Introduction

The Imagined Individual at the Borders of Contract

This book is a genealogy of the emergence of our modern conception of contract. It argues, against conventional wisdom, that our current conception of contract is not the outgrowth of gradual, piecemeal refinements of a centuries-old idea of contract. Rather, contract as we know it was shaped by a revolution in private law undertaken by classical legal scholars toward the end of the nineteenth century. Further, the revolution in contract thinking is best understood in a frame of reference wider than the rules governing the formation and enforcement of contracts. That frame of reference is a cultural negotiation over the nature of the individual subject and his role in a society undergoing transformation.

American lawyers typically see contract as the art of enforcing promises, believing that for the most part, "contract law is confined to *promises*," and that, "No question for the law of contracts arises unless the dispute is one over a promise."[1] The view that contract is essentially about enforcing

1. E. Allan Farnsworth, *Contracts* 4 (3d ed. 1999).

promises is not limited to those who believe that the independent moral force of promises forms the underlying basis of contract enforcement.[2] Instead, this common conception is shared by a wide range of scholars and observers of contract, including some who might prefer to see a retreat from the emphasis on promise. Thus, it is an oversimplification but not a wild exaggeration to claim that, "To a lawyer, a 'contract' is a legally enforceable promise."[3] But if, as Patrick Atiyah argues, contract was not always primarily about promise, how did the current conception of contract take root?[4] How did the definition of contract as enforceable promise become so obvious? I attempt to awaken these questions by highlighting the relatively technical process by which the promissory conception of contract became the taken for granted backdrop to almost all discussions of contract.

For anyone who has experienced the first year of law school and probably for a much wider public, it is difficult to imagine an alternative view of contract. The consensus over the general definition of contract is sometimes understood as evidence of its unchanging character. Yet such consensus is not the mark of the necessity of the conception itself, but rather a trace of a successful revolution, one whose effects are so ingrained that they appear completely natural. The very essence of contract seems tied inherently to the idea of enforceable promises, and any characterization that displaces the centrality of promise seems to miss the point. In this sense, historical claims that ancient, or medieval, or early modern sources on the law did not equate contract with promise are seen as evidence, not that contract was once different, but that contract was not well understood. If we believe that the essence of contract is the enforceable promise, the history of contract becomes a story of the refinement of the art of making, classifying, and enforcing promises.

Such a history of contract is written from the present to the past, or, as it were, backward. If contract *is* enforceable promise, then the law of contract can be understood teleologically, as the sometimes bumpy road along which the enforceability of promises progressed.[5] Such a teleological history

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2. See, e.g., Melvin A. Eisenberg, "The Theory of Contracts," in *The Theory of Contract Law: New Essays* 206, 242–43, 259–64 (Peter Benson ed., 2001). For the view that the moral force of promise undergirds contract law generally, see Charles Fried, *Contract as Promise* (1981).

3. Thomas W. Joo, "Contract, Property, and the Role of Metaphor in Corporations Law," 35 *U.C. Davis L. Rev.* 779, 789 (2002).

4. P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

5. See E. Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract," 69 *Colum. L. Rev.* 576 (1969). Farnsworth's history is teleological in the broad view: "Over the course of the fifteenth

makes it easy to underestimate the role of the changes in our conception of contract in generating the frame for the modern discourse of contract, and of private law generally. The frame supplied by the conception of contract is the private ordering paradigm. Within the frame of private ordering, individuals are preexisting entities with preexisting preferences or desires. They use contract as a means to achieve their preexisting ends by exchanging their entitlements.[6] The development of modern contract law, according to the teleological picture, goes hand in hand with the expansion of the free market. And that concurrent development is the story of individuals capturing the power to make their own decisions about production and consumption, in accordance with their own preferences and interests. This much is so widely accepted that it is nearly forgotten background; it becomes the very stage on which the play of contract law is enacted.

My principal aim in this book is to undermine the stability of the perspective of modern contract discourse. The key to such a process lies in a close reading of contract cases and theory, side by side. Late nineteenth-century contract theory was revolutionary, in that it instated systematic, theoretical neatness and order into a chaotic mass of materials. Theoretical extrapolations of doctrine proposed and refined a framework for abstracting and understanding contract problems. But the case law is richer than the theory: the cases cannot be explained in accordance with the simplicity offered by the new contract theory and doctrinal articulation. They consistently have to deal more explicitly with the contaminating effects of relationships, precisely those elements that theory attempts to abstract from its treatment. The lasting theoretical framework installed by late nineteenth-century scholars articulates the autonomous calculating subject; the case law

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and sixteenth centuries the common law courts had succeeded in evolving a general basis for the enforceability of promises through the action of assumpsit. . . . [I]n view of the difficulty that mankind the world over has had in developing any general basis at all for enforcing promises, it is perhaps less remarkable that the common law developed a theory that is logically flawed than that it succeeded in developing any theory at all." Id. at 598–99.

6. Michael Trebilcock outlines the key features of the private ordering paradigm in distinguishing private ordering from traditional economies on the one hand, and command economies on the other:

> In the case of a market economy, production and consumption decisions are decentralized and depend on the myriad decisions of individual producers and consumers, acting in furtherance of individual preferences and incentives, thus minimizing the role played by social conventions or status in traditional societies and centralized information gathering and processing and coercion in command economies.

Michael J. Trebilcock, *The Limits of Freedom of Contract* 2 (1993).

offers the site for a more complex cultural negotiation of subjectivities, the site of conflict over the shape of individuality.

Contract, then, ought to be read as part of a wider cultural discourse, and at times, cultural conflict. In the late nineteenth century, the conception of contract was undergoing fundamental structural changes. At the same time, American culture more generally experienced a period of radical change and tumult surrounding the process of industrialization. The contest between labor and capital engendered by industrialization and the nationalization of the market formed a violent backdrop to wide-ranging cultural unease.[7] In conjunction with economic debates over the labor problem, there was an ongoing debate in various circles over the nature of subjectivity and individuality. On the one hand, there were proponents of a worldview that had faith in individual autonomy, and that argued that societal progress was dependent on the disciplined, autonomous self. Discipline and autonomy in this context were—with regard to the individual—keys to rationalization, elements of what Max Weber called "the specifically modern calculating attitude."[8] On the other hand, "the rationalization of urban culture and the decline of religion into sentimental religiosity further undermined a solid sense of self. For many, individual identities began to seem fragmented, diffuse, perhaps even unreal."[9] Modern subjectivity was, at the turn of the century, both an open question and a political issue.[10]

The conflict over the subject generated many responses, but complete avoidance of the issue was not an option. Contract discourse, in this respect, should be read alongside any number of elite cultural productions. There are various agenda on the table, but one recurring issue is the shape and role of the individual. Is the individual vulnerable, exposed, in need of protection? Is the individual responsible, in control? Does the individual choose freely, or succumb to pressures? Is the individual honest, or scheming? Generous, or calculating? And contract discourse is not unified within

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7. One author describes the labor-capital contest at the end of the nineteenth century thus: "Tens of thousands of industrial disputes, work stoppages, lockouts, and strikes raged throughout the northern manufacturing belt during this period and contributed to what became one of the most tumultuous and violent labor experiences in the history of industrialization." Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877–1900*, p. 13 (2000).

8. 1 Max Weber, *Economy and Society* 86, 107–9 (Guenther Roth and Claus Wittich eds., 1978).

9. T. J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880–1920*, p. 32 (1981).

10. See James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850–1940*, pp. 80–81 (1994).

itself. At the most basic level, even elite contract discourse would be split into at least two parts. First, there is a body of scholarly work or contract theory, produced by a handful of academic lawyers; second, there are reported cases. The case law is more complex on questions of subjectivity than the scholarship, a difference I take into account in the ensuing chapters. But for purposes of introducing the work, a reductive claim should suffice: late nineteenth-century contract discourse should be read in the context of that period's cultural upheaval. The individual posited by contract thinking is both forward- and backward-looking, but in fact represents precisely those elements of individuality that fin de siècle culture in America was either rejecting or mourning the loss of.[11]

The late nineteenth century, then, is a border, a site of transition and emergence, in two distinct but related senses. First, contract law and private law generally were undergoing a thorough transformation. The dominant conception of contract was distinguishing itself from the law governing a set of defined relations (entry into which was voluntary, but whose terms were set primarily by law), and morphing into a law of private agreement, with its terms set by the parties' actual consent or extrapolation from such consent.[12] American law was busy reorganizing itself around the concept of *will*, a reorganization that yielded our familiar categorizations of property,

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11. It is in this sense, contract discourse is of a piece with what Jackson Lears calls a half-conscious, self-deceptive and evasive pattern of faith in individual autonomy within dominant culture. See Lears, *No Place of Grace*, 17.

12. Roscoe Pound's generalization of the principle of relation as the mode of organization for common law thinking about private law is instructive, and worth quoting at length:

> If we must find a fundamental idea in the common law, it is relation, not will. If the Romanist sees all problems in terms of the will of an actor and of the logical implications of what he has willed and done, the common-law lawyer sees almost all problems—all those, indeed, in which he was not led to adopt the Romanist's point of view in the last century—in terms of a relation and of the incidents in the way of reciprocal rights and duties involved in or required to give effect to that relation. . . . [O]ur private law is the field where the idea of relation is most conspicuous as a staple juristic conception. On every side we think not of transactions but of relations. We say law of landlord and tenant, not of the contract of letting. We say master and servant, not *locatio operarum*. We say law of husband and wife or of parent and child or of guardian and ward, or for the whole, law of domestic relations, not family law. We say principal and agent, not contract of mandate; principal and surety, not contract of suretyship; vendor and purchaser, not contract of sale of land. We think and speak of the partnership relation and of the agency, liabilities, claims and duties which it involves—which give effect to it as a relation of good faith—not of a contract of *societas*. We think of the claims and duties involved in a fiduciary relation and of the legal incidents that give effect to trusteeship or executorship as a relation of good faith, not of the implications of the declaration of will involved in accepting or declaring a trust or qualifying as executor. We do not ask what are the logical deductions from the will of the parties involved in a sale of land. We ask what incidents attach in equity when the vendor-purchaser relation arises. We do not think of giving effect to the will of the parties

contract, tort, and unjust enrichment (or quasi contract) in private law.[13] Second, rapid industrialization, urbanization, the fragmentation of "island communities,"[14] and economic and class conflict set the stage for a cultural negotiation over a calculating individual subject. The interplay within legal discourse of these two aspects of late nineteenth-century American culture is the focus of this book.

The central theme I pursue is the intersection of the transformation in contract with shifts in the image of the individual subject. Whereas the dominant story is one in which expanding contractual freedom makes room for the preexisting individual, I argue instead that a particular view of contract (as individual-centered) and a particular view of the individual (as calculating, calculable, autonomous) are actually mutually reinforcing effects of historical processes that came to a head in the late nineteenth century. The novelty in the conception of contract advanced by late nineteenth-century theorists was the centrality and calculability of the individual. Contract, under this conception, is the private law of the parties to the contract: their obligations flow directly from their agreement, not merely in the sense that they have agreed to be bound, but also in that they have agreed on the specific terms that bind them. The parties, thus, are seen as making law for themselves. Analytically, this conception requires a strict distinction between those terms that the parties actually agree to and those that are imposed by law, a distinction difficult to maintain in practice. But the analytic coherence of the conception may not be the most important factor in the success of this conception of contract. Instead, the power of the conception to capture the imagination of academic lawyers

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to a contract of hypothecation. We consider what incidents are involved in the relation of mortagor and mortgagee and the reciprocal claims and duties that give effect thereto.

We must remember that the analogy which was ever before the lawyers and judges of the formative period of our law, the typical social and legal institution of the time, was the relation of lord and man, still represented in our law by the relation of landlord and tenant. Continual resort to this analogy, consciously or subconsciously, has made the idea of relation the central idea in our traditional mode of juristic thought.

Roscoe Pound, *Interpretations of Legal History* 56–58 (1930).

13. See Duncan Kennedy, "Toward and Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940," 3 *Res. L. Sociology* 3, 7 (1980) ("The premise of Classicism was that the legal system consisted of a set of institutions, each of which had the traits of a legal actor. Each institution had been delegated by the sovereign people a power to carry out its will, which was absolute within but void outside its sphere"). Duncan Kennedy, "The Rise and Fall of Classical Legal Thought" (unpublished manuscript, 1975).

14. See Robert H. Wiebe, *The Search for Order, 1877–1920*, p. 44 (1967).

and eventually almost everybody else seems to rely on the appeal of installing a powerful individual at the center of the system.

The fact that today it requires great effort to imagine anything but the agreement of the parties as a source of obligation is a testament to the success of this revolution in the conception of contract. The success runs so deep that two ahistorical tendencies seem to form widely accepted background assumptions. The first tendency is to forget that just prior to the classical period, contract thinking was dominated by an understanding that contracts were divided into pre-ordered types according to specified relationships, whose obligations were set as a matter of law. The parties could alter these obligations at the margins, but the source of the obligations was the relation, the contours of which were societally defined. The second tendency is to read the entire history of contract from the perspective of the current dominant conception. In other words, rather than assuming that different periods have been governed by different conceptions of contract, the tendency is to read the history of contract as an evolutionary process, a progressive rationalization of the law of promissory obligation. On this reading, contract was always about individuals creating their own obligations, even though law and theory may have misperceived the actual role of the parties or the source of their obligations.

While my argument is that this reading of contract is ahistorical and thus in some sense a distortion, it is important not to overstate the case. Classical contract scholars of the late nineteenth century did not invent out of whole cloth the idea of contract as private law making. In fact, the idea was popular in jurisprudential writing for at least a hundred years, and resonates strongly at least as far back as the writing of Hobbes, and possibly back into Roman law. The point is that classical scholars made the crucial leap of connecting the idea of individuals creating their own obligation with a systemic derivation of contract doctrine.[15] They thus linked contract law with an interpretation of the idea of contract: that linkage, with the individual as its crux or its glue, still forms the heart of the dominant conception of contract.

This book focuses on issues that are traditionally considered marginal to contract. The argument, however, is that these marginal issues are crucial

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15. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* 160–64 (1991).

in shaping the conception of contract at its core. Marginal issues shape the conception of contract in two distinct senses. First, the very shape or content of the conception is defined in opposition to those elements that are not considered part of the core. To the extent that marginal elements may change their character, or expand in scope, they may change the basic conception. Second, a focus on issues perceived as marginal, and on that perception itself, allows us to examine the conception of contract as a structure of thought, without taking a position as to the content of the structure. The focus on marginality, in this sense, is a focus on the *framework* that creates a debate, rather than on the positions within that debate. Thus, the first sense of marginality is thematic, while the second sense is structural.

In the course of this book, I treat three conceptual issues within contract doctrine: wagers, gifts, and implied obligations or incomplete contracts. Each of these areas, according to traditional visions of what is central and peripheral in contract, represents an exceptional case. A recurrent argument offered here is that the seemingly exceptional is crucial to defining the seemingly central. Thematic marginality may be contrasted to a second, structural sense of marginality. The analysis throughout this book sidesteps mainstream concerns within contract scholarship, in that it withdraws from the accepted practice of evaluating the normative arguments regarding the boundaries between, say, enforceable and unenforceable promises. Instead, it points us toward a different set of questions, oriented around the possible effects of the framework that fixes our gaze on the boundaries between such promises. My analysis in this book is marginal, then, in the sense that it does not participate in the normative debate over what the rules of contract should be.

The justification for this sort of theoretical investigation is that the existing debate functions as a limitation. In order to advance solutions to problems within a framework that supplies its own rules for recognizing a problem, an analyst must do two related things: she must accept those rules as properly defining the scope of inquiry, and she must ignore the possible effects that the framework engenders. My claim throughout is that the framework of debate has important limiting effects, so that before we continue answering its questions, we should reevaluate the framework itself. Another way to put this is to suggest that before we continue providing answers, we should spend additional time and energy thinking about whether we are asking the right questions. This view does not imply that we should

abandon the normative outlook on contracts, or the search for a quality normative theory of contract. It does, however, suggest that there is value in putting that project on hold temporarily in an attempt to dislocate it.

An example from the law of gifts should help clarify how the senses of marginality are related. In the nineteenth century, gifts were not a unified legal category, but rather sprang up in various areas of the law. An observer trying to understand the legal treatment of gifts would be faced with a series of problems of classification: should gifts be thought of alongside contracts or as a particular species of contracts? Are gifts actually a problem of property law, since they are often conducted through conveyances and often have land as their object? Are gifts mainly incidental to the law of wills? Or should they perhaps be a subcategory of the law of trusts? Complicating the classificatory problems, there were a host of gratuitous undertakings to be considered. These generally arose in the context of some kind of business arrangement, and it was clear that the participants did not experience them as gifts, but they were situations in which there was no directly bargained-for exchange.

Classical legal thinkers made order out of the chaos. According to these scholars, everything in contract could be conceptualized around two things: promise, coupled with consideration. Gift promises were important, because they defined the outer limit of enforceability. In theory, if a promise was met by a return, even a return promise (even a return promise of something insignificant), there was consideration, and therefore the original promise was enforceable, definable as contract. If there was no return, the promise was unenforceable, definable as gift. The simplicity of the formula was attractive, but its very economy made it rich in problems of application. In fact, the formula proved so problematic that contract scholars and judges have spent the intervening century arguing about where to draw the line between the enforceable and the unenforceable (literally, the question of the border of contract): should reliance on a gratuitous promise be protected? Should offers for unilateral contracts be enforceable? What should be done about gratuitous business promises, which the parties intend at the time they make them to be legally binding? How should the law treat promises to do something the promisor is already bound to do, either by contract or by law? These are the types of questions within the framework, and contracts scholars have tirelessly answered them and asked them again.

Over time, new justifications for answers have been proposed, and the

answers most widely accepted have changed as well. In other words, it is arguable that contract law at the turn of the twenty-first century draws the line between enforceable and unenforceable promises in a different place from the law at the turn of the twentieth century. The framework, however, is lasting. Its staying power stems in part from the fact that it is commonly assumed to be the only framework for discussing contract. The important question that remains unasked is: what is the effect of using this particular framework to evaluate the social behavior under discussion? My claim is that the framework gives us, its speakers, a sense that obligation is the result of voluntary choice, based on rational, calculating decision making, exercised by an individual. It teaches us that other forms of obligation are marginal and exceptional. The road to obligation leads to the market, passing through promise and consideration, that is, contract, which can be distinguished sharply from obligation that arises elsewhere, through gift or status. Thus, the framework of the debate establishes the story of private ordering, with its particular conception of a calculating individual, as the master narrative of obligation in society.

The book is divided into three parts. Part One is about the law of gifts and consideration. The chapters of Part One focus on the way the technical building blocks of doctrine contribute to the erection of a conception of contract. Classical legal scholars installed consideration as the centerpiece of contract law. On the doctrinal plane, this required a simplification and rationalization of consideration doctrine, which until the late nineteenth century had been a congeries of doctrines with a range of functions. Classical legal scholars unified consideration around the binary question of the enforceability of promises. In the process, they set out a framework for contract thinking that distinguished contract from gifts and from status, or societally imposed obligation. An analysis of litigation surrounding gifts and gift promises shows that the scholarly framework could not comprehend the cases neatly. Nonetheless, the framework was successful in reorienting the conception of contract law, and while ensuing scholarship has challenged the concrete results propounded by classical scholars, the framework for thinking about contract has remained intact. By turning contract into the law of enforceable promises, the classical legal framework succeeded in establishing the calculating promisor as the subject of contract.

Part Two deals with the paradox raised by wagers for the concept of contract. Contract law is at pains to distinguish illegitimate speculation from

legitimate risk allocation. At the turn of the last century, courts grappled with speculation in two important areas of contract litigation—commodities futures trading, and assignment of life insurance policies—just as courts today must confront their modern analogues in two fast-growing industries: trading in derivatives and viatical settlements. Part Two focuses on a transformative moment in the development of contract law when the question of gambling was eventually swallowed and internalized, as if the problem were solved. However, no analytic formula could distinguish gambling from risk allocation. Instead, the gambling question was subjected to a complex and indecisive cultural negotiation and displacement. A close reading of judicial rhetoric shows the role of legal discourse in coming to terms with the fears and uncertainties that accompanied the transition into modernity. More than straightforward prohibitions on certain types of conduct, judicial grappling with risk and uncertainty offered its audiences an image with which to identify: recognizing that an element of gambling existed in all economic activity, contract discourse made way for the emergence of an individual who could claim mastery even while acknowledging uncertainty.

Part Three considers the ongoing debate over incomplete contracts with special attention to its historical assumptions. The debate on incomplete contracts is polarized over the question of whether the completion of contracts by courts should proceed on the basis of an examination of all the circumstances up to the time of the dispute, or instead, only on the basis of the parties' putative bargain at the time of formation, had they been able to overcome the barriers to reaching explicit agreement regarding the contingency that generated the dispute. Both sides in the debate rely on a common historical narrative, asserting that the course of twentieth-century contract law has seen a gradual increase in judicial intervention into incomplete contracts, positing at one end a rigid formalistic refusal to complete contracts at the beginning of the century, and an increasing willingness since the New Deal to intervene, especially since the adoption of the Uniform Commercial Code. The participants in the debate divide over the normative evaluation of the history, with one group seeing progress where the other sees decline. An examination of cases from the turn of the century reveals, however, that the basis of the shared historical narrative is fundamentally flawed. The cases show that at the height of the classical period, courts were heavily involved in completing contracts for the parties, among other things by implying an obligation to perform in good faith. Exposing the shared historical narrative as flawed history makes the other effects of

this framework more visible, revealing that the deeper work of the narrative is to establish the conception of a free-standing, preexisting individual, and his counterpart, the "free market," as limitations on the goals to be pursued through contract.

I propose to show how marginal doctrines, the borders of contract, combine to generate a particular idea of the meaning of contract. That idea is centered around an image of the contracting individual, which functions as a focal point for identification. Here, the "borders of contract" show through in their double meaning. On the one hand, the borders of contract are precisely those areas where contractual liability is uncertain, where the scope of contract thinking reaches its limit. But in a deeper sense, the borders of contract refer to the active role of the framework of discourse in creating individuals: individuality, in the sense of the calculating subject, is created through enframing, the positing of borders—the roping off, defining, delimiting—that generates *individuation*. Calculation is based on singularity, on eliminating competing impulses and undefined responsibilities to others. This type of reckoning with the meaning of contract does not engage in the standard normative debate, which always revolves around the justifications for a particular rule choice. Instead, my concern is to show how the framework of these debates over rules generates a conception of contract, one that glorifies the individual at the price of sacrificing the imagination.