norm of a relationship is appropriately regarded as legally binding, the lesson from relational theory is that, in a case like parallel contract, legal obligations are not set out ex ante and can only be deciphered by reference to words and acts over the course of performance. While there are relations in which thick norms might be undermined by legal enforcement, parallel contract occurs where relations are arms-length for legal purposes; the law has reason to presume or operate as if individuals are business

[128] *See* LLEWELYN, *supra* note 69, at 370; Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 636 (2002).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

actors and do not intend to assume obligations or acquire rights of the sort whose value turns on voluntary *compliance*.[129]

Because obligations in parallel contract track the words and acts of the central party, that party is able to avoid inadvertently ratcheting up her obligations by simply declaring that words and deeds directed at a given contractee do not reflect on the central party's agreement with other contractees. (The rules of parallel contract are default rules.) However, the central party must issue disclaimers with each communication or conduct that could revise her obligations; it would not be adequate to issue such a disclaimer once at the time of initial contracting since legal obligations are not settled then.[130]

---

[129] Parallel contract is rarely characterized by formalized mechanisms for enforcing norms outside the law, such as would justify an inference that the initial agreement did not contemplate amendment through subsequent words and acts. *Cf.* Ronald Gilson, Charles Sabel & Robert Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, 110 COLUM. L. REV. 1377, 1384 (2010) ("[C]ontracting parties can and do agree on formal contracts for exchanging information about the progress and prospects of their joint activities, and that these same information exchanges provide the foundation for raising the existing level of trust. It is this information-sharing regime that braids the formal and informal elements of the contract, endogenizes trust, and thereby supports the informal enforcement of the parties' substantive performance."). For example, employers are not usually required to provide information to employees that would establish a framework for resolving legal gaps in the agreement as they arise. Instead, gaps are filled by the employer unilaterally.

The classic interpretation would read the absence of any restraint on discretion in the initial agreement as signaling an allocation of discretion constrained only by good faith. But such an allocation is at odds with the usual understanding of the employee, and lacks any normal mechanism for motivating compliance even with the loose requirement of good faith. *See* Aditi Bagchi, *Unions and the Duty of Good Faith in Employment Contracts*, 112 YALE L.J. 1881 (2003); *cf.* Gilson et al., *supra* at 1386 ("[M]aking the parties' capabilities and character observable . . . serves to raise switching costs that support informal enforcement of the parties' substantive obligations.").

Either the employer has no obligation because he has been allocated control, or his unspecified obligations are of the same type (i.e. legal) as those which are detailed; there is no reason to believe that the parties have carved up obligations into legal and nonlegal varieties where the apparent basis for their failure to specify was merely the cost of doing so ex ante. The inference that unspecified norms were intended to be nonbinding follows only if we presume that all legal obligations are specified ex ante.

[130] Requiring the central party to issue disclaimers is a burden that existing law would not impose on an employer that wishes to avoid certain liability. But this additional cost of achieving one's preferred employment regime is but one factor in the choice of a default regime; it does not put such a regime so outside the power of an employer as to render the default regime involuntary. *Cf.* Alfred Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178, 1185 (1964) ("lack of enforceability undercuts only part of the effectiveness of contract as a means of ordering relations between individuals. That it is an important part is obvious. But, the protection of party expectation and reliance is at stake; freedom is not.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

The effect may be that parallel contract in the employment context will result only in an endless wave of disclaimers on the part of employers. But these disclaimers will come at a cost to employers and result in a corresponding benefit primarily—though not exclusively—realized by employees.[131] The cost to employers is that employees will no longer operate on an inflated understanding of their rights; this may result in less employee loyalty, and perhaps, more shirking. However, these costs flow from an intrinsic and instrumental good: transparency. Employees will have a clearer understanding of their legal employment relations. Knowledge of the truth is a human value, knowledge of legal truths is of distinctly legal value, and the more rational decision-making that it enables is of economic value to employees and others whose welfare is hinged to the efficient operation of labor markets. Enforcing parallel contract as a distinctive category of contract will render the legal and material outcomes they deliver less surprising.

III. MEANS AND ENDS IN CONTRACT

Two familiar regulatory ends of contract are advanced by the parallel contract framework.[132] First, contract law limits the exploitation of new bargaining power after a contract has been formed. Second, boundaries on contract law limit the externalities of bilateral exchange. In its context, parallel contract serves both ends.

Parallel contract is well-suited to policing opportunism[133] in its setting because it relaxes the inapplicable assumption that obligations have been set at formation. It better accounts for the interconnectedness of agreements within a bounded contractual community because it relaxes the classical assumption that

---

[131] These results of the interpretative paradigm help justify taking into account contractual process. *See* Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 852, 855 (1964) ("[C]ourts often state that a contract will be so interpreted, if possible, as to attain a result that is fair to both parties, rather than one that is unfair" and "[i]f a public interest is affected by a contract, that interpretation or construction is preferred which favors the public interest.").

[132] *Cf.* Shavell, *supra* note 21, at 346 ("There are two standard reasons for legal intervention in contracts: asymmetric information and externalities. To these broad rationales for intervention, prevention of holdup should seemingly be added . . . ."). This article describes the possibility for opportunism (not holdup per se) as related to party design of parallel contracts, which in turn is driven in part by asymmetric information.

[133] *See* Oliver Williamson, *Opportunism and its Critics*, 14 MAN. & DECISION ECON. 97 (1993) ("Opportunism corresponds to the frailty of motive which requires a certain degree of circumspection and distrust in the transaction cost economics scheme of things."). *See also* Henry Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 903 (2012) (defining opportunism as "use of the system in hard-to-foresee ways by well-informed parties, even at the expense of shrinking total surplus").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

agreements are negotiated and understood by way of bilateral communications between two parties.

A. Shifts in Bargaining Power

In locking in a deal, parties to a contract lock in a distribution of their joint gains from trade. Parties may attempt to seize a larger portion of the transactional surplus when the opportunity arises. Contract law aims to prevent parties from usurping opportunities they forfeited by enforcing the deal that was earlier-made.[134] Ordinary breach occurs where a party attempts to do what she earlier promised not to do, presumably because, at least in the absence of legal remedy, new possibilities (or costs) make it attractive to do so. Where terms are underspecified, the duty of good faith polices the most flagrant exercise of power beyond the boundaries of rightful discretion.[135] Limits on enforceable modifications also should prevent opportunistic renegotiation of an agreement.[136]

However, there are real limits to what contract law can do to preserve a deal that reflects a distribution of power that has passed.[137] The limits of the law reflect in part the incompleteness of contract.[138] Because contracts do not fully address all acts and contingencies,[139] even with the interpretive aid of good faith, some acts that can shift transaction value from one party to another are neither prohibited nor required by terms of the agreement. This results in *practical uncertainty* for parties

---

[134] *See* Cohen, *supra* note 20, at 78, 90 (explaining that "the problem of opportunistic behavior is perhaps the key justification for court intervention in contracts" and defining opportunism as "deliberate contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality").

[135] *See* Oakwood Vill. L.L.C. v. Albertsons, Inc., 104 P.3d 1226, 1240 (Utah 2004) (duty of good faith cannot be "read to establish new, independent rights or duties to which the parties did not agree ex ante").

[136] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (modifications must be equitable responses to an unexpected change in circumstance).

[137] *See* Benjamin Klein, *Why Hold-ups Occur: The Self-enforcing Range of Contractual Relationships*, 34 ECON. INQUIRY 444, 444 (1996) ("Hold-ups occur when unanticipated events place the contractual relationship outside the self-enforcing range."); Barbara Koremenos, *Can Cooperation Survive Changes in Bargaining Power? The Case of Coffee*, 31 J. LEG. STUD. 259 (2002) (describing difficulties of enforcing treaties where underlying distribution of power has shifted).

[138] *See* Schwartz & Scott, *supra* note 1; Scott, *supra* note 1.

[139] *See* Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755, 756 (1988).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

in that they do not know whether certain acts/events will occur; certain details of performance remain unresolved by initial agreement.[140]

In those contexts where the optimal ex post allocation of entitlements is uncertain at the time of contract, a contract will be not just inevitably but optimally incomplete.[141] Because the optimal set of background terms in parallel contract depends on an evolving set of contractees, those terms cannot be fixed at the time the central party contracts with any particular contractee.[142]

Since the efficacy of contract as a commitment mechanism turns on its capacity to deter opportunistic behavior, courts are loathe to infer legal uncertainty from practical uncertainty. An agreement can be "obligationally complete" even where it is practically uncertain to the extent it allocates discretion over performance to one party.[143] Assigning discretion does not eliminate practical uncertainty, especially for the party subject to discretion, but it does afford courts a mechanism by which to determine whether a breach has occurred ex post.[144]

But there is another way to avoid legal uncertainty in the face of practical uncertainty. The details of performance might be left not to the discretion of either party but to some exogenous mechanism. Familiar examples would be agreements that fix price by reference to industry publications or arbitration.[145]

---

[140] *See* Williamson, *supra* note 133, at 101 ("[T]he assumption of comprehensive contracting, according to which there are no ex post surprises, hence no attendant needs to adapt to surprises . . . is implausible.").

[141] *See* Scott & Triantis, *supra* note 90.

[142] Even if the parties attempted to fix those background terms the selected terms would likely be unstable due to pressure to renegotiate. *See* Aaron S. Edin & Benjamin E. Hermalin, *Contract Renegotiation and Options in Agency Problems*, 16 J.L. ECON. & ORG. 395, 416 (2000) ("Committing to foregoing renegotiation of inefficient outcomes strikes us as a difficult commitment to make, so in many circumstances we expect renegotiation to be a relevant threat until the party who values the asset more . . . owns the asset.").

[143] *See* Scott & Triantis, *supra* note 27.

[144] *See* SHAVELL, *supra* note 17, at 292 ("[A]n incomplete contract may well provide a complete set of instructions by implication."); *id.* at 301 ("[P]arties will want incomplete contracts to be interpreted as if they had spent the time and effort to specify more detailed terms.").

[145] *See, e.g.*, Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469 (5th Cir. 2012) (long-term supply contract provided for arbitrator to set price where parties could not mutually agree); Ga. Power Co. v. Cimmarron Coal Corp., 526 F.2d 101 (6th Cir. 1975) (arbitration clause governed price dispute under coal supply agreement); Teco Coal Corp. v. Orlando Utilities Com'n, 2010 WL 8750622, at *4 (E.D. Ky. Sept. 17, 2010) (price of jet fuel set by reference to oil industry publication); PMC Film Can.,

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

Legal certainty is constructed by way of interpretation, with varying degree of guidance by the agreement itself. Some agreements make heroic efforts at legal completeness, or at least, specify mechanisms by which particular aspects of performance will be determined in the course of performance. They can do this, for example, by assigning discretion, specifying a price mechanism, detailing arbitration procedures, or (most relevant here) by including a most-favored-nation clause. Where parties do not themselves dictate how legal certainty will be recovered from practical uncertainty, courts apply some default method of filling in the contours of party obligation.

In many cases of parallel contract today, especially in the employment context, courts' preferred method of creating legal certainty is allocating discretion (or reading a contract to have allocated discretion).[146] The parallel contract model, by contrast, resolves it by reference to exogenous facts, namely, commitments made or practices implemented by a central party to other contractees over the course of performance.

Why is the parallel contract model a superior legal response to practical uncertainty in this context? Doctrinally, it is superior because it is often more consistent with party intent at formation. Remember that contractees in parallel contract have a normative expectation that the central party will treat them consistently with other contractees with respect to background terms.[147] This expectation, where reasonable, implies that while the central party retains discretion as to how their commitments and practices evolve, it has forfeited discretion as to whether to maintain uniformity with respect to background terms. Since the boundaries of permissible conduct shift over time, they are ill-suited to

Inc. v. Shintech, Inc., 265 Fed. App'x 126 (3d Cir. 2008) (setting price of resin with reference to Chemical Data Index).

[146] *See* Grzyb v. Evans, 700 S.W.2d 399, 400 (Ky. 1985) (describing termination at will as a corollary of the principle of mutuality in contract); *see also* Steelworkers v. Warrior & Gulf Navigation, 363 U.S. 574, 583 (1960) ("Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions.").

[147] *See supra* Part II.A.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

enforcement under the duty of good faith; bad faith usually applies only to actions outside the contemplation of the parties at the time of contract formation.[148]

Legal certainty by way of exogenous facts is also preferable to a default of discretion because exogenous facts can operate as a constraint on opportunism. Recall that one of the functional virtues of legal certainty is that it facilitates legal enforcement of an agreement, and legal enforcement helps lock in a particular bargain—and the bargaining power of which it is a product. Where parties themselves choose to allocate discretion to one party, the other is presumably compensated ex ante for the risk of any surprising (but not actually prohibited) exercise of discretion ex post.[149] But where discretion is read into an agreement by way of default, or where one party's understanding of discretion is preferred over the other party's expectation of constraint, the court constructs legal certainty at the expense of its underlying function, i.e., deterring opportunism.[150]

On this reasoning, we should be wary of default rules that assign discretion to one party where some other method of constructing legal certainty is available; and we should prefer narrow discretion over broad discretion where the product of a default rule. But we should be especially averse to defaults of discretion under circumstances where we expect bargaining power to shift over the course of performance, i.e., when we have reason to believe that bargaining power in a relationship is destined to become misaligned with its governing contract.

---

[148] *See* Oakwood Vill. L.L.C. v. Albertsons, Inc., 104 P.3d 1226, 1240 (Utah 2004) (stating that the duty of good faith cannot be "read to establish new, independent rights or duties to which the parties did not agree ex ante").

[149] *Cf.* Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 669 (1988) ("under compensatory remedies would be unobjectionable if promises were perfectly informed about all relevant risks").

[150] We should not take the absence of a most-favored nation clause as evidence that the parties did not expect the central party to maintain parity over time. Unlike industries where the party protected by an MFN clause exercises market power, in parallel contract the contractee has an interest in parity but is unable to extract a credible commitment from the other party. *See supra* text accompanying note 93. In fact, R. McAfee and Marius Schwartz show that firms with an interest in equal treatment by a monopolist (because they are in competition with each other), where terms are secret, buyers may be unable to obtain a credible commitment of parity even where the monopolist is in principle willing to so commit ex ante. *See* R. Preston McAfee & Marius Schwartz, *Opportunism in Multilateral Vertical Contracting: Nondiscrimination, Exclusivity and Uniformity*, 84 AM. ECON. REV. 210 (1994). They suggest that the solution is sometimes vertical integration, *id.* at 223, which is of course not usually an option in the context of parallel contract since contractees may be natural persons.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

This misalignment characterizes relations under parallel contract. Contractual incompleteness and asymmetrical reliance together shift bargaining power toward a central party.[151] This makes it possible for that party to perform differently than the parties anticipated (or differently than the contractee reasonably assumed) at time of contract. Although this shift is predictable, for the reasons discussed in Part II.B., contractees are unlikely to be compensated for it ex ante. In any case, a contract design that allows the central party to deviate from a norm of homogeneity with respect to background terms is inefficient inasmuch as it increases the costs of contracting for the set. Although adjustment of background terms over time is efficient, variation in the terms across a set of contractees is not. It is both more costly for the central party to administer inconsistent terms and more costly for contractees to monitor compliance. Variation is also more likely to trigger ex ante negotiation and ex post renegotiation of background terms.[152]

This relates to the central feature of parallel contract that renders it vulnerable to opportunism and explains why courts have generally supplied a default of discretion. It usually makes sense in parallel contract for the central party to control and unilaterally set background terms because the costs of negotiating terms individually is prohibitively high. Thus, we would not wish to create legal certainty in circumstances of parallel contract in a way that jeopardizes the efficiency gains from control by the central party.[153]

---

[151] Because parties do not equally invest in the contractual relationship—they are not equally fungible to the other—parallel contract is not normally characterized by bilateral monopoly. The less-invested party can behave opportunistically without effective extralegal sanctions. *Cf.* Edward Rock & Michael Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1923 (1996) (describing internal labor market as a bilateral monopoly).

[152] The losses from variance in background terms are similar to the inefficiency of renegotiating background terms in other long-term exchange agreements. *See* Keith Crocker & Thomas Lyon, *What do 'Facilitating Practices' Facilitate? An Empirical Investigation of Most-Favored-Nation Clauses in Natural Gas Contracts*, 37 J.L. & ECON. 297 (1994) (evidence from natural gas markets suggests MFNs are more likely to facilitate efficiency than collusion); Victor Goldberg, *The International Salt Puzzle*, 14 RES. L. & ECON. 31 (1991) (MFNs may create efficient price flexibility).

[153] It is efficient to allow the central party flexibility in setting background terms notwithstanding the possibility of opportunism in the same way it is efficient to preserve managerial discretion notwithstanding agency costs. In the latter case, constraining production and investment decisions results in the loss of "some of the value of the expertise brought to [a] firm by its managers." George G. Triantis, *Secured Debt under Conditions of Imperfect Information*, 21 J. LEG. STUD. 225, 240 (1992). In parallel contracts, constraining the central party's choice of background terms will either increase the transaction costs associated with revising those terms or render them unresponsive to the evolving attributes of the pool of contractees.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

The solution of parallel contract is appealing because it does not jeopardize the transaction cost savings of unilateral control. The central party retains control over background terms across its set of contractees. Parallel contract nevertheless would deter opportunism because the general policies and practices of the central party, unlike its practices vis-à-vis particular contractees, are constrained by an evolving market, including reputational, constraints. Further, those market-driven policies are always an exogenous fact at the point of adjudicating particular disputes. Although the central party will in a literal sense control its obligations toward a group, its obligations with respect to a given contracting party in any instance will be determined by facts (policies and practices) that are no longer within its control, and those facts are in turn driven by facts (market conditions) that never were within the central party's unilateral control. Setting the boundaries of the central party with reference to those facts thus polices opportunism more effectively than traditional rules of interpretation.

B. Externalities from Bilateral Agreement

Bilateral exchange affects third parties. Sometimes the effect is the desirable working of a market, as in the effect of a price term in a single agreement on the price term in subsequent agreements. Some types of effects are at times positive and at other times negative, as in the network effects and learning effects of earlier innovations and shortfalls in contract design.[154] Other externalities are consistently undesirable (though they may be the product of terms that are ultimately defensible), as in anticompetitive terms,[155] terms that would jeopardize the claims of other creditors,[156] or terms that create competitive pressure toward practices that we collectively deplore.[157]

---

[154] *See* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 729–34 (1997) (discussing network and learning effects).

[155] *See, e.g.*, Reed, Roberts Assocs. v. Strauman, 353 N.E.2d 590, 592–93 (N.Y. 1976) (though they may be sometimes justifiable, noncompete covenants are inherently anticompetitive); Jonathan M. Jacobson & Daniel P. Weick, *Contracts that Reference Rivals as an Antitrust Category*, ANTITRUST SOURCE, Apr. 2012, http://www.wsgr.com/publications/PDFSearch/jacobson-0412.pdf (discussing vertical contracts that affect the terms available to a party's competitors).

[156] *See* Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595, 597 (1998) ("unsecured creditors are harmed when an originator sells its most valuable assets").

[157] *See* Monica J. Oberkofler, *Examining the Role of Companies in Realizing Human Rights: The Case of Gap, Inc.*, 26 BERKELEY J. INT'L L. 392, 392–93 (2008) ("When consumers bargain shop, they put downward pressure on prices. This pressure encourages companies to negotiate lower prices with their suppliers, which, in turn, may have a negative impact on the human rights of the workers making those

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

Where the effects of bilateral exchange on third parties are negative, there is often some kind of statutory intervention. Antitrust, bankruptcy, employment, environmental, and consumer protection statutes all intervene in bilateral exchange in ways that arguably protect the interests of third parties.

Statutory intervention and/or a private attorney general scheme is usually the most feasible response to negative externalities from bilateral exchange because most externalities are diffuse and there are information barriers, collective action problems or other obstacles to private coordination that make a decentralized solution impracticable. Parallel contract, however, is a circumstance where the effects of bilateral exchange on third parties are concentrated, and they are not consistently negative. Such concentrated externalities are the counterpart to third-party beneficiaries except that we cannot rely on parties in the bilateral exchange at issue to take third-party disadvantage into account or to implicitly or expressly designate the relevant third parties.[158] The central party is not motivated to include "most-favored nation" style clauses that will restrict its discretion over the course of performance and contractees are poorly positioned to demand such protection with respect to background clauses, the substance of which they are only dimly aware at the time of contract formation.[159]

Parallel contract is thus a class of contract in which concentrated externalities render many of the usual policy responses to third-party effects inapt, and in which contracting parties themselves are poorly positioned to account for third parties.[160] In this context, the best solution is an interpretive default that directly manages the relation between separately-negotiated agreements in a manner consistent with underlying expectations. Specifically, because parties in parallel contract expect background terms to evolve but remain consistent across contracts over time, such an interpretive norm should be imposed (as a default) through interpretation.

---

products."); Joel Trachtman, *Who Cares About International Human Rights? The Supply and Demand of International Human Rights Law*, 44 N.Y.U. J. INT'L L. & POL. 851, 862 (2012) ("competitive or pecuniary externalities may be expected to produce increasing pressure on certain domestic human rights as globalization advances").

[158] *Cf.* Huntington Natl. Bank v. Jasar Recycling, Inc., No. 11-CO-24, 2013 WL 500773, at *7 (Ohio App. Feb. 8, 2013) ("To be an intended third-party beneficiary, the parties must have entered into the contract directly or primarily for the benefit of the third party.").

[159] *See supra* Part II.B.

[160] *See* Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1695–1700 (2011) (discussing usual strategies for resolving externalities).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

Private law ends where transactions are not essentially bilateral, that is, where parties to a transaction impose substantial effects on third parties and cannot be relied upon to optimize aggregate interests. Concentrated externalities test the limits of private law. They do not fit comfortably in the usual ambit of mandatory regulation because the set of relevant third parties is too small, and the optimal terms are too varied from one transactional setting to another to be imposed ex ante or across all firms. But nor is contract law on the classical model adequate to account for the fact that exchange is not robustly dyadic. Parallel contract provides an intermediate solution that keeps these kinds of contracts within the realm of common law contract at relatively low cost.

IV. CONCLUSION

This article has offered a model of contract formation in which two central presumptions of the classical model do not hold true. In parallel contract, parties do not set or understand their obligations to one another solely by reference to their communications or dealing with each other. The party in a position to determine their respective obligations does so by way of acts and words directed at numerous individuals. As with contracts of adhesion, parallel contract is not robustly dyadic in the way present default rules presume.

Second, as relational theory suggests is sometimes the case, parties to parallel contract do not take their respective obligations to be fully determined at the moment of contract formation. The terms agreed upon at the start of the contractual relationship comprise an initial agreement; but they do not amount to an "original agreement" which parties amend only through new and separate moments of contract.

Parallel contract demonstrates that details pertaining to contract formation are relevant to the appropriate norms of contract adjudication. Contract law today is already sprawling—it includes a common law that allows for some specialized rules for particular contractual circumstances, as well as many statutory regimes that apply rules specific to various contractual contexts.[161] As a pragmatic matter, the interpretive reforms called for here could be achieved through employment legislation (and legislation tailored to other situations where parallel contract may

[161] *See* Feinman, *supra* note 76, at 738 (describing "neo-classical contract law" as residual because statutes have carved out various types of transactions for special treatment, and fragmented because even the common law does not attempt to apply the same rules to all transactions).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu

prevail) or reform on the margin, by way of small adjustments to the rules of interpretation in case law.

There is no doubt that attempting to tailor rules to variations in the contractual process is costly; if it were not, we might be tempted to take into account all the details of process behind each individual contract, and no one is proposing that. Contract law cannot be completely tailored,[162] nor can it be (or has it been) completely general.[163] When recognized law is too general, judges are prone to contorting contract law by overextending open-ended doctrines like unconscionability, duty of good faith, and promissory estoppel. The processes by which contracts are created are too diverse in fact and normative import to warrant a universal law of contract. Parallel contract is one repeat form of contracting that is distinct and frequent enough to warrant special treatment.

[162] *See* Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 L. & SOC. REV. 507, 521 (1977) ("If writing about contract were to reflect the empirical operation of the contract system, we might lose the elegance and neatness that once gave us confidence that our doctrine supports and reflects our economic ideals. Instead of a neat system, we would risk being left with an unsatisfying collection of ideas where everything 'depends.'"); Kessler, *supra* note 22, at 636 ("To be sure, the task of building up a multiple system of contract law is eminently difficult, particularly since courts are not commissions which are able to examine carefully the ramifications of the problem involved, and can see only the narrow aspect of the total problem which comes up for litigation.").

[163] *Cf.* ADDISON IN TREATISE ON CONTRACTS (1847) ("The law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2013.303
http://lawreview.law.pitt.edu