

# A Pragmatic Defense of Contract Law

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## INTRODUCTION

Contract law is such a fixed part of our legal practice that it may seem odd to suggest that it requires a defense, except perhaps among utopians or anarchists.<sup>1</sup> To be sure, one might believe that this or that rule of contract law ought to be altered. Perhaps the parol evidence rule should be given greater force,<sup>2</sup> or perhaps courts should be more generous with the doctrines of duress and unconscionability,<sup>3</sup> but surely no one objects to the idea of having at least some sort of law of contracts? The answer depends on what one means by contract law. If one means rules governing disputes of the kind generally discussed in a first-year law school course on contracts, it would likely be difficult to find someone opposed to the existence of contract law. Even with its command-and-control economy, for example, the Soviet Union had a body of rules that purported to govern contracts.<sup>4</sup> On the other hand, if one means by contract law a single set of legal principles that purports to govern liability for basically all voluntary transactions, call it “General Contract Law,” then the question becomes much more controversial. Indeed, since the early twentieth century, successive generations of critics have argued that General Contract Law in this sense is a mistake and that in many—perhaps most—cases we would be better off fragmenting the field into distinctive bodies of law for different sorts of transactions.<sup>5</sup> The hostility continues in present contracts scholarship. For ex-

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1. If any can be found at this late date. Even the anarchists, however, seem to be enthusiastic supporters of contract law. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150–51 (1974) (noting that rules governing “the transfer of holdings from one person to another” are necessary even for a minimalist conception of justice (emphasis omitted)).

2. See *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 568–69 (9th Cir. 1988) (arguing that California’s relaxed approach to the parol evidence rule is misguided and destructive).

3. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (suggesting that the doctrine of unconscionability could extend to cover cross-collateralization clauses in consumer lending agreements).

4. See George M. Armstrong, *The Problem of Autonomy in Soviet International Contract Law*, 31 *AM. J. COMP. L.* 63, 67–72 (1983); Bernard Dutoit, *Contracts*, in *ENCYCLOPEDIA OF SOVIET LAW* 169, 169–70 (F.J.M. Fedlbrugge et al. eds., 2d rev. ed. 1985).

5. For example, in his 1934 contracts casebook, Harold C. Havighurst organized the entire subject around contracts for services, gratuities, loans, and sales of goods. See HAROLD C. HAVIGHURST, *A SELECTION OF CONTRACT CASES AND RELATED QUASI-CONTRACT CASES* vii–viii (1934) (setting forth the table of contents). Havighurst wrote:

It is my hope and belief . . . that the system here used has several advantages. It enables the student more easily to master the facts of a case and to see each situation as a living problem rather than as merely dead material for logical dissection. Rules and doctrines are viewed in a

ample, Roy Kreitner has suggested contract law should be thought of not as a set of abstract rules governing a wide variety of cases, but rather as a “set of relationships whose terms are potentially regulated by the state.”<sup>6</sup> On this view, General Contract Law ought to be replaced by labor law,<sup>7</sup> employment law,<sup>8</sup> landlord-and-tenant law,<sup>9</sup> insurance law,<sup>10</sup> lending law,<sup>11</sup> and the like. According to Kreitner, specialized bodies of regulations would improve the law “by ridding it of those commitments that have the effect of limiting contract’s fairness-promoting, or redistributive potential.”<sup>12</sup> As the list above suggests, on at least some fronts the critics of General Contract Law can claim victory; in many areas we already have specialized bodies of law governing particular kinds of transactions.

The strongest case for skepticism about the value of a General Contract Law rests on three related intellectual moves. The first part of the argument is to delegitimize the drive for generality and abstraction in contract law by giving it a disreputable intellectual pedigree. Historically, so the argument goes, General Contract Law grew out of the formalism of Christopher Columbus Langdell, which was ultimately based on a set of aesthetic rather than functionalist commitments.<sup>13</sup> The second move is to associate General Contract Law with an unworkable attempt to derive the whole body of law from a single normative theory. The final move is to argue that the application of a General Contract Law to certain kinds of cases results in undesirable outcomes. Notice how in this indictment of General Contract Law, generality serves no practical purpose. It is simply the vestigial result of a particular historical moment in the development of the common law or the hypothesis of an untenable theoretical ambition. It is not something that serves any concrete, practical purpose—or at least any concrete practical purpose of great worth—and accordingly, when faced with unpleasant results there is no normative basis for maintaining the generality of

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truer perspective; and at the same time their constant repetition facilitates the learning process. The student’s power of analysis is more rapidly developed. More emphasis is placed upon the construction and interpretation of the language used in contracts. The part that relationship, circumstance, and custom play in molding the bargain becomes more readily apparent.

*Id.* at iii.

6. ROY KREITNER, *CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE* 236 (2007).

7. *See generally* MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, *LABOR LAW: CASES MATERIALS & PROBLEMS* (2003) (providing a brief summary of American labor law).

8. *See generally* MARK A. ROTHSTEIN, *EMPLOYMENT LAW* (3d ed. 2005) (summarizing American employment law).

9. *See generally* MARGARET WILKIE & GODFREY COLE, *LANDLORD AND TENANT LAW* (Marise Cremona ed., 4th ed. 2000) (summarizing the American law of landlord and tenant).

10. *See generally* LEE R. RUSS, *COUCH ON INSURANCE* (3d ed. 2005) (summarizing American insurance law).

11. *See generally* ANDREA BLOOM, *LENDER LIABILITY: PRACTICE AND PREVENTION* (1989) (discussing the special laws applying to loan contracts).

12. KREITNER, *supra* note 6, at 236.

13. The *locus classicus* for this view is GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995).

contract law.

While at some level I am sympathetic to the arguments put forward against General Contract Law, I think that the indictment fails to appreciate the virtues of generality. What I hope to show in this Article is that the abstraction of contract law serves important practical purposes in its own right. In particular, it guards against the capture of the law by special interests that seek to manipulate legal rules for their own benefit, and it allows contracts to serve as “laboratories of democracy”—ways of searching for solutions to collective problems. My argument makes an essentially pragmatic case for General Contract Law, one that can be thrown into our normative calculus against the pragmatic arguments that can be made in favor of dissolving it into particular fields.

Part I of this Article takes up the case against General Contract Law, outlining the arguments that can be made in favor of dividing it into specialized bodies of law. Part II argues that the generality of contract law serves as a check on the power of factions to manipulate the law. Part III argues that the generality of contract law facilitates the decentralized and experimental search for solutions to collective problems, a virtue that is sacrificed by specialized bodies of law. Because the arguments put forward in this Article in favor of General Contract Law are ultimately pragmatic, I do not purport to offer an Archimedean criterion for choosing between generality and specificity in every case. In place of such a theory, however, in Part IV, I offer an analysis of one particular area of contract law—the assignment of contract rights and the rise of so-called asset securitization transactions—to show both how the generality of contract law creates problems that justify more specialized bodies of law and how that specialization can give rise to pathologies that generality can guard against. In place of a simple policy algorithm for avoiding such apparent circularity, this account shows how to recognize the pragmatic tensions on both sides of the issue. At best what emerges is a useful rule of thumb: the problems giving rise to the urge for specialized law are often best dealt with at the highest level of generality possible.

## I.

There are essentially three sets of arguments against General Contract Law. The first is historical and claims that the idea resulted from a notion of law as a science that gained popularity at the end of the nineteenth century but ultimately was rejected as untenable. On this view, General Contract Law is the lingering manifestation of an unfortunate and embarrassing moment in our jurisprudential past that is best repudiated. The second argument is theoretical and claims that General Contract Law should rest on a single normative theory. As a theoretical matter, however, it is exceedingly unlikely that a single normative theory can actually cover all of the factual circumstances that give rise to “contracts.” The third argument is related to the first two and is essentially substantive. Given that General Contract Law arose historically from a disreputable approach to law and rests on an untenable theoretical ambition, its application will necessar-

ily result in injustice in many circumstances.

The idea of a general law of contract is relatively new. One will study the earliest legal systems in vain for General Contract Law. The Code of Hammurabi, for instance, had nearly three hundred rules governing particular factual situations, some of which might be characterized as contractual. Thus, for example, it provided that:

If a man sell a male or female slave, and the slave have not completed his month, and the bennu fever fall upon him, he (the purchaser) shall return him to the seller and he shall receive the money which he paid.<sup>14</sup>

And that:

If a man rent his field for tillage for a fixed rental, and receive the rent of his field, but bad weather come and destroy the harvest, the injury falls upon the tiller of the soil.<sup>15</sup>

On the other hand, it contained no general principles about warranties or risk of loss. Roman law showed greater abstraction, but it still had no general law of contract.<sup>16</sup> For example, liability could be created by sale, hire, or partnership. Each of these transactions, however, had its own legal form—*emptio venditio*, *locatio conductio*, and *societas*, respectively—with its own associated rules. For example, rules of formation for *emptio venditio* required agreement on a thing and a price, while those for *societas* required only an agreement to pursue a common purpose.<sup>17</sup>

The common-law development of contract law followed a similar trajectory. Originally, of course, there was no common law of contracts as such. Rather, there were simply common law writs such as debt, covenant, or assumpsit that provided relief if certain formulaically alleged facts could be proven. The requirements for an enforceable contract, however, varied from writ to writ. Hence, an action in debt required a promise to pay a sum certain, while an action in covenant could only be maintained on a promise under seal.<sup>18</sup> It was only as the writ system went into final decline in the nineteenth century that legal thinkers turned their attention to formulating a general law of contracts. The shift can be seen in the contents of law books. For example, Joseph Chitty's

14. THE CODE OF HAMMURABI: KING OF BABYLON ABOUT 2250 B.C. Rule 278 (Robert Francis Harper ed. & trans., 1994).

15. *Id.* at Rule 45.

16. See W.H. BUCKLER, THE ORIGIN AND HISTORY OF CONTRACT IN ROMAN LAW DOWN TO THE END OF THE REPUBLICAN PERIOD I (London, C.J. Clay & Sons 1895) (noting that “[p]overty of Contract was in fact a striking feature of the early Roman Law”).

17. See BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 171–89 (1962) (discussing so-called consensual contracts including *emptio venditio*, *locatio conductio*, and *societas*).

18. See E. ALLEN FARNSWORTH, CONTRACTS 10–24 (2d ed. 1990) (briefly discussing the evolution of the common law writs associated with contract).

1834 edition of *A Practical Treatise on the Law of Contracts Not Under Seal*, the standard reference work in the first part of the nineteenth century, has chapters organized around contracts of married women, contracts with aliens, contracts with “*Outlaws and Persons attainted*,” contracts with parish officers, contracts for the purchase of real estate, contracts between landlord and tenant, contracts of sale, contracts of bailment, contracts of guarantee and indemnity, and the like.<sup>19</sup> Writing seventy years later, on the other hand, Samuel Williston organized his casebook on contracts not around particular transactions, but rather around general concepts like mutual assent, consideration, parties affected by contracts, implied conditions, impossibility, novation, and the like.<sup>20</sup> In short, General Contract Law had appeared. Clearly, something had changed radically in the intervening decades.

According to the standard narrative, what happened was legal formalism.<sup>21</sup> In the United States, Christopher Columbus Langdell is cast as the villain, insisting that law needed to be conceptualized as a science.<sup>22</sup> By this, Langdell purportedly meant that law was a system of abstract concepts that could be extracted from a close reading of “correctly reasoned” cases and then logically manipulated to produce objectively right legal conclusions on any disputed issue.<sup>23</sup> In response to this idea, Oliver Wendell Holmes, Jr. called Langdell “the greatest living legal theologian,” a sobriquet that was not meant as a compli-

19. See JOSEPH CHITTY, JR., *A PRACTICAL TREATISE ON THE LAW OF CONTRACTS* v–xvi (Garland Publishing, Inc. 1978) (1834) (setting forth the table of contents).

20. See 1 SAMUEL WILLISTON, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* v–vi (1903) (setting forth the table of contents); 2 SAMUEL WILLISTON, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* iii–iv (1904) (same).

21. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (offering an influential interpretation of Langdell as the arch-formalist of the Gilded Age). Christopher Wonnell has pointed out that among the critics of General Contract Law, there is actually no widespread agreement on exactly when contract law took the turn toward generality. See Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437, 439–48 (1990) (discussing the scholarship of Lawrence Friedman, Morton Horwitz, and Patrick Atiyah). While I share Wonnell's skepticism about the neatness of the narratives spun by critical historians about the rise of so-called “classical contract law,” I do believe that there is an important shift in legal thinking between Chitty's treatment of the subject and Williston's treatment.

22. Recent scholarship has suggested that this view of Langdell, while widely held and very influential, unfairly caricatures him. See Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345 (2007) (arguing against the traditional interpretation of Langdell's contracts jurisprudence); Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277 (2004) (summarizing and critiquing the scholarship on Langdell).

23. Langdell wrote:

Law, considered as a science, consists of certain principles or doctrines. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.

C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi–vii (Boston, Little, Brown, & Co. 1871).

ment.<sup>24</sup> Rather, he was pointing to the disjunction he saw between the abstract law conceptualized by the formalists and the practical, lived, experience of the common law.<sup>25</sup>

Langdell, of course, was a scholar of contract law, and in the influential twentieth-century work of Grant Gilmore, he is made the primal author of General Contract Law, aided and abetted by followers, most notably Samuel Williston.<sup>26</sup> Although few historians of contract are inclined to take Gilmore's story as an accurate description of how the law actually developed, the taint of formalism still attaches to contract law in some quarters, particularly in the United States.<sup>27</sup> The push for a single set of rules to govern all voluntary transactions seems to rest on the misguided hope that law can be made into a simple set of abstract premises from which correct results can be deduced. On this view, contract law is simply the manifestation of a naive aesthetic prejudice that should have been beaten out of the brains of all right-thinking lawyers in their first semester of law school, or, as one professor summarized his subject: "Contracts. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879."<sup>28</sup>

The notion of a single set of principles governing all contracts would seem to go hand in hand with the notion that these principles can be reduced to a single normative theory, and herein lies the second line of attack against General Contract Law. Attempts to provide such a unitary theory of contract law have not met with widespread acceptance.<sup>29</sup> To take perhaps the most prominent

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24. Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (2d ed. 1879) and WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT (Oxford, Clarendon Press 1879)).

25. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Publications Inc. 1991) (1881) ("The life of the law has not been logic: it has been experience.").

26. See GILMORE, *supra* note 13, at 6. In one of his many strange historical moves, Gilmore casts Holmes as a co-conspirator with Langdell, something that one suspects Holmes himself would have found surprising.

27. A.W. Brian Simpson, who surely counts as an authority on the history of the common law of contracts if anyone does, recently remarked that in *The Death of Contract*, Gilmore was engaged in "the writing of historical twaddle, uninhibited by more or less total ignorance of his subject!" A.W. Brian Simpson, Book Review, 26 LAW & HIST. REV. 221, 222 (2008) (reviewing ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE (2006)); see also James R. Gordley, *The Death of Contract*, 89 HARV. L. REV. 452, 454-55 (1975) (criticizing Gilmore's historical scholarship when reviewing GRANT GILMORE, THE DEATH OF CONTRACT (1974)).

28. James D. Gordon III, *How Not To Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991).

29. See Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 830-31 (2007) ("[T]here is widespread agreement about the doctrinal shape of modern contract law. What we lack is a widely accepted interpretation of that law."). For examples of attempts to articulate such a theory, see generally CHARLES FRIED, CONTRACT AS PROMISE (1981) (arguing that the "promise principle" underlies contract law); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (arguing that a consent theory of contract best explains how legal force is justified in the context of contracts); Peter Benson, *The Unity of Contract*

example, Charles Fried's attempt to show that all of contract law can be reduced to the moral obligation to keep a promise<sup>30</sup> has been rejected even by theorists who share Fried's individualistic assumptions.<sup>31</sup> Law and economics has been more successful in attracting adherents, but even here the chorus of skeptics is sizeable and includes practicing lawyer economists.<sup>32</sup>

In the face of the apparent failure of more ambitious theoretical projects, many scholars have suggested that it is best to identify particular classes of contracts that share the same basic normative concerns and construct a law based around those normative principles rather than searching for a more overarching account of contract.<sup>33</sup> A natural starting place is to carve off commercial transactions from the rest of contractual activity and provide them with their own rules.<sup>34</sup> For example, one might argue that contracts between corporations ought to be concerned solely with maximizing efficiency, even if other sorts of contracts—say those between corporations and consumers—ought to be dominated by other concerns.<sup>35</sup> Once one begins carving up the world of contracts into different normative spheres, however, the prospect of justifying a General Contract Law becomes exceedingly unlikely. Differing normative commitments tend to lead to different legal rules. Indeed, even the apparent convergence of concerns for personal autonomy and economic efficiency looks increasingly unlikely upon closer analysis.<sup>36</sup> In short, our inability to provide a coherent normative justification for General Contract Law counsels in favor of a more modest effort to justify rules governing a more limited domain. Such a move, however, implies the fracturing of contract.

The final argument is essentially an extension of the other two. If General

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Law, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118 (Peter Benson ed., 2001) (arguing that contracts are best conceptualized as transfers of property). See generally Peter Benson, *Contract, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 24 (Dennis Patterson ed., 1996) (summarizing contemporary debates over contract theory).

30. See FRIED, *supra* note 29.

31. See Randy Barnett, *Some Problems with Contract as Promise*, 77 *CORNELL L. REV.* 1022, 1025–27 (1992) (criticizing Fried's theory).

32. See STEPHEN A. SMITH, *CONTRACT THEORY* 106–63 (Peter Birks ed., 2004) (summarizing normative critiques of efficiency theories of contract); Ian Ayres, *Valuing Modern Contract Scholarship*, 112 *YALE L.J.* 881 (2003) (responding to Posner's arguments that economic analysis of contract law has failed); Richard Craswell, *In That Case What Is the Question? Economics and the Demands of Contract Theory*, 112 *YALE L.J.* 903 (2003) (same); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 *YALE L.J.* 829, 864–68 (2003) (arguing that economic analysis of contract law has failed due to an ambiguity about the idea of transaction costs).

33. See, e.g., Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 54 (Jody S. Kraus & Steven D. Walt eds., 2000).

34. See *id.*

35. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 544–50 (2003) (arguing that contracts between corporations should encourage “efficient trade and investment”).

36. See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 242 (1993) (“On various central normative issues pertaining to the concept of freedom of contract, I have concluded that the claim of convergence between autonomy and welfare values is much more tenuous than proponents of the private ordering paradigm have conventionally been prepared to acknowledge.”).

Contract Law was born in the original sin of formalism and cannot be justified by a coherent normative theory, we would expect that the results of its application to specific cases would be less than edifying. In particular, a general law of contract involves abstracting from particular types of transactions, relying on a necessarily idealized vision of contracting parties. The result is a disjunction between the sorts of transactions that the law implicitly contemplates and the transactions that it actually governs. For example, Brian Bix has argued that “the portrayal of the diverse contract world as exemplifying a single phenomenon frequently works both to distort the underlying reality and (at least sometimes) to legitimate unjust practices.”<sup>37</sup>

In support of such a claim, one might point to the cases of *Feinberg v. Pfeiffer Co.*<sup>38</sup> and *Pitts v. McGraw-Edison Co.*<sup>39</sup> Both decisions involved promises of pensions made by companies to long-time workers. In both cases, the workers retired, and, after they received payments for a number of years, the companies cut off the pensions. In *Feinberg*, the plaintiff had worked as a secretary for the company for thirty-seven years when the board of directors adopted a resolution promising her \$200 a month upon her retirement.<sup>40</sup> She worked for another year and a half before taking her pension, which was then canceled when new management took over the company.<sup>41</sup> Her suit for breach of contract was met with the argument that the promise lacked consideration and therefore was not binding.<sup>42</sup> The court, however, held for the plaintiff on the basis of promissory estoppel, reasoning that she made her ultimate decision to retire based on the company’s promise.<sup>43</sup> In *Pitts*, however, the court reached the opposite conclusion.<sup>44</sup> In that case the plaintiff was a traveling salesman who had worked on a commission basis for years on behalf of a publisher.<sup>45</sup> The company eventually forced him into retirement by giving his territory to a younger man, but “to make the matter of retirement a little less distasteful” promised to continue paying the plaintiff a one percent commission on all sales made in his old territory.<sup>46</sup> “You will get your check each month,” wrote the publisher’s agent, “just as you have been in the habit of getting our check on commissions.”<sup>47</sup> When the company refused to honor the promise, Pitts sued. The court, however, ruled that payments under the plan “were mere gratuities terminable by the

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37. Brian Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality* 20 (Minn. Legal Studies, Research Paper No. 07-30, 2007), available at <http://ssrn.com/abstract=993949>.

38. 322 S.W.2d 163 (Mo. Ct. App. 1959).

39. 329 F.2d 412 (6th Cir. 1964).

40. *Feinberg*, 322 S.W.2d at 164–65.

41. *Id.*

42. *Id.* at 167.

43. *Id.* at 168–69.

44. See *Pitts*, 329 F.2d at 416.

45. *Id.* at 413.

46. *Id.* at 414.

47. *Id.*

defendant at will.”<sup>48</sup> Unlike the court in *Feinberg*, the *Pitts* court refused to enforce the promised pension via promissory estoppel on the ground that Pitts never relied on the publisher’s promise.<sup>49</sup>

In both cases, the outcome nominally turned on the question of whether the plaintiff had reasonably relied on the promise. However, in *Feinberg* it is unclear whether the defendant really did rely on the promised pension, despite her predictable protestations to that effect in depositions.<sup>50</sup> She continued to work for the company for a year and a half after the promise was made, and the opinion makes no reference to any contemporary evidence that her decision to quit was influenced by the promise.<sup>51</sup> She may have simply retired because she was old and needed a rest from work. One suspects that the actual basis of the court’s decision was an unwillingness to let a company abandon a long-time employee who was now too sick to support herself.<sup>52</sup> Somewhat counter-intuitively, however, under the court’s theory she could not have recovered if the company had simply fired her because such a firing would have eliminated the reliance upon which the court based its decision. Indeed, this is more or less the position adopted by the court in *Pitts*, where the company did fire the plaintiff.<sup>53</sup> Little is served, one might argue, by the court’s obfuscation of its true reasons in *Feinberg*, and the accident of voluntary versus involuntary retirement is an arbitrary basis on which to decide the scope of a company’s pension obligations. To use language from the letter sent to the plaintiff in *Pitts*, one might believe that the real issue in such cases is how best to ensure that, in their retirement, senior citizens have “enough to help keep a few pork chops on the table and a few biscuits in the oven.”<sup>54</sup> In the face of such decisions, it is not surprising that in 1974, Congress passed the Employee Retirement Income Security Act, in effect carving the law of pensions off from the law of contracts and subjecting it to a special set of rules.<sup>55</sup>

In short, there are powerful arguments to be made in favor of dismembering General Contract Law into more particularized bodies of rules. Stated in its starkest form, General Contract Law was born of a mistaken jurisprudential theory, lacks a normative foundation, and leads to injustice in particular cases. One English scholar succinctly summarized the criticism thus:

Different transactions call for different rules, even if they are all contracts, just as lockjaw and goitre call for different prescriptions though both are dis-

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48. *Id.* at 416.

49. *Id.* The court also expressed some doubt as to whether Tennessee, whose law governed the case, had adopted the doctrine. *Id.*

50. *See* *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163, 166 (Mo. Ct. App. 1959).

51. *Id.* at 165–66.

52. *See id.* at 165–66, 169 (discussing *Feinberg*’s medical condition).

53. *See Pitts*, 329 F.2d at 416.

54. *See id.* at 414.

55. *See generally* JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004) (describing the Employee Retirement Income Security Act and its history).

eases. . . . *Assumpsit* was doubtless a single action at law, but there is more than one kind of transaction in fact, and it is not a merit of the common law to fail to distinguish what a child can tell apart, who knows better than to offer “rent” to the bus-conductor or a “premium” to his barber. This failure has resulted, among other things, in the English law of contracts already having a General Part which is much too big.<sup>56</sup>

All of these arguments, of course, are open to dispute, and how one judges their strength will no doubt dictate in large part one’s enthusiasm for the further dismemberment of contract law. They are conspicuous, however, in rendering generality essentially pointless, a quixotic intellectual game with pernicious consequences. Yet as we shall see generality has pragmatic, functional virtues that must also be considered before we pass judgment on contract law’s continued decline.

## II.

Although it may seem a long way from constitutional theory to the philosophy of private law, Madison’s discussion of faction in *Federalist No. 10* provides the germ of an argument in support of General Contract Law. He wrote:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.<sup>57</sup>

The negative results of faction, according to Madison, can be treated by either disposing of their cause or mitigating their effects.<sup>58</sup> Speaking of mankind in general, he wrote, “As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other.”<sup>59</sup> In other words, “[t]he latent causes of faction are thus sown in the nature of man.”<sup>60</sup> Accordingly, Madison concluded that one could only address the problem of faction by mitigating its effects. The solution, he insisted—breaking with more than a millennium of republican theory—was an extended republic:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more

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56. Tony Weir, *Contract—The Buyer’s Right To Reject Defective Goods*, 35 CAMBRIDGE L.J. 33, 38 (1976).

57. THE FEDERALIST NO. 10 (James Madison).

58. *Id.*

59. *Id.*

60. *Id.*

frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.<sup>61</sup>

In contrast, a large polity makes capture by any particular faction more difficult.

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>62</sup>

An analogous argument can be made in favor of the generality of contract law. Specialized bodies of law are like small republics, easily captured by a single faction. A generalized body of law, on the other hand, is like an extended polity that is much more difficult for a special interest to manipulate.

While our General Contract Law is a relatively recent arrival, the notion that requiring legal generality is a safeguard against the capture of the law by factions is a very old idea. The ancient Greeks identified the rule of law with the term *isonomia*, which literally meant “same” (*iso-*) “laws” (*nomia*).<sup>63</sup> The term could take on different shades of meaning depending on the context in which it was used, but at its core it stood for the idea that different laws should not apply to different classes of society but that all should be governed by the same general rules.<sup>64</sup> Herodotus wrote that *isonomia* was “the finest of all names” to describe a polity,<sup>65</sup> and in his praise of Athenian democracy, Pericles insisted that “equal justice” [*isonomia*]<sup>66</sup> was part of what made the city “the school of Hellas.”<sup>67</sup> Roman law also contributed to the emergence of generality. Beginning in the eleventh century, Western Europeans rediscovered Roman law through the Justinian’s *Digests*, which they sought to reformulate as a universal

61. *Id.*

62. *Id.*

63. See JOHN WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS: AN INTRODUCTION* 84–87 (photo. reprint, Scientia Verlag Aalen 1977) (1956) (discussing the concept of *isonomia* in Greek legal thought).

64. See *id.* at 85.

65. See HERODOTUS, *THE HISTORIES* iii.80 at 207 (Aubrey De Sélincourt trans., Penguin Books 2003); Edward M. Harris, *Pericles’ Praise of Athenian Democracy: Thucydides 2.37.1*, 94 *HARV. STUD. CLASSICAL PHILOLOGY* 157, 160 (1992) (“The word *isonomia* probably has two aspects here. On the one hand, it refers to the passive right to receive justice on equal terms in the courts (equality before the law). On the other, it denotes the active right to participate in the judicial process by sitting on the courts.”).

66. *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR* 2.37.1 at 112 (Robert B. Strassler ed., Richard Crawley trans., The Free Press 1996) (1874) (“If we look to the laws, they afford equal justice [*isonomia*] to all in their private differences . . .”).

67. See *id.* 2.41.1 at 114 (“In short, I say that as a city we are the school of Hellas . . .”); Harris, *supra* note 65, at 161–62.

and generalized instantiation of natural law.<sup>68</sup> It was during this period that the first efforts at a general theory of contract were attempted in the civil law tradition.<sup>69</sup> In the seventeenth century, James Harrington revived the idea of “Isonomy,” insisting that it was the *sine qua non* of a government of laws rather than of men.<sup>70</sup>

In a more practical vein, a generation before Harrington, the Court of King’s Bench decided *The Case of Monopolies*.<sup>71</sup> Queen Elizabeth I had granted to Edward Darcy a monopoly over the manufacture and sale of playing cards, and he sued a “T. Allein, haberdasher, of London” for selling cards without his consent.<sup>72</sup> The justices sided with Allein, holding that the grant was invalid because it ran contrary to common law.<sup>73</sup> Among other grounds for their decision, they stated: “[S]uch a charter of a monopoly, against the freedom of trade and traffic, is against divers Acts of Parliament, which for the advancement of the freedom of trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary.”<sup>74</sup> Put another way, the court in effect held that the law guarded against the evil of monopolies by privileging the general rules laid down by Parliament over the special acts of the Crown. To hammer home the danger of special interests, Lord Coke closed his report of the case by noting pointedly:

And *nota*, reader, and well observe . . . our lord the King that now is [that is, James I], in a book which he in zeal to the law and justice commanded to be printed anno 1610, intituled [sic], “A Declaration of His Majesty’s Pleasure, &c.” has published, that monopolies are things against the laws of this realm; and therefore expressly commands, that no suitor presume to move him to grant any of them, &c.<sup>75</sup>

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68. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 120–64 (1983) (discussing the revival of Roman law in medieval universities).

69. See generally HAROLD BERMAN, *The Religious Sources of General Contract Law: An Historical Perspective*, in FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 187, 187–208 (1993) (describing the religious sources behind General Contract Law); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991) (discussing the synthesis of rediscovered Roman law and late-Scholastic philosophy that resulted in the articulation of the first general theory of contract law).

70. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 166–67 (1960); see also JAMES HARRINGTON, *The Commonwealth of Oceana*, in *THE OCEANA AND OTHER WORKS OF JAMES HARRINGTON ESQ.* 33, ch. 1 at 37 (John Toland ed., London, A. Millar 1747) (1656) (“Government (to define it *de jure*, or according to antient Prudence) is an Art whereby a Civil Society of Men is instituted and preserv’d upon the Foundation of common Right or Interest; or (to follow Aristotle and Livy) It is the Empire of Laws, and not of Men [sic].”).

71. *The Case of Monopolies*, Y.B. 44 Eliz, fol. 84b, Trin. (1602), (1602) 77 Eng. Rep. 1260 (K.B.) (U.K.). For a general discussion of the case and other similar decisions from the same time, see Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 5 *ECON. HIST. REV.* 30 (1935).

72. *Monopolies*, 77 Eng. Rep. at 1260–61.

73. *Id.* at 1262.

74. *Id.* at 1265 (internal citations omitted).

75. *Id.* at 1266 (internal citations omitted).

A similar theme emerged as American law in the nineteenth century grappled with the question of how to deal with the rising power of corporations and their tendency to extract monopolies and other special privileges from the state.<sup>76</sup> One response to this problem was the creation of state constitutional provisions requiring that corporate charters, which frequently contained special privileges, be granted only by general laws. In the words of the widely copied 1846 New York state constitution, “Corporations may be formed under general laws; but shall not be created by special act . . . .”<sup>77</sup> Other states went even further. Nevada, for example, required that “[t]he Legislature shall pass no Special Act in *any manner relating to corporate powers*.”<sup>78</sup> Tennessee’s 1870 constitution contained the most elaborate provision. It stated that “[n]o corporation shall be created or its powers increased or diminished by special laws,”<sup>79</sup> but it nested this prohibition within a much broader requirement of generality in the law:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individuals, or individual rights, privileges, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.<sup>80</sup>

Such provisions were part of “dual hostility toward political and market privilege: incorporation by special charter resulted not only in the monopolization of sectors of the economy but also in the corruption of legislatures through bribery or other schemes designed to protect this artificial privilege.”<sup>81</sup> The preference for generalized laws over specialized laws combated both evils.<sup>82</sup>

76. *See generally* HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836–1937* (1991) (arguing that classical political economy was developed, in part, to deal with the rise of politically powerful groups, such as corporations).

77. N.Y. CONST. art. VIII, § 1 (1846); *see, e.g.*, ILL. CONST. art. X, § 1 (1848) (incorporating language from the New York Constitution); MD. CONST. art. III, § 47 (1851) (same); MICH. CONST. art. XV, § 1 (1850) (same); MO. CONST. art. VIII, § 4 (1865) (same); OR. CONST. art. XI, § 2 (1857) (same); *see also* LA. CONST. tit. VI, art. 123 (1845) (“Corporations shall not be created in this State by special laws, . . . but the legislature shall provide by general laws, for the organization of all other corporations . . . .”); MINN. CONST. art. X, § 2 (1857) (“No Corporations shall be formed under special acts . . . .”); OHIO CONST. art. XIII, §§ 1–2 (1851) (“The general assembly shall pass no special act conferring corporate powers . . . . Corporations may be formed under general laws . . . .”); S.C. CONST. art. XII, § 1 (1869) (“Corporations may be formed under general laws . . . .”); W. VA. CONST. art. XI, § 1 (1872) (“The legislature shall provide for the organization of all corporations hereafter to be created, by general laws, uniform as to the class to which they relate; but no corporation shall be created by special law . . . .”).

78. NEV. CONST. art. VIII, § 1 (1864) (emphasis added).

79. TENN. CONST. art. XI, § 8 (1870).

80. *Id.* (emphasis added).

81. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 36 (1993).

82. *See id.*

The claim that generality serves as a prophylaxis against partiality can be rearticulated using the modern language of public choice theory. Government institutions, so the arguments go, are prone to capture by special interests that have an incentive to obtain concentrated benefits by imposing diffuse costs on the general public.<sup>83</sup> There is thus a depressing tendency for institutions, programs, and laws designed to regulate particular industries to become captured by those very same groups, which then modify the law over time for their own benefit regardless of the costs to the public or other interests.<sup>84</sup> Indeed, some scholars have noted precisely this tendency in some of the fields that have been broken off from contract law. For example, California's insurance regulations were allegedly created in a brokered deal between insurance companies and tort lawyers:

In the late 1980s, Assembly Speaker Willie Brown sat down in Frank Fat's restaurant in Sacramento with insurance industry lobbyists and trial lawyers. He negotiated an agreement, written on a cocktail napkin, in which the insurance industry obtained an insurance law with no controls on prices and the trial lawyers were rewarded no control on lawyers' fees and damage awards.<sup>85</sup>

The more general the application of a body of law, however, the less likely it is to be subject to such capture by special interests.

Public choice theory in effect sees the production of law as a market in which special interests "buy" policy makers with campaign contributions and lobbying efforts, and policy makers "sell" policy outcomes to those who expend the most resources in procuring them, a process known as "rent seeking."<sup>86</sup> A similar model can be applied to courts, where litigants seek to purchase favorable precedents by investing in litigation and where judges respond by providing

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83. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 34 (1991) ("When economists describe special interest legislation as 'rent-seeking,' they mean that the legislation is not justified on a cost-benefit basis: it costs the public more than it benefits the special interest, so society as a whole is worse off.").

84. See JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 22 (1997) ("The most prominent reason given for this regulatory lethargy was a variant of interest group theory, the 'capture' of the old-line agencies by the groups that they had been designed to regulate.").

85. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 *LOJ. L.A. L. REV.* 1239, 1248 (1998). The law was later changed by a ballot initiative. *Id.* at 1248 & n.62.

86. Anne O. Krueger first coined this term in 1974. See Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *AM. ECON. REV.* 291, 291 (1974). For an extensive discussion of the term and the theories associated with it, see *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (James M. Buchanan et al. eds., 1980). For a lucid introduction, see Gordon Tullock, *Rent Seeking*, in 4 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 147 (John Eatwell et al. eds., 1987).

legal rules in response to the resources expended on advocacy.<sup>87</sup> While public choice uses a short hand of “buying” and “selling,” one need not posit any actual bribery or dishonesty. All that the theories assume is that over time, policy makers—whether judges or legislators—tend to respond to the concerns of those who expend the greatest resources on advocating their position.

Like any other market, the production of law—on this view—must be analyzed on both the demand side and the supply side. On the demand side, Todd Zywicki writes:

The demand,  $D$ , for a particular legal rule will be a function of the present value of the expected stream of economic rents that will be generated by a particular legal rule. . . . So as the expected value of  $V$  increases for a particular law, parties will be willing to invest greater sums to secure that law’s passage.<sup>88</sup>

On the other hand, the smaller the expected pay-off for any particular legal change, the less incentive special interests have in investing in the lobbying effort to make that change. The size of the pay-off, in turn, can be influenced by the institutional context of the policy maker on the “supply side.” For example, Zywicki posits that “if a precedent is less durable, the present value of the precedent will decrease because a favorable precedent will transfer less wealth over time. As a result, litigants will be less willing to invest resources *ex ante* to secure a favorable precedent.”<sup>89</sup>

The virtue of generality from this point of view is that it reduces the payoff from any particular change, thereby reducing the incentive for rent seeking. A thought experiment can illustrate the argument. Suppose that ABC Inc. is an insurance company that, all things being equal, would prefer that its policies be interpreted using a particularly strict version of the parole evidence rule. Imagine that ABC Inc.’s payoff from the application of a strict version of the parole evidence rule to its policies would be \$1 million per year. ABC Inc., however, also enters into critical contracts that are not insurance policies, for example, contracts with businesses from which it purchases goods and services. Here, ABC Inc. would prefer that courts adopt a version of the parole evidence rule that was more attentive to the actual intent of the parties. Imagine that the cost to ABC Inc. of applying the strict version of the parole evidence rule to these critical contracts would be \$300,000 per year. Finally, let us imagine two different worlds, one where there is a special rule for insurance policies and one where there is simply a general rule for all contracts, in other words a world of

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87. See generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (using economic analysis to reconcile the idea of an independent judiciary with the importance given to interest groups in the political process).

88. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1556 (2003).

89. *Id.* at 1566.

General Contract Law. In the world of General Contract Law, ABC Inc.'s pay-off for the stricter parol evidence rule is \$700,000 (that is, \$1 million for the benefit of the strict rule in its insurance contracts minus \$300,000 for the costs of the strict rule in its other contracts), while in the world where there is a specialized rule for insurance contracts, the pay-off for the stricter rule is \$1 million. This is because a stricter parol evidence rule would be applied only to insurance contracts, allowing ABC Inc. to reap the benefits of the laxer version of the rule for its other contracts. Accordingly, we would expect ABC Inc. to invest more money in shifting the rule for "insurance law" than it would be willing to shift the rule for General Contract Law. Note this holds true even if we explicitly assume that under a regime of General Contract Law, ABC Inc. would still prefer one rule over another. So long as General Contract Law precludes ABC Inc. from being certain that it will always be on the "winning" side of a particular rule change, however, it has less of an incentive to invest in capturing the legal regime.

The background choice between generality and specificity also creates differing incentives on the demand side. If we suppose that over time judges tend to respond to the weight of advocacy that they hear, we would expect them to be more responsive to the interests of insurance companies in the field of insurance law for the simple reason that insurance companies are one of the few "buyers" in this particular "market." In contrast, when judges are making decisions about General Contract Law, they are less likely to be responsive to insurance companies because they will be hearing from the much more diverse group of litigants who make up the "buyers" in this larger, less specialized "market." Thus, even if ABC Inc. and its compatriots are willing to expend money on advocacy to change the general law of contracts, they will now be forced to "bid" against other constituencies that may wish the law to develop in a different direction. Indeed, one need not even suppose that there is direct calculation on the part of any particular group. All that one need suppose is that once thrown into court, parties will advocate for the rule that is in their interest. A decision maker presiding over a specialized set of rules is more likely to heed the wishes of a small group of repeat players for the simple reason that they are the ones who use the specialized rules. In contrast, a decision maker presiding over a highly generalized set of rules will hear from a much more heterogeneous group.

An analogy to this argument can be found in John Rawls's famous idea of the veil of ignorance. In *A Theory of Justice*, Rawls sets forth what he calls "justice as fairness."<sup>90</sup> What he means by this is that justice consists of those moral principles that would be chosen by rational actors under conditions that all

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90. See JOHN RAWLS, *A THEORY OF JUSTICE* 3–40 (rev. ed. 1999) (setting forth Rawls's theory of "justice as fairness"); see also JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001) (same).

parties would recognize as fair.<sup>91</sup> Rawls thus falls into the social contract tradition, not because he believes that principles of justice can be derived from an actual, historical contract but rather because thinking about what principles self-interested parties would choose to abide by provides a useful conceptual tool for uncovering defensible principles of justice.<sup>92</sup> He calls this hypothetical choice situation the “original position.”<sup>93</sup> In the original position, hypothetical actors choose moral principles upon which to build political institutions and practices, but they do so under conditions that rigorously exclude any knowledge about the particular place they would occupy in the society for which they are choosing principles.<sup>94</sup> This “veil of ignorance” ensures that the principles chosen will be fair because even a self-interested actor will have no incentive to choose principles that favor him at the expense of others.<sup>95</sup> Ignorance of one’s particular position in society forecloses such an incentive. The public choice argument offered above suggests that legal generality provides an admittedly very rough approximation of the veil of ignorance. Because rent-seeking parties are less likely to know how any particular rule will affect them, they have less of an incentive to push for rules that benefit them at the expense of others. To be sure, our hypothetical insurance company, even under a regime of General Contract Law, is a long way from Rawls’s original position. Still, the veil of ignorance behind which the company operates is thicker than it is when the object of rent-seeking is a more specialized body of law.

In short, the first practical, functional defense of contract law’s generality is that it serves as a prophylaxis against capture of the law by special interests. To be sure, even in a world governed only by General Contract Law, repeat players would still have incentives to change the law in their own favor. A specialized body of law, however, will likely increase the incentives for capturing the law by limiting the extent to which repeat players will face costs due to a rule change. On this argument, a preference for generalized contract law over specialized bodies of law, far from being a mindless, formalistic prejudice,

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91. RAWLS, A THEORY OF JUSTICE, *supra* note 90, at 15 (“I have said that the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair. This fact yields the name ‘justice as fairness.’”). Rawls’s theory is actually more subtle than this because he argues that the principles created by the procedural model of the veil of ignorance and the original position must then be tested against our considered judgments in a process of reflective equilibrium. *See id.* at 18–19 (describing the process of reflective equilibrium).

92. *See id.* at 10 (“My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.”). *See generally* Ann Cudd, *Contractarianism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 2007 ed.), available at <http://plato.stanford.edu/entries/contractarianism> (last visited Aug. 11, 2009) (discussing the relationship between Rawlsian philosophy and the social contract tradition).

93. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 90, at 102–68 (setting forth, in detail, Rawls’s arguments concerning the structure of the original position).

94. *See id.* at 118 (“Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this, I assume that the parties are situated behind a veil of ignorance.”).

95. *Id.*

reflects a pragmatic desire to reduce rent seeking. As I argue in the next Part, however, this is not the only practical benefit of legal generality. Contract law, by allowing for transactional innovation, can also serve as a way for society to find solutions to the numberless problems of coordination and collective action that it faces. This benefit is also often sacrificed by specialized bodies of law, which serve to limit transactional innovation. In facilitating problem-solving and experimentation, contract law serves to advance many of the same values that pragmatist philosophers such as John Dewey or Hillary Putnam have associated with democracy.

### III.

Lon Fuller argued that virtually any body of law can serve two interests. First, it can regulate human misbehavior. Second, it can facilitate self-directed human action.<sup>96</sup>

While contract law might seem like the quintessential example of a body of law that facilitates human interaction, many contract theorists have answered Fuller's question decisively in favor of viewing contract law as a mechanism for social control. Jean Braucher, for example, has written:

In the event of a dispute between contracting parties, some external power must first decide whether the parties have consented in a valid manner and, if so, determine the scope of the consent. Legal decisionmakers, serving collective societal norms, construct consent. This process is unavoidably a means of regulation, one which fosters one view or another of beneficial contractual relations.<sup>97</sup>

Fuller himself acknowledged that the question of contract's role was anything but clear cut. "The law of contracts, on its face, seems obviously aimed at producing a facilitation of interaction," he wrote.<sup>98</sup> "Yet adherents of the view that law consists essentially in an exercise of social control over human behavior may point out that the law of contracts itself of necessity contains a coercive element."<sup>99</sup> Creating a special body of law for particular kinds of transactions, however, tends to commit one to a much stronger regulatory vision of contract law. The preference for a facilitative view of contract law over a regulatory vision has generally been argued for on the basis of a commitment to

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96. Lon L. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 *BYU L. REV.* 89, 89 ("Do we use law as an instrument of constraint to keep people from evil or damaging behavior, or do we, through rules of law, provide for our citizens a framework within which they can organize their relations with one another in such a manner as to make possible a peaceful and profitable coexistence?").

97. Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 *WASH. & LEE L. REV.* 697, 699-700 (1990) (citation omitted).

98. Fuller, *supra* note 96, at 91.

99. *Id.*

autonomy or economic efficiency.<sup>100</sup> There is, however, another argument rooted in a pragmatic vision of democracy. In particular, the dissolving General Contract Law tends to limit the possibilities for transactional innovation and thus diminishes the ability of contracts to act as a source of solutions for collective problems.

Particularity need not necessarily commit one to a more regulatory vision of the law. A preference for party autonomy over socially imposed norms is an approach that could operate across different legal domains. Hence, for example, one might think that regulatory norms in landlord-and-tenant contracts should be kept to a minimum without necessarily thinking that the other rules of landlord-and-tenant law ought to apply to all contracts. Nor does a preference for specialized law necessarily correlate with a more paternalistic attitude toward contracting parties. For example, Article 2 of the Uniform Commercial Code (which is itself a specialized set of rules for sales) frequently contains special rules applying only between merchants that are less paternalistic than the generally applicable law.<sup>101</sup>

While there is not a strict logical connection between General Contract Law and a preference for private ordering, there is a strong contingent and historical connection. By and large the contemporary bodies of specialized law that have grown out of contract—employment law, labor law, lending law, and the like—are creations of the twentieth, and to a lesser extent, the late nineteenth century. As Lawrence Friedman has observed:

The 19th century was the golden age of the law of contract. As late as Blackstone, contract occupied only a tiny corner of the temple of common law. Blackstone devoted a whole volume to land law, but a few pages at most to informal, freely negotiated bargains. In the 19th century, contract law, both in England and America, made up for lost time. This was a natural development. The law of contract was a body of law well suited to a market economy. It was the general branch of law that made and applied rules for arm's-length bargains, in a free, impersonal market. The decay of feudalism and the rise of a capitalist economy made the law of contract possible; in the age of Adam Smith it became indispensable. After 1800, the domain of contract steadily expanded; it greedily swallowed up other parts of the law.<sup>102</sup>

The caricature of the end of the nineteenth century as a pristine era of laissez-

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100. See generally TREBILCOCK, *supra* note 36 (discussing the defense of freedom of contract in terms of autonomy and efficiency theories).

101. See, e.g., U.C.C. § 2-207(2) (2003) (noting that while additional terms in otherwise valid acceptances are normally to be construed as offers of additions to the contract, such terms generally become part of the contract between merchants).

102. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 275 (2d ed. 1985).

faire cannot ultimately be squared with the historical facts.<sup>103</sup> Likewise, recent research has shown that classical contract law was not the rigid and formalistic regime that it is often portrayed as having been.<sup>104</sup> Still, the contract law that ushered in the twentieth century was extremely solicitous of formal party autonomy, and, despite the rise of doctrines such as unconscionability, contemporary contract law is essentially committed to a regime of freedom of contract. Hence, as an empirical matter, if not as a matter of logical necessity, the tendency of specialized bodies of law is to replace a regime based on the facilitation of private ordering with one that is much more concerned with the enforcement of regulatory norms.

Although the connection between General Contract Law and a preference for a facilitative rather than a regulatory approach to transactional law is largely a historical accident, there are also practical difficulties involved in creating a body of law that maintains both specificity and flexibility in the face of new transactional forms. The jurisprudence of James Coolidge Carter provides an illustration. Carter was a leading lawyer during the Gilded Age, the mastermind of the movement against the codification of the common law, and a prolific author on legal topics.<sup>105</sup> At the heart of his legal thought was an almost mystical devotion to the idea of custom as a basis for law. In this sense, he is an American manifestation of the nineteenth century school of historical jurisprudence that had its roots in the work of Savigny and German romanticism.<sup>106</sup> Although Carter did not develop a theory of contract law per se, his devotion to a law based on customary practice made him hostile to the abstract conception of law championed by contract theorists such as Langdell.<sup>107</sup> Rather, he wrote, “I know of no reason why men were in the first instance compelled to perform their contracts except that such performance was in accordance with cus-

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103. See KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 229 (1989) (“Legislators between 1860 and 1920 were affected by and contributed to the era’s massive economic transformation, and their behavior defies the characterization of *laissez-faire* so frequently stamped on them.”).

104. See, e.g., Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 213 (2005) (arguing that Williston’s work has “strong elements of pragmatism”); Mark L. Movsesian, *Williston as Conservative Pragmatist*, 32 S. ILL. U. L.J. 135, 135 (2007) (“Williston shared the progressives’ distaste for conceptual rigidity . . .”).

105. For a summary of Carter’s thoughts, see generally Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577 (2002) (describing Carter as a “Mugwump”—an important legal figure who sought to synthesize traditional beliefs with modern life); Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 179–93 (2007) [hereinafter Grossman, *Langdell Upside-Down*] (describing Carter’s role as an “anticodifier” in the movement to replace common law with a written civil code).

106. JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY* 121 n.10 (1990) (“The debate over codification in New York, carried on principally between Carter and David Dudley Field, was in many ways a repeat performance of the same debate in Germany in the first quarter of the nineteenth century between Savigny and Thibaut.”); see also J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 320–25 (1992) (briefly summarizing the debate over “historical jurisprudence” between Savigny and Thibaut).

107. See Grossman, *Langdell Upside-Down*, *supra* note 105, at 156–63.

tom.”<sup>108</sup> Yet in discussing contracts, Carter focused not on the general rules of contract law, but rather on the specific rules surrounding particular types of transactions.<sup>109</sup> Custom having elaborated the duties of the parties to such a transaction and the law having recognized them, the question then arose for Carter of what the law should do when the custom changed.

Carter’s answer was ambiguous. On one hand, he insisted that law must change when custom changes. He wrote:

[I]f some piece of conduct really in accordance with custom is declared by the courts to be otherwise, society will, if the matter be one of grave importance, pursue its own course, regardless of the decision. . . . In the next place, we shall observe that the courts themselves recognise, tacitly, at least, this fact, and when they perceive that a rule of law as laid down by them is not generally accepted, that is, that it fails to control conduct, they change the rule.<sup>110</sup>

Carter’s problem, however, was that he could not explain how it is that custom shifts over time. Indeed, he recognized that custom is never always and everywhere the same, that there are always aberrations, but he insisted that these aberrations cannot themselves be customs. Rather, they are simply bad practices that the law can suppress.<sup>111</sup> Thus, for example, he discussed warranties in the law of sales and how “the unwritten private law recognises the advance in morals and manners and affixes upon advancing forms of custom the authenticating stamp of public approval.”<sup>112</sup> The final result was a system where any attempt to deviate from the norm results in “the manufacturer . . . be[ing] compelled to answer in damages in case of defects in the product caused by the want of the customary care.”<sup>113</sup> The implication is that the attempt to disclaim such a duty by agreement would constitute a “bad practice.” Yet, the very fact that the law now sanctions any deviation from past practice will have the effect of retarding the continuing growth of custom. By insisting that law be closely tied to custom, Carter undermined precisely the organic growth he wished to foster.

In the realm of contract, Carter fell into this contradiction because of his rejection of abstraction and generality. He implicitly or explicitly assumed that the law considers “contracts” not in some abstract sense, but rather as sales agreements, maritime insurance treaties, and the like. When a new transactional form blurs the boundaries set by the law, however, we are faced with a choice.

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108. JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 71 (1907).

109. Carter chose to focus mainly on the example of maritime insurance contracts. *Id.* at 70–72.

110. *Id.* at 83.

111. *See, e.g., id.* at 80 (“Thefts are extremely frequent, but they are, like all crimes, departures from custom—mere bad *practices* which true custom condemns.”).

112. *Id.* at 327.

113. *Id.* at 328.

We can either allow the transaction to continue, or we can insist that it conform to the model implicit in legal rules. If we limit transactional novelty, then the law has firmly committed itself to a regulatory vision of contract. On the other hand, if the law allows the parties to “opt out” of its prefabricated transactional form via agreement, then the law of sales or maritime insurance has been reduced to the status of a default rule. More importantly, we will need some set of abstract rules that identify agreements independent of a particular transactional form in order to even contemplate the possibility of the law recognizing deviations from those forms. In short, even if one believes—as Carter did—that contract law should follow the organic and unplanned process of customary development, one will need abstract rules to accommodate new developments. Likewise, unless the specialized rules of a particular kind of transaction are to become nothing more than a set of default terms, particularized bodies of law will necessarily be hostile to transactions that do not fall neatly into prefabricated legal relationships.

Generally, theorists have justified a preference for contractual freedom on either Kantian or consequentialist grounds.<sup>114</sup> My argument moves in a different direction. A preference for a facilitative rather than a regulatory role for contract—and the generality with which it is often tied—are desirable, I assert, because they advance a pragmatic vision of democracy. Much of the traditional rhetoric surrounding the idea of democracy suggests that it consists of translating the “Will of the People”—seen as some sort of quasi-divine font of political legitimacy—into public policy.<sup>115</sup> An important line of pragmatist thinking flowing from the philosophy of John Dewey, however, suggests a different argument for democracy.<sup>116</sup> Hillary Putnam has labeled this argument “the epistemological justification of democracy.”<sup>117</sup> Putnam summarizes the claim succinctly: “Democracy is not just one form of social life among other workable forms of social life; it is the precondition for the full application of intelligence to the solution of social problems.”<sup>118</sup> Ultimately, Dewey’s own enthusiasm for democracy extended to its supposed capacity for allowing human beings to

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114. See generally FRIED, *supra* note 29 (arguing that the general contract law reflects a commitment to the classical liberal value of personal autonomy); Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437, 439 (1990) (arguing that the generality of contract law creates incentives for parties to behave in economically efficient ways).

115. See, e.g., Abraham Lincoln, *The Gettysburg Address*, in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS PRESIDENTIAL MESSAGES AND PROCLAMATIONS 536, 536 (Roy P. Blaser ed., 1989) (defending democracy as the “government of the people, by the people, for the people”); see also GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992) (discussing Lincoln’s theory of democracy and the role played by the will of the people).

116. See generally DAVID FOTT, *JOHN DEWEY: AMERICA’S PHILOSOPHER OF DEMOCRACY* 63–97 (1998) (providing a succinct summary of Dewey’s philosophy of democracy).

117. HILARY PUTNAM, *RENEWING PHILOSOPHY* 180 (1992).

118. *Id.* There is some debate over the extent to which Putnam’s argument adequately captures Dewey’s own views. See FOTT, *supra* note 116, at 87–88 (concluding that Putnam’s argument is broadly correct in its statement of Dewey’s thought); Robert B. Westbrook, *Pragmatism and Democracy*:

realize the fullest possible growth and progress.<sup>119</sup> Applied to the legal setting, however, the argument can be made to rest on more modest footing.<sup>120</sup> Louis Menand writes:

[T]he more arrows you shoot at the target, the better sense you will have of the bull's-eye. The more individual variations, the greater the chances that the group will survive. We do not . . . permit the free expression of ideas because some individual may have the right one. . . . We permit free expression because we need the resources of the whole group to get us the ideas we need. Thinking is a social activity. I tolerate your thought because it is part of my thought—even when my thought defines itself in opposition to yours.<sup>121</sup>

On this view, democracy is desirable because we need the ideas that the bubbling, open-ended process of democratic politics provides. This is the tradition, for example, of Louis Brandeis, who praised the states as “laboratories” of democracy.<sup>122</sup> Indeed, progressive though he was, Brandeis treated the New Deal with suspicion precisely because he feared that the centralization of power in Washington, D.C. would suppress local experimentation.<sup>123</sup> Seen in these terms, to sin against democracy is not to thwart the “Will of the People.” Rather, it is to shut down the collective process of trial and error by which we find solutions to social problems.

The generality of contract law is democratic in this pragmatic sense. Since

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*Reconstructing the Logic of John Dewey's Faith*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 128, 129–30 (Morris Dickstein ed., 1998) (same).

119. See generally FOTT, *supra* note 116, at 87–88 (describing Dewey's contention that democracy was the only way to pursue knowledge); PUTNAM, *supra* note 117, at 180–200 (describing Dewey's “epistemological justification of democracy”).

120. Dewey and his modern disciples ultimately seek to ground democracy in a thoroughgoing philosophical pragmatism that includes particular theories of metaphysics, linguistics, and philosophical anthropology. My own claim is more modest, and I find myself sympathetic to Thomas Grey, who writes:

I want to suggest that pragmatism in legal theory can stand free of *philosophical* pragmatism, whether old (William James, John Dewey) or new (Richard Rorty, Hilary Putnam). Epistemological foundationalists, metaphysical realists, Kantian moralists, and even theologically conservative Christians may find that they are jurisprudential pragmatists. So may lawyers who, though reflective about their profession, are not much interested in most of the questions debated by philosophers.

Thomas C. Grey, *Freestanding Legal Pragmatism*, in *THE REVIVAL OF PRAGMATISM*, *supra* note 118, at 254, 254.

121. LOUIS MENAND, *THE METAPHYSICAL CLUB* 431 (2001).

122. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

123. See AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 243 (2007) (noting that Justice Brandeis warned President Roosevelt through an intermediary against the centralizing tendency of the New Deal); see also *New State Ice Co.*, 285 U.S. at 311 (referring to state governments as “laboratories” of democracy).

the work of Friedrich Kessler,<sup>124</sup> it has been common for scholars to assert that contracts represent a kind of private lawmaking. The most common implication drawn from this insight is that contracts are undemocratic and therefore of questionable legitimacy.<sup>125</sup> Political morality, so the argument goes, counsels in favor of subjecting contracts to greater democratic—that is, collective—control, thus re-legitimizing them.<sup>126</sup> Pragmatism, however, offers another way in which one might understand the relationship between the private lawmaking of contract and democracy: Contracts are solutions to collective problems. Of course, contracts are more than simply this, but the dominant theoretical approaches to contract law tend to obscure this aspect of contracting. For example, seeing contract law as related to the duty to keep a promise, albeit transformed and limited in various ways, focuses our attention on questions of personal morality, the meta-ethical foundations of promising, and their relationship to the law.<sup>127</sup> Likewise, conceptualizing contracts as consensual transfers of rights focuses our attention on the role of free citizens in a liberal polity, launching us into debates over the boundary between alienable and inalienable rights.<sup>128</sup> A law and economics approach to contracting also points us in other directions. Our central concern becomes welfare—defined in terms of the satisfaction of expressed preferences—and the best way of arranging incentives to provide for its maximization.<sup>129</sup> My point is not that any of these approaches is per se mistaken.<sup>130</sup> Rather, I want to focus our attention on a fact that is not central for

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124. See generally Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (describing contracts as a legal doctrine expanded in the sixteenth century in order to enforce promises).

125. See W. David Slawson, *Standard Form Contract and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 554–56 (1971).

126. See *id.* at 560.

127. See generally FRIED, *supra* note 29 (exploring the moral obligations behind promise); DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* (2003) (exploring the relationship between contract and promise, and the implications on political morality); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007) (analyzing the divergence between the legal norms that regulate contractual promises and the moral norms that form their basis).

128. See generally Barnett, *supra* note 29 (describing a consent theory of contracts as “part of a broader system of legal entitlements”); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL’Y 179 (1986) (arguing that the inalienability of certain rights accounts for certain remedial doctrines in contract).

129. See TREBILCOCK, *supra* note 36, at 7 (“This style of analysis—conventionally referred to as welfare economics—would tend to ask the question, is it likely that this particular transaction, or this particular proposed policy or legal change, will make individuals affected by it better off in terms of how they perceive their own welfare (not how some external party might judge individuals’ welfare)?”). See generally READINGS IN THE ECONOMICS OF CONTRACT LAW (Victor P. Goldberg ed., 1989) (collecting key articles on the law and economics of contract law).

130. Indeed, while I am skeptical of unified theories of contract, I think that both autonomy and law and economics provide important insights into any adequate understanding of contract law. See generally Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 142–44 (2005); Nathan Oman, *Introductory Remarks: Contract Law and Morality*, 48 WM. & MARY L. REV. 1643 (2007); Oman, *supra* note 29; Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005).

these theories, namely that contracts are also mechanisms for solving problems.

Consider the construction of a large building. Transforming a bare spot of land into a new library is beyond the capacity of a single individual; erecting the building is a collective problem. Think of the myriad of difficulties that must be overcome before we can go browsing through the stacks. The site must be surveyed. Plans must be drawn up. Foundations must be dug. Materials must be located, transported, and prepared. Laborers must be found, collected, and directed. The concerns of neighbors about parking must be placated. Funding must be found. Decisions must be made about everything from square footage to the color of the carpets. And so on. Upon even a moment's reflection, the common construction site reveals itself as a dizzyingly complicated collective problem. Among the tools used for solving these problems are contracts. They allow us to coordinate the actions of the parties involved in the construction site and create the procedures and institutions—broadly conceived—that will make the building a reality. We can thus think of contracts as one item in our social tool box, sitting, say, between surveying tools, conventions about measurement, and computer assisted design techniques.

Perhaps the most obvious problem that contracts deal with is that of ex post opportunism. Suppose that a contractor pays a subcontractor up front for all of his work, and the subcontractor then absconds with the money without performing the promised labor. At its simplest, the legal enforcement of contracts addresses this problem, but it can also be dealt with in the structure of the transaction itself, for example, by providing for progress payments rather than a lump sum up front. As the voluminous and sophisticated economic literature on the optimal design of contracts testifies, the transactional structures dealing with this simple problem can become very complex.<sup>131</sup>

Ex post opportunism, however, by no means exhausts the role that contracts can serve.<sup>132</sup> For example, “[f]irms may use contracts as a mechanism for acquiring information and experimenting with new capabilities.”<sup>133</sup> Thus, a builder might enter into a contract with a supplier on a particular job not only to acquire supplies for the particular project at hand, but also as a way of acquiring information about the supplier with an eye to future, long-term relationships.<sup>134</sup> Contracts also serve as repositories for cumulatively acquired knowledge.<sup>135</sup> As

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131. See D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 5–19 (2009) (summarizing economic research on the use of contracts to deal with ex post opportunism). See generally PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* (2005) (describing the basis and methodology of contract theory and describing its multiple applications).

132. See generally D. Gordon Smith, *The “Branding Effect” of Contracts*, 12 HARV. NEGOT. L. REV. 189 (2007) (discussing the various problems that parties use contracts to solve).

133. Smith & King, *supra* note 131, at 27.

134. Cf. Jongwook Kim & Joseph T. Mahoney, *How Property Rights Economics Furthers the Resource-Based View: Resources, Transaction Costs, and Entrepreneurial Discovery*, 1 INT’L J. STRATEGIC CHANGE MGMT. 40 (2006) (arguing that joint venture contracts are used as a way of searching for long-term business partners).

135. Smith & King, *supra* note 131, at 30.

all transactional lawyers know, contracts are virtually never drafted from scratch. Rather, contracts from previous deals are copied, modified in light of experience or new circumstances, and then presented to the parties. The result is that over time contracts accumulate the information acquired through the process of trial and error.<sup>136</sup> Hence, for example, the tool supply company, from whom the contractor purchases his radial saws, might have entered into a franchise agreement with a tool manufacturer with an accumulated experience of years of franchising relationships. The iterative process of modifying and redrafting the contract provides a process by which the manufacturer learned from its mistakes and remembered their lessons.

Such examples of how contracts solve problems could be endlessly multiplied.<sup>137</sup> It is extremely difficult to know *ex ante*, however, the best way in which this tool should be used. Put in more concrete terms, we—speaking in the imperial we of lawmakers—do not know what the “best” construction contracts would look like, and given the multiplicity of differing contexts, goals, concerns, and constraints faced by builders, it probably does not even make sense to think about a “best” construction contract. The problem was summarized by Friedrich Hayek thus:

The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate “given” resources—if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data.” It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality.<sup>138</sup>

Hayek’s insight, for which he was later to earn the Nobel Prize in economics, was that the price mechanism in a market serves to aggregate this information in a way that can be used by individual decision makers.<sup>139</sup> However, there is a

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136. In the insurance industry, for example, contractual language is frequently bought and sold, its value being tied to the fact that it has either been accepted by insurance regulators or else subject to authoritative interpretation by the courts. Thus, contractual language itself contains information acquired from previous legal experience. See Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1113 (2006).

137. See Smith & King, *supra* note 131, at 19–24 (summarizing empirical research on the uses of contracts).

138. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519–20 (1945).

139. See Erik Lundberg, Professor, Royal Acad. of Scis., Presentation Speech for the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel (1974), available at [http://nobelprize.org/nobel\\_prizes/economics/laureates/1974/presentation-speech.html](http://nobelprize.org/nobel_prizes/economics/laureates/1974/presentation-speech.html) (“[Hayek’s] guiding criterion in assessing the viability of different systems refers to the efficiency with which these systems

close connection between Hayek's claim and the pragmatists' epistemic argument for democracy.<sup>140</sup> Both see the solution to social problems in terms of harnessing the disaggregated insights of many individuals in the face of the unavoidable ignorance of any particular person or small group of persons. Allowing the widest possible innovation in transactional forms responds to these concerns by allowing the disaggregated process of experimentation with contracts in particular situations to gradually evolve toward effective solutions to a myriad of collective problems. To again use Menand's language, "the more arrows you shoot at the target, the better sense you will have of the bull's eye. The more individual variations, the greater the chances that the group will survive."<sup>141</sup> In this sense, the private lawmaking of contracting has the same virtues as the public process of democratic lawmaking. A specialized body of law, in contrast, by placing restrictions on innovations in transactional form, limits the ability of the contracting process to generate these potential solutions.

Surprisingly, consent plays a relatively modest role in this pragmatic argument. For very different reasons, both autonomy theories of contract and efficiency theories of contract have a tendency to make consent the fulcrum on which their arguments turn. For the autonomy theorist, consent is important because it serves a justificatory purpose. It is the fact that contractual obligations are freely chosen that gives them normative significance.<sup>142</sup> Economic theorists also emphasize consent, albeit for a different reason. Efficiency is primarily concerned with the distribution of resources so as to maximize social welfare.<sup>143</sup> Strictly speaking, however, efficiency is indifferent to *the method* by which resources are distributed. There is nothing logically impossible about a central planner who assigns to each citizen a bundle of resources in such a way as to maximize welfare. As a practical matter, however, economists are extremely skeptical that any central planner has enough information to make such decisions. Indeed, even in individual cases, it is extremely difficult for an outside observer to determine whether a person is made better or worse off by a reallocation of resources involving a trade-off between good A and good B. On the other hand, a well-informed and consensual transaction that does not decrease the welfare of others can be taken to increase welfare if we assume that the parties themselves know what will make them better off.<sup>144</sup> Hence,

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utilize the knowledge and information spread among the great mass of individuals and enterprises. His conclusion is that it is only through a far-reaching decentralization in a market system with competition and free price formation that it is possible to achieve an efficient use of all this knowledge and information.").

140. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 250–91 (2003) (comparing the legal philosophies of Hayek and Hans Kelsen).

141. MENAND, *supra* note 121, at 431.

142. See, e.g., Barnett, *supra* note 29, at 299 ("[T]he consent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers . . .").

143. See, e.g., JULES COLEMAN, *MARKETS, MORALS, AND THE LAW* 95–132 (1998) (discussing the relationship between concepts of efficiency, utility, and wealth maximization).

144. See *id.*

economic theorists of contract also tend to defer to consensual transactions, not because consent does any justificatory work per se, but rather because consent is an epistemic marker, an observable indicator that a redistribution of resources results in a non-observable increase in welfare.<sup>145</sup>

In contrast, what drives the pragmatic argument offered above is not consent but experimentation. Consent does little, if any, justificatory work in the argument. Rather, what matters is whether or not we facilitate transactional variation in the face of collective problems. What we want are lots of different approaches to solving this or that difficulty in the hope that the social process of experimenting with transactional forms will produce tools for more effectively solving this or that problem of social coordination. For example, suppose that one believes—as Kessler suggested—that form contracts represent one-sided transactions in which the signing party cannot be said to have consented in any meaningful way.<sup>146</sup> So long as the authors of those form contracts are left free to experiment with various transactional forms, there will be an experimental, pragmatic value to the contracts. To be sure, the absence of meaningful consent could raise countervailing concerns—for example, without consent there is no meaningful competition to discipline the authors of form contracts, or without consent there are autonomy objections to imposing legal obligations—and the pragmatic argument offers no objection to the consideration of these concerns. On the other hand, the presence or absence of consent does little if anything to support or undermine the pragmatic argument on its own merits.

In summary, General Contract Law tends to be agnostic as to ideal transactional structures. Specialized bodies of law, in contrast, have historically tended to adopt a more restrictive attitude toward transactional innovation, opting for a stronger, more regulatory view of law's role in contractual activity. The transactional agnosticism of General Contract Law increases the ability of private actors to experiment with different solutions to the problems that they face. By facilitating this process of trial and error, General Contract Law serves to advance democratic values, pragmatically conceived. Coupled with arguments above regarding its prophylactic value in reducing rent seeking, the argument from the pragmatic conception of democracy strengthens the claim that General Contract Law is more than an anachronistic prejudice. It has real, practical virtues. Both of these arguments, however, are positive. They suggest that generality is valuable. They do not, however, lay to rest the kind of particularized concerns illustrated, for example, by *Feinberg* and *Pitts*. Maintaining contractual generality has virtues, but the arguments offered here give us no reason to suppose that these virtues always ought to be paramount in the design on our laws. The question thus arises of how the values of generality and

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145. *But see, e.g.*, Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 495 (1980) (arguing that utility judgments should be used to determine voluntariness).

146. *See* Kessler, *supra* note 124, at 632 (“[S]tandardized contracts are frequently contracts of adhesion . . .”).

specificity are to be traded off against one another. Lacking an overarching theory that answers that question, what I offer instead is a set of stories.

#### IV.

Like all pragmatic arguments, those put forward in the two previous sections have the weakness of offering no Archimedean criterion or set of arguments for weighing the competing considerations of generality and specialization. They certainly do not demonstrate that specialization is always and everywhere a mistake and that General Contract Law should always be allowed to prevail. As illustrated in *Feinberg* and *Pitts*, one will often be able to find objections to the general law of contracts' treatment of an issue. Sometimes these considerations justify creating a specialized body of law. However, the choice to do so must consider the inherent virtues of generality. General Contract Law cannot be treated as a bit of aesthetic formalism without practical value. There are real dangers of rent seeking and capture that are increased by legal specialization. Likewise, limiting transactional forms is not without costs. Such limitations constrain the extent to which contracts can function as an organ in the search for solutions to collective problems.

The best way of illustrating the tensions inherent in the choice between generality and specificity is to consider a concrete example. The law of contracts long struggled with the assignment of contract rights, particularly the assignment of rights to payment. Ultimately, the special problems created by these transactions led to a special set of rules that became part of Article 9 of the Uniform Commercial Code. The current debates over asset securitization, however, show that however justified the decision to create a special set of rules for the assignment of rights to payment, the abandonment of generality has not come without costs, as increasing legal specialization has both facilitated special-interest pleading and dampened transactional innovation in some contexts. While no clear algorithm for choosing generality or specificity emerges from this story, it does support a useful rule of thumb; namely, that imperfections in the law of contracts are best dealt with by rules pitched at the highest possible level of generality.

In fall 2008, global financial markets suffered a series of shocks that were repeatedly proclaimed to be without precedent since the crash of 1929.<sup>147</sup> Tracing the origins of the crisis is well beyond the scope of this Article, but much of the controversy over the freezing up of credit markets has swirled around the creation of collateralized debt obligations (CDOs), a process also

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147. See, e.g., *A Special Report on the World Economy: When Fortune Frowned*, ECONOMIST, Oct. 11, 2008, after 68, at 3 (stating that “[t]he worst financial crisis since the Depression is redrawing the boundaries between government and markets”); Peter S. Goodman, *Markets Suffer as Investors Weigh Relentless Problems*, N.Y. TIMES, Oct. 16, 2008, at A1 (comparing recent market swings to those in the early days of the depression); Floyd Norris, *A Monthlong Walk on the Wildest Side of the Stock Market*, N.Y. TIMES, Nov. 1, 2008, at B1 (comparing historical stock market fluctuations).

known as asset securitization.<sup>148</sup> In a nutshell, a CDO is a security such as a bond or share of common stock that gives the holder a fractional right to the income generated by a pool of debt obligations.<sup>149</sup> For example, imagine that Car Finance Company has a thousand outstanding loans that it has made to car purchasers. These loans are a valuable asset that will pay money in the future as the purchasers make their loan payments, but Car Finance Company needs money now. To generate ready cash, it becomes what is known in securitization argot as an originator, assigning its loans to a trust or other separate legal entity set up especially for the transaction. This entity, known as a special purpose vehicle (SPV), special investment vehicle (SIV), or special purpose entity (SPE), generates money by issuing securities entitling holders to a share of the future payments from the car loans. The money generated from the sale of these securities, after the inevitable fees to lawyers, investment bankers, and others have been paid, is then given to the originator. Over the last ten to fifteen years, financial alchemists cooked up an almost infinite number of variations on this simple pattern, creating the hundreds of billions of dollars of mortgage-backed securities that lost value so dramatically when the U.S. housing bubble burst in 2008.<sup>150</sup> At the heart of these complex instruments is a deceptively simple transaction—the transfer of a right to payment—that long bedeviled contract law and that gave rise to a specialized body of law that illustrates both the virtues and the vices of a generality.

The common law of contract struggled for centuries with the idea of assignment, whereby one party transferred his rights under a contract to another party. If Pollock and Maitland are to be believed, “Ancient German law, like ancient Roman law, [saw] great difficulties in the way of an assignment of a debt or other benefit of a contract.”<sup>151</sup> Likewise, the medieval common law forbade the assignment of contract rights.<sup>152</sup> The rationale for the prohibition is debated, but the likeliest explanation is that the assignment of a contract claim—so-called

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148. See, e.g., Roger Lowenstein, *Triple-A Failure: How Moody's and Other Credit-Rating Agencies Licensed the Abuses that Created the Housing Bubble—and Bust*, N.Y. TIMES MAG., Apr. 27, 2008, at 36 (describing rating agencies' failure to properly evaluate CDOs).

149. See *Confessions of a Risk Manager*, ECONOMIST, Aug. 9, 2008, at 72, 72.

150. See *Credit Markets: CDOh No!*, ECONOMIST, Nov. 10, 2007, at 90 (explaining why increases in mortgage defaults are poisonous to CDOs, and providing a grim forecast for the CDO market); Nelson O. Schwartz & Julie Creswell, *What Created This Monster?*, N.Y. TIMES, Mar. 23, 2008, at 1 (describing the explosion and contraction of the CDO market). In the face of the financial meltdown at the end of 2008, the number of securitization transactions plummeted. However, given the long-term benefits of asset partitioning and disintermediation offered by securitization, the possibility that such transactions will disappear entirely is remote. See generally Steven L. Schwarcz, *The Future of Securitization* (Duke Pub. Law & Legal Theory, Paper No. 223, 2008), available at <http://ssrn.com/abstract=1300928> (describing the role of securitization in the current financial crisis, but nevertheless, concluding that securitization will continue to play a substantial role in capital markets).

151. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 226 (2d ed., photo. reprint, Cambridge Univ. Press 1923) (1895).

152. A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 80 (1975) (“The general principle of the medieval common law was that a *chose in action* could not be assigned, such a ‘thing’ being regarded as being incapable of being granted effectively.”).

“choses in action”—constituted maintenance and stirred up unwanted litigation.<sup>153</sup> Lord Coke, for example, claimed that assignment would be “the occasion of multiplying contentions and suits, of great oppression of the people, . . . and the subversion of the due and equal execution of justice.”<sup>154</sup> Very early on, however, parties found ways of circumventing the rule. For example, under medieval Jewish law, contract claims were assignable, and such assignments could be enforced in Jewish courts. Until the twelfth century, the Norman kings allowed Jews to sue Christians in the royal courts. A Christian who took assignment of a claim from a Jew who had a contract with another Jew was allowed to sue on the contract, notwithstanding the common law’s prohibition.<sup>155</sup> More generally, an assignee of a contract was eventually able to sue to enforce the contract on the fiction that he was the attorney of the original assignor.<sup>156</sup>

Notwithstanding the ease with which the original prohibition was circumvented and the common law’s cautious embrace of assignment, judges continued to express concerns. If *A* sold a cow to *B*, who took possession, it was unlikely that *C* would be willing to pay money to *A* for a cow that he (*A*) fraudulently claimed to own when the cow in question was in the possession of *B*. Possession acted as a signal of ownership and helped police deceptive transactions.<sup>157</sup> A contract, in contrast, has no tangible existence, and, thus, possession could not act as a public indicator of good title. The starkest version of this ostensible ownership problem arose when *A* assigned a contract to *B* and then turned around and sold the same contract to *C*, where neither *B* nor *C* had any knowledge of the other’s claim to the chose in action. A similar problem arose when *B* acquired some interest in the rights under a contract held by *A*, for example by loaning money to *A* and taking assignment of the contract as collateral on the loan. *A* would then assign the contract to *C*. Did *C* take the contract subject to *B*’s interest? Did the assignment to *C* cut off *B*’s rights?

In a widely cited 1817 case, Chancellor James Kent faced an analogous situation.<sup>158</sup> A misbehaving trustee wrongfully conveyed a piece of trust property to a third party in exchange for a promise to pay the purchase price.<sup>159</sup> The trustee then assigned the purchaser’s debt to a third party, who in the fullness of

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153. See 3 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.2, at 64 (3d ed. 2004).

154. *Lampet’s Case*, Y.B. 10 Jac. 1, fol. 46b, Mich. (1612), (1612) 77 Eng. Rep. 994 (K.B.) (U.K.).

155. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 202 (1965) (setting forth the Jewish theory of the origins of the assignor-as-attorney fiction). See generally S.J. Bailey, *Assignment of Debts in England from the Twelfth to the Twentieth Centuries*, 47 L.Q. REV. 516, 516–35 (1931) (discussing the royal courts’ treatment of Jewish contracts allowing assignment).

156. See 3 FARNSWORTH, *supra* note 153, § 11.2, at 65.

157. Possession, of course, has never been sure proof against fraudulent claims of ownership, as the complex rules regarding good faith purchasers and voidable title attest. See, e.g., U.C.C. § 2-403 (2003) (allowing bailees who also act as merchants to grant good title to goods in their possession to which they do not have good title).

158. *Murray v. Lylburn*, 2 Johns. Ch. 441 (N.Y. Ch. 1817).

159. *Id.* at 441.

time was sued by the beneficiaries of the trust.<sup>160</sup> Kent ruled that the assignee took the contract subject to the beneficiaries' interest, in part because the assignee had "constructive notice" of the trustee's misbehavior due to an earlier suit against the trustee.<sup>161</sup> Kent realized, however, that his holding seemed to place on any assignee a duty to search through the records of the courts or take the assignment at the peril of being primed by an earlier claimant. Accordingly, he suggested, "the safety of commercial dealing would require a limitation of the rule."<sup>162</sup> In the case before the court, however, he noted that the defendant was "dealing with a subject out of the ordinary course of traffic, . . . and there can be very little ground for the complaint of hardship in the application to such a case."<sup>163</sup>

The horns of the dilemma identified by Chancellor Kent sharpened at the end of the nineteenth and beginning of the twentieth century, as accounts receivable financing became popular. Suppose that a retailer sold to customers on thirty-day credit. Each sale resulted in a debt in the seller's favor, and if business was brisk, he would soon have a substantial pool of "accounts receivable." These accounts in turn could serve as collateral for a lender who provided the retailer with a loan that he used to purchase new inventory. As new inventory was sold, new accounts were created, and these accounts became the collateral of the lender, who could then extend additional credit to purchase yet more inventory. The result was a retail business that was able to finance itself using its intangible assets (accounts receivable) as collateral.

The problem with the arrangement was that the receivables' financier's lien on the accounts was invisible to other creditors, who might be induced to make loans on the assumption that the wealth represented by the accounts would be available to satisfy all of the retailer's debts. Accordingly, the U.S. Supreme Court held in *Benedict v. Ratner* that such a secret lien on the accounts was a fraudulent transfer and therefore void.<sup>164</sup> Unless there was some way of providing notice to third parties of the assignment of a right to the accounts, the Court insisted that the transaction be treated as fraudulent.<sup>165</sup> The Court's concern in *Ratner* is legitimate. As Justice Brandeis observed, in the transfer of accounts, "there is nothing which corresponds to the delivery of possession of chattels."<sup>166</sup> In the United States, the response was to create a special body of law in Article 9 of the Uniform Commercial Code that governs the sale and hypothecation of accounts receivable. The result is that in order for an assignee of accounts to prevail against a rival claimant to the same contract rights, he or she must first file a public "financing statement" in the Secretary of State's office of

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160. *Id.*

161. *Id.* at 444.

162. *Id.*

163. *Id.*

164. *Benedict v. Ratner*, 268 U.S. 353, 364–65 (1925).

165. *Id.*

166. *Id.* at 361.

the debtor's state, putting the world on notice of the assignee's claim to the accounts.<sup>167</sup> A mere agreement between the assignor and the assignee is not enough to vindicate the assignment against third parties.

The fate of the assignment of accounts is a classic example of General Contract Law giving way to specialized rules. Assignment of accounts sat uneasily within contract law, which generally allowed parties to create obligations between themselves without providing notice to third parties. The result was a General Contract Law that could never quite decide if the assignment of accounts was a laudable way of increasing the wealth and liquidity of account holders or a nefarious method of defrauding creditors. The problem of the secret lien was solved by ceasing to treat the assignment of accounts as a pure contract issue and bringing it under the specialized rules of the UCC, with its infrastructure of filing requirements and public records.

The solution has worked reasonably well, but as lawmakers have created even more specialized rules governing particular kinds of assignments, problems have developed. Given the arguments offered in the preceding sections, we would expect that legal specialization would increase the risks of capture by special interests and present the danger of ossifying transactional structure, thus limiting the ability of private lawmaking to find solutions to the collective problems posed by the assignment of debt obligations. Such has been the case. First, the asset securitization industry, which by volume is the largest user of the law of accounts receivable assignment, has successfully lobbied state legislatures for specialized rules that allow them to benefit at the expense of other creditors. Second, internationally the creation of specialized rules for asset securitization has ossified transactional structure, preventing innovation at the expense of debtors, especially in developing countries.

Commercial lawyers have long understood that virtually all of the attributes of a secured transaction—a loan backed by the security of easy recourse to a particular, pledged asset—can be created through a series of nominally non-loan transactions. For example, rather than borrowing money and then giving the bank a mortgage on the borrower's house to secure the loan, a borrower could sell the house to the bank, lease it back, and then repurchase it at the end of the lease. The economic reality of the transactions is similar: the borrower receives a lump sum payment in return for a promise to make regular payments for a fixed period, during which the lender has the ability to take possession of the house in the event that the borrower does not pay. However, characterizing the transaction as a sale rather than a loan can confer substantial benefits. For example, under *sharia* law, the taking of interests—*riba*—is forbidden.<sup>168</sup>

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167. See U.C.C. § 9-310 (2003) (stating the general rule, applicable to accounts receivable, that “a financing statement must be filed to perfect all security interests”); *id.* § 9-317(a) (setting forth the priority between a lien creditor and the assignor of accounts); *id.* § 9-322 (setting forth the priority of claimants in, among other things, accounts based on consensual security interests).

168. See N.J. COULSON, A HISTORY OF ISLAMIC LAW 138–39 (1964) (discussing the prohibition on *riba* as developed by the jurists of classical Islam).

Muslim lawyers, however, have been using sale-and-lease back transactions, known as *ijara*, for centuries to circumvent the prohibition on *riba*.<sup>169</sup> Likewise, under American law, packaging what is in reality a secured loan as a sale can allow parties to avoid state usury laws and gain favorable tax, accounting, and bankruptcy treatment for the transaction.<sup>170</sup> In response, the courts have developed the so-called “true sale doctrine,” which allows them to look beyond the labels that parties attach to a transaction to determine whether the allocation of risks between a “seller” and “buyer” are such that they should be reclassified as a “borrower” and “lender.”<sup>171</sup>

In the abstract, powerful actors are likely to be on either side of the battle over the true sale doctrine, and these interests have tended to cancel one another out. On the other hand, in the more limited domain of securitization transactions, investors have been successful in bending lawmakers to their will. In particular, they have secured exceptionally favorable bankruptcy treatment by exempting themselves from the protections normally provided for other creditors.

Under American bankruptcy law, investors in asset-backed securities have two ultimately contradictory desires. First, they wish to ensure the maximum level of stability in the payments generated from receivables. This reduces the level of risk and volatility associated with CDOs, increasing their market value and lowering the cost of capital for originators. This means that investors have an incentive to push the risk associated with non-payment of the receivables back onto the originator through warranties, guarantees, put options, and credit enhancements such as originator-provided letters of credit or credit default swaps. The result is an allocation of risk that is more likely to be declared a secured loan, rather than a sale, under the true sale doctrine. Second, investors and originators wish for the assignment of receivables to an SPV to be characterized as a sale, mainly to avoid the risk that investors will find themselves sucked into the originator’s bankruptcy proceeding should it become insolvent. Be-

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169. See BILL MAURER, *PIOUS PROPERTY: ISLAMIC MORTGAGES IN THE UNITED STATES* 44–45 (2006) (discussing the use of modern *ijara* contracts for home mortgages based on models drawn from classical Islam).

170. See, e.g., *People v. Serv. Inst., Inc.*, 421 N.Y.S.2d 325 (N.Y. Sup. Ct. 1979) (characterization of a sale as a loan subjected buyer to state usury laws). See generally JOHN FRANCIS HILSON, *ASSET-BASED LENDING: A PRACTICAL GUIDE TO SECURED FINANCING* § 2:5.1 (6th ed. 2006) (setting forth the benefits of a “true sale” versus a loan).

171. See, e.g., *Home Bond Co. v. McChesney*, 239 U.S. 568, 575–76 (1915); *Major’s Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 543–44 (3d Cir. 1979); *Joseph Kanner Hat Co. v. City Trust Co.*, 482 F.2d 937, 939–41 (2d Cir. 1973); *In re Evergreen Valley Resort, Inc.*, 23 B.R. 659, 661 (Bankr. D. Me. 1982); *In re Nixon Mach. Co.*, 6 B.R. 847, 850–53 (Bankr. E.D. Tenn. 1980). As promulgated by the National Conference of Commissioners on Uniform State Laws, Article 9 of the UCC defers to this common law development. The Code declares that Article 9 governs “a transaction, regardless of its form, that creates a security interest in personal property of fixtures by contract.” U.C.C. § 9-109(a) (2003). The Code itself, however, while affirming that it applies “regardless of the form of the transaction or the name that the parties have given it” contains little guidance as to when a transaction is a loan or a sale. *Id.* § 9-109 cmt. 2.

cause, in effect, the Bankruptcy Code requires secured lenders to assist in the reorganization of a debtor's business, under the true sale doctrine, the investors in a securitization transaction that, in fact, functions as a secured loan will be forced to participate in the originator's reorganization with the other creditors. Facing an uncertain battle over the common law rules, the securitization industry turned to state legislatures, pleading for securitization-specific rules exempting them from the more general true sale doctrine. In at least seven states, this effort has proved successful.<sup>172</sup>

For example, in January 2002, Delaware adopted the Asset-Backed Securities Facilitation Act at the behest of lobbyists from the securitization industry.<sup>173</sup> The statute provided in part that “[n]otwithstanding any other provision of law, . . . [a]ny property, assets or rights purported to be transferred, in whole or in part, in [a] securitization transaction shall be deemed to no longer be the property, assets or rights of the transferor.”<sup>174</sup> This law has at least two dramatic effects. First, any assignment that is part of a securitization transaction is exempted from the demands of the true sale doctrine. So long as the parties characterize the transaction as a sale, Delaware law commands that it be treated as such, regardless of how the risk of default on the underlying receivables or asset is allocated. This means that investors in asset-backed securities may reap the benefits of full recourse against the originator on what amounts to a loan while bearing none of the bankruptcy costs that must be borne by other secured lenders.<sup>175</sup>

Second, and more problematic, the “notwithstanding any other provision of law” clause exempts the assignment of contract rights in securitization transactions from any of the common law doctrines and UCC rules that have been

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172. See Asset-Backed Securities Facilitation Act, 73 Del. Laws 524, 525 (2002) (codified as amended at DEL. CODE ANN. tit. 6, § 2703A(a)(1) (2005)) (“Any property, assets or rights purported to be transferred, in whole or in part, in the securitization transaction shall be deemed to no longer be the property, assets or rights of the transferor . . . .”); see also ALA. CODE § 35-10A-2(a)(1) (LexisNexis Supp. 2008) (setting forth a similar provision); LA. REV. STAT. ANN. § 10:9-109(e) (2002) (same); N.C. GEN. STAT. § 53-426(a)(1) (2007) (same); OHIO REV. CODE ANN. § 1109.75(A)(1) (LexisNexis Supp. 2008) (same); S.D. CODIFIED LAWS § 54-1-10(1) (2004) (same); TEX. BUS. & COM. CODE ANN. § 9.109(e) (Vernon 2002) (same).

173. See Jeffrey M. Carbino & William H. Schorling, *Delaware's Asset-Backed Securities Facilitation Act: Will the Act Prevent the Recharacterization of a Sale of Receivables in a Seller's Bankruptcy?*, 6 DEL. L. REV. 367, 367 (2003) (noting the date that the act passed); Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1775–77 (2004) (discussing the lobbying efforts to create carve-outs for securitization transactions); Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1582 (2008) (discussing legislative efforts at the state and federal level to create special carve-outs from the true sale doctrine for securitization transactions).

174. DEL. CODE ANN. tit. 6, § 2703A(a)(1) (2005).

175. I say “may” only because, while the Bankruptcy Code generally steps back from state law regarding the assignment of security interests and other property rights, it is always possible that federal law may pre-empt the Delaware legislation. See, e.g., Janger, *supra* note 173, at 1781–87 (arguing that federal legislation or judicial intervention may pre-empt or alter Delaware's securitization-related legislation).

developed over the years to avoid the problem of secret liens and ostensible ownership. For example, Delaware's law seems to exempt transfers of receivables in securitization transactions from the rigors of the UCC filing system and the pre-UCC common law rules developed under *Benedict v. Ratner* and earlier cases.<sup>176</sup> In short, the Delaware law creates a special preference for a particular group, namely investors in asset-backed securities, potentially at the expense of other creditors and debtors. In other contexts, these same investors can benefit from the application of the UCC's rules and the true sale doctrine. For example, in its own bankruptcy, the holder of asset-backed securities could use the true sale doctrine against its own secured lenders. Put another way, the specialization of the rule adopted by Delaware insulates the favored constituency from the costs that it would bear were the same approach adopted more generally. Legal specialization in this case assisted with capture and rent seeking by lowering the cost to the securitization industry of changing the general rule.

Specialization in the law of asset securitization, particularly internationally, has also diminished transactional experimentation, limiting the ability of borrowers and investors to craft solutions to the problems that they face. As already noted, in the United States, the special problems associated with the assignment of receivables led to carving these transactions off from General Contract Law in Article 9 of the UCC. Article 9, however, purports to provide a single set of rules applying to a wide variety of transactions.<sup>177</sup> Thus, parties are generally free to structure those transactions as they see fit. Other countries, however, have opted to create a specialized body of law for asset securitization transactions. The result of this specificity has been less flexibility in transactional structure, foreclosing experimentation in solutions to problems such as the allocation of risk between the parties to the transaction. For example, under French law, the traditional way of transferring accounts receivable is a device known as a *cession*, which is subject to a number of formalities that make it an ungainly way of assigning large numbers of receivables.<sup>178</sup> French lawmakers responded by creating a special set of rules for assignments in securitization

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176. See GILMORE, *supra* note 155, at 250–86 (summarizing the rules developed in the wake of *Benedict v. Ratner* governing the assignment of receivables); Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421, 473 (2005) (arguing that Delaware's securitization legislation exempts transactions from the UCC's notice provisions).

177. There are exceptions, of course, to this claim. For example, the sale of so-called "payment intangibles" are not subject to Article 9's ordinary filing requirements. See U.C.C. § 9-309(3) (2003) ("The following security interests are perfected when they attach: . . . a sale of a payment intangible . . ."). This rule, originally adopted because of special pleading by banks with regard to loan participations, has led to some surprising and potentially destructive results. See *In re Commercial Money Ctr.*, 350 B.R. 465, 488 (B.A.P. 9th Cir. 2006) (holding that payment streams split off from chattel paper normally subject to a filing requirement need not be filed again in order to perfect an assignment by sale); Steven Walt, *Article 9's New Threat to Securitization*, 2 J. PAYMENT SYS. L. 418 (2006) (criticizing the court's decision in *Commercial Money Center*).

178. See Lina Aleknaitė, *Why the Fruits of Capital Markets Are Less Accessible in Civil Law Jurisdictions or How France and Germany Try To Benefit from Asset Securitization*, 5 DEPAUL BUS. & COM. L.J. 191, 215 (2007) ("Taking into account that the rules for cession in French law are very

transactions using a special deed known as a *bordereau*.<sup>179</sup> This assignment, however, must be treated as a sale, even though outside the context of asset securitization, French law does allow for the assignment of a security interest in receivables.<sup>180</sup> The problem, of course, is that sometimes the parties have very good reasons for wanting to allocate more of the risk of non-performance of the underlying assets to the originator.<sup>181</sup> Likewise, in international transactions, parties may prefer to securitize the receivables-backed debt obligation of the originator rather than the receivables themselves in order to, for example, comply with currency regulations.<sup>182</sup>

Many other countries have specialized rules governing the transfer of particular kinds of receivables that limit innovation in transactional structure.<sup>183</sup> As in the United States of the nineteenth and early twentieth centuries,<sup>184</sup> there are often specialized bodies of law internationally governing particular security devices such as pledges, chattel mortgages, and the like.<sup>185</sup> Any transaction involving a piece of property used as security must fit into one of these prefabricated transactional forms. Each transactional form, in turn, contains a set of rules allocating risk between lenders and borrowers. The result, according to practitioners, is that it simply is not possible to efficiently access international credit markets in these countries because the allocation of risk cannot be fine-tuned in the way required by the bundling, securitization, and resale of loans.<sup>186</sup> Accordingly, the U.N. Commission on International Trade Law con-

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detailed and their application is cumbersome, cession transactions are not very well suited for transfers of large amounts of receivables.”).

179. *Id.* (“Therefore a new kind of assignment was created, which is performed by delivering a transfer deed (*bordereau*).”).

180. *Id.* at 216 (“[T]he transactions of asset securitization must be conducted within the framework of the laws specifically adopted for that purpose.”).

181. *See, e.g.*, Suhas Ketkar & Dilip Ratha, *Development Financing During a Crisis: Securitization of Future Receivables* 10 (Econ. Policy & Prospects Group, The World Bank, Working Paper No. WPS2582, 2001), available at <http://www-wds.worldbank.org> (“Risk mitigation in securitized transactions occurs via the structure of the transaction as well as the choice of the future flow receivable to be securitized.”).

182. *See, e.g.*, Selma Stern, *What Banks Need To Know About Securitization of Future Cash Flows in Emerging Markets*, 122 *BANKING L.J.* 953, 957 (2005) (noting that, due to currency controls, Turkish “securitization deals should be structured as security instead of as sale of receivables. Thus, originators do not sell receivables to a special purpose company, but obtain loans from the special purpose company against security created over the receivables.”).

183. *See, e.g.*, James E. Ritch, *Principal Mexican Legal Issues of Securitization*, in *SECURITIZATIONS: LEGAL & REGULATORY ISSUES* § 16.02[2][a]–[c] (Patrick D. Dolan & C. VanLeer Davis III eds., 14th release 2008) (discussing the differing transactional requirements for the assignment of different kinds of receivables under Mexican law).

184. *See generally* GILMORE, *supra* note 155, pt. I (recounting the history of the so-called “Independent Security Devices” that existed prior to the adoption of Article 9 of the UCC).

185. *See generally* JAN H. DALHUISEN, *DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW* 675–99 (3d ed. 2007) (discussing the international variety of approaches to secured lending and assignment of tangible and intangible property in credit transactions).

186. *See* MP3: Panel Discussion on Contract Rights—Secured Transactions, held by The Federalist Society (Apr. 26, 2007), available at [http://www.fed-soc.org/publications/pubID.310/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.310/pub_detail.asp) (“It is true, . . . often times we’ll come to people and we’ll say, ‘Here’s how we solved the problem in

cluded in a 1993 report that “[d]ivergent answers are . . . given to questions of assignability of claims, for example, which claims are permitted to be assigned and which ones are not assignable.”<sup>187</sup> The result is that “[s]ellers (assignors) face difficulties in mobilizing their claims in order to obtain working capital.”<sup>188</sup> Such difficulties can impose substantial costs on borrowers, particularly in the developing world. According to a 2001 World Bank study, for example, the estimated potential value of securitizing future flow receivables in developing countries was over \$65 billion per year.<sup>189</sup> However, until parties are able to alter transactional structures in order to solve problems and take advantage of new opportunities, the global poor must continue to wait for “a utopia where credit is plentiful and inexpensive,” to use the words of a UNCITRAL secretary.<sup>190</sup> Put in starker terms, in many cases the rejection of generality keeps the poor in the developing world from developing devices that would give them access to the capital of the developed world.<sup>191</sup>

This brief tour through the law of assignment and asset securitization illustrates the necessary tension between generality and specialization. Ultimately, there are good reasons for creating a specialized body of law dealing with the assignment of receivables. These assets have special characteristics—notably their intangibility—that make ordinary contract rules unworkable. Insisting on the General Contract Law out of some sort of allegiance to its doctrinal simplicity or elegance would be mindless formalism. At the same time, starting

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another country,’ and you’ll have a Dutch lawyer, or a French lawyer, or a Latin American lawyer who will say, ‘I don’t think that we can do that; it is not specifically authorized by the code.’”)

187. *Assignment of Claims: Note by the Secretariat*, [1993] 24 Y.B. Comm’n Int’l Trade L. 244, para. 7, U.N. Doc. A/CN.9/378/Add.3, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V93/860/34/IMG/V9386034.pdf>.

188. *Id.* para. 11.

189. Ketkar & Ratha, *supra* note 181, at 22.

190. See Spiro V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL’s Contribution*, 8 DUKE J. COMP. & INT’L L. 315, 316 (1998). Asset securitization has already yielded substantial benefits to developing countries, however. For example, in the wake of the Mexican peso crisis, the securitization of Mexican debt allowed borrowers to obtain credit at a discount of anywhere from 50 to 337.5 basis points. Ketkar & Ratha, *supra* note 181, at 16. Nevertheless, it remains true that “[m]ost developing countries lack ready access to international capital markets, while those with access are prone to crises.” Dilip Ratha, *Financing Development Through Future-Flow Securitization*, PERM-NOTES, June 2002.

191. According to a World Bank study, legal uncertainty constitutes one of the key constraints on securitization in the developing world:

In general, it is difficult to structure securitized transactions in countries that have few laws on their books. Typically, less law implies greater doubt and uncertainty which makes it more difficult to structure a deal. Bankruptcy law, in particular, is crucial for securitized transactions. Ideally, the bankruptcy law should permit “true sale” of a future flow asset. But it is possible to structure a securitized transaction by examining the country’s history of adherence to existing laws or if the law is ambiguous enough to permit a “true sale” opinion.

Ketkar & Ratha, *supra* note 181, at 25. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (arguing that economic betterment for the world’s poor is best achieved through asset-based financing through formalization of property and contract rights).

down the road toward legal specialization has real costs. There are many forces at work in the adoption of securitization-specific legislation, but among the factors facilitating this lawmaking is the fact that those who benefit from it do not have to face the costs that would accrue to them if the same approach were applied more generally. Accordingly, they have a greater incentive to seek a transaction-specific change rather than a general change. Put another way, it is easier to capture “asset securitization law” than General Contract Law. Likewise, the push toward a specialized law of securitization internationally has led, in at least some cases, to a set of prefabricated transactional forms that limit the ability of parties to experiment with new ways of dealing with the myriad of unforeseen problems that they face.

This set of interwoven stories does not ultimately provide an algorithm for choosing between generality and specificity. Rather, there is a necessary tension in many cases between the attractions of specialization and the dangers it inevitably creates. At best, the story of assignment and asset securitization points toward a useful rule of thumb; namely, that when dealing with a problem calling for specialization, we are generally best off dealing with the problem at the highest possible level of generality. Subjecting the assignment of accounts to specialized rules may have been necessary, but it has also created greater risks of rent seeking that have proven even more potent with the advent of an even more specialized law of asset securitization. Likewise, while specialized rules for assignments do create limits on transactional innovation—for example, the requirement of public notice in order for a transaction to be good against third parties—United States law, in contrast to its overseas cousins, allows considerable room for transactional innovation, as is perhaps best illustrated by the rise of asset securitization itself. In contrast, in many countries, specialized legal rules have left millions of people financially stranded, cut off from efficient access to international capital markets. Although the tension between specialization and generality illustrated by these stories defies easy analysis, it powerfully illustrates that generality is not a mindless prejudice. It has its own virtues that we sacrifice with specialization.

#### CONCLUSION

General Contract Law has frequently been seen by contract theorists as a historical accident born of a formalism whose basis was ultimately more aesthetic than functional. Accordingly, calls for more specialized bodies of law generally have been met with arguments based on the specifics of the proposals rather than any defense of generality *per se*. For example, a critic might object to the particular content of lending law, labor law, insurance law, employment law, or the like, but few have sought to defend generality in contract law as having any independent value. In contrast to the formalist caricature of the preference for a generalized law of contracts, I have sought to show that generality serves concrete, pragmatic goals, namely the insulation of the law against capture by special interests and the facilitation of a pragmatic search for

solutions to collective problems. I have not, however, argued for the absolute priority of generality or offered simple criteria for choosing specificity or generality. Indeed, the example in the previous section illustrates this absence. The law governing the assignment of accounts is both specialized and generalized, striking a balance between both approaches. Despite the fact that this Article does not provide a philosopher's stone for solving such difficulties, I hope that it has demonstrated that the generality of contract law has substantial and practical virtues in its own right.