Contract in Liberal States

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Liberalism has a complicated relationship with contract. On the one hand, a liberal state is committed to limiting the externalities of contract, i.e., its effects on third parties. It has at least two bases for that commitment. First, ensuring the justice of its basic structure requires that the state regulate the cumulative effects of private exchange. Distributive justice and other political-moral principles thus constrain contract as an allocative institution. Second, the harm principle not only justifies state attention to the effects of private agreements on particular third parties but likely requires that the state protect those third parties from joint action by others (as by contract) that undermine the value of third party entitlements. These two threads of the liberal state mandate generally call for vigilant oversight of private exchange.

On the other hand, a liberal state is uniquely sensitive to the value of allowing individuals to contract as freely as possible. Contract is an alternative to tort and other mandatory regimes. Unlike the latter forms of regulation, it allows individuals to choose whom they deal with and on what terms. It allows individuals to give expression to a range of preferences and values which together constitute the subject on which the liberal state is premised. From the standpoint of individuals in contract, private exchange involves promise and permission; the exercise of such normative powers help constitute parties as moral agents vis-à-vis strangers in civil society. A liberal state is committed to facilitating this process by which citizens acquire moral identity.

Although in its most narrow form, we might interpret the autonomy principle to require only that the liberal state refrain from regulating private conduct that has no consequence on third parties, in complex societies almost every private action gives rise to some third party effects. The liberal commitment to autonomy is better understood to weigh in favor of an expansive sphere for individual agency even outside the vanishing space in which private acts impose no burdens on others. This commitment, which we recognize in the rhetoric of neo-liberal or libertarian approaches to economic regulation, calls for great restraint in the regulation of private exchange. These competing implications of liberalism for contract create unavoidable tension within the contract law of a liberal state. The tension is traceable to the multiple commitments of liberalism as well as the multiple functions of contract. Where does the tension manifest? The tension is most apparent and most hotly contested at the boundaries of contract. Where and when should contract be replaced with mandatory regulation? But the tension is also manifest within contract, in its internal rules. In particular, it is apparent in the rules of interpretation, which must reconcile a foundational commitment to parties’ intention with attention to the objective reasonableness of the arrangements those parties propose. It is evident too in rules of validity and remedy, though they are not my focus.

My paper will present the tension described above and its implications for contract law. Although I regard the tension as characteristic of liberal states generally, my account identifies a source of divergence among avowedly liberal states. Just as ambiguity in a contract allows for the introduction of external evidence, the complexity of the relation between contract and liberalism allows legal culture, including differential ranking of the various tenets of liberalism, to determine the particular balance struck by any jurisdiction.