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FREEDOM OF CONTRACT

PART 1: LIBERAL CONTRACT THEORY

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ABSTRACT

Freedom of Contract *justifies enforcement of contract law through its role in enhancing individual autonomy defined as self-determination. The book addresses the big questions of contract theory, answers longstanding doctrinal debates in contract law and points the way to justified reforms.*

Part 1 of the book – Liberal Contract Theory – *is included here. It develops our normative and conceptual framework. Chapter 2 situates law's commitment to autonomy in broader debates in political philosophy, distinguishes competing approaches, and shows how we justify contract enforcement. Chapter 3 identifies the three core principles that animate liberal contract law – "proactive facilitation," "regard for the future self," and "relational justice" – and wraps up by showing how our view on freedom of contract stands in sharp contrast to the prevailing laissez-faire definition.*

Freedom of contract, correctly understood, is the right to pursue our voluntary joint plans – facilitated by autonomy-enhancing law that offers an adequate range of normatively attractive contract types; protects our future selves' ability to re-write core life plans; and ensures relational justice, including a measure of substantive equality.

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BRIEF OVERVIEW OF *CHAPTER 1*

Freedom of Contract shows how to align contract law with its animating liberal values. Our account answers the big questions of contract theory and resolves longstanding doctrinal debates in contract law.

Forty years ago, in *Contract as Promise*, Charles Fried focused attention on the centrality of autonomy to contract. Though influential, his approach fell short. Later liberal theorists also ran into roadblocks. For a time, it seemed legal economists had won the battle. But their approaches faltered because they could not account for the irreducible role of freedom in contract law. We can't drop "freedom" from "freedom of contract."

In *The Choice Theory of Contract,* we showed how contract law, at its core, enhances individual autonomy defined as self-determination. *Choice Theory*, however, provoked heavy criticism. We heard the critics. Their insights pushed us to write – together, separately, and with co-authors – nearly thirty articles along the path from the preliminary sketch in *Choice Theory* to the definitive account here in *Freedom of Contract.*

Grounding contract in self-determination requires that law must adhere, as it mostly does, to three autonomy-based principles: "proactive facilitation," "regard for the future self," and "relational justice." Braiding these principles into a compelling theory of liberal contract comprises the main task of *Freedom of Contract* and it creates the solid basis for the book's doctrinal work and reformist agenda. We explain how contract law works across all spheres of modern contracting, and we resolve doctrinal debates from pre-contractual bargaining through breach and remedies.

Freedom of Contract refocuses how contract law should be practiced, taught, and reformed. In short, freedom of contract is the right to pursue voluntary joint plans facilitated by autonomy-enhancing law that offers adequate choice, protects our future selves, and ensures relational justice.

PART I: LIBERAL CONTRACT THEORY

This Part presents our liberal theory of contract, an approach that starts from a commitment to autonomy defined as self-determination.

Chapter 2 situates *Freedom of Contract*'s commitment to autonomy in broader debates in political philosophy, distinguishes competing approaches, and explains how we justify contract enforcement. Chapter 3 details our approach, one that identifies and braids together the three core principles necessary for genuinely liberal contract law – proactive facilitation, regard for the future self, and relational justice.

Our work in this Part is to create the jurisprudential scaffolding needed to support the concrete doctrinal explanations and reform proposals that follow in Parts II and III.

CHAPTER 2:
AUTONOMY AS CONTRACT'S ULTIMATE VALUE

Contract's ultimate value is autonomy defined as *self-determination*. Independence, community, and efficiency are important values in contract law, but autonomy comes first. It cannot be traded away. This is our central normative claim.

A contract in a liberal state is best understood as a *voluntary joint plan.* Other theories conceive of contract in terms of transfer, promise, consent, or exchange. In earlier work, we put choice at the core. All these are indeed key elements, but in a liberal polity, contract's irreducible mission is to enhance individual autonomy through well-tempered support for voluntary joint plans. This is our core conceptual claim.

Our normative and conceptual claims interrelate: we describe contract as a voluntary joint plan because this is the view that best implements the widely-shared commitments to freedom and equality that define a genuinely liberal state. Defending this strong claim is the main task of this Part. Happily, as we'll show in Parts II and III, our view also best describes actual contract law. And, to the extent doctrine does not comply with our account, it should. That is, grounding the normatively-laden concept of contract in voluntary joint planning is the surest route to a justified reformist agenda.

Our account challenges the traditionalists and the economists – the two main camps that dominate the contract theory literature (and, to an extent, the caselaw). Both camps argue for far-reaching doctrinal reforms, but each is based on a handful of unsound jurisprudential foundations.

We reject traditionalist theories that justify contract in terms such as transfer, or cognates including promise and consent.[1] We also reject accounts based on exchange that elevate welfare maximization or joint maximization.

Legal economists' accounts, aggregating party preferences, cannot justify contract.

By contrast, our account is based on enhancing autonomy, not maximizing utility. When autonomy and utility conflict, as happens in doctrinal settings we highlight in Part II, contract law can, should, and usually does prefer autonomy.

This Chapter covers some difficult jurisprudential terrain. It may feel a little in the weeds. But the stakes are high. For those impatient with jurisprudence, the takeaways of this Chapter can be briefly stated:

As noted above, (1) contract's ultimate value is autonomy defined as self-determination, (2) a liberal contract is best understood as a voluntary joint plan, and (3) our autonomy calculus should prevail when it conflicts with party independence or preference maximization. Implicit in these points is one additional takeaway: (4) Unlike the dominant legal-economic approach, we put real people first. While corporations are vital to the modern economy, they have no independent autonomy interests and cannot be the core subject of contract theory or law. Our approach covers *all* contracts in which real people are parties, whether they aim at mere preferences (like most consumer contracts) or constitutive plans (like marriage and employment).

A. Autonomy for Contract

1. Autonomy, Liberalism, and Self-Determination. Autonomy is the capacity to direct one's life according to one's reasons and desires. Liberalism is the political system that aims to promote and protect this capacity. Beyond these general propositions, the terms autonomy and liberalism have competing meanings across intellectual and public settings. So, we begin by briefly specifying these shorthand definitions.

Liberalism in our view is premised on the conviction that each one of us is entitled to act on our capacity "to have, to revise, and rationally to

pursue a conception of the good."[2] We deserve to exercise some control over our destiny, "fashioning it through successive decisions through [our] lives."[3] That said, we can never be the sole authors of our life stories. Each of us is situated in a pre-existing environment. Although we are partly constituted by our social embeddedness, each of us is nonetheless entitled to be the ultimate navigators of our own path.

A liberal regime is one that ensures and enhances the ability of all people to be able to write their life stories – to have autonomy, defined as some measure of self-determination or self-authorship (terms we use interchangeably),[4] including access to some minimum share of resources sufficient to ensure the capacity to pursue these projects.

Our life story is neither a script fully written in advance nor a set of unrelated episodes. A conception of self-authorship in which one is bound to a narrative arc for one's life constructed fully in advance would be a form of unfreedom. But that does not mean autonomy requires the ability to make unconstrained decisions at each fork in the road. Autonomous people characteristically make decisions in a piecemeal fashion, choosing both short-term and long-term pursuits. Self-determination allows – to some extent requires – opportunities for people to alter their plans and sometimes even to replace them completely.[5]

Autonomy does necessitate a measure of independence: it requires some freedom from interference by others (or negative freedom) as well as some non-subordination to the choices of another. But autonomy is not guaranteed merely by a structure of negative rights.[6] Self-determination focuses on our ability to make effective, meaningful choices about the direction of our lives.[7] For a regime to be liberal – in the sense of aiming to provide everyone a meaningful right to self-determination – the state must attempt to ensure to each of us certain material conditions along with an adequate range of significantly distinct options for our key life choices.[8]

The basic rule that underpins an autonomy-based legal regime – its "grundnorm" – is that people are entitled to a system of law supportive of

their ability to shape a life they can view as their own, rather than merely one that respects their capacity for uncoerced choice.

2. Distinguishing Raz and Rawls. The above propositions may sound familiar. And, indeed, they overlap to an extent with work by Joseph Raz and John Rawls.[9] But the autonomy-based liberalism of this book is nonetheless distinguished from the "liberal perfectionism" often identified with Raz, notwithstanding our partial reliance on his work and the resemblance between our accounts. Our approach also diverges from the "political liberalism" of the later Rawls, notwithstanding the common view that his approach is the only coherent alternative to Raz.[10]

First, our account stands in sharp contrast to liberal perfectionism, at least in the way that term is usually understood by political theorists. Perfectionist accounts of the good life perceive self-determination as one means, albeit typically an important means, for securing a life of human excellence. Autonomy does not stand in a privileged position vis-à-vis other values. It is valuable only when exercised in the pursuit of objectively valuable ends. This is why perfectionist accounts often unashamedly address how we treat ourselves, not just how we treat others. In other words, these accounts are also – indeed, irreducibly – paternalist.

On our understanding of liberalism, perfectionism is objectionable. While the liberal state is obligated to ensure everyone's basic pre-conditions for autonomy, it must stop there. Law cannot distrust or override people's agency regarding their own core plans.[11] Quite the contrary: it must empower individuals to form and pursue their own conceptions of life so long as – and this is the crucial proviso – they do not overly impinge on others' conceptions.

In contrast to perfectionist accounts, in our view, liberal law should not promote (or discourage) any specific ways of life as particularly good (or bad) for people. This means that our liberal contract theory is not implicated in any form of potentially disrespectful paternalism. It also means autonomy is emphatically not on par with any other value that matters to contract

(although autonomy does not do all the normative work in our account, as we explain below). As the system's lodestar (and as its side-constraint, which we also discuss later), the fundamental commitment to autonomy serves as liberal contract's principled tool for ensuring people choice among an adequate range contract law "types."

We also stand apart from political liberalism. Despite recognizing the deep social and political disagreement around the value of autonomy, we are committed to *autonomy foundationalism*. This does not mean we reject value pluralism. Instead, we situate pluralism at the more-correct level of contract law types. Competing values and goods shape the distinctive contract types that a state must provide if it is committed to enhancing autonomy. Some of these values and goods are intrinsic to people's self-determination; others are instrumental to it. Further, commitment to autonomy entails rather demanding relational justice requirements.

Both these propositions – regarding choice among types and relational justice – require that autonomy be the single *ultimate* value to which liberal contract law must be committed. With this value in place, law can refuse to facilitate practices that defy people's equal right to self-determination, while remaining neutral among other practices.

Some philosophers and legal scholars worry about the coherence of an intermediate position that resists both perfectionism and political liberalism.[12] In this book, we show this concern is misplaced. A properly empowering law can both retain its resolute commitment to autonomy while at the same time avoiding the pitfalls of perfectionism.

But we're getting ahead of ourselves. To establish this point, we need first to explain contract's distinctive mission.

3. Contract as a Voluntary Joint Plan. States employ many means to carry out their obligation to facilitate people's self-determination. Contract is one such means, tasked with a distinctive mission. A contract – or at least a contract in a genuinely liberal legal order – is *an autonomy-enhancing*

voluntary joint plan, the beginning of a joint journey of interdependence. This is our core conceptual claim.

Like other means for self-determination, the institution of contract, if it is to be legitimate, must be situated within a robust background regime that aims to guarantee everyone the material, social, and intellectual preconditions to become and remain self-determining individuals. In other words, it is implausible to expect that contract law's legitimacy be fully freestanding.

Yet, contract's autonomy-enhancing role is non-optional and irreducible. Because our practical affairs are necessarily interdependent, our autonomy is necessarily relational.[13] This means that our interpersonal interactions carry some freestanding normative significance. Therefore, our self-determination cannot be fully secured by public law. Private law must set up (or participate in constructing) the social and economic frameworks we need to be able to lead our chosen conceptions of life in relation with others.[14]

Contract expands people's choices regarding how to shape their lives. That is, it attaches legal consequences to certain acts to enable people to affect their entitlements if and only if they so choose. Thus, contract is essentially a *power-conferring*, rather than duty-imposing, body of law. Contract is at root unlike the important parts of, say, tort law that vindicate rights such as the right to bodily integrity.[15] The choice-expanding normative powers contract makes available are essential to our ability to plan over time – and they make contract a key autonomy-enhancing legal institution.

Liberal contract theory can thus be read as elaborating on Charles Fried's celebration of contract as "a kind of moral invention," one that empowers people to make binding commitments. The ability to commit gives "free individuals a facility for extending their reach by enlisting the reliable collaboration of other free persons."[16]

We, and others, have thoroughly criticized Fried's "promise theory." This is not the place to rehash those critiques.[17] But his most important

insight remains: contract is law's principal means through which we can legitimately enlist others to our own goals, purposes, and projects – both material and social.[18]

Contract, in this view, is rightly treated as an essential feature of liberal law because of its core mission in service to planning. Plans are necessary for autonomy – the fundamental right to write and re-write the story of our lives – because autonomy requires a temporal horizon of action. Autonomous persons must be entitled to abandon old plans and make new ones. Having a set of plans arranged in a temporal sequence is key to the ability to carry out higher-order projects, that is, to self-determine.[19]

Plans enable complex forms of self-determination. For individuals deciding their own actions, planning is a matter of forming intentions and then carrying them through over time, despite inevitable roadblocks. If our plans also involve other people acting – as many plans do – then intentions are not enough, because I can't intend that you act. What I can do is to get a commitment from you that you'll act.[20] Enter contract.

The secure interpersonal commitments known as contracts dramatically augment the available repertoire of plans from which self-determining people can choose. By ensuring the reliability of contractual promises for future performance, law enables people to join forces in their respective plans into the future, expanding the available repertoire of secure interpersonal planning engagements beyond the realm of promises and other extra-legal interactions.

An enforceable agreement is the parties' script for this co-operative endeavor. As Chapters 4-8 show in detail, contract law provides parties with the indispensable infrastructure that both facilitates this risky venture and ensures its integrity. The contractual parties' rights and obligations are always, indeed necessarily, set by the content of what the law deems to be their agreement plus relevant mandatory and default background rules.

4. Instrumental and Constitutive Choices. While the additional choices contract may offer are potentially valuable on almost any justificatory

account, an autonomy-enhancing theory must distinguish among choices based on how they contribute to self-determination.[21] To accomplish this, we offer a rough "autonomy calculus" needed for an ex-ante analysis of law based on autonomy, rather than utility. But we don't offer a full-blown theory of how autonomy can be aggregated. For our purposes here, it is enough to highlight the qualitative distinction between our mere preferences and the constitutive choices that make us who we are.[22]

Consider first mere preferences. Many choices contract affords are driven by such preferences. Some of these may be instrumentally important, such as consumer purchases. Choices that help satisfy people's preferences reflect and serve their life plans. Or they may contribute to people's general welfare which in turn serves as a means for advancing their self-determination. Either way, choices driven by mere preferences – those with no direct bearing on people's broader plans, goals, and conception of self[23] – lend themselves to a straightforward cost benefit analysis that renders commensurate all contract rules and terms. In other words, for such contracts, the autonomy-enhancing approach will usually incorporate the welfare-maximizing one.

But other choices go beyond preference satisfaction; they are integral to who we are. While many of our core features are immutable or socially constructed conditions, some of the features most significant to people's identity result from and reflect their own choices. After all, the idea of self-determination implies that decisions on what constitutive choices – or "ground projects" – to pursue must be reserved to the individual.[24] This category of constitutive choice is significant because it reminds us that contract is not only important in the spheres of commerce and consumption, but also to empower people's autonomy in the rest of their lives, including the spheres of home, work, and intimacy.

The constitutive choices people make are not on par with their preferences for mundane goods or daily services. Unlike fully instrumental choices, constitutive ones cannot be usefully analyzed in familiar cost benefit terms. Indeed, if self-determination is the lodestar of contract law,

then its doctrinal makeup must reflect the *qualitative* distinction between ground projects and mere preferences.[25]

In short, contract is best justified in terms of enhancing people's ability to carry out voluntary joint plans, including both their instrumental and ground projects. Contract law – or, at least, genuinely liberal contract law – is best conceptualized as the law governing autonomy-enhancing joint planning.

To persuade you of this view, we also must explain why contract cannot be justified through either of the two dominant paths in the existing literature – that is, either as a spot exchange projected into the future as *traditionalist theorists* posit, or as a means for efficiently re-allocating entitlements as some *lawyer-economists* assert. Along the way, we answer the challenge of justifying why we enforce contracts in the first place.

B. Why Traditionalist Theories Fall Short

1. Contract as Widget Transfer. We begin with the pitfalls of traditionalist theories of contract, including all theories that trace their philosophical roots back to Kant and Hegel or their doctrinal orientation to the laissez-faire era.[26] Today, these theories go by names including transfer theory, promise theory, and consent theory.

Daniel Markovits, Seana Shiffrin, Arthur Ripstein, Randy Barnett, and leading traditionalist theorists each capture aspects of the approach's intuitive appeal. They aim to show how obligations arise between people who cooperate or collaborate in making a contract, and possibly are strangers before and after. Despite their profound divergences, all traditionalist approaches necessarily rely on one key point of convergence: *all* the normative action of contracting takes place at the moment of formation – the transfer is the only necessarily cooperative moment, after which the right to performance rightfully belongs to the promisee.

We focus here on Peter Benson's work because he has offered the most recent, comprehensive, and only book length account of the traditionalists' point of convergence. There exists no other, better synthesis of their key move. At the end of the day, Markovits relies on a Benson-type transfer. As does Shiffrin. As do all the traditionalists (which we have shown elsewhere[27]). If Benson's view falls short, then so do the rest.

Benson claims that contract developed from "the immediately executed barter or exchange." The conceptual move became possible, he argues, once law recognized that the parties' representations establish "the moment of the transfer of present exclusive control over a determinate object."[28] We remain agnostic regarding Benson's historical account,[29] but insist that contract's normative status should not depend on its historical path.

We understand the intuitive appeal of traditionalist theories, which stands for "the simple idea that contract is the means through which people vary the normative relations between them."[30] This idea does work well with respect to a particular, familiar type of commitment, such as a future delivery of a widget for an agreed-upon price. That contract indeed looks like a spot exchange projected into the future. Benson seems to explain that case, because, as he puts it, this "transaction is not a cooperative venture." At all relevant times, "there is no 'ours' . . . only a 'mine' and a 'thine'"[31] – so the only thing at stake is to secure the reassignment of the parties' respective, pre-existing rights.

In other words, to shape themselves as assignors and assignees in the widget case, all the contractual parties seem to need from the law is enforcement services, along with a background set of procedural rules that provide instructions on how to make any contract largely from scratch. Contract, under this traditionalist view, is strictly voluntaristic, such that contract law puts into effect the parties' mutual will, intent, or consent. (Traditionalists sometimes add adjectives like "apparent" or "presumed," as in "apparent consent" or "presumed intent" to this description.)

In this view, the parties create all contractual norms. That said, contract law need not limit itself only to the agreement's express terms; law can legitimately supplement them with implied terms. But these terms can only be implied on a particular basis: if they are grounded in what can reliably be described as the actual joint will of the parties (or the content of their consent).[32]

So far, so good. But things look very different once we move from widget contracts to garden-variety executory contracts whose performances are arranged in a temporal sequence – that is, once we move from the traditionalists' edge case to the bread-and-butter of contemporary contract practice.

2. Sequential Performance. When performance is sequential, the parties' script cannot be meaningfully translated into a set of disconnected exchanges (or, more precisely, of exchanges of rights over objects that do not necessarily require further action by either party). Often, the contract has an irreducible intertemporal dimension, such as when the object of the agreement is the pursuit of a project – say, the promisor agrees to build the promisee's home, with the inevitable adaptations, adjustments, and dependencies that are entailed.

Numerous contract types implicate such interactive engagements. Many of these are complicated commercial contracts that increasingly take the form of relational contracts (output, requirements, and exclusive dealings are just a few familiar examples).[33] Other contract types that belong in this intertemporal category relate to people's most fundamental decisions – the ground projects that make us who we are and give meaning to our lives.[34] Some of the most important contract types – regarding employment, marriage, and home – often implement constitutive choices that are categorically distinct from spot transfers.

Unlike the traditionalist views of contract – which nicely fit with what legal-economists call "the complete contingent contract" – the parties usually contemplate a joint plan that requires ongoing adaptations. For all

of the above contract types, thinking about contract formation as a set of reassignments of the parties' pre-existing entitlements seriously misrepresents what is going on. Contract formation here signifies the beginning of a new path for the parties, one in which they become interdependent.[35]

Most agreements fall between the incomplete relational end and the complete contingent end of the contracting continuum. But even in these mixed cases, traditionalist theories efface the normative significance of contract's intertemporal dimension. By re-casting the promisor as an assignor and the promisee as the possessor of a promised entitlement, traditionalist theories fail to capture the idea or practice of contract.

Contract law cannot and does not merely offer enforcement services for parties' fully scripted moment of agreement. Rather, it *proactively* facilitates their *cooperative* endeavor.

Indeed, as we show below in Chapter 3, proactive facilitation is the name of the game of modern contract law. This is why, as we discuss in Chapters 5-8, its capacious fabric of default rules goes far beyond what can be reasonably accounted for as implied terms. Rather, contract's defaults are – and should be understood as – critical means for *expanding* the scope of the possible cooperative arrangements that may advance the parties' plans.

3. Between Independence and Self-Determination. Traditionalist theories take a different tack. By rejecting the idea that contract be understood as a cooperative venture, they aim fully to safeguard the parties' independence.[36]

But rejecting ongoing cooperation and ensuring independence comes at a price. Traditionalist theories inescapably limit contract's ability to function as a planning device, thus curtailing its empowering potential and practice. Fundamentally, they fail to account for a significant part of the legal phenomenon they seek to explain.

In brief: our *joint planning* picture of contract can accommodate the simple reassignment cases,[37] but the traditionalist *reassignment* picture is incapable of accounting for the vast array of cooperative ones.

Promise theory, consent theory, and all other traditionalist theories of contract ultimately rely on the logic of transfer theory – one-shot exchange and independence.[38] All are vulnerable to the same criticism regarding the normative implications of intertemporal performance and interdependent relations.

Traditionalist theories are equally vulnerable along one more fundamental dimension. Given their shared commitment to independence as a core value, these theories are unable to meet the challenge of justifying contract enforcement.

C. How to Justify Contract Enforcement

1. The Challenge. Contract's autonomy-enhancing role depends, as we've noted, on the reliability of contractual promises. This feature explains why contract law does not merely protect promisees' actual *reliance* and why a contractual right is the right to *expect* (which does not necessarily converge with expectation damages, as well discuss later).[39]

To perform its core mission of ensuring the reliability of executory contracts, liberal contract law requires two key features: first, it needs to recruit the law's authority and coercive power against promisors even beyond any actual reliance harm promisees have incurred, and indeed even before they have even been harmed at all. Second, it must sometimes require individuals to satisfy what promisees' expect even if they inadvertently invoked contract with no subjective intent to be legally bound. These two features are required because contract's empowerment potential depends on people's ability to count on the representations of others.

But how can these two critical features of contract be defended in a traditionalist regime that enforces only duties of right while avoiding coercion of virtue?

This question reformulates contract's long-standing justificatory challenges, ones that Lon Fuller and William Perdue famously raised, and that traditionalist theorists also use to animate their inquiry: Why is contract law willing coercively to enforce promises even when nonperformance generates no (or only limited) harm? What legitimizes law's disrespect of the updated preference of promisors who have changed their minds? And how can enforcement be justified even when promisors did not deliberately intend to be bound?[40]

We agree these are the right questions to ask. The core normative task for contract theory in a liberal polity is to justify applying law's authority and coercive power (a) beyond what is required to offset promisees' actual reliance, and (b) even when promisors did not intend to be bound.

2. Independence Cannot Justify Contract. For traditionalists, contract law's justification cannot be justified either based on the virtues that moralists attribute to promise-keeping or by reference to the public benefits that may be generated by vindicating promisees' expectations.

Up to this point, we agree: liberal contract law is not a moral education project. And the law owes individual promisors a stronger justification than telling them that the world is a better place if promisees are given the remedies they seek.[41]

Traditionalists, however, go further,[42] and then we part with them. To continue with Benson, as he puts it, a proper justification must fit private law's "organizing idea" of "liability for misfeasance only," in which "a party is subject to liability only insofar as [they] may reasonably be viewed as injuring or interfering with another's ownership or rightful exclusive possession of something."[43]

This idea is baked into traditionalist accounts given their underlying commitment to "the innate mutual independence of all persons in relation to others" – a commitment central to the recently reinvigorated Kantian conception of law.[44] It excludes any reference to the parties' self-determination, and thus renders legally irrelevant their respective needs, desires, circumstances, interests, and well-being, as well as their purposes and motives. Importantly, this view also rejects any consideration of substantive equality, subscribing instead to formal equality in which "the claims parties make in relation to each other must be absolutely the same." The parties must "respect each other as mutually exclusive private owners," but they need not "justify their conduct in light of these or any other substantive ends."

Because this conception of our interpersonal juridical life imposes only *negative* duties, that is, duties of non-interference, the only viable way to justify contract's legitimacy seems to be by conceptualizing contract as a transfer. But transfer theory, as we've just seen, cannot plausibly account for more than a small corner of the vast array of modern contract law.

So, what can justify contract's actual background rules, which *do* impose interpersonal responsibility that goes beyond the traditionalist vision of private law as the realm of reciprocal respect for independence and formal equality? If not traditionalism, what possibly justifies contract?

This difficulty dissolves as soon as we recognize that, *contra* the contract (and other private law) traditionalists, people in a liberal polity properly so-called are justifiably expected to pay some modest price in exchange for accessing the power-conferring institution of contract. This price is entailed by our general duty to respect each other's right of self-determination in our interpersonal relationships. The facts of interdependence and personal difference – and thus the vulnerability and the valuable options to which these social conditions give rise – require that the liberal commitment to individual self-determination must be included in the law governing relationships between people.

It should be no surprise, therefore, that modest affirmative interpersonal duties indeed do and should typify private law. (Dagan has defended this claim in substantial detail in a recent book co-authored with Avihay Dorfman.[45])

For our purposes here, it is enough to highlight that these interpersonal duties are modest. Private law resists, as it should, the excessive interference with people's autonomy that would arise if law imposed overly demanding affirmative interpersonal duties to aid others. But private law is not and should not be a stronghold of interpersonal independence with its blanket rejection of affirmative duties. Not every infringement of independence ignores people's distinct individuality.[46]

3. Putting Independence in its Correct Place. Even though we treat self-determination, not independence, as the principal value justifying contract, we also acknowledge the intrinsic and instrumental importance of independence.[47]

To start, we recognize the existence of intrinsic values that are not of ultimate value. This recognition is what enables our account of liberalism to embrace legal pluralism without rendering values like friendship or art merely instrumental. It also keeps our theory from collapsing into an unacceptable foundational value pluralism.

Here is the lesson for our current pursuit: although independence is not the ultimate value, neither is it merely instrumental. The contribution of independence to autonomy renders it intrinsically valuable and deserving of genuine consideration in any decent liberal polity.[48] This means law must properly safeguard people's independence while at the same time recognizing that self-determination is what ultimately justifies and requires independence.

Properly safeguarding independence is a challenge. A liberal state, concerned with excessive interpersonal impositions and duties, must undertake what H.L.A. Hart described as the "unexciting but indispensable chore" of distinguishing "between the gravity of the different restrictions

on different specific liberties and their importance for the conduct of a meaningful life."[49]

How does this Hartian command apply to private law's grundnorm of reciprocal respect for self-determination in governing interpersonal relationships? It means there is no way, and no reason, to wish away the modest interpersonal burden law imposes on promisors who voluntarily invoke the contract convention. Contract's empowerment potential depends on people's ability to count on others' representations.

In sum, the state empowers individuals to pursue their life plans by providing each of us with the institution of contract. But contract is not free.

Law exacts a price: promisors may sometimes be required to satisfy what promisees' expect even when they only inadvertently invoke the convention of contract and even though this requirement typically exceeds what is needed to offset these promisees' harm. The burden this imposes on promisors – the precautions it requires – is the modest price each party pays so others with whom they interact can benefit from contract law's potential to advance their life plans, that is, their self-determination.

Many other doctrines and rules of contract law require similar Hartian qualitative judgments that are part of what we call the "autonomy calculus." Liberal contract legitimately restrains the independence of some people when its significance to their self-determination is minimal and when upholding that independence could jeopardize their or others' self-determination or undermine a floor of substantive equality among people.

At the same time, liberal contract treats people's independence with great care absent strong opposing normative pressure, that is, when there is no threat to others' self-determination and in settings where formal equality roughly approximates substantive equality. Also, law must strictly uphold independence when it is crucial for ensuring self-determination.

In brief, we reject the views of traditionalists – anxious to vindicate the parties' independence – that contract is a voluntary reassignment of the parties' pre-existing rights. In a genuinely liberal state, a contract is best

understood as a voluntary joint plan, one that protects independence in its proper domain, but always aims to enhance self-determination.

If not independence, how about exchange? Can the economically-oriented view – the dominant contemporary rival to traditionalism – offer a more promising path to justifying contract? Perhaps, contract is best understood as a means for an efficient re-allocation of entitlements.

D. Why Legal-Economic Theories Fall Short

Legal-economic analysts of contract usually do not explicitly address the normative foundation of their accounts. But a few do it well, including Steven Shavell and Robert Scott. So, they stand in here for the whole, as Benson does for traditionalist accounts. There does not exist some other, more subtle, jurisprudential account available to justify contract from a welfare maximizing position. If Shavell and Scott fall short, so do all legal-economic accounts.

1. Against Welfare Foundationalism. Shavell fairly represents the normative legal-economic canon when he writes that the point of contract law in conferring contractual powers is to "maximize social welfare." Acting "to further the welfare of the parties to the contract" is presumed to be a proper means to that end because (and to the extent that) "they will ordinarily be the only parties affected by the contract."[50]

The basic idea is straightforward. The normative commitment of economic analysis of law is to maximize aggregate welfare, typically understood in terms of preference satisfaction.[51] The market, including the institution of contract, is an important means for continuously improving both allocative and productive efficiency, particularly in contrast to the evident epistemic pitfalls and computational challenges of a planned economy – which is how economists typically frame the alternative.[52]

Facilitating contracts via rules that economize on the parties' transaction costs is laudable, in this view, exactly because it improves how the market operates.[53] Foundational welfarists embrace, indeed celebrate, the recruitment of the invisible hand: by pursuing private interests within their contracts, contractors advance the public good.

Welfare foundationalism, however, cannot plausibly be accepted as contract law's normative core.

To see why, consider the role of freedom of contract in welfare economics. Welfare economics celebrates free markets as a means to achieve the greatest good for the greatest number. The invisible hand of the market offers, in this view, a comparative advantage vis-à-vis other forms of social design because it harnesses individuals' self-interest both to obtain and to process information about people's tastes and preferences. As Eric Posner and Glen Weyl put it, the market is "programmed" to allocate resources efficiently; it is like "a giant computer composed of these smaller but still very powerful computers."[54]

But if freedom of contract is *wholly* instrumental to the ultimate welfarist goal of optimizing allocative efficiency, we could (as Posner and Weyl do) envision replacing contract with a more efficient mode of economic organization. Perhaps in the not-too-distant future, artificial intelligence will be able to learn "the statistical patterns in human behavior [and] use this information to distribute goods (and jobs) as well as, or possibly better than, people can choose goods (and jobs) themselves."[55]

At that point, people's *choices* are no longer necessary because their *preferences* can be reliably deduced, not from the choices they make, but rather from their behavioral, physical, and psychological attributes. Once AI can accurately determine human preferences better than we humans can determine our own, then AI could, and from a welfarist perspective should, replace contract.

Analyzing the human predicament under full AI governance is unnecessary for our purposes. What is important here is to appreciate that if *all* the choices people reveal through their contracts are merely

instruments in service of welfare maximization, then *any* freedom of contract is unnecessary.[56] In this new (dystopian) world, interpersonal interactions are frictions. Individual planning and choice are frictions. Contracts are frictions. From a thorough-going welfarist standpoint, there is no problem if aggregate welfare-increasing (technology-determined) transfers were to substitute fully for inefficient (human-chosen) contracts.

True believers in welfare foundationalism would not necessarily be alarmed by the idea of fully replacing contract with AI, at least where the welfarist gain is sufficiently high. For them, individual autonomy has no necessary place, no non-contingent, non-instrumental value. And this makes sense because, welfarism is at root a collectivist enterprise, not a respecter of individuals.

This implication of AI governance may sound overly futuristic or too simplistic. But even if it is, it reveals a deep difficulty with welfare foundationalism: legal-economists' support for individual freedom is inescapably contingent. They equate respect for individual freedom with satisfying people's preferences and would guarantee freedom of contract only so long as it instrumentally advances those preferences.

A glance at this possible future suggests why the foundational welfarist view must be wrong. It undermines the very reason that justifies caring about satisfying people's preferences and promoting their welfare in the first place. We care about preferences because of the role they play in advancing people's plans, projects, and goals. We care about them because of the how they reflect people's normative convictions.[57] In short, in a liberal polity, ultimately, we care about promoting social welfare because of how it serves freedom, that is, by enhancing individuals' self-determination.

Situating the satisfaction of people's preferences in their life stories explains both its normative significance and why it cannot be foundational or even freestanding. People's preferences are meaningful *because* of their role as features of personal self-determination. This means that it is inappropriate for law to be guided by preferences that defy self-determination. It also implies that attempts forcibly to incorporate a

commitment to autonomy into economic analysis – typically, by reducing it to a taste whose value is grounded in preference satisfaction – would only jeopardize the plausibility of economic analysis. Law cannot be guided solely by the criterion of maximizing preference satisfaction.

Welfare foundationalism cannot justify contract in a liberal state because it makes a categorical error: people are not just data points of preferences or joint carriers of the aggregate social welfare.[58] At a minimum, for any legal regime to be worthy of being called liberal, it must understand people to be agents with projects who are entitled to govern their own lives.

2. The Limited Normative Bite of Joint Maximization. Not all economic analyses of contract law fall into the collectivist trap of welfare foundationalism. For example, the legal-economic scholar Robert Scott tries to avoid this unhappy predicament by departing from Shavell's view that enlists contracting parties as delegates in service to the collective goal of maximizing aggregate welfare.

In Scott's influential work (some co-authored with Jody Kraus), legal-economic analysis of contract should center not on aggregate welfare, but instead on the *parties' joint maximization*, so it is grounded ultimately in a commitment to party autonomy. This view offers an economic analysis of contract that works as a potent empowerment device in service of people's – that is, individuals' – autonomy.[59]

In a nutshell, for Scott, autonomy justifies barebone doctrines of capacity, duress, fraud, and procedural unconscionability – which together "ensure that an agreement will be enforceable only if the bargaining process satisfies the conditions under which moral agents can be properly held accountable for their choices."[60] After this start-up requirement is satisfied, the rest of contract law must focus solely on supporting parties' efforts to maximize their expected joint surplus – by adopting the majoritarian default paradigm that typifies the legal-economic approach to contract. Because writing contracts is costly, rules should mimic the preferences of most contracting parties. Majoritarian rules minimize transaction costs,

decrease barriers to contract, and in turn, maximize the contractual surplus – in line with the presumed intent of most contracting parties. In Scott's joint maximizing view, any contract rule that increases costs beyond this threshold violates the individual liberty to make promises.

Restated, in Scott's approach, autonomy makes a cameo appearance to get relations started. Then, it drops out and conventional legal-economic analysis takes over. Legal-economic analysts are often tempted to embrace some version of this "autonomy-lite" view of contract, one that gestures towards the normative resilience of freedom of contract independent of its epistemic and computational benefits.[61] But they cannot succeed. Autonomy is a more demanding concept.

If liberal contract is grounded in autonomy – and we show it is – its animating principles may, and indeed often do, require different doctrinal rules from those legal-economic analysts, including Shavell, Scott, and their allies would endorse. Chapter 3 refines the relevant autonomy principles; Chapters 5-8 show where they depart from the majoritarian default paradigm. In these chapters we demonstrate the practical differences, at times significant, between liberal contract's autonomy calculus and legal-economists' preference maximization.

What is critical at this stage is that, apart from noting the existence of doctrinal differences, we argue that legal-economists are asking the wrong question. And the question itself matters. Whether majoritarian preferences are cast as freestanding or grounded in social welfare, those framings tend to divert lawmakers from seeing the "pernicious, self-reinforcing social norms" that typify deep-seated injustices.[62] Deferring uncritically to what "most people want" can contribute to perpetuating systemic patterns of disadvantage.[63] Deepening injustice in this way undermines genuinely liberal law.[64]

Contract law often looks to majoritarian preferences, and indeed should do so, but only to the extent they serve people's autonomy.

3. Contracts are for People. What leads legal-economic analysts astray is perhaps their analytic focus on the corner case of commercial contracting. The prevailing approach perceives commercial contracts between legally informed, sophisticated firms to be the key object of contract theory and legal analysis.[65] This approach is deeply misguided.

When legally informed, sophisticated firms enter commercial contracts, they can, and typically do, adjust their particular contract *terms* according to the cost-benefit calculus that legal-economic analyses highlight. But contract *rules* apply to, and should be directed at, idiosyncratic and legally uninformed parties as well. This difference between terms and rules is fundamental.

Liberal contract law focuses on *real* people. It is real people who are the addressees of law's justification. Contract law is accountable to them for its legitimacy. *General* contract law – as opposed to statutes or doctrines exclusively directed at sophisticated commercial entities – must respond first and foremost to the real people whom it serves and upon whom it exercises authority and coercive power. Artificial persons are an important subset of normative analysis, but they are not the core.

In short, we aim to reverse the analytic focus of the now-dominant legal-economic approach.

Our autonomy-enhancing approach dovetails with our comparative institutional understanding. Judges are the residual architects of contract law. They are well-positioned to set rules, and they should set rules, based on what seems normatively justified and required for transactions where at least one party is an individual. At the same time, as a matter of comparative institutional competence, an autonomy-enhancing law would encourage judges generally to allow legally-sophisticated firms to opt in and out of (most of) these rules – to the extent the parties are operating in the externality-free, bias-free, sophisticated-commercial subset of contracts on which economic analysis focuses.

The reason for this firm/judge (term/rule) division of labor emerges from the work of prominent legal-economic analysts of contracts. They

demonstrate that commercial firms are relatively more expert than judges in pricing and negotiating terms and remedies that will likely serve commercial wealth-maximizing aims.[66]

Does this mean that liberal contract theory, which focuses on persons as human beings, is irrelevant to these *artificial* commercial legal persons? Not at all. Because the individual human is liberal contract's unit of analysis, we can confidently assume that our account of contract law *obligations* applies to the dealings of these artificial persons with natural persons, say as sellers or employers. Our approach very much covers consumer contracts and employment contracts, as we discuss in Part II and elaborate in Chapter 8.

Indeed, as we'll see, in at least some of these contexts, commercial firms may face (or should face) *more* demanding obligations than their natural counterparts. Similarly, some contractual (and precontractual) obligations become attenuated when applied to natural persons in their dealings with commercial firms. The reason for this has been most clearly stated by Alan Schwartz and Robert Scott. Despite championing the commercial-centric view of contract, they concede commercial firms are "artificial persons whose autonomy the [law] need not respect."[67]

Admittedly, our approach leaves some questions unaddressed. In this book, we by and large set aside contract types involving sophisticated corporations on both sides of the interaction. We also do not address the question if freedom of contract applies to these artificial persons, although our account does imply that even if it does, it is only in a rather qualified way. A principled theory of incorporated persons that transcends their economic function is urgently needed in private law theory, but this is a separate – and rather formidable – task, beyond the scope of this book.

Instead, we focus on real people who contract with others to advance their chosen life plans.

4. The Indispensable Role of Legal-Economic Analysis. Even though welfarism fails as the normative basis for contract, the tools of legal-

economic analysis are nevertheless indispensable for implementing liberal contract theory.

The issue for liberal theory is that contract law does not directly guide party behavior. For example, contracting parties, especially well-informed and sophisticated ones, often view contract doctrines more as a list of prices than as binding rules – even when those doctrines are framed as reasons for action. When the price is right, parties may break the rules.[68]

This gap between law's rationale and parties' behavior poses a challenge for liberal contract theory. We aim to ensure just rules, prospectively and constructively, for the parties' interactions. But law can have the opposite effect, depending on how parties actually respond. To ensure law serves its autonomy-enhancing function, it must adopt an ex-ante perspective, one that takes incentive effects seriously when choosing among contending rules. This is why some of our analyses of specific contract law doctrines in Part II resort to and build on insights from legal-economic analysis.

But this reliance does not render liberal contract theory welfarism in disguise. True, exclusive concern for social welfare would ultimately subordinate the parties' plans to the general interest. We don't go there. As we explain below, liberal contract theory focuses on facilitating people's cooperative efforts and enhancing the freestanding value of contractual interactions to self-determination – which at times is at odds with contract law's instrumental contribution to social welfare.

Economic analysis can be a useful tool for advancing contractual autonomy so long as it is properly cabined.

E. The Contract Convention

We note one final point where we diverge from legal-economic analysis of contract: concerning the status of the contract convention. Our differences are worth making explicit because they intervene usefully in the

philosophical debate regarding whether contract rights are natural or conventional, and why that matters.

Our starting point is that contract is a convention. This tracks the view of lawyer-economists and other scholars who maintain or assume that contract has no freestanding value. But then we part ways.

We insist that contract is not a convention *simpliciter* (one that serves our all-things-considered desirability judgment). Rather, contract is a convention that any polity committed to respecting people's dignity or normative agency is obliged to have (or to establish). Our claim is that the contract convention is crucial for people's self-authorship, meaning that it differs from other, contingent conventions.[69]

To appreciate contract's distinctive place in the constitution of a genuinely liberal regime, consider a leading conventionalist account. Liam Murphy aims to invigorate the "practice-based" view of promissory rights and obligations. His argument is complex, but his bottom-line is straightforward: contract is valuable *only* for the "morally significant *social* benefits" it engenders. Therefore, there simply is *no* right to freedom of contract (the title of this book!). The decision whether to enforce an agreement, and if so, under which conditions, is one "to be figured out when designing the rules of the practice," and as such it is "a matter of what is, all things considered, desirable."[70]

Murphy correctly rejects the notion of a natural right to contract because, as we've noted above, contract is at core a *power-conferring*, rather than duty-imposing, body of law.[71] The relevant normative question for contract law – by contrast with tort law doctrines such as battery – is not *what constraints to people's autonomy are legitimate?* Rather, the right question for the power-conferring convention of contract is *what forms of voluntary obligations generate autonomy-friendly outcomes such that law should proactively facilitate them*?[72]

This means that the right to contract is *not* on par with our right to bodily integrity (vindicated by tort law) or with a fundamental human right such as freedom of speech.

But this conclusion does *not* imply that contract is fully contingent, subject to the open-ended judgment of all-things-considered social desirability that befits your garden-variety social practice. To see why, recall our discussion of an efficient AI regime that possibly replaces contract law. Assume this regime offers a just system of provision that equals or exceeds the market's decentralized system. If that's so, we may well, as Murphy implies, happily marginalize – or maybe even eliminate – contracting in certain areas of human society. This outcome may well be appropriate for the canonical contract example of widgets. Insofar as widgets are necessary instruments for human flourishing (or whatever is the all-things-considered litmus test), people's choices may become an unnecessary friction. In some circumstances, contract might unjustifiably impinge on efficient and just widget provision.

Murphy's conventionalism implies that, in principle, the same analysis can apply to all categories of contracting. This conclusion seems inescapable because strict conventionalism finds *no intrinsic value* either in the relationships engendered by contract or in the expanded choice that the practice of contracting offers people. But we assume that most of us (including Murphy?) would recoil at the idea of expanding AI technology such that it supplants contract beyond the sphere of widget-like, strictly utilitarian, needs and wants.

Substituting AI for human choice to determine our career path, for example, misses something foundational.

Work contracts are significant not only for their allocative function (or other collectivist purposes, like those served by many of our garden-variety social practices). These contracts stand – or at least should stand – for something more fundamental to our being. Adam Smith was justified in celebrating how employment can liberate individuals from predetermined roles and hierarchical social positions. This is exactly because contract, at its best, can serve the intrinsic value of respecting people's *choices* regarding their vocations and the relationships such arrangements engender. The convention of contract is not easily replaceable in the sphere of work – or in

some other contracting spheres, such as choosing one's life partner or where to make one's home. Contract is best conceptualized as a joint plan exactly because this function is the irreducible core of contract law and practice.

Here's the key: *contract is a convention that empowers people* to make critical choices regarding their life plans.

This means that the social practice of contract is distinctive. Unlike social practices that only serve collective values like efficiency or distributive justice, the value of contract lies in its service to autonomy. As Seana Shiffrin (advancing a quite different contract theory) writes:

> For agents such as ourselves, whose embodiment and development must necessarily involve dependent, inter-dependent, and mutually enriching relationships with others, it seems implausible to posit that the right of autonomy must be understood in such a stark individualist way that it would not include the powers necessary to become full agents and to help others become full agents who can recognize and be recognized by others in morally respectful and empowered ways.[73]

The distinctive nature of contract implies that it is a convention that any polity committed to autonomy must adopt. Indeed, it is a social practice that we are obliged *to one another* to create and maintain.[74]

This obligation best explains an otherwise puzzling aspect of contract law: what underlies promisees' special standing vis-à-vis their promisors to pursue a breach, to settle, or to sue? Legal-economists and other strict conventionalists cannot offer a satisfying answer. They must artificially conceptualize promisors as society's delegates or as private attorneys general.[75] By contrast, liberal contract offers a straightforward, *non-contingent* justification for contracting parties' standing vis-à-vis each other, rooted in reciprocal respect for their particular voluntary joint plan.

More generally, the *interpersonal* obligation enshrined in the contract convention best explains why contract law – at least genuinely liberal

contract law – can neither piggyback on majoritarian preferences as legal-economists argue, nor be content merely to offer enforcement services as the traditionalist view requires.

* * *

A genuinely liberal contract law empowers individuals to extend their reach by setting in motion voluntary joint plans that serve their goals and projects. What must contract law look like if it is to achieve this goal? The next chapter answers this query; the balance of the book shows how this works, and should work, in practice.

CHAPTER 3:
THE THREE ANIMATING PRINCIPLES OF LIBERAL CONTRACT

We justify contract law based on its service to real people's autonomy, defined as enhancing our self-determination, and specified as supporting our ability to undertake voluntary joint plans. This justification serves as contract's DNA – its *telos* – shaping the law's animating principles and guiding its operative doctrines.

We come now to liberal contract's main constitutive elements. To put the punchline up front, liberal contract law must adhere, as it by and large does, to three autonomy-enhancing principles:

> (1) Law must *proactively facilitate* the availability of a sufficient number of distinct contract types to enable meaningful choice in each sphere of human endeavor.
> (2) Law must respect *the autonomy of a party's future self,* that is, it must take seriously the ability to *re*-write the story of one's life.
> (3) To justify enforcement, law must comply with *relational justice* by ensuring reciprocal respect for self-determination.

These principles address the three key axes of contractual autonomy, specifying contract's justified *range, limit,* and *floor.* The first concerns *law's obligations to individuals*, so people have a sufficient range of choices to plan their own lives. The second concerns *individuals' obligations to themselves* by limiting law's ability to lock people into their plans. The third concerns *individuals' obligations to each other* by ensuring that contract operates above a floor of respectful relations. These three principles are internal to and required by the contract convention that any liberal society must adopt.

Commitment to these three principles does not mean law should ignore the external effects of contractual practices. Quite the contrary. We'll come to this point in Chapter 9. Law should, and to some extent does, address contract's substantial negative externalities on third parties either through specialized bodies of law, such as antitrust, or via contract law doctrines (notably, public policy). For now, though, we focus on the ample legal domain internal to, and constitutive of, contract.

A. Proactive Facilitation

1. The State's Responsibility to Provide Contract Law. Grounding contract in self-determination means that the state may betray its autonomy-enhancing mission by offering too little contract law.[1]

In other words, the contract convention cannot leave people entirely to their own devices, as the traditionalist conception requires. Quite the contrary. Contract law plays a crucial role in delivering on the liberal promise of freedom. To enhance autonomy, contract requires law's *proactive facilitation*, the first core liberal principle we identify.

Law is critical because of its essential material and cultural roles. Legal-economic analysis of private law forcefully demonstrates that many of our existing practices rely on legal devices to help overcome numerous types of transaction costs – information costs (symmetric and asymmetric), bilateral monopolies, cognitive biases, and heightened risks of opportunistic behavior. These costs generate endemic vulnerabilities in most cooperative interpersonal interactions.

Merely enforcing the parties' expressed intentions cannot overcome the inherent risks of such endeavors. For contracting to be viable, law must provide background reassurances that help generate the trust so crucial for success.[2] Even where parties are primarily guided by their own social norms – which is true for most exchanges most of the time – law often plays an important role in providing background safeguards. For example, law plays

no visible role in the day-to-day life of a marriage or on the job. But that does not mean law is not important. It operates as a safety net for hard times that can help establish trust in routine, happier interactions.[3]

But law's effects are not only material. Because contract law tends to blend into our natural environment, its categories play a crucial role in structuring our daily interactions.[4] Many of our interactions – including existing social practices we take for granted such as bailment, suretyship, or fiduciary roles – are available to us only because of cultural conventions that are legally constructed.[5]

If these conventions were not legally minted, people would have to face the transaction costs of constructing such arrangements from scratch. Even more crucially, they would also face "obstacles of the imagination" just to come up with the options in the first place. As Charles Fried noted in his review of our previous book, contract types offer parties "a menu of possible interactions" that are crucial for "party autonomy and self-fulfillment . . . because human interactions and legal interventions are hardly imaginable without them." Just like "language that enables thought[,] without types, our minds would be blank."[6]

To be genuinely liberal, law must structure contract to support the flourishing and development of a wide array of voluntary joint plans. Lack of legal support undermines – maybe even obliterates – many cooperative types of interpersonal relationships and thus reduces people's ability to seek their own conception of the good.

Meaningful autonomy requires a "language" of viable choices, not a blank slate on which people can write. This is why contract requires a robust legal edifice to fulfill its autonomy-enhancing promise.

And it is indeed robust. Modern contract law discards the merely proceduralist posture of the traditionalist model. Instead, it offers parties an impressive inventory of contract types, each shaped around a set of normatively distinct default rules, so parties can select the type that most closely fits their goals. Then they can tinker with these defaults, if they choose, to create their joint contractual plan.

The main punchline of our *Choice Theory* book was to highlight the normative and practical importance of multiplicity in contract types. We argued there that liberal contract law must support choice within each constitutive category of human activity, such that law provides enough, and sufficiently distinct, contract types within each sphere. We further demonstrated that existing contract law substantially does so in the commercial sphere, and pointed out that it can, and should, do better in the spheres of work, home, and intimacy.

In Chapters 5 and 6 below, we go further, deepening our argument and making it more concrete. We show the multiple pathways that contract law proactively takes to facilitate people's cooperative efforts, not just by ensuring a multiplicity of contract types, but also by adopting the objective standard and by offering a robust apparatus of autonomy-enhancing default rules.

2. Does Our Theory Violate Liberal Toleration and Neutrality? Our approach resists criticisms that we violate liberal toleration and neutrality even though we (a) hold self-determination to be contract's ultimate value and (b) combine *foundational* autonomy with *pluralist* contract types.[7]

On the first point, liberal contract theory does seem open to attack: not everyone is committed to the foundational status of individual self-determination. At least some religious believers reject it. But even if religious believers indeed find the ideal of self-determination offensive,[8] their objection is not dispositive.

Recall that contract is a power-conferring device, one that people may, but need not, use in service of their self-determination. Bolstering the autonomy-enhancing capacity of contract in the spheres of work, home, and intimacy can empower people. But it does not force them to deviate from their already existing (perhaps illiberal) ways of conducting themselves in these spheres. For example, offering alternative marriage types does not prevent people from opting for a traditional religious marriage.

As to the second point, adding choice among contract types may be controversial. But objectors cannot ground their claim in liberal neutrality among conceptions of the good. Just the opposite. This objection to expanded choice is, after all, an argument against allowing *others* – not the objectors themselves – to benefit fully from contract's empowering potential. But this means that their qualms are based on their "external preferences," that is, their views regarding the proper "assignment of goods and opportunities to others." As Ronald Dworkin has persuasively argued, taking this type of preference into account seriously violates, rather than vindicates, "the right of everyone to be treated with equal concern and respect."[9]

To further ease neutralist worries of unequal treatment among different conceptions of the good, we preview our discussion in Chapter 8 on the multiplicity of contract types. Liberal contract requires these types to be *partial functional substitutes*, so that law's inventory offers people real alternatives from which they can choose. Additionally, one of the ways meaningful choice can be enhanced is by enriching this repertory through support for minoritarian or utopian contract types. This requirement implies that law must not invest in contract types based solely on demand. At the same time, this demand-insensitivity of liberal contract involves neither censorship nor worth-ranking.

3. The Challenge of Involuntariness. Proactive facilitation meaningfully contributes to contract's autonomy-enhancing *telos*. But alas, there is no free lunch.[10] As contract law becomes more empowering, the risk increases that it will subject people to obligations to which they did not consent and may not have voluntarily chosen.

Involuntariness infringes the promisor's independence. While autonomy – and not independence – is liberal contract's ultimate value, independence is, as discussed in Chapter 2, intrinsically (and not only instrumentally) valuable.[11] Sometimes, the significance of independence to people's self-determination is minimal, and therefore not a grave concern

for liberal contract law. But, as we've emphasized above, much greater caution *is* required when independence is crucial for ensuring self-determination.[12]

Contract law must not subject people to obligations they did not voluntarily choose, and probably would not have chosen, when these obligations prevent or undermine their self-determination – that is, when the contract type involves a constitutive choice, rather than an instrumental one. Minimizing the risk of involuntariness in such cases is critical. A core challenge for liberal contract is to ensure the promisor's full voluntariness not only regarding interactions with the promisee, but also regarding the legal consequences of the promise.

Indeed, contract doctrine does address, as it should, the endemic risks of involuntariness. It does so through two distinct pathways. Here, we preview our discussion in Chapters 4 and 5:

First, given the reality that many terms of contractual interactions are not chosen or known, the trend in contract law has been to strengthen rules around unconscionability, fraud, misrepresentation, and mistake – doctrines that relieve people from contractual obligations that are involuntary because parties did not know what they were getting into.

But even if these tools were perfect – and they can't be without frustrating contract's proactive facilitation mission – they come, in a sense, too late in the game. Law, especially contract law, is at its best when least litigated.[13] To address this concern, the second pathway through which doctrine avoids involuntariness is through contract formalities. As we will show, formalities play an indispensable empowering role by serving as entry rules to contract types and as shields against unintended contractual obligations that might be autonomy-reducing.

B. Regard for the Future Self

1. The Freedom to Change Your Mind. Self-determination requires that people have the right to write the story of their lives. Liberal contract law follows suit. It offers people the normative power to make contractual commitments, and it properly assumes that, insofar as these commitments are indeed part of the current self's plan, the future self is presumed to adhere to them. Thus, contract law takes seriously the voluntary commitments individuals undertake: it requires them to make good on their promises and is not moved by sheer regret following bad choices.[14]

Restated, self-determination necessarily entails some authority of a person's current self over their future self. But this authority must not be boundless. The law's *regard for the future self* is the second core feature of liberal contract that we identify.

To see why, recall that self-determination also requires that people have the right to *re-write* the story of their lives. The inter-temporal constancy that planning agency requires must be, in other words, sensitive to the fact that "sometimes an agent supposes there are conclusive reasons for change." While new ordinary desires and preferences may not suffice, the constancy that planning agency implies should nonetheless be "defeasible constancy: constancy in the absence of supposed conclusive reason for an alternative."[15]

This is why a liberal legal regime – one that offers people the normative power to make contractual commitments that enhance their autonomy – runs up against a limit on its legitimacy to enforce agreements even when they *indisputably enhance the autonomy of the parties' current selves*. Law cannot fully ignore the effect such agreements have on the parties' future selves.

Enhancing people's autonomy in their capacity as *promisees* requires, as noted in Chapter 2, vindicating their ability to carry out their plans and not only protecting their reliance. But respecting their autonomy in their capacity as *promisors* also implies that contract law must be careful in

defining the scope of the obligations it enforces and in circumscribing their implications. Law must allow some space for the *defeasibility* of intertemporal constancy.

In other words, people sometimes must be free to change their minds.

A liberal law, along with enabling us to make credible commitments, must also attend to its potentially detrimental implications for the autonomy of the parties' future selves.[16] Accordingly, liberal contract's second principle requires that the same law that proactively facilitates people's ability credibly to commit themselves through contracts must also address how contracts affect their future selves. In a genuinely liberal legal regime, contract's invaluable empowerment service cannot end up as a straitjacket, allowing peoples' current selves fully to dominate their future selves.

Being able to re-write your life story is as fundamental as being able to choose your path in the first instance.

2. Two Subtle Distinctions. Concern for the autonomy of promisors' future selves, as we frame it, should be carefully distinguished from two competing ways of addressing the time dimension of contract.

First, our account does not rely on people's imperfect foresight.[17] While we accept the relevance of systemic behavioral limitations to contract law, reliance on such imperfections can neither explain nor justify contract doctrine. As a matter of positive law, the claim that imperfect foresight limits the power to bind is over-inclusive because it also covers many cases of mistaken judgment (such as a bad gamble) that contract law does not and should not hesitate to enforce. Further, and more fundamentally, our normative claim is that even if behavioral limitations were to be completely eliminated – say, through new technology or legal techniques – liberal contract law would not, or at least should not, authorize the current self's complete dominion over the future self.

Second, liberal contract's concern for the future self does not imply endorsement of the idea of "multiple selves,"[18] that is, the idea of the disintegration of the self. Quite the contrary. Liberal contract rejects this position. Indeed, our core claim regarding the significance of planning to self-determination implies that the current self and the future self are the *same* self. The integrity of the self, rather than its separation into different selves, is what drives liberal contract's justification for contract enforcement, and therefore self-integrity is a necessary feature of our account.

Discussion of the future self is a discussion of the self in the future and the liberal requirement that we be able to re-write our life plans.

3. Liberal Contract Law and the Future Self. Because *any* act of self-authorship constrains the future self, the obligation of the liberal state to enhance autonomy implies that contract law must simultaneously bolster and limit people's ability to commit.

This is a subtle task, and there is no easy formula for resolving the difficulty.

But difficulty does not necessarily lead to an impasse, nor does it imply that resolution needs to be *ad hoc*. Instead, liberal contract law does and should apply qualitative judgments to identify manageable *categories* of contract types that excessively limit promisors' freedom to change their minds. Consider, for example, indentured servitudes, non-compete agreements, and agreements that purport to render certain debts in bankruptcy non-dischargeable. Such contracts should not be enforceable, in general or under certain conditions, because they overly undermine the autonomy of our future selves.

Additionally, doctrine should be vigilant in ensuring that contractual liability does not attach in categories of cases where contractual commitments do not significantly serve to enhance the autonomy of the parties' current selves. Such categories of commitment should not constrain parties' future selves. This proposition is the normative justification for

familiar doctrines governing cases in which both parties' basic assumptions fail – mutual mistake, impossibility, impracticability, and frustration – as we discuss in Chapter 6. It is also key to the common law treatment of specific performance as an exceptional contract remedy, which has in recent years come under attack (unjustified, we think), as we discuss Chapter 7.

C. Relational Justice[19]

1. From Formal to Substantive Equality. Liberal contract's third animating principle shifts gears from the *intra*-personal (me now and later) to the *inter*-personal (me and you) dimension of contracting. At a minimum, in a liberal polity, we must be able to act as self-determining agents and to enter contracts as equals. We call this obligation *relational justice* and define it to mean that contract law must ensure at least some floor of *substantive equality*.

Traditionalist accounts of contractual justice do not get us there. Those accounts focus on ensuring the parties' independence, a view that requires only *formal equality* and wholly disregards people's differences.[20] Formal equality is not sufficient for genuinely liberal contract law.

It is not, however, irrelevant. In contractual settings where the parties are roughly equally situated, formal equality may be, all else equal, the best proxy for substantive equality. This proxy value possibly explains why legal treatment of commercial contracts (say, between traders) largely concerns itself with formal equality. In that case, it's usually fine. But contract theorists extrapolate from this commercial context to make the more ambitious claim that formal equality is the foundational ideal of contracts.[21] This conclusion does not hold.

Differences among people mean that reciprocal respect for self-determination is hollow without *some* doctrinal attention to people's distinctive features, circumstances, and constitutive choices – at least to the extent these differences are crucial for the interacting parties to be able to

contract as equals. Attending to difference means law must ensure we treat each other as more than mere bearers of a generic human capacity for choice. Liberal contract law must provide a floor of substantive equality.

A first step is to substitute the traditionalist mode of examining interactions between *A*s and *B*s (abstract beings) with a relational justice prism that takes difference seriously. This framing better reflects how contract law can (and often does) address systemic patterns of disadvantage, including those arising from past injustices.[22] Relational justice helps us see entrenched injustices for what they are – contingent practices that "*organize us* in ways that are unjust/harmful/wrong."[23]

Focusing on relational justice helps expose the *pre*-distributed burdens that hinder people from pursuing their life plans and relating to others as equals. Once these burdens are visible, genuinely liberal contract law cannot defer wholly to public law and to other institutions of distributive justice for their resolution. Addressing tilted terms of interaction is a task internal to, and required of, liberal contract law (and private law more generally).[24]

2. Relating as Equals. Some readers may find alarming the view that contract law must safeguard and vindicate the parties' substantive equality.

Don't be alarmed. As we use this term, substantive equality just puts into practice the intuitively appealing principle of people *relating as equals*.[25] Not all deviations from strict equality are objectionable. Instead, substantive equality in private law settings is an ideal concerning *just terms* of interactions. The ideal of relating to others as substantively equal means, most abstractly, that just terms of interactions must acknowledge some differences among parties along two dimensions – their *interests* and *conditions*.[26] Both are closely related to self-determination.

The first dimension – regarding interests – concerns liberal contract's qualitative distinction between mere preferences and constitutive ones, the features and choices that make us who we are.[27] Mere preferences do not impinge our ability to relate as equals and therefore do not justify

interpersonal claims of accommodation. By contrast, and depending on context, substantive equality may require that people not bear the full monetary and nonmonetary costs of their constitutive features and choices. At other times, it may be illegitimate for parties to take account of traits commonly branded as inferior.

The second type of difference – regarding conditions – concerns imbalances of power and vulnerability in which one party can exercise controlling influence over contract terms. Relational dominance can take many forms: a party may be better informed, more experienced, physically or emotionally stronger, or simply a repeat player.[28]

Given such differences, one path to relational justice is if both have *more or less* equal power to set terms. Parties need not be situated strictly equally regarding their powers, broadly conceived to include information, skill, etc. They just must be situated *equally enough* for their contract terms to reflect that both are authors of the interaction.

Another path to substantive equality can arise even when one party effectively lacks voice. In some categories of contracts, such as work or intimacy, the absence of voice cannot be legitimate.[29] But in others, absence of voice can nevertheless be legitimate, for example, when consumers are term-takers facing adhesive contracts. In such cases, relational justice requires the law to ensure contract terms that respect the voiceless party's interest in safety, privacy, and relevant information. By reducing the most detrimental effects of relational dominance, such terms can ensure a floor of reciprocal respect for self-determination.

Before we wrap up introducing relational justice, we attend now to alternatives offered in the literature, regarding hierarchy, exploitation, and just price.

3. Neither Hierarchy, Nor Exploitation. The concept of relational justice in contract law (and private law more generally) explains what is wrong with relations of inequality and how they must be addressed. But it does so

on different grounds from the two other leading theories – approaches concerned with *hierarchy* and *exploitation*.

Under the first theory, hierarchies of power, esteem, and standing are paradigmatic instances of relational inequality if they put one party in an "inferior position."[30] In our account, however, relations of hierarchy are not necessarily impermissible. In many contract types – say contracts of adhesion – hierarchies may be legitimate so long as contractual terms ensure the term-taking party a minimum level of security, privacy, and informational protection. Conversely, in our account, contracts can be relationally unjust even when the parties are not in a hierarchical relationship.[31]

In the second theory, relations of *exploitation* are the key: contract law must refrain from facilitating one party's exploitation by the other.[32] In this account, such relations denote a moral failure to treat others as free and equal agents. By contrast, for us, exploitation is a too-specific case of the more general category of substantive inequality. Thus, contract terms may be unjust even without one party's exploitation by the other. Terms that fail (even inadvertently) to pay due attention to a party's safety or privacy do not necessarily reflect exploitation. But they still fail to treat both parties as equals, which has moral import because it matters to the parties' ability to interact as free and equal agents.

Hierarchy and exploitation matter, but neither is central to liberal contract theory. Ensuring relational justice is at the core.

4. Against Just Price. Liberal contract's account of contractual justice also departs from the idea of a *just price* – despite its familiar and influential legacy in contract theory.

James Gordley offers a modern articulation of just price theory focusing on the uniqueness of the parties' decisions regarding price. Unlike the parties' subjective preferences – which determine all other aspects of their transaction – the decision on the proper price is one that, he argues, "all potential buyers and sellers face whatever their aspirations and

circumstances." A party who does not use the market price is thus assumed to be "either unaware of [it] or unable to use the market." This means that a contract price that deviates from the market price can result only from ignorance or necessity. Because neither party has a "moral or equitable claim to the benefits that exchange confers" on the other, this conclusion implies that parties should not be free to decide the price in a contract.[33]

Gordley grounds this argument on the principle that neither party should be "enriched at the other's expense."[34] But this makes his claim either wholly circular or normatively indefensible.

To decide whether an enrichment is unjust necessarily relies on a prior decision as to what renders changes in distribution just.[35] And if the answer to this query relies, in turn, on prevailing market prices, it ends up begging – or worse, obscuring – our normative inquiry. Why? Because market prices are themselves the product of the legal infrastructure we are trying to establish.[36] Obscuring private law's *pre*-distribution by reference to market prices is particularly worrisome given the scale dynamics of contemporary markets, which tend to make the market a site of power and domination.[37]

5. Relational Justice in Liberal Contract. Relational justice is key to liberal contract law. It justifies contract law's careful, but important, divergence from the so-called laissez-faire[38] mode of (a) regulating the parties' *bargaining process* and (b) regulating relations *during the life* of a contract.

First, relational justice best explains many contract doctrines that operate during the bargaining process: for example, the modern rules dealing with unilateral mistake, duress, anti-price-gouging, unconscionability, and the inclusion of affirmative duties of disclosure in the law of fraud (beyond the traditional categories of misrepresentation and concealment). As we show in Chapter 4, attempts to enlist contract in ways that undermine relational justice must be treated as *ultra vires* (at least on a first pass). The state cannot legitimately enforce contracts resulting from a bargaining process that lacks normative justification.

Second, concern for relational justice also best explains key rules that operate *during the life* of a contract, as epitomized by the duty of good faith and fair dealing, which we discuss in Chapter 6. This duty, now read into every contract, protects the parties against the heightened interpersonal vulnerability that contract performance engenders and solidifies a conception of contract as a cooperative venture.

D. What is Freedom of Contract?

We conclude this chapter by reflecting on *Freedom of Contract*. Why choose this title for a book on liberal contract theory and doctrine?

Freedom of contract plays a key role in many legal and public debates, but its meaning is rarely directly considered. Often, people assume that freedom of contract stands for the idea that law should simply enforce private deals and otherwise get out of the way. One aim of this book is to upset this familiar understanding and offer a more persuasive alternative.

The conventional understanding of freedom of contract is captured in "the idea, fundamental in the orthodox understanding of contract law, that the *content* of a contractual obligation is a matter for the parties, not the law." As such, freedom of contract does not concern autonomy as we define it. Instead, it is "an aspect of negative liberty, of freedom from coercion and other infringements of liberty."[39] Respecting people's freedom of contract, in this conventional view, requires strictly upholding "the actual intentions and expectations of the parties" and refusing "to require the parties' agreement to adopt any particular terms" or "to make any particular division of the contractual surplus."[40]

By contrast, in our view, law may be justified in conditioning enforcement of people's agreements on compliance with additional requirements beyond offer and acceptance and by supplementing agreements with autonomy-enhancing default rules. Those who hold the conventional view would say that our approach impinges on freedom of

contract. Where law refuses "to enforce agreements that are prima facie valid" or where it adds a term to the parties' agreement, thus overriding their consent, it "disregard[s] the principle of freedom of contract." Legitimately doing so requires a justification which is, by definition, external to the freedom of contract principle and which must be weighty enough to override it.[41]

Thus, conventionally understood, freedom of contract is closely associated with the *Lochner* era[42] and laissez-faire capitalism, standing for "the inherent right of individuals to make such bargains as they choose."[43]

It is no wonder that libertarians today embrace this version of freedom of contract: they would treat it as "an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations."[44] They thus endorse the oft-quoted words of Sir George Jessel, that "[i]f there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."[45]

This conventional view implies that any limitation on, or qualification of, the enforceability of people's voluntary agreements infringes on party freedom. Thus conceived, freedom of contract resists normative inquiry into the boundaries of contract's jurisdiction and grounds for its justification. This view relies on a conception of negative liberty in which contract rights are natural rights and the parties create *all* contractual norms. But such a view is deeply misguided, as we showed throughout this Part.

Surprisingly, even foes of the laissez-faire account do not challenge this conventional view. They simply argue that public policy can justify infringing on freedom. Liberal egalitarians, for example, say regulating contract can be legitimate if it serves a significant purpose external to contract, such as remedying a general social or economic problem.[46]

Similarly, John Rawls refers to "freedom of contract as understood in the doctrine of laissez-faire."[47] Rawls' discussion is telling. He accepts the

conventional definition, but only for the limited purpose of advancing his goal of identifying equal basic liberties (which would not include freedom of contract, as conventionally defined). At the same time, he recognizes the contingency of the laissez-faire definition. We can recognize that contingency as well. More than one conception is available. Freedom of contract need not be linked to negative liberty.

There is no reason to cede the definition of freedom of contract to laissez-faire advocates, their allies, their foes, or even to Rawls.

The liberal contract theory we develop in this Part offers a conceptually and normatively coherent account of freedom of contract. And as we'll see in Part II, it also fits better descriptively with actual contract law, while offering a powerful reform program. Our approach highlights the *inner* limits of contract's jurisdiction, instead of obscuring them.[48]

To put the claim more boldly: grounding freedom of contract in self-determination is the only genuinely liberal path forward, the one that best implements widely shared commitments to freedom and equality.

Contract, as we've argued in Chapter 2, is a social convention whose value lies in its morally significant benefits. But unlike many other social conventions, its existence and design cannot be fully subject to judgment based on all-things-considered social desirability. Contract's empowering function is distinctive. Its unique contribution to people's self-authorship means that freedom of contract must be taken seriously. It is thus appropriate to claim, as we do in Chapter 9, that external (or public) concerns cannot easily justify overriding freedom of contract, contra both the conventional libertarian and liberal egalitarian views.

Freedom of contract is emphatically *not* the negative liberty assumed by its contemporary friends and accepted by its foes. Properly understood, freedom of contract is the right to use contract within the boundaries of its legitimate jurisdiction as an *autonomy-enhancing* institution. Freedom of contract does not include the freedom to use contract in autonomy-reducing ways – outside its justified limit or floor. This means law must refuse to enforce such agreements based on reasons wholly internal to contract.

Ensuring contract's range (proactive facilitation), guarding its limits (regard for the future self), and defending its jurisdictional floor (relational justice) are not derogations from freedom of contract, rightly understood. They are contractual freedom's constitutive elements.

NOTES TO CHAPTER 2

[1] We refer to rights-based, deontological accounts of contract obligation as "traditionalist," and show they cannot be purged of any teleological foundations. In the text here, we leave aside this philosophical language, but readers interested in these intricacies should consult HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS, 19-47 (2017).

[2] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (2001).

[3] JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986).

[4] This commitment requires us to respect every person's right to self-determination. It does not belittle the choice of an unexamined life or suggest that such respect is contingent on the accomplishment of a worthy life plan.

[5] *See, e.g.,* JAMES GRIFFIN, ON HUMAN RIGHTS 149, 151 (2008); Raz, *supra* note 3, at 384; Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 171, 176 (1998).

[6] *See* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 836 (1979).

[7] We intentionally use the adjective "meaningful" to claim that not only is adding choices not always valuable – *see, e.g.,* DAGAN & HELLER, *supra* note 1, at 128-30 (2017) – but, as David Enoch claims, the value of choice ultimately lies in ensuring that one's life "is led by the commitments and values of the person whose life it is." David Enoch, *Autonomy as Non-Alienation, Autonomy as Sovereignty*, 30 J. POL. PHIL. 143, 150-51 (2022). Enoch refers to this ultimate value – which we call self-determination – as non-alienation, and rightly adds that one's life manifests self-determination/non-alienation "to the extent that the more central and important parts of your life-story are in line with your deep commitments and values." *Id.* at 149. The distinction between meaningful and banal choices (at times termed mere pickings) is, in a way, echoed in the core distinction we apply between ground projects and mere preferences. *See infra* text accompanying notes 24-25.

[8] *See* RAZ, *supra* note 3, at 372, 398.

[9] *See respectively* RAZ, *supra* note 3; JOHN RAWLS, POLITICAL LIBERALISM (1993).

[10] *See* JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2010).

[11] *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 207, 213, 215, 220, 231 (2000).

[12] *See* QUONG, *supra* note 10, at 19, 22, 25.

[13] Our theory does not require us to take a stand in many intricate debates regarding autonomy. That said, we largely side with what has been broadly termed "relational autonomy." *See* Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured, in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3 (Catriona Mackenzie & Natalie Stoljar

eds., 2000). *See also, e.g.*, Joel Anderson & Axel Honneth, *Autonomy, Vulnerability, Recognition, and Justice, in* AUTONOMY AND CHALLENGES TO LIBERALISM: NEW ESSAYS 127 (John Christman & Joel Anderson eds., 2005).

[14] *See generally* HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW (2024).

[15] *See* DAGAN & HELLER, *supra* note 1, at 39-40; Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 L. & Phil. 213, 226-30 (2021). Contract is not the only power-conferring private law institution; property is another major such institution. *See* Hanoch Dagan, *Liberal Property and The Power of Law*, 36 Can. J.L. & Jurisp. 281 (2023), where Dagan further refines and defends the notion of a power-conferring institution and discusses the tension between our taxonomy here and the conventional Hohfeldian framework.

[16] Charles Fried, *The Ambitions of* Contract as Promise *Thirty Years On*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 17, 20 (Gregory Klass et al. eds., 2014).

[17] *See* DAGAN & HELLER, *supra* note 1, at 22-24; Daniel Markovits, *The Promise Theory of Contract, in* RESEARCH HANDBOOK ON THE PHILOSOPHY OF CONTRACT LAW *, *-* (Mindy Chen-Wishart & Prince Saprai eds., 2025).

[18] *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 8 (1981).

[19] *See* Charles R. Beitz, *Property and Time*, 26 J. POL. PHIL. 419, 427 (2018).

[20] *See* Michael E. Bratman, *Time, Rationality, and Self-Governance*, 22 PHIL. ISSUES 73, 74, 82 (2012).

[21] This subsection draws heavily on DAGAN & DORFMAN, *supra* note 14, at 48-49.

[22] *Contra* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 7-8 (1976).

[23] Not all preferences are "mere." Some preferences are intimately related to people's ground projects, and insofar as they are, they may deserve heightened respect. *Cf.* Mark Gergen, Debt's Challenge to Autonomy Theories of Contract (unpublished manuscript, on file with authors), which claims that "[w]hile consumer durables often serve 'garden-variety' and 'mundane' needs (like providing electricity) often these are needs that must be satisfied before people can pursue grander projects."

[24] *See* RAWLS, *supra* note 9, at 30-32.

[25] Contract law responds to the qualitative distinction between ground projects and mere preferences by adjusting its relevant categories and rules, rather than by attending to individual's particular understanding of their choices. This should not be surprising: particularistic, and thus necessarily post-hoc, judgments are not only

offensive to the rule of law, they also poorly fit the function of contract law. As we presently clarify in the text, this function is to structure the legal frameworks of our voluntary undertakings prospectively, rather than to respond *ex post* to how their performance has unfolded.

Note that we rely on only thin assumptions in treating certain categories of choice – regarding intimacy, home, or vocation – as ground projects. We reject smuggling in judgments regarding the worthiness of human projects, and we insist on having a normatively-varied menu of contract types from which people can choose within each broad category. Therefore, our assumptions regarding, say, the significance of intimacy, home, or vocation should be no more objectionable than Rawls' assumptions regarding human nature and "primary goods," the goods that individuals prefer to have more of rather than less. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 23-24 (rev. ed. 1999).

[26] *See, respectively,* Helge Dedek, *A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract*, 25 CAN. J.L. & JURISP. 313 (2012); Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989).

[27] *See* DAGAN & HELLER, *supra* note 1, at 25-40, 61-64; Dagan & Heller, *supra* note 15.

[28] PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 334, 339 (2019).

[29] *See* Roy Kreitner, *Toward a Political Economy of Money, in* RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW 7, 10 n.9 (Ugo Mattei & John E. Haskell eds., 2017).

[30] Arthur Ripstein, *The Contracting Theory of Choices*, 40 LAW & PHIL. 185, 210 (2021).

[31] Peter Benson, *The Idea of a Public Basis of Justification for Contract,* 33 OSGOODE HALL L.J. 273, 316-17 (1995).

[32] *See* BENSON, *supra* note 28, at 23, 123-24, 131-34; Brian Langille & Arthur Ripstein, *Strictly Speaking: It Went without Saying*, 2 LEGAL THEORY 63 (1996).

[33] *See* U.C.C. § 2-306. *See also generally* Robert E. Scott, *The Promise and the Peril of Relational Contract Theory, in* REVISITING THE CONTRACT SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 105 (Jean Braucher et al. eds., 2013).

[34] *Cf.* Bernard Williams, *Persons, Character and Morality, in* MORAL LUCK 1, 12 (1981).

[35] This is, of course, Ian Macneil's critical and most important contribution to contract theory. *See* THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF

IAN MACNEIL (David Campbell ed., 2001).

[36] BENSON, *supra* note 28, at 373, 468-69.

[37] We acknowledge that describing the widget-type agreements referred to above as exercises of joint planning is somewhat inflationary. But this is only because in our account these agreements are not part of contract's irreducible core. Indeed, as we clarify below, this part of contract law, which takes central stage in transfer theory, can be seamlessly substituted with technology. *See infra* text accompanying notes 54-56, 72-73.

[38] *See* DAGAN & HELLER, *supra* note 1, at 19-40.

[39] *See infra* Chapter 7 text accompanying note *.

[40] *See respectively* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); BENSON, *supra* note 28, at 12, 16-17, 19, 469, 361.

[41] *See* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 110 (2013). *Cf.* RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 188-228 (Jeffrey Flynn trans., 2011).

[42] BENSON, *supra* note 28, at 24, 27, 367-69, 371-72, 364, 367, 373, 377-78, 468-69.

[43] As the text implies, Benson's version of transfer theory invokes the (infamous) view of ownership as "sole and despotic dominion." Other transfer theorists, which avoid such reference, implicitly rely on similar notions. We criticize both elsewhere. *See respectively* DAGAN & HELLER, *supra* note 1, at 36-37; Dagan & Heller, *supra* note 15, at 225-29.

[44] *See, e.g.*, ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL THEORY (2009).

[45] *See* DAGAN & DORFMAN, *supra* note 14.

[46] *See* Hart, *supra* note 6, at 834.

[47] On the distinction between ultimate, intrinsic, and instrumental values that is implicit in this subsection, see RAZ, *supra* note 3, at 177-78. *See also* DAGAN & HELLER, *supra* note 1, at 41-45.

[48] *See also* David Enoch, *Hypothetical Consent and the Value(s) of Autonomy*, 128 ETHICS 6, 30-35 (2017); Enoch, *supra* note 7, at 151-52.

[49] Hart, *supra* note 6, at 835.

[50] STEVEN M. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 294 (2004).

[51] *See* EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 12 (2010).

[52] *See* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING

CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 278-83, 285-86 (2018).

[53] *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 307 (6th ed. 2011). *See also, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 123 (8th ed. 2011).

[54] *See* POSNER & WEYL, *supra* note 52, at 278-83, 285-86.

[55] *Id.*, at 277, 286-87, 289-90, 292.

[56] This paragraph and the following ones draw on Hanoch Dagan, *Why Markets? Welfare, Autonomy, and The Just Society*, 117 MICH. L. REV. 1289 (2019). *See also* Hanoch Dagan & Roy Kreitner, *Economic Analysis* in *Law*, 38 YALE J. REG. 566, 573-74 (2021).

[57] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 112 (1994). *See also* CHRISTINE KORSGAARD, THE SOURCES OF NORMATIVITY 47, 49, 113 (1996).

[58] As John Rawls famously argued, the idea that society should "maximize the net balance of satisfaction taken over all of its members" conflates "all persons into one through the imaginative acts of the impartial sympathetic spectator," and thus fails to "take seriously the distinction between persons." RAWLS, *supra* note 25, at 23-24.

[59] *See* Robert E. Scott, *A Joint Maximization Theory of Contract and Regulation, in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 22 (Hanoch Dagan & Benjamin Zipursky eds., 2020); Jody S. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323 (2020); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1631-33, 1648 (2009).

[60] Scott, *supra* note 59, at 28.

[61] *See, e.g.*, VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 2 (2006).

[62] Jonathan Wolff & Virginia Mantouvalou, *Introduction, in* STRUCTURAL INJUSTICE AND THE LAW 1, 3 (Jonathan Wolff & Virginia Mantouvalou eds., 2024).

[63] *Cf.* IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 52 (2011).

[64] *See* DAGAN & DORFMAN, *supra* note 14, at 44-45.

[65] *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003). A firm, for Schwartz and Scott, is "(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm." *Id.* at 545.

[66] *See* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523 (2016).

[67] Schwartz & Scott, *supra* note 65, at 556. *See also* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 77

(1986).

[68] *See* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 171 (1920).

[69] A similar analysis applies to property. *See* HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 173-76 (2021).

[70] Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. 453, 456, 475, 481-82 (2020). For another recent defense of a social practice view of contract, see Thomas Christiano, *Normative Conventionalism about Contracts, in* ENGAGING RAZ: THEMES IN NORMATIVE PHILOSOPHY * (Andrei Marmor et al., eds., 2025).

[71] *See supra* text accompanying note 15.

[72] This is the core reason for the failure of T.M. Scanlon's famous assurance theory, which attempts to ground contract on natural promissory morality. As Dagan argues elsewhere, this failure undermines assurance theory's ability to account properly for the robustness and the foundation of contract-based obligations. It also obscures both the premise and the challenge of contract law's justice-based rules. *See* Hanoch Dagan, *The Value of Choice and the Justice of Contract*, 10 JURISPRUDENCE 422 (2019).

[73] Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 520 (2008). We discuss (and criticize) Shiffrin's important contribution to contract theory elsewhere. *See* DAGAN & HELLER, *supra* note 1, at 26-32.

[74] *See* Shiffrin, *supra* note 73, at 523.

[75] *See* Christiano, *supra* note 70, at *.

NOTES TO CHAPTER 3

[1] *See* ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 201-03 (2011).

[2] *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000). *Cf.* Prince Saprai, Trust in Promise and Contract: One Sense or Two? (unpublished manuscript, on file with authors).

[3] *Cf.* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J.

549, 578-79 (2001); Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1137 (2010).

[4] *See, e.g.*, Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195, 212-14 (1987).

[5] *See* Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 8 (2006).

[6] Charles Fried, *Contract as Promise: Lessons Learned*, 20 THEOR. INQ. L. 367, 377–78 (2019).

[7] *See* Nathan B. Oman, *Contract Law and the Liberalism of Fear*, 20 THEOR. INQ. L. 381 (2019). Also, note that this ability to answer such criticisms further vindicates the coherence of our antiperfectionist position, discussed in Chapter 2. *See supra* Chapter 2 text accompanying note 12.

[8] For us, self-determination still seems indispensable in this case: even if people should not *author* their life story, they need at least to *discover* it. *See* Leslie Green, *What is Freedom For?*, Oxford Legal Studies Research Paper No. 77/201 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193674.

[9] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 275 (1977).

[10] *But cf.* Harry M. Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952) (famously arguing that diversification is the only free lunch in investing).

[11] *See supra* Chapter 2 text accompanying note 48.

[12] *See supra* Chapter 2 text following note 49.

[13] *Cf.* H.L.A. Hart, A*merican Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

[14] Such cases of regret should be carefully distinguished from cases in which the parties were mistaken regarding the basic assumptions on which their contracts were based. *See infra* Chapter 5 text accompanying notes *-*.

[15] Michael E. Bratman, *Time, Rationality, and Self-Governance*, 22 PHIL. ISSUES 73, 82 (2012).

[16] *Cf.* Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 3 (2018); Dori Kimel, *Promise, Contract, Personal Autonomy, and the Freedom to Change One's Mind*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 96, 99-101 (Gregory Klass et al. eds., 2014).

[17] *See, e.g.*, Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937-41 (1985).

[18] *Contra* Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 77, 98, 113 (2014).

[19] This section draws heavily on Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89 (2022).

[20] *See supra* Chapter 2 text accompanying notes 43-45.

[21] *See, e.g.,* Daniel Markovits, *Promise as an Arm's Length Relation*, *in* PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295, 316-17 (Hanoch Sheinman ed., 2011).

[22] *See* IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 52 (2011). *See also, e.g.,* Maeve McKeown, *Structural injustice*, 16 (7) PHILOSOPHY COMPASS 1 (2021).

[23] Sally Haslanger, *Systemic and Structural Injustice: Is There a Difference?*, 98 PHILOSOPHY 1, 22 (2023) (our emphasis).

[24] *See* HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 44-45 (2024).

[25] *See further* Avihay Dorfman, Conflict Between Equals: A Vindication of Tort Law ch. 8 (unpublished manuscript, on file with authors).

[26] *See* Dorfman, *id.*, at chs. 7, 9-10.

[27] *See supra* Chapter 2 text accompanying notes 19-25.

[28] For further elaboration see Dorfman, *supra* note 25, at ch. 8.

[29] *See* Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and The Law of Work*, 24 THEOR. INQ. L. 49 (2023); Hanoch Dagan, *Intimate Contracts and Choice Theory*, 18 EUR. REV. CONTRACT L. 104 (2022).

[30] ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 127 (2017). *See also* Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEOR. INQ. L. 239, 263-65 (2007); Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFF. 287 (2014). With Anderson and Kolodny, we do not focus on the motives and attitudes underlying the behavior of parties to egalitarian relationships.

[31] Another difference between our account of substantive equality and Kolodny's (and, arguably, Anderson's as well) is that the demands of substantive equality are not limited to what Kolodny calls "ongoing social relations." Kolodny, *supra* note 30, at 300. *See also* NIKO KOLODNY, THE PECKING ORDER: SOCIAL HIERARCHY AS A PHILOSOPHICAL PROBLEM 99 (2023).

[32] *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 207, 213, 215, 220, 224, 227-28, 231, 236, 245 (2000). The inadmissibility of exploitation is also key for Aditi Bagchi's thesis that distributive justice should be central to contract. *See* Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105 (2008); Aditi Bagchi, *Distributive Justice and Contracts*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT, *supra* note 16, at 193. For a (sympathetic) critique, see Dagan & Dorfman, *supra* note 19, at 97-100.

[33] James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1612, 1616-19, 1624 (1981).

[34] *Id.*, at 1604, 1616. A more charitable reading of the argument – but less loyal to its author – would emphasize the normative pitfalls of benefitting from another's ignorance or necessity. But this reading invites the relational justice critique that clarifies why we hold the benefitting party responsible for taking measures to protect the disadvantaged party. The critique also refines the scope and circumstances of the benefitting party's responsibility (relating not only to ignorance and necessity).

[35] *See generally* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 11-36 (2004).

[36] *See* Robert C. Hockett & Roy Kreitner, *Just Prices*, CORNELL J.L. & PUB. POL'Y 771, 782 (2018). *See also* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 658-60 (2014).

[37] *See* David Singh Grewal & Jedediah Britton-Purdy, Liberalism, Property, and the Means of Production, *available at*: https://lpeproject.org/blog/liberalism-property-and-the-means-of-production/.

[38] The term laissez-faire is misleading since, like any other economic system, it necessarily relies on a robust legal infrastructure. *See* Hanoch Dagan et al., *The Law of the Market*, 83 L. & CONTEMP. PROBS. i (2020).

[39] STEPHEN A. SMITH, CONTRACT THEORY 59, 139 (2004).

[40] Daniel Markovits, *Good Faith as Contract's Core Value, in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 272, 284, 287 (Gregory Klass et al. eds., 2014).

[41] SMITH, *supra* note 39, at 209, 246, 283, 287, 353-55. *See also, e.g.*, Richard Craswell, *Freedom of Contract, in* CHICAGO LECTURES IN LAW AND ECONOMICS 81 (Eric A. Posner ed., 2000). For a comparison of the nuanced versions of freedom of contract in the UK, France, Germany, and the EU and their respective intellectual histories, see HANS-W. MICKLITZ, ON THE INTELLECTUAL HISTORY OF FREEDOM OF CONTRACT AND REGULATION (2015).

[42] *See* Lochner v. New York, 198 U.S. 45 (1905).

[43] Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 369 (1921). *See also, e.g.*, JAN M. SMITS, CONTRACT LAW: A COMPARATIVE INTRODUCTION 10 (2014).

[44] Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984). *See also, e.g.*, Richard A. Epstein, *Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire, in* THE FALL AND RISE OF FREEDOM OF CONTRACT 25 (F. H. Buckley ed., 1999).

[45] Printing and Numerical Registering Co. v Sampson (1875) 19 Eq. 462, 465.

[46] *See* Energy Rsrvs. Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983).

[47] *See* JOHN RAWLS, *Reply to Alexander and Musgrave, in* COLLECTED PAPERS 232,

239 (Samuel Freeman ed., 1999). In a similar vein, see, e.g., Rebecca Stone, *Putting Freedom of Contract in its Place*, 16 J. LEGAL ANAL. 94 (2024).

[48] *Cf.* James Gordley, *Freedom of Contract*, *in* RESEARCH HANDBOOK ON THE PHILOSOPHY OF CONTRACT LAW *, *-* (Mindy Chen-Wishart & Prince Saprai eds., 2025), which correctly rejects the strictly voluntaristic view of contract and argues that contract rules are not "limitations on the parties' freedom of contract," because they serve "the purposes for which *the parties [choose] to contract*." (the emphasis is ours).