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# Liberty at the Borders of Private Law

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# LIBERTY AT THE BORDERS OF PRIVATE LAW

*Donald J. Smythe\**

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## I. INTRODUCTION

Most people place great value on their liberty. In fact, some would rather die than live without it.<sup>1</sup> The quest for liberty has been one of the strongest currents in modern political and intellectual history and has been a driving force in the founding of the United States as well as economic and political developments in Europe and around the world.<sup>2</sup> This Article takes the advancement of liberty seriously, both as an important part of American and European culture, history, and politics<sup>3</sup> and as an objective in the ongoing work of reforming and restructuring the law and legal systems across the globe. The examples focus on United States law,<sup>4</sup> but the same issues and problems pervade other legal systems as well. The analysis does not presume that liberty is the only social value of importance, but it focuses on the relationship between law and liberty to put the connections between the two in the clearest light possible. The great advantage of focusing the analysis on liberty for its own sake is that the reader does not have to accept idiosyncratic value judgments. Almost everyone values liberty and cares about the ways in which the law may advance or impede it.

In spite of the importance that most people attach to liberty, it is not always clear what we mean when we refer to it. Scholars have debated the relative importance of different kinds of liberty and have drawn useful distinctions, for example, between the freedom from evils, such as

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1. The most famous pronouncement was no doubt by Patrick Henry, who ended a speech to the Virginia Convention on March 23, 1775, with the emphatic declaration, “[G]ive me liberty or give me death!” See 1 WILLIAM WIRT HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 266 (1969).

2. The role that the quest for liberty plays in the American imagination is reflected in the titles of numerous books. See, e.g., 1 ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY (3d ed. 2010); JOY HAKIM ET AL., FREEDOM: A HISTORY OF US (2002); and KENNETH BRIDGES, FREEDOM IN AMERICA (2007). Slavery was an abomination against liberty, but even the history of slavery has been cast in many books as a struggle for liberty. See, e.g., JOHN HOPE FRANKLIN & EVELYN HIGGINBOTHAM, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (9th ed. 2010); JULIUS LESTER, FROM SLAVE SHIP TO FREEDOM ROAD (1999); and JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865 (2014).

3. The role that the pervasive yearning for freedom played in the development of western culture and politics is thoroughly documented in 1 ORLANDO PATTERSON, FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE (1991).

4. The “American experiment” has been portrayed as an experiment in the application of the classical liberal thought of the Age of Enlightenment to the founding of a nation. See, e.g., ADRIENNE KOCH, THE AMERICAN ENLIGHTENMENT: THE SHAPING OF THE AMERICAN EXPERIMENT AND A FREE SOCIETY (1965). References to the “American experiment” date to 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 25 (1900), who wrote, “In that land the great experiment was to be made, by civilized man, of the attempt to construct society upon a new basis; and it was there, for the first time, that theories hitherto unknown, or deemed impracticable, were to exhibit a spectacle for which the world had not been prepared by the history of the past.”

physical force or coercion exerted by others, and the freedom to act, such as the freedom to speak one's mind or worship the religion of one's choice.<sup>5</sup> Nonetheless, there is no consensus about the freedoms that are essential to liberty, and so its meaning remains nebulous and elusive. To focus the analysis, therefore, liberty is defined to require 1) that individuals<sup>6</sup> be as free as possible from the exercise of coercion<sup>7</sup> by others, including the State,<sup>8</sup> except to the extent that they have truly and voluntarily assented to the coercion, and 2) that individuals have a sphere of personal autonomy and privacy within which they are free from intrusions by the State or others to think what they will, say what they want, associate with whomever they like, and be whoever they are.<sup>9</sup> While the appropriate scope of autonomy and privacy rights may be debatable, few, if any, would dispute that they are integral to liberty.

There is a wide range of literature on the relationship between law and liberty, but most of it focuses specifically on the relationship between public law and liberty.<sup>10</sup> Public law is usually defined as the branch of the law that addresses relationships between levels of

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5. See, in particular, ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 146 (1969). See also Ian Carter, *Positive and Negative Liberty*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, (Mar. 5, 2012) <http://plato.stanford.edu/archives/spr2012/entries/liberty-positive-negative/>.

6. The term "individual" is used in this Article exclusively to mean natural persons, as opposed to corporate persons.

7. The word "coercion" is also necessarily nebulous and ill-defined. The word is used here in the sense that FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 20-21 (1960) defined it, which is to mean "such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another."

8. When a capital "S" is used in the word "State," it is meant to indicate a reference to government generally, not a state government within the United States.

9. The first part of this definition of liberty is from HAYEK, *supra* note 7, at 11 (liberty is "that condition of men in which coercion of some by others is reduced as much as is possible . . ."). The second part of the definition is derived from the importance accorded by libertarian writers to individuals having personal spheres of autonomy and privacy. Consider, for example, Hayek's further observations that "[c]oercion . . . cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem by conferring the monopoly of coercion on the [S]tate and by attempting to limit this power of the [S]tate . . . . This is possible only by the [S]tate's protecting known private spheres . . . ." *Id.* at 21. See also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 14 (1998) ("Given the various problems that arise when humans live and act in society with others, the classical liberal answer . . . was that each person needed a 'space' over which he or she has sole jurisdiction or liberty to act and within which no one else may rightfully interfere.") (emphasis omitted).

10. See, e.g., FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014); and BARNETT, *supra* note 9.

government and relationships between governments and individuals.<sup>11</sup> Scholars have no doubt focused on public law and liberty because there are so many important public law questions that bear on the liberties of individuals—for example, the powers of governments to regulate speech, engage in searches and seizures of persons and property incidental to an arrest, or to regulate the right to bear arms.

This Article, on the other hand, focuses on the relationship between private law and liberty. Private law is usually defined as the branch of law that addresses the relationships between individuals, rather than between individuals and their governments.<sup>12</sup> There is already a significant amount of literature addressing the relationships between private law and liberty, but much of it focuses on the justifications for private law and the role of the government in facilitating and regulating private legal transactions.<sup>13</sup> Most of it has very little to say about specific private law doctrines.<sup>14</sup> In contrast, this Article explores the ways in which specific private law doctrines may advance or impede liberty.

One of the lynchpins in the analysis is the simple and noncontroversial observation that when courts enforce private legal rights they exercise the powers of State coercion against the parties subject to their enforcements.<sup>15</sup> Courts' decisions about whether to enforce claims under private laws therefore have direct consequences for liberty. The courts thus play an important role in advancing liberty through their enforcement or non-enforcement of private legal claims under well-known contract and property doctrines. Unfortunately, there are some important ways in which courts may also undermine liberty through their enforcement or non-enforcement of some private legal

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11. Jonathan Law & Elizabeth A. Martin, *Public Law*, OXFORD DICTIONARY OF LAW (7th ed. 2014), available at <http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-3146?rskey=ws5Gap&result=3315> (last visited Aug. 10, 2014).

12. Jonathan Law & Elizabeth A. Martin, *Private Law*, OXFORD DICTIONARY OF LAW (7th ed. 2014), available at <http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-3032?rskey=6jZnt0&result=3201> (last visited Aug. 10, 2014).

13. For example, Friedrich Hayek, Richard Epstein, and Randy Barnett have all addressed aspects of the relationship between private law and liberty, but with a much larger purpose and broader focus that placed the relationship within the context of public law issues. See HAYEK, *supra* note 7; EPSTEIN, *supra* note 10; and BARNETT, *supra* note 9.

14. Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 78-79 (2010) critiques libertarian theories of property on the grounds that they are consequentialist and not rooted in a conception of individual rights. This Article concurs with Freyfogle, but seeks to explicate the relationship between private law doctrines and liberty recognizing, as he does, that the connections are highly nuanced.

15. See *infra* Part II.

claims under some other well-known contract and property doctrines.

Another one of the lynchpins of the analysis is the equally simple and noncontroversial observation that corporate persons are created under state laws for the benefit of their owners and/or other interested parties and, presumably, for the good of society. Both for-profit and non-profit corporations enjoy rights and privileges under the law, including, for example, the right to sue and be sued, limited liability, and preferential tax treatment; they are, in that sense, State-sponsored entities.<sup>16</sup> In return for the rights and privileges they enjoy, they are often subjected to restrictions and regulations that do not apply to natural persons—for example, a for-profit corporation may have reporting obligations under securities regulations and a non-profit corporation may not be allowed to participate in political campaigns. Although they are private legal entities, because of the rights and privileges they enjoy under state and federal law, the State is complicit whenever a corporation impinges upon the liberties of natural persons. In particular, the State is complicit whenever a corporation impinges upon an individual's liberty by intruding into her sphere of personal autonomy and privacy. The concern may be mitigated when the corporation is for-profit, subject to the discipline of the market, but it is exacerbated when the corporation is non-profit that receives significant tax exemptions as a public charity.<sup>17</sup>

This Article argues that private laws are no less important to liberty than public laws and that if private laws are constructed and applied appropriately they will advance liberty, but if not, they may actually facilitate the exercise of coercion and, therefore, undermine liberty. To that end, this Article illustrates some of the ways in which certain well-known private law doctrines may advance liberty.<sup>18</sup> But it also expresses concerns about the application of some other private law doctrines. One of the concerns lies in the fear that private laws may sometimes allow some individuals and corporations to use the courts, and implicitly, therefore, the power of State coercion, to impinge upon the liberty of other individuals. This concern is explicated using private land use restrictions as an example. Another concern is that private laws may allow corporations to use their rights and privileges to intrude into the

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16. *See infra* Part II.

17. *See infra* Part II.

18. This Article does not intend to imply that private law doctrines were devised to advance liberty, although further investigation of the matter may be justified; it merely observes the role of private law doctrines in advancing liberty and suggests ways in which private law doctrines might be revised to advance liberty still further.

spheres of personal autonomy and privacy that are essential to the liberty of natural persons. This concern is explicated using lifestyle covenants and morals clauses as an example.

Part II of this Article discusses the relationships between liberty, the State, and private law and elaborates on some of the presumptions of the analysis. Part III focuses on the relationships between liberty and specific property law doctrines. It uses examples from human rights, the first in time, first in right rule, findings and adverse possession, and eminent domain to illustrate some of the ways in which property doctrines may advance or undermine liberty, depending on whether the doctrines are appropriately constructed and applied. It also raises concerns about the ways in which property law may systematically undermine liberty, using courts' enforcements of some private land-use restrictions as an example. Part IV focuses on the relationships between liberty and specific contract law doctrines. It uses examples from the parol evidence rule, the unconscionability doctrine, and the impracticability doctrine to illustrate the ways in which contract doctrines may advance or undermine liberty, depending on whether the doctrines are appropriately constructed and applied. It also raises concerns about the ways in which contract law may systematically undermine liberty, using, as an example, the practices of some State-sponsored, non-profit corporations that use lifestyle covenants and morals clauses in their employment contracts to intrude into their employees' spheres of personal autonomy and privacy. Part V offers some conclusions.

## II. LIBERTY, THE STATE, AND PRIVATE LAW

Liberty is both dependent upon and limited by the State. The State protects individuals from the coercion of others, but paradoxically, it must exercise coercion itself in doing so.<sup>19</sup> For example, an individual is protected (to some degree) from acts of physical violence against her person in part because other individuals know that such acts are prohibited by criminal laws and will be subject to punishment by the State. The use of force or the threat of the use of force by individuals against other individuals is discouraged by the State's threat of the use of force against anyone who perpetrates acts of violence against others.<sup>20</sup> The State thus necessarily relies on coercion to protect individuals from the coercion of others. If the social objective was to maximize individual

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19. HAYEK, *supra* note 7, at 21.

20. *Id.*

liberty, the State's use of coercion would be justified only if it reduced the amount of coercion exercised by individuals against other individuals by a greater amount.<sup>21</sup>

This does not necessarily mean that a free society should rely exclusively on the power of the State to deter coercion. There might be less coercion overall if individuals—or groups of individuals—assumed some of the responsibility for protecting themselves. For example, a neighborhood association might be able to prevent many crimes against property and persons simply by exercising some vigilance without the need to involve the police and courts.<sup>22</sup> That would lessen the burden on the criminal justice system, while at the same time diminishing the exercise of coercion overall. In fact, almost every society relies to some extent on the ability of its citizens to protect themselves against transgressors, whether it is through simple vigilance, a credible threat of resistance against the use of force, or the threat of the use of force in self-defense or even retaliation.<sup>23</sup> Nonetheless, every developed society still relies primarily on the State to deter coercion, and this inevitably raises concerns about the abuses of State power.

#### *A Constitution Mitigates Concern Regarding State Abuse of Its Powers of Coercion*

The reliance on the State to deter coercion raises the possibility that the State's powers of coercion might be abused. A constitution that constrains the exercise of the State's coercive powers helps to mitigate those concerns. There are a variety of ways in which a constitution might protect individual liberties against encroachments by the State.

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21. It is not clear whether anyone believes that the State's sole objective should be to maximize individual liberty. Libertarian scholars have usually focused on minimizing the size and role of the State. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974). Even Nozick concedes, however, that "[w]hatever its virtues, it appears clear that the minimal [S]tate is no utopia." *Id.* at 297.

22. Robert Nozick, for example, discusses the ways in which individuals in the state of nature might form "protective associations." *Id.* at 12-15. He argues, however, that even a "dominant protective association"—a protective association that might emerge from a state of anarchy to bring a semblance of order to a particular geographical area—would fall short of fulfilling the requirements of a State. *Id.* at 15-25.

23. The use of force by individuals against other individuals raises nuanced problems. It may, for example, undermine the State's monopoly of the use of force. HAYEK, *supra* note 7, at 21. But the use of force by individuals arguably does not undermine the monopoly of the State over the use of force if the State, through its laws, delegates to individuals the right to use force in self-defense. Randy Barnett provides a detailed justification of the right of self-defense. *See* BARNETT, *supra* note 9, at 184-91. The use of force by individuals in retaliation for others' use of force against them is more problematic.



For example, a constitution arguably should separate the powers of government to provide appropriate checks and balances between and within its branches and constrain any one branch from impinging on liberties too far.<sup>24</sup> If the executive branch has a veto over new legislation, for example, this limits the power of the legislature to enact statutes that might impinge on citizens' liberties.<sup>25</sup> If the legislature is a bicameral one, this means that any new legislation must have a coalition of support in two chambers rather than one, again limiting the power of the legislature to enact statutes that might impinge on liberties.<sup>26</sup>

A constitution arguably should also place hard constraints on the nature of the coercion that may be used by the State. For example, a constitution might constrain the State from imposing cruel and unusual punishments, even though such punishments might have a strong enough deterrent effect to reduce the amount of coercion exercised in society overall.<sup>27</sup> The State's use of such extreme punishments might offend such basic human dignities that the reduction in other forms of coercion might not justify the increased deterrent effect.<sup>28</sup> To give another example, a constitution might constrain the State from conducting some searches and seizures, even though the searches and seizures might help to detect and deter the use of coercion by some citizens against others so much that they would reduce the amount of coercion overall. Some searches and seizures might intrude into individuals' privacy so much that the reduction in the exercise of coercion overall might not justify the impingement on their liberty.<sup>29</sup>

Ultimately, of course, there are considerations other than ensuring that individuals are free from coercion that must also be factored in any calculus of a just society. Thus, many constitutional provisions in the United States and other nations have less relevance to protecting liberties than they do to advancing other core social values. These core social

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24. BARNETT, *supra* note 9, at 253-54. See also ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 215-39 (2000).

25. COOTER, *supra* note 24, at 215-23.

26. *Id.* at 223-25.

27. Barnett goes so far as to argue against using any punishments as deterrents to committing crimes. BARNETT, *supra* note 9, at 216-37. He argues that the deterrence effect might be illusory, and that it is, in any case, immoral. One of his concerns is that innocent people will always be wrongfully subjected to punishments, and the severity of the punishments necessary to provide deterrence to others exacerbates the injustice. *Id.* at 225-33.

28. As Justice Brennan wrote, "[T]he extreme severity of a punishment makes it degrading to the dignity of human beings." *Furman v. Ga.*, 408 U.S. 238, 272 (1972).

29. As Justice Frankfurter wrote, "The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' . . ." *Wolf v. Colo.*, 338 U.S. 25, 27 (1949).

values often reflect the cultural importance of fundamental human dignities such as the right to equal protection of the laws or the right to due process in the administration of justice. Thus, the Equal Protection Clause of the Fourteenth Amendment militates against the State exercising its coercive powers unequally,<sup>30</sup> and the due process clause of the Fifth Amendment provides procedural safeguards to militate against unfair incarcerations.<sup>31</sup> The protections and rights afforded by such constitutional provisions do not necessarily diminish the amount of coercion exercised in a society overall—they might actually increase it—but they are obviously vested with great social importance and, in that sense, transcend the need for social order.

### *B. Justifications for Private Laws in Free Society*

The need for public laws that constrain State actors is so widely accepted that it is virtually taken for granted. Considerably less attention has been devoted to the role of the State in the creation and enforcement of private laws. Of course, some libertarian scholars have gone to great pains to explain why private laws are justified in a free society at all. In fact, the libertarian justifications for having a State-enforced system of private law are far from obvious. One obvious argument is that property and contract laws help to reduce coercion by preventing private disputes between individuals from escalating into conflicts that involve the use of force or the threat of force between the disputants. But that argument is less than fully persuasive. In theory, at least, the State could protect the rights of its citizens to only their own persons.<sup>32</sup> In other words, all property could be communal, and the State could decline to enforce any private agreements.<sup>33</sup> Everyone would thus have rights to use all land

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30. Although the Supreme Court rarely applied the Equal Protection Clause of the Fourteenth Amendment until *Brown v. Board of Education*, 347 U.S. 483 (1954), it has since then frequently used the Equal Protection Clause to combat “invidious discrimination and . . . [safeguard] fundamental rights.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 668 (3d ed. 2006).

31. The Bill of Rights provides many protections against unfair incarcerations. CHERMERINSKY, *supra* note 30, at 566. The United States Supreme Court has stated that “the interest of being free from physical detention by one’s own government” is “the most elemental of liberty interests.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

32. Richard Epstein, for example, recognized the potential limitations of minimalist State libertarian arguments when he observed “A system of liberty may well give each person rights over his or her own person, but it does not in and of itself do much to assign ownership rights over things in the external world.” RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 38 (2003). This concurs with Robert Nozick’s view that “the minimal [S]tate is no utopia.” NOZICK, *supra* note 21, at 297.

33. Communal property rights would entail that everyone had the right to use the property

and chattels, but no one would have the right to exclude others from the use of land or chattels or to use the courts to enforce private agreements.

A nation without a system of private law would probably best resemble some traditional hunting and gathering societies. While it might be peaceful and largely free from the exercise of coercion, it probably would not provide a good foundation for the material prosperity or advancement of its citizens.<sup>34</sup> It is perhaps not surprising therefore that some libertarian justifications for private law appear to rest on utilitarian arguments,<sup>35</sup> such as the argument that private law facilitates cooperation and mutually gainful transactions or the argument that it maximizes the value of all property holdings by individuals within a society.<sup>36</sup> Indeed, there is widespread agreement that private property rights and contract law provide important incentives for investments in land, new technologies, and new methods of production, not to mention the incentive for greater work effort and productivity.<sup>37</sup> While economic progress might not directly reduce the amount of coercion exercised in a society, it might significantly increase the value that individuals derive from the liberty and freedoms that they have.

Other libertarian justifications for having a system of private law rely on non-consequentialist arguments.<sup>38</sup> Private law concepts have a strong appeal to those who accept the basic tenets of natural rights and natural law theory.<sup>39</sup> In some cases, natural rights justifications for private law overlap with consequentialist ones.<sup>40</sup> Indeed, some scholars

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but no one had the right to exclude others from its use. In other words, individuals would have property rights, but not private property rights. If the State declined to define and enforce contract laws, individuals could still make private agreements with one another, but they could not rely on the State to enforce their agreements.

34. The notion that hunting and gathering societies were prosperous and afforded ample leisure may be a myth. In fact, the notion that they were generally peaceful may be a myth too. See *Noble or Savage*, THE ECONOMIST, Dec. 19, 2007, available at <http://www.economist.com/node/10278703>.

35. See generally FREYFOGLE, *supra* note 14.

36. See, e.g., RICHARD EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 79 (2011) (“the key challenge for the legal system is to identify the set of consistent property uses that maximizes the value of the holdings of all individuals within the group . . .”). HAYEK, *supra* note 7, at 61, however, sounded a warning about the limitations of consequentialist arguments: “Those who believe that all useful institutions are deliberate contrivances and who cannot conceive of anything serving a human purpose that has not been consciously designed are almost of necessity enemies of freedom.”

37. This is such a basic postulate of economics that is accepted by economists of almost all schools of thought.

38. BARNETT, *supra* note 9, at 4-26 discusses natural rights, natural law, and utilitarian methods of analyzing the law.

39. See, e.g., *id.*

40. Thus, for example, Randy Barnett purports to provide a natural rights justification for the

simply seem to presume that private property rights attach to individuals as naturally as the rights they have in their own persons. The intuitive appeal of property and contracts might make the need to justify a system of private law appear unimportant, but it would be a mistake to presume the need for a system of private law since the justification for having a system of private law arguably provides the basis for evaluating the private laws that we have. This Article presumes that the purpose of the State is to advance liberty. Thus, the question that it seeks to answer is how should private laws be devised and applied if the objective is to advance liberty?

### *C. The State's Role in Enforcing Private Laws*

It is helpful to begin by clarifying the role of the State in the enforcement of private laws. In most developed countries, the dual principles of party autonomy and party responsibility apply.<sup>41</sup> Thus, individual members of a society are generally free to dispose of their property as they wish and enter into whatever agreements they like; thus, they may create their own private legal rights and obligations, but they are also responsible for asserting their own private legal rights and defending themselves against others who might attempt to hold them to legal obligations they dispute. Ultimately, however, courts enforce private legal rights and obligations, and courts are State actors.<sup>42</sup> When a court enforces a private property right or a contractual obligation it does so with the full force of the State's coercive powers behind it.<sup>43</sup> Anyone

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structure of private law that is only indirectly consequentialist. *Id.* at 23.

41. See, e.g., Stefan Grundmann, *Information, Party Autonomy and Economic Agents in European Contract Law*, 39 COMMON MKT. L. REV. 269, 270-72 (2002).

42. This is a statement of fact, not a statement about United States law. As CHEMERINSKY, *supra* note 30, at 527 observed, "[T]here seems little doubt that judges are government actors and that judicial remedies are state action." Nonetheless, the United States Supreme Court has generally limited the definition of State action under the State action doctrine to acts undertaken by the executive and legislative branches. See *id.* at 507-27. Thus, actions undertaken by the judicial branch, including court enforcements of private legal rights, are generally not considered State acts under the State action doctrine. *Id.* The most important exception is *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), in which the United States Supreme Court held that "action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment." *Shelley*, however, was an exceptional case involving a challenge against racially restrictive covenants. The Supreme Court has not followed *Shelley* in other cases and has, therefore, generally not treated other court actions in other cases as State action. CHEMERINSKY, *supra* note 30, at 528.

43. This is not a new observation. For example, in the wake of *Shelley v. Kraemer* some scholars argued that all judicial enforcements of private legal obligations should be treated as State action. See, e.g., Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962). Those arguments were rebutted by counters that the Equal Protection Clause of

who declines to respect a court's injunction can be held in contempt and subjected to an escalating series of State-imposed penalties, even imprisonment; and anyone who declines to pay a money judgment can have her property subjected to an execution and levy or her wages garnished.<sup>44</sup> State coercion is thus the bedrock of any system of private law.

It is important to emphasize that this is not an argument against the State action doctrine. Under the State action doctrine, individuals have constitutional protections against only State actions, not against actions of other private individuals.<sup>45</sup> The argument that courts' enforcements of private legal rights are a form of State action is not an argument that individuals should have constitutional protections against actions of other private individuals. It is merely an argument that when courts provide individuals with a remedy for a violation of their private legal rights by another individual the courts are engaging in State action; it is not an argument that courts engage in State action when they decline to provide individuals with a remedy for an alleged violation of their legal rights by another individual.<sup>46</sup> When a court declines to enforce a private legal right it does not take any action at all, let alone State action.<sup>47</sup> In fact, it is important to remember that a court's decision not to provide a remedy for an alleged violation of a private legal right is not tantamount to the court's—or the State's—approval of anyone's actions.<sup>48</sup> An

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the Fourteenth Amendment was intended to apply only against state governments and not to regulate the behavior of private individuals. *See, e.g.,* Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 3 WASH. U. L. REV. 757, 762 (1979). The analysis in this Article, however, is directed at the relationship between private law and liberty. The judicial enforcement of private legal obligations is an exercise of State coercion, and one way of disciplining that exercise of State coercion would be by expanding the scope of State action under the State action doctrine.

44. 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 12-18 (2d ed. 1993).

45. CHEMERINSKY, *supra* note 30, at 507.

46. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 514-16, 521-25 (1985) argued that courts' failure to provide a legal remedy for a violation of an alleged private legal right should constitute State action. Since this would make private individuals liable to other private individuals for violating their constitutional rights, it would effectively abolish the distinction between State action and the actions of private individuals. But when a court declines to enforce a private legal right or provide any other remedy for an alleged violation of a private legal right, it does not take any action at all in the sense that is meant here.

47. This equates a court's actions with its provision of remedies. A court that declines to provide a remedy thus refrains from taking action. Obviously, one could counter that a court's decision not to provide a remedy is also a court action. But that would be tantamount to arguing that not taking an action is an action too.

48. Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 140 (1989).

individual's private actions could be morally reprehensible and even harmful to other individuals and yet not provide others with a right to a legal remedy.<sup>49</sup>

The distinction between courts' actions and their decisions not to act is an important one because courts' enforcements of private legal rights involve the exercise of the State's power of coercion while courts' decisions not to enforce private legal rights do not. If the applicable definition of State action under the State action doctrine was expanded to include courts' enforcements of private legal rights but not to include courts' decisions not to enforce private legal rights, courts would be prevented from enforcing private legal rights when doing so would violate the constitutional constraints on State actions against individuals. However, this would not allow individuals to make constitutional claims against other individuals. In other words, an individual would be unable to have a court enforce a racially restrictive covenant against his neighbor, but, absent some restriction against flying flags in general, his neighbors could not prevent him from flying a Confederate flag, regardless of how morally reprehensible they—and the courts—might think it was to fly one. State coercion would be used only to protect liberty, not to impede it.

That is not to say that this is going to happen anytime soon. Constitutional doctrines usually evolve gradually, and sometimes not at all.<sup>50</sup> The State action doctrine has many critics, but it also has many supporters,<sup>51</sup> and it is unlikely that the Supreme Court will broaden the applicable definition of State action under the State action doctrine any time soon. While that may be regrettable, it does not diminish the most important point, which is that courts' enforcements of private legal rights involve the exercise of the State's power of coercion and that they, therefore, have important implications for liberty. Courts' decisions not to enforce private legal rights do not involve the exercise of the State's power of coercion, and they therefore do not have any direct implications for liberty.

This is important because, if the primary purpose of the State is to advance liberty, and if liberty is advanced by reducing the exercise of

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49. For example, a homeowner might fly a Confederate flag over his house. The flag might be offensive to many others, yet, absent some private land-use restriction on flying such a flag, the neighbors would have no private legal right to a remedy. That hardly implies that flying a Confederate flag is condoned by either the courts or the State.

50. As CHEMERINSKY, *supra* note 30, at 7 observed, the purpose of a constitution is to entrench important social values in a way that will make it very difficult for them to change rapidly.

51. Sundby, *supra* note 48, at 139-44.

coercion, then courts' decisions to enforce private legal rights require more justification than their decisions not to enforce private legal rights. It is therefore not enough to provide a sweeping justification for a system of private law overall.<sup>52</sup> What is needed is a justification of the specific private law doctrines that authorize courts to enforce particular private legal rights. What is also needed is an understanding of when courts' enforcements of private legal rights might actually interfere with liberty and an understanding about how legislatures or courts could rectify the problems.<sup>53</sup>

#### *D. Private Law—Individuals and Corporations*

Of course, not all private transactions are between individuals—that is, natural persons—and other individuals. Some private transactions are between individuals and corporations and others are between corporations and other corporations. Corporations are created under state laws.<sup>54</sup> They are, in that sense, State-sponsored entities. Moreover, they enjoy rights and privileges that provide benefits to their stakeholders. In fact, that is why they are formed. For example, organizing a business as a for-profit corporation provides the shareholders with the protections of limited liability.<sup>55</sup> It may also offer them the advantages of transferable ownership shares, capital gains tax rates as opposed to income tax rates, and the alleviation of agency problems.<sup>56</sup> A non-profit corporation has no shareholders, but it does have stakeholders. Its stakeholders are initially those who form the corporation, and subsequently may include its officers, senior employees, and major donors.<sup>57</sup> A non-profit corporation usually benefits from sweeping tax exemptions, since it usually pays no income, property or sales taxes.<sup>58</sup>

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52. Libertarian scholars have tended to focus more on justifying a system of private law than on analyzing the role of specific private law doctrines in advancing or limiting liberty. *See, e.g.*, HAYEK, *supra* note 7; BARNETT, *supra* note 9; and NOZICK, *supra* note 21.

53. This is not to suggest that we should look to the State for solutions to all our social problems. The problems here are a consequence of State action—court enforcements of private law doctrines that impinge on the liberty of individuals—and the only way of addressing them is by imposing legal constraints on State actors—here the courts.

54. REINER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERAD HERTIG, KLAUS HOPT, HIDEKI KANDA & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 34 (2d ed. 2009).

55. *Id.* at 9-11.

56. *Id.* at 11-14.

57. EDWARD L. GLAESER, *THE GOVERNANCE OF NOT-FOR-PROFIT ORGANIZATIONS*, 1-44 (2003).

58. *Id.* *See also* Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 *YALE L.J.* 54, 55-57 (1981).

Since corporations are State-sponsored entities with rights and privileges that individuals do not enjoy, private transactions between individuals and corporations raise questions about the nature of the State sponsorship and its implications for the liberty of the individuals. If liberty requires not just that individuals be as free from coercion as possible, but also that they have spheres of personal autonomy and privacy, and if the transactions between individuals and corporations intrude into individuals' spheres of personal autonomy and privacy, then the State may indirectly contribute to the impingement upon the liberty of individuals through its sponsorship of the corporations. If securing the liberty of individuals is the ultimate purpose of the State, transactions between corporations and individuals that may intrude into individuals' liberty should be subjected to careful scrutiny. In particular, it is important to ask whether the State's sponsorship of any particular corporations contributes to intrusions into individuals' liberty of any particular kind and, if it does, whether legislatures or courts might be able to provide any solutions to the problems.<sup>59</sup>

### III. LIFE, LIBERTY, AND THE PURSUIT OF PROPERTY

This section focuses on the relationships between liberty and specific property law doctrines. It uses examples from human rights, the first in time, first in right rule, findings and adverse possession, and eminent domain to illustrate some of the ways in which property doctrines may advance or undermine liberty, depending on whether the doctrines are appropriately constructed and applied. But it also raises concerns about the ways in which property law may systematically undermine liberty, using courts' enforcements of some private land-use restrictions as an example.

Private land-use restrictions may intrude into a property owner's sphere of personal autonomy and privacy in ways that public land-use restrictions cannot because they would be unconstitutional. This Article argues, therefore, that courts should be restrained from enforcing private land-use restrictions that would be unconstitutional if they were public land-use restrictions.<sup>60</sup> This could be accomplished through 1) an expansion in the definition of State action under the State action doctrine

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59. Once again, this is not to suggest that we should look to the State for a solution to all social problems, but here the problems may arise because of the State's sponsorship of corporate behavior that may intrude into individuals' liberty, and the best solutions therefore may be ones that mitigate the adverse impact of the State's policies.

60. See *infra* Part III.C.



that would make courts' enforcement of private land-use restrictions subject to all the constitutional constraints on public land-use restrictions, 2) the enactment of state statutes that would make courts' enforcement of private land-use restrictions subject to all the constitutional constraints on public land-use restrictions, or 3) an expansion in the public policy restraint on courts' enforcement of private land-use restrictions that would make private land-use restrictions unenforceable whenever they would be unconstitutional if they were public land-use restrictions.<sup>61</sup>

Part III.A will discuss liberty and human rights and Part III.B will discuss the first in time, first in right rule, findings and adverse possession, and eminent domain. Finally, Part III.C will discuss the ways in which private land-use restrictions may be used to impinge on liberty and suggest ways in which constitutional law, state law, and the public policy restraint on courts' enforcement of private land-use restrictions could mitigate the problems.

#### *A. Liberty and Human Rights*

The most basic liberty is the right to be free from coercion over the control and use of one's own body and self. To be subject to such coercion would be slavery, the most fundamental human rights violation.<sup>62</sup> A free person owns herself in the sense that her actions are voluntary, and unless she wishes to donate her time and efforts, others must pay her for them. In that respect, the rights a free person enjoys over her own body and self are like property rights; they are rights that one may trade in the labor market for income. But they are more than simply property rights because they are fundamental to our dignity as human beings. They are intimately related to freedoms that are central to our unique identities such as freedoms of religion, speech, and association that enable us to hold and practice our own beliefs, speak our own minds, and indulge our own preferences in friends and associates. Almost no one in any developed society today disputes any of these freedoms,<sup>63</sup> although the sad truth is that they are still being breached all

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61. *See infra* Part III.C.

62. Article 4 of the Universal Declaration of Human Rights states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." G.A. Res. 217A (III), at 71, U.N. Doc A/810 (Dec. 10, 1948).

63. Of course, slavery was one of the terrible ironies of early American history. Although the Declaration of Independence held that all men are created equal and endowed with inalienable rights, there were many slave owners in the Continental Congress that adopted it. *See, e.g.*, PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF THOMAS*

around the world.<sup>64</sup>

One matter that has dogged scholars is whether a free person should be free to sell himself into slavery. The question can be rephrased as one about the scope of individuals' rights in their own persons: Do they include the right of alienation? Most people seem to believe that they do not, and individuals' rights in their own persons are inalienable under the laws of all civilized nations.<sup>65</sup> The challenge is to provide a compelling justification. A restraint on the alienability of one's rights in her person seems to place a limit on our most basic freedom since some people who might like to use the proceeds for the benefit of their families or others might actually be willing to sell themselves into slavery. If they are truly free, why should they not have the liberty to do so? Does a prohibition on their right to sell themselves into slavery not limit their most fundamental liberty?

If liberty means the right to be free from coercion, then the answer is clearly yes. A State that enacted and enforced a law prohibiting its citizens from selling themselves into slavery would have used the power of State coercion to interfere with a private transaction. If the objective was to minimize the use of coercion in society overall, the State's use of coercion to deter a private transaction would be counterproductive. Of course, there are other social values, reflected in constitutions, statutes, and court precedents, that constrain private transactions in many ways, but to the extent that they trump liberty, they should be subjected to the same careful scrutiny. If liberty were the sole criterion for evaluating social welfare, there would be no social value in any law, whether it was under a constitution, statute, or case precedent that prohibited people from selling themselves into slavery.<sup>66</sup> But that does not mean the State should use its powers of coercion to enforce such a transaction. Once again, it is important to understand the distinction between the State

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JEFFERSON (2d ed. 2001).

64. Unfortunately, the moral consensus against slavery has not ended human trafficking and the exploitation of children and adults through coercive labor practices. *See, e.g.*, U.N. OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS, at 9, U.N. Sales No. E.13.IV.1 (2012) (stating that more than twenty million people worldwide are victims of forced labor).

65. The preamble to the Universal Declaration of Human Rights begins with the words: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." G.A. Res. 217A (III), at 71, U.N. Doc A/810 (Dec. 10, 1948).

66. Some libertarian scholars have argued that liberty includes the freedom to alienate oneself into slavery. *See, e.g.*, NOZICK, *supra* note 21, at 331 ("The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would."). Others have provided sophisticated arguments that it does not. *See, e.g.*, BARNETT, *supra* note 9, at 77-82 (arguing that the right to one's self is inalienable).

using its coercive powers to prohibit voluntary, private transactions and the State using its coercive powers to enforce private transactions.

A constitutional constraint, statute, or case precedent prohibiting a private transaction would be suspect because it would use the State's coercive powers to interfere with individuals' liberty. But just because individuals might have the liberty to engage in a private transaction does not mean that the State's coercive powers should be used to enforce it. Although it would be unjustified for the State to prohibit a voluntary private transaction in which an individual sold himself into slavery, it would arguably be even more unjustified for the State to use its coercive powers to enforce such a private transaction.<sup>67</sup> If the social objective is to advance liberty, therefore, the State should not prohibit private transactions in which individuals sell themselves into slavery, but it should not enforce them either since there is no justification for the use of the State's coercive powers to enforce a transaction that would result in someone losing their most fundamental liberty. If such transactions were legal but not enforceable, individuals would be able to enter into private agreements to serve as others' slaves, but the agreements would not be legally binding. As a practical matter, this might destroy the incentives for anyone to buy a slave since the seller's servitude would be entirely permissive and therefore terminable at the seller's will, but it would still provide the greatest liberty possible.<sup>68</sup>

### *B. Liberty and Private Property*

In theory, the State could protect its citizens from the use of coercion without protecting their claims to any property rights in chattels or land.<sup>69</sup> Indeed, the enforcement of property rights by the State presents an obvious problem, since it requires the use of the State's coercive powers on behalf of some individuals against others.<sup>70</sup> Of

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67. Given the importance that almost everyone attaches to her liberty, it would be legitimate to ask whether anyone would voluntarily engage in such a transaction. But for the sake of the argument, it is best to set that matter aside.

68. As a practical matter, although the argument here is different, it comes out close to the same place in the end as Randy Barnett's. See BARNETT, *supra* note 9, at 81 ("while right-holders may exercise their inalienable rights consistent with the wishes of others, a right-holder may never surrender the right to change her mind in the future about whether to exercise such rights or not.") (emphasis omitted).

69. See, e.g., EPSTEIN *supra* note 32, at 38 ("A system of liberty may well give each person rights over his or her own person, but it does not in and of itself do much to assign ownership rights over things in the external world.").

70. See, e.g., EPSTEIN, *supra* note 36, at 22 ("litigation . . . involves the threat of the use of public force against a recalcitrant defendant.").

course, the State's coercion would be exercised against only those individuals who infringed upon or challenged the property rights of others, and an individual's liberty does not include the right to infringe upon other individuals' rights.<sup>71</sup> Of course, the use of coercion by the State could also be justified by consequentialist objectives such as increasing the freedoms of individuals to use and dispose of chattels, land, and intellectual property, and creating incentives for individuals to invent, innovate, and develop their property. Although the primary focus of this Article is on liberty, a well-defined system of property law provides the foundations for a productive and materially prosperous society and helps to free people from hunger and want.<sup>72</sup>

The challenge, of course, is how to define the property rights that the government should enforce. It is helpful first to conceptualize the role of private law and its components—property, contract, and tort. Although these are separate areas of law, they are interrelated. Private law rests in a fundamental way on a system of property rights.<sup>73</sup> Tort and contract laws help to define the scope of property rights, although the scope is also defined by the inherent powers of the State and any relevant governmental regulations.<sup>74</sup> When a person acquires private property rights in chattels or land, those define her right to possess, use, and dispose of the chattels or land, as well as her rights to preclude others from exercising the same rights.<sup>75</sup> Property rights can be quite nuanced. For example, a person can have the right to possess and use chattels, as well as the right to dispose of them by abandonment or gift, but not the right to dispose of them by sale; for another example, a person could have the right to possess a parcel of land and to use it for residential purposes, but not to use it for commercial or industrial purposes.<sup>76</sup>

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71. BARNETT, *supra* note 9, at 73 observes that “rights are relational” and that if individuals should “act in such a manner as to prevent others from using their rightfully owned resources then the purpose of having rights in the first place would be defeated.”

72. Freyfogle, *supra* note 14, generally argues that most libertarian scholars ultimately depend on consequentialist arguments. Of course, some do so more explicitly than others. For example, EPSTEIN, *supra* note 36, at 79 argues that property rules should be designed to maximize the total value of property holdings. However, HAYEK, *supra* note 7, at 61 sounded a warning about the limitations of consequentialist arguments.

73. As a matter of logic, the right to make a claim against another for an injury to one's person or property in tort presumes rights in one's person or property, as does the right to alienate one's rights in one's person or property through a contract.

74. See *infra* Part III.C.

75. EPSTEIN, *supra* note 36, at 79.

76. *Id.* See also JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 102-03 (8th ed. 2014) for a discussion of the

When we say that someone owns something we merely mean that at present that person has the strongest property claim of anyone to that thing; we do not mean to imply that the person's property claim is absolute and without qualification or that it is unlimited and will always necessarily remain the strongest.<sup>77</sup> Moreover, there is nothing inherent in a regime of private property rights that necessarily involves the exercise of coercion, either by the State or the owners of private property. In matters of private law, the State exercises coercion only when it enforces private legal rights. If a person's property claim is subject to a claim by another, and the person concedes ownership, then there will be no exercise of coercion by the State. If, however, a person is in possession of chattels when another challenges her property rights and she does not concede ownership, then the other person will have to petition a court to issue an injunction to force her to transfer possession of the chattels.<sup>78</sup> Even then, the court would only exercise the State's coercive powers if it did issue the injunction.

In fact, the property dispute would probably only arise at all if there was a disagreement about the assignment of property rights in the first place. Such a disagreement would normally arise only if there was some uncertainty about the relative strength of the parties' property claims. If both parties knew with certainty that a court would side with the person in possession, the other party would have little, if any, incentive to go the expense of making the challenge.<sup>79</sup> And if both parties knew with certainty that the challenger would win the contest, the person in possession would have little, if any, incentive to defend against the challenge.<sup>80</sup> To the extent that any exercise of State coercion was necessary, therefore, it could generally be attributed to the uncertainty in the property laws that gave the parties an incentive to take their dispute to court. In that respect, liberty could be furthered by clarifying the property laws, but not by modifying them in any way that would make them more uncertain.

There is an obvious tension, however, between pressures to

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"bundle of rights" theory of property.

77. See *DUKEMINIER ET AL.*, *supra* note 76, at 126-27 for a discussion of the "relational" nature of property rights.

78. The other person would seek an injunction under an action in replevin if the dispute were over the possession of chattels and an injunction under an action in ejectment if the dispute was over land. *Id.* at 128.

79. This was an early insight from the law and economics literature. See generally William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & ECON.* 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. LEGAL STUD.* 399 (1973).

80. See generally Landes, *supra* note 79; Posner, *supra* note 79.

improve the private laws and pressures to maintain stability and predictability.<sup>81</sup> Once the basic parameters of an effective system of private laws have been established, an incremental approach to improvements may be most efficacious.<sup>82</sup> Nonetheless, it would be a mistake to presume that stability and certainty should always prevail over the need for innovation and change. As society and technologies evolve, and as our understanding of the consequences and implications of the laws that we have grows, it may be possible to comprehend ways in which innovations in our private laws could not only help to advance liberty but also help to vindicate other social values.<sup>83</sup>

It is important to anticipate that some of the political pressures for legal reforms may be antithetical to liberty. This is partly because in a democracy some groups will always try to use the levers of the State for self-serving and ill-conceived goals. Because a system of private property rights implies a distribution of wealth, there will also inevitably be pressures to use the levers of the State to redistribute property. Indeed, there is an important sense in which private property rights confer freedoms on some at the expense of others. Since private property rights typically include the right to exclude, they typically also limit the rights of others to use. When the State enforces private property rights, therefore, it uses its coercive powers to exclude non-owners from the use and enjoyment of the property.

There are obviously compelling reasons for the State to protect private property rights, but it would be cavalier to disregard the potential for inequity.<sup>84</sup> A society, for example, in which a small minority owned all of the property might be unjust.<sup>85</sup> The majority might understandably feel that the State was a mere façade for the interests of the minority,

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81. HAYEK, *supra* note 7, at 231 acknowledged that “[t]here is ample scope for experimentation and improvement within . . . [the] . . . legal framework which makes it possible for a free society to operate most efficiently.” Yet, he also wrote that “[s]o far as possible, our aim should be to improve human institutions so as to increase the chances of correct foresight.” *Id.* at 30.

82. *Id.*

83. Hayek observed that “the continuous growth of wealth and technological knowledge . . . will constantly suggest new ways in which government might render services to its citizens . . .” *Id.* at 231. He also wrote of the “scope for . . . improvement within . . . [the] . . . legal framework which makes it possible for a free society to operate most efficiently.” *Id.*

84. The consequentialist justifications often rest on maximizing the value of the property or maximizing utility. *See, e.g.*, EPSTEIN, *supra* note 36, at 79. BARNETT *supra* note 9, at 64-72 develops a natural rights justification.

85. As a general matter, many libertarian scholars might disagree. NOZICK, *supra* note 21, at 274-75 not only argues against the idea of redistribution but also predicts that it would ultimately benefit the middle-class. HAYEK, *supra* note 7, at 232 argues that efforts directed at redistribution ultimately undermine the order of an existing legal system and result in a command economy.

especially if the society offered little hope for the majority to acquire property of their own. The majority might become alienated from its government; in fact, one wonders whether the government could persist unless it used the power of State coercion to suppress dissent.<sup>86</sup>

Some libertarians are opposed to redistribution altogether.<sup>87</sup> It is not difficult to understand their concerns. Redistribution not only requires the use of State coercion, but it also encourages individuals to reallocate their time and efforts away from productive activities and towards political ones that will increase their share of the society's material resources.<sup>88</sup> Even the possibility that the State might engage in the redistribution of resources encourages unproductive investments of time and effort in politics. There is some logic, therefore, in strictly opposing redistribution. But while the logic is compelling, it would be a mistake to believe that it eliminates the need to address redistribution issues.

To begin with, liberty is not the only factor to consider in the calculus of social welfare, and other social values might justify a use of the State's coercive powers to redistribute resources.<sup>89</sup> Moreover, if the State is going to protect liberty, it will need financing, and that means the need for tax revenues. Unfortunately, taxation inevitably raises redistribution issues.<sup>90</sup> Finally, liberty can probably only thrive in a democracy,<sup>91</sup> and in a democracy the weight of the electorate is likely to make redistribution an ongoing political issue.<sup>92</sup> The most sensible response would be to devise redistribution policies that interfere with liberty as little as possible. That would be a Herculean task, and it cannot be undertaken here, but it is an issue that any full treatment of the relationship between liberty and private property will ultimately have to

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86. The hypothetical probably better describes a totalitarian State than any existing or historical democracy. Since a totalitarian State would be antithetical to liberty, its demise would be welcome.

87. See, e.g., NOZICK, *supra* note 21, at 274-75; HAYEK, *supra* note 7, at 232.

88. See, e.g., Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 PUBLIC CHOICE 73, 74 (2012).

89. There are, for example, people who are clearly unable to provide for themselves by dint of their physical or mental limitations. These include small children, adults who are severely disabled, and those who are mentally ill.

90. Should the State be financed through a head tax? Even if a head tax was feasible, would it be fair, especially if some individuals received more protection from coercion and other government services than others? And what if some individuals could not afford to pay the tax? Since taxes themselves have redistributive effects, the need for taxes makes the need to address redistribution issues inevitable.

91. For a classic argument, see CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

92. See, e.g., George J. Stigler, *Director's Law of Public Income Redistribution*, 13 J.L. & ECON. 1 (1970).

address.

### 1. First In Time, First In Right

The most basic principle of property is that the first person to take possession of something acquires the strongest claim to it.<sup>93</sup> This is the first in time, first in right rule. It has a strong intuitive appeal. Indeed, some scholars have justified it using natural rights arguments.<sup>94</sup> Regardless of the merits of those arguments, the first in time rule also seems to minimize the exercise of coercion. As a general matter, it implies that the first person to take possession of something will be protected by the State against others who might forcibly try to take possession from them.<sup>95</sup> The first possessor would normally retain her possessory rights until she decided to transfer them voluntarily to someone else through a contract, gift, or devise.<sup>96</sup>

The most obvious alternative to the first in time rule would be one that allowed the current possessor to have the strongest property claim even if the current possessor was not the first possessor. It seems reasonable to predict that, under the alternative rule, at least some individuals would devote their time and energy to trying to usurp possession (and thus property rights) from the first-possessors; the first-possessors would then have to devote time and resources to retaining possession (and, thus, their property rights).<sup>97</sup> Moreover, some individuals would probably be tempted to acquire possession from others coercively; thus, the State would probably have to exercise more coercion to police against the use of coercion, and the first-possessors would probably have to use more coercion against other individuals to retain possession. A rule that favored the current possessor would therefore probably increase the use of coercion by both individuals and the State.

As every law student quickly learns, the concept of possession is

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93. This is the first principle of property that tens of thousands of law students have been taught. It is the rule that comes out of that case about the fox, *Pierson v. Post*, 3 Cai. R. 175, 177-79 (N.Y. Sup. Ct. 1805).

94. See, e.g., BARNETT, *supra* note 9, at 68-71.

95. Of course, the concept of possession is malleable. Under the doctrine of constructive possession a person may be deemed to have possession of something even without having dominion and control over it. *DUKEMINIER ET AL.*, *supra* note 76, at 32.

96. Of course, in some cases, her rights might be terminated through eminent domain or subordinated by an adverse possessor or finder. See the discussion, *infra* Part III.B.3.

97. The same logic could be applied to any alternative rule. It would always provide an incentive for individuals to acquire superior property rights to the first-possessor, and that would mean a waste of time and energy as well as a potential increase in the use of coercion.



slippery, and so, the first in time rule is malleable. The first person to acquire possession has the strongest claim to something, but possession may be constructive rather than actual.<sup>98</sup> Moreover, because the legal definition of constructive possession is a muddy one, the doctrine gives courts considerable discretion in assigning initial property rights.<sup>99</sup> For example, a court might apply the doctrine under circumstances when a person is merely in pursuit of something rather than in actual physical possession; however, the court would normally only apply the doctrine in such a case if the person in pursuit was highly likely under the circumstances to succeed in gaining actual physical possession, but this would still give the court considerable wiggle room.<sup>100</sup> The doctrine can obviously be rationalized on other grounds, but it is at least a happy coincidence that it also helps to forestall the exercise of coercion by the person in pursuit against other persons that might intervene and take actual possession before the person in pursuit, and vice versa.

## 2. Findings And Adverse Possession

Other property rules, such as those for findings and adverse possessions, probably also minimize the exercise of coercion. Under the law of findings, for example, the finder of lost chattels usually has superior property rights against all except the owner.<sup>101</sup> The findings rule protects the finder against coercive efforts that others might engage in to acquire possession from her, and it thus diminishes the incentives for others to engage in such coercion.<sup>102</sup> Of course, courts would normally use their coercive powers to help an owner reclaim possession within some reasonable time of the finding. At some point, however, the statute of limitations on an action in replevin would normally preclude the original owner from using the courts to reclaim possession and the finder would become the de facto new owner.<sup>103</sup> The same basic scheme of rules applies in adverse possession cases. An adverse possessor has a

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98. DUKEMINIER ET AL., *supra* note 76, at 32.

99. Thus, the case about the whale, *Ghen v. Rich*, 8 F. 159, 161-62 (D. Mass. 1881), in which the beachcomber who first took physical possession of a whale was liable to the whaler who killed it.

100. This is the logic of Barbeyrac's rule, which states that a hunter in pursuit of a wild beast with "large dogs and hounds" has constructive possession whereas a hunter in pursuit merely with "beagles only" does not. *Pierson v. Post*, 3 Cai. R. 175, 181 (N.Y. Sup. Ct. 1805).

101. This is the rule of *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.).

102. As in *Armory v. Delamirie*, in which the court prevented a jeweler from converting an item of jewelry found by a chimney sweep. *Id.*

103. DUKEMINIER ET AL., *supra* note 76, at 143.

superior property claim against all except the owner.<sup>104</sup> This has the virtue of protecting the adverse possessor from the use of coercion by others attempting to acquire possession from him, and it diminishes the incentives for others to engage in such coercion. The original owner is able to use the coercive powers of the courts to reclaim possession of the land until the statute of limitations on an action in ejectment runs out. At that point, the adverse possessor becomes the de facto new owner.

One could argue that the rule for adverse possession actually gives individuals an incentive to use coercion to force owners off their lands so that they can then begin possessing adversely and eventually make an adverse possession claim. However, this use of coercion would be illegal under criminal laws, and statutes of limitations on actions in ejectment by owners against adverse possessors are generally more than long enough to give owners time to protect their property rights.<sup>105</sup> Moreover, in some jurisdictions an adverse possession claim must be made in good faith, and a claim based on the forcible ejection of the owner would never succeed. It is not surprising, therefore, that adverse possession claims rarely, if ever, arise from adverse possessors' use of coercion against owners. In fact, adverse possession claims most commonly arise for more innocuous reasons, such as boundary disputes and surveying errors, and both the adverse possessor and the owner are often surprised to find themselves in a legal dispute.<sup>106</sup>

If the objective is to minimize the exercise of coercion, the only obvious way of improving the rules governing findings and adverse possession would be to make it clearer how the rules would apply. That would reduce the legal uncertainty that might require the exercise of coercion by the courts. For example, if it were crystal clear in a findings case exactly when the statute of limitations on an action in replevin would run out, there would hardly ever be any need for the original owner to take legal recourse to reclaim possession; the finder would be a fool to go to the expense and bother of trying to defend against the owner's action before the statute of limitations had run out, and the original owner would be foolish to go to the expense of trying to reclaim possession after the statute of limitations had run out.<sup>107</sup>

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104. *Id.* at 144-45.

105. *Id.*

106. *Id.* at 163.

107. *See generally* Landes, *supra* note 79; Posner, *supra* note 79.

### 3 .Eminent Domain

An individual's property rights are never absolute. Even if they are otherwise unregulated by either public or private restrictions, an individual's property rights can still be condemned by the State through the power of eminent domain.<sup>108</sup> In the United States, and most, if not all, democratic nations, the government's power to take<sup>109</sup> private property is constitutionally limited and, thus, regulated by the courts, but it does, nonetheless, provide an important, if controversial, limitation on private property rights.<sup>110</sup> Whether it is constitutionally limited or not, therefore, the power of eminent domain helps to define the scope of an individual's private property rights.

For example, a person's property rights in land are limited by the government's constitutional right to take the land, subject to whatever compensation, if any, the government may be required to provide for the taking.<sup>111</sup> In this respect, the government's power to take the land is similar to the right of entry or power of termination that a grantor retains in land whenever the grantor conveys a fee simple subject to a condition subsequent to a grantee; although, in contrast to a taking by the government, the grantor is not normally required to pay any compensation after asserting a right of entry.<sup>112</sup> Perhaps the biggest difference between the government's power of eminent domain and a right of entry is that eminent domain gives the government the equivalent of a right of entry automatically and not because a grantor has elected to retain a right of entry in conveying property to a grantee.<sup>113</sup>

The State's power of eminent domain undermines liberty because it requires the use of the State's coercive powers against an individual. That is inherently problematic because the powers of the State in any

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108. For a thorough overview of the topic, see *DUKEMINIER ET AL.*, *supra* note 76, at 1107-1266.

109. In a democracy, the power of eminent domain is typically exercised by government officials on behalf of an elected executive or legislature; the reference to the "government's powers to take" rather than the "State's power to take" is intended to comport with that reality and common parlance.

110. The fact that the State's powers of eminent domain are regulated by the courts—a branch of government—is worth noting. In a State that had no real separation of powers, such that the judiciary was not truly independent of the executive branch, there would be no effective restraint on the scope of the government's takings powers. *See COOTER*, *supra* note 24, at 225-34.

111. Under the United States Constitution, "just compensation" is required. U.S. CONST. amend. V.

112. For an overview of defeasible fee simples and the fee simple subject to a condition subsequent, see *DUKEMINIER ET AL.*, *supra* note 76, at 244-74.

113. Eminent domain limits private property rights automatically in the sense that it is not a limitation placed upon a property interest expressly at the time it is granted.

representative democracy might be wielded on behalf of a tyrannical majority, or even a disproportionately powerful minority. It is true, in the United States at least, that the State's takings powers are constitutionally limited, and just compensation must be provided even when they are exercised. It is also true that the State's takings powers have expanded significantly over the last several decades,<sup>114</sup> and that just compensation is rarely, if ever, fully sufficient to compensate expropriated property owners fully for the subjective values that they place on the property that is taken.<sup>115</sup>

Just compensation is generally inadequate because it is calculated using estimates of market values rather than the owners' true subjective values. As every undergraduate student learns in an introductory microeconomics course, the market price in a well-functioning, competitive market (which is the usual assumption for real estate markets) reflects the marginal valuation of what is being sold—intuitively, the marginal value of the last property of that type sold.<sup>116</sup> Almost all buyers in such a market, however, are infra-marginal, and they value the properties they buy more than the prices they pay for them.<sup>117</sup> That is why a well-functioning, competitive market generates buyers' (or, in the case of consumer goods, "consumer") surplus. The surplus earned by any individual buyer is the difference between the value they place on whatever it is they are buying and the price they must pay to make the purchase.<sup>118</sup> If a property owner is compensated for a taking in an amount exactly equal to the market price, therefore, she will lose all of the surplus value she enjoyed from her property.<sup>119</sup> This, no doubt, explains why most property owners are typically disgruntled when they are subjected to a taking.

The United States Constitution expressly limits the government's power of eminent domain to cases where the taking is for a public use.<sup>120</sup> The Supreme Court's definition of a public use thus defines the scope of the government's takings powers. It is not surprising, therefore, that the Supreme Court's recent holdings expanding the definition of public use have caused so much controversy.<sup>121</sup> Historically, the Court defined

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114. See *infra* notes 120-127 and accompanying text.

115. DUKEMINIER ET AL., *supra* note 76, at 1127-29.

116. *Id.* See also DAVID M. KREPS, MICROECONOMIC FOUNDATIONS I: CHOICE AND COMPETITIVE MARKETS (2013) for an introduction to microeconomic theory.

117. KREPS, *supra* note 116, at 296-303.

118. *Id.*

119. DUKEMINIER ET AL., *supra* note 76, at 1127-29.

120. *Id.* at 1129.

121. See, in particular, *Kelo v. City of New London*, 545 U.S. 469 (2005). For a sample of the

public uses narrowly, essentially limiting the power of eminent domain to takings of land for uses that would make the land open to the public or provide it to private carriers who would make their transportation services open to the public.<sup>122</sup> In a series of recent cases, however, the Supreme Court has gradually expanded the scope of permissible public uses, initially to include takings from some private owners to others for the purpose of redeveloping blighted neighborhoods, but more recently to include takings from some private owners to others for the purpose of redeveloping non-blighted neighborhoods as part of integrated redevelopment plans.<sup>123</sup>

Takings for public uses that involve making the land open to the public or providing it to public carriers who will make their services open to the public may be justified as necessary to provide public goods.<sup>124</sup> If there are strong enough public good justifications for a taking, those might be sufficient to justify the exercise of State coercion against private property owners.<sup>125</sup> But if the government's takings power is exercised to reallocate properties from some private owners to others simply for the purpose of encouraging economic development in non-blighted neighborhoods, that is another matter. Opening the door to the use of State coercion against some individuals for the benefit of others opens the door to an abuse of the State's powers by those who are the most wealthy and influential against those who are the least wealthy and influential.<sup>126</sup> The State could thus serve as an instrument for exactly

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immediate critical reactions to *Kelo*, see the following: Orlando E. Delogu, *Kelo v. City of New London—Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17 (2006); Sonya D. Jones, Note and Comment, *That Land Is Your Land, This Land Is My Land . . . Until the Local Government Can Turn It for a Profit: A Critical Analysis of Kelo v. City of New London*, 20 BYU J. PUB. L. 139 (2005); and Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006).

122. Justice O'Connor provided a useful overview of the historical development of the public use requirement in her dissenting opinion in *Kelo*. See *Kelo*, 545 U.S. at 496-504 (O'Connor, J., dissenting).

123. *Id.* at 519. See also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984).

124. Pure public goods are characterized by the impossibility of excluding anyone from consuming them and their inexhaustible availability for consumption by everyone once they have been provided. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 45-46 (5th ed. 2008). Obviously, pure public goods are extremely rare, but some goods have enough of their characteristics to come close, and it is those ones to which the term "public goods" typically refers.

125. This concurs with Justice O'Connor's dissenting opinion in *Kelo*. 545 U.S. at 496-504 (O'Connor, J., dissenting).

126. As Justice O'Connor explained, "[T]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with

the kind of coercion that it is supposed to prevent. If liberty is the cornerstone of a just society, the power of eminent domain should be confined to cases where it is essential to the provision of public goods.<sup>127</sup>

### C. Private Land-Use Restrictions

Land uses may be restricted under public laws, usually local land-use ordinances, or private laws, usually private servitudes.<sup>128</sup> The servitudes in most new residential developments are established in a document detailing the “Covenants, Conditions, and Restrictions,” or the CC&Rs as they are commonly known.<sup>129</sup> In most common interest communities, the CC&Rs provide for the establishment and operation of a Home Owners’ Association, or HOA, which is typically organized as a non-profit corporation and governed by an elected Board of Directors.<sup>130</sup> The Board of Directors’ duties typically include the responsibility for the enforcement of the CC&Rs.<sup>131</sup> The CC&Rs typically also outline a process that can be used to amend the CC&Rs; this process typically requires homeowners to vote to approve the proposed amendments.<sup>132</sup>

Since many of the services provided by the HOA under the CC&Rs are similar to services provided by a local government, and since the HOA itself is governed by electoral processes that are similar to those through which local government officials are elected, private land-use restrictions are analogous to public land-use restrictions in many ways.<sup>133</sup> There is, however, an important difference. Local governments’

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more.” *Id.* at 505.

127. This would make the definition of a public good central to the scope of the government’s takings powers, and since the definition of a public good is somewhat nebulous, that would, to some extent, simply change the focus of the debate. But the traditional public uses much more to clearly satisfy the public good requirement than controversial redevelopment plans such as those in *Kelo*.

128. For an introduction to private land-use restrictions, see GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES (2d ed. 2004).

129. For an overview of modern residential real estate developments, see Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998).

130. For a comprehensive treatment of the governance issues in common interest communities, see ADRIENNE SCHMITZ ET AL., RESIDENTIAL DEVELOPMENT HANDBOOK 185-210 (3d ed. 2004).

131. *Id.*

132. *Id.*

133. For a sample of the commentary, see Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make the Call”*, 30 VAL. U. L. REV. 509, 521 (1996); David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763 (1995); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 57 (1995); and ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY

land-use ordinances are subject to the full panoply of constitutional constraints; however, as a general matter, private land-use restrictions are not.<sup>134</sup>

If a city government enacts an ordinance that impinges on a property owner's First Amendment rights, for example, by forbidding the owner from posting any signs supporting candidates for political office during an election, the courts will declare the ordinance unconstitutional and decline to enforce it.<sup>135</sup> Or, if the government enacts an ordinance that establishes an architectural board and empowers it to approve or deny any architectural modifications to structures in the neighborhood using such vague guidelines that no one can understand them or predict how they will apply, the courts will strike the ordinance on the grounds of being unconstitutionally vague.<sup>136</sup> In each of these cases, the State's exercise of coercion (through the underlying threat of penalties for any property owner who posts a political sign or modifies her property's architecture without the required approval) would be constrained by the United States Constitution or a state constitution. Thus, the property owners' sphere of personal autonomy and privacy would be protected and liberty would be advanced.

As a general matter, however, constitutional constraints do not apply to private land-use restrictions, such as the CC&Rs in a modern residential property development.<sup>137</sup> Thus, if the CC&Rs in a residential development forbid a property owner from posting political signs, the Board of Directors of the HOA may order her not to do so and even impose financial penalties on her if she fails to comply.<sup>138</sup> And if the CC&Rs establish architectural guidelines and require the approval of an architectural review board for any modifications to the exterior of a

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ASSOCIATIONS IN AMERICAN GOVERNANCE 62 (1992).

134. For an early argument, however, that HOAs should be subject to constitutional constraints see Katharine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. PROB. & TR. J. 1, 30 (1984).

135. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 58-59 (1994).

136. See, e.g., *Anderson v. City of Issaquah*, 851 P.2d 744, 746 (Wash. Ct. App. 1993).

137. For an extended analysis that corroborates that conclusion, see Lisa J. Chadderdon, Note, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233 (2006). For arguments that constitutional constraints should apply to CC&Rs, see Rosenberry, *supra* note 134; John C. Toews, Comment, *Validity Rules Concerning Public Zoning and Private Covenants: A Comparison and Critique*, 39 S. CAL. L. REV. 409 (1966); and Mark Urban, Comment, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 UCLA L. REV. 1655 (1974).

138. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 21 (1994).

house, the board's decisions will generally be enforceable regardless of whether the guidelines are vague.<sup>139</sup>

An HOA and its governance structures are established under private law, and even though HOAs have begun to assume some of the responsibilities of local governments and increasingly appear to operate as if they were private governments, as private entities they are generally beyond the reach of any constitutional constraints.<sup>140</sup> This is problematic because ultimately, if they are to have any teeth, the CC&Rs that an HOA enforces must be enforceable in the courts. It would be pointless, for example, for an HOA to levy assessments (in other words, impose financial penalties) against a homeowner for failing to comply with the CC&Rs unless the HOA could gain the assistance of the courts in enforcing the assessments.<sup>141</sup> The State is thus ultimately complicit in the enforcement of private land-use restrictions. What if the CC&Rs go too far? What if they regulate a homeowner's land uses in ways that a local government could not? More importantly, what if they intrude into the spheres of personal autonomy and privacy that are essential to individuals' liberty?

Under the State action doctrine, constraints against government in the United States and state constitutions usually apply only to State actors, and in enforcing private laws, courts have not generally been treated as State actors.<sup>142</sup> There is, of course, one well-known exception. In *Shelley v. Kraemer*, the United States Supreme Court held that any court that enforced racially restrictive covenants would violate the Equal Protection Clause of the Fourteenth Amendment.<sup>143</sup> The Supreme Court, in effect, treated the judicial branch as a State actor in the enforcement of the racially restrictive covenants even though the covenants were created under private law.<sup>144</sup> This expanded the scope of State action

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139. Toews, *supra* note 137, at 412; Urban, *supra* note 137, at 1679-80.

140. See generally MCKENZIE, *supra* note 138. There are exceptions. In some cases, state constitutional constraints might apply to private actors because State action is not required. See, e.g., *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n.*, 29 P.3d 797, 827 (Cal. 2001) (Werdegar, J., dissenting) (construing free speech protections under the California Constitution). Moreover, HOAs may also be constrained by federal or state statutes. See, e.g., *Amin v. 5757 N. Sheridan Rd. Condo Ass'n.*, No. 12 CV 446, 2012 U.S. Dist. LEXIS 67930, at \*2 (N.D. Ill. May 15, 2012) (quoting the Illinois Condominium Act, which states that HOAs may not make any rules impairing free exercise of religion rights guaranteed under the United States Constitution or the Illinois Constitution). See also 765 ILL. COMP. STAT. ANN. 605/18.4(h) (Westlaw through P.A. 99-140 2015).

141. See, e.g., SCHMITZ ET AL., *supra* note 130.

142. See the discussion *supra* Part II.

143. 334 U.S. 1, 8-23 (1948).

144. As Justice Vinson wrote in the majority opinion, "We have no doubt that there has been



under the State action doctrine, and, at least in theory, opened the door to a much wider range of constitutional constraints on the use of the courts to enforce private land-use restrictions. In practice, however, the State action doctrine continues to be applied narrowly;<sup>145</sup> *Shelley v. Kramer* is a clear outlier and has been widely criticized—not for the outcome in the case, because hardly anyone would want racially restrictive covenants to be enforceable, but for creating a glaring inconsistency in the case law and confounding the State action doctrine.<sup>146</sup> It may be regrettable, but it is perhaps not surprising that courts have generally declined to extend the *Shelley* precedent to other private law cases.<sup>147</sup> There is no logical reason, however, why the judicial branch of government should be treated differently than the legislative or executive branches or why the use of State coercion to enforce private legal rights is any different than its use to enforce public laws.<sup>148</sup>

Some scholars have tried to justify strict enforcement of private land-use restrictions using a freedom of contract argument that individuals impliedly consent to the exercise of State coercion against them when they assume private legal obligations under contracts with other individuals.<sup>149</sup> Since private land-use restrictions are created voluntarily, and since the parties who create them, or become owners of land bound by them, may be presumed to have impliedly consented to the restrictions, some might argue that courts' failure to enforce them would undermine the autonomy and will of the parties who created them.<sup>150</sup> That is a compelling argument that justifies the use of State coercion to enforce most private legal obligations. But it does not justify judicial enforcements of private legal obligations that would undermine individuals' liberty.<sup>151</sup> Many scholars concur that agreements alienating

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[S]tate action . . . in the full and complete sense of the phrase.” *Id.* at 19.

145. Chemerinsky, *supra* note 46, at 527-31.

146. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959); Choper, *supra* note 43, at 769-71; and George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 329 (2003).

147. Chemerinsky, *supra* note 46, at 527-31.

148. That does not mean, of course, that there are no legal reasons. The State action doctrine has created an important legal difference between actions of the judicial branch and actions of the executive and legislative branches.

149. See, e.g., BARNETT, *supra* note 9, at 53-57, who defines principles of “consensual transfer,” and Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1368 (1981), who argues that we should accept the basic proposition that contract terms shall be binding on the original parties who create them and on all third parties who take with notice of the terms.

150. Epstein, *supra* note 149.

151. BARNETT, *supra* note 9, at 77-82, discusses reasons for constraining “consensual freedom” and concludes that not all rights are necessarily alienable. Epstein, *supra* note 149, at

certain liberties should not be enforceable by the State.<sup>152</sup> For example, would we want courts to enforce an agreement under which one individual or group of individuals paid another individual or group of individuals not to vote? Would we want courts to enforce a private land-use restriction that allowed homeowners to post signs in favor of Republican candidates, but not Democratic ones?

These may seem like contrived examples since they involve particularly important liberties that have far-reaching social and political implications. But if anyone is going to argue that the courts should enforce private agreements alienating other liberties even though the other liberties are also constitutionally protected against government intrusions, they should be prepared to explain where we are to draw the line between liberties that are fully alienable and those that are not.<sup>153</sup> The line may be deceptively difficult to draw. For example, should courts enforce an agreement under which an individual gives another individual consideration in return for not posting any political signs during an election?<sup>154</sup> If not, why should courts enforce a private land-use restriction that forbids a homeowner from posting political signs during an election, especially if it has been established that they would not enforce a city ordinance that forbid the homeowner from posting such signs?<sup>155</sup> Individuals would presumably receive an accommodation in the price of the home for knowingly accepting it with either public or private restrictions on such signs, so why treat the cases differently? And if the courts decline to enforce the legislature's sign restrictions, why should they enforce an HOA's?

The freedom of contract argument ignores the third parties whose liberty might be diminished by the enforcement of private land-use restrictions. Private land-use restrictions convey with the land from the parties who created them to their successors in interest.<sup>156</sup> Thus, the land

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1368 takes a stronger position in favor of free alienability, but also acknowledges limitations.

152. See BARNETT, *supra* note 9; Epstein, *supra* note 149.

153. BARNETT, *supra* note 9, at 77-82 argues that certain liberties are inherently inalienable, but his purpose is different, and he does not seek to address this question.

154. See, Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 344-45 (1998) for a discussion of the nuances. Professor Garfield observes that the issues have not been widely addressed, but argues that courts should generally refrain from using their powers to suppress speech.

155. Nuisance considerations might justify some government restrictions on speech rights but it is not clear why they should justify allowing more restrictions under private law than under public law.

156. To be more precise, real covenants have been said to convey with estates in land; equitable servitudes have been said to attach to the land directly. This, however, is a technical distinction of fading relevance.

can end up being owned by someone who never particularly cared about the restrictions and might even find them obnoxious. To the extent that the restrictions remain enforceable after the land is conveyed by the parties who created them, they may continue to restrict land uses when virtually all landowners find them objectionable. Moreover, they would continue to apply against prospective buyers who had no say in their creation. In that respect, State coercion would inevitably be used against individuals without their implied consent.<sup>157</sup>

The constitutional constraints on State action reflect important social values and protect fundamental individual liberties, and there is no logical reason why those constraints should not apply to the judicial branch's enforcement of private laws just as they apply to acts of the executive or legislative branches. But that does not necessarily mean that the constraints should or have to apply as a matter of constitutional law. In fact, the issue is probably moot, because under the State action doctrine judicial enforcements of private laws are generally not considered State acts, and the scope of the State action doctrine is not likely to be expanded anytime soon.<sup>158</sup> But there are other ways in which the important social values that underlie constitutional constraints against the State can be respected.

*Shelley v. Kraemer* was an easy case. A racially restrictive covenant would generally be invoked only if a homeowner attempted to sell his property to someone who was a member of a race to whom alienation was forbidden.<sup>159</sup> Both the homeowner and the prospective buyer would want to engage in the transaction; the opposition would come from other homeowners in the neighborhood who wanted to prevent a member of the prospective buyer's race from living in their neighborhood. If a court enforced the restriction it would be using the State's coercive powers to frustrate the wishes of the buyer and seller.<sup>160</sup> The idea that an individual (the prospective buyer) could be compelled to pay taxes that help to finance the exercise of coercion against herself when there is no plausible way in which she could obtain any reciprocal freedom from the coercion of others (or any other benefits, except perhaps the courts' assistance in discriminating against others) is troublesome. In the final

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157. It would strain the meaning of consent, for example, to suggest that the Shelleys "consented" to the racially restrictive covenants in *Shelley v. Kraemer*.

158. Chemerinsky, *supra* note 46, at 507-13.

159. Of course, this is exactly what happened in *Shelley v. Kraemer*, 334 U.S. 1, 5-6 (1948).

160. Presumably the seller, who must have either created the restriction or purchased the land subject to the restriction, would no longer wish to be bound by it. If courts held that the seller should not be bound by his initial consent to the restrictions, then the restrictions would effectively be inalienable. BARNETT, *supra* note 9, at 81.

analysis, if a court enforced a racially restrictive covenant it would, in effect, be serving as the instrumentality for the racist neighbors' exercise of coercion against the prospective buyer.

Many other private land-use restrictions raise similar policy considerations. Suppose, for example, that a private restriction prohibits homeowners from posting signs in favor of candidates for political office.<sup>161</sup> The United States Supreme Court has declared similar public land-use restrictions unconstitutional on the grounds that they violate the First Amendment.<sup>162</sup> Those rulings advance liberty, of course, because it would be inappropriate to allow a local government to use its coercive powers to suppress homeowners' First Amendment rights. If a court enforced a private land-use restriction prohibiting the same political signs it would be using the State's coercive powers to suppress homeowners' speech no less than if the restriction arose from a public land-use restriction. In fact, the case might be even more problematic than one involving a public restriction since the State might be expected to enforce a public restriction more consistently and uniformly than a relatively small group of neighbors acting through their HOA in a residential development. For example, if all the neighbors were Republican, they might not enforce the restriction against a homeowner who posted a sign supporting a Republican candidate, even though they would enforce the restriction against a homeowner who posted a sign supporting a Democratic candidate.

For another example, consider a case in which an HOA adopts a new restriction that prohibits religious gatherings in a common room, but continues to allow non-religious gatherings.<sup>163</sup> To be more specific,

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161. This is hardly just a hypothetical question. Courts in several cases have rejected free speech arguments and upheld private land-use restrictions against signs. *See, e.g.*, *Tansey-Warner, Inc. v. E. Coast Resorts, Inc.*, 1978 Del. Ch. LEXIS 688, at \*9 (Del. Ch. Nov. 27, 1978) (sign prohibition in condo did not violate free speech rights); *Knolls Ass'n. v. Hinton*, 389 N.E.2d 693, 697 (Ill. App. Ct. 1979) (enforcing a sign prohibition); *Murphy v. Timber Trace Ass'n.*, 779 S.W.2d 603, 609 (Mo. Ct. App. 1989) (rejecting a free speech challenge against restriction on for sale signs); and *Harrison v. Tucker*, 342 S.W.2d 383, 384 (Tex. Ct. App. 1961) (enforcing sign prohibition but dissolving racially restrictive covenants). In states that do not require State action to trigger free speech rights, however, courts may decline to enforce of CC&Rs restricting signs, and they have done so in at least one case. *See, e.g.*, *Mazdabrook Commons Homeowners' Ass'n. v. Khan*, 46 A.3d 507, 522 (N.J. 2012).

162. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

163. This is not a hypothetical question either. *See, e.g.*, Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57, 57-59 (2010). As Professor Carmella explains, both the U.S. Department of Justice and the U.S. Department of Housing and Urban Development interpret religion-free environments to be in violation of the Fair Housing Act, but the only court to have considered the matter did not. *See Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n.*, 456 F. Supp. 2d 1223, 1234 (S.D. Fla. 2005) (religion-free

suppose the restriction prevents a Christian prayer group from meeting, but allows a yoga club to meet and engage in meditation. If a public ordinance prohibited a religious group from gathering to pray in a public park, but allowed another group to meet and engage in meditation in the same place, it would violate the freedom of religion clause in the First Amendment.<sup>164</sup> It would also clearly undermine liberty, since the State's coercive powers would be used to prevent a group from praying while allowing another group to engage in meditation, a very similar activity. If a court enforced a private land-use restriction against religious groups meeting to pray in the common area of a residential development but allowed other groups to use the area for meditation, it would be using the State's coercive powers to suppress religious freedom just as much as it would if it was enforcing a public ordinance.

If liberty is to provide the compass governing the use of State power, then courts should be restrained in the enforcement of private land-use restrictions in all the ways that government is restrained in enforcing public land-use restrictions. In other words, all of the constitutional constraints that apply against public land-use restrictions should also apply against courts' enforcement of private land-use restrictions. In an ideal world, the constraints would be applied under a more liberal application of the State action doctrine, one that recognized the judiciary as a branch of government and the courts as State actors.<sup>165</sup> Since constitutional doctrines evolve slowly, that is unlikely to happen anytime soon. It might be more efficacious for legislatures to apply all federal and state constitutional constraints to private land-use restrictions as a matter of statutory law, although that is not likely to happen anytime soon either.<sup>166</sup> Ultimately, if legislatures fail to act, courts should apply

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common space was not discriminatory since all religions were treated the same).

164. See JOHN B. ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 654-55 (4th ed. 2012). See also *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (a public university cannot exclude student religious groups from access to university facilities if it provide such access to other student groups).

165. Not all critics of private land-use restrictions against religious gatherings agree that this would be the best approach. Carmella, *supra* note 163, at 95-98, for example, worries that constitutional norms might actually undermine the rights of religious groups to use common areas in common interest communities. The concern here is neither to promote nor suppress the rights of religious groups but to advance liberty. Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away?"*, 47 KAN. L. REV. 61, 64-65 (1998) opposes applying the State action doctrine in private law cases on the grounds that it might actually undermine liberty. She worries, for example, that residents may not be able to enforce restrictions against an adult book store because it would be protected by the First Amendment.

166. Some states have already applied some particular constitutional protections through state statutes. Nonetheless, they have not done so coherently and pervasively and they are not likely to do so anytime soon. See Amanda Hopkins, Article, *What's Wrong with My Nativity Scene?*:

the constraints themselves through new holdings that make private land-use restrictions unenforceable as a matter of public policy whenever they would be unconstitutional as public land-use restrictions.<sup>167</sup>

#### IV. LIBERTY OF CONTRACT

This section focuses on the relationships between liberty and specific contract law doctrine. It uses examples from the parol evidence rule, the unconscionability doctrine, and the impracticability doctrine to illustrate the ways in which contract doctrines may advance or undermine liberty, depending on whether the doctrines are appropriately constructed and applied. It also raises concerns about the ways in which contract law may systematically undermine liberty, using as an example the practices of some State-sponsored, non-profit corporations that use lifestyle covenants and morals clauses in their employment contracts to intrude into their employees' spheres of personal autonomy and privacy.

Corporations may require employees to sign lifestyle covenants or morals clauses as a condition of employment; they may subsequently discharge the employees for violating the covenants or clauses. Since the lifestyle covenants and morals clauses may intrude into the employees' spheres of personal autonomy and privacy, the fear or fact of being discharged for violating a lifestyle covenant or morals clause might impinge on the employees' liberty. Moreover, prospective employees might be excluded from a significant segment of the labor market if they cannot, in conscience, sign a lifestyle covenant or morals clause that is inconsistent with their own lifestyle and values.

Since the rights and privileges accorded to corporations by the State no doubt contribute to their economic success and power in labor markets, the State is complicit in the intrusion into the liberty of their employees and prospective employees.<sup>168</sup> The State's complicity is the greatest when the employer is a non-profit corporation because non-profit corporations receive significantly more rights and privileges from the State than for-profit corporations and because they are not disciplined as rigorously by market competition.<sup>169</sup>

This Article argues, therefore, that 1) subject to an appropriately

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*Religiously Discriminatory Restrictive Covenants in New York*, 13 RUTGERS J. L. & RELIGION 415, 421-22 (2012).

167. Carmella, *supra* note 163, at 103-09 endorses courts' use of public policy to void restrictions against religious gatherings. Saxer, *supra* note 165, at 70 also supports the public policy approach.

168. *See infra* Part IV.C.

169. *See infra* Part IV.C.

defined ministerial exception,<sup>170</sup> non-profit corporations that benefit from significant tax exemptions should be prohibited under federal and state tax laws and/or regulations from requiring or even requesting employees to sign lifestyle covenants or morals clauses, 2) any employees they discharge for lifestyle or personal moral choices should be able to seek a remedy against them under state wrongful-discharge statutes, or 3) if the remedy is not provided under state statutes, it should be provided through the courts' expansion in the scope of the public policy exception to the employment-at-will rule in employment law.<sup>171</sup>

Part IV.A will discuss the freedom of contract and Part IV.B will discuss some of the limitations to this freedom, focusing on the parol evidence rule, the unconscionability doctrine, and the impracticability doctrine. Finally, Part IV.C will discuss the ways in which the use of lifestyle clauses and morals clauses by some State-sponsored, non-profit corporations in their employment contracts intrudes into their employees' spheres of personal autonomy and privacy and it suggests ways in which the problems could be mitigated through federal and state statutes, as well through court decisions which expand the scope of wrongful-discharge laws.

#### A. *The Freedom of Contract*

The term "freedom of contract"—or "liberty of contract"—is often associated with an argument that the government's right to regulate private markets is or should be constrained by the due process clause of the Fifth Amendment to the United States Constitution.<sup>172</sup> But the term is also often used in a more general sense to refer to the respect for the autonomy of the parties to a contract to decide for themselves what the rules governing their agreement should be.<sup>173</sup> Scholars have sometimes used this broader meaning of the term in critiquing contract doctrines or courts' contract decisions that they believe frustrate the intentions of the

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170. See *infra* Part IV.C.

171. See *infra* Part IV.C.

172. See, e.g., DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 1-2 (2011).

173. HAYEK, *supra* note 7, at 230-31, BARNETT, *supra* note 9, at 77-82, and Epstein, *supra* note 149, at 1354, 1368. This is, in fact, a basic principle of contract law in the United States and most other developed nations. See, e.g., U.C.C. § 1-302 (1977) (Variation by Agreement section of the Uniform Commercial Code); U.N. COMMISSION ON INTERNATIONAL TRADE LAW, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, at 3, U.N. Sales No. E.10.V.14 (Article 6 of the United Nations Convention on Contracts for the International Sale of Goods states: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

parties and, in effect, alter the terms of the parties' agreements.<sup>174</sup>

There are often excellent reasons to raise concerns about government regulations in private markets, but the main purpose of this section is to focus on the role that State coercion plays in enforcing private contractual obligations. Since courts exercise coercion whenever they enforce contractual obligations, this raises the question: Why should they do so? The best answer is that the parties impliedly agree to subject themselves to that form of State coercion when they execute their contract.<sup>175</sup> In other words, it is their intention and will to bind themselves to their agreement by deferring to the State's authority to use its coercive powers to enforce the terms, should enforcement be necessary.<sup>176</sup> By binding themselves to their agreement, the parties are able to enjoy even greater freedom, since they can thus trade their private property and other rights in return for private property and rights of others that are of greater value to them.<sup>177</sup>

There is considerable commentary and debate about the ways in which some courts have construed and applied contract doctrines. One common concern, particularly among scholars who take a formalist approach to contracts, is that overly broad or loose interpretations of some contract doctrines might frustrate the intentions of the parties to an agreement; another concern is that it might increase the transaction costs of contracting parties regardless of whether they ever have any kind of dispute.<sup>178</sup> In keeping with the focus of the Article, this Part focuses instead on the ways in which some important contract doctrines may advance or impede liberty. As the discussion below will elaborate, the matter may be somewhat nuanced.<sup>179</sup>

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174. EPSTEIN, *supra* note 36, at 120-21 describes this view as the classical synthesis. Interestingly, HAYEK, *supra* note 7, at 230-31 argues that the issue is not what contracts the State will allow, but which ones they will enforce.

175. See, e.g., BARNETT, *supra* note 9, at 53-57 for Randy Barnett's discussion of consensual transfers.

176. *Id.*

177. As Friedrich Hayek observed, "The rules of property and contract are required to delimit the individual's private sphere wherever the resources or services needed for the pursuit of his aims are scarce and must, in consequence, be under the control of some man or other." HAYEK, *supra* note 7, at 141.

178. This is standard transaction cost analysis: legal uncertainty encourages parties to draft their agreements more carefully than they otherwise would. See COOTER & ULEN, *supra* note 124, at 195-244.

179. Interestingly, Friedrich Hayek had few quibbles with contract doctrines. In fact, his conception of freedom of contract was not the one that is meant today. As he wrote; "Freedom of contract, like freedom in all other fields, really means that the permissibility of a particular act depends only on general rules and not on its specific approval by authority." HAYEK, *supra* note 7, at 230.



## B. *The Limits of The Freedom of Contract*

### 1. The Parol Evidence Rule

Most contract disputes raise questions about the appropriate interpretation of the contract terms.<sup>180</sup> Disputes about contract interpretation often raise questions about what evidence a court will consider in interpreting the contract.<sup>181</sup> Some scholars have argued that when the parties are sophisticated and use a written instrument that includes a merger clause to provide evidence of a carefully negotiated and drafted agreement, courts should apply the parol evidence rule strictly and rely on the plain meaning of the writing to interpret the contract's terms.<sup>182</sup> Since it arrives at a formalist prescription using modern neoclassical economic analysis, this line of scholarship constitutes a neo-formalist movement in modern contract scholarship.<sup>183</sup> Within the sphere of its application, the logic is beyond dispute. What is not beyond dispute, however, is whether the analysis is at all novel or surprising and whether it applies as widely as the authors contend, or even widely enough to be of any practical value.<sup>184</sup>

Indeed, the normative implications of the neo-formalist analysis are predictable consequences of its neoclassical economic assumptions. Given that the analysis is predicated on a model of two perfectly rational parties, endowed with the computational abilities of high speed computers and the wisdom of Job, the implication that courts should respect and enforce their mutual intentions about the scope of the evidence that might be used to interpret their contract is hardly surprising. In fact, the main part of the analysis was anticipated by Eric

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180. George Cohen, *Interpretation and Implied Terms in Contract Law*, ENCYCLOPEDIA OF CONTRACT LAW AND ECONOMICS 125, 125-26 (Gerrit de Geest ed., 2d ed. 2011).

181. As Margaret Kniffin clarifies, questions about contract interpretation and the admissibility of extrinsic evidence are often conflated, but they are distinct. Margaret N. Kniffin, *Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else's Clothes?*, 62 RUTGERS L. REV. 75, 76-77 (2009).

182. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Alan Schwartz & Joel Watson, *The Law and Economics of Costly Contracting*, 20 J.L. ECON. & ORG. 1 (2004); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006); Jody Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009); and Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010).

183. Alan Schwartz and Robert Scott describe the work as part of a larger project, "arguing that the law should pursue the first order goal of maximizing contractual surplus when it chooses rules to regulate merchant-to-merchant contracts." Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 (2010).

184. See generally STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION (2009).

Posner well before the neo-formalists addressed the matter.<sup>185</sup> Moreover, one could argue that some of the claims about the normative implications are clearly overreaching. For example, Robert Scott and Alan Schwartz's analysis is intended to apply only to "sophisticated" parties, but their definition of a "sophisticated" party is any corporation that has five or more employees.<sup>186</sup> It seems highly doubtful whether even the largest corporations ever engage in the kind of sophisticated strategizing and contract drafting that is assumed in their analysis or would have anything close to the computation abilities and foresight they would need in order to do so.<sup>187</sup>

As a practical matter, the terms of any contract, whether it covers a complex long-term business relationship or a simple one-shot transaction, must be negotiated and agreed upon using a language of some kind. Unfortunately, there are inherent limitations on the use of language. First of all, as Wittgenstein observed, there can be no such thing as a "private" language.<sup>188</sup> That is to say, a language must be shared; it cannot consist of symbols, signs, or sounds that have only personal meanings, or meanings to only the person who uses them.<sup>189</sup> A language is therefore necessarily "public" in the sense that its meanings must be shared for the language to qualify as a medium of communication. Unfortunately, because the meanings of any language are also inherently personal they cannot be understood in precisely the same way by different people. The meanings must be "shared", but they can only be shared imperfectly since we can never be certain that they are understood by all persons in exactly the same way.<sup>190</sup> In fact, it is not even certain that the understandings people have of the language they use at one time will be the same as their understandings—or even their

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185. See generally Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998).

186. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003).

187. HAYEK, *supra* note 7, at 56-61 went to great lengths to reject the "French rationalist tradition" of rooting economic theory in assumptions about perfectly rational behavior in favor of the "British empirical tradition." He believed the latter was closer to the "Christian tradition of the fallibility and sinfulness of man." *Id.* at 61. In that respect, his views accorded with those of the modern day new institutional economists. See, e.g., Rudolph Richter, *The Role of Law in the New Institutional Economics*, 26 WASH. U. J.L. & POL'Y 13, 15 (2008) ("[T]he NIE from its very beginnings proceeded . . . by taking account of the imperfections of individual rationality and limited foresight.").

188. Val D. Ricks, *The Possibility of Plain Meaning: Wittgenstein and the Contract Precedents*, 56 CLEV. ST. L. REV. 767, 785 (2008).

189. *Id.* at 785-88.

190. Public language cannot reflect the parties' private thoughts. *Id.* at 789.

recollection of their understandings—of the same language later on.<sup>191</sup>

Unfortunately, the interpretation of contractual rights and obligations is subject to the limitations of the language that is used to express them. Moreover, the need for interpretation implies the need for an “interpreter.”<sup>192</sup> If the parties have a dispute about the interpretation of the language of their agreement, then they obviously cannot agree on an appropriate interpretation. And if only one of the parties is assigned the right to interpret the language so that there is no need for them to agree on its interpretation, that party will apply its own understanding of the language as of that time, rather than any shared understanding between the parties at the time of contracting. For practical purposes, the “language” of the contract would be a private one, and, therefore, only a language in name, and the contract would obviously not reflect any genuine agreement of the parties, nor would the contract be subject to “interpretation”—its terms would simply be dictated by the party with the right to “interpret” it. Any true contract—one that reflects a mutual agreement of the parties—must, therefore, be interpreted by a third party. And, of course, that third party will usually be a court or private arbiter.

Some of the most fundamental limits on the liberty of contract are therefore inherent in the limitations of language. The terms of a contract cannot be self-enforcing. Nor can they be self-interpreting.<sup>193</sup> Indeed, the parties themselves cannot contract for the interpretation of the contract in the contract. For one thing, if they attempt to specify how a particular right or obligation is to be interpreted, their language will confront the same limitations of the language used to specify the right or obligation itself. Since the specification of how the contract is to be interpreted would itself have to use language, and since that use of language would be subject to all the same limitations, the parties would merely add an additional interpretive hurdle to their dispute.<sup>194</sup> Perhaps more importantly, since there is an unavoidable need for third party interpretation of any contract term, the notion that the parties themselves

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191. BRIAN BIX, *LAW, LANGUAGE, AND LEGAL DETERMINACY* 37 (1993) (“Wittgenstein . . . has shown that there is no fact of the matter to prove that I mean the same thing by my current use of a word as I did by a former use . . .”).

192. Marc A. Loth, *Limits of Private Law: Enriching Legal Dogmatics*, 35 *HOFSTRA L. REV.* 1725, 1726 (2007) (citing Wittgenstein for the proposition that rules are not self-applying).

193. *Id.* at 1726.

194. Of course, this does not mean that a merger clause or other contract term bearing on the interpretation of the contract would be of no value to a judge or arbiter; it merely means that such a contract term could not by itself govern the interpretation of the contract.

could contract for the interpretation of the contract is illogical.<sup>195</sup>

Since the parties to any complex contract would have to rely on a third party to interpret the language, they would have to specify how their language was to be interpreted to ensure that it would be unambiguous. But the language specifying how the language was to be interpreted would itself have to be interpreted. The only way of avoiding an infinite regress of clauses specifying how clauses were to be interpreted would be by including a self-referential clause that specified how the contract, including the clause itself, was to be interpreted. A complete and unambiguous contract could thus only be defined by a set of statements about the parties' rights and obligations plus an additional, self-referential statement about how the statements were to be interpreted. Unfortunately, self-referential systems of rules and logic are well-known to yield paradoxes and inconsistencies.<sup>196</sup>

Suppose the parties to a contract execute a written instrument, but suppose there is also parol evidence that contradicts the writing. A court that relies exclusively on the writing to interpret the contract would probably rule differently than a court that relied exclusively on the parol evidence.<sup>197</sup> A court that used both the writing and the parol evidence to interpret the contract might rule either way. But suppose the parties include in their writing a merger clause stating that the writing is a complete and final expression of their agreement. Some courts might be persuaded by the merger clause to exclude the parol evidence. But from a purely theoretical perspective, and setting aside any concerns about the reliability of the evidence,<sup>198</sup> there is no reason why a court should privilege certain kinds of language, such as the language used in writing, over other kinds of language, such as verbal statements.

As a matter of logic, a court would need to interpret the contract to determine whether the parties meant to exclude parol evidence before it could exclude the parol evidence on the grounds that the contract excluded it.<sup>199</sup> And there is no logical reason why the court should not

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195. This is not meant to suggest that any of the neo-formalists have ever said otherwise.

196. There is a debate about whether Godel's Theorem implies that a complete and consistent legal system is logically impossible. *See generally* Kevin W. Saunders, *What Logic Can and Cannot Tell us About Law*, 73 NOTRE DAME L. REV. 667 (1998). The point being made here is closely related, but it does not rest on Godel's Theorem.

197. Ricks, *supra* note 188, at 803 ("[T]he meaning of contractual language might be clear within the four corners of the document but ambiguous or different outside of that context or when more context is added.").

198. The parol evidence rule is, after all, a rule of contract law and not a rule of evidence.

199. Loth, *supra* note 192, at 1732 ("In legal theory it is an accepted proposition that the application of law, or the identification of a legal proposition, presupposes an interpretation of the law.").

consider parol evidence in interpreting whether the parties intended the contract to exclude parol evidence.<sup>200</sup> It is possible that the parties' oral agreement might have contradicted a clause in the writing even though the parties also agreed orally that the writing would be a complete and final statement of their agreement. Of course, it would be much more likely that if the parties' oral agreement contradicted certain terms in the writing, it would also contradict any merger clause in the writing. Thus, if a court did consider the parol evidence, this would likely raise some ambiguity about the interpretation of the contract. It would at least raise the possibility that two courts, or the same court at different times, might reach inconsistent interpretations—especially if they applied different versions of the parol evidence rule.<sup>201</sup>

The limitations of language and logic thus cast considerable doubt on the merits of a strict parol evidence rule. But there are more practical reasons to doubt the wisdom of a strict parol evidence rule. A strict parol evidence rule would, in general, work to the advantage of stronger parties and the disadvantage of weaker ones. In most cases where there is a single written instrument, it is drafted by one party and signed by the other. In fact, the scenario is ripe for the formation of a contract of adhesion.<sup>202</sup> The drafter is typically the party with more economic resources and greater sophistication; even where both parties are merchants, the writing may take a standard form and the weaker party may be given a take-it-or-leave-it offer.<sup>203</sup> The terms of the writing are therefore more likely to reflect the interests of the stronger party than those of the weaker one, and a strict parol evidence rule would therefore work to the advantage of the stronger party at the expense of the weaker one.

Of course, when a court enforces the terms of a written agreement it exercises the power of State coercion. If the term that the court was enforcing was not one that the weaker party had truly assented to, then the State's coercive powers would, in effect, be used against the weaker party on behalf of the stronger party.<sup>204</sup> If, on the other hand, the court

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200. *Id.* The logic appears to have been persuasive. Thus, for example, U.C.C. § 2-202 cmt. 1(c) (2001) rejects the idea that a court needs to find a writing to be ambiguous before it will consider parol evidence.

201. This is consistent with H.L.A. Hart's conception of the law as "open-textured" in the sense that its rules will always be indeterminate because of the nature of language and the contexts in which it is applied. Loth, *supra* note 192, at 1726.

202. *See, e.g.*, Friedrich Kessler, *Contracts of Adhesions—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) for the classic article.

203. *Id.* at 632.

204. As Friedrich Kessler observed, therefore, courts that are conscious of the imbalance in

declined to enforce an obligation of the stronger party because of “fine print” in the written instrument that had been drafted by the stronger party, even though both parties understood the obligation to have been agreed upon, then the court would, in effect, facilitate a kind of malfeasance perpetrated by the stronger party against the weaker one.<sup>205</sup> Unfortunately, the State’s coercive powers would probably be used on behalf of the powerful against the weak much more commonly than they would be used on behalf of the weak against the powerful.<sup>206</sup>

## 2. Unconscionability

The modern doctrine of unconscionability allows a court to void a contract or terms of a contract on the grounds that the terms are so unfavorable to a party that enforcing them would cause oppression and unfair surprise.<sup>207</sup> It is commonly thought to provide a way for courts to regulate bargains. Since that sounds like interference with a market transaction, the doctrine of unconscionability has been widely criticized by scholars who favor liberty and free markets.<sup>208</sup> While the doctrine would pose a serious threat to liberty if it was applied inappropriately, concerns about the doctrine may have been overstated, and its virtues may have been understated. In fact, in some cases the doctrine of unconscionability may provide a legal justification for courts not to allow the stronger party to an agreement to use the courts and the power of State coercion to enforce wrongful claims against the weaker party.<sup>209</sup>

Unconscionability has a confounding and controversial history.<sup>210</sup>

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the bargaining power of the parties have gone to great lengths to interpret the parties’ contracts equitably for the weaker parties. *Id.* at 633.

205. Kessler thus observed that courts might try to interpret the contract to satisfy the weaker party’s “reasonable expectations” and cited Karl Llewellyn’s observation that oral evidence can provide the basis for interpreting contracts that reflect the parties’ “life situation.” *Id.* at 637.

206. As HAYEK, *supra* note 7, at 141, observed, “That other people’s property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts. The whole network of rights created by contracts is as important a part of our own protected sphere, as much the basis of our plans, as any property of our own.” To the extent that rules of contract interpretation favored the stronger against the weak, they might also implicate the State in helping the stronger parties to usurp the rights of the weaker parties.

207. See, e.g., U.C.C. § 2-302 cmt. 1 (1977) (“The principle is one of the prevention of oppression and unfair surprise.”).

208. See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975).

209. See the discussion, *infra* this Part.

210. The history of the unconscionability doctrine is integral to the history of the development of modern contract law. See Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974) for a discussion of the “sound price” rule and the vestiges of equity in modern contract law.

As the doctrine is most commonly described and applied today, it involves a two-pronged test.<sup>211</sup> The first prong applies a test for procedural abuse, which is proved by evidence of sharp dealing, deceptive bargaining tactics, and unequal bargaining power—generally anything that suggests there was a flaw in the bargaining process.<sup>212</sup> The second prong applies a test for substantive abuse, which is proved by evidence that the terms are so one-sided and grossly unfair that it would be inequitable to enforce them.<sup>213</sup> The two-pronged test did not actually originate in the case law; it was actually first described in a law review article by Arthur Leff.<sup>214</sup> Leff carefully reviewed the discussions and debates between members of the Permanent Editorial Board of the National Conference of Commissioners on Uniform State Laws and the American Law Institute during the drafting of Section 2-302 of the Uniform Commercial Code (UCC), but he struggled in deciding whether to advocate a two-pronged test because it was far from clear whether the drafters intended that procedural abuse should be required.<sup>215</sup> He ultimately decided that a two-pronged test would be best and that is what he advocated.<sup>216</sup>

It remains doubtful whether the drafters of Article 2 intended that the doctrine of unconscionability should entail the application of a two-pronged test. As Leff documented, the drafters' discussions and debates did not make this clear, nor do the cases cited in the Official Comments to Section 2-302 of the UCC.<sup>217</sup> In fact, what is most remarkable about the cases cited in the Official Comments is that none of them even mentions the word "unconscionability" and all of them can be construed as cases about questions of contract interpretation.<sup>218</sup> Indeed, there is a fine line between regulating a contract and interpreting it, and unconscionability cases are often, expressly or impliedly, ones about contract interpretation.<sup>219</sup> As Robert Hillman points out, guile at the bargaining stage of an agreement often goes hand-in-hand with an

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211. See, e.g., CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 155 (1999).

212. *Id.*

213. *Id.*

214. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

215. *Id.* at 489-501.

216. *Id.* at 487.

217. *Id.* at 489-501.

218. Donald J. Smythe, *Consideration for a Price: Using the Contract Price to Interpret Ambiguous Contract Terms*, 34 N. ILL. U. L. REV. 109, 126-32 (2013).

219. ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 41 (1997).

overreaching interpretation of contract terms later on.<sup>220</sup> Many unconscionability cases thus bear more than a superficial resemblance to ones about contract interpretation.<sup>221</sup> To put this in another perspective, one might wonder how the terms of an agreement could have been truly bargained-for if they are so grossly unfair that it would be inequitable to enforce them. And if they were not truly bargained-for, could they really have been part of the agreement?

Unconscionability cases therefore raise questions about the courts' exercise of State coercion in enforcing contractual obligations. If the terms of a contract are unconscionable, they were arguably not truly bargained-for, and the party against whom enforcement of the terms is sought did not really assent to be bound by them. If a court enforced the contract under those circumstances, it would use the State's power of coercion to enforce a claim by the stronger party against the weaker party, even though the weaker party did not consent to subject itself to the State's coercive powers. Under such circumstances, a court would arguably further liberty by using the unconscionability doctrine to void the purported contractual obligations.

Of course, a court that applied the unconscionability doctrine in circumstances in which the weaker party did assent to the contract terms, and therefore did impliedly consent to the use of the State's coercive powers to enforce the contract claim, would undermine the freedom of the parties to commit themselves to binding agreements. The doctrine of unconscionability, therefore, is a double-edged sword: It has an important role to play in advancing liberty, but it can also be abused. Its abuse, however, would not directly interfere with liberty. When a court declines to enforce a contractual obligation it merely declines to exercise the State's coercive powers to bind the parties to a purported agreement. The court does not thereby exercise any coercion or even interfere with the parties' agreement. Of course, although this does not directly undermine liberty, it does diminish the efficacy of contract law, and the application of the unconscionability doctrine should, therefore, be limited to the appropriate circumstances. Nonetheless, if the primary purpose of the State is to advance liberty, there is an important role for the doctrine of unconscionability in modern contract law.

### 3. Impracticability

Sometimes, after a contract has been formed, a party seeks to be

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220. *Id.*

221. *See generally* Smythe, *supra* note 218.



excused from performance of an obligation. This has led to the development of legal doctrines under which courts will grant parties excuses from contractual obligations.<sup>222</sup> The doctrine of impossibility was the first excuse doctrine to emerge from the case law. Under the doctrine of impossibility a party may be granted an excuse from the performance of a contractual obligation if the party's performance has become impossible.<sup>223</sup> The classic example is one in which a party has contracted to provide a music hall for a concert, but in between the formation of the contract and the concert date the music hall is destroyed in a fire.<sup>224</sup> The second excuse doctrine to emerge from the case law was the doctrine of frustration of purpose. Under the frustration of purpose doctrine a party may be excused from performance of a contractual obligation if the basic purpose of the contract has been frustrated.<sup>225</sup> The classic example is one in which an apartment has been rented for a day to view a parade, but the parade is postponed to another day, and the party's purpose in renting the apartment is, therefore, frustrated.<sup>226</sup>

The doctrine of impracticability was the third, and arguably most important, excuse doctrine to emerge from the cases. Under the doctrine of impracticability a party may be excused from performance of its contractual obligations if its performance has become impracticable, in the sense that it would cause severe economic hardship, due to unforeseen supervening events since the time of contracting.<sup>227</sup> The classic example is one in which a party has contracted to build a bridge, but discovers that, due to difficult soil conditions that were unknown at the time of contracting, the construction costs will be several times larger than expected and that building the bridge will cause the party to suffer severe economic hardship, if not complete financial ruin.<sup>228</sup> The doctrine of impracticability is probably most relevant today, since it has been adopted in Section 2-615 of the U.C.C.<sup>229</sup> and, arguably, also in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods.<sup>230</sup>

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222. See Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 227-29 (2004) for an overview of the development of excuse doctrines.

223. *Id.*

224. *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 310 (Q.B.).

225. Smythe, *supra* note 222, at 228.

226. *Krell v. Henry*, (1903) 2 K.B. 740.

227. Smythe, *supra* note 222, at 236-38.

228. *Mineral Park Land Co. v. Howard*, 156 P. 458, 459 (Cal. 1916).

229. U.C.C. § 2-615 (2014) (discussing breach, repudiation, and excuse).

230. U.N. COMMISSION ON INTERNATIONAL TRADE LAW, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, at 24-25, U.N. Sales No. E.10.V.14.

The trend in the law has clearly been to grant excuses in a broader range of circumstances, beginning with the physical impossibility of performance and culminating in the mere economic impracticability of performance.<sup>231</sup> The broadening scope of contractual excuse doctrines has concerned some commentators who fear that parties may be able to use them to evade contractual obligations opportunistically.<sup>232</sup> This is a legitimate concern. Nonetheless, the manner in which the concerns have been stated may, at times, have misconstrued a court's role in adjudicating contractual disputes. For example, some scholars have criticized courts for interfering with the allocation of parties' risks when they grant contractual excuses.<sup>233</sup>

Strictly speaking, even if courts misapply excuse doctrines and allow them to be used opportunistically, they do not interfere with the risk allocations in the parties' agreements. In fact, if anything at all, they merely decline to enforce the risk allocations. There is an important difference between a court using its coercive powers to change the risk allocations in an agreement and a court declining to use its coercive powers to bind parties to an agreement. In the former case, the court would undermine liberty because it would use the power of State coercion against a party's will; in the latter case the court would not use the power of State coercion at all. Moreover, it would be a mistake to presume that courts have run amuck and granted too many excuses when they should not have done so.<sup>234</sup>

One of the overarching principles of modern contract law is the principle of party autonomy.<sup>235</sup> The parties to a contract are free to

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231. Smythe, *supra* note 222, at 228.

232. See, e.g., Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985); Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J. LEGAL STUD. 43 (1990); and George G. Triantis, *Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability*, 42 U. TORONTO L.J. 450 (1992).

233. See generally Gillette, *supra* note 232; Sykes, *supra* note 232; and Triantis, *supra* note 232. See also Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987).

234. Robert Scott observed, "The most curious aspect of the commercial impracticability cases decided over the past 20 years has been the courts' steadfast refusal to grant excuse for nonperformance despite the apparent invitation to do so in the Uniform Commercial Code and the Second Restatement." Scott, *supra* note 233, at 2006 n.1.

235. The principle is reflected, for example, in U.C.C. § 1-302 (1977) (Variation By Agreement section of the Uniform Commercial Code) as well as the United Nations Convention on Contracts for the International Sale of Goods, Article 6. U.N. COMMISSION ON INTERNATIONAL TRADE LAW, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, at 3, U.N. Sales No. E.10.V.14 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

contract around any of the default rules that will apply to their agreement, except for certain basic rules, such as the doctrine of good faith or fair dealing requirements.<sup>236</sup> This means that almost all contract rules and doctrines can be waived or modified by express agreement. As Randy Barnett observed, the parties to a contract impliedly agree to all the rules and doctrines that courts will apply to adjudicate any disputes unless they expressly waive or modify them under the terms of their bargain.<sup>237</sup> That includes any excuse doctrines that might apply to the parties' contract, either under a case precedent or a statute.<sup>238</sup> Thus, if courts do apply the doctrine of impracticability and grant an excuse, it is impliedly under the terms of the parties' bargain.<sup>239</sup> Even if courts inadvertently apply an excuse doctrine when they should not, that is a risk the parties will have bargained-for; in other words, courts do not thereby disturb the allocation of risks in the parties' agreements.

Perhaps even more importantly, one might doubt whether courts do commonly misapply excuse doctrines. The doctrine of impracticability, for example, is normally applied using a two-pronged test.<sup>240</sup> Although the cases do not apply the test consistently, under the most persuasive interpretation of the test, courts will grant an excuse only if the circumstances giving rise to the impracticability claim were reasonably unforeseen at the time of contracting and if the party under the obligation would be subjected to severe economic hardship if required to perform.<sup>241</sup> It seems implausible that any party could have truly agreed to perform an obligation under circumstances that were not reasonably foreseeable and if performing the obligation would cause such a severe hardship, especially if the parties did not expressly waive the application of the impracticability doctrine. If a court failed to grant an excuse and compelled the party's performance, it would thus exercise the power of State coercion to force the party to engage in a performance it did not truly assent to. In other words, it would force the party to perform against its will. The State's power of coercion would, in effect, be used to provide a contractual right that was not truly bargained-for to one party at the expense of the other party.

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236. See, e.g., U.C.C. § 1-302(b) (1977) ("The obligations of *good faith*, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by *agreement*." (emphasis added).

237. Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 864-65 (1992).

238. Smythe, *supra* note 222, at 264.

239. *Id.*

240. *Id.* at 236.

241. *Id.*

Excuse doctrines are thus also a double-edged sword: If they are applied inappropriately they facilitate opportunism by a party seeking to evade an obligation it had agreed to perform; if they are not applied when they should be, and the party seeking an excuse is forced to perform, then the court uses the State's power of coercion against that party's will. If the primary purpose of the State is to protect liberty, then there is also an important role for the doctrine of impracticability in modern contract law.

### *C. Lifestyle Covenants and Morals Clauses*

To earn a living in a modern industrial economy most people have little alternative but to sell their labor services to an employer. The terms and conditions of employment contracts therefore influence the freedoms and opportunities that most individuals enjoy. Unfortunately, employment contracts sometimes impinge on employees' personal autonomy. Some employers, for example, require employees to sign lifestyle covenants or morals clauses,<sup>242</sup> which may proscribe or require certain lifestyle choices or moral decisions that are not directly related to the duties of the employee's job.<sup>243</sup> Some colleges and universities also require that new students as well as employees sign similar lifestyle covenants.<sup>244</sup> Lifestyle covenants and morals clauses raise difficult questions about the role of contract law in employment relationships and the importance of respecting individuals' autonomy and privacy.

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242. The systematic use of lifestyle covenants and morals clauses dates at least to the middle of the twentieth century. Indeed, some important cases arose during the McCarthy era, when film directors, writers, and actors were alleged to have violated morals clauses through their political associations. See, e.g., *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 87-88 (9th Cir. 1957); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847-48 (9th Cir. 1954); and *Loew's, Inc. v. Cole*, 185 F.2d 641, 644-45 (9th Cir. 1950).

243. For some recent examples, see, Dustin Siggins, *Catholic Archdiocese Expands Morality Clause for School Employees After Losing Lawsuit*, LIFESITENEWS.COM (Mar. 10, 2014, 2:47 PM), <http://www.lifesitenews.com/news/catholic-archdiocese-expands-morality-clause-for-school-employees-after-los>; Jessica Martinez, *Attorneys of Ind. Teacher Fired From Catholic School for In Vitro Procedure Argue Church Doctrine Is Irrelevant in Lawsuit*, THE CHRISTIAN POST: CHURCH & MINISTRY (Feb. 7, 2014, 4:01 PM), <http://www.christianpost.com/news/attorneys-of-ind-teacher-fired-from-catholic-school-for-in-vitro-procedure-argue-church-doctrine-is-irrelevant-in-lawsuit-114195/>; and Rebecca S. Green, *Jury Sides with Fired Teacher*, THE JOURNAL GAZETTE (Dec. 20, 2014, 1:03 AM), <http://www.journalgazette.net/news/local/courts/Jury-sides-with-fired-teacher-4094706>.

244. For an example of a case in Canada that has recently raised a controversy about whether a new law school that requires students and employees to sign lifestyle covenants should be approved, see Andrea Woo, *Lawyers File Challenge Over B.C.'s Approval of Trinity Western Law School*, GLOBE AND MAIL (Nov. 3, 2014, 9:51 PM), <http://www.theglobeandmail.com/news/british-columbia/lawsuit-filed-against-bc-government-over-trinity-western-approval/article21435054/>.

For example, suppose a Roman Catholic school requires all employees to sign a morals clause, regardless of whether their duties include any responsibility for teaching Catholic doctrine or participating in any Catholic services.<sup>245</sup> Suppose an employee who teaches languages and who has no responsibilities related to Catholic teachings or services is discharged from her job for using in vitro fertilization to become pregnant, thus violating the morals clause in her contract. Suppose her discharge did not give her any causes of action against her employer under any federal or state laws. Although one might sympathize with her for losing her job, under the employment-at-will rule that prevails in United States employment law, and given that an exception might not apply, she might be left with no legal recourse against her employer.<sup>246</sup>

Cases such as this are complicated because they raise questions about the scope of the employers' religious freedoms as well as the discharged employees' autonomy. Religious organizations have been exempted to some extent from anti-discrimination laws that might protect their employees from encroachments on their autonomy under the "ministerial exception."<sup>247</sup> The ministerial exception protects religious organizations' freedom of religion and association by exempting them from the reach of any laws that would prevent them from using religious criteria in selecting or discharging their religious leaders.<sup>248</sup> But employees who are not ministers are still often required to sign lifestyle covenants and morals clauses as part of the terms of their employment.<sup>249</sup> And the termination of an employee for violation

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245. See, e.g., Martinez, *supra* note 243.

246. At the time of writing, this is still unclear. In the case that motivated this example the employee won a judgment at trial for her employer's violation of a federal gender discrimination statute, but the employer is still seeking to have the judgment overturned. See Associated Press, *Fired Teacher Asks Judge to Reject Request to Reject Verdict*, CNSNEWS.COM (Jan. 21, 2015, 8:06 PM), <http://cnsnews.com/news/article/fired-teacher-asks-judge-reject-request-reject-verdict>.

247. The ministerial exception arises as a matter of constitutional law; it is not a statutory exception. See *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999).

248. See *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000) (where no spiritual function is involved, the First Amendment does not stay the application of a generally applicable law); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 132 S. Ct. 694, 697-98 (2012) ("called" teachers, as opposed to "lay" teachers, are "ministers" within the ministerial exception); and *Dias v. Archdiocese of Cincinnati*, No. 11-CV-00251, 2012 U.S. Dist. LEXIS 43240, at \*17 (S.D. Ohio, Mar. 29, 2012) (plaintiff's mere association with a religious school is insufficient to make her a minister and subject her to the ministerial exception).

249. In many cases, the employees are not even members of the religion. For a discussion about Catholic schools requiring teachers to sign morals clauses that require adherence to Catholic doctrine, see Sandhya Dirks, *Morals Clauses Prove Controversial For Catholic School Teachers*, NPR (July 15, 2014, 4:58 PM), <http://www.npr.org/2014/07/15/331751394/morals-clauses-prove-controversial-for-catholic-school-teachers>.

of a lifestyle covenant or morals clause might not give rise to any cause of action under an anti-discrimination statute or other law, even though the discharge might impinge upon rights and privileges within the employee's sphere of personal autonomy and privacy.<sup>250</sup>

Nonetheless, lifestyle covenants and morals clauses do not in and of themselves involve the exercise of coercion. When an employer requires an employee to sign a lifestyle covenant or morals clause, there is generally no direct exercise of coercion, either by the employer or the State. There is no exercise of coercion by the employer or the State when an employer discharges an employee for the employee's lifestyle choices or moral decisions either. Under the employment-at-will doctrine, employers have a right to discharge employees for any cause, or even no cause at all,<sup>251</sup> and courts only exercise State coercion directly when they enforce private legal rights. In fact, if a court awarded damages to the employee for wrongful discharge, it would be using the power of State coercion against the employer on behalf of the employee. But the issue is more complicated than that, and an employee's liberty is implicated even though there is no direct exercise of coercion by the employer or the State.

Lifestyle covenants and morals clauses are a market phenomenon, like any other. Perhaps the important questions are: Why does the employer bargain for them? And why would the employee agree to them? The answers are easy. In the example above, the Catholic school probably bargains for a morals clause that forbids employees from using in vitro fertilization because in vitro fertilization would violate Catholic doctrine.<sup>252</sup> And the employee probably agrees to the restriction because she needs the job or the job pays better than the alternatives and it is worth it to her to sacrifice some of her autonomy by signing the clause.<sup>253</sup> In fact, there are many reasons why an employee might not care about such a restriction: She might agree with Catholic doctrine and want to adhere to it as far as possible in her personal life, she might be beyond child bearing years, or she simply might not anticipate that it would ever bind her personal choices. But there might also be cases in which an employee does care about the restriction and agrees to it,

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250. See, e.g., the McCarthy era cases cited, *supra* note 242.

251. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 517-18 (Tenn. 1884) (overruled on other grounds). *Hutton v. Watters*, 179 S.W. 134, 135 (Tenn. 1915) (employers may discharge or retain employees at-will for good cause or for no cause or even for bad cause without thereby being guilty of an unlawful act *per se*).

252. See, e.g., *Dirks*, *supra* note 249.

253. According to *Dirks*, eighteen percent of the teachers at one Catholic high school who were required to sign a morals clause were not even Catholic. *Id.*

nonetheless, because she wants the job. Presumably, if an employee does actually violate a morals clause then the clause is either one she would rather not have been bound to when she contracted with her employer or it became one that she did not want to remain bound to sometime after she became an employee.

Lifestyle covenants and morals clauses provide ways for employers to control their employees' lifestyle choices and moral decisions about matters that bear no relation to the employee's work duties. Outside the scope of a narrowly defined ministerial exception, the idea that an individual's lifestyle choices and moral decisions can be controlled by her employer should grate on the conscience of any serious advocate for liberty. Although the employer might not exercise any direct physical coercion over the employee, the use of a contract clause to control her behavior subjects the employee's lifestyle and moral decisions to a kind of economic coercion.<sup>254</sup> Given most employees' dependence on their jobs for income, the threat of termination operates through the fear of deprivation and want. And while it is true that prospective employees are not forced to sign the covenants and clauses, they lose gainful employment opportunities if they do not.<sup>255</sup>

Of course, the law offers some protections. In addition to protections under antidiscrimination statutes,<sup>256</sup> it is possible, for example, that the morals clauses could, at times, be unconscionable. In employment contracts, the employer often has a preponderance of bargaining power since the employee typically has fewer employment options than the employer has potential employees to choose among; the employer also typically has considerably more legal sophistication and

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254. EPSTEIN, *supra* note 32, at 47 observes that the concentration of market power itself can seem coercive, even though no force or fraud are actually involved. In cases where market power helps gain acceptance to contract clauses that intrude into individuals' spheres of personal autonomy and privacy, the concerns should be greater.

255. Recall that HAYEK, *supra* note 7, at 20-21 defined coercion to mean "such control of the environment or circumstances of a person by another that, in order to avoid great evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another."

256. Several courts have held that federal and/or state anti-discrimination statutes applied in cases where employees were terminated for violating lifestyle or morals clauses. *See, e.g.*, *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 806 (N.D. Cal. 1992); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 668 (6th Cir. 1999); and *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 U.S. Dist. LEXIS 43240, at \*24 (S.D. Ohio, Mar. 29, 2012). In some cases, however, anti-discrimination statutes have not protected discharged employees. *See, e.g.*, *Nader v. ABC Television, Inc.*, 150 F. App'x 54, 56 (2d Cir. 2005); *Arbor Leasing, LLC v. BTMU Capital Corp.*, No. 603151/2006, 2014 N.Y. Misc. LEXIS 138, at \*5-6 (N.Y. Sup. Ct. Jan. 14, 2014); and *Galaviz v. Post-Newsweek Stations*, No. SA-08-CA-305, 2009 U.S. Dist. LEXIS 59603, at \*21-24 (W.D. Tex. July 13, 2009).

normally drafts the lifestyle covenant or morals clause.<sup>257</sup> But it seems doubtful whether many lifestyle covenants or morals clauses are truly unconscionable. Employers who require their employees to sign the clauses typically want the employees to be fully aware of the restrictions. If a lifestyle covenant or morals clause is not unconscionable—if it is, in fact, truly bargained-for—then it would seem to be within the parties’ freedom of contract. And, in any case, under the employment-at-will rule, an employer may usually discharge employees for any cause or for no cause at all, which presumably includes lifestyle choices and moral decisions.<sup>258</sup> Indeed, the employment-at-will rule itself is within the parties’ freedom of contract.

In contracts between individuals—meaning natural persons—and other individuals, the freedom of contract argument is compelling. One of the rights within the sphere of personal autonomy and privacy that individuals should enjoy is the freedom to associate with whomever they like. A free individual, therefore, has a right to include a lifestyle covenant or morals clause in her contracts with other free individuals. Other free individuals, of course, have a right to choose whether or not to bind themselves to contracts that constrain their lifestyle choices or moral behavior. Moreover, in a well-functioning employment market the employee might normally receive some form of consideration for the restraints; the employer, on the other hand, might normally have to provide some consideration in return for the restraints.<sup>259</sup> The market would thus provide a disincentive against such restraints, but it would allow them if they increased the surplus derived from the contract by both the employer and the employee.<sup>260</sup>

The market would also provide a disincentive against lifestyle and moral restraints in contracts between for-profit corporations and individuals. For-profit corporations are created under state statutes, and they enjoy rights and privileges under state and federal laws;<sup>261</sup> they are, in that sense, State-sponsored entities, and the State is thus complicit in their actions. But because they have shareholders who expect a return on

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257. Kessler, *supra* note 202, at 631-32 observed that standardized contracting practices have diffused into labor markets and that they are typically “used by enterprises with strong bargaining power.”

258. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 517-18.

259. Thus, free market economists and libertarian scholars have often placed their confidence in the freedom of contract and the discipline of the market. For a classic statement of the argument that the market disciplines and discourages parties from basing their decisions on non-economic considerations see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 108-19 (2002).

260. *Id.*

261. *KRAAKMAN ET AL.*, *supra* note 54, at 34.



investment, they are ultimately subject to the discipline of the market.<sup>262</sup> A for-profit corporation that pays a premium to employees for signing lifestyle covenants and morals clauses would normally do so only if this was expected to increase profits or if the shareholders, as a group, were willing to sacrifice some of the profits in return for the corporation's pursuit of non-economic objectives. A well-functioning market might thus provide a disincentive against the lifestyle restraints, and one would expect to observe them only if they increased surplus for both the shareholders and the employees.<sup>263</sup>

It is not surprising, therefore, that for-profit corporations rarely require their employees to sign lifestyle covenants or morals clauses and rarely discharge employees for their lifestyle choices and moral behavior.<sup>264</sup> If they do discharge employees for their lifestyle choices or moral behavior, they might in fact pay a significant price, especially if the case receives much adverse publicity.<sup>265</sup> In the years to come, the public's increasing awareness of the issues, the pervasive and growing respect for personal autonomy and freedom, and the dramatic advancements in the dissemination of news through modern social media will probably provide stronger disincentives against discharges of employees for their lifestyle choices and moral behavior, at least by for-profit corporations.<sup>266</sup> Social disapprobation and the discipline of the market may thus be sufficient to protect individuals' personal autonomy against encroachments by for-profit corporations. In any case, for-profit corporations do not provide the greatest threat to employees' liberty.

The greatest threat to employees' liberty comes from non-profit

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262. FRIEDMAN, *supra* note 259, at 108-19.

263. *Id.*

264. In the for-profit sector, lifestyle covenants and morals clauses are probably most common today in entertainment industries such as television, film, and professional sports. Of course, these are all industries in which personal images and reputations can significantly affect profits. For a discussion of the role of morals clauses in the sports and entertainment industries, see Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347 (2009). As a general matter, the employees subject to lifestyle covenants and morals clauses in these industries—often actors and athletes—are also subject to the discipline of the market through their right of publicity and their prospects of losing valuable future advertising endorsements. See DUKEMINIER ET AL., *supra* note 76, at 83-90.

265. Of course, as the McCarthy era cases, *supra* note 242, illustrate, that is not always the case. In fact, the truth is that for-profit employers might risk losing profits for not terminating employees who make lifestyle choices or moral decisions that violate widely accepted social norms.

266. Market discipline ultimately operates through the values and choices of individual producers and consumers. Thus, if consumers expressly or implicitly boycott employers who intrude into their employees' autonomy and privacy or terminate employees for their lifestyle or moral decisions, for-profit employers who continue to do so will lose their market shares.

corporations. Indeed, many of the employers who require employees to sign lifestyle covenants or morals clauses are religious ones, often schools, colleges, or universities. They are generally organized as non-profit corporations under state statutes and benefit from significant rights and privileges under both federal and state law.<sup>267</sup> For example, they generally do not pay corporate income taxes or property taxes,<sup>268</sup> even though they clearly benefit from the State's protection of their property rights as much as individuals and for-profit corporations. In fact, since they do not pay taxes even though they receive direct government subsidies and services, they are implicitly subsidized by other taxpayers.<sup>269</sup>

Because they generally receive implicit tax subsidies, and because they are not formed to earn profits, non-profit corporations are not subject to the same degree of discipline by the market as for-profit corporations.<sup>270</sup> It is not surprising therefore that they appear to use employment contracts to regulate their employees' lifestyle choices and moral decisions more commonly than for-profit corporations.<sup>271</sup> One of the ironies is that they receive an implicit tax subsidy from the employees whose lifestyle choices and moral decisions they may seek to control. Indeed, some of their economic and market power no doubt derives from their tax subsidies since they would almost certainly have fewer financial resources and less market power if they were required to pay income taxes, property taxes, and sales taxes and compete on an equal footing in the marketplace with for-profit corporations.<sup>272</sup> The rights and privileges conferred upon them by the State thus help to maintain the economic power that they may then use to control their employees' lifestyle and moral decisions.

This Article presumes that a sphere of personal autonomy and privacy is essential to liberty. Indeed, intrusions into individuals'

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267. For a complete description of the subsidies as well as an attempt to quantify them, see Ryan T. Cragun, Stephanie Yeager & Desmond Vega, *How Secular Humanists (and Everyone Else) Subsidize Religion in the United States*, 32 FREE INQUIRY 39 (2012).

268. They also receive significant tax-deductible personal donations and benefit from direct subsidies such as those under the federal government's Faith-Based Initiatives. *Id.* at 41.

269. *Id.*

270. It is worth noting that the economic power they derive from their subsidies may also augment their political power and influence. *Id.* at 45.

271. See, e.g., Siggins, *supra* note 243; Martinez, *supra* note 243; and Green, *supra* note 243.

272. A conservative estimate of the total subsidy to religious organizations in the United States calculates it at about forty percent of the total subsidy to agriculture. Cragun et al., *supra* note 267, at 43. Of course, this is the total subsidy to all religious organizations and not just those that provide schooling or health services and hire significant numbers of non-clerical employees. It nonetheless offers a useful perspective.

autonomy to decide matters as private as whom they engage in sexual relationships with, whether to use birth control or assisted reproductive technologies, and whether to have an abortion, impinge upon some of their most basic human dignities. There are well-established protections under the United States and state constitutions as well as federal and state statutes against State intrusions into the sphere of individuals' autonomy and privacy, but liberty is also compromised when State-sponsored entities that receive significant tax subsidies are able to use their financial resources and economic power to control their employees' lifestyle choices and moral behavior, especially when the choices and behavior have no relationship to the employees' job responsibilities. Liberty would be advanced, therefore, if non-profit corporations were constrained from intruding into their employees' autonomy and privacy in the same ways that the State is constrained from intruding under the U.S and state constitutions.

There are several practical ways in which non-profit corporations could be constrained from intruding into their employees' liberty: 1) since they are generally created under state statutes, they could be constrained through the statutes under which they are created; 2) they could be regulated under the federal and state tax laws—for example, federal tax laws could be revised to preclude non-profit corporations from qualifying as public charities and receiving federal income tax exemptions if they required employees to sign lifestyle covenants or morals clauses; and 3) courts could constrain them by expanding the scope of wrongful-discharge laws. This could be accomplished by narrowing the ministerial exception that may exempt religious organizations from lawsuits under anti-discrimination statutes and by broadening the public policy exception to the employment-at-will rule so that a nonprofit corporation that receives tax exemptions as a public charity could be sued for discharging an employee for violating a lifestyle covenant or morals clause or for making a lifestyle choice or engaging in moral behavior that would be protected by the United States or state constitutions against intrusions by the State.

## VI. CONCLUSION

This Article has explored the relationship between private law and liberty. To that end, it has defined liberty to require that individuals be as free as possible from the exercise of coercion by others, including the State, except to the extent that they have truly and voluntarily assented to the coercion, and that individuals have a sphere of personal autonomy

and privacy within which they are free from intrusions by the State and others to think what they will, say what they want, associate with whomever they like, and be whoever they are. This sphere of personal autonomy and privacy may be thought of as being similar to the rights and privileges accorded to individuals against the State under the United States and state constitutions, although in an ideal world those rights and privileges would arguably be defined even more broadly.

There are many important ways in which private law doctrines may advance liberty. For example, common law courts have developed and refined doctrines, such as the first in time rule, the finders rule, and the rule for adverse possession in property, or the parol evidence rule, the doctrine of impracticability, and the doctrine of unconscionability in contracts, that appear to advance liberty by limiting the exercise of coercion by individuals against other individuals directly or by individuals against other individuals indirectly using the power of the State. Indeed, it may have been largely through the spontaneous order of the common law that individuals in common law nations have enjoyed the liberty that has enabled them to experiment, innovate, muse, and reflect, thus spawning intellectual advancement, material progress, and cultural refinement, not only for themselves but for others too.

Nonetheless, as social conditions and economic practices evolve, there will always be ways in which further refinements in the law can advance liberty. This Article has explored some of the important ways in which liberty in the United States could be advanced by refining the system of private legal rights. It has focused in particular on problems that have wide and increasing importance for many people across most states: the impingement on individuals' liberty caused by the enforcement of some private land-use restrictions, and the intrusion into employees' personal autonomy and privacy wrought by the lifestyle covenants and morals clauses in the employment contracts that some employers use and enforce. The State is always complicit in the former, because court enforcements of private laws always involve the exercise of the State's power of coercion. The State is not necessarily complicit in the discharge of employees for their lifestyle or moral decisions, but it is complicit if the employer is a State-sponsored entity, such as a non-profit corporation that is created under state statutes and receives significant tax exemptions that are tantamount to implicit tax subsidies.

Legislatures and courts have a responsibility to mitigate these problems. This Article proposes some concrete options. To begin with, liberty would be advanced if courts were restrained in the enforcement of private land-use restrictions in all the ways that the State is restrained

in enforcing public land-use restrictions. In other words, all of the federal and state constitutional constraints that apply against public land-use restriction should also apply against courts' enforcement of private land-use restrictions. In an ideal world, the constraints would be applied under a more expansive application of the State action doctrine, one that recognized the judiciary as a branch of government and the courts as State actors. Since it seems unlikely that the State action doctrine is going to be expanded any time soon, it might be more efficacious for state legislatures to constrain courts by enacting statutes that apply all the federal and state constitutional constraints to private land-use restrictions as a matter of state law. In the absence of action by state legislatures, state courts themselves could adopt new holdings that would make private land-use restrictions unenforceable as a matter of public policy whenever they would be unconstitutional as public land-use restrictions.

There are several practical ways in which State-sponsored non-profit corporations could be constrained from invading their employees' liberty. First of all, they could be constrained through the statutes under which they are created. They could also be constrained through revisions to the federal and state tax laws that would preclude them from qualifying as public charities and thus receiving tax exemptions if they required employees to sign lifestyle covenants or morals clauses, or if they discharged employees for lifestyle choices or moral behavior. If legislatures failed to act, courts could constrain them by narrowing the ministerial exception that often exempts religious non-profit corporations from lawsuits under anti-discrimination statutes, and by broadening the public policy exception to the employment-at-will rule so that a nonprofit corporation that receives tax exemptions as a public charity could be sued for discharging an employee for making lifestyle choices or engaging in moral behavior that would be protected by the United States or state constitutions against intrusions by the State.

The advancement of liberty is the most fundamental purpose of the State. History has taught us that governments cannot engineer social progress or material welfare, but it has also taught us that if people are given the liberty to do what they will, think and act as they like, and live their lives as freely as possible, they will thrive personally, socially and materially. The State nonetheless plays a pivotal role in fostering individuals' personal happiness, cultural enlightenment, and material welfare because the power of State coercion is essential to liberty. Unfortunately, the State may undermine liberty by failing to take the actions necessary to protect it, or by taking actions that encroach upon it.

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The State's role in creating and enforcing private laws is no less important to liberty than its role in creating and enforcing public laws, and the State may undermine liberty by failing to develop and apply private law doctrines that are necessary to advance liberty or by enforcing private law doctrines that encroach upon it.