AGAINST DEREGULATION

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INTRODUCTION

In *Deregulating Contracts*, Alan Schwartz and Simone Sepe have made an important and ambitious contribution to contract theory. In their view, we have been way too conformist about contract law.[1] Their argument is that both welfarist and deontological considerations suggest our law of contracts should be radically reformed.[2] More specifically, they argue that contract law should abandon its current approach to what they call "procedural terms" (remedial clauses, interpretative clauses, renegotiation provisions, and the like) and adopt the same hands-off approach that, within limits, it takes regarding "substantive terms" (quantity, quality, and price terms).[3]

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1 *See* Alan Schwartz & Simone M. Sepe, *Deregulating Contracts*, 101 NOTRE DAME L. REV. XXX, (manuscript at 103) (2026).

2 *See id.* at (manuscript at 116–17).

3 *See id.* at (manuscript at 134–37).

Despite the value of Schwartz and Sepe's contribution, I must say I remain skeptical. Even assuming, arguendo, that the economic basis of their argument is correct, Schwartz and Sepe's moral argument is far from conclusive. Unless one adopts an extremely narrow and implausible conception of political morality (which, in their own argument, Schwartz and Sepe correctly avoid[4]), their case for deregulation is not persuasive. Indeed, the considerations of political morality that Schwartz and Sepe allude to fail to support, in my view (and despite the many virtues displayed by their ambitious and sophisticated argument), the case for deregulation.

Here is the structure of this response. In Part I, I offer a brief summary of Schwartz and Sepe's argument. As I will note there, I will not discuss the argument that Schwartz and Sepe make regarding the inefficiency of mandatory procedural rules in contract law. Instead, I will only focus on the other normative arguments offered by Schwartz and Sepe. Thus, in Parts II, III, and IV, I go over three of the substantive arguments (outside of efficiency) offered by Schwartz and Sepe in favor of their proposal: distributive justice, autonomy, and rights. In Part V, I revisit an objection (based on Seana Shiffrin's work on unconscionability[5]) that Schwartz and Sepe themselves discuss. Finally, Part VI focuses on the social world that Schwartz and Sepe envisage arising if we adopt their suggested reform.

I. SCHWARTZ AND SEPE'S ARGUMENT

As Schwartz and Sepe note, contract law primarily (though not exclusively) impacts the agreements of commercial parties.[6] There is a widespread belief, as they too note, that this impact is limited given a broad commitment to contractual freedom.[7] But this common belief, they argue, is mistaken: The law significantly (and immorally) constrains this freedom through widespread mandatory rules.[8] Such rules, they argue, should at least become defaults.[9]

Schwartz and Sepe's argument applies to contracts between "sophisticated agents contracting to maximize expected commercial gains."[10] As Schwartz and Sepe explain, by relying on the well-known case of *Lake River*,[11] contract law allows such parties to freely determine

4 *See id.* at (manuscript at 146).

5 *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFS. 205 (2000).

6 Schwartz & Sepe, *supra* note 1, at (manuscript at 103).

7 *See id.* (manuscript at 103)

8 *Id.* (manuscript at 103)

9 *Id.* (manuscript at 103)

10 *Id.* at (manuscript at 106).

11 Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985).

their substantive terms (what they want to trade), but significantly regulates their procedural terms (i.e., terms about remedies, interpretation, and renegotiation).[12] This approach, they claim, leads to an incoherence at the heart of contract law.[13] Crucially, this incoherence also generates a self-defeating, or at least ineffective, feature of the regulation of procedural terms.[14] Well-resourced, sophisticated parties can avoid these mandatory rules by adopting substantive terms that achieve the very economic results that the mandatory rules are supposed to avoid.[15]

As Schwartz and Sepe put it, while courts are relatively "inexpert regulators" of procedural terms,[16] sophisticated parties—while not rational in the strict economic sense—are sensitive to payoffs and can learn and update their beliefs.[17] A deregulation of contract law—by extending contractual freedom to procedural terms—would thus generate a coherent approach to contract law.[18] That approach would also align with the comparative competence of sophisticated parties and courts and would increase welfare.[19] Crucially, too, Schwartz and Sepe's reform would also align with the substantive moral considerations that bear on contract law.[20]

Following their own reconstruction, Schwartz and Sepe make three claims:

(i) Mandatory procedural rules are inefficient (they reduce welfare), and their elimination or transformation into default rules would thus increase welfare;[21]

(ii) mandatory procedural rules in any event tend to be self-defeating, or at least ineffective, because well-advised and -resourced parties can evade their effects by adapting their substantive terms (thus, mandatory default rules typically constrain only sporadic players and inexpert firms);[22] and

(iii) when they are effective, procedural rules are distributively unjust, restrict party autonomy, and violate the right to freedom of contract.[23]

12 Schwartz & Sepe, *supra* note 1, at (manuscript at 108).
13 *Id.* at (manuscript at 111, 126).
14 *See id.* at (manuscript at 114–15).
15 *Id.* at (manuscript at 114, 127).
16 *Id.* at (manuscript at 106).
17 *Id.* at (manuscript at 105–06).
18 *See id.* at (manuscript at 112).
19 *See id.* at (manuscript at 105–06, 115).
20 *Id.* at (manuscript at 115).
21 *See id.* at (manuscript at 155).
22 *Id.* (manuscript at 155)
23 *Id.* at (manuscript at 155–56).

Because of this, Schwartz and Sepe argue, "contract law should be deregulated because today the law functions as a morally unjustified, inefficient, regressive tax on the commercial economy."[24]

In what follows, I will concede points (i) and (ii) above (i.e., I will assume that mandatory rules are inefficient and generally ineffective) and focus on point (iii). In other words, my argument will question whether, when mandatory procedural rules effectively bind parties, they violate distributive justice, autonomy, or rights. In each of these cases, the argument is, as I will suggest, unpersuasive. This leaves Schwartz and Sepe's argument as a straightforward utilitarian argument about what arrangement might lead to the maximization of welfare. Others are better suited than I to evaluate that specific argument—its economic grounding and empirical plausibility—in its own merit. My only limited point here is that the *other* normative considerations that Schwartz and Sepe raise—concerning distributive justice, autonomy, and freedom—fail to support their argument.

II. DISTRIBUTIVE JUSTICE

Schwartz and Sepe argue that mandatory procedural rules are like a regressive tax that affects the least wealthy and least experienced commercial parties the most.[25] This follows from their claim—which I noted in the previous Part—that well-advised, large, repeat players can avoid the effects of mandatory rules through carefully crafted substantive terms.[26] If that is the case, then those who bear the cost of mandatory rules predominantly are sporadic, less well-advised, smaller firms.[27]

As a consequence of this fact, Schwartz and Sepe argue, mandatory rules allow "large firms to exploit their technological advantage in contracting to maintain and enhance their market positions."[28] Thus, not only are mandatory rules ineffective. To the extent they have an effect, they are also unjust (in such effects) because they place a bigger burden on the least well-off firms. Thus, the current set of mandatory procedural rules is unfair because it violates equality of opportunity and disadvantages the worst-off commercial parties.[29] This is an effect that seems intuitively unfair.[30]

Schwartz and Sepe put this point in terms of John Rawls's theory of justice. They write: "Mandatory contract law rules undermine

24 *Id.* at (manuscript 156).
25 *Id.* at (manuscript at 126).
26 *Id.* at (manuscript at 114); *see also supra* note 15 and accompanying text.
27 *See* Schwartz & Sepe, *supra* note 1, at (manuscript at 130–31).
28 *Id.* at (manuscript at 130).
29 *Id.* at (manuscript at 133–34).
30 *Id.* (manuscript at 133–34).

equality of opportunity because parties have different access to the transformation operators that enable them to escape a mandatory rule's impact. Rawls's second principle of justice implies that such disparate opportunities to contract are unjust."[31]

I think this is not a persuasive argument, for the following reasons (which, following Schwartz and Sepe, I will tend to frame in terms of Rawls's theory, although similar arguments would be plausible under roughly similar liberal egalitarian theories).

First, considerations of distributive justice are about the allocation of benefits and burdens across persons, members of a society, citizens, etc.[32] They are not, on any plausible conception of distributive justice, about the allocation of benefits and burdens across commercial firms. Take Rawls's second principle of justice. On one formulation of that principle, "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."[33] By "everyone" here, of course, Rawls means every *person*, because persons are, after all, the entities of moral concern for political morality. It would be strange, to my mind, to apply Rawls's or any other theorist's conception of distributive justice to the subset of firms engaging in commercial exchange. The set of worst-off firms within that category is not, either from a Rawlsian perspective or from the perspective of any plausible conception of political morality, a morally significant category. In fact, the legal rules that allow for firms to exist and to engage in contracting are part of the institutions that should be assessed on the basis of distributive justice. Whether one or another set of legal rules is distributively just, thus, depends on the overall effect of those rules on the distribution of welfare or primary goods across persons, citizens, etc. It could very well be the case that rules and institutions that negatively impact smaller firms and benefit larger firms also benefit the least well-off members of society. Of course, this is an open question—but one on which, absent further argument, we are entitled to remain agnostic.

Second, all legal rules can be evaded and creatively sidestepped: Some (greater or lesser) degree of creative noncompliance is a reality in every legal regime. The set of rules that can be evaded includes mandatory rules in contract law, partly for reasons alluded to by Schwartz and Sepe.[34] But that set includes other rules too, including rules about income taxation, white-collar crime, environmental regulation, and so

31 *Id.* at (manuscript at 133) (footnote omitted).

32 *See* Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYC. OF PHIL. (Sep. 26, 2017), https://plato.stanford.edu/entries/justice-distributive/ [https://perma.cc/DE6Q-XQ8G].

33 JOHN RAWLS, A THEORY OF JUSTICE 53 (rev. ed. 1999).

34 *See* Schwartz & Sepe, *supra* note 1, at (manuscript at 127).

on. It is at least possible (and perhaps even likely) that some of those rules are also more successfully evaded by more powerful, wealthier firms. But if that is the case, it seems strange to think that justice demands doing without the rules that are not being complied with.

Third, on a Rawlsian view like the one Schwartz and Sepe rely on to make their point, principles of justice apply to the entirety of "the basic structure of society and its major institutions."[35] But, if that is the case, whether an institutional arrangement is just (even if its justice is, again implausibly, measured by its impact on the least well-off firms) is a wholesale rather than retail question. The question is not whether this or that rule or set of rules produces a just outcome but whether the entire set of laws, policies, and institutions that make up the basic structure and major institutions of a society complies with the demands of justice. As Rawls himself argues, a particular rule, a set of rules, or an entire institution might be unjust when judged in isolation, but the social system as a whole might not be.[36] More importantly, what seems unjust in isolation might not be unjust when taking society as a whole.[37] The opportunities that contract law currently "takes away" in its operation from some parties might thus be compensated for through other institutional mechanisms.

Fourth, and relatedly, once we think that contract law is part of the set of institutions subject to the demands of justice, why should we stop at thinking about opportunities for contracting? Why not also consider the impact of mandatory rules on wealth, resources, and other primary goods that might be impacted by those rules?[38]

Schwartz and Sepe are, of course, aware of this potential rejoinder. They claim that contract law is better suited to pursue equality of opportunity rather than of resources.[39] Attempting to affect resource distribution is thus "incompatible with the principle of the division of institutional labor," according to which policies should be implemented by the institutions that are best suited to do so.[40]

Allocating institutional tasks on the basis of an empirical assessment of which institutions are best positioned to pursue specific policy goals is, of course, a very reasonable idea. But if that is what Schwartz and Sepe want to suggest here, then there is no a priori reason why contract law rules might not be used to achieve the redistribution of resources. Whether we ought (or not) to use contract law for distributive ends is an empirical question that depends on facts that vary across

35 RAWLS, *supra* note 33, at 47, 50.

36 *Id.* at 50.

37 *Id.*

38 On the notion of primary goods, see *id.* at 54–55.

39 *See* Schwartz & Sepe, *supra* note 1, at (manuscript 132–33).

40 *Id.* at (manuscript at 132, 132–33).

jurisdictions and on which there is just no last word.[41] So, the idea of the division of institutional labor tells us that contract law should not pursue the end of redistributing resources if it is not instrumentally well-suited to do so. But that is a conditional claim that depends on empirical facts that are unlikely to remain constant over time or across multiple jurisdictions.[42] It is not some general principle that rules out using contract law rules to affect the distribution of resources.[43] To be clear, I think that Schwartz and Sepe are probably right that contract law is a poor vehicle for achieving redistributive aims. My limited point is that this is just something that's likely true—and that therefore there is not some general *principle* that we would be violating if we used contract law for redistributive aims, if it were the case that at least in certain settings it can be effectively used in this way.

Here, perhaps someone might want to suggest that there is a deeper normative reason for not assigning a redistributive role to contract law. If so, then we are owed an account of that reason and why it would prevent us from using contract law in this way. Schwartz and Sepe offer no such argument.

It's not that such arguments don't exist. For example, one could argue that contract law is not part of the basic structure of society, and, therefore, it is not subject to the demands of resource redistribution captured by Rawls's difference principle.[44] But, if that is the case, the principles of justice don't bear on contract law, and the whole argument that Schwartz and Sepe make about the second principle of justice justifying their position doesn't even get off the ground.[45] Within a Rawlsian framework, legal institutions are either part of the basic structure of society or they aren't.[46] If they are (Rawls mentions the examples of the constitution, the law of property, the economic system, and the family[47]), they are subject to the principles of justice.[48] If they are not part of the basic structure, they are not subject to such principles (in which case, the fact that freedom of contract is not fairly

41 For discussion, see Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); and Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

42 Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFFS. 251, 260–61 (1999).

43 *See* Kevin A. Kordana & David H. Tabachnick, *Taxation, the Private Law, and Distributive Justice*, 23 SOC. PHIL. & POL'Y 142, 165 (2006).

44 *See, e.g.*, Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1816 (2004).

45 Schwartz & Sepe, *supra* note 1, at (manuscript 133–34).

46 *See* RAWLS, *supra* note 33, at 8–9.

47 JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 4.1 (Erin Kelly ed., 2001).

48 *See supra* note 35 and accompanying text.

distributed is not a significant concern). From this perspective, the most consistent position with Schwartz and Sepe's arguments about unfairness is that contract law is part of the basic structure and subject to the demands of justice.

In fairness to Schwartz and Sepe, though, there are aspects of Rawls's thought that could be read to suggest that contract law is, in fact, not subject to the demands of justice. In *Political Liberalism*, Rawls discusses a "division of labor" between the standards that govern the basic structure of society and those "governing . . . individual transactions."[49] As he writes:

> What we look for . . . is an institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.[50]

This paragraph has generated a debate in the literature over whether contract law constitutes part of the basic structure of society within Rawls's framework.[51] Arthur Ripstein, for instance, argues that contract law need not be subject to the demands of distributive justice.[52] Others, like Kevin Kordana and David Blankfein-Tabachnick, suggest that contract law is part of the basic structure of society and is therefore subject to all the demands of justice.[53]

As a matter of interpretation, I believe there is no reason to think that a Rawlsian perspective should exclude contract law from the basic structure of society and from the demands of the principles of justice. This is compatible with the view that *other* principles are also relevant to contract law, of course.[54] But, as Samuel Scheffler puts it, the view that contract law is beyond the basic structure of society is inconsistent with Rawls's view as a whole.[55] Under that view, Scheffler argues, the

49 JOHN RAWLS, POLITICAL LIBERALISM 267–68 (expanded ed. 2005).

50 *Id.* at 268–69.

51 *See* Josse Klijnsma, *Contract Law as Fairness*, 28 RATIO JURIS 68, 69 (2015).

52 Ripstein, *supra* note 44, at 1815.

53 *See, e.g.*, Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598 (2005).

54 *See* SAMUEL FREEMAN, *Private Law and Rawls's Principles of Justice*, *in* LIBERALISM AND DISTRIBUTIVE JUSTICE 167, 173 (2018).

55 Samuel Scheffler, *Distributive Justice, the Basic Structure and the Place of Private Law*, 35 OXFORD J. LEGAL STUD. 213, 222 (2015). Similarly, see SAMUEL FREEMAN, *The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice*, *in* JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 259, 268 (2007); FREEMAN, *supra* note 54, at 179–80, 194; Klijnsma, *supra* note 51, at 76; and Murphy, *supra* note 42, at 261.

entire legal system should be understood as part of the basic structure and therefore subject to the demands of justice.[56]

Again, Schwartz and Sepe seem to agree with this, given their arguments about the inconsistency between mandatory procedural rules in contract law and Rawlsian distributive justice. But, again, if contract law is subject to the demands of justice, then there is no principled reason to think that it is not subject to *all* the demands of justice, including the demand to distribute resources justly. Thus, if some mandatory rules could adequately achieve or be part of the set of rules that achieve desirable distributive effects, then there is no principled reason to reject a priori the use of mandatory contract law rules for distributive ends.[57]

At this point, Schwartz and Sepe might argue that such use of mandatory rules in contract law would be illegitimate because it violates a fundamental right to freedom to contract. But that's a libertarian argument that assumes a pre-institutional right that places a constraint on the design of legal institutions. There is no reason why such argument might not be plausible, and Schwartz and Sepe, later in the paper, go on to make that type of claim.[58] But that is not a Rawlsian argument—for Rawls, as we have seen, contractual rights and powers are part of the institutional scheme that needs to be justified by reference to the principles of justice.[59] It is perfectly possible for a society to legitimately organize itself without a system of contract law.[60] Principles of contractual freedom cannot have priority—from a liberal egalitarian perspective such as Rawls's—over distributional considerations.[61]

All of this ultimately leads me to think that Schwartz and Sepe's claims about fairness, couched in terms of Rawls's theory, should be rejected. More importantly, in an important respect, those claims might distract us from what's Schwartz and Sepe's central deontological position: a libertarian view about the illegitimacy of mandatory regulation of contractual terms and the inviolability of contractual freedom. I turn to that argument in the next Sections.

III. AUTONOMY

Schwartz and Sepe argue that contractual freedom is intrinsically valuable, and therefore its restriction is in principle problematic. They write: "[C]ontracting freedom has intrinsic moral value. . . . [P]arties'

56 Scheffler, *supra* note 55, at 219–20.

57 Kordana & Tabachnick, *supra* note 53, at 616.

58 *See* Schwartz & Sepe, *supra* note 1, at (manuscript 134–38).

59 *See supra* notes 46–47 and accompanying text.

60 *See* Kordana & Tabachnick, *supra* note 53, at 610–11.

61 *See* Scheffler, *supra* note 55, at 224–25.

rights—and their power to transfer them—should be constrained only when parties acquired their rights illegitimately."[62]

From this perspective, mandatory rules are illegitimate. If they are not evaded, they unjustifiably restrict contractual freedom. If they are evaded, they raise the cost of exercising that freedom.[63] Restricting contractual freedom to substantive terms and not extending it to procedural terms thus reduces autonomy, and does so in a way that is unjustified.[64] This, Schwartz and Sepe say, is a "similarity argument" for expanding contractual autonomy.[65] In their own statement, the argument is the following:

> P1: Contract terms that implement substantive freedom are on a moral parity with terms that would implement procedural freedom.
>
> P2: Contract terms that implement substantive freedom are legally enforceable.
>
> . . . .
>
> C: Contract terms which would implement procedural freedom also should be legally enforceable . . . .[66]

Underlying the first premise is the thought that whatever reasons might be relevant to the restriction of substantive terms must also be relevant to the restriction of procedural terms. As Schwartz and Sepe write:

> P1 rejects a common moral objection to expanding freedom of contract: The expansion would allow parties to agree to disadvantageous procedural terms as a result of insufficient reflection or unequal bargaining power. For example, a party might agree to ruinous penalty damages because they are temporally myopic. Parties, however, also 'can use substantive terms to ruin themselves through shortsightedness or desperation for a deal.' Absent mistake or coercion, courts will enforce substantively one-sided contracts.[67]

But why can't the enemy of contractual freedom argue that this is not a reason to expand contractual freedom from substantive to procedural terms but rather to extend the restrictions in the opposite direction? As the saying goes, one person's modus ponens is someone else's modus tollens. In other words, the two premises in the argument above could also lead to the conclusion that contract terms that

62 Schwartz & Sepe, *supra* note 1, at (manuscript at 116).

63 *Id.* at (manuscript at 126).

64 *Id.* at (manuscript at 134–35).

65 *Id.* at (manuscript at 135) (emphasis omitted).

66 *Id.*(manuscript at 135)

67 *Id.* at (manuscript 135–36) (footnote omitted) (quoting Alan Schwartz & Simone Sepe, Fairness and Freedom in Contract Law 26–27 (Sep. 25, 2023) (unpublished manuscript) (on file with the Columbia Law Center for Law and Economic Studies)).

implement substantive freedom should be legally unenforceable. Which conclusion we should prefer depends on whether we think contractual freedom is valuable and why, rather than on a supposed symmetry or equivalence between freedom regarding substantive terms and freedom regarding procedural terms.

To be clear, my position is not that contractual freedom should be restricted when it comes to substantive terms. I agree with Schwartz and Sepe that contractual freedom is, all else being equal, valuable. But to what extent contractual freedom ought to exist, regarding which terms, and so on, are all questions the answers to which depend on how we understand the value of contractual freedom and its relationship to other values. The answers are not to be found on mere logical consistency because logical consistency can go—without further normative argument—in any direction.

It is certainly true that, on Schwartz and Sepe's view, freely agreed terms are an implementation of autonomous agents' preferences, so a restriction of freedom of contract is inherently problematic from the perspective of autonomy.[68] But whether that really is the case, again, depends on what the right conception of autonomy might be and how it is best realized in contract law regimes. Here, my suspicion is that a full account of the value of contractual freedom and of the other values realized by the law of contracts would in fact be able to offer a plausible justification of current contract law,[69] or perhaps even justify a more restrictive role for party autonomy.[70] In this sense, Schwartz and Sepe are right to note that there is a "discontinuity," as they argue, in the degree of freedom that parties enjoy regarding substantive and procedural terms.[71] It is also true that such discontinuity is not explainable by reference to the choices of parties or to some qualitative difference in the exercise of their legal powers.[72] But from this it does not follow that the noted discontinuity is necessarily unjustified.

To this, Schwartz and Sepe have a response: They can argue that their point is not just about the logical consistency of our legal regime vis-à-vis substantive and procedural terms but rather about the intrinsic value of contractual freedom or autonomy.[73] As they suggest, it might be a form of disrespect to fail to recognize parties' voluntary agreements to their full extent—i.e., including their agreements regarding

68 *See id.* at (manuscript at 134–35).

69 *See, e.g.*, HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017).

70 *See, e.g.*, Rebecca Stone, *Putting Freedom of Contract in Its Place*, 16 J. LEGAL ANALYSIS 94 (2024).

71 Schwartz & Sepe, *supra* note 1, at (manuscript at 136 n.186) (emphasis omitted).

72 *Id.* (manuscript at 136 n.186)

73 *See id.* at (manuscript at 134 n.180).

procedural terms.[74] But here we must recall that *legal* consequences are not brute facts that immediately arise from parties' agreements. They are institutional facts that do not inevitably flow from the voluntary choices of individuals.[75] And once we see that contractual rights and obligations are a consequence of institutional arrangements, we must ask ourselves how and in which way those rights and obligations ought to be structured, to what extent they should coincide with the parties' agreed terms or shared intentions, etc. There is no reason to assume ab initio that whatever the parties desire regarding every aspect of their transaction necessarily is what the institution of contract law ought to recognize as effective for the construction of their rights and obligations—even from the perspective of autonomy.

Again, the mere observation that mandatory procedural rules reduce party autonomy or control is not sufficient.[76] The relevant questions are whether that reduction is justified or not, when that reduction is justified, under what circumstances is that reduction justified, etc. Note too that the reduction might be justified because the loss in autonomy *here* is compensated for, or perhaps even justified, because of the existence of related gains in autonomy produced elsewhere in the legal institution as a consequence of mandatory rules. The answers to all these questions require a more sustained normative argument about the value and limits of contractual freedom, its proper weight, the legitimate tradeoffs in different aspects of contractual freedom and between it and other values, etc., than what Schwartz and Sepe have offered.

IV. RIGHTS

All of this would be wrongheaded, though, if the parties had a natural, pre-institutional right to contractual autonomy—such that, although contractual rights and obligations do not arise immediately from the parties' consent, they *ought* to do so. In other words, perhaps agents' natural rights should lead to the conclusion that the institution of contract law ought to be structured in such a way that the parties have the widest possible contractual freedom. Perhaps this is what Schwartz and Sepe have in mind when they argue that "[m]oral theories that protect rights support deregulating contract law."[77]

Here, though, I must confess my perplexity. Firms are not, at least without further argument, holders of natural rights and freedoms.

74 *Id.* at (manuscript at 136).

75 *See generally* G.E.M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69 (1958); John R. Searle, *What Is an Institution?*, 1 J. INSTITUTIONAL ECON. 1 (2005).

76 *See* Schwartz & Sepe, *supra* note 1, at (manuscript at 136).

77 *Id.* at (manuscript at 137).

More importantly, even if they were, how can we ascertain what those rights and freedoms are? It is true that, as Schwartz and Sepe argue, under a libertarian theory like Robert Nozick's, individuals have pre-institutional rights to life, liberty, property, and control.[78] And perhaps such rights imply a right to contract.[79] But then whether such a natural right to wide freedom of contract really exists would turn on whether Nozick's libertarianism is the correct account of political morality. It could very well be the case that a sound account of our rights does not include or even imply a general right to wide freedom of contract.[80]

More disturbingly, perhaps the idea of natural rights is, as Bentham famously argued, "nonsense upon stilts."[81] Or, even if there are *some* natural rights, the set does not include any right to freedom of contract.[82] All of this turns on which is the sound account of substantive pre-political justice, and there's very little that Schwartz and Sepe offer as a justification for their preferred libertarian account of natural rights. There are many plausible conceptions of what natural or pre-legal rights (if any) we have, and from the fact that under *one* conception of such rights a certain arrangement seems problematic, it simply doesn't follow that it is in fact the case that the arrangement really is problematic.

V. RECONSIDERING SHIFFRIN'S OBJECTION

In their article, Schwartz and Sepe preemptively defend their argument from two potential objections: one grounded in relational equality, the other in the role of the State as the enforcer of contractual rights. The objection from relational equality holds that choices are only autonomous in the context of egalitarian relationships—i.e., relationships lacking "hierarchies of power, esteem, and standing."[83]

Here, I want to focus on the second objection. This objection comes from Seana Shiffrin's argument that the unconscionability

78 *Id.* at (manuscript at 137 & n.193).

79 *Id.* at (manuscript at 137).

80 *Cf.* Stone, *supra* note 70, at 95.

81 Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, *in* 'NONSENSE UPON STILTS': BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987).

82 *See, e.g.*, Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORO. L.J. 453 (2020).

83 Schwartz & Sepe, *supra* note 1, at (manuscript at 139); *see also* Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999). Schwartz and Sepe argue that esteem and standing are not relevant in this context, given that they most naturally apply to persons rather than firms. Schwartz & Sepe, *supra* note 1, at (manuscript at 139). That's perfectly fine, although it does leave one wondering—again—why autonomy and natural moral rights matter given that we are not dealing with actual persons.

doctrine need not be grounded in paternalism.[84] On the contrary, she argues, the State's refusal to enforce certain terms might be justified by the fact that the State might legitimately refuse to endorse or facilitate harmful or exploitative behaviors through contract enforcement.[85] Schwartz and Sepe reconstruct this argument as one about the State being a "partner" in the parties' bargain given its role in enforcement.[86] This role as a partner would give the State the legitimate power to refuse to enforce certain terms and to otherwise impose mandatory rules.[87]

Schwartz and Sepe's response to this objection is twofold. First, the State is not the parties' partner.[88] Second, if it were, each of the partners in the relationship has equal moral standing, such that the State cannot unilaterally impose its preferences.[89] In fact, Schwartz and Sepe argue, the State's contribution to the standard contract between sophisticated firms is less significant than the parties' contribution, because "commercial contracts . . . are largely self-enforcing."[90] Thus, the State is not a partner but a provider of a service—namely, contract enforcement.[91] And unlike a partner, a service provider has no say in how customers use their service.[92]

I agree that the State is not a partner in every commercial contract. To be fair, though, that is not Shiffrin's view. In fact, Shiffrin's argument is significantly closer to the idea that the State provides a service (although she would probably not put the claim in that language) by enforcing contracts.[93] Here, though, I must note that the idea that service providers have no say in how customers use their service is implausible, both as a matter of the everyday experience of consumers (think about the terms of service that go along with most services we use in our everyday lives) and—more importantly—as a moral matter. Providing assistance—in this case, through contract enforcement—is a form of cooperation with the activity one is assisting—in this case, with commercial contracts.[94] The State is not obligated to aid with every project consented to by two agents, particularly when those two agents are not even persons but artificial entities.[95] Once the

84 Shiffrin, *supra* note 5, at 206.
85 *See generally id.*
86 Schwartz & Sepe, *supra* note 1, at (manuscript at 140).
87 *Id.* (manuscript at 140)
88 *Id.* at (manuscript at 141).
89 *See id.* at (manuscript at 140).
90 *Id.* at (manuscript at 141).
91 *Id.* (manuscript at 141)
92 *Id.* (manuscript at 141)
93 *See* Shiffrin, *supra* note 5, at 221.
94 *See id.* at 221–22.
95 *See id.* at 228–29.

political community has decided to enforce contracts, it also has a legitimate decision to make over which contracts to enforce and how.[96] That is, to my mind, the plausible argument that Shiffrin makes.

This does not mean, of course, that the limits of the assistance provided by contract enforcement need to perfectly coincide with such limits under our current law of contracts.[97] But it does mean that the political community—through the State—has a legitimate say about the extent to which it will enforce contracts, how, and so on. Again, this is not because the State is a partner in every contract but because contract enforcement is a form of public support granted to contractual parties.[98] And once we see things in this way, there might be better or worse standards regulating the State's assistance to contractual parties' mutually agreed contracts through contract enforcement, but there is no reason to think that any limitation is immediately suspect or unjustified.

VI. AGAINST COMMERCIAL ANARCHY

Let's go now to the last part of Schwartz and Sepe's positive argument. In an admirably creative and intriguing section of their article, they argue that the deregulation they recommend would lead to a world where parties are authorized to create their own private "associations" with their own procedural rules that courts would enforce.[99] In this world of expanded contractual freedom, there would be significantly more private enforcement of contracts (with the aid of state enforcement). As they put it, parties would—in this world—be able to rely on the State as an agent that enforces their private governance mechanisms and enforcement rules.[100] This would be a world with multiple privately designed systems of contract enforcement—a world of "commercial anarchism,"[101] although ultimately supported by State coercion.[102]

Thus, instead of one state-wide regime of contract law, the system would be populated by multiple private associations with their own contract law regimes (including their own sets of procedural rules).[103]

96 *See id.*

97 *Cf.* Schwartz & Sepe, *supra* note 1, at (manuscript at 142).

98 *See* John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. LEGAL PHIL. 1, 7–8 (2018).

99 Schwartz & Sepe, *supra* note 1, at (manuscript at 145, 145–46).

100 *Id.* at (manuscript at 146).

101 *Id.* (manuscript at 146)

102 There are certain connections between this argument and the one developed by Gillian K. Hadfield & Barry R. Weingast, *Law Without the State: Legal Attributes and the Coordination of Decentralized Collective Punishment*, 1 J.L. & CTS. 3 (2013).

103 *See* Schwartz & Sepe, *supra* note 1, at (manuscript at 146–49).

As long as the parties' choices are made "under ideal contracting conditions" and their agreements do not violate deontological constraints or create externalities, the State would recognize the independence of these contracting associations.[104] This is a system that would look like a private federalist system, with specific associations reflecting the contractual preferences and autonomous choices of their members.[105] Parties would sort themselves out and choose amongst associations, always having the right to exit them, and parties' choices would therefore determine which associations thrive and which don't.[106] The role of the state would be, in this world, to enforce the association rules that were selected by the parties.[107]

Here, I will make two observations. First, at a theoretical level, it is not obvious where the parties' power to create moral and legal obligations would come from if not some body of contract law provided by some state. Second, at a practical level, I would raise a more limited concern: Even though the ideal world posited by Schwartz and Sepe might be appealing to some (and even though it might be better than the status quo), we should not let the best be the enemy of the good. Our current legal regime for commercial contracting works relatively well, even if not optimally. There are prudential, small-c conservative reasons that counsel against radically transforming the status quo in search for Schwartz and Sepe's libertarian utopia.

Let me start with the first concern. Schwartz and Sepe themselves recognize the theoretical concern: Do parties actually have the power to create moral and legal rights and obligations, including procedural terms (and therefore much of the structure of contract enforcement), out of thin air?[108] Schwartz and Sepe's response is the following:

> First, drawing on action theory, we assume that individuals have agency collectively to consent to a specific form of action or interaction. The act of shaking hands—a mutually agreed form of action symbolizing greeting or agreement—is a good example of this agentic power. . . . Second, this agentic power of form creation fosters shared expectations among individuals. . . . Third, obligations are generated when a collective agreement is reached regarding certain forms of action or interaction, which in turn would lead to the development of common expectations. Exercising one's agency to participate in collective actions or interactions thus carries an implicit acceptance of moral responsibility towards fellow

104 *Id.* at (manuscript at 147).
105 *Id.* (manuscript at 147)
106 *Id.* at (manuscript at 148).
107 *See id.* at (manuscript at 149).
108 *Id.* at (manuscript at 150).

> participants and toward the agreed-upon practice. This . . . transforms mutual expectations into obligations.[109]

The first two steps of the argument—according to which agents have the power to collectively create forms of interaction that symbolize an agreement—are plausible as an account of pre-legal conventions that establish practices of promising and generate certain expectations amongst their participants.

But the third step in Schwartz and Sepe's argument—the crucial step that is supposed to show how these expectations become genuine obligations—is where the argument fails. First, it is relatively clear that in the absence of a legal system these expectations are not *legal* rights and obligations. Schwartz and Sepe, though, at times suggest that their argument is about moral rights and obligations.[110] The crucial passage above is where they write that "[e]xercising one's agency to participate in collective actions or interactions thus carries an implicit acceptance of moral responsibility towards fellow participants and toward the agreed-upon practice."[111] But why? In a footnote, Schwartz and Sepe offer an explanation:

> [T]he thought that participation in a practice can ground a duty to conform can be expressed in consequentialist terms, where the point of compliance is to avoid the bad outcomes that would follow if agents treated the practice as optional. It also fits deontological, practice-based accounts on which obligation arises from our collective or "joint" commitment to a practice rather than from particular reliance losses. A familiar Kantian way to capture this idea is via the principle of universalizability—requiring one to act only on maxims that could be willed as universal laws.[112]

I don't think there is any reason to think that voluntary participation in a practice immediately grounds any duty to behave consistently with the expectations generated by that practice. It is certainly true that one can think of both consequentialist and deontological arguments in favor of such a view. But both types of arguments are, to my mind, ultimately unsuccessful.

Take first the consequentialist argument. Schwartz and Sepe claim that "the point of compliance is to avoid the bad outcomes that would follow if agents treated the practice as optional."[113] That is right. A breach *could* lead to adverse outcomes. But whether it does is an open empirical question. Any single breach might not have adverse outcomes. We might have a duty to avoid adverse outcomes, but from

109 *Id.* at (manuscript at 151) (footnotes omitted).
110 *See, e.g.*, *id.* at (manuscript at 150–51).
111 *Id.* at (manuscript at 151).
112 *Id.* at (manuscript at 151 n.259).
113 *Id.* (manuscript at 151 n.259)

that duty it does not follow that we have general duties generated by social practices of promise or agreement to keep those agreements.

This also explains why there is no link between universalizability and a general duty to comply with the rules of practices. While "I can breach whenever I want to" is not universalizable, "I should not breach except when doing so is better than performing" is in fact universalizable, at least in principle. In simple terms, at least some breaches of conventional rules lack any adverse effects.[114] The potential irrelevance of any particular breach, moreover, increases the larger the practice of exchange becomes.[115] This is all a symptom of a larger problem: It is *very hard* to go from the mere existence of conventions and their rules to duties of compliance.[116]

Now one might want to argue that the expectations of parties are in fact what's doing the work here. It would be wrong to breach these agreements because promises expect them to be kept. Thus, the expectation would ground a genuine moral duty. The problem is that from the fact that, as an empirical matter, an expectation exists, it doesn't follow that, as a normative matter, there is a duty involved. The real question is whether the expectations are morally legitimate or, more precisely, morally binding, so they actually generate duties with equivalent content. I am afraid we can't really decide the answer to that question without making substantive moral judgments about the content of the parties' agreements and the associational rules they agree to—which is precisely what Schwartz and Sepe want to avoid.

But perhaps the more fundamental problem here is that, even if successful, Schwartz and Sepe's argument would at best show that private agreements can generate moral rights and obligations. But that argument would not show that they generate legally enforceable rights and obligations. I don't see how the latter can be generated without the existence of state law.[117] And once state law is involved, as Shiffrin argues, there are a host of legitimate moral questions we can ask about freely consented contracts and our willingness, as a political community, to support them through enforcement.[118]

114 *See* Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 149 (1984); *see also* M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J 950, 956 (1973).

115 Regarding promises, see A.K. Stout, *"But Suppose Everyone Did the Same,"* 32 AUSTRALASIAN J. PHIL. 1, 5 (1954).

116 For a general exploration of this problem, see Liam Murphy, *Legal Practice and the Responsibility of Individuals*, COLLÈGE DE FRANCE (May 12, 2025), https://www.college-de-france.fr/en/agenda/guest-lecturer/liam-murphy/legal-practice-and-the-responsibility-of-individuals [https://perma.cc/5TX7-T62V].

117 For a full exploration of this issue, see Felipe Jiménez, The Institution of Contract: A Theory of Contract Law 36–83 (unpublished manuscript) (on file with author).

118 *See* Shiffrin, *supra* note 5.

Let me now turn to the second, prudential concern I raised: Even if our status quo were defective in some of the ways articulated by Schwartz and Sepe, we should be careful about the radical revisionism they argue for. It is a mistake, in my view, to think that normative questions about institutional design can be answered at the abstract level of pure theory without taking into account the history of legal institutions and the fact that the goods they (imperfectly) secure are a contingent feature of the social world. Contract law in the Western legal tradition is a legal institution that has centuries of existence and that has served societies in fostering exchange and cooperation reasonably well. That tradition has included, throughout a lot of its history, the mandatory procedural rules that Schwartz and Sepe argue we should do without. Unraveling well-functioning (even if sometimes deficient) social practices in the pursuit of the ideal strikes me as a bad idea. It is also an idea that assumes naively, to my mind, that we can radically revise stable conventions without affecting the fragile achievement of peaceful and fruitful commercial cooperation.

CONCLUSION

Because of all these reasons, I remain unconvinced. This is not to deny that Schwartz and Sepe's contribution is significant. It certainly is, and the value of arguments is not measured by the agreement that they generate but rather by whether they open up new ways of thinking. In this regard, we should thank Schwartz and Sepe.

Moreover, there is a particular value in a contribution that attempts to combine the welfarist perspective characteristic of the economic analysis of law and a broader set of normative considerations.[119] Nevertheless, because of the problems I have identified in Schwartz and Sepe's philosophical case, their argument is a narrowly welfarist one at best. That's fine as far as it goes, but it is not the type of argument they aimed to offer. Nor is it a compelling argument in terms of political morality, unless one adopts a very narrow and implausibly monistic conception of the latter that reduces everything to efficiency.[120]

119 On this gap, see Schwartz & Sepe, *supra* note 1, at (manuscript at 114).

120 *Cf.* RAWLS, *supra* note 33, at 61–62.