Unifying Status and Contract

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For over a century, courts and scholars have been operating under the assumption that status and contract are oppositional concepts. Under the traditional view, status is an identity-based, bundled, mandatory, and socially embedded package of regulation significantly affecting one's rights and obligations. Contract, in contrast, involves voluntary, discrete transactions, the parameters of which are determined by private parties and in which the state has no particular interest. The status/contract dichotomy dictates our understandings of important relationships like marriage, employment, and business organizations, and has been used to describe the very trajectory of the law from primitive (status) to modern (contract).

This Article argues that the status/contract dichotomy is descriptively misleading and normatively harmful. Scholars have already recognized that statuses like marriage and employment have become more contractual over time, but they have neglected how the nature of contracting parties' relationships shapes their freedom of contract. Contract doctrine has adopted special rules for cohabitants, insureds, franchisees, and the like. The law of contracts is also a law of relationship types. Put differently, contract law bears the unmistakable imprint of

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status. The failure to recognize this statusization of contract has propped up a caricatured notion of contract with pernicious effects: obscuring the relational aspects of market transactions and perpetuating the mistaken belief that hallmarks of private agreement justify extreme deference to the formal preferences of one of the parties. The dichotomy continues to mask and distort the courts' active balancing of autonomy, relational vulnerability, and other values in ways that systemically favor powerful interests under the guise of contract.

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INTRODUCTION

> "Starting, as from one terminus of history, from a condition of Society in which all relations of Persons are summed up in relations of the Family, we seem to have steadily moved towards a phase of social order in which all of these relations arise from the free agreement of Individuals . . . . [T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*."[1]

We live in a time of extreme inequality.[2] Meeting the moment, legal scholars have called for a reexamination of the role of law and legal doctrine in producing and maintaining unequal outcomes.[3] Contract law has not been spared from scrutiny, with numerous scholars observing the role of private transactions in exploiting those with less bargaining power.[4] Those accounts, however, often accuse courts of misusing contract law rather than subjecting its foundations to deeper scrutiny.[5] This Article examines contract law from a different angle: it questions the very idea of contract as a form of private ordering. It reveals how the fundamental conception of contract law itself — as taught to every first-year law student — downplays the role of relationships in determining outcomes. It shows that courts apply different sets of default and mandatory rules depending on types of contracting relationships, producing outcomes analogous to legal status.

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[1] HENRY SUMNER MAINE, ANCIENT LAW 163, 165 (Henry Holt & Co. 1906) (1861) (describing the move from hierarchical relations to obligations incurred through free agreement). Maine's famous phrase, "the movement of the progressive societies has hitherto been a movement *from Status to Contract*," has been cited in over 1000 publications on Google Scholar and in over 550 articles in Westlaw's Secondary Sources database.

[2] *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1786 (2020); *see also* JULIANA MENASCE HOROWITZ, RUTH IGIELNIK & RAKESH KOCHHAR, PEW RSCH. CTR., TRENDS IN INCOME AND WEALTH INEQUALITY 19 (2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/ [https://perma.cc/8D6S-5KG4] (summarizing findings that the wealth gap between upper-income families and other Americans is "sharp and rising").

[3] *See, e.g.*, Britton-Purdy et al., *supra* note 2, at 1787 nn.8-11, 1788 nn.12-18, 1789 nn.19-20 (identifying and summarizing sources).

[4] *See, e.g.*, NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013) (examining the abuse of boilerplate to exploit consumers); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012) (same).

[5] *See infra* notes 99–104.

For over a century, contract and status have been conceived as opposites. Legal institutions characterized as statuses include marriage, employment, parentage, and citizenship. Although status is a slippery concept,[6] authorities tend to agree on the following features.[7] Status turns on an individual's membership in a particular identity category. It is comprised of a bundle of legal incidents. At least some of these incidents are mandatory rules, as opposed to defaults. Finally, the incidents create and attend to vulnerabilities or power imbalances inherent in the nature of the underlying relationship.

For example, at common law, "masters" had a property interest in the output and labor of their "servants" and could control the servants' conduct, even through the use of moderate physical force.[8] In return, masters were obligated to provide servants with food and shelter, and became legally liable for many of the actions performed by their servants.[9] Likewise, husbands controlled their wives' property, labor, and earnings, and wives were unable to enter contracts in their own name.[10] As with servants, husbands became legally responsible for most of their wives' conduct, which was subject to the husbands' control.[11] Parties to these relationships had no power to change these rules.

Contract, by contrast, is customizable and individualized. It "is blind to details of subject matter and person. It does not ask who buys and sells, and what is bought and sold. . . . [It is] what is left in the law relating to agreements when all peculiarities of person and subject-matter are removed."[12] In contrast to status, the obligations flow directly from the

[6] *See, e.g.*, JOHN AUSTIN, LECTURES ON JURISPRUDENCE 401 (Robert Campbell ed., 3d ed. 1869) ("To determine precisely what a *status* is, is . . . the most difficult problem in the whole science of jurisprudence."); Otto Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635, 635 (1967) (noting "the ambiguity of the term 'status'"); Paul B. Miller, *The Idea of Status in Fiduciary Law*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 25, 26-27 (Paul B. Miller & Andrew S. Gold eds., 2016) (observing that there is no single conception of status).

[7] *See* Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 680-87 (2021). These points are developed in Part I.A, *infra*.

[8] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *428-29 (discussing the features of the master-servant relationship).

[9] *See id.* at *430-31.

[10] *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11-12 (2000).

[11] *See* BLACKSTONE, *supra* note 8, at *442-44.

[12] LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 20 (1965); *see also* 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 669 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (associating freedom of contract with

parties rather than the state. This is, by and large, the version of contract law taught in law school classrooms: a generalized and formalized theory of private agreement centering on the objectively manifested will of the parties.[13]

Perceptions of the relative merits of status and contract have shifted over time. Since the mid-nineteenth century, it has been fashionable to criticize status as archaic and oppressive and to welcome contract as a liberatory corrective.[14] Certainly the common law statuses of marriage and domestic servitude left much to be desired, especially for wives and servants.[15] Yet scholars have increasingly warned that contract has become a tool by which the powerful oppress the vulnerable.[16] Stymied in their ability to secure health insurance benefits or wage guarantees through negotiation, workers' rights advocates have fought to extend employment status, with all of its protections and conditions, to gig workers.[17] Some family law scholars, recognizing that wealthier cohabitants will have little incentive

"the greatly increased significance of legal *transactions*"); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 808 (1985) ("Modern contractual relationships are distinctive in that they are sharply defined and appear to be severed from the background conditions from which they emerge.").

[13] *See* GRAND GILMORE, THE DEATH OF CONTRACT 46 (Ronald K.L. Collins ed., 1995) (1974); *see also id.* at 12-13; P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 681 (1985) (noting that the classical model of contract was "suffused with the notion that the consequences of the contract depended entirely on the intention of the parties, and were not imposed by the Courts").

[14] *See* MAINE, *supra* note 1, at 163-65 (describing the move from hierarchical relations to obligations incurred through free agreement); *see also* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 834-38 (2004) (discussing the commonly held assumptions that family statuses were oppressive and that the law has moved away from those statuses by accepting more contractualization).

[15] *See, e.g.*, Trammel v. United States, 445 U.S. 40, 52 (1980) (deriding rules confining wives to the home as "demean[ing]" and "archaic").

[16] *See, e.g.*, ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 148, 157, 186-87 (1991) (noting that as the master/servant status dissolved in favor of contract, workers had to negotiate for their rights from a position of vastly inferior bargaining power); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1160-61 (1981) (noting the criticism of contract theory as an "intensifier of human disadvantage by which the wealthy and powerful exploit the poor and weak").

[17] *See* Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 325 (2018) (noting the fixation on employment status as a solution to worker exploitation); *see also* Matsumura, *supra* note 7, at 695.

to agree to share their property, have similarly turned to status as a way to make cohabitants financially accountable for each other.[18]

Understandings of the status/contract dichotomy have also shifted over time.[19] Once conceived as a rigid binary — *i.e.,* legal relationships are *either* status *or* contract — the trend is to express the dichotomy as a spectrum with "pure" status and contract at opposite ends.[20] Many statuses like marriage, for instance, are commonly described as having bent in the direction of contract.[21]

This Article argues that a significant aspect of the status/contract dichotomy has gone unexamined. Scholars have failed to recognize the ways in which contract doctrine has bent in the direction of status. Although the contractualization of "statuses" like marriage and employment is well-recognized, the parallel observation — statusization of contract — has been virtually absent in discussions of contract doctrine.[22] As such, the oppositional nature of status and contract has persisted.

Recall that status comprises a bundle of mandatory rules that turn on an individual's membership in a particular identity category, constructed for the purpose of imposing a particular normative view about the individual's relationship to others. These very attributes are embedded in contract doctrine as it has developed over the past decades and centuries, so much so that it is impossible to speak of contract doctrine as meaningfully distinct from these features of status.

In many contexts, the identities of the contracting parties give rise to special rules governing enforcement and interpretation. To take a common

[18] *See, e.g.*, PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02 cmt. b (AM. L. INST. 2002) (proposing to impose marital-like obligations on lengthy cohabiting relationships regardless of consent).

[19] A dichotomy refers to the division of a realm of experience into "two sharply defined or contrasting parts" that are "mutually exclusive." *Dichotomy*, OXFORD ENGLISH DICTIONARY (3d ed. 2014); *see also* Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW, *supra* note 6, at 51, 54-57 (describing the relationship of status and contract as a "dichotomy").

[20] *See* Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 3 (2010) [hereinafter *Behind the Law of Marriage*] (noting that status and contracts have transformed from "polar opposition into a spectrum").

[21] *See* Hasday, *supra* note 14, at 835-36 (arguing that despite some increased contractualization, marriage retains significant aspects of status).

[22] *See* Kahn-Freund, *supra* note 6, at 641 (arguing that the role of the legislature in setting mandatory contract terms has been overlooked in Anglo- (and by extension) American contract law).

casebook example, a general contractor is allowed to hold a subcontractor to its bid in the absence of a reciprocal promise to award the subcontractor the work if the general contractor's bid is accepted.[23] This rule recognizes the vulnerability that general contractors would face if subcontractors could change their bids after the contract were awarded.[24] Under this approach, however, the general contractor has not made an enforceable promise to accept the subcontractor's bid, leaving the subcontractor vulnerable to opportunistic behavior. So, the law requires the general contractor to accept the subcontractor's bid promptly, and prohibits the general contractor from reopening negotiations to try to achieve a better price.[25] Courts also impose obligations "that are reasonably necessary for the orderly performance of the contract," whether the parties have agreed to those terms or not, such as the requirement that general contractors "give their subcontractors a reasonable opportunity to perform" as well as "suitable working conditions."[26] Much like spouses, these fixed rules turn on the contractors' relational identities rather than their individual peculiarities,[27] and reflect their interdependency and shifting vulnerabilities.

One response might be to question whether contracting relationships like that between a general contractor and subcontractor are exceptional. Yet, it is difficult to find a case in a Contracts casebook where the outcomes, and the rules producing them, were not influenced by the relational identities of the parties.[28] Contracts between spouses, cohabitants, employers and employees, landlords and tenants, contractors and subcontractors, franchisees and franchisors, buyers and sellers of real property, and technology companies and their consumers are all subject to special rules that govern the terms to which the parties can agree as well

[23] *See* Drennan v. Star Paving Co., 333 P.2d 757, 759 (Cal. 1958).

[24] *See id.* at 760.

[25] *See id.*

[26] McClain v. Kimbrough Constr. Co., 806 S.W.2d 194, 198 (Tenn. Ct. App. 1990).

[27] The critical point is that the party's role (e.g., a subcontractor or lessee) affects the rules governing the parties' exchange, not its personal identity (e.g., Acme Concrete or Beta Electrical, John Doe or Richard Roe).

[28] It will become apparent throughout the Article that the emphasis on the role of *relational identity* as the basis for imposing bundles of legal regulation distinguishes my contribution from two sets of insights on which I build: first, the recognition by legal realists that the state is actively underwriting all private agreements and supplementing those agreements through the process of interpretation; and second, the recognition by relational contract theorists that every agreement must be understood in the social context in which it arose. *See infra* Part I.B. Neither of those two movements focus on the use of categorical identities based on contract type to produce status under the guise of contract.

as how such agreements are to be interpreted.[29] In all of these situations, courts actively balance party autonomy, situational vulnerabilities, and the needs and interests of third parties, including the promotion of morality and the efficient functioning of markets.[30] These are features of status.

This Article's first contribution is to demonstrate that scholars and courts have treated the statusization of contract as exceptional rather than typical, and to examine the impact of this revelation on the status/contract dichotomy. That impact is profound: status and contract mean less than supposed if both bear features of the other. The second contribution is to show that on top of being descriptively inaccurate, the status/contract dichotomy remains a powerful organizing principle in the law today, justifying, on the status side, the imposition of mandatory rules governing some of society's most important relationships and, on the contract side, terms favoring powerful business interests over individual consumers.[31] The status/contract dichotomy perpetuates an extreme, caricatured version of contract, or "contractualism,"[32] obscuring important questions about autonomy, vulnerability, and the state's proper role in distributing entitlements. The most egregious abuses through contract of the vulnerable by the powerful depend on the status/contract dichotomy.

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[29] Few, if any, types of contracts are not impacted by special rules based on the relational identities of the contracting parties, so much so that the exceptions only prove the rule. *See* Brian H. Bix, *The Promise and Problems of Universal, General Theories of Contract Law*, 30 RATIO JURIS 391, 393 (2017) (recognizing the existence of different rules for different types of contracting relationships); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 328 (1986) (claiming that "only carefully negotiated and well-drafted agreements between parties with sophisticated counsel fit well within the [traditional] contracts matrix").

[30] Examples of these considerations are discussed in Part IV, *infra.* I use "autonomy" in a thin sense to refer to the law's recognition of the exercise of personal choice.

[31] *See infra* Part I.

[32] Early Twentieth Century legal realist Morris Cohen coined the term "contractualism" to express "the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely," reinforcing "the political doctrine that all restraint is evil and that the government is best which governs least." Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933). By using this label, I call attention to the phenomenon in which courts pay tribute to an exaggerated form of free market contracting. *See, e.g.*, Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1411-12 (1985) (noting that the fiction that investors contract with corporate managers about the terms of the relationship between investors and management "stretches the concept 'contract' beyond recognition"); Felipe Jiménez, *The Grounds of Arbitral Authority*, 96 TUL. L. REV. 745, 747 (2022) (arguing that the Court's arbitration jurisprudence rests on an "'everyday libertarian' conception of arbitration," a faulty metaphor of contract).

The Article unfolds as follows. Part I explores how the status/contract dichotomy has traditionally been described in the courts and scholarly literature. It provides several examples of the dichotomy at work. By contrasting status with the notion of arm's length exchange, courts justify extreme deference to the formal preferences of one of the parties. Courts exhibit fealty to contractualism when, for instance, they enforce arbitration clauses and adhesion agreements over compelling evidence that one of the parties was not aware of, much less desired to be bound by, terms in a form agreement. Another example comes from family law. Scholars protest that the family is treated exceptionally when compared to other areas of the law, most notably when compared to market relationships.[33] Although the family is no doubt subject to special rules, often to the disadvantage of women or those providing domestic services, scholars ignore the similar treatment of market relationships.[34] Paradoxically, by underselling the extent to which the law recognizes intimacy in theoretically arm's length relationships, these scholars prop up the dichotomy instead of undermining it.

Part II is the theoretical heart of the Article. It argues that both status and contract must contend with fundamental uncertainties: for status, how to reconcile the concept of individual choice with mandatory obligations, and for contract, to what extent social context should affect enforcement. These uncertainties highlight the inherent instability of the status/contract dichotomy. Rarely will the law impose a social agenda irrespective of an individual's decisions or vindicate one party's autonomy interests to the exclusion of countervailing social concerns. In fact, statuses ignore autonomy at their peril, and courts frequently overwrite or ignore exploitative or harmful contractual promises. Far from being opposite poles, status and contract depend upon the other, explaining the dichotomy's inexorable conceptual collapse.

With these concepts in mind, Part III makes the descriptive case that elements of status permeate contract. It does so by examining three case studies. It starts first with contracts between cohabitants. Although

[33] *See, e.g.*, JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 415 (2014) (collecting sources claiming that family law rules are different from the "everyday rules" governing other areas of the law); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999) ("'[F]amily law' can be thought of as a system of exceptions from the everyday rules that would apply to interactions among people in a non-family context . . . ."); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMPAR. L. 753, 754 (2010) (discussing how family law is treated as an "autonomous domain" with a "distinctive set of rules").

[34] These arguments are developed in Part I.B, *infra*.

virtually all states have declared that cohabitants are empowered to enter into binding agreements as long as they do not involve sexual services, cohabitants are, in fact, substantially constrained by hidden mandatory rules that turn on their identity as intimate partners. Some readers may be tempted to dismiss contracts between cohabitants as exceptional because they replicate family relationships long governed by marriage, an established status. So, this Part next turns to parties in business relationships: contractors and subcontractors, and online service providers and their users. Just like intimate partners, these contractual relationships are governed by a collection of mandatory and default rules tailored to the relationship between the parties that promote a specific view of the types of obligations the parties should owe each other.

Part IV focuses on insights that flow from the collapse of the status/contract dichotomy. While the notion of a general law of contracts is not entirely illusory, it cannot explain outcomes separate from the relationships in which the agreements arise — for instance, between cohabitants, contractors and subcontractors, or merchants selling wares. The law of contracts — like status — is also a law of relationship types. Using the language of free agreement, courts actively allocate entitlements between parties. In contexts like contractual arbitration, this usually redounds to the weaker party's detriment by limiting legal remedies for potentially unlawful acts. In short, it is the state and not solely the parties producing unequal outcomes. Efforts to remedy the situation must respond to this reality.

I. THE DICHOTOMY AT WORK

This Part establishes the parameters of the status/contract dichotomy, illustrating the theoretically oppositional nature of status and contract. It then shows how the dichotomy continues to influence both doctrine and scholarly discourse.

A. Status and Contract as Opposites

Status and contract are conceived of as conceptual opposites. Status has several key features. First, status refers to legal rules that flow from a particular identity. In an early exploration of status over a century-and-a-half ago, Henry Sumner Maine associated status with innate identities, such as infancy or lunacy.[35] Other examples of innate identity categories

[35] *See* Dagan & Scott, *supra* note 19, at 53-54 (arguing that, to Maine, status was both comprehensive and inalienable, and identifying status with that extreme position); Kahn-

include enslavement and illegitimacy,[36] now abolished, and race and sex, which are largely viewed with suspicion.[37] Some identities, such as husband and wife, citizen, or employee, are voluntarily assumed or subject to change rather than innate.[38]

A second feature of status is that it involves the bundling of multiple legal rules that turn on the relevant identity. In *Maynard v. Hill*,[39] the Supreme Court distinguished marriage from other contracts, which involve "*certain, definite, fixed private rights* of property," as opposed to the marriage relation, which was so pervasive as to form an "institution."[40] Bundling is implicit in many scholarly characterizations of status as totalizing or universal.[41]

A third feature of status is that its rules are mandatory and standardized. In *Maynard*, the Court noted that although marriage was often denominated a "civil contract" by courts and scholars, marriage, unlike other private agreements, creates "a relation between the parties . . . which they cannot change."[42] When people marry, "they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those

Freund, *supra* note 6, at 636 (arguing that Maine "gave a 'restricted' meaning to the term 'status,'" referring to rights and obligations "which society confers or imposes upon individuals irrespective of their own volition").

[36] *See* Janet E. Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 24 (2011) [hereinafter *What Is Family Law?*] (noting that the legitimacy of a child flowed from the circumstances of her birth and affected many legal rights); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1719 (1993) (showing how the law transmitted the status of slavery through the rule that "children of Blackwomen assumed the status of their mother").

[37] *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2325 n.33 (1997).

[38] For example, citizenship can be changed or renounced, or even divested. 8 U.S.C. § 1481(a)(5) (2018) (governing the renunciation of U.S. citizenship); 8 U.S.C. § 1427 (2018) (setting forth naturalization requirements for legal permanent residents).

[39] Maynard v. Hill, 125 U.S. 190 (1888).

[40] *Id.* at 210-11.

[41] *See, e.g.*, Harris, *supra* note 36, at 1719-20 (describing how the various laws regulating slavery resulted in the total commodification of enslaved peoples). A few accounts address the bundled aspect of status more explicitly, such as Max Weber's discussion of status contracts and Carleton Kemp Allen's description of status as a "collection of rights and duties." *See* WEBER, *supra* note 12, at 672 (noting that "status contracts," unlike "purposive contracts," change the total legal situation of the parties involved); Carleton Kemp Allen, *Status and Capacity*, 46 L.Q. REV. 277, 282 (1930).

[42] *Maynard*, 125 U.S. at 211.

rights, duties, and obligations."[43] The mandatory aspects of status standardize those legal identities.[44] This standardization makes it possible to speak of wives or children and for those concepts to be legally intelligible because all members of those categories are subject to the same legal duties.[45]

A fourth feature of status is that it bridges law and society: it is a sociolegal phenomenon. Because they govern relationships, statuses often reflect social norms.[46] The package of mandatory rules encapsulates and reproduces beliefs about the nature of those relationships as well as the position of those relationships in society. Statuses often involve relationships involving power differentials or dependency.[47] In marriage, for example, spouses owe each other open-ended duties of support, both financial and emotional, and depend on each other for their fulfilment.[48] Vulnerability is therefore a feature of the relationship, as are the law's prescriptions to meet that vulnerability.

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[43] *Id.* (citing Adams v. Palmer, 51 Me. 480, 483 (1863)). Numerous scholars have emphasized this aspect of status: that its rules are fixed by law and cannot be changed by the parties to the relationship. *See, e.g.*, Allen, *supra* note 41, at 288 (noting that a chief feature of status is the fact that its obligations are "*extrinsically determined*" rather than self-determined); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. L. 249, 259 (2010) (noting that "once one becomes a spouse or parent, certain rights and obligations follow"); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 972 (2000) (discussing the fixed obligations of a marital relationship); Halley, *Behind the Law of Marriage*, *supra* note 20, at 4 (associating status with state investment in ascriptive rules); Miller, *supra* note 6, at 27 (noting that statuses have normative meanings and social and moral implications beyond the determination of the parties).

[44] *See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 39 (1917) (arguing that the basic difference between status and contract is standardized relations versus individualized relations).

[45] *Cf.* Dubler, *supra* note 43, at 974 (showing that the doctrine of common law marriage, and the social norms embodied in it, helped to establish the meaning of marriage more broadly).

[46] *See, e.g.*, Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000) (analyzing the effect of social norms on the legal regulation of marriage).

[47] *See, e.g.*, Kahn-Freund, *supra* note 6, at 640 (noting various circumstances in which "the law operates upon an existing contractual relation, but it moulds this relation through mandatory norms which cannot be contracted out to the detriment of the weaker party (employee, passenger, customer in general)").

[48] *See* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1301 (2015) (noting that marriage imposes "imperfect duties" on the spouses: duties involving "(1) substantial latitude in the required conduct and (2) an intrinsic connection to subjective motivations").

In contrast, contract duties are conceptualized as identity-neutral and voluntarily assumed, customizable, discrete, and abstracted. Classical contract law depicts contract as a disembodied exchange of abstract and incommensurable goods. In the nineteenth century, courts began to "reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange" in favor of the belief that "the source of the obligation of contract is the convergence of the wills of the contracting parties."[49]

A central aspect of classical contract doctrine is "its abstractness, its lack of particularity, its attempt to treat all contracts as being of the same general character."[50] Under this view, contracting parties possess different goods and resources that are, on some level, incommensurable.[51] One party might possess a skill and time; the other money. Or one might possess a horse and the other a cow. Each party assigns these goods a subjective value, "its own unique ranking of goods and services, based on complex private motivations that can be satisfied without giving explanations to others."[52] In these dealings, parties do not owe each other duties until they reach a deal, meaning that they do not need to volunteer information or look out for the other's interests.[53] Contract law facilitates an exchange between parties based on their own subjective valuations and situational needs, promoting mutual gain.[54] This subjectivity requires rules that are instrumental and facilitative and that do not substitute externally imposed notions of fairness for the parties' own.[55] As Michel Rosenfeld has noted, this abstracted view circumscribes obligations within the context of existing relationships, allowing parties that know each other, even intimately, to specify the obligations they owe each other, thereby

[49] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 160 (1977).

[50] ATIYAH, *supra* note 13, at 402; *see also* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 807 (2000) (characterizing classical contract doctrine as objective and standardized, a system of rules "unrelated to the intentions of the parties or the particular circumstances of the transaction").

[51] *See* Rosenfeld, *supra* note 12, at 815.

[52] Richard A. Epstein, *Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 25, 32 (F.H. Buckley ed., 1999).

[53] ATIYAH, *supra* note 13, at 403.

[54] Epstein, *supra* note 52, at 34.

[55] *Id.*; *see also* ATIYAH, *supra* note 13, at 402-03 (noting that under this view, "[i]t is assumed that the parties know their own minds, that they are the best judges of their own needs and circumstances, that they will calculate the risks and future contingencies that are relevant, and that all these enter into the bargain").

excluding obligations that one might assume would flow from the relationship.[56]

The features of status and contract relate to each other oppositionally as follows:

Status	Contract
Identity-based	Identity-neutral
Bundled obligations	Discrete obligations
Mandatory obligations	Voluntary obligations
Socially embedded	Abstracted

As I will discuss in Part II, these characterizations of status and contract are oversimplified. Classical contract doctrine, in particular, has been subjected to withering criticism on the grounds that the law has always imposed limits on private transactions based on relational considerations. Nonetheless, the status/contract dichotomy persists and continues to influence both doctrine and scholarly discourse as the following examples illustrate.

B. In Action

Courts continue to perpetuate the status/contract dichotomy, as the following juxtaposition of marital and arbitration contracts illustrates.

Spouses who have attempted to change their familial obligations through contract have frequently run into the objection that marriage is a status that resists private alteration. The fact that marriage "is a highly regulated institution of undisputed social value" justifies "many limitations on the ability of persons to contract with respect to it, or to vary its statutory terms, that have nothing to do with maximizing the satisfaction of the parties or carrying out their intent."[57] Spouses cannot alter the duty of mutual financial support during marriage; the duty to support a child of the marriage; and judicial supervision of marital dissolution.[58] Although states allow spouses to enter into agreements governing property, most jurisdictions impose substantive limits and procedural requirements that narrow the spouses' contractual freedom. One example of a substantive limitation is the refusal in many states to enforce spousal support waivers if the denial of such support would render

[56] Rosenfeld, *supra* note 12, at 810.

[57] *In re* Marriage of Bonds, 5 P.3d 815, 829 (Cal. 2000).

[58] *See id.* at 830.

a spouse eligible for public benefits.[59] One example of a heightened procedural requirement is the financial disclosure requirement, which requires the party seeking enforcement to show that he or she provided an adequate financial disclosure to the other party before the agreement was entered into.[60] The Massachusetts Supreme Judicial Court has justified this procedural requirement by observing that "[m]arriage is not a mere contract between two parties, but a legal status from which certain rights and obligations arise."[61]

The association of marriage with status and related questions of social value allows the court to discount the preferences of the parties, which we are told have nothing to do with the substantive limitations on contract that the law imposes. For instance, the California Supreme Court has flatly deemed marriage "inconsistent with . . . freedom-of-contract analysis[.]"[62] States can change the substantive rules that flow from marriage — even if one of the spouses highly valued the existing rules at the time they married — without impairing the obligation of contracts more generally.[63]

In this context, status functions not only to limit party autonomy but to promote other myths and distortions. Consider the following examples from the California Supreme Court's decision in *In re Marriage of Bonds*. The issue before the court was whether a prenuptial agreement entered into without the advice of counsel was subject to strict scrutiny under the state's law governing those agreements.[64] Although it was not necessary to the decision, the court devoted a section of the opinion to distinguishing premarital agreements from commercial contracts.[65] To make this point, the court recited the various mandatory aspects of marriage before noting,

[59] *See, e.g.*, Rider v. Rider, 669 N.E.2d 160, 163 (Ind. 1996) (noting the widespread adoption of this rule, which originates in the Uniform Premarital Agreement Act).

[60] *See, e.g.*, DeMatteo v. DeMatteo, 762 N.E.2d 797, 806 (Mass. 2002).

[61] *Id.* at 809.

[62] *Marriage of Bonds*, 5 P.3d at 829 (contrasting the Pennsylvania Supreme Court's approach to prenuptial agreements as expressed in *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990)).

[63] *See, e.g.*, *In re* Marriage of Walton, 104 Cal. Rptr. 472, 475-76 (Cal. Ct. App. 1972) (holding that the adoption and application of no-fault divorce laws to a preexisting marriage did not impair the obligation of a wife's marriage contract because the legal incidents of marriage are "subject to plenary control by the state"); Fearon v. Treanor, 5 N.E.2d 815, 817 (N.Y. 1936) (upholding the legislature's abolition of civil actions to recover damages for alienation of affections, criminal conversation, seduction, and breach of promise to marry over the argument that doing so deprived spouses of a remedy for the enforcement of property rights flowing from existing contracts).

[64] *See Marriage of Bonds*, 5 P.3d at 821.

[65] *See id.* at 829.

as if it were dispositive, that marriage "normally lacks a predominantly commercial object."[66]

This statement sends two messages: that marriage does not involve exchange (and by extension is not a site of economic exchange)[67] and that commercial transactions are not normally subject to substantive limitations. I will return to the second suggestion later in this Section. The first suggestion is flatly belied by a half century worth of research studying how households combine nonmarket work with market goods to produce commodities for consumption;[68] how they make decisions to maximize utility and minimize transaction costs like firms;[69] and how family and household members allocate responsibility for childrearing, domestic labor, and wage earning.[70] All of this coordination cannot be achieved without some manner of exchange.

The *Bonds* court also drew a distinction between remedies in the commercial and marital contexts. "[A] party seeking rescission of a commercial contract . . . may be required to restore the status quo ante by restoring the consideration received," the court said, but "the status quo ante for spouses cannot be restored to either party."[71] Here, the court must mean that spouses cannot be restored to their pre-married states; that their myriad investments and contributions cannot be traced and quantified. But that is not true: financial contributions can be traced,[72] as they routinely are within the context of divorce, and domestic services could be valued.[73]

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[66] *Id.* at 830.

[67] The definition of "commerce" involves the "exchange of goods and services . . . ." *Commerce*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[68] *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 18-19 (1996) (citing Gary S. Becker, Elisabeth M. Landes & Robert T. Michael, *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977), among others) (noting that households use nonmarket time and market goods to produce commodities).

[69] *See, e.g.*, Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581, 582 (1985) (describing this methodology).

[70] *See* Silbaugh, *supra* note 68, at 19; *see also* Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 233, 237 (2006) (arguing that household members manage their affairs like firms do, and that this management includes decisions about how to allocate resources).

[71] *Marriage of Bonds*, 5 P.3d at 830.

[72] As just one example, Arizona has a formula to trace and disaggregate marital and separate property contributions to property owned by one of the spouses before marriage, apportioning the value of appreciation accordingly. *See* Barnett v. Jedynak, 200 P.3d 1047, 1049-50 (Ariz. Ct. App. 2009).

[73] Indeed, economists have been quantifying and tracking household production for several decades. *See, e.g.*, Benjamin Bridgman, Andrew Craig & Danit Kanal, *Accounting*

Of course the court cannot literally turn back the clock, but that same limitation applies to commercial actors. Moreover, in the commercial context, the restoration of consideration will not result in the recovery of opportunity costs, the costs of pursuing and negotiating the agreement, and of resolving the dispute.[74] The very suggestion that the law can restore the status quo between contracting parties bolsters the myth that contract damages are fully compensatory, a view associated with the theory of efficient breach.[75] Marriage, in short, exerts a strong influence over contracts falling not only within, but also outside its orbit.

I turn now to a complementary example of the status/contract dichotomy. Recall the suggestion of the *Marriage of Bonds* court that commercial contracts are not subject to substantive limitations. That exaggerated version of classical contract doctrine[76] can be seen when courts interpret arbitration agreements.[77] Those cases fixate on consent and contrast the choice to arbitrate with the imposition of mandatory obligations.

The purpose of the Federal Arbitration Act ("FAA"), the Court has repeatedly said, "was to ensure judicial enforcement of privately made agreements to arbitrate" and to place them "upon the same footing as other contracts."[78] Before the FAA, courts "jealous[ly]" guarded their jurisdiction over legal disputes notwithstanding the parties' preferences

for Household Production in the National Accounts: An Update 1965-2020, 102 SURV. CURRENT BUS. 1 (2022), https://apps.bea.gov/scb/2022/02-february/pdf/0222-household-production.pdf [https://perma.cc/VZ9R-B9X5] (finding that household production increased significantly in 2020).

[74] *Cf.* Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 995 (2005) (observing that the costs of obtaining damages under a contract are almost never accounted for in expectation damages).

[75] *See id.* at 980-89 (explaining the traditional efficiency rationale for expectation damages as well as efficiency-based challenges to expectation damages). *See generally* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (arguing against the common assumption that expectation damages are adequately compensatory and more efficient than specific performance).

[76] *See supra* note 32 and accompanying text (explaining use of the term "contractualism"). Lawrence Cunningham has called this phenomenon "rhetoric." Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 132 (2012). Felipe Jiménez has called it a "contractual metaphor." *See* Jiménez, *supra* note 32, at 749. The point is that the courts' depiction of contract strays from contract doctrine as applied in other contexts.

[77] Another area is adhesion agreements. *See infra* Part III.C.

[78] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1983).

for private dispute resolution.[79] The legislation was thought necessary to give parties the benefit of the agreement they "negotiated," elevating party autonomy over judicial policy.[80] Unsurprisingly, this contractualist origin story, fetishizing party autonomy, has taken on a life of its own, leaving behind contract doctrine established in other contexts and producing outcomes in the name of arbitration that cannot even be supported by party intent.

In many other areas, courts will decline to enforce agreements that conflict with statutes or public policies, whether legislatively or judicially created.[81] The Court, however, has interpreted the FAA to require the arbitration of federal statutory claims under the theory that the parties contractually committed those claims to arbitration.[82] The Court adheres to this view even when the circumstances make it highly unlikely that parties would be able to vindicate their statutory rights through arbitration.[83] Moreover, although courts still have the power to determine whether an arbitration clause is valid,[84] parties can agree to arbitrate questions about arbitrability.[85] The insertion of clauses delegating the question of arbitrability to an arbitrator in the first instance makes it highly

[79] *See id.* at 220 n.6.

[80] *See id.* at 219.

[81] *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1240-50 (N.J. 1988) (refusing to enforce a surrogacy agreement on the ground that it conflicted with state adoption statutes as well as a judicially-created policy against the separation of a child from her mother against the mother's will); *see also* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 451 (2011) [hereinafter *Arbitration as Delegation*] (noting that for many years until the 1980s, the Supreme Court repeatedly held that a plaintiff could not be forced to arbitrate statutory claims); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1228, 1233-38 (2013) [hereinafter *FAA Preemption*] (noting the longstanding tradition of state court refusal to enforce agreements that violate public policy).

[82] *See* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1954 (2014); *see also* Horton, *Arbitration as Delegation*, *supra* note 81, at 451-53.

[83] *See* Aragaki, *supra* note 82, at 2019-24; *see also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013) (upholding a class action waiver in a case involving federal antitrust claims where the cost of arbitration would exceed the potential recovery).

[84] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002).

[85] *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 396 (2018) (discussing Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63 (2010)).

likely that a flood of legal disputes will be shunted to private dispute resolution without courts exercising their gatekeeping function.[86]

Additionally, the Court's arbitration jurisprudence sometimes stretches or disregards the parties' preferences in the name of arbitration. For example, parties that attempt to opt out of the FAA by indicating that state law will apply must do so with "crystal clarity"[87]: anything less and the Court will presume an ambiguity that favors arbitration.[88] The Court has also allowed strangers to a contract to enforce an arbitration clause contained within that contract, even in the face of a complete lack of evidence that the parties to the contract intended that result.[89] And in perhaps the most pronounced example, the Court disregarded language in an arbitration clause granting the district court expanded powers of judicial review because the clause conflicted with the "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[90]

These examples show that the *idea* of contract — the private, contractual resolution of disputes that arbitration represents — displaces an *actual* interrogation of the parties' contractual intent.[91] Arbitration takes on a life of its own.

It will become clear that these decisions represent a distortion of contract principles that apply in other contexts. For current purposes, it is important to see how they reflect an exaggerated understanding of classical contract doctrine, developed in opposition to status. First, these cases deny that the identity of the parties should have any impact on the enforceability of agreements to arbitrate. So, for example, it matters not whether the agreement to arbitrate is between sophisticated parties or is found in terms unilaterally imposed by a large company upon individual

[86] *See id.* at 367-70; *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 377 (discussing how entire bodies of law have been diverted to private dispute resolution).

[87] Cunningham, *supra* note 76, at 135.

[88] *See id.* (noting that "[t]he common law requires no such clarity . . . .").

[89] *See id.* at 142-43 (discussing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009)) (allowing advisors to a financial transaction to compel arbitration under a bankrupt management firm's contract with investors, despite the absence of any real evidence that the management firm and investors intended the other advisors to benefit from the contract).

[90] Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 588 (2008).

[91] *See* Cunningham, *supra* note 76, at 144; Jiménez, *supra* note 32, at 754 ("[A]rbitration is not . . . purely a creature of the parties' contractual intent.").

customers.[92] Second, they elevate form over substance by claiming that the decision to arbitrate governs but one aspect of the parties' relationship — dispute resolution — even though it practically forecloses the ability of the weaker party to enforce its rights.[93] Third, they justify the outcome based on the consent, noting that to *not* order arbitration pursuant to the terms of the agreement would be to subject the parties to a form of judicial coercion.[94] Fourth, they enforce agreements even in the face of state policies designed to limit the scope of private agreements to protect the vulnerable from exploitation.[95]

These rationales gather strength by contrast to status. The notion of status as archaic, mandatory, highly regulated, often domestic, enables courts to say that contractual arbitration "is a matter of consent, *not coercion*."[96] The specter of marriage, employment, and other statuses casts the concepts of choice and assent into sharp relief,[97] as illustrated in this statement from a leading Contracts casebook:

> On its face, the system of classical contract law would appear to apply as readily to dealings between two family members as it would to any other transaction. Upon reflection, however, it should be obvious that the nature of the bargain theory of consideration would exclude from the contract sphere most of the dealings between family members . . . . To the extent that the law does impose legal obligations between persons in the family context, these obligations *are for the most part based on the relationship of the parties*[.][98]

Scholars have roundly criticized these outcomes. Yet, these critiques impliedly accept the features of classical contract law propped up by the status/contract dichotomy. Margaret Jane Radin, for example, has criticized adhesion contracts on the grounds that they impact party rights

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[92] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011).

[93] *See* American Express Co. v. Italian Colors Rest., 570 U.S. 228, 234-35 (2013) (rejecting the concern that the inability to aggregate small claims in arbitration would effectively leave parties without a remedy for statutory violations).

[94] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010).

[95] *See Concepcion*, 563 U.S. at 346-47 (preempting a California public policy against enforcing class action waivers through consumer adhesion contracts).

[96] *Stolt-Nielsen S.A.*, 559 U.S. at 681 (emphasis added).

[97] *See* Halley, *What Is Family Law?*, *supra* note 36, at 45 (noting the opposition between public marriage and private contract).

[98] CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 226 (9th ed. 2019) (emphasis added).

without freedom of choice or consent.[99] In order to justify her claim that these contracts amount to a "distortion" of contract law,[100] she posits a "core contract" that shifts entitlements based on the consent of the parties pursuant to rules governing the means by which the transaction will be carried out, remedies for breach, and adequate dispute resolution procedures.[101] Radin's paradigmatic core contract is a bespoke agreement that shifts "particular entitlements between private parties under terms that the people involved have chosen, acting freely or autonomously."[102] This core contract is not so different from the contractualism courts invoke to justify adhesion agreements in the first place. And it is an attractive concept: one that makes a person a master of her own fate.[103] But arguing that adhesion agreements should be governed by another regulatory framework or brought in line with contract principles merely preserves contractualism's centrality.[104]

The status/contract dichotomy also shapes understandings of marriage and other family relationships. A pervasive narrative in legal scholarship is that family relationships are treated differently from market relationships, usually in ways that disadvantage vulnerable family members, often women. A growing body of scholarly work seeks to

[99] *See* RADIN, *supra* note 4, at 19. Radin has also noted that mass boilerplate is problematic because it subverts the legal infrastructure for contract, focusing in particular on the availability of legal remedies. *See* Margaret Jane Radin, *The Deformation of Contract in the Information Society*, 37 OXFORD J. LEGAL STUDS. 505, 516 (2017).

[100] *See* Radin, *supra* note 99, at 517. Nancy Kim has similarly characterized wrap contracts as "twist[ing] and shov[ing] doctrinal rules into ill-suited contractual forms[,]" leaving "stretched and misshapen precedent." KIM, *supra* note 4, at 175; *see also id.* at 212 ("The wrap contract has shifted and distorted the focus of contract law."). For other characterizations that depend on the belief in a core concept of contract, see Cunningham, *supra* note 76, at 131 (accusing arbitration cases of "distort[ing] *actual* contract-law doctrine" (emphasis added)); Nancy S. Kim, *The Wrap Contract Morass*, 44 SW. L. REV. 309, 324-25 (2014) (noting that wrap contracts have "deviate[d] from contract law's traditional path" and have departed from contract's "roots").

[101] *See* Radin, *supra* note 99, at 508.

[102] *Id.* at 508-09.

[103] As Robert Tsai has observed, metaphors are powerful tools for ordering the social world, and are frequently deployed by courts to explain legal rules and institutions. *See* Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 188-89 (2004).

[104] *See* Shubha Ghosh, *Against Contractual Authoritarianism*, 44 SW. L. REV. 239, 239-40 (2014) (noting these different approaches to the problem of boilerplate). In contrast to Radin, who sees the disjunction between the court's boilerplate doctrine and traditional contract doctrine as a question of kind, not degree, this Article takes the opposite view. Yes, clickwrap agreements are governed by special rules, but no more special than many other types of contractual relationships.

critique the law's exceptional treatment of the family, scrutinize its distributional consequences, and uncover its ideological foundations.[105]

In the nineteenth century, the development of employment outside of the household led to a separation between the spheres of the market and the home.[106] The sphere of the market was described as selfish, individualistic, and exploitative, in contrast to the home, which was a nurturing and spiritual site of respite from the harshness of the marketplace.[107] Women were excluded from the market but were promised a central role in the domestic sphere.[108] Unsurprisingly, this opposition ultimately devalued the economic value of women's contributions and perpetuated her dependency on men.[109]

The study of family law exceptionalism emerges against this backdrop.[110] According to Janet Halley, a leading thinker in the field, the separation of spheres required marriage, which was previously described as a type of contract, to be recast as status.[111] Its consensual aspects were downplayed in favor of its mandatory ones; its individualistic aspects were downplayed in favor of its public and communal nature.[112] Moreover, the rules governing the family were described as specialized and distinct from rules governing transactions between commercial entities.[113] At the same time, the legal elites were inventing classical contract doctrine by subtracting out idiosyncratic contexts like the family, thereby forging a general law of contracts.[114] Scholars committed to studying family law

[105] *See* Halley & Rittich, *supra* note 33, at 754-58.

[106] *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1093 (1994).

[107] *See* Olsen, *supra* note 106, at 1499-500; Siegel, *supra* note 106, at 1093-94.

[108] *See* Olsen, *supra* note 106, at 1500.

[109] *See id.*; Siegel, *supra* note 106, at 1094. Although this account may be an accurate statement of law and publicly reported sentiment at a high level, Martha Minow has shown that many women at the time actually participated in market affairs, undermining the strict separation of the market and family spheres. *See* Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 867-84.

[110] *See* Fineman, *supra* note 33, at 1207 (connecting the separate spheres logic to the "unique" rules that govern family relationships today).

[111] *See* Halley, *What Is Family Law?*, *supra* note 36, at 40-45.

[112] *See id.* at 42.

[113] *See id.* at 83.

[114] *See id.* at 86-91.

exceptionalism identify and question contemporary manifestations of these practices.[115]

Yet, the claim that family law is treated exceptionally is only meaningful if other areas of law are treated the same. The naming of the concept therefore gives rise to the temptation to generalize about contract law. We see this tendency when Halley folds the nineteenth century phenomenon of employment[116] into the "general" law of the market to highlight the exceptional treatment of the family.[117] Equating work with the market downplays the significant state regulation of the employment relationship, including the fact that employment status is not purely a matter of party choice.[118]

Another example can be found in Martha Ertman's influential work. Ertman argues that a comparison between family forms and business law forms reveals "long-standing inequities within current family law discourse that are fossilized artifacts of the naturalized construction of intimate relationships."[119] So far, so good. However, she goes on to say, "business models have the potential to disrupt its inequalities. Business models *are free of* the antiquated notions of status, morality, and biological relation that have hampered family law's ability to adapt with the times."[120] I express no view on whether business models are antiquated, but they certainly contain aspects of status, mandatory and default rules and duties that attempt to promote the state's normative vision.[121] The characterization of business forms as opposed to family relationships results in a sanitized, abstracted understanding of contract. It props up the contract end of the status/contract dichotomy.

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[115] *See, e.g.*, Halley & Rittich, *supra* note 33, at 754 (noting that the "special" character of the family and its law has created new "ideological and material significances").

[116] *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 13, 14 (2004) (noting that the market for employment outside the household did not exist until the nineteenth century).

[117] *See* Halley, *What Is Family Law?*, *supra* note 36, at 2-3; *see also id.* at 12 ("Domestic labor and domestic love were taking divergent ideological paths. Both were domestic, but they were starkly opposed in law; there, only the latter deserved the term.").

[118] *See* Matsumura, *supra* note 7, at 690.

[119] Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 80 (2001).

[120] *Id.* at 82 (emphasis added); *see also id.* at 90 ("First, market rhetoric is rarely naturalized. Second, contracts do not require majoritarian or public approval to be enforced . . . .").

[121] *See, e.g.*, Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L.Q. 369, 378-80 (1995) (noting the relationship between off-the-rack default business forms and mandatory rules).

II. QUESTIONING THE DICHOTOMY

The previous Part illustrated the vitality of the status/contract dichotomy. This Part shows that status cannot escape the gravitational pull of individual choice, and that contract cannot completely divorce itself from a consideration of the parties' relationships. As a result, status ineluctably moves in the direction of contract, which itself bears features of status. When one focuses on these similarities rather than contrasts, status and contract merely become different ways of describing how the law balances primary values such as individual autonomy and relational vulnerability.

A. Conceptual Anxieties

Every account of status involves the imposition of mandatory obligations. Over time, many scholars have moderated the view that every aspect of a status must be mandatory and have expanded the definition of status to institutions like marriage that accept some degree of individual choice. This evolution highlights the incompatibility of status and autonomy.

Some scholars have taken the view that statuses must be imposed on the individual, and the individual must also lack the power to change any of the legal incidents. Henry Sumner Maine associated status with the general trend in "primitive" societies to organize legal relations around the patriarchal family, rather than the individual.[122] This family structure governed the legal relationships between members, subordinating women to their male family members, children to their fathers, enslaved people to their masters, and more.[123] The defining feature of status was that legal obligations stemmed from these roles rather than free agreement.[124]

Over the years, many scholars have followed Maine in suggesting that status refers to laws imposed on a person based on his identity alone and without any regard for his voluntary actions. Over a century ago, some

[122] *See* MAINE, *supra* note 1, at 121.

[123] *Id.* at 136-61.

[124] *See id.* at 163; *see also* FREDERICK POLLOCK, INTRODUCTION AND NOTES TO SIR HENRY MAINE'S "ANCIENT LAW" 35 (London, John Murray, 1906) (noting that "so long as we recognise any differences at all among persons, we cannot allow their existence and nature to be treated merely as matter of bargain"); Katharina Isabel Schmidt, *Henry Maine's "Modern Law": From Status to Contract and Back Again?*, 65 AM. J. COMPAR. L. 145, 155 (2017) ("What Maine really intended with his juxtaposition of status and contract had been to draw attention to the contrast between 'primitive' collectivism and progressive individualism.").

four decades after Maine published *Ancient Law*, Sir Frederick Pollock surmised that Maine intended to define status narrowly, referring only to innate, personal obligations.[125] Pollock argued that such a move made sense to preserve the essential distinction between status and matters subject to private bargain.[126] Otto Kahn-Freund likewise argued that the narrow definition was necessary to distinguish between two different phenomena: "the imposition of rights and duties irrespective of the volition of the person concerned, and the shaping of a contractual relation into which he has freely entered."[127] This subject has been taken up most recently by Hanoch Dagan and Elizabeth Scott. They argue that the narrow definition of status remains a useful position from which to distinguish liberalism's "preference for 'the world of contract,' in which . . . 'individuals are putatively equal and, as such, can design or at least negotiate the terms of their own interactions.'"[128] The fact that a few examples of narrowly defined status remain, such as infancy, supports their view that even heavily regulated relationships like marriage must be something other than status.[129]

To summarize this narrow view, once an identity can be voluntarily assumed or the legal incidents are subject to individual alteration — as in marriage or employment — it is no longer a status. The problem with this view is that the status realm shrinks to a sliver, simultaneously swelling the realm of contract.[130]

The narrow view is unsatisfactory precisely because it explains so little. Using marriage as an example, "the 'legal condition' which accompanies [it] is something very different from the 'legal condition' which results from the voluntary act of becoming, say, a mortgagor"[131]: "[A] woman chooses to enter into the married state; she voluntarily undertakes certain definite conjugal duties and acquires certain definite conjugal rights. But over and above this act of choice there is something which the law imposes

[125] POLLOCK, *supra* note 124, at 35.

[126] *See id.*

[127] Kahn-Freund, *supra* note 6, at 640.

[128] Dagan & Scott, *supra* note 19, at 5.

[129] *See id.* at 6, 8-9 (noting that marriage is not an open-ended contract and suggesting that heavily regulated relationships like marriage instead be conceptualized as "offices").

[130] *See, e.g.*, Kahn-Freund, *supra* note 6, at 638 (observing the extent to which aspects of infancy gave way to contract); *id.* at 640-42 (noting the growth of protective legislation layered on top of contractual relationships such as employment, and associating these developments with the law of contract).

[131] Allen, *supra* note 41, at 285.

independently of her free election."[132] To put it another way, the "'juridical result is more than any mere outcome of the agreement *inter se* to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds.'"[133]

The important aspect, from the subject's perspective as well as the state's, is the experience of status as a bundle of mandatory obligations. This is not to say that the ability to enter or exit the status is unimportant; but lack of choice amplifies a feeling about regulation that already exists because of the other aspects of the regulatory regime.

This explains the trend in recent years to treat the question whether a legal regime is status or contract as one of *degree*. It assumes that while the innateness of identity may be important, it is not definitional.[134] In other words, an identity that is voluntarily assumed — such as marriage — can still ground a legal status as long as it has mandatory aspects.

Under a more capacious definition, status is not incompatible with the exercise of choice. Instead, the greater the role of autonomy, the more the legal institution moves in the direction of contract. Institutions like marriage or employment that rest on a consensual foundation but impose mandatory rights and duties can slide back and forth on this spectrum, depending on whether, for example, the law allows spouses to disclaim property obligations through enforceable prenuptial agreements or significantly increases the minimum wage.[135]

This capacious view still presupposes that status is associated with mandatory obligations and contract is associated with freely chosen ones. That said, the broadening of the definition to accommodate some degree

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[132] *Id.*

[133] *Id.* (citing Salvesen v. Adm'r of Austrian Prop. [1927] A.C. 641, 653); *see also* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 99 (2000) ("Once married, you had only the rights and remedies derived from an identity as a wife or husband."). This was also the result in Maynard v. Hill, 125 U.S. 190 (1888), in which the Court ruled that marriage, although referred to colloquially as a contract, was not a contract within the meaning of the Constitution's Contracts Clause because "a relation between the parties is created which they cannot change," one "'of law, not of contract.'" By discounting the importance of innate identity, but emphasizing the importance of mandatory terms, the Court comes to the exact opposite conclusion that Maine did: marriage is status, not contract. *See id.* at 213. Rather than one drop of autonomous choice transforming status to contract, the court treats the completely mandatory aspects of marriage as defeating contract notwithstanding the fact that the marriage was chosen by the parties.

[134] *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 115 (1998).

[135] *See* Halley, *Behind the Law of Marriage*, *supra* note 20, at 2-3 (describing the general phenomenon).

of choice reveals the vulnerability of status-based regulation to autonomy-based considerations. Status either excludes choice and shrinks to a sliver, or it allows individualization, which threatens to swallow it.

Status' uncertain relationship to autonomy is mirrored by contract's uncertain relationship to the social positions and relational dynamics of the parties. Not long after the classical theory of contract crystalized, legal realists demonstrated that the conception of contract as essentially private is seriously misleading in several respects. First, it obscures the active role of the law in creating entitlements[136] and enforcing those exchanges the law expressly approves.[137] Second, it downplays the role of the courts in supplementing and standardizing agreements through the process of interpretation.[138]

Moreover, scholars have demonstrated that the notion that courts apply consistent legal rules without regard to the parties to the underlying exchange is descriptively false. Courts have always regulated contracts

[136] *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (analyzing the distributional consequences of the creation and protection of property interests).

[137] *See, e.g.*, Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 6 (N.H. 1926) ("A contract is not a law, nor does it make law. 'It is the agreement plus the law that makes the ordinary contract an enforceable obligation.'" (citing Stanley v. Kimball, 118 A. 636, 637 (N.H. 1922)); David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 997 (2021) (noting that courts have various methods of limiting the enforcement of contracts that create negative externalities).

[138] *See* Cohen, *supra* note 32, at 589. Scholars have continued to elaborate on this critique. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1017-22 (1985) (arguing that the act of interpretation does not occur in a vacuum, but invites judges to filter words and conduct through social context and their own experiences); *see also* Gregory Klass, Contract Exposition and Formalism 56 (Feb. 2017) (unpublished manuscript) (on file with the author) (arguing that it is impossible to interpret the meaning of language without referring to "patterns, conventions or defeasible rules of usage" of which the interpreter must be aware); *cf.* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 761 (1995) (noting that the repeated use of corporate contract terms increase their value by creating a network of judicial precedents to enhance the clarity of the terms). Many notable jurists and scholars have argued against the very possibility of plain meaning in contract law because of the inherent context dependency of language. *See, e.g.*, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968) ("Words . . . do not have absolute and constant referents . . . . The meaning of a particular word or groups of words varies with the verbal content and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges).").

based on the parties and transactions at issue.[139] In a meticulous review of cases from the 1880s — a time associated with the apex of freedom of contract[140] — Mark Pettit, Jr., found that courts routinely refused to enforce agreements in order to protect vulnerable parties (e.g., refusing to enforce one-sided terms imposed by utilities, insurance companies, and common carriers),[141] promote morality (e.g., refusing to enforce contracts made on Sundays, or concerning "sinful" behavior like gambling or prostitution),[142] protect the functioning of markets (e.g., refusing to enforce covenants not to compete),[143] and hold public officials to their duties (e.g., refusing to enforce bribes or agreements regarding bids on public contracts).[144]

In many of these cases, limitations flowed from the identity of the contracting parties. Restrictions on the contractual freedom of common carriers, for example, stemmed from their obligation to serve the public on equal and reasonable terms.[145] The limitation on privately owned and managed railways was justified by their "prime purpose," to "furnish the public suitable and convenient facilities for the transportation of freight and passengers."[146] Contracts in contemplation of sexual or cohabiting relationships were not enforced because of the interest in promoting healthy relationships between spouses.[147] Even scholars with formalist sympathies will admit that contract doctrine always imposed constraints on freedom of contract based on the identity of the parties or the nature of the transactions at issue.[148]

Relational contract theorists have also persuasively demonstrated that transactions cannot be divorced from their interpersonal context. Forces besides promise — such as social customs, habits, and hierarchies —

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[139] *See* HORWITZ, *supra* note 49, at 186-87 (commenting on the inconsistent treatment of partial performance between employment contracts and construction contracts).

[140] Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall*,*"* 79 B.U. L. REV. 263, 304 (1999).

[141] *See id.* at 312-16.

[142] *See id.* at 317-30.

[143] *See id.* at 330-38.

[144] *See id.* at 338-47.

[145] *See, e.g.*, Wells v. Or. Ry. & Nav. Co., 15 F. 561, 571 (D. Or. 1883) (noting the public's interest in access to delivery services provided over railways, and the resulting limitation on the right of the railways not to allow express companies to provide those services using the railways on the same terms as any other passenger).

[146] *Id.*

[147] *See* Pettit, *supra* note 140, at 325-30.

[148] *See* Epstein, *supra* note 52, at 30-31.

shape interactions.[149] Ongoing contractual relationships as well as ongoing markets for products and services shape expectations about the nature of any given exchange.[150] Moreover, few if any contracts can be distilled down to discrete, disembodied transactions.[151] As Ian Macneil has argued, "the very complexity of modern technology calls for processes and structures tying even the most specific and measured exchanges into ongoing relational patterns."[152] As an example, Macneil notes that "the difference between a poor and a very good white-collar worker may be neither measured nor measurable on either the pay or the output side."[153] The success of a transaction may depend on ongoing or future cooperation, coordination with additional parties, long-term planning, and specialization,[154] not to mention the hope of future business dealings not covered by any existing agreement. Contracts are therefore shaped by norms intended to preserve the relationship of the parties, such as the need to perform one's role (whether manager, salesperson, or husband) consistently, and the downplaying of conflict.[155]

Taken together, these critiques show that all contracts are inseparable from the relational context in which they are made and interpreted. The terms of the agreements and the meanings ascribed to them are shaped by the relationship of the parties and, if a dispute arises, the experiences of the judges. Numerous types of agreements are also subject to bundles of rules that respond to the nature of those agreements — another way that contract law is sensitive to context.

These critiques are consistent with — and prefigure — this Article's insight that status resides in contract. For instance, relational contract theorists have studied the social relations in which a particular transaction or set of transactions is embedded[156] although they have not focused on the study of similar transactions between similarly situated contracting

[149] *See* IAN MACNEIL, THE NEW SOCIAL CONTRACT 8-9 (1980).

[150] *Id.* at 8.

[151] *See* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 486-87 (arguing that even if it were possibly to identify a relatively discrete exchange, no products or services are actually created outside of a cooperative, or relational, context); *cf.* Eisenberg, *supra* note 50, at 812-21 (summarizing the attempts by scholars to define relational contracts in contrast to discrete ones, and showing that those efforts generally fail because of problems with line drawing).

[152] MACNEIL, *supra* note 149, at 22.

[153] *Id.* at 22-23.

[154] *See id.* at 24-34.

[155] *Id.* at 64-70.

[156] *See id.* at 10-20.

partners. Moreover, scholars have observed that the law tends to develop types of contracts that begin to be governed by a set of specific rules,[157] although these studies examine the functioning of these agreements more so than the relationship-based distributive patterns that result. The recognition of status in contract is therefore a natural extension of several existing lines of inquiry.

B. Inexorable Convergence

The previous Section showed that despite their traditional portrayal as oppositional concepts, status and contract inexorably move toward some middle ground. Here, I theorize why this is so.

The status/contract dichotomy is an example of a binary opposition, an organizational tool through which individuals and societies structure reality.[158] Concepts take on meaning in relation to their opposites.[159] Binaries such as male/female, individualism/altruism, market/home, public/private are pervasive in Western thought.[160] These binaries often take the form of hierarchies of thought: "A is the rule and B is the exception; A is the general case and B is the special case; . . . A is self-supporting and B is parasitic upon it; A is present and B is absent; A is immediately perceived and B is inferred; A is central and B is peripheral; A is true and B is false; A is natural and B is artificial."[161]

Post-structuralist philosophers have shown that binaries are inherently unstable because each pole's existence depends on the other.[162] One

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[157] *See, e.g.*, HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 75 (2017) (noting the development of classes of agreements regarding suretyship, insurance, etc.); Linzer, *supra* note 29, at 327-28 (similarly noting the development of special rules in some areas of contract law).

[158] *See* Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2519-21 (1992); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 465-74 (1987).

[159] Schanck, *supra* note 158, at 2521; *see also* Peter Elbow, *The Uses of Binary Thinking*, 13 J. ADVANCED COMPOSITION 51, 53 (1993); *cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1723 (1976) (defending the responsiveness of "opposed concepts" to "real issues in the real world").

[160] *See* Schanck, *supra* note 158, at 2525-27 (citing Jacques Derrida's view that binary oppositions are pervasive in Western thought, as well as Derrida's critique of those binaries as instantiating a hierarchy that privileges one pole over the other).

[161] J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 747 (1987).

[162] *See* JACQUES DERRIDA, OF GRAMMATOLOGY 144-45 (Gayatri Chakravorty Spivak trans., The Johns Hopkins University Press 1997) (1976) (arguing that binaries are

cannot take precedence over the other as neither is original or fundamental: "[e]ach is continually calling upon the other for its foundation, even as it is constantly differentiating itself from the other."[163] This statement is true of status and contract. Contract, as a tool to simultaneously create and limit the scope of the parties' relationship, displaces what otherwise might be governed by status: a set of rules governing the relationship between individuals that flows from the state.[164] Status, too, is a system of rules that creates and limits relational obligations. One might argue that contract originates in individual will, but contract is completely dependent upon the state for its enforcement.[165] Status, on the other hand, struggles to justify itself in the absence of consent, which explains what appears to be the inexorable turn toward contract in statuses like marriage and employment.[166]

Indeed, although they may appear to be opposites, status and contract are supplements in the Derridean sense:[167] "The supplement adds itself, it is a surplus, a plenitude enriching another plenitude . . . . But the supplement supplements . . . . It intervenes or insinuates itself *in-the-place-of*."[168] Neither status nor contract is complete in itself; neither can completely displace the other.

Once the door is opened to it, autonomy affects all aspects of status. Identities become subject to the parties' control. Obligations can be disaggregated and altered. And social control over the relationship is correspondingly diluted in favor of private ordering. Take marriage as an example. Even though the state always allowed individuals to choose whether to marry, it once tightly restricted divorce, heightening marriage's

inherently supplementary, one adding to and replacing the other); Balkin, *supra* note 161, at 747; *see also* Schanck, *supra* note 158, at 2527.

[163] Balkin, *supra* note 161, at 751.

[164] *See* Rosenfeld, *supra* note 12, at 810-12 (observing that contract is a tool to create obligations between parties while simultaneously limiting them).

[165] *See* Cohen, *supra* note 32, at 562.

[166] *See supra* notes 131–33 and accompanying text (describing suspicion of statuses based on immutable identities).

[167] Janet Halley has also made this observation, although her interpretation of the concept is very different than my own. *See* Halley, *Behind the Law of Marriage*, *supra* note 20, at 15 (invoking the concept of the Derridean supplement, but then saying that "the rules within [marriage and other family forms] can be torqued towards 'status' or towards 'contract'").

[168] DERRIDA, *supra* note 162, at 144-45; *see also* Balkin, *supra* note 161, at 758-59.

mandatory nature.[169] As divorce became more accessible, individuals gained a means to terminate the state's imposition of marital duties through exit. In the past half-century, states have also granted spouses significant leeway to customize the property consequences of the relationship through contract.[170] By allowing marital contracting, states transformed mandatory property rules into defaults and simultaneously unbundled property consequences from the package of marital rights and duties.

On the contract side, relational identity affects every feature of contract. Scholars have shown that the contract doctrine is sensitive to context: specific rules will arise based on the identity of the contracting parties. Although parties are by and large free to limit the scope of their exchange, courts still impose mandatory obligations and rely on interpretive rules that exist beyond the parties' control. These context-specific rules arise because, far from being agnostic about the social context in which the agreements arise, courts respond to relational dynamics.

Both status and contract are enriched by the other to the point that they must ultimately resist displacement. The binary understanding of status and contract is therefore untenable. It describes something that cannot exist in any meaningful sense.[171] Ultimately, the pure forms of status and contract are incompatible with the law's highest values — autonomy with status and social obligation with contract. Lurking under the labels of "status" and "contract" are merely different forms of legal regulation that determine the obligations that flow from human relationships. This regulation honors the individual choices and preferences of parties, but only to the extent that those exchanges are deemed socially valuable.

What the foregoing discussion shows is that status and contract are merely different and sometimes overlapping means through which the law regulates relationships. Contract doctrine bears the imprint of status; in some instances, status features so infuse contractual relationships that contract and status become indistinguishable.

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[169] Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613, 1644-50 (2001). The inability to divorce also affected the right to marry a different person because of bigamy prohibitions.

[170] *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1458-61.

[171] *But see* Dagan & Scott, *supra* note 19, at 7 (arguing that status and contract are not mere caricatures, but conceding the basic point that they are outliers).

III. CONTRACT AS STATUS

The previous Part demonstrated the theoretical instability of the status/contract dichotomy. Although status and contract continue to be depicted as oppositional forms of legal governance, status exists in areas of the law nominally governed by contract, and vice versa. This Part gives substance to theory. It demonstrates, through a progression of examples, that what is often thought of as "contract" in fact operates to a significant degree as status. In the process, it illustrates how the law actively balances values like autonomy, vulnerability, morality, economic efficiency, and the like.[172]

A. Cohabitation Agreements

For much of the twentieth century, nonmarital relationships were prohibited by criminal laws designed to preserve marriage as the exclusive intimate status.[173] The law has undergone a sea change, however, and contracts between unmarried partners regarding their earnings, property, or expenses are now enforceable in a vast majority of states.[174] Ushering in this rule, the California Supreme Court reasoned that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[175] Dismissing moral disapproval of cohabiting relationships more broadly in the face of "radically" changing social mores,[176] the court allowed that contracts for the exchange of sexual services would still be prohibited.[177] Agreements respecting property made in the shadow of an intimate relationship, however, would not be unenforceable merely because of the nature of the cohabiting relationship.[178]

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[172] One quick caveat is in order. In this Part, I characterize contract doctrine governing three different contractual relationship types. The court decisions in these areas apply state contract law, meaning that there may be differences from state to state. In representing the doctrine, I attempt to depict the dominant trends without claiming universality or homogeneity.

[173] *See* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 121-25 (2011).

[174] *See* Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 96-97 (2021).

[175] Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976).

[176] *Id.* at 122.

[177] *Id.* at 116.

[178] *See id.*

The majority rule thus allows unmarried partners to enter into agreements basically on the same terms as parties at arm's length. Or so it seems. In actuality, cohabitants are subject to a package of mandatory rules that dictate the nature of their relationship — the hallmarks of status.

First, the law limits the acceptable subject matter of agreements that would otherwise be the subject of a bargain between two adults. The parties likely cannot make enforceable agreements regarding the amount or types of sexual activity.[179] They cannot make enforceable agreements regarding the consequences of their sexual activity, namely, regarding parental rights or support obligations.[180] And they likely cannot enter into enforceable agreements regarding the exchange of nonmonetary services, like washing the dishes in exchange for taking out the trash.[181] Thus, contract law places much of what comprises the relationship on a daily basis out of reach.

Adding to these limitations, Albertina Antognini has recently revealed that despite what courts represent about enforceability, they practically refuse to recognize agreements exchanging domestic services for property.[182] Courts rely on several different rationales. They might be unable or unwilling to disentangle the domestic services, such as housecleaning, homemaking, and hosting, from the sexual nature of the parties' relationship.[183] They might see such performances as instances of love and affection rather than one half of an exchange, concluding that the performances are gratuitous or that the alleged agreement lacks

[179] *See* Favrot v. Barnes, 332 So. 2d 873 (La. Ct. App. 1976), *rev'd on other grounds*, 330 So. 2d 843 (La. 1976). In *Favrot*, a husband alleged that his wife breached an agreement "to limit sexual intercourse to about once a week," claiming that she "sought coitus thrice daily." *Id.* at 876. Unsurprisingly, the court held that such a term was unenforceable because it conflicted with a spouse's marital obligations. *Id.* Although cohabitants, unlike spouses, are not technically under such obligations, it is hard to imagine a court ordering such an agreement to be enforced.

[180] *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 108 (2017) (arguing for greater control over the decision whether to co-parent); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 196-97 (2013).

[181] *See* Silbaugh, *supra* note 134, at 78 (noting that agreements regarding nonmonetary terms between spouses are typically not enforced); *see also* Jan Hoffman, *Just Call It a Pre-Prenup*, N.Y. TIMES (May 25, 2012), http://www.nytimes.com/2012/05/27/fashion/the-background-on-relationship-agreements.html [https://perma.cc/CD5Z-ZLX3] (reporting the view that agreements governing how the couple should spend their time or allocate domestic tasks would be unenforceable).

[182] *See* Antognini, *supra* note 174, at 102-18.

[183] *See id.* at 106-09 (citing, *inter alia*, Smith v. Carr, No. CV 12-3251 (JCGx), 2012 WL 3962904, at *4 (C.D. Cal. Sept. 10, 2012)).

consideration.[184] Or they might consider the promises exchanged — domestic services for financial support, broadly stated — too vague to enforce.[185]

An example of such a case is *Williams v. Ormsby*.[186] Amber Williams and Frederick Ormsby lived together in a house acquired by Frederick from Amber after he paid off the remaining mortgage on the property.[187] A few months later, the couple had a disagreement and separated. As part of the separation, they entered into an agreement governing their respective rights in the house, including their rights to reside at the property until sold, responsibility for property taxes and utilities, maintenance costs, and how to divide the proceeds in an eventual sale.[188] After they executed the agreement, they attempted to reconcile.[189] As part of the reconciliation process, they entered a second agreement declaring the first agreement void and stating that "'for valuable consideration,' the parties agree that although titled solely in Frederick's name, the house [would] jointly [be] owned by Frederick and Amber."[190] The court held that the second agreement failed for lack of consideration.[191] It noted that Amber did not pay or share any assets in exchange for the second agreement and that any transfer of rights was consideration for the first agreement.[192] Thus, the only consideration for the second agreement "was her resumption of a romantic relationship."[193] The dissenting justice objected that material differences between the two contracts affected the parties' rights under the first agreement, amounting to consideration for the second contract.[194] The court refused to ignore the relational context in which the second agreement arose, however, declaring that "[f]or more

[184] *See id.* at 110-17.

[185] *See id.* at 117-18. I have argued that contracts between cohabitants would stand a better chance of enforcement if the parties would allege discrete and specific commitments rather than broad promises of support. *See* Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1073 (2018).

[186] 966 N.E.2d 255 (Ohio 2012).

[187] *Id.* at 257. Williams had obtained the house in a divorce settlement, but she executed a quitclaim deed in Ormsby's favor after Ormsby paid the remaining mortgage balance of $310,000. *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 260.

[191] *Id.* at 264-65.

[192] *Id.* at 264.

[193] *Id.*

[194] *Id.* at 267 (Pfeifer, J., concurring in part and dissenting in part).

than a century, love and affection alone have not been recognized as consideration for a contract."[195]

Another recent study of the case law governing claims between nonmarital partners by Courtney Joslin echoes Antognini's findings. Looking specifically at claims by long-term nonmarital partners to divide property accrued during the relationship based on a theory of implied partnership, Joslin finds, unsurprisingly, that most courts reject such claims and apply more stringent standards of proof than between people in implied business partnerships.[196]

Despite these limitations, both Antognini and Joslin observe that courts more readily enforce agreements between nonmarital partners when they concern specific, market-like transactions. Antognini, for example, points to the existence of several dozen cases allowing partners to allege contracts that involve exchanges "pertaining exclusively to finances contributed, or property owned, during the relationship."[197] Joslin similarly shows that courts will enforce "claims based on 'business-related' exchanges," sometimes even within the context of an agreement that combines such exchanges with claims based on domestic services that are rejected.[198]

Carney v. Hansell[199] provides a good example. Joann Carney lived with Christopher Hansell for over 16 years.[200] During that time, Joann maintained the couple's household and was the primary caregiver for their son.[201] She also helped Christopher with the towing business that Christopher started around the time the couple first met.[202] Joann handled the paperwork, answered the phones, reached out to customers, and did the billing.[203] During this time, Christopher went to great lengths to ensure that Joann would not be recognized by the law as his business partner and told her "point blank" that the business would never be in her name.[204]

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[195] *Id.* at 264.

[196] *See* Courtney G. Joslin, *Nonmarriage: The Double-Bind*, 90 GEO. WASH. L. REV. 571, 602-03 (2022) (citing and discussing Martin v. Coleman, 19 S.W.3d 757 (W. Va. 2000)).

[197] Antognini, *supra* note 174, at 127 n.365 (listing cases).

[198] Joslin, *supra* note 196, at 608 (also noting that courts that establish rules critical of contracts between cohabitants will still go out of their way to enforce business-like transactions).

[199] 831 A.2d 128 (N.J. Super. Ct. 2003).

[200] *Id.* at 130.

[201] *Id.* at 131.

[202] *Id.*

[203] *Id.* at 131-32.

[204] *Id.* at 132.

Christopher also repeatedly reminded Joann that he would not share any property with her if the relationship ended.[205] The court rejected Joann's argument that the couple had formed a joint venture or implied partnership, but concluded that Joann could recover the value of her services to the towing business under a theory of unjust enrichment."[206] Distinguishing Joann's role as "homemaker, mother and housemate," for which she had already "received the benefit of the bargain" by having her living expenses covered while the couple cohabited, the court held that her services to the towing company clearly had a market value that she was unjustly denied.[207]

Carney and *Williams* show that contract doctrine renders people in nonmarital relationships something other than spouses or legal strangers.[208] Public policy considerations narrow the range of permissible subjects that the parties can attempt to secure through legally enforceable agreements. Rules regarding consideration and mutual assent also function to limit the subject matter of permissible exchange.

As a reminder, people in arm's length relationships are allowed to enter into binding agreements regarding many of these performances.[209] One can enter into contracts with babysitters, housecleaners, drivers, personal shoppers, event planners, and gestational surrogates. Night nurses, for example, work overnight shifts for parents of newborns, changing, swaddling, soothing, and feeding babies so that parents can get rest.[210] It is an intimate job: night nurses see parents when they are emotionally vulnerable, provide advice, coaching, and support, and get to know the

[205] *See id.* (noting that one of his "pet sayings" was, "'If you think you have it so bad, get out, leave,' and 'Don't let the door hit you in the ass'").

[206] *Id.* at 134-36.

[207] *Id.* at 135-36.

[208] *See Carney*, 831 A.2d 128; *Williams v. Ormsby*, 966 N.E.2d 255 (Ohio 2012); Joslin, *supra* note 196, at 607-09 (arguing that cohabitants are left worse off).

[209] *See* Matsumura, *supra* note 7, at 714.

[210] *See, e.g.*, Terra Becks, *Mom Talk: On Hiring a Night Nurse*, MOTHER (Nov. 8, 2018), https://www.mothermag.com/hiring-a-night-nurse/ [https://perma.cc/64G7-52YE]; Ariel Ramchandani, *How Night Nannies Fit into an Affluent Urban Life*, ATLANTIC (Jan. 10, 2020), https://www.theatlantic.com/family/archive/2020/01/night-nannies-nurses/604696/ [https://perma.cc/NC7U-PG5K].

family's social circle.[211] Yet the nurses still command wages and negotiate contracts months in advance of the baby's birth.[212]

The fact that people in cohabiting relationships cannot enter into binding agreements regarding these same performances places the partner who performs these services at a disadvantage to the partner who does not. Making domestic labor market-inalienable transfers the value of those services from one party to the other, enabling the party with greater property to claim services from the other party for free.[213]

To summarize, courts have adopted a special set of rules that apply when people share their lives within the context of an intimate, nonmarital relationship; rules that bear all the hallmarks of status. The relevant identity on which the rules turn is cohabitation.[214] People who live together in an intimate relationship may make agreements regarding joint financial projects but must provide domestic services gratuitously.[215] Much of the daily business of their relationship is rendered invisible, and economically

[211] *See* Becks, *supra* note 210 (reporting the following first-hand account: "I don't remember a lot about those first few months of hazy newborn life . . . but I do remember that first night and the relief that washed over me when Olive [the nanny] arrived promptly at 10pm"); Ramchandani, *supra* note 210.

[212] *See, e.g.*, Becks, *supra* note 210 (noting that night nurses charge between $35-50 per hour, work four to six nights per week, and are often booked months in advance); Ramchandani, *supra* note 210 (reporting that parents often hire night nannies for long stretches of time at the cost of several thousand dollars per month).

[213] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1114 (1972) (noting the importance of where the law places initial entitlements to any distribution scheme, and that "[p]rohibiting the sale of babies makes poorer those who can cheaply produce babies and richer those who through some nonmarket device get free an 'unwanted' baby"). Several scholars have criticized the adverse distributional impacts on women and poorer people of rules preventing the enforcement of agreements between intimates regarding domestic services. *See, e.g.*, Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 517 (2005) (accusing such rules of "maintaining and increasing distributive inequality"); Silbaugh, *supra* note 134, at 123, 134 (noting, within the context of contracts between spouses, that enforcing monetary terms and refusing to enforce agreements based on domestic services systematically penalizes those who perform the services, usually women).

[214] Disputes between intimate partners regarding property typically arise when they have been living together, at least for a period of time. This does not mean that courts would not expand the status rules to people in intimate relationships who do not live together, or people who live together without engaging in intimacy. The precise boundaries of the status have not yet been tested.

[215] As Antognini and Joslin have noted, these rules are reminiscent of coverture, except coverture also imposed support obligations on husbands and protected the wife in the event of divorce or her husband's death.

vulnerable partners should expect exploitation, at least from a financial perspective. Indeed, because the partners have not married, their legal relations are defined in opposition to marriage's partnership model.[216]

Moreover, contract law takes away rights that the parties would otherwise have if transacting at arm's length. Contract rules governing public policy limitations, definiteness, and consideration work together to limit the types of legal duties the parties owe each other.[217] These rules are part of a package that the partners have no power to alter.[218] And the rules have developed in the shadow of marriage, first, as a means to promote marriage, and, more recently, as a reaction to the deep commitments that are assumed to accompany marriage.[219] What emerges, as I have previously argued, is a status of "singleness," produced in no small part through contract doctrine.[220]

B. Construction Contractor-Subcontractor Agreements

Despite the fact that nonmarital relationships fall outside of the legal category of marriage, the law governing the contractual relationship between unmarried cohabitants may seem different from other types of

[216] *Cf.* Cook v. Cook, 691 P.2d 664, 668 (Ariz. 1984) ("The law will not give to non-marital cohabiting parties the benefit of community property rights, since these rights derive solely from the marital relationship.").

[217] These rules work together with extra-contractual rules such as those governing private insurance, domestic violence, and tort, to make partners responsible for non-financial injuries they cause each other while shielding third parties from liability for relational harms. For example, insurers will sometimes deny coverage to nonmarital partners of the insured based on exclusions for family members. *See* Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Nonmarital Relationships*, 51 ARIZ. STATE L.J. 1325, 1344-45 (2019). Courts also rely on nonmarital relationships to impose more stringent criminal charges for domestic violence. *See id.* at 1346-51. Most states, however, limit liability for tortfeasors who injure nonmarital partners, denying partners standing to sue for torts like wrongful death or emotional distress. *See id.* at 1351-54; *see also* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 947-48, 951-53 (2001). Such tort rules also leave partners to fend for themselves in the face of injury.

[218] Courts often seem to assume that partners *do* have the power to change these rules by marrying, and that it is effectively a choice to remain unmarried. *See, e.g.*, Holguin v. Flores, 18 Cal. Rptr. 3d 749, 756 (Ct. App. 2004) (holding that lack of tort standing could have been overcome by choosing to wed). However, the dynamics by which a couple decides to marry are complicated by the fact that marriage is not a unilateral decision.

[219] *See* Carbone & Cahn, *supra* note 180, at 68-69, 93 (arguing that courts increasingly recognize that parties that do not marry want to avoid the legal commitments that accompany marriage).

[220] Matsumura, *supra* note 7, at 714.

contractual relationships because they involve intimacy.[221] Yet, contract doctrine operates in similar ways even where the parties are in what one might call a market relationship. The law governing construction contracts between general contractors and subcontractors shows that even arm's length relationships are regulated through a bundle of mandatory and default rules designed to address vulnerabilities that arise during the course of the contractual relationship. In short, they create a contractor-subcontractor status.

Few construction projects are completed by a single contractor. Because of the costs associated with hiring and exploiting the capacity of the large number and variety of skilled workers necessary to complete any given project, contracting firms usually lack the capacity and expertise to complete a project in-house.[222] General contractors farm out a vast majority — from 70 to 90 percent — of construction work to subcontractors like plumbers, electricians, and other specialists.[223] These relationships are contractual: owners will enter into a contract with the general contractor, which will then enter into contracts with subcontractors.

They are also subject to several complicated relational dynamics. For one thing, it can be difficult for the parties to evaluate and monitor each other's performances given the uniqueness of each construction project, the fact that production is tailored to the needs of those unique projects, and that the tasks require a high amount of experimentation and intuition.[224] The uniqueness of most projects — due to the specific nature of the site, type of work proposed, or specific expertise of the contractors — gives each party a form of monopoly power, whether over financial

[221] Indeed, Antognini associates the contractual law of nonmarriage with the concept of "status" precisely because it so closely invokes the set of duties and disabilities associated with coverture. *See* Antognini, *supra* note 174, at 138.

[222] *See* Serdar Kale & David Arditi, *General Contractors' Relationships with Subcontractors: A Strategic Asset*, 19 CONSTR. MGMT. & ECON. 541, 543 (2001) (noting the costs associated with maintaining a large organization to perform the entire construction process due to changing demand, seasonality, and other factors).

[223] *See* David Arditi & Ranon Chotibhongs, *Issues in Subcontracting Practice*, 131 J. CONSTR. ENG'G & MGMT. 866, 866 (2005); Emmanuel Manu, Nii Ankrah, Ezekiel Chinyio & David Proverbs, *Trust Influencing Factors in Main Contractor and Subcontractor Relationships During Projects*, 33 INT'L J. PROJECT MGMT. 1495, 1496 (2015).

[224] *See* Kale & Arditi, *supra* note 222, at 543-44; Manu et al., *supra* note 223, at 1497 (noting that highly idiosyncratic transactions depend on relationally derived safeguards, and that highly technical tasks will leave general contractors reliant on the expertise of the subcontractors).

resources,[225] expertise,[226] access to plans or the construction site, or the ability to delay construction.[227] Concerns about opportunistic behavior threaten to undermine the efficiency of the parties' performance.[228] The trust built between the parties becomes essential to address difficulties that arise during the construction process.[229]

Unsurprisingly, contract doctrine has developed several rules specific to general contractors and subcontractors to address their interdependency and strengthen their relationship. To be clear, courts have not held that the very nature of the parties' relationship should give rise to a heightened duty of good faith and fair dealing.[230] And most of the following rules extend general contract principles (i.e., principles that would apply in other contexts) rather than starting from scratch.[231] Yet, courts have adapted these general principles to the context of relationships between contractors and subcontractors, shaped by the facts of thousands of legal disputes that have arisen between those two types of parties.[232]

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[225] *See, e.g.*, Arditi & Chotibhongs, *supra* note 223, at 868-69 (analyzing the impact of the timing of payments); Manu et al., *supra* note 223, at 1497, 1502 (noting that late payments to subcontractors pass down risks to parties that may be illiquid or otherwise unable to bear those risks).

[226] *See, e.g.*, Manu et al., supra note 223, at 1497 (noting the potential of substandard work by subcontractors and the problem such work creates for the general contractors).

[227] *See, e.g.*, *id.* ("[S]ubcontractors can also be faced with unlimited liabilities in the event of project delays as there is often no pre-ascertained liquidated damage proportionate to the level of risk they pose.").

[228] *See* Kale & Arditi, *supra* note 222, at 541; Manu et al., *supra* note 223, at 1495 ("[D]ifficulties in securing optimum benefits from supply chain integration and collaboration efforts in the UK construction sector have mostly been attributed to deficiencies in trust.").

[229] Kale & Arditi, *supra* note 222, at 547 (noting the importance of positive relationships to the ability to address coordination problems that commonly arise during construction projects).

[230] *See, e.g.*, Electro Assocs. v. Harrop Constr. Co., 908 S.W.2d 21, 23 (Tex. Ct. App. 1995) (noting that a "special relationship," as between an insurer and insured, would give rise to a freestanding claim for breach of the duty of good faith, but refusing to extend the doctrine to contracts between contractors and subcontractors).

[231] *See, e.g.*, Harrington v. McCarthy, 420 P.2d 790, 793 (Idaho 1966) (noting that the rule developed for construction contracts recognizing waiver of contractual provisions requiring changes to be approved in writing is consistent with the rule allowing for modification of written contracts by parol agreement).

[232] The special rules governing construction contracts in general are so numerous that the authors of a leading construction law treatise claim the following:

> Rarely can even well-drafted construction contracts be said to be "complete" in all respects, because contracts often fail to include provisions covering all conceivable contingencies and routinely are construed to include judicially

One set of rules has developed to address the owner's failure to make timely payments. When the general contractor pays the subcontractor for work that it has done, it puts itself in the position of the owner's creditor. If it refuses to pay the subcontractor until it is paid, it transfers the risk to the subcontractor. That the subcontractor lacks a contractual relationship with the owner magnifies its vulnerability in the latter scenario.

States have adopted several overlapping rules to protect subcontractors. In the absence of a specific provision to the contrary, the contractor must pay the subcontractor within a reasonable period of time.[233] Contractors frequently attempt to insert clauses into their agreements conditioning payment to subcontractors on the receipt of payments from the owner.[234] These clauses, however, are strictly construed against the contractors.[235] For instance, a clause stating that "no part of [the contract amount] shall be due until five (5) days after Owner shall have paid Contractor therefor," was held *not* to transfer risk of the owner's nonpayment due to insolvency, where the clause did not specifically "refer to the possible insolvency of the owner."[236] This interpretive rule exemplifies what Ian Ayres calls an "impeding altering rule," a rule designed to deter a disfavored behavior by making it more costly to opt out.[237] Although the rule is in some ways a manifestation of contract doctrine's "general disfavor in the law towards

> implied terms arising from the contract's "context" interpreted in accordance with special trade customs and practices. [. . .] Such contextual "gloss" arises out of (1) judicial *interpretation* of contract terms in accordance with accepted rules of interpretation and industry customs and usages, and (2) judicial imposition as a matter of law of *implied* rights and obligations, conditions and warranties that assure fairness within the context of the parties' expressly contracted responsibilities.

1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 3:2.

[233] *See* Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co., 303 F.2d 655, 660-61 (6th Cir. 1962) (noting the subcontractor's "expectation and intention of being paid" by the general contractor, and that "the insolvency of the owner will not defeat the claim of the subcontractor against the general contractor"); Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd., 965 N.E.2d 1007, 1012 (Ohio Ct. App. 2011) ("Under the custom in the construction industry, the risk of an owner's nonpayment rests on the general contractor.").

[234] *See* 3 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 8:47.

[235] *See Evans, Mechwart, Hambleton & Tilton, Inc.*, 965 N.E.2d at 1013 (noting that the contract language must "unequivocally evince an intent to . . . shift the risk of the owner's nonpayment"); Giammetta Assoc's, Inc. v. J.J. White, Inc., 573 F. Supp. 112, 113 (E.D. Pa. 1983) (noting that such clauses are "strictly construed" against the drafter).

[236] *Thos. J. Dyer Co.*, 303 F.2d at 656, 661.

[237] Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084-86 (2012) (noting that such rules create quasi-mandatory rules).

conditions precedent,"[238] it is shaped by the expectations of the parties within the context of the contractor-subcontractor relationship: general contractors "expect to be paid in full by the owner for the labor and material [they] put into the project"; thus, the "solvency of the owner is a credit risk necessarily incurred by the general contractor"; and "[t]his expectation and intention of being paid is even more pronounced in the case of a subcontractor whose contract is with the general contractor, not with the owner."[239]

In some cases, contractors will succeed in including "pay if paid" clauses that unequivocally transfer the risk of nonpayment to subcontractors. That is not the end of the road for the subcontractor, however. A handful of states have enacted statutes preventing the enforcement of such clauses.[240] And a minority of state courts have held that those clauses are simply unenforceable on public policy grounds.[241]

Where those clauses are enforceable, courts will craft other vehicles for the subcontractor to obtain payment for its work, such as through an unjust enrichment claim against the owner. In *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, for example, a subcontractor and sub-subcontractor performed several hundred thousand dollars of extra steel fabrication and erection work that the owner refused to pay for on the ground that it was covered by the original contract.[242] When the owner and general contractor refused to pay for the work, the subcontractors sued for breach of contract and unjust enrichment. The court noted that the subcontractor and general contractor had signed a valid pay-if-paid clause, which transferred the risk of the owner's nonpayment from to the

[238] *Evans, Mechwart, Hambleton & Tilton, Inc.*, 965 N.E.2d at 1013.

[239] *Thos. J. Dyer Co.*, 303 F.2d at 660-61.

[240] *See, e.g.*, 770 ILL. COMP. STAT. ANN. 60/21 (West 2022) ("Any provision . . . when payment from a contractor to a subcontractor or supplier is conditioned upon receipt of the payment from any other party . . . shall not be a defense by the party responsible for payment."); N.C. GEN. STAT. § 22C-2 (2022) ("Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor . . . and an agreement to the contrary is unenforceable."); WIS. STAT. § 779.135 (2022) (Making void "[p]rovisions making a payment to a prime contractor . . . a condition precedent to a prime contractor's payment to a subcontractor").

[241] *See, e.g.*, Wm. R. Clarke Corp. v. Safeco Ins. Co., 938 P.2d 372, 374 (Cal. 1997) (concluding that pay if paid clauses would amount to an end run around a subcontractor's right to assert a mechanic's lien); West-Fair Elec. v. Aetna Cas. & Sur. Co., 661 N.E.2d 967, 971 (N.Y. 1995) (same).

[242] Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC, 540 S.W.3d 770, 774-75 (Ky. 2017).

subcontractor.[243] The lack of a contractual remedy against the general contractor and lack of contractual privity with the owner, however, meant that the subcontractors lacked an adequate remedy at law.[244] Thus, the subcontractors could bring an equitable claim against the owner for the benefit of the work performed.[245]

The sum total of these overlapping rules regarding payment makes it virtually impossible for either the owner or general contractor to avoid payment to subcontractors for work they perform, regardless of the steps that those parties take to contractually insulate themselves from liability.[246]

Another body of special rules pertains to the way courts handle extra work that arises during the project. It is not uncommon for plans to change and sometimes expand as a project unfolds simply because of the inability to completely predict every possible contingency at the outset.[247] Applying traditional common law rules, the parties would only be able to change the terms of the contract through bilateral negotiation.[248] The bargaining process would give an unscrupulous contractor significant leverage to hold up the project for more time or money and could delay the construction process even under the best circumstances.[249]

In response to this situation, for a century, parties have inserted "change clauses" in their construction agreements: "provisions allowing the owner the flexibility unilaterally to make or approve additive or deductive changes in the work."[250] These clauses typically allow the owner to issue written change orders and obligate the owners to adjust the contractors' payment and schedule accordingly.[251]

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[243] *See id.* at 785-86.

[244] *See id.* at 778-79.

[245] *See id.* at 782.

[246] Interestingly, New York, which refuses to enforce pay-if-paid provisions, also refuses to allow unjust enrichment claims to proceed under similar circumstances. *See id.* at 780 (citing A&V 425 LLC Contracting Co. v. RFD 55th St. LLC, 830 N.Y.S.2d 637 (Sup. Ct. 2007)). This fact bolsters the notion that what matters to the courts is that subcontractors will ultimately have an avenue to avoid exploitation under these types of circumstances.

[247] *See* 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:1 ("Certainty of change is a constant of the construction process."); Kale & Arditi, *supra* note 222, at 543 (noting that "every contingency that may arise during the course of the transaction cannot be foreseen and specified in a written contract in advance").

[248] 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:1.

[249] *See id.*

[250] *Id.* § 4:2.

[251] *See id.*

These provisions originate with the parties[252] but are in operation mostly molded by the courts. For instance, when work "is so drastically altered that the contractor effectively performs duties that are materially different from those for which the contractor originally bargained," the additional work is taken outside of the contract and its change clause.[253] This cardinal change doctrine presents a factual question, based on the "quality, character, or nature" of the project, to which courts must apply their own judgment and experience.[254]

Additionally, contract provisions that require express written authorization of the scope of work are in practice overridden by oral directions to perform additional work or the general course of conduct of the parties.[255] Even anti-waiver clauses — clauses that attempt to prevent the waiver of written order requirements unless expressly in writing — can be waived by actions inconsistent with enforcement of the provision.[256]

Courts have also superimposed doctrines to facilitate work even in the face of potential disputes. The doctrine of constructive change, for instance, allows contractors and subcontractors to continue to perform work in the face of a dispute over whether such work falls within the scope of the contract or requires a change order by promising to supply an *ex*

[252] Parties choose to insert such clauses in agreements, but usually do so as a result of industry practice. The federal government began to insert change clauses in all of its contracts after World War I, and the American Institute of Architects adopted its own change clause into its form contract shortly thereafter. *See id.* § 4:3. Considering this longstanding and widespread use, the inclusion of a change clause is something less than a freely negotiated term.

[253] J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc., 89 P.3d 1009, 1020 (Nev. 2004).

[254] *See id.* at 1020-21 (noting that the inquiry requires a qualitative judgment based on all the facts and circumstances). This doctrine applies to work performed by subcontractors for general contractors. *See generally id.*

[255] Peter Scalamandre & Sons, Inc. v. FC 80 Dekalb Assocs., Inc., 12 N.Y.S.3d 133, 136 (App. Div. 2015); *see also* 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:39 ("[T]he judiciary has paid only lip service to contract requirements that change orders must be authorized in writing . . . .").

[256] *See* 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:40 (citing, *inter alia*, Cathedral Grp., Ltd. v. Gen. Constr. Mgmt. Co., No. E054971, 2013 WL 6451177 (Cal. Ct. App. Dec. 9, 2013)).

post adjustment of the contract.[257] This doctrine effectively circumvents contrary procedures laid out in the written agreement.[258]

These examples are but the tip of the iceberg of rules and doctrines that shape the contractor-subcontractor relationship.[259] In this context, the status turns on the identity of parties as contractors and subcontractors. While preserving some contractual freedom (initial selection of contracting partners, scope of work and level of compensation, construction schedules) many aspects of the relationships are placed outside of the parties' control, either through mandatory rules or sticky defaults. The special rules respond to the needs of the relationship, specifically the desire to prevent parties from exploiting the vulnerabilities of the other at different stages in the construction process. Much like marriage and employment, the contractor-subcontractor relationship, once formed, consists of many mandatory duties derived from generalized expectations about how contracting partners should behave in furtherance of a presumed goal.

C. Agreements Between Online Service Providers and Users

Despite being in what most people would consider a market relationship, general contractors and subcontractors still engage in an endeavor that involves working together to a shared goal. This Section shows that aspects of status appear in contractual relationships between parties that have an even greater claim to being strangers.

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[257] *See* HDR Env't, Operations & Constr., Inc. v. Deason, No. 15cv1402, 2018 WL 2287333, at *1-2 (S.D. Cal. May 16, 2018); 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:25.

[258] The justification for this outcome is the equitable principle that "what should have been done will be done." 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:25.

[259] Other doctrines include substantial performance, which arose as an alternative to strict compliance under construction contracts, *see* Ambassador Dev. Corp. v. Valdez, 791 S.W.2d 612, 615-17 (Tex. Ct. App. 1990) (explaining the doctrine of substantial performance and applying it to claims by a subcontractor against a general contractor), rules regarding non-interference with subcontractor performance, *see* McClain v. Kimbrough Constr. Co., Inc., 806 S.W.2d 194, 198 (Tenn. Ct. App. 1990), and rules governing delay, *see* 1A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 3:26.

Most American adults engage in online shopping,[260] interact on social networks,[261] and use smartphone applications.[262] Their interactions with the firms that provide these services and products — whom I will collectively refer to as online service providers — are governed by standardized agreements.

Firms have long sought to impose favorable terms on users through what are known as contracts of adhesion, terms offered by one party on a take-it-or-leave-it basis.[263] Agreements between online service providers and users typically involve the imposition of terms to which one nominally consents by indicating agreement on a website or application, commonly known as "clickwrap."

Clickwrap agreements are formed when users of a website or electronic device are presented with set of digitally mediated terms and are asked to indicate their agreement to those terms by clicking on a box or button saying "I agree" or some substantial equivalent.[264] These agreements

[260] *See* NPR/MARIST POLL: ADULTS AND ONLINE SHOPPERS 2 (2018), https://maristpoll.marist.edu/wp-content/misc/usapolls/us180423_NPR/NPR_Marist%20Poll_Tables%20of%20Questions_May%202018.pdf [https://perma.cc/P68R-BRUA] (finding that 69% of adults report that they shop online).

[261] *See* John Gramlich, *10 Facts About Americans and Facebook*, PEW RSCH. CTR. (June 1, 2021), https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/ [https://perma.cc/BBA5-AB2M] (reporting that 81% of adults use YouTube and 69% use Facebook).

[262] *See Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/ [https://perma.cc/TYV8-NCQJ] (reporting that 85% of American adults own a smartphone).

[263] *See* RADIN, *supra* note 4, at 18 (characterizing forms with standard terms, such as those presented when renting an automobile, purchasing a house, joining a gym, or clicking "I agree" on a website as "boilerplate"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177-80 (1983) (identifying the core features of contracts of adhesion). I use the terms "contract" and "agreement" in this context notwithstanding the fact that the transactions falling under those labels arguably do not exhibit all the elements of a traditional contract. *See* RADIN, *supra* note 4, at 21-22; *see also* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006) ("[M]ore and more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract even if nobody agrees to it.").

[264] KIM, *supra* note 4, at 3-4. This definition encompasses what Uri Benoliel and Shmuel Becher have denominated sign-in-wrap agreements: agreements presented to website users that require users to manifest their agreement to terms and conditions, often presented via hyperlink, before they can proceed to use the website. *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2264-65 (2019) (defining clickwrap agreements more narrowly to refer to terms that are presented to the user in full before the user indicates her assent). There are several basic variations in these

resemble other business-to-consumer contracts of adhesion in that sophisticated firms draft the terms and offer them to comparatively inexperienced consumers who "reliably, predictably, and completely fail to read the terms" before agreeing to them.[265] Yet, they differ in that most bricks-and-mortar vendors do not offer customers a list of terms and require the customer to sign before proceeding (renting a car or hotel room are a couple of obvious exceptions).[266] As Nancy Kim has observed, websites replace pieces of paper with hyperlinks and agents with pop-up windows, making it much easier to secure a customer's nominal consent before proceeding.[267]

Firms purportedly use clickwrap agreements to allocate contract risks, making transactions more predictable while simultaneously placing the risks on the parties that can most efficiently bear them, ultimately reducing the costs of goods or services.[268] Common terms include those governing use of the firm's services, such as "an intellectual property clause, which informs users that the website data is protected under copyright law; . . . a prohibited use clause, which outlines prohibited actions, such as data scraping; . . . a modification clause, which allows the website to modify the terms of the contract; . . . a limitation of liability clause, which stipulates the degree of legal exposure for the website in actions arising from website usage," and those governing dispute resolution, such as "an arbitration clause, which mandates arbitration of disputes concerning the user's rights and duties."[269]

types of agreements, *see, e.g.*, Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 398-99 (E.D.N.Y. 2015) (noting that some clickwrap agreements do not present terms in full, and require consumers to scroll down to see the complete terms, calling such agreements "scrollwrap" and arguing that they are different from clickwrap), but the differences are not significant for my purposes. Some online service providers have attempted to impose terms on users based solely on their use of their websites and not an accompanying manifestation of assent, what courts and scholars have called "browsewrap." *See* Lemley, *supra* note 263, at 460. I focus on clickwrap because firms have largely moved away from browsewrap. *See* Thomas Haley, *Illusory Privacy*, 98 IND. L.J. 75, 82 (2022) (noting the fading popularity of browsewrap).

[265] *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 432-33 (2002).

[266] *See* Lemley, *supra* note 263, at 466 (noting that few retailers attempt to impose terms on customers altering the parties' obligations).

[267] *See* KIM, *supra* note 4, at 58-59.

[268] Hillman & Rachlinski, *supra* note 265, at 438-39 (noting also that standardized terms obviate bargaining costs, and, through repeated examination by courts, may result in a clearer set of obligations that are more likely to be upheld in the future).

[269] Benoliel & Becher, *supra* note 264, at 2266.

Additionally, the collection of personalized data is central to the business models of online service providers, which use the data to sell advertising,[270] fine-tune their services,[271] better market their products,[272] or sell the data to third parties.[273] Privacy policies govern the online service provider's collection and use of user data.[274] Many, if not most, online service providers use clickwrap agreements to enforce privacy policies, leading some scholars to claim that data privacy is largely contractual.[275]

The fact that these terms are offered on a take-it-or-leave-it basis, and that individuals are unlikely to read or understand them, provides firms the opportunity to exploit their informational advantage and transfer risks to users in ways that might not be particularly efficient.[276] Firms may, for example, know about a technological feature that makes their products susceptible to hacking, yet shift the risk of hacking to users rather than

[270] *See* Spandana Singh, *Special Delivery: How Internet Platforms Use Artificial Intelligence to Target and Deliver Ads*, NEW AM. FOUND., https://www.newamerica.org/oti/reports/special-delivery/ (last updated Feb. 18, 2020) [https://perma.cc/3Z3V-KPQK] (noting that a majority of Google's and Facebook's revenue comes from the sale of online advertisements that are targeted based on user data).

[271] *See, e.g.*, *AirBnb.org Privacy Policy*, AIRBNB, https://www.airbnb.org/legal/privacy#:~:text=We%20may%20use%2C%20store%2C%20and,and%20improve%20our%20advertising%20and (last updated Dec. 7, 2020) [https://perma.cc/7HX2-CC8G] (noting that information is used to "provide, understand, improve, and develop the Airbnb.org programs"); *Uber Privacy Notice*, UBER, https://www.uber.com/legal/en/document/?name=privacy-notice&country=united-states&lang=en (last updated Apr. 5, 2023) [https://perma.cc/5BBG-TEVA] (noting the various uses of data in Section III.B., including providing and improving Uber's services).

[272] *See, e.g.*, Max Freedman, *How Businesses Are Collecting Data (and What They're Doing with It)*, BUS. NEWS DAILY, https://www.businessnewsdaily.com/10625-businesses-collecting-data.html (last updated Feb. 21, 2023) [https://perma.cc/U6W6-X58K] (providing an overview of the types of data collected online and how it is used).

[273] *See* FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, at i-vi (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf [https://perma.cc/G5Z4-MGER] (providing an overview of the market for the collection and sale of personal information).

[274] *See* Haley, *supra* note 264, at 83.

[275] *See* Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662, 663 (2019) ("To a large extent, the relationship between the business and the user with regards to information privacy is contractual."); Haley, *supra* note 264, at 83-85 (noting that some firms incorporate privacy policies into their terms of service by reference while other firms' privacy policies have been enforced contractually even without express incorporation).

[276] *See* Hillman & Rachlinski, *supra* note 265, at 440. Professor Nancy Kim has commented that the fact that individuals do not read these terms also amounts to a drafting advantage.

addressing those features even though they might not be particularly costly to fix.[277] Or they might insert a forum selection and choice of law clause that moves disputes to a particular state because they are aware that the state's substantive law does not provide for consumer class actions.[278]

Courts have had to balance these benefits and drawbacks and have tipped the scales in favor of online service providers.[279] In practice, this means that purchasers of bundled television and internet services,[280] internet advertising,[281] computer software,[282] and online brokerage services,[283] as well as online shoppers,[284] social media users,[285] rideshare users,[286] and more,[287] often find themselves forced to arbitrate disputes,[288]

[277] *See id.*

[278] RADIN, *supra* note 4, at 30 (using the example of Virginia).

[279] *See* Lemley, *supra* note 263, at 459 (claiming, as of 2006, that "[e]very court to consider the issue has found 'clickwrap' licenses . . . enforceable"); *see also* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (noting that courts have "routinely upheld" clickwrap agreements). *But see* Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart, & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REGULATION 447, 462 (2019) (finding, in a 2019 study of clickwrap cases, that courts in six out of 56 cases did not enforce clickwrap agreements).

[280] *See, e.g.*, Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248 (10th Cir. 2012) (finding clickwrap agreement for television and telephone services containing a forum selection clause valid and enforceable under Oklahoma law).

[281] *See, e.g.*, Feldman v. Google, Inc., 513 F. Supp. 2d 229 (E.D. Pa. 2007) (finding clickwrap agreement for advertising services containing a forum selection clause valid and enforceable under federal law).

[282] *See, e.g.*, Recursion Software, Inc. v. Interactive Intel., Inc., 425 F. Supp. 2d 756 (N.D. Tex. 2006) (finding that clickwrap agreement for software licensing was enforceable).

[283] *See, e.g.*, Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc., 464 F. Supp. 3d 634 (S.D.N.Y. 2020) (enforcing Terms and Conditions presented in clickwrap at the time the customer created her brokerage accounts).

[284] *See, e.g.*, Anderson v. Amazon.com, Inc., 490 F. Supp. 3d 1265 (M.D. Tenn. 2020) (upholding clickwrap terms of use provided when the sale of goods was consummated).

[285] *See, e.g.*, Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (finding that clickwrap agreement for online sale of goods containing an arbitration agreement was enforceable).

[286] *See, e.g.*, Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454 (S.D.N.Y. 2017) (finding clickwrap agreement containing an arbitration clause valid and enforceable).

[287] *See, e.g.*, Jallali v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc., 908 N.E.2d 1168, 1171 (Ind. Ct. App. 2009) (involving a dispute over access to questions and answers on certification examinations required for individuals to become osteopathic physicians).

[288] *See, e.g.*, Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248, 1261 (10th Cir. 2012) (affirming the district court's dismissal pursuant to an arbitration clause); *Applebaum*, 263 F. Supp. 3d at 470 (same).

litigate them in distant forums,[289] or foreclosed from complaining about objectionable practices[290] and restricted in their use of the products at issue.[291]

The terms and the way in which they are presented to consumers evolve over time and vary from firm to firm,[292] meaning that a decision in any given case will be confined to its facts. That said, the conclusion by a court that a particular set of terms, offered in a particular manner, is enforceable, can impact thousands, if not millions of individuals who have assented to those terms in the same way.[293] Everyone who has signed up for and used the Airbnb website after 2009, for example, has indicated his agreement to hyperlinked terms and conditions as a condition of using the website, and has further been periodically exposed to updated terms, to which he must affirmatively agree before proceeding to use the website.[294] Moreover, online service providers constantly refine their contracting practices to present terms to consumers in a manner that will be enforced by courts.[295]

The contractual relationship between firms that conduct business online and users with whom they transact, like the other contexts investigated in this Part, bears features of status. Unlike in the cohabitation and contractor-subcontractor contexts, the rules that govern this relationship are less visible. We do not see, for instance, an unusually robust application of the unconscionability doctrine or the active use of public

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[289] *See, e.g.*, *Fteja*, 841 F. Supp. 2d at 839-40 (transferring a case from New York to California in part based on a forum selection clause in a clickwrap agreement); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007) (upholding a forum selection clause).

[290] *See, e.g.*, Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc., 464 F. Supp. 3d 634, 643-44 (S.D.N.Y. 2020) (holding that complaints about brokerage account practices were foreclosed by a provision in the clickwrap agreement).

[291] *See, e.g.*, Recursion Software, Inc. v. Interactive Intel., Inc., 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (holding that a clickwrap license agreement could govern the defendant's use of software).

[292] *See, e.g.*, *Applebaum*, 263 F. Supp. 3d at 457-63 (involving two sets of terms imposed by the ridesharing company Lyft within a period of seven months).

[293] *Cf. In re* Facebook Biometric Info. Priv. Litig., 185 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016) (noting, in a case challenging Facebook's "tag suggestions" program, that Facebook has over one billion users worldwide).

[294] *See* Plazza v. Airbnb, Inc., 289 F. Supp. 3d 537, 542-46 (S.D.N.Y. 2018); *see also* Haley, *supra* note 264, at 100-01 (noting, in its study of 122 website privacy policies, that virtually every one provided for unilateral modification).

[295] *See, e.g.*, *Applebaum*, 263 F. Supp. 3d at 457-63 (describing the process by which users signed up for accounts with Lyft and by which Lyft's terms of service were updated).

policy to limit common terms.[296] Yet, there are notable patterns of rules that operate to fix the parties' rights in this context.

The most glaring special rules are those governing mutual assent. Courts go out of their way to declare that the principles governing clickwrap agreements are "the principles of contract."[297] "It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit *with knowledge of the terms of the offer*, the taking constitutes an acceptance of the terms."[298] Knowledge need not be actual; constructive knowledge is enough.[299] Unlike actual knowledge, constructive knowledge is a legal conclusion based on a court's determination of what a reasonable person would know under the circumstances.[300] It depends on a judicial inference.[301]

The act of inferring consent in the clickwrap context involves the collective suspension of disbelief. Scholars have shown that users do not actually read the terms presented by websites. An influential study of the

[296] To be clear, customers still have room to argue that they did not have inquiry notice about a term because it was hidden or unclear, *see Applebaum*, 263 F. Supp. 3d at 466, although such arguments are hard to sustain. Additionally, a few courts have suggested that the manifestation of assent may not save terms that are substantively invalid, for instance because they are unconscionable or against public policy. *See, e.g.*, Disney Enters., Inc. v. Redbox Automated Retail, LLC, 336 F. Supp. 3d 1146, 1153 (C.D. Cal. 2018) (noting the role of courts in assessing whether terms are unconscionable). There are a few examples of cases in which courts have refused to enforce terms within clickwrap agreements. *See, e.g.*, Cristales v. Scion Grp. LLC, 478 F. Supp. 3d 845, 856 (D. Ariz. 2020) (holding that a term waiving liability under the Telephone Consumer Protection Act was unconscionable); Edwards v. Vemma Nutrition, No. CV-17-02133, 2019 WL 5684192, at *2 (D. Ariz. Nov. 1, 2019) (holding that a unilateral modification clause that allowed the defendant to modify its arbitration provision was substantively unconscionable and unenforceable); Corwin v. NYC Bike Share, LLC, 238 F. Supp. 3d 475, 499 (S.D.N.Y. 2017) (holding that while private defendants could benefit from a contractual release of liability for a biking accident allegedly caused by hazardous road conditions, public policy prevented the municipal defendant from disclaiming liability); Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213, 1227-28 (D. Haw. 2010) (noting that under Texas law a person cannot waive gross negligence and fraud claims through a clickwrap agreement).

[297] *See* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004); *see also* Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175 (9th Cir. 2014) (noting that one fundamental principle of contract is "mutual manifestation of assent"); Kauders v. Uber Techs., Inc., 159 N.E.3d 1033, 1048 (Mass. 2021) ("The touchscreens of internet contract law must reflect the touchstones of regular contract law.").

[298] *Register.com*, 356 F.3d at 403 (emphasis added).

[299] *See Nguyen*, 763 F.3d at 1176.

[300] *Knowledge*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[301] *See* Kai Peng v. Uber Techs., Inc., 237 F. Supp. 3d 36, 47 (E.D.N.Y. 2017) (noting that courts infer acceptance under the circumstances).

browsing behavior of 48,154 monthly users of 90 online software companies found that only one or two of every thousand retail shoppers viewed the end-user license agreements that governed use of the software.[302] Another study of browsing behavior found that users were only 0.36% more likely to access terms presented as clickwrap than if the terms were just made available on the website.[303] Even judges unaware of these studies realize that most people do not actually read the terms before clicking "I agree." A vast majority of them do not read the terms themselves; Chief Justice John Roberts famously admitted as much.[304] Nor would it be wise or efficient to take the time to read much less understand the terms every time one engages in a transaction online.[305]

To hold, under the circumstances, that users have constructive knowledge of the terms and conditions, and to enforce those terms on that basis, is therefore tantamount to imposing those terms irrespective of the user's actual knowledge.[306] To put it differently, the legal rule when it comes to clickwrap is that user knowledge or intent *does not matter*.[307]

Another glaring departure from classical contract doctrine is in the area of modification. Traditionally, "[w]here a party has the power of acceptance, [the] act of acceptance triggers contract formation.

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[302] Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUDS. 1, 1, 3 (2014).

[303] *See* Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts*," 78 U. CHI. L. REV. 165, 168 (2011) (analyzing the browsing habits of 47,399 households to the websites of 18 software companies and comparing access to end-user license agreements between websites using clickwrap and browsewrap).

[304] *See* Benoliel & Becher, *supra* note 264, at 2257.

[305] *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 552 (2014) (dismissing the notion that consumers should read all of the terms and conditions as "normatively unattractive and descriptively unattainable"); *see also* Hillman & Rachlinski, *supra* note 265, at 446.

[306] Nancy Kim argues that under current doctrine, "a reasonably prudent offeree is one that is uniquely diligent, overly cautious, highly knowledgeable about wrap contract doctrine, exceptional at multitasking, infinitely patient, and likely does not exist in the real world." KIM, *supra* note 4, at 111. My analysis ends up in the same place but ignores all the fiction: courts allow firms engaging in online transactions to impose their terms upon consumers through clickwrap.

[307] To be sure, the same conclusion could apply to adhesion contracts more broadly. The differences here are twofold: first, empirical research has demonstrated the absence of actual consent in this context, *see supra* notes 302–03; second, the types of terms being imposed, especially governing the use of personal information, differ dramatically from the brick-and-mortar adhesion context, *see* text accompanying notes 270–75. Thus, the practical impact of this rule in this context is very different.

Modifications and addendums . . . require new consideration."[308] This explains the special rule in the construction context, discussed above, facilitating the use of change orders to avoid holding up construction.[309] In the clickwrap context, most terms of service include modification clauses that allow firms to change the terms of service, often with some notice, usually provided through more clickwrap.[310] These types of modifications occur routinely and are often upheld.[311] Thus, the average user's rights with respect to a firm can change over time without any semblance of renegotiation or change of behavior on the user's part.[312]

The status of clickwrap consumer contracts provides that firms can impose terms on the user at the outset of the relationship or at any time irrespective of their actual intent.[313] Individuals who transact with firms will resolve their disputes in the firm's forum of choice — often not a court — without the ability to aggregate claims. Their use of the websites or platforms will be heavily regulated pursuant to the terms set out by the firms, and that the firms will be able to change those terms unilaterally. The "market" for privacy terms, informed by online service providers'

[308] KIM, *supra* note 4, at 110. For a statement of the traditional rule, see, for example, Levine v. Blumenthal, 186 A. 457, 458 (N.J. 1936) ("It is elementary that the subsequent agreement, to impose the obligation of a contract, must rest upon a new and independent consideration."). The Restatement (Second) of Contracts relaxes this rule but still requires special justification for the modification, for example because it would be "fair and equitable in view of circumstances not anticipated by the parties when the contract was made." *See* RESTATEMENT (SECOND) OF CONTS. § 89(a) (AM. L. INST. 1981). The online service provider context bypasses these requirements.

[309] *See supra* notes 257–58 and accompanying text.

[310] *See* Benoliel & Becher, *supra* note 264, at 2265-66; Haley, *supra* note 264, at 114 (noting that in many instances, further notice of changes is not even required); *see, e.g.*, *Terms of Service*, GOOGLE, https://policies.google.com/terms?hl=en-US (effective Jan. 1, 2022) [https://perma.cc/64RQ-5PKX] ("We may update these terms . . . to reflect changes in our services or how we do business . . . [or] for legal, regulatory, or security reasons . . . .").

[311] *See, e.g.*, Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454, 457-63 (S.D.N.Y. 2017) (describing the process by which Lyft changed its terms).

[312] Writing about consumer contracts more broadly, David Horton has argued that unilateral modification may be the most oppressive aspect of these types of agreements from a consumer perspective. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 609, 649-51 (2010). Thomas Haley has suggested that the rapidly evolving nature of online business, from software updates to acquisitions and business failures, makes it very difficult for users to foresee exactly what their relationship with any given online service provider might be in the years to come. *See* Haley, *supra* note 264, at 105-06.

[313] As discussed in the text accompanying note 269 above, there are a few limits on the terms that firms can impose.

interpretations of previous regulatory and judicial activity,[314] will naturally coalesce around terms that maximize data collection, allowing online service providers to extract the maximum possible value from users.[315] The law invests firms with what Todd Rakoff has called "the power of the form"[316] and Shubha Ghosh has called "contractual authoritarianism"[317]: "freedom from legal restraint and an ability to control legal relationships across a market."[318]

Viewed in this way, the relationship of users to firms is not wholly dissimilar to the relationship of wives to husbands under coverture. Women theoretically could choose whether to marry, but upon marrying, were subjected to a set of rules subjecting them to their husbands' authority.[319] The husband alone had the power to dispose of the fruits of the family labor[320]; the wife could not enter into lawsuits on her own behalf, much less enter into a contract with him or sue him.[321] Of course, the idea that wives could not maintain lawsuits in their own names had nothing to do with their inherent attributes, but was a product of the law at

[314] *Cf.* Cathy Hwang & Matthew Jennejohn, *Contractual Depth*, 106 MINN. L. REV. 1267, 1292 (2022) (reporting an interview in which an in-house attorney responsible for the drafting of privacy policies described his primary audiences as the courts and the Federal Trade Commission, not users).

[315] *See* Haley, *supra* note 264, at 104, 119 (predicting that "all market participants will eventually converge around a standard set of practices" and arguing that firms "collect as much information about as many people as they possibly can"). This is not to say that all online service providers will regulate data collection and use in the exact same ways. Florencia Marotta-Wurgler has shown that firms in different markets — "adult, cloud computing, dating, gaming, news and reviews, social networks, and special-interest message boards" — adopt different types of privacy terms, although the terms tend to coalesce within these categories. Florencia Marotta-Wurgler, *Self-Regulation and Competition in Privacy Policies*, 45 J. LEGAL STUDS. S13, S15-S16 (2016). To the extent that Marotta-Wurgler's findings undermine the suggestion that users of online services writ large are regulated similarly, they support my argument that classes of relationships, for instance adult websites and their users, or social networks and their users, are governed by rules that apply to those relationship-types.

[316] Rakoff, *supra* note 263, at 1229.

[317] Ghosh, *supra* note 104, at 246.

[318] Rakoff, *supra* note 263, at 1229. Ghosh describes "contractual authoritarianism" similarly as "delegation of how to determine contractual terms to one side of a transaction." Ghosh, *supra* note 104, at 246 (arguing that the delegation is judicial policy designed to promote the stability and order of market transactions).

[319] *See* Maynard v. Hill, 125 U.S. 190, 211 (1888) ("[W]hen the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change.").

[320] *See* Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2151 (2019).

[321] *See* Hasday, *supra* note 14, at 845-46.

the time. So too is a rule allowing firms to unilaterally waive the consumer's right to a judicial forum, even if the term is ultimately authored by the more powerful party. A bundle of legal outcomes is triggered in this context on the basis of the parties' relationship; like cohabitants and contractors, users of online services experience contract law to a significant degree as a status.

IV. RELATIONSHIP TYPES AND PRIMARY VALUES

The preceding two Parts dismantle the status/contract dichotomy, theoretically and descriptively. This Part explores what is left in its place. The answer is a legal terrain in which people are empowered to customize some but not all of the legal obligations that stem from their relationships. Relationships that pose a greater risk of exploitation, a heightened possibility of societal harms, or tempting opportunities for social engineering, may be regulated more heavily than transactions that create lesser risks, or where unfettered exchange is thought to promote other goods like wealth maximization. The nature of the relationship between the parties shapes how the law performs this balancing. What remains, in short, is a law of relationship types.

Whether we care to admit it, contract law is a law of relationships viewed through a public lens. Courts and lawmakers are not only making judgments about a narrow range of statuses like marriage. They are constantly making value judgments about how to balance autonomy and dependency, exploitation and vulnerability, and how to distribute resources optimally. Abolishing the status/contract distinction therefore forces us to confront an important set of distributional questions.

Existing scholarship amply demonstrates that neutral-seeming rules can "embed structural imbalances and policy preferences,"[322] and that contract outcomes are influenced by the courts' perceptions about the parties or the

[322] Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO STATE L.J. 471, 484 (2022) (adroitly summarizing the key insights from critical legal theory). *See generally* Dalton, *supra* note 138 (demonstrating how various contract rules produce outcomes that substantively favor certain parties); *supra* notes 137–47 and accompanying text (surveying the historical use of contract doctrine to promote substantive outcomes).

public interest.[323] The insight that state power is omnipresent in contractual relations goes back a century to the legal realists.[324]

What this Article shows is that the distributional patterns of these decisions are evident *within the context of relationship types*.[325] As with recognized statuses such as marriage, patterns within relationship types are highly transparent if one bothers to look. The status lens reveals that in many contexts it will be difficult for parties to increase the likelihood of contract enforcement regardless of individual differences. For instance, a general contractor might have much more economic resources than a subcontractor, or much less: it could be a single office working with a national window provider, or a large outfit working with an individual craftsperson. Yet, the rules governing the relationship will be the same.

The law balances several different interests. Contracts often pit one party's autonomy interests against the other's interest in freedom from exploitation.[326] Duncan Kennedy has called this "the substantive dichotomy of individualism and altruism."[327] Kennedy argues that the content of private law rules is shaped by the tension between individualism, the belief that "I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others,"[328] and altruism, "the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others."[329] He notes that when the law imposes limits on the powerful to use physical violence, makes a tortfeasor liable for the injury he causes, or imposes upon contracting parties the duty to act in good faith, the law effectively curbs individualism by requiring the more powerful party to act at least

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[323] *See, e.g.*, Dalton, *supra* note 138, at 1021-22 (noting that contracts are enforced for reasons of justice); Hoffman & Hwang, *supra* note 137, at 984 (arguing that when contract enforcement creates negative externalities like risks to public health, courts have declined to enforce them).

[324] *See supra* notes 137–38 and accompanying text; *see also* Cohen, *supra* note 32, at 562 (noting, wryly, that if contracts served purely private interests, there would be little reason for the state to enforce them).

[325] When scholars have recognized the impact of relationships, they have tended to treat those relational contexts as exceptional or aberrant, rather than indicative of a consistent legal approach. *See, e.g.*, Aditi Bagchi, *At the Limits of Adjudication: Standard Terms in Consumer Contracts*, *in* COMPARATIVE CONTRACT LAW 439, 451 (Martin Hogg & Larry DiMatteo eds., 2016) (depicting the judicially-created set of rules regulating insurance contracts as a departure from the norm).

[326] *See* Matsumura, *supra* note 7, at 689-95.

[327] Kennedy, *supra* note 159, at 1713.

[328] *Id.*

[329] *Id.* at 1717.

somewhat altruistically.[330] Hanoch Dagan and Michael Heller identify a similar dynamic. They argue that courts will sometimes refuse to vindicate an individual party's autonomy interest in the name of promoting relational equality.[331]

Individualism often prevails. A court's refusal to recognize a cohabitant's claim that domestic services were exchanged for a share of the partner's property, for instance, elevates the property-holder's freedom to live with a person and benefit from the other's labor over the service provider's interest in receiving payment for services rendered.[332] The enforcement of an online service provider's contract requiring individual arbitration of a user's claim protects the firm's right to choose the form of dispute resolution, potentially leaving the user without the means to protect her rights. But courts also protect vulnerable parties. The invalidation of a non-compete agreement between a low-skilled worker and large firm, for example, limits the firm's contractual freedom to extract an agreement from the worker not to seek employment from a competing business, preserving the worker's marketability.[333]

Courts often consider values that go beyond Kennedy's dichotomy, however. Dagan and Heller argue that courts additionally consider "utility" and "community," which they associate with economic efficiency and the enhancement of social relationships and cooperation between parties.[334] Normative views about what parties to a relationship owe each other may also stem from traditional morality or from other instrumental needs like privatizing dependency.

The cohabitation context reveals how courts balance these various considerations. Some scholars have argued that women lack the leverage to convince men to marry them, leaving them vulnerable to exploitation by men who would sooner find a new partner than agree to share their

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330 *See id.* at 1719-21.

331 *See* DAGAN & HELLER, *supra* note 157, at 88.

332 *See* Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2002-04 (2018) (showing that autonomy in the nonmarital relationship context is often associated with freedom to choose one's financial obligations).

333 *See generally* Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1227-36 (2020) (summarizing the law regarding non-compete agreements and identifying a new trend in favor of protecting vulnerable workers).

334 *See* DAGAN & HELLER, *supra* note 157, at 79-88.

property.[335] They therefore suggest rules that promote altruism. Courts, however, have viewed women as sufficiently able to safeguard their own interests, in some cases viewing the decision to cohabit without marriage as a straightforward rejection of marital rights. Individualism prevails. Yet, broader moral concerns also come into play. In *Davis v. Davis*, for example, the trial court judge found that plaintiff "voluntarily assumed the unsanctioned role of mistress and failed to seek the law's protection through a marriage ceremony."[336] The state supreme court agreed: "When opportunity knocks, *one must answer its call*."[337] These statements clearly reflect a belief in the superiority of marriage: the court blames the plaintiff for the predicament in which she finds herself, one a "mistress" deserves.

The balancing of values considers third party interests. For instance, relationships provide opportunities to privatize dependency or redistribute entitlements. The determination that one intimate partner is financially responsible for another makes it less likely that the state — all of us — will have to provide that support.[338] Lawmakers have similarly added obligations to employment contracts, imposing responsibilities like unemployment benefits on employers that might otherwise fall to the state.[339]

Economic efficiency is also a paramount concern. In *ProCD, Inc. v. Zeidenberg*, for example, the court considered whether to allow a software company to limit the use of its product through a license contained within a shrinkwrapped package.[340] Although ostensibly decided based on an interpretation of the Uniform Commercial Code,[341] the court emphasized the role of the license in enabling the software company to engage in efficient price discrimination and, more broadly, the importance to the economy of allowing firms to impose detailed terms after a transaction has

[335] *See, e.g.*, Blumberg, *supra* note 16, at 1163 (noting that a woman's lack of economic power leaves her without leverage to persuade her male partner to marry her); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 972 (2019) (noting the influence of gender scripts requiring men to propose marriage).

[336] Davis v. Davis, 643 So. 2d 931, 934 (Miss. 1994).

[337] *Id.* at 936 (emphasis added).

[338] *See* Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 OHIO STATE L.J. 919, 966-67 (2016) (calling privatization of dependency family law's "guiding principle"); Stolzenberg, *supra* note 332, at 1992-96.

[339] *See* Matsumura, *supra* note 7, at 694.

[340] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449-50 (7th Cir. 1996).

[341] *See id.* at 1453-54. The court's interpretation of the UCC has received significant criticism. *See, e.g.*, Lemley, *supra* note 263, at 468-69 (analyzing and criticizing the *ProCD* opinion).

taken place.[342] The court noted that many transactions, including the purchase of airline and concert tickets, consumer electronics, and over-the-counter drugs, are consummated before the seller's detailed terms are presented to the buyer; to require those terms to be presented first would "lengthen queues and raise prices," drastically affecting prices and "return[ing] transactions to the horse and buggy age."[343] Underlying this decision is a theory of efficient markets for goods and services, and the role of contracts in allowing the seller to set the terms upon which transactions will unfold.[344]

This balancing of interests is pervasive and unavoidable. As the arbitration cases from Part I reveal, even decisions purporting to defer to the consent of the parties can mask judicial preferences for certain outcomes — like private dispute resolution favoring large firms — over others.[345] It can be difficult to reconcile the impacts of relationships with contract law, which is assumed to be generalized and universal. Yet, focusing on the *type* of relationship in which the parties find themselves provides strong clues about the rules that will govern them.

Admitting that relationships will result in starkly different applications of doctrine gives rise to the reality that there are innumerable contract doctrines: cohabitation law, contractor-subcontractor law, and clickwrap law, as discussed in Part III, but also airline-passenger law, credit card-consumer law, retailer-consumer law, fertility clinic-patient law, and the like.

This disintegration of unitary contract doctrine will no doubt prompt objections.[346] Yet the status-izing of contract cannot simply be wished

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[342] *See ProCD*, 86 F.3d at 1451.

[343] *Id.* at 1451-52.

[344] *See id.* at 1449-50, 1452 (assuming that without contracts to prevent arbitrage and respond to other contingencies, prices would rise sharply).

[345] *See supra* Part I.B.

[346] This splintering of general law has been referred to pejoratively in other contexts as "the law of the horse," referring to a narrow focus on particularized contexts that fails to "illuminate the entire law" and "is doomed to be shallow." Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207. A second aspect of the law of the horse is the arguably "unnecessary effort to bring together unrelated and duly self-contained bodies of law." J. B. Ruhl & James Salzman, *Climate Change Meets the Law of the Horse*, 62 DUKE L.J. 975, 977 n.1 (2013); *see also* Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 572 n.85 (2007) (describing "that famous non-book, *The Law of the Horse*, which consists of Chapter I, 'Contracting for a Horse'; Chapter II, 'Owning a Horse'; Chapter III, 'Torts by a Horse'; and Chapter IV, 'Litigating over a Horse'"). The "horse" — such as cyberlaw — sometimes becomes important enough to ground its own field, but the critique assumes that such attention to context requires special justification. *Compare* Easterbrook, *supra* note

away. Importantly, my claim is *not* that black letter contract doctrine is obsolete: it remains salient to all of the relational contexts identified in the previous paragraph. Courts have not completely discarded the framework of offer and acceptance and consideration as much as they have distended them in some contexts beyond recognition. It is equally true, however, that one cannot predict or understand outcomes in these cases without attending to the relationships of the parties and all they reveal. The impact of relationships on outcomes is not an exception to contract law but is central to it.

CONCLUSION

This Article challenges the conventional wisdom that status and contract are opposites. It also demonstrates that the status/contract dichotomy obscures the law's role in exercising normative judgments about relationship types, with the consequence that some parties' interests are favored over others.

Indeed, if the outcomes are dictated by relationship-specific rules crafted by state actors (mostly courts), then these disputes are more political than doctrinal. That is, they depend less on the facts of an individual case than they do the triumph of one interest group over another.[347] To put it another way, the fact that relationships are dictating outcomes should be small comfort to the parties in a weaker position, either because of their relative economic or social status. Predictably, in our examples from Part III, it is the cohabitant who provides domestic services who nearly always loses to the property-holder, and the individual user whose interests are subordinated to the online service provider.[348]

346, at 208 (arguing against cyberspace law because lawyers don't understand cyberspace's unique qualities, any knowledge would soon be outdated, and predictions about change would be worthless), *with* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (arguing that cyberlaw can in fact illuminate the entire law by shedding light on the way law constrains behavior). *See also* Ruhl & Salzman, *supra* note 346, at 983-84 (analyzing whether the law of climate change should be treated as a distinct field).

[347] *See* Britton-Purdy et al., *supra* note 2, at 1820 (calling for a renewed focus on power "as a central unit of analysis in law"); Matsumura, *supra* note 7, at 734-35 (arguing that distributional inequalities in employment and intimate relationships must be met with greater status consciousness).

[348] *See supra* Part III.A (cohabitants) and Part III.C (clickwrap). The balance of power between contractors and subcontractors is less clear and the rules governing that relationship do not clearly favor one party over the other.

The insights of this Article dovetail with the current movement among several influential scholars, including Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman, to reorient legal scholarship around the study of "Law and Political Economy" ("LPE"), which they define as the "relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences."[349] These scholars have called for the examination of three forms of power: "the *constitutive power* of law to create endowments that shape all voluntary bargains, the *market power* that legal structures enable, and the *political power* that may arise from differential endowments, market power, or ways that legal rules insulate economic power from democratic reordering."[350] The LPE movement seeks to reveal that "interpersonal relations" are not "presumptively equal market transactions that are further legitimated by being voluntary[,]" but "fundamentally power-laden bargains that require law and policy to be rendered more equal and fair."[351]

Status tends to reveal power because its rules mediate between parties to a relationship in ways that acknowledge authority and vulnerability.[352] The recognition of status in contract coincides with the efforts to identify power-laden bargains and study how they are constituted.[353] As Jedediah Britton-Purdy and his coauthors have observed, "[a]n approach that puts inequality at its center would need to ask how 'status' . . . persists and is reproduced in the age of contract."[354] This Article has ventured one answer to that question.

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[349] Britton-Purdy et al., *supra* note 2, at 1792; *see also* Angela P. Harris & James J. Varellas, III, *Introduction: Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1, 5 (2020) (noting that "[m]arkets and their constituents, including corporations, trade relations, contracts, property, and money itself are creatures of law and politics, crafted by the state").

[350] Britton-Purdy et al., *supra* note 2, at 1820.

[351] *Id.* at 1823.

[352] *See* Aditi Bagchi, *Exit, Choice, and Employee Loyalty*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 271, 272 (Paul B. Miller & Andrew S. Gold eds., 2016) (arguing that statuses like employment are justified when they protect vulnerable parties from domination); Aditi Bagchi, *The Employment Relationship as an Object of Employment Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 361, 372-74 (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020) (exploring the protective features of status).

[353] As discussed in Part IV, some of the rules that govern relationship types might spring from other considerations besides economic efficiency, such as morality.

[354] Britton-Purdy et al., *supra* note 2, at 1825.

The insights of this Article lead in several different directions. First, different contractual relationship types should be studied either to reveal the legal parameters that the law imposes on those relationships,[355] or to deepen our knowledge of the types of interests (like economic efficiency, morality, or equality) that the law considers. Second, the fact that courts are performing this balancing under the cover of "doctrine" calls for a comparative institutional analysis.[356] Under what circumstances do we trust courts to be able to identify and weigh competing interests, and under what circumstances is that task better left to legislatures, private review boards, or other actors?[357] Finally, Contracts professors need to reveal to students the underlying machinery that produces outcomes between the parties instead of using those very cases to depict only the unified and neutral doctrine that sometimes perpetuates injustice.[358] The point is not to bury general contract law,[359] but to awaken every incoming law student to the fact that relationships matter to outcomes. Only by naming power imbalances can reformers possibly hope to change them.

[355] Antognini's study of nonmarital contracts is an exceptional example. *See generally* Antognini, *supra* note 174; *see also* Kaiponanea T. Matsumura, *Restating the Law of Nonmarital Contracts*, JOTWELL (Apr. 27, 2021), https://family.jotwell.com/restating-the-law-of-nonmarital-contracts/ [https://perma.cc/2ER2-E8A2] (summarizing Antognini's contributions).

[356] I cannot hope to scratch the surface here, but I mean the type of sophisticated inquiries suggested by, for example, NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 3-4 & *passim* (2001) (noting the various institutions that administer law and rights, including "[c]ourts, political processes, markets, and informal communities"); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (documenting the development of institutional analysis from the legal process school to critical theory).

[357] Courts and legislatures are the most obvious actors, but not the only options. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) ("A variety of nongovernmental actors, including corporations, public interest organizations, private standard setting bodies, professional associations, and nonprofit groups, engage in 'public' decisionmaking in myriad ways."); Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 470 (2020) (noting that private firms are sometimes called on to regulate themselves).

[358] *See* Britton-Purdy et al., *supra* note 2, at 1821 (calling for professors to "redirect the pedagogical spirit of 'private law' courses toward examining inequality and encasement of private power in markets as an ongoing product of law").

[359] *Cf.* Dalton, *supra* note 138, at 1009 (noting that the author's deconstruction of contract doctrine was not an "attack" so much as an awakening to "debates about commitments and concerns central to our society").