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Contracts in the Modern Supreme Court

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Contracts in the Modern Supreme Court

G. Richard Shell†

This Article compares the modern Supreme Court's jurisprudence concerning contract enforcement with the approach of the Court in the era of Lochner v. New York and the period stretching from the New Deal through the end of the Warren Court. Taking as a bellwether the Supreme Court's consideration of the public policy exception to contract enforcement, the author finds that the modern Court has shown more fidelity to an absolute principle of freedom to contract than the Courts that preceded it. Indeed, the author argues that even when cast against the reputedly conservative Lochner-era Court, the modern Court's approach represents a radical change. In contrast to commentators such as Cass Sunstein, the author contends that the modern Court has looked beyond libertarian common law baselines such as those supported by the Lochner Court to new visions of common law rules inspired by the appealing—but dangerously oversimplistic—reasoning of law and economics scholarship. Most crucially, the modern Court has given short shrift to the importance of public interest and participation. As an alternative, the author suggests that scholars revitalize the neoclassical theory of contract, integrating a realistic consideration for efficiency with the vital concerns of fair process and morality.

INTRODUCTION

Economists often assert that law serves a market economy best when it concentrates on three principal tasks: enforcing contracts, defining property rights, and punishing fraud.¹ Since 1971, the modern

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1. EDWIN MANSFIELD, *ECONOMICS* 66 (5th ed. 1986) (stating that, for a price system to function, "government must see to it that contracts are enforced, that private ownership is protected, and that fraud is prevented"); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29 (3d ed. 1986) (explaining, in economic terms, that the common law has three parts: the law of property to create and define rights of exclusive use; the law of contracts to facilitate the movement of property to those who value it most highly; and the law of torts to protect property rights); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON.

Supreme Court² has shown an increasing interest in advancing this model of legal regulation by enhancing protection for private property³ and by approving the innovative use of criminal⁴ and civil liability⁵ stat-

615, 615-16 (1981) ("An implicit assumption of the economic paradigm of market exchange is the presence of a government to define property rights and enforce contracts" as well as to "sanction stealing and renegeing.").

2. This Article dates the "modern Supreme Court" from 1971 when President Nixon's appointees Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell decisively altered the makeup of the Warren Court. Thus, the term "modern Supreme Court" encompasses both the Burger and the Rehnquist Courts, although, as will be seen, the more radical of the developments discussed in this Article date from 1986, when Rehnquist became Chief Justice.

3. The modern Court has strengthened private property using a number of different sources of law. First, it has actively interpreted the Constitution's Takings Clause, U.S. CONST. amend. V, to protect property. One of the most anticipated decisions of the 1991-92 Term, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), held that state environmental legislation that eliminated the value of beachfront property constituted a taking that required compensation. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 573-76 (1984); see also, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (a zoning permit conditioned on conveyance of an easement across beachfront property constitutes a taking); *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987) (damages are recoverable for the time period between enactment of a regulation and a determination that it constituted a taking); *Hodel v. Irving*, 481 U.S. 704 (1987) (a statute providing that fractional interests in Native American lands could not descend but must escheat to the tribe constitutes a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (a statute requiring landlords to permit installation of cable facilities constitutes a taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (creation of public right of access across a pond developed privately at great expense constitutes a taking).

Second, the Court's interest in private property has been evident in both its First Amendment and Due Process jurisprudence. See, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711 (1992) (municipal airport financed by user fees and operated for profit is not a "public forum" and may ban solicitation activities on its premises); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (Free Exercise Clause does not prevent the federal government from exploiting timber resources on its own land even though this use impinges on Native American holy ground); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (due process requires that property owners receive more than mere publication notice of tax foreclosure proceedings).

Finally, the Court has been solicitous of private property in its interpretations of a variety of federal statutes. See, e.g., *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992) (under federal labor laws, employer may bar nonemployee union organizers from employer's privately owned parking lot); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (grant of an exclusive property right in the word "olympic" is within Congress' constitutional powers); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (federal patent laws do not preempt state trade secret laws).

4. See, e.g., *Carpenter v. United States*, 484 U.S. 19 (1987) (upholding use of criminal mail and wire fraud statutes to prosecute employees who breached fiduciary duties to their employers by engaging in insider trading); *United States v. Lane*, 474 U.S. 438 (1986) (holding that, in an insurance fraud case, submission of a proof-of-loss form after receipt of insurance payment triggered criminal liability under mail fraud statute); *United States v. Turkette*, 452 U.S. 576 (1981) (holding criminal sanctions of RICO to be applicable to racketeering activities in both legitimate and illegitimate enterprises).

5. See, e.g., *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985) (rejecting *in pari delicto* defense in insider trading cases under securities laws and permitting tippees to sue tipsters); *Herman & McLean v. Huddleston*, 459 U.S. 375 (1983) (recognizing an implied right of action under the special anti-fraud provision of the Securities Exchange Act of 1934 and imposing less stringent standard of proof on plaintiffs); *Steadman v. SEC*, 450 U.S. 91 (1981) (imposing less

utes to deter commercial fraud.⁶ However, at least at first glance, the Court has appeared to pay much less attention to economists' concern with contract enforcement.

The Court has utilized the Contracts Clause⁷ only twice in over twenty years⁸ and has eschewed entirely the *Lochner* era doctrine of economic substantive due process declaring freedom of contract to be an aspect of protected liberty under the Constitution.⁹ Moreover, the Court shed its institutional role as a leading arbiter of common law contract rules in 1938, when it declared in *Erie Railroad v. Tompkins*¹⁰ that fed-

stringent standard of proof on plaintiff in SEC administrative proceedings); see also *Tafflin v. Levitt*, 493 U.S. 455 (1990) (finding that RICO cases may be brought in both state and federal courts); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) (elaborating on the elements of a civil RICO claim, including "enterprise" and "pattern," in conventional white collar fraud context); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (defining the statute of limitations for RICO civil enforcement actions); *Sedima, S.P.R.L. v. Inrex Co.*, 473 U.S. 479 (1985) (refusing to restrict civil RICO liability to a conventional organized crime context).

6. The Supreme Court's increasing reliance on economic models of legal regulation extends considerably beyond those examples specified in the text. See Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (describing the Court's use of economic reasoning in a variety of cases and contexts).

7. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

8. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Most recently, the Court unanimously rejected a Contracts Clause challenge to the retroactive application of a Michigan unemployment statute. See *General Motors Corp. v. Ronein*, 112 S. Ct. 1105 (1992). Indeed, the Contracts Clause has been little used during the past 100 years. The clause "remained largely dormant during the *Lochner* era . . . and was nearly interred altogether in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 619 & n.1 (2d ed. 1988). The Court did not use the Contracts Clause at all as a "protective shield" from 1947 to 1977. *Id.* at 619-20.

Conservatives have advocated revitalization of the Contracts Clause. See, e.g., Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705 (1984); L. Gordon Crovitz, *Justices Should Defend a Revolutionary Idea—The Contract*, WALL ST. J., Dec. 4, 1991, at A17.

9. In the late-nineteenth and early-twentieth centuries, the Supreme Court interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments as forbidding legislation that unduly restricted "freedom of contract" between private parties. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (striking down on due process grounds a New York law that limited bakers' work days to eight hours), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *Lochner* and like cases were functionally if not explicitly overruled in *West Coast Hotel Co. v. Parrish*. See *infra* notes 88-92 and accompanying text; see also Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 269-82.

Radical conservatives have been urging the Court to resurrect economic substantive due process as an aspect of an overall push for constitutional "economic rights." See, e.g., Norman Karlin, *Substantive Due Process: A Doctrine for Regulatory Control*, 13 SW. U. L. REV. 479 (1983); Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453 (1985); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983); Paul M. Barrett, *Supreme Court Signals Willingness to Draw Line Between Government Power and Property Rights*, WALL ST. J., Dec. 9, 1991, at A16 (discussing an "economic rights revival" and reporting on the founding of the Institute for Justice, a legal advocacy group dedicated to "pushing economic rights in the courts"); L. Gordon Crovitz, *Justices to Decide If Even Land Developers Have Civil Rights*, WALL ST. J., Dec. 11, 1991, at A17.

10. 304 U.S. 64 (1938).

eral courts in diversity cases are obliged to apply the substantive common law of the forum state.¹¹

This Article argues that, appearances notwithstanding, the modern Court has shown a sustained interest in reconstructing the American legal system to better reflect economists' ideal of strict contract enforcement. In contrast to its work on private property and business fraud, which has been hammered out on relatively well-known constitutional and statutory texts, the Court has constructed its contracts jurisprudence from admiralty, statutory, and constitutional doctrines that have concealed its preoccupation with contract enforcement.

When viewed as a single line of cases and placed in historical perspective, however, the modern Court's approach to contract emerges as a well-integrated, even radical, aspect of its pro-market jurisprudence. Not only has the Court exerted a substantial influence on the way important issues affecting contracts are decided in both state and federal courts, it has come increasingly to resort to "contract . . . as [a] metaphor."¹² Recent cases in widely divergent fields, such as retirement benefits,¹³ organized labor,¹⁴ and even federal habeas corpus,¹⁵ have been decided with reference to classical notions of contract privity and associated common law agency doctrines. These common threads suggest that contract images and ideology exert a strong hold on the legal imaginations of the Justices.

In order to set the modern Court's contracts cases into proper perspective, this Article will compare the modern Court's work on contracts with the work of the Court from the *Lochner* era¹⁶ and from the period

11. *Id.* at 78 ("There is no federal general common law."). *But see* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986) (arguing that, even after *Erie*, federal courts have much discretion to create federal common law). *See generally* John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

12. Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 741 (1982) ("The institution of contract is central to our social and legal systems, both as reality and as metaphor.").

13. *E.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992) (holding that common law notions of who is a contractual "employee" define rights to pension benefits under ERISA).

14. *E.g.*, *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 112 S. Ct. 494 (1991) (holding that an individual union member may sue her local union for breach of contract when it violates the international union's constitution); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Local 334, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, 452 U.S. 615 (1981) (holding that one union may sue another for breach of contract for actions that violate international union's constitution).

15. *E.g.*, *Coleman v. Thompson*, 111 S. Ct. 2546 (1991) (death row inmate loses habeas corpus rights and is bound through agency law principles when the inmate's lawyer is three days late in filing state court appeal raising a federal constitutional question).

16. Although the *Lochner* case was itself not decided until 1905, it has become customary to label the entire period between the end of the Civil War and the late 1930s as the "*Lochner* era." *See, e.g.*, TRIBE, *supra* note 8, at 567-74 (discussing the period from the early 1870s through the 1930s as associated with the policies of the *Lochner* Court); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 n.9 (1991) (dividing

between 1937 and 1971, which this Article calls the "New Deal/Warren" period.¹⁷ Comparisons with the *Lochner* era are revealing because this early Court has the reputation of being our staunchest defender of the value of freedom of contract.¹⁸ This Article reaches the surprising conclusion that the modern Court is, in important respects, more market-oriented than the *Lochner* Court. The Article also provides several illustrations of the sharp break between the modern Court and the New Deal/Warren Court where the treatment of statutory rights are concerned. More broadly, the Article argues that an historical look at the Court's approach to contracts over the past one hundred years illuminates several current theoretical debates, including Cass Sunstein's thesis regarding the Court's use of common law "baselines" in constitutional and statutory interpretation¹⁹ and the "crisis" in modern contract theory.²⁰

The Article's specific focus is the Court's treatment of one important aspect of the common law of contracts: the exception to contract enforcement based on public policy.²¹ Public policy defenses to contracts

the entire "*Lochner* era" into three periods: early (1870-1900), middle (1900-1920), and late (1920-1937)). This Article adopts this scholarly convention.

17. The New Deal Court came into being in the late 1930s and early 1940s with the death and retirements of the *Lochner* Court's last members and the appointments of Justices Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, and Robert Jackson. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 56 (1990).

The Warren Court emerged in 1953, when President Eisenhower appointed Earl Warren to be the new Chief Justice, replacing Harlan Stone. *Id.* at 70-74. The Warren Court gained strength through the appointments of liberal Justices Tom Clark, William J. Brennan, Jr., Arthur Goldberg, Abe Fortas, and Thurgood Marshall, Jr. *Id.* at 72.

A leading legal historian has argued that the period from 1946 through 1969 constitutes a single period in Supreme Court history dominated at various times by Justices Black, Frankfurter, Douglas, Warren, Harlan, and Brennan. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 310 (1989) (describing the period as a single "long cycle[]") characterized by a jurisprudence of "liberal legalism"). Although Warren Burger replaced Chief Justice Warren in 1969, this Article marks the emergence of the modern Court era between 1971 and 1972, a period during which President Nixon appointed Justices Blackmun, Powell, and Rehnquist. See *supra* note 2. At the same time, for purposes of historical convenience, the Article pushes the beginning of Hall's "long cycle" back to 1937, when the Court abandoned economic substantive due process and opened the door to the liberal era. See *infra* text accompanying notes 88-92.

18. See *infra* text accompanying notes 69-77.

19. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990); see also *infra* text accompanying notes 346-53.

20. See, e.g., Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990); Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988).

21. This Article discusses the public policy doctrine in detail later at *infra* text accompanying notes 35-65. Stated briefly, traditional common law contract doctrine permits courts to refuse to enforce a fully bargained and otherwise valid agreement if enforcement would violate public policy. For a general overview of the doctrine, see 2 E. ALLAN FARNSWORTH, *CONTRACTS* ch. 5 (2d ed. 1990), and RESTATEMENT (SECOND) OF CONTRACTS ch. 8 (1981) ("Unenforceability on Grounds of Public Policy"). The topic also has been the subject of a number of recent scholarly treatments. See, e.g., William K. Jones, *Private Revision of Public Standards: Exculpatory Agreements in Leases*, 63 N.Y.U. L. REV. 717 (1988); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L.

are particularly revealing because they permit courts to pivot between two opposing visions of the role of law in a market economy. In supporting claims that public policy requires nonenforcement of contracts, courts subjugate private ordering to a system of state regulation, override the expressed preferences of private parties, and substitute their own judgment for that of the market. In rejecting public policy defenses, judges leave parties free to transact without state interference and affirm the priority of market ordering over state regulation.²² Because public policies sometimes originate from statutory sources,²³ the doctrine also illuminates a third facet of judicial attitudes toward private ordering—the degree of deference owed to legislative attempts to negate choices made by parties in private transactions.²⁴

In advancing its thesis, this Article examines in detail three public policy issues: clauses that affect access to the courts,²⁵ exculpation and damage limitation clauses,²⁶ and collisions between private contract and various constitutional and statutory policies.²⁷ The Court has visited these topics repeatedly over the past one hundred years, and, as this

REV. 563 (1982); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988); Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163 (1985); John Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144 (1972).

22. The *Lochner*-era Court had a pithy summary of this perspective: "[T]he right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy." *Baltimore & O. Sw. Ry. v. Voigt*, 176 U.S. 498, 505 (1900). Perhaps the most famous expression of this perspective was made in *Printing & Numerical Registering Co. v. Sampson*:

[I]f there is one thing which more than another 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.

19 L.R.-Eq. 462, 465 (1875).

23. See *infra* text accompanying notes 46-49.

24. While some conservatives have been urging the Court to strengthen constitutional economic liberties, see *supra* note 9, others have urged the Court to take a "beady-eyed contractual approach" to statutory interpretation because many laws in the regulatory state are nothing more than legislative "deals" between private interest groups and legislators. Easterbrook, *supra* note 6, at 15; see also Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41 (1983). Cass Sunstein has taken sharp issue with this view. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408-09 (1989) [hereinafter Sunstein, *Interpreting Statutes*]; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) [hereinafter Sunstein, *Lochner's Legacy*]. Sunstein has argued that the New Deal signaled a fundamental change in the way Americans conceive of the relationship between individuals and the state and calls for new interpretive baselines drawn from sources other than the common law. SUNSTEIN, *supra* note 19, at 141 ("[I]n the wake of the New Deal attack on the common law and the subsequent rights revolution, a presumption in favor of private ordering can no longer be sustained.").

25. See *infra* Section II.A.

26. See *infra* text accompanying notes 168-227.

27. See *infra* text accompanying notes 228-310.

Article will demonstrate, the modern Court has implemented an activist agenda in all three areas.

Part I of this Article examines background concepts regarding application of the public policy defense. Building on a conceptual framework developed by Ian Ayres and Robert Gertner,²⁸ Part I also introduces a vocabulary that helps to describe the legal tools that courts use to incorporate public policy concerns into the framework of contract.

Part II reviews cases from the *Lochner* era, the New Deal/Warren Court, and the modern Court that treat the three topics under discussion. The materials in Part II demonstrate how the modern Court has reshaped the assumptions about contract that it inherited from the New Deal/Warren Court, and fashioned a model of private contract that recalls, and in some ways goes beyond, the formalism of the classical *Lochner* era. This Part concludes with a look at the notable impact the modern Court's contracts jurisprudence has had on both state and lower federal courts.

Part III examines some implications of the Supreme Court's treatment of contracts. First, this Part examines the debate regarding the Court's reliance on common law baselines in its constitutional and statutory jurisprudence and probes Cass Sunstein's fear that such reliance returns us to the *Lochner* era.²⁹ Part III suggests that, contrary to Sunstein's argument, the current Court holds significantly different values than did the *Lochner* Court. This is true not only respecting economic substantive due process, which Sunstein acknowledges,³⁰ but also, and less obviously, at the level of the two Courts' approaches to the common law.

Second, Part III analyzes the modern Court's public policy cases purely as developments affecting the common law. After briefly summarizing the major theoretical approaches to the public policy defense now evident in the legal literature—neoclassical realism, law and economics, libertarianism, and critical legal studies—Part III demonstrates how the modern Court's public policy cases display the marked influence of law and economics. This Part then examines the weaknesses of the Court's efficiency-based approach to contract law and criticizes the extremes to which the Court has gone in its quest for certainty in contract enforcement.

Finally, Part III concludes that the modern Court's pristine law and

28. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

29. See SUNSTEIN, *supra* note 19, at 5-7 (warning that conservative constitutional and statutory theories of interpretation that favor private ordering under common law norms return us to an "anachronistic legal culture" exemplified by the *Lochner* Court).

30. See Sunstein, *Lochner's Legacy*, *supra* note 24, at 874 ("The basic understanding [regarding the need for judicial deference to legislative enactments in the modern era] has been endorsed by the Court in many cases . . .").

economics models of contracting deny important values of public participation in private ordering that are designed to give citizens a feeling of empowerment in their economic as well as their social lives. This Part asserts that the modern Court should abandon attempts to fit the complexities of modern economic life into simplistic models of economic efficiency and return to the more complex and realistic images of economic relations that informed the Court's approach to contractual problems during earlier periods. Part III ends with suggestions for a revitalized neoclassical approach to contract on which to base such a reform.

I

BACKGROUND: CONTRACT ENFORCEMENT AND PUBLIC POLICY

Contract law facilitates the movement of private property to those who value it most highly by rendering transfer agreements legally enforceable in a court.³¹ In general, contract law favors enforcement of agreements without judicial review of either the overall fairness or individual terms of the exchange.³² Indeed, under the prevailing "objective" theory of contract, parties who do not consciously consent to be subject to contractual duties nevertheless are bound so long as their conduct reasonably manifests assent.³³

The reasons for this heavy presumption in favor of contract enforcement are not difficult to fathom. Were courts to engage in detailed, substantive review of the terms of each transaction presented to them, individual contracting parties would suffer a significant loss of freedom over their own economic lives, transaction costs would soar, and the

31. See POSNER, *supra* note 1, at 29; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 876 (1992) ("[O]ne of the functions of freedom to contract is to enable persons to exchange entitlements they have for those that they subjectively prefer, thereby making them better off.").

32. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, Introductory Note (1981) ("In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance.").

33. Under the objective theory of contract, "a manifested consent can be 'real' even when it is not accompanied by subjective assent." Barnett, *supra* note 31, at 859 n.81. Rather, if a party's actions, judged by objective "reasonableness" standards, manifest an intention to be bound, that is enough to bind the party in law. See 1 FARNSWORTH, *supra* note 21, § 3.6 (contrasting objective with subjective theories of contract). Judge Learned Hand gave a classic expression of the objective view of contract: "If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort." *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

In contrast to the objective theory of contract, the older "subjective" or "will" theory justified contract enforcement with evidence that there had been a "meeting of the minds" between the contracting parties. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933) ("According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect.").

courts would be overwhelmed by the task of judicial review.³⁴

Despite the general need to enforce contracts as written, the law recognizes a number of occasions when judicial review of agreements is warranted.³⁵ Defenses based on public policy are among the most ancient of these exceptions.³⁶ In its narrowest application, the public policy doctrine bars enforcement of "illegal" bargains—contracts the enforcement of which would involve the court in sanctioning conduct outlawed by well-established criminal or civil law.³⁷ More broadly, the public policy defense forbids contracts that: (1) offend constitutional and statutory policies; (2) harm marriage or domestic relations; (3) injure the rights of third parties; (4) exculpate, indemnify, or otherwise restrict recovery of damages for negligence; (5) abridge a fiduciary duty; (6) restrict access to the courts or obstruct the administration of justice; or (7) restrain trade.³⁸

The public policy doctrine applies most frequently when courts either refuse to enforce, or burden with special requirements, "single clauses in particular transaction-types."³⁹ Examples of this latter use of the public policy doctrine include the court access⁴⁰ and exculpation⁴¹ clauses considered in this Article. As Karl Llewellyn noted, when the public policy defense is applied to single clauses, "the policy is equilibration of the bargain, not discouragement of the bargain-type."⁴² Courts also use the public policy doctrine to invalidate entire classes of transac-

34. See Eisenberg, *supra* note 12, at 743-44; Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629 (1943) (describing the institution of contract in a modern market economy as an "indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way"); Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 84 (1991) (noting that, without contract law, transaction costs would make commercial enterprise extremely difficult).

35. Defenses to contract enforcement other than the public policy defense include, *inter alia*, incapacity, 1 FARNSWORTH, *supra* note 21, § 4.2; misrepresentation, *id.* § 4.10; duress, *id.* § 4.16; undue influence, *id.* § 4.20; mistake, 2 FARNSWORTH, *supra* note 21, § 9.2; impossibility and impracticability, *id.* § 9.6; and the failure of the parties to use required writings, *id.* at ch. 6.

36. See Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 77-78 (1928) (tracing the history of the public policy defense back to the fourteenth century).

37. Historically, the doctrine was used to refuse enforcement of contracts to do immoral or illegal acts: "The principle of public policy is this; . . . No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." 2 FARNSWORTH, *supra* note 21, § 5.1, at 3 (quoting Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (1775)).

38. Prince, *supra* note 21, at 173 & nn. 42-44; see also 2 FARNSWORTH, *supra* note 21, ch. 5. Corbin has a somewhat more general list. He groups public policy cases around four norms: (1) a morality principle; (2) an economic liberty interest; (3) an interest in honest government and judicial integrity; and (4) fiduciary responsibilities. 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1373-1517 (1962).

39. Karl N. Llewellyn, *What Price Contract?: An Essay in Perspective*, 40 YALE L.J. 704, 735 (1931).

40. See *infra* Section II.A.

41. See *infra* text accompanying notes 168-227.

42. Llewellyn, *supra* note 39, at 735.

tions.⁴³ Within the context of this Article, contracts purporting to waive important constitutional or statutory rights⁴⁴ fall into this broad category.

From the nineteenth century to the present, the boundaries of the public policy defense increasingly have reflected judicial preferences regarding "undesirable conduct" and "unsavory" business practices as often as a reluctance to enforce illegal agreements.⁴⁵ Under the current public policy doctrine, judges may draw not only on constitutions, statutes, and case precedent, but also on their own views of what public interest or morality requires⁴⁶ to overrule market choices⁴⁷ by refusing to enforce certain types of agreements.⁴⁸ The power to overrule market choices granted by public policy doctrines gives courts flexibility in administering justice, but adds a degree of uncertainty to commercial transactions.⁴⁹

43. Surrogacy contracts are one such class. See *In re Baby M*, 537 A.2d 1227, 1246-51 (N.J. 1988); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 326-37 (1988); Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989). Commercial bribery is another example. See *Sirkin v. Fourteenth St. Store*, 124 App. Div. 384, 108 N.Y.S. 830 (1908); 2 FARNSWORTH, *supra* note 21, § 5.6.

44. See *infra* text accompanying notes 228-310.

45. 2 FARNSWORTH, *supra* note 21, § 5.1, at 2-3.

46. See *Prince*, *supra* note 21, at 170 ("[C]ourts have stated repeatedly that they will not enforce contracts that are contrary to public policy in that they injure the public welfare or interests, or are contrary to public decency, sound policy, or good morals."); see also *Trist v. Child*, 88 U.S. (21 Wall.) 441, 448 (1874) (public policy doctrine is "a rule of the common law of universal application"); Shand, *supra* note 21, at 146.

47. Not all contracts scholars are willing to admit that the public policy doctrine involves overruling market choices. Randy Barnett has argued that, to the extent that jurisdictions have different public policy doctrines and parties are able to choose which jurisdiction's law will bind them, the application of such a doctrine is the product of consent. Barnett, *supra* note 31, at 904-05. Juliet Kostritsky has argued that the public policy defense is consistent with both economic theory and private autonomy because the exception efficiently deters illegal contracts. See Kostritsky, *supra* note 21, at 121-23. She admits, however, that the public policy doctrine presupposes "public regulatory intervention in the definition of the policies," and that "even the application of the doctrine seems rooted in public, not private, goals" in some cases. *Id.* at 123 n.27.

48. Simple refusal to enforce contracts that violate public policy is the most common judicial response under the public policy doctrine. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 22-3 (2d ed. 1977); Kostritsky, *supra* note 21, at 118; Shand, *supra* note 21, at 146-47. Were a commercial party to attempt to contract out of the duty of good faith in a transaction involving the sale of goods, for example, a court would simply refuse to enforce the offending term and impose the duty of good faith anyway. See Barnett, *supra* note 31, at 883 n.164. But see Corey R. Chivers, Note, "Contracting Around" the Good Faith Covenant to Avoid Lender Liability, 1991 COLUM. BUS. L. REV. 359 (arguing that the good faith requirement should be subject to default rule in some cases). In its most extreme form of regulation, the state may set criminal or civil penalties for attempts to make contracts that violate public policy. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 720-21 (1990) (noting that price-fixing agreements and contracts to commit murder are prohibited by the criminal law and that various consumer credit terms such as wage assignments and blanket household goods security interests are penalized through civil sanctions imposed by the Federal Trade Commission).

49. See *Moran v. Harris*, 182 Cal. Rptr. 519, 522 (Ct. App. 1982) (noting that "judicial realization of the meandering nature of 'public policy' necessitates judicial restraint"); Richardson v.

In order to discuss more easily the full range of judicial responses to public policy challenges, it is helpful to review some vocabulary from modern contracts scholarship.⁵⁰ Public policy cases usually involve attempted bargaining around some preordained assignment of rights provided by common law, statutory, or constitutional rules. These rules vary in content from economic matters, such as the common law right to collect damages for breach of contract, to constitutional speech and press rights that affect the functioning of a democratic state.

Ian Ayres and Robert Gertner have noted that an important attribute of such background rules⁵¹ is the transferability of the rights conferred by them in markets. Ayres and Gertner label the category of rules that cannot be waived or varied by agreement "immutable rules."⁵² They give the name "default rules" to a second category of background norms and presumptions that the law will implement unless the parties

Mellish, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824); Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 695 (1935) (asserting that an "obvious criticism" of overbroad application of public policy doctrine "is that too much uncertainty would thus be injected into contractual relationships"); Prince, *supra* note 21, at 166 (stating that "inherent vagueness present in public policy interests invites uncertainty").

50. This vocabulary, which was initially used by law and economics scholars in discussions about corporate governance, see Barnett, *supra* note 31, at 824 n.13, is rapidly becoming the normal mode of discourse among a large and growing number of contracts scholars of all stripes. See *id.* at 823-24 (speaking of the vocabulary of immutable and default rules as "a new and powerful heuristic device" and listing scholars using it); see also David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

51. Ayres and Gertner analyze background rights that are specifically related to commercial contract transactions, such as the right of a buyer to collect consequential damages. Ayres & Gertner, *supra* note 28, at 101-04 (discussing rule of *Hadley v. Baxendale*). This Article extends their vocabulary to apply to a variety of legal rights, not just those associated with commercial deals.

52. *Id.* at 87-88 ("Immutable rules cannot be contracted around; they govern even if the parties attempt to contract around them."). In some cases, the state sets what Ayres and Gertner have called "single-sided" immutable rules, which do permit limited bargaining around state-imposed minimum performance or maximum obligation standards. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 743-44 (1992) (discussing both regular "immutable rules," which cannot be contracted around, and "single-sided" immutable rules, which set a floor or ceiling for the contractual obligation, but which can be varied by agreement within limits). If parties exceed the limits set by law, a court often will supply a "reasonable" term as a substitute for the offending clause. Ayres & Gertner, *supra* note 28, at 126-27. For example, a contractual stipulated damages provision may be unenforceable as a penalty, but the injured party will still be entitled to a reasonable damage remedy. 2 FARNSWORTH, *supra* note 21, § 12.18, at 895-904. In addition, a court may refuse to enforce a broad covenant not to compete as against public policy, but then substitute a narrower, more reasonable clause. *Id.* at 384-85 (discussing the "blue-pencil" rule, by which courts enforce overbroad covenants not to compete if they can render the clause reasonable by striking through language, and commenting that courts in recent years simply have reduced the scope of covenants as a way of saving them). Where courts are interested in strong deterrence of the prohibited clause, the penalty of complete nonenforcement will have a stronger effect than rewriting the clause with a "reasonable" substitute. Ayres & Gertner, *supra* note 28, at 126-27.

chose some other arrangement by agreement.⁵³ Using Margaret Radin's terminology, rights that are governed by an immutable rule are "market-inalienable" because they cannot be traded as part of a contractual exchange.⁵⁴ Rights governed by default rules are "alienable" because parties may alter the rules as part of a market transaction.⁵⁵

Public policy exceptions to contract enforcement take the form of either immutable rules or what this Article will call "special default rules," whereas most contract rights are governed by "ordinary default rules."⁵⁶ An example of an immutable rule is the contract doctrine against enforcement of liquidated damages stipulations that impose a "penalty" for nonperformance of a contract.⁵⁷ The rule against penalty clauses cannot be waived no matter how much bargaining, notice, or consent the transaction evidences.⁵⁸

53. Ayres & Gertner, *supra* note 28, at 87 ("Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them."). Ayres and Gertner go on to distinguish three types of default rules: "majoritarian defaults," *id.* at 93, "tailored defaults," *id.* at 91, and "penalty defaults," *id.* at 97. Majoritarian defaults are what the majority of contracting parties in a particular commercial community would want; tailored defaults are what the individual contracting parties before the court would have bargained for; and penalty defaults are set to encourage one party or the other to bargain explicitly over the matter so the court will not have to supply either a majoritarian or tailored default term.

54. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987) (stating that "market-inalienability" means "nonsalability," something that is not to be sold, "which in our economic system means it is not to be traded in the market"). Radin's vocabulary, and Ayres' and Gertner's as well, owes much to Calabresi's and Melamed's important article on various attributes of legal remedies. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

55. Of course, parties may also agree to alter the rules purely for their mutual convenience. Radin associates the widespread alienability of rights with "universal commodification." Radin, *supra* note 54, at 1859-61 ("Everything that is desired or valued is an object that can be possessed, that can be thought of as equivalent to a sum of money, and that can be alienated.").

56. Rights governed by ordinary default rules are, like ordinary items of commercial property, subject to alienation under the prevailing objective theory of contract. For example, a default rule involving the sale of goods specifies that the place of delivery of goods "is the seller's place of business or if he has none his residence." U.C.C. § 2-308(a) (1990). The seller is free to alienate this favorable presumption by trading it for something the seller values more highly. Thus, the parties may use the ordinary, objective rules of contract formation and interpretation to specify some other place of delivery. *Id.* (specifying the seller's place of business or residence as the place of delivery "unless otherwise agreed").

Ayres and Gertner do not use the terms "special" and "ordinary" default rules discussed in this Article. They elaborate on "majoritarian" versus "tailored" default rules, thereby focusing attention on the different reasoning processes that courts use to decide what the actual default rule should be when it has not been altered by agreement. See *supra* note 52. The notion of a special default rule focuses attention on the processes parties must use to negotiate a change in the default.

57. 2 FARNSWORTH, *supra* note 21, at 935-46.

58. Similarly, neither express warranties of description, U.C.C. § 2-316(1) (1990), nor consequential damage remedies for personal injuries to consumer-buyers, *id.* § 2-719(3), can be disclaimed under normal circumstances under the Uniform Commercial Code. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-2, at 490 (3d ed. 1988) (explaining that under U.C.C. § 2-316(1), "[i]f the factfinder determines that a seller's statement created an express warranty, words purportedly disclaiming that warranty will have no effect, for the disclaiming language is inherently inconsistent"); *id.* at 539 n.7 (noting that, although disclaimers of

Special default rules permit waivers, but only under specified conditions. Public policy may require that the minimal evidence of contractual notice and consent normally demanded by the objective theory of contract be enhanced to assure that rights transfers are the product of conscious and voluntary acts of will.⁵⁹ For example, in routine commercial transactions involving standard form contracts, the law may require that enhanced forms of notice accompany the contract formation process so that a particular term, such as a disclaimer of the implied warranty of merchantability,⁶⁰ will be brought to the attention of the buyer.

In special interactions not involving adhesion or standardized contracts, courts may refuse to recognize attempts to vary background rules unless explicit evidence of truly voluntary consent is forthcoming. For example, courts sometimes state that contractual waivers of due process or other constitutional rights must be knowing, intelligent, and voluntary, thereby imposing a higher standard of subjective consent than would otherwise be required under the objective theory of contract.⁶¹ Cases in both of these categories impose special default rules as that term is used in this Article.

It is important to note that public policy doctrines are, by their nature, subject to change. Rights that were once subject to immutable rules may become subject to special or even ordinary default rules as time

consequential damages for injury to consumer-buyers are only prima facie unconscionable under the U.C.C., "[n]o defendant in any of the reported cases has yet succeeded in overcoming the prima facie case for unconscionability established by 2-719(3)"). When sellers try to disclaim such warranties or remedy obligations, the courts ignore their contracts and impose the immutable rules.

59. The public policy preference for an initial assignment of rights may not be so strong as to make it subject to an immutable rule, but the assignment may embody such common expectations or norms that variations come as a surprise to many people and a distinct hardship to some. Moreover, the bargaining circumstances accompanying attempts to vary the preferred assignment may be so casual or one-sided that there is a predictable likelihood that the transfer either will not be noticed or its implications will not be understood fully by the parties charged with having traded away their assigned rights. Thus, public policy may require that buyers engage in special efforts to bring the transfer of the right to the attention of sellers or to obtain something approaching full, subjective consent before the court will recognize that a transfer has, in fact, taken place.

60. Under the U.C.C., the implied warranty of merchantability may be waived only if special steps are taken to bring the disclaimer to the attention of the buyer; specifically, the disclaimer must mention the word "merchantability" and must be "conspicuous." U.C.C. § 2-316(2); see WHITE & SUMMERS, *supra* note 58, § 12-5, at 496-504. Without these special forms of notice, the attempt to vary the default will fail. Judicial review of indemnity and exculpation clauses in adhesive form contracts in consumer cases is also an example of a special default rule. See CALAMARI & PERILLO, *supra* note 48, § 9-44, at 418 (noting the interaction of public policy and mutual assent rationales in various judicial decisions striking down indemnity and exculpation clauses in form contracts and stating that "[t]here has been a tendency, particularly in recent years, to treat contracts of adhesion or standard form contracts differently from other contracts"). Cases involving so-called "procedural unconscionability" often also involve courts in creating special default rules based on issues of notice and consent. See Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 486-87 (1967).

61. See, e.g., *County of L.A. v. Soto*, 674 P.2d 750 (Cal. 1984) (requiring that contractual waiver of paternity rights be knowing and voluntary); see also *infra* text accompanying notes 294-302.

passes. New issues may surface, requiring the courts to declare new rights and new rules regarding transferability. Allan Farnsworth has commented that "[public] policies vary over time. As the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete or are comprehensively dealt with by legislation."⁶² Recent surveys of developments in contract law confirm that courts have exercised wide discretion with regard to the public policy defense. Not only have parties on the frontiers of social experimentation invoked the public policy doctrine with increasing frequency,⁶³ but courts have used the doctrine to reorder basic commercial relationships in the light of changing economic expectations.⁶⁴ Thus, the settled appearance of the public policy doctrine⁶⁵ masks a host of changes in the application of the law made possible by the judicial power to reinterpret the public policy doctrine at different points in history.

62. 2 FARNSWORTH, *supra* note 21, § 5.2, at 11; *see also* Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233-34 (1892) ("The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interest, at a more advanced stage are treated as legal and binding.").

63. In the domestic relations field, for example, activities that were once offensive to conventional morality and disapproved by the courts on the grounds of public policy, such as cohabitation, have become more socially accepted. Courts have accordingly become more willing to approve contracts structuring these new forms of intimate relationships. *See* Prince, *supra* note 21, at 172 (discussing the need to restrict the boundaries of public policy doctrine so as to limit judicial interpretations of moral decency). The same trend can be observed in the enforcement of prenuptial agreements, which were once thought to violate public policy but now often are upheld. *See, e.g.*, Walters v. Walters, 580 So.2d 1352 (Ala. 1991); Simeone v. Simeone, 581 A.2d 162 (Pa. 1990); Perkinson v. Perkinson, 802 S.W.2d 600 (Tenn. 1990); *see also* Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 24 FAM. L.Q. 309 (1991).

64. Employment and banking are two recent examples. In the employment field, the traditional "at will" employment contract, under which employees can be terminated for any reason at the discretion of the employer, was once so favored by judicial notions of public policy that it enjoyed constitutional status. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908) (holding that the employer's right to terminate an employee at will is protected by the Fifth Amendment and striking down a federal statute that made it a crime for employers to fire employees because of their union activities). Today, many courts refuse to honor "at will" contracts when the reasons for a discharge offend modern, pro-employee notions of public policy. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1031-35 (Ariz. 1985) (reviewing cases creating a public policy exception to "at will" employment contracts in other jurisdictions and adopting such an exception in Arizona); CHARLES BAKALY, JR. & JOEL GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* § 1.5, at 12-13 (Supp. 1990) (discussing statutory and common law developments that limit an employer's right to terminate "at will" employees); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983). In the banking field, "lender liability" cases based on an immutable implied covenant of good faith and fair dealing have transformed lender-customer relations. *See* DENNIS M. PATTERSON, *LENDER LIABILITY: DEFINITIONS, THEORIES, APPLICATIONS* (1990); Kenneth Goldberg, Note, *Lender Liability and Good Faith*, 68 B.U. L. REV. 653 (1988).

65. Commentators have asserted that the formal categories encompassed by the public policy doctrine have not changed significantly as a body of black letter law in over one hundred years. *See* Prince, *supra* note 21, at 173-74 (noting that categories of public policy cases "have not changed" materially since 1886).

II

THE SUPREME COURT AND THE PUBLIC POLICY DEFENSE

This Part investigates three contract public policy issues in three historical periods. The contracts topics are: (1) rights of access to judicial forums; (2) exculpation and damage limitation clauses; and (3) contracts that offend constitutional or statutory policies. These topics have been selected because, unlike other public policy defenses, they have been the subjects of Supreme Court scrutiny during each of the major periods of the Court's history. The periods studied are: (1) the *Lochner*-era period from 1870 to 1937;⁶⁶ (2) the New Deal/Warren Court from 1937 to 1971;⁶⁷ and (3) the modern Court from 1971 to the present.⁶⁸ The Court has not dwelled at length on all of these subjects during all three periods. Representative cases in each historical period reveal distinctive judicial attitudes regarding each topic, however, and the Court has given concentrated attention to one or more public policy defenses at each historical stage. This Part begins with a short summary of the basic attitudes toward contract evidenced by the Court during the three periods under study.

Scholars generally consider the *Lochner* era to be the high water mark for freedom of contract in Supreme Court history⁶⁹ for two main reasons. First and foremost, the *Lochner* Court constitutionalized freedom of contract through the doctrine of economic substantive due process.⁷⁰ Toward the end of the nineteenth century, state courts, following sentiments expressed in the dissenting opinion of the Supreme Court's *Slaughter House Cases*,⁷¹ began overturning legislation that placed limits on various types of employment relations, professional activities, and other commercial arrangements on the grounds that freedom of contract was an essential component of individual liberty protected by the Fifth and Fourteenth Amendments to the federal Constitution.⁷² The Supreme Court joined this trend and declared freedom of contract to be a

66. See *supra* note 16 and accompanying text.

67. See *supra* note 17 and accompanying text.

68. See *supra* note 2 and accompanying text.

69. Legal historians generally regard the nineteenth century as "the century of contract." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 532 (2d ed. 1985); see also JAMES W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 12 (1956) ("The nineteenth-century presumption always favored the exercise of the autonomy which the law of contract gave private decision makers . . ."), *id.* at 18.

70. See *supra* note 9 and accompanying text.

71. 83 U.S. (16 Wall.) 36 (1872).

72. See Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 470 (1909) (analyzing both state and federal cases that recognized freedom of contract as an element of liberty protected by the Fourteenth Amendment and concluding that "the fountain head of this line of decisions seems to be the opinion of Mr. Justice Field in *Butchers' Union Co. v. Crescent City Co.*, in which he restates the views of the minority in the *Slaughter-House Cases*" that legislatures had no right to interfere "with the right to follow 'lawful callings'").

constitutionally protected liberty in 1897, when it overturned a Louisiana statute that fined citizens for entering into marine insurance contracts with companies that had not complied with state insurance regulations.⁷³ In 1905, the *Lochner* decision⁷⁴ struck down a New York statute limiting the number of hours that bakers could work. Probably because of Justice Oliver Wendell Holmes' famous dissent, *Lochner* became the historical exemplar of the economic substantive due process doctrine.⁷⁵ Between 1897 and 1937, the Court struck down both state and federal economic and labor legislation on due process grounds⁷⁶ until the doctrine met its demise in the New Deal period.⁷⁷

Second, the Court's development of a federal common law of contract in diversity cases under the doctrine announced in *Swift v. Tyson*⁷⁸ also marked the apparent primacy of contract. Scholars generally maintain that the classical model of contract law developed by state courts in the late-nineteenth century resulted in contract enforcement in all but the most extraordinary cases.⁷⁹ It is often assumed that this presumption in favor of contract carried over into the public policy doctrine.⁸⁰

In contrast with what may have been the norm in state courts, the *Lochner* Court was surprisingly willing to introduce regulatory elements into the common law of contracts.⁸¹ Drawing on notions of public policy

73. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589-91 (1897).

74. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

75. Cf. BORK, *supra* note 17, at 46 (arguing that *Allgeyer* could just as easily have become the paradigm case of the *Lochner* era).

76. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down a District of Columbia minimum wage law for women), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down a Kansas statute that made it a criminal offense to require employees, as a condition of hiring, to agree not to join a labor union); *Adair v. United States*, 208 U.S. 161 (1908) (holding unconstitutional a federal statute that made it a criminal offense to fire an employee because that employee belonged to a union); see also BORK, *supra* note 17, at 36-49.

77. See *supra* note 9. Surprisingly, while activist in its use of the Due Process Clauses, the *Lochner* Court limited the Contracts Clause as a basis for constitutional review of state economic legislation. See David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 327-35 (1985).

78. 41 U.S. (16 Pet.) 1 (1842). Under the doctrine announced in *Swift*, the Court retained the right to base decisions in diversity cases on "general principles and doctrines of commercial jurisprudence" in the absence of a controlling state statute. *Id.* at 18. It could thus ignore interpretations of common law rules made by the state courts of forum states.

79. See W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 28 (1984) (describing the *Lochner* era as dominated by the notion that parties were free to take "every possible advantage" of one another and that "[i]f one party bound himself to terms he never read or did not understand, this was his choice, and the law, within broad limits, did nothing to excuse him from the risks he had supposedly voluntarily assumed").

80. See Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 371, 373-74 (1921) (describing how nineteenth-century courts applied a narrow range of public policy exceptions to contract).

81. Some of its more activist cases imposed public policy limitations on contracts that ran

from the broadest set of sources, including constitutions, statutes, case precedents, and the Justices' own notions of the public interest,⁸² the *Lochner* Court applied the public policy defense not only to the topics treated in this Article, but also to such agreements as fee-sharing contracts between attorneys in bankruptcy proceedings,⁸³ profit-sharing contracts between bidders for public works projects,⁸⁴ and contracts for legislative lobbying services "to procure . . . the passage of [laws] providing for the payment of [private] claim[s]."⁸⁵ The Court also held conventional liquidated damages stipulations to be unenforceable when they constituted a contractual penalty⁸⁶ and recognized the general concept of contract unconscionability.⁸⁷

With the arrival of the New Deal in the 1930s and the Warren Court era of the 1950s and 1960s, the Supreme Court's attitudes toward legislative ordering and making common law changed. First, in 1937 the Court abandoned the doctrine of economic substantive due process.⁸⁸ Under intense political pressure brought about by the Great

directly counter to the pro-market rules of commercial states, such as New York. See *infra* text accompanying notes 180-87.

82. The *Lochner* Court viewed its own intuitions regarding "sound policy and good morals" to be legitimate sources of public policy in contracts cases. See *Trist v. Child*, 88 U.S. (21 Wall.) 441, 448 (1874). In fact, a close examination of the contract law in general use during the late-nineteenth century reveals that the public policy exception had surprising vitality in many jurisdictions during the *Lochner* era. A leading treatise author, writing in 1886, found enough cases to fill an 860-page treatise on the subject of public policy exceptions to contract enforcement. ELISHA GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS REDUCED TO RULES* (1886). Topics covered in the treatise include contracts affecting illegal activities, gambling, public and personal service, government, corruption of private citizens, public justice, personal liability, domestic relations, restraints on trade and alienation, and limitations of liability of "Common Carriers, Telegraph Companies, Employers, and Tort-feasors." *Id.* at vii-ix. Professor Hurst noted the

caution with which courts [of the nineteenth century] held on to a residual authority to refuse to enforce agreements which they found to be against public policy. By enforcing a contract, the public power supported the decisions the agreement represented and so far inescapably shared moral responsibility for the social consequences.

HURST, *supra* note 69, at 11.

83. *Weil v. Neary*, 278 U.S. 160, 173-74 (1929).

84. *McMullen v. Hoffman*, 174 U.S. 639, 654-55 (1899).

85. *Trist v. Child*, 88 U.S. (21 Wall.) at 448.

86. *The Atlanten*, 252 U.S. 313 (1920); *Bignall v. Gould*, 119 U.S. 495 (1886); *Watts v. Camors*, 115 U.S. 353 (1885). But cf. *Sun Printing & Publishing Ass'n v. Moore*, 183 U.S. 642, 656-62 (1902) (upholding a liquidated damages clause for the value of a destroyed vessel when the value was uncertain at the time the contract was made). The Court was also quite innovative in the law of fraud when it came to the duty to disclose facts in contract negotiations. See *Strong v. Repide*, 213 U.S. 419, 431-33 (1909) (adopting a "special facts" test and holding that a corporate insider owed a duty to a shareholder to disclose facts regarding a likely rise in stock price before purchasing stock from the shareholder).

87. *Haffner v. Dobrinski*, 215 U.S. 446, 450 (1910) (holding that a party need not prove that a contract is invalid to defeat enforcement if the contract is "unconscionable, oppressive, or iniquitous") (quoting *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1892)).

88. See BORK, *supra* note 17, at 57-58.

Depression,⁸⁹ the Court in *West Coast Hotel Co. v. Parrish*⁹⁰ effectively overruled *Lochner*⁹¹ and upheld a minimum wage law for women. In essence, the Court recognized that the public had a substantial interest in what had appeared in an earlier era to be strictly private contractual relations. *West Coast Hotel* opened the way for highly deferential review of economic and contractual regulations and struck a note of egalitarianism in contractual regulation that sounded throughout the next thirty-five years.⁹²

Second, in *Erie Railroad v. Tompkins*,⁹³ the Court in 1938 abandoned its role as the ultimate arbiter of the common law in diversity cases and ordered federal diversity courts to apply state common law, including state contract law.⁹⁴ Third, the Court retreated from the *Lochner* Court's broad view of the legitimate sources of public policy in contract cases and signaled its preference for legislation and long-standing precedent as the proper authorities on which to base nonenforcement of contracts.⁹⁵ The Court did, however, maintain a role for judicially determined "obvious ethical and moral standards" in the public policy doctrine.⁹⁶

The rest of this Article examines the modern Court's attitudes

89. For an account of how President Roosevelt threatened to "pack" the Court if it did not alter its substantive due process views and the now-disputed "switch in time that saved nine," see *id.* at 54-55, and ALPHEUS T. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 101-28 (rev. ed. 1968). The importance of this constitutional change for present purposes is that it heralded a new ascendancy of legislative regulation over private ordering, a reprioritization that is reflected in the Court's cases dealing with the public policy defense to contract.

90. 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)).

91. Commentators agree that *West Coast Hotel* marks the demise of the *Lochner* era. See *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 808 n.1 (1988) (Rehnquist, J., dissenting) (stating that *West Coast Hotel* "finally overruled" *Lochner*); Sunstein, *Lochner's Legacy*, *supra* note 24, at 876 (noting that *West Coast Hotel* is "generally thought to spell the downfall of *Lochner*"). Scholars have pointed out that the Court's change of heart on economic substantive due process was foreshadowed in 1934 when it upheld a law under which the price of milk could be regulated by a state Milk Control Board. See BORK, *supra* note 17, at 57 (suggesting that economic substantive due process was beginning to decline by the time of the Court's decision in *Nebbia v. New York*, 291 U.S. 502 (1934)).

92. As the Court put it, "exploitation of a class of workers who are in an unequal position with respect to bargaining power" and who cannot, therefore, bargain for a living wage, "casts a direct burden for their support upon the community." *West Coast Hotel*, 300 U.S. at 399. The Court therefore found that the legislature was acting within its constitutional authority in refusing "to provide what is in effect a subsidy for unconscionable employers." *Id.*; see also BORK, *supra* note 17, at 72 (describing the work of the Warren Court, led by New Deal Court Justices Black and Douglas as "organized by the theme of egalitarianism").

93. 304 U.S. 64 (1938).

94. See *supra* text accompanying notes 10-11.

95. See *Muschany v. United States*, 324 U.S. 49, 66-67 (1945) (stating that public policy in contract cases is to be "ascertained by reference to the laws and legal precedent and not from general considerations of supposed public interests," but that courts retain power to declare public policy based on "obvious ethical or moral standards").

96. *Id.*

towards contract law.⁹⁷ The standard view is that the modern Court's overall constitutional jurisprudence has displayed a marked and surprising continuity with the New Deal/Warren period.⁹⁸ As noted earlier, the modern Court has heeded the lesson of *West Coast Hotel* and declined to reintroduce economic substantive due process under the Fifth and Fourteenth Amendments,⁹⁹ and it has struck down state economic statutes under the Contracts Clause only twice.¹⁰⁰ Moreover, the modern Court has adhered to the *Erie* doctrine and does not impose its views of common law contract doctrine on lower courts in diversity cases as did the *Lochner* Court.

97. The modern Court has been the subject of mixed critiques regarding its overall place in Supreme Court history. Most commentators would agree with Robert Bork that it has been "less relentlessly adventurous" in constitutional matters than the New Deal and Warren Courts that preceded it. BORK, *supra* note 17, at 101 (describing the modern Court as "less relentlessly adventurous than the Warren Court" but nevertheless displaying "a strong affinity for legislating policy in the name of the Constitution" that "invariably incorporat[es] part of the modern liberal agenda"). But speculation that both the Burger and Rehnquist Courts would take sharp turns to the right has proven premature time after time. For commentary predicting a turn to the right, see DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992) (predicting conservative turn for the Rehnquist Court); A.E. Dick Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445, 465-67 (1972) (warning that the Burger Court would overturn Warren Court legacy); Linda Greenhouse, *Court Serves Notice of Its Transformation*, N.Y. TIMES, Feb. 2, 1992, § 4, at 3 ("The years of tense and fitful ideological transition, of hard-fought battles and often inconclusive compromise, are largely over. The Rehnquist Court majority now has votes to spare and is ready to put its new power on display."). For commentary suggesting these predictions are premature, see Paul M. Barrett, *High Court Upholds Workers' Comp Law in Setback to Employer-Rights Advocates*, WALL ST. J., Mar. 10, 1992, at A3 (reporting recent Supreme Court decisions refusing to overturn regulatory schemes based on the Constitution's Contracts and Due Process Clauses and quoting conservative legal activist Clinton Bolick as saying "[n]otions of a major jurisprudential revolution [in the wake of the Clarence Thomas appointment] may have been premature'"); Paul M. Barrett, *High Court Wanders from Path to Right*, WALL ST. J., July 1, 1992, at B8 (commenting with respect to the Rehnquist Court that "[t]he Supreme Court's march to the right has stalled in many areas, leaving members of the conservative majority walking in circles, kicking up dust, and generally creating confusion about important legal questions"); *The Extraordinary Burden Borne by Nine Ordinary Men*, ECONOMIST, Feb. 16, 1980, at 31 (noting the conclusion of constitutional law scholars speaking at the 1980 annual professional meeting that the "court had confounded expectations of radical change from the Warren era" and quoting Prof. A.E. Dick Howard as saying that many predictions about the Burger Court, some of them his own, had turned out to be wrong).

98. See, e.g., THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1986); THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986 (Herman Schwartz ed., 1988). Both the Burger and Rehnquist Courts have extended and followed many Warren Court precedents, including: establishing and upholding the right to an abortion, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-08 (1992); *Roe v. Wade*, 410 U.S. 113 (1972); upholding flag burning as protected free speech, see *Texas v. Johnson*, 491 U.S. 397 (1989); prohibiting prayer in the public schools, even at graduation ceremonies, see *Lee v. Weisman*, 112 S. Ct. 2649 (1992); and maintaining the majority of Warren Court precedents in the field of criminal justice and procedure, see *TRIBE, supra* note 8, at 685-704 (noting that the modern Court has maintained the bulk of Warren Court precedents in all fields, including criminal justice and procedure).

99. See *supra* note 9 and accompanying text.

100. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

This appearance of moderation and continuity is deceptive, however, when it comes to public policy defenses to contract. On this topic, the modern Court has made a sharp break with the past and elevated contract enforcement to the position of a preferred value in its jurisprudential order. The reasons for these developments will be explored later. For now it is enough to note two points. First, the modern Court has expressly rejected the notion that public policy defenses may be based on judicial preferences of any kind, moral or otherwise. Instead, public policy defenses are limited to instances when "existing laws and legal precedents . . . demonstrate . . . a 'well defined and dominant' policy" against contract enforcement.¹⁰¹ Second, as this Part will demonstrate, the Court has jettisoned public policy defenses that have dominated the Court's view of contract for over one hundred years.

A. Access to the Courts: Alienating Litigation Rights

Traditionally, the interests and convenience of plaintiffs in accessing courts of their choice have constituted an important public policy in Anglo-American law.¹⁰² This policy has found expression in immutable rules barring specific performance of arbitration and choice of forum clauses. Parties are entitled to their day in court and, if several forums have jurisdiction over a case, the plaintiff's choice of forum at the time an action is filed is determinative unless the forum is chosen for purposes of harassment or is found by a court to be inappropriate under the doctrine of forum non conveniens.¹⁰³

1. The *Lochner* Court

The *Lochner* Court stayed in the mainstream of nineteenth-century jurisprudence by refusing to permit parties to alienate their rights of access to or choice of courts,¹⁰⁴ but it did allow arbitration in limited contexts. For example, in the field of construction disputes, the Court

101. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). In *Misco*, the Court reversed a court of appeals' decision to set aside a labor arbitration award on public policy grounds. *Id.* at 42. While courts do have the authority to refuse to enforce contracts contrary to public policy, *id.*, the Court stated that public policy formulations must be derived from positive legal sources and "not from general considerations of supposed public interests." *Id.* at 44 (quoting *Muschany*, 324 U.S. at 66). Although the Court in *Misco* cited the New Deal/Warren Court case *Muschany* as authority, the Court deliberately excised all reference to qualifying language in *Muschany* that retained judicial discretion to base public policy decisions on "obvious ethical or moral standards." *Muschany*, 324 U.S. at 66-67; see also *supra* text accompanying notes 95-96.

102. See Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 980-81 (1982) (discussing the "accepted principle that the plaintiff ought to be permitted to be the master of his own lawsuit" because it is the plaintiff who is put to the expense and trouble of initiating a claim and therefore he "ought to be permitted to select the place of trial").

103. See *id.*; see also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947).

104. See GREENHOOD, *supra* note 82, at 466-69 (citing and discussing cases in which nineteenth-century courts refused to enforce both arbitration and choice of forum clauses).

was willing to uphold decisions made by government contract officers and engineers regarding disputes over the scope of work and the compensation for work completed.¹⁰⁵ Moreover, it would enforce completed arbitration awards as if they were court judgments.¹⁰⁶ Finally, the Court would enforce clauses that required arbitration of issues of damages as a "condition precedent" to the filing of a court action regarding liability.¹⁰⁷

When it came to enforcing an arbitration clause to determine both liability and damages, however, the Court balked. This immutable rule was such a settled part of nineteenth-century contracts that the Court was not called upon to make new law on the subject, nor did it seek occasions to do so. Quoting a pre-Civil War opinion by Justice Story, the Court stated:

[W]hen [the courts] are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and close against him the doors of the common Courts of justice, provided by the Government to protect rights and redress wrongs.¹⁰⁸

As this quotation indicates, the Court's traditional objection that arbitration clauses would oust the jurisdiction of the court conveyed a concern for the rights of the parties to full legal remedies as much as a jealousy regarding court jurisdiction.¹⁰⁹

With respect to choice of forum clauses, the Court endorsed the general judicial attitudes of the day in refusing to enforce such stipulations

105. See *Martinsburg & P.R.R. v. March*, 114 U.S. 549 (1885) (decision of a railroad's engineer is binding under contract stipulation unless the decision results from gross mistake, fraud, or bad faith); *Sweeney v. United States*, 109 U.S. 618, 620 (1883) (decision of a government contract officer is binding); *Kihlberg v. United States*, 97 U.S. 398 (1878) (same).

106. See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) ("If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law, or in equity."); *Bayne v. Morris*, 68 U.S. (1 Wall.) 97 (1863) (allowing a claimant to pursue court action on the defendant's failure to comply with an arbitration award); *Burchell v. Marsh*, 58 U.S. (17 How.) 344 (1854) (dismissing action attacking an arbitration award).

107. See *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U.S. 242, 254-55 (1890).

108. *Red Cross Line*, 264 U.S. at 121 n.1 (quoting *Tobey v. County of Bristol*, 3 Story 800, 821 (1845)); see also *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 450-51 (1874) (stating that there is "no sound principle" upon which a party can "bind himself in advance by an [arbitration] agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, [to go to court] whenever the case may be presented.").

109. See G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 635 (1988); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 138-44 (1934).

on the grounds of public policy.¹¹⁰ In *Insurance Co. v. Morse*,¹¹¹ the Court held that an agreement by which an insurance company waived its right to remove state cases to federal courts was not enforceable. The Court analogized enforcement of such a clause to specific performance of an arbitration agreement and refused to honor it.¹¹² Once again, the prevailing legal sentiment on forum stipulations was so firmly against their enforcement that few cases arose in which parties seriously litigated the question, much less pressed their objections in the nation's highest court.

2. *The New Deal/Warren Court*

With respect to court access issues, the New Deal/Warren Court occupies something of a middle ground between the *Lochner* Court and the modern Court. Where litigation of claims arising under federal statutes was concerned, the New Deal/Warren Court carried forward the *Lochner* Court's immutable rules against specific performance of contracts that alienated litigation rights. In situations involving only common law rights, however, the New Deal/Warren Court moved toward alienability of court access rights.

Commercial arbitration cases arising under the Federal Arbitration Act (FAA),¹¹³ passed by Congress in 1925, demonstrate the Court's disparate treatment of statutory and common law rights. The FAA's centerpiece is § 2, which provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹¹⁴ This provision was a clear legislative attempt to overrule the immutable rule against specific performance of arbitration clauses and to subject the right of court access to the ordinary default rules of common law contract.

Despite this strong congressional signal in favor of contract enforcement, the New Deal/Warren Court refused to order arbitration of claims founded on New Deal rights legislation. In *Wilko v. Swan*,¹¹⁵ the Court

110. See GREENHOOD, *supra* note 82, at 466-69. The Court's attitude regarding forum selection clauses was consistent with the general judicial hostility to such clauses exhibited in state courts. See, e.g., *White Eagle Laundry Co. v. Slawek*, 129 N.E. 753 (Ill. 1921); *Nashua River Paper Co. v. Hammermill Paper Co.*, 111 N.E. 678 (Mass. 1916); *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174 (1856); *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518 (1862); *Sanford v. Commercial Travelers' Mut. Accident Ass'n*, 41 N.E. 694 (N.Y. 1895).

111. 87 U.S. (20 Wall.) 445 (1874).

112. *Id.* at 451-52. The contractual provision had been required by a Wisconsin state law, which the Court went on to find violated the Constitution. *Id.* at 458; see also *Barron v. Burnside*, 121 U.S. 186 (1887) (reaffirming *Morse*); *Doyle v. Continental Ins. Co.*, 94 U.S. (4 Otto) 535 (1876) (same), overruled by *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

113. 9 U.S.C. §§ 1-15 (1988).

114. *Id.* § 2.

115. 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490

denied enforcement of a predispute arbitration clause and held that an individual securities investor retained his right to sue his broker in court under § 12(2) of the Securities Act of 1933.¹¹⁶ For the balance of the New Deal/Warren Court era and extending into the modern period, *Wilko* spawned a host of lower court public policy prohibitions on arbitration based on other federal statutes.¹¹⁷

Where common law claims were concerned, by contrast, the New Deal/Warren Court moved energetically to further the FAA's objective of facilitating alienation of court access rights.¹¹⁸ In *Prima Paint Corp. v.*

U.S. 477 (1989). The Court also signaled its caution regarding arbitration in a second arbitration case that at least two Justices thought was related to the public policy defense. *See Moseley v. Electronic & Missile Facilities*, 374 U.S. 167 (1963). In *Moseley*, the question was whether an arbitration clause would be enforceable against a subcontractor bringing suit under the Miller Act, 40 U.S.C. § 270b (1988). The Court relied on the common law "revocation" provision in § 2 of the FAA, *supra* text accompanying note 114, by generously interpreting an allegation of fraud in the case to be directed not just against the contract as a whole, but against the arbitration clause specifically. This broad interpretation of fraud preserved the subcontractor's access to a federal judicial forum without necessarily elevating the Miller Act over the FAA. In their concurrence, Chief Justice Warren and Justice Black indicated that they had doubts that an arbitration clause should be enforceable in a case raising Miller Act claims, *Moseley*, 374 U.S. at 172-73 (Warren, C.J., concurring), thus signaling their preference for an immutable rule of court access that the majority was apparently unwilling to adopt.

116. 15 U.S.C. § 77f(2) (1988). The 1933 Act contains a general anti-waiver provision that declares void all stipulations waiving "compliance" with statutory provisions. Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." *Id.* § 77n. The 1933 Act also gives investors the right to sue in either state or federal court for statutory violations. *Id.* § 77v. The issue before the Court was whether the pro-contract policies of the FAA permitted investors to waive their right under the 1933 Act to go to court. Pointing to the congressional purposes behind the 1933 Act, including the protection of securities purchasers who labor under informational disadvantages vis-à-vis securities industry professionals, *Wilko*, 346 U.S. at 435, the Court found that the right to bring an action in state or federal court was the kind of "provision" that Congress "must have intended" to be nonwaivable and therefore held that the customer's agreement to arbitrate future disputes was void. *Id.* at 434-37. The Court made clear its general attitude about arbitration as a forum distinct from the courts in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1955), holding that federal diversity courts were obligated under *Erie* to apply the arbitration law of the forum state in wholly intrastate transactions in order to avoid a substantially different result from one a state court would reach. *Id.* at 203-04.

117. Courts following *Wilko* held that arbitration clauses could not be applied in cases raising claims under a number of statutes. *See, e.g.,* *Page v. Moseley, Hallgarten, Eastabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986) (applying the Racketeer Influenced and Corrupt Organizations Act); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (applying the Securities Exchange Act of 1934); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (applying the Sherman Antitrust Act); *see also* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 555-72 (1990) [hereinafter Shell, *ERISA*] (discussing the public policy defense with respect to federal employment statutes such as ERISA, Title VII, the ADEA, and FLSA); G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/Am. Express, Inc. v. McMahon*, 26 AM. BUS. L.J. 397, 402-04 (1988) [hereinafter Shell, *Public Law*].

118. The Warren Court also aggressively pursued a policy of promoting resolution of contractual collective bargaining claims through labor arbitration, stating that "[t]he judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful

Flood & Conklin Manufacturing Co.,¹¹⁹ the Court construed the FAA to require enforcement of arbitration clauses even when the party resisting enforcement claimed that it had been induced to enter the contract by fraud. The Court constructed a special doctrine of arbitration clause "severability," whereby a party resisting arbitration must allege that the fraud was directed specifically at the arbitration clause itself and not at the contract as a whole.¹²⁰ *Prima Paint* is notable because it made arbitration agreements *more likely* to be enforced than ordinary contracts. The Court's construction of the FAA¹²¹ moved court access for common law claims from an inalienable right to one more easily alienable than many other underlying rights.

The New Deal/Warren Court's treatment of choice of forum clauses paralleled its treatment of arbitration agreements. Where statutory rights were concerned, the Court was unwilling to recognize the alienability of a plaintiff's right to select the judicial forum. In *Boyd v. Grand Trunk Western Railroad Co.*,¹²² the Court refused to enforce a choice of forum clause in a contract to advance funds for medical expenses between a railroad and an employee who had been injured on the job. Relying on the anti-waiver provision of the Federal Employers Liability Act (FELA),¹²³ which deems void "[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter . . .,"¹²⁴ the Court held that the

settlement for the older regime of industrial conflict." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960). It thus chose to develop a federal common law of arbitration under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1988), that was independent of the FAA and that answered a special need to protect both workers and the public from the harsh effects of prolonged strikes. See Shell, *ERISA*, *supra* note 117, at 518, 527 n.114. The Warren Court's eagerness to read § 301 as requiring deference to "private ordering" through arbitration between unions and management has continued to the present day. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42-45 (1987) (refusing to recognize broad grounds for judicial review of labor arbitration awards based on "public policy"). Most commentators feel that the Warren Court's reading of § 301 was extremely expansive and, in fact, represented a highly intrusive example of judicial usurpation of power. See, e.g., Alexander Bickel & Harry Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 35-36, 38 (1957); James E. Pfander, *Judicial Purpose and the Scholarly Process: The Lincoln Mills Case*, 69 WASH. U. L.Q. 243, 276-77 (1991).

119. 388 U.S. 395 (1967).

120. *Id.* at 402.

121. The Court found that, although § 2 of the FAA refers to general contract rules of revocability, § 4 instructs courts to order arbitration to proceed when satisfied that "the making of the agreement for arbitration . . . is not in issue." *Id.* at 403 (quoting 9 U.S.C. § 4 (1988)). It interpreted § 4 to restrict the courts' inquiry, as a matter of federal substantive law, to fraud in the inducement of arbitration clauses, not entire contracts. *Id.* at 403-04. Justices Black, Douglas, and Stewart protested that the Court's holding was "fantastic" in that it relegated the issue of a contract's voidness to decisionmakers whose sole basis of jurisdiction depended on the existence of a valid contract. *Id.* at 407 (Black, J., dissenting).

122. 338 U.S. 263 (1949).

123. 45 U.S.C. § 51 (1988). The *Lochner* Court had held that the FELA was constitutional. See *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

124. 45 U.S.C. § 55 (1988). The *Lochner* Court earlier had specifically upheld this anti-waiver

forum restriction was unenforceable.¹²⁵ It noted that FELA provided plaintiffs with a generous choice of forums and that this provision would be frustrated if contractual forum clauses were enforced.¹²⁶

Where ordinary commercial transactions were concerned, however, the Court adopted interpretations that furthered the alienability of litigation rights.¹²⁷ In *National Equipment Rental v. Szukhent*,¹²⁸ the Court interpreted Rule 4(d)(1) of the Federal Rules of Civil Procedure to permit alienation of personal jurisdiction rights through the contractual device of agent appointment.¹²⁹ In *Szukhent*, a Michigan farmer had signed a standard form equipment lease with a New York company. The lease named the wife of an officer of the leasing company "as agent for the purpose of accepting service of any process within the State of New York."¹³⁰ Although the contract stipulated that New York law would apply, and under New York law the officer's wife was not an "agent" and could not be appointed as such by a nonresident of the state,¹³¹ the Court chose to create a federal rule of agency under Rule 4(d)(1) and found the contractual appointment in the case proper.¹³²

provision as constitutional. See *Philadelphia, B. & W.R.R. v. Schubert*, 224 U.S. 603 (1912) (refusing to enforce an agreement under which an employee waived his right to sue under the FELA by accepting payments for his injuries from an employer-sponsored relief fund).

125. The employee in *Boyd* had accepted advances from the company to pay for current medical expenses under the condition that these advances would be deducted from any award he might ultimately receive under the FELA. A clause in the agreement required that any FELA action be brought only in the district where the employee resided at the time of the accident or the district where the accident took place, both of which were in Michigan. After signing this agreement and receiving his advance, the employee sued in his home state of Illinois in violation of the agreement. *Boyd*, 338 U.S. at 263-64.

126. See *id.* at 266. *Boyd* was but one in a line of New Deal/Warren Court cases that expanded the rights of railroad workers under the FELA. See Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 83 (1992).

127. Occupying something of a middle ground between its pro- and anti-forum clause jurisprudence is the New Deal/Warren Court case of *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). There, the Court confronted as a matter of admiralty law the issue of whether to enforce a forum stipulation in a bill of lading designating Genoa, Italy as the sole forum competent to decide disputes over damage to an American company's cargo. *Id.* at 181-82. Although the forum clause was quite broad, covering all "legal proceedings . . . against the Captain or Shipowners or their agents in respect to any loss of or damage to any goods," the Court held that it did not apply to an action brought by the American company *in rem* against the ship in question, which happened to be in a Texas port on another voyage. *Id.* The Court thus managed to negate enforcement of the clause without having to decide, as the appeals court had, that all clauses of this sort were unenforceable as against public policy. The four dissenters rebuked the Court for ducking the merits of the public policy issue and accused the Court of "talking in riddles" since a ship can have no liability independent of its owner. *Id.* at 184 (Harlan, J., dissenting) (quoting *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 253 (1943)).

128. 375 U.S. 311 (1964).

129. Service of process upon an individual may be made "by delivering a copy of the summons and of the complaint to an agent authorized by appointment . . . to receive service of process." FED. R. CIV. P. 4(d)(1).

130. *Szukhent*, 375 U.S. at 313 n.3.

131. *Id.* at 321 (Black, J., dissenting).

132. In dissent, Justice Black called the agency a "sham," *id.* at 323 (Black, J., dissenting), and

3. *The Modern Court*

The modern Court has taken the seeds sown in cases such as *Prima Paint* and *Szukkent* and completely deregulated the alienation of court access rights. With respect to arbitration, the modern Court explicitly overruled *Wilko* in 1989¹³³ and put an end to the public policy exceptions for statutory claims that had proliferated in *Wilko*'s wake.¹³⁴ The full story of this program of law reform can be found elsewhere,¹³⁵ but a pattern that emerges from this line of cases is relevant to this Article's thesis. During the Burger years of the 1970s and early 1980s, the modern Court negated the arbitration public policy defense in cases involving sophisticated international business parties,¹³⁶ but was careful to hedge its decisions with rhetoric discussing the need for international comity.¹³⁷

Justice Brennan, joined by Chief Justice Warren and Justice Goldberg, argued that it "offends common sense" to assume that an individual's mere signature on a form contract prepared by a corporation suffices as proof that the individual "understandingly consented to be sued in a State not that of his residence." *Id.* at 333 (Brennan, J., dissenting). In a reference to the *Lochner* Court, the dissenters warned that the Court might soon be seen as "that 'blind' Court . . . that does not see what '[a]ll others can see and understand.'" *Id.* at 334 (Brennan, J., dissenting) (quoting *United States v. Rumely*, 345 U.S. 41, 44 (1953)). Scholars also have criticized the holding in *Szukkent*. See, e.g., Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 25-26 (1989) (criticizing *Szukkent* as inferring consent too readily from a signature on an adhesion contract).

133. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

134. See Shell, *Public Law*, *supra* note 117, at 398. An exception to the pattern described in the text relates to labor arbitration under collective bargaining agreements. At least for the present, the modern Court has preserved individual union members' access to the courts for statutory claims even after their unions have arbitrated grievances arising from a common set of facts. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (preserving union member's court access for claims under 42 U.S.C. § 1983 following a grievance arbitration involving the same facts as those raised by a statutory claim); *Barrentine v. Arkansas-Best Freight*, 450 U.S. 728 (1981) (finding the same result for claims under the Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (finding the same result for claims under Title VII). Arbitration of collective bargaining claims serves special policies and involves unique conflicts of interest between unions and their members that make these cases distinguishable from commercial arbitration. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1656-57 (1991); see also Shell, *ERISA*, *supra* note 117, at 512-13.

135. See Shell, *Public Law*, *supra* note 117, at 401-17.

136. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (finding federal antitrust claims to be arbitrable in an international dispute); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (finding a federal claim under the Securities Exchange Act of 1934 to be arbitrable in an international dispute).

137. The first case to question *Wilko* was *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), which involved a complex international business transaction where the party complaining about the arbitration clause was a giant U.S. corporation, Alberto-Culver. Alberto-Culver purchased three companies, together with all their trademark rights, from a German citizen. The contract of sale contained a clause calling for arbitration before the International Chamber of Commerce in Paris. The American purchaser soon discovered that the trademarks were encumbered and sued the seller in federal court in Illinois for fraud under Section 10(b) of the 1934 Securities Exchange Act. 15 U.S.C. § 78j(b) (1988). In deciding that the parties were subject to contractual arbitration, the Court was careful to note both the sophistication and international character of the deal. The Court distinguished *Wilko* both because *Wilko* dealt with the 1933 Securities Act, which contains wider jurisdictional choices for plaintiffs than does the 1934 Act, and because international transactions

With these precedents in hand, the Rehnquist Court has collapsed all distinctions between international and domestic cases and between consumer and nonconsumer transactions and ruled that statutory litigation rights are fully alienable regardless of context.¹³⁸

The Court's final steps in this process are notable. Not only has the Court ruled that federal statutory claims based on New Deal¹³⁹ and even civil rights¹⁴⁰ legislation may be subject to final resolution by private arbitrators, but in *Southland Corp. v. Keating*,¹⁴¹ it interpreted the FAA to bar the states from imposing public policy limits on arbitration by statute.¹⁴² It extended this preemption analysis in *Perry v. Thomas*¹⁴³ to cover state common law special default rules and warned that state courts could not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable."¹⁴⁴

Finally, in overruling *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹⁴⁵ the Court demonstrated its commitment to this near-automatic rule of alienability by ordering arbitration of claims under the Securities Act of 1933 in what were surely unconscionable circumstances. The case involved a group of first-time investors that included widows, retirees, minors, and "individuals without the ability to understand English."¹⁴⁶ The broker allegedly concealed the arbitration clause by presenting the contract documents to these customers with the

triggered policy concerns of comity. *Scherk*, 417 U.S. at 513-14. The Court used similar comity rhetoric to endorse arbitration of federal antitrust claims in *Mitsubishi Motors Corp.*, 473 U.S. at 629.

138. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In *McMahon*, the Court extended its holding in *Scherk* to encompass 1934 Act claims by individual American securities customers against their brokers. The Court first ruled that the anti-waiver provisions of the 1934 Act do not foreclose arbitration. *Id.* at 227-31. Then, discarding the suspicion expressed in *Wilko* that arbitration might not protect substantive rights, *id.* at 231-33, the Court effectively collapsed all distinctions between international cases involving sophisticated parties and domestic consumer transactions. It then applied, in mechanical fashion, the contract enforcement rules developed in *Scherk* and *Mitsubishi* to the claims at issue in *McMahon*. One commentator has noted the tendency of the Court to initiate changes in procedural rules in international cases and then apply the new rules in the domestic setting. See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1466-73 (1991) (reviewing GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1989)).

139. See *McMahon*, 482 U.S. at 227.

140. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (holding that a securities industry employee was bound to arbitrate his federal statutory age discrimination claim pursuant to an industry-mandated arbitration provision in the New York Stock Exchange Rules).

141. 465 U.S. 1 (1984).

142. In *Southland*, the Court held that the FAA preempted a California franchisee protection statute that stipulated court access for resolution of claims under that legislation. *Id.* at 10. Moreover, it held that state as well as federal courts were obligated to enforce the FAA in the face of ample evidence that Congress in 1925 intended the FAA to apply only as a procedural statute in federal courts. *Id.* at 25-29 (O'Connor, J., dissenting).

143. 482 U.S. 483 (1987).

144. *Id.* at 493 n.9.

145. 490 U.S. 477 (1989).

146. Brief for Petitioners at 2, *Rodriguez de Quijas*, 490 U.S. 477 (No. 88-385).

appropriate signature lines on the side facing up and with the arbitration and New York choice of law clauses facing down.¹⁴⁷ There was even an allegation that the broker tried to sexually assault one plaintiff while on a visit to her home.¹⁴⁸ After the broker "disappeared," the investors discovered that he had lost most of their funds in over-the-counter securities in which the broker's firm was a market-maker.¹⁴⁹ With these facts presented in the record, the Court found that "[a]lthough petitioners suggest that the agreement to arbitrate here was adhesive in nature, the record contains no factual showing to support that suggestion."¹⁵⁰

The modern Court's preference for rules favoring alienation of litigation rights regarding arbitration is matched by its treatment of forum selection clauses. As with arbitration, the revolution in forum selection clause enforcement began with a dispute between two sophisticated international business parties. The vehicle of reform was an admiralty case, *The Bremen v. Zapata Off-Shore Co.*¹⁵¹ Pointing to "ancient concepts of freedom of contract"¹⁵² founded on "solemn" promises between sophisticated parties,¹⁵³ the Court decided to drop "parochial" requirements that disputes involving U.S. parties always be decided by U.S. courts under U.S. law.¹⁵⁴ Instead, it enforced a forum selection clause calling for litigation in England and stated that such clauses should be honored in all but the most exceptional circumstances.¹⁵⁵ As with arbitration, the Court's initial pronouncement left open the possibility that access to the

147. *Id.*

148. *Id.*

149. *Id.*

150. *Rodriguez de Quijas*, 490 U.S. at 484. The Court then overruled *Wilko*. *Id.* Commentators have criticized the abandonment of the public policy exception to arbitration clause enforcement and proposed that, at least in consumer cases, such clauses be "presumed invalid." See Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 272 (1990); Richard Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 206-07 (1989).

151. 407 U.S. 1 (1972). In *The Bremen*, Zapata, an American owner of an ocean-going, self-elevating oil drilling rig, sued Unterweser, a German company that contracted to tow Zapata's rig from the United States to a drilling site off Italy. The contract between the parties contained several controversial clauses. First, it stipulated that all disputes would be resolved in England. *Id.* at 2. This clause amounted to a choice of law as well as a choice of forum clause because English courts generally apply English law when their jurisdiction is invoked by contract. *Id.* at 13 n.15. Second, the contract relieved Unterweser of all liability for damages caused by its own or its agents' negligence and associated with the tow. *Id.* at 3. This clause was enforceable under English, but not American, law. *Id.* at 8 & n.8. The rig sustained severe damage during a storm in the Gulf of Mexico, and the flotilla put in at Tampa, Florida. There Zapata sued Unterweser in Florida federal district court for \$3.5 million in damages to its oil rig. It claimed that the choice of forum stipulation should not be enforced because England had no contacts with the dispute other than the clause itself. *Id.* at 4. Moreover, enforcement of the clause would mean enforcement of the exculpation provision in violation of U.S. law and public policy.

152. *Id.* at 11.

153. *Id.* at 9, 12 & n.14.

154. *Id.* at 9-11.

155. The Court stated that the party opposing enforcement must "clearly show that

plaintiff's chosen forum merely had moved from an immutable to a special default rule that would impose some additional requirements of notice or consent to protect consumers and others with bargaining disadvantages.

In 1991, the Court set such doubts to rest in *Carnival Cruise Lines v. Shute*.¹⁵⁶ The plaintiffs in *Shute* were not a business: they were a Washington state couple who booked passage on a seven-day Carnival cruise from a local travel agent for a trip off the coast of California and Mexico. Their tickets, which they received a few days before leaving, contained several fine print terms on the back, including (1) a stipulation that all litigation must take place before a court located in Florida and (2) a provision stating that "[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger."¹⁵⁷ As might be expected, there was no bargaining whatsoever regarding the clauses.

Mrs. Shute was injured while the ship was in waters off the coast of Mexico. When the couple returned home, they sued Carnival for negligence in federal district court in their home state of Washington.¹⁵⁸ The appeals court refused to enforce the forum selection clause on the grounds that consumer contracts such as this were not covered by the rule announced in *The Bremen*.¹⁵⁹ The Supreme Court reversed, flatly rejecting any distinction between *The Bremen* and *Shute* based on the adhesive nature of the contract in *Shute*.¹⁶⁰ Instead, the Court found that, just as a fully negotiated contract reflects tradeoffs benefitting both parties, an adhesive consumer agreement's terms are also presumptively good for both parties and, absent strong evidence of fraud or duress, are no cause for judicial alarm.¹⁶¹

In addition to favoring contractual forum selection in its common law rulings in admiralty, the modern Court has interpreted two federal statutes to support forum clause enforcement. First, in *Stewart Organization, Inc. v. Ricoh Corp.*,¹⁶² the Court interpreted the federal venue statute, 42 U.S.C. § 1404(a), to permit, if not require, federal

enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15.

156. 111 S. Ct. 1522 (1991).

157. *Id.* at 1529 (Stevens, J., dissenting).

158. The Shutes' choice of forum was determined in part by the possibility, noted by the Ninth Circuit in its opinion, that the couple might be physically and financially incapable of pursuing this litigation in Florida. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir. 1990), *rev'd*, 111 S. Ct. 1522 (1991). It is worth noting that many cruise passengers are, in fact, people of modest means. See Edwin McDowell, *Where Recession Is an Ocean Away*, N.Y. TIMES, Jan. 25, 1992, at 37, 50 (noting that one half of cruise passengers in 1991 had annual incomes of \$35,000 or less).

159. *Shute*, 897 F.2d at 388.

160. *Shute*, 111 S. Ct. at 1527-28.

161. *Id.* at 1527.

162. 487 U.S. 22 (1988).

diversity courts to enforce forum clauses even when state courts in the same jurisdiction would not.¹⁶³ Second, as an alternative grounds for its holding in *Shute*, the Court narrowly construed the general anti-waiver provision of a New Deal remedial statute guaranteeing ship passengers their rights to court access for negligence claims.¹⁶⁴ The Court said that the legislative history of the provision revealed a concern over arbitration and exculpation clauses, not forum clauses.¹⁶⁵ Hence, the provision did not apply. This cramped approach to statutory interpretation stands in stark contrast to a New Deal/Warren Court case like *Boyd v. Grand Trunk Western Railroad Co.*,¹⁶⁶ in which the Court held that a forum stipulation violated the general anti-waiver provision of the FELA.¹⁶⁷

163. *Id.* at 30. The federal venue statute provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988). The Court in *Ricoh* held that this provision overrides state common law rules that are hostile to forum selection provisions in contracts. The case was a diversity suit brought in federal district court in Alabama by an Alabama computer dealer against its New Jersey based computer equipment manufacturer. The dealership contract contained a forum clause calling for all litigation to take place in the Manhattan borough of New York City, a provision that was unenforceable under Alabama's common law of contract and would have been ignored by an Alabama court. *Ricoh*, 487 U.S. at 35 (Scalia, J., dissenting). Invoking the forum stipulation, the computer manufacturer asked the federal court to transfer the case to the Southern District of New York in Manhattan. The trial court denied the motion on the grounds that forum selection clauses violated Alabama public policy. The Court held that federal, not state, law governed the validity of the forum selection clause because the motion to transfer was filed pursuant to § 1404(a). *Id.* at 29-31. It went on to state that, under federal law, forum clauses should be given "neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)." *Id.* at 31. This obscure standard was clarified by Justices Kennedy and O'Connor, who stated in concurrence that "[c]ourts should announce and encourage rules that support private parties who negotiate such clauses. . . . [A] valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33 (Kennedy, J., concurring).

Scholars have criticized the *Ricoh* Court for overstepping the bounds of *Erie* and trampling on states' interests in enforcing their own law. See Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1091 (1989) (asserting that *Ricoh* only "fuels the drive toward further evisceration of legitimate state interests"); Alan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1982 (1991) (stating that to the extent that state rules disfavoring enforcement of forum clauses are based on concern about unequal bargaining power of contracting parties, "federal enforcement of the clause would directly frustrate that policy").

164. In *Shute*, the plaintiffs alleged that the forum clause violated a federal statute passed in the New Deal era to protect ship passengers. See 46 U.S.C. app. §§ 183, 183b, 183c (1988). This statute contains an anti-waiver provision stating that all contract provisions tending to "lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability [for loss of life or bodily injury] . . . shall be null and void and of no effect." *Id.* § 183c(2).

165. *Shute*, 111 S. Ct. at 1528-29. The Court did not note that forum selection clauses were almost uniformly unenforceable by common law rule at the time the statute was passed in 1936 and that Congress therefore would not think it necessary to address that issue. *Id.* at 1532 (Stevens, J., dissenting).

166. 338 U.S. 263 (1949); see *supra* text accompanying notes 122-26.

167. Following the New Deal/Warren Court decision in *Boyd*, *supra* text accompanying notes 122-26, the Court might have construed the forum selection clause in *Shute* as "lessening" or "weakening" the right to a trial on the question of a ship owner's negligence liability because it forced plaintiffs of modest means to travel 3000 miles to pursue their action. The Court in *Shute*, however, chose to construe the statute narrowly. It found that the courts of Florida were courts "of

B. *Exculpation and Damage Limitation Clauses: Alienating Risks of Loss*

Exculpation and damage stipulations attempt to limit parties' exposure to claims arising from their own negligence. The background rule from the common law of torts is that parties to whom a duty is owed may collect damages for all losses foreseeably caused by another's breach of the duty of reasonable care.¹⁶⁸ Within a contractual relationship, there is no question of the existence of an underlying duty,¹⁶⁹ but the institution of contract presents parties with the opportunity to shift some or all of the risk of loss from the party that owes the duty of care to the party to whom the duty is owed.¹⁷⁰

Traditionally, courts have been hostile to these clauses in a variety of commercial settings.¹⁷¹ There are two problems with them. First, contractual risk-shifting may reduce the incentives of parties performing important services to the public-at-large to take reasonable care in the performance of their contractual duties.¹⁷² Second, exculpation clauses may shift risks of loss to parties, such as consumers and small businesses, who are ill-equipped to bear them and who have little practical choice but to accept what is presented to them by economically-dominant bargaining partners.¹⁷³

1. *The Lochner Court*

The *Lochner* Court was deeply suspicious of contractual clauses significantly limiting or disclaiming liability for negligence.¹⁷⁴ In a series of

competent jurisdiction." It thus found the statute inapplicable to its analysis. *Shute*, 111 S. Ct. at 1528-29.

168. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28, at 160, § 30, at 164 (5th ed. 1984).

169. See *id.* § 92, at 655 (noting that tort duties extend to, and often go beyond, parties in privity of contract).

170. See *id.* § 68, at 482 ("It is quite possible for the parties expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff . . .").

171. See Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 636 (1988) (noting, after exhaustive review of case law, that courts evaluate each case "with concern for what well may be a sense of personal fairness").

172. See 2 FARNSWORTH, *supra* note 21, § 5.2, at 13 (noting that courts are particularly concerned with allowing exculpation through contract when the agreement "affects the public interest and the other party is a member of the protected class"). Where the services are essentially recreational activities known to be hazardous, courts have shown less concern with exculpation. See *id.* § 5.2, at 15.

173. See, e.g., Jones, *supra* note 21, at 749 & n.131 (noting that low-income tenants are unlikely to be able to procure insurance and arguing that public policy doctrine barring exculpatory clauses in residential leases will keep risk of loss on the party best able to procure insurance and control the risks).

174. This attitude was consistent with those of a number of state courts of the period. See Robert H. Kaczorowski, *The Common Law Background of Nineteenth Century Tort Law*, 51 OHIO ST. L.J. 1127, 1148-50 (1990) (discussing how a number of U.S. state courts, as well as the U.S.

cases dating from the 1870s, which involved injury to people, goods, and vessels, the Court imposed an immutable rule regarding the right to expect reasonable care from contracting partners. Thus, the Court refused to enforce attempts by companies to exculpate themselves from negligence liability through stipulations in maritime towage contracts,¹⁷⁵ passenger tickets,¹⁷⁶ and bills of lading.¹⁷⁷

One early case in this line was *The Steamer Syracuse*,¹⁷⁸ in which a canal boat being towed by a steamer from Albany to New York City was damaged when the canal boat collided with a vessel at anchor in New York harbor. The contract stipulated that the canal boat was being towed at the owner's risk, but the Court refused to enforce this stipulation on the grounds that such exculpation clauses could not relieve a contracting party of its duty of reasonable care.¹⁷⁹

Another leading case was *Railroad Company v. Lockwood*.¹⁸⁰ There, a cattle drover traveling on a free pass issued by the railroad was injured in a rail accident. Prior to boarding, the drover signed a stipulation accepting all risk of injury to either himself or his cattle.¹⁸¹ The Court noted that New York law, under which the contract arose, would enforce the stipulation. It chose not to follow this rule, however, invoking its authority under *Swift v. Tyson*¹⁸² to "place our decision upon grounds satisfactory to ourselves, and resting upon what we consider to be sound principles of law."¹⁸³ Concluding that the New York rule would lead to increased accidents and decreased care by the railroad and its employees,¹⁸⁴ the Court commented that "the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the [contractual exculpation stipulation] of validity."¹⁸⁵

In 1889, the Court declared a similar immutable rule against negligence exculpation clauses for admiralty cases in *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*¹⁸⁶ In that case, the Court

Supreme Court "refused to recognize that a common carrier had a common-law right to limit his liability even by express agreement").

175. See *The Steamer Syracuse*, 79 U.S. (12 Wall.) 167 (1870); see also *Compañía de Navegación, Interior, S.A. v. Fireman's Fund Ins. Co.*, 277 U.S. 66 (1928) (reaffirming that negligence exculpation clauses violate public policy in admiralty cases).

176. See, e.g., *The Majestic*, 166 U.S. 375 (1897) (steamship passengers); *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873) (railroad passengers).

177. See, e.g., *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889).

178. 79 U.S. (12 Wall.) 167 (1870).

179. *Id.* at 171.

180. 84 U.S. (17 Wall.) 357 (1873).

181. *Id.* at 358.

182. 41 U.S. (16 Pet.) 1 (1842); see also *supra* text accompanying notes 78-79.

183. *Lockwood*, 84 U.S. (17 Wall.) at 368.

184. *Id.*

185. *Id.* at 381-82.

186. 129 U.S. 397 (1889).

trumped both New York and English laws permitting exculpation.¹⁸⁷ In doing so, the Court emphasized once again that such contracts exhibited a crucial lack of consent and “freedom of choice” in the contracting process.

The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higggle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.¹⁸⁸

As *Lockwood* and *Phenix* indicate, the Court’s decisions to overturn exculpation clauses were motivated, at least in part, by a sensitivity to the inability of the injured party to bargain effectively over the stipulation *ex ante* with what may have been a monopolistic bargaining partner. The Court made clear in other cases, however, that it was the absence of an ability to bargain—not monopoly power per se—that triggered its public policy concerns.¹⁸⁹

For example, the Court invoked the public policy defense even regarding the less objectionable practice of stipulating a ceiling on damages when bargaining over the rate to be paid was not possible. In *The Kensington*,¹⁹⁰ a ship passenger purchased a ticket containing, among other clauses, a stipulation limiting liability to 250 francs unless the passenger declared a higher value and shipped the excess baggage value as cargo.¹⁹¹ The Court found that the passenger’s ability to bargain for a higher declared value was illusory under applicable admiralty legislation governing cargo and thus the clause violated public policy.¹⁹²

The Court also favored special default rules when onerous clauses

187. See *id.* at 443-45. Citing *Lockwood*, the Court held that U.S. policy was against such clauses. *Id.* at 441-42.

188. *Id.* at 441.

189. When the party agreeing to the exculpation clause was strong enough to bargain with the railroad, the Court relaxed its immutable rules regarding negligence stipulations and permitted alienation of the right to due care. See *Baltimore & O. Sw. R.R. v. Voigt*, 176 U.S. 498 (1900) (upholding an exculpation clause in a contract between a railroad and an express company). In addition, where actual bargaining was possible, as in cases involving shipping contract charges that could be adjusted to reflect the value of the property being shipped, the Court dropped its public policy objections. See *Hart v. Pennsylvania R.R.*, 112 U.S. 331, 340 (1884) (“The limitation [on carrier liability to the extent of the agreed valuation of the property carried] has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on.”); cf. *Primrose v. Western Union Tel. Co.*, 154 U.S. 1 (1894) (upholding as reasonable contractual limitation on negligence liability for nonrepeated telegraph messages because customer could contract out of stipulation by repeating the message for a slightly higher price).

190. 183 U.S. 263 (1902).

191. *Id.* at 267-68.

192. *Id.* at 277 (stating that “the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void”); see also *Union Pac. R.R. v. Burke*, 255 U.S. 317 (1921) (finding a damage cap

violated consumer expectations. In the 1896 admiralty case *The Majestic*,¹⁹³ for example, the Court refused to enforce a contract stipulation limiting the liability of a shipowner for negligent loss or damage to passenger luggage on the grounds that the stipulation had not been brought sufficiently to the attention of the passengers.¹⁹⁴ Characterizing the stipulation as a mere unenforceable "notice,"¹⁹⁵ the Court held that "when a company desires to impose special and most stringent terms upon its customers . . . there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."¹⁹⁶

The *Lochner* Court declared the same rule for insurance companies when consumer contracts contained terms that ran counter to what the Court viewed as ordinary consumer expectations. In *Insurance Co. v. Slaughter*,¹⁹⁷ the Court construed a coverage exclusion narrowly to protect a consumer.¹⁹⁸ As the Court put it, in the absence of contractual

on a railroad shipment to be violative of public policy when only one shipping rate is possible under ICC rules).

193. 166 U.S. 375 (1897).

194. *Id.* at 385-86. Two sisters and their maid received tickets from the sisters' father that contained an attached "notice to passengers" printed in "fine type," which exempted the shipowners and travel agents from all liability for "negligence in navigation" and which limited liability in any event to 10 English pounds. *Id.* at 378. On route, the ship ploughed into ocean debris, a porthole broke, and the women's luggage was ruined. They sued for the full value of their belongings, and the Court upheld their claim. The ticket stipulated that English law was to be applied, but the Supreme Court found the applicable rules in England to be the same as those in the United States, namely that such stipulations were unenforceable in the absence of enhanced evidence of consent. *Id.* at 382-84. See generally Edwin C. Goddard, *Passenger Tickets As Contracts*, 25 MICH. L. REV. 1, 14 (1926) (analyzing *Lochner* era cases from a number of jurisdictions and concluding that "[b]y the great weight of authority to constitute assent there must be some other fact beside acceptance of the ticket").

195. *The Majestic*, 166 U.S. at 381.

196. *Id.* at 386 (quoting *Henderson v. Stevenson*, 2 L.R.-S. & D. App. 470, 481 (H.L. 1875)). Interestingly, the Court also found that the limitation on liability to 10 English pounds was not "exactly reasonable in view of the 'twenty cubical feet' of luggage [permitted] for each" passenger. *Id.* The Court took some care to describe the lack of actual consent given by the passengers to the stipulations:

The ticket was sent to the office of the father of two of the libellants and was forwarded or handed to one of them in an envelope. It was not seen by her until taken up in the middle of the ocean, nor by either of the others at all. The attention of neither of them was called to the notices, nor in any way to the ticket, nor had either of them read it, or read any of the printed matter, in fine type, by which the contract for passage was surrounded.

Id. at 385. The Court declined to introduce such a special default rule for damage cap clauses on railroad passenger tickets in the face of comprehensive federal legislation regulating railroads rates. See *Boston & Me. R.R. v. Hooker*, 233 U.S. 97, 119-21 (1914) (holding that the special default rule in Massachusetts for damage limitation clauses was preempted by the Interstate Commerce Act). Justice Pitney, a strong conservative, wrote an outraged and lengthy dissent, arguing that the common law's requirements of actual notice and bargaining over negligence liability limitations should not be read out of the law merely because a rate had been filed with the Interstate Commerce Commission in Washington, D.C. *Id.* at 122-57 (Pitney, J., dissenting).

197. 79 U.S. (12 Wall.) 404 (1870).

198. In *Slaughter*, an insurance company attempted to limit liability for damage to an insured's goods destroyed by a fire in a Mississippi storehouse. *Id.* at 405. The storehouse contained a small quantity of gunpowder, which the insurance company claimed triggered a policy exclusion. The

language in "type . . . large enough to arrest the attention of an interested party," such exclusions would not be enforced.¹⁹⁹ This preference for special default rules extended to transactions between business parties that attempted to vary the ordinary rule that sellers are not liable for buyers' consequential damages.²⁰⁰

One measure of the strength of the *Lochner* Court's preferences for its public policy rules regarding exculpation clauses was the treatment the Court gave to legislative attempts to lessen the protections afforded by its decisions.²⁰¹ For example, the Court construed the Hepburn Act of 1906²⁰² as preserving its decision in *Railroad Co. v. Lockwood*,²⁰³ despite evidence in the text of the statute that Congress meant to acknowledge the practice of giving drovers "free" railroad passes by limiting carrier liability.²⁰⁴ In addition, in a striking series of cases following

insured argued that the policy exclusion could be read to permit storage of up to one barrel of gunpowder and that this limit was not exceeded in the case. The clause in question, printed in very small type, read in pertinent part as follows:

[I]f gunpowder, phosphorus . . . or crude earth oils are kept on the premises, or if camphene, burning-fluid, refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without written permission in, or indorsed upon, this policy; then, and in every such case, this policy shall be void.

Id. at 405 (emphasis omitted). The insurance company argued that the one-barrel limitation referred only to camphene, burning-fluid, refined coal, or earth oils. Gunpowder, by contrast, could not be "kept on the premises." *Id.* The Court construed the policy in favor of the insured, stating that any other construction "would be deceptive, and calculated to mislead those who are not well informed on matters of this kind." *Id.* at 406. The Court noted that many housekeepers were known to keep on hand small quantities of the forbidden substances and "[i]t would never occur to this class of persons, on making application . . . for insurance, that they were forbidden to keep these things in their houses." *Id.* at 407. Interestingly, the plaintiff in *Slaughter* was not a "housekeeper," but rather was a businessman who stored goods in a warehouse.

199. *Id.*

200. See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 545 (1903) (holding that "mere notice to a seller of some interest or probable action of the buyer is not enough . . . to charge the seller with special damage[s]," but rather the special knowledge "must be brought home to the party sought to be charged") (quoting *British Columbia & Vancouver's Island Spar, Lumber, & Saw Mill Co. v. Nettleship*, 3 L.R. 499, 508 (C.P. 1868)). The so-called "tacit agreement" theory embraced in *Globe Refining* was rejected by the drafters of the U.C.C., who preferred a "reason to know" foreseeability test more favorable to buyers. See U.C.C. § 2-715 cmt. 2 ("The 'tacit agreement' test for the recovery of consequential damages is rejected.").

201. Another measure was the Court's willingness to countenance state law restrictions on exculpation and damage limitation clauses that were stricter than its own public policy rules. See *Pennsylvania R.R. v. Hughes*, 191 U.S. 477 (1903) (refusing to overturn a New York State public policy rule that barred damage limitation clauses in railroad shipping contracts). The Court later found that the Hepburn Act preempted such special state rules. See *Boston & M.R.R. v. Hooker*, 233 U.S. 97, 109 (1914) (refusing to enforce a special default rule in Massachusetts requiring that damage limitation clauses be "brought home to the knowledge of the shipper").

202. Act of June 29, 1906 (Hepburn Act), ch. 3591, 34 Stat. 584 (codified as amended at 49 U.S.C. § 11104 (1982 & Supp. V 1987)).

203. 84 U.S. (17 Wall.) 357 (1873); see also *supra* text accompanying notes 180-85.

204. See *Norfolk S. R.R. v. Chatman*, 244 U.S. 276, 280 (1917). The Hepburn Act regulated railroads by, inter alia, barring the issuance of "free passes" to passengers except as necessary to enable drovers and others handlers to take care of their livestock and produce. *Id.* The railroads argued that this statute constituted legislative recognition that drovers rode free and that negligence exculpations were now enforceable as to these handlers, as they were against other passengers who

the passage of the Harter Act in 1893,²⁰⁵ the Court narrowly construed provisions limiting shipowners' liability in order to preserve the rights to due care enjoyed by cargo shippers.²⁰⁶

rode for free. The Court disagreed and construed the Hepburn Act to have preserved the rule against negligence exculpations by railroads announced in *Lockwood*, 84 U.S. at 381-82. See *Chatman*, 244 U.S. at 280-81 (holding that a drover riding with his livestock could still sue a railroad for personal injuries as a passenger for hire).

205. 46 U.S.C. §§ 190-196 (1988). In 1893, Congress passed the Harter Act in response to strong objections from American shipowners to the Court's invalidation of negligence exculpation clauses in maritime shipping contracts. British courts recognized the validity of such exculpation clauses, while the U.S. Supreme Court did not. This put American shipowners at a competitive disadvantage because American shipowners were forced to load their rates to cover the cost of insurance while British owners could shift this cost to their customers. See HERBERT R. BAER, ADMIRALTY LAW OF THE SUPREME COURT 492-93 (3d ed. 1979) ("American shipowners found themselves at a disadvantage because, regardless of how many exceptions from liability they placed in their bills of lading, they were . . . held liable for negligence while their English competitors were free to contract themselves out of liability for failing to use due care."). The first two sections of this statute represented a victory for the cargo interests and provided that shipowners could not contract out of: (1) liability for the acts of the ship manager, master, owners, or agents by reason of "negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery" of cargo, 46 U.S.C. § 190; or (2) the duty to exercise due diligence to provide a "vessel seaworthy and capable of performing her intended voyage," *id.* § 191. The third section of the Act, however, favored the shipowners by providing that, so long as the shipowner exercised due care to provide a seaworthy vessel, "neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." *Id.* § 192. Thus, proof of due diligence to provide a seaworthy vessel exempted the shipowner from liability for any actual unseaworthiness of the vessel, as well as for negligence by the crew in the navigation and management of the ship. BAER, *supra* at 493.

206. The Court held that a lack of due diligence by any of the owner's employees, and not just by the owner himself, was sufficient to trigger liability. *E.g.*, *International Navigation Co. v. Farr & Bailey Mfg.*, 181 U.S. 218, 225 (1901). In addition, the shipowner, not the cargo shipper, carried the burden of proof on the issue of due care. *Id.* at 226.

Next, even if a shipowner and his employees used due diligence to provide a seaworthy vessel, the Harter Act was not self-executing and required express contractual exculpation of liability for unseaworthiness. As the Court explained:

Because [under the Harter Act] the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence.

The Carib Prince, 170 U.S. 655, 660-61 (1898).

Finally, the Court read general exculpation clauses for undiscoverable, latent defects in the ship's construction or equipment quite narrowly and refused to exempt shipowners from liability for unseaworthiness when the latent defect existed at the time the ship sailed. See *id.* at 659-60; see also *The Caledonia*, 157 U.S. 124, 137-39 (1895) (holding that a general clause exempting the shipowner from liability for defects in machinery did not apply when a shaft with a latent defect at the beginning of voyage broke). The Court insisted that such exculpation clauses referred explicitly to latent defects existing at the time the voyage commenced. *The Carib Prince*, 170 U.S. at 659-60.

With respect to cargo, the Court exempted passenger luggage from the sweep of the statutory definition of "cargo" and refused to enforce an exculpation and damage limitation clause printed on a passenger ticket and directed at passenger luggage. See, *e.g.*, *The Kensington*, 183 U.S. 263, 274-75 (1902); see also BAER, *supra* note 205, at 495 n.12. Moreover, in cases involving damage to cargo, the Court held that navigational changes in ballast where the "primary purpose is to get the cargo ashore" were not covered by the Harter Act's exemption provision. *The Germanic*, 196 U.S. 589, 597-98 (1905). And when both a peril of the sea and negligent stowage were possible causes of cargo damage, and the shipowner could not prove what damage was attributable to sea peril, the Court held that the shipowner bore the entire loss. *Schnell v. The Vallescura*, 293 U.S. 296, 307 (1934).

In summary, it is clear that the *Lochner* Court was sensitive to public policy concerns regarding exculpation clauses and to underlying issues related to fine print contracts and possible unfair contractual surprise and prejudice. It was not afraid to declare and defend both immutable and special default rules as means to implement its views of public policy in contract cases.

2. *The New Deal/Warren Court*

Many of the exculpation and damages limitation issues treated by the *Lochner* Court as a matter of common law had been addressed by legislation by the time of the New Deal/Warren Court.²⁰⁷ Nevertheless, in its admiralty cases, the New Deal/Warren Court carried forward the *Lochner* Court's immutable rule against exculpation from negligence liability.

In the leading case, *Bisso v. Inland Waterways Corp.*,²⁰⁸ the Court voided a negligence exculpation clause contained in a contract between a tugboat owner and a barge company, relying on the *Lochner* Court's decision in *The Steamer Syracuse*²⁰⁹ to support its result.²¹⁰ The *Bisso* Court declared that public policy required nonenforcement of such clauses "to discourage negligence by making wrongdoers pay damages" as well as "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."²¹¹

However, deference to legislative will distinguished the Court of this period from the *Lochner* Court.²¹² When confronted with a statute that specifically approved exculpation clauses, the Court abandoned the cramped statutory interpretations of the *Lochner* era²¹³ and read the exculpation statute broadly. In *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*,²¹⁴ the Court read the "Fire Statute" of

207. See, e.g., Carmack Amendment, 49 U.S.C. § 20(11) (1976) (current version at 49 U.S.C. §§ 10103, 10730, 11707 (1988)) (codifying a carrier's liability for goods lost or damaged in shipment); *supra* notes 205-06 and accompanying text (discussing the Harter Act); *supra* notes 203-04 and accompanying text (discussing the Hepburn Act).

208. 349 U.S. 85 (1955); see also *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955) (decided on the same day on the same grounds).

209. 79 U.S. (12 Wall.) 167 (1870); see also *supra* text accompanying notes 178-79.

210. *Bisso*, 349 U.S. at 89-90.

211. *Id.* at 91. In 1963, the Court reaffirmed its holding in *Bisso*. See *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697, 698 (1963) (per curiam). The Court repeated this theme of curing bargaining imbalances when it referred to the government's "vast economic resources and stronger bargaining position in contract negotiations" in a case that construed an indemnification provision against the United States to avoid exculpating the government from liability for injuries caused by its own negligence. *United States v. Seckinger*, 397 U.S. 203, 216 (1970).

212. See *supra* text accompanying notes 88-92.

213. Cf. *supra* text accompanying notes 203-06.

214. 320 U.S. 249 (1943).

1851²¹⁵ liberally in order to permit exculpation of both ship and ship-owner from liability for fire damage to cargo when, under maritime law, the ship itself could be sued *in rem* because the contracts were signed "for master."²¹⁶ The Court reasoned that allowing liability to be maintained against the ship "would deny effect to the Fire Statute as an immunity and convert it into a limitation of liability to the value of the ship" in contravention of congressional intent.²¹⁷

3. *The Modern Court*

The modern Court has not yet abandoned the immutable rule against negligence exculpation in admiralty, but it strongly signaled its skepticism regarding this rule in *The Bremen v. Zapata Off-Shore Co.*²¹⁸ *The Bremen* was important not only for its primary holding regarding the enforceability of forum clauses under admiralty law, but also for its narrow view of the public policy against contract stipulations in towage agreements that exempt the tower from liability for negligence.

The German towing company in *The Bremen* sought to litigate in England primarily because English courts applying English law would enforce its exculpation clause and relieve it of any liability for its own negligence. The appeals court refused to enforce the forum selection clause precisely because enforcement would subject a U.S. party to an exculpation clause that violated what it thought was a deeply held U.S. public policy.²¹⁹

The Supreme Court chose to avoid confronting this long-held public policy issue by holding that, "whatever the proper scope of the policy expressed in *Bisso*,"²²⁰ it did not reach an international case. Given the Court's poor record of maintaining doctrinal distinctions based on the international nature of cases,²²¹ the rule in *Bisso* appears ripe for

215. Act of Mar. 3, 1851, 46 U.S.C. app. § 182 (1988). The "Fire Statute" exculpated the owner of a ship from liability for any damage to merchandise caused by fire "unless such fire is caused by the design or neglect of the owner." *Id.* The statute does not address the rights of cargo shippers to proceed *in rem* against the ship in case of fire.

216. 320 U.S. at 252-53.

217. *Id.* at 253-54.

218. 407 U.S. 1 (1972); see also *supra* text accompanying notes 151-55.

219. *Zapata Off-Shore Co. v. M/S Bremen*, 428 F.2d 888, 895 (5th Cir. 1970) (citing *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963), *rev'd*, 407 U.S. 1 (1972)); see also *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), *overruled by The Bremen*, 407 U.S. at 1. As a general matter, in the absence of a controlling statute, a court is not required to apply a foreign state's law when that law violates the public policy of the forum. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(b) (1971).

220. *The Bremen*, 407 U.S. at 15. The Court did note that, "so long as *Bisso* governs American courts with respect to the towage business in American waters," a contract between two American parties that attempted to avoid the *Bisso* policy through stipulation of a foreign forum might "arguably be improper." *Id.* at 17.

221. The Court has first relied on and then collapsed this distinction in cases involving arbitration and forum selection clauses. See *supra* text accompanying notes 133-60.

overruling.

The modern Court's skepticism regarding restrictions on alienation of risks of loss has extended from immutable rules to special default rules created by treaty.²²² The Warsaw Convention on international air travel, as modified by the Montreal Agreement, constructs a special default rule for attempts to contract out of liability for injury to people and luggage by requiring that disclaimers be presented to passengers in a stipulated typeface size.²²³ At least with respect to damage to passenger luggage, any defect in the stipulated notice results in a return to the default rule of full tort liability for the airline.²²⁴

In *Chan v. Korean Air Lines*,²²⁵ the Court held that this strict notice requirement was not applicable to liability for personal injury or death. It thus subjected passengers to the Montreal Agreement's liability limit of \$75,000 even though the notice of this limitation received by the passengers was printed in type twenty percent smaller than that required by the Agreement.²²⁶ Seizing on what the United States argued in its brief to be a drafting error in the treaty,²²⁷ the Court implemented its preferred policy of contract enforcement by holding that damage limitation clauses regarding luggage should be treated more favorably than those dealing with human life and limb.

222. As a general matter of state common law, where exculpation clauses are permitted at all, they are subject to special default rules. See KEETON ET AL., *supra* note 168, at 483. For example, "[i]f an express agreement exempting the defendant from liability for his negligence is to be sustained, it must appear that its terms were brought home to the plaintiff." *Id.*

223. Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, May 13, 1966, reprinted in 49 U.S.C. app. § 1502 (1988) [hereinafter Montreal Agreement]; Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, arts. 3, 20(1), 22(1), 49 Stat. 3000, 3015, 3019, reprinted in 49 U.S.C. app. § 1502 (1988) [hereinafter Warsaw Convention]; see also *Chan v. Korean Air Lines*, 490 U.S. 122, 123-24, 125 n.1 (1989).

224. Warsaw Convention, *supra* note 223, art. 3, § 2.

225. 490 U.S. 122 (1989).

226. *Id.* at 124. The Montreal Agreement required the notice to be printed in 10-point type, but the Korean Air Lines tickets in question used eight-point type. See *id.*

227. See *id.* at 133-35. In *Chan*, both the plaintiffs and the United States as *amicus curiae* argued that the failure of the Convention to impose a penalty for failure to comply with the special default rule for damage limits on personal injuries was a drafting error. *Id.* at 133. The Convention simply states that its damage limitations for personal injuries apply so long as the carrier delivers a ticket to the passenger. Warsaw Convention, *supra* note 223, art. 3; see also *Chan*, 490 U.S. at 127. In an attempt to cure this drafting defect, many lower courts had construed the personal injury portions of the Convention to mean that delivery of a ticket with a defective notice of liability limits was tantamount to nondelivery for purposes of liability limits. See, e.g., *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 789 F.2d 1092, 1098 (5th Cir. 1986); *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, 705 F.2d 85, 89-91 (2d Cir. 1983), cert. denied, *Polskie Linie Lotnicze (LOT Polish Airlines) v. Robles*, 464 U.S. 845 (1983). In *Chan*, the Court rejected this approach and refused to go beyond the text of the Warsaw Convention to resolve the case. It found that the passengers manifestly had received a ticket and that the damage limitation therefore applied with full force. *Chan*, 490 U.S. at 127-29.

C. *Contracts Affecting Constitutional and Statutory Policies: Alienating Fundamental Rights*

One of the most interesting developments in American law during the past one hundred years has been the blurring of the boundaries between "public" and "private" law.²²⁸ This development has resulted in increasing pressure on contract law, to absorb new constitutional and statutory policies, and on courts to declare whether particular constitutional or statutory rights are alienable. Particularly in the realm of constitutional law, many of the cases discussed below are so familiar in their respective constitutional areas that their relationship to private contract may appear at first glance to be merely incidental. One of the purposes of this Article is to revisit and highlight these cases as instances when the Court has chosen to use or reject the Constitution as a source of policy limits on contractual regimes.

With respect to statutory rights, the Court's treatment of contract is closely tied to its habits of statutory interpretation in two areas. First has been the Court's treatment of "anti-waiver" provisions, under which Congress attempts to insulate statutory rights from contractual alienation.²²⁹ Second, the proliferation of federal statutes has led to an increasing number of occasions when the modern Court has been called on to determine if a federal statutory scheme preempts state contract law rights and remedies. These latter cases, although not litigated directly under the public policy rubric, nevertheless call on the Court to engage in a type of public policy defense analysis: to interpret federal legislation to determine if it supersedes state contract law.

I. *The Lochner Court*

The *Lochner* Court's constitutional commitment to freedom of contract is the touchstone of this era.²³⁰ The Court found that public policies emanating from the Due Process Clauses prohibited certain types of economic regulatory legislation.²³¹ The Court thus characteristically used the Constitution to protect private contract, rather than as a source of public policy to render contracts unenforceable.

Nevertheless, in *Bailey v. Alabama*,²³² the *Lochner* Court did create an immutable contract rule regarding a constitutional right—the right to be free of involuntary servitude under the Thirteenth Amendment.²³³ The Court struck down an Alabama statute that imposed penalties

228. See generally Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

229. See *supra* text accompanying notes 113-17, 122-26, 162-67, 203-17.

230. See BORK, *supra* note 17, at 44 (noting that the *Lochner* decision generally "lives in the law as the symbol, indeed the quintessence, of judicial usurpation of power").

231. See *supra* text accompanying notes 69-77.

232. 219 U.S. 219 (1911).

233. U.S. CONST. amend. XIII, § 1.

against employees and tenant farmers who fraudulently breached contracts of employment or tenancy.²³⁴ The statute in question set up an evidentiary presumption of intent to injure or defraud against any employee or tenant who received advances from an employer or landlord and then quit work before the agreed services were rendered.²³⁵ Thus, a simple breach of contract was enough to trigger guilt and punishment. The plaintiff, an African-American farm hand, was convicted under this law for receiving fifteen dollars and leaving his employment before completing his term of service. He was sentenced to a fine of thirty dollars or, if he could not pay this amount,²³⁶ a period of hard labor of 136 days.²³⁷

Holding that the Thirteenth Amendment's prohibition of "involuntary servitude" encompassed more than just formal slavery,²³⁸ the Court found that the statute's evidentiary presumption and criminal penalties amounted to an unconstitutional system of peonage.²³⁹ Perceiving a conflict between the Constitution and state contract law, the Court ruled that employees and tenant farmers could not bargain away their Thirteenth Amendment rights through the vehicle of an employment agreement.

When Congress created special statutory rights, the *Lochner* Court was willing to recognize the legislature's power to exempt these rights from contractual waiver. In *Philadelphia, Baltimore & Washington Railroad Co. v. Schubert*,²⁴⁰ the Court rejected a substantive due process attack on the anti-waiver provision of the FELA and refused to enforce a railroad employment contract under which the employee waived his right to sue for injuries in exchange for benefits from an employer-run "relief fund."²⁴¹ The Court upheld a similar statutory limit on contract

234. *Bailey*, 219 U.S. at 244-45. This is not the first article to examine *Bailey* as a case involving contractual waiver of a constitutional right. See, e.g., David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 574 n.242 (1988) (discussing *Bailey* as the only instance when the Court prohibited a waiver of a constitutional right).

235. *Bailey*, 219 U.S. at 227-28. The law provided, in part, that

the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure his employer or landlord or defraud him.

Id. at 228.

236. This was virtually certain to be the case because the employee could not repay an advance of one half this amount. *Id.* at 230.

237. *Id.* at 231.

238. *Id.* at 241.

239. *Id.* at 242. Justice Holmes, writing in dissent, argued that states were empowered to make breach of contract a crime if they wished and that prison labor was not "involuntary servitude" within the meaning of the Constitution. *Id.* at 245-47 (Holmes, J., dissenting). He went on to remind the Court that, in any event, the statute did not make breach of contract a crime; rather, it made fraudulent receipt of money a crime. *Id.* at 247-49 (Holmes, J., dissenting).

240. 224 U.S. 603 (1912).

241. The constitutionality of the liability provisions of the FELA was directly challenged and

that protected seamen from waiver of their statutory rights.²⁴²

2. *The New Deal/Warren Court*

The New Deal/Warren Court not only discarded the *Lochner* Court's economic substantive due process doctrine as a shield to contract, it actually used due process as a means to regulate commercial agreements.²⁴³ The Court did not reach this position, however, until 1972 in *Fuentes v. Shevin*.²⁴⁴

Fuentes involved the constitutionality of replevin statutes in Florida and Pennsylvania used by creditors to repossess goods sold to consumers under conditional installment sales contracts. These statutes permitted creditors, upon *ex parte* application to a court clerk and the posting of a bond, to obtain a writ of replevin authorizing seizure of the goods in question by a local sheriff without notice or the opportunity for a hearing.²⁴⁵ In addition, form contracts signed by the consumers gave the sellers the contractual right to repossess the sold items if the buyer defaulted on payments. Noting with concern that the household goods at issue in the case "provide a minimally decent environment for human beings in their day-to-day lives" and that working people typically seek such consumer goods as the object of earning a living,²⁴⁶ the Court held the statutes unconstitutional.²⁴⁷

Significantly, the Court refused to find that the consumers had waived their constitutional rights by signing standard form contracts that expressly gave the sellers the right to repossess goods. The Court found that the consumer contracts involved no bargaining and no effective notice. Moreover, the parties "were far from equal in bargaining power,"²⁴⁸ and the waivers did not discuss explicitly the process by

sustained by the Court in *Second Employers' Liability Cases*, 223 U.S. 1 (1912). The Court also had sustained state legislation giving railroad workers the right to sue for their injuries and prohibiting contractual waivers of these statutory rights. See *Chicago, B. & Q.R.R. v. McGuire*, 219 U.S. 549 (1911).

242. See *Pacific Mail S.S. Co. v. Lucas*, 258 U.S. 266 (1922) (refusing, under a federal statute protecting seamen, to give effect to a seaman's release of liability given to his employer).

243. See *supra* text accompanying notes 88-92.

244. 407 U.S. 67 (1972). Although *Fuentes* was decided in 1972, one year after the cut-off point for the Warren Court era used in this Article, a four-Justice Warren Court coalition consisting of Justices Stewart, Douglas, Brennan, and Marshall issued the plurality opinion for the seven-member Court. Justices Powell and Rehnquist took no part in the decision, and Justices White, Blackmun, and Burger dissented. *Fuentes* therefore represents the last effort of the Warren Court Justices to stamp their views on contract into the Constitution.

245. *Id.* at 69-72.

246. *Id.* at 89.

247. *Id.* at 96-97. *Fuentes* was the second Warren Court case to overturn remedies for sellers in cases involving consumer installment sales. The first, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), declared unconstitutional state wage garnishment statutes that did not provide for pre-garnishment hearings.

248. *Fuentes*, 407 U.S. at 95.

which repossession would take place.²⁴⁹ Accordingly, the contracts were unenforceable on the grounds of public policy, as derived from the Constitution.

With regard to waivers of statutory rights, the New Deal/Warren Court broke equally new ground. While the *Lochner* Court was willing to permit Congress to place certain statutory rights beyond the realm of contract, the New Deal/Warren Court was positively innovative in the way it protected statutory rights from contractual waiver.²⁵⁰ We have already seen how the New Deal/Warren Court in *Wilko*²⁵¹ and *Boyd*²⁵² interpreted anti-waiver provisions in federal statutes to frustrate not only explicit waivers of statutory rights, but also arbitration²⁵³ and forum selection²⁵⁴ clauses.

The Court similarly voided contracts burdening other statutory claims.²⁵⁵ For example, in *Duncan v. Thompson*,²⁵⁶ the Court construed the same anti-waiver section of the FELA that was at issue in *Boyd*.²⁵⁷ This time the Court refused to enforce a contract under which an employee had accepted advance payments on his injury claim in return for his promise to repay the advances before instituting suit.²⁵⁸ The

249. *Id.* at 95-96.

250. Where the Court confronted an area in which Congress had not legislated, however, it was reluctant to impose public policy limits of its own creation. In *Muschany v. United States*, 324 U.S. 49 (1945), the Court turned away a public policy challenge by the federal government to enforcement of one of its own contracts, stating that judicial notions of "supposed public interests" in the absence of "definite indications in the law of the sovereignty" were insufficient grounds for contract invalidation. *Id.* at 66. However, the Court did not wholly abandon its role as a source of public policy: in addition to judicially-originated precedents, "long governmental practice or statutory enactments, or . . . violations of obvious ethical or moral standards" also constituted possible grounds for public policy in the Court's view. *Id.* at 66-67.

251. *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Sherson/Am. Express, Inc.*, 490 U.S. 477 (1989).

252. *Boyd v. Grand Trunk W.R.R. Co.*, 338 U.S. 263 (1949).

253. *See supra* notes 115-17 and accompanying text.

254. *See supra* notes 122-26 and accompanying text.

255. In addition to those discussed in the text, there are numerous other examples of the New Deal/Warren Court's use of statutory schemes to negate common law rules protecting private contract. *See, e.g.*, *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945) (refusing, on the basis of patent law policies, to apply common law estoppel and good faith defenses to a contract); *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 358 (1943) (refusing, on the basis of Interstate Commerce Act policies, to recognize contractual attempt to alter the statute of limitations); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942) (refusing, on the basis of Merchant Marine Act policies, to apply state common law rule regarding the burden of proof in a case attacking the validity of a release).

256. 315 U.S. 1 (1942).

257. *See supra* text accompanying notes 122-34.

258. *Duncan*, 315 U.S. at 5-8. In *Duncan*, an employee was injured while working at his railroad job. Because he was unable to pay his current medical expenses, he borrowed \$600 from his employer and signed an agreement that he would repay this amount before instituting any action against the company for further compensation. *Id.* at 2-3. He later sued without returning the money. The railroad urged the Court to dismiss the suit, arguing that the contract was a valid release because the employee had not fulfilled the conditions of the loan. The Court refused to enforce the agreement, however, finding that the realities of the employee's bargaining situation

Court found that enforcement of the conditional release would compromise the purposes of the Act.

Perhaps most strikingly, the New Deal/Warren Court created immutable rules against waiver of statutory rights, even when the statute in question contained no anti-waiver provision. In *Brooklyn Savings Bank v. O'Neil*,²⁵⁹ the Court refused to enforce an agreement under which employees agreed to forego their rights to collect statutory liquidated damages under section 16(b) of the Fair Labor Standards Act (FLSA).²⁶⁰ Congress had considered and rejected an anti-waiver provision when it passed the FLSA in 1937.²⁶¹ Nevertheless, the Court indicated that the lack of an anti-waiver provision in the statute was not dispositive.²⁶² It went on to strike down the releases in question because they contravened the statutory policies embodied in the FLSA.²⁶³ The Court took the holding in *O'Neil* to its logical conclusion in *D. A. Schulte, Inc. v. Gangi*,²⁶⁴ where it ruled that even settlements of bona fide disputes could not extinguish an employee claim for statutory liquidated damages under the FLSA.

The New Deal/Warren Court also signaled its preference for legislative over private contractual ordering in preemption cases under federal patent law. In *Brulotte v. Thys Co.*,²⁶⁵ the Court held unenforceable a contract for patent royalties extending beyond the statutory term of the patent. Similarly, in *Lear, Inc. v. Adkins*,²⁶⁶ the Court negated a licensee's contractual duty to pay royalties while the licensee challenged the validity of the licensor's patent in court.

weighed against honoring the deal. *Id.* at 7. If the employee had to borrow money for current medical expenses, there was scant chance he would find the money to repay the loan.

259. 324 U.S. 697 (1945).

260. See *id.* at 707. Section 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069, 29 U.S.C. §§ 201-219 (1988), entitles employees to collect "the amount of their unpaid minimum wages . . . and . . . an additional equal amount as liquidated damages." *Id.* The various employees suing in *O'Neil* all had valid claims for unpaid wages, and all signed releases in return for either full or partial payments of the back wages due. These releases were then set up as defenses when the employees later pressed for payment of liquidated damages under the statute. *O'Neil*, 324 U.S. at 698-702.

261. See *O'Neil*, 324 U.S. at 718 (Stone, C.J., dissenting and concurring).

262. See *id.* at 706-07. The Court stated that the rejection of the anti-waiver section merely demonstrated that the issue of contractual waiver was neither considered nor resolved by Congress. *Id.* at 705-06.

263. *Id.* at 706-08.

264. 328 U.S. 108 (1946). The parties in *Schulte* reached a settlement under which the employer paid the employees an agreed amount as back wages and obtained a general release. The employees then sued for liquidated damages. The Court upheld the claim, holding that Congress' purpose of providing the lowest paid employees with "minimum wages, promptly paid" would be thwarted if employers could bargain out of statutory obligations through settlements. *Id.* at 116. But see *Callen v. Pennsylvania R.R.*, 332 U.S. 625, 630-31 (1948) (holding that a full compromise and settlement of a FELA dispute did not violate the express anti-waiver provision of that statute).

265. 379 U.S. 29, 33-34 (1964).

266. 395 U.S. 653, 671-74 (1969).

3. The Modern Court

The modern Court's handling of the interplay between constitutional rights, statutory protections, and freedom of contract provides striking evidence of its departure from the New Deal/Warren Court's view of contract. As was the case with court access issues,²⁶⁷ the modern Court's jurisprudence in this area began by announcing rules in cases involving sophisticated parties where notice and consent were not at issue. The Court then used these rules as precedent in cases involving standardized consumer contracts.

The modern Court's approach to waiver of constitutional rights began to take shape with the Court's decision in *D. H. Overmyer Co. v. Frick Co.*²⁶⁸ There, the Court enforced a cognovit note²⁶⁹ in a contract between two business parties over objections that the cognovit provision violated due process.²⁷⁰ The cognovit note waives virtually all rights of a party, including those to procedural due process, and has been the subject of critical comment for over a century.²⁷¹ Even the *Lochner* Court once declared in dicta that contracts under which a party waived all possible defenses to a contract would violate public policy.²⁷² Nevertheless, the modern Court approved a special default rule to govern cognovits, pointing to the sophistication of the parties²⁷³ and the fact that the complaining party had waived its rights "voluntarily, intelligently, and knowingly."²⁷⁴

The modern Court's second case in this area put to rest any notion that contractual waivers of due process rights would always be governed by special default rules or limited to sophisticated parties. In 1974, in *Mitchell v. W. T. Grant Co.*,²⁷⁵ a voting majority consisting of Justices

267. See *supra* text accompanying notes 135-50.

268. 405 U.S. 174 (1972).

269. *Id.* at 187. As the Court described it, the "cognovit" is an "ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." *Id.* at 176.

270. *Id.* at 181-82. *Overmyer* involved a construction subcontract in which the contractor, which had agreed to pay the subcontractor by progress payments, fell behind in its payments. Eventually, after several rounds of bargaining, which included attorneys for both sides, the contractor negotiated a new payment schedule at a lower rate of interest in exchange for a contract that contained the cognovit provision. When the contractor defaulted under its new obligations, and the subcontractor asserted its rights under the cognovit, the contractor challenged the cognovit under the Constitution. *Id.* at 178-82.

271. The Court noted that even Charles Dickens had commented on the cognovit "with obvious disfavor" in the *Pickwick Papers*. *Id.* at 177.

272. See *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1892) (stating that "a contract not to set up any defence [sic] whatever to any suit that may be begun upon fifty different causes of action is in violation of public policy").

273. *Overmyer*, 405 U.S. at 186-87.

274. *Id.* at 187. The Court noted that a different result might obtain in a case involving an adhesion contract and a consumer debtor. *Id.* at 188.

275. 416 U.S. 600 (1974).

White, Powell, Burger, Blackmun, and Rehnquist sharply curtailed *Fuentes v. Shevin*²⁷⁶ as a restriction on private contract enforcement, upholding a consumer installment sales contract enforcement scheme under which constables were empowered to seize goods after a consumer default without either notice or a prior hearing.²⁷⁷

The modern Court has also signaled its acceptance of standardized contracts as a means of waiving the due process rights embodied in the "minimum contacts" limits of personal jurisdiction.²⁷⁸ In *Burger King Corp. v. Rudzewicz*,²⁷⁹ the Court declared that a choice of law clause contained in the boilerplate language of a franchise agreement, combined with the proposed twenty-year business relationship contemplated by the agreement, was persuasive evidence that a party had consented to be sued in the forum whose law had been selected.²⁸⁰

276. 407 U.S. 67 (1972). Dissenting in *Mitchell*, Justice Stewart noted:

The only perceivable change that has occurred since *Fuentes* is in the makeup of this Court. A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government.

Mitchell, 416 U.S. at 635-36 (Stewart, J., dissenting) (footnote omitted).

277. The Court attempted to distinguish *Fuentes* on the grounds that the writ was issued by a judge instead of a clerk, that the seller was required to file a sworn affidavit to obtain the writ, and that the issues governing the issuance of the writ were narrower than those in the earlier case. *Mitchell*, 416 U.S. at 615-18. Justice Powell commented in his concurrence, however, that *Fuentes* had been "overruled." *Id.* at 623 (Powell, J., concurring).

These predictions of *Fuentes*' demise proved to be premature. In areas not affecting contract enforcement, the Court has continued to rely on *Fuentes* to impose due process restrictions on judicial procedures by which the transferability of private property is limited. *See, e.g., Connecticut v. Doehr*, 111 S. Ct. 2105 (1991) (imposing due process restrictions on real estate attachment procedures).

278. The Warren Court's decision in *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964), perhaps anticipated this development by ignoring the latent due process issues presented. Instead, the majority contented itself with analyzing whether the Federal Rules of Civil Procedure permitted an equipment seller to appoint by contract the wife of one of its officers as the buyers' agent for service of process. *See supra* text accompanying notes 128-32. However Justice Black, writing in dissent, noted that the constitutional due process issue was "implicit" in both the oral arguments and briefs of the case. *Id.* at 329 (Black, J., dissenting). Having unsuccessfully urged the Court to order rehearing on the constitutional issues, Black went on to analyze the question and concluded that the "printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home." *Id.* at 332 (Black, J., dissenting).

279. 471 U.S. 462 (1985).

280. In *Burger King*, a Florida-based franchiser sued a Michigan franchisee in Florida federal court over a default in royalty payments. The franchise agreement contained a Florida choice of law clause, which stated that "[t]he choice of law designation does not require that all suits concerning this Agreement be filed in Florida." *Id.* at 481. The franchisee claimed that he had insufficient contacts with Florida to satisfy procedural due process standards of fairness. The franchisee had dealt primarily with the regional Burger King office in Michigan and had not physically entered Florida. *Id.* at 479-80. The Court nevertheless found jurisdiction in Florida to be proper. The Court said that the choice of law clause "standing alone would be insufficient to confer jurisdiction," but found that the clause provided just the "weight" needed to tip the balance in favor of finding jurisdiction constitutionally proper when combined with the 20-year relationship contemplated by the contract. *Id.* at 481-82.

In addition, the modern Court has approved alienation of First Amendment rights to free speech and press.²⁸¹ In *Snepp v. United States*,²⁸² CIA agent Frank Snepp signed an employment agreement with his agency promising to submit for agency approval all writings about the CIA prior to publication. After his retirement, Snepp published an account of CIA activities in Vietnam without submitting the manuscript for prepublication review. The CIA, admitting that Snepp had divulged no classified information in the book, sued for damages and an injunction against further violations of the agreement.²⁸³ Snepp argued that the contract amounted to a prior restraint on protected speech under the First Amendment and was therefore unenforceable.²⁸⁴ The Court upheld the government's right to sue its former employee, stating that Snepp's contractual waiver of free speech rights was reasonable and that it was irrelevant that the book was entirely truthful and exposed no government secrets.²⁸⁵

More recently, in *Cohen v. Cowles Media Co.*,²⁸⁶ the Court decided that a newspaper may waive First Amendment free press rights when a reporter promises to keep confidential the identity of a news source. *Cohen* concerned a "dirty tricks" political campaign story. A reporter covering a Minnesota state election received information leaked by Dan Cohen, a Republican campaign worker, showing that a third-party candidate had formerly been charged with some minor crimes, including shoplifting six dollars' worth of sewing materials from a store. The reporter promised Cohen he would keep Cohen's identity confidential. After the editors looked into the matter, the newspaper decided that the source of such a story was bigger news than the story itself and printed Cohen's name along with the information about the candidate. The day the stories appeared, Cohen was fired from his campaign job, and he sued for damages.²⁸⁷

The Court held that the enforcement of the newspaper's promise under the doctrine of promissory estoppel did not raise a significant First Amendment issue despite "incidental effects on [the newspaper's] ability

281. The Court also has intimated that contract principles have a role to play in the evaluation of plea bargains in criminal cases. See *Ricketts v. Adamson*, 483 U.S. 1 (1987) (holding that a plea bargain may waive constitutional protection against double jeopardy).

282. 444 U.S. 507 (1980).

283. *Id.* at 507-08.

284. *Id.* at 509 n.3.

285. *Id.* at 511. The Court awarded the CIA damages equal to Snepp's income from the book under the theory of a constructive trust. *Id.* at 515-16. Justices Stevens, Brennan, and Marshall argued in dissent for "a rule of reason analysis," under which courts would be free to refuse enforcement of prepublication review clauses imposing "a harsh restriction on the employee's freedom," when no vital government interest was compromised. *Id.* at 520 (Stevens, J., dissenting).

286. 111 S. Ct. 2513 (1991).

287. *Id.* at 2516.

to gather and report the news.”²⁸⁸ In the Court’s view, information gathered through a breach of promise was not necessarily “lawfully acquired”²⁸⁹ and thus did not trigger the heightened scrutiny normally reserved for state action that restricts the flow of news. In a particularly revealing passage, the Court noted that “[the common] law simply requires those making promises to keep them. The parties themselves . . . determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.”²⁹⁰

In addition to repeatedly turning away requests to use the Constitution as a source of public policy to limit contract, the modern Court steadfastly has refused to interpret statutory policies to override private contracts unless literally compelled by Congress to do so. Cases such as *Rodriguez de Quijas*,²⁹¹ *Shute*,²⁹² and *Chan*²⁹³ demonstrate the Court’s tendency to interpret narrowly anti-waiver and other statutory provisions to uphold alienation of litigation and negligence recovery rights.

The Court has also upheld contracts waiving the most sensitive of statutory civil rights claims. The leading case is *Town of Newton v. Rumery*.²⁹⁴ In *Rumery*, a Massachusetts man was falsely accused of, and wrongfully arrested for, witness tampering. He threatened to sue various public officials associated with his arrest under 42 U.S.C. § 1983.²⁹⁵ The prosecutor offered to drop all criminal charges against Rumery if he would sign a release-dismissal agreement waiving all rights to sue the town or its officials.²⁹⁶ Rumery’s attorney reviewed a proposed agreement and advised signature because, although Rumery wanted to go forward to prove his innocence, the attorney felt that a criminal trial was “sort of a crap shoot” for which he could not “guarantee a result.”²⁹⁷ After considering the matter for three days, Rumery signed

288. *Id.* at 2518.

289. *Id.*

290. *Id.* at 2519.

291. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *see also supra* text accompanying notes 145-50.

292. *Carnival Cruise Lines v. Shute*, 111 S. Ct. 1522 (1991); *see also supra* text accompanying notes 156-61.

293. *Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *see also supra* text accompanying notes 225-27.

294. 480 U.S. 386 (1987).

295. *Id.* at 390-91. Section 1983 “give[s] a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.” *Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled on other grounds by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The Warren Court significantly extended the standing of individuals to use § 1983 for redress of official abuses. *See* Eric H. Zagrans, “*Under Color Of*” What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 500-01 (1985). The modern Court has used a variety of devices to cut back on the availability of this sort of suit. *See id.* at 504-25.

296. *Rumery*, 480 U.S. at 390-91.

297. *Id.* at 407-08 n.8 (Stevens, J., dissenting).

the agreement. Ten months later, however, he regretted his decision and sued the town under § 1983.²⁹⁸ The appeals court held that the release-dismissal agreement violated public policy and refused to enforce the contract. The court noted that

[i]t is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights.²⁹⁹

The Supreme Court reversed, upheld the waiver under a special default rule,³⁰⁰ and dismissed the suit. Adopting a cost-benefit balancing approach, the Court asked whether "the interest in [contract] enforcement is outweighed . . . by a public policy harmed by enforcement of the agreement."³⁰¹ Characteristically, the Court had difficulty locating a public policy that would be compromised by contract enforcement. It rejected the notion that the public had a cognizable stake in the outcome of Rumery's § 1983 case, stating that Rumery "had no public duty to institute a [§] 1983 action merely to further the public's interest in revealing police misconduct."³⁰²

Similarly, the Court has ruled that plaintiffs may contractually waive the right to collect attorneys' fees in civil rights cases under 42

298. *Id.* at 391.

299. *Rumery v. Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985), *rev'd*, 480 U.S. 386 (1987).

300. The Court acknowledged the potential for prosecutorial abuse in cases involving certain potentially helpless defendants. *Rumery*, 480 U.S. at 393. It therefore constructed a special default rule for the waiver of such rights to assure that waivers are procured "voluntarily." *Id.* at 394, 397-98.

Justice O'Connor added an additional burden to this special default rule by writing separately to emphasize that the burden of proof on the issue of voluntariness rests with the parties relying on the contractual waiver. *Id.* at 399 (O'Connor, J., concurring). Justice O'Connor's vote to shift the burden of proof on voluntariness to the party seeking to uphold the agreement, coupled with the four dissenters' votes for such a standard, *id.* at 417 (Stevens, J., dissenting), placed a majority of the Court behind this additional burden.

301. *Id.* at 392. As Seth Kreimer has pointed out, the *Rumery* Court's invocation of the common law of contract really amounted to little more than an excuse to engage in the modern Court's familiar "balancing" analysis. Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 862 (1988). Moreover, had the Court been inclined to look, "[t]he common law fairly bristles with other appropriate starting points for analysis, most of which would point to the per se voidability of release-dismissal bargains." *Id.* at 861 (noting that contracts obtained under threat of prosecution or duress of imprisonment often were voidable at common law). Ironically, conservative scholars working in a number of fields have noted and criticized the Court's tendency to use balancing tests, in part because balancing is an unprincipled way to reach results that are really nothing more than an expression of policy preferences. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Paul W. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987); Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

302. *Rumery*, 480 U.S. at 395.

U.S.C. § 1988,³⁰³ regardless of objections from their lawyers. State professional ethical standards sometimes forbid attorneys from demanding that a settlement of a case be conditioned on an opponent dropping a demand for legal fees.³⁰⁴ In *Evans v. Jeff D.*,³⁰⁵ the Court rejected this approach, finding no warrant in the text or legislative history of § 1988 to forbid demands by defendants' lawyers that plaintiffs drop a claim for fees as part of settlement negotiations.³⁰⁶

Finally, in sharp contrast with New Deal/Warren Court cases overturning contracts that purported to transfer intellectual property subject to federal definition and control,³⁰⁷ the modern Court has refused to find that federal patent law preempts royalty contracts for an invention that is not, in fact, under patent. In *Aronsen v. Quick Pencil Co.*,³⁰⁸ the Court held that a patent royalty agreement relating to an invention that had not yet been patented was fully enforceable even after the patent application was actually rejected by the government. The Court distinguished the New Deal/Warren Court cases on this subject by reasoning that, since no patent ever issued, no policy of the patent laws was endangered by enforcing such contracts.³⁰⁹ Such restraint in the use of federal preemption to preserve contract rights stands in contrast with the Court's aggressive use of preemption in the arbitration area to overturn state and common law rules that frustrate contract enforcement.³¹⁰

D. Alienating Litigation, Risk of Loss, and Fundamental Rights: The Impact of Modern Supreme Court Public Policy Cases

The modern Court's public policy cases are interesting and important as seminal decisions within their respective admiralty, statutory, and constitutional law fields. Their importance grows, however, when one realizes that they have exerted a strong influence on state and lower federal court approaches to contract enforcement. If one includes the two New Deal/Warren Court decisions, *Prima Paint*³¹¹ and *Szukhent*,³¹²

303. 42 U.S.C. § 1988 (1988) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

304. See *Evans v. Jeff D.*, 475 U.S. 717, 765 (1986) (Brennan, J., dissenting).

305. 475 U.S. 717 (1986).

306. *Id.* at 730-31; see also *Venegas v. Mitchell*, 495 U.S. 82 (1990) (upholding a contingent fee agreement under which a civil rights plaintiff agreed to pay his lawyer more than the amount to which the lawyer was entitled under the statutory fee award).

307. See *supra* text accompanying notes 265-66.

308. 440 U.S. 257 (1979).

309. See *id.* at 264-65.

310. See *supra* text accompanying notes 141-44.

311. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); see also *supra* text accompanying notes 119-21.

312. *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964); see also *supra* text accompanying notes 128-39.

anticipating developments in the modern period, the modern Court's treatment of contract law has exhibited three notable trends.

First, as noted above,³¹³ the Court has taken away from state courts entire fields of state statutory law intended to modify common law contract doctrines. Using the concept of federal preemption, the Court in *Southland Corp. v. Keating*³¹⁴ wiped out all state statutory objections to arbitration clause enforcement in cases involving interstate commerce.³¹⁵ This effectively placed claims based on numerous consumer and small business protection laws beyond the reach of judicial enforcement and review.³¹⁶ In *Perry v. Thomas*,³¹⁷ the Court indicated in dicta that even state common law objections to arbitration clauses based on notions of adhesion and notice are preempted by the FAA if such concerns arise only with respect to arbitration agreements. This eliminated the possibility of state-originated special default rules based on the unfamiliarity of consumers or others with the legal consequences of an arbitration clause.³¹⁸ Even where states have remained free to decide arbitration law and policy, state courts have reviewed modern Supreme Court doctrines such as the "severability" rule announced in *Prima Paint*³¹⁹ and, after consideration, decided to follow the Supreme Court's lead.³²⁰

313. See *supra* text accompanying notes 141-44, 310.

314. 465 U.S. 1 (1984); see also *supra* text accompanying notes 141-42.

315. This back-handed treatment of the value of federalism in arbitration cases has been criticized by commentators. See, e.g., George F. Carpinello, *Testing the Limits of Choice of Law Clauses: Franchise Contracts As a Case Study*, 74 MARQ. L. REV. 57, 87 (1990) (asserting that the Court's "rush to eliminate parochialism [regarding arbitration] . . . has ignored the states' legislative determination that, in certain kinds of transactions, and for certain kinds of parties, the contract should have limited applicability").

316. Under the Federal Arbitration Act, an arbitrator's decision regarding an underlying claim is reviewable on only the narrowest grounds, none of them related to the merits of the claim or objections based on errors of law. See Shell, *ERISA*, *supra* note 117, at 528.

317. 482 U.S. 483, 493 n.9 (1987).

318. See, e.g., *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) (striking down on preemption grounds a state regulation requiring, inter alia, that broker-customer arbitration agreements be voluntary); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (ruling as a matter of federal law that arbitration clauses contained in contracts of adhesion are enforceable); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 806-07 (8th Cir. 1986) (preempting a state law requirement that an arbitration clause be in 10-point type); *Collins Radio Co. v. Ex-Cell-O Corp.*, 467 F.2d 995, 997-98 (8th Cir. 1972) (special state rule requiring signature of attorney on arbitration clause is preempted by FAA); *Cook Chocolate Co. v. Salomon, Inc.*, 684 F. Supp. 1177, 1182 (S.D.N.Y. 1988) (preemption of a state law that required references to arbitration to be made specifically within the body of principal agreement); *Downs v. Prudential-Bache Sec., Inc.*, 248 Cal. Rptr. 734, 736 (1988) (California adhesion contract principles are to be disregarded when the FAA applies); *Heily v. Superior Court*, 248 Cal. Rptr. 673, 675-76 (1988), *cert. denied*, 489 U.S. 1013 (1989) (state law governing neutrality of arbitrators is preempted by the FAA).

319. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); see also *supra* text accompanying notes 119-21.

320. See, e.g., *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.*, 673 P.2d 251, 255 (Cal. 1983) (adopting *Prima Paint* as the state law rule for California and noting that the high courts of other states have followed "*Prima Paint* with near unanimity"); *Quirk v. Data*

Second, the Court, by allowing the enforcement of standard form contracts as drafted, has contributed substantial momentum toward the abolition of immutable and special default rules favoring consumers and small businesses. As noted above, lower courts are now barred from giving any special treatment to standardized or adhesion contracts in arbitration cases.³²¹ The Court's influence has also been felt in the field of forum clause enforcement. Since 1972, when the Court decided *The Bremen*,³²² courts in over fifteen states have enforced choice of forum clauses, often citing *The Bremen* as primary authority for changing the state's common law.³²³ Moreover, the Court's decision in *Shute*³²⁴ has intensified the momentum. Lower federal courts, citing *Shute*, have enforced a forum stipulation in an arbitration agreement,³²⁵ a clause waiving the right to remove a case to federal court,³²⁶ and various choice of foreign law clauses in form contracts.³²⁷ In states that have resisted the rule of *The Bremen* as extended by *Shute*, lower federal courts sitting

Terminal Sys., 400 N.E.2d 858, 861-62 (Mass. 1980) (adopting *Prima Paint* rule for Massachusetts); Weinrott v. Carp, 298 N.E.2d 42, 47 (N.Y. 1973) (adopting *Prima Paint* rule for New York after finding Supreme Court's arguments favoring this rule "compelling"). But see Fouquette v. First Am. Nat'l Sec., 464 N.W.2d 760, 763 (Minn. App. 1991) (rejecting *Prima Paint* rule); City of Blaine v. John Hayes & Assocs., 818 S.W.2d 33, 38 (Tenn. App. 1991) (same), *appeal denied*, 1991 Tenn. LEXIS 365 (Sept. 9, 1991).

321. See *Corion Corp. v. Chen*, No. 91-11792-Y, 1991 U.S. Dist. LEXIS 18395 (D. Mass. Dec. 27, 1991) (finding an arbitration clause contained in an employee manual to bind employer).

322. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also *supra* text accompanying notes 151-55.

323. See *Volkswagenwerk, A.G. v. Klippam*, 611 P.2d 498, 503-04 (Ala. 1980), *cert. denied*, 449 U.S. 974 (1980); *Societe Jean Nicolas et Fils v. Mousseux*, 597 P.2d 541, 542 (Ariz. 1979); *SD Leasing v. Al Spain & Assoc.*, 640 S.W.2d 451, 452 (Ark. 1982); *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1208-09 (Cal. 1976); *ABC Mobile Sys. v. Harvey*, 701 P.2d 137, 139 (Colo. App. 1985); *Funding Sys. Leasing Corp. v. Diaz*, 378 A.2d 108, 110 (Conn. C. P. 1977); *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 216 (Del. Super. Ct. 1978); *Manrique v. Fabbri*, 493 So. 2d 437, 439 (Fla. 1986); *Calanca v. D & S Mfg. Co.*, 510 N.E.2d 21, 23 (Ill. App. Ct. 1987); *Prudential Resources Corp. v. Plunkett*, 583 S.W.2d 97, 99 (Ky. Ct. App. 1979); *Hauenstein & Bermeister, Inc. v. Met-Fab Indus.*, 320 N.W.2d 886, 889-90 (Minn. 1982); *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 495-96 (Mo. 1992); *Air Economy Corp. v. Aero-Flow Dynamics, Inc.*, 300 A.2d 856, 857 (N.J. Super. Ct. App. Div. 1973); *Credit Francais Int'l, S.A. v. Sociedad Financiera de Comercio, C.A.*, 490 N.Y.S.2d 670, 674-76 (1985); *United Standard Management Corp. v. Mahoning Valley Solar Resources*, 476 N.E.2d 724, 726 (Ohio Ct. App. 1984); *Reeves v. Chem Indus. Co.*, 495 P.2d 729, 732 (Or. 1972); *St. John's Episcopal Mission Ctr. v. South Carolina Dep't of Social Serv.*, 280 S.E.2d 207 (S.C. 1981); *Green v. Clinic Masters, Inc.*, 272 N.W.2d 813, 815 (S.D. 1978); *International Collection Serv. v. Gibbs*, 510 A.2d 1325, 1327 (Vt. 1986).

324. *Carnival Cruise Lines v. Shute*, 111 S. Ct. 1522 (1991); see also *supra* text accompanying notes 156-61.

325. See, e.g., *Bear, Stearns & Co. v. Bennett*, 938 F.2d 31, 32 (2d Cir. 1991).

326. See, e.g., *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1215-17 (3d Cir.), *cert denied*, 112 S. Ct. 302 (1991). This holding runs against the *Lochner* Court's holding in *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 454 (1874), although *Foster* does not cite *Morse*. Cf. *supra* text accompanying notes 110-12 (discussing the *Morse* decision).

327. See, e.g., *Seinbawang Shipyard v. Charger, Inc.*, 955 F.2d 983, 985-86 (5th Cir. 1992) (Singapore law chosen and applied); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 768 (D.C. Cir. 1992) (Italian law chosen and applied).

in diversity have either invented intrusive federal common law doctrines³²⁸ or seized on the Court's interpretation of the federal venue statute in *Ricoh*³²⁹ to circumvent state common law rules that disfavor forum clauses.³³⁰

Finally, the Court's public policy cases instituting special default rules for transfers of sensitive civil rights have inspired a number of followers in state courts. Some state courts, citing some combination of *The Bremen*,³³¹ *Szukhent*,³³² and *Burger King*,³³³ have determined that a choice of forum or choice of law clause, even in a form contract, can constitute consent to jurisdiction that waives the need for the constitutionally required minimum contacts in the forum state.³³⁴ Cognovit provisions, not judicial favorites prior to 1971, have also been approved by state courts, citing the special default rule announced by the Court in *Overmyer v. Frick*.³³⁵ In addition, other state and federal courts, citing modern Supreme Court precedent, have adopted highly flexible views of

328. Compare *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512-13 (9th Cir. 1988) (finding that the validity of a choice of forum clause in a diversity case is a question of federal common law) with *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986) (holding that the validity of forum clauses in diversity cases is a question of state law under *Erie*). One inventive federal district court has even held that claims of fraud in the inducement of a contract do not negate a forum clause unless the fraud goes directly to the forum clause itself. *Ritchie v. Carvel Corp.*, 714 F. Supp. 700, 703 (S.D.N.Y. 1989); see also *Freer*, *supra* note 163, at 1108 (noting that courts have applied the federal choice of forum rule without even noticing that an *Erie* question was raised); *Stein*, *supra* note 163, at 1983-85 (describing the decisions federalizing a venue clause question as "fundamentally flawed"). Allan Stein has noted that it is difficult to account for the creation of federal common law in these circumstances except through the sheer force of the Court's preference for private ordering as expressed in *The Bremen*. See *id.* at 1983-84.

329. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); see also *supra* text accompanying notes 162-63.

330. See, e.g., *Brock v. Entre Computer Ctrs.*, 933 F.2d 1253, 1257-58, *amended*, slip op. (4th Cir. 1991); *Moses v. Business Card Express*, 929 F.2d 1131, 1136-37 (6th Cir.), *cert. denied*, 112 S. Ct. 21 (1991).

331. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

332. *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

333. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

334. See, e.g., *Morgan Bank v. Wilson*, 794 P.2d 959, 961 (Ariz. App. 1990); *Sternberg v. O'Neil*, 550 A.2d 1105, 1112 (Del. 1988); *Tandy Computer Leasing v. Milam*, 555 N.E.2d 174, 176 (Ind. App. 1990); *International Collection Serv. v. Gibbs*, 510 A.2d 1325, 1327 (Vt. 1986); see also *National Equip. Rental v. Polyphasic Health Sys.*, 490 N.E.2d 42, 45 (Ill. App. 1986) (finding that a choice of forum clause constitutes minimum contacts). Federal diversity courts have followed suit. See, e.g., *Safeco Ins. Co. v. Mabra*, No. 90-35506, 1991 U.S. App. LEXIS 10280, at *7-8 (9th Cir. May 9, 1991); *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990).

335. 405 U.S. 174 (1972); see, e.g., *United States v. Mountain Village Co.*, 424 F. Supp. 822, 825 (D. Mass. 1976); *Strick Lease, Inc. v. Juels*, 780 S.W.2d 594, 596 (Ark. App. 1989); *Bank of Boston Conn. v. Barbieri*, No. 91-03388963-S, 1991 Conn. Super. LEXIS 1337, at *6 (1991); *Pellaton v. The Bank of N.Y.*, 592 A.2d 473, 476 (Del. 1991); *Burkette v. Finger Lake Dev. Corp.*, 336 N.E.2d 628, 631 (Ill. App. 1975); *Society Nat'l Bank v. Val Halla Athletic Club & Recreation Ctr., Inc.*, 579 N.E.2d 234, 239 (Ohio App. 1989); *Federman v. Pozsonyi*, 529 A.2d 530, 533 (Pa. Super. 1987); *Meier v. Purdun*, 288 N.W.2d 839, 843-45 (Wis. 1980). But see *Hulland v. State Bar*, 503 P.2d 608, 614 (Cal. 1972) (stating that cognovit provisions in adhesion contracts are presumptively unconstitutional).

contractual waivers of constitutional rights ranging from termination of parental rights³³⁶ to waivers of First Amendment,³³⁷ protection against self-incrimination,³³⁸ due process,³³⁹ and jury trial³⁴⁰ rights. The modern Court's decision in *Rumery*,³⁴¹ meanwhile, has been used by other courts to uphold waivers of rights to appeal³⁴² and rights to sue under state statutory causes of action,³⁴³ as well as to weaken the common law contract defense of duress.³⁴⁴ *Rumery* has also been used as direct authority to uphold a waiver of § 1983 rights in a case involving a seventeen-year-old prison inmate injured in a prison fire.³⁴⁵

III

THE SUPREME COURT AND CONTRACT: FROM AUTONOMY TO EFFICIENCY

This Part explores some implications of the public policy cases discussed in Part II. This Part first argues that the public policy cases give a new perspective to Cass Sunstein's position, advanced in *After the Rights*

336. See, e.g., *Karr v. Shorey*, 575 P.2d 981, 985 (Or. 1978); *Brown v. McLennan County Children's Protective Servs.*, 627 S.W.2d 390, 393 (Tex. 1982).

337. See, e.g., *Erie Telecommunications v. City of Erie*, 853 F.2d 1084, 1094-96 (3d Cir. 1988); *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 60-61 (Iowa 1983). The Minnesota Supreme Court, on rehearing *Cohen v. Cowles Media Co.* after the Supreme Court rejected a First Amendment challenge to the promise at issue there, see *supra* text accompanying notes 286-90, rejected claims that the Minnesota state constitution barred enforcement of the agreement and affirmed the damage award in the case. See *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390-92 (Minn. 1992).

338. See, e.g., *Paramount Pictures Corp. v. Miskinis*, 344 N.W.2d 788, 807-10 (Mich. 1984) (upholding the waiver of state and federal rights against self-incrimination even though the waiver was contained in a contract of adhesion).

339. See, e.g., *Gifford v. Casper Neon Sign Co.*, 618 P.2d 547 (Wyo. 1980) (upholding a cognovit provision in a commercial lease agreement requiring lessees to allow an attorney to be appointed for them, waive due process rights, and confess judgment against lessees).

340. See, e.g., *Meyer v. State Farm & Casualty Co.*, 582 A.2d 275, 277-79 (Md. App. 1990) (upholding a contractual appraisal provision as a waiver of the right to jury trial guaranteed by the state constitution).

341. *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

342. See *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir. 1990) (upholding the waiver of the right to appeal a criminal sentence), *cert. denied*, 112 S. Ct. 1488 (1992); *McCall v. United States Postal Serv.*, 839 F.2d 664, 666 (Fed. Cir. 1988) (upholding a waiver of the right to appeal a disciplinary action).

343. See *Leaman v. Ohio Dep't of Mental Retardation*, 825 F.2d 946, 954 (6th Cir. 1987) (upholding a waiver of the right to bring suit under a state cause of action), *cert. denied*, 487 U.S. 1204 (1988).

344. See *Burch v. Rame*, 676 F. Supp. 1218, 1228-29 (S.D. Ga. 1988) (finding that a police officer's resignation given in return for a promise not to prosecute the officer for perjury was not obtained under duress).

345. *Berry v. Peterson*, 887 F.2d 635, 636-37 (5th Cir. 1989). Courts also have been willing to distinguish *Rumery* when the waiver was made involuntarily. See, e.g., *Hall v. Ochs*, 817 F.2d 920, 923-24 (1st Cir. 1987) (considering a case in which the plaintiff's release from jail was conditioned on a waiver of the right to sue police officers). Indeed, the New York Court of Appeals has rejected the holding of *Rumery* in cases arising under New York law. *Cowles v. Brownell*, 538 N.E.2d 325 (N.Y. 1989).

Revolution,³⁴⁶ that the modern Court's reliance on common law "baselines"³⁴⁷ threatens to return us to a legal order reminiscent of the *Lochner* era.³⁴⁸ Next, this Part analyzes the modern Court's public policy cases purely as developments in the modern law of contracts. These cases cast into sharp relief the contemporary debate in modern contract theory between the conservative economic and libertarian theorists who favor private ordering with a minimum of state interference, and liberals and critical legal theorists who advocate judicial and legislative activism in contracts. This Part concludes with recommendations for revitalizing the neoclassical theory of contract law originally forged by the Legal Realists.

A. Contract and Sunstein's Common Law "Baselines"

In *After the Rights Revolution* and an impressive series of articles,³⁴⁹ Cass Sunstein advances the thesis that the modern Court's approach to statutory and constitutional interpretation displays a strong undercurrent of deference to common law norms or "baselines" that recalls the *Lochner* Court's approach to public and private ordering.³⁵⁰ He argues that the modern Court's reliance on the common law is inappropriate both because such reliance incorrectly assumes that the common law is a part of nature rather than a legal construct³⁵¹ and because it ignores the impact of the New Deal "rights revolution" on America's understanding of its legal order.³⁵² By refusing to extend statutory and constitutional

346. SUNSTEIN, *supra* note 19.

347. *Id.* at 207-10.

348. See *id.* at 1-8 (arguing that conservative constitutional and statutory theories of interpretation that favor private ordering under common law norms are reminiscent of the "pre-New Deal principles of private right," *id.* at 1).

349. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Sunstein, *Interpreting Statutes*, *supra* note 24; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Sunstein, *Lochner's Legacy*, *supra* note 24; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

350. See *supra* text accompanying notes 347-48.

351. See SUNSTEIN *supra* note 19, at 4; Sunstein, *Lochner's Legacy*, *supra* note 24, at 883, 902-03, 917-18.

352. SUNSTEIN, *supra* note 19, at 24-31. Sunstein has argued that the New Deal signaled a fundamental change in the way Americans conceive of the relationship between individuals and the state, and he calls for new interpretive baselines drawn from sources other than the common law. See *id.* at 141 ("[I]n the wake of the New Deal attack on the common law and the subsequent rights revolution, a presumption in favor of private ordering can no longer be sustained."). Sunstein's work has generated its own legal literature. See, e.g., Daniel A. Farber, *Playing the Baseline: Civil Rights, Environmental Law, and Statutory Interpretation*, 91 COLUM. L. REV. 676 (1991) (reviewing SUNSTEIN, *supra* note 19); Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990); Peter L. Strauss, *Sunstein, Statutes, and the Common Law—Reconciling Markets, the Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907, 915-17 (1991) (same); Stephen F. Williams, *Background Norms in the*

protections beyond those provided by the common law and by importing common law standards and doctrines into regulatory schemes, the Court subverts legislative and regulatory schemes in favor of private, pro-market ordering.³⁵³

Until now, no one has tracked Sunstein's thesis into the realm of contract law.³⁵⁴ The public policy cases discussed in Part II as well as other cases mentioned at the outset of this Article,³⁵⁵ however, provide strong confirmation of Sunstein's analysis. Virtually all the modern cases reviewed in Part II, except those decided exclusively under admiralty law, show the Court deflecting statutory and constitutional claims and referring parties instead to the rights and remedies available at common law.³⁵⁶

In addition, common law contract principles have served as a "baseline" for the modern Court in fields unrelated to contract law. For example, in *Wooddell v. International Brotherhood of Electrical Workers, Local 71*,³⁵⁷ the Court held that an international union constitution is a "contract" within the meaning of Labor Management Relations Act section 301, thus exposing local unions to breach of contract lawsuits brought by individual union members when local unions violate the international's constitution.³⁵⁸ In *Nationwide Mutual Insurance Co. v.*

Regulatory State, 58 U. CHI. L. REV. 419, 433 (same) (noting that the framers had an "implied preference" for "minimizing state interferences in private ordering, especially the sort of discretionary ones so common in the regulatory state"); Ronald F. Wright, *Letters from Beyond the Regulatory State*, 100 YALE L.J. 825 (1990) (reviewing SUNSTEIN, *supra* note 19).

353. SUNSTEIN, *supra* note 19, at 6-7.

354. Even scholars who have studied the modern Court's tendency to favor common-law baselines have done very little to explore the Court's direct influence on the common law. Professor Sunstein has studied judicial preferences for private ordering in constitutional, administrative, and civil rights law. See SUNSTEIN, *supra* note 19, at 207-26. Professors Farber and Frickey appear to be the only scholars who have investigated directly the evolution of an area of the common law—an aspect of the law of torts—in connection with Sunstein's thesis. See Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 888-905 (1991) (discussing interstate nuisance law and rules relating to wrongful death actions on behalf of seamen).

355. See *supra* text accompanying notes 13-15.

356. For example, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-82 (1989), the Court subrogated statutory policies of investor protection in the 1933 Securities Act to enforcement of an arbitration clause. See *supra* text accompanying notes 145-50. In *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1528 (1991), statutory rights for ship passengers under 46 U.S.C. app. § 183c (1988) fell before a choice of forum clause. See *supra* text accompanying notes 156-61. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the Court enforced a contractual waiver of the right to sue for constitutional violations of 42 U.S.C. § 1983. See *supra* text accompanying notes 294-306. And in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), the Court subjugated protection of First Amendment rights to regulation under the doctrine of promissory estoppel. See *supra* text accompanying notes 286-90. Meanwhile, in its admiralty cases, the Court has been engaged directly in the process of formulating common law rules. See *supra* text accompanying notes 218-31.

357. 112 S. Ct. 494 (1991).

358. *Id.* at 498-501; see also *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Local 334, United Ass'n of Journeymen & Apprentices of the Plumbing &*

Darden,³⁵⁹ the Court held that common law agency criteria for identifying master-servant relations define who is an "employee" and who is an "independent contractor" under ERISA, thereby restricting who may be entitled to pension protection under that statute. Finally, the modern Court has held that even federal habeas corpus rights are limited by classical notions of contract privity and associated common law agency doctrines. In *Coleman v. Thompson*,³⁶⁰ a death row inmate lost his federal habeas corpus rights and ultimately his life³⁶¹ when the lawyer with whom he had a contract for legal services filed a state court appeal raising a federal constitutional question three days late. Citing the *Restatement (Second) of Agency*,³⁶² the Court held that the prisoner's contract with his lawyer bound him to his lawyer's error through the common law doctrines of agency law.³⁶³

However, these cases and those discussed in Part II do more than support Sunstein's thesis. They demonstrate that the modern Court's vision of contract rejects not only the neoclassical, egalitarian vision of the New Deal/Warren Court, but also important aspects of the *Lochner* Court's approach. The modern Court has not just relied on common law baselines, it has *reconstructed* classic common law doctrines to reflect its contemporary conception of private ordering. Sunstein's comparison of the modern Court with the *Lochner* Court thus may significantly understate the conservative passions of the modern Court. Sunstein's critique fails to capture this important development, in part because he adopts a common misinterpretation of the *Lochner* Court's approach to contract.

Sunstein's misreading of the *Lochner* Court is a subtle, but nonetheless important one. Based largely on the evidence of the economic substantive due process cases,³⁶⁴ many commentators have asserted with Sunstein³⁶⁵ that the *Lochner* Court was trying to implement the laissez-faire principle of classical economic theory:³⁶⁶ that government is best

Pipefitting Indus., 452 U.S. 615, 619-23 (1981) (finding that an international union constitution is a contract within the meaning of LMRA § 301 for purposes of a suit by one union against another).

359. 112 S. Ct. 1344, 1346 (1992).

360. 111 S. Ct. 2546, 2566-67 (1991).

361. Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. TIMES, May 21, 1992, at A20.

362. The Court cites § 242, but evidently intended to cite RESTATEMENT (SECOND) OF AGENCY § 243 (1958) (noting that a master is subject to liability for harm caused by the negligent conduct of his servant within the scope of employment).

363. *Coleman*, 111 S. Ct. at 2567 (stating that "where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule [holding that the attorney ceased to be the client's agent] would be contrary to well-settled principles of agency law"). See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (holding that common law agency principles apply in Title VII cases to determine employer liability for acts of employees).

364. See *supra* text accompanying notes 70-77.

365. SUNSTEIN, *supra* note 19, at 5 (stating that judges in the *Lochner* era "[s]tart[ed] from principles of laissez-faire").

366. According to Roscoe Pound, the classical economist Ricardo "laid it down as a principle of

which governs least.³⁶⁷ This view, however, oversimplifies the *Lochner* Court's philosophical orientation.

Recently, legal historian Michael Les Benedict has persuasively argued that the *Lochner* Court was motivated not by laissez-faire economic theory but by libertarian principles of individual rights.³⁶⁸ The

political economy that legislation should not interfere with contracts." Pound, *supra* note 72, at 456 n.19.

367. This opinion regarding the motivation of the *Lochner* Court was chiefly advanced by early critics of the Court's economic due process decisions such as Roscoe Pound and Oliver Wendell Holmes. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating that economic due process decisions were "decided upon an economic theory which a large part of the country does not entertain"), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); Pound, *supra* note 72, at 456-57 (criticizing the notion that freedom of contract was a "natural right" and arguing that the doctrine of contract freedom originated with the "*laissez faire*" theory of Adam Smith). This opinion has carried down to the present day. See CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 329, 393 (1954) (discussing "laissez-faire attitude" of both the general legal culture and the Supreme Court during the late-nineteenth century); KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 291 (1990) (noting that courts of the late-nineteenth century were guided by laissez-faire ideas and allowed stronger commercial parties to prevail over weaker ones); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053 (1984) (describing economic due process decisions of the "Old Court" as a "last-ditch defense of laissez-faire capitalism against the modern activist state"); Phillips, *supra* note 9, at 277 (stating that the Court's pre-1937 economic substantive due process jurisprudence "display[s] a reasonably consistent laissez-faire, anti-regulation approach"). An extreme version of this critique depicts the *Lochner* Court as "an arm of the capital-owning class," Arthur S. Miller, *Toward a Definition of "the" Constitution*, 8 U. DAYTON L. REV. 633, 647 (1983), whose function was to block those who sought to stop capitalist expansion by "lay[ing] down the lines of economic orthodoxy," Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 672 (1933); see also Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 672 (1960) (noting that the "main focus" of the *Lochner* Court was "toward providing a favorable climate for business affairs").

368. Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 304-05 (1985) (asserting that judges did not object to economic regulations because they violated "immutable economic laws," but rather because they "violated rights"). Libertarianism arose as a self-conscious school of political philosophy in the second half of the nineteenth century as a reaction against the utilitarianism of Jeremy Bentham. See JOHN S. MILL, *AUTOBIOGRAPHY* ch. 5 (Roger Howson ed., 1924) (1873) (describing Mill's crisis of faith in utilitarianism); Gertrude Himnielfarb, *Editor's Introduction* to JOHN S. MILL, *ON LIBERTY* 30 (Penguin Books 1985) (1859) [hereinafter MILL, *ON LIBERTY*] (stating that Mill's "primary concern was to establish liberty, not utility, as the sole principle governing the relations of the individual and society"). In contrast with utilitarianism, which focused on finding and implementing laws that would give the greatest benefit to the greatest number of people, libertarianism focused on the right of individuals to act according to their own desires and to enter into whatever voluntary associations they chose free of state interference so long as their actions did not injure others. See MILL, *ON LIBERTY*, *supra* at 68 (noting that "the sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number is self-protection" and that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

The late-nineteenth century witnessed a flowering of libertarian thought in the United States that, Professor Benedict argues, influenced the thinking of the *Lochner*-era Justices. See Benedict, *supra* at 304-05. Benedict points out that Justice Holmes' famous dissent in the *Lochner* case objected not only to the Court's use of an "'economic theory which a large part of the country does not entertain,'" but also, and perhaps more pointedly, to the constitutionalization of "Herbert Spencer's *Social Statics*," a contemporary book espousing philosophical libertarianism. *Id.* at 305

distinction between classical laissez-faire and libertarian theories of law as understood in the late-nineteenth and early-twentieth centuries is vital to a proper understanding of the *Lochner* Court. The libertarianism of a century ago, at least in its judicial manifestations, contemplated a meaningful role for both courts and legislatures in overseeing private ordering.³⁶⁹ For example, libertarian John Stuart Mill acknowledged the public's interest in regulating trade.³⁷⁰ The purely laissez-faire approach, by contrast, cared only to preserve the single principle that "complete freedom of exchange promised the greatest prosperity for all."³⁷¹

A number of legal historians have noted that the *Lochner* Court's jurisprudence defies facile economic labels.³⁷² Benedict's thesis goes beyond these rejections of the laissez-faire label to identify the deeper libertarian basis for the *Lochner* Court's jurisprudence. As the *Lochner* Court itself put it in 1911, "freedom of contract is a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."³⁷³ The Court's libertarian foundation explains why it so often upheld government regulations that protected the public's health, safety, and morals from injury when the process of

(quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

The work to which Holmes refers is HERBERT SPENCER, *SOCIAL STATICS; OR, THE CONDITIONS OF HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* 42, 121 (1865) (arguing for a "systematic morality" as deduced from the principle that "[e]very man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man"). Spencer was a radical libertarian who opposed, among other things, public education and the public postal system. See Benedict, *supra* at 301.

369. Benedict, *supra* note 368, at 298, 304.

370. MILL, ON LIBERTY, *supra* note 368, at 164 ("Whoever undertakes to sell any description of goods to the public does what affects the interests of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society.").

371. Benedict, *supra* note 368, at 299.

372. *Id.* at 296-97 (discussing scholarly "reassessments" of the traditional charges that Supreme Court Justices of the *Lochner* era were motivated by class bias or economic theory); see also FRIEDMAN, *supra* note 69, at 344 ("Undeniably, *some* major constitutional decisions, both state and federal, were both conservative in result and radical in method. The number of these cases can be easily exaggerated. On the whole, federal courts threw out only a minority of the state regulatory statutes that came before them for review."); HALL, *supra* note 17, at 246 (commenting that in the late-nineteenth and early-twentieth centuries, the "industrial world was a reality, and judges gave far broader discretion to legislatures than historians have usually recognized" and laissez-faire mentality "pervaded, but never completely controlled, American social and economic thought between the Civil War and World War I"); HURST, *supra* note 69, at 7 ("It has been common to label nineteenth-century legal policy as simple laissez faire, and political debate of the last sixty years has propagated a myth of a Golden Age in which our ancestors—sturdier than we—got along well enough if the legislature provided schools, the sheriff ran down horse thieves, the court tried farmers' title disputes, and otherwise the law left men to take care of themselves. The record is different.").

373. *Chicago, B. & Q.R.R. v. McGuire*, 219 U.S. 549, 567 (1911) (upholding an Iowa regulatory scheme protecting railroad workers' right to sue employers for job-related personal injuries irrespective of contractual provisions to the contrary).

seeking individualistic gains led to injurious results.³⁷⁴ It also underlies the Court's insistence that notice and consent be the basis of contractual relations between parties possessing disparate economic power.³⁷⁵

The *Lochner* Court's public policy contract cases further support

374. Benedict has pointed out that what triggered the *Lochner*-era Court's economic substantive due process doctrine was "'class' or 'special [interest]' legislation" through which organized economic groups manipulated the majoritarian institutions of government "for the benefit of a particular group at the expense of the rest of society." Benedict, *supra* note 368, at 305-06 (noting that to many intellectuals of the late-nineteenth century such laws seemed based on socialism and communism). Government subsidy of large, established business enterprises, trades, and professions engendered opposition throughout much of early American history. *See id.* at 314-31.

Although such legislation was dressed in the rhetoric of public purposes, the libertarian *Lochner* Court did not accept these legislative explanations at face value and insisted on evidence of an actual threat to general public health, safety, welfare, or economic choice. *See, e.g.,* *Coppage v. Kansas*, 236 U.S. 1, 18 (1915) (noting "the numerous and familiar cases in which this court has held that the [legislative] power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts"), *overruled by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). *Coppage* cites *Erie R.R. v. Williams*, 233 U.S. 685 (1914), *Chicago, Burlington & Quincy R.R. v. McGuire*, 219 U.S. 549 (1911), and *Holden v. Hardy*, 169 U.S. 366 (1898). *See also* *McLean v. Arkansas*, 211 U.S. 539 (1909) (affirming state power to regulate miners' wages); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding regulation of women's labor hours); *Minnesota Iron Co. v. Kline*, 199 U.S. 593 (1905). The Court's decisions regarding freedom of contract in the labor setting, meanwhile, also reflected the sentiments of the so-called "free labor" movement. *See* Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900*, 36 AM. J. LEGAL HIST. 19, 24-27 (1992); Allan H. Macurdy, *Classical Nostalgia: Racism, Contract Ideology, and Formalist Legal Reasoning in Patterson v. McLean Credit Union*, 18 REV. L. & SOC. CHANGE 987, 1002-10 (1990-91).

The concern with possible harm to the public also explains the Court's upholding state regulation of monopolies and businesses "affected with a public interest." *Munn v. Illinois*, 94 U.S. 113, 130 (1876); *see also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 259, 263 (1989) (describing "Progressive Era antitrust analysis" as the "essential logical complement" of laissez-faire constitutionalism); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 206 & n.85 (1984) (discussing the development and demise of the "businesses affected with the public interest" doctrine).

375. The *Lochner* Court cared deeply about how individuals consented to give up their autonomy through institutions such as contract. Admiralty cases from the *Lochner* era such as *The Majestic*, 166 U.S. 375 (1897), and *The Kensington*, 183 U.S. 263 (1902), evidence a strong concern for actual notice and consent to contractual clauses that might prejudice ship passengers in their recovery of damages for negligence. *See generally* Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494 (1950) (summarizing various judicial approaches to enforcement in cases involving fine print terms).

The *Lochner* Court also had strong opinions regarding the voluntariness of agreements. Where the circumstances clearly revealed that the contracting party had no choice but to sign an agreement or go out of business, the Court refused to enforce the contract. *See* *Swift Co. v. United States*, 111 U.S. 22, 28-29 (1884) (holding that, where the only choice given to a business negotiating with tax authorities was to "submit to an illegal exaction, or discontinue its business," the business "had no choice," and the contract was not enforceable). Unlike the New Deal/Warren Court, however, the *Lochner* Court was not interested in state-imposed equalization of bargaining power. Indeed, the Court objected to statutes primarily intended to "level[] inequalities of fortune" between bargainers. *Coppage*, 236 U.S. at 18; *see also* Wonnell, *supra* note 9, at 93-96 (noting that the *Lochner* Court struck down many statutes aimed at "remedy[ing] perceived defects in economic bargaining

Benedict's reassessment of the *Lochner* period and call into question comparisons that equate the *Lochner* and the modern Courts. As Part II demonstrates, the *Lochner* Court took a broad view of the sources from which public policy could be drawn in contracts cases,³⁷⁶ protected the public's access to state authority to procure remedies for legal wrongs,³⁷⁷ and imposed legal rules assuring that powerful private corporations would take adequate care in delivering their services.³⁷⁸ The Court showed that it was willing to recognize as inalienable new, legislatively created rights;³⁷⁹ conversely, when legislatures attempted to cut back on common law contract restrictions announced by the Court, it met these attempts with resistance and construed such statutes narrowly.³⁸⁰ The Court also rejected state common law contract rules that were less restrictive than its own.³⁸¹ Most strikingly, the *Lochner* Court's public policy cases strongly suggest that the Court held a vision of contract that recognized the importance of consent as a justification for state enforcement of agreements,³⁸² particularly in cases involving consumers and small businesses.³⁸³

In summary, the *Lochner* Court held private ordering in high regard, but saw a role for itself in policing private contract under the public policy doctrine. Far from being transfixed by a market model of social ordering, the *Lochner* Court was surprisingly sensitive to differences in contractual settings and contractual capacities.

The modern Court has parted company from the *Lochner* Court in

power"). Thus, for the *Lochner* Court, consent apparently meant a conscious choice among real options, even when the options were few.

376. See *Trist v. Child*, 88 U.S. (21 Wall.) 441, 448 (1874) (stating that, under public policy doctrine, a contract may be "void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals"); *supra* note 82 and accompanying text.

377. See *supra* Section II.A.1.

378. See *supra* Section II.B.1.

379. See *supra* text accompanying notes 240-46.

380. See *supra* text accompanying notes 203-06, 240-42.

381. See, e.g., *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889); *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873); see also *supra* text accompanying notes 186-88 (discussing the Court's decision in *Phenix*); *supra* text accompanying notes 180-85 (discussing the Court's decision in *Lockwood*). But see *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 527 (1928) (overturning a state public policy objection to a contract on federal common law grounds), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). There is strong evidence that the controversy associated with the Court's decision in *Black & White Taxicab* helped push the Court a few years later to abandon the whole enterprise of inventing federal common law. See *Erie*, 304 U.S. at 73 ("Criticism of the doctrine [of *Swift v. Tyson*] became widespread after the decision [in *Black & White Taxicab*].").

382. See *supra* note 375 and accompanying text.

383. Professor Friedman, a leading legal historian, has characterized the period from 1890 to 1900 as generally favoring "the consumer" interest. FRIEDMAN, *supra* note 69, at 541-42. By "consumer," Friedman meant not only individuals, but also "the small merchant or farmer, who took on manufacturers in court. Courts were avidly middle class in their outlook. Their shift in emphasis meant less catering to big business, more attention to small." *Id.* at 542. Many of the Supreme Court cases discussed in Part II reflect this sentiment.

several important respects regarding private contract. First, the modern Court has reduced the sources to which courts may turn to find public policy exceptions to contract, essentially eliminating judicial discretion as one such source.³⁸⁴ Second, as demonstrated in Part II, the Court has overturned or substantially weakened specific *Lochner* Court rules regarding access to the courts and exculpation clauses. Third, in cases in which the Court has been asked to defer to the public policy rules of particular states, the modern Court has used its powers to overturn restrictive state public policy doctrines,³⁸⁵ whereas the *Lochner* Court imposed public policy restrictions on contract that contradicted permissive state rules.³⁸⁶

Finally, and more generally, the modern Court has abandoned values of voluntary consent and notice that undergirded the consumer aspects of the *Lochner* Court's approach to contract. In cases such as *The Majestic*,³⁸⁷ *The Kensington*,³⁸⁸ and *Insurance Co. v. Slaughter*,³⁸⁹ the *Lochner* Court repeatedly expressed its preference for special default rules in consumer cases that would assure that "special and most stringent terms . . . be distinctly declared and deliberately accepted"³⁹⁰ before a contract was entitled to enforcement. The modern Court has dispensed with such special default rules altogether and preserved the conventional common law exceptions for fraud and unconscionability in name only. In *Rodriguez de Quijas*³⁹¹ it enforced a contract clause which a securities broker was alleged to have deliberately concealed, and in *Shute*³⁹² the Court enforced a forum stipulation clause without any affirmative evidence of either notice or consent.

In summary, the current Court, while compelled by current understandings regarding the separation of powers to be more deferential than the *Lochner* Court to legislative ordering of the economy, remains much more skeptical than was the *Lochner* Court of judicial attempts to improve on the results of private bargains. When Sunstein criticizes the modern Court for adopting *Lochner* Court values, therefore, he may be complaining more about the modern Court's adoption of the neo-conservative principles advocated by his Chicago colleagues Epstein,

384. See *supra* text accompanying note 101.

385. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (overturning a state policy disfavoring contractual forum selection clauses); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (overturning a state policy limiting arbitrability of franchise contract provisions).

386. See *supra* text accompanying note 381.

387. 166 U.S. 375 (1897).

388. 183 U.S. 263 (1902).

389. 79 U.S. (12 Wall.) 404 (1870).

390. *The Majestic*, 166 U.S. at 386.

391. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); see also *supra* text accompanying notes 145-50.

392. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); see also *supra* text accompanying notes 156-61; *infra* text accompanying notes 455-59.

Easterbrook, and Posner than the conservative philosophy of *Lochner*-era justices Peckham, Pitney, and Fuller.³⁹³ It is therefore to the influences on Supreme Court contracts cases of modern conservative legal theories that the Article now turns.

B. *The Supreme Court and Modern Contract Theory*

Assuming the *Lochner* Court's classic, libertarian vision of contracts has not guided the modern Court's innovations in contract law, the question arises as to what influences have affected the Court. This subpart surveys what the major contemporary contract theories have to say about the public policy defense and then analyzes the influence of these respective schools on the modern Court's contracts cases. This Section concludes with a critique of the approach the Court has chosen.

1. *Current Theoretical Perspectives on Contract and Public Policy*

Modern contracts scholarship evidences a range of theoretical perspectives vying for dominance. A brief summary of the jurisprudential landscape will help place the Court's theoretical choices into a framework for analysis.

a. *Neoclassical Realism*³⁹⁴

The New Deal period of the 1930s gave birth not only to an explosion of rights legislation,³⁹⁵ but also to Legal Realism's attack on classi-

393. Richard Epstein, at least, has stated explicitly that he stands well to the right of the *Lochner* Court Justices with reference to his interpretation of both the Takings Clause and the Contracts Clause. See EPSTEIN, *supra* note 3, at 30-31 (advocating a level of judicial restriction of legislative ordering under the Takings Clause that goes beyond anything the United States has seen in its history); Epstein, *supra* note 8, at 747-50 (arguing that even state judicial decisions based on the public policy defense to contract should be subject to review under the Contracts Clause).

394. See EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 89 (4th ed. 1991) (identifying period "from roughly 1940 to date" as being associated with a neoclassical contracts movement based on Legal Realism that has occupied itself with legalizing commercial expectations and protecting fairness of exchange). In the past several years, many scholars who trace their intellectual heritage to Legal Realists such as Karl Llewellyn have begun to call for the application of "practical reason" and "pragmatism" in legal argument. See, e.g., Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 537-38 (1992) (citing literature on pragmatism and tracing it to Llewellyn); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) (collecting articles discussing various aspects of pragmatic legal theory).

This Article retains the older "neoclassical" label because it seems more specifically associated with contract law at this time than does the newer "pragmatic" label. For the sake of simplicity and at the cost of precision, the Article lumps both "relational" and "empirical" contract theorists together with traditional neoclassical realists. See Feinman, *supra* note 20, at 1299-308 (summarizing distinctions between relational, empirical, and traditional neoclassical contract theories).

395. Sunstein described this rights revolution as follows:

Between the New Deal and the 1980s the United States witnessed a rights revolution—the creation by Congress of legal entitlements to freedom from risks in the workplace and in consumer products, from poverty, from long hours and low wages, from fraud and

cal formalism in the common law, particularly contract law.³⁹⁶ The realist attack ultimately prevailed and its insights were incorporated into what has become known as the neoclassical paradigm of contract law.³⁹⁷ Most scholars agree that, as a matter of descriptive fact, our era is dominated by this neoclassical realist model, which is characterized by a pragmatic mix of both firm rules and open-ended standards.³⁹⁸ The set rules provide the basic road map for transactions, while the more open-ended standards permit widely-shared ethical norms and contextual facets of a case such as commercial expectations and customs to influence contract regulation.

Indeed, to some extent, the basic purpose of neoclassical contract law is to implement the reasonable expectations of the parties to the dispute rather than to permit the formal requirements of legal doctrine to defeat such expectations.³⁹⁹ Flexible neoclassical doctrines such as

deception, from domination by employers, from one-sided or purely commercial broadcasting, and from dirty air, dirty water, and toxic substances.

SUNSTEIN, *supra* note 19, at 12-13.

396. G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1202-12 (1988) (tracing the history of the common law approach to contract in late-twentieth-century American commercial law and noting the influence of 1930s' Legal Realists in this development); see SUNSTEIN, *supra* note 19, at 148 (noting that Realists argued that distributive government power lay beneath the surface of seemingly neutral common law rules); Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 468-503 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) (describing at length the intellectual history of Legal Realism).

397. See MURPHY & SPEIDEL, *supra* note 394, at 89.

398. See, e.g., HUGH COLLINS, *THE LAW OF CONTRACT* 8-15 (1986); GRANT GILMORE, *THE DEATH OF CONTRACT* 55-87 (1974) (chronicling the decline of legal formalism in common law contract doctrines); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 50 (1984) (describing contract law as moving towards more open-ended, collective values of fairness, welfare, and social justice); Shell, *supra* note 396, at 1198-99 (noting courts' increasing reliance on generalized ethical standards to decide not only consumer cases, but also disputes between businesses); Slawson, *supra* note 79, at 23-31 (arguing that "whereas under the old meaning [of contract], the contract is the parties' manifestations of mutual assent, which are interpreted to try to fulfill their reasonable expectations, under the new meaning the reasonable expectations are the contract," *id.* at 23); Strauss, *supra* note 352, at 915-17 (describing the common law as moving away from traditional laissez-faire concepts and toward a regulatory system with distributive effects).

399. This was a significant aspect of the "reality" that the Legal Realists were trying to inject into the logical, formalist structure of the classic common law. See generally Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Karl N. Llewellyn, *A Realist Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

promissory estoppel,⁴⁰⁰ good faith,⁴⁰¹ and unconscionability,⁴⁰² give judges explicit discretion over private transactions, freedom to do justice between the actual litigants before the court, and power to deter what the courts determine to be unfair market practices.⁴⁰³ The public policy doctrine is an open-ended aspect of the classic, formalist law of contract that fits comfortably into the neoclassical model.

This realist perspective informs the work of a large, eclectic group of what David Charny has labeled "conservative communitarian" or "fairness" contracts scholars.⁴⁰⁴ This Article calls this group neoclassical realists. They are somewhat skeptical about the importance of contract rules as incentives in social and economic ordering⁴⁰⁵ and are cautiously optimistic about the ability of judges to empathize with parties to achieve "correct" results on a case-by-case basis after taking into account such factors as relative bargaining power, ability, knowledge, sophistication, relationship, and culpability.⁴⁰⁶ They point out, as did the Legal Realists of the 1930s, that classic versions of the common law, far from being "neutral," are really regulatory systems that favor those with generous allotments of property rights.⁴⁰⁷

Neoclassical realists generally support the current legal mix of rules

400. See Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985) (presenting a modern analysis of contract law focusing primarily on the promisor's underlying economic intentions rather than on reliance); cf. Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659, 706-15 (1988) (arguing that Karl Llewellyn rejected a reliance-based theory of recovery in constructing the U.C.C. and that promissory estoppel should be replaced by a theory focusing on the actual agreement of the parties).

401. U.C.C. § 1-203 (1990).

402. *Id.* § 2-302.

403. MURPHY & SPEIDEL, *supra* note 394, at 89-90; Feinman, *supra* note 20, at 1288 ("In deciding the scope of contractual liability, courts [now] weigh the classical values of liberty, privacy, and efficiency against the values of trust, fairness, and cooperation, which have been identified as important by post-classical scholars."). Thus, modern contract law reflects as often as it opposes the values of the Welfare State. COLLINS, *supra* note 398, at 9-10.

404. Charny, *supra* note 50, at 1837-39.

405. This is especially true of the so-called "empirical" school of contract at the University of Wisconsin, which takes its cue from Stewart Macaulay. See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467-78; see also Feinman, *supra* note 20, at 1305 (noting that, under this empirical view of contract, "contract law is not irrelevant to the world of commerce, but it is of much more limited relevance than neoclassical law assumes").

406. Charny, *supra* note 50, at 1840 (stating that conservative communitarians tend to use "a case-by-case assessment of the parties' rationality, equality of bargaining power, and the like"); see also COLLINS, *supra* note 398, at 11; Jay Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1542 (1987) (reviewing HUGH COLLINS, *THE LAW OF CONTRACT* (1986)). The neoclassical paradigm continues its evolution. See G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 265-81 (1991) (asserting that a flexible cause of action should govern cases involving bad faith bargaining); Shell, *supra* note 396, at 1254 (arguing that legal rules governing business should be sensitive to context and should have an aspirational content).

407. See Braucher, *supra* note 48, at 699-700, 712-14; Singer, *supra* note 396, at 482-87; Sunstein, *Interpreting Statutes*, *supra* note 24, at 410, 444 & n.136.

and standards, although they may seek reform of particular doctrines. Such modern contracts scholars as Ian Macneil,⁴⁰⁸ Stewart Macaulay,⁴⁰⁹ Melvin Eisenberg,⁴¹⁰ Richard Speidel,⁴¹¹ Robert Hillman,⁴¹² W. David Slawson,⁴¹³ Peter Linzer,⁴¹⁴ and Todd Rakoff,⁴¹⁵ among many others, have inherited Karl Llewellyn's passion for balanced, flexible, contextually-based legal rules.

Not surprisingly, then, although the public policy defense itself has not been the subject of a great deal of study by this group, those who have studied it have endorsed the flexibility it gives judges.⁴¹⁶ Likewise, they have generally praised the related doctrine of unconscionability.⁴¹⁷

b. *Law and Economics*⁴¹⁸

The law and economics movement has mounted an intellectually sophisticated frontal attack on the neoclassical realist theory of con-

408. IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980). In the interests of simplification, this Article lumps relational contract theorists with neoclassical realists. Although relational contracts scholars have quite a different focus than the typical neoclassicist, they nevertheless view contract doctrine in the realist tradition and focus heavily on reciprocal values in the exchange process. See MURPHY & SPEIDEL, *supra* note 394, at 94-96.

409. Macaulay, *supra* note 405.

410. Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982) (discussing paradigmatic concept of unconscionability in law of contract).

411. MURPHY & SPEIDEL, *supra* note 394.

412. Hillman, *supra* note 20.

413. W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974).

414. Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139.

415. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

416. See, e.g., Kostitsky, *supra* note 21, at 121-22; Prince, *supra* note 21, at 163-89; Radin, *supra* note 54, at 1909-14.

417. See M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Slawson, *supra* note 79; John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

418. This subsection's description of law and economics is limited to the conservative wing of the law and economics movement. Recently, some law and economics scholars have launched a progressive movement concerned with expanding the behavioral assumptions used in the economic analysis of legal doctrines and enriching the economic critique with insights from game theory, psychology, and other social sciences. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Jason S. Johnston, *Law, Economics, and Post-Realist Explanation*, 24 LAW & SOC. REV. 1217 (1990) [hereinafter Johnston, *Post-Realist Explanation*]; see also Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. REV. 303, 305, 322-29 (1983) (describing and seeking to remedy the weaknesses inherent in the use of microeconomics in contract theory); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 648-49 (1990) [hereinafter Johnston, *Strategic Bargaining*] (discussing problems with developing economic efficiency explanations for contract theories without considering the informational environment of the bargain); Daniel T. Ostas, *Predicting Unconscionability Decisions:*

tracts. Normatively, law and economics scholars believe strongly that legal rules have incentive effects, so they seek rules that will motivate parties toward transactional and allocative efficiency, thereby maximizing wealth.⁴¹⁹ As noted at the beginning of this Article, economists believe that markets require clear rules about property, contracts, and fraud to assure that goods and services will move to users who are willing to pay the highest price for them.⁴²⁰ Consequently, law and economics scholars have attacked on efficiency grounds flexible neoclassical contract doctrines, including unconscionability,⁴²¹ good faith,⁴²² impossibility of performance,⁴²³ and promissory estoppel.⁴²⁴ Indeed, they have even argued against such classical doctrines as the unenforceability of penalty clauses⁴²⁵ and the availability of consequential damages,⁴²⁶ and objected

An Economic Model and an Empirical Test, 29 AM. BUS. L.J. 535, 541-42, 584 (1991) (arguing that, viewed from the perspective of what they do rather than what they say, unconscionability decisions "are both predictable and in conformity with economic reasoning," *id.* at 584); *infra* notes 541-47 and accompanying text.

419. The market is operating efficiently when the allocation of resources maximizes their value. POSNER, *supra* note 1, at 12; *see also* RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 88-92 (1981) (discussing various theories used to evaluate efficiency); Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 817-18 (1989) (discussing various formulations of the concept of efficiency and indicating how they are used in the economic analysis of law); Singer, *supra* note 396, at 513-16 (discussing the law and economics perspective and its goal of promoting efficiency and maximizing wealth). Law and economics scholars also concern themselves with productive as well as allocative efficiency. *See* D. Bruce Johnson, *Wealth Is Value*, 15 J. LEGAL STUD. 263, 270-77 (1986).

420. *See supra* note 1 and accompanying text. When law and economics scholars speak of users who "value" resources most highly, they define the word "value" as meaning "willingness to pay." POSNER, *supra* note 1, at 10.

421. *See, e.g.*, Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (arguing against the broad use of this doctrine on both efficiency and libertarian grounds); Benjamin Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356 (1980) (arguing that contract terms deemed "unfair" may actually be voluntarily agreed to as compensation for hidden market costs); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1071-76 (1977) (arguing that market bargaining power should not be a factor in deciding whether a contract is unconscionable).

422. *See, e.g.*, James A. Brickley et al., *The Economic Effects of Franchise Termination Laws*, 34 J.L. & ECON. 101, 130 (1991) (arguing against imposing a duty of good faith on franchisers in the termination of at-will franchisees); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 962-77, 981-82 (1984) (same—termination of at-will employees).

423. *See, e.g.*, Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 117 (1977) (arguing that impossibility cases should be decided on the basis of which party is the superior risk bearer); Michelle J. White, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory*, 17 J. LEGAL STUD. 353, 374 (1988) (arguing on efficiency grounds that "courts should treat all cases involving unperformed contracts as breach of contract cases rather than as discharge cases, and that the nonperforming party should pay nonzero damages except in a few special cases").

424. *See, e.g.*, David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 446-56 (1990) (arguing for judicial restraint in application of promissory estoppel).

425. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 138 (1979).

426. Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 115-21, 137-38 (1989).

to neoclassical aspects of tort law⁴²⁷ and property law.⁴²⁸

Armed with the fundamental insights of Ronald Coase's theorem that rational actors, in a world of low transaction costs, will bargain their way toward the optimal use of their own resources regardless of the legal rule in effect,⁴²⁹ law and economics scholars have "fought long and hard to convince courts to restrict the use of immutable rules," including those based on public policy.⁴³⁰ They have been equally hostile to the premise that notice or consent matters significantly when contract enforcement is at issue.⁴³¹ Hence, special bargaining rules based on the sophistication of the parties or the degree of notice or consent accompanying agreement to disputed contract terms in consumer transactions find little support in the law and economics literature.⁴³²

427. See, e.g., Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2199-205 (1989); Peter Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 CARDOZO L. REV. 2263, 2265-77 (1989); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

428. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970); R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983); Joseph T. Janczyk, *Land Title Systems, Scale of Operations, and Operating and Conversion Costs*, 8 J. LEGAL STUD. 569 (1979).

429. Many scholars date the modern law and economics movement from 1960 when Professor Ronald H. Coase published his seminal article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). See POSNER, *supra* note 1, at 16 (discussing the importance of Professor Coase's article to the law and economics movement); Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994 (1990) (same).

430. Ayres & Gertner, *supra* note 28, at 89. Legal economists think that immutable rules such as those applied in public policy cases never further efficiency and suspect that such rules have weak or even perverse distributive effects. See Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 239 (1988) ("Coercive contract rules either have no efficiency or distributive effect or are inefficient with uncertain distributive effects."). Even if it can be shown theoretically that an immutable rule might be efficient, economists have concluded that "there is small hope that lawmakers will be able to divine the efficient rule in practice." Ayres & Gertner, *supra* note 52, at 733.

431. See Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535, 541 (1990) ("Contemporary law and economics scholarship suggests that inquiry into parties' intent in a particular case addresses the wrong question."). Law and economics scholars are not much interested in the process of contract-making except as that process affects the efficiency of the final contract. Indeed, people themselves matter little, for it is only "those lifeless abstractions, A and B," not the "identities of the contracting parties" that are relevant to law and economics. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1364, 1366 (1983). So long as the people making the contract make an economic choice, the contract should reflect rationality, and efficiency will be served. Posner has stated that "[r]ational choice in economics does not mean . . . conscious choice." Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1439 (1986).

432. A few legal economists have put forward tentative endorsements of special rules favoring consumers in commercial transactions. See, e.g., Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 483-91 (1974) (arguing that judges may be justified in second-guessing adhesion contracts signed by consumers but that regulators might be better intervenors); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979) (arguing that some regulatory response to contract might be appropriate in noncompetitive markets). Alan Schwartz later clarified his stance that "legal institutions other than courts should do the responding; judges

According to Judge Frank Easterbrook, judges who impose rules that interfere with contract enforcement are little more than well-meaning meddlers, who "almost invariably ensure that there will be fewer gains and more losses tomorrow" because "[a] right that cannot be the subject of bargaining is worth less, just as eagle feathers that cannot be sold are worth less to their owners."⁴³³ Similarly, according to Easterbrook, "[t]o forbid the contractual waiver [of a statutory right] is to make the class of statutory beneficiaries worse off, by depriving them of the opportunity to obtain the benefits of the statutory entitlement by using it as a bargaining chip in the process of contracting."⁴³⁴

c. *Libertarianism*

In modern legal theory, conservative scholars such as Richard Epstein and Judge Posner have blurred the distinctions between economic and libertarian theories of legal regulation to a point where these justifications are sometimes used interchangeably to argue for pro-market legal rules.⁴³⁵ The principal distinction between the two schools is that libertarianism is premised on autonomy, not efficiency.

Thus, libertarians argue that the legal system should guarantee the right of all individuals to be free of interference by others, including the state, in all their economic and social decisions, absent compelling proof that their actions will bring harm to others.⁴³⁶ The ideas of contract and

should do the enforcing." Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107, 116 (1986). Victor Goldberg has subsequently retracted his endorsement of judicial or even regulatory activism where consumer contracts are concerned. READINGS IN THE ECONOMICS OF CONTRACT LAW 167 (Victor P. Goldberg ed., 1989) (stating that he has an "increased faith in the ability of private parties to cope with, if not fully resolve, the problems associated with standard form contracts" and that "[i]t is not enough to say that [a term] was not understood or consented to by the buyer" because the objective reasonableness of the term may justify enforcement).

433. Easterbrook, *supra* note 6, at 10-11. Moreover, according to legal economists, when markets are even slightly competitive and parties sophisticated, legal attempts to impose limits on contract are ultimately futile because, at the margin, people will shift their activities to other arenas not burdened by legal limitations. See Charny, *supra* note 50, at 1846-47.

434. *Cange v. Stotler & Co.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring).

435. See Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 666 (1990). Indeed, Judge Posner has taken Richard Epstein to task for creating an "uneasy mix" of utilitarian and libertarian theories to support his radically conservative legal agenda. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 346 (1990). Judge Posner is just as guilty of trying to have it both ways, however. Even as Epstein has justified an autonomy-based theory of law on utilitarian grounds, EPSTEIN, *supra* note 3, at 334-38; Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988), Posner has attempted to use a libertarian concept—implied consent—to justify a utilitarian norm—efficiency—as the goal of legal regulation, Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491-94 (1980).

436. See, e.g., JAN NARVESON, *THE LIBERTARIAN IDEA* (1988); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); see also EPSTEIN, *supra* note 3, at 334-38 (discussing Nozick's position).

consent are therefore crucial.⁴³⁷ Modern libertarians have argued that imposition of any legal duties not assented to by the individual is suspect, if not unjustified, because contract is the preferred means of undertaking such duties.⁴³⁸ By the same token, frustration by the state of contractual obligations that parties have assented to is equally threatening to liberty and must be discouraged.⁴³⁹

Libertarians favor the public policy defense in exceptional cases where a contract, such as one to commit murder, threatens harm to someone, or when a contract purports to alienate those fundamental aspects of freedom that enable people to make their own choices.⁴⁴⁰ They generally oppose the doctrine, however, when it is used as a judicial device to equalize bargaining power or otherwise substitute state control for individual choice in economic and social exchanges.⁴⁴¹

d. Critical Legal Studies⁴⁴²

Critical Legal Studies ("CLS") scholars oppose all conventional defenses of the legal system—law and economics, libertarian, and neo-

437. See, e.g., Charny, *supra* note 50, at 1825 ("In autonomy-based contract theories, obligation arises from the express consent of the parties. The basis of obligation is the act of choice.").

438. Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 326 (1986) (citing the work of Richard Epstein, Robert Nozick, and Bernard Siegan); see also CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). Epstein straddles the libertarian and law and economics camps on contract issues. See *supra* note 435 and accompanying text; *infra* note 441 and accompanying text.

439. See Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985) (arguing that alienation of rights should be permitted except in narrow cases where harm is threatened to third parties).

440. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 195 (1986) ("[R]ights to possess, use, and control resources external to one's person are (generally) alienable, and . . . the right to possess, use, and control one's person is inalienable."). The reason for restricting transfers of body and soul is that such personal attributes are what make it possible for us to respect the rights of others. *Id.* at 186-95.

441. Mixing libertarian and utilitarian arguments, Richard Epstein argues that, if the unconscionability doctrine is used substantively to disregard provisions in contracts for standard consumer goods, the costs of setting agreements aside will needlessly raise the costs of goods to the "protected" class; further, it is unclear what legal rule should replace the provision struck down. In sum, the interference "serves only to undercut the private right of contract in a manner that is apt to do more social harm than good." Epstein, *supra* note 421, at 302 n.28, 304-05, 315. Charles Fried has a much more subjective view of consent, FRIED, *supra* note 438, at 57 (asserting that the moral force behind contract "is autonomy: the parties are bound to their contract because they have chosen to be"), but nevertheless opposes legal restrictions on standard form agreements under doctrines such as unconscionability because under competitive conditions neither buyer nor seller has any choice but to accept a competitive price. See *id.* at 103-07. Randy Barnett strongly believes that the objective theory of contract is justifiable on libertarian grounds. See Barnett, *supra* note 31, at 857-59. At the same time, he has stated that enforcement of standard form contracts is not justified by consent because "a party does not manifest consent to an obscure term that deviates from common sense and is hidden in pages of fine print simply by signing such a form." *Id.* at 890 n.183. Such disagreements illustrate how consent theorists reach different legal conclusions based on their *a priori* beliefs about what counts as consent.

442. David Charny has usefully distinguished neoclassical realists from CLS scholars by

classical realist alike. In the realm of contracts, CLS scholars share the neoclassical view that the common law is a regulatory system that has distributive purposes and effects,⁴⁴³ but they criticize as theoretically incoherent and ideologically deceptive the present system of neoclassical rules and standards.⁴⁴⁴ They also note that the libertarian perspective on contract is hypocritical in that "personal autonomy is limited, not promoted, by enforcing contracts" because contract enforcement "restricts the freedom of the party who disavows the earlier agreement."⁴⁴⁵ Finally, they view law and economics as little more than a thinly disguised program to promote capitalist domination.⁴⁴⁶

When they advocate any positive program of law reform at all, CLS scholars favor using immutable rules in contract law as a paternalist device to redistribute wealth, adjust relationships between various social classes, and reconstruct society in terms of their stipulated social ideal of justice.⁴⁴⁷ They generally support the public policy doctrine to the extent it is used to implement a "communitarian vision" and "collectivist schema" for society.⁴⁴⁸

2. *Theories of Justification: From Autonomy to Efficiency*

Reviewing the list of theories described above, it is clear that neither the critical legal studies nor neoclassical realist approaches to contract have exerted substantial influence on the modern Court. CLS critiques do not constitute a program of positive law reform⁴⁴⁹ and are, in any

labeling the former "conservative" and the latter "radical" communitarians. Charny, *supra* note 50 at 1837-40. Both groups believe law operates to achieve social and distributional ends, but CLS scholars are profoundly skeptical that anyone who makes law can do so neutrally. *See id.*

Feminist legal studies blend somewhat with CLS perspectives and are therefore not treated separately for purposes of this Article, although a more exhaustive survey would certainly do so. *See, e.g.,* CARMEL SHALEV, *BIRTH POWER* (1989) (arguing on feminist grounds against the use of public policy doctrines to restrict surrogacy agreements); Mary Joe Frng, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

443. *See* Singer, *supra* note 396, at 482, 541 (stating that law matters "because it determines how power and wealth are used and distributed").

444. *See* Feinman, *supra* note 20, at 1308-13 (describing neoclassical contract law as "a constructed reality, the form, substance, and method of which conceals its problematic, controversial, and ideological nature," *id.* at 1309); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 849-53 (1983) (asserting that contract law serves mainly to advance the interests of economically superior parties); Kennedy, *supra* note 21, at 580-83 (arguing that traditional contract law is too incoherent and indefinite to provide a useful guide for contracting parties).

445. Feinman, *supra* note 444, at 841.

446. *See* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985).

447. *See* Charny, *supra* note 50, at 1835-40; Kennedy, *supra* note 21, at 638-49 (advocating "ad hoc" paternalism to mobilize races, classes, and sexes to transform society).

448. Feinman, *supra* note 444, at 842.

449. *See id.* at 860 (admitting that the CLS approach to contract law lacks both a "utopian vision" and practical legal recommendations and urging that scholars undertake the task of transforming both society and experience in order to make a new vision of contract possible).

case, anathema to the conservative justices.⁴⁵⁰ Moreover, it is apparent from Part II that the modern Court has firmly rejected the neoclassical egalitarian ethos of the New Deal/Warren Court, with its broad interpretation of constitutional and statutory public policy and concern for bargaining inequality.

Differences with the *Lochner* Court notwithstanding, there are hints that libertarian values have played some role in the modern Court's thinking. Language used in a number of the public policy cases suggests that contract freedom ideology and the moral importance of keeping promises have entered into the Court's approach to contracts.⁴⁵¹

However, a closer look at the Court's public policy cases reveals that libertarian rhetoric is usually little more than window-dressing for arguments drawn with increasing frequency directly from a utilitarian, law and economics perspective.⁴⁵² The Court's economic efficiency justifica-

450. Indeed, CLS perspectives rarely get taken seriously even by liberal state and federal judges. According to a LEXIS search conducted by the author in December 1992, Roberto Unger's book, *The Critical Legal Studies Movement* (1986), has never been cited by a court—state or federal. Indeed, the name "Roberto Unger" appears only twice in any reported opinion by a state or federal court, and only one of these citations is serious. See *Parker v. Kentucky Bd. of Dentistry*, 818 F.2d 504, 513 (6th Cir. 1987) (Nelson, J., concurring in part and dissenting in part); *Charlton v. Charlton*, 413 S.E.2d 911, 919 n.3 (W. Va. 1991) (Neely, J., dissenting) (criticizing Unger's writing style). By contrast, various editions of Richard Posner's book, *Economic Analysis of Law*, have been cited in 60 state and 64 federal court decisions. Richard Epstein's book, *Takings: Private Property and the Law of Eminent Domain* (1985), has been cited in one state and 11 federal court decisions.

451. For example, in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Court spoke of "ancient concepts of freedom of contract," *id.* at 11, and the need to keep "solemn" promises as reasons for enforcing the forum selection clause at issue in that case, *id.* at 9, 12 & n.14; see also *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (finding that the right under § 1988 to collect attorneys' fees in civil rights cases in no way limits plaintiffs' freedom to contract with their attorneys for a fee higher than that set by statute). In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court concluded that domestic securities customers, "having made the bargain to arbitrate," will be held to their bargain." *Id.* at 242. In *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), in which the Court rejected a First Amendment challenge to enforcement of a newspaper's promise to keep a source's name confidential, the Court stated that the "law simply requires those making promises to keep them. The parties themselves . . . determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed." *Id.* at 2519.

The notion that judicial enforcement of a promise involves nothing more than implementing what "the parties themselves" have determined to be "the scope of their legal obligations" fits snugly into a modern libertarian view Sunstein wrongly ascribed to the *Lochner* Court, namely that the common law is more a "part of nature" than a "legal construct." See SUNSTEIN, *supra* note 19, at 4. In his dissent in *Cohen*, Justice Blackmun pointed out that, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court previously had held that a claim for intentional infliction of emotional distress against a magazine publisher was subject to heightened scrutiny under the First Amendment. *Cohen*, 111 S. Ct. at 2521 (Blackmun, J., dissenting). The only difference between *Hustler* and *Cohen* was the type of damages claimed: emotional harm in *Hustler* and loss of job and earning capacity in *Cohen*. See *id.* at 2521 n.3. However, Justice Blackmun failed to note the special place that contract enforcement occupies in the Court's hierarchy of common law principles, a position that helps explain the result in *Cohen* and the language quoted in the text.

452. The increasing substitution of efficiency rhetoric for libertarian, promise-based language may be one way to mark the transition from the Burger to the Rehnquist Courts. It was noted several times in Part II that the modern Court has followed a distinct pattern in its public policy

tions generally take the form of an assertion that virtually everyone concerned in the disputed transaction—except the party who loses the lawsuit—will be made better off by a rule that results in contract enforcement. This sort of statement is rhetorically compelling because it asserts that society as a whole will be better off if the contract is enforced.⁴⁵³ Libertarian concerns regarding promises, notice, and consent seem to evaporate in the face of a compelling efficiency justification.

Sometimes the Court justifies a contract enforcement rule on the grounds that it will benefit the affected market by facilitating transactions between similar parties in the future.⁴⁵⁴ In *Carnival Cruise Lines, Inc. v. Shute*,⁴⁵⁵ for example, there was no evidence of consent to or notice of the forum stipulation.⁴⁵⁶ The Court therefore supported its decision to enforce the clause entirely with arguments related to efficiency. First, the Court noted that cruise lines would save money in the future by being able to consolidate potential suits by far-flung passengers in one jurisdiction.⁴⁵⁷ Next, the Court observed that both passengers and cruise lines would save money by avoiding pretrial litigation on the issue of lawsuit location.⁴⁵⁸ Finally, and most revealingly, the Court said that enforcement of the forum selection clause was especially good for passengers because “it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting

cases of breaking new ground in a case involving sophisticated parties and then using the rule developed there to change the law in a consumer case. See *supra* notes 136-38, 151-61, 267-77 and accompanying text. The first cases in these lines of precedent typically came up during the Burger years, while the next were often Rehnquist Court opinions.

453. It might also be claimed that, if the loser of the case also stands to win in future transactions in the same market, the decision might be Pareto optimal. See POSNER, *supra* note 1, at 12 (defining a Pareto-superior transaction as “one that makes at least one person in the world better off and no one worse off”). The more common type of efficiency linked to utilitarian law and economics arguments is called Kaldor-Hicks efficiency or “potential Pareto superiority: The winners could compensate the losers, but need not.” *Id.* at 13.

454. This is the familiar *ex ante* perspective of law and economics, which is frequently contrasted to the *ex post* orientation of disputes before the court. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 181 (1988) (comparing *ex ante* and *ex post* perspectives as applied to regulation).

455. 111 S. Ct. 1522 (1991); see *supra* notes 156-61 and accompanying text.

456. The Court attempted to finesse the notice issue by claiming it had been conceded by the plaintiffs. The best the Court could muster as evidence of this concession, however, was to say that the plaintiffs “essentially . . . conceded that they had notice” of the provision, citing to a portion of the plaintiffs’ brief in which their lawyer stated that the clause was communicated “‘as much as three pages of fine print can be communicated.’” *Shute*, 111 S. Ct. at 1525.

457. *Id.* at 1527. The Court found it necessary to say that Carnival’s selection of Florida was “reasonable” because that was the location of its headquarters and the departure point for many of its cruises, even though the plaintiffs’ cruise departed from California. *Id.* at 1528. Such a statement gives the appearance of some sort of judicial review, but it is clear that this review was itself based on efficiency. The Court would have found any economically sensible venue equally acceptable.

458. *Id.* at 1527. These savings are reduced somewhat by the fact that passengers still may litigate the issue of venue under 42 U.S.C. § 1404(a) (1988) and the doctrine of forum non conveniens.

the fora in which it may be sued."⁴⁵⁹

The Court has also employed this "everybody wins" efficiency perspective in cases involving individualized bargaining situations where parties waive special statutory and constitutional rights. In *Evans v. Jeff D.*,⁴⁶⁰ the Court gave a general endorsement of contract as the optimal means of adjusting private relations even when statutory civil rights are at issue, concluding that a proscription against waiving statutory entitlements to attorneys' fees would reduce the attractiveness of settlement in some cases and "impede vindication of civil rights."⁴⁶¹ One of the most interesting passages in the Court's opinion dealt with its analysis of the role of § 1988 attorney fees as "bargaining chip[s]"⁴⁶² in the settlement of civil rights cases. The Court wrote:

Most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package. If fee waivers cannot be negotiated, the settlement package must either contain an attorney's fee component of potentially large and typically uncertain magnitude, or else the parties must agree to have the fee fixed by the court. Although either of these alternatives may well be acceptable in many cases, there surely is a significant number in which neither alternative will be as satisfactory as a decision to try the entire case.⁴⁶³

Similarly, in *Town of Newton v. Rumery*,⁴⁶⁴ the Court justified its decision to enforce a waiver of the right to sue for civil rights violations as good for both victims of constitutional torts and public officials who are defendants in such cases. The Court stated that it "hesitate[d] to elevate more diffused public interests [possibly endangered by enforcing release-dismissal agreements] above Rumery's considered decision that he would benefit personally from the agreement."⁴⁶⁵ The Court went on to note that police and other public official defendants would also benefit from enforcement of release-dismissal contracts because they could bargain out of "marginal" or "frivolous" suits.⁴⁶⁶

A last way that efficiency reasoning has entered into the Court's contracts cases is through the idea that contract enforcement rules maximize judicial as well as party economy. The quest for judicial economy

459. *Shute*, 111 S. Ct. at 1527.

460. 475 U.S. 717 (1986); see *supra* notes 304-06 and accompanying text.

461. *Id.* at 732.

462. *Evans*, 475 U.S. at 731 n.20 (quoting *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1112 (D.C. Cir. 1985)).

463. *Id.* at 734.

464. 480 U.S. 386 (1987); see *supra* notes 294-302 and accompanying text.

465. *Rumery*, 480 U.S. at 395 (plurality opinion).

466. *Id.* The Court did not mention the fact that the defendants would also benefit from bargaining out of meritorious claims.

has nearly achieved the status of an independent public policy in recent years as courts have confronted what many perceive to be a "litigation crisis."⁴⁶⁷ Whether or not this perception is accurate,⁴⁶⁸ it has certainly entered into the Court's efficiency calculations in some of the public policy cases described in Part II.

First, the Court's concern over docket pressure helps explain its selection of arbitration as a field of law reform. Off the bench, Chief Justice Burger openly lobbied for increased use of alternatives to the courts as a way of reducing docket pressure, singling out arbitration as having great promise.⁴⁶⁹ Statistics regarding court filings appear in the Court's arbitration decisions,⁴⁷⁰ and it is a simple fact that, given the narrow grounds for judicial review of an arbitration award,⁴⁷¹ cases referred to arbitration usually stay there, taking a burden off the courts.⁴⁷² Second, efficiency concerns regarding judicial time spent hearing pretrial motions inform the Court's public policy decisions.⁴⁷³

467. See RICHARD A. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* 63-64 (1985) (finding evidence of a litigation crisis); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977) (same).

468. An active scholarly debate is underway regarding the reality of the litigation crisis. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (questioning the reality of the litigation crisis).

469. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

470. The Court even went so far in one case as to use litigation statistics from the 1980s to justify its interpretation of congressional intent in passing the Federal Arbitration Act in 1925. See *Southland Corp. v. Keating*, 465 U.S. 1, 15 & n.8 (1984) (relying on 1982 litigation statistics for state and federal courts to support argument that, in 1925, Congress intended the FAA to be applicable in state as well as federal courts).

471. An arbitration award may be overturned only if the award is procured by fraud, if the arbitrators are obviously biased, if there is gross misconduct by the arbitrators, or the arbitrators fail to render a final award. 9 U.S.C. § 10(a) (1988).

472. For example, in 1980, before the modern Supreme Court decided most of its public policy cases interpreting the FAA, some 1768 cases were filed in federal court under the securities and commodities laws. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 368 & tbl. C-2 (1981). This compares with 830 arbitration demands filed with securities industry arbitrators for roughly the same period. Securities Industry Conference on Arbitration, *Report #6* 4 (August 1989) [hereinafter *Report #6*]. By 1989, the number of federal court filings had grown to 2608 per year, while arbitration caseloads had shot up to 6101. Compare ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 179 & tbl. C-2 (1990) (2608 new securities and commodities cases filed in federal courts in the 12-month period ending June 30, 1989) with *Report #6, supra* at 4 (reporting on total arbitration cases filed in 1988). Thus, in a decade that saw the largest stock market crash since 1929, the bulk of litigation over securities law violations was diverted to arbitration by virtue of the Court's reinterpretation of the FAA. There is little doubt that the Court intended this result.

473. For example, the "severability" doctrine announced in *Prima Paint* eliminates the need for courts to hear preliminary claims that contracts containing arbitration clauses were induced by fraud. Instead, the court can enter a simple order requiring the parties to arbitrate even if the contract was procured by fraud. See *supra* notes 118-21 and accompanying text. In *Shute*, the Court argued that "a clause establishing *ex ante* the forum for dispute resolution" would "conserv[e] judicial resources that otherwise would be devoted to deciding [pretrial] motions." *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991); see also *Stewart Org., Inc. v. Ricoh Corp.*, 487

Finally, cases rendering constitutional and statutory rights alienable have sometimes triggered Court concern over federal caseloads in fields such as § 1983 litigation⁴⁷⁴ and federal habeas corpus appeals.⁴⁷⁵

While litigation efficiency is a prominent factor in some public policy cases, it does not explain the modern Court's overall approach to contracts. First, the Court has repeatedly held that contract enforcement, not judicial economy, is the principle factor informing the Court's interpretation of the FAA.⁴⁷⁶ Thus, it has rendered decisions increasing the procedural complexity of litigation and arbitration in the name of fidelity to contract.⁴⁷⁷ Second, its forum and exculpation clause cases have clearly emphasized party-based efficiency arguments as well as judicial economy.⁴⁷⁸ Finally, many constitutional and statutory policy cases have arisen in unique circumstances that have prompted the Court to draw on efficiency principles beyond a concern for crowded dockets. First Amendment cases such as *Snepp*⁴⁷⁹ and *Cohen*,⁴⁸⁰ for example, were surely not decided in order to alleviate a litigation crisis.

To summarize, efficiency arguments that contract enforcement is

U.S. 22, 33 (1988) (Kennedy, J., concurring) ("The federal judicial system has a strong interest" in enforcement of forum clauses "to relieve courts of time-consuming pretrial motions.").

In the exculpation area, although the Court has never made this point, the enforcement of contractual risk-shifting clauses makes it possible to dispose of routine negligence cases without trials using preliminary screening procedures such as summary judgment. *See, e.g., Allison v. Nationwide Mut. Ins. Co.*, 964 F.2d 291 (3d Cir. 1992); *In re E.F. Hutton Southwest Properties II*, 953 F.2d 963 (5th Cir. 1992); *Buchan v. United States Cycling Fed'n, Inc.*, 227 Cal. App. 3d 134 (Ct. App. 1991).

474. *See Town of Newton v. Rumery*, 480 U.S. 386, 395-96 (1987) (stating that many § 1983 claims are "marginal and some are frivolous" and that the burden of defending them is "substantial"); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989) (critiquing Court's narrow treatment of § 1983 claims); Michael G. Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1493 (1989).

475. By strictly enforcing procedural default rules, the Court limits access of state prisoners to federal courts. *See Coleman v. Thompson*, 111 S. Ct. 2546, 2555 (1991); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 193-95 (1989); Lori Bienstock, Note, *Federal Habeas Corpus: The New Standard of Retroactivity*, 57 BROOK. L. REV. 865, 876, 890-94 (1991).

476. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (holding that "Congress' principal purpose" in enacting the FAA was to ensure "that private arbitration agreements are enforced according to their terms"); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (holding that the purpose of the FAA is to promote "judicial enforcement of privately made agreements to arbitrate" and rejecting the suggestion that "the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims").

477. In *Volt*, the Court held that a state law that imposed burdens on the arbitration process became part of the arbitration agreement for which the FAA mandated enforcement because the parties had selected it through a choice of law clause. The Court treated dispute resolution efficiency as a distinctly secondary concern. *Volt*, 489 U.S. at 478-79.

478. *See supra* text accompanying notes 454-69.

479. *Snepp v. United States*, 444 U.S. 507 (1980); *see also supra* text accompanying notes 282-85.

480. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991); *see also supra* text accompanying notes 286-90.

good for markets, good for parties, and good for courts have dominated the Court's approach to the public policy defense. This reliance on explicit utilitarian criteria and incentive-based argumentation marks a sharp break from the Court's egalitarian approach to contracts in the New Deal/Warren era and the classic libertarian philosophy of the *Lochner* Court. Whether this shift to efficiency is desirable is the question to which the Article now turns.

3. *A Critique of the Court's Efficiency Approach to Contract*

Although, as will be seen, this Article is critical of the modern Court's efficiency approach to contract, there is much to praise in the Court's actions. The recent collapse of communism in the Soviet Union and Eastern Europe has provided a vivid occasion for reaffirming the importance of clear rules to govern the enforcement of commercial agreements. It is apparent that the lack of such rules in these countries has placed a major obstacle in their path to becoming viable market economies.⁴⁸¹ The modern Court's approach to contract certainly does nothing to weaken the basic presumption of contract enforcement for business transactions reflected in the present neoclassical system of contract law. Calls by critical legal scholars for an open-ended revolution in contract jurisprudence are misguided and threaten to lead back toward the sort of conditions that former communist countries are now desperately seeking to escape.

In addition, specific aspects of the Court's public policy cases are legally sound. The FAA deserved considerably more deference than the New Deal/Warren Court gave it in *Wilko v. Swan*,⁴⁸² which the modern Court overruled. Recent studies have shown that arbitrators render decisions that appear statistically fair,⁴⁸³ so there is no reason to be suspicious of arbitration per se. Moreover, *Wilko* was symptomatic of the New Deal/Warren Court's unrestrained interpretation of statutory public policy that often flew in the face of legislative text and history and has led over the years to well-documented statutory excesses.⁴⁸⁴

481. See George Melloan, *Coase Was Clear: Laws Can Cure or Kill*, WALL ST. J., Oct. 21, 1991, at A19 (restating Ronald Coase's suggestion that "a system of contract law and the means to enforce it are fundamental" to the success of formerly communist countries seeking to make the transition to capitalism); Louis Uchitelle, *The Art of a Russian Deal: Ad-Libbing Contract Law*, N.Y. TIMES, Jan. 17, 1992, at A1 (describing the difficulty of doing business in the newly independent state of Russia without contract law because "both parties have to make money almost from day one" in order to maintain "mutual benefit and trust").

482. 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); see also *supra* text accompanying notes 115-17, 145-50.

483. Diana B. Henriques, *Wall St. Arbitration Programs Criticized*, N.Y. TIMES, May 12, 1992, at D1, D9 (reporting on a GAO study that found that securities customers won roughly 60% of the time in securities arbitration and, when they won, recovered an average of 60% of their demands).

484. In *Wilko*, the Court held that the 1933 Act's grant of jurisdiction was a substantive aspect of the statute, a broker's "compliance" which could not be waived. See 346 U.S. at 434-35. A grant

Finally, the New Deal/Warren Court's refusal in *Bisso*⁴⁸⁵ to permit sophisticated commercial parties to contractually allocate the duty to procure insurance to cover the risk of damage to a towed vessel seems antiquated. As noted by Farnsworth, public policies change based on changes in underlying commercial circumstances.⁴⁸⁶ The wide availability of insurance to cover risks of loss in maritime ventures, which may have been restricted in the 1870s when the Lochner Court decided *The Steamer Syracuse*,⁴⁸⁷ should lead courts to alter the common law rule to fit new realities. Although the modern Court has not yet overruled *Bisso*, it has restricted it to domestic settings and appears likely to overturn the case if given the opportunity.⁴⁸⁸

On the other hand, guided by the heavy hand of efficiency reasoning, the modern Court has gone too far toward contract enforcement in almost every field it has addressed. With respect to arbitration, the Court tortured both the text and history of the FAA to wipe out public policy defenses for consumers and small businesses based on state statutes and state common law rules⁴⁸⁹ when, by its own terms, the FAA applies only in "United States district court[s]"⁴⁹⁰ and "courts of the United States."⁴⁹¹ The great weight of the evidence from both the text and legislative history indicates that Congress intended the FAA to apply only in federal courts and that it would preempt neither state public policies nor common law rules.⁴⁹² Yet, the Court's zeal to promote contract enforcement of arbitration clauses has transformed the FAA from a procedural statute applicable only in federal courts into a national

of subject matter jurisdiction, however, is not something with which brokers "comply"; rather, it is a restriction on judicial power. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227-38 (1987).

Similarly, the Court's relentless expansion of the rights granted railroad employees under the FELA has led to a situation in which, despite a shrinking employee population and falling accident rate, injury payouts to workers have skyrocketed, making the FELA a lawyer's dream. *See Baker, supra* note 126, at 83. In 1990 alone, the railroads paid over \$900 million in personal injury claims, \$200 million of which went to lawyers. Daniel Howes, *Jury Awards Make Lawyers Very Jealous*, ROANOKE TIMES & WORLD-NEWS, June 14, 1992, at B1; *see also Baker, supra* note 126, at 84-92 (describing various attempts, all unsuccessful, to reform the FELA and force railroad workers to use regular state worker's compensation schemes). The notion that a court should "imply" a statutory non-waiver provision when Congress has considered and rejected such a stipulation transformed the Court into little more than a super-legislative conference committee to which disappointed interest groups turned to rewrite statutes. *See supra* notes 259-64 and accompanying text.

485. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *see also supra* text accompanying notes 208-11.

486. *See supra* note 62 and accompanying text.

487. 79 U.S. (12 Wall.) 167 (1870); *see supra* text accompanying notes 178-79.

488. *See supra* text accompanying notes 220-21.

489. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *supra* notes 141-42, 314-16 and accompanying text.

490. 9 U.S.C. § 4 (1988).

491. *Id.* § 3.

492. Commentators have been highly critical of the Court's reading of the FAA. *See Speidel, supra* note 150.

charter for arbitration clause enforcement.⁴⁹³

The same can be said for the Court's interpretation of the federal venue statute—a pure federal court “housekeeping” law—to preempt state public policies regarding choice of forum stipulations.⁴⁹⁴ In addition, although its narrow reading of the Warsaw Convention in *Chan*⁴⁹⁵ is defensible, cases involving drafting errors surely make the most compelling occasions for judicial creativity where statutes are concerned.⁴⁹⁶

The Court has even run roughshod over the traditional common law defenses to contract formation for fraud, duress, and incapacity—all essential elements of the economic model of contract.⁴⁹⁷ The consumers in *Shute* did not see their contract until after they had paid for their trip and were notified that their payment was nonrefundable.⁴⁹⁸ Even Judge Richard Posner, no friend of special default rules or the doctrine of procedural unconscionability, commented that the facts in *Shute* were “special” and perhaps warranted treatment as a case of unconscionable overreaching.⁴⁹⁹ In the arbitration field, *Rodriguez de Quijas* displays the worst sort of consumer exploitation—an unscrupulous securities broker, clients who did not read English, and an attempt to hide the arbitration clause in question.⁵⁰⁰ Yet the Court found no evidence of overreaching in its rush to enforce the contract.

At a more general level, the Court's contracts opinions expose five significant weaknesses of an exclusively economic approach to contract law. First, these opinions are sometimes other-worldly and display the abstract, formalistic quality of classroom exercises in economic logic.⁵⁰¹ As it reasons about models of perfectly competitive markets and rational bargainers, the Court quietly ignores the degree of misinformation and institutional unresponsiveness encountered in the real world. Such models are intellectually appealing, but they yield unjust and even inefficient results when they fail to describe reality accurately.

For example, in *Shute*⁵⁰² there was no evidence that cruise lines

493. See *Shell, Public Law*, *supra* note 117, at 397.

494. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (1988) (Scalia, J., dissenting) (“It is difficult to believe that state contract law was meant to be preempted by this . . . ‘federal judicial housekeeping measure.’”) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 636-37 (1964)).

495. *Chan v. Korean Air Lines*, 490 U.S. 122 (1989); see also *supra* text accompanying notes 225-27.

496. The costs of reforming simple drafting errors through the cumbersome legislative process counsel in favor of giving such flawed terms sensible, policy-based judicial interpretations.

497. Epstein, *supra* note 421, at 295-303.

498. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1529 (1991) (Stevens, J., dissenting).

499. See *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (Posner, J.) (“If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary.”).

500. See *supra* notes 145-50 and accompanying text.

501. See Singer, *supra* note 396, at 522-28 (arguing that “[l]aw and economics is very much an exercise in formalism,” *id.* at 522).

502. *Shute*, 111 S. Ct. at 1522.

would actually be forced by competitive pressures to pass on any cost savings accrued from forum clause enforcement to consumers.⁵⁰³ Yet the Court's opinion argued that such a pass-through "stands to reason" and justified its result.⁵⁰⁴ Indeed, there was no evidence that consumers would really prefer forum clause enforcement over an increase in ticket prices of a few pennies. Hence, there may be no net economic gain from enforcing such clauses.⁵⁰⁵ Yet the Court assumed that such a gain would

503. See *supra* notes 156-61 and accompanying text. Even assuming that some cost savings result from forum clause enforcement, Carnival may not operate in a market that forces it to pass on such savings to its passengers. Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 50 (1992) (noting that the cruise line in *Shute* could use the savings from forum clause enforcement for "increased profits"). Carnival may have some form of monopoly power in the location where the consumer wishes to depart.

Regardless, consumers have no choice in the matter. In the past 10 years, all major cruise lines have incorporated standard forum selection terms in their form contracts. See Donald Groff, *Cruise Lines Have the Home-Field Advantage*, CONDÉ NASTÉ TRAVELER, Oct. 1992, at 60. With no apparent competition on this basis, the cruise lines may be able to keep all of the savings resulting from the forum selection clauses. The point is that neither we nor the Court know how this market works. The Court nevertheless concluded that what was good for Carnival Cruise Lines was good for its passengers. This sort of reasoning will yield contract enforcement results every time, but such results may or may not be efficient.

504. *Shute*, 111 S. Ct. at 1527.

505. Contrary to the Court's analysis, when passengers' preferences are taken into account, there might not be a net economic savings from forum clause enforcement. Rakoff, *supra* note 415, at 1231-34. Enforcement of this clause essentially constitutes an economic loss to injured passengers, who must now pay more for litigation and receive less compensation for injuries caused by the cruise line. For less serious injuries and for consumers with low disposable incomes, the increased costs of litigation will cause them to forego asserting their rights completely and lead to their absorbing the entire economic loss of the injury negligently caused by the cruise line. Consumers who hire attorneys in the stipulated venue will have to absorb the cost of travel and lodging during the trial. They may also have to hire two attorneys—one in the home town and one in the stipulated venue. At the margin, home town attorneys who work on contingency will refuse cases that have the burden of increased expense associated with traveling to distant forums to assert injury claims. Thus, properly informed passengers would pay a few cents to get the cruise line to give up its right to sue at home—i.e., to buy insurance against the economic losses of litigating in Florida. Passengers' cognitive inability to correctly assess the risk of the loss they face, however, will lead them to systematically underinsure. The cognitive problem arises because shipboard injuries followed by the need to sue an unresponsive defendant are remote risks that will be heavily discounted by consumers who have been conditioned by advertising to expect a happy week on the water being attended to by a friendly crew. In addition, the added cost of litigating in the cruise line's home state if the passenger is injured is likely to appear not only remote but small in amount. Thus framed, if they notice the forum clause at all, see *id.* at 1179, most passengers will accept it. Yet passengers may have it wrong. If so, forum clause enforcement will be inefficient.

Collective action problems compound the cognitive disability discussed above. Even if passengers have good information about the risk of injury and wish to purchase a consumer-choice litigation clause, they will not be able to succeed in this negotiation unless most other passengers make a similar demand, thus signaling to the cruise line that it is profitable to standardize a pro-passenger clause. The transaction costs of organizing to communicate a preference on an issue such as this, however, may be prohibitive.

Nor can cruise lines effectively solve the passengers' collective action problem by offering competing forum clause terms. First, there are substantial internal transaction costs associated with altering standard forms, and firms will be reluctant to change them unless they can be assured of some return. See *id.* at 1224-25. Second, cruise lines that detect a consumer preference for home state litigation and that seek to take competitive advantage of this preference by offering it would

result from its rule. *Shute* demonstrates that, with economic efficiency, what you assume is what you get.⁵⁰⁶ If one imagines the world to be a perfectly competitive mechanism, in which price is the only relevant preference, then a rule favoring contract enforcement will appear compelling in almost every circumstance.⁵⁰⁷

Second, efficiency arguments conceal policy choices in the way they are framed. For an efficiency argument to work, its creator must carefully shape the transactional frame of reference so that the assumptions she makes regarding the incentive effects of her favored rule appear compelling.⁵⁰⁸ But, if one changes the frame of reference, one's conclusion about a rule often changes. For example, the Court used a sophisticated risk calculus in *Evans v. Jeff D.*⁵⁰⁹ to explain how attorney fees serve as "bargaining chips" in negotiations leading to contractual settlements of civil rights cases.⁵¹⁰ That analysis seeks an efficient rule for settling cases *after they have been brought*, but it excludes the risk that unconstrained waivers of fee awards by clients might discourage lawyers from bringing

find it difficult to communicate the value added by an item like this. *See id.* at 1225. This is similar to the problem faced by manufacturers in advertising a safety enhancement. *See* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 211 (1973). Cruise lines advertise great service and good times, not injuries and cheaper lawsuits. Consumer preferences on forum selection are therefore likely to get lost in the "noise" of a contract that mainly concerns price, level of accommodation, length of cruise, and destination.

506. Kennedy, *supra* note 21, at 586-87 (efficiency concept "is so inmanipulable as to permit the analyst complete leeway to smuggle distributive and paternalist (or anti-paternalist) motives into the analysis without acknowledging them"). Indeed, two commentators have reached opposite conclusions regarding the efficiency of the result in *Shute*. Compare Lee Goldnan, Comment, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992) (arguing that *Shute* announces an inefficient rule) with Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992) (arguing that the *Shute* result is efficient).

507. The off handed economic assumptions displayed by Justice Blackmun's opinion in *Shute* stand in sharp contrast to his much more carefully reasoned opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992), in which he and a majority of the Court demonstrated how information costs might permit a company to charge monopoly prices even in what appears to be a competitive market. Just why the modern Court might be inclined to adopt formalistic law and economics assumptions in contracts cases while refusing to do so in antitrust cases is a mystery that must be left to another article. It may be that the Court simply thinks harder about cases with higher stakes.

508. *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 410-21 (1981) (showing that choices analysts make in valuing externalities for purposes of framing economic efficiency analyses determine the conclusions of those analyses).

509. 475 U.S. 717 (1986).

510. *See supra* text accompanying notes 460-63. With respect to the narrow issue of whether bargaining over fees will improve the incentives to settle, the Court's opinion also depends on unwarranted assumptions about litigant behavior. The Court admitted that settlements could go forward on the merits without discussion of fees by having the parties independently estimate fees or by agreements to have fees fixed by the judge. *Evans*, 475 U.S. at 734. The Court nevertheless speculated without any factual basis that a "significant number" of cases would fail to settle under these conditions because of uncertainty regarding the attorney fee issue. *Id.* at 734-38. It then used this assumption to conclude that fee waivers would encourage "more" settlements and help to vindicate civil rights. *Id.* at 732-34.

cases in the first place. If one seeks the rule that will efficiently surface meritorious cases *before* litigation has begun, a different fee waiver rule might be appropriate.

Third, by minimizing the values of contractual notice and consent as foundational interests in contract formation, the efficiency approach to contract surreptitiously alters the underlying preassignment of rights. The result is a transfer of economic power without legislative blessing or even apparent judicial action.⁵¹¹ For example, cases such as *Shute* and *Rodriguez de Quijas* demonstrate how the use of standardized adhesion contracts, coupled with special presumptions favoring contract enforcement,⁵¹² have effectively shifted the background assignment of litigation rights.⁵¹³ In a consumer market where the majority of businesses use arbitration or choice of forum clauses in the contract boilerplate, consumers must bargain around this standardized "default" in order to gain access to a court. But because bargaining over such clauses is either difficult or impossible, the standardized term becomes an essentially immutable background rule.⁵¹⁴ Thus, while the Court appears to be doing nothing more than "requir[ing] those making promises to keep them,"⁵¹⁵

511. There is evidence that the assignment of a default has economic consequences in bargaining, yielding benefits to the party who enjoys the protection of a default rule. See Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 242 (1988) (stating that, based on experimental evidence, "a party with the contract presumption in its favor will be more successful in negotiations").

512. In both the arbitration and forum clause areas, the Court has added to the ordinary default rules of contract formation and interpretation a public policy *presumption* in favor of contract enforcement. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (construing the FAA to represent a legislative determination that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (finding that a choice of forum clause should be enforced unless to do so would be "unreasonable and unjust"); see also *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (Posner, J.) (suggesting that *The Bremen* requires forum clause enforcement in adhesion contracts unless the party resisting enforcement can show that enforcement would harm third parties).

513. Indeed, Ayres and Gertner use the example of an arbitration clause in a standard form contract to illustrate how not only weak bargaining power, but also the "strategic reluctance to reveal private information" can result in *ad hoc* default rules based on the terms presented in an initial offer on a standard form. Ayres & Gertner, *supra* note 52, at 764 ("[A]version to making a counteroffer to a standard form contract [containing an arbitration clause] can . . . exhibit a party's strategic reluctance to reveal private information" even though he "may have idiosyncratic preferences for additional due process protection."). Such barriers to bargaining result in a standard default that is inefficient. This is the case, for example, for the use of arbitration clauses in the security industry. See Tim Stone, *Making Nice to Your Stockbroker*, N.Y. TIMES, Aug. 27, 1989, § 3, at 10 (reporting that most margin and options accounts and 60% of all cash accounts in the securities industry contain arbitration clauses).

514. Trying to negotiate around a standard litigation rights term in a form contract is difficult because no one has authority to alter the term at the customer service level, and no one at the executive level wants to be bothered by someone who is making a fuss over their right to sue. Cf. Rakoff, *supra* note 415, at 1222-24 (arguing that "form documents" promote efficiency within firms by reinforcing institutional organization and hierarchy).

515. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991).

a hidden wealth transfer takes place. The final step in this shifting of the default rule may be to require parties to arbitrate or use the defendant's forum unless a contract provides otherwise.⁵¹⁶

Even the Court's construction of special default rules designed to assure that transactions are voluntary can mask a transfer of power when the Court's consent rhetoric is examined in light of the social context in which bargaining takes place. In *Rumery*, for example, the Court constructed a special default rule to assure that § 1983 waivers are voluntary.⁵¹⁷ It is clear from the context of the case, however, that many agreements obtained under substantial degrees of psychological if not physical duress will satisfy the Court's voluntariness test.⁵¹⁸ In such circumstances, the Court has brought about a very real transfer of the underlying assignment of the statutory right to damages for constitutional violations. One may argue, as Judge Easterbrook has, that a statutory right gives the right holder a sufficient "bargaining chip" to compel negotiation.⁵¹⁹ But negotiations often do nothing to improve the underlying powerlessness of many rights holders. Thus, bargaining solutions to social problems may simply give the more powerful party a contractual escape from statutory or other obligations.⁵²⁰

Fourth, the Court's economic approach to contracts provides no

516. Such a shift has already occurred in the field of maritime indemnity law. The Second Circuit, citing the widespread use of arbitration in the industry, bound ("vouched in") a maritime party to a prior arbitration, even though it never signed an arbitration contract, nor participated in the arbitration. *SCAC Transp. (USA) Inc. v. S.S. "Danaos,"* 845 F.2d 1157 (2d Cir. 1988). As the court explained: "The efficiencies afforded by vouching are as great in the case of maritime arbitration as in litigation, . . . and we perceive no reason to distinguish between the two processes for purposes of vouching because of a lack of consent to arbitration." *Id.* at 1163.

517. *Town of Newton v. Rumery*, 480 U.S. 386 (1987); see *supra* notes 294-302 and accompanying text.

518. The mere fact that the waiving party is threatened with potential imprisonment on what may be wholly unsubstantiated charges does not affect the voluntariness inquiry because this threat is present in every serious criminal case. Justice Stevens' dissent emphasized the inherent coercion of forcing people wrongfully accused of a crime to choose between "a threatened indictment and trial, with their attendant publicity and the onnipresent possibility of wrongful conviction, and surrendering the right to a civil remedy against individuals who have violated his or her constitutional rights." *Rumery*, 480 U.S. at 403 (Stevens, J., dissenting). Nor do the added factors of being poor or having a criminal record affect the analysis because the defendants have no control over these factors. Yet poor defendants with criminal records will have less choice than their middle class counterparts because their risk of criminal conviction is higher, and the likelihood that they could prevail in a § 1983 action is especially low. Cf. Joe Davidson, *U.S. Prosecutors Face Substantial Obstacles in Los Angeles Trial*, WALL ST. J., Aug. 6, 1992, at A1 (discussing jury bias in favor of police officers in cases involving police brutality); Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. TIMES, May 12, 1992, at C1, C11 (describing how middle class, white juries tend to sympathize with police and "blame the victim").

519. See *supra* note 434 and accompanying text.

520. For example, states have recently found that mediation of divorce and custody disputes institutionalizes bargaining disadvantages of certain women and have moved to ban mediation in some instances. See Junda Woo, *Mediation Seen As Being Biased Against Women*, WALL ST. J., Aug. 4, 1992, at B1 (noting that "many states . . . have begun reforming their mediation systems to make them more responsive to possible sex bias").

principled basis for distinguishing between alienable and inalienable rights. Economic reasoning presumes that voluntary transactions are evidence of an efficiency gain between the parties that the law should not disturb. Therefore, the presumption in favor of contract enforcement now extends to virtually every kind of voluntary agreement regardless of the social effects of creating markets in such things as human freedom, democratic speech rights, and police brutality.⁵²¹ Yet, putting certain rights beyond the realm of contract protects those who lack the economic or social resources to bargain effectively, usefully places the burden on those with greater power to obtain continuing consent from those whose cooperation they require, and recognizes that some matters are ethically or morally nontransferable as a matter of basic human dignity.⁵²²

For example, one could easily make an efficiency argument for enforcing the employment and tenancy contracts struck down by the *Lochner* Court in *Bailey v. Alabama*.⁵²³ The parties entered these relationships voluntarily, as that term is understood in law and economics scholarship, and the penalties imposed for breach of contract may have been an efficient means to deter habitual breaches by employees and tenant farmers. Thus, under an efficiency analysis, the modern Court might have decided *Bailey* differently. But, the *Lochner* Court valued principles of human dignity and freedom more highly than efficiency values of contract enforcement and properly refused to uphold the contract.⁵²⁴

In addition, rights to free speech and a free press are arguably so fundamental to the functioning of a democratic society that they ought not to be subjected to unregulated market ordering backed by the state power of contract enforcement.⁵²⁵ Waivers such as those approved in *Cohen*⁵²⁶ and *Snepp*⁵²⁷ fail to account for the important public interests in the free exchange of information.⁵²⁸ Moreover, when special default

521. As Judge Easterbrook has commented, "[c]ontracts rarely defeat the function of [a] statute so utterly that they may be set aside" under common law public policy doctrines. *Cange v. Stotler & Co.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring). Note how high economists like Easterbrook set the bar for application of the public policy doctrine. It is not enough that the policies of a statute or the constitution be compromised. They must be "utterly defeated."

522. Cf. *infra* notes 569-73 and accompanying text.

523. 219 U.S. 219 (1911); see *supra* notes 232-39 and accompanying text.

524. As Justice Stevens put it, "virtually all contracts that courts refuse to enforce nevertheless reflect perfectly rational decisions by the parties who entered into them," including an agreement to pay a police officer \$20 to not issue a traffic ticket or a contract to pay a usurious rate of interest. *Town of Newton v. Rumery*, 480 U.S. 386, 408 (1987) (Stevens, J., dissenting).

525. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 560-62 (1991) (describing free speech as a public good that does not lend itself well to market ordering).

526. *Cohen v. Cowles Media, Inc.*, 111 S. Ct. 2513 (1991); see also *supra* text accompanying notes 286-90.

527. *Snepp v. United States*, 444 U.S. 507 (1980); see also *supra* text accompanying notes 282-85.

528. The economic view of these decisions is that they promote the optimal use of information by relegating the issue to private ordering. Government agencies sometimes value information more

rules fail to assure that sensitive rights are transferred voluntarily, as in *Rumery*,⁵²⁹ immutable rules are appropriate and should be adopted.

Fifth, to the extent that judicial economy figures into the Court's efficiency calculus as an independent public policy,⁵³⁰ the Court reverses the proper roles of courts and litigants. Courts are supposed to serve the public interest by providing access to justice. In a doctrinal universe dominated by the policy of judicial economy, however, judicial convenience and preference may trump the public's needs. Efficiency arguments are particularly dangerous in this regard because they can become a means of satisfying a self-interested judiciary's preference regarding its caseload.⁵³¹ In short, judicial economy represents a particularly unsatisfactory and impoverished concept of justice on which to base public policy decisions.⁵³²

highly if that information is secret than if it is public. Contracts to keep secrets therefore preserve that value. Moreover, if news sources know that they can sue for damages if their names are revealed in violation of a promise, they will be more likely to give information to newspapers, and everyone will be better off. It is just as likely, however, that after *Snepp*, the public will have less access to information from inside obsessively and needlessly secretive bureaucracies; and after *Cohen*, newspapers fearing lawsuits for breach of contract will be more hesitant to promise confidentiality and will therefore obtain less information on public figures and others. As Justice Souter pointed out in his first dissent, *Cohen*'s extraordinarily narrow conception of the First Amendment gives short shrift to the public's interest in obtaining truthful information through the press. *Cohen*, 111 S. Ct. at 2522-23 (Souter, J., dissenting).

529. *Town of Newton v. Rumery*, 480 U.S. 386 (1987); see also *supra* text accompanying notes 294-302.

530. This Article has argued that litigation efficiency may be an important factor in some public policy cases, but has disputed the notion that this concern explains the Court's overall approach to public policy defenses. See *supra* notes 467-80 and accompanying text. To the extent that this Article underestimates litigation efficiency as a dominant concern, the arguments in the text take on added weight.

531. The judicial economy argument may sometimes conceal a policy judgment about the sort of litigation that judges prefer to hear. Cf. Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 921-22 (quoting 1987 remarks of Justice Scalia in which he complained of the "triviality" of the cases heard in federal courts). The civil litigation line outside the courthouse door is long enough, particularly with the current burdens of criminal litigation, that no rule barring specific types of civil cases is likely to result in fewer total cases being heard by the courts or fewer judges being needed. Nor, given a 40-hour plus work week, do such rules mean judges can hear the merits of significantly more claims. Rather, litigation-barring rules allow courts to shut out some parties so others can get to the front of the civil litigation line more quickly. The occasions when judges enforce litigation-barring rules thus sometimes reflect the judges' preferences regarding "worthy" litigants, as evidenced by the Supreme Court's disparaging comments about § 1983 and habeas corpus plaintiffs. See *supra* notes 474-75 and accompanying text.

532. See American Law Institute, *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 811, 823 (stating that "merely disposing of cases must not become a dominant goal" of the legal system, and alternatives to the present system of civil litigation "must lead not only to more dispositions, but also to better justice"); Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 348 (1948) ("Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state."); Eisenberg, *supra* note 12, at 801 (stating that the additional complexity of contract rules "involves costs of administration," but adhering to the bargain model in the face of a complex society "involves still greater costs to the system of justice"); Shell, *supra* note 109, at 661.

C. Toward a Revitalized Neoclassical Realist Model of Contract

This Article has brought into focus a neglected aspect of the modern Supreme Court's treatment of legal rules affecting contract as a means of better understanding the modern Court. The Court's overzealous application of efficiency principles in its contracts cases, however, raises normative questions regarding the jurisprudential alternatives that might exist to correct judicial overreliance on economic principles.⁵³³ The Article therefore turns, however tentatively, to the process of helping to build a theory that will justify more active judicial involvement in contract review than the modern Court has deemed appropriate.

In some measure, the answer lies in the still-dominant neoclassical paradigm of contract law, supplemented by the *Lochner* Court's classical libertarian view of public policy. The neoclassical realist perspective on contract is sensitive to factors such as market context, party status, commercial relationship, bargaining power, and public interests that the modern Court's decisions ignore.⁵³⁴

Attacks on neoclassical realism from both conservative and critical legal scholars in recent years, however, have left it damaged as a coherent, well-grounded theory of contract law.⁵³⁵ From the conservative point of view, neoclassical judges' attempts to interfere with market ordering result in windfalls to the few parties released from their obligations while similarly situated nonparties end up paying more for goods and services.⁵³⁶ From the radical CLS perspective, judges deciding cases in the realist tradition do little more than express their own class biases about the spending habits of other people.⁵³⁷

Scholars applying the methods of philosophical pragmatism to legal issues have started to reconstruct the neoclassical paradigm.⁵³⁸ The application of "practical reason"⁵³⁹ to contracts allows courts to incorporate not only concerns for efficiency, but also sensitivities to context and an appreciation of the limits of markets in allocating important human and economic rights.⁵⁴⁰ This Section offers several suggestions to assure

533. A number of judges have shown an inclination in recent years to follow principles from the law and economics movement. See William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REVIEW* 49, 99-100 (1991).

534. See *supra* notes 404-17 and accompanying text.

535. The crisis in liberal scholarship goes well beyond contract law. See, e.g., Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 *MICH. L. REV.* 189 (1988).

536. See, e.g., *supra* notes 433-34 and accompanying text.

537. See Kennedy, *supra* note 21, at 623, 648-49.

538. See Steven D. Smith, *The Pursuit of Pragmatism*, 100 *YALE L.J.* 409 (1990); *supra* note 394.

539. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 *STAN. L. REV.* 321 (1990); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 *TUL. L. REV.* 775 (1991) (discussing major theorists using a pragmatic approach to legal theory and practice).

540. Catharine Wells, *Situated Decisionmaking*, 63 *S. CAL. L. REV.* 1727 (1990).

that a revitalized neoclassical theory of contract, perhaps renamed "Pragmatic Contract Theory," will avoid the errors regarding public policy defenses illustrated by the cases explored in this Article.

1. *A Revitalized Theory Must Avoid Deterministic Use of Non-Empirical Efficiency Arguments*

There is a tendency on the part of some progressive contracts scholars to offer their own theoretical efficiency arguments to justify legal doctrines that would be objectionable under the efficiency analyses of conservatives like Epstein, Easterbrook, and Posner.⁵⁴¹ These efforts are misguided. Without empirical support, efficiency is in the eye of the beholder.⁵⁴² Efficiency arguments grounded on progressive assumptions about rational choice and market competition simply invite more and more complex modeling leading to essentially indeterminate policy conclusions. For example, progressive efficiency theorists such as Jason Scott Johnston,⁵⁴³ Daniel Farber,⁵⁴⁴ and Lewis Kornhauser⁵⁴⁵ have done much to demonstrate that economic arguments often simply justify "a set of assumptions and notions of efficiency."⁵⁴⁶ They have shown that the farther one moves from the simple world of economic models towards the complex reality with which judges and litigants must cope, the more obvious it becomes that "[e]conomic theory cannot provide the final answers to legal problems, if only because economic theory itself has no final answers."⁵⁴⁷ The deterministic use of nonempirical efficiency arguments therefore seems unlikely to advance the cause of a revitalized neoclassical theory of contract.

This position is also supported by the devastating critique of efficiency theory by CLS scholars,⁵⁴⁸ legal historians,⁵⁴⁹ and legal philoso-

541. The author has been guilty of this tendency. See Shell, *supra* note 406 (arguing that new rules are needed to deter opportunism efficiently in the contract formation stage); see also Kostritsky, *supra* note 21 (justifying judicial proscription against illegal contracts on efficiency grounds).

542. See Kennedy, *supra* note 21, at 603-04 (speculating that efficiency arguments appeal to some because they "legitimate[] the pretensions to power of a particular subset of the ruling class—the liberal and conservative policy analysts, most of whom are lawyers, economists or 'planners' by profession," *id.* at 604, and because these arguments transpose legal disputes over rights and power into arguments about the probability of facts).

543. Johnston, *Post-Realist Explanation*, *supra* note 418; Johnston, *Strategic Bargaining*, *supra* note 418.

544. Farber, *supra* note 418.

545. Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986).

546. Johnston, *Strategic Bargaining*, *supra* note 418, at 649.

547. Farber, *supra* note 418, at 339.

548. Kennedy, *supra* note 21, at 603-14; Kennedy, *supra* note 446, at 963-67; Singer, *supra* note 396, at 522-28.

549. Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293 (1992).

phers.⁵⁵⁰ Collectively, these attacks strongly suggest that ad hoc efficiency arguments will not satisfactorily justify a more active role for the judiciary in contracts cases any more than they have succeeded in justifying judicial restraint in the Supreme Court public policy cases examined in this Article. Until there is strong empirical data that refutes or confirms some of the efficiency hypotheses of the law and economics movement, neoclassical realists should value progressive efficiency theory primarily for its ability to debunk some conservative economic myths and as a means for exploring the policy dimension of the law in the classroom. Neoclassical realists should understand, however, that progressive efficiency theory and its conservative counterpart are exceedingly imprecise tools for deciding real cases involving real people.⁵⁵¹

2. *A Revitalized Theory Must Treat Standardized Form Contracts Differently from Fully Negotiated Commercial Agreements*

The modern Court's treatment of the public policy defense has collapsed all significant differences between standardized consumer and small business contracts, and fully negotiated business deals. A revitalized neoclassical theory must restore the basis for distinguishing between these two types of agreements.

Given the *Lochner* Court's sensitivity to differences between consumer and nonconsumer contract settings, it is perhaps no coincidence that the phrase "contract of adhesion" was coined by a scholar from the *Lochner* era, Edwin W. Patterson.⁵⁵² It remained for Karl Llewellyn to pick up this theme in the 1930s and 1940s and argue that standardized form contracts deserved different treatment because they tended to be "tremendously deflected to . . . one side"⁵⁵³ of the transaction—the sellers'—"even in . . . competitive spheres."⁵⁵⁴

In modern times, many scholars have attempted to find justifications for treating adhesion contracts differently from conventional business agreements.⁵⁵⁵ While Llewellyn based his treatment of adhesion con-

550. JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 213-29 (rev. ed. 1990); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 *PHIL. & PUB. AFF.* 3 (1975); Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *YALE L.J.* 1335 (1986); Ronald M. Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 191 (1980).

551. Ayres & Gertner, *supra* note 52, at 765-66 (admitting that an economic model based on efficiency is characterized by "practical indeterminacy" but arguing that "[b]ecause it will be extremely difficult for lawmakers to predict what behavior will be produced by a given rule, it will be just as difficult for lawmakers to maximize equity as it is for them to maximize efficiency").

552. Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 *HARV. L. REV.* 198, 222 (1919); Slawson, *supra* note 79, at 31.

553. Llewellyn, *supra* note 39, at 737.

554. *Id.* at 734; see also KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960) [hereinafter LLEWELLYN, *THE COMMON LAW*]; Karl N. Llewellyn, Book Review, 52 *HARV. L. REV.* 700 (1939) (reviewing O. PRASNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

555. See Eric M. Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating*

tracts at least in part on the nature of the assent given by the adhering party,⁵⁵⁶ these modern theorists have resorted to critiquing the underlying reasonableness of the contract terms in dispute. Todd Rakoff has asserted that onerous terms in form contracts should be presumed to be unenforceable unless the drafting party can prove that they are necessary to its business.⁵⁵⁷ W. David Slawson has argued that the courts should simply give effect to what they perceive to be the reasonable expectations of consumers.⁵⁵⁸ Eric Holmes and Dagmar Thürmann have argued for something close to a pure public policy treatment, giving the courts full power to exert "direct unfairness control."⁵⁵⁹ All of these scholars have argued, in one form or another, that what is important in form contract cases is that the court get the *outcome* right—i.e., that the court inquire into custom, markets, or parties' expectations and enforce the contract term that most comports with any or all of these. While this Article does not advance a comprehensive alternative to these theories,⁵⁶⁰ it can offer a fresh perspective: *process* concerns, not just outcome, justify the use of special default rules in cases involving standardized contracts.

Research findings from the social psychology of "procedural justice" highlight the importance of process concerns, making clear the difference between standardized contracts and conventional commercial agreements. Beginning with the landmark work by Professors Thibaut and Walker,⁵⁶¹ social psychologists and legal scholars have explored the phenomena of procedural justice by measuring the subjective feelings of satisfaction and evaluations of "fairness" experienced by parties when they have participated in various adjudicatory and other social processes.⁵⁶² While these scholars have not directly studied the contract

Standardized Contracts, 17 GA. J. INT'L & COMP. L. 323 (1987); Rakoff, *supra* note 415; Slawson, *supra* note 79; Slawson, *supra* note 413.

Indeed, Arthur Leff has argued that adhesion contracts should not be considered contracts at all, but rather should be treated as "things" and regulated by administrative agencies. Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147-57 (1970); see also Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 817 (1987) (arguing that "most consumer purchases [are] irrational" and that direct government regulation is needed to promote an efficient and just consumer marketplace).

556. LLEWELLYN, *THE COMMON LAW*, *supra* note 554, at 362-71 (contrasting "dickered terms" with boilerplate).

557. Rakoff, *supra* note 415, at 1242-43, 1247, 1280-82.

558. Slawson, *supra* note 79, at 42 (stating that the goal of the court should be the "fulfill[ment] of the parties' reasonable expectations in a standard-form situation" and acknowledging that this requires a "new definition of contract").

559. Holmes & Thürmann, *supra* note 555, at 420-21.

560. For a recent, comprehensive attempt to bring cognitive psychology and decision theory to the defense of treating consumer contracts differently from ordinary commercial deals, see Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893 (1990).

561. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE* (1975); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

562. There is a large and growing literature in the field. For an excellent summary, see E.

formation process, their overall findings have application to contract and may help account for the widely shared intuition that form contracts differ from conventional agreements.

Procedural justice scholars have discovered that people care almost as much about their ability to experience control over decisions that affect them and to have a voice in the processes leading to those decisions as they do about the actual outcomes they receive.⁵⁶³ Thus, it may be offensive to people to enforce standardized contracts, not just because the actual terms may seem onerous, but because they never had a meaningful opportunity to bargain over the content of the agreement before signing, or to dispute the reasonableness of the terms afterwards.

Process concerns therefore yield a somewhat different prescription for treatment of standardized contracts than the conclusions of Rakoff, Slawson, and Holmes. The procedural justice literature suggests⁵⁶⁴ that special default rules, requiring enhanced notice and judicial review of standardized terms, should be applied in order to provide an opportunity for citizens to participate in, and have a voice in, the process by which their economic rights are determined. By requiring that special clauses be highlighted, or perhaps separately consented to, special default rules add a measure of dignity to the contracting process that may enhance the parties' subjective feelings of fairness. Similarly, by providing some form of "reasonableness" review, special default rules allow people to participate in the determination of the nature and extent of their legal and economic relationships. Participation in these matters may help to eliminate the feelings of powerlessness and alienation that citizens experience when a standard term that was never brought to their attention is enforced in a summary manner.⁵⁶⁵

The procedural justice literature suggests that cases enforcing standardized contracts based purely on an efficiency analysis devalue important goals of citizen participation and choice in activities that trigger

ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988). Research has focused to a great extent on citizen encounters with the legal system, but it has recently expanded to include perceptions of fairness and justice in employment settings, *id.* at 173-202, and the political arena, *id.* at 147-72.

563. *Id.* at 203-20 (noting the four most important and robust procedural justice effects as being: "the enhancement of procedural justice judgments when those affected are granted voice or process control, the enhancement of distributive justice judgments and satisfaction with outcomes by procedural justice judgments, the enhancement of attitudes towards authorities by judgments of procedural justice, and the instigation of various salutary behavioral effects by judgments of procedural justice").

564. Needless to say, the author thinks that the problem of form contracting should be an area of potential research interest to procedural justice scholars.

565. The procedural justice perspective also may shed light on the degree of imposition consumers might feel regarding different kinds of standard clauses. For example, a choice of forum clause that stipulates a judicial forum 3000 miles away, as was enforced in *Shute*, might be viewed as taking more control away from a consumer and therefore being more of an imposition than a clause calling for arbitration before an unbiased tribunal in the consumer's home city.

potential state intervention into their lives. Individuals eventually lose respect for a system that forecloses all opportunity for participation in the decision to undertake an obligation and then enforces that obligation without regard to their individual preferences.

3. *A Revitalized Neoclassical Theory Must Find a Basis to Protect Important Rights with Immutable Rules*

A critical problem for neoclassical realist legal theory is its need to find new justifications for the many immutable rules that bar the transfer of important common law, statutory, and constitutional rights. This is one of the most profound intellectual challenges facing scholars who seek to revitalize the neoclassical paradigm, and its solution falls well outside the scope of the Article.⁵⁶⁶ Nevertheless, some comments may help to summarize the situation as it now stands.

The modern Court's approach to contract notwithstanding, many states continue to recognize a host of immutable rules forbidding various socially questionable contracts and terms, and imposing nonwaivable implied warranties, fiduciary duties, and duties of good faith.⁵⁶⁷ Yet, as noted earlier, the scholarly consensus that sustained these immutable rules in the era dominated by the egalitarian norms of Legal Realism has broken down under the sustained assault of conservative efficiency and libertarian theorists.⁵⁶⁸

Some modern neoclassical scholars have responded to the conservative challenge by justifying immutable rules either on concepts of distrib-

566. Indeed, symposia have been dedicated to this topic without conclusive result. See, e.g., J. Roland Pennock, *Epilogue to NOMOS XXXI, MARKETS AND JUSTICE* 328 (John W. Chapman & J. Roland Pennock eds., 1989).

567. P.S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 36-37 (4th ed. 1989) (commenting on "two massive trends [regarding contract law in both the U.S. and U.K.] running in opposite directions": a revival of freedom-of-contract principles based on economic analysis and "huge bodies of law largely derived from the period 1870-1980, when freedom of contract was in decline").

568. *Id.*; see *supra* notes 418-28 and accompanying text. Efficiency theorists have challenged immutable contract rules in virtually every context except enslavement. Indeed, Posner has even defended slavery contracts as a matter of theory. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 134 (1979). But see POSNER, *supra* note 435, at 376-77 (stating that the justification of slavery on wealth maximization grounds fails "the ultimate test of a moral . . . theory"—conformity to intuition). In addition, rights-based theorists such as Randy Barnett have argued that, in principle, all "rights to possess, use, and control resources external to one's person are (generally) alienable, and . . . [only] the right to possess, use, and control one's person is inalienable." Barnett, *supra* note 440, at 195; see also Thomas L. Hudson, Note, *Immutable Contract Rules, the Bargaining Process, and Inalienable Rights: Why Concerns over the Bargaining Process Do Not Justify Substantive Contract Limitations*, 34 ARIZ. L. REV. 337 (1992) (rejecting both paternalistic and efficiency justifications for contract restrictions and endorsing restrictions based on the inalienability of certain human rights). As Jean Braucher has commented, conservative critiques seek to constrain the scope of such immutable rules by asking: "what is sufficiently 'like' slavery also to be impermissible in the name of consent and freedom?" Braucher, *supra* note 48, at 719.

utive justice⁵⁶⁹ or by framing a new contract "paradigm" of procedural unconscionability founded on the need to protect individuals from exploitation of distress, incapacity, and ignorance, as well as to prohibit unfair persuasion in the context of market ordering.⁵⁷⁰ Others have taken a rights-based approach to immutable rules. Margaret Radin has proposed a theory of inalienability based on the need to "protect all things important to personhood" under an appropriate conception of "human flourishing."⁵⁷¹ Jean Braucher has taken Radin's standard one step further and asserted a right to minimum degrees of "decency, self-definition and participation"⁵⁷² in social and economic interactions. A third group has posited progressive efficiency justifications for various immutable rules.⁵⁷³

To date, these three attempts to find new justifications for immutable rules have not been notably successful. Many liberals feel that direct wealth transfers and progressive tax policies—and not contract law—are the appropriate means to achieve substantial distributional justice.⁵⁷⁴ In addition, both distributive and rights-based approaches largely fail to give courts or legislatures meaningful guidance in distinguishing those

569. See, e.g., Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 510 (1980) (arguing that distributive justice considerations should be permitted to influence the choice of contract rules); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 933 (1985) (stating that "specialized distributive goals can only be achieved through some kind of inalienability rule").

570. See, e.g., Eisenberg, *supra* note 12, at 799-801; Spencer N. Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. LEGAL STUD. 17, 22 (1988) (arguing for limiting freedom of contract in situations exhibiting exploitation because a free market economy often endows individuals with significantly different degrees of wealth and opportunity).

571. Radin, *supra* note 54, at 1903. Radin stakes out three aspects of personhood as worthy of protection: the exercise of free will, the construction of an integrated and continuous identity, and, perhaps most importantly, contextuality, or the relationship between the self and the social and natural world. *Id.* at 1904. This latter aspect of identity—its intimate and interdependent relationship to the world around it—differentiates Radin's view from the atomistic conception of self that characterizes the economic model.

572. Braucher, *supra* note 48, at 733.

573. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 765 (1983) (pointing to efficiency as a basis for paternalistic immutable rules, in addition to distributive justice, self-respect, and sound judgment); Rose-Ackerman, *supra* note 569, at 932-33 (discussing efficiency rationales for immutable rules based on externalities, imperfect information, prisoner's dilemmas, free rider problems, and cost-benefit analysis). An increasing amount of theoretical work on strategic interactions that calls into question certain aspects of the economic paradigm has come from research on the intersections between law and game theory. See ERIC RASMUSEN, *GAMES AND INFORMATION* (1989); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1989); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990) (reviewing RASMUSEN, *supra*).

574. Kronman, *supra* note 569, at 474 ("[L]iberals who oppose the use of contract law as a redistributive device do so because they believe that distributional objectives (whose basic legitimacy they accept) are always better achieved through the tax system than through the detailed regulation of individual transactions.").

instances that require legal intervention from those that do not.⁵⁷⁵ Finally, as noted earlier, progressive efficiency arguments often merely substitute one set of assumptions about the market for another, leaving others to agree or disagree based on their private policy preferences and biases.⁵⁷⁶ Of course, to the extent that progressive law and economics scholars demonstrate how economic analysis can be used to disclose an arbitrary and even perverse character to market ordering,⁵⁷⁷ they serve an important function in demystifying conservative economic theory and redirecting interest in courts and legislatures.⁵⁷⁸

The two areas of research that seem to hold the most promise for bolstering existing theories and breaking new ground for a theory of immutable rules are, respectively, empirical work in psychology and sociology on human cognition and preference formation, and modern theoretical investigations on the moral basis of law. For example, a substantial and growing body of empirical work demonstrates that people act in economically "irrational" ways in certain bargaining situations. Research from cognitive psychology shows that people are subject to systematic biases in the way they receive, understand, and frame information and thus make flawed strategic and competitive decisions.⁵⁷⁹ Such research may be helpful in justifying procedurally-oriented paternalistic contract rules.

With respect to distributive justice, research demonstrates that people have a preference for equitable distributions that is so strong they will often turn down economically advantageous offers if they feel they are not getting their fair share.⁵⁸⁰ Moreover, when dividing a surplus, people will offer others considerably more than the minimum that purely eco-

575. Radin admits that in an ideal world nothing would be subject to market exchange—a result that is clearly unworkable in a market economy. Radin, *supra* note 54, at 1915. As she backs away from the logical implications of her theory, however, her prescriptions for legal doctrine become too fuzzy to be helpful.

576. See *supra* Section III.C.1.

577. See, e.g., Ayres & Gertner, *supra* note 52, at 762-66 (discussing strategic bargaining incentives); Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293, 330-31 (1992) (discussing the potential problem of endless cycling in negotiations in the low transaction cost world assumed by Coasian law and economics scholars); Kuklin, *supra* note 560, at 950-60 (discussing problems of impacted information in many negotiation settings under progressive assumptions).

578. Ayres, *supra* note 573, at 1315 ("The 'new' game theory runs against the laissez-faire policy prescriptions of the Chicago school of law and economics.").

579. RICHARD H. THALER, *THE WINNER'S CURSE* 63-78 (1992) (discussing endowment effect, loss aversion, and status quo bias); Ellickson, *supra* note 418, at 35-43; Kuklin, *supra* note 560, at 970-82.

580. THALER, *supra* note 579, at 21-35 (discussing ultimatum games where two negotiating parties have full information regarding the size of the surplus to be divided and commenting on research findings regarding the "willingness of people to resist what they consider to be unfair allocations" even when it means passing up an opportunity for positive gain); Ellickson, *supra* note 418, at 48-49; Kuklin, *supra* note 560, at 982-93.

conomic reasoning would suggest is rational.⁵⁸¹ Such a passion for equity is not accounted for in economic models and may explain why legal rules promoting such equity have broad appeal.⁵⁸²

Finally, underlying many efforts that rely on distributive, rights-based, and progressive economic criteria to justify immutable rules is a core notion that social institutions like law have a moral content as well as an allocation function. Immutable rules that bar transactions in such things as babies, bias, police brutality, and intolerance serve a moral function that a purely economic approach to law cannot encompass.⁵⁸³ Immutable rules that remove certain important rights from the market may be society's way not only of accommodating human cognitive frailty and keeping explosive, equity-inspired emotions from disabling the bargaining process,⁵⁸⁴ but also of making important moral statements about the type of society we are or would like to become.⁵⁸⁵

581. THALER, *supra* note 579, at 35 (remarking on the tendency of allocators in ultimatum games to choose a 50-50 solution "even when the risk of rejection is eliminated").

582. One area needing further empirical work that would bolster the case for legal over market ordering involves the process of preference formation. Individual preferences may neither be as fixed nor as informed by self-interest as economists might wish. People appear to vary widely in their power of self-control and may not dependably make wise, self-interested decisions, as economists assume. Ellickson, *supra* note 579, at 43. In addition, society may help shape human preferences in ways that economics discounts entirely. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1132-33 (1986) (describing an alternative conception of "freedom" in which purely private preferences are understood "to be shaped by circumstances; they are social constructs" such that "legal intervention may be necessary in order to promote autonomy"). Obviously, a revitalized neoclassical contract theory would be deeply interested in empirical work on this subject.

583. Sunstein, *supra* note 582, at 1137 (discussing how the moral function of law may be "the change of objectionable preferences" and stating that "preferences may themselves be a function of legal rules: if this is the case, a change in legal rules will produce a change in preferences"); see Albert O. Hirschman, *Against Parsimony*, 1 ECON. & PHIL. 7, 10 (1985) ("A principal purpose of publicly proclaimed laws and regulations is to stigmatize antisocial behavior and thereby influence citizens' values and behavior codes."); Johnston, *Post-Realist Explanation*, *supra* note 418, at 1248.

584. Braucher also notes that immutable rules may foster community goals of social responsibility and responsiveness. She points out that immutable rules do not eliminate private agreements to waive rights or forego actions. Rather, immutable rules impose a duty on the party obtaining the waiver or promise to cultivate the *continuing consent* of the rights holder to the exchange. Braucher, *supra* note 48, at 720. For example, after *Rumery*, judicial enforcement of contracts waiving § 1983 rights against police misconduct may direct the energies of police toward constructing strong bargaining positions from which to obtain one-time releases from victims on a case-by-case basis. By contrast, Braucher would argue that under an immutable rule against legal enforcement of release-dismissal agreements, the parties in *Rumery* might still sign such an agreement as evidence of their mutual intent to put the incident behind them. But the police would be forced by the immutable rule to maintain good relations with the victim and perhaps the victim's community to secure a true release from their misconduct. In areas such as police misconduct, such social, as opposed to legal, ties may be more desirable means of adjusting relationships.

585. AMITAI ETZIONI, *THE MORAL DIMENSION* 4, 41-50 (1988) (asserting the fundamental importance of people's group identity as well as their individual identity and modeling the role of moral criteria in human decisionmaking).

CONCLUSION

This analysis has shown how the modern Court has found ways to implement the value of strict contract enforcement embraced by economists even as it has maintained a respectful distance from doctrines such as economic substantive due process and general federal common law, under which it might dictate contract freedom to legislatures and courts more directly.

The Article suggests several conclusions. First, despite its overall tendency to maintain constitutional continuity with the New Deal/Warren period, the modern Court has made a radical break with the New Deal/Warren Court where public policy defenses to contract are concerned. The modern Court has forthrightly overruled or sharply restricted public policy cases like *Wilko* and *Fuentes* from the New Deal/Warren period. In addition, it has either abandoned or curtailed other statutory or admiralty public policies that the New Deal/Warren Court advanced.⁵⁸⁶

Second, and more surprising, the modern Court is more *laissez-faire* about contract public policy than was the *Lochner* Court. Thus, in contrast to what Cass Sunstein and others have asserted, the modern Court not only relies on common law baselines but also reconstructs these baselines to suit its overall view of law and society. The *Lochner* Court had a well-developed sensitivity to defects in certain bargaining circumstances that led it to constrct both immutable and special default rules limiting the transferability of litigation rights, risks of loss, and even constitutional and statutory rights. When faced with similar situations, the modern Court has minimized concerns regarding bargaining opportunity, notice, and consent. Instead, it has constructed a contract regime that favors strict enforcement of agreements in even the most questionable of consumer and civil rights cases. In addition, as to certain types of agreements, the Court has created doctrines that go beyond even the common law in ensuring that contracts obtain swift and summary enforcement.

There are deep philosophical differences in the way the modern and *Lochner* Courts view the institution of contract as a social mechanism. The *Lochner* Court had a classical libertarian view of contract that retained for the courts a substantial role in reviewing agreements that might in some way cause harm to third parties and that offended libertarian norms of notice and consent. The modern Court has largely abandoned these foundations and substituted an efficiency calculus drawn

586. For example, the modern Court's approach to interpreting statutory anti-waiver provisions is quite different from the New Deal/Warren Court's reading of these statutory attempts to limit contractual alienation of statutory rights. See *supra* notes 291-93 and accompanying text. In addition, the modern Court has limited the admiralty public policy defense against enforcement of exculpation clauses to domestic cases, if any limits remain at all. See *supra* notes 218-21 and accompanying text.

from law and economics. Viewed through the lens of an economic analysis that assumes vigorously competitive markets and consumer preferences dominated by the issue of price, there are few conventional contracts not already barred by criminal law that pose a risk of harm to third parties. Moreover, if people and firms behave rationally, contract enforcement can almost always be seen as serving the goals of wealth maximization and allocative efficiency regardless of such issues as individual party consent.

The rise of economic efficiency as a dominant, explicit argument in courts' decisions in contracts cases raises a number of troubling concerns. Efficiency is a malleable concept in legal, as distinct from purely economic, reasoning. Efficiency reasoning also conceals policy choices, alters the background assignment of rights without appearing to do so, fails to weigh adequately important social and democratic values, and overemphasizes judicial economy as a public policy. These problems require answers from a revitalized neoclassical theory of contract, and the Article has offered some tentative suggestions to those who are engaged in the process of reinvigorating the inheritance of Legal Realism.

The question remains as to how far the modern Court will go with its new-found value of economic efficiency. The modern Court has been true to the constitutional understanding established in the New Deal period and has steered well clear of doctrines that would give it plenary powers over the regulation of contract. It is possible that, as the Court grows more confident in its powers of economic reasoning, various attempts by other branches of government to regulate contract will appear more and more arbitrary or "irrational," thus tempting the Court to engage in constitutional review.

Interestingly, the materials reviewed in this Article provide a reassuring perspective on this final question. The modern Court's public policy cases discussed in Part II exhibit nothing so much as a profound skepticism regarding the ability of courts to improve on the judgments of private actors in the marketplace. Such skepticism may be a manifestation of the fundamental value of judicial restraint that also undergirds the Court's temperance in reviewing economic regulation. The Court may be telling us that it will implement its efficiency values whenever it sees an opportunity to disengage the judiciary from contract review under admiralty, statutory, and constitutional law. It will nevertheless defer to explicit legislative commands that interfere with contracts when such commands are even remotely plausible because, in a democracy, legislatures, like private actors, may possess a wisdom that nonelected judges cannot and need not fathom.⁵⁸⁷ If this surmise is correct, then the

587. Such an overriding commitment to the value of judicial restraint would explain why, despite the Court's preference for efficiency reasoning in contracts cases, it has been relatively

real battle for "economic rights" will be fought in legislatures, and the program of law reform that seeks to make economic efficiency the guiding principle for social organization will have to win over not only the academy and the courts, but also the arenas of majoritarian decisionmaking.

reluctant to use the Contracts Clause as a vehicle for judicial review. This clause, which states simply that "[n]o state shall . . . pass any . . . Law impairing the obligation of Contracts," U.S. CONST. art. I, § 10, cl. 1, is so open-textured that a literal application of it would disable states from any meaningful role in the economy. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978) ("[L]iteralism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection.") (quoting *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934)). Faced with a constitutional provision that is, in its own way, as open-ended as the common law contract public policy defense, the Court has taken much the same judicial attitude toward both doctrines—that of minimizing the opportunities for judicial discretion to work mischief.