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THE IMPORTANCE OF CONTRACT LAW: A HISTORICAL PERSPECTIVE

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I. INTRODUCTION: THE ROLE AND HISTORY OF CONTRACT LAW

It has been said that contract law is the most important contribution to jurisprudence made by the English common law.¹ Contract law as we know it (as part of the broad, comprehensive societal structure known today as “the law”) did not exist before the common law period.²

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1. *See infra* note 8. The English common law is also credited with establishing the law of trusts. *See, e.g.*, S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 205–10 (1969).

2. *See infra* note 8. Of note, there were some narrow antecedents, related moral standards, and very limited, essentially private standards of conduct governing a small range of merchant parties and transactions, such as the Law Merchant, which existed before the common law period. *See, e.g.*, JOHN EDWARD MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* 1 (7th ed. 2015) (“The concept [that promises ought to be kept] is at least as old as the covenant between Jehovah and the people of Israel. The failure of the people to adhere to the covenant was a sin, but it was also a breach of contract.”); *see*

Moreover, in some ways the development of contract law was a historical accident, largely owing its effectuation to a seemingly random series of events rather than a sudden or comprehensive social or political epiphany.³ In part because of this, and perhaps because any system of law based on party autonomy (such as freedom of contract) and derived from historical anomalies is likely to seem chaotic at times, contract law (along with its various branches—such as the Uniform Commercial Code) is subject to the criticism that it is overly complex and messy and should be rationalized (or replaced) by a more modern alternative structure designed by experts.⁴ And it is undoubtedly true that the human

also infra Part III. *See generally* WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (illustrating the role of merchant courts in the Venetian Empire). Thus, narrow commercial antecedents to contract law existed (like the Law Merchant and the medieval doctrine of covenant, which was derived from the Roman doctrine of *stipulatio* and required a formal “document under seal”). MILSOM, *supra* note 1, at 271–73; *see also infra* notes 10–11. These types of commercial antecedents were of limited use and restricted to narrow classes of parties or transactions. *See* MURRAY, *supra* at 1–6, 200–02. The general theory of contract law as we know it today (as further explained below) grew out of the medieval English writs of trespass and assumpsit, essentially beginning in the early seventeenth century with Lord Coke’s famous decision in *Slade’s Case*. *See generally* *Slade’s Case* (1602) 76 Eng. Rep. 1074; 4 Co. Rep. 92 b. This general theory of contract law was initiated in the seventeenth century and then fully developed and articulated as a separate body of law in the eighteenth century. *See, e.g.*, GRANT GILMORE, *THE DEATH OF CONTRACT* 8–14 (1974); MILSOM, *supra* note 1, at 244–317; *see also infra* Part III.

3. *See infra* Section III.B. This statement may seem to understate the contributions and importance of the philosophical foundations of contract law—as grounded in Magna Carta, the Scottish Enlightenment, and the intellectual role of common law judges (such as Lord Mansfield) who crafted and implemented so much of the law of contracts. *See, e.g.*, GILMORE, *supra* note 2, 18–19; IAIN MCDANIEL, *ADAM FERGUSON IN THE SCOTTISH ENLIGHTENMENT* (2013), *reviewed by* Jeffrey Collins, *A Skeptical Modern*, WALL ST. J., Mar. 25, 2013, at A15; MILSOM, *supra* note 1, at 271–315; JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 8–11 (5th ed. 2011); *see also infra* note 20. However, this in-text statement merely recognizes that the necessary opportunity for this effectuation depended on seemingly random and historically unique developments. *See* *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank*, 159 N.E. 173, 175 (N.Y. 1927) (noting the “symmetry of a [contracts] concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure”); *see also infra* Part III.

4. Who among us would not like to be called upon for this task? *See, e.g.*, Alvin C. Harrell, *Book Review and Commentary: James Steven Rogers, The End of Negotiable Instruments*, 66 CONSUMER FIN. L. Q. REP. 220, 264–65 (2012) (reviewing JAMES STEVEN ROGERS, *THE END OF NEGOTIABLE INSTRUMENTS* (2012)) (noting criticisms of common law legal mechanisms and calls for their replacement). A modern result of such criticism is the Bureau of Consumer Financial Protection, given barely restrained authority to correct perceived imbalances within the broad range of its jurisdiction over the laws governing consumer credit and related contract transactions. *See* Dodd–Frank Wall Street

and economic relationships spawned by party autonomy tend to be complex and sometimes messy, and this leads to complex legal issues, analyses, critiques, and rules of law.⁵

The resulting criticism gives rise to a seemingly irresistible desire to rewrite, limit, and restrict the law of contracts—with the result that party autonomy (especially for consumers) is emphatically in decline.⁶ The difficulty of understanding the relationships between issues—such as party autonomy, economic progress, and social justice—opens society to seemingly inevitable pressures that continually endanger the foundational “American creed of egalitarianism, liberty and individualism.”⁷ Yet, virtually all of human progress for the ordinary citizen (likely in the range of more than ninety percent⁸) has occurred

Reform and Consumer Protection Act of 2010, 12 U.S.C. §§ 5301–5641 (2012 & Supp. II 2014); John L. Ropiequet et al., *The Dodd-Frank Act Changes the Consumer Finance Landscape*, 64 CONSUMER FIN. L. Q. REP. 284 (2010); *infra* note 74. An ironic result is the trend toward carving out consumer law from the broader-based common law of contracts, leaving the latter to apply largely to commercial transactions, as in the days of the Law Merchant. *See, e.g., infra* notes 19, 54–55.

5. *See supra* note 4; *infra* Part IV.

6. *See supra* note 4; *see also* GILMORE, *supra* note 2, at 3–4, 95–103.

7. Charles Murray, *Trump’s America*, WALL ST. J., Feb. 13–14, 2016, at C1.

8. In the 2,300 years prior to Lord Mansfield’s effectuation of contract law in the late eighteenth century, living standards in London increased by a total of maybe 100%. The harshness of ordinary daily life during this earlier period of human history is almost unimaginable from our modern perspective. Then, rather suddenly (in historical terms)—upon the implementation of contract law—it all changed. In the roughly 220 years since, living standards in England (as measured by per capita gross domestic product) have improved by roughly 4,000% (i.e., forty times more in 220 years than in all of previously recorded English history). *See, e.g., Harrell, supra* note 4, at 221–22; Matthew Schoenfeld, Opinion, *Air Jordan and the 1%*, WALL ST. J., July 11, 2012, at A11. This cannot be surprising, given that contracts are the means by which human needs and desires are satisfied. *See, e.g., MURRAY, supra* note 2, at 1 n.1; THE RHETORIC OF ARISTOTLE 64 (John Edwin Sandys ed., Richard Claverhouse Jebb trans., 1909) [hereinafter ARISTOTLE] (“[I]f contracts are invalidated, the intercourse of men is abolished.”). Yet, before the time of Lords Coke and Mansfield (roughly the seventeenth and eighteenth centuries), ordinary contracts between private citizens were not widely recognized or enforced in the King’s courts. *See, e.g., MURRAY, supra* note 3; *infra* Part III.

This is the meaning of the famous observation that “[t]he movement of the progressive societies has hitherto been a movement *from status to contract*.” MURRAY, *supra* note 2, at 2 (quoting HENRY SUMNER MAINE, ANCIENT LAW 141 (1905)) (recognizing the importance of the movement from serfdom to party autonomy in common law England). It is quite striking how quickly, even in modern times, the basic functioning of society can be impaired when these lessons are ignored. *See, e.g., Anatoly Kurmanav & Maolis Castro, Venezuela’s ‘Savage Suffering,’ WALL ST. J., Feb. 13–14, 2016, at A1* (explaining how a resulting economic “crisis has turned ordinary life into an

since the effectuation of contract law, arguably as a direct result of the creed of party autonomy that contract law permits.⁹ Although we mostly

ordeal for nearly everyone”).

9. See *supra* note 8. Albert Einstein reportedly said that the most powerful force in all of human history is compound interest. See ALLYSON LEWIS, *THE MILLION DOLLAR CAR AND \$250,000 PIZZA* 21 (2000). Einstein may or may not have said that, but it makes the point that human events are as often influenced by commercial and social developments as by more dramatic scientific discoveries. For example, others might say that mankind’s greatest invention is double-entry bookkeeping because it enabled the development of large-scale enterprises essential to the Industrial Revolution. See, e.g., JANE GLEESON-WHITE, *DOUBLE ENTRY* (Norton, 1st Am. ed. 2012) (2011), reviewed by Edward Chancellor, *The Bookkeeper of Venice*, WALL ST. J., Nov. 8, 2012, at A19 (As noted by Chancellor: “[T]he invention of double-entry bookkeeping, which originated in Italy more than six centuries ago, is one of the great achievements of Western civilization. Without this . . . , it is scarcely possible to conceive of our economic system.”). No doubt these factors are important, as even recognized in popular films. One example is the closing scene in the BBC film rendition of Sir Walter Scott’s *Ivanhoe*, where Cedric of Rotherwood (Ivanhoe’s father) inquires of the banker, Isaac of York: “You understand the ways of accounting, do you not?” Following an interlude, Isaac replies by explaining the rudiments of double-entry bookkeeping: “Remember, two lists. One for comings in, the other for goings out.” At this point, Cedric’s recently freed serf and jester, Wamba, replies: “I’ll do it,” seemingly evidencing an intent to embark on a new career in accountancy. Cedric responds gratefully: “My home is yours, Isaac of York”; to which Isaac retorts: “It soon will be, if you don’t mind your accounts.” SIR WALTER SCOTT’S *IVANHOE* (BBC 1997). The setting was England in 1194, some twenty-one years before Magna Carta, and while Sir Walter Scott sometimes departed from historical accuracy for dramatic effect, this reference to the role of accountancy in the early common law period reflects its importance in the shift from feudalism. See generally Gillen D’arcy Wood, *Introduction to WALTER SCOTT, IVANHOE* xv, xxv–xxvi (Barnes & Noble Classics 2005) (1819) (“Scott certainly plays fast and loose with historical detail. . . . But this is not to say we should not take the historical lessons of *Ivanhoe* seriously.”). “Scott de-emphasizes his hero in *Ivanhoe* in order to bring into clearer focus his true subject: the transformation of medieval Saxon society as expressed in popular life, through its living participants.” *Id.* at xxvi–xxvii. Moreover, *Ivanhoe* (and all of its film versions) and some of Scott’s other literary works, such as *Rob Roy* (and its film renditions), also reflect the importance of contractual arrangements that ultimately would find their way into the common law during the times of Lords Coke and Mansfield (including negotiable instruments and the like). While the importance of compound interest and modern accountancy should not be underestimated, your author believes that most observers, even including Einstein, have missed the more direct and important role of the law of contracts.

That includes, of course, the law of credit contracts: “If we [are] asked—Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer—The man who first discovered that a Debt is a Saleable Commodity.” 1 HENRY DUNNING MACLEOD, *THE PRINCIPLES OF ECONOMICAL PHILOSOPHY* 481 (2d ed. 1879); see also JOSEPH M. PERILLO, *CONTRACTS* 640 (7th ed. 2014). Quite probably, that honor belongs to Lord Mansfield, who (if not the first discoverer of this principle) did more than anyone else to bring it to fruition. See, e.g., NORMAN S. POSER, *LORD MANSFIELD: JUSTICE IN THE AGE OF REASON* 220–37

take it all for granted, the results are almost miraculous from a historical perspective. Having recently passed the 800th anniversary of Magna Carta, arguably (as noted here) a cornerstone for all that followed, it is appropriate for the legal profession to also contemplate the central role played by the profession, the common law, and its most innovative component: the law of contracts.

II. THE ROMAN AND VENETIAN PERIODS

Civilization (in the sense of a formal societal structure governing human relations on a broad scale) came to much of Europe when the Roman Empire replaced feuding ethnic tribes across much of the area (ultimately including Britain). While the Roman Empire brought a semblance of peace (and, at least for awhile, the semblance of law and a Greek-style republic for Roman citizens¹⁰), thereby allowing increased commerce and prosperity (at least for some, though admittedly at a high price for others), its benefits were limited by a notable lack of legal protection for party autonomy.¹¹

Aside from the obvious point that slavery was widespread, even “free” Roman citizens had very limited opportunities to conduct enforceable private transactions beyond a face-to-face barter or cash

(2013). Lord “Mansfield’s most important and lasting contribution to the law came in his decisions affecting commerce.” *Id.* at 243. He “may be truly said to be the founder of the commercial law of [Britain]”—and one might add, the United States. *Id.* (quoting Justice Francis Buller). Clearly, “[c]ommerce is based largely on contract.” *Id.* at 229. And, in turn, commerce is the life blood of economic progress and modern society. *See, e.g.*, Frederick W. Smith, Opinion, *How Trade Made America Great*, WALL ST. J., Mar. 26–27, 2016, at A9.

10. Roman law, culminating in the Justinian Code, arguably represented a high point in the development of jurisprudence to that time, not equaled on the European continent until its renewed reception in the Renaissance period some ten centuries later. As Milsom observed: “Twice only have the customs of European peoples been worked up into intellectual systems. [First, t]he Roman system has served two separate civilisations[: the Roman Empire and European civil law since the Reception]. [Second, t]he common law . . . has developed without a break from its beginnings in a society utterly different from any of them.” MILSOM, *supra* note 1, at ix.

Of course, the roots of a modern legal system go back far beyond Roman law, the latter being, in a sense, a conduit for ideals formalized at least as early as third-century Greece. *See, e.g., infra* note 86.

11. The Roman procedure known as *stipulatio* has some resemblance to contract law, but it was limited by formal requirements and substantive uncertainties; as a result, it was inadequate as a substitute or direct antecedent for the law of contracts. *See, e.g.*, MURRAY, *supra* note 3, at 5 n.18; HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 76–77 (1951).

exchange.¹² This meant that significant economic transactions were limited to a small class of wealthy, professional merchants whose credibility and reputations (i.e., “my word is my bond”) were essential in a commercial world that operated largely without law and carefully passed from generation to generation.¹³

When the Roman Empire collapsed, merchant families sought refuge in isolated Italian city-states, notably Venice (where unusual topography and sea currents offered protection from the ravages and banditry of barbarians in the post-Roman period).¹⁴ While the roughly thousand-year period between the collapse of Roman authority in the West and the common law period is widely (and appropriately) known as the “Middle Ages” or the “Dark Ages,” this was also the age of the Venetian Empire—a time when the Venetian city-state became the heart of a commercial (and ultimately military) empire remarkably similar in concept (though at a more rudimentary level of technology) to the subsequent British one.¹⁵ While most of Europe festered in medieval serfdom, the merchant society in Venice largely prospered and lived in freedom.

Venice was not only protected by nature; it also lay at the heart of important international trade routes. The merchants of Venice preserved and enforced the ancient principles governing commercial transactions that were essential to this international trade; in consequence, they prospered,¹⁶ even as most of the rest of Europe did not.¹⁷ These merchants, and the Venetian society they created, ultimately succumbed to the dangers of an oppressive government and the diminished importance of their trade routes as international trade expanded elsewhere (partly as a result of the spread of Venetian mercantile law to

12. See *supra* note 11.

13. See, e.g., Maria Fusaro, *Cooperating Mercantile Networks in the Early Modern Mediterranean*, 65 *ECON. HIST. REV.* 701, 703 (2012) (“[I]n London [merchant circles], . . . it appears that family connections were extremely advantageous for membership.”). In the absence of contract law, this is probably inevitable, as has been true throughout history. But compare the conventional wisdom to the contrary, as stated by Gilmore, *supra* note 2, at 95.

14. See, e.g., Fusaro, *supra* note 13, at 705–06; see also Richard A. Gabriel, *Why Rome Fell*, *MIL. HIST.*, Sept. 2013, at 36, 39–44 (describing the chaos and invasions that ended the Roman Empire).

15. See, e.g., Fusaro, *supra* note 13, at 704.

16. See generally SHAKESPEARE, *supra* note 2; Fusaro, *supra* note 13, at 704; *supra* note 9 (discussing the invention of double-entry bookkeeping).

17. See *infra* notes 20–26 and accompanying text.

merchants in England, Holland, Portugal, and Spain).¹⁸ But the Venetian Empire served an important role in the creation of the English common law, as it preserved the custom of merchants (an important basis for contract law) and extended it to merchant communities and trading partners in other countries, including England (where it became known as the “Law Merchant”).¹⁹ However, the massive improvement in the human condition that resulted from the Industrial Revolution had to await one additional, essential element: the English common law of contracts.

III. DEVELOPMENT OF THE ENGLISH COMMON LAW OF CONTRACTS

A. *Medieval England*

England, like much of Europe, in 1215 was essentially a feudal society in which the great mass of humanity lived in serfdom without private economic rights (except as bestowed by the feudal system).²⁰

18. These countries were better positioned to conduct the increasingly important trade with the Americas. Other factors in the decline of Venice included the plagues (1348 and 1575–1577) and the reduced importance of trade with the Eastern Roman Empire (centered in Constantinople), as that empire receded and fell. *See, e.g., Venice*, WIKIPEDIA <http://en.wikipedia.org/wiki/Venice> [<http://perma.cc/GFB2-EFQ6>] (last visited May 18, 2016).

19. And, ultimately, this served as an intellectual foundation for the law of contracts. *See, e.g., STEVEN L. HARRIS & CHARLES W. MOONEY, JR., SECURITY INTERESTS IN PERSONAL PROPERTY 2* (5th ed. 2011) (stating that “[i]n the seventeenth century the merchants’ courts were shouldered to one side by the King’s judges, who in 1666 proclaimed that ‘the law of merchants is the law of the land’” and noting that it was Lord Mansfield who fulfilled this promise after his appointment as chief justice of the King’s Bench in 1756 (quoting *Woodward v. Rowe* (1666) 84 Eng. Rep. 84, 84; 2 Keble 132, 132–33)); *see also* William Searle Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 289 (Ass’n of Am. Law Sch. ed., 1907); MURRAY, *supra* note 3; THOMAS EDWARD SCRUTTON, THE ELEMENTS OF MERCANTILE LAW 28–29 (1891); *infra* Section III.C.

20. *See, e.g., MILSOM, supra* note 1, at 1–25; David Carpenter, *What Did Magna Carta Mean to the English in 1215?*, BBC HIST. MAG., Feb. 2015, at 22. This is true despite Magna Carta (June 15, 1215)—a landmark but (at the time) largely aspirational gesture that was soon repudiated by the pope and never directly implemented. *See, e.g., id.*; Jason Douglas & Simon Clark, *Magna Carta Celebrations Reignite Legacy Debate*, WALL ST. J., June 16, 2015, at A8. Nonetheless, Magna Carta stands as a monumental achievement—recognizing the principle of limited government as essential to party autonomy and the rule of law. It can be viewed as the beginning of our system of law and an important foundation for the common law of contracts. Although it remained largely aspirational for nearly 400 years, Magna Carta survived in the public consciousness and served as a foundational basis for the legal developments that eventually followed, even

Even the feudal lord, despite Magna Carta, was essentially in the service of the King (or, subsequently, the Queen); the law of feudalism was the only “law,”²¹ and those who aspired to live freely, outside this law, were deemed “outlaws” (as, for example, in the legend of the “outlaw” Robin Hood).²²

to the point of being copied in part (virtually verbatim) in the United States Constitution. *See, e.g.*, Paul Johnson, *Laying Down the Law*, WALL ST. J., Mar. 10, 1999, at A22. Last year, June 15, 2015, was the 800th anniversary of Magna Carta, and it was appropriately celebrated by many, even in popular literature. *See, e.g.*, Daniel Hannan, *Magna Carta: Eight Centuries of Liberty*, WALL ST. J. (May 29, 2015), <http://www.wsj.com/articles/magna-carta-eight-centuries-of-liberty-1432912022> [<http://perma.cc/Q7AZ-V4VE>]; Nicholas Vincent, *The Amazing Legacy of Magna Carta*, BBC HIST. MAG., Feb. 2015, at 28, 28 (recounting the subsequent history of Magna Carta and its continuing influence, despite its being “a dead letter within only 12 weeks of its creation in June 1215.”). These principles are a significant reason why the common law nations are among the most stable and “are the ones most devoted to law and human rights.” Daniel Hannan, *The World of English Freedoms*, WALL ST. J. (Nov. 15, 2013), <http://www.wsj.com/articles/SB10001424052702303289904579195922823363280> [<http://perma.cc/R6RC-2VTP>] [hereinafter Hannan, *English Freedoms*].

21. *See supra* note 20. Feudalism is not law as we know it today, at least in the common law countries. *Id.*

22. *See, e.g.*, Mike Ibeji, *Robin Hood and His Historical Context*, BBC, www.bbc.co.uk/history/british/middle_ages/robin_01.shtml [<http://perma.cc/SC75-DBBD>] (last updated Feb. 17, 2011); *The Legend*, ROBIN HOOD: THE FACTS AND THE FICTION, www.robinhoodlegend.com/the-legend/ [<http://perma.cc/3GSZ-ZDGU>] (last visited May 18, 2016); *see also* THE REAL ROBIN HOOD (History 2010). Though some are obviously better than others, various popular film and television productions (including some based on the legend of Robin Hood) capture this point nicely. *See* Wood, *supra* note 9, at xxvii–xxiv (“[I]n its idealization of Robin of Locksley, *Ivanhoe* adheres to, and in fact did much to sustain, the grand historical narrative of English liberalism, which traces its roots from the Magna Carta of 1215 . . .”).

It can be noted again that—more than 100 years after the foundations had been laid for contract law by the judges of the King’s Bench—it remained for Chief Justice Lord Mansfield, a product of the Scottish Enlightenment, to bring the legal manifestation of party autonomy to practical fruition in the English common law. Lord Mansfield was born into a Scottish culture very different from the top-down authoritarianism of European feudalism. Largely separated from the Roman Empire by Hadrian’s Wall, Scottish culture prized party autonomy to an extent inconsistent with the basic tenants of feudalism. As a result, there was a long-standing fundamental tension between Scottish individualism and European feudalism:

England became highly structured, top-down, and feudal while Scotland remained atomized, [and] bottom-up The English (particularly under the Normans) built a military caste system coldly imposed from above The [Scottish] Celts retained a no-less-warlike tribal system, but . . . made it more democratic and compelling, based on an individual’s honor And the implications of these distinctions, subtle as they may seem, are in fact enormous.

JAMES WEBB, BORN FIGHTING: HOW THE SCOTS-IRISH SHAPED AMERICA 32 (2004). In a

This was a period in which most people lived (as most people always had) in the most abject poverty and primitive conditions, essentially without a functioning society or private legal “rights” as we know them today.²³ For most people, the human progress and party autonomy that we now take for granted did not yet exist (and had not over a period spanning thousands of years). The idea that human beings have an inalienable legal right to pursue their own happiness, as subsequently embodied in the American Declaration of Independence,²⁴ surely would have seemed impossibly utopian to these medieval serfs; theirs was a struggle to survive, to overcome the daily drudgery and dangers of a life with very little comfort, freedom, or hope.²⁵ Not much more than 100

sense, this tension continues today. Lord Mansfield’s decisions helped create the law of contracts, but centralized British administrative law largely eclipsed it in the twentieth century. As a result, contract law reached its zenith in the decentralized common law of the United States, with its emphasis on personal liberty. *See, e.g.,* Hannan, *English Freedoms*, *supra* note 20 (“The American is the Englishman left to himself” (quoting Alexis de Tocqueville)). Of course, even in the United States, the principles embodied in the law of contracts are continually confronted with the same basic tensions that counteract party autonomy in general. *See, e.g.,* Murray, *supra* note 7; *infra* Part IV; *see also supra* note 4; *infra* note 74.

23. *See, e.g.,* WEBB, *supra* note 22, at 32–34; *supra* note 8; *see also* Kurmanaev & Castro, *supra* note 8 (illustrating a modern equivalent through the economic breakdown of a formerly prosperous society in the absence of enforceable contracts and the rule of law).

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting that these “unalienable Rights” include “Life, Liberty and the pursuit of Happiness”).

25. As James Webb observed, feudalism was based on a

heavy-handed diminution of the common man. . . . [Feudalism] was a system that thrived on camaraderie among a band of [political] elites and was fed by the unthinking subjugation of those below them. The lowly serf who toiled hard for his daily crust of black bread was given no toasts, and very little thanks, in feudal England.

. . . The essence of Norman feudalism . . . was that the land remained with the lord, whatever the man might do. Thus the landed pyramid rose up tier by tier to the King, until every acre in the country could be registered as held of somebody by some form of service. This bond of service was unbreakable

WEBB, *supra* note 22, at 34 (footnote omitted). The contrast with the common law of contracts could not be more dramatic. *See, e.g., supra* notes 8, 22. In effect, barely more than 100 years before President Abraham Lincoln freed the slaves in America, nearly everyone lived in serfdom—even in “advanced” European societies. *See generally* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 232–40, 412–32 (2d ed. 1968). Arguably, English judges, including Lords Coke and Mansfield, and the law of contracts they created, did more to change this and free humankind from serfdom than any other single factor. *See infra* Sections III.B–C, IV.C; *see also* Kurmanaev & Castro, *supra* note 8.

years before Abraham Lincoln and the Civil War ended slavery in America, most people everywhere (including England) lived in some form of serfdom.²⁶

What happened to change this in common law England (and thereafter in the United States) is truly an extraordinary tale—dependent in part on unique circumstances and coincidences that improved ordinary living conditions in ways that have never been surpassed in terms of importance, before or since.

B. Foundations of the Common Law

It is difficult to say precisely how and when the change began in Britain. The medieval legend of Robin Hood suggests a long-simmering resentment against feudal authority, far predating the common law period, and is consistent with the possibility that those returning from the Crusades brought with them the consequences of exposure to Greek (and Venetian) ideas of republican self-government and party autonomy.²⁷ Certainly the signing of Magna Carta in 1215 is concrete evidence of these ideas, as subsequently reinforced in the phenomenon of the Scottish Enlightenment—an intellectual movement likely fomented by the traditions of Scottish independence and resistance to distant rulers.²⁸ All of this was consistent with the norms of the Scottish merchant class and their resistance to feudal rule by English kings.²⁹

By the sixteenth and seventeenth centuries, the English system of government had developed distinct “courts,” each charged with conducting a separate aspect of the King’s business.³⁰ Among these were

26. See, e.g., MILSOM, *supra* note 1, at 1–9.

27. According to legend, Robin Hood was said to be a yeoman (i.e., a free man) bowman who had served in the crusades, along the way being exposed to the idea of freedom as embodied in Greek literature and traditions. See, e.g., ARISTOTLE, *supra* note 8; *supra* Part II; *supra* note 22.

28. See *supra* notes 3, 20–26.

29. Scotland’s geographic remoteness from England engendered a political remoteness that dates at least from Roman times, as amply illustrated in the history of Hadrian’s Wall. See, e.g., WEBB, *supra* note 22, at 23–31. It is a remoteness that—in different form—continues to manifest itself even today. See, e.g., Colin Kidd, *Devolution in the UK*, BBC HIST. MAG., Dec. 2014, at 14.

30. See, e.g., MILSOM, *supra* note 1, at 20–21, 42. The term “court” is derived from the Roman custom of conducting official business in the courtyards of the villas of Roman officials. Among the King’s courts, the Common Bench (or Court of Common Pleas) is not otherwise discussed here because (though important in medieval England) it played little role in the development of the modern common law. The courts of Common

the following: the Chancellor in Equity (the religious branch of the King's government, charged with administering the ecclesiastical courts, obviously an important office given the King's claim to rule by divine right)³¹ and the Court of Exchequer (in charge of tax collections, obviously another function important to the King).³² These two courts enjoyed considerable prestige (due to their obvious, direct relevance to the King's rule), and they handled large revenue streams (e.g., from religious donations and tax collections)—some of which was retained by the courts and used to fund court operations and judicial or administrative expenses.³³ As almost any feature film or television representation of this era vividly reveals, lavish attire (including colorful flowing robes), fine food and carriages, multiple servants, and elaborate facilities and furnishings were considered highly desirable;³⁴ such a lifestyle, however, was in stark contrast to the drab climate and surroundings suffered by most English citizens.³⁵ This led to something of a "competition" between the courts to attract new court business, and the concurrent desire of the King for a centralization of justice created a place for new forms of common law actions to replace the declining influence of the feudal courts.³⁶

In contrast to the other central courts noted above, a third judicial branch (the King's Bench) was essentially limited to trying crimes against the King or Queen (e.g., actions for trespass) from which, as

Pleas competed with the King's Bench during the early common law period, but they failed to innovate beyond the old writ system (while the King's Bench created the law of contracts). See, e.g., MILSOM, *supra* note 1, 20–21. These events, including the legal debates between the King's Bench and the courts of Common Pleas, are recounted in MURRAY, *supra* note 3.

31. See, e.g., MILSOM, *supra* note 1, at 74–87; see also *infra* note 50.

32. See, e.g., MILSOM, *supra* note 1, at 20–21, 53–54.

33. See *supra* notes 30–32.

34. Apparently, that is why these films are sometimes called "costume dramas." See Grace_from_Dogville, *The Best Costume Dramas*, IMDB (Oct. 17, 2010), <http://www.imdb.com/list/DW35eIav6d0/> [<https://perma.cc/82PP-KLHR>].

35. See, e.g., *supra* notes 23–26 and accompanying text.

36. See, e.g., MILSOM, *supra* note 1, at 53–59; see also *infra* text accompanying notes 44–46. It should be noted that some scholars have cast doubt on the theory that the King's Bench embraced an expanded writ system as an "effort to procure additional revenue through fees." MURRAY, *supra* note 3, at 10 (citing J. H. Baker, *New Light on Slade's Case, Part II*, 29 CAMBRIDGE L.J. 213, 215 (1971)). It seems clear, however, that it "was due, essentially, to the general desire of these courts to expand their jurisdiction rather than any perceived need to enforce promises." *Id.* at 6; see also *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 175 (N.Y. 1927).

noted below, the law of torts and contracts would ultimately be derived.³⁷ As originally limited, however, trespass was not a very lucrative form of court business.

Prior to the sixteenth century, then, the King's Bench functioned largely (though not entirely) as the King's criminal court.³⁸ At this time, most crimes were still litigated in local feudal courts; as noted, the King's Bench was largely limited to prosecuting crimes against the King (e.g., cases of trespass to prosecute the "highwaymen" who robbed travelers on the King's highways).³⁹ While obviously an important function, these criminal cases did not provide the desired revenue or stature to the court; many criminal defendants tended to spend their money quickly (or hide it) before being caught, so these criminal defendants tended to be without funds by the time they got to trial. In a sense, the King's Bench got the dregs; its cases were unglamorous and unremunerative, and the King's Bench judges' prestige and lifestyles suffered accordingly.⁴⁰ By the seventeenth century, the judges of the King's Bench had strong incentives to broaden their horizons (as well as their jurisdiction and sources of revenue).

Your author does not know precisely why Lord Mansfield was

37. See, e.g., MILSOM, *supra* note 1, at 53–62. "[T]respases, wrongs, first came before royal courts only when the king's rights were affected . . ." *Id.* at 55. For a time, the King's Bench continued to be called the King's Bench even during the reign of a queen.

38. See *supra* note 37. In the sixteenth century, the King's Bench recognized a writ (i.e., a cause of action) known as the "Bill of Middlesex" (so named because that was the county where the court sat) to expand the court's jurisdiction beyond its traditional boundaries. MILSOM, *supra* note 1, at 23.

39. The word "trespass" meant, simply, a wrong against the King (excluding certain felonies) to be prosecuted by a public authority on behalf of the Crown. MILSOM, *supra* note 1, at 244–45. Civil liability (e.g., the law of torts and contracts) ultimately derived from related proceedings recognizing claims for compensation by the victim based on the theory that it was a trespass because the King's Peace was broken. *Id.* But in the sixteenth century, these cases were still exceptional; the jurisdictional foundation was there, but the implications (and common law of torts and contracts) remained to be developed over the ensuing 200 years. *Id.* at 271–315.

40. The discovery of silver and the development of silver mines in the Americas caused an increase in coinage, which debased the value of money on a largely unprecedented scale during the sixteenth century, adding economic pressures on the King's Bench, and other central courts, to increase jurisdiction and business at the expense of the local courts. This devaluation of the currency also resulted in a direct expansion of the jurisdiction of the King's Bench, which was limited to claims exceeding forty shillings (the forty shillings rule)—a limit that became less restrictive as the value of forty shillings fell dramatically. See 1 THE STATUTES OF THE REALM 48 (photo. reprint 1963) (1810).

appointed chief justice of the King's Bench in 1756.⁴¹ It is possible that it was partly a sop to dampen Scottish nationalism (somewhat like "balancing the ticket" in American presidential campaigns).⁴² To a large extent, however, it was likely a recognition of Lord Mansfield's stature and prominence; whatever the reason, it brought to the court a leading jurist—schooled in the philosophy of the Scottish Enlightenment—at a time when the court was eager for a broader role.⁴³

As noted above, this coincided with the English centralization of justice, an effort to shift jurisdiction from local feudal courts to the central courts in London (i.e., to consolidate the central government's hold on the kingdom,⁴⁴ a phenomenon not unknown in modern times, as demonstrated by the increasing federalization of commercial and consumer law in America today⁴⁵). So there was a convergence of accidental, largely unrelated motivating factors: the heritage of Magna Carta; the intellectual foundation of the Scottish Enlightenment; a possible need to appease pressures for Scottish devolution; a desire of the judges to increase the stature and revenue of the King's Bench; a rejection of the European reception of Roman civil law; and an overall policy favoring the centralization of justice in London.⁴⁶

41. For a description of Lord Mansfield's rise to prominence, culminating in his appointment as chief justice of the King's Bench, see POSER, *supra* note 9, at 68–119. *See generally supra* note 19.

42. *See supra* notes 22–26, 41; *see also* WEBB, *supra* note 22, at 32–63. *But see infra* note 43.

43. *See supra* notes 3, 19, 22, 30–41. Interestingly, Lord Mansfield's Scottish heritage was viewed with disdain by some. *See, e.g.,* POSER, *supra* note 9, at 68 ("The only objection that can be made to him is what he can't help, which is that he is a Scotchman." (quoting the Duke of Richmond)). In any event, Lord Mansfield's "reputation as the foremost lawyer and legal scholar of his day" was clearly established. *Id.* at 112; *see also id.* ("So greatly superior to the rest of his Profession, he stood without a Rival." (quoting Lord Waldegrave)).

44. MILSOM, *supra* note 1, at 15–16. Well before Lord Mansfield, "[t]he increase in [K]ing's [B]ench work in the course of the sixteenth century [was] striking." *Id.* at 58; *see also supra* note 36 and accompanying text.

45. *See, e.g., supra* note 4.

46. *See supra* Section III.B; *see also infra* notes 47–51. Aside from the Enlightenment, these factors were at best coincidental and unrelated to any coherent social policy or benefits. It is likely that these pressures were largely expressions of self-interest by those responsible. *See, e.g.,* MILSOM, *supra* note 1, at 61 ("There were, then, two levels to this development. There was the level of legal reasoning, devious and sometimes incoherent And then there was the level of social reality"); *see also* Allegheny Coll. v. Nat'l Chautauqua Cty. Bank, 159 N.E. 173, 175 (N.Y. 1927). Of course, other factors were also at work (e.g., the increase in mercantile transactions, and the importance of the Law Merchant, when King Henry VIII relaxed centuries-old

As noted, at roughly the same time, there was an important corollary development in continental Europe: the reception and resurgence of interest in the principles of Roman law (sometimes called the “Reception”), a companion to the Renaissance.⁴⁷ This led to development of the modern European system of civil law, which is conceptually very different from the English common law model (and lacks a direct equivalent to the case law approach largely responsible for the development of contract law).⁴⁸ The Reception might also have swept England but for a historical oddity: the English anathema for anything Roman in the aftermath of King Henry VIII’s break with the Roman Catholic Church over his divorce of Catherine of Aragon.⁴⁹ In this circumstance, and given the continuing ecclesiastical battles over the sanctioned English church (with its important endorsement of the monarch’s divine rights⁵⁰), an English reception of Roman law was out of the question.⁵¹ An alternative had to be found, and the King’s Bench obliged.

C. How the King’s Bench Created Contract Law

The result was analytically elegant, if sometimes seemingly

controls on international capital flows that previously prohibited the exportation of gold to pay for sales of goods).

47. See, e.g., Robin Evans-Jones, *Roman Law in Britain*, in *QUAESTIONES IURIS* 83 (Ulrich Manthe & Christoph Krampe eds., 2000); Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 *B.C. INT’L & COMP. L. REV.* 257 (1981); *supra* note 46 and accompanying text.

48. See *supra* note 47; *infra* notes 50–66 and accompanying text.

49. See, e.g., WEBB, *supra* note 22, at 81–86; see also *Catherine of Aragon*, TUDORHISTORY.ORG, <http://www.tudorhistory.org/aragon/> [<https://perma.cc/36EK-ESKU>] (last updated June 1, 2010).

50. The endorsement was embodied in the Chancellor of Equity. See, e.g., MILSOM, *supra* note 1, at 83 (“At the political level this turned on the source of the court’s authority. The king’s divine duty to provide channels for an absolute justice turned into divine right; and the discretion of the chancery . . . was left seemingly dependent upon the royal prerogative.”); see also *supra* note 31.

51. See, e.g., Jenny Gross & Laurence Norman, *Britain Forges EU Deal, Sets Up Showdown at Home*, WALL ST. J., Feb. 20–21, 2016, at A1; Tim Montgomerie, *Brexit Strategy*, WALL ST. J., Feb. 20–21, 2016, at C1 (advocating for a British exit from the European Union). In this sense, it can be said that we enjoy the benefits of contract law today (at least in part) because King Henry VIII wanted to divorce his wife. It is interesting that—although the reasons and circumstances are apparently quite different—there continues to be significant resistance to European law in the United Kingdom today. *Id.*

chaotic,⁵² and it forms the basis for much of our private law to this day. In a nutshell, the King's Bench used its authority over public crimes (against the King) to create a corollary law of private remedies (i.e., recognizing a private right to compensation for a loss caused by the crime); thus, criminal law begat the law of torts.⁵³ In turn, it became logical to recognize the breach of a promise sanctioned by law (a breach of contract) as essentially another form of tort; this permitted the King's Bench to adopt the Law Merchant as part of the common law of England.⁵⁴ Thus, the law of torts begat the law of contracts based on the Law Merchant.⁵⁵ This required development of a whole new body of

52. See, e.g., *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 175 (N.Y. 1927). How could it be otherwise? Can anyone envision any other process by which public authorities would conjure up and sanction a legal system that allows ordinary citizens to effectively create their own law? A formal agreement with the sovereign was tried, in Magna Carta, and failed. See *supra* note 20. In contrast, common law judges, such as Lord Coke and Lord Mansfield, succeeded brilliantly. This was, perhaps, the ultimate form of judicial activism. "Judicial activism" is often discussed today, even in the popular media, and usually in the context of constitutional limits on public authority. See, e.g., George Will, Opinion, *The Case for Judicial Activism*, OKLAHOMAN, May 5, 2013, at 18A. And today, of course, the courts are far more constrained by statutes and regulations than ever before in our history. See, e.g., *id.*; see also GILMORE, *supra* note 2, at 69. But the development of the common law was pure and aggressive judicial activism. In this respect, it was a far different process from the popular concept of democracy, or even administrative law (where the members of a legislature, bureau, or constitutional convention sit down to negotiate, draft, and approve a law or regulation). See *supra* Section III.B. And yet it was arguably the greatest law-making project in history. See *supra* note 8; see also *infra* note 58. But see *supra* note 4; *infra* note 74 (noting the modern countermovement).

53. See, e.g., POLLOCK & MAITLAND, *supra* note 25, at 530–31 ("The king's courts . . . were approaching the field of tort through the field of crime.").

54. "The ill performance of a promise was remedied, not as a breach of it but as a negligent wrong." MILSOM, *supra* note 1, at 277. This concept has truly ancient roots but had never before been used in this way. See, e.g., MURRAY, *supra* note 2; see also MURRAY, *supra* note 3.

55. See MILSOM, *supra* note 1, at 277; see also *supra* notes 19, 54. Thus, in the words of Lord Coke, "it is termed *trespass* in respect that the breach of promise is alleged to be mixed with fraud and deceit." A sentence from a report of 1574 makes a similar point . . . : "For here no debt is to be recovered but [only] damages for the debt; and this default of payment is a wrong." MILSOM, *supra* note 1, at 292 (original alterations omitted) (first quoting Lord Coke; then quoting a case report); see also MURRAY, *supra* note 3. This was an unprecedented change in the law:

The common law had not in the past claimed jurisdiction over [mercantile] contracts made or offenses committed abroad, . . . [or in English] ports Such jurisdiction was now coveted. By supposing these contracts or offenses to have been made or committed in England the Common Law Courts assumed jurisdiction; and . . . they endeavored to capture jurisdiction over the growing

companion rules, including the doctrine of consideration, to differentiate between formal promises sanctioned by law (i.e., enforceable contracts) and the casual, common statements of intention or opinion that are a part of ordinary daily conversations.⁵⁶

Thus, the law of contracts was born. At the time, it must have seemed a daunting task; to your author's knowledge it had never been done before on a broad societal scale. The idea that ordinary (and therefore, in the eyes of the political and intellectual elite, ignorant) peasants should have a legal right to conduct their own private transactions, free of more enlightened direction from above, must have seemed to many at least as inappropriate then as it does to some today.⁵⁷ It probably could have never happened without the incremental case law approach of the common law; this allowed the judges of the King's Bench to develop the law rationally on a step-by-step and case-by-case basis—without the emotions inherent in a political process.⁵⁸ Without

commercial business of the country. The other common law judges followed Coke's lead.

Holdsworth, *supra* note 19, at 315.

As previously noted, Lord Coke's decision in *Slade's Case* (in 1602) is often seen as the beginning of this process and modern contract law—although the process of effectuating this change began earlier and can be said to have reached its full potential only with the decisions of Lord Mansfield in the mid-to-late eighteenth century. *See, e.g., Peacock v. Rhodes* (1781) 99 Eng. Rep. 402; 2 Doug. 633 (effectuating the modern law of negotiable instruments); *Miller v. Race* (1758) 97 Eng. Rep. 398; 1 Burr. 452 (same); *Strangborough v. Warner* (1588) 74 Eng. Rep. 686; 4 Leo. 3 (enforcing executory promises exchanged for each other). Nonetheless, it cannot be denied that Lord Coke's decision in *Slade's Case* "marked a critical passage in the common law of contract." MURRAY, *supra* note 3, at 11.

56. One such example is the requirement for consideration. *See, e.g., MURRAY, supra* note 3, at 309–15; *infra* Part IV. Thus developed what we now know as substantive rules of law. It is important to note that prior to this development, "[t]here was no common law, no body of substantive rules There was [only] justice, beyond human control and manifested in unreasoned answers to disputes; and it was from the need to reason, obliquely compelled by the substitution of a fallible for an infallible deciding mechanism, that substantive law later grew." MILSOM, *supra* note 1, at 76. "The new element was a positive human law beginning to be conceived in substantive terms, in terms of a rule that on these facts this result ought to follow . . ." *Id.* at 80. This was, in essence, the creation of a rule of law, embodying the movement from a system based on status to the law of contracts. *See, e.g., supra* note 8.

57. *See supra* note 4; *see also* Murray, *supra* note 7 (arguing that modern political and academic elites have become increasingly condescending toward ordinary citizens).

58. As explained by Milsom:

But if the books tell us that Sir Edward Coke distorted his authorities to present new ideas as ancient principles, or if the reader feels he is entitled to despise the shifts employed, it is well to remember that this is how the common law has

this common law approach, it did not happen elsewhere (and arguably the English approach reached its zenith in the intellectual soil of American common law, aided and abetted by a written Constitution that formalized limited government and American federalism).⁵⁹

Although the theoretical and jurisdictional basis for contract law had already existed for well over 100 years, it was left to Lord Mansfield to fully effectuate the law of contracts in the late 1700s.⁶⁰ Of course, as noted above, Lord Mansfield and his colleagues and predecessors did not simply think up the law of contracts or create it out of whole cloth.⁶¹ In this, they were guided (and heavily influenced) by the Law Merchant—the English private law of merchants derived from commercial practices, including the Venetian merchants’ code of standards and behavior, derived in turn from a prior thousand years of traditions and customs for merchants.⁶² In effect, Lord Mansfield and his colleagues and predecessors grafted the Law Merchant onto the common law, adopting it almost wholesale (even if in pieces, in a process that unfolded in total

lived, perhaps how any system of law must live when direct change by legislation is out of the question. . . .

Nor must we allow ourselves, even when considering great changes made quickly, to think in terms of a legislator, of a single mind addressing itself to a single problem. We look back and see a twisting path circumventing an inconvenient rule; but only the last steps can have been directed to that end. The earlier ones were the individual solutions to different and smaller problems

MILSOM, *supra* note 1, at 52–53. Clearly, this is a chaotic process, and it is one not likely to be encountered in the context of a more traditional legislative or administrative state (such as the Roman civil law), where all rules emanate directly from the sovereign. The result was something special: “Although all these mechanisms look as untidy as the pieces of a jigsaw puzzle, the pieces fit together to make a picture.” *Id.* at 72; *see also supra* notes 51, 54. Compare the political influences at work today, as described in Murray, *supra* note 7.

59. *See, e.g.,* Hannan, *English Freedoms*, *supra* note 20 (“The American is the Englishman left to himself.” (quoting Alexis de Tocqueville)). This is the essence of American “exceptionalism.” *See generally* Steven G. Calabresi, “A *Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006).

60. GILMORE, *supra* note 2, at 18–19; *see also supra* note 19.

61. *See supra* text accompanying notes 52–56; *see also supra* Part III. Of course, not all of Lord Mansfield’s innovations stood the test of time—but most did. *See supra* note 60. *See generally* POSER, *supra* note 9, at 68–119. Today, our commercial law (including Uniform Commercial Code Articles 2 and 3) rests in no small measure on the principles articulated by Lord Mansfield. *See, e.g., id.* at 220–43 (noting Lord Mansfield’s reliance on the Law Merchant in deciding cases); Harrell, *supra* note 4.

62. *See supra* Part II; *supra* note 61.

over a period of nearly 200 years) as the common law of contracts.⁶³ In doing so, these judges created a substantive law of contracts for the first time—a system of law providing far more than a vague notion of justice at the discretion of the sovereign or merely a judicial procedure or custom available only to members of a select class.⁶⁴

For the first time, then, an ordinary citizen could use the law to leverage his or her talents and ideas, funding them by creating contractual rights and obligations and effectuating them by financing, buying, and selling goods and services.⁶⁵ It should not be surprising that the Industrial Revolution followed, along with political reforms and the greatest improvements in the human condition in all of history, and on an unprecedented scale.⁶⁶ It simply cannot be denied that people are happier and more prosperous when they are allowed to decide for themselves the basic issues affecting their lives and that this results in a series of economic exchanges that enhances the lives of all and the prosperity of society as a whole.⁶⁷ And to a significant degree, it all depends on

63. See *supra* notes 58, 61; see also MILSOM, *supra* note 1, at 271–315.

64. Again, Milsom is instructive:

In the fourteenth century there was no law of England, no body of rules complete in itself with known limits and visible defects There were justice and right, absolute values; but it was not yet the lawyer's business to comprehend them in the sense of knowing what was the just and right result upon [those] facts

MILSOM, *supra* note 1, at 75; see also *supra* notes 56, 58.

65. See, e.g., *supra* note 8.

66. See *id.* See generally POSER, *supra* note 9, at 220–43. As observed by Professor Murray: “Human beings wish to make choices—they seek freedom to elect among alternatives. . . . They wish to plan and design their futures. They are capable of bringing the future plan into the present” MURRAY, *supra* note 2, at 2. This is the essence of economic enterprise and progress, and it requires the party autonomy provided by contract law.

67. See *supra* notes 8, 66. However, the results are obviously not spread evenly, creating political and social forces at odds with party autonomy. See *infra* Part IV. As Gilmore observed:

It seems apparent to the twentieth century mind, as perhaps it did not to the nineteenth century mind, that a system in which everybody is invited to do his own thing . . . must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves

GILMORE, *supra* note 2, at 95. Nonetheless—and however much this quote may resonate at an intuitive level (who among us does not resent the “rich and powerful?”)—upon reflection, it does not necessarily ring true. Even aside from the obvious point that (other things being equal) a voluntary exchange is inherently a positive-sum transaction, it would seem that party autonomy is the primary counterpoint to (and bulwark against) the

contract law.

IV. THE LIMITS OF CONTRACT LAW

A. *The Limitations of Party Autonomy*

While contract law—in conjunction with related legal concepts such as representative government, an independent judiciary, due process, the case law system of legal precedent, constitutionally limited government with an effective appeals process, and a decentralized federal system of state and national law (i.e., federalism)—is the legal embodiment of party autonomy and has generated an unprecedented era of human progress and achievement,⁶⁸ obviously contract law cannot change human nature or make us perfect.⁶⁹ In some ways, contract law may even seem to magnify our flaws—freedom to choose includes the freedom to make mistakes.⁷⁰ This collides with another common human trait—namely, the desire to help others (e.g., by helping them to avoid errors that seem obvious to us but may be unknown to them).⁷¹

The desire to help others avoid mistakes is likely reinforced by the obvious foolishness, injustices, and needless suffering that each of us witnesses nearly every day. As theologian Herman Bavinck noted:

Round about us we observe so many facts which seem to be unreasonable, so much undeserved suffering, so many unaccountable calamities, such an uneven and inexplicable distribution of destiny, and such an enormous contrast between the extremes of joy and sorrow, that anyone reflecting on these things is forced to choose between [dramatically conflicting views of] this universe⁷²

This leads naturally to a desire to help others conform to our standards

“rich and powerful” who want to order our lives. But of course, some decisions are better than others, and some persons make better decisions than others, and these things have social and economic consequences. *See infra* Part IV; *cf. Murray, supra* note 7.

68. *See supra* note 8.

69. Indeed, contract law is likely to reflect human nature, not change it. Those who wish to change human nature must look elsewhere.

70. *See supra* note 69.

71. Indeed, that is a basis for the universally recognized goal of education.

72. HERMAN BAVINCK, *THE DOCTRINE OF GOD* 396 (William Hendriksen ed. & trans., Banner of Truth Trust 1977) (1951).

by limiting their ability to make foolish errors (i.e., to protect them from the risks inherent in party autonomy). It is irresistible as a policy goal, especially in the abstract or in the context of blatantly self-destructive or abusive behavior.

And so contract law and equity have always recognized and imposed limits on party autonomy in the form of legal concepts relating to the formation of contracts (the doctrine of consideration, a bargained-for exchange of value; the statute of frauds; the requirements for offer and acceptance; the defenses of, among others, mistake, incapacity, and duress) and the remedies in their enforcement or nonenforcement (e.g., damages, rescission, and restitution).⁷³ Modern consumer protection law has gone much further, essentially barring many consumers from certain categories of transactions.⁷⁴ The modern history of contract law is in large measure a story of efforts to reconcile the tensions between party autonomy and its legal limits, a story that is ongoing and no less intense today.

B. Inequality of Rights and Income

Today, another focus of public debate is the desire of many for more equal outcomes and a related focus on group rights, concepts potentially inconsistent with contract law and party autonomy.⁷⁵ As a part of such debates, the ills of Western society (past and present) are sometimes viewed as paramount and have been blamed on contract law.⁷⁶ Intuitively, this may seem appropriate, as two examples may illustrate. Upon reflection, however, these examples illustrate that there are also important counterpoints.

73. See, e.g., MURRAY, *supra* note 2, at 11–37.

74. See, e.g., *supra* note 4; see also Alvin C. Harrell, *Commentary: Reflections on the Mortgage, Housing and Financial Crisis*, 68 CONSUMER FIN. L. Q. REP. 123, 123, 126–29 (2014) [hereinafter Harrell, *Reflections*]; Alvin C. Harrell, *Ten Current Issues Affecting Consumer Financial Services Law*, 68 CONSUMER FIN. L. Q. REP. 286, 286–88, 290, 292–93 (2014).

75. It is also inconsistent with other traditional American values. See, e.g., Murray, *supra* note 7 (noting inconsistencies between the core American values of liberty and individualism and the current political focus on “an ideology in open conflict with liberty and individualism”).

76. One example is the 2007–2008 financial meltdown. See, e.g., *The 2012 Fisher Memorial Program: Home Ownership—American Dream or American Nightmare?*, 68 CONSUMER FIN. L. Q. REP. 81, 84 (2014) (blaming the meltdown on “private lending”); cf. Harrell, *Reflections*, *supra* note 74, at 123–26 (providing an alternative view).

First, consider the squalor of urban life in Victorian England,⁷⁷ sometimes presented as a primary consequence of the Industrial Revolution. It is often represented in literature and popular films, old and new, that the squalor of urban living in the aftermath of massive migrations to the cities during the nineteenth century created newly inhumane living conditions that can be blamed on party autonomy and contract law.⁷⁸ No doubt there is some truth to this, and our far more pleasant current circumstances naturally cause us to recoil at these reports.⁷⁹ But such a massive disruption of a previously agrarian and feudal society, a transition that also brought with it obvious benefits for most of society, could not have been expected to come entirely without costs. Urban authorities and the then-existing social infrastructure could not have been expected to make advance preparations for the unprecedented consequences of industrialization. Indeed, it is too much to ask that any society accurately predict such events.⁸⁰

In defense of Victorian England, it can be noted again that the disruption to existing society during the common law period and the Industrial Revolution also was accompanied by truly extraordinary, historically unique improvements in the general human condition, which in turn permitted eventual amelioration of the worst conditions of the Victorian period (not to mention the end of feudal serfdom).⁸¹ Moreover, it has been suggested that the deprivations of the Victorian period, while not deniable, may sometimes have been exaggerated (for dramatic, political, or proprietary purposes).⁸² Overall, there is evidence that Victorian life was far less grim, and indeed was improved and far more

77. This was the subject of a recent BBC One television series and a cover story in *BBC History Magazine*. See, e.g., Rosalind Crone, *Was Victorian Life Really So Grim?*, *BBC HIST. MAG.*, Christmas 2015, at 50.

78. *Id.* at 51.

79. If we are being honest, we also should actively recoil at the other human tragedies being inflicted on a massive scale in the world today (for some of which the United States, as the world's leading nation, may bear some responsibility, though others are entirely self-inflicted). See, e.g., Kurmanav & Castro, *supra* note 23. In contrast to the costs of contract law and industrialization, however, many of these tragedies are not accompanied by any benefits that are apparent to this author. So, there is a lack of moral equivalence in respect to many of the problems, and a focus on the social costs of contract law, in isolation, is misplaced.

80. Though, of course, coping with them after the fact is another matter, and the modern social infrastructure made possible by contract law and the Industrial Revolution is yet another benefit of our common law system.

81. See, e.g., Crone, *supra* note 77, at 52–53; *supra* note 8; *supra* note 80.

82. Crone, *supra* note 77, at 54–56.

healthy and happy, than some popular accounts would suggest.⁸³

Nor is there significant evidence that many citizens of that era pined for the earlier days of an agrarian society based on feudal serfdom. Instead, it is clear that the migrations to urban areas were eagerly pursued by the participants in the vast majority of cases, and their efforts were essential to the progress of modern society (including the subsequent improvements in our social structure, which occurred thanks largely to the fruits of contract law principles essential to party autonomy).⁸⁴ It is not enough to blame the costs along the way on contract law without acknowledging the overwhelming evidence of massive improvements in the human condition that also resulted.

C. Contract Law and Slavery

An even more difficult issue is the role of contract law in promoting slavery and the slave trade, two of the most odious practices in human history. To our great shame, these will forever be associated with early American history, which included contracts that financed the slave trade and bore, and continue to bear, responsibility for the associated consequences.⁸⁵ It is not enough to note that slavery (or some form of serfdom) existed widely at this time—and even was the prevalent social structure throughout much of human history and nearly everywhere in the world, with exceptions that are noticeable and disheartening for their rarity.⁸⁶ Clearly, however, the common law of contracts did not create

83. *Id.* In addition, perhaps more obviously, Victorian England was a fountain of increased innovation, productivity, and increasingly broad-based prosperity. See, e.g., Lottie Goldfinch, *The Age of Invention: The Victorians Who Built the Modern World*, HIST. REVEALED, Sept. 2015, at 26. See generally *supra* note 8.

84. See, e.g., *supra* notes 8, 20, 22.

85. See, e.g., POSER, *supra* note 9, at 286–87; Fergus M. Bordewich, *The Children of Manifest Destiny*, WALL ST. J., Jan. 23–24, 2016, at C5 (reviewing NED SUBLETTE & CONSTANCE SUBLETTE, *THE AMERICAN SLAVE COAST* (2016)).

86. See, e.g., *supra* text accompanying notes 15–19 (discussing the Venetian Empire). For another, perhaps better-known example, consider Greece from the fifth to the third century B.C.:

[T]he Greeks' radically dynamic menu of constitutional government, private property, . . . free scientific inquiry, rationalism, and separation between political and religious authority would spread to Italy, and thus via the Roman Empire to most of northern Europe and the Western Mediterranean. Indeed, the words freedom and citizen did not exist in the vocabulary of any other Mediterranean culture, which were either tribal monarchies, or theocracies.

Victor Davis Hanson, *No Glory That Was Greece*, in WHAT IF? 15, 18–19 (Robert

this problem; indeed, the foundational contracts law concept of party autonomy is directly at odds with that of involuntary servitude.⁸⁷

Nonetheless, a defender of contract law and a student of its history must admit to a disturbing fact: Even though slavery and serfdom long predated contract law and existed nearly everywhere, and the concept of party autonomy (once established in contract law as a universal principle) was instrumental in dooming slavery in the Western world, there was still a time when the law of contracts combined with institutionalized slavery to create and fund an expanded slave trade.⁸⁸ There is no way to sugarcoat this, and it is no excuse to note that the practice was widespread elsewhere and based inherently on a horrific social and political structure that existed independently of contract law.

All that can be said in defense of the common law of contracts in this context is that it was ultimately instrumental in ending this disgrace.⁸⁹ Certainly, no one can rationally argue that the course of English or American legal development (including contract law) was always smooth or perfect.⁹⁰ But neither should one argue that contract law was entirely responsible for this injustice in human relations and history nor fail to recognize the central role of the common law, including contract law and party autonomy, in the resulting solutions that have raised much of the world out of poverty, serfdom, slavery, and economic stagnation.⁹¹ In the

Cowley ed., 2001). Notably, despite Britain's feudal past (and the existence of slavery in Britain, even in Lord Mansfield's time) Britain's industrial economy functioned on the basis of contract law (i.e., party autonomy) from the beginning and was never based on slavery. *See, e.g.*, POSER, *supra* note 9, at 287.

87. *See* POSER, *supra* note 9, at 290–91.

88. *See, e.g.*, Bordewich, *supra* note 85, at C6 (noting “slavery was, in effect, the South's version of the American dream”); *see also* POSER, *supra* note 9, at 286–87.

89. *See, e.g.*, POSER, *supra* note 9, 286–300. This is not to deemphasize the importance of the American Civil War, but it can also be noted that common law England did more than any other country to end the international slave trade in the late 1700s and the early 1800s. *See, e.g.*, *Somerset v. Stewart* (1772) 98 Eng. Rep. 499, 509–10; Lofft. 1, 17–19 (opinion of Lord Mansfield). For example, consider the efforts that led to the Slave Trade Act of 1807 and the Slavery Abolition Act of 1833.

90. *See, e.g.*, POSER, *supra* note 9, 286–300; Bordewich, *supra* note 85; Jason Zweig, *Market Crashes, Stock Scandals: Lessons from the U.S. Frontier*, WALL ST. J. (Jan. 27, 2016), <http://blogs.wsj.com/moneybeat/2016/01/27/market-crashes-stock-scandals-lesson-s-from-the-u-s-frontier/> [<http://perma.cc/AVB5-AEP5>].

91. *See, e.g.*, Edward Glaeser, *Those Were the Days*, WALL ST. J., Jan. 16–17, 2016, at C5 (reviewing ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH* (2016)) (dramatically contrasting lifestyles in nineteenth- and twentieth-century America—the former including travel by horse, rampant contagious diseases, short life spans and high infant mortality rates, extremely limited diet, and virtually no entertainment options); *supra* notes 8, 20, 22, 89, 90.

end, it was the common law principles of egalitarianism, liberty, and individualism,⁹² as embodied in contract law, that helped spell the end of institutionalized slavery in the United States (and elsewhere).

V. CONCLUSION

An essential point of practical application from this discussion is that an essence of understanding “the law” consists of an ability to analyze the foundational principles of the common law in the context of a given factual setting (along with, today, a vast overlay of state and federal statutes and regulations, often confusingly written in isolation from each other and with little regard for the resulting interrelationships).⁹³ There may be some doubts about whether we have a “living” Constitution, which is subject to fundamental change based on economic and political currents, but there can be little doubt that the common law remains alive and in evolution—that is its very nature.⁹⁴

Yet, a crucial element of the common law is its bias toward consistency. This is part of what makes it “common” to all persons, regardless of social, economic, or political status.⁹⁵ The importance of adhering to judicial precedent (“stare decisis”) is part of what distinguishes the common law from more discretionary administrative systems of law; the resulting legal doctrine is the anchor that ties modern legal analysis to foundational legal principles, and it is essential to the rule of law. This consistency of foundational principles has allowed the common law of contracts to evolve over centuries within the confines of basic constraints recognized by the judges of the King’s Bench (and often based on the even older principles of the Law Merchant and Magna Carta), going back 800 years or more and with direct ties beginning in

92. See Murray, *supra* note 7; see also *supra* note 20.

93. See *supra* note 74.

94. This has implications for legal education. As New York University Professor Richard A. Epstein noted:

[L]aw schools can’t just be “practical training” centers, as [some] would have them; they must make sure that their students grasp the fundamentals of legal theory and doctrine. Future lawyers must also be capable of connecting law with collateral disciplines ranging from corporate finance to game theory to cognitive psychology.

Richard A. Epstein, *The Rule of Lawyers*, WALL ST. J., May 6, 2013, at A13 (reviewing STEVEN J. HARPER, *THE LAWYER BUBBLE* (2013)).

95. See, e.g., MAINE, *supra* note 8; *supra* note 56; *infra* note 97.

earnest some 400 years ago.⁹⁶

It is this remarkable consistency and tendency toward stability—and the equally remarkable “commonality” of the common law, applying its doctrine equally regardless of status—that comprise both its greatest strength (embodying what is essentially the “rule of law”) and its vulnerability (as there will always be those who favor a return to the law of status as a means to achieve preferences or correct perceived injustices).⁹⁷ As observed by James Fenimore Cooper more than 175 years ago (with respect to property law but with equal application to contracts):

There are numerous instances in which the social inequality of America may do violence to our notions of abstract justice, but the compromise of interests under which all civilized society must exist, renders this unavoidable. . . . If we would have civilization and the exertion indispensable to its success, we must have property; if we have property, we must have its rights; if we have the rights of property, we must take those consequences of the rights of property which are inseparable from the rights themselves.

The equality of rights in America, therefore, . . . is only a greater extension of the principle . . . [that] there is no such thing as an equality of condition.⁹⁸

The era of modern contract law (roughly the last 250 years) remains unique, an anomalous period in human history, with common law courts and lawyers creating and implementing the concepts of private law, rights, and party autonomy as we know them. And it has not yet come to an end; however, that outcome is always in doubt and dependent upon each new generation of judges and lawyers (and the restraint of legislators and regulators). If society is to preserve our traditions of party

96. See *supra* Section III.B. It is 800 years if you count from Magna Carta. See, e.g., *supra* note 20.

97. See, e.g., Murray, *supra* note 7; *supra* note 4. Your author will concede that the term “common law” is generally a reference to the “common pleas” required by the writ system and (less generally) the geographic scope of the King’s courts (being administered centrally rather than locally), but he believes the point made here (relating to a “common,” or consistent, rule of law) is valid, nonetheless. For more on the writ system, see MURRAY, *supra* note 3, at 5 n.19.

98. J. FENIMORE COOPER, *THE AMERICAN DEMOCRAT* 48 (1838); see also Murray, *supra* note 7.

autonomy and the rule of law in the years ahead, then understanding this history, and the important role of contract law, is essential.