COMMERCIAL ANARCHY: A RESTATEMENT

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Our previous Article argued that three mandatory contract law rules—the rules prohibiting penalties and no renegotiation clauses, and authorizing courts not to obey party instructions regarding the evidence admissible to make an interpretation—should be reduced to defaults. We showed that these three rules—the "triad"—functioned unfairly because they bound only agents who lacked the contracting technology to avoid them; were inefficient because they raised the costs of or prevented parties from structuring particular deals, though the structures would not affect nonparties; and reduced party autonomy by restricting the ability of sophisticated parties to pursue their commercial goals through contract.

Professor Felipe Jiménez's Reply accepts for purposes of argument our economic claim that the triad is inefficient and generally ineffective, and acknowledges that mandatory procedural rules reduce party autonomy or control. He argues, however, that these considerations do not establish the case for reform without a fuller account of distributive justice, autonomy, rights, and the state's role in contract enforcement. For example, we showed that the triad rules violated Rawls's difference principle because they bore most heavily on the least advantaged contractors. Jiménez responds that a complete Rawlsian analysis could uncover legal cases where doing justice would overcome the justice "loss" we expose.

This Response does two things: (i) We argue that, in the commercial area, reformers make out a prima facie case for reform by showing that existing rules are inefficient, autonomy reducing, and unfair. The justificatory burden should then shift to rule proponents. Jiménez instead argues that the welfare and autonomy case does not establish reform without a fuller account of the relevant political morality. We argue that placing this broader justificatory burden on reformers would unduly privilege the status quo and impede incremental legal reform. (ii) We also reframe the issue in terms of normative powers: Contract is a power-conferring practice, yet current law empowers parties

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to set primary obligations while disabling meaningful control over key incidents of enforcement and adjustment, producing unequal "normative opportunity." We propose "deregulatory parity"—treating the triad rules as defaults—bounded by two limits, anti-realization and assent, and we sketch a model of robust private ordering (commercial anarchy) within those constraints.

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INTRODUCTION

The terms of a contract to sell are in two categories: substantive terms that specify what the parties are trading and procedural terms that structure how the parties must trade.[1] For example, "ten widgets for price P" is substantive; "the widgets must be delivered in a reasonable time" is procedural. In *Deregulating Contracts*, we focused on three mandatory procedural rules: (i) Penalties are prohibited; (ii) renegotiation must be permitted; (iii) courts are free to ignore party efforts to specify the evidence courts should consider when interpreting a contract.[2] Our article argued that these three mandatory rules (the triad) should be demoted to defaults or (for some contexts) repealed.[3]

We took a normative approach: That is, we did not ask how the triad rules came to be or why courts continue to apply them. Rather, we showed that the rules are inefficient, restrict parties' autonomy, are distributionally unfair, and function arbitrarily.[4] The rules are inefficient because they bar solutions to parties' contracting problems when those solutions would not injure nonparties. Thus, a penalty term could increase a party's incentive to invest efficiently in the deal.[5] The rules restrict parties' autonomy because they reduce parties' ability to use contracts to realize their plans.[6] For example, permitting parties to control the evidentiary base on which courts interpret their agreements would let them treat significant and minor contracts differently, asking a court to resolve disputes over the former on a full evidentiary record and disputes over the latter on a summary one.[7] The triad rules are distributionally unfair because legally armed parties can commonly escape the rules' effects by using adroit contracting strategies while poorly resourced parties are bound.[8] And the rules function arbitrarily because their effectiveness in implementing substantive policies does not turn on the policies themselves but rather on the parties' ability to avoid regulation.[9]

These results constitute a prima facie case for reform. Contract law gives parties control over substantive terms because parties use that control to make contracts that increase their welfare and effectively

1 *See* Alan Schwartz & Simone M. Sepe, *Deregulating Contracts*, 101 NOTRE DAME L. REV. 279, 279 (2026).

2 *See id.* at 286–88.

3 *Id.* at 333.

4 *Id.* at 292, 308–09, 315.

5 *See id.* at 299.

6 *See id.* at 315.

7 *See id.* at 287–88.

8 *See id.* at 292–93.

9 *Id.* at 293, 308.

exercise their autonomy.[10] Control over procedure would function in the same ways: to increase welfare and facilitate autonomous choice.[11] Though this would be justification enough for reform, we also argued that reducing the triad to defaults is consistent with other widely held political theories such as Rawls's theory of justice.[12] Finally, we created a thought experiment regarding what commerce would be like if the locus of control over creating contract rules shifted from the state to parties themselves.[13] There may be gains, we suggested, from pursuing this line further.[14]

Professor Felipe Jiménez's critique in *Against Deregulation* accepts arguendo that the triad rules reduce welfare and party autonomy, as autonomy is conventionally understood, but he believes that this showing is insufficient to justify demoting the triad to defaults.[15] In his view, the reformer must supply a fuller normative account showing why considerations of justice, autonomy, and rights support the proposed reform.[16] Jiménez therefore remains "not persua[ded]" by our case against the mandatory triad rules.[17] We think this places the burden of proof in the wrong place. In the commercial domain, once reformers identify substantial welfare, autonomy, and fairness costs, the burden should shift to defenders of the status quo to identify the countervailing policy or principle that justifies retaining the rules. In the commercial domain, the burden should shift to status quo defenders to identify the policy or principle that would justify courts in continuing to apply inefficient and otherwise unfair rules.

We proceed as follows. Section I.A defines our context: business-to-business contracts between sophisticated parties. We explain here the concept of *commercial rationality*: that, through repetition and feedback, commercial actors learn to choose effective means of pursuing their goals within their business domains.[18] We then reprise how the triad rules operate in practice and explain why, once those effects are

10 *See id.* at 279.

11 *Id.* at 333–34.

12 *See id.* at 312; *see also* JOHN RAWLS, A THEORY OF JUSTICE 52–53 (rev. ed. 1999) [hereinafter RAWLS, A THEORY] (introducing the concept of justice as fairness, and his two fundamental principles of justice); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 39–50 (Erin Kelly ed., 2001).

13 *See* Schwartz & Sepe, *supra* note 1, at 329. We characterized such a contracting world as a "commercial anarchy" because independent commercial groups would be creating rules for themselves. *Id.*

14 *See id.* at 324–29.

15 Felipe Jiménez, *Against Deregulation*, 101 NOTRE DAME L. REV. 895, 898, 905–06 (2026).

16 *See id.* at 896, 906–07.

17 *Id.* at 896, 901, 913.

18 *See infra* notes 21–23 and accompanying text.

in view, the efficiency and autonomy case is prima facie sufficient to justify reform, so that the justificatory burden shifts to those who would retain mandatory constraints. Section I.B engages Jiménez's critique on its own terms. Given his concession on welfare and the absence of harms to nonparties from our proposal,[19] we argue that his call for additional moral theory cannot justify retaining conceded inefficiencies. Part II reframes our Response in the language of normative powers and rights. We characterize the current regime as an uneven allocation of legal incidents from a functional perspective: Parties are empowered to set their primary contractual obligations but disabled from shaping key procedural incidents that govern enforcement and adjustment. This disability, however, is distributed unequally in practice because high-capacity actors can neutralize it through contract design while lower-capacity actors often cannot. The result is *inequality in normative opportunity* within a legal order which purports to treat all competent commercial parties as equals.[20] Part II also articulates two limiting principles—*anti-realization* and *assent*—that locate the moral and legal boundaries of our deregulatory proposal. Anti-realization preserves the substantive perimeter of what the state will enforce, by refusing to make legally enforceable (through procedural design) any exchanges that society has placed off-limits to contract. Assent preserves the validity conditions for the exercise of contractual power, by ensuring that consequential governance terms result from a voluntary agreement. With these limits in place, Part II concludes by setting out our notion of commercial anarchy: a regime of robust private ordering. The Conclusion briefly restates the argument.

I. THE BURDEN OF JUSTIFICATION

We proceed in two steps. We first reprise how the triad rules operate in practice. We then explain why, once those effects are in view, the case for deregulation is prima facie—and the burden shifts to those who would retain mandatory constraints.

A. Reprise: How the Triad Rules Function

Mandatory procedural rules prevent parties[21] from making potentially beneficial agreements and they require terms parties would reject

19 *See* Jiménez, *supra* note 15, at 898; *see also infra* note 21 and accompanying text.

20 *See* Schwartz & Sepe, *supra* note 1, at 312–14.

21 Our deregulatory proposal applies to contracts between sophisticated commercial parties whose performance would not impose material costs on nonparties. These contracting agents commonly have adequate information, can price terms and allocate risk, and have meaningful options before contracting. It is widely assumed that such parties can create efficient substantive terms; there is no reason to believe that their abilities vanish when

if permitted. Mandatory rules also bind unequally.[22] Well-resourced firms with legal teams and extensive deal experience can often circumvent the rules through clever drafting. By contrast, smaller (or one-shot) firms face higher costs and risks in attempting similar workarounds.[23]

This inequality in contractual freedom is deeply problematic in a liberal framework because the law is distributing *normative opportunity* based on the parties' organizational resources—a criterion with no public justification.[24] The law ostensibly gives everyone the same standard procedural regime, but in reality it offers procedural self-determination as an expensive privilege that only large firms and repeat players can afford.[25] Competitive markets amplify the harm: Rules that raise contracting costs for smaller firms impose a structural disadvantage on them that is unrelated to any legitimate public goal.[26]

B. A Prima Facie Case and Reversal of Burden

Jiménez's critique apparently meets us on common ground because he accepts, for purposes of discussion, our positive case against the triad rules.[27] Jiménez's real objection lies elsewhere. In his view, our argument as originally presented lacked a basic normative grounding.[28] We appealed to party autonomy and mutual benefit, but we did not adequately engage with deeper questions of justice, rights, or the proper role of the state.[29] Jiménez suggests that without a comprehensive moral justification, the case for deregulation remains incomplete.[30] Even if no one is materially hurt by allowing more contractual freedom, the question remains whether more freedom should exist—whether moral values might warrant keeping the triad rules despite their inefficiency and unequal incidence. Jiménez thus requires a fuller normative account before treating our welfare and autonomy

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they create procedural terms. For a sustained discussion of merchant rationality—and of how merchants, though boundedly rational, may converge over time toward economically rational contracting choices through learning and feedback—see generally Simone M. Sepe, *Freedom of Contract, Commercial Rationality, and State Cooperation*, 42 YALE J. ON REGUL. 1424, 1440–43 (2025).

22 *See* Schwartz & Sepe, *supra* note 1, at 292.

23 *See id.* at 308.

24 *See id.* at 309.

25 *See id.* at 292, 308.

26 *See id.* at 303–04.

27 *See* Jiménez, *supra* note 15, at 898.

28 *See id.* at 906–07.

29 *See id.* at 896–97, 907–09.

30 *Id.* at 896, 913.

case as sufficient. We argue that this approach places an unduly demanding burden on reformers and risks privileging the status quo.

In contrast, we treated the efficiency and autonomy case as prima facie sufficient to justify changing the rules, absent some specific showing of countervailing harm or principle.[31] It's not that we ignored morality—we invoked widely shared values like welfare maximization and respect for voluntary agreements, which are deeply embedded in contract law's ethos.[32] Honoring the choices of informed, consenting adults and improving their joint welfare are positive goods that our legal system functions to advance. Our argument was not only welfarist; it also included efficiency-independent justifications—grounded in voluntariness, non-harm, and equality in normative opportunity.[33] These justifications for expanded procedural freedom cohere with basic liberal constraints. In sum, we demonstrated that the triad rules hurt the parties they were supposed to protect and served no discernible public interest.[34]

The divergence between our approach and Jiménez's is best understood as a difference in standpoint. We write from the standpoint of practical lawmakers—judges or legislators—operating within the ordinary justificatory framework of contract law. Jiménez writes from the standpoint of broader political morality and institutional prudence. We agree that those considerations matter, but we think the burden he places on reformers is too demanding for ordinary lawmaking and risks paralyzing incremental improvement by insisting on a level of justificatory completeness that few legal policies can satisfy *ex ante*.

As an illustration, we showed that the triad rules function like a regressive tax: Powerful firms can often evade them, while smaller or less sophisticated firms cannot.[35] We drew an analogy to John Rawls's theory of justice, noting that the triad rules undermine a form of *equality of opportunity* among firms.[36] They fail Rawls's difference principle, which requires inequalities to work to the benefit of the least advantaged,[37] because here the rules burden the less advantaged for no gain. Jiménez resists labeling this outcome *unjust*.[38] He suggests that one could remain agnostic about whether hurting small firms and helping large firms is unjust, positing that perhaps the overall social effects are complex or that some broader distributive scheme might compensate

31 *See* Schwartz & Sepe, *supra* note 1, at 294.
32 *See id.* at 279–80, 294.
33 *See id.* at 292–94.
34 *See id.* at 293, 301.
35 *See id.* at 304.
36 *Id.* at 311–12.
37 *See id.*
38 *See* Jiménez, *supra* note 15, at 898–900.

for them.[39] Put simply, our normative assessment might be *incomplete*. That level of abstraction, we contend, cannot justify preserving a demonstrably failing rule.

Jiménez erects a similar burden of proof regarding other values. Thus, we argued that respecting the autonomy of commercial parties implies letting them govern their own transactions.[40] Jiménez responds that our notion of autonomy might be too *narrow*, or that contract law's limits could be justified by a broader conception of autonomy or democracy.[41] But again, he points to no concrete harm to anyone's autonomy that would result from allowing the opt-outs we propose.[42] Finally, citing tax and environmental laws as examples, Jiménez argues that the fact that some people can evade laws is not a reason to repeal them.[43] (Those laws, however, serve a discernible purpose though imperfectly enforced: Tax law still raises revenue and redistributes wealth; environmental regulations overall produce cleaner air and public health benefits.) In our case, by contrast, Jiménez concedes, for purposes of argument, that the mandatory contract rules are inefficient and generally ineffective, but argues that their retention may nonetheless be justified on broader moral and institutional grounds.[44]

Our argument against the triad rules had a welfare cast, but the version we use is grounded in voluntary transactions rather than in a social welfare function.[45] In standard welfare economics, a voluntary, informed agreement between competent adults—absent relevant externalities—is modeled as a Pareto improvement: Each party weakly prefers the contract to the status quo, and at least one party strictly prefers it. Enforcing such bargains does not aggregate welfare across persons in a utilitarian manner; it respects an outcome that all affected parties regard as at least as good for themselves as other available alternatives. On this account, the Pareto criterion incorporates both welfare (each party's well-being) and voluntariness (each party's authority over its own evaluative judgments).[46] Our proposal fits that structure. A party would opt out of a mandatory rule only if doing so improved its position relative to the regulatory baseline, and an opt-out regime does not require making anyone worse off in order to make someone else better off.[47]

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39 *Id.* at 900–01.

40 *See* Schwartz & Sepe, *supra* note 1, at 293.

41 *See* Jiménez, *supra* note 15, at 905–06.

42 *See id.*

43 *Id.* at 899–900.

44 *See id.* at 898, 908–09, 913.

45 *See* Schwartz & Sepe, *supra* note 1, at 316, 333–34.

46 *See* Sepe, *supra* note 21, at 1427 & nn.7–8.

47 *See* Schwartz & Sepe, *supra* note 1, at 296.

Once framed this way, the Pareto principle—and the way we employed it—admits a deontological interpretation. What matters is not that *total welfare* increases, but that no one is made worse off for the sake of others' gains. The no-sacrifice (or in Lockean terms, the no-waste) condition thus functions as a moral side constraint, resonating with familiar deontological critiques of utilitarianism (Rawls's insistence on inviolability; Nozick's rights as side constraints).[48] Feinberg's account of harm sharpens the institutional implication.[49] If harm consists in setbacks to interests that matter to the person harmed, then a legal rule that invalidates a term the parties would voluntarily have chosen—thereby leaving at least one party worse off than it permissibly could have been—imposes a setback, not merely a failure to confer a benefit.[50] Where a feasible alternative exists in which no one would be worse off and at least one party would be better off, the intervention is harmful in Feinberg's sense because it creates an avoidable loss.[51] Kronman's parallel point is that the attraction of Pareto superiority over wealth maximization lies in its respect for autonomy: A Pareto-superior change is one that every affected person would choose given their own preferences, while wealth maximization can endorse changes with winners and losers so long as gains outweigh losses.[52]

48 The Pareto principle has a deontological aspect because it incorporates a "no harm/no sacrifice" constraint that aligns with respecting persons and their claims. A Pareto improvement, by definition, makes at least one party better off without making anyone else worse off. From a deontological standpoint, this means that no one's legitimate expectations, rights, or interests are being set back for the sake of another's gain. If each person is owed a moral status that forbids worsening their position without justification or consent, then changes that benefit some while harming none are, all else equal, morally permissible—and arguably morally required—because they honor the separateness of persons while still allowing for improvement. *See* Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 152–53 (1970); RAWLS, A THEORY, *supra* note 12, at 3–4; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33 (1974); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 63–84 (1962).

49 *See generally* JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1984).

50 *See id.* at 31–36 (defining harm, in the relevant sense, as a setback to a person's interests); *id.* at 33–34 (emphasizing that to harm someone is to make that person worse off by setting back an interest that matters to them).

51 *See id.* at 34–35 (explaining that the harm principle is properly concerned with preventing avoidable and substantial harm); *cf.* Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1285–86, 1305–06 (2003) (discussing harm in comparative terms—worsening relative to a feasible alternative baseline—and the implications of alternative baselines for identifying "harm").

52 *See* Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 229–34 (1980) (criticizing wealth maximization as a normative criterion and contrasting it with the Pareto principle's connection to voluntary agreement/consent); *see also* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law*

Taken together, these lines of argument show that the Pareto criterion is more than an efficiency heuristic. It embeds a no-harm/no-sacrifice constraint with deontological bite. Absent a concrete countervailing moral duty or public-policy limit, legal constraints that push parties—especially lower-capacity parties—into Pareto-dominated arrangements do not merely fail to promote welfare; they inflict avoidable harms by overriding voluntary choices that would have made at least one person better off while harming no one else.[53] To summarize, we criticize the differential effect of the triad rules on deontological as well as consequentialist grounds.

Our disagreement with Jiménez ultimately is about justification. Do the mandatory procedural rules in commercial contracts deliver moral or policy benefits that warrant their costs? Or do they persist largely as path-dependent constraints that sit uneasily with a legal order committed to welfare and voluntary choice? Jiménez's critique invokes broader moral and institutional reasons for caution, but it does not identify a benefit specific to the triad that, in our view, warrants the costs we have identified. We address those concerns in the next Part by situating our proposal within first principles of legal structure.

II. NORMATIVE POWERS AND DEREGULATORY PARITY

Jiménez's central charge is that our case lacks a sustained normative grounding.[54] We disagree. But we take the critique as an occasion to state our normative architecture more explicitly. On the view we defend, the question is not only whether deregulation increases welfare, but whether the allocation of contractual authority is justified by principles of justice that govern when and how a liberal state may empower private parties. We therefore restate the proposal on deontic grounds and specify its limits—limits derived from those principles and designed to fix the proper distribution of contractual authority between parties and the state.

A. Unequal Contracting Powers

Our proposal follows from an institutional premise: Contract is a power-conferring legal practice. By contracting, parties enlist the

Adjudication, 8 HOFSTRA L. REV. 487, 488–97 (1980) (contrasting Pareto superiority with Kaldor-Hicks/wealth-maximization approaches and discussing the "consent" intuition often associated with Pareto improvements).

53 *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 178 (A.L.I. 1981) (providing that a promise is unenforceable *on grounds of public policy* when the policy against enforcement outweighs the policy in its favor)*; see also* Posner, *supra* note 52, at 500 (suggesting that legal decisionmaking guided by efficiency can, in that sense, "promot[e] personal autonomy").

54 *See* Jiménez, *supra* note 15, at 896, 906–07, 913.

state's enforcement machinery to create (or modify) binding claim–duty relations. In this sense, contract law delegates a circumscribed form of private lawmaking authority: Within the domain the law recognizes, private parties can alter their normative situation, and the state will treat those alterations as binding.[55]

Delegation operates through distinct legal incidents.[56] Some are first order and *deontic*: They specify what is required, forbidden, or permitted in performance, and thus generate claim-rights, duties, liberties, and no-rights.[57] Others are second order and competence related: They specify what normative changes are possible or impossible within the rule system, and thus generate powers, liabilities, immunities, and disabilities.[58] A party can violate a duty; it cannot successfully perform an act for which it lacks legal power. An attempted exercise of a disability is a nullity. For this reason, much of what is called mandatory

55 *See* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727–28 (2008) (describing the "power-conferring" picture: "entering into a contract is an act of self-legislation," and "contract law is what H.L.A. Hart calls a 'power-conferring' rule," enabling parties "to create and modify their legal obligations to one another," *id.* at 1727 (quoting H.L.A. HART, THE CONCEPT OF LAW 32 (1961))); *id.* at 1734 (stating that "contracting parties exercise a legal power" because "[b]y entering into a legally enforceable agreement, the parties create new duties for themselves or modify or extinguish old ones").

56 *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–34 (1913) (setting out the analytic table of jural correlatives and jural opposites—claim-right/duty, privilege/no-right, power/liability, immunity/disability—and using it to show that legal relations decompose into distinct incidents rather than collapsing into an undifferentiated "right"); *see also* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 745–49 (1917) (analyzing property—and, by extension, other legal relations—as an aggregate of distinct Hohfeldian incidents: in rem claim-duty relations, privilege-no-right relations, power-liability relations, and immunity-disability relations, and stressing the importance of keeping these analytically distinct); Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFFS. 223, 224–26, 232–34 (2005) (explaining the "molecular" approach: ordinary rights are often complex bundles "made up of multiple Hohfeldian incidents," *id.* at 234, and the two canonical forms of rights-assertion can be "resolvable into combinations" of the four "atomic" incidents, *id.* at 225).

57 *See* L.W. SUMNER, THE MORAL FOUNDATIONS OF RIGHTS 22–25 (1987) (setting out the deontic triad—*required/forbidden/permitted*—and using it to "begin assembling" the first-order Hohfeldian relations: restrictive rules impose duties, with correlatives/opposites yielding claims, liberties, and no-rights, *id.* at 23).

58 *Id.* at 27–31 (distinguishing second-order rules that "enable us to manipulate normative relations" from first-order conduct-regulating rules; explaining that second-order rules determine "not what we may do but what we can do," i.e., what is possible/impossible within the rule system; defining a Hohfeldian power as the ability, under the system's rules, to "alter or sustain" a normative relation, *id.* at 27–28); *id.* at 30–31 (mapping the logical relations among the second-order Hohfeldian incidents—power/liability as correlatives and immunity/disability as the corresponding opposites—and providing the correlatives/opposites matrix).

contract law is not a deontic prohibition on conduct but a competence rule: It renders certain attempted alterations of remedial or interpretive incidents legally ineffective.[59]

Modern commercial contract law embodies a particular allocation of these second-order contracting powers. Parties have broad powers over the substantive content of exchange—price, quantity, performance specifications, risk allocations, and so on. But parties have materially weaker powers over key procedural incidents of the contract. Analytically, the parties' power to create first-order duties is paired with a disability as to many second-order terms that govern how those duties will be interpreted, enforced, and adjusted over time. The state holds the correlative immunity: The law withholds certain procedural powers from the parties, effectively reserving that domain for itself. The penalty doctrine is a classic example. Parties may specify a payment due upon breach, but the law disables them from creating an enforceable claim for an amount that a court deems *punitive* rather than compensatory.[60] Similar competence limits appear when courts refuse to honor no extrinsic evidence clauses or anti-modification agreements.[61] By contrast, the law does recognize party control in closely related meta-domains—such as choice of law, forum selection, and arbitration clauses—showing that this restriction on procedural freedom is a selective policy choice, not an inherent necessity.[62]

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59 *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (A.L.I. 1981) ("A promise or other term . . . is unenforceable on grounds of public policy if legislation provides that it is unenforceable" *or* if "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms"); *id.* § 179 (stating that sources of "public policy" include "legislation" and the common law); *id.* § 182 (stating that a promise is unenforceable if performance would involve a violation of law); *id.* § 183 (stating that when an agreement is prohibited by statute, it is unenforceable to the extent required by the statute); Holman v. Johnson (1775) 98 Eng. Rep. 1120, 1121; 1 Cowp. 341, 343 ("No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.") (being a classic common law statement of the nonenforcement principle).

60 *See* Schwartz & Sepe, *supra* note 1, at 289.

61 *Id.*

62 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1)–(2) (A.L.I. 1971) (stating that party autonomy controls in choice of law, subject to limited exceptions such as lack of a substantial relationship or conflict with a fundamental policy of a state with a materially greater interest); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (holding that forum-selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable'"); Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) (holding that when a "contract contains a valid forum-selection clause, [it] 'represents the parties' agreement as to the most proper forum'" and alters the usual transfer analysis so that the party defying the clause bears the burden (quoting Stewart Org. v. Ricoh Corp., 487 U.S. 22, 31 (1988))); 9 U.S.C. § 2 (2024) (providing that written arbitration agreements "shall be valid, irrevocable, and enforceable," subject only to generally applicable contract defenses).

The principal difficulty with the current allocation is not exhausted by this state-party division of authority. The regime also generates a horizontal asymmetry among contracting parties because procedural disabilities do not bind uniformly.[63] As we described earlier, repeat players with contracting infrastructure can often replicate the practical function of a prohibited procedural term by using permissible adjustments to substantive terms, forum selection, organizational structure, or other deal design.[64] In such cases, the legal prohibition is not an absolute barrier but rather a design puzzle. The additional design and transaction costs are manageable for some parties (typically large firms with legal teams) but prohibitive for others (smaller firms or those without expert advice). The same legal rule thus yields two very different positions on the ground: For high-capacity parties, the rule's constraint is merely a cost (a hurdle they can pay to work around), whereas for low-capacity parties, the constraint is effectively a true incapacity (a hard limit on what they can achieve in a contract).[65]

This is a distribution of second-order contractual authority: The issue is access to legally available forms. Procedural regulation leaves formal freedom intact while making effective procedural self-governance contingent on costly contracting technologies. Parties with that capacity can reach governance states that others cannot, so the law allocates normative opportunity by private infrastructure rather than by any principled criterion.[66]

Sumner distinguishes two conceptions of rights. On the *interest conception*, a right protects an interest of the right-holder and thereby justifies imposing duties on others; on the *choice conception*, a right protects a domain of normative control—Hart's small-scale sovereignty—by giving the right-holder managerial powers over another's duty, including powers to demand performance, to waive or modify the duty, and to invoke enforcement.[67] The contrast is whether rights are best

63 *See* Schwartz & Sepe, *supra* note 1, at 292–93, 308.

64 *Id.* at 292.

65 *Id.*

66 *See id.* at 292, 309.

67 *See* SUMNER, *supra* note 57, at 46–48 (distinguishing an interest conception—rights as protections of the right-holder's welfare-relevant interests, grounding duties on others—from a choice/"will" conception—rights as allocations of normative control, with the right-holder as "the active manager of a network of normative relations," and emphasizing that, on the choice conception, the right-holder must possess "managerial abilities," *id.* at 47); *id.* at 46–49 (noting that, on the control account, even a claim-right implicates powers of demand or waiver); *see also* H.L.A. HART, *Legal Rights*, *in* ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 162, 183–84 (1982) (articulating the will/choice picture: the right-holder is "a small-scale sovereign to whom the duty is owed," with the "fullest measure of control" including powers to waive or extinguish the duty and, after breach or threatened

understood as protections of welfare-relevant interests or as allocations of agency.

Commercial contract law is largely consistent with the choice conception of rights. Contracts do not merely create static benefits; they create structured choices. For example, a contractual claim (a right to be paid) inherently carries certain powers of control: The promisee can choose to enforce the claim, to forgive it, or to renegotiate it. Even basic contract rights are embedded in a framework that gives the right holder some control over enforcement and waiver. Thus, contract rights are not merely interests protected by duties, but also choices protected by legal powers and immunities.

Once we understand contract as a choice-right regime, the substantive-procedural split in current law is not justifiable. The reasons for respecting parties' control over price, quantity, and risk allocation do not change character when the focus shifts to second-order terms of enforcement and interpretation.[68] In both cases, the parties are pursuing their joint projects and allocating risks through contractual terms, under the same baseline constraints (true assent, no fraud or duress, no external harms).[69] A legal system that deems parties competent to *legislate* the content of their exchange but incompetent to legislate the enforcement architecture is splitting one integrated practice into *private* and *public* halves without a principled boundary—given that the moral risk (voluntary harm to self or others) is the same in both.[70]

The result is a two-tier regime in which effective procedural authority tracks contracting capacity rather than any publicly justified distinction among commercial actors.

This regime yields a systematic *inequality in normative opportunity*.[71] Parties operating in the same markets, engaging in similar transactions, face different feasible sets of enforceable governance structures. This difference is not tied to any morally relevant feature of their deals (such as external harms or information asymmetries); it correlates with the parties' private capacity to navigate the legal framework. The law thus effectively parcels out the power to shape one's contract based on a criterion—the ability to *purchase* a workaround—that the liberal state cannot publicly justify.[72] A state committed to treating competent actors as equals in authority cannot, at the same time, allocate practical

breach, to enforce it through legal process (and related control over remedial consequences), *id.* at 183 (footnote omitted)).

68 *Cf.* Schwartz & Sepe, *supra* note 1, at 314–15.

69 *See id.* at 315–16.

70 *See id.* at 315–16, 321.

71 *See id.* at 313.

72 *See id.*

sovereignty over contract terms in a way that favors a subset defined by wealth or organizational resources.[73]

This stratification also reveals a tension in the current regime. A competence rule that disables a certain type of term is *stable* only if the legal system also *disables* all functional equivalents of that term. But contract law's broad substantive freedom inevitably permits substitutes for most prohibited arrangements.[74] Thus, the state faces a dilemma: either accept that procedural mandatory rules will be porous and uneven in effect or extend regulatory control to the equivalents as well (which would mean also curtailing substantive freedom). At present, the system occupies an unstable middle ground. It announces procedural limits as if they were absolute matters of public policy, yet it preserves enough freedom in other dimensions that sophisticated parties can partially escape those limits.[75] The outcome is a deadweight loss for those who try to circumvent the rules, binding constraints for those who cannot, and no coherent account of what public value is achieved in return.

This is where the commercial archipelago we proposed becomes relevant. The current regime already generates an *informal archipelago*: Repeat players assemble localized governance systems through bespoke drafting, arbitration design, forum selection, and organizational substitutes. The *archipelago model* is a response to that structure. It would replace covert, capacity-weighted circumvention with overt and generally available governance options.[76] Associations could supply standardized packages of remedial, interpretive, and adjudicative rules, lowering fixed costs and making second-order powers usable for a wider set of commercial actors. The point is not to create procedural autonomy, which already exists for some, but to regularize it on terms consistent with equality in normative opportunity. The state's role would remain the enforcement of lawful bargains within the democratically set substantive perimeter, with ordinary safeguards for assent and public policy; what changes is that procedural self-governance is no longer an expensive privilege.

Our proposal—essentially the archipelago idea narrowed to the trio of rules at issue—thus would replace the current structure with a more stable and just allocation.[77] Commercial parties would hold broad powers over both substance and procedure, constrained at the margins by the same safeguards that apply to any contract (true assent

73 *See id.* at 311 n.164, 312 n.169.
74 *See id.* at 308.
75 *See id.*
76 *See id.* at 325–29.
77 *See id.* at 333.

and prevention of public harm), and supported (at the limit) by institutions that help make those powers practically exercisable rather than merely theoretical.

B. Deregulatory Parity and Its Limits

The legal system determines which first-order claim-duty relationships it will recognize (this is the domain-defining step, delineating what kinds of promises can be enforced). Within that *domain*, parties exercise their second-order powers to create, modify, and allocate the first-order obligations, and to specify the governance architecture for their deal. A further layer of rules concerns *validity*: The law asks whether a purported exercise of power (creating a contract or a contract term) succeeded, which depends on assent and the absence of defects like fraud or duress. The limits relevant to our deregulatory proposal are consistent with this conceptual structure. One limit operates at the domain level, defining what kinds of obligations the state will simply not enforce regardless of consent. Another limit operates at the validity level, defining what counts as an agreed-upon exercise of private power. These constraints are powers over contractual powers, defining both the competence to invoke state enforcement and the conditions under which that competence is validly exercised.[78] By maintaining these two limits, we preserve contract law's public-policy boundaries while securing *equality of normative opportunity* for parties within the permissible domain.

Jiménez also invokes Seana Shiffrin's nonpaternalistic *state noncomplicity* objection[79]: Because contract enforcement is an act of public cooperation, the state may refuse to enforce voluntary commercial terms on moral grounds.[80] In the business settings we address, however, that objection does not justify mandatory limits on procedural ordering within the domain the law is prepared to enforce. Selective

78 *Cf.* Wenar, *supra* note 56, at 229–30, 230 n.8 (introducing "higher-order" Hohfeldian incidents as "rights to alter our privileges and claims, and rights that our privileges and claims not be altered," and noting that beyond second-order powers and immunities "[t]here are . . . 'third-order' powers and immunities that range over second-order incidents, and so on," yielding a layered structure of authority).

79 *See* Jiménez, *supra* note 15, at 908–09.

80 *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFS. 205, 221–25, 229–30 (2000) (arguing that contract enforcement is not a morally neutral response to private choice but an exercise of public power that can render the state complicit in objectionable treatment, defending judicial nonenforcement of even voluntarily accepted terms on the ground that the state may properly withhold its cooperative assistance when enforcement would involve it in moral wrongdoing, and presenting this as a nonpaternalistic justification distinct from protecting parties from their own choices).

nonenforcement would predictably privilege parties with greater extralegal enforcement capacity, recreating inequality of opportunity through unequal access to substantive substitutes.[81]

But the premise that enforcement involves public force does support a different, narrower constraint: our first limiting principle—*anti-realization*. This principle holds that state enforcement is the application of public force on behalf of private will. Some private commitments, however, lie outside the domain of enforceable contracts because turning them into legal obligations would violate fundamental public values. Illegality is the clearest example, but there are other well-established categories—vote-selling, transactions tantamount to bribery, and agreements that trade in personal status or fundamental rights.[82] Anti-realization identifies categories of would-be contractual obligations that the state refuses to enforce as a matter of public policy.

Anti-realization takes on particular importance once procedural freedom expands because freedom creates a risk of recharacterization: Parties may attempt to achieve through procedural form what substantive law forbids. The state's filter is not whether it approves a particular procedural device; it is whether the device functions to realize, through procedure or remedy, an exchange that is substantively impermissible.[83] A contract might, for example, style a term as *remedial* while using it to impose an effectively punitive outcome—such as a

81 Jiménez relies on Shiffrin's state noncomplicity claim to argue that, because enforcement is an exercise of public coercion, the state may refuse cooperation with terms it regards as morally objectionable. We accept the premise that enforcement is public force, and we agree that it supports domain-boundary exclusions of the sort stated in this Response. The disputed question about Shiffrin's objection is more general and concerns both substantive rules and procedural terms (discussed here): Within the enforceable domain, does the state have a further unilateral warrant to deny enforcement? One of us answers no. Selective nonenforcement reallocates effective enforcement from law to extralegal substitutes (reputation, repeat-play leverage, relational networks, and, more generally, comparable private enforcement resources), and those substitutes are unevenly distributed. The expected consequence is an inequality of opportunity in the ability to make commitments credible, produced by differential access to nonlegal enforcement capital rather than by any publicly defended distinction in the permissibility of the underlying exchange. For the full argument, see Sepe, *supra* note 21, at 1452–54.

82 *See, e.g.*, 18 U.S.C. § 597 (2024) (criminalizing payments made or accepted "to vote or withhold [a] vote," underscoring that agreements for vote-selling are outside the domain of legally cognizable exchange); McConnell v. Commonwealth Pictures Corp., 166 N.E.2d 494, 496 (N.Y. 1960) (refusing enforcement where the plaintiff's performance centrally involved conduct tantamount to bribery/illegality); RESTATEMENT (SECOND) OF CONTRACTS § 189 (A.L.I. 1981) (stating that promises "unreasonably in restraint of marriage" are unenforceable on public-policy grounds); *id.* § 190(2) (stating that "a promise that tends unreasonably to encourage divorce or separation" is unenforceable); *id.* § 191 (stating that promises trading in child-custody rights are unenforceable unless consistent with the child's best interests).

83 *Cf.* Schwartz & Sepe, *supra* note 1, at 306.

penalty for breach—that could not be enforced as a core obligation.[84] Or a party might attempt to waive a fundamental, noncontractible duty—such as liability for intentional fraud—by recoding the waiver as a *procedural* stipulation. Anti-realization blocks these moves, ensuring that additional governance choice does not become a mechanism for smuggling forbidden transactions into enforceability.[85]

The second limiting principle is *assent*, understood as a condition of validity for procedural self-governance. Expanded second-order powers are available only when their exercise preserves the transaction's character as a voluntary exchange between free parties. A procedural innovation cannot be enforced if, because of concealment, manipulation, or coercive pressure, the resulting agreement cannot be attributed to a voluntary choice.[86] Standard doctrines therefore continue to do their work: Fraud, duress, and undue influence vitiate consent; so do process defects that prevent a party from understanding what it is accepting.[87]

Assent requires clear manifestation as deviations from defaults increase. Nonstandard or high-stakes governance terms should be stated

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84 *Id.* at 306 n.141, 307 n.143.

85 *Cf. id.* at 316–17.

86 *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (A.L.I. 1981) (stating that "a contract requires a bargain in which there is a manifestation of mutual assent"); *id.* § 19 (stating that assent must be manifested by words, acts, or conduct); *id.* § 163 (stating that misrepresentation as to the character/essential terms can prevent effective assent); *id.* §§ 164(1), 167–69 (stating that a contract is voidable if a party's assent is induced by a fraudulent or material misrepresentation on which the party is justified in relying, including by nondisclosure where it is equivalent to an assertion); *id.* §§ 161–62 (stating that nondisclosure can operate as misrepresentation and defining when misrepresentation is fraudulent/material); *id.* §§ 175(1), 176–77 (stating that a contract is voidable if assent is induced by duress—an improper threat leaving no reasonable alternative—or by undue influence); *cf.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (holding that a forum-selection clause is unenforceable if "unreasonable" or if its inclusion was the product of "fraud or overreaching"); 9 U.S.C. § 2 (2024) (providing that arbitration clauses are enforceable save upon grounds that exist at law or in equity for the revocation of any contract—i.e., including fraud, duress, and coercion).

87 *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (A.L.I. 1981) (defining void and voidable contracts, thereby locating fraud/duress/undue influence within the basic architecture of enforceability); *id.* § 12 (stating that capacity is a prerequisite to enforceable obligation); *id.* § 20(1) (stating that there is no contract where there is no mutual assent because the parties attach materially different meanings under specified conditions); *id.* § 211(3) (stating that a standard-form term is not part of the agreement where the drafter has reason to believe the adhering party would not assent if aware of it—capturing process defects that defeat meaningful acceptance); *id.* §§ 159–62 (providing a general definition of misrepresentation and when nondisclosure operates as misrepresentation, as the basic framework for the fraud doctrines); *id.* § 174 (stating that when there is physical compulsion, apparent assent is ineffective); *id.* § 177 cmt. b (describing undue influence as "unfair persuasion" in a relationship of dominance or trust, i.e., a classic consent-vitiating defect).

in ways that make acceptance verifiable—conspicuous language, separate acknowledgment, or comparable devices that reduce the risk of surprise and evidentiary dispute. Commercial law already imposes such form requirements for certain risk-shifting provisions.[88] The same logic generalizes: If parties want a bespoke procedural regime, they must adopt it in a manner that makes the agreement, and its consequences, unmistakable.

Together, anti-realization and assent supply the only limiting structure our project needs: They preserve the substantive perimeter set by public policy and the voluntariness conditions that make an agreement a contract at all. Within those bounds, there is no principled basis for denying parties procedural authority while granting them substantive authority.

We acknowledge a practical concern: Increasing contractual freedom over procedure could introduce more variation in contract terms, potentially raising interpretive or enforcement costs. However, commercial practice itself offers an answer. Parties who opt out of defaults have incentives to draft tailored terms clearly and operably, because they want those terms to be enforceable. Courts already manage a great deal of customization through mechanisms like arbitration clauses, choice of law clauses, liquidated damages provisions, and other negotiated terms, using familiar interpretive tools and existing safeguards. We expect that expanding procedural freedom would cause a reallocation of decisionmaking: Some questions that courts now decide *ex post* (by applying mandatory rules) would instead be decided by parties *ex ante* (by planning their own frameworks).[89]

Moreover, greater choice would likely spur useful standardization. If procedural design becomes an explicit object of competition and innovation, we can expect industry groups and trade associations to develop modular governance regimes—prepackaged sets of rules for

88 *See id.* § 211(3) (stating that in standardized agreements, a term is not part of the agreement where the drafter has reason to believe the adhering party "would not" assent if aware of it—reflecting the law's insistence that meaningful assent be verifiable when terms depart from ordinary expectations); *see also* U.C.C. § 2-316(2) (A.L.I. & UNIF. L. COMM'N 2023) (imposing heightened form requirements for certain risk-shifting terms: to exclude or modify the implied warranty of merchantability, the disclaimer must mention "merchantability" and, if in writing, must be conspicuous; to exclude any implied warranty of fitness, the exclusion must be by a writing and conspicuous); *id.* § 1-201(b)(10) (defining "conspicuous" by reference to headings in capitals/contrasting type and language set off to call attention, and making conspicuousness a question for the court—i.e., devices designed to make acceptance provable and reduce surprise and evidentiary dispute); *cf. id.* § 2-201(1) (providing a formal writing requirement for enforcement of contracts for the sale of goods priced at $500 or more, reflecting the legal system's use of form to manage stakes and proof).

89 *Cf.* Schwartz & Sepe, *supra* note 1, at 326.

interpretation, remedies, and dispute resolution that parties can adopt wholesale. This would shift some innovation from costly one-off lawyering by elite firms to accessible products that any similarly situated firm can use. Such standardization would lower drafting costs, reduce error rates, and make procedural self-governance feasible for parties who currently are stuck with the state's defaults.[90] It would also enhance transparency: Instead of procedural strategies being hidden in dense contracts, the key terms could become known packages or model clauses, which would be easier for counterparties and courts to recognize. Throughout, the state's essential role would remain the same: It would enforce commitments within the permissible domain, refuse to enforce those that violate fundamental policy, and insist on real assent. What the state need not do is impose a single, inflexible set of procedural rules on all parties within the legitimate commercial domain.

The emerging picture is one of bounded parity. We preserve the boundaries that safeguard the integrity of contract law (no enforcement of contracts that violate fundamental norms and no enforcement of terms without consent), while advancing a liberal ideal of equality in contracting freedom. Similarly situated commercial actors should not be relegated to different contracting capabilities merely because some can effectively purchase loopholes and others cannot.[91]

CONCLUSION

The triad of mandatory procedural rules on remedies, interpretation, and modification imposes costs while delivering no offsetting benefits. Jiménez does not dispute this welfare assessment. His objection is principally methodological: He argues that our welfare case, without a fuller account of political morality, is insufficient to establish the case for reform.[92] A demand for theoretical completeness cannot

90 *Cf. generally* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) (developing the transaction-cost account of contractual standardization: reuse of common terms reduces drafting and negotiation costs and, through learning/network effects, lowers interpretation and litigation uncertainty); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006) (explaining how standardized modular boilerplate hides complexity, lowering reading and information-processing costs for boundedly rational parties and reducing error from unforeseen interactions among bespoke provisions); Gillian K. Hadfield, *Legal Markets*, 60 J. ECON. LITERATURE 1264 (2022) (arguing that scalable, standardized legal "inputs" and intermediated legal services can reduce the cost of legal infrastructure and expand access—making sophisticated private ordering feasible for parties who otherwise must rely on off-the-rack state defaults).

91 *Cf.* Schwartz & Sepe, *supra* note 1, at 292–93.

92 *See* Jiménez, *supra* note 15, at 896, 913.

itself support retaining the status quo, however. The justificatory burden, therefore, remains on those who would preserve the mandatory rules to specify the interest or principle those rules protect. This Response's further contribution is a rights-based diagnosis. The current regime allocates contractual authority asymmetrically: Parties are empowered to set primary obligations but disabled from specifying key incidents of enforcement and adjustment. Because high-capacity actors can often replicate the barred incidents through costly substitutes, the disability is not uniform in practice; it produces inequality in normative opportunity within a system whose goal is to treat competent commercial parties as equals in authority. Deregulatory parity responds by according to parties the same authority over procedural rules as parties have over substantive rules, within the democratically fixed substantive perimeter of permissible exchange.

The policy implication is direct. For merchants, the procedural rules at issue should be converted into defaults, so parties may specify governance terms by agreement, subject to public policy limits and valid assent. This reform respects voluntary agency, reduces regressive incidence, and fits the liberal premise that coercive restriction requires a justification. It is also the first step toward *commercial anarchy*, the regime this Response restates and defends, in which parties, not the state, make their own contract law. Jiménez's Reply identifies no such justification for the mandatory rules, so reform should proceed.