CONTRACT LAW AND DISTRIBUTION IN THE AGE OF WELFARE REFORM

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In this Article, I track the ongoing adaptation of U.S. contract law to the 1990s' contraction of the welfare state. Many courts partake of the prevailing ideological shift away from socially sensitive adjudication and towards market mechanisms of private autonomy. In legal scholarship, this phenomenon has received considerable attention in the past decade. Other courts, however, strive to compensate for the shortage of welfare services and to pursue redistributive goals. I provide examples of the latter kind of cases and then analyze the non-linear relation between doctrines, judicial redistribution, and welfare politics in both case law and scholarship. Finally, I discuss the role of socially sensitive judicial discourse in light of contemporary welfare politics and explain its continuing importance.

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INTRODUCTION

Jay Feinman's "Un-Making Law" and other scholarly contributions depict a sobering portrait of contemporary common law adjudication.[1] The picture is one of a monolithic ideological commitment to roll back, through case law and statutes, the progressive legal conquests obtained by common law courts through the 1970s. It is indeed true, in the specific realm of contract law, that cases like

1. *See* JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW (2004); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1135 (1995) (arguing that the new conceptualism in contract law reflects political conservatism); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 433–35 (1993); Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 455–56 (1999). *Cf.* Ellis Horvitz, *An Analysis of Recent Supreme Court Developments in Tort and Insurance Law: The Common-Law Tradition*, 26 LOY. L.A. L. REV. 1145, 1163 (1993) (examining post-1987 California cases and discussing them as samples of the "evolutionary common law process" rather than symptoms of an overall conservative trend).

Williams v. Walker-Thomas Furniture Co.[2] are now considered historical curiosities, that the duty to read and the dogma of private autonomy control a large portion of judicial opinions, and that the protection of weaker parties is no longer fashionable in contract cases. It is also true that this judicial trend is chronologically in sync with the political triumph of neo-liberalism, and with "the end of welfare as we [knew] it."[3] This picture, however, remains incomplete.

To begin with, the assumption that the triumph of autonomy in contract law is an unavoidable byproduct of political neo-conservatism is unwarranted. The existing variety of welfare systems, as they have developed over time in the Western world, suggests no necessary correlation between austere welfare politics and the celebration of contractual autonomy in court.

Another layer of complexity lies in the ambivalent relation between doctrines that constrain the scope of contractual freedom and the redistributive potential of contract law. The decline of such doctrines as unconscionability in a significant number of jurisdictions does not necessarily signal the oblivion of redistributive goals in the adjudication of private disputes. The doctrinal pillars of classical contract law are equally amenable to judicial outcomes informed by sensitivity to context and emerging socio-economic vulnerabilities.

Furthermore, scholars and activists increasingly pursue progressive agendas through contract strategies in a way that does not rely on socially sensitive modes of adjudication. In court, by the same token, formalist adjudication may be turned on its head and produce redistributive results while strictly adhering to the dogma of autonomy.

While the unmaking-law literature is in many ways analytically accurate, it underestimates these complexities and brings into a linear function three independent variables: the direction of welfare politics, the decline of restrictive contract doctrines, and the fading of progressive agendas in the context of contract law. I aim to unpack the simplifying assumptions of that literature and to disentangle the three variables from one another so as to provide a more nuanced account of contemporary case law and contracts scholarship.

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2. 350 F.2d 445 (D.C. Cir. 1965) (refusing to enforce a contract that the court found to be unconscionable at the time it was made); *see also* Toker v. Westerman, 274 A.2d 78 (D.N.J. 1970) (finding the retail installment contract for a refrigerator-freezer unconscionable, even without evidence of procedural unconscionability, because the contract price of more than $1,200 was more than two-and-one-half times the reasonable retail value of the unit).

3. The contraction of welfare benefits had already begun in the early 1970s. ALVIN L. SCHORR, WELFARE REFORM: FAILURE AND REMEDIES 18 (2001). However, the "end of welfare as we [knew] it" was explicitly called for by President Clinton. Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. TIMES, July 15, 1994, at A1. Clinton eventually signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, replacing the Aid to Families with Dependant Children (AFDC) program with the Temporary Assistance to Needy Families (TANF) block grant and eliminating the federal entitlement to public assistance. *See* SCHORR, *supra*, at 5, 7.

By this revised account, the problem is not so much in the actual change of adjudicatory outcomes, the foreclosure of equitable solutions to contract disputes, or the impossibility of pursuing regulatory goals by means of contract law. Courts still enjoy a powerful range of equitable contract doctrines, and progressive agendas can be adequately served by the most formalist of legal jargons. The problem, rather, lies in the unmaking of contracts *discourse*. Overt redistributive motives in contracts adjudication are used sparingly. Many judicial opinions depict equitable solutions as a way of reinforcing, rather than correcting, the logic of self-reliance and autonomy. In scholarly circles, the prevailing view portrays restrictive contract doctrines as a natural component of contract law rather than an expression of sensitivity towards social issues.

By contrast, I argue, restrictive judicial rhetoric, even if only in dictum, retains its importance against the background of welfare reform. Courts perform not only adjudicatory functions, but also important expressive roles. Judicial discourse helps to define socially acceptable conventions and informal norms of interaction. Independent of actual results or distributive outcomes, the occasional acknowledgment of socially sensitive issues in court contributes to the reassertion of norms of solidarity and merits note.

This argument proceeds in three steps. Part I provides three illustrations of contemporary contracts case law. These cases are remarkable because they contain explicit references to the ongoing contraction of welfare benefits and overtly adapt contract doctrines to new socio-economic realities. Both a sensitivity to context and the protection of vulnerable parties are featured prominently in these opinions, which do not allow the dominant rhetoric of self-reliance to push those factors aside. Contract law, at least within the identified jurisdictions, has only been partially unmade.

Part II analyzes relevant developments in recent legal scholarship and tracks the decline of distributive motives in contemporary contracts discourse. The view that contract rules, whether restrictive or sternly affirming of private autonomy, have no direct relation to questions of redistribution has become increasingly popular. This view now finds wide acceptance and ample support in judicial opinions. In a post-realist world, the occasional paternalist interference with private autonomy is considered by many to be an ideologically neutral element of contract law, no more fit to yield redistributive results than the classical enforcement of plain agreements.

One strand of contemporary legal scholarship, however, aims at reviving the importance of restrictive contract doctrines on discursive grounds. This strand originates in the European debates concerning the harmonization of contract law and finds fertile soil in U.S. literature on the law's expressive function. Part III reviews this literature and endorses the idea that the tone of judicial discourse may still bear on the ultimately political question of redistribution. Acknowledging social context in the adjudication of private disputes has long-term discursive salience and—if only for this reason—remains on balance desirable in the age of welfare reform.

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A few qualifying statements are in order. First, these pages only pertain to the common law of contracts because of its uniquely complex doctrinal apparatus. A large part of the unmaking-law literature, that focused on tort litigation and regulatory reform, remains at the margins of this inquiry. Second, the label "restrictive contract doctrines" is hereby used to indicate all common law rules that allow courts both to rectify the parties' apparent agreements and to depart from the canonical endorsement of contractual freedom.[4] Third, these pages adopt the intentionally broad category of socially sensitive adjudication to indicate overt judicial concern for the protection of socially weaker parties.[5]

I. SHRINKING WELFARE AND JUDICIAL RESPONSE: THREE EXAMPLES

The judicial opinions discussed in this Part are characterized by explicit references to the changed politics of welfare. They illustrate the persistent vitality of restrictive contract doctrines and of distributive motives in the adjudication of contract disputes. These opinions pertain to the award of restitution damages against a contracting agency, to the policing of unconscionable disclaimers, and to the invalidation of arbitration clauses. What makes each case remarkable is the courts' overt endorsement of a distributive rationale. Otherwise anodyne doctrines thereby find use for the purpose of correcting social imbalances resulting from an overall reduction of welfare benefits. The assumption running through these examples is that a sensible and nuanced enforcement of contracts is a perfectly apt instrument for addressing certain undesirable consequences of welfare reform.

A. The Breach of the Contracting State

An increasingly frequent way to improve the efficiency of state welfare delivery is to contract services out to private providers, who will be obliged to serve the public according to contract specifications.[6] This is privatization of the most tenuous kind, whereby the state (or district, county, etc., depending on the level of localism mandated for each type of service) still takes responsibility, albeit

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4. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 285, 293–95 (1995).

5. This category comprises both distributive and paternalist motives in adjudication. For analytical distinctions and definitions, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571–72 (1982). Both subcategories are viewed with suspicion in discussions about decision-making rules and coarsely associated with adjudicatory bias. Efficiency motives, by contrast, come across as mostly neutral guidelines for decision makers. *See id.* at 587–88.

6. Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 162 (2000) ("The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA)—which abolished the federal entitlement to financial assistance known as Aid to Families with Dependent Children, providing instead a system of block grants to the states—seems to be intensifying the privatization of benefits administration in at least some states.").

indirectly, to provide benefits for eligible citizens.[7] Service recipients are usually not considered third-party beneficiaries,[8] and therefore cannot directly enforce the contractual obligations of either states or private providers. The smooth running of contractual relations between service providers and the state is in many ways guaranteed by mechanisms of self-enforcement listed in each contract.[9]

There is still room, however, for disagreement concerning such issues as the interpretation of contract clauses, the extent of breach, or the availability of excuses. When such disagreements occur, both sides may invoke the common law of contracts in court. A close look at such disputes shows that some courts strive to adapt contract law to the changed circumstances of welfare delivery and use doctrines in a way that compensates for the shrinking of social benefits.

Sovereign immunity and public policy limit the application of ordinary common law to the contracting state. For instance, both promissory estoppel and recovery in quantum meruit are mostly unavailable to private plaintiffs against municipalities.[10] In general, equity is supposed to play a lesser role when the state is the defendant in a contract case. This judicial and statutory policy shelters the public coffers and confines the state's contractual activities within precise and predictable guidelines. Against this background, the case of Mrs. Poey appears quite remarkable.

Linda Poey operated a childcare service in her home in New York City.[11] The city referred public assistance recipients to her as an approved private day-care provider. The city's Human Resources Administration ("HRA") would directly compensate authorized providers for serving eligible families. The HRA issued a reference guide for private providers such as Mrs. Poey, which explained that the HRA would duly notify her of a participant's benefit termination. Upon receipt of the notification letter, Mrs. Poey would be expected to immediately stop providing day care for the newly ineligible families, since she would receive no

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7. *See* Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 85 (2003) (arguing against privatization of welfare services).

8. Freeman, *supra* note 6, at 156 ("Absent a procedural right to participate in contract negotiations, and without third-party rights of action, the beneficiaries of these contracts may be left with no avenues for participation or redress.").

9. *See, e.g.*, Hosanna Homes v. County of Alameda Soc. Servs. Agency, 29 Cal. Rptr. 3d 326, 331–33 (Ct. App. 2005) (placing foster children with a licensed foster family agency, which then has the duty to place the children with one of its certified foster families, receiving compensation for successful, continuous placements).

10. *E.g.*, 27 N.Y. JUR. 2d Counties, Towns & Municipal Corporations § 1324 (2001). A contract between a municipality or other political subdivision and another party may be held invalid or unenforceable whenever the power of a municipality to make a contract is limited, as to the mode or manner of contracting, and "no implied liability arises against a municipality for benefits received under a contract entered into in violation of these mandatory provisions." *Id.* The text further reads: "equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions," and "[i]t is plain that if the restriction put upon municipalities by the legislature for the purposes of reducing and limiting the incurring of debt and the expenditure of public money may be removed, there is no legislative remedy for the evils of municipal governments." *Id.*

11. Poey v. Eggleston, 777 N.Y.S.2d 227 (Civ. Ct. 2003).

further payments from HRA. When two of her customers lost eligibility, Mrs. Poey received no HRA notice, and she continued providing services in expectation of compensation for many months thereafter.

In the ensuing dispute, the court could have followed the most obvious precedents by holding that HRA could not contract out childcare services for non-eligible beneficiaries and by simply denying recovery to Mrs. Poey in quantum meruit against the city.[12] By taking that course of action, the court would have aligned itself with an established judicial practice, aimed at discouraging "the violation of statutes governing the expenditure of public funds" and at safeguarding "the taxpayers' interest."[13] But the very same logic of protecting taxpayers steered the court in the opposite direction. The court looked for less immediate precedents and eventually granted Ms. Poey full recovery for overdue tuition. The rationale for the court's choice was explicit:

> The child care services provided by Mrs. Poey are important and in the public interest. State law mandates work fare programs in order to reduce dependence on public assistance. Licensed care givers provide a safe environment in which to leave young children while parents receive important training to become self-reliant. This is clearly *in the interest of the tax payer* and a benefit to society. Conversely, not paying Mrs. Poey for the services she rendered may result in the reduction and quality of child care that families of public assistance recipients should receive.[14]

While the *Poey v. Eggleston* holding rests on a very narrow fact pattern, its argumentative logic is remarkable. In style, if not in practice, this is "making law" in the footsteps of a "Grand Tradition" dating back to *Britton v. Turner*, a 19th century employment case that expanded the reach of quantum meruit to protect employees' rights to compensation.[15] The rule against enforcing state obligations in quantum meruit stops where the reason behind it gives way to countervailing policies.[16]

Poey is not an isolated case. When the contracting state is in breach, the legislative trend of curtailing public expenditures may lead to two alternative policies in court: a pro-defendant course (as in the unmaking-law scenario), in which the court will excuse the state from all but the clearest obligation to pay,[17]

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12. *See, e.g.*, S. T. Grand, Inc. v. City of N.Y., 330 N.Y.S.2d 594 (App. Div. 1972) (dismissing a claim in quantum meruit against the City, based on an improperly awarded contract).

13. *Poey*, 777 N.Y.S.2d at 229.

14. *Id.* at 231 (emphasis added).

15. Britton v. Turner, 6 N.H. 481 (1834) (finding defendant actually received plaintiff's labor and thereby derived a benefit and advantage so as to be responsible for compensating for the labor actually performed).

16. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 158 (1951) (1930) ("[W]here the reason stops, there stops the rule . . . .").

17. *See generally* FEINMAN, *supra* note 1; *see also* Infant & Nutritional Prods., Inc. v. State, No. B177561, 2006 WL 759769, at *6 (Cal. Ct. App. Mar. 27, 2006) (rejecting private vendor's suit for damages against a public agency by declining to create or enforce any good faith obligation on the State to cater to the private vendor's best interests; a

and a pro-plaintiff course, if the court believes that the mid-1990s welfare reform demands strong commitment of states' funds and efforts in order for the reform to be politically and financially successful. Examples of the latter judicial mode, identified in *Poey*, range from preventing the diversion of state funds away from welfare programs[18] to rejecting the contractual interpretation of a public entity and ordering it to compensate a private agency acting in good faith.[19]

The unmaking-law picture, emphasizing the former policy but not the latter, fails to capture the multi-layered nature of contemporary common law.

B. Changing Necessities

Gavin W. was two-and-one-half years old when his parents, both with full-time jobs, enrolled him in a childcare program offered by YMCA of Los Angeles. The contract contained a release that exculpated YMCA from liability for injuries caused by its own negligence. Over a year later, another child in the program molested Gavin in the restroom of the childcare center. The childcare providers were aware of the child's propensity toward inappropriate sexual conduct, yet they did not prevent the incident. Gavin's parents sued YMCA for negligence, but the trial court upheld the release of liability and dismissed both breach of contract and negligence claims. The court of appeals saw things differently.[20] Justice Perluss began his opinion with long quotes from recent empirical studies, attesting to the "shortage of quality childcare options for California families"[21] and reporting that "[w]aiting lists for subsidized child care are especially long, due to insufficient funding."[22] He concluded that contracts for childcare services in California are necessarily "affected with a public interest," and that YMCA's release of liability was void as against public policy in light of the *Tunkl v. Regents of University of California* doctrine regarding exculpatory provisions.[23]

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decision against the private vendor was not adverse to the public interest because other vendors were eager and readily available to provide the service to public benefit recipients).

18. *See* Cuyahoga County Bd. of Comm'rs v. State, 832 N.E.2d 745, 750 (Ohio Ct. App. 2005).

19. *See* Corr. Servs. v. Davidson County, No. 02 CVS 739, 2004 WL 2413420, at *8 (N.C. Super. Ct. Sept. 30, 2004).

20. Gavin W. v. YMCA of Metro. L.A., 131 Cal. Rptr. 2d 168 (Ct. App. 2003).

21. *Id.* at 169 (quoting Linda Jacobsen et al., *Understanding Child Care Demand and Supply Issues: New Lessons from Los Angeles*, PACE POLICY BRIEF 01-2, June 2001, at 1).

22. *Id.* at 170 (quoting California Child Care Resource & Referral Network, *The California Child Care Portfolio, 2001: A Compilation of Data about Child Care in California, County by County* 1 (2001)).

23. *Id.* (citing Tunkl v. Regents of University of California, 383 P.2d 441 (Cal. 1963), in which the Supreme Court of California invalidated an exculpatory provision releasing a medical center from liability in part because the center's services were of practical necessity to the public); *cf.* Randas v. YMCA of Metro. L.A., 21 Cal. Rptr. 2d 245, 247 (Ct. App. 1993) (holding release that swimmer signed did not involve the public interest). Feinman cites *Randas* as a sign that "disclaimers will be allowed in more circumstances, as fewer activities are considered to have a public interest . . . ." FEINMAN, *supra* note 1, at 99.

Boilerplate waivers, disclaimers, and releases are commonly found in contract forms drafted by providers of recreational services. They are also commonly enforced by courts, based on a three-part rationale: (1) recreational activities, while not necessary, are socially desirable options; (2) the availability of such services would certainly shrink if providers were forced to internalize all costs of their employees' negligence; and (3) those who find ordinary disclaimers objectionable may choose to do without optional recreation.[24]

Any change in welfare regimes, addressing a wide range of social commodities, from housing and employment benefits to education and healthcare, is bound to affect the balance between social needs and market options. In particular, a reduction in subsidized services may increase the public's reliance on the availability of such services through private contracts. On the basis of this assumption, contract adjudication takes two different courses. Certain courts become particularly sensitive to the need of keeping the market alive and routinely uphold disclaimers so as to reduce the operating costs of private providers.[25] The appellate court decision in Gavin W.'s case is indicative of the opposite approach: when welfare shrinks, what used to be an option becomes a necessity and must legally be treated as such. If parents really have no choice other than relying on the private market for childcare services, it is essential that common law courts police blanket disclaimers and keep childcare standards from spiraling downward.

C. Unconscionability, Again: Employment Contracts and Arbitration

In the mid-1990s, Katherine Stone contributed to the unmaking-law literature with an article focused on employment contracts.[26] She offered the following portrait:

> In recent years . . . a new trend has emerged that threatens to turn back the clock on workers' rights. This trend is found in legal doctrines *and judicial opinions* that require workers to assert their statutory rights in the forum of private arbitration. . . . [E]mployers are using arbitration clauses as a new-found weapon to escape burdensome employment regulations.[27]

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24. Sharon v. City of Newton, 769 N.E.2d 738, 745 (Mass. 2002).

25. *See, e.g.*, Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (Ct. App. 1990) ("The public as a whole receives the benefits of such waivers . . . . [The options for recreational and sports activities] are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education.").

26. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

27. *Id.* at 1019 (emphasis added). As an example of such clauses, consider the contractual practice of Circuit City Stores, requesting that the following claims, among others, be submitted to arbitration:

> claims arising under . . . Title VII of the Civil Rights Act of 1964, . . . state discrimination statutes, state statutes and/or common law regulating employment termination, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge,

Stone's contribution came on the heels of two relevant U.S. Supreme Court cases. First, in *Southland v. Keating*, the Court established that the Federal Arbitration Act ("FAA") preempts state law when it purports to invalidate arbitration agreements in contracts involving commerce.[28] Second, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that statutory claims may be the subject of arbitration agreements and that the exclusionary clause in section 1 of the FAA is inapplicable to arbitration clauses contained in securities applications.[29]

Shortly thereafter, the U.S. Supreme Court further restricted the possibility of challenging arbitral clauses in two notable opinions: *Circuit City Stores, Inc. v. Adams*, which narrowly read section 1 of the FAA's exclusionary clause to except only the contracts of employment for classes of workers engaged in transportation,[30] and *Green Tree Financial Corp.-Alabama v. Randolph*, which compelled arbitration despite the possibility that the litigant might face prohibitive costs in enforcing her statutory rights.[31] At the dawn of the new millennium, enforcement of arbitration clauses in employment contracts seems to be as strong as ever.[32]

Yet, employment contracts remain substantially subject to state common law.[33] Thus, it remains the case that "generally applicable contract defenses may be applied to invalidate arbitration agreements."[34] In a recent string of cases, state

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wrongful arrest/wrongful imprisonment, and intentional/negligent infliction of emotional distress or defamation.

Brief of Appellant Circuit City Stores, Inc. at 10, Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005) (No. 03-35297).

28. Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984).

29. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). Section 1 of the FAA states: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Federal Arbitration Act, 9 U.S.C. § 1 (2000).

30. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

31. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90–91 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. . . . [But the] 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.").

32. *See* Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638-39 (2007) (noting that arbitration clauses and non-compete covenants, both routinely placed in standardized employment contracts, combine to shrink the package of employees' entitlements).

33. *See* Michael Schneidereit, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 HASTINGS L.J. 987, 996 (2004) (outlining the history of arbitration in U.S. law since 1925 and concluding that "the last vestige of a defense to mandatory arbitration of employment contracts . . . lies in state contract law").

34. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that contract defenses grounded in state law, such as fraud, duress, or unconscionability, may operate to invalidate arbitration agreements without contravening Section 2 of the FAA). This important holding goes hand in hand with another opinion by the U.S. Supreme Court, holding that the arbitration agreement signed by an employee did not prevent him from

contract doctrines have allowed employee–plaintiffs to avoid employer-drafted arbitration clauses and to bring their claims in court. What comes most conveniently to the aid of employees is the worn out, lame, and otherwise forgotten doctrine of unconscionability.[35] A typical component of this doctrine rests in the absence of meaningful choice for one of the parties to a contract.[36] In principle, employees are bound by arbitration clauses contained in standard job-application or employment forms.[37] But how meaningful is their choice? [38] Once more, the shrinking of the welfare state and the non-deferability of employment inform judicial findings and determine litigation outcomes:

> [I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after

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filing a complaint with the Equal Employment Opportunity Commission, which in turn retained full choice of forum and of relief against the employer. EEOC v. Waffle House, Inc., 534 U.S. 279, 297–98 (2002).

35. Feinman concedes that in extreme cases "[t]here continues to be much litigation about the unconscionability of particular arbitration schemes, and courts do strike down some as too one-sided." FEINMAN, *supra* note 1, at 107.

36. *See* Williams v. Walker Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960). By contrast, if consumers could have purchased from other vendors under different contract terms, or if they could simply have chosen not to buy at all, courts tend to dismiss all claims of unconscionability. *See, e.g.*, Brown v. Dorsey & Whitney, LLP, 267 F. Supp. 2d 61, 73–75 (D.D.C. 2003) (rejecting the employee's unconscionability arguments and ordering the employee to submit her claims to arbitration where plaintiff employee was a Harvard educated attorney who had a meaningful choice in the execution of her employment contract and the terms were not unreasonably favorable to the other party); Wayne v. Staples, Inc., 37 Cal. Rptr. 3d 544, 556 (Ct. App. 2006) ("There can be no 'oppression' establishing procedural unconscionability, even assuming unequal bargaining power and an adhesion contract, when the customer has meaningful choices . . . .").

37. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005). In *Caley*, the court stated:

> We recognize that the Ninth Circuit in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir.), *cert. denied*, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2003), found such a clause unconscionable. However, the Ninth Circuit was applying a California-law rebuttable presumption of unconscionability in employer–employee arbitration agreements. Georgia courts, unlike California courts, typically enforce contracts between parties of unequal bargaining positions, including in the employment context, and apply no such presumption.

Id. at 1378 n.21.

38. Stone remarked that "[a]t the moment of hire, employees lack bargaining power and are needful of employment, so they frequently agree to such terms without giving them much thought," but she described courts as almost uniformly indifferent to this point. Stone, *supra* note 26, at 1036, 1038. The one exception to this judicial indifference resided in opinions of the Ninth Circuit, holding that employees' statutory civil rights could not be waived without a "knowing agreement." *E.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994) ("Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes."); *see also* Arnow-Richman, *supra* note 32, at 663-64.

> employees may be particularly acute, for the arbitration agreement stands between the employee and *necessary employment*, and few employees are in a position to refuse a job because of an arbitration requirement.[39]

Courts confidently invalidate certain arbitration clauses on grounds of unconscionability under the state contract laws of California,[40] Montana,[41] and Washington.[42] Outside of the Ninth Circuit, even courts most favorable to the enforcement of arbitration agreements have hinted at the possibility of voiding them in cases of grave contractual imbalance.[43] While enforcing arbitration clauses, some courts often concede that different facts—involving less choice and more risks for the employees—might lead to a finding of unconscionability.[44] Others curb the most oppressive features of otherwise enforceable arbitration clauses.[45]

The courts' reasoning, unsurprisingly, pivots on the dearth of the employee's choice.[46] Because employment is even less deferrable today than it

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39. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (emphasis added).

40. *See, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893–94 (9th Cir. 2002). *Cf.* Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002) (finding Ahmed's contract was not adhesive because it was not a condition of employment and there was a choice to opt-out); *Armendariz*, 6 P.3d at 694; Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 399 (2006).

41. Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 941 (9th Cir. 2001) (applying Montana law).

42. Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1262 (9th Cir. 2005) (applying Washington law).

43. *E.g.*, Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 615 (D.S.C. 1998) (denying motion to compel arbitration where there was "a marked disparity in the parties' bargaining power" and the "arbitration scheme fails miserably to satisfy even the most basic requirements of a commercially reasonable arbitration scheme"), *aff'd*, 173 F.3d 933 (4th Cir. 1999).

44. *See, e.g.*, Musnick v. King Motor Co., 325 F.3d 1255, 1259 (11th Cir. 2003); Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943, 947 (8th Cir. 2001) (recognizing "the potential that substantial arbitration fees may make an arbitration agreement unconscionable"); W.K. v. Farrell, 853 N.E.2d 728, 737 (Ohio Ct. App. 2006).

45. Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 (8th Cir. 2001) (finding the inclusion of a damages-limitation clause did not affect the validity of the entire arbitration agreement, severing the invalid provision, and enforcing the remaining agreement).

46. *See generally* Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931 (10th Cir. 2001) (franchise agreement context); Perez v. Globe Airport Sec. Servs., 253 F.3d 1280 (11th Cir. 2001), *vacated*, 294 F.3d 1275 (11th Cir. 2002); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 779 (D. Tenn. 2002), *rev'd and vacated*, 367 F.3d 493 (6th Cir. 2004).

once was, employees are often found to lack meaningful choice when signing on to the terms unilaterally drafted by prospective employers.[47]

Within the Ninth Circuit, the tendency to invalidate arbitration clauses on grounds of unconscionability is most pronounced.[48] At the opposite end of the spectrum, the Seventh Circuit tends to uphold employment contracts as written, arbitration clauses and all, because "[o]ne aspect of personal liberty is the [job applicant's] entitlement to exchange statutory rights for something valued more highly"—employment.[49]

Interestingly, choice and individual freedom are the justifications offered by each end of the spectrum when taking their respective paths of adjudication.

D. Unmaking Law, Revisited

The cases analyzed in the foregoing pages provide an essential complement to the unmaking-law landscape. Descriptively, these cases suggest that the legislative reforms of the 1990s have not eradicated distributive motives from contracts case law. Even when federal statutes embrace conservative ideologies, state courts retain meaningful room for maneuver and handle cases in ways that are not ideologically predetermined.[50] The opinion of the *Poey* court, for instance, forces the contracting state to internalize the costs of notification failures, both in the *Poey* dispute and in future cases in the same jurisdiction. It is therefore meant to be as distributive as the decision to create an administrative system for the monitoring of welfare agencies, with a consequent increase in public spending. The holding relates to an unusual fact pattern, and is therefore of limited practical significance, but it is still strongly characterized by the goal of softening, judicially, the hard edges of the reformed welfare regime. In this respect, the "conservative campaign to roll back the common law" has not entirely succeeded.[51]

These cases also make the general point that there is no necessary correlation between trends in welfare politics and trends in contract law. The relative generosity of welfare benefits, the incidence of restrictive doctrines, and the pursuit of redistribution by way of contracts adjudication, may develop synergies and proceed in sync,[52] but they may as well be orthogonal to one another.[53]

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47. Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1234–35 (2002).

48. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1176 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004).

49. Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc., 294 F.3d 924, 929 (7th Cir. 2002); *see also* Perdue v. RBC Mortgage Co., 156 Fed. App. 824 (7th Cir. 2005).

50. *See supra* notes 33–35 and accompanying text.

51. FEINMAN, *supra* note 1.

52. The lengthy opinion drafted by Judge Francis in *Henningsen v. Bloomfield Motors, Inc.* presents a telling sample of judicial paternalism inspired by legislative trends. 161 A.2d 69, 85 (N.J. 1960).

Comparative legal history provides pertinent points of reference. At the dawn of the 20th century, continental Europe displayed a net increase in social legislation on one hand, and a staunch adherence to autonomy in contract law on the other.[54] Progressive politics and formalist judicial entrenchment can be compatible bedfellows. By the same token, a legislative move towards welfare austerity may generate compensatory judicial doctrines and enhance the role of paternalism in the adjudication of private disputes. Again, Europe offers convenient models of this phenomenon. Until recently, Sweden was characterized by generous welfare benefits *and* by a dominance of distributive concerns in court. Because of global economic pressure and EU-mandated constraints, the country is now experiencing a significant shrinking of state-provided benefits, an ongoing transformation prompting Swedish courts to cling to equitable discretion, and to resist the legislative turn to self-reliance.[55] As illustrated above, the landscape of contemporary case law can and does host similar judicial phenomena. The revival of unconscionability and the expansion of the *Tunkl* doctrine in state courts constitute conscious and perfectly plausible compensatory techniques.

> The Legislature has intervened in the public interest, not only to regulate the manner of operation on the highway but also to require periodic inspection of motor vehicles and to impose a duty on manufacturers to adopt certain safety devices and methods in their construction. It is apparent that the public has an interest not only in the safe manufacture of automobiles, but also, as shown by the Sales Act, in protecting the rights and remedies of purchasers, so far as it can be accomplished consistently with our system of free enterprise.

Id. (citation omitted).

53. *See* Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 880–81 (1999) (questioning the assumption that the 1990s' neo-conceptualism in contract law has really favored economically privileged parties).

54. *See* William E. Forbath, *Politics, State Building, and the Courts, 1870–1920*, *in* 2 CAMBRIDGE HISTORY OF LAW IN AMERICA 1092, 1093, 1158 (Michael Grossberg & Christopher Tomlins eds., forthcoming December 2007) (explaining that in the early 20th century, European nations created broad systems of public social insurance, administered by a strong, centralized bureaucracy. As a consequence, European courts did not need to take upon themselves the U.S. courts' task of "striking the balance between the old liberalism and the new."); FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 431–33 (Tony Wier ed. & trans., 1995) (noting that in pre-World War I Germany, labor law and other aspects of social regulation had to be excised and separated from the system of private law in order to maintain its internal coherence).

Analogous reactions to regulatory intervention can be found in the U.S. judiciary. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 390–91 (Conn. 1980) (Cotter, J. dissenting) (defending the doctrine of employment at will in all areas but the ones expressly contemplated by legislation).

55. *See* Rasmus Goksor, *Jurisprudence on Protection of Weaker Parties in European Contracts Law from a Swedish and Nordic Perspective*, 6 CHI-KENT J. INT'L & COMP. L. 184, 249–50 (2006), *available at* http://www.kentlaw.edu/jicl/articles/spring2006/GOKSOR.pdf.

E. The Ambivalence of Judicial Policies and Doctrines in the Age of Welfare Reform

The case-law examples provided above also make an important analytical point. Even when courts seem to embrace what Feinman describes as a dominant, pervasive ideology[56] (celebrating autonomy over solidarity), varied judicial results are possible. As observed, the very rationale of switching from social assistance to market-based services may lead judges to constrain contractual autonomy and expand the role of the *Tunkl* doctrine.[57] The goal of saving taxpayers' money may prompt courts to find in favor of plaintiffs when the defendant state fails to compensate private providers of social services.[58] The nonpaternalist belief that everyone must get a job and outgrow welfare dependence may induce judges to exempt employees with little bargaining power from unconscionable obligations.[59] In this revised picture, the public policy of welfare austerity can be turned on its head in court and yield opposite distributive effects.

By the same token, restrictive contract doctrines are not the only vehicles for counteracting the current trend in welfare politics. While a finding of unconscionability (in employment contexts) and the paternalist deletion of waivers (as in *Gavin W. v. YMCA of Metropolitan Los Angeles*) have a distinct antimarket flavor, the *Poey* opinion does without restrictive doctrines and only pursues the realization of the parties' agreed exchange. Yet, it is no less meaningful an example of socially sensitive adjudication. Redistributive agendas can be equally served by restrictive doctrines *and* by classical contract law.

Welfare politics, doctrinal arguments, and distributive outcomes are by no means aligned in this picture. An analogous degree of complexity is to be found in the legal scholarship on restrictive doctrines and judicial redistribution.

II. THE FALL OF DISTRIBUTIVE MOTIVES

Against the background of changing welfare politics, this Part reviews a progression of scholarly articles on the subject of distributive motives in contract law. The traditional dismissal of judicial redistribution, based on grounds of institutional competence and economic efficiency, underwent passionate challenges in the 1970s and 1980s, when several scholars defended the legitimacy of distributive motives in adjudication.[60] That scholarly discourse is still alive but no longer occupies the center-stage of academic debates.[61] Today, neoformalist scholars push distributive and paternalist motives to the margins of contract law. In broader academic circles, however, restrictive contract doctrines are understood as

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56. FEINMAN, *supra* note 1, at 3 (describing "a comprehensive and coordinated campaign to reshape the common law" involving "[p]oliticians, academics, and ideologues").

57. *See* Gavin W. v. YMCA of Metro. L.A., 131 Cal. Rptr. 2d 168, 175–76 (Ct. App. 2003).

58. *See* Poey v. Eggleston, 777 N.Y.S.2d 227 (Civ. Ct. 2003).

59. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).

60. *See infra* notes 67–68 and accompanying text.

61. *See infra* Part II.B.

neutral vehicles for the balancing of conflicting policies and therefore disjoined from redistributive agendas. While logically flowing from basic insights of legal realism, this prevailing view underestimates the osmotic relation between judicial discourse and social reform.

A. Restrictive Contract Doctrines from the mid-1960s to the mid-1980s

The common law of contracts rests on the premise that agreements should be enforced in accordance with the manifested intentions of the parties, but it also allows for the policing of bargains through a variety of techniques. Some doctrines, such as fraud and mistake, can be easily rationalized as necessary corollaries of private autonomy, as they aim at protecting individual will from obfuscating circumstances and at avoiding market failures.[62]

Other policing doctrines, such as avoidance of contract terms based on "progressive" public policy, are harder to reconcile with the idea of freedom of contract. They are, in fact, meant to protect weaker parties from their own improvidence and can be used to correct the *systemic* bargaining inequality of whole categories of contracting parties.[63] These doctrines became judicially prominent in the 1960s and 1970s—a time in which the dominant political forces had expressly embraced the goal of combating poverty and discrimination.[64]

This judicial trend met with foreseeable scholarly resistance. All limitations on freedom of contract, resulting either from compulsory terms or from the paternalist policing of whole classes of agreements, met objection not only on doctrinal grounds but also as vehicles of back-door redistribution, and therefore at odds with autonomy and economic logic.[65] Critics posited that those who attempt to favor socially weaker parties, either by releasing them from agreed-upon duties or by enhancing their contractual entitlements, end up hurting the very same

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62. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 104 (3d ed. 1986) (arguing that fraud, incapacity, and duress, if narrowly defined, can be proper grounds for repudiating contractual obligations); *see also* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 619 (2003) (arguing that welfare maximization justifies courts in refusing enforcement of contracts affected by fraud or duress).

63. MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 249 (1993) ("[A]ny serviceable concept of autonomy probably requires some sensitivity to concerns about exploitation of situational inequalities. But what distinguishes these cases from other forms of inequalities is precisely that they are situational and not systemic. Systemic inequalities . . . are not well suited to judicial redress in two-party contract disputes . . . .").

64. In his 1964 State of the Union address, President Lyndon Johnson announced: "This administration today, here and now, declares unconditional war on poverty in America." Lyndon B. Johnson, U.S. President, Annual Message to the Congress on the State of the Union (Jan. 8, 1964). Feinman defines the 1960s and 1970s as times of liberal developments, "culminat[ing] in a wave of consumer oriented legislation and judicial decisions." FEINMAN, *supra* note 1, at 81.

65. *See, e.g.*, Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293–95, 315 (1975) (defending freedom of contract on utilitarian grounds).

people they are trying to help.[66] The additional costs imposed upon business by interference with private autonomy would eventually be passed along and worsen, rather than improve, the conditions of employees, customers, tenants, franchisees, etc.

The ideological climate of the 1970s, however, prompted a surge of scholarly interest in the redistributive potential of private adjudication. Several authors became intensely preoccupied with redeeming the idea of distributive motives in private law from its traditional law and economics critiques. They argued that there is no clear economic reason for expunging distributive or paternalist motives from contracts adjudication. In their view, the pass-along critique proved either over-inclusive or altogether wrong in light of a proper assessment of context.[67] While mostly concerned with compulsory terms, this line of scholarly arguments also supported the idea that policing contracts through restrictive contract doctrines would be both politically desirable and economically sensible.[68]

B. The 1990s' Downturn of Restrictive Contract Doctrines

With the 1980s' increase in regulatory intervention for the sake of weaker market actors, the pursuit of redistribution through adjudication of private disputes became, by comparison, a less desirable option. By the late 1980s, the "puniness problem" of redistributive adjudication had been persuasively articulated.[69] Even when judicial activism enhanced the socio-economic status of weaker social groups, its impact seemed quantitatively insignificant. The regulatory option of compulsory contract terms seemed, by contrast, promising and wide open. Those interested in redressing social inequalities switched their attention to regulatory domains.[70] This was, per se, one of the reasons restrictive contract doctrines lost their progressive appeal. But more was at stake.

In the 1990s, the pass-along critique gained political visibility in conservative quarters and renewed popularity in legal discourse. From the

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66. *See* RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW 259–62 (1st ed. 1972) (arguing that the result of strict housing code enforcement is likely to be a reduction in the stock of housing available to the poor).

67. *See, e.g.*, Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194, 1194 (1973); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1188 (1971); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815, 1815, 1817 (1976).

68. *See, e.g.*, Kennedy, *supra* note 5; Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 770 (1983) (arguing that contractual regulation will on occasion be the least intrusive and most efficient way of redistributing wealth).

69. Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 384, 405 (1988).

70. *See generally* Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393 (2003) (illustrating the attention switch to regulatory domains).

standpoint of the Seventh Circuit, judges still believing in the possibility of judicial redistribution were simply delusional. In the words of Richard Posner:

> The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because [the stronger side] will demand compensation for bearing onerous terms.[71]

This argument was regularly paired with the idea that redistribution is a matter of regulatory and fiscal policy and should not be achieved with the coarse and incoherent tool of adjudication.[72] Redistribution, with clear losses and benefits for identifiable social groups, came to be deemed beyond the scope of courts' intervention and properly left to other institutional mechanisms.[73]

C. The Law & Economics Diatribe

To be sure, the front of law and economics scholars was not as united as it might seem. In the mid 1990s, Eric Posner revisited the relation between the common law of contracts and the welfare state on economic grounds.[74] Posner's contribution starts from the assumption that the government is committed to combating poverty and that a certain degree of welfare intervention must be taken for granted as a feature of contemporary capitalism.[75] He also presupposes that welfare provides the poor with a sense of ultimate security. As a consequence, actual or potential benefit recipients are prone to engage in risky practices, such as high-interest borrowings or relatively unaffordable purchases.[76] By definition, high-risk ventures are more likely to end up badly. The poor become poorer, and more of the taxpayers' money is needed to bail them out.[77] In this light, Posner

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71. Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 282 (7th Cir. 1992).

72. *See* Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994) (concluding that "[r]edistribution is accomplished more efficiently through the income tax system than through the use of legal rules").

73. *See* FEINMAN, *supra* note 1, at 2–3 (arguing that "[r]ecent decades represent a conservative response to liberal developments in the 1960s and 1970s").

74. Posner, *supra* note 4, at 285. Law and Economics scholars interested in wealth redistribution through common law have more recently tackled tort law, rather than the common law of contracts. *See, e.g.*, Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1657–58 (1998) (providing a law and economics defense of redistribution through legal rules, and explaining that the analysis of redistributive legal rules in contract law poses different issues).

75. Posner, *supra* note 4, at 285 (outlining a "minimum welfare theory").

76. *Id.* at 286 (positing that "[b]ecause loss of income or other assets entitles an individual to payment from the state, . . . actors make riskier investments and more often suffer failure than they would outside a welfare regime").

77. *Id.* (arguing that "welfare opportunism is foremost a threat to the state's fisc: it increases the number of people to whom the state must pay benefits").

determines that restrictive contract doctrines, such as unconscionability, perform the useful function of preventing the poor from taking too many chances, which in turn keeps welfare expenditures from escalating.[78]

Adding a dynamic spin to Eric Posner's model, one obtains the following formula: the more generous the welfare state, the higher the need to correct the indigents' spending frenzy with such devices as the unconscionability doctrine and usury laws. By contrast, should the welfare state get leaner, and should the poor be warned that the financial consequences of their reckless behavior shall fall on them and their families, courts might return to a classical understanding of private autonomy and enforce all contracts as written. Within this analytical framework, the cases discussed in Part I represent a sort of historical in-between—not as frequent as at the high point of welfare as we knew it, but still appropriate insofar as taxpayers continue to subsidize the reckless poor.

This positive spin on restrictive contract doctrines did not directly engage with the above-mentioned critiques (pass-along, quantitative irrelevance, lack of institutional competence, and incoherence) and garnered little attention in legal academia. By contrast, the pass-along question—investigating whether compulsory contract terms would necessarily hurt consumers—continued to be the subject of academic discussions in the 1990s,[79] and to this day it cannot be considered settled.[80] The scholarly debate, however, now centers on the different question of the role of formalism in contract law.

D. Neoformalism[81] *and the Restructuring of Progressive Agendas*

The comeback of formalism in contract law, both in court and in legal scholarship, is a large-scale phenomenon and properly identified as such by Jay Feinman.[82] The triumph of individual will, as expressed through consent within the

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78. *Id.* at 296–97 (arguing that restrictive contract doctrines deter the offering of high-risk credit to the poor).

79. *See, e.g.*, Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 361–62 (1991).

80. *See, e.g.*, Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 229 (2000) (challenging on economic grounds the assumption that the employers' costs of an accommodation mandate will typically be shifted to the accommodated group in the form of reduced wages or reduced employment levels).

81. For a concise distinction between legal formalism and neoformalism, see Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 851 n.11 (2000) (describing neoformalists as relying upon instrumental justifications rather than on pure logical arguments).

82. FEINMAN, *supra* note 1, at 127 (discussing the conservative drive towards "enforcing the apparent deals the parties make, not looking beyond the four corners of a document that embodies an agreement, and not judging the fairness or reasonableness of a transaction"); *see also* Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 444 (observing that formalists "hope to see contract cleansed of any considerations beyond corrective justice [or] efficiency"). For prominent instances of neoformalism in contract law, see CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (putting forth a general theory of promissory obligations); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270–71 (1986) (providing a unitary account of contract law based on consent theory); Andrew Kull, *Mistake, Frustration, and*

four corners of a written agreement, is now hailed even in settings once understood as steeped in social context.[83] This literature abounds with caveats against the perils of judicial interference with private autonomy.[84] Legal intervention must be non-intrusive,[85] choice of forum is presumptively legal,[86] and "restrictive" doctrines are to be used with utter parsimony.[87] It is against this background that the unmaking-law literature laments the disappearance of restrictive doctrines and the ensuing indifference to social causes in both contracts scholarship and case law.

Neoformalism, however, is not per se antithetical to progressive agendas. If restrictive contract doctrines are truly at odds with the dominant rhetoric of self-reliance, it may make sense for several scholars to pursue social agendas on other grounds, and perhaps turn neo-classical private autonomy to the systemic advantage of weaker contracting parties.[88]

Within the widespread "return to contract" movement, one finds several projects explicitly animated by redistributive goals. Even though contract law has been purged of social elements and reduced to the simple schema of an exchange between formally equal parties, private agreements can be cleverly utilized:

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the Windfall Principle of Contract Remedies, 43 HASTINGS L.J. 1, 1 (1991) (The author argues "against the prevailing academic conception that sees a mistaken or frustrated contract as an occasion for judicial intervention in the form of 'gap-filling.'").

83. *See* Scott, *supra* note 81, at 851–52.

84. *See* Schwartz & Scott, *supra* note 62, at 619.

> The welfare-maximization goal . . . cannot support many of the mandatory rules that today govern much contracting behavior between firms. These rules bar enforcement to contract terms that efficiently cope with problems of hidden information and hidden action. A normative theory of contract law that takes party sovereignty seriously shows that much of the expansion of contract law over the last fifty years has been ill-advised. . . . Taking freedom of contract seriously . . . would radically truncate current contract law. A law merchant appropriate to our time would be a merchants' law; and for merchants, the less publicly supplied law the better.

Id.

85. *See* Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323, 328–29 (explaining that legal intervention—i.e., judicial filling of gaps in incomplete contracts—is only called for "when the sunk costs—uncertainty about the likelihood of and the presence of opportunistic behavior—are present and the parties' costs of reducing opportunism on their own are more costly than a judicial alternative").

86. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

87. *See, e.g.*, Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 371 (2004) (advocating a return to a "parsimonious contract law").

88. *See* Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1237 (1996) (suggesting that "the move to the private may not necessarily be . . . a conservative political move" and that "progressives [may] discover a subversive potential in private solutions").

a) to remedy the under-appreciation of women's labor in the family;[89]
b) to provide unmarried cohabitants with economic security;[90]
c) to correct the systemic exploitation of socially marginalized groups in the market for body parts;[91]
d) to combat discrimination on grounds of sexual orientation in the work place.[92]

In all of these projects, the judicial revision of consent, motivated by unequal bargaining power or other social concerns, is unnecessary and perhaps undesirable. Scholars proceed creatively with contractual instruments without the baggage of restrictive doctrines, which might sound obsolete and detract from the contemporary appeal of their projects.

The celebration of consent carries through in public law contexts. The metaphor of choice was once property: famously introduced by Charles Reich,[93] it prompted a reconceptualization of welfare entitlements, whereby administrative whim would be replaced by individual rights and due process safeguards.[94] Today, the metaphor of choice in public law is contract.[95] The idea of bargained-for exchange effectively captures the growing role of negotiation and consent in the relation between public agencies and private actors.[96] Here again, contractual

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89. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements*, 77 TEX. L. REV. 17, 18–20 (1998). *Cf.* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 67–70 (1998) (arguing for the non-enforcement of premarital agreements).

90. Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 79–81 (2001).

91. MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY & DEMAND OF BODY PARTS 21–22 (2006) (recommending "a transparent but limited market approach" which "would allow for individuals to negotiate for organ transfer upon death"); *see also* Michele Goodwin, *Private Ordering and Social Justice: Reconceptualizing The Right to Contract*, 49 ARIZ. L. REV. 599, 625 (2007).

92. *See* Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587, 587 (2007). The "contract" devised by Ayres and Brown is a license, granting employers the right to use a specially created Fair Employment Mark based on proposed ENDA legislation. By explicitly identifying employees as third-party beneficiaries, the license agreement allows employees to sue employers on grounds of discrimination not yet contemplated by statute. *Id*; *see also* IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS (2005).

93. Charles Reich, *The New Property*, 73 YALE L.J. 733, 786–87 (1964).

94. William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 2–3 (1985).

95. *See* Christine N. Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246, 250 (2002) (explaining that in the current paradigm of public assistance, "government agents . . . assess each applicant and create an individualized contract or plan detailing the agreement between the government and the recipient").

96. *See* Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1563 (2001) (explaining that in order to comply with the

consent is understood as the crude result of unbridled bargaining. Yet, exactly in such situations contract can serve progressive causes, such as curing the inefficiency of environmental regulation,[97] or improving the quality of educational services for children with disabilities.[98]

E. The Richness Viewpoint

Quite distant from the unmaking-law standpoint, another line of scholarship perceives contract law to be "rich" in doctrinal tools and underlying policies.[99] This scholarship turns the potentially desolate landscape of legal formalism into a fertile and bountiful place. Here, contractual autonomy, provocatively declared dead by Grant Gilmore in the 1970s,[100] is alive and well, but so is a large countervailing set of doctrinal arguments, which may still correct at the margins the one-sided harshness of private agreements. Today, many perceive the whole body of contract doctrines as a vehicle for balancing a set of conflicting but equally legitimate policies.[101] Freedom of contract coexists with judicial intervention motivated by considerations ranging "from fairness, equality and morality to efficiency."[102] Courts are meant to balance countervailing considerations in a way that produces socially acceptable outcomes, but no obvious redistributive results.[103] Far from imagining any direct connection between doctrinal restrictions of autonomy and progressive reforms, this well-established and comprehensive viewpoint finds justification for socially sensitive adjudication within the boundaries of legal doctrine or in the philosophical underpinnings of private exchange.[104] In a clever summa of contemporary legal scholarship, Robert Hillman finds in contract law a perfect compendium of multifarious world views. In purposefully general and conciliatory terms, Hillman asserts that "contract law largely succeeds because it is the product of the legal system's reasonable and practical compromises over conflicting values and

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Temporary Assistance for Needy Families (TANF) program, "many states are privatizing by contracting out services that have long been the province of government").

97. Freeman, *supra* note 6, at 192–94.

98. *See* Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 194–95 (2005).

99. TREBILCOCK, *supra* note 63, at 243 (advocating "a rich conception of individual autonomy," entailing both a positive and a negative theory of liberty, and making room for contract doctrines meant to redress "the deliberate exploitation by one party of another party's lack of choices").

100. GRANT GILMORE, THE DEATH OF CONTRACT (1974).

101. Efficiency—understood as enhancement of social welfare—and judicial economy—understood as minimal use of the expensive and cumbersome machinery of justice—are examples of such nonideological goals on which everyone is bound to agree.

102. ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 267 (1997).

103. Kreitner, *supra* note 82, at 442–46 (offering a comprehensive genealogy of the idea of conflicting considerations in contracts adjudication).

104. The philosophical sources recently invoked in support of paternalist contracts adjudication range from Aristotle to Rawls. *See* James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 548–550 (1995); Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598 (2005).

interests."[105] Only by letting a million doctrinal flowers bloom may contract adjudication achieve an "appropriate mix of flexibility and certainty."[106]

This broad perspective accommodates a wide variety of scholarly viewpoints.[107] It is compatible with a neoliberal understanding of private autonomy, whereby equitable adjustments of classical contract law, flexible standards, unconscionability, and other policing doctrines are simply welcome correctives to the dogma of contractual freedom.[108] But it also flows logically from classical legal-realist contributions, showing how multiple and very diverse policies can underlie doctrinal arguments.[109] Even the question of redistribution through contract adjudication—once a polarizing issue among contracts scholars[110]—becomes relatively non-divisive if disjoined from ideology and phrased in very general terms.[111]

From this eclectic viewpoint, restrictive doctrines are just as legitimate in contemporary contract enforcement as the fostering of private autonomy. Judges interfere with contractual freedom not because of a complete misunderstanding of the judiciary's competences or because of specific political biases, but rather in the dutiful performance of their institutional role. They remain non-ideological enforcers of private bargains and simply take into consideration, as courts are supposed to do when interpreting and enforcing contracts, the social context and the transformations it is undergoing.

This view provides a necessary counterpoint to the unmaking-law perspective, which overestimates the synergy of conservative ideology and neoformalism. It fails, however, to capture the osmotic relation between judicial rhetoric and social change, which is, as we shall see, discursive if not purposive.[112]

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105. HILLMAN, *supra* note 102, at 2.

106. *Id.* at 171.

107. The idea that common law adjudication is based on balancing conflicting considerations is by now widely accepted in legal academia. *See* Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 96 (2000) (noting that "[there is a] nearly universal elite legal academic view that we could indeed resolve all situations where there is choice of norm by balancing conflicting considerations of one kind or another").

108. TREBILCOCK, *supra* note 63, at 243.

109. Kreitner, *supra* note 82, 442–44 ("Legal realism . . . derives its impetus from the insight that, in actuality, lawmaking is full of conflicting considerations that are not susceptible of definitive ordering."). For an example of such insights, see Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 816 (1961).

110. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS 217–18 (4th ed. 2004) (Judicial "interference in the bargaining process requires courts to consider competing policies" such as autonomy and transactional stability on one hand, and prevention of unfairness on the other, but also that courts are "not well equipped to redress fundamental imbalances in the distribution of wealth.").

111. *See, e.g.*, HILLMAN, *supra* note 102, at 273 ("[C]ontract law contributes to distributive justice through its . . . policing standards.").

112. *See* Hillman, *supra* note 53, at 885–86. Hillman acknowledges the *reflective* function of adjudication and assumes that judicial decisions preferring the enforcement of written contracts over asserted oral, less formal agreements are a reflection of increased conservatism (i.e. trust in markets rather than in government) in public opinion. These pages

F. Unmaking Discourse

In light of the foregoing pages, the unmaking-law literature retains much relevance but requires adjustments. First, the transformation of the common law is much less radical than in the unmaking-law scenario. As illustrated in Part I, social and political events can give new impetus to dormant doctrines, and the foreclosure of possibilities at the level of federal courts leaves ample margin for socially sensitive adjudication in state courts. Second, according to a large set of contemporary scholarship, restrictive contract doctrines coexist comfortably with the dogma of autonomy. Neoformalism occupies only part of the contracts-theory stage. Third, even if restrictive doctrines were to become irrelevant exceptions in judicial discourse, it would still be quite possible to implement progressive agendas by means of contract law. The "return to contract" movement has shown a great deal of potential in this respect.

The real and profound transformation that has occurred over the years is the detachment of progressive agendas from the use of restrictive arguments both in courts and in legal scholarship. As observed above, in a post-Realist scenario, contract law is often perceived as ambivalent in point of results. There no longer seems to be anything socially sensitive or politically compelling about any given doctrinal path. Even when courts openly attempt to correct the social imbalances generated by the contraction of welfare, they use paternalist language as sparingly as possible and make sure to cloak redistributive motives in the guise of autonomy, self-reliance, or lean government.[113]

The question acutely raised by the unmaking-law scholars,[114] but left unanswered, is not whether the conservative campaign has succeeded at demolishing the progressive potential of contract law; rather, the question is whether the change in contracts *discourse*—the demise of paternalist language and the formalist suppression of distributive motives—is a reason for concern. The cases identified in Part I, whereby restrictive doctrines are explicitly put to the service of redistributive goals and meant as correctives to welfare contraction, lend themselves to different readings. They could simply attest to contract law's ability to embrace social change, thanks to its rich doctrinal toolset. In this light, they would seem plain and unremarkable. Alternatively, they could be read as instances of unwarranted nostalgia because, as observed, courts could have yielded identical outcomes without resorting to overt—and passé—redistributive language. It is also possible, however, to read those cases as important attempts to engage at discursive levels with the merits of welfare reform.

III. THE RELEVANCE OF CONTRACT DISCOURSE

Even if the connection between restrictive contract doctrines and progressive politics is no longer necessary or direct, the relationship between socially sensitive adjudication and the politics of welfare reform equates to

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focus on the *expressive* function of private adjudication, and see courts as plausible agents of change in public discourse. *Id.*

113. This argumentative style is most evident in *Poey v. Eggleston*, 777 N.Y.S.2d 227 (Civ. Ct. 2003).

114. *See supra* note 1.

something more than pure indeterminacy. The cases exemplified in Part I may inform legal discourse in ways that have long-term political salience. Their impact is mixed and yet, I conclude, desirable on balance.

A. The Danger of Normalization

The nostalgic attachment to restrictive contract doctrines, which pervades the unmaking-law literature, is occasionally the target of harsh political critiques. David Dante Troutt, for instance, highlights the absurdity of tackling poverty by policing contracts, when the poor have little experience with the kind of legal, enforceable contracts that most scholars and judges envisage in their writings.[115] This viewpoint leads to a complete disengagement with contract law as a possibility for pursuing social justice of any kind.

Another strand of contemporary legal scholarship asserts that the only role of social nuances in common law is to provide an aesthetically pleasing counterbalance to pure market rhetoric. The eternal balancing of conflicting considerations, omnipresent in the adjudication of disputes, simply marks "a commitment to a safe and ironically invariant middle of the road."[116] If this is the case, paternalism is no correction to the dogma of individual autonomy. Rather, it allows for individualism to be softened at the margins and thus avoid challenge. Unconscionability and similar judicial niceties cosmetically enhance the status quo and therefore prevent political mobilization.[117]

In this scenario, the endless play of conflicting considerations in contracts adjudication allows distributive motives to resurface constantly and counterbalance the rhetoric of individual freedom or private autonomy. Thanks to such compensatory mechanisms, the legal universe may display features of internal peace, coherence, and legitimacy. Analogies abound. A generous and charitable treatment of war prisoners, desirable as it is, may cast even the most atrocious acts of military aggression in a somewhat favorable light.[118] The political temperature stays lukewarm, or increases ever so slightly each day, so that no one can really feel the heat. For similar reasons, the normalization critique results in a sobering message: those who praise the courts' sensitivity to the downsides of welfare contraction should realize they are falling into the trap of convenient cosmetics.

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115. David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 27–28 (2000) (Regulatory and adjudicatory "protections assume the primacy of meaningful consumer choice, which itself assumes choice. They assume that 'market failures' can be corrected through minor, equitable adjustments in contract performance litigated by individual consumers against private vendors. They do not, therefore, assume the harsh economic realities of the inner-city poor." (footnotes omitted)).

116. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1080 (2002).

117. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 2 (1997) (arguing that the dominance of judicial lawmaking reduces the power of political activism).

118. DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 25 (2004) (arguing that the vocabulary of human rights may provide useful justifications for those whose political and military projects are repressive).

There is, however, another way to look at the same picture, one just as concerned with the decline of welfare. Both in Europe and in the United States, the importance of keeping alive the practice of injecting considerations of social justice in judicial discourse finds new sources of scholarly support.

B. The Revival of Paternalist and Distributive Motives in European Contracts Discourse

A number of European scholars look at paternalist contract doctrines with particular interest today. The ongoing harmonization of contract law in the European Union is increasingly acquiring constitutional salience. The project of organizing the technical contract rules of the twenty-seven member states around a set of coherent and uniform principles finds merit in the functionalist goals of abolishing market barriers, equalizing the level of consumer protection throughout the Union, and leveling the playing field for business actors.[119] At the same time, however, the harmonization of contract law prompts new reflections on which balance between free market and regulation is appropriate and acceptable for all European constituencies.[120]

Discussions on this topic are politically difficult. The process of dismantling the traditional welfare state and replacing it with a pan-European-Union market for welfare services is "much discussed [and] politically controversial."[121] As is well known, there is tremendous resistance in Europe towards the idea of codifying a set of identical political and social goals for the entire Union. The fact that the project of establishing a constitution for Europe came to a halt in 2005 can be at least in part blamed on the difficulty of agreeing on a finite list of common values.[122] Member States have not yet pooled their

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119. Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 157 (2004) (noticing that the European Commission, when promoting the harmonization of contract law, appeals "to the functional necessities of market building and the need to prevent distortions of competition caused by legal differences among Member States").

120. *See* Martijn W. Hesselink, *Principles of European Contract Law: Some Choices Made by the Lando Commission*, *in* MARTIJN W. HESSELINK, THE NEW EUROPEAN PRIVATE LAW 75, 107–11 (2002) (discussing the difficulty of striking a balance between competing social and doctrinal views in the context of contract law harmonization).

121. Gareth Davies, *The Process and Side-Effects of Harmonisation of European Welfare States*, Jean Monnet Working Paper No. 02/06 (2006), *available at* http://www.jeanmonnetprogram.org/papers/06/060201.pdf. Davies explains that this process has in many ways already occurred, based on the European Court of Justice's interpretation of market freedoms and competition law. *Id.*

122. Highly indicative in this respect is the debate on whether or not to mention Christianity, or religion in general, in the preamble of the draft Constitution. *See* Robert Howse, *Piety and the Preamble*, LEGAL AFF., May–June 2004, at 60, 60 (reviewing JOSEPH H.H. WEILER, UN'EUROPA CRISTIANA: UN SAGGIO ESPLORATIVO (BUR Saggi, Milano, 2003)). Also relevant is the not yet binding and, in any case, overly vague language of the Charter of Fundamental Rights of the European Union (2000/C 364/1). *See* Gráinne de Búrca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 WASH. & LEE L. REV. 555, 573–74 (2004). Gráinne de Búrca explains that:

sovereignty in matters of welfare benefits and social security, and no unification of legal regimes is in sight in such matters.[123] By contrast, the process of contract law harmonization is very much underway.[124] In this context—seemingly remote from politics and confined to the functional goal of establishing a seamless market—the task of discussing an acceptable societal vision for the twenty-seven member states slowly reaches accomplishment. New E.U.-wide rules for the adjudication of contract disputes may have some degree of distributive relevance.[125] But even when neutral in distributive terms, such rules help set the stage for, and the tone of, the public debate on the future of the E.U. [126]

The subject of contract law harmonization has polarized legal academia.[127] On one side of the debate, scholars insist on keeping the rules of market exchange anchored to the realization of private autonomy.[128] This view is intuitively in line with the original free-market rationale that started the process of European integration in the 1950s. On the opposite side, others argue that contract-law rules and standards have more than technical meaning and reflect the norms of solidarity prevailing in each member state. They demand, therefore, that considerations of fairness and wealth redistribution be at the forefront of contract law.[129] Others dismiss as simplistic the link between rigid contract rules and political neoliberalism and point to creative uses of contractual mechanisms for

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> Many of the rights contained in [the Charter] are expressed in vague and weak terms. Several of the rights relate to areas in which the EU has few or no powers of action. Some have deemed many of the "principles" contained in the Charter to be nonjusticiable, and the general clauses at the end of the Charter are preoccupied with asserting and ensuring that it brings about no change whatsoever in the relations between the EU and the states . . . .

Id.

123. *See* Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 65 (2002), art. 137(1) (allowing the European Community to "support and complement," but not to harmonize, the modernization of social protection systems in the Member States).

124. *See Commission Green Paper on the Review of the Consumer Acquis (Presented by the European Commission)*, COM (2006) 744 final, (Feb. 8, 2007), *available at* http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf (listing relevant harmonizing legislation in matters of contract law).

125. Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653, 665 (2004) ("A modern statement of the principles of the private law of contracts needs to recognize its increasingly pivotal role in establishing distributive fairness in society.").

126. *See generally* Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 10 EUR. REV. PRIV. L. 7 (2007).

127. Hugh Collins, *Editorial: The Future of European Private Law: An Introduction*, 10 EUR. L.J. 649, 649 (2004); Ugo Mattei & Fernanda Nicola, *A "Social Dimension" in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1, 15–16 (2006).

128. *See, e.g.*, Jürgen Basedow, *A Common Contract Law for the Common Market*, 33 COMMON MKT. L. REV. 1169, 1173–82 (1996).

129. *See* Study Group on Social Justice in European Private Law, *supra* note 125, at 665.

purposes of social justice.[130] In the context of European integration, contracts discourse has now become a place where otherwise intractable questions, such as the desirability of Europe-wide social cohesion, take manageable proportions and lend themselves to regional cooperation.[131] In this discourse, the injection of paternalist and distributive motives performs a meaningful expressive function.

C. Norms and the Expressive Function of Socially Sensitive Adjudication

A renewed appreciation of paternalist arguments and overt distributive motives in common-law adjudication may find indirect support in the camp of social norms theory.

The literature on social norms explores the general constraints placed upon human behavior by social conventions, custom, and fear of reputation costs, rather than sanctions and enforceable rules.[132] Scholars preoccupied with the relation between norms and proper *legal* rules have articulated the idea that law and norms engage in a sort of bilateral, fluid exchange.[133] Legal rules are enacted against the background of preexisting norms of conduct. Norms, in turn, are affected by the values enforceable law embodies.[134]

In this analysis, "law" may refer not only to statutes but also to judicial opinions.[135] Norms scholars now provide a sophisticated account of why courts, though being countermajoritarian in principle, may nonetheless reflect prevailing moral attitudes and even influence social behavior.[136] By this account, when courts

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130. Mattei & Nicola, *supra* note 127, at 62–65.

131. *See generally*, Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751 (2004).

132. The groundbreaking empirical work on this subject is ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). For an update on relevant literature, see Richard McAdams & Eric B. Rasmusen, *Norms in Law and Economics*, *in* THE HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., forthcoming Jul. 2007), *available at* www.rasmusen.org/papers/norms.pdf.

133. JOHN N. DROBAK, *Introduction*, *in* NORMS AND THE LAW 1, 1 (John N. Drobak ed., 2006) ("[I]nformal rules, like norms, religious precepts and codes of conduct, and formal rules, like statutes and the common law . . . work in parallel to influence society. Norms and law also have an impact on each other." (citation omitted)).

134. *Id.* (noting that "the law can be a strong influence on a change in norms, by . . . inducing a change in the perceptions about the propriety of certain conduct").

135. Most of the work on legal expression focuses on legal rules of general application stated in advance of a particular dispute. More recently, however, scholars have begun to focus on the expressive effect of adjudication, i.e., the power of courts and tribunals to influence both disputants and broader audiences "after [a] dispute occurs." Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1062; *see also* Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1041 (1999) (finding that "[a]n expressive function may, in fact, be the most significant one that courts perform"); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996) (discussing the educative and cultural role of adjudication).

136. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 374–78 (2000); McAdams, *supra* note 135, at 1092 (explaining that courts "merely by expression, can influence behavior"). The question of the propriety of counter-

adjudicate disputes and offer guidelines of relational conduct, they may simply embrace preaccrued values and conventions,[137] but they may also signal a change in what morality and fairness require, thus redirecting prevailing perceptions.[138] This is all the more true when the judicial reference to norms is quite irrelevant to the outcome of a given dispute, and simply happens to reinforce in dictum the results of traditional doctrinal arguments.[139]

When applied in the context of ongoing welfare politics, the theory of judicial expression helps to explain the cases discussed in Part I. As observed, referring to the new vulnerabilities generated by the "end of welfare" is not a necessary argumentative step for courts inclined to invalidate disclaimers, to compel cities to pay for day care services, or to strike down arbitration clauses.[140] By addressing the need to tailor contracts adjudication to changed social circumstances, however, courts perform at the same time a reflective and expressive function. On one hand, they reflect the persistent livelihood of altruism in a prevailingly individualist society; on the other, by incorporating social cohesiveness into final judicial statements, they enhance the currency of distributive arguments in public debates as well as in private interactions.[141]

From this viewpoint, the livelihood of socially sensitive discourse in court is definitely desirable. While incapable of yielding progressive redistribution in the

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majoritarian law-making in common law courts exceeds the scope of this Article. It may suffice here to accept the general proposition that "in a real sense no decision is formalist or mechanical, even when the judge thinks it is," that judges operate within a "framework of norms and values and ideas floating about in society," and that "judges can be arranged . . . so as to form a nice, ordinary bell-shaped curve" depending on which norms, values, and ideas they espouse. Lawrence M. Friedman, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act*, *in* NORMS AND THE LAW 139, 153 (John N. Drobak ed., 2006).

137. *See* Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173, 204 (J. Goldstein & Robert O. Keohane eds., 1993) (arguing that the European Court of Justice often decides disputes on some constrained, predictable basis, and retroactively expresses "what occurred in the past"); Hillman, *supra* note 53, at 885 (arguing that judges are unlikely to resist "sustained, generalized changes in perspectives and values").

138. McAdams, *supra* note 135, at 1069 ("By changing the individuals' view of the facts, signals might change the individual's view of what morality or fairness requires, and thereby change behavior.").

139. This point is effectively elaborated by Jonathan C. Lipson, *The Expressive Function of Directors' Duties to Creditors*, 12 STAN. J.L. BUS. & FIN. (forthcoming 2007) (applying the theory of judicial expression to recent Delaware cases concerning fiduciary duties: "[E]xpressivism may be an important—perhaps the only appropriate—manner in which courts can experiment with the values they hope may grow someday into norms and, perhaps, from norms to standards and rules").

140. *See supra* at Parts I.D–E.

141. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1286 (2004) ("When an adjudicator forms a decisive belief about the expectations defining a convention or about the facts the convention makes relevant, then the adjudicator can influence the behavior of the players by signaling her belief.").

short term, paternalist and distributive arguments are still a meaningful way of expressing, through judicial opinions, the sort of concerns that should animate political debate.[142] Just as in the E.U., where the harmonization of contract law is an occasion for defining common constitutional values, the adjudication of contract disputes in the U.S. contributes to defining the tone of legal debate. Judicial opinions of the kind exemplified in Part I carry meaningful discursive weight, if nothing else.

D. Concluding Remarks

This Article provides a revised version of the unmaking-law literature. The conservative bent in contracts adjudication and the rise of neoformalism in academic circles are indeed remarkable phenomena, but not necessarily in the terms espoused by the unmaking-law scholars. As a matter of fact, the adjudication of contract disputes is not flatly aligned with the celebration of self-reliance in political circles. Equitable doctrines, even if cast as mere enablers of individual autonomy, continue to perform traditional corrective functions on a case-by-case basis. Moreover, due to the plasticity of its meaning, the very concept of private autonomy can generate judicial arguments apt to make up for bargaining inequities. Contractual autonomy is also at the core of several progressive strategies, whereby neoliberal market mechanisms are used to redress social problems. At the level of scholarship, a neo-formalist faith in private autonomy is certainly on the rise, but it is still far from occupying the center stage of legal discourse. Much more common is the understanding of contract law as a place where conflicting considerations, mostly neutral in distributive terms, can be balanced and reconciled.

The problem does not lie in the judicial abandonment of restrictive contract doctrines, in the rise of neoformalism, or in the dearth of progressive uses of contractual mechanisms. Rather, the problem lies in the paucity of judicial opinions that engage directly with market failures generated by the political decline of solidarity. This change in contracts discourse may have no impact on the net yield of redistributive outcomes, but it does endorse, expressively, the triumph of individualism in political milieus. By contrast, the laudable, if infrequent, contract cases exemplified at the start of these pages are overt responses to ongoing welfare reforms and provide much needed counterbalance to the rhetoric of self-reliance.

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142. *See* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1335 (1998) (arguing that courts adjudicating contracts disputes "must consider the effect of their decisions on all the rest of us" rather than simply on litigants).