Interpreting Contracts in a Regulatory State

By ADITI BAGCHI*

WHEN CONTRACTING PARTIES GO TO COURT, it is usually to dispute what their contract requires of them.[1] If the language of their agreement is not clear, courts enforce the most reasonable interpretation of the ambiguous contract term.[2] Sometimes that is the most reasonable reading of a written agreement. At other times, it is the most reasonable understanding of what a person has said or done.[3] Either way, the content of a contractual obligation turns on its most reasonable interpretation.

What is the most reasonable interpretation? Courts usually determine the most reasonable understanding of a contractual obligation by reference to the parties' intentions, as evidenced by their words and acts.[4] But reasonableness is not reducible to party intent.[5] In ordi-

* Professor of Law, Fordham University Law School. J.D., Yale Law School; M.Sc., Oxford University; A.B., Harvard College. The Article has benefited from workshops at Fordham Law School and Harvard Law School, and a conference at Venice International University. Special thanks to Hanoch Dagan, Abner Greene, John Goldberg, Martijn Hesselink, Clare Huntington, Joseph Raz, Henry Smith, and Ben Zipursky for comments and discussion.

1. *See* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2005). *See generally* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25–34 (2014) (discussing the competing interpretative positions taken by courts when interpreting contracts in dispute); *see generally* David A. Dilts, *Of Words and Contracts: Arbitration and Lexicology*, 60 DISP. RESOL. J. 41, 43 (2005) (describing how labor arbitration developed the rules of contract construction because resolution for labor-management contract disputes rely heavily on the interpretation of the language's meaning).

2. Sutton v. E. River Sav. Bank, 55 N.Y.2d 550, 555 (1982) ("Our goal must be to accord the words of the contract their 'fair and reasonable meaning.'"). This Article concerns the interpretation of *ambiguous* terms. In line with existing law, it presumes that unambiguous terms are either enforced in a manner consistent with their unavoidable meaning or rejected altogether.

3. *See, e.g.*, Embry v. Hargadine, Mckittrick Dry Goods Co., 105 S.W. 777 (Mo. Ct. App. 1907) (holding that a conversation can constitute a valid contract of law if only one party had a right to understand a conversation as intending to create a contract).

4. *See, e.g.*, Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 682 (2010) ("[T]he parties' intentions control."); ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc., 699 F.3d 832, 842 (5th Cir. 2012) ("The primary concern of a court

nary and legal usage, reasonableness is itself a tricky concept. Usually, when we ask whether a person behaved reasonably (such as, "was that a reasonable tip for the waiter?"), we ask whether they behaved appropriately or fairly. When we say that an obligation or standard of conduct is reasonable (such as, "tipping a waiter twenty percent is reasonable"), we similarly claim that it is appropriate and fair to hold someone to that obligation or standard.

It is less clear what courts mean when they adopt a "reasonable" interpretation of a written statement of obligation. For example, if I promise to reimburse you for all labor costs in connection with transporting heavy equipment, whether this covers the costs of repairing your truck to render it suitable for the job may depend on what the court believes we had in mind, or it could take into account market practice directly. That is, a reasonable interpretation of the obligation could be a reasonable guess about *what parties meant* by their words, or it can seek to derive a reasonable *obligation* from those words. Usually, what contracting parties had in mind will dovetail with common business practices, so a wrenching choice between these possible meanings is unnecessary—but the intentions of contracting parties will not always mirror other indicia of reasonableness in this way. Sometimes people intend to contract on unreasonable terms.

Courts already, if inconsistently, read ambiguous contracts to impose substantively reasonable obligations.[6] In searching for the most

construing a written contract is to ascertain the true intent of the parties as expressed in the instrument."); Walker v. Martin, 887 N.E.2d 125, 135 (Ind. Ct. App. 2008) ("[I]t is the court's duty to ascertain the intent of the parties at the time the contract was executed as disclosed by the language used to express their rights and duties."); Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d 363, 368 (2005) ("In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds."); Jones Assocs., Inc. v. Eastside Props., Inc., 704 P.2d 681, 685 (Wash. Ct. App. 1985) ("Where the parties' contractual language is ambiguous, the principal goal of construction is to search out the parties' intent."); Robert F. Felte, Inc. v. White, 302 A.2d 347, 351 (Pa. 1973) ("When interpreting a contract the intention of the parties must be determined.").

5. *Cf.* Omri Ben-Shahar & Lior Jacob Stahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. Rev. 1753, 1759–60 (2017) (arguing that courts should use polls to decide meaning because common understanding of terms should control).

6. *See, e.g.,* Columbia Propane, L.P. v. Wis. Gas Co., 661 N.W.2d 776, 787 (Wis. 2003) ("In ascertaining the meaning of a contract that is ambiguous, the more reasonable meaning should be given effect on the probability that persons situated as the parties were would be expected to contract in that way as opposed to a way which works an unreasonable result."); Glenn Distribs. Corp. v. Carlisle Plastics, Inc., 297 F.3d 294, 301 n.4 (3d Cir. 2002) ("Courts must be mindful to adopt an interpretation of ambiguous language which under all circumstances ascribes the most reasonable, probable, and natural conduct of

reasonable meaning of a text, courts do not limit themselves to evidence of parties' thinking; they take into account what a fair meaning would be, or what parties owe each other in light of background legal norms.[7] Courts are right to do so,[8] and we should update our scholarly understanding of contract interpretation to reflect this more expansive understanding of reasonableness.[9]

The reigning debate about contract interpretation does not address this matter. The debate is largely between those who would allow (or require) courts to consider evidence of contractual context and those who would sharply delimit the inquiry by directing courts to rely first (and sometimes last) on the text of written agreements.[10] Both sides of this debate assume that meaning turns just on what con-

---

the parties, bearing in mind the objects manifestly to be accomplished.") (internal citations omitted); Tessmar v. Grosner, 128 A.2d 467, 471 (N.J. 1957) ("Even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties should be adopted so that neither will have an unfair or unreasonable advantage over the other. These rules apply in all circumstances, whether the agreement be integrated or unintegrated.") (internal citations omitted). Courts that invoke substantive reasonableness do not usually announce indifference to party intent; instead, they treat a substantive analysis as the basis for imputing a particular intent to the parties. In each of these cases, though, at least one of the parties disavows having had any such intent, and it seems unlikely that courts believe that parties always intend to treat each other fairly. The practice of nevertheless *assuming* parties acted reasonably does not have to be explained by a substantive commitment to reasonableness, but it is best explained that way. Since courts usually aim to resolve disputes on the greatest common ground, they have no reason to pick the theoretical fight that this Article mounts.

7. Background legal norms may be hard legal norms that clearly announce the boundaries of legality (e.g., you may not park on X street from 9am-5pm) or soft legal norms that animate a set of cases or doctrines. For example, the soft legal norm that favors market price is the norm against unjust enrichment. *See generally* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707 (2010) (describing legal positivist, rationalist, and constructivist conceptions of hard and soft law).

8. Larry Cunningham has observed that courts do not seem inclined to make the stark choices regarding interpretative methodology that scholars would set up for them. *See* Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All But Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625, 1627 (2017) (observing that courts do not use either textualist or contextualist approaches exclusively). Similarly, courts have proven capable of affording party intention priority even while giving due weight to background legal norms.

9. The Second Restatement of Contracts section 203(a) provides that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect," and section 207 expressly allows that "in choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (AM. LAW INST. 1981). Unfortunately, these principles have not permeated the standard theory of contract interpretation.

10. *See* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010) (advocating formalism); *see* STEVE J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 21–28 (2009) (advocating middle course of "objectivism"); Shawn J. Bayern, *Rational*

tracting parties intended; the controversy surrounds the method most likely to get that inquiry right.[11] Indeed, some scholars have suggested that even the correct interpretive methodology might depend on the preferences of parties to a transaction.[12]

Most of the time, contract interpretation should and does largely center on ferreting out party intent. But that is only because in the vast majority of cases, parties intend to contract on proper and fair terms.[13] Some parties self-consciously intend to contract on terms that comply with background duties. In other cases, parties' material interests and the balance of power between them result in terms that comply with background duties. And still in other cases, parties' understanding of their interests and prerogatives is so deeply influenced by background duties that they comply without self-consciously attending to those duties. Contract terms rarely flout background duties, and when they are clearly inconsistent, those terms are held against public policy.[14]

Contract terms do not usually clearly violate public policy. More often, contract terms could be read as either consistent or inconsistent with background legal duties. Scholars have failed to recognize that where there is some doubt about whether terms are compliant with background duties, terms are read *so as to render them compliant*. Indeed, even when written terms are merely in potential tension with public policy, they are read to align squarely with background duties unless there is affirmative evidence that the parties intended other-

Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law, 97 CAL. L. REV. 943 (2009) (advocating contextualism).

11. *See* Shafar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L. J. 519, 524 (2017) (noting common premise). This Article delves into the questions of "the use of government authority and the power of enforcement" that Lifshitz and Finkelstein put aside. *Id.*

12. *See* Uri Benoliel, *The Interpretation of Commercial Contracts: An Empirical Study*, 69 ALA. L. REV. 469, 470 (2017) (reporting that most commercial parties include terms that imply that they prefer textualism).

13. Indeed, Eyal Zamir defends a primary role for substantive reasonableness on the grounds that it actually better realizes party intention. Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1715 (1997). Zamir also demonstrated the ways in which the standard account misses interpretation on the ground. He argues that substantive reasonableness is given inadequate weight in orthodox theories of interpretation and cites numerous cases in distinct doctrinal lines that show how courts directly reference fairness and justice. *Id.* This Article complements Zamir's work in that it aims to justify the style of interpretation that Zamir observes and defends. However, it grounds the move to substantive reasonableness in a theory of shared authority over contract.

14. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 178–179 (AM. LAW INST. 1981); *See generally* 2 WILLIAM BLACKSTONE, COMMENTARIES 161–62.

wise (or a "clear statement" to that effect).[15] This kind of angled interpretation is familiar to us—and to judges—from the quite separate context of statutory interpretation. The canon of constitutional avoidance, discussed further below, prefers interpretations that render a statute clearly permissible over those that would skirt unconstitutionality.[16]

The weight assigned to background legal norms in contract interpretation does not depend on the preferences of contracting parties any more than the weight of constitutional norms in statutory interpretation depends on legislators' interest in abiding by the Constitution. In the case of contract, the state's interest in promoting the substantive policy that bears on a given transaction is balanced against the state's interest in deferring to parties' choice of terms. Because courts expressly assert background duties only in those cases where there is the specter of noncompliance, those duties operate mostly in the shadows of interpretation. However, these duties are conceptually critical to a legitimate practice of contract interpretation. The aim of this Article is to excavate and clarify the role that background legal duties play.[17]

The tension in case law between the dominant language of party intent on the one hand, and occasional references to substantive reasonableness on the other, reflects a deep tension in the state's attitude toward contract. A liberal state like ours is committed both to regulating the market to promote justice and protect people from harm *as*

15. *See, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 77, 83 (2002) (requiring clear statement by parties of a mutual intent to subject agreement to arbitration).

16. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 398–414 (2010) (reading the statutes addressing federal mail and wire fraud statutes as applying only to bribes and kickbacks in order to avoid potential problem of unconstitutional vagueness); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress."). *See also infra* note 160 and accompanying text.

17. The aim here is not to argue that background norms should displace authorial intent in interpretation, but to show how the exercise of normative interpretation gives them each due weight. One might contrast this view with a simple pluralism whereby courts sometimes look to authorial intent and other times give background norms primary consideration. While the weight assigned to different interpretive criteria surely vary by contract-type, we would expect some constant principles—elaborated here—to direct when and how each reference should figure in the interpretive process. *Cf.* Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. Davis L. Rev. 1097, 1102 (2016) ("[C]ontract law should be pluralistic in the possibilities of interpretive regimes it considers.").

well as maximizing our sphere of autonomy in private affairs.[18] These goals compete in the domain of contract: The former commitment to regulating the market weighs in favor of taking the state's substantive preferences over contract terms into account in the course of enforcing ambiguous terms. The commitment to private autonomy entails a more formal approach limited to deciphering parties' own intentions. Every incursion into a private transaction that is intended to promote systemic goals or protect third parties has the effect of narrowing the scope of individual choice in contracting.

The trade-off between public purpose and private choice is not new, but as a tension *within* the law, it is not ancient either. Under *Lochner v. New York*,[19] it might very well have been appropriate—or at least consistent—to interpret contracts with almost exclusive attention to party intent. *Lochner* struck down a New York state statute that limited the number of hours that bakers could work in a day and in a week on the grounds that it was an "unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty."[20] The case stood for a broad doctrine of economic liberty under which individuals were free to contract on the terms of their choosing with little interference from the state.[21] Under *Lochner*, the state's interest in preserving a free space where individuals choose the terms on which they deal with others did not compete with a state interest in regulating the marketplace because the latter was not a valid exercise of its police power.[22]

But the *Lochner* era is long over. In *West Coast Hotel Co. v. Parrish*,[23] the Supreme Court reversed its course of resistance to the New Deal and upheld a Washington State minimum wage statute. More important, the seventy years since the New Deal have witnessed an explosion in statutory regulation of commerce and administrative oversight of

18. These dual aims are evident in the canonical liberal theory of John Rawls, which requires the state both to maximize liberties and regulate the basic structure under the difference principle. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); *see* THOMAS HOBBES, LEVIATHAN 279–80 (Lerner Publ'g Grp. 2018) (1651) (providing a foundation for modern political thought highlighting the relationship between law and crime to show that the state objective is to protect people from harm).

19. Lochner v. New York, 198 U.S. 45 (1905).

20. *Id.* at 56.

21. *Id.*

22. "[W]e think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act." *Id.* at 57.

23. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

the market.[24] Although we remain reluctant to interfere in private exchange, and though some observers remain dogmatically opposed, regulation of private exchange is now commonplace.[25]

Regulation of exchange removes intent as an exclusive anchor to private obligation in the context of commercial transactions. Still, contractual intent retains a privileged status in modern contract law,[26] as well as in the account offered here. Courts are appropriately focused on the overlapping points of agreement between contracting parties and focused in the ways each reasonably understood the other. Contract and its legal offshoots (including much of business law) are distinctive in law because of the weight they assign parties' own choices. In fact, as discussed further below, contract has a special place in a liberal regime due to the deference it affords private persons in their choices of whom to deal with and on what terms. When courts give legal effect to private commitments, they allow individuals to rewrite the normative ties that bind persons to others in a political economy. Contract thereby expands the scope of moral agency.

Liberal states are especially sensitive to the advantages of allowing private individuals to control their relations with others, but they are also interested in regulating the justice of the marketplace.[27] Individuals engaged in exchange constitute public markets with public consequence. Parties to exchange can harm each other and others.[28] States are thus interested in the terms of private exchange.

Our modern regulatory state can, and sometimes does, directly regulate those terms. Mandatory systems like tort directly control the terms on which individuals deal with one another. Federal and state statutes, and their related administrative agencies, focus on matters ranging from consumer protection,[29] labor or employment,[30] securi-

24. *See generally,* Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State,* 41 J. ECON. LIT. 401 (2003) (discussing the increase in statutory regulation to support a Posner-inspired regulatory model).

25. The Cato Institute and the Ludwig von Mises Institute are exemplars of libertarian thought—and opposition to most market regulation—in contemporary political discourse. *See* Brian Doherty, *A Tale of Two Libertarians*, MISES INST. (Feb. 15, 2010), https://mises.org/library/tale-two-libertarianisms [https://perma.cc/6NCR-YGMT].

26. *See* cases cited *supra* note 4 and accompanying text.

27. *See* RAWLS, *supra* note 18.

28. *See generally* Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211 (2015) [hereinafter Bagchi, *Other People's Contracts*] (arguing that contract law does not adequately account for harms that individuals can inflict on others or third parties).

29. *See* 12 U.S.C. § 1841 (2012); *see* Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399 (2012); *see also* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1928 (2013) (Appendix: Fifty-State Survey: State Consumer Protection Laws). *See generally* 15 U.S.C. § 45(a)(1) (2012).

ties,[31] insurance,[32] health care,[33] antitrust,[34] and civil rights,[35] all of which constrain the terms of acceptable exchange. Private contract, or at least its voluntary dimension, is an *alternative* to those regimes. In the realm of private agreement, states capitalize on the economic and moral advantages of allowing parties to use private information about their own preferences to navigate a web of bilateral relations.

But background duties that the law leaves individuals to navigate on their own persist in a regime of contract—not only morally, but legally. Our choices about how to transact with others are subject to moral constraints. Some of these are entirely private such as the duty not to charge a friend more than market price in most cases. But some moral duties have legal status too. Duties of reciprocity, fair play, and no exploitation are manifest in legal duties inside and outside of contract; those duties are not suspended but apply precisely in the context of private exchange. The background duties I refer to

30. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2012); Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 (2012); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2012); Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (2012); Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012); Occupational and Safety Health Act of 1970, 29 U.S.C. §§ 651–678 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012); National Labor Relations Act, 29 U.S.C. §§ 151–189 (2012); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (2012). Other important regulation of employment, including additional minimum floors, workers' compensation, and unemployment insurance schemes, takes place at the state level.

31. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a–77mm (2012); Securities Exchange Act of 1934, 15 U.S.C. § 78 (2012); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–80a-64 (2012).

32. Most states have adopted model laws promulgated by the National Association of Insurance Commissioners. *See, e.g.*, Unfair Trade Practices Act §§ 1–15 (Nat. Ass'n of Ins. Comm'r 2004); Replacement of Life Insurance and Annuities Model Regulation §§ 1–10 (Nat. Ass'n of Ins. Comm'r 2015); Model Unfair Claims Settlement Practices Act §§ 1–9 (Nat. Ass'n of Ins. Comm'r 1997).

33. 42 U.S.C.A. § 300gg-3 (2012), *invalidated by* Texas v. United States, 340 F.Supp.3d 579 (N.D. Tex. 2018) (prohibiting insurers from denying coverage based on pre-existing medical conditions).

34. *See, e.g.*, 15 U.S.C. § 13(a) (2012) (prohibiting price discrimination); Utah Pie v. Cont'l Baking Co., 386 U.S. 685, 700 (1967) (holding there was ample evidence to find that Continental violated 15 U.S.C.§ 2a by price-fixing the Utah frozen pie market); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293 (1985) (analyzing whether concerted refusals to deal are a per se violation Section 1 of Sherman Act). *See also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435–36 (1990); Otter Tail Power Co. v. United States, 410 U.S. 366, 378–81 (1973) (a facility deemed to be essential may be required to make its facility available to competitors to avoid violating the Sherman Act).

35. *See, e.g.*, 42 U.S.C. §§ 2000a(a)–2000a(e) (2012) (outlawing racial discrimination in places of public accommodation); 42 U.S.C. §§ 12101–12117 (2012) (outlawing employment discrimination on the basis of disability).

throughout this discussion are immanent in existing legal norms; the state has already backed them with its political authority. Voluntary commitments in contract are undertaken in the shadow of these "political" duties, which do not encompass the full range of interpersonal duties that parties owe each other. For example, they exclude private duties of friendship. They do not exhaust the obligations of human decency. The legal duties that properly inform contract interpretation derive only from interpersonal, political duties already recognized by the state.

It might be that self-interest and even private morality figure into parties' choice of contract terms more than background political duties. Indeed, I assume they do. But political duties are discharged in contract regardless of whether contracting parties consciously think about contract in that way. Even where a background duty does not motivate a promise, it mediates between the obligation that an individual intends to assume (or avoid) and the ultimate scope of her legal obligation. Penalty defaults are intended to force information out of a party that might be tempted to withhold certain information.[36] Interpretive defaults read the promisor's words and acts so as to render them reasonable. These defaults can effectively incorporate ideas of substantive reasonableness that derive from involuntary duties operating in the background.[37] Consider sticky interpretive defaults that require collective bargaining agreements and employment contracts to very expressly waive the right to litigate discrimination claims, even when less clear language would be strong evidence that the parties intended to see the right waived.[38] This is a different exercise than

36. *See* Ian Ayres & Robert Gerner, *Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 90 (1989).

37. *See, e.g.*, Morin Bldg. Prod. Co. v. Baystone Constr. Inc., 717 F.2d 413 (7th Cir. 1983) (interpreting a clause with reference to a reasonable default notwithstanding evidence of contrary subjective intent). *See also* Larry A. DiMatteo, et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 320 (2004) ("Many of the CISG articles provide very general, vague default rules tied to the concept of reasonableness."). David Slawson further defines reasonableness with respect to contracts, claiming that under "the new meaning of contract," contracts entail just those obligations that consumers would reasonably expect, though businesses are free to spell out and define those obligations within the bounds of reasonableness. W. David Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. PITT. L.R. 21, 28 (1984).

38. *See* Warfield v. Beth Israel Deaconess Med. Ctr., 910 N.E.2d 317, 326 (Mass. 2009) (describing courts' interpretive rules in employment agreements where waiver of litigation rights must be unambiguously stated); Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79–81 (1998) (stating that arbitration clauses for collective bargaining agreements must be "particularly clear").

classic accounts of contract would expect; the latter would focus at best on what the promisee might reasonably have understood the promisor to intend. Yet defaults cannot be reduced to our best guess about the parties' intentions.

Involuntary duties thus inform the obligations we "freely" assume when those obligations are not clearly specified.[39] However, not all moral duties are relevant to the particular perspective of the state at the moment of adjudication. Whether courts should read our express intentions in light of background duties depends on whether these duties are of a political nature. Where courts can glean a background duty from existing legal norms—in much the same way they already extract principles of public policy from statutes, case law, and common law history[40]—promises made to discharge such a duty should be interpreted in its light.

I call this method of interpretation "normative triangulation." Drawing from Donald Davidson's concept of triangulation, Brian Langille and Arthur Ripstein have suggested that contracts are and should be interpreted by incorporating facts about the world into party intent, irrespective of what parties actually thought about those facts.[41] We cannot know what others mean just by the sounds or marks they make. We rely on language, and language has no meaning except in the common space shared by speaker and listener.[42] Ripstein and Langille argue that in contract, as in ordinary speech, in light of the inherent limitations on the intelligibility of others, we "must take his or her beliefs to be largely true" and figure out what people are saying "by finding a way to make most of what a speaker says come out true."[43] The factual world thus serves as a reference point for filling in apparent gaps in the meaning of words in contract.

39. As with other theories that speak to the selection of default rules, the interpretative method endorsed here applies primarily to contracts subject to some ambiguity. Such ambiguity may arise because a written text is ambiguous; the initial determination of whether the text is ambiguous or completely integrated is subject to some uncertainty; or evidence of the terms of an oral agreement is subject to uncertainty. Where parties have made a contractual term entirely clear, the court is left with the questions of enforceability and remedy. Although my discussion of the sometimes competing interests of the state in regulating exchange are relevant to the question of whether to enforce a term as well as the scope of remedy available, I focus here on implications for interpretation.

40. *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 (AM. LAW INST. 1981).

41. *See* Brian Langille & Arthur Ripstein, *Strictly Speaking—It Went Without Saying*, 2 LEG. THEORY 63, 63–64, 74–75 (1996).

42. Barry C. Smith, *Language, Conventionality Of*, 5 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 368, 368–71 (Edward Craig ed., 1998).

43. Langille & Ripstein, *supra* note 41, at 73–74.

The practice that I describe and defend here extends this method to reference shared *norms*. Normative triangulation is doubly normative. First, the facts at which it is directed, i.e., the objects of interpretation, are normative. It aims to decipher the parties' obligations toward one another under the contract. Second, normative triangulation is normatively motivated.[44] The best method of interpretation is the one that best advances the state's policy agenda—a normative agenda. As discussed further below, the state's agenda includes both attention to the agency interests of contracting parties and broader substantive goals that implicate any two parties' terms of exchange. But in both respects the state's interests have a strong moral dimension. When a court looks to social practices and shared social norms, it is not just as evidence of how parties likely understood their agreement but also as evidence of the parties' background duties to each other. When social practices are inadequate, states can override prevailing private ideas about what parties owe each other and move the ball forward in clarifying soft legal norms.[45] The courts are not just trying to figure out what parties were thinking. Courts try to make what contracting parties actually said come out right—that is, compliant with hard and soft legal norms.

My account of normative triangulation will proceed in three parts. First, I will offer a schemata of a liberal state's interests in contract regulation. These are broadly speaking of two sorts: promoting the justice of public institutions and allowing space for private moral agency. Both of these interests inform the kind of contract law a state adopts, including its rules of interpretation. A liberal state plausibly responds to the competing moral demands that it faces by conditionally and partially delegating its authority over transactions to the parties to exchange. That is, private parties share authority over their transactions with the state, and private parties are the junior partners in this arrangement.

The second part of the Article follows from the first. I will defend an extension of one pillar of Davidsonian triangulation: Courts should apply a "principle of charity" in their construction of contractual obli-

44. *Cf.* Robert H. Myers, *Finding Value in Davidson*, 34 CAN. J. PHIL. 107–36 (2004) (arguing that we must assume that others' values and desires, not just their reactions/perceptions, are the same as our own, but on epistemic grounds).

45. For example, if it is unclear under the common law whether a bank must disclose the range of possible interest rates that might apply to a loan, the legislature might clarify the kinds of disclosures that are necessary to render the loan agreement enforceable.

gation that reads obligations as compliant with background duties.[46] The basic triangle in Davidson triangulation runs between a speaker and her object, between object and interpreter, and between speaker and interpreter. Davidson's principle of charity holds that the interpreter should maximize agreement with the speaker or interpret the speaker so as to make as much as possible of what she says true.[47] The principle follows from the relation between speaker and interpreter, and in particular, the interpreter's belief that they will respond similarly to stimuli.[48] In the context of contract interpretation, a court charitably reading an agreement will read it as *in agreement with* or *in compliance with* background duties that attend exchange.

Courts' reasons for applying a principle of charity are very different than those which motivate Davidson's interpreter. I will argue that the conditional delegation of authority to private parties gives states content-dependent reasons[49] for enforcing obligations. At this stage, I will compare the aims of contract interpretation to those of statutory and constitutional interpretation. Contracts and public legal instruments are both authored under bounded authority, but it is only in contract where authority is actively shared with another institution that has a simultaneous role.

The third part of the Article will further examine the implications for how we interpret contracts. Most importantly, contractual intent is not an exhaustive consideration in interpretation. I will also explore the distinction between political and private background duties and between equitable and public policy norms. I will illustrate how courts already engage in normative triangulation.

I. Shared Authority over Contract

Liberalism has a complicated relationship with contract. On the one hand, a liberal state is committed to controlling the material consequences of contract. It has at least two bases for that commitment. First, ensuring the justice of its basic structure requires the state to

46. *See* DONALD DAVIDSON, SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 119, 148–49 (2001).

47. Langille & Ripstein, *supra* note 41, at 73.

48. *See* DAVIDSON, *supra* note 46, at 193–204.

49. A content-dependent reason is "a reason for conforming to a directive because the directive has a certain content," where content-independent reasons "are supposed to be reasons simply because they have been issued and not because they direct subjects to perform actions that are independently justifiable." Scott J. Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 389 (Jules L. Coleman et al. eds., 2002).

regulate the cumulative effects of private exchange.[50] Distributive justice thus constrains contract as an allocative institution.[51] Second, a state should undertake to protect people from certain kinds of harm.[52] This includes both some of the harms inflicted within contractual relationships and harm to third parties from joint action.[53] These two threads of the liberal state mandate generally call for vigilant oversight of private exchange.

On the other hand, a liberal state is uniquely sensitive to the value of allowing individuals to contract as freely as possible.[54] Contract is an alternative to tort and other mandatory regimes. Unlike mandatory forms of regulation, contract allows individuals to choose whom they deal with and on what terms. It allows individuals to give expression to a range of preferences and values which together constitute the subject on which the liberal state is premised. From the standpoint of individuals in contract, private exchange entails granting promises and permissions.[55] The exercise of such normative powers helps constitute parties as moral agents vis-à-vis strangers in civil soci-

50. *See generally* Samuel Scheffler, *Distributive Justice, the Basic Structure and the Place of Private Law*, 35 OXFORD J. LEG. STUD. 213, 220–21 (2015) (discussing Rawls's comparison of tax and contract laws to show the distinctiveness of the "two kinds social rules" and how they are governed and/or regulated by different social entities).

51. *See generally* Aditi Bagchi, *Distributive Justice and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193 (Gregory Klass et al. eds., 2014) [hereinafter Bagchi, *Distributive Justice and Contract*] (describing how consent to terms acts as a method of allocating interpretation, thus justice, to an institution such as the state). Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 605 (2005).

52. The strong and largely discredited liberal principle is that states should *only* undertake to prevent harm, but it is uncontroverted that protection from harm is an important state function. *See* JOHN S. MILL, ON LIBERTY 163 (Andrews UK Limited 2011) (1859). *See also* Addington v. Texas, 441 U.S. 418, 426 (1979) (stating that under its powers of *parens patriae*, the state authority to hospitalize the mentally ill is in furtherance of its compelling state interest of protecting other individuals from the harms caused by the mentally ill).

53. *See* George M. Cohen, *Implied Terms and Interpretation in Contract Law*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME III: THE REGULATION OF CONTRACTS 78, 90 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) (discussing how opportunism harms contracting parties and causes a court's intervention, stating that "the problem of opportunistic behavior is perhaps the key justification for court intervention in contracts"); Steven Shavell, *Contractual Holdup and Legal Intervention*, 36 J. LEGAL STUD. 325, 346 (2007) (stating that legal intervention in contract is justified where asymmetric information and externalities can cause harm to contracting parties).

54. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 2–4 (2017).

55. *See* CHARLES FRIED, CONTRACT AS PROMISE (1981); Seana Shiffrin, *Is a Contract a Promise?*, *in* ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 241 (Andrei Marmour ed., 2012); *see* Daniel Markovits, *Contracts and Collaboration*, 113 YALE L. J. 1417 (2004) (explaining that promises are the substance of contracts).

ety. A liberal state is committed to facilitating this process by which citizens acquire moral identity.

We might attempt to do away with this tension by definition. That is, we could interpret the autonomy principle to require only that the liberal state refrain from regulating private conduct that has no consequence for third parties. But in complex societies almost every private action gives rise to some third-party effects. The liberal commitment to autonomy is best understood to weigh in favor of an expansive sphere for individual agency even outside the vanishing space in which private acts impose no burdens on others. This commitment vaguely resembles the rhetoric of neo-liberal or libertarian approaches to economic regulation, but it is not a bar to legal intervention. The liberal commitment does, however, call for restraint in the regulation of private exchange.

Historically, self-described liberal states were more attune to the autonomy interests of contracting parties than to the moral interests served by regulation.[56] The tension between these interests is experienced more acutely now. The evolving stance of states largely reflects new (or at least modern) recognition of the regulatory interest of the state in ostensible private markets.[57] We are also more aware of the ways in which individual transactions may adversely affect third parties.[58] And we have revised, too, our understanding of causation in ways that make it possible to allocate responsibility and thus justify imposing costs on contracting parties whose terms are socially deleterious.[59] There have also been factual developments that press down on the regulatory side of the conflict. Market integration accelerates externalities because there is direct competition across a larger set of exchanges, requiring parties to respond to terms offered elsewhere in that set. Standardization amplifies third party effects because the scale of a given term is no longer the market effect of one transaction but of the entire market governed by that term. New technologies and the expanded capacity of the administrative state have lowered the cost and intrusiveness of regulation. These facts together make it tempting

56. *See* DAGAN & HELLER, *supra* note 54, at 10–11.

57. *See* Bagchi, *Distributive Justice and Contract*, *supra* note 51, at 19.

58. *See generally* Bagchi, *Other People's Contracts*, *supra* note 28, at 212–13 (arguing that contract law does not adequately account for harms that individuals can inflict on others or third parties).

59. *See* Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72 (Gerald J. Postema ed., 2001).

to regulate transactions primarily by way of public law, but we do so at the expense of the tailored flexibility of private ordering.[60]

The competing implications of liberalism for contract create unavoidable tension in the law governing transactions. States have allocated considerable space to private parties in setting the terms of private transactions, but the boundaries of private authority are not clearly established or stable. Rather than positing clear borders, courts[61] continuously negotiate the border by attempting to reconcile a foundational commitment to parties' intent with attention to the objective reasonableness of the arrangements those parties propose.

A. The Regulatory Interests of a Liberal State

The evolution of contract regulation could be understood to track the expansion of state power. In the United States, the expansion of the federal government's formal regulatory powers coincided with the erection of a full-blown administrative state during the New Deal, and both surged again a few decades later during the Great Society.[62] One might be tempted to relate both phenomena to a quelling of typical liberal anxieties. That is, if liberals are fundamentally concerned with limiting state power, then the increased tolerance for regulation—or intervention—in private affairs may reflect the withering of this foundational anxiety and its substitution with new concerns about private power.[63] People may worry less about state power because, however powerful the state may be, we now feel more immediately vulnerable to private power.

Whatever the merits of this cultural speculation, it is misguided as an explanation for the last century's expansion of regulation. Liberalism did not recede and thereby make room for regulation. Liberalism properly understood—in the United States, primarily with the benefit of John Rawls and others like Ronald Dworkin—is itself the intellectual impetus for much regulation.[64]

---

60. *See generally* Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. Rev. 319 (2002). Private ordering is "[t]he sharing of regulatory authority with private actors." *Id.* at 319.

61. This Article does not attempt to describe how all liberal states manage to reconcile public and private authority over contracts. Although many of my claims can be generalized to other states, my argument is focused on contract law in United States states.

62. *See generally* Daniel Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940 1–8 (2014) (outlining the general history of the emergence of the American administrative state).

63. *See* Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 257–60 (1995).

64. *See* Rawls, *supra* note 18; *see generally* Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 Phil. & Pub. Aff. 185 (1981); Ronald Dworkin, *What is Equality? Part*

The first important link between liberalism and contract regulation is distributive justice.[65] Private law is among the pillars of the basic structure of society, and to the extent the rules of contract have distributive consequences, those rules are constrained by the demands of distributive justice.[66] A more general argument for the relationship between distributive justice and contract is outside the scope of the present Article; in any case, distributive justice is just one of the public functions of contract.

The state's second regulatory interest regarding contract derives from the political imperative to prevent certain kinds of harm. The link has two aspects. Before I elaborate those, I will set aside the question of which harms count. The argument here requires only that we accept that a state should protect citizens from injury, and these injuries include material (not just bodily) harm.[67]

The first set of harms for the state to target in contract regulation are those that arise within the contractual relationship by way of deceit, exploitation, and contractual default. Patrick Atiyah saw these harms as sufficient to explain the state's interest in contract and viewed the promissory framework as gratuitous and misleading, not merely rivalrous—as I view it here.[68]

Contracting parties induce reliance in one another, and failure to follow through on commitment thus results in economic harm. Contracting parties also sometimes contract on terms that are so much worse than those available elsewhere such that one of the parties is effectively worse off as a result of the contract if one takes into account her opportunity costs. Contracting parties may also exploit the incompleteness of their agreements and shifting power relations over the course of the contract to extract additional concessions and destabilize the contract to the detriment of one of the parties. Contract law uncontroversially protects us from each of these harms to various degrees.

The other harms regulated by contract regulation are externalities of contract. The state protects third parties from the contracts of others.[69] That is, contract cannot be used to inflict harm on third par-

2: Equality of Resources, 10 PHIL. & PUB. AFF. 283 (1981). Both Rawls and Dworkin defend theories of justice that require the state to actively manage the economy, especially to limit inequality.

65. *See* Bagchi, *Distributive Justice and Contract*, *supra* note 51, at 1–5.

66. *Id.*

67. *See* HOBBES, *supra* note 18, at 279–80.

68. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 139–49, 687–89 (1979).

69. *See* Bagchi, *Other People's Contracts*, *supra* note 28.

ties. While it is obvious that a contract should not be enforced where it is designed with the express purpose of harming third parties, it is less obvious to what extent contracting parties may incidentally undermine the value of third-party entitlements. We might be tempted to say that parties to contract have no moral right to harm the interests of others. But this would be unduly restrictive; a regime that disallowed any conduct, whether individual or joint, that adversely affects others would leave an intolerably small space for individual freedom. Individuals have a strong interest in being permitted to burden others to some extent, but limiting that burden is among the legitimate functions of contract regulation.

The size and administrative capacity of the state makes it possible to regulate exchange in ways that were not possible before, and this expands the scope of what justice demands of the state. Economies of scale make it cheaper to administer some kinds of regulation. Technology improves the information available to bureaucrats and, together with their evolving technocratic skill, improves the quality (and lowers the social cost) of regulation.[70] Even judges benefit from better information about the decisions of their peers as a result of better search engines and case law databases. New technology makes it possible to observe regulatory compliance with less personal attention by relying instead on aggregate data. None of this makes contract regulation costless—if nothing else, the basic incursion on an apparently private space remains—but in the balance of considerations, it cuts in favor of regulation to protect the material interests of third parties.

The upshot is that the state has a legitimate interest in the terms on which we deal with each other. Although contractual obligation is characterized as the quintessential voluntary obligation in law,[71] in fact, contracts attempt to govern space that is already properly governed by ordinary law. A liberal state must pursue and effectuate distributive justice. It has to promote the material stability and independence that individuals require in pursuit of their various life plans, and this entails regulating contracts for future and third-party effects. These legitimate interests of a state in contract manifest in involuntary legal duties that limit free exchange, sometimes crowding

70. *See* Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 895 (1999) ("[T]he relative efficiency with which a particular regulatory regime maximizes a social welfare function depends on institutional and technological circumstances.").

71. *See* Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433 (forthcoming 2019) [hereinafter Bagchi, *Voluntary Obligation and Contract*].

out and sometimes crowding in voluntary contract. Regulatory interests crowd out the authority of private parties where parties have no choice left to them—where they cannot choose to buy certain products considered dangerous, or where they cannot choose to be employed in a line of work considered demeaning. Regulatory norms crowd in private authority over transactions insofar as they narrow the range of acceptable, or enforceable, terms—where they limit price or require the right of rescission.

B. The Nature of the Autonomy Interest

It is dangerous to even speak of autonomy in connection with contract. This is because one might easily confuse the claim here—the existence of an autonomy interest—with a more radical but widespread claim that contracting parties have rights and duties dictated by the principle of autonomy. Scholars like Charles Fried, Jody Kraus, and Randy Barnett (who are concerned with consent rather than promise) are most explicit about such claims—though Fried may have attenuated his claim since its original statement in *Contract as Promise*.[72] One might also confuse the claim here with the claim by Seana Shiffrin that the practice of promise, which serves our autonomy interests, constrains contract law because too great a divergence between the law of contract and its closest ordinary moral practice threatens to undermine the stability of the latter.[73]

Both of these kinds of claims are misguided because they reduce contract to promise, or reduce contract in a way that misses the force of liberal interests outside of individual autonomy, and because they obfuscate even the implications of autonomy for contract. Less dogmatic versions of these theories, as advanced by Shiffrin, Daniel Markovits, and others, can channel values peripheral to the core motivating values of autonomy, self-determination, or simply, control.[74] These theories can channel peripheral values by allowing that conditions for valid promise or consent—the conditions under which state must support promise or recognize consent, or even the value of

72. FRIED, *supra* note 55; Randy Barnett, *A Consent Theory of Promise*, 86 COLUM. L. REV. 269, 319–20 (1986); Jody S. Kraus, *Personal Sovereignty and Normative Power Skepticism*, 109 COL. L. REV. SIDEBAR 126 (2009); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COL. L. REV. 1603 (2009). *See also* Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961 (2012).

73. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 713–15 (2007).

74. *See* Shiffrin, *supra* note 55. *See generally* Markovits, *supra* note 55, at 1467–80.

promise or consent—may turn on other values. But the centering value has a moral life of its own.

Our understanding of the demands of autonomy on the practice of promise or the validity of consent plays out outside the law and outside political morality. People make promises to others without invoking the law. People consent to arrangements that have no legal force.[75] Our understanding of when promise and consent are effective is driven by those contexts, which often involve only two people and raise no question of legal sanction. By describing contract as legal promise or legal consent, we assert continuity over context in the moral practice of promise and consent. We imply that the commitments people make in the context of legally binding exchange are fundamentally of the same species as the commitments they make in ordinary life—and if the promissory or consent framework is to do any work, these commitments should be subject to similar (though not identical) rules in and out of the law.

The psychological and moral import of terms like consent and promise is not fully permeable by alien political-moral considerations;[76] and the alien political-moral considerations are not reducible to their impact on the quality of promise or consent. The effect of a transaction between two people on other people or its effect on the distribution of resources in a society might have some implications for the values that inform promise and consent—but those implications are incidental. Resting the legal significance of third-party externalities or distributive justice on their implications for the quality of promise and consent distorts their significance. If the rules of interpretation and the conditions of enforceability depend just on the quality of promise and consent, then contract law will fail to adequately attend to important aspects of exchange.

We might characterize the problem with most promissory and consent-based theories of consent as a misallocation of authority. That is, they begin with a false conception of contracting parties' authority over their own transactions. The normative powers of promise and consent are ones we recognize because they are valuable to moral agents,[77] but these normative powers are always circumscribed.

75. For example, we might agree to meet for dinner or you might permit a friend to skip your wedding so she can do a long-awaited audition.

76. Political-moral considerations are ones that pertain to the institutional context of contract rather than the bilateral relationship, such as distributive justice or the effective functioning of a market.

77. *See* David Owens, Shaping the Normative Landscape (2012).

Outside of law, they are limited by the myriad interpersonal duties that control our normative situation in ways that we cannot revise.[78] In the context of regulating private agreement, these normative powers rival other interests of a state in the terms of exchange.[79] While some of those state interests coincide with the moral interests of agents in the boundaries of their own normative powers, there is no reason to believe that the conditions under which a state should recognize parties' commitments as binding will perfectly coincide with those conditions under which promise and consent should be regarded as effective as a general matter. Moral agency is enhanced by the powers of promise and consent but over time, and for some more than others, legally binding promises and consent can diminish autonomy as well.[80] Exchange, which is the legal subject of contract—not agreement, promise or declarations of consent per se—affects the autonomy of third parties and a variety of other interests relevant to state regulation. Using regulation of exchange to promote our normative powers is one thing; centering contract law around that function is quite another.

The liberal interest in the autonomy of contracting parties is about enhancing agency, not respecting jurisdiction. The claim here is neither that principles of contract are morally determined by promise nor that contract must prop up the practice of promise. Instead, the normative powers exercised in contract, which include but are not limited to promise, are valuable exercises of agency; allowing space for exercise of those powers expands moral agency.[81] This claim does not deny this interest might sometimes be outweighed by other aspects of the liberal interest in transactions, and it does not favor correspondence between contract law and the moral laws of promise—in fact, I have argued elsewhere that divergence between those regimes may be morally valuable.[82] It does, though, acknowledge a real cost to overriding voluntary obligation with involuntary duty.

In this section, I will first describe further how contract can be understood to reflect normative powers, and then discuss why a liberal

78. For example, one can try to release a best friend from a duty of friendship, such as the duty to visit one on one's deathbed, where it is entirely feasible to do so; but arguably the dying friend cannot release the other from this duty.

79. *See supra* Part I.A (describing state interests).

80. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (requiring exchange for enforceability).

81. *See* OWENS, *supra* note 77, at 6–12.

82. *See* Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 724–26. (2011) [hereinafter Bagchi, *Separating Contract and Promise*].

state should be especially interested in allowing individual space to cultivate those powers. Combining the interests developed in the last part with those here results in a picture of contract where the state has an interest in allowing contractual freedom, but individuals lack free-standing authority over their transactions.

1. Normative Powers in Contract

Contract is regarded as voluntary because we assume contractual obligations deliberately by communicating an intention to bind ourselves.[83] Our ability to change normative relations by virtue of communicating an intention to do so implies the exercise of a normative power.

Promising is the most discussed normative power; by making a promise, an agent creates a new obligation where there was none before. Consent is another classic normative power by which an agent makes some action by another person permissible where it previously was not. Because the concept of consent in contract theory has been predominantly political—i.e., consent is usually granted to the state and operates to justify state action[84]—I will separate out consent directed to another private person and, consistent with ordinary usage, refer to the latter as *permission*. Like consent, permission is created by communicating an intention to grant it. But permission is granted to another private person.

Normative powers like *promise* and *permission* comprise an important element of our self-understanding as moral agents. But these powers are not natural features of a person. Normative powers are constructed by mutual recognition. If we fail to accept others as obligated when they purport to bind themselves, we deny them this moral capacity. If we fail to regard ourselves as bound after holding ourselves out as self-bound, we deny and thereby diminish our capacity to bind ourselves. The general reason for respecting voluntary obligation is respect for the moral capacity and picture of the moral agent that makes such obligation possible.

---

83. *See* Bagchi, *Voluntary Obligation and Contract*, *supra* note 71.

84. This idea underpins social contract theories. *See* HOBBES, *supra* note 18, at 239; *see* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT) AND A LETTER CONCERNING TOLERATION 3, 49–50 (J. W. Gough ed., Basil Blackwell & Mott, Ltd., 3d ed. 1966) (1690); *see generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Christopher Betts, trans., Oxford Univ. Press 1994) (1762).

The normative power of making binding promises is sometimes recognized on the grounds that it facilitates valuable relationships, or more generally makes it possible to shape one's moral world.[85] I do not aim to propose a theory of promising as such, but I pull as a common element from most accounts of promising that the recognition of the practice enhances moral agency. Promising makes it possible to impose an imprint on one's own moral world, whether generally or through its specific aspects, such as one's relationships with others. The imprint reflects something about one's self, one's conceptions of the good or life plan.

Although there has been less scholarly attention to the moral value of permission, that value is perhaps even more isolatable as involving this capacity to direct and compose one's normative relations. When we trade one thing of value for another, we may manifest in the world our otherwise subjective valuations of those things.

Institutions like contract that support the practice of promise and permission increase the value of those normative powers for agents. As I have argued elsewhere,[86] support for the private practice of promise does not entail copying it; sometimes the legal practice of promise should diverge from the ordinary practice in order to avoid crowding it out. But the state enhances moral agency by allowing us to control our moral position to a greater degree, especially by enabling us to deliberately alter our position by communicating an intent to do so.

2. Liberalism and Normative Powers

I have claimed that a liberal state should be especially attentive to the moral agency of its constituents, as promoted through the assumption of voluntary obligation. One might argue to the contrary that a liberal state is properly indifferent to the moral makeup of citizens and thus unfettered by any private autonomy interest where a proper regulatory state interest obtains. Agnostic between claims about the good life, it should not attempt to shape constituents in any particular way.

Liberal perfectionists, similar to Joseph Raz, should be most sympathetic to the idea that the state should promote autonomy as a condition for individual flourishing.[87] But even those who are unprepared to endorse a mandate for the state to cultivate autonomy

85. *See, e.g.*, OWENS, *supra* note 77, at 6–12.

86. *See* Bagchi, *Separating Contract and Promise*, *supra* note 82.

87. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986) (critiquing neutral liberal theory in favor of perfectionism).

in a thick sense can endorse a mandate to promote agency. While a conception of the good, in which individuals reflect on and shape their lives on a range of dimensions, may exclude certain conceptions of the good life that a modern liberal state cannot afford to exclude, moral agency is a thinner goal.[88] Its value to persons does not presuppose that we should be active in our choice of a conception of the good; its value goes to the casting of a person as an agent, whatever her conception of the good. Exercising agency by possessing the power to shape one's obligations and rights vis-à-vis others—sometimes exercising the power and sometimes withholding it, in line with whatever conception of the good and however one came to identify with it—is valuable to moral agents.

There are probably some conceptions of the good that do not value moral agency, in that they do not posit it as an important dimension of the person. But those are already in tension with the liberal project. For a liberal state purports to justify its powers derivatively from the moral claims of its constituents. Its authority depends on it fulfilling a moral function for its constituents. Its constituents have obligations to be fulfilled through the state, and they can make claims on the state and each other only inasmuch as they are conceived as moral agents.

Liberalism starts with a picture of the person as a self-originating source of value.[89] The edifice collapses if we do not regard individuals as capable of conferring value on their particular ends—capable of making claims on others and having claims made on them. So central is this feature of the person to liberalism's working picture of herself that a liberal state cannot afford to disregard it entirely even when the substantive moral interests of those same individuals call for coercive regulation. The state is in a dilemma every time it must weigh the interests of one individual against another, as it must in the course of regulation, because it is committed to not knowing how to value these interests, let alone how to weigh them against each other. Any kind of welfare analysis or analysis of the distribution of primary resources requires that the state adopt a working view about what people want; in the absence of real knowledge, state actors are left to substitute their ideas about what people must want. Even a state with the most liberal motives is confronted with the reality of illiberal method in implemen-

88. *See* MATTHEW H. KRAMER, LIBERALISM WITH EXCELLENCE (2017) (critiquing existing liberal perfectionist theories as "edificatory").

89. *See* RAWLS, *supra* note 18, at 11 (defining justice as fairness by reference to what free and rational persons would accept).

tation. Avoiding that inevitable and uncomfortable moment calls for leaving as much space as possible for individual agency. Humility in the pursuit of even legitimate regulatory interests is the homage a liberal state pays to its normative foundations.

C. Conditional Delegation of Authority

In the realm of contract, the institutional form that such humility takes is a conditional delegation of transactional authority to private parties. Conditional delegation allows parties to choose their transactional partners and terms within parameters that are broadly consistent with the regulatory imperatives of the state. The state recognizes parties as having acted within their authority only inasmuch as private terms are compatible with background duties stipulated in statutory law, administrative regulation, and case law. Many of these norms bearing on the bounds of private authority are well-outside traditional private law (e.g., all residential apartments must have hot water) while others are local norms articulated within contract law itself (e.g., parties to a contract may not exploit shifts in bargaining power that are the result of the contract itself). If a contract clearly flouts a background legal duty—such as a residential lease that purports to waive any right to hot water, or a contract that allows one party to cancel for any reason should performance no longer serve its interests—courts will flatly refuse to enforce the contract as a violation of the housing code, or for lack of mutuality or consideration. Parties have no right to make those contracts.[90]

Many cases are less clear cut. Many leases are silent about providing hot water. In such a case, the court will read the lease as imposing that duty on the landlord, and failure to provide hot water operates as a breach that suspends the tenants' obligation to pay rent.[91] Similarly, there are many contracts that do not allow a party to exit the contract for any reason but allow substantial discretion. In these cases, the court will read the contract to imply that a party has a duty to exercise its discretion in good faith.[92] The court "cures" a lack of mutuality and

90. *See, e.g.*, Kline v. Burns, 276 A.2d 248, 251–52 (N.H. 1971) (violation of city housing code constitutes a breach of contract). *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. LAW INST. 1981) (requiring mutuality of obligation).

91. *See* Foisy v. Wyman, 515 P.2d 160 (Wash. 1973).

92. Centronics Corp. v. Genicom Corp., 562 A.2d 187, 193 (N.H. 1989) (detailing legal spaces in which contractual duty of good faith applies).

in doing so brings the contract within the bounds of private authority—and enforceability.[93]

That our contract law regime operates in this way is more apparent, and its merits more evident, when we contrast the existing model with an alternative—one so unattractive that it is merely hypothetical.

Instead of conditionally delegating its authority to regulate transactions, the state could allot certain transactional spaces to its regulatory functions and reserve others as entirely free domains. Such an approach might appear to strike a reasonable balance between the state's interests in securing distributive justice and protecting citizens from harm, on the one hand, and allowing moral space for exercise of normative powers, on the other. This model is not wholly alien in that there are important differences across transactional spheres in existing law, with some spaces heavily regulated and others largely left to private ordering. For example, transactions between privately-held, sophisticated firms are comparatively lightly regulated, while contracts entered into by a fiduciary with a conflict of interest are highly scrutinized.[94] But the hypothetical model we are considering is one in which there are contractual domains entirely absent of constraints. Note that spaces of private agreement that are unregulated by contract do not fit this description because, to the extent the state does not make itself available for enforcement, agreements are not contracts at all. Similarly, the model suggests transactional domains in which the state directly controls every aspect of transactions. Imagine a state that decides which shoes you will wear and from whom you will get them, at what price. On this model, you do not get to choose even your shoe size.

While the advantage of the hypothetical model is that courts need not ever decide whether a particular agreement falls within the parameters of private authority, the advantage is secured at obvious, intolerable costs. The burden of exchange in which choice is wholly absent is not justified by rampant choice in other life domains. The injustice and outright danger of a wholly unregulated transactional space is not well purchased by way of bureaucratic bliss elsewhere in the state machine. Every individual transaction is unjust or oppressive in the hypothetical model. The model we actually have allows instead

93. *See, e.g.*, E.I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224, 232 (8th Cir. 1933); Pac. Pines Const. Corp. v. Young, 477 P.2d 894, 896 (Or. 1970) (lack of mutuality does not make a contract void when there are implied promises).

94. *See, e.g.*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930–32 (Del. 2003).

for the justice of individual transactions by bringing each of the states' interests to bear simultaneously, albeit not equally, on every enforceable agreement for exchange.

Contract scholars have not framed the relationship between state authority over transactions and individual choice as a conditional delegation of authority. However, it has been clear for some time that, contrary to occasional rhetoric,[95] parties in contract are not inevitably "free" to contract as they see fit.[96] The overturning of *Lochner* and the more fundamental rejection of wide-ranging economic liberty ushered in by the New Deal has more profound implications for contract that we have acknowledged. The post-*Lochner* era is characterized by a broad, if imperfect, consensus that the state has a legitimate interest in regulating exchange for purposes other than policing consent.[97] The state actively regulates the terms of exchange in a wide range of activities.[98] It has been widely understood that denying the exclusive right of individuals to control the terms on which they engage in "private" exchange expands the scope of permissible regulation and thereby reigns in the *boundaries* of private contract. But scholars have not taken seriously the implications of shared authority internal to contract law itself, i.e., the rules that govern legally binding agreements.

95. *See* Printing and Numerical Registering Co v. Sampson (1875) 19 LRCh 462 at 465 (Eng.) ("[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.").

96. *See* Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) (Cohen stressed that because contracts implicate public policy it is always up to the state whether to enforce a private agreement; contracts are in sense always public law and private will is not controlling. Non-negotiated contracts in particular are unrecognizable under the classic model of entirely voluntary contract.); *see also id.* at 588–89 (At the end of his article, Cohen suggests "[c]ontracts are standardized not only by statutory enactments . . . but also by the process of interpretation that courts apply to human transactions and to their formulated agreement. . . When courts follow the same rules of interpretation in diverse cases, they are in effect enforcing uniformities of conduct.") We have come quite a bit closer to Cohen's vision in which contracts are not presumed binding based on a false theory of freedom. This Article can be understood as elaborating a normative scheme to replace the one he rejects.

97. *See generally* Glaeser & Shleifer, *supra* note 24.

98. *See supra* notes 8–14.

II. Content Dependence in Contract Enforcement

We regard contract as voluntary because contracting parties exercise normative power over their relations with contracting partners.[99] We appear to be the source of our own obligations in contract. While the state does not create the normative power of promise, our legal power—to create legal obligation—is the intended fruit of a conditional delegation of authority from the state. Under this regime, individuals and state *both* have say over how transactions proceed. Contract is the peculiar method by which states *mostly* leave it to individuals to sort out the terms of private transactions, but as a tool of governance it is subject to a logic separate from the private practice of promise. Contractual promises create promissory reasons for *parties* to follow through on their agreements, but they generate *separate* reasons for the state to enforce those agreements. Because the state has a range of regulatory interests in contract outside of promise, even if parties' intentions control their promissory obligations in contract, they do not similarly control the scope of a legally binding agreement.

Why not think that enforcing contracts is about enforcing promises, even if our reasons for enforcing promises include non-promissory norms? As a descriptive matter, the principle of objectivity in contract already suggests that the law is uninterested in enforcing a party's actual intentions, including what they undertook to promise.[100] There are some situations where subjective intent appears to trump—as where the parties both understand a term differently than a reasonable third party would have understood it, or where a party's claims are limited by her actual knowledge of the other party's intended meaning.[101] But we can understand even those cases as ones where the court treats the parties' agreement, or one party's understanding against her own interests, as more reliable evidence of what was reasonable for the parties to believe rather than the court's own

99. *See* Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 928–31 (1982) (book review) (stating that a person has normative power where she can change her normative position by communicating an intention to do so); OWENS, *supra* note 77, at 4–6, 127–28.

100. *See, e.g.*, SAS Inst. Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005) ("[A] court interprets a contract by ascertaining the true objective intentions of the parties, based on the contract language."); Cochran v. Norkunas, 919 A.2d 700, 710 (Md. 2007) ("[T]he true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."); Klos v. Polskie Linie Lotnicze, 133 F.3d 164, 168 (2d Cir. 1997) ("When interpreting the meaning of a contract, it is the objective intent of the parties that controls. The secret or subjective intent of the parties is irrelevant.").

101. *See* RESTATEMENT (SECOND) OF CONTRACTS §201 (AM. LAW INST. 1981).

ex post reconstruction of events based on skewed and partial information.

One could argue that the obligations created by promise turn on a promisor's objective intent too, such that the law's interest in objective intent is consistent with the morality of promise. The question then is whether objective intent should turn on how each party is *most likely* to have interpreted the other party's intentions, or on the most *reasonable* interpretation of each person's intentions. If contractual commitments arise spontaneously from a vacuum, these two variations on objective intent might collapse into one: The most reasonable interpretation of intent would be the other party's best guess about those intentions.

However, if private contract is to govern the terms of an exchange within the parameters of private authority, it must actually function as an alternative to mandatory regulation. That is, it must reasonably specify the duties implicated in exchange—which is to say, as I argue further below, that it *must be read* to reasonably specify the relevant duties. There are many reasons to harness the practice of promise for the purpose of specifying duties in exchange—it allows individuals to set their own prices, choose their own products and providers, and ratchet their warranty protections up and down based on their particular levels of risk aversion and productive capacities. Private individuals are usually better at setting the terms of exchange than a third party like the state. But courts' reasons for deferring to our terms are instrumental; contract expands individual agency while regulating conduct in the course of exchange.[102] Although individuals' authority on the terms of exchange is not entirely epistemic—grounded in their superior information—it is not fully jurisdictional either. We are authoritative only inasmuch as the terms we choose are consistent with the regulatory functions served by contract. Thus, even if, by virtue of the state's commitment to private ordering, our promises generate some content-independent reasons for state enforcement, our terms are effective substitutes for the background legal scheme only where they fall within certain bounds—and that inquiry is content-dependent.

At this point, it is useful to observe one point of contrast between interpreting contracts and interpreting law, and a separate point of similarity. First, the point of contrast: Post-*Lochner*, individuals have no inherent claim of authority over the terms on which they deal with

102. *See supra* Part I.

others. In this respect, courts interpreting individual *promises*, in light of background political duties, are differently situated than individuals or courts interpreting *laws* in light of related moral principles. At least in a positivist account of law, the sources of legal obligation do not depend directly on the moral attributes of law. Political authority is content-independent to the extent that our reasons for respecting political authority do not depend on the substance of particular laws. For that reason, depending on how we construe the scope and basis of authority and the process of law-making, we (or courts) might care whether the legal authority that passed a law intended it to prohibit or permit some conduct.[103]

To be sure, political authority to generate laws is not boundless. There are constitutional limits to what lawmakers may do. However, there are important differences between political authority over laws and private authority over contracts. Some differences are in kind, and others are a matter of degree.

Lawmakers do not share authority over the subject matter of most laws with anyone else. Courts may pronounce that a law is unconstitutional but—outside of exceptional positive injunctions—they do not substitute their own laws instead.[104] Moreover, political authority derives from democratic principles and constitutionally mandated procedures. Lawmakers are not delegated their authority by another institutional actor; outside of revolutions, "the people" are not a rival actor, they act through lawmakers. Private authority over contracts is more meaningfully shared because legislatures, courts, and administrative agencies are live agents of the state that regulate the same transactional space as private parties, simultaneously, and their terms displace private terms where terms conflict.

Perhaps because lawmakers do not actively share authority with anyone else, constitutional limits on lawmaking are less heavy-handed than restrictions on private contract. Most of the things that democratically-elected lawmakers want to do in contemporary society are constitutionally permissible.[105] For example, if the state wants to regulate pens, it is largely free to ban certain features (e.g., toxic chemicals

103. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 139 (2005) (stating that deferring to legislative intent when interpreting law is justified "if, and only if, a certain law is justified on the basis of the expertise branch of the normal justification thesis").

104. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review).

105. *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that courts will rarely strike down legislation because "it would require an uncommon portion of fortitude in the judges").

that both manufacturers and consumers might prefer) or impose certain mandatory remedies (e.g., the right to sue for bodily injury, which both manufacturer and consumer might prefer to waive).[106]

Of course, there are exceptions. It is harder to regulate guns.[107] There are times in which the Constitution factors heavily in major political decisions, and laws that raise constitutional concerns are especially salient.[108] If it turns out that courts see live constitutional questions in every statute, then to that extent statutory interpretation is content-dependent too. It might turn out that no real authority in the world is purely content-independent; nevertheless, in some contexts, authority is more heavily dependent on content than in others.

In contract, the weight of the state is heavy indeed. Most contracts are so bare-boned that they would be unintelligible and unworkable without state-supplied defaults.[109] Contracts are expected to reflect the interests of contracting parties; regulations that overlay contracts to advance some public end are not anomalous, but pervasive.[110] Our interest in moral agency is among the reasons for leaving it to private individuals to decide how we deal with others, and that interest may be advanced irrespective of the content of our choices. But the interests of others must also be consistently well-served by a system of private ordering; whether these interests are well-served is content-dependent.[111] The force of public reasons for deferring to private terms of exchange depends in part on the terms that contracting parties choose.

Indeed, political authorities, dissatisfied with the terms on which whole classes of market transactions take place, regularly override those terms through consumer, labor, tenant-landlord, antitrust, and other statutes.[112] When courts find the terms of individual transac-

106. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012) (banning pollutants). *See generally* U.C.C. § 2-719(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (stating that the limitation of damages for injury to person is prima facie unconscionable).

107. *See* Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696, 700–03 (1978).

108. *See generally* Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 824–29 (2005).

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

110. *See generally* Glaeser & Shleifer, *supra* note 24 (explaining the optimal governmental action is not to intervene in private affairs).

111. Even Joseph Raz allows, though he does not pursue, the possibility that promissory norms may be justified on grounds that "combine content-independent and content-dependent arguments." *See* Joseph Raz, *Promises and Obligations, in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 210 (P.M.S. Hacker & J. Raz eds., 1977).

112. *See supra* notes 22–25.

tions inadequate, they have the doctrinal resources to refuse to enforce those contracts by declaring them unconscionable or against public policy.[113] In all the less dramatic cases, courts should read contracts sympathetically as our effort to carve out some moral space in a world already saturated with duty.

Contract interpretation differs from legal interpretation in the kind of authority exercised by the speakers whose words are subject to interpretation. But contract interpretation is similar to legal interpretation in that the best rules of interpretation depend on our conception of the practice and its purposes. The practice of contract, as a method of regulating exchange, depends on its legitimacy, or at least its appeal, on the theory of interpretation it presupposes. A silly theory of interpretation will result in a contract regime that no one would endorse. A better interpretive practice will deliver a better practice of contract, and might make it a more attractive alternative to mandatory regulation than it would be otherwise.

In the context of jurisprudence, Ronald Dworkin's proposal that law as a practice involves constructive interpretation of legal rules to cast them in their best light, or to exemplify the values in law, depends on his underlying conception of law.[114] Similarly, my more modest point that courts should read contract terms to render them reasonable where possible turns on my account of the function of contract law. The feature of Dworkin's conception of law that may most importantly drive his theory of interpretation is his account of law's authority; similarly, what does work in my account of contract interpretation is the relatively narrow bases that I identify for contracting parties' authority.

Legal positivists argue that, though we can expect law to take into account certain moral values, we ought not to directly reference those values in interpretation.[115] Similarly, many contract theorists imply that, though freely negotiated contract should be consistent with background duties like reciprocity and fair exchange (and we have reason to believe parties take into account duties pertaining to exchange); those duties ought not to inform contract interpretation.[116] Without commenting on the jurisprudential debate, my argument

113. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 208 (AM. LAW INST. 1981).

114. RONALD DWORKIN, LAW'S EMPIRE 52–53 (1986).

115. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 621 (1958) (expressing a belief that referencing values when interpreting law can be "misleading"). Neil MacCormick, *A Moralistic Case for A-moralistic Law?*, 20 VAL. U. L. REV. 1, 8–9 (1985).

116. *See supra* note 72.

here is that because contract is not an inevitable, but rather instrumental regime for governing exchange, we should select its interpretive rules such that they serve underlying normative values. There is nothing in the apparatus of contract that requires it operates on autopilot, forbidding judges and other state actors from looking backward at its purposes in the course of implementation.

Notably, in contrast to Dworkin's theory of legal interpretation, I am not proposing that we read contracts to be the *most* reasonable terms of exchange possible. Contract enforcement is content-dependent, but not content-determined. First, normative triangulation kicks in only where ambiguity is present. To the extent contracts are to be the work product of private parties at all, they must turn in part on what those parties said and did. If a court was to read terms to optimize the state's regulatory interests without any regard for parties' own intentions, then the regulatory dimension of its interest in contract would overwhelm its interest in allowing parties serious opportunity for self-direction. If the sale of five widgets is read as the sale of ten, or a price of ten dollars read as only eight, then the court is refusing parties control of quantity and price; it is not sharing authority over these pivotal terms. Regulatory interests entirely crowd out voluntary obligation with respect to many transactions and terms, but in such cases terms inconsistent with background legal norms are unenforceable altogether.[117] If the agreement as a whole clearly falls outside the bounds of legal permissibility, then it is not a contract at all. The court does not *interpret* those agreements—it does not assign meaning to the verbal acts of the parties. Instead, it denies the authority of the parties to control the transaction as they attempted to do.

Nothing in the argument here establishes what qualifies as an ambiguous term. The argument addresses the question of how courts do and should handle terms that they deem ambiguous. In practice, there will be agreements that a court could interpret in multiple ways because the initial determination of ambiguity is indeterminate. In these cases, a court can either strike the agreement as unenforceable, or it can interpret the agreement to bring it within the bounds of what is enforceable. Modern courts are more willing to engage in the exercise of pulling contracts within permissible bounds by way of creative interpretation. Contracts that would have failed for vagueness or lack of mutuality a few generations ago are now "saved" by allowing parties to submit evidence that one meaning is more reasonable than others,

117. *See generally*, Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 215 (N.Y. 1917) (examplifying background legal norms' prevalence in the court's decision).

or by a presumption that each party agreed to have its discretion cabined by good faith or reasonableness—just enough to establish mutuality.[118] But if there is no legal norm prohibiting enforcement of what they recognize as an unambiguous term, courts do not read it contrary to party intent merely to improve it.

There is another reason why courts do not undertake to optimize contract terms. They have to bring terms within the bounds of reasonableness even as they remain agnostic about the *most* reasonable term. That is, a court lacks the resources to declare ten widgets better than five in a given contract. Because the state has delegated authority over quantity of goods to private parties, there is no legal norm that supplies an optimal term.

The committed agnosticism of the state as to the ideal terms of exchange might at first appear to render the analogy to Davidson's triangulation inapt. Davidson's concept of triangulation is bound up with objectivity, that is, an awareness that thoughts are true or false.[119] Only beings that possess the concept of falsehood, and thus see their own perceptions and those of others as capable of falsity, will use triangulation to prefer interpretations that render utterances largely true. One might think that the state is incapable of triangulation with respect to normative facts such as the obligations of parties toward each other if it must operate as though no objective obligation exists. While we have reason to believe that we should be responding to a descriptive statement ("there is a cat on the mat") in the same way as others (or at least, observing the same phenomenon), a liberal state cannot expect contracting parties to perceive normative facts similarly, and judges should not expect parties to see their obligations in exchange as judges themselves might construe them.

Normative triangulation in the context of contract interpretation works, however, even if the state recognizes a radically incomplete set of background obligations. That is, the state does not have to have a policy about how many widgets should be sold; it can interpret an ambiguous quantity term to fall within objective *boundaries* that exclude, for example, no widgets, a wholly indeterminate number of widgets, or many more widgets than a buyer could secure at a given price without fraud. Background legal norms usually establish objective boundaries to terms even where they fail to supply a determinate set of optimal terms.

118. *See id.*

119. *See* DAVIDSON, *supra* note 46, at 45–46.

The state effectively reads ambiguous terms as if they were uttered by a reasonable person.[120] Andrei Marmor describes interpretive statements as counterfactuals about the communicative intent of a hypothetical speaker.[121] In contract, the hypothetical speaker is one committed to successfully navigating background duties in contract. Thus, a court interpreting an ambiguous term must answer the question: What would a reasonable person that intends to comply with her background duties mean by these words? In this way, courts are properly constrained by the words actually chosen and are not merely asking what a reasonable person would do. They can give proper weight to background constraints while respecting the underlying policy choice to delegate some authority.

This view of contracts and the correct attitude of judges in interpreting them is subject to the following challenge: I have referred to the obligations of exchange as indeterminate within a range. But this suggests the obligations exist before contracting parties "assume" them. I speak as if parties are themselves only interpreting background duties rather than authoring them.

It is true that the picture of contract offered here entails a certain externalism about normative powers. Davidson's perceptual externalism is the view that the meaning of what one says is partly determined by external objects.[122] In contract, parties make promises or grant permissions in response to the facts of prospective exchange. While these normative powers may operate spontaneously in some contexts,[123] in contract at least, promises are made and permissions are granted in response to the material facts that drive exchange and in coordination with another person simultaneously offering promises and permissions of her own. Normative powers are not exercised spontaneously but in response to external facts. We can use those external facts to

120. *See* Sutton v. E. River Sav. Bank, 435 N.E.2d 1075 (N.Y. 1982); Embry v. Hargadine, Mckittrick Dry Goods Co., 105 S.W. 777 (Mo. Ct. App. 1907).

121. MARMOR, *supra* note 103, at 23.

122. *See* DAVIDSON, *supra* note 46, at 193–204.

123. There is reason to believe that the exercise of normative power may always be constrained by background duties in a way that most discussion of the concept has obscured. After all, only a moral agent capable of obligation is capable of exercising normative power, but such an agent will always already have obligations attached. The idea of normative power seems to presuppose a blank slate on which the agent acts where it might usually be more appropriate to speak of an indeterminate terrain. Inasmuch as we expect agents to exercise normative powers in response to externally (if partially) determined normative facts, it might be appropriate to interpret the utterances by which normative powers are exercised always by reference to background duties. However, this Article is focused only on the appropriate bases for interpreting normative powers exercised in contract.

interpret how those powers were used in the way we use external facts about the world to interpret utterances that purport to describe them. Because the interpretation is unabashedly normative, we need not assume that parties successfully exercised their normative powers in a way that appropriately responds to external facts, or that they aimed to do so. We are justified in our presumption that they exercised their legal powers appropriately by virtue of the conditions to which private transactional authority is subject. To the extent that contracting parties chose terms that cannot be construed as a reasonable response to their transactional setting, their choice of terms is unenforceable, and it does not matter what the parties intended to do.

We exercise (or can be presumed to exercise) normative powers in reaction to the external world in another respect. The moral situation that prompts us to promise or permit is not of our making. We act on imperfect duties[124] even where no one has a particular claim against us. We seek to comply with vague legal obligations to our partners in exchange that are only substantiated occasionally, ex post through adjudication. Although we create new obligations to our contracting partners through contract, we do not create them randomly, but in recognition of existing commitments. Indeed, the normative powers we exercise in contract might be considerably less valuable instances of moral agency if their exercise involved no moral deliberation.

Externalism about normative powers, however, does not require that we view contractual commitments as merely interpretive. Or at least, this would be a metaphorical and highly reductivist way to describe the activity. I am not claiming, as Patrick Atiyah did, that our promises are merely evidence for existing duties.[125]

Even a linguistic description of the external world is original in its perception. Although committed to the possibility of falsehood, interpreters engaged in triangulation are not committed to the existence of any *single* true description of the world we observe. Similarly, moral agents exercising normative powers in contract can be responsive to

124. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 153 (Mary Gregor ed. & trans., 1996) (1797). Imperfect duties prescribe a general course of conduct (e.g., giving money to the poor, cultivating one's talents, helping one's friends), but do not require particular actions or correspond to entitlements in others. *Id.* (defining imperfect duties as those which "prescribe only the maxim of actions, not actions themselves," or those which "leave[ ] a playroom (latitudo) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do").

125. ATIYAH, *supra* note 68, at 687–89.

external facts and constraints while still creating obligations that did not exist before. We can presuppose some similarity in how moral agents react to external events without assuming that we will all navigate our moral situations in the same way.

Again, the presumption that contracting parties are responding to the circumstances of exchange in a way that complies with background duties is not an epistemic presumption justified by some belief about how people actually operate, though it may be buttressed by some psychological theory.[126] Courts presume that parties comply with some minimal standards of efficiency or fairness in exchange in the context of contract interpretation because only such a regulatory presumption justifies deference to the terms parties have chosen. Parties are left to navigate the ethics of exchange only to the extent they do so in a plausible way. While Davidson's interpreters may have reason to believe that speakers react to a common world in a similar way, the state has reason to interpret contracts *as if* parties are responding to the facts of exchange in a reasonable way, irrespective of whether they aimed to do so.[127]

III. Normative Triangulation in Interpretation

I have argued that the state's reasons for enforcing an agreement depend on its terms and whether they are consistent with background duties that parties have toward each other—duties that the state could

126. People tend to divide and expect others to divide fixed amounts equally. *See* Martin A. Nowak, Karen M. Page & Karl Sigmund, *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773–74 (2000) (describing experiments in which most individuals prefer to walk away empty handed rather than permit highly asymmetrical division of fixed amount between themselves and another person). *See also* Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEG. STUD. 259 (1985); Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J. L. & ECON. 73 (1982).

127. Because normative triangulation is differently motivated than Davidson's triangulation, it is not subject to the critique that Marmor lodges against application of the principle of charity in interpreting particular utterances. Marmor says that because "the principle of charity amounts to the claim that one cannot have a theory of meaning for natural language whereby the bulk of the speakers' beliefs would turn out to be false," the principle "only makes sense with respect to language and thought as a whole, not to bits and pieces of it." MARMOR, *supra* note 103, at 17. The counterpart principle of charity in contract interpretation does not only justify the enterprise of contract as a whole but also enforcement of particular agreements. Marmor may be right that because individuals are capable of uttering false statements, we cannot operate on a theory of interpretation that disallows that possibility. But because contracting parties need not be capable of binding themselves on socially unacceptable terms, we can interpret contracts to disallow that possibility.

otherwise enforce in a mandatory regime. Interpreting agreements thus turns in part on the content of those background duties.

I will now elaborate and narrow that claim. In the first section, I argue that because state enforcement is content-dependent, contract interpretation is not limited to discovering party intent. We should interpret contractual obligations in light of background duties.

The second section introduces some distinctions to locate more precisely the background norms at issue. We should read contracts in light of background duties if and only if the background constraint is of a political sort. Private moral constraints in contract are not relevant to contract interpretation unless they arise from duties that support state functions. But so far as contracts support legitimate state interests—that is, inasmuch as we defer to parties to regulate themselves *instead of regulating them directly*—courts should construct contractual intent to ensure private exchange occurs on acceptable terms. I also compare the role of equitable norms that protect the interests of contracting parties with the rule of "true" public policy norms that are intended to protect third parties. Equitable norms should bear more strongly on interpretation.

Finally, I show how normative triangulation already operates in several lines of case law.

A. Beyond Intention

As discussed above, Langille and Ripstein introduced the idea of interpreting contracts by way of triangulation.[128] Like Davidson, their triangulation is epistemic and committed to discovering meaning without attributing it.[129] They are true to Davidson in that they take the interpreter (courts) to be interested exclusively in speakers' intentions.[130] In fact, they argue that after triangulation, there are no gaps in contracts that courts must—or may—fill by reference to exogenous considerations.[131] The primary implication of the content dependence for which I argued above is that such an exclusive interest in party intent is unjustified.

Courts interpreting ambiguous agreements often find themselves reconstructing the bargain that parties made, as incompletely indi-

128. *See* Langille & Ripstein, *supra* note 41, at 74–75.

129. *See generally id.* at 63–64 ("[W]hen the relationship between the meaning of an agreement and the world in which it is made is properly understood, agreements themselves turn out to be highly determinate.").

130. *Id.* at 66.

131. *Id.* at 65.

cated by its express terms.[132] Courts can proceed in two ways. They can reconstruct the bargain parties actually made, for which they may be uncertain evidence. Or they can reconstruct a hypothetical bargain. Scholars have challenged the propriety of enforcing a bargain that parties might have made; hypothetical consent is no substitute for actual consent.[133]

One need not rely on hypothetical consent as a normative substitute for actual consent, however, in order to justify reconstructing bargains to reflect prevailing market conditions and applicable norms. There is another way to understand what courts are doing when they inquire into the circumstances of contract. They may not be merely *assuming* that bargains were intended to reflect market conditions and background duties but *imposing* compliant terms as a normative matter, at least where they doubt that contract terms reflect special features of the transaction. Why should they do this? If courts suspect that departures from market terms often reflect market or bargaining failure (as a result of transaction costs), and in particular, if they think that one party is disproportionately bearing the costs associated with a suboptimal bargain, then they can correct for this ex post by reading the agreement to render it adequate (reasonable).

Courts do this already because contracts are always incomplete, and the more straightforward rules of contract interpretation are sometimes indeterminate with respect to specific terms.[134] Thus, judges are regularly left with the ultimate question before them: What was "reasonable" for one party to infer what the other intended?[135]

132. *See* Sayers v. Rochester Tel. Corp., 7 F.3d 1091, 1094–95 (2d Cir. 1993) ("The primary objective in contract interpretation is to give effect to the intent of the contracting parties 'as revealed by the language they chose to use.'").

133. *See, e.g.*, Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1567 (2009).

134. *See* Timothy Endicott, *Objectivity, Subjectivity and Incomplete Agreements, in* OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES 151, 163–65 (Jeremy Horder ed., 2000) ("[T]here is commonly more than one good answer to [the] interpretive question," so reference to principles exogenous to party intent is unavoidable.). *But see* Langille & Ripstein, *supra* note 41 (arguing contracts are highly determinate when properly interpreted in light of context facts).

135. *See, e.g.*, Schwartz v. Family Dental Grp., P.C., 943 A.2d. 1122, 1126–27 (Conn. App. Ct. 2008) ("[I]ntent . . . is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract."); Dickenson v. State, Dep't of Wildlife, 877 P.2d 1059, 1061 (Nev. 1994) ("An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."); Wilkes-Barre Twp. Sch. Dist. v. Corgan, 170 A.2d 97, 98–99 (Pa. 1961) ("Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two con-

Reasonableness is a famously flexible standard. It can be interpreted in multiple ways.

First, an interpretation may be *empirically* reasonable in that it is consistent with how most parties would interpret agreements under comparable circumstances. Second, a reading may be *normatively* reasonable in that, as a substantive matter, the agreement is equitable on that reading. Third, it may be *procedurally* reasonable to privilege one party's understanding of terms over that of the other party because of their relative expertise or control over the agreement. Finally, an interpretation may be more *publicly* reasonable in that it may be desirable as a matter of public policy that obligations be construed in that way.

Sometimes courts use the notion of reasonableness in just one of these ways. But often courts invoke a default, which may be motivated by an array of reasons that roughly correspond to the considerations that bear on the reasonableness inquiry.[136]

Only empirical reasonableness, or majoritarian defaults, are designed to reconstruct bargains as they really were. Each of the other types of reasonableness justify incorporating information about the market and the constraints it imposes on parties independent of parties' actual intentions.

A view of contract in which parties are free to deal with each other on any terms will be hostile to every conception of reasonableness save the empirical mode, which amounts to a best guess about what obligation a party voluntarily assumed. But post-*Lochner* judges are no longer guided by the presumption that parties are free to contract on any terms.[137] Private ordering is an alternative to direct regulation of markets; the state can reference other kinds of reasonableness in deciding how to handle a transaction. Contracts are the product of markets, and markets are in many ways the products of states. Courts can and do read contracts in a way that preserves and promotes the market institutions for which states are responsible.

---

structions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. If one construction would make it unreasonable, while another would do justice to both parties, the latter will be adopted.").

136. *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390–91 (1993) (describing types of defaults).

137. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1973). *See also* Glaeser & Shleifer, *supra* note 24.

Contracting parties' intent remains an anchor to contract interpretation under a principle of normative triangulation.[138] It will remain central to any account of contract that understands contract to be a kind of private arrangement between two parties, an arrangement they have been empowered by law to make. I have assumed that the state chooses to govern through contract in order to allow individuals a greater measure of control in their bilateral relations, and also to harness the information about values and preferences that individuals tend to possess only about themselves. Contract will not serve those purposes unless states remain committed to enforcing bargains as conceived by contracting parties. But these interests of the state in contract are not exhaustive. They sit alongside other legitimate interests—including interests of justice—in the terms of private exchange. The best regime of contract must be one that gives adequate weight to the interest in private agency and private ordering, as well as the interest in regulation that promotes public justice and wealth. I argued above that because the choice of contract as a method of regulating exchange necessarily turns on its adequacy in serving interests other than ones related to private agency, the state has content-dependent reasons for enforcing contracts. It flows from that fact that interpretation is more than a series of guesses about what parties were thinking or even what thoughts each ought to have attributed to the other.

B. Interpreting Reasonable Contracts

Contractual promises discharge a range of background duties. In this section I draw two distinctions. First, some background duties derive from legally enforceable norms, while others are not properly subject to enforcement by a liberal state. Second, some legal norms are equitable and concern the interests of the parties to a transaction, while others are truly "public policy" in the sense that they protect third parties. Equitable norms may bear more strongly on interpretation than those that concern third parties; at least, public policy norms inform interpretation under narrower conditions.

I begin by restricting normative triangulation to duties subject to state enforcement ("*political duties*").[139] Not all of the duties that moti-

138. For an explanation of the significance of party intent, *see* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25–34 (2014); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2005); David A. Dilts, *Of Words and Contracts: Arbitration and Lexicology*, 60 DISP. RESOL. J. 41, 43 (2005).

139. The aim of this Article is not to delineate the border between enforceable and unenforceable obligations—a separate exercise in pure political theory—but to identify

vate promise are political, i.e., not all background duties are appropriately the subject of legal enforcement in a liberal state. When entirely private duties motivate contractual promise, those duties ought not to inform how they are read except inasmuch as the social construction of those duties is likely to have informed the parties' own understandings of their agreement. For example, a court charged with enforcing a contractual promise made between friends should not import any state-backed conception of friendship or the duties of friendship into its adjudication of rights and obligations between friends.[140] But courts have a different role when the background duty at issue is one that is the ordinary subject of legal regulation. For example, a contractual promise made by an employer to an employee in order to discharge obligations emanating from, if not strictly speaking arising under, a civil rights or employment statute should be interpreted in light of those background duties. It is the prerogative of the state to define the conditions of just employment.

Not all political duties are actually legal duties, in the way that not all principles of public policy recognized by common law courts are specifically set forth by statute. Political duties between persons are the private counterpart to principles of public policy. They can be extracted from statutes, gleaned from case law, or otherwise gathered from the history and state of the law with respect to some issue.[141] They are subject to controversy, but their scope of application is relatively narrow. They are incorporated into the decision that courts make about whether it is appropriate to bring the coercive powers of the state to bear on the enforcement of a private agreement.

By contrast, duties that arise from personal relations ("*personal duties*") are not duties that are ordinarily in the province of state authority. A liberal state does not enforce all moral duties, only those that support legitimate state functions. It is beyond the scope of this Article to delineate the boundaries of legitimate state authority; the pur-

the role of that boundary in contract interpretation, whatever it may be. *Cf.* Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 OXFORD J. L. STUD. 205, 217 (2000) ("Only those morally legitimate expectations that clear the moral-political and institutions limitations upon legal intervention are protected by the imposition of contractual liability.").

140. For the opposite view, *see* ETHAN J. LEIB, FRIEND V. FRIEND (2011).

141. For the amorphous boundaries of public policy, *see* Md.-Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena, 386 A.2d 1216, 1228–29 (Md. 1978) (noting public policy is extracted from constitutions, statutes, and judicial decisions, but not limited to express statements in those sources).

pose here is only to link those boundaries with considerations that are appropriate to bear on contract interpretation.

One way to draw the line between political duties subject to state enforcement and duties that the state should not set out to enforce is the harm principle.[142] Although it is not my ambition to challenge the harm principle per se, there are some limitations to using the harm principle to distinguish between political and personal duties. In particular, the harm principle requires identifying some set of harms that qualify as triggers for state intervention. The harm principle, though useful in excluding some illiberal reasons for state imposition, excludes some wrongs we may wish to coercively punish or prevent[143] while failing to exclude some types of state coercion we might wish to rule out. For example, there are many emotional and even material harms that attend breach of promise in personal relationships, harms from which we might not wish the state to protect us. Thus, while Dori Kimel successfully argues that we ought not to enforce promises merely because breach of promise is immoral, the harm principle alone does not explain why we should further decline to provide remedy for at least some promises made in the context of intimate relationships.[144]

For the limited purposes of this Article, I suggest a different line between political and personal duties. Political duties are ones that arise from a general duty to support just state institutions.[145] For example, duties to cooperate with police, pay taxes, refrain from physically injuring others, respect others' property, or maintain real property so it is not dangerous to others are all important to the functioning of legitimate state institutions. There may be disagreement

142. *See* JOHN STUART MILL, ON LIBERTY 82–83 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

143. *See* Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 216–22 (2006) (arguing that the harm principle problematically excludes coercion to prevent harmless trespass and other infringements on independence).

144. *See* Dori Kimel, *Fault and Harm in Breach of Contract*, *in* FAULT IN AMERICAN CONTRACT LAW 271, 280–83 (O. Ben-Shahar & A. Poral eds., 2010) (claiming that principle of autonomy can be used to identify harms relevant for harm principle, but proceeding to defend one conception of relevant harms in contract against another conception advanced by Joseph Raz, also on autonomy grounds).

145. *See* RAWLS, *supra* note 18, at 334 ("[T]he most important natural duty is that to support and further just institutions. This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangement when they do not exist, at least when this can be done with little cost to ourselves."). It is beyond the scope of this Article to defend a particular conception of political obligation. I will just assume a duty to support state institutions in our society.

about what justice entails, and therefore, whether a particular law is actually justified on the grounds of the justification it stated. Any theory of a given body of law describes those laws as serving some legitimate state function. For example, there is deep disagreement about the function of tort law. Some scholars believe it promotes economic welfare;[146] others believe it enacts corrective justice;[147] others believe it empowers individuals to exact redress for legal wrongs committed against them.[148] But every author contends that the particular function they ascribe to the institution of tort is one that the state is authorized to pursue.[149] When this is not obvious, one part of the account explains why the function attributed to the state in the realm of tort by that theory indeed falls within the proper ambit of state authority.

I describe all these duties as political rather than merely legal because not all political duties are legal duties. One can imagine a jurisdiction that does not expressly require individuals to cooperate with the police. But a law imposing such a duty would advance a legitimate state purpose. Although there may be disagreement about whether the duty exists in the absence of such a law (or even in its presence), there is likely little disagreement that any such duty would be political in that it would intend to advance a legitimate state purpose in security.

What are the political duties implicated in contract? Legal duties are obviously political in the sense used here, meaning subject to legal enforcement. For example, duties not to discriminate or impair competitive markets both constrain the terms on which we contract.[150] Duties not to recklessly induce reliance that has no payoff, or not to induce another person to confer a benefit on you with the false expectation of compensation, are also already subject to enforcement through contract principles like promissory estoppel and unjust enrichment.[151] Even the duty to compensate for a benefit already re-

146. *See, e.g.*, GUIDO CALABRESI, THE COST OF ACCIDENTS 26–29 (1970); WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1–24 (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

147. *See, e.g.*, JULES COLEMAN, RISKS AND WRONGS 360–74 (1992); *see* Perry, *supra* note 59. *See also* Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811 (2004) (theory that the law of tort rectifies takings of property rights).

148. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs,* 88 TEX. L. REV. 917, 918–19 (2010) (civil recourse theory).

149. *See, e.g., id.* at 919–20.

150. *See generally supra* notes 31, 35.

151. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981) (promissory estoppel); RESTATEMENT OF RESTITUTION § 1 (AM. LAW INST. 1937) ("A person who has

ceived has limited enforcement through the contract doctrine of moral obligation as substitute for consideration.[152] Thus, promises that make good on any of these background duties should be interpreted in their light.

By contrast, promises made in light of personal relationships of friendship or family reflect duties of the sort not normally subject to state enforcement. Personal duties speak only to the morality of private individuals. Thus, the duties that may have motivated or informed those promises are not appropriately used by courts in interpretation except insofar as they bear on parties' own intentions.

Beyond the constraints of liberalism, which warn against the state adopting and promoting a thick conception of the good,[153] states risk undermining the value of private promise by interfering; they therefore have affirmative reasons to avoid their enforcement.[154] If states are not appropriately in the business of regulating the terms of intimate relationships for their own sake—though they have a legitimate interest in the fairness of their material consequences—then they should not reference the norms of such relationships when they construct the promises intimates make to each other.

Within the set of enforceable legal norms, it is worth further distinguishing equitable norms from public policy norms. Equitable norms are ones that control the fairness of the transaction at hand.[155] These include norms such as protecting reliance, reflected in the doctrine of promissory estoppel; avoiding forfeiture that corresponds to windfall, reflected in the doctrine of unjust enrichment; and avoiding exploitation of vulnerability, as reflected in the doctrine of unconscionability.[156] It is easiest to see how these norms, which correspond with private norms that regulate interpersonal conduct even outside the law, can be incorporated through normative triangulation. Private parties are aware of these norms substantively, even if they are not aware of their legal character. Because compliance with these norms is the stuff of interpersonal responsibility, it is well within the traditional

been unjustly enriched at the expense of another is required to make restitution to the other.").

152. *See* Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935) (holding a promise made to employee who saved promisor's life enforceable against estate of promisor).

153. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) (advocating a liberal conception of justice that is compatible with many conceptions of the good).

154. *See* Bagchi, *Separating Contract and Promise*, *supra* note 82, at 750.

155. *See* Skubal v. Meeker, 279 N.W.2d 23, 27 (Iowa 1979) ("The invocation of equity jurisdiction permits the necessary flexibility to work out the equities between the parties.").

156. *See supra* notes 31, 35 and accompanying text; *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (the unconscionability doctrine).

functions of private law to give them legal effect through interpretation (in addition to giving them effect through rules of validity and excuse).

Public policy norms that concern the interests of third parties raise distinct concerns. They make salient the stake that some third parties have in a transaction-type. When public policy specifies concrete legal duties it reflects authoritative political judgment about the balance of relevant interests, and only then do those norms provide guidance to private individuals. One might wonder whether even "reasonable" parties can be expected to incorporate general public policy norms into their dealings. To the extent public policy norms are wholly alien to transactional purposes, imposing them ex post on contracts that did not contemplate them would distort those agreements, favoring one party at the expense of the other in ways that do not reflect the merits of the parties' own conduct.

To avoid such arbitrariness, it is especially important that norms designed to protect third parties be promoted robustly only where those norms are expressed in legal duties that attach the individual party to the transaction. For example, as previously observed, contracting parties are already subject to duties not to engage in anticompetitive or discriminatory conduct.[157] Those duties already apply directly to their own conduct. Even if the terms of a particular transaction do not strictly speaking run afoul of competition law or antidiscrimination law, parties are on notice of the soft legal norms favoring competition and equality, and parties can be expected to comply with those norms in the context of private exchange. By contrast, background traffic regulations or environmental policies that disfavor certain transportation or production methods are not so easily promoted through contract interpretation. While courts can take those legal norms into account too, it would not be appropriate to do so by way of a very sticky default that effectively penalizes parties who could not have been reasonably expected to incorporate those norms into their private conduct. The upshot is that normative triangulation requires a series of subtle judgments about the political status of a background norm as well as its relation to the moral and legal responsibilities of the parties to a transaction. While some norms are not appropriately incorporated into interpretation at all, others should be referenced only on the margin to resolve deep ambiguity. Still, others can be robustly promoted by way of sticky default rules.

157. *See supra* notes 31, 35 and accompanying text.

These judgments may seem daunting, but they are familiar and perhaps inevitable. Courts do not make these judgments from scratch with respect to any particular agreement. Rather, a court interpreting a term about product features in an agreement for the sale of microwaves will look to a line of similar cases about small household appliances, or if they are lucky, microwaves using the same cross-licensed patents. It is the responsibility of the parties in litigation to dig up those cases, as well as any new safety regulations that bear on how the court should interpret the contract's specifications. The next section discusses how courts already engage in normative triangulation when interpreting contracts and other legal instruments.

C. Existing Legal Practice

The idea of angled interpretation is already familiar to us in the way United States courts read statutes to conform to constitutional principles: A court interpreting a statute will prefer a reading that saves it.[158] Indeed, courts may go further and prefer a reading that avoids the constitutional question altogether.[159] The doctrine has been used repeatedly by Justice John Roberts in recent years.[160] Its expansive application has been subject to some scholarly criticism, but even its critics would preserve the long-standing doctrine in some form.[161]

One way to understand this rule is that courts aim to respect the separation of powers and avoid stepping on the toes of the legislature any more than necessary, instead prompting the legislature to act

158. *See, e.g.*, Solid Waste Agency v. Army Corps of Eng'rs., 531 U.S. 159, 174 (2001) ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation."); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

159. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (criticizing the practice of avoiding constitutional questions, labeling it altogether "modern avoidance").

160. *See, e.g.*, Bond v. United States, 572 U.S. 844, 856 (2014) (reading in an exception to the Chemical Weapons Convention given uncertainty about the scope of federal authority to criminalize individual acts of poisoning); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574–75 (2012) (interpreting Affordable Care Act as a tax rather than command because the Court had "a duty to construe a statute to save it"); Nw. Austin Mun. Util. Dist. v. Holder, 557 U.S. 193, 209–11 (2009) (interpreting Voting Rights Act to exclude utility districts from preclearance process); Skilling v. United States, 561 U.S. 358, 408–09 (2010).

161. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2159 (2015); Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015).

where necessary.[162] While courts may have reasons to strike down a particular law, these reasons are outweighed by the general reasons not to strike down any law. But we might go further: A reading of a statute under which it is not only constitutional but robustly constitutional delivers a better interpretation—because as a general matter, a statute that is clearly constitutional is preferable to a statute that barely survives scrutiny.[163] Although reasons to strike down the law may be outweighed by structural considerations, those reasons do not disappear. They cut in favor of the "more constitutional" reading.[164]

As with legislative deference, a court also has many reasons to respect private ordering and the voluntary dimensions of contract by declining to substitute its own preferred terms for those selected by the parties.[165] These general reasons cut in favor of "delegating" to parties the terms of their own exchange and respecting those terms with narrow exceptions. But the political interest in the terms of exchange is not extinguished by the virtues of private ordering and a legal culture that recognizes promise; they are merely outweighed by them. Thus, the residual interest in fair exchange, or in exchange that does not undermine background justice, still appropriately shapes interpretation of private agreement. For example, if we have pragmatic and moral reasons for limiting direct invocation of distributive justice considerations in the regulation of particular transactions, we can avoid the "distributive question" by interpreting agreements in a manner that neutralizes it.

The normative triangulation proposed here is more familiar than my argument for it. Like Davidson's triangulation, it describes an interpretive strategy we continuously deploy. Facts about duty describe a

162. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1204–06 (1992).

163. Trevor Morrison's "constitutional enforcement theory" of the avoidance principle is consistent with this approach. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum. L. Rev. 1189 (2006). The canon of constitutional enforcement theory provides "a means of enforcing the underlying constitutional provision." *Id.* at 1196.

164. The "less constitutional reading" is one that brushes impermissibility. A reading is not "more constitutional" in this sense just because, for example, it better promotes a constitutional principle. Just as respecting the partial authority of private individuals over their transactions dictates against twisting contractual language to promote public policy goals where the transaction does not run afoul of any legal norm, respecting the legislative authority of Congress dictates against distorting statutory language to affirmatively promote constitutional norms. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010) (criticizing the canon more generally for undermining the ideal of interpretive courts as faithful agents of the legislature).

165. Unlike legislative lawmaking, however, private ordering in the broad terms conceived here is not constitutionally mandated. *See* Schwarcz, *supra* note 60.

common moral space inhabited by promisor and promisee (and court). Duties of all sorts make up our moral world in the way that hard facts make up our physical world. People speak—and communicate intentions to assume obligations—in a shared context. When a cashier says that she "will go get five," we may take her to mean that she will go get five dollars, and not five cents, because we know that she owes us five dollars. When we promise to help our friend move, we understand the promise will be excused if we fall ill because it would be unreasonable for our friend to hold us to the promise under those circumstances. We interpret words and underspecified articulation of obligations in light of what is actually owed.

Courts interpret contracts in the same way. Consider the case of *Vizcaino et al v. Microsoft Corporation*,[166] in which employment agreements specifically addressed workers: "[A]s an Independent Contractor to Microsoft, you are self-employed and are responsible to pay all your own insurance and benefits . . . . You are not either an employee of Microsoft, or a temporary employee of Microsoft." The Internal Revenue Service subsequently found that these workers were in fact employees of Microsoft.[167] The question then was whether they were eligible to participate in certain stock option plans that were limited to employees.[168] The Ninth Circuit described its dilemma: Either the contracts misinformed employees as to their status, or this language simply reflected an error by Microsoft.[169] It chose to find that Microsoft meant to label these workers as employees who were therefore eligible to participate in the benefit plans.[170] It arrived at this finding even though *the IRS had not yet corrected Microsoft's classification of the workers at the time of contracting*.[171] Neither party could plausibly have understood the contract to designate the workers as employees at the time the agreement was entered. The court justified its interpretation of the agreement in this way: "We should, and we do, consider what the parties did in the best light. In so doing, we do not believe that we are being panglossian; we are merely acting in accordance with the ancient maxim which assumes that 'the law has been obeyed.'"[172]

166. Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1010 (9th Cir. 1996).
167. *Id.* at 1008.
168. *Id.* at 1011.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

A similar move was made in *Ace Ltd. v. Capital Re Corp.*,[173] where the Delaware Chancery Court interpreted a merger agreement so as to permit the seller to enter talks with another potential buyer, as the fiduciary duties of its board members required.[174] The court reasoned that even though could not rule out that the contrary interpretation was what the parties intended, a provision that prevented the buyer from seeking the best price for its shareholders would be unenforceable.[175] It stuck with the reading that rendered the agreement compatible with Delaware fiduciary law.[176]

Deciphering intent to align it with substantive reasonableness is by no means a recent invention. A similar explanation is available for a classic case on objectivity in contract *Lucy v. Zehmer*.[177] There, the plaintiff claimed the defendant sold him a tract of land, but defendant claimed there was evidence demonstrating it was a joke.[178] The court described a number of facts that spoke to whether it was reasonable for Lucy to believe he had a real deal.[179] But lurking in the background was the fact that Zehmer was best placed to avoid confusion. We might not be confident that Lucy was reasonable in taking Zehmer so seriously, but we can be confident about the reasonableness of a penalty default that motivates funny people to be more careful.

Another well-established line of cases consistently demonstrates how courts can and should interpret agreements in a manner that brings them in line with background duties. Where agreements once regularly failed for lack of mutuality of obligation, courts now frequently imply a duty of good faith or a duty to apply best efforts in order to "cure" lack of mutuality.[180] For example, in the classic case of *Wood v. Lucy, Lady Duff-Gordon*,[181] Judge Cardozo read an exclusive agreement between the fashion designer and her agent as containing

173. Ace Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999).
174. *See id.* at 109.
175. *Id.* at 108–09.
176. *See id.* at 109.
177. *See* Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954).
178. *Id.* at 497–500.
179. *Id.* at 500–01.
180. *See, e.g.*, U.C.C. § 2-306(2) (Am. Law Inst. & Unif. Law Comm'n 2017) ("A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."); Omni Group, Inc., v. Seattle-First Nat'l Bank, 645 P.2d 727, 729–30 (Wash. Ct. App. 1982) (reading the right of cancellation, which was subject to feasibility report, as implying a duty to attempt to obtain such report in good faith).
181. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214–15 (N.Y. 1917).

an implied obligation on the part of the agent to use reasonable efforts to market the designer's endorsements. Cardozo's opinion did not rest so much on speculation that the parties intended the agent to have such an obligation, but rather on the court's confidence that the parties intended a familiar form of business relations and a legally binding agreement to govern it.[182] The court is "not to suppose that one party was to be placed at the mercy of the other."[183] Reading the agreement as wholly lopsided would have put it outside the bounds of enforceable contract. The court instead interpreted the agreement in a way that *made* it normatively defensible, and therefore enforceable.

Courts already reference the normative as well as factual aspects of context when they interpret agreements. The prevailing rhetoric of voluntary obligation and its attendant focus on literal intent have obscured the normative dimension of interpretation.

IV. Conclusion

Critical to the interpretive mode recommended here is my starting point that enforcing contract is an alternative to other legal modes of regulation. Policymakers could enforce background political (but not personal) duties through mandatory rules. But policymakers have many reasons not to pursue mandatory regulation over contract. Besides the efficiency advantages, the voluntary character of contract allows individuals to exercise an important moral capacity; we bring not only private information but also values, virtues, and vices to bear on transactions. We express moral personality in our dealing with others, and contract helps make space for us to do that.

Even though we have these and other good reasons not to enforce many political duties through mandatory rules and to instead delegate them to private ordering, political duties—and the public interest behind them—persist in a regime of contract. An extensive body of private law norms "in equity" establishes that the state prefers contracts in which both parties are treated fairly.[184] It also rightly prefers contracts that do not undermine state objectives, like competitive markets, consumer safety, or civil equality.[185] More generally, the state should not undo with one hand, contract law, what it pursues with its other hand, its regulatory apparatus. Once we recognize that parties have no natural or constitutional right to control the terms of private

182. *See id.* at 214–15.
183. *Id.* at 214.
184. *See generally supra* notes 31, 35 and accompanying text.
185. *See generally supra* notes 30–36.

transactions, the state need not feign blindness or ineptitude in the context of private adjudication. The public dimensions of exchange appropriately motivate the way in which exchange is regulated in the private domain.

Most contracts are between private persons, but contract is a social regime. Contract scholars think a lot about the economic significance of transactions[186] and the moral significance of promises,[187] but we have not dwelled long enough on its distinctly legal character and the problems of authority it raises. Because contracts are enforced by courts, it is well within the authority of the state to decide how it will go about this exercise of state power. There is nothing natural or inevitable about deferring to party intention in the course of interpretation.

Indeed, we override contractual intent all the time through statute, regulation, and the refusal of courts to enforce contracts that are unconscionable or against public policy.[188] But the balance of transactional authority that these practices reflect does not sufficiently inform our formal understanding of how courts handle contracts that *are* enforceable.

This Article has been concerned with a subset of enforceable contracts: those which are ambiguous and which therefore present courts with the very explicit task of interpretation. Courts interpret ambiguous terms in the most reasonable manner possible, and the aim here has been to emphasize the ways in which the most reasonable interpretation takes into account legal norms outside of contract itself.

The proposed method of interpretation—normative triangulation—responds to the allocation of transactional authority under our present regulatory state. If ever they were, contracting parties are no longer free to contract on whatever terms suit them. They share authority over the terms of exchange with the state. Through legal norms contained in statutes, administrative regulations and case law, courts lay down many background duties that constrain private choice. Individuals must negotiate these myriad background duties. Our choices are legally binding only inasmuch as they fall within the delineated bounds of private authority.

186. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 293 (2004). *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998).

187. *See* FRIED, *supra* note 55, at 14–17; Shiffrin, *supra* note 55, at 249–51; MARKOVITS, *supra* note 55, at 1417.

188. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 178–179 (AM. LAW INST. 1981); Glaeser & Shleifer, *supra* note 24; RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).