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PUTTING FREEDOM OF CONTRACT IN ITS PLACE

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Abstract: I develop a novel, rights-based conception of contract—the "democratic conception"—that can deliver a justification for granting a sphere of freedom to contracting parties while setting principled limits on that grant. It justifies doctrines—including the penalty doctrine, the doctrine of substantial performance, a robust doctrine of changed circumstances, and a robust doctrine of unconscionability—that an influential group of contract theorists argue set unprincipled limits on the parties' equal procedural freedom. My account shows how these doctrines can be rendered compatible with a robust principle of freedom of contract that is grounded in the parties' rights.

Suppose two sophisticated parties freely and knowingly stipulate in their contract a damages remedy for breach that will exceed the expectation interest of the breach victim. Under the common law, such a remedial clause is a "penalty" that may not be enforced (Restatement (Second) of Contracts 1981, section 356). Why isn't the parties' determination worthy of respect given that it was freely and knowingly made? Granted, the breach victim receives more than their expectation in the event of breach—an apparent windfall from an ex-post standpoint. But the parties agreed to this result ex ante. They might even have adjusted other terms of the contract in ways that are unfavorable to

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the eventual victim to reflect the greater protection against breach the remedial clause provides. Viewed from an ex-ante standpoint, payment of such damages thus no longer looks like it confers a windfall (Kraus & Scott 2020, 1368, 1372). It simply makes good on something that the parties bargained for.

Theoretical discussions about private law often involve sharp disagreements between those who analyze it in economic terms and those who seek to make sense of it through the lens of rights-based political morality.[1] Yet whichever way we look at this example, the law seems to have got it wrong. From a welfarist standpoint, the parties know better than the court what remedy is in their interests, and so enforcing the clause looks like a way of promoting the goal of social welfare maximization (Scott & Triantis 2004; Schwartz & Scott 2003). From a rights-based standpoint, honoring a remedial clause that the parties chose under procedurally free and fair conditions looks like a way of doing justice between the parties (Kraus & Scott 2020, 1331). The competing schools seem to align when it comes to the significance of ex ante intent.

In line with this intuition, a recent strand of influential theorizing about contract law, which I will refer to as sovereignty theory, suggests that by putting the parties' freedom to choose the terms of their agreements front and center, contract law can simultaneously realize efficiency and do justice between the parties—at least when the parties are rational and well-informed. By honoring the terms that the parties have chosen under procedurally free and fair conditions, courts instantiate the equal freedom of the parties (Kraus & Scott 2020, 1331). And, given that parties generally know better than anyone else what is in their own interests, they will, even if self-interested, rationally devise agreements that maximize joint value, thus, in the absence of externalities, maximizing social welfare (id., 1346-48). Therefore, sovereignty theorists contend, we should get rid of "ex post doctrines" like the penalty doctrine that seek to do substantive justice between the parties but are "in fundamental tension with the commitment to honor ex ante intent" (id., 1332). Instead, courts should honor all terms that the parties have agreed upon under procedurally free and fair conditions, deferring not only to their determinations of the

[1] For classic economic treatments of tort law, see e.g Calabresi (1970); Kaplow & Shavell (2002a), 85-154; Landes & Posner (1987); For classic economic treatments of contract law, see e.g., Kaplow & Shavell (2002a), 155-224; Posner (1972), 41-65). Prominent rights-based accounts of private law include Ripstein (2016), Weinrib (1995), Coleman (2001), Benson (2020), and Goldberg & Zipursky (2020).

primary substantive terms of their transaction but also to their views about procedural questions regarding how to identify and enforce those substantive terms.

My aim in this paper is to disrupt this apparently happy convergence of views and advance a new way of conceptualizing contract law in rights-based terms. I don't challenge the welfarist justification of sovereignty theory. But I argue that the deontological case for privileging ex ante intent is weaker than first appears, even when agreements are made by sophisticated parties under conditions that sovereignty theorists would deem to be free and fair. This is because a deontological account of contract is properly concerned, first and foremost, with justice, and justice, all except the staunchest libertarians would agree, is about more than the equal formal freedom of each to do as she wishes with whatever she happens to have. Once we fully appreciate that to be justified in rights-based terms, contract must be oriented in the right way towards substantive justice, we will see that more constraints on the freedom of parties are required, contrary to the prescriptions of sovereignty theory.

While the conception of contract I develop here takes substantive justice to be the foundational commitment on which the edifice rests, a procedural notion of equal freedom has life within the framework. But it is one that is procedurally more demanding than sovereignty theory's requirement that the conditions of agreement be free and fair as well as ultimately subordinated to substantive justice. Parties don't have untrammelled freedom to design the substance of their transactions. They must do so together with an eye towards realizing substantive justice. And, as a substantive matter, the agreements they arrive at must articulate a plausible vision of justice between them. Only when the parties satisfy these conditions do their agreements have a transformative effect on the parties' moral rights against one another, thus giving rise to a rights-based justification for their enforcement.

This still leaves the parties considerable latitude to articulate their own joint vision of justice, however, because of the existence of pervasive normative uncertainty about what justice between contracting parties requires. The parties, I argue, are the ones who are morally authorized to settle uncertainty about matters of justice that affect them. Because figuring out what justice between parties requires is an immensely difficult task (even in the absence of empirical uncertainty about morally relevant facts), the parties have

considerable freedom to design the substance of their transaction. My conception of contract thus delivers a justification for granting considerable freedom to contracting parties while simultaneously setting principled limits on that grant. Insofar as the parties are settling together in good faith normative uncertainty about justice that they are morally authorized to settle, their determinations about how it should be resolved deserve respect. But their freely made agreements that don't constitute plausible joint resolutions of normative uncertainty about justice do not.

Even if I'm wrong about this and the parties ought to have more complete freedom to determine the content of the substantive performance terms of their agreements, it doesn't follow that they should also be free to determine the content of procedural terms that determine how the agreement will be enforced, such as the remedy for breach. This is because such determinations are often responsive to the parties' imperfect motivations—their unwillingness to follow the true principles of justice. To respond to such departures from the ideal, we must appeal to second-best principles of justice—principles that respond justly to the fact of injustice. When they cast their theory in deontological terms, sovereignty theorists implicitly assume that second-best deontological principles will resemble those that regulate the ideal. But that assumption is unjustified. There are limits on the types of remedial clauses that parties may validly devise and on their determinations about other procedural matters, because the parties are not the ones who should be fashioning a just response to their own non-conformity to the dictates of justice. Contra sovereignty theory, the broad outlines of the common law's penalty doctrine are therefore justified.

Given how steeped we are in libertarian rhetoric about the virtues of freedom of contract, it might seem implausible to suppose that contracting parties must be seeking to do substantive justice. But if we are seeking a rights-based justification of contract, it is the sovereignty theorists that have more explaining to do. For the contention of sovereignty theory in its deontological incarnation is that through their agreements contracting parties alter the content of their rights and duties even when they are each ruthlessly pursuing their own advantage just so long as they do so under free and fair conditions (Kraus & Scott 2020, 1368, 1372; Ripstein 2009, 108-116). My contention is just that more than the

procedurally free and fair mutual pursuit of advantage is required for the parties to transform what they owe one another morally speaking.

At first glance, my account may seem to impose unrealistic deliberative demands on contracting parties. Certainly, many actual agreements that are made under procedurally free and fair conditions would not be morally valid on my account. But institutions including courts and well-functioning markets can—and, indeed, on my conception should—ease deliberative burdens on the parties, rendering the criteria for moral validity less demanding under some conditions. For those who remain convinced that I am articulating a utopian vision of contract law, moreover, my account still has an important negative implication. If it turns out that notwithstanding feasible institutional reform, most actual agreements won't be morally valid, the immediate implication is just that enforcing most agreements is not a way of vindicating the moral rights and duties of the parties. This, in turn, entails that we have departed so far from the realm of ideal theory that any justification of contract law will need alternative, more instrumental, foundations. Rather than focusing on the values instantiated by particular agreements, the question becomes whether the institution as a whole reduces overall injustice better than feasible alternatives. As welfarists emphasize, agreements that reflect the procedurally free and fair pursuit of mutual advantage will be good proxies of what the parties believe will make them better off, regardless of whether they are morally valid. There may therefore be a plausible instrumental case for enforcing some such agreements in the name of overall justice, even if there is no direct rights-based justification for doing so.

There are other ways of incorporating concerns about substantive justice into contract theory. One strategy I'm sympathetic to is the instrumental strategy I just described as apt under very non-ideal conditions. Though Bagchi (2024) doesn't describe it in these terms, her account of "Contract as Exchange" has this structure. Bagchi argues that we should drop our focus on the internal life of contracting parties and focus on the ways in which the institution as a whole promotes the autonomy of market participants in a way that is compatible with principles of justice. In a similar vein, Christiano (2024) defends the view that contracts and their normative force are primarily explained by reference to the conventional rules that define the institution of contract, conventions that, in turn derive their normative force from their satisfaction of values such as freedom,

justice and efficiency. I've suggested that even for one who endorses my conception of contract, an approach along the lines of Bagchi's or Christiano's might be the right one when conditions are sufficiently far from the ideal. When most people are unwilling to respect the rights of others, the most we can hope for is a set of rules that tend to avoid unjust outcomes.

A second strategy is to retreat to a more localized, transactional sense of justice. Thus, Benson (2020, 24, 184-85, 386-88) argues for a specific conception of contractual fairness that "is distinct and independent from distributive justice" and exemplified by transactions that take place at the competitive market price, which, because it is "unaffected by the specific purposes, needs, situation or conduct of any given individual," expresses the parties' abstract equality. Gordley and Jiang (2020, 741) also view transactions at the competitive price as fair, not because they express the abstract equality of the parties, but because they ensure that the "performance that each party makes is equivalent in economic value to the one that he receives" in the sense that "each party is compensated for the risks that the contract places on him."

A third strategy is to enrich our account of freedom or autonomy with more substance than the libertarian ideal of pure procedural justice. Dagan and Dorfman (2024) pursue a strategy along these lines arguing that private law ought to be organized around the "maxim of reciprocal respect for self-determination and substantive equality."

While some of the prescriptions that follow from my account may converge with those of these alternative approaches, my account has different theoretical foundations that render it democratic in a distinctive way. At the foundation of the edifice is substantive justice. But contract law doesn't seek to do substantive justice directly—whether this be transactional or distributive or relational—because of normative uncertainty about its content. Rather, the point of contract law is to provide a just framework for the settlement of normative uncertainty about substantive justice in a way that honors democratic egalitarian commitments.

The rest of this article is organized as follows. Part I lays out the welfarist and deontological justifications of sovereignty theory casting doubt on the latter. Part II sets out my alternative framework for understanding the deontological significance of freely

made agreements and compares and contrasts it with the economic approach. Part III develops some doctrinal implications. Part IV concludes.

I. SOVEREIGNTY THEORY

Sovereignty theorists, recall, contend that deference to the ex ante will of contracting parties can be alternately justified on welfarist or deontological grounds. In this Part, I begin by describing the welfarist case for sovereignty theory and the assumptions on which it rests. I then set out the deontological case and argue that it is, at best, incomplete.

A. The Welfarist Case for Sovereignty Theory

According to classical economic analysis, agents are motivated to act in accordance with their subjective, self-interested preferences. Those preferences rank options in accordance with their considered views about what makes their lives go best—their well-being or welfare. And what matters morally can be completely described by a function of the welfare of all agents—a social welfare function (Shavell 2004).

These assumptions motivate the reduction of private law—indeed law more generally—to a system of incentives that ought to be designed to induce rational, self-interested actors to choose social welfare maximizing actions (Posner 2011, 32-33; Kaplow & Shavell 2002b). Because agents are self-interested, they don't have preferences to conform to the law as such.[2] They conform only insofar as it is in their self-interest to do so. Because agents are perfectly rational, they have the capacity to make decisions about whether to conform with the rules on a case-by-case basis asking on each occasion whether the self-interested benefits of conforming exceed the costs.[3] Thus, they have no reason to look to the law for guidance about what to do, because they can always figure it out for themselves.[4] The law simply alters the circumstances in which they act by altering the self-interested costs and benefits of available actions.

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[2] A considerable body of work in behavioral economics challenges the self-interest assumption. See, e.g. Camerer & Thaler (1995); Gintis et al. (2005, 8-22); Jolls, Sunstein, & Thaler (1998, 1489-97).

[3] A considerable body of evidence in behavioral economics challenges the rationality assumption. See, e.g. Jolls et al. (1998, 1477-79, 1548-50); Tversky & Kahneman (1982).

[4] Relaxing either the assumption of self-interest or the assumption of perfect rationality could lead an agent to act in accordance with the rules without considering case-by-case whether it is rational to do so, for either intrinsic considerations (when the self-interest assumption is relaxed) or instrumental considerations (when either assumption is relaxed) (see Stone 2016a & 2016b).

In the realm of tort, the optimal rules ensure that subjects internalize the welfare costs their activities impose on others and that those best able to reduce those costs or bear associated risks are motivated to do so (Arlen 1990, 54). In the realm of contract, the optimal rules give subjects reason to use available resources to pursue activities that maximize aggregate welfare (id., 51).

The lawmaker's task in each case is therefore informationally demanding, but particularly so in the case of contract. In the realm of tort, the lawmaker must determine the welfare costs activities impose on others and figure out who is best placed to minimize those costs. In the realm of contract, they must figure out how best to put existing resources to use, which depends on everyone's informed preferences as well as the productive possibilities available to everyone individually and collectively.

But contract law, unlike tort law, can harness information that is in the hands of private parties by enforcing agreements that they have freely assented to. Given the self-interest assumption, few of these agreements will be fully self-enforcing, and a party who performs her part may worry that her counterparty will lack a sufficient self-interested reason to reciprocate.[5] But when the legal system gives parties sufficient incentives to perform through the imposition of rewards or sanctions, this problem is overcome, and rational, self-interested parties will create agreements that maximize their joint welfare, confident that each will do his part (Scott 2006, 279). The law can thereby harness decentralized information about the optimal allocation of resources simply by enforcing freely made agreements (Arlen 1990, 52).

From this standpoint, agreements and their associated rights and duties have no intrinsic, law-independent significance for the parties or the lawmaker. They are simply instruments for maximizing social welfare that are efficacious only because of the existence of an effective enforcement system. Private parties design the rules that will regulate their joint activities for every possible future contingency and the lawmaker specifically enforces the results. Thus, if we assume unboundedly rational agents with an unbounded capacity to imagine future contingencies who are also fully informed about the

[5] This leads to the famous "hold-up problem." One party moves first, irreversibly investing in the relationship. The other then lacks an incentive to compensate the first-moving party. Anticipating this, the first-moving party won't invest in the first place. See Hart & Moore (1988).

law and their own interests alongside a benevolent, utilitarian lawmaker, contract law is best understood not so much as a device for enforcing agreements as such, but rather as a delegation of power to private parties to write rules to regulate their interactions that the law will enforce.

The law's role is thus a limited one. It must create rules—rules against duress and misrepresentation, for example—that ensure that the processes of contract formation reflect the parties' informed, uncoerced preferences. And it must create a remedial regime that enforces all resulting agreements in accordance with the parties' wishes—so long as the agreements don't impact the welfare of non-parties.

Given the choice, parties would opt for remedial rules that guarantee specific performance of the substantive terms of their agreement, such as a rule directing a court to order performance backed up by a penalty that will ensure that parties have sufficient self-interested reasons to conform to it. These are also the remedial rules that a social planner would impose on the parties if the agreement were silent on the matter. They guarantee performance of a contract that maximizes the joint welfare of the parties.

Of course, things are not as ideal as the picture painted thus far. Much economic theorizing about contract law recognizes and tries to respond to the fact that contracting parties don't anticipate every possible contingency and may fail clearly to specify everything that is to be done in contingencies that are anticipated by the parties (Hart 1998; Hart & Moore 1999). To begin with, the inability to efficiently contract for all future contingencies complicates the remedial landscape by creating the possibility of an efficient breach. In the complete contracting world of fully rational agents, any efficient "breach" would have already been contemplated by the parties and thus could have been incorporated into the contract as something the "breacher" was in fact permitted to do with an appropriate adjustment of the consideration received by the other side. Thus, in the complete contracting world, we can always define the terms of the parties' agreement so that any breach would be inefficient so long as there is an enforcement regime that guarantees performance. But in the incomplete contracting world, contracts will be incompletely specified and insufficiently tailored to possible contingencies, such that breach of specified performance terms will sometimes be optimal from a welfare maximizing standpoint in ways that the parties didn't anticipate ex ante. The remedy for

breach should thus be tailored to give parties incentives to make performance and reliance decisions that maximize the joint surplus.[6]

More generally, in an incomplete contracting world, courts cannot simply enforce the performances the parties have specified for each possible state of the world, because the parties cannot anticipate what ought to be done in all contingencies (Scott 2006, 291). Instead, they must design a set of rules governing interpretation, gap-filling, and breach in a way that furthers the objective of welfare maximization. The effect of the development of such procedural rules is to detach the terms of the enforceable contract—the enforceable set of terms that arises from the parties' agreement, including terms governing remedies for breach—from the substantive terms of trade that they had in mind at the time of contract formation.

Despite the reality that contracting parties generally can't write efficient complete contracts, economic sovereignty theorists display a high level of confidence in parties' abilities to figure out what those rules should be, at least when it comes to sophisticated well-informed parties. Sovereignty theorists contend that parties' determinations of such procedural matters are worthy of the same deference as their determinations of the substantive terms of their interactions. This may be because they are inclined to attribute sophisticated parties' failures to perfectly specify arrangements in advance to external impediments—specifically, transaction costs of negotiating remote contingencies and the difficulty of verifying the occurrence of certain contingencies in court—rather than to internal impediments arising from parties' bounded rationality (see Shavell 1980, 468-69). It may also reflect their skepticism about the ability of courts to do a better job than sophisticated parties (see, e.g. Schwartz & Scott 2003, 594-609). Thus, for example, as we have seen, economic sovereignty theorists typically disapprove of the application of the common law's penalty doctrine, which invalidates remedial clauses that specify damages that are obviously in excess of the promisee's expectation, favoring instead more complete deference to the parties' choices of remedial terms. And they tend to favor the strict enforcement of clauses like merger clauses that express the parties' agreement about how interpretation of their agreement should proceed (id., 589-90).

[6] Shavell (1980) explores the effect of different measures of damages on parties' incentives to perform and make relation-specific investments.

When an agreement is silent on a procedural matter, economic sovereignty theorists usually favor rules that capture what a majority of similarly situated contracting parties would have wanted if they had thought about it. Schwartz and Scott (2003, 569), for example, defend a formalist approach to contractual interpretation on the grounds that this is the "interpretative style [that] typical parties [would] want courts to use when attempting to find the correct answer." And Markovits and Schwartz (2011) defend the expectation damages default rule on the grounds that this is the remedy that most contracting parties would have wanted ex ante. Indeed, they go further than this by arguing that precisely because it's what the parties would have wanted ex ante had they thought about it, contracts are best interpreted as imposing alternative obligations on the promisor either to perform or pay expectation damages (even if the contract simply says perform) (id., 1986).

Whether or not sovereignty theory describes what is required from a welfarist standpoint is, of course, ultimately an empirical question. As economic sovereignty theorists would themselves concede, the account is less compelling when parties are less than perfectly rational, as the terms to which such parties agree may not be welfare maximizing.[7] Yet sovereignty theory may still be on firm welfarist ground if the parties are more likely than courts to optimize the terms of their transactions. Even imperfectly rational parties may be better equipped than courts to figure out what the substance of their transaction ought to look like. On the other hand, perhaps courts have the upper hand when it comes to procedural matters given their adjudicatory expertise.

There are even reasons to doubt that the parties' resolutions of procedural matters will maximize social welfare under the assumptions of rationality and self-interest that underpin the economists' contentions that parties' agreements about substantive questions should be respected. If, for example, parties are asymmetrically informed about the rules, then the self-interest of those who know better will lead them to exploit their superior knowledge to gain difficult-to-foresee advantages at the expense of their counterparties.[8] Such opportunism may then give rise to a welfarist rationale for ex post equitable interventions that prevent opportunists from exploiting their greater knowledge of the law,

[7] Thus, Schwartz & Scott (2003, 545) confine their theory to agreements between sophisticated actors.
[8] What we might describe as "self-interest seeking with guile" (Williamson 1985).

even if this decreases the power of others to control how procedural matters will be resolved ex ante (Ayotte et al. 2023).

B. The Deontological Case for Sovereignty Theory

The success of the deontological justification of sovereignty theory depends on whether the theory's robust principle of contractual freedom follows seemlessly from the equal freedom principle—the idea that "it is always just and fair to the parties to hold them to agreements reached under free and fair conditions" (Kraus & Scott 2020, 1328). There are several reasons for doubt. To begin, certain public interests might be compromised when courts defer to the parties. For example, deference to parties' stipulations of remedies for breach prevents the judiciary from rendering impartial judgments about the public significance of private legal wrongs, as Shiffrin (2016) has argued. But, as I will explain in this Section, an appeal to a simple principle of equal freedom likely cannot succeed even when we set aside this important public interest for two reasons. First, it can only deal in a stipulative way with the problem of background injustice. Second, even assuming *arguendo* that the equal freedom principle requires courts to defer to the parties' determinations of the primary performance terms of their agreement, it doesn't follow that the equal freedom principle requires courts to defer to the parties' determinations of procedural and remedial matters.

i. The Problem of Background Injustice

Consider, first, the problem of background injustice. Suppose a rich person and poor person enter into an agreement on mutually beneficial terms. The resulting transaction will benefit the rich person much more than it will benefit the poor person. The reason for the disparity, moreover, is background injustice resulting in an unjust disparity of bargaining power that enabled the rich person to bargain for better terms. Both parties fully understand the terms of the transaction and neither forced the other to assent to it. Thus, the transaction was entered into under procedurally free and fair conditions. Yet it is not obvious that the agreement is worthy of our respect just in virtue of that fact. The agreement enables the rich person to benefit from background injustice at the poor person's expense. The rich person may be under a duty of justice to relinquish some of their resources to the poor person or deal with the poor person on more generous terms. At the very least, they have a duty to support institutions that are taking steps to rectify the underlying injustice. Under

such conditions, the principle of equal freedom will thus find itself in competition with other values.[9]

The sovereignty theorist might respond by insisting that the voluntariness of agreements always makes them presumptively worthy of respect while acknowledging that other values may counsel against upholding them. If this is the case, though, sovereignty theorists face a dilemma. They must either accept that the value of personal sovereignty is just one value that must be balanced against others.[10] Or they must admit that the scope of the equal freedom principle is limited by deeper principles. The operative principle would take a conditional form: respect freely chosen agreements *if* background conditions are just. But such a principle is crying out for a deeper explanation that could also tell us what shape contract law should take if background conditions are not just (cf. Cohen 2003).

Notice that the economic sovereignty theorist might, depending on the circumstances, have the resources to respond in a way that the deontological sovereignty theorist cannot. If declining to enforce certain exploitative agreements would tend to make poorer persons worse off, because their exploiters will respond by simply refusing to enter into such agreements in the first place, there may be a welfarist argument in favor of their enforcement. But this is an instrumental (and empirically contingent) argument not a rights-based one. It is unavailable to a theorist seeking to defend sovereignty theory in rights-based terms.

ii. The Problem of Non-Compliance with the Principle of Equal Freedom Itself

The second challenge arises from the fact that parties might shape procedural and remedial rules to respond to their own potential unwillingness to honor the agreements they make under free and fair conditions. To see the problem clearly, its helpful to break down the parties' deliberations into two stages. During the first stage, the parties determine what each ought to do for them to realize the objectives of their joint project. Call the output of these deliberations the *primary agreement*. If we assume *arguendo* that the principle of equal freedom is the master principle governing when the parties' agreement on the substantive performance terms of their transaction ought to be respected, then the primary

[9] For arguments that distributive considerations are or ought to be relevant to contract law, see, e.g., Davis & Pargendler (2022) and Bagchi (2014).

[10] Sovereignty theorists seem disinclined to do this. Kraus & Scott (2020) argue that an important virtue of the sovereignty theory is that it avoids an unprincipled pluralism.

agreement describes what the parties owe to one another so long as it was fashioned under procedurally free and fair conditions.

But now suppose that the parties anticipate that they will be imperfectly motivated to do as the equal freedom principle requires. That is, they anticipate they may be tempted to breach the primary agreement. Then they enter a second stage of deliberations in which they might agree to modify the terms of their agreement to ensure that they will have the incentive to conform more closely to the terms of the transaction they envisaged in their primary agreement. Call the output of these deliberations the *secondary agreement*. While the point of the secondary agreement is to ensure that imperfectly motivated parties have incentives to conform to the primary agreement, its content will not perfectly mirror what it is the parties have freely and fairly agreed ought to happen. That is set out by the primary agreement to which the parties are imperfectly motivated to conform.[11]

The problem for the deontological sovereignty theorist is that it is not obvious why the same principle of equal freedom ought to govern whether the secondary agreement is respected. When one of the parties fails to honor the primary agreement, we are in a second-best world by sovereignty theory's own lights. We lack a basis for assuming that second-best principles of justice resemble those that regulate the ideal.[12] It isn't obvious that the parties ought to be the ones to determine what the result of such an infringement ought to be. The sovereignty theorist might try to appeal to the value of autonomy. But the primary agreement is an expression of the parties' autonomy, and thus the parties' unwillingness to conform to the the primary agreement manifests disrespect for the other's (and perhaps even their own) autonomy. It is therefore plausible to suppose that the parties ought to have *no* say about the implications of their own disrespect for the principle of equal freedom. Certainly, it is a mistake to suppose, without further argument, that the rules that the parties

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[11] We can analogize the primary agreement to the first-best complete contingent contract that economists imagine parties writing when they have an unlimited ability to contemplate all possible contingencies. In an ideal world, the parties would just conform to it. But of course, the standard economic assumption is that people are self-interested. Given that motivational assumption, such agreements would ideally be costlessly and specifically enforced by a benevolent lawmaker. But in reality such perfect enforcement is unavailable. The secondary agreement is analogous to the second-best contract that the parties write in light of this reality. The parties distort the content of their agreement to ensure that their incentives are aligned as close as possible with the first-best given the prevailing enforcement regime.

[12] Cf. Lipsey & Lancaster (1956) (showing that when one optimality condition in an economic model cannot be satisfied, the resulting optimality conditions will differ from those that characterize the first best).

create to respond to their own departures from their primary agreements, such as stipulated damages clauses and other procedural and remedial rules fashioned with their imperfect motivations in mind, should be regulated by the same principle of equal freedom that determines when the primary agreement is worthy of respect.

Suppose that the parties design their primary agreement to maximize their joint welfare by giving one party, A, an out when the costs of performance exceed the benefits to the other party, B. In the spirit of efficient breach theory, the primary agreement might specify that A can either render a performance or in the alternative pay their counterparty an amount of money that the counterparty would value as much as receiving that performance. If this is the content of the primary agreement then, so long as A will willingly perform their disjunctive duty to either pay or render the performance, the secondary agreement need not distort the content of the primary agreement to ensure that the party has sufficient self-interested reasons to conform to the primary agreement. But if A won't necessarily be willing to perform the disjunctive duty without additional self-interested incentives, the parties might distort the secondary agreement to supply such incentives. If, for example, A can render a subpar performance in a way that won't always be easily detectable or verifiable by B, then, anticipating the possibility of such a willful breach, the parties may agree to write a term into the secondary agreement that would impose a supercompensatory remedy on a party who is discovered to have made such a willful breach.[13] They do so not because they think that the breach victim ought to receive more than the value of the performance in such an eventuality, but because they believe that the threat of the higher damages upon discovery of such a breach will deter the performing party from trying to get away with a subpar performance in the first place. But it's not clear why a court should honor this determination by the parties given the equal freedom principle. That principle says that the primary agreement is worthy of respect. A court ought thus to devise remedies that reflect the primary rights and duties of the parties. The equal freedom principle alone, even if it is the correct principle of justice, doesn't tell the court that it must listen to the parties when devising a remedy for breach of their primary agreement.

[13] See Bar-Gill & Ben-Shahar (2009) for an economic argument for supercompensatory damages for breaches of this kind.

Now consider Schwartz and Scott's (2003, 569) contention that "[a] commitment to party sovereignty regarding the contract's substantive terms implies a further commitment to party sovereignty regarding the interpretative style an adjudicator should use to find the substantive terms." Suppose the parties write an agreement containing a term directing a court charged with resolving a dispute about the meaning of their agreement to adopt a formalist approach. That is, the agreement directs the court to focus exclusively on the plain text instead of situating the text in the broader context in which the agreement was made. The parties do so because, although a contextual interpretative approach is more likely to yield an interpretation that accurately reflects the parties' primary agreement, it increases the parties' litigation costs by requiring a more extensive examination of relevant evidence and discourages them from speaking clearly during negotiations (id., 571-577). Suppose that a court is now resolving the ambiguity and that a formalist approach would resolve the ambiguity differently from a contextualist approach. Schwartz and Scott (2003) argue that a court should defer to the parties and enforce the result recommended by the formalist method, even though it is more likely to diverge from the primary agreement.

It is straightforward to see why a welfarist might recommend this result. Rational, self-interested parties will make welfare maximizing trade-offs between error, drafting, and dispute-resolution costs, giving courts reason to defer to the way they have agreed to resolve the trade-offs (id., 569, 576-577). But why is it a corollary of sovereignty theory in its deontological incarnation? Contextualist interpretation is required to honor the primary agreement but it goes against the parties' assent to formalist interpretation in the event of a dispute. Why prioritize the latter intent at the expense of the former if both were chosen under free and fair conditions?

Sovereignty theorists may respond that it was precisely this type of conflict that the parties were managing when they agreed on formalism: the parties have freely traded-off accuracy for reduced litigation costs (see id., 571-577). But such a response is in tension with a view of the primary agreement as defining the parties' rights in virtue of having been freely agreed to. The agreement on formalism causes the set of legally enforceable obligations that arise from the parties' agreement to diverge from the primary agreement. While directed by the parties, there is no longer a straightforward sense in which the result

instantiates respect for the substantive terms that were freely chosen by the parties as opposed to simply maximizing joint welfare as expressed by the larger agreement that supplements the primary agreement with interpretative directives. The purportedly deontological justification of sovereignty theory ends up converging with the welfarist justification.

Sovereignty theorists might reply that the parties may simply be responding to reasonable doubts about the competence of judges to evaluate contextual evidence in interpreting their agreements. But it isn't clear why a high level of judicial competence is needed when the parties are ideally motivated. Such parties, believing themselves to be bound to the primary agreement by the equal freedom principle, would be motivated to ascertain the truth should they encounter a dispute about the meaning of it. Being motivated to conform to the primary agreement, they would often be able to resolve such a dispute between themselves. Were they to find themselves in need of the assistance of a court, they would willingly share relevant evidence and arguments to give the judge the best shot at accurately identifying the meaning. Thus, it isn't obvious why they would want to limit the evidence that the judge could look at.

Because the concern about litigation costs is not a pressing one when the parties are ideally motivated, parties who write interpretative directives into their agreements with an eye towards reducing those costs will often be responding to their own imperfect motivations to conform to their primary agreements. But then the central objection reemerges: if the equal freedom principle is the operative principle of justice, why should a judge adhere to an interpretative directive that makes it less likely that the court enforces conformity to the primary agreement—the transaction that the parties freely and fairly agreed ought to take place?

If the arguments in this subsection are correct, sovereignty theory's equal freedom principle doesn't justify deference to parties' procedural and remedial directives that have been fashioned with the parties' own imperfect motivations in mind. But parties might devise procedural and remedial rules without imperfect motivations in mind, for instance to facilitate the compliance of well-motivated actors by enabling them to identify the content of their agreement more easily. Sovereignty theorists don't confront a special problem in explaining why courts ought to respect such terms. It is only insofar as such

terms are designed with the imperfect motivations of the parties in mind that they lack a good reason to suppose that they are valid just in virtue of having been made under procedurally free and fair conditions.

II. The Democratic Conception

I just argued that the equal freedom principle is not a foundational principle and that even if it is, we have no basis to assume that it governs attempts by the parties to regulate problems stemming from their own imperfect motivations to conform to it. In this Part, I sketch a framework for identifying the deeper principles that lie behind any operative principle of freedom of contract and limit its scope. My central contentions are that: (i) there is normative uncertainty about what reason and justice require; (ii) agreements are constitutively mechanisms for settling normative uncertainty about justice; and (iii) they deserve our respect when and only when they represent plausible, good faith attempts to settle that uncertainty by those who are morally authorized to do so.[14]

A. The Idealization

Let's start by envisaging an ideal world of superbeings who are perfectly motivated to conform with the demands of morality and justice. Some of the reasons that motivate these beings are impartial reasons that all feel the force of, such as reasons to promote the well-being of everyone. Others are partial reasons that derive from their circumstances and relationships. Each may have reason to give special weight to their own interests and those of their family members, friends, and neighbors.[15] The balance of these impartial and partial reasons define what I will refer to as agents' *standpoints*—the all-things-considered evaluations of the rationality of available courses of action that reflect the balance of the reasons that apply to them.[16]

If agents were motivated only by impartial reasons, had access to all morally relevant facts, and the dictates of reason were determinate and known to all, their

[14] See Stone (2023) for discussion of some further implications of my conception (there referred to as the "settling conception").

[15] See Scheffler (2010) for a defense of the "commonsense" view that morality and partiality understood as a "preference or fondness or affection for a particular person" are compatible as "inevitable concomitants of certain of the most basic forms of human valuing."

[16] We could use a preference map to describe an agent's standpoint, though were we to do so, we couldn't assume, as classical economics does, that such preferences provide a measure of the agent's self-interest or well-being. They would reflect reasons (some partial, some impartial) that are genuinely other regarding.

standpoints would converge. But with partial reasons added to the mix, different agents' standpoints may yield conflicting prescriptions. One agent, Shira, may rationally want the meal to be fed to her child while another, Vikram, may rationally want it to be fed to his child, even if Shira's child needs it more from an impartial standpoint. Thus, agents need to know whose standpoint governs their choices. Consider the choice whether to give the meal to Shira's child or Vikram's. If Shira's standpoint governs, the meal must be given to her child, while if Vikram's governs, it must be given to Vikram's.

The considerations that determine how standpoints are allocated to choices are distinct from the reasons that define agents' standpoints. Figuring out exactly what they are and entail is a difficult problem. I don't attempt to resolve it here beyond making an assumption that prominent among them will be considerations of fairness and flourishing. We can think of these as considerations of *justice* that by allocating agents' standpoints to choices give agents *moral rights* to have choices decided in accordance with their assigned standpoints.[17] If we also assume that they yield known and determinate prescriptions, ideally motivated agents know exactly what they should do: they should act in accordance with the standpoints that justice has assigned to their choices. These rights don't (yet) confer decision-making authority on the possessor of the standpoint. They simply tell agents that the choice is to be made in accordance with the possessor's standpoints (regardless of what the possessor says about the matter). If justice assigns Shira's standpoint to Vikram's choice about the meal in the above example, Vikram should give the meal to Shira's child even though his standpoint, considered apart from justice, prescribes otherwise. He should do this even were Shira to direct him to do otherwise.

B. Comparison with Classical Economic Model

There are structural similarities between this idealization and the idealization from which welfarist theories begin, as well as significant differences. In the classical economic model, agents' "standpoints" are defined by their subjective preferences that determine what actions will rationally advance their welfare. Conflicts will arise because agents' standpoints are defined by their self-interest. In my idealization, agents' standpoints are

[17] This is compatible with the Rawlsian claim that the conditions that make justice possible and necessary, the so-called "circumstances of justice," are conditions of moderate scarcity of resources and conflicting claims on those resources that arise from persons' pursuit of divergent plans of life. Rawls (1999, 109-112).

defined by the balance of all the reasons, impartial and partial, that apply to each including, but not limited to, reasons arising from the agent's own well-being. In the economic model the social welfare function defines what "justice" requires by aggregating agents' conflicting standpoints into a measure of societal well-being (see Sen 1984, 33-46).

In the classical economic model, agents are motivated only by the (self-interested) considerations that define their standpoint and thus not by the considerations of "justice" that are embodied in the social welfare function—hence, the ever-present need for a social planner who designs institutions to ensure that each agent's self-interest aligns with social welfare.[18] In my idealization there is no need for a social planner to align agents' incentives with justice, because agents are perfectly motivated to conform to justice even when that means acting in accordance with the standpoint of another.

Of course, it is not realistic to suppose that people are so ideally motivated, just as it isn't realistic to suppose that persons are rational in the manner of homo economicus. But it is helpful to have the ideal in view before we start theorizing about non-ideal conditions, particularly when our objective is to evaluate a claim—the claim that free choices should be respected—that seems to have its greatest intuitive plausibility under conditions of full compliance with justice.

C. Agreements

In the economic model, there is no need for contract when the social planner has perfect information and enforcement is costless. The social planner can simply dictate the optimal outcome without relying on the information that would be elicited by parties' agreements concerning what would maximize their joint welfare. Given the assumptions I have made thus far, agents in my framework will also have only a limited need for agreements. Indeed, given their perfect motivations they don't even need a social planner. What justice requires is known by all and each is perfectly motivated to do as justice requires. A need for agreements arises, however, when there is normative uncertainty about what justice requires even in a world of perfectly motivated agents. In the economic model, what justice requires is normatively certain (even if the information required to implement it may not

[18] Even behavioral economic models that relax the self-interest assumption by incorporating other-regarding concerns into the utility function generally don't assume that agents' preferences align with the social welfare function. For a discussion of such models, see Fehr & Fischbacher (2002).

be): the maximization of a social welfare function the content of which is known by the social planner. Agreements solve a problem of imperfect information about empirical rather than normative matters. In my framework, normative uncertainty provides the basis for an argument that agreements matter even when agents are perfectly motivated to conform to justice and all morally relevant facts are known. Agreements, on my conception, are constitutively mechanisms for navigating normative uncertainty about justice.

i. Determinacy about Reason and Justice

Before we get to agreements, consider consent. It might seem that agents need the power of consent whenever justice assigns A's standpoint to B's choices (or vice versa), as it likely does when it comes to many actions by B that intimately interfere with A's person. But this need is illusory given the idealizing assumptions made thus far. B will be perfectly motivated to conform to justice and so will act in accordance with the prescriptions of A's standpoint. A, being rational, would never authorize anything contrary to her own standpoint. If A were to irrationally do so, moreover, B would have no reason to follow A's instructions because justice requires B to act in accordance with A's standpoint.

Perhaps there is a freestanding value of autonomy or self-authorship associated with deciding what one's own standpoint prescribes. If so, then B would have some reason to follow A's instructions regardless of what A's standpoint actually requires. A would have, in effect, a right to authorize the irrational. Yet it is hard to see why considerations of autonomy would play a significant role in agents' practical lives in a world where everyone knows and respects what reason and justice require. Common grounds for postulating autonomy concerns are absent here given that I am assuming that there is no indeterminacy about the content of each agent's standpoint, and everyone can see what each agent's standpoint determinately requires, eliminating all rational basis for any substantive disagreement about its content. Chang (2020, 292), for example, argues that we resolve a particular form of indeterminacy about what reason demands that she calls "parity" through the exercise of consent. But thus far I have been assuming that there is no indeterminacy about what reason demands.

As for agreements, it may seem that the need to engage in joint activities over time might on its own create a need for the power to make agreements to reallocate standpoints

among possible choices, thus enabling the parties to commit a particular course of action. But the need for agreements for such commitment purposes also turns out to be illusory, because standpoints are already assigned to choices justly. Thus, any reallocation that could be achieved through an agreement wouldn't better serve justice than the allocation that justice already determinately prescribes—an allocation that all agents know and are motivated to conform to. Suppose that A and B both need widgets. A can create a widget machine that only B has the skills to operate. B therefore controls the subsequent distribution of the widgets. Suppose that B's standpoint would require B to distribute so few widgets to A that A wouldn't be able to recover the costs she will incur should she make the machine, while A's standpoint would require B to distribute enough widgets to A to enable A to cover her costs. It thus makes sense for A to invest only if A's standpoint governs the distribution of widgets. This is the type of situation where we might expect to see an agreement whereby B agrees to give A enough widgets to induce A to make the machine in the first place to the benefit of both parties. But in our ideal world there won't be any need for such an agreement because this is what justice (we may assume) already requires, and A and B will understand this and act accordingly.

ii. Normative Uncertainty about Reason and Justice

Now consider how things change when there is normative uncertainty or indeterminacy about reason or justice. Metaphysical indeterminacy arises whenever reason doesn't settle what is to be done from a given agent's standpoint or justice doesn't settle whose standpoint controls a choice. An agent's standpoint will be metaphysically indeterminate when the reasons that constitute it are incomparable or on a par over some range (on incomparability, see Raz 1986; on parity, see Chang 2017). Decisions about what career to pursue, whom to marry, and how many children to have are the types of decisions that are plausibly characterized by incomparability or parity. There likely isn't a single right answer about how exactly one should rationally trade off job satisfaction against leisure time and the many other considerations people rationally weigh when deciding on a career, in which case persons will sometimes find themselves choosing among careers that can't be rationally compared. To the extent that is so, a person's choice of a particular career represents a pure expression of their autonomy (Chang 2020, 292). Rather than choosing a career because they believe that it best advances a set of values, their choice of career is a

choice to value that career over the others from the incomparable set, and their choice should be respected for that reason.

Justice doesn't seem to be metaphysically indeterminate to the same extent. Justice seems to make claims on us that are not up to us to determine. When relevant considerations conflict, as when flourishing must be sacrificed to advance fairness, it may be hard to figure out how to resolve the tension, but we may be able to argue meaningfully about the right way to resolve it. There seems to be a truth of the matter, albeit one that may be difficult to ascertain for limited beings like ourselves. Of course, justice may sometimes be *indifferent* among some allocations, as when the question is how control over 100 functionally identical items is to be allocated. But indifference isn't the same as indeterminacy. So long as we have a mechanism for coordinating on one allocation in a set of equally just allocations, we simply don't care which allocation is selected.

Still, some have the intuition that there are domains of activity over which justice holds no sway. For a libertarian, justice simply is whatever persons choose under procedurally free and fair conditions (Nozick 1974, 160-64, 167-74): the substantive content of justice is indeterminate before such choices are made. Even Rawls (1993, 267-69) suggests that while the institutions of private law must be designed to secure background justice, the particular interactions that private law authorizes need not directly instantiate duties of justice (see also Scheffler 2015).

But in my framework, justice refers to the set of normative considerations that determine how conflicts among standpoints should be resolved and thus it has a wide domain. Contract law resolves conflicts associated with the allocation of resources, and there are surely normatively better and worse—more or less just, that is—ways of resolving such conflicts. If so, justice surely does regulate relationships between contracting parties. The primary problem is not that justice makes no claims on contracting parties nor that its claims are indeterminate. The problem is that for epistemically limited beings, there is considerable uncertainty about its prescriptions. It is difficult to figure out what the true principles of justice are and exactly what they prescribe, which creates scope for reasonable disagreement about justice.[19]

[19] See Rawls (1993) ("Reasonable political conceptions of justice do not always lead to the same conclusion, nor do citizens holding the same conception always agree on particular issues."); Dworkin

Epistemic normative uncertainty is distinct from epistemic uncertainty about descriptive facts, though the two will often interact, because descriptive uncertainty raises normative questions about how we should respond to it—how we should select among the probability distributions over the descriptively uncertain outcomes. Where there is an obviously correct way to respond to descriptive uncertainty, responding to descriptive uncertainty doesn't present a special challenge.

iii. Normative Uncertainty and Normative Powers

Normative uncertainty sets the stage for a conception of freedom of contract that is substantively and procedurally more constrained than that entailed by the pure procedural justice that lies at the heart of sovereignty theory. Consider the widget example discussed above. I made some simplifying assumptions about what justice required, effectively bracketing the problem of normative uncertainty. But what justice requires in this example is contestable. While it seems reasonable to suppose that in many circumstances justice will require that A get enough widgets to cover the cost of producing the widget machine, it is much less clear that each agent's standpoint justly controls how they would use their respective skills of creating and operating the machine. Why should the possessor of skills be the one to determine whether and how they are exercised? This might be what justice requires when skills are equitably distributed among persons. But if skills aren't so equitably distributed, justice might prescribe a different allocation.

Whenever, as in this example, there are multiple plausible ways of resolving normative uncertainty, we face a further allocative question: *who* has the authority to resolve it? In other words, we face a second-order problem of justice. Justice doesn't simply allocate standpoints to choices (the first-order problem of justice). It also allocates moral authority to settle normative uncertainty about the content of those standpoints and their allocation across choices (the second-order problem of justice). My assumption here is that normative uncertainty creates a *moral* problem. While some have developed models of *rational* decisionmaking under moral uncertainty (e.g., Macaskill et al. 2020; Lockhart 2000; Ross 2006, 742-768),[20] I believe that we should view normative uncertainty as a

(1986, 178) (explaining that in a pluralistic society "different people hold different views about moral issues that they all treat as of great importance"); Waldron (1999) (discussing the significance of pervasive disagreements about justice).

[20] See also Cox (2003) for an application of this approach to the problem of jurisprudential uncertainty.

moral problem requiring a solution that we can justify to one another morally as Rosenthal (2024) argues. On my conception, as I will now explain, contractual rights are best understood as a morally justified response to normative uncertainty about first-order justice.

Who has the moral authority to settle normative uncertainty about an agent's standpoint? I assume that, presumptively at least, this authority is allocated to the agent. Such an allocation is instrumentally valuable insofar as an agent is likely to be epistemically better acquainted than others with their own standpoint. More importantly, it instantiates liberal egalitarian values of equal respect and self-authorship. Equal respect is realized by having each person resolve uncertainty about a single standpoint—their own. Each agent is made the author of their own life in an important sense by resolving normative uncertainty about their own standpoint. Even when one agent might be epistemically better equipped to figure out what the standpoint of another prescribes, these intrinsic considerations of autonomy and equal respect suggest that the agent to whom the standpoint belongs should be the one to settle normative uncertainty about its content. If, as I assume, these intrinsic considerations trump instrumental concerns, then an agent's moral right to have a choice decided in accordance with their standpoint whenever first-order justice assigns their standpoint to the choice also entails a right to decide what their standpoint prescribes to the extent that there is normative uncertainty about its content.

A way to understand consent now emerges. With respect to any choice to which their own standpoints have been assigned by first-order justice, agents must settle normative uncertainty about the content of their standpoints. Agents exercise the power of *decision* when their own choices are implicated by the settlement of the normative uncertainty. They exercise the power of *consent* when the choices of others are implicated. Because consent affects what others should do, its practical operation will necessarily differ from that of decision-making. For example, something more than an internal mental act of deciding may be required for a valid act of consent, because the person whose choices are affected by it must, at minimum, have a way of finding out how the agent settled the applicable normative uncertainty. Nonetheless, at a fundamental level, consent resembles decision-making. Both involve agents settling normative uncertainty that is associated with their standpoints.

On this picture, acts of consent are morally valid when they arise from agents' plausible settlements of normative uncertainty about their own standpoints. Consent must be freely given because the settlement of such normative uncertainty must represent the agent's own view about how best to settle it. But agents are substantively constrained: they cannot resolve normative uncertainty in a way that is clearly inconsistent with their standpoint.

What about justice? Who has the moral authority to settle normative uncertainty about (first-order) justice? Similar intrinsic considerations of equal respect and co-authorship suggest that affected parties collectively have the moral authority to settle normative uncertainty about justice. A community effort will be needed to settle the community-wide questions of justice that determine the baseline allocation of standpoints to choices, with subgroups of agents authorized to settle questions of justice that are relevant to the group and don't implicate the rights of outsiders. Given epistemic normative uncertainty such efforts likely won't realize justice. But they are morally valid so long as they resolve normative uncertainty in a plausible way. We can thus think of such settlements as giving rise to a set of *legal rights* that are distinct from the underlying moral rights that they approximate. Importantly, given normative uncertainty such settlements are provisional and thus subject to revision by those morally authorized to settle the normative uncertainty.

This is where agreements fit into the picture. Through an agreement, the parties allocate their standpoints to choices that they may make, thus resolving questions of justice between them. They are justified in doing so if their chosen allocation represents a plausible attempt to resolve normative uncertainty about what justice between them requires and doesn't infringe on the rights of non-parties. In this way, agreements modify legal rights without transferring rights at the fundamental moral level. Thus, they too have a provisional quality and may be reallocated by subsequent valid agreements.

The move I make here can be justified in terms of the democratic egalitarian values that may serve to justify the authority of democratic institutions. Decision procedures that give each an equal say in community decisions instantiate principles of equal respect for the judgments of all (Christiano 2008; Valentini 2012), while also, arguably, instantiating egalitarian relations between persons (Kolodny 2014; Viehoff 2014). Theorists operating

in this tradition tend to focus their energy on the justification of majoritarian decision-making about matters that affect all of us. But as Shiffrin (2021, chapter 2) argues other institutions, including the common law, can instantiate this democratic commitment to relational equality in a more decentralized fashion.[21] Here I suggest that private agreements are continuous with the decisions of representative democratic institutions: the egalitarian values that make the latter authoritative also make authoritative the decentralized settlement of questions that are specific to particular parties' relationships by the parties themselves.

The democratic conception of agreements that emerges vindicates a limited form of freedom of contract while placing significant substantive and procedural constraints on its exercise. To be morally valid, an agreement must plausibly articulate the parties' vision of just relations between them given extant normative uncertainty about what justice requires. On the flip side, an agreement is morally invalid if its content doesn't reflect such a vision—either because it isn't the product of the parties' own good-faith deliberations or because it is a substantively implausible settlement of what justice requires.[22] Someone might object that there may be disagreement about what makes a settlement substantively implausible. While there might be disagreement about the exact location of the line that doesn't mean that such a line doesn't exist. There will be cases that are clearly beyond the pale.

A morally valid agreement may well reflect values that go beyond considerations of justice between the parties. The parties' individual standpoints might align in various respects, in which case the agreement is likely to reflect those shared ends. But the parties don't need the power to make an agreement to realize shared ends because joint decision-making suffices in the absence of conflict. The power of agreement will be needed to resolve any conflicts that may arise as the parties pursue shared ends. But when the parties' standpoints are perfectly aligned, all they need is a memorandum of understanding to tell them how to coordinate to realize their shared ends. There is no need to reallocate

[21] On the role of legislative decision-making in the realm of contract specifically and how it relates to judge-made law, see Rosen (2023).

[22] Viehoff (2014, 373) defends a similar limitation on the validity of collective democratic decisions, arguing that such decisions may lack authority when "the citizens vote or act on the basis of the wrong kinds of reasons."

standpoints among possible choices and so no need for an agreement about what justice between them requires.

Of course, there may be normative uncertainty about what each party's standpoint prescribes and thus uncertainty about whether their standpoints converge. But once the parties have settled such uncertainty in a way that creates convergence, joint decision-making should suffice to enable them to realize their shared vision together. While each is morally authorized to settle uncertainty about their own standpoint and so might later revise her settlement in a way that would undermine this convergence, they would have moral reasons not to do so to the extent that they know that the other has relied on it. Thus, a considerable amount of moral glue may contingently arise from joint decision-making in the face of normative uncertainty about the parties' standpoints, even though it doesn't give rise to the transfer of rights associated with agreements.

In short, nothing in the democratic conception precludes the parties from realizing shared ends as part of their agreement. However, it is the fact that they are also settling normative uncertainty about what justice between them requires—and thus, resolving sources of conflict between their standpoints—that makes their arrangement an agreement that has a transformative effect on the parties rights and duties rather than a mere joint decision or plan.

D. Moral Validity and Invalidity on the Democratic Conception

If the above picture is correct, then the powers of consent and agreement arise from an allocation of moral authority to settle normative uncertainty about reason and justice respectively. This allocation of moral authority is regulated by (second-order) principles of justice. Exercises of consent and agreement are morally valid when those to whom justice has allocated the authority to resolve it settle applicable normative uncertainty in good faith together in a substantively plausible way. Thus, substantively, a morally valid agreement embodies a plausible vision of just relations between the parties. Procedurally, it is the product of good faith joint deliberations between the parties about what justice between them requires. When an agreement satisfies these conditions, it is valid as between the parties. To be valid generally and thus worthy of respect by non-parties, the parties must also have the moral authority to make their agreement, which means that it must not encroach on the rights of non-parties.

While this conception of contract may seem overly demanding, it won't be overly so when appropriate mechanisms are in place that ease the deliberative burdens on the parties. First and foremost, it will be important that the community ensure that the legal rights that the parties take as a starting point for their deliberations—in particular, their property rights and rights over their person—arise from morally valid settlements of normative uncertainty about community-wide questions of justice. When the parties begin from a reasonably just starting point, they can focus their attention squarely on the potential transaction at hand. By contrast, when the parties are deliberating from an unjust starting point, they must consider whether and how such background injustice matters for their relationship. They should consider whether they ought to transact with one another, as opposed to, say, someone else who has been more disadvantaged by background injustice, and if so, to what extent the terms of their arrangement need to compensate for unjust disparities in their starting positions.

There are further important ways in which the community can ease deliberative burdens on the parties. Courts can construct standards of good faith and substantive fairness not only to police the boundaries of moral validity, but also to guide those who are committed to dealing with others in a just way. The rules of the marketplace can be designed to reduce opportunities to profit from self-interested or opportunistic conduct by, for example, policing conduct that tends to lead to concentrations of market power. When markets operate reasonably competitively, the chance that agreements among market participants will be morally invalid declines both because market forces discipline the conduct of those who are focused on seeking their own advantage and because those seeking to transact with others on just terms may be able to use typical market transactions as a template for their own agreements rather than reasoning from first principles about what a reasonably just transaction looks like.

While we need an account of morally valid agreements if we are to construct a rights-based account of contract law wherein the justification for enforcing parties' agreements lies in the rights and duties of the parties, a rights-based account of contract might nonetheless recommend the enforcement of some morally invalid agreements under some conditions. Suppose that circumstances are far from the ideal, unjust attitudes are rampant, and most people (falsely) believe that agreements are morally valid so long as

they are made under procedurally free and fair conditions. Under these conditions, failing to enforce agreements on grounds of their moral invalidity might provoke widespread cynicism about the legal system and disregard for the law, which could result in greater overall injustice. If so, the polity might have good reasons, grounded in justice, for enforcing some freely made but morally invalid agreements. But the justification for enforcing those agreements would be instrumental nots rights based. Those agreements, being morally invalid, wouldn't constitute the rights and duties of the parties even were their enforcement to contribute to the reduction of overall injustice.[23] The parties would not owe it to each other to conform to their agreements, though they might owe conformity to the community at large insofar as failing to conform disrupts the community's effort to reduce overall injustice.

III. IMPLICATIONS

I will now illustrate the democratic conception's prescriptive power by deriving implications for contract law. The prescriptions of the account vary depending on the extent to which people are motivated to conform to justice. Normative uncertainty means that it is highly unlikely that even ideally motivated actors will perfectly conform to justice. But when ideal motivations are the norm, settlements will generally reflect substantively plausible and procedurally fair efforts to navigate the normative uncertainty. The community's settlements of persons' rights that form the background legal rights against which agreements are made will constitute plausible settlements of what background justice requires. And private parties' agreements will modify those legal rights in ways that plausibly do justice between them without encroaching on the morally valid legal rights of non-parties.

Deriving implications is more complex when fewer persons are motivated to conform to justice. Imperfectly motivated agents are more likely to make morally invalid agreements and breach morally valid agreements. Parties might fashion their agreements to respond to the possibility of non-compliance. What should courts make of such

[23] For further discussion of the ways in which deontological theorizing is compatible with instrumental justifications under non-ideal conditions, see Quong & Stone (2015). For an example of an argument that takes an instrumental approach to contract design that seeks to reflect concerns about the ways in which the rules of contract can produce greater overall injustice, see Schwartz & Sepe (2024).

agreements? My account suggests a nuanced approach to this question. Judicial deference to the parties is less likely to be warranted when it comes to their attempts to manage problems arising from their own unwillingness to conform to justice. It is more likely to be warranted when it comes to their attempts to respond to frictions created by the presence of non-compliant agents in the larger population. Attempts of the latter kind are morally valid when they plausibly resolves a problem of non-ideal justice between the parties—that is, when the parties' agreement distributes the burdens imposed on them by non-compliant actors in a reasonably just way. But unqualified deference to attempts by the parties to manage such problems is not warranted. Information may be revealed over the course of contracting that renders their solutions unnecessary.

A. A Robust Doctrine of Unconscionability

My account prescribes a robust doctrine of unconscionability with procedural and substantive dimensions. Procedurally, much more is required for validity than the mere absence of fraud or duress and the like as sovereignty theory requires (see Kraus & Scott 2020, 1353-56). The parties must be seeking in good faith to articulate a joint vision of justice between them. Thus, the parties' agreement cannot simply be imposed by one of the parties in a take-it-or-leave-it fashion, even when the other freely and knowingly assents to the terms. Unless deference to the more powerful party on a matter of justice between them is warranted and the parties understand this, the resulting agreement won't reflect a genuinely joint vision of justice; it will reflect the vision of the more powerful party, or, worse, an attempt by the powerful party to advance its interests at the other's expense. It is possible that under certain circumstances enforcement of such agreements will nonetheless be justified all-things-considered, as when given existing institutional arrangements, a refusal to enforce such agreements would be very disruptive to all, including adhering parties. But such justifications of enforcement are not grounded in the rights of the parties and so ought not be couched in rights-based terms.

At the same time, the amount of careful joint deliberation the parties will need to engage in will depend on the context. When, for example, a seller has greater expertise about the transaction type than buyers, as will often be the case in consumer markets, it may be reasonable for buyers to leave many of the details to the seller. It simply doesn't make sense for buyers to devote the resources it would take to get up to speed especially

when the transaction is a relatively trivial one. There is nothing inherently undemocratic about a division of labor of this kind. But it will be incumbent on the expert party to consider the interests of both sides of the transaction when it designs the terms. Failure to do so is not just a substantive problem. It is also a procedural problem, because it subverts the aim of designing terms that reflect a plausible joint vision of justice. Public oversight of terms set by parties possessing expertise about the transaction may thus be necessary to ensure they reflect the interests of non-expert party.

Under some conditions, well-functioning markets can relieve deliberative burdens on the parties with respect to at least some terms of their transaction. The market price in a reasonably competitive market will sometimes approximate the fair price, making it reasonable for the parties to transact at that price without too much second guessing.[24] Yet sometimes there will be reasons to doubt that perfect competition serves as the right benchmark for justice between the parties, as when service providers are much poorer than those seeking to purchase such services, or where a potential creditor is viewed by the market as a riskier prospect on account of their poverty. Thus, depending on the nature of the transaction and the particular circumstances of the parties, simply transacting at the market price for those services will no longer by justified, and more careful deliberation will be required to meet the bar for procedural validity.

In short, markets, especially when they are subject to public oversight and operate against background conditions that are reasonably just, may ease deliberative burdens on the parties. But parties must remain attentive to the ways in market mechanisms may fail to produce reasonably just outcomes and so don't warrant their deference.

An agreement might also be substantively beyond the pale according to the democratic conception. Both sovereignty theory and my account deem an agreement morally invalid when it encroaches on the morally valid legal rights of non-parties. But the democratic conception imposes substantive constraints on morally valid agreements that extend beyond a concern for non-parties. For instance, agreements that are manifestly against the interests of one of the parties or mutually beneficial but very one-sided will be morally invalid in a wide range of circumstances even if freely agreed to by the disadvantaged party. Thus, my account justifies a doctrine of substantive

[24] See Gordley & Jiang (2020) for an argument that competitive market prices embody an ideal of fairness.

unconscionability—one that is arguably more robust than that provided by the contemporary common law of contract.[25]

This implication of my account may seem paternalistic. But it doesn't rest on a paternalistic judgment about persons' capacities to conform to reason or justice.[26] It rests on the claim that the freedom to enter agreements and thus to alter the rights and duties of the parties is valuable insofar as it is directed towards resolving normative uncertainty about justice. To decline to honor or enforce a substantively invalid agreement is just to recognize that the parties' lacked the moral authority to alter their rights in the manner specified in the agreement. Any account that prioitizes substantive justice over a principle of pure procedural justice will set some constraints on what the parties are free to agree to. The analogy to democratic theory is helpful here. Democratic theorists generally accept that there are substantive limits on what counts as valid democratic law.

Still, it might seem that I am putting the cart before the horse: the injunction against paternalism is a feature of justice and thus can't be limited by it. But insisting that free choices have value simply in virtue of being freely made, even when they otherwise run counter to substantive justice, leads to an unpalatable choice. We must either resolve a clash of values—freedom versus substantive justice—with no deeper principles to guide us or join sovereignty theorists by stipulating that freedom has priority over substantive justice (see Kraus & Scott, 1361-63). According to the democratic conception, it *would* be problematically paternalistic for a court to override an agreement that set out the parties' plausible vision of just relations on the grounds that the court knows better about what justice between them requires. Intrinsic reasons grounded in considerations of moral

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[25] According to the Restatement (Second) of Contracts § 208 cmt. c (1981): "[G]ross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance." For examples of cases that can be explained on grounds of substantive unconscionability, see Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 266–67 (N.Y. Sup. Ct. 1969) (reforming the price of a contract pursuant to which welfare recipients purchased a freezer with maximum retail value of $300 on credit from a door-to-door salesman for $900 plus interest, explaining that "the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs"); Toker v. Westerman, 274 A. 2d 78, 80 (N.J. Super. Ct. App. Div. 1970) (finding unconscionable an installment sales contract where customer was to pay $1230 for a refrigerator-freezer with a reasonable retail price between $350 and $400 and accepting definition of unconscionability as "one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other").

[26] For accounts of paternalism that make such judgments the core of what makes actions paternalistic, see Quong (2011, 74-83); Shiffrin (2000).

equality and the importance of co-authorship assign to the parties the presumptive authority to settle normative uncertainty that is relevant to them. Thus, the democratic conception has the resources to vindicate concerns about paternalism, while also setting principled limits on their scope.

B. Duties to Negotiate in Good Faith

According to the democratic conception, the substantive fairness of agreements that the parties assent to along with the fairness of the deliberative process via which their agreements were formed ought to be scrutinized under the robust version of the doctrine of unconscionability sketched in the previous subsection. Once formed, the democratic conception entails that parties have ongoing duties to make sense of their agreements as settlements of what justice between them demands. Thus, the existence of a robust and non-disclaimable obligation of good faith and fair dealing in the performance and enforcement of the contract is an immediate implication of the democratic conception (see Restatement (Second) of Contracts 1981, section 205; Uniform Commercial Code, section 1-304).

But what about failures to reach an agreement in the first place? Like an agreement to transact, an agreement not to transact is morally valid on the democratic conception when it results from the parties' good faith joint determination that justice requires them not to transact with one another. But many parties who don't transact with one another might not make such a deliberate joint determination of this sort at all. Rather, they will fail to come to an agreement without much or any deliberation. This usually isn't problematic on the democratic conception. Under most conditions, there will be tremendous normative uncertainty about whom a party ought to deal with, such that justice reasonably would counternance the pursuit of a particular transaction with many different parties, and by implication, the non-pursuit of such a transactions with others. Thus, courts should rarely intervene to impose a contract upon parties where they have failed to come to an agreement themselves. To do so will likely intrude on the parties' moral authority to decide whether to deal with the other and on what terms.

This is not to say that courts should never impose contracts on parties. In a range of circumstances, for example, recipients of certain benefits ought to pay for them despite the absence of a valid agreement requiring them to do so. The law of unjust enrichment

imposes liability on recipients of certain benefits in such circumstances. But it imposes transactions on disputants only when a party has conferred a benefit on the other (Restatement (Third) of Restitution 2011, section 1). It is less likely that the law should impose transactions on parties where neither side has yet conferred a measurable benefit on the other. Even discrimination law, which robustly limits parties freedom to choose with whom they will contract, only limits the set of criteria a party can use to decide not to contract with another, preventing, for example, discrimination in contract on the basis of gender or race.[27]

But the failure to reach agreement may also result from non-discriminatory bad-faith conduct on the part of a negotiating party. In such cases, the resulting failure to agree is morally invalid. Yet it doesn't follow that the parties ought to have reached an agreement, because there will usually be normative uncertainty about whether justice required them to do so. Hence, the law's general reluctance to impose contracts on parties. Even in the unusual case where it is clear that justice requires an agreement to transact, there will be considerable normative uncertainty about what the agreement should look like.

While for these reasons the appropriate response to bad faith in negotiations generally won't be to impose a transaction on the parties, there is a role for the courts to police the negotiation process to ensure that parties are seeking to do justice rather than striving for advantage during deliberations. The democratic conception recommends caution here too. Vigorous policing of the negotiation process may cause parties to conform to their expectations of what a court thinks justice between them demands rather than working it out for themselves. Still in situations where one party is acting with manifest disregard for the interests of another, as in the famous case of *Hoffman v. Red Owl*, 133 N.W.2d 267 (Wis. 1965), imposing tort-like liability on that party is apt on the democratic conception,[28] an implication of my account that runs counter to the prevailing reluctance of courts to impose precontractual liability on negotiating parties on such grounds (Scott 2007).

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[27] For a survey of the ways in which American law prohibits discrimination in contracting, see Ayres et al. (2024, 749-770).

[28] See Restatement (Second) of Contracts § 205 cmt. c (1981) ("Bad faith in negotiations . . . may be subject to sanctions.").

C. Remedial Clauses

Sovereignty theorists contend that parties should be free to determine the consequences of breach. They thus take issue with the reluctance of common law courts to enforce clauses stipulating high damages under the penalty doctrine and damage disclaimers under the unconscionability doctrine.[29] A failure by courts to defer to remedial terms that the parties have freely inserted into their agreements, they contend, impairs "the parties' ex ante choices of how to allocate risks" and leads to ex post unfairness, because parties who will benefit from such terms in the event of breach will have paid for them upfront through unfavorable adjustments of substantive terms of the contract (Kraus & Scott 2020, 1372).

My account recommends a more cautious approach to the enforcement of remedial clauses. A remedial clause that reflects the parties' informed and considered judgment about the remedy that would do justice between the parties in the event of breach is morally on a par with ordinary substantive terms of the agreement that reflect the parties' informed and considered judgments about the just shape of their primary duties. But, parties might use a remedial clause to deter potential breach, signal their own willingness to perform, or reduce a party's liability in the event of breach to induce that party to agree to the transaction in the first place, and then adjust other terms of their agreement in the light of their beliefs about what is likely to happen as a result. For instance, the parties might stipulate damages for breach by a seller that exceeds the buyer's expectation in exchange for the buyer promising to pay a higher price given the the protection against breach that such a remedial clause provides. When an agreement containing a remedial clause is designed with such aims in mind, it doesn't reflect the parties' considered views about what justice between them requires in the event of breach—as required for moral validity on the democratic conception. The parties are instead operating in a regulatory mode, trying to achieve a particular result in light of their perceived imperfect motivations.

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[29] As the Restatement (Second) of Contracts § 356 cmt. a (1981) explains: "the parties to a contract are not free to provide a penalty for its breach." See also UCC § 1-305(a) ("The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential nor special damages or penal damages may be had except as specifically provided in the Code…"). Both the Second Restatement and the Uniform Commercial Code specifically note that the unconscionability doctrine is appropriately invoked to invalidate remedial clauses that stipulate an "unreasonably small amount" of damages. Restatement (Second) of Contracts § 356, cmts. a, d (1981)); UCC § 2-718 cmt. 1.

Recall the distinction introduced earlier between the primary agreement and the secondary agreement. The primary agreement describes the terms of the transaction that the parties together believe that justice between them requires. Were it common knowledge that they were both perfectly motivated to conform to it, their actual agreement would perfectly track it. But when they believe this isn't the case, they might construct a secondary agreement with terms designed to ensure that they will have sufficient incentives to conform to the primary agreement or something close to it. In other words, the parties distort the terms of their agreement to ensure that their incentives are aligned as closely as possible with the primary agreement's requirements. The content of the secondary agreement then won't represent what the parties believe justice between them requires.

When, for example, a clause aiming to deter breach by an imperfectly motivated party fails its purpose and the party breaches anyway, the resulting damages are likely to be higher than what the parties believe that justice between them requires in the light of the breach that has occurred. And if the substantive terms of the transaction have been adjusted to reflect the presence of the remedial clause, then they too might not represent the parties' considered views about the just terms of their transaction in the event that the seller performs. The agreement represents a hedge against the likelihood of breach given the parties' expectations that at least one of them may not be motivated to do as justice requires. Likewise, a remedial clause that shields a party from liability for a culpable breach of an agreement to induce their assent may be a concession to that party's anticipated unwillingness to conform with the terms of the primary agreement for his own reasons. If so, it doesn't reflect the parties' considered judgment about what justice requires in the event of such a breach.[30]

There is nothing problematic, on my conception, with allocating ordinary risk through contract, so long as the resulting allocation constitutes the parties' plausible vision

[30] The common law's approach to remedial clauses tracks these recommendations. Courts enforce remedial clauses that look like concerted efforts on the part of the parties to approximate the breach victim's expectation, especially in circumstances where the expectation is likely to be hard to estimate precisely. See Restatement (Second) of Contracts § 356 cmt. b (1981); UCC § 2-718(1). Courts regard stipulated damages clauses that seek to compel an unwilling promisor to perform as suspect because they don't look like plausible attempts to do remedial justice. As one court put it: "The basic question is whether the [plaintiff] intended the liquidated damages provision in the contract to compensate it for a loss difficult to quantify in monetary terms or intended it as a penalty to spur timely performance." Space Master International, Inc. v. Worcester, 940 F.2d 16, 19 (1991).

of a just allocation of such risk. Even allocating risk arising from the likelihood of inadvertent breach of contract—by, for example, limiting a party's liability for consequential losses arising from such a breach—might be part of the parties' vision of just relations between them.[31] Parties who are motivated to conform with justice will sometimes make mistakes that lead them to breach their agreements.

But terms regulating risk arising from a party's unwillingness to do their part in the agreement for their own private reasons is a different matter. Terms freely agreed to with a view to overcoming parties' own imperfect motivations to conform to their joint vision of justice between them are mere instruments towards achieving the end of inducing conformity to the primary agreement and so don't themselves constitute settlements of what justice between them requires.

The use of a remedial clause to signal a party's willingness to perform in the light of the other's reluctance to trust her may look on its face less suspect than the use of a clause to deter breach.[32] A party's need to signal their trustworthiness arises not from their own imperfect motivations to perform or those of their contracting partner but out of a need to distinguish themselves from untrustworthy others. But, on the democratic conception, a remedial clause that is used for such a purpose isn't morally valid, because it isn't thereby setting out the parties' vision of what justice requires in the event of breach of the primary agreement.

The fact that an agreement that is animated by a deterrence or signaling purpose lacks moral validity doesn't entail that, all things considered, the legal system should not enforce it. It could be that non-compliance with justice is so ingrained and widespread that justice is all-things-considered better served by enforcing such agreements than declining to enforce them. But such a justification isn't grounded in the moral rights of the parties to the transaction. It is grounded in the fact that declining to enforce agreements of this kind

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[31] Compare Niccoli v. Denver Burglar Alarm, Inc., 490 P.2d 304 (Colo. App. 1971) (upholding a contractual limitation on a burglar alarm company's consequential damages for breach of an agreement to dispatch an agent to the client's place of business when the alarm went off) with United States Fire Insurance Co. v. Sonitrol Management Corp., 192 P.3d 543 (Colo. App. 2008) (declining to uphold a similar limitation if the alarm company was found to have acted "willfully and wantonly" in breaching the agreement).

[32] See Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (1985) (Posner, J.) (arguing that penalty clauses can "provide an earnest of performance" that enhances the credibility of a promise).

in these circumstances tends to move the polity even further from justice than enforcing them.

What about alternative performance clauses—clauses that allow parties to choose among different ways of meeting their obligations under the contract? Sovereignty theorists view remedial clauses as equivalent to such clauses. Accordingly, they view the willingness of courts to enforce alternative performance clauses as evidence of judicial hostility to the penalty doctrine (Kraus & Scott 2020, 1369).

My account suggests otherwise. Alternative performance clauses are morally valid if they reflect the parties' plausible belief that giving a party the option to choose among alternative ways of performing the contract implements their vision of just relations. When these conditions obtain, such clauses are properly regarded as part of the primary agreement. But such clauses are not morally valid when they are instead disguised remedial provisions designed to give an imperfectly motivated promisor the right incentive to perform. Courts should therefore enforce an alternative performance clause if it is clearly part of the parties' vision of justice that the promisor have discretion to choose how they will perform, proceeding more cautiously when it seems that the parties' primary agreement made the first "option" a requirement. In the latter scenario, the other "option" should be treated as a remedial clause and invalidated if it doesn't represent the parties' considered judgment about what justice demands in the event non-performance.[33]

Does the democratic conception also render suspect settlement agreements formed in the wake of breach that end up giving the breach victim significantly more or less than the victim's expectation? I don't think so. The democratic conception regards all agreements—including settlement agreements—as valid only if they plausibly settle normative uncertainty about what justice between the parties requires. The fact that a settlement agreement plainly gives the breach victim more or less than the default remedy for breach may render it invalid. But because it arises in the wake rather than anticipation of breach, the parties cannot be trying to signal anything about their own motivations nor

[33] In line with this prescription Restatement (Second) of Contracts § 356, cmt. c (1981) states: "Although the parties may in good faith contract for alternative performances and fix discounts or valuations, a court will look to the substance of the agreement to determine whether this is the case or whether the parties have attempted to disguise a provision for a penalty that is unenforceable under this section."

trying to deter an imperfectly motivated counterparty from breaching nor otherwise trying to manage the risk of breach. The timing of a settlement also means that it couldn't have been priced into the agreement ex ante by parties seeking to protect themselves from breach. In short, there are fewer structural reasons for heightened scrutiny when it comes to agreements about breach that occur after the fact.

D. Substantial Performance, Conditions, and Forfeiture

According to the doctrine of constructive conditions, one party's failure to perform discharges the other party's remaining duties of performance, entitling the latter to stop performing as well as sue for breach (Restatement (Second) of Contracts 1981, section 237 cmt. a). The doctrine makes sense on the democratic conception. It will often be unjust to force a party to perform when the other hasn't done their part. Taken to its extreme, however, the doctrine produces harsh results. A party committing a minor, inadvertent breach would lose the right to their counterparty's return performance, even when this would result in a substantial forfeiture of their investments in the relationship. The common law has accordingly softened the rule. Pursuant to the doctrine of substantial performance only a material breach by one of the parties discharges the other party's duty to perform (though the breaching party remains liable to the latter for damages arising from a breach, whether it is immaterial or not) (id., sections 237, 241). This doctrine is also compatible with the democratic account because it approximates what justice between the parties requires in most circumstances.

To what extent can parties contract around these rules? There are suggestions in the case law that parties can contract around the rule of substantial performance by making one party's full performance an express condition of the other party's duty to perform.[34] Yet if the doctrine is a default rule, it is a sticky one. This is partly because courts apply interpretative presumptions against finding conditions that would result in forfeitures (id., section 227 cmt. b). But even a clear statement of intent to switch the rule may not be enough.[35] According to the Second Restatement, a court may excuse the non-occurrence

[34] In Jacob & Youngs v. Kent, 129 N.E. 889, 890-91 (1921), for example, Cardozo states that the parties could have contracted around the rule of substantial performance "by apt and certain words."

[35] As Ayres (2012, 2057) points out, in Jacob & Youngs Cardozo doesn't explain what additional language beyond the specification that the pipe be of Reading manufacture, which the plaintiff breached, would have been sufficient for the parties to have contracted around the rule of substantial performance.

of a condition solely because of the "disproportionate forfeiture" that would result "unless its occurrence was a material part of the agreed exchange" (id., section 229)—even if the parties clearly expressed otherwise in their agreement.

Sovereignty theorists view the stickiness of the doctrine of substantial performance as problematic (Schwartz & Scott 2003, 616)). The democratic conception can make sense of it. This is partly because an attempt to contract around the rule is an attempt by the parties to determine the consequences of breach by one of the parties by allowing the breach victim to withhold its own performance in response to the breach. As we saw in the previous section, attempts to determine the consequences of breach by the parties are only valid when they represent the parties' good faith determinations of what justice between them requires in the event of breach. But, in addition, an attempt to contract around the rule might license transparently unjust behavior by the victim of a breach. If a breach is genuinely immaterial, it doesn't substantially upset the justice of the arrangement that the parties envisioned ex ante. The breach victim therefore lacks a just basis to invoke it to justify their own non-performance.

There is complexity here, because the breach victim's motivation for terminating the contract might not be opportunistic even if the breach is in fact immaterial. Normative uncertainty means that it may be normatively uncertain whether a particular breach is in fact material. The parties could therefore form good faith but mistaken beliefs about the materiality of a breach after that fact. In the light of that possibility, they might reasonably seek to settle *that* uncertainty in advance with a view to minimizing future dispute-resolution costs, especially if courts are not good at evaluating materiality after the fact.

But it's not clear that the possibility of judicial incompetence can justify an attempt to contract around the rule of substantial performance in a blanket fashion. This is because parties can reduce the likelihood that a court will err simply by making clear to a court in their agreement that particular matters are of idiosyncratic importance to the parties. Consider the famous case of *Jacob & Youngs v. Kent*, 129 N.E. 889 (1921), where the plaintiff builder breached the contract by failing consistently to use Reading pipe, as specified in the contract, instead of using pipe of identical quality made by another manufacturer. Had the defendant really cared that the pipe in his house be Reading pipe, the parties could have explained that in the contract itself, thereby educating the court about

the materiality of the breach rather than contracting around the rule of substantial performance.

The more interesting question, then, is whether the parties can contract around the doctrine by specifying in rule-like fashion which breaches will discharge the other's duty to perform in ways that may be over- or under-inclusive from the standpoint of justice, because they fear that courts will make too many mistakes if left to their own devices. Suppose that the parties in *Jacob & Youngs* had agreed that any departure from the building specifications, no matter how trivial, should count as a material breach thus discharging the defendant's duties to pay for the plaintiff's work. Should a court always defer to such a determination on the democratic account?

Here we must be mindful that the question of a court's competence is intimately related to the way in which the parties themselves engage in dispute resolution. When all parties are ideally motivated there is no reason to worry that courts will make serious mistakes because such parties will readily share all relevant information and perspectives with the court. But in a less ideal world even parties who are themselves ideally motivated may act defensively out of concern that the other party isn't motivated to act in good faith. The threat posed by the existence of non-ideally motivated parties in the larger population thus places burdens on contracting parties whose motivations are opaque to each other. The parties may manage these burdens in a more or less just way.

The democratic conception suggests that the parties should be able to contract around the rule of substantial performance, if in doing so the parties have attempted to settle this problem of (non-ideal) justice between them in a reasonably just way. Breach-specific attempts to do so in a careful and considered way are more likely to do this successfully than blanket, boilerplate attempts to replace the rule of substantial performance with a rule of perfect tender for any and all breaches. But even when a clause contracting around the rule appears to be valid, courts should remain on the alert for parties who try to get out of their duties to perform for self-interested reasons. Parties shouldn't be able to opportunistically invoke such clauses to evade their own duties of justice, just as parties should not be able license such opportunism in advance through their agreements.

Parties often insert conditions into their contracts for substantive reasons unconnected to the possibility of breach by one of them. They might, for example, use them

to allocate or otherwise protect themselves from risk. There is nothing inherently suspect about the use of conditions for this purpose from the standpoint of the democratic conception. Consider an insurer's promise to compensate the insured if the insured's building burns down that is made conditional on the insured installing a sprinkler system. Although such a clause may induce the insured to installing a sprinkler system, it might represent an attempt to control the insurance company's own exposure to risk rather than to police non-compliance with justice.

What about terms that expressly condition one party's duty on the other's fulfilment of certain technicalities that facilitate the former's performance, such as terms conditioning an insurer's duty to pay on the insured notifying in writing the insurer of a covered loss. When the purpose of the condition is fulfilled without the condition occuring, as when the insurer receives reliable oral notice of the loss, may the insurer invoke the failure of the condition to justify not doing its duty? The question is once again whether the parties can elect to govern themselves by a clear rule that would simply discharge a duty when the technicality wasn't satisfied instead of a standard that would only discharge the duty if the function of the technical requirement was met in the circumstances.

Insofar as even parties acting in good faith might end up disagreeing about whether the substantive purpose of a procedural requirement has been met, parties may have a reason to choose a rule rather than a standard. Mistrust of the other in a world where some are imperfectly motivated, as we have already seen, tends to impede the processes of dispute resolution even among ideally motivated parties. And so, parties may decide to govern themselves by simpler rules to simplify renegotiation and enforcement.

But there are limits on the extent to which the parties may do this on my account. When it would be transparently unjust to invoke a procedural condition because its purpose has clearly been met and invoking it would impose considerable hardship on the obligee while giving the obligor a windfall, the condition should be excused notwithstanding a clear ex ante agreement by the parties to the contrary. It isn't incoherent, on the democratic conception, to make unambiguous express conditions presumptively enforceable if freely agreed to, while also allowing that presumption to be rebutted when it is clear that the condition no longer serves its intended purpose.[36]

[36] Compare Restatement (Second) of Contracts § 227 cmt. b (1981) ("The policy favoring freedom of

Finally, consider implied excusing conditions. It is straightforward on the democratic conception to justify discharging a party's duty to perform on grounds of mistake, frustration, and impracticability (see Restatement (Second) of Contracts 1981, sections 152, 153, 154, 261, 265). When one or both of the parties operating on a significant erroneous factual assumption such that their agreement fails to represent their considered collective judgment about how best to settle normative uncertainty about justice, the agreement is substantively invalid on the democratic conception.

The democratic conception doesn't invalidate attempts by the parties to allocate the risk of such mistakes through their agreements by specifying what should happen if things turn out otherwise. But this doesn't mean anything goes, even when the contingency that materializes was contemplated by the parties ex ante. When parties contract for the unexpected, it is less likely that they have the full set of normatively relevant considerations in mind and thus less likely that their agreement represents a plausible vision of what justice between them demands.

In short, the democratic conception endorses invalidating contracts that are premised on mistaken factual assumptions, while also creating room for courts to excuse performance when remote risks cause unexpected hardship, even when the contract was made by sophisticated parties who expressly contracted for the outcome.[37] Excusing performance in the latter circumstances is, of course, anathema to sovereignty theorists, for the fact that the parties provided for a contingency is dispositive on their account (Kraus & Scott 2020, 1365-66). On my account, the extent to which the parties thoroughly contemplated what justice requires in the relevant contingency matters. Courts have reason to defer to their determinations when the parties carefully considered what should happen with a view to realizing justice between them. But courts should not defer to cursory or boilerplate assignments of risk.

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contract requires that, within broad limits . . . the agreement of the parties should be honored even though forfeiture results.") with id. at § 229 ("To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.").

[37] Eisenberg (2009, 210) also endorses the practice of taking into account ex post considerations when deciding whether to grant relief based on mistakes or changed circumstances.

E. Contract Interpretation

When most contracting parties are ideally motivated, the democratic conception entails that contract law should respect the substantive terms that the parties have jointly agreed to as plausible settlements of what justice between them requires. Given their epistemic limitations, even ideally motivated parties often won't express themselves clearly or completely on all relevant matters resulting in agreements that are ambiguous or incomplete. But they will elaborate their agreements over time—filling in gaps and resolving ambiguities—to make sense of those agreements as settlements of what justice between them requires. Courts should understand themselves as partners of the parties in this process. Their job is to help the parties make best sense of their agreement as their joint vision of what justice between them requires.

Thus, my account recommends a contextual approach to contractual interpretation that tries accurately to understand what the parties were trying to achieve in the light of all relevant evidence, rather than the formalist approach advocated by sovereignty theorists, which artificially narrows the court's evidentiary base with a view to reducing dispute resolution costs (Schwartz & Scott 2003, 569). This is, moreover, exactly the role that ideally motivated parties would want courts to play were they devising the interpretative rules themselves. While such parties will be mindful of their dispute resolution costs, there is no reason to think that such costs would lead parties to recommend a different approach. They understand themselves to be engaged in a cooperative enterprise of resolving normative uncertainty about justice. Thus, they will behave in a cooperative way that should keep dispute resolution costs to a minimum—willingly producing relevant evidence and presenting good faith arguments to the court.

None of this is to say that a formalist approach is necessarily ruled out. The court may have its own institutional reasons, as an agent of the public, to adopt an approach that reduces its own dispute resolution costs. In a world where many are imperfectly motivated to conform to their agreements, moreover, the parties cannot be sure that disputes will be resolved smoothly and in good faith. Even when the parties themselves are motivated to conform to justice, they cannot be sure that their contracting partner will be similarly motivated. Thus, the parties may devise interpretative rules with an eye towards managing resulting dispute resolution costs. On the democratic conception, it is not enough that they

agree to such rules under free and fair conditions; they must do so with an eye to allocating those costs justly. Courts should accordingly defer to parties' interpretative rules so long as those rules plausibly allocate dispute resolution costs justly, while remaining alert to the possibility that such rules might inadvertently license ex post advantage-taking or opportunism designed to evade the terms of the primary agreement.

IV. Conclusion

Sovereignty theorists contend that theories that give weight both to the value of "ex ante" freedom of contract and "ex post" considerations of justice inevitably devolve into an unprincipled or vacuous pluralism that "cannot designate any doctrine as anomalous" (Kraus and Scott 2020, 1352). "In the end," they argue, "pluralism makes the purely formal claim that an area of law vindicates more than one value, but lacks the theoretical resources to reject doctrines as invalid or to advance any substantive explanatory or normative claim beyond its assertion that an area of law has a value headcount of greater than one" (id. 1352-53). I have argued that something like the opposite may be true. Sovereignty theory, with its exclusive emphasis on ex ante contractual freedom, doesn't have the theoretical resources to deal with departures from the ideal. The democratic conception, by contrast, has the theoretical resources to deal with such departures in a principled fashion, because it embeds the value of party freedom within a larger theory of how people's rights get determined that makes substantive justice the foundational value. On my account, agreements are morally valid, and so worthy of deference by courts who are seeking to vindicate the rights of the parties, when they constitute the parties' plausible settlements of what justice between them requires. Agreements that fail to do this are morally invalid even if freely chosen by the parties. Parties' attempts to regulate the procedural and remedial rules that govern enforcement of their agreements are more likely than their attempts to define the substance of their transactions to be driven by concerns other than a desire to resolve problems of justice between the parties. Thus, courts are rightly more hesitant to defer to procedural and remedial rules that the parties have chosen than to their substantive directives.

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