



12-1-2022

A Quick Critique of the Common Law of Contracts and Capitalism

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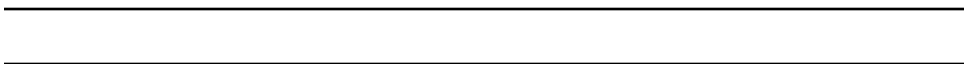
Recommended Citation

Charles R. Calleros, *A Quick Critique of the Common Law of Contracts and Capitalism*, 53 U. PAC. L. REV. 706 (2022).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol53/iss4/7>

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UNIVERSITY OF THE PACIFIC LAW REVIEW



A Quick Critique of the Common Law of Contracts and Capitalism

Charles R. Calleros*

Our common law has long prized “ancient concepts of freedom of contract.”¹ Historically, however, some have enjoyed more freedom than others. European “settlers” wrested 1.5 billion acres of land from Native Americans through means other than arms-length bargaining, and they enslaved many of them.²

But our shameful history of slavery is largely the story of millions of slaves of African origin. Far from having freedom of contract, they were the subject of contracts: treated as property, purchased and sold, sometimes leased to others or used as collateral for bank loans,³ and sometimes covered by loss insurance.⁴ We take pride in our nation’s impressive economic growth, but its foundation rests on slave labor.⁵

In the same era, the common law of coverture provided that women lost their capacity to enter into contracts once they married because their husbands’ rights superseded their legal rights.⁶ In the second half of the nineteenth century, states

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1. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

2. See ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* (2016) (focusing on enslavement in the West); ALAN GALLAY *THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH, 1670–1717* (2002); BRETT RUSHFORTH, *BONDS OF ALLIANCE INDIGENOUS AND ATLANTIC SLAVERIES IN NEW FRANCE* (2013).

3. See Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 *CONN. L. REV.* 1 (1995); see also *The 1619 Project*, N.Y. TIMES (Aug. 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (on file with the *University of the Pacific Law Review*); Bonnie Martin, *Slavery’s Invisible Engine: Mortgaging Human Property*, 76 *J. S. HIST.* 817 (Nov. 2010).

4. See Rachel L. Swarns, *Insurance Policies on Slaves: New York Life’s Complicated Past*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html> (on file with the *University of the Pacific Law Review*); see Sharon Ann Murphy, *Securing Human Property: Slavery, Life Insurance, and Industrialization in the Upper South*, 25 *J. EARLY REPUBLIC* 615, 615–652 (2005); Insurance Policy for Robert Moody (1845–1888), in SCHOMBURG CENTER FOR RESEARCH IN BLACK CULTURE: MANUSCRIPTS, ARCHIVES AND RARE BOOKS DIVISION, <https://digitalcollections.nypl.org/items/510d47df-e942-a3d9-e040-e00a18064a99> (on file with the *University of the Pacific Law Review*).

5. See *SLAVERY’S CAPITALISM – A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 26 (Sven Beckert & Seth Rockman eds. 2018) (recognizing the “indispensable” role that slave-produced cotton played in “national economic development”); see also Sven Beckert, *Emancipation and Empire: Reconstructing the Worldwide Web of Cotton Production in the Age of the American Civil War*, 109 *AM. HIST. REV.* 1405, 1408 (Dec. 2004) (“[The cotton industry] catapulted the United States onto the center stage of the world economy.”); Calvin Schermerhorn, *How America Was Built on Slavery: Those Roots Can Still Be Felt Today*, ARIZ. STATE U. (June 19, 2020), <https://news.asu.edu/thought-huddle/how-america-was-built-slavery-those-roots-can-still-be-felt-today> (on file with the *University of the Pacific Law Review*).

6. 41 *AM. JUR. 2D Contracts* §§ 1–9 (1995); 5 *WILLISTON ON CONTRACTS* § 11:2 (4th ed. 2021); 1 *WOMEN IN AMERICAN LAW: FROM COLONIAL TIMES TO THE NEW DEAL* (Marlene Stein Wortman ed. 1985); e.g., Hon. Richard A. Dollinger, *Judicial Intervention: The Judges Who Paved the Road to Seneca*

began abolishing coverture,⁷ and the Thirteenth Amendment abolished slavery,⁸ but the common law of contracts remained indifferent to discrimination in contracting.

Freedom of contract meant that an individual could choose whether to make an offer to another person, or whether to accept an offer from another person, on any basis, including the other person's race or sex. The common law of contracts was not concerned about the basis for one's exercise of freedom in contracting.⁹

Post-civil war federal legislation prohibited racial discrimination in contracting,¹⁰ but the statute lay dormant for a century under the weight of restrictive judicial interpretations,¹¹ becoming newly relevant shortly after the Civil Rights Act of 1964.¹² In the meantime, wealth creation since the First Reconstruction was often denied on the basis of race through employment discrimination, redlining and other mortgage discrimination by banks,¹³ as well as discrimination in federal farm loans.¹⁴ Freedom of contract has little value to

Falls in 1848, 12 JUD. NOTICE 4, 5 (2017) (“[U]nder coverture, a married woman was ‘civilly dead.’”).

7. Dollinger, *supra* note 6, at 5 (discussing the New York State Married Women's Property Act's passage, which allowed women to retain ownership over personal property brought into marriage and stipulated that contracts entered into prior to marriage remained valid).

8. U. S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

9. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 194 (1976) (White, J., dissenting) (explaining traditional contract law's rule: “no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract”); *see also* MICHAEL TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 188–93 (1993) (discussing invidious discrimination permitted by the common law of contracts, the libertarian defense of such discrimination, and modern legislative restrictions on such discrimination).

10. Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–1982 (1987) (prohibiting, *inter alia*, racial discrimination in the making and enforcement of contracts and prohibiting racial discrimination in property rights, including the rights to purchase, lease, and sell)).

11. *See* Pamela S. Karlan, *Contracting the Thirteenth Amendment*, Hodges v. United States, 85 B.U. L. REV. 783 (2005) (contrasting *Lochner's* emphasis on freedom of contract with the decision in *Hodges* which failed to protect African Americans' right to labor); John C. Williams, *Slave Contracts and the Thirteenth Amendment*, 39 SEATTLE U. L. REV. 1009, 1016–19 (2015).

12. 42 U.S.C. §§ 2000e–2000e-15 (1970), *amended by* 42 U.S.C. §§ 2000e–2000e-17 (Supp. II 1972); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (reviving § 1982 by applying it to private discrimination); *Runyon*, 427 U.S. at 160 (reviving § 1981 in 1976 by applying it to private discrimination, relying on *Jones*).

13. NAT'L CMTY. REINVESTMENT COAL., HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY 4 (Bruce Mitchell & Juan Franco eds., 2018), https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf (on file with the *University of the Pacific Law Review*); URBAN INST., MORTGAGE LENDING DISCRIMINATION 1 (Margery Austin Turner & Felicity Skidmore eds., 1999), <https://www.urban.org/sites/default/files/publication/66151/309090-Mortgage-Lending-Discrimination.PDF> (on file with the *University of the Pacific Law Review*); Press Release, Off. of Pub. Aff., U.S. Dep't of Just., *Justice Department Announces New Initiative to Combat Redlining* (Oct. 22, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining> (on file with the *University of the Pacific Law Review*). *See generally* Keeanga-Yamahtta Taylor, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

14. Chaumtoli Huq, Integrating A Racial Capitalism Framework into First-Year Contracts: A Pathway to Anticapitalist Lawyering, 35 J.C.R. & ECON. DEV. 181, 202 n. 125 (2022) (gathering other resources); Mark Bittman, *Opinion: Black Farmers May Finally Get the Help They Deserve*, N.Y. TIMES (last visited June 16,

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someone who is arbitrarily denied a business loan or home loan. And for homeowners of color who seek to realize its appreciation in value, freedom of contract is devalued by disparate appraisals of the same home, depending on whether the appraiser believes that the owner is White or Black.¹⁵

Other marginalized communities must live with the common law principle that the objective theory of contracts will recognize mutual assent even if one party could not understand the terms due to a language barrier, on the reasoning that a party bears the responsibility to secure whatever assistance they need to understand the terms of an offered contract before manifesting assent.¹⁶ The U.S. Court of Appeals for the Third Circuit applied this principle with surprising breadth by finding, over a dissent, that a monolingual Spanish-speaking employee assented to an arbitration clause even though a bilingual employee *selected by the employer* failed to include the arbitration clause in his translation.¹⁷ In this context, the employee deserved freedom *from* the arbitration agreement.¹⁸

To be fair, contract law has provided the grease that lubricates an impressive economic engine, a resilient engine that has rewarded innovation and generated great wealth.¹⁹ But the inequality in the distribution of income and wealth is mind-

2022), <https://www.nytimes.com/2021/03/04/opinion/black-farmers-covid-relief.html> (on file with the *University of the Pacific Law Review*); Jared Hayes, *Timeline: Black Farmers and the USDA, 1920 to Present*, ENV'T WORKING GRP. (last visited June 16, 2022), <https://www.ewg.org/research/black-farmer-usda-timeline/> (on file with the *University of the Pacific Law Review*).

15. See Statement of Interest from the Department of Justice, *Austin, et al. v. Miller, et al.*, to Honorable Maxine M. Chesney (Feb. 14, 2022), <https://www.justice.gov/crt/case-document/file/1472031/download>. The DOJ has expressed interest in a case currently underway filed by a black couple who sought an appraisal and received a significantly lower home valuation than when their white friend posed as the owner a few weeks later. Complaint at 2, *Austin v. Miller*, (N.D. Cal. 2021) (No. 3:21-cv-09319-MMC) (alleging that the appraiser who initially appraised the home violated the Fair Housing Act); see FREDDIE MAC, RACIAL AND ETHNIC VALUATION GAPS IN HOME PURCHASE APPRAISALS, *passim* (2021), <https://www.freddiemac.com/research/insight/20210920-home-appraisals> (on file with the *University of the Pacific Law Review*) (following several news stories indicating a racial appraisal bias, Freddie Mac published a research study showing a quantifiable appraisal gap for minorities); see also Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (updated Aug. 27, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html> (on file with the *University of the Pacific Law Review*) (revealing stories from black individuals who received lower appraisals).

16. See *Paper Express v. Pfankuch Maschinen GmbH*, 972 F.2d 753 (7th Cir. 1992) (concluding a U.S. firm was bound by a forum-selection clause written in the German language; it could have secured a translation prior to agreeing); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

17. *Morales v. Sun Constructors*, 541 F.3d 218, 222 (3d Cir. 2008); cf. *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 248 P.3d 193, 196-97 ¶¶ 13-14 (2011) (*en banc*) (applying general principles of contract law, finding that statutory requirement that insurer offer certain coverage by written notice did not require translation into Spanish).

18. See *Morales*, 541 F.3d at 224 (Fuentes, J., dissenting) (arguing that the parties failed to manifest mutual assent because the employer asked an employee to translate the agreement into Spanish and the employee failed to translate the arbitration clause).

19. Ufuk Akcigit et al., *When America Was Most Innovative, and Why*, HARV. BUS. REV. (Mar. 6, 2017), <https://hbr.org/2017/03/when-america-was-most-innovative-and-why> (on file with the *University of the Pacific Law Review*). See generally Neil Irwin, *What Was the Greatest Era for Innovation? A Brief Guided Tour*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/15/upshot/what-was-the-greatest-era-for-american-innovation-a-brief-guided-tour.html> (on file with the *University of the Pacific Law Review*).

boggling. In June 2021, the Federal Reserve released data that showed that the top one percent in the U.S. holds sixteen times more wealth than the entire bottom fifty percent of our economy.²⁰ And the trend has been a steady increase in the size of the gap.²¹ After all, those who already have wealth—and access to yet more capital—naturally have more promising contractual opportunities and can more easily add to their wealth.²²

We have maintained a system in which some individuals have the means to create private *space programs as a side gig*,²³ while others live in their cars,²⁴ and more than 10 million children have lived below the poverty line in recent years.²⁵

20. *Distribution of Household Wealth in the U.S. Since 1989*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Dec. 17, 2021), <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/> (on file with the *University of the Pacific Law Review*); Julianna Menasce Horowitz, et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> (on file with the *University of the Pacific Law Review*); Alexandre Tanzi & Mike Dornig, *Top 1% of U.S. Earners Now Hold More Wealth Than All of the Middle Class*, BLOOMBERG WEALTH (Oct. 8, 2021, 9:07 AM), <https://www.bloomberg.com/news/articles/2021-10-08/top-1-earners-hold-more-wealth-than-the-u-s-middle-class> (on file with the *University of the Pacific Law Review*); Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSPS. 1, 3–26 (2020); see also Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485, 1530-31 (by measures of inequality of income, “the United States more closely resembles developing countries than other wealthy countries.”)

21. Peter Coy, *Wealth Inequality Is the Highest Since World War II*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/opinion/inequality-wealth-pandemic.html> (on file with the *University of the Pacific Law Review*) Horowitz et al., *supra* note 21; Carter C. Price & Kathryn A. Edwards, *Trends in Income From 1975 to 2018*, RAND CORP. (Sept. 2020), https://www.rand.org/pubs/working_papers/WRA516-1.html (on file with the *University of the Pacific Law Review*).

22. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014) (highlighting wealth begets wealth); Nick Hanauer & David M. Rolf, *The Top 1% of Americans Have Taken \$50 Trillion From the Bottom 90%—and That’s Made the U.S. Less Secure*, TIME (Sept. 14, 2020, 9:30 AM), <https://time.com/5888024/50-trillion-income-inequality-america/> (on file with the *University of the Pacific Law Review*).

23. See Michael Hiltzik, *The Bezos-Branson-Musk Space Race is a Huge Waste of Money and Scientifically Useless*, L.A. TIMES (July 6, 2021, 1:10 PM), <https://www.latimes.com/business/story/2021-07-06/jeff-bezos-richard-branson-elon-musk-space-race> (on file with the *University of the Pacific Law Review*) (“Let’s promptly dispense with the notion that any of these flights [Elon Musk’s SpaceX flight, Jeff Bezos’ Blue Origin flight, and Richard Branson’s Virgin Galactic flight] will add anything to our scientific knowledge, unless it’s the establishment of a new metric for how long it takes for money to burn a hole in your pocket when you have more than you could possibly need.”).

24. See generally HAW. REV. STAT. § 291C-112 (1972) (prohibiting individuals from using vehicles parked on public property between the hours of 6:00 PM and 6:00 AM “for purposes of human habitation”); OKLA. STAT. tit. 21 § 21-1787 (2014) (making it “unlawful for any persons to loiter in or upon any automobile or motor vehicle”); STURM C. L. HOMELESS ADVOC. POL’Y PROJECT, *SHIFTING GEARS: MOVING COLORADO AWAY FROM CRIMINALIZING VEHICLE RESIDENCY AND TOWARDS SAFE PARKING* (Charles Allison-Godfrey et al. eds., 2021), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/shifting-gears.pdf> (on file with the *University of the Pacific Law Review*); see also Karianna Barr, *Lawsuit Challenges Exclusionary Parking Laws Designed to Run Homeless Persons Out of Town*, NAT’L HOMELESSNESS L. CTR. (Aug. 30, 2021), <https://homelesslaw.org/potter-lawsuit/> (on file with the *University of the Pacific Law Review*); see Jessica So et al., *Living at the Intersection: Laws and Vehicle Residency*, SEATTLE U. SCH. L. HOMELESS RTS. ADVOC. PROJECT (2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1005&context=hrap> (on file with the *University of the Pacific Law Review*).

25. *Child Poverty in America 2019: National Analysis*, CHILDREN’S DEF. FUND, 1 (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/12/Child-Poverty-in-America-2019-National-Factsheet.pdf> (on file with the *University of the Pacific Law Review*).

This year, we temporarily reduced child poverty with an expansion of the child tax credit, but that expired the week prior to this panel's presentation.²⁶ Perhaps Congress will extend the credit by the time this essay is published, but Martin Luther King believed that providing modest financial assistance to the poor is not a sufficient response to inequality. He urged us to see that "an edifice which produces beggars needs restructuring."²⁷ In this spirit, we should question an economic system that increasingly concentrates ever greater shares of total wealth and income in the hands of a privileged few while millions live in poverty.

Some might respond that our economic edifice is a free-market system that has produced economic growth, a rising tide that lifts all boats. But there's something wrong with a tide that lifts enormous yachts into the stratosphere while millions of rowboats are still struggling against the current. And few would argue that we have a perfect market system with level playing fields. Due to our history of discriminatory obstacles to wealth creation, some are forced to start the race a lap behind with a flat tire while others start at the front with Porsches and Lamborghinis.²⁸

I recognize that I make these observations from a privileged position of my own. I never missed a paycheck during the pandemic, and I was able to work entirely remotely during its first year and a half. I put in long workweeks to switch to remote teaching while keeping students connected and engaged, but that was a safe, enjoyable, creative process. Many workers deemed to be essential during the pandemic made much less and worked in much more difficult conditions than I. Others who were laid off or later quit had time to reflect on just how much they disliked their jobs and the terms of their employment, emboldening them to hold out for something better.²⁹

26. Zachary Parolin & Megan A. Curran, *Sixth Child Tax Credit Payment Kept 3.7 Million Children Out of Poverty in December*, 6 POVERTY AND SOC. POL'Y BRIEF 1, 3 (Jan. 18, 2022).

27. Martin Luther King Jr., *Beyond Vietnam: A Time to Break Silence Speech* (Apr. 4, 1967) (transcript on file with the *University of the Pacific Law Review*).

28. Apologies for invoking a variety of metaphors in a single paragraph, but they create mental pictures that might be worth a thousand words, or at least several dozen.

29. See Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), <https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/> (on file with the *University of the Pacific Law Review*); see also Emma Goldberg, *In a 'Workers Economy,' Who Really Holds the Cards?*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/business/jobs-workers-economy.html?action=click&module=RelatedLinks&pgtype=Article> (on file with the *University of the Pacific Law Review*); David Gelles, *Executives Are Quitting to Spend Time With Family . . . Really*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/business/executives-quitting.html> (on file with the *University of the Pacific Law Review*).

What role does contract law play in all of this? As a means of ensuring a more level playing field, we should consider polishing some of the sharp edges of the common law with legislative or administrative measures such as the following:

State or federal proposals to ban noncompete agreements for certain low-level, low-wage employees, with criminal sanctions for employers who knowingly include banned provisions;³⁰

Congressional bills to modify the Federal Arbitration Act to restrict class action waivers in arbitration clauses, and bills prohibiting mandatory pre-dispute arbitration provisions altogether in certain contexts;³¹

30. See 820 ILL. COMP. STAT. 90/25 (2022) (imposing civil penalties on employers who enter into a noncompete with any employee whose annual rate of earnings is \$75,000 or less). Two other states prohibit and penalize noncompetition agreements more broadly. CAL. BUS & PROF. CODE §§ 16600–16601 (West 2022) (forbidding employee noncompetition agreements with limited exceptions); CAL. LAB. CODE §§ 432.5, 433 (West 2011) (making it a misdemeanor for employers to require an employee to enter into a noncompetition agreement that the employer knows to be unenforceable); COLO. REV. STAT. § 8-2-113 (2022) (makes violation of C.R.S. § 8-2-113 which generally voids noncompetition agreements except in a few circumstances, a class 2 misdemeanor punishable by up to 120 days in jail, a fine of up to \$750, or both). Other bills or laws would prohibit noncompetition agreements with low-wage workers but without penalties against employers who include them, raising the risk of noncompliance by employers who hope that unwitting employees abide by the terms of an unenforceable agreement. *E.g.*, Workforce Mobility Act of 2021, H.R. 1367, 117th Cong. (proposing to prohibit the use of noncompete agreements in commercial enterprises with some circumstantial exceptions); Freedom to Compete Act, S. 2375, 117th Cong. (proposing alteration of the Fair Labor Standards Act to retroactively ban noncompete agreements with certain exceptions); *cf.* Chris Marr, *Red State Lawmakers Look at Noncompete Bans for Low-Wage Workers*, BLOOMBERG L. (Feb. 9, 2022), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XDNTB83K000000?bna_news_filter=daily-labor-report#cite (on file with the *University of the Pacific Law Review*) (discussing the multiple states, including WA, OR, NV, IL, VA, MD, MA, RI, NH, ME, which prevent employers from enforcing non-compete agreements for low-wage earners, with varying definitions of “low-income,” without imposing criminal or civil penalties, and additional states such as IA and WV are considering such legislation).

31. See Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2022) (enacted) (banning pre-dispute arbitration agreements for individuals bringing sexual assault or sexual harassment allegations); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1001–1100H, 124 Stat. 1376, 1955–2113 (2010) (making pre-dispute agreements to arbitrate whistleblower claims unenforceable, bans pre-dispute arbitration in residential mortgage and home-equity loans, and allows the SEC to ban or regulate pre-dispute arbitration contracts between customers of an investment adviser). Many other proposals are pending. *See, e.g.*, Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (2022) (proposing to prohibit “predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights dispute” and agreements that prevent the right to participate in a class action); Investor Choice Act of 2021, H.R. 2620, 117th Cong. (2021) (proposing “[t]o amend the Securities Exchange Act of 1934 to prohibit mandatory pre-dispute arbitration agreements”); Ending Passenger Rail Forced Arbitration Act, S. 3082, 117th Cong. (2021) (“proposing [t]o amend title 49, United States Code, to prohibit Amtrak from including mandatory arbitration clauses in contracts of carriage, and for other purposes”); Justice for Patients Act, H.R. 3947, 117th Cong. (2021) (proposing to prohibit private health insurance plans from including mandatory arbitration provisions or limiting disputants’ ability to participate in a class action related to the plan); Justice for Student Borrowers Act, H.R. 1023, 117th Cong. (2021) (proposing to prohibit “a predispute arbitration agreement from being valid or enforceable if it requires arbitration of a dispute relating to a private education loan”); Justice for Servicemembers Act, H.R. 2196, 117th Cong. (2021) (proposing to prohibit “a

State laws requiring translations of English language contracts into the non-English languages in which the deals were marketed or negotiated;³²

Federal laws requiring translations of contracts in certain circumstances;³³
and

State laws modifying the doctrine of at-will employment, to impose an obligation of good faith in the termination of any employment contract after a probationary period.³⁴

Another proposal for improvement in contract law is suitable for common law evolution but has not taken hold in the courts,³⁵ and so would be suitable for legislation: supplementing unconscionability analysis with a robust reasonable expectations doctrine, limiting the range of terms in standard form contracts that are not brought specifically to a consumer's attention.³⁶

Admittedly, the impetus for much of my dissatisfaction with our economic system stems from problems that transcend current contract principles, although they are interrelated. They include:

A culture that, in my opinion from observation, excessively worships individualism and the pursuit of head-spinning levels of individual wealth;

predispute arbitration agreement from being valid or enforceable if it requires arbitration of a dispute related to the employment or reemployment rights of a uniformed service member”).

32. See CAL. CIV. CODE § 1632 (as amended in 2015) (providing that a business that “negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean,” must provide a translation of “every term and condition” of the final language of negotiation, with respect to several kinds of consumer contracts); cf. 815 ILL. COMP. STAT. 505/2N (2001) (requiring customers in a retail transaction negotiation, in a language other than English, to sign an acknowledgement in the non-English language which states that the merchant orally explained the English-language contract to the customer).

33. Although the Truth in Lending Act does not mandate disclosures in the non-English language, Federal law carves out a narrow translation requirement for door-to-door and used car sales. See 16 C.F.R. § 429.1(a) (1995) (explaining door-to-door salespersons must provide customers with a contract in the same language used in the oral sale); see also 16 C.F.R. § 455.5 (2017) (requiring used car salespersons who make a sale in Spanish are required to provide certain warranty information in Spanish).

34. See generally James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing with American Employment Law Good Faith and Fair Dealing in the Individual Employment Relationship*, 32 COMP. LAB. L. & POL'Y J. 773 (2010–2011) (discussing how the implied duty of good faith is generally not applied in employment contract settings); see *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 275 (2014) (dealing with Minnesota law, where the implied covenant of good faith applies to all contracts except employment contracts).

35. Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733 (2016).

36. John E. Jr. E. Murray Jr., *The Judicial Vision of Contract: The Constructed Circle of Assent and Unconscionability*, 52 DUQ. L. REV. 263, 272–74 (2014).

Great inequities—and often great inadequacy—in funding for K-12 education;³⁷

Persistence of race and sex discrimination despite laws against it;³⁸

A tax system that leaves untaxed enormous annual increases in individual wealth or corporate revenue;³⁹

Knowing inclusion of contract terms that are unenforceable but that escape challenge;⁴⁰ and

Dispute resolution systems and contract provisions that make it difficult for some to assert legal rights at all, including contract rights.⁴¹

If these truly are problems, what are the solutions? I've mentioned a few changes to contract law that I favor, which would almost certainly require further legislative modification of the common law. More immediately, labor shortages in 2022 are providing workers with greater bargaining power,⁴² and some states are

37. Bruce D. Baker et al., *The Real Shame of the Nation: The Causes and Consequences of Interstate Inequity in Public School Investments*, RUTGERS UNIV. (Apr. 2, 2018), <https://drive.google.com/file/d/1cm6Jkm6ktUT3SQplzDFjJIy3G3iLW0tj/view> (on file with the *University of the Pacific Law Review*); Bruce D. Baker et al., *Is School Funding Fair? A National Report Card*, EDUC. L. CTR. (Feb. 2018), https://edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Editi.pdf (on file with the *University of the Pacific Law Review*); see also Drew Desilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RSCH. CTR. (Feb. 15, 2017) (analyzing data based on 15-year-old students taking the PISA puts U.S. in the middle of the pack in science, math, and reading).

38. EEOC, *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2020*, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020> (last visited June 16, 2022) (on file with the *University of the Pacific Law Review*); see Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627 (2005).

39. Alexandra Thornton & Galen Hendricks, *Ending Special Tax Treatment for the Very Wealthy*, CTR. FOR AM. PROGRESS (June 4, 2019), <https://www.americanprogress.org/article/ending-special-tax-treatment-wealthy/> (on file with the *University of the Pacific Law Review*); Chuck Marr et al., *Substantial Income of Wealthy Households Escapes Annual Taxation or Enjoys Special Tax Breaks*, CTR. ON BUDGET AND POL'Y PRIORITIES (Nov. 13, 2019), <https://www.cbpp.org/research/federal-tax/substantial-income-of-wealthy-households-escapes-annual-taxation-or-enjoys> (on file with the *University of the Pacific Law Review*); Frank Clemente et al., *Corporate Tax Chartbook: How Corporations Rig the Rules to Dodge the Taxes They Owe*, ECON. POL'Y INST. (June 1, 2017), <https://www.epi.org/publication/corporate-tax-chartbook-how-corporations-rig-the-rules-to-dodge-the-taxes-they-owe/> (on file with the *University of the Pacific Law Review*).

40. See Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Clauses*, 70 OHIO ST. L.J. 1127, 1169 (2009). See generally Paul Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002).

41. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> (on file with the *University of the Pacific Law Review*).

42. Callum Williams, *Why 2022 Will be the Year of the Worker*, ECONOMIST (Nov. 8, 2021), <https://www.economist.com/the-world-ahead/2021/11/08/why-2022-will-be-the-year-of-the-worker> (on file with the *University of the Pacific Law Review*); Buffalo, *How America's Talent Wars are Reshaping Business*, ECONOMIST (Feb. 5, 2022), <https://www.economist.com/business/2022/02/05/how-americas-talent-wars-are-reshaping-business> (on file with the *University of the Pacific Law Review*); Antony Shelton, *Kellogg's Strike*

increasing their minimum wage in the face of a paltry and stagnant federal minimum.⁴³ If labor unions and collective bargaining make a comeback, employees could regain some lost bargaining power.

More broadly, in my view, we need to find a better middle ground, a better balance between unconstrained capitalism and individualism on the one hand and social support and social justice on the other hand, and between a fixation on short-term gains and a concern for long-term sustainability. Corporations should be responsive to a broader range of stakeholders than their shareholders, including consumers, employees, the community, and the environment.⁴⁴

Finally, all of us in the middle and upper classes should be willing to pull an oar in our society's ship by investing in human resources in addition to more traditional economic infrastructure represented by bridges, ports, and highways.⁴⁵ If we can manage to overcome our collective reluctance to paying taxes, we could increase upward mobility and reduce income inequality by improving access to high-quality education, from universal pre-K to graduate schools with affordable tuition.⁴⁶ The potential long-term social and economic returns on universal pre-K make it an especially promising investment.⁴⁷ By distributing our great wealth

Ends: BCTGM Members Ratify New Contract, BCTGM (Dec. 21, 2021, 10:23 AM), <https://bctgm.org/2021/12/21/kelloggs-strike-ends-bctgm-members-ratify-new-contract/> (on file with the *University of the Pacific Law Review*).

43. David Cooper et al., *Twenty-One States Raised their Minimum Wages on New Year's Day*, ECON. POL'Y INST.: WORKING ECON. BLOG (Jan. 6, 2022, 2:17 PM), <https://www.epi.org/blog/states-minimum-wage-increases-jan-2022/> (on file with the *University of the Pacific Law Review*).

44. See Jackson C. Esker, *Corporate Social Responsibility: Can a Corporation be Responsible if Its Only Responsibility Is to the Shareholders?*, 106 IOWA L. REV. 1961 (2021); see *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (on file with the *University of the Pacific Law Review*) ("Business Roundtable today announced the release of a new Statement on the Purpose of a Corporation signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders."); see also Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018, 7:01 PM), <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687> (discussing a new bill as a way to require corporations to be accountable to employees and other stakeholders).

45. Scott Lanman et al., *A Win for Roads, and No Tax Hikes: Infrastructure Deal Takeaways*, BLOOMBERG (June 24, 2021, 2:47 PM), <https://www.bloomberg.com/news/articles/2021-06-24/a-win-for-roads-and-no-tax-hikes-infrastructure-deal-takeaways> (on file with the *University of the Pacific Law Review*); John McCormick, *Democrats Say Their \$3.5 Trillion Reconciliation Bill Will Boost Growth. Not All Economists Are So Sure*, WALL ST. J. (Oct. 17, 2021, 5:33 AM), <https://www.wsj.com/articles/bidens-soft-infrastructure-agenda-may-not-boost-growth-11634463181> (on file with the *University of the Pacific Law Review*).

46. Beth Akers, *A New Approach for Curbing College Tuition Inflation*, MANHATTAN INST. (Aug. 2020), https://media4.manhattan-institute.org/sites/default/files/new-approach-curbing-college-tuition-inflation_BA.pdf; Mark J. Perry, *Chart of the Day . . . or Century?* AM. ENTER. INST. (Jan. 14, 2020), <https://www.aei.org/carpe-diem/chart-of-the-day-or-century-3/> (on file with the *University of the Pacific Law Review*); Stephen J. Carroll & Emre Erkut, *How Taxpayers Benefit When Students Attain Higher Levels of Education*, RAND CORPORATION (2009), https://www.rand.org/pubs/research_briefs/RB9461.html (on file with the *University of the Pacific Law Review*); see also Tara Westover, *I Am Not Proof of the American Dream*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/opinion/tara-westover-educated-student-debt.html> (on file with the *University of the Pacific Law Review*).

47. See, e.g., The Center for High Impact Philanthropy, *U. Penn, High Return on Investment (ROI)*,

more equitably, we can provide more people with meaningful opportunities to enjoy the full benefits and opportunities offered by contracts and contract law.

