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Contract Law

RULES, THEORY, AND CONTEXT

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Preface

The series in which this book appears is Cambridge Introductions to Philosophy and Law. There is a special challenge to philosophical introductions to law – in particular, when the topic to be introduced "philosophically" is a doctrinal area of law. It is difficult to speak knowledgeably about the theoretical aspects of contract law in general, or about particular subcategories (doctrinal rules and principles, or transaction types), without a strong grounding in the specific rules and cases.[1] For that reason, this book offers an introduction to philosophy and contract law that is grounded on the detailed rules and principles of American contract law; the book then offers theoretical claims that can be made regarding those rules and principles. As will be seen, such claims can be made at different levels: the individual rules, "doctrine," transaction types, and American contract law more generally. It will be part of the theoretical argument of Chapters 8 and 9 that particular claims about the nature of (American) contract law, and claims one level of abstraction up, about the nature of contract theorizing, are weakened or refuted by the details of existing contract law rules. The theoretical discussions in this book are most present in Chapters 1, 8, and 9, and in end sections of other chapters; the historical discussions are primarily in Chapter 2 and one section of Chapter 3; there are doctrinal discussions throughout.

It is also part of the view underlying this text that theories of an area of law need to be supported by, or at least informed by, history. Understanding contract law is in part a process of understanding why we have the rules and principles we have. Too often in law schools, law journals, and elsewhere, discussions of the purpose of contract doctrine (and doctrine from other areas of law) are a strange form of "just so" story known as "rational reconstruction" – what justification could be offered for the rules we actually have, regardless of whether that justification

[1] This assumption is generally shared. One can find a comparable level of detail in other, better-known discussions of contract theory (e.g., C. Fried 1981).

has any connection to the actual reasons for why the rule was introduced or why it persisted.[2]

I do not mean to dismiss rational reconstruction; it is valuable to legal reasoning in the United States (and many other countries) because courts actually use it, so practitioners should be adept at it as well. However, there is a type of understanding of doctrine that can come only from familiarity with the actual origins and purposes of rules, even beyond the current reworkings we can imagine for those rules and principles.

What does it mean to have a contract law theory? A theory is an explanation of the subject of the theory,[3] but what does it mean to explain contract law? If someone asks you to explain the game of baseball or a legislative process, one's initial response would be to detail the rules under which the activity occurs. However, those seeking an explanation of contract law are looking for something more than a recitation of doctrinal rules. The questioner would likely want a deeper explanation, one that discussed how the rules and practices got to be the way they are (and this is the role history plays in theories of doctrinal areas) and why they have been maintained rather than radically revised (and here is the place for justification of some sort).

However, the process of explanation is complicated by the dynamic nature of law (in particular – though not exclusively – common law areas of law), where it is the case not only that the law changes regularly and significantly but also that explanations, justifications, and recharacterizations play a role in those changes.[4] This is the sort of feedback that Dworkin captured in his idea of "constructive interpretation."[5] And as Michael Moore has pointed out, theory – at least, theorizing of a sort – plays a role within legal reasoning and legal practice, as much as being about legal reasoning and legal practice.[6]

In Chapter 7, and again in Chapter 9, I express skepticism about the idea of "contract law" as a simple category, or as an area that is likely to be helpfully explained or justified by a single universal theory. However, given that attitude toward the subject, a reader might wonder on what basis I have selected the topics to

[2] Of course, to the extent that a rule serves a present purpose, even if it were not its original purpose, this may help explain why the rule has persisted. (I am grateful to Daniel Schwarcz for this point.)

[3] Barnett (1986: 269) asserts (in the context of presenting and defending his own theory of contract law) that "[t]heories are problem-solving devices" and that "[w]e assess the merits of a particular theory by its ability to solve the problems that give rise for a need for a theory." As is indicated in the coming chapters, I think this view of theory in general, and contract theory in particular, is too focused on the perspective of the judge or advocate, and not sufficiently on the observer who may not have an immediate stake in doctrinal disputes.

[4] In discussing alternative objectives for theories, Moore (2000: 732; 1990: 120–121) distinguishes explanation (in terms of historical-causal discussions) from description (a discovery of patterns that may be distant from either historical discussion or justification and rational reconstruction). The distinction is useful, but I prefer to use "explanation" broadly, because I think that the idea of explanation ranges over a number of different objectives and that it is important to emphasize that scope.

[5] Dworkin 1986: 49–53.

[6] Moore 1990: 118–129.

be covered in a book called *Contract Law*. The simple response is that I have picked the topics that are most often covered in American law school courses under this name (although there is sufficient variation in coverage that for any given course there may be some topics I do not touch on). These courses generally deal with the rules for enforcement of promises and exchanges in our society. The way this book tracks the conventional law school course also means that, although Article 2 of the Uniform Commercial Code is regularly mentioned throughout the book, the text follows the conventional practice of these courses in giving only sporadic coverage to the special rules for the sale of goods and related commercial law topics. (One technical matter relating to sources and citations: all references to the Uniform Commercial Code (UCC) are, unless otherwise indicated, to the prior Articles 1 and 2 of the Code, not to the revised UCC.[7])

Additionally, American contract law is primarily a matter of state (not federal or local) law. Therefore, there are potentially fifty-one different rules of American contract law for any given issue.[8] Although in practice there is significant convergence in different states' approaches, different approaches among the states remain on many issues. I have tried to note the variation in the text, but students and practitioners are well advised to check their own state's law before assuming that the present text accurately reflects the contract law of their jurisdiction on any particular point of law.

I have tried to write this book so that it could be of use to a variety of audiences for different purposes: to give a concise overview of basic doctrine while also offering some more detailed arguments about the rules and underlying policies; and offering theoretical and historical arguments for scholars more interested in those aspects of contract law. With luck, this book might thus be beneficial to first-year students, new to contract law; to academics already well established in the field; and to those in between, simply curious about the fascinating issues raised in and about contract law.

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[7] Revised Article 1 was promulgated in 2001; revised Article 2 was promulgated in 2003. Generally, the section numbering was not changed by the revisions; where it was I often offer both the pre-revision and the revised section numbers. Revised Article 1 has been adopted by thirty-seven states; no states have adopted revised Article 2, and in May 2011, the American Law Institute withdrew the 2003 Amendments to UCC Article 2 (and the Amendments to Article 2A).

[8] That is, the fifty states and the District of Columbia.

Law Center, University of Illinois Law School, the University of Minnesota Law School, the William S. Boyd School of Law at the University of Nevada–Las Vegas, and the Analytical Legal Philosophy Conference. I am especially grateful to William A. Edmundson, Joshua Gitelson, Brett H. McDonnell, Daniel Schwarcz, Jason Steck, and William Whitford for reading (at various stages) the entire manuscript. I also want to pass along my special thanks to the series editor at the time this book was commissioned, William A. Edmundson, and to the Cambridge University Press editors in charge of the series, Beatrice Rehl and John Berger, for their support throughout this process.[9]

[9] On a related point, I should note that I recognize the dubious appearance of being an author in a Cambridge series in which I am a coeditor. By way of explanation, I want to report that I was commissioned to write this text (and had a proposal approved by readers and by the Cambridge University Press Board) long before I had been asked to coedit the series, and long before I even had any thought of doing so. It may have been an error to have me write this text (I leave that to others to judge), but it was not self-dealing.