Louisiana Law Review

Volume 76 | Number 4
Liber Amicorum: Alain A. Levasseur
A Louisiana Law Review Symposium of the Civil Law
Summer 2016

Coping with the Death of the Bargain Without Burying the Spirit of the Law: A "Foundational" Approach to Comparative Law and Its Application to Adhesion Contracts in Louisiana

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INTRODUCTION

As the Huns rampaged across the Eurasian Steppe,[1] Gothic tribes amassed along the eastern bank of the Danube River, hoping to obtain passage to and protection from the Roman Empire.[2] Asylum was granted, but the sanctuary soon became a hellish prison as famine inundated the settlements.[3] In this time of desperation, it is believed that Gothic parents' only option to avoid starvation was to barter their children for dog meat.[4] The fact that Roman officials participated in and enforced these "agreements" only added to the hopelessness of the humanitarian tragedy.[5]

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1. *See generally* Peter Heather, *The Huns and the End of the Roman Empire in Western Europe*, ENG. HIST. REV., Feb. 1995, at 4–41 (discussing the activity of the Huns in the fourth and fifth centuries as well as the impact of the resulting barbarian migrations and invasions on the Western Roman Empire).

2. *Id.* at 5.

3. *See* HERWIG WOLFRAM, HISTORY OF THE GOTHS 119 (Thomas J. Dunlap trans., Univ. Cal. Press 1998).

4. *See* MICHAEL KULIKOWSKI, ROME'S GOTHIC WARS 130–31 (2007).

5. *See id.*

Discontent among the Gothic people could not be contained, and the Empire soon had its first taste of the barbarian uprisings that would one day reshape the political order of Western Europe.[6]

Such "agreements" are shocking—if not utterly repulsive—to the Western world today, and thus slavery as a legal institution is explicitly outlawed.[7] But slavery is only one—albeit a most extreme—example of agreements that shock the conscience,[8] and even legally enforceable agreements can invoke moral condemnation. Modern contempt for agreements that trade fundamental rights for basic necessities runs deeper than the letter of the law. Society is concerned not only with adherence to the law as it is written or the competence of the law to address today's problems, but, more fundamentally, the legitimacy of the law itself.

Like the Roman enforcement of slave contracts, the proliferation of certain agreements today can have profound consequences for a legal system's legitimacy. Although these consequences may arouse narrow policy concerns—such as economic efficiency, individual autonomy, fairness, social stability, and political pragmatism—more fundamental problems can arise. Most notably, the legal problems associated with certain agreements not only call into question the legitimacy of their enforcement but, more importantly, the legitimacy of the governing authority that does the enforcement. In this sense, the Gothic plight illustrates an important lesson for government that was later expressed by the social contract theorists.

As social contract theorists emphasize, "[t]here will always be a great difference between subduing a multitude and ruling a society."[9] The key point to this lesson is that force alone cannot bring about a duty, at least in any meaningful sense of the word.[10] Instead, as social contract theorists

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6. *See* Heather, *supra* note 1, at 41.

7. *See, e.g.*, U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

8. *See* Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 290 (1999).

9. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, *in* THE BASIC POLITICAL WRITINGS 147 (Donald A. Cress trans., Hackett Publ'g Co. 1987) (1762).

10. *See id.* at 143 ("Let us suppose for a moment that there is such a thing as this alleged right [of the strongest]. I maintain that all that results from it is an inexplicable mish-mash. For once force produces the right, the effect changes places with the cause. . . . As soon as one can disobey with impunity, one can do so legitimately . . . .").

claim, all legitimate authority is derived from the sincere consent of the governed.[11] This idea is applicable to the relations between a people and its government as well as the relations among the people themselves.[12]

Consent has been seen as an essential feature of contractual obligations since the time of the Romans.[13] Although the nature of consent is debated, it remains central to modern contract theory.[14] The importance of consent to modern contract theory can be problematic because it is often difficult to determine whether a person has in fact consented to an agreement through her actions, which may be misleading for a number of reasons. Thus, legal systems must grapple with the challenge of ensuring the reliability of the objective manifestation of consent if consent is to remain a realistic foundation of contract law.

The bargain has been seen historically as a safeguard to the reliability of the objective manifestation of consent;[15] however, many recognize that today most consumer contracts do not involve anything that resembles a meaningful bargain.[16] Instead, they are "adhesion contracts" that are "standard form printed contracts prepared by one party and submitted to the other on a 'take it or leave it' basis."[17] These contracts are ubiquitous in the modern life of a consumer, who often inadvertently manifests consent to be bound by extremely onerous terms with the mere click of the mouse or stroke of the pen. A question thus arises: how should legal systems cope with the death of the bargain as the traditional indicia of reliability for the objective manifestation of mutual assent?

Although common law jurisdictions have developed the doctrine of unconscionability to answer this question,[18] Louisiana's civil law has yet to develop a systematic way of addressing the concerns surrounding adhesion

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11. *See id.* at 144–45; JOHN LOCKE, TWO TREATISES OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 154–55 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

12. The lack of sincere consent in the arrangement suggests slavery—like tyranny—is inherently illegitimate. *See* ROUSSEAU, *supra* note 9, at 144–45.

13. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 563–65 (1990).

14. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981).

15. *See id.* § 17.

16. *See, e.g.*, Jones v. Dressel, 623 P.2d 370, 374 (Colo. 1981) (en banc) ("An adhesion contract is a contract drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere. An adhesion contract is generally not bargained for, but is imposed on the public for a necessary service on a take or leave it basis." (citations omitted)).

17. Standard Oil Co. v. Perkins, 347 F.2d 379, 383 n.5 (9th Cir. 1965).

18. *See infra* Part II.A.

contracts.[19] Thus, scholars have asked whether the doctrine would be useful in Louisiana.

When answering the question of whether the doctrine of unconscionability fits well with Louisiana's civil law system, scholars have taken a functional approach—looking to the legal system in practice and testing the doctrine of unconscionability against other legal institutions that may serve to police adhesion contracts.[20] The question for these scholars is whether the traditional tools of the civil law can serve the same purpose the doctrine of unconscionability serves,[21] which is essentially to ensure procedural safeguards in the bargaining process that preserve the reliability of the objective manifestation of mutual assent.[22] Thus, this approach focuses on the narrow policy concerns surrounding adhesion contracts rather than broader policy concerns associated with the legitimacy of governmental action in general. In short, the functional approach essentially tests proposed solutions to legal problems in a legal vacuum.

The major advantage of the functional approach is its practicality. The functional approach "understand[s] institutions through their relation to problems."[23] Thus, this approach focuses on pragmatism, rather than theoretical cohesiveness,[24] and allows the comparative law scholar to tailor

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19. *See infra* Part II.B.

20. *See infra* Part II.B. Despite some heterogeneity, the functional method of comparative law has some general characteristics. Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 342 (Mathias Reimann & Reinhard Zimmermann eds., 2006) ("Functionalist comparatists agree on some important elements. First, functionalist comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations. Second, functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. Law and society are thus thought to be separable but related. Consequently, and third, function itself serves as *tertium comparationis*. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems. A fourth element, not shared by all variants of functional method, is that functionality can serve as an evaluative criterion. Functionalist comparative law then becomes a 'better-law comparison'—the better of several laws is that which fulfills its function better than the others.").

21. *See infra* Part II.B.

22. *See infra* Part II.A.

23. Michaels, *supra* note 20, at 360.

24. *Id.* at 362.

individual institutions to narrow policy objectives. This microscopic focus, however, ignores a solution's potential to have greater implications for the structural integrity of the legal system as a whole.

Although functionalism is a dominant force in comparative law,[25] this Comment challenges the broader utility of the functional approach with respect to the problems associated with adhesion contracts. This challenge is grounded on the fact that the proliferation of adhesion contracts has a profound impact on the general theory of contract law and, thereby, the legal system as a whole.[26] The concern is that proposed solutions are inseparable from their guiding principles, which may be inconsistent with the general principles that transcend a legal system. Thus, the adoption of inconsistent solutions undermines the coherency of the legal system, disrupting the connection between the law and the foundation of the law's legitimacy.[27]

A more comprehensive approach to comparative exercises would look to the philosophical foundations of each legal system and, thereby, derive legal institutions from foundational principles. This is a "foundational approach" in that it looks to the source of a legal system's legitimacy for solutions to legal problems. This approach presents a type of Copernican Revolution in comparative law; instead of asking *whether a particular legal institution is justifiable in light of narrow policy objectives*, this inquiry will establish *whether narrow policy objectives are justifiable in light of the underlying foundation of existing legal institutions*. This shift is subtle, but important. In a practical application, for example, this shift may involve a set of inquiries that are meant to derive practical solutions to adhesion contracts from the philosophical foundations of the Louisiana

25. *Id.* at 341.

26. *See infra* Part I.C.

27. In this sense, the functionalist approach is associated with three major disadvantages that cripple its utility as a comparative exercise. First, the functional approach risks losing sight of the forest for the trees. By focusing on narrow policy objectives and problems, it is easy to forget that a legal system is a complex web of institutions and that one minor change in one area of the law can send shockwaves of confusion and inconsistency throughout other areas. Second, without a coherent theory or set of broad policies to tie specific legal institutions together, the choice of a particular policy rationale for any given legal institution is relatively arbitrary. Finally, the functional approach assumes away the issue of legitimacy and fails to recognize that, for a government to solve problems, there must first be a legitimate government. It is beyond the scope of this Comment to give a detailed account of the functionalist approach or a complete critique of its application. This Comment is primarily tailored to identifying and dealing with one specific problem with the functionalist approach—its deficiency in determining the coherency of a particular legal institution with a broader legal system that is governed by general principles.

civil law and Anglo-American common law legal systems. These inquiries are collectively what this Comment calls the "foundational method."

Recognizing the necessity of determining coherency before competency, the main purpose of this Comment is to present an example of how a comparativist may employ a "foundational approach" to comparative law. This Comment applies its version of the foundational approach to the treatment of adhesion contracts in the Anglo-American common law legal system as well as Louisiana's civil law legal system. Thus, although this Comment's narrow goal is to determine whether the doctrine of unconscionability is coherent with those legal systems, and the broader goal is to illustrate the foundational approach's steps in the process. There are four of these steps, which guide the structure of this Comment.

Part I of this Comment illustrates the first step in the foundational approach, which is to identify and articulate the nature of a "legal problem." This Part argues that the proliferation of adhesion contracts results in the death of the bargain in consumer contracts and strips away significant evidentiary and theoretical justifications for the enforcement of contracts generally, undermining the legitimacy of contract law in both the common law legal system and Louisiana's civil law legal system. Part II illustrates the second step in the foundational approach, which is to account for a proposed solution to the legal problem presented in the first step as well as to determine the guiding principles of that solution. This Part focuses on a proposed solution to the problems associated with adhesion contracts from the common law—the doctrine of unconscionability. Part III illustrates the third step in the foundational approach, which is to use the "foundational method" to test whether proposed solutions to legal problems are coherent with the legal systems under consideration. Utilizing social contract theory, this Part argues that two "perspectives" on the social contract—the "means-focused" perspective and the "ends-focused" perspective—can act as philosophical foundations of the common law legal system and Louisiana's civil law legal system, respectively. These philosophical foundations can be used to deduce general principles of each legal system, which can be compared with the guiding principles of the doctrine of unconscionability to determine the doctrine's coherency with each legal system. Part IV illustrates the fourth step in the foundational approach, which is to conduct "secondary inquiries" in light of the coherency of the proposed solution. After determining that the doctrine of unconscionability is readily coherent with the common law but leaves something wanting in Louisiana's civil law, this Part argues that Louisiana courts should focus more attention on the cause requirement of contract as a means of policing adhesion contracts. This Comment concludes by suggesting that—in addition to being

"conscionable"—adhesion contracts in Louisiana must be "sociable," reflecting the importance of a cause that is consistent with public policy.

I. IDENTIFYING THE LEGAL PROBLEM: THE DEATH OF THE BARGAIN IN CONSUMER CONTRACTS

Before determining whether a proposed solution to a legal problem is coherent with the overall legal system, one must first establish the existence of a "legal problem"—a development that degrades the structural integrity of a coherent legal system.[28] Consequently, the first step in the foundational approach is to articulate the general nature of a legal problem, which must be distinguished from specific policy concerns.[29] One example of a legal problem is the development of adhesion contracts.[30] The development of adhesion contracts presents a legal problem for both the common law and Louisiana's civil law, because the proliferation of adhesion contracts tends to degrade evidentiary and theoretical justifications for the enforcement of consumer contracts, undermining the legitimacy of contract law.[31] Accordingly, this Part illustrates the first step in the foundational approach by considering the proliferation of adhesion contracts, which are contracts typically presented as a standard form.

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28. Not all developments will present "legal problems," because their impact on the legitimacy and coherency of a legal system may be negligible. For example, a government's decision to develop a particular traffic management system—with rules concerning the speed limit, the direction of traffic, and the directing signs—is not likely to have broader consequences for the coherency or legitimacy of the legal system, assuming the decision was made in accordance with proper procedure. This is not to say that a traffic management system does not implicate policy concerns but instead that the concerns are not substantially legal in nature.

29. Some examples of specific policy concerns include concerns related to economics, morality, politics, sociology, and the sciences. The problem with considering specific policy concerns when addressing the appropriateness of governmental action is that even the "most competent" solution from a given policy standpoint may be illegitimate from a legal standpoint. In addition, governmental action can only be legitimate if the government is itself legitimate. Thus, the question of legitimacy and coherency precedes the question of competence.

30. *See infra* Part I.C.

31. *See infra* Part I.C.

A. The Proliferation of Adhesion Contracts

The standard form contract is a natural outgrowth of the consumer economy, which impersonalizes the consumer–producer relationship.[32] Large corporations and industry groups craft boilerplate language[33] to lower transactional costs,[34] suppress juridical risks,[35] and ensure favorable terms.[36] Such terms are often presented to consumers embedded in a larger

32. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943) ("The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract. A standardized contract, once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service. The individuality of the parties which so frequently gave color to the old type contract has disappeared. The stereotyped contract of today reflects the impersonality of the market." (footnote omitted)).

33. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 87 (N.J. 1960) (discussing a standard warranty clause drafted by the Automobile Manufacturers Association).

34. Clayton P. Gillette, *Standard Form Contracts*, *in* 6 CONTRACT LAW AND ECONOMICS 115 (Gerrit de Geest ed., 2011). The standard form contract allows for efficient spreading of fixed drafting costs, allowing firms to achieve significant economies of scale. *See* Steven R. Salbu, *Evolving Contract as a Device for Flexible Coordination and Control*, 34 AM. BUS. L.J. 329, 375–76 (1997) ("Standardized language and culture can generate transaction efficiencies by facilitating the trading of contractual rights. The transaction cost savings that result from standardization of terms are akin to the economies of scale that are realized in manufacturing when an investment in fixed assets is spread across a large number of outputs. Like customized production processes, individually tailored contracting incurs high variable costs that must be renewed with each unit of production. These variable costs are comprised of the time and resources that must be invested in developing new contract terms for otherwise familiar transactions, and analyzing these customized terms whenever a contract is consulted." (footnotes omitted)).

35. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 336. Juridical risks or "'[j]uridical hazard' is a term used to describe the risks to insurers arising from the resolution of uncertainties in a judicial process rather than some idealized mechanism." Charles Tiefer, *Forfeiture by Cancelation or Termination*, 54 MERCER L. REV. 1031, 1065 n.178 (2003); *see also* Kessler, *supra* note 32, at 631 ("The insurance business probably deserves credit also for having first realized the full importance of the so-called 'juridical risk', the danger that a court or jury may be swayed by 'irrational factors' to decide against a powerful defendant.").

36. *See, e.g.*, Florencia Marotta-Wurgler, *What's in a Standard Form Contract?*: *An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 713 (2007) (finding most end-user license agreements

document, formatted to small print, and written in confusing language.[37] Generally, when presented with a standard form contract, consumers have a clear choice: adhere to the non-negotiable terms or walk away from the transaction.[38] To call a consumer's decision a "choice," however, is often misleading, because adherence to the contract is usually necessary for the consumer to attain some good or service that is indispensable to modern life.[39]

The contracts described above are often termed "adhesion contracts," reflecting the consumer's inability to modify the contractual language.[40] Although not all standard form contracts can be classified as adhesion

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associated with typical non-customized software products display a net bias in favor of the software company when compared to the relevant default rules of Article 2 of the Uniform Commercial Code).

37. *See* Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* Williams v. Walker-Thomas Furniture Company, 26 U. HAW. L. REV. 441, 453 (2004).

38. Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 585 (2005); *see also* State *ex rel.* King v. B&B Inv. Grp., Inc., 329 P.3d 658, 669 (N.M. 2014).

39. For example, to gain access to the Internet and all of its associated services (for example, e-mail, online shopping, social media, news media, etc.), the consumer is required to submit to the "terms and conditions" of not only the internet provider but also the internet browser software provider and website providers. *See* Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 135 (2012). Another example involves so-called "shrink-wrap agreements." As Professor Zalesne explains:

> Shrink-wrap licenses, which apply to store-bought software, have been at the center of much contract debate in recent years. Generally, reference to these license agreements is placed on the outside of software packaging, but the detailed terms are often placed inside the package, or they are encoded as part of the set-up of computer programs. When a consumer uses the product or clicks on the "accept" button referencing the contract agreement, the purchaser agrees to the provisions as stated, even though those terms were not accessible at the time of purchase.

Zalesne, *supra* note 38, at 588–89 (footnote omitted); *see also King*, 329 P.3d at 669.

40. *See* Saúl Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 757 (1987).

contracts,[41] that classification is generally appropriate when there is a significant disparity in bargaining power between the consumer and the drafter.[42] Thus, an adhesion contract is typically equated to "a contract drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere."[43] Regardless of the precise definition, adhesion contracts are uniformly characterized by a lack of meaningful consumer choice.[44] Although this fact has led courts to treat adhesion contracts with hostility,[45]

41. Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 10 (La. 2005) (noting "a contract of adhesion is a contract executed in a standard form in the vast majority of instances").

42. *Id.* at 8–9 ("Broadly defined, a contract of adhesion is a standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party." (quoting Golz v. Children's Bureau of New Orleans, 326 So. 2d 865, 869 (La. 1976)) (internal quotation marks omitted)).

43. Jones v. Dressel, 623 P.2d 370, 374 (Colo. 1981) (en banc); *see also* Chandler v. Aero Mayflower Transit Co., 374 F.2d 129, 135 n.11 (4th Cir. 1967) (noting the early recognition among legal scholars of the "difference between contracts negotiated between coequals and standard printed form contracts offered the public by industries so powerful, by reason of franchise or otherwise, to effectively impose terms (called an 'adhesion contract') . . . ."); Broemmer v. Abortion Servs. of Phx., Ltd., 840 P.2d 1013, 1015 (Ariz. 1992) (en banc) (equating adhesion contracts to "a standardized form 'offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract" (quoting Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783 (Ct. App. 1976))).

44. *See Broemmer*, 840 P.2d at 1016 (echoing the view of adhesion contracts articulated in California jurisprudence, which "stated that '[t]he distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms'" (quoting *Wheeler*, 133 Cal. Rptr. at 783)).

45. For example, in *Henningsen v. Bloomfield Motors, Inc.*, the New Jersey Supreme Court found that the terms in an automobile sales contract, which purported to give the buyer a "delusive remedy of replacement of defective parts at the factory" while eliminating the "maker's liability for personal injuries arising from the breach of the warranty, and . . . any other express or implied warranty," caused "[a]n instinctively felt sense of justice [to cry] out against such a sharp bargain." 32 N.J. 358, 388 (1960). After noting that, "in the framework of modern commercial life and business practices," the basic tenet of the freedom of contract "cannot be applied on a strict, doctrinal basis," the court recognized the "gross inequality of bargaining position occupied by the consumer in the automobile

their use in consumer transactions has grown exponentially over the last 150 years.[46]

Today, no one questions the ubiquity of adhesion contracts,[47] especially when consumers deal with large corporations.[48] From browsing the Internet to renting an apartment, the average consumer encounters boilerplate terms on a daily basis.[49] The consumer, who has neither the patience nor the expertise to read and review the fine print, usually ignores these terms.[50] Even if the consumer were to object to any of the terms, they

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industry." *Id.* at 386, 391. Next, the court described the relationship between the disparity in bargaining power and the nature of the contract:

> The warranty before us is a standardized form designed for mass use. It is imposed upon the automobile consumer. He takes it or leaves it, and he must take it to buy an automobile. No bargaining is engaged in with respect to it. In fact, the dealer through whom it comes to the buyer is without authority to alter it; his function is ministerial—simply to deliver it. The form warranty is not only standard with Chrysler but, as mentioned above, it is the uniform warranty of the Automobile Manufacturers Association.

Id. at 391. The court concluded that the boilerplate disclaimer of warranty was void as a matter of law. *Id.* at 405.

46. *See generally* Preston & McCann, *supra* note 39 (discussing the history of adhesion contracts and common law responses to problems associated with such contracts).

47. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 479 (2006); *see also* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

48. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1225 (1983).

49. *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 7–8 (2013).

50. One study placed "the fraction of retail software shoppers that accesses [end-user license agreements] at between 0.05% and 0.22%" and found that "the very few shoppers that do access it do not, on average, spend enough time on it to have digested more than a fraction of its content." Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts* 35 (N.Y.U. Ctr. for Law, Econ. & Org., Working Paper No. 09-40, 2009), *available at* http://ssrn.com/abstract=1443256 [https://perma.cc/VT6V-W6DK] (last visited Feb. 27, 2016) (concluding "very few consumers choose to become informed about standard form online contracts"). In fact, this result seems to be the very purpose of drafting a standard form contract. *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New*

are typically presented on a "take-it-or-leave-it" basis.[51] Thus, the idea that there is any meaningful "meeting of the minds" on non-dickered terms is largely a legal fiction.[52]

The acceptance of this legal fiction is alarming when one considers the importance of non-dickered terms, which frequently include provisions that negate significant consumer rights: arbitration clauses, choice of law clauses, forum selection clauses, disclaimers of warranties, exclusion of liability for damages, remedy limitations, indemnification clauses, and clauses reserving the right to make unilateral changes to contract terms.[53] As this list makes clear, non-dickered terms in adhesion contracts often determine both a consumer's substantive rights under the contract and—perhaps more troubling—that consumer's ability to enforce his or her substantive rights under the contract.[54]

B. The Primary Concern with Legal Developments

Due to the significance of boilerplate terms in adhesion contracts, policy concerns have been at the forefront of the debate over the enforceability of such terms. However, there is a glaring problem in the literature, which is dominated by functionalist analysis. Even if one's

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Clause, 115 U. PA. L. REV. 485, 504 (1967) ("The form contract is designed *not* to be read or pondered; if it is or has to be it loses much of its utility.").

51. As Professor Rakoff explains, this fact is widely understood by consumers:

> Customers know well enough that they cannot alter any individual firm's standard document. They are largely members of the society that spawns business firms, and they understand the institutional arrangements behind the take-it-or-leave-it stance. If they do not, and if they attempt to bargain the form terms, the salesman will explain his lack of authority to vary the form. Haggling, the customer finds, requires penetrating the hierarchical structure of the firm in the hope of finding someone who will deal—a daunting and perhaps prohibitively costly endeavor. And there may in fact be no one at any level who is willing to bargain. "We cannot make an exception for one customer"—the language of standardization becomes a moral claim. Ultimately, in transactions involving organizational hierarchies, bargaining ceases to be the expected, or even appropriate, consumer behavior.

Rakoff, *supra* note 48, at 1225.

52. *See* Zalesne, *supra* note 38, at 586.

53. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 516 (2008).

54. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011).

position in the debate can be objectively determined by invoking policy considerations, there is no clear answer to the preliminary question: which policy consideration should be paramount?[55]

A multitude of options are available for determining which policy consideration should be paramount,[56] including economic efficiency, contractual freedom, fairness, and political pragmatism.[57] But these concerns are premature and superficial; policy concerns are neither justifiable in themselves nor susceptible to objective balancing. Instead, when analyzing the legitimacy of a particular class of contract, the question of legal soundness should always be the primary concern, because contracts are not made in a legal vacuum and must pass the enforceability hurdle to be relevant.

Contracts are useful as a legal institution only because they carry the force of law and give effect to agreements. Thus, before deciding whether the enforcement of a particular type of agreement is good policy, one has to ask whether its enforcement is coherent with the legal system that provides for the enforcement. One way to begin this inquiry into the legal problem of adhesion contracts is by asking the fundamental question of contract law: which agreements—or more precisely which promises—should be enforceable as a matter of law?[58]

C. The Legal Problem of Adhesion Contracts

As one scholar notes, "[n]o legal system has ever been reckless enough to make all promises enforceable."[59] Although a promise may bring about

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55. It is premature to evaluate adhesion contracts' impact on particular policy concerns when those concerns have not even been shown to be relevant or important.

56. For every identifiable public policy concern there are many potential perspectives and solutions, creating a disjointed debate.

57. *See, e.g.*, James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161 (2013); Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 CAP. U. L. REV. 617 (2012).

58. *See* E. ALLAN FARNSWORTH ET AL., CONTRACTS 1 (8th ed. 2013).

59. Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 139 (2005). Consistent with this view, while broadly defining a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made," the *Restatement (Second) of Contracts* narrowly defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS §§ 1–2 (1981).

moral duties *a priori*,[60] it does not necessarily follow that the law should enforce all promises or allow all promises to be carried out, as the result may be inconsistent with the recognized interests of the promisor, the promisee, third persons, or society as a whole.[61] Thus, the law ultimately determines the limits of a binding promise.[62] These limits reflect broader normative principles that underlie a society's values and views concerning the legitimacy of legal authority.[63] When new developments in the law are contrary to such principles, the structural integrity of the legal system is threatened. As a result, it is important to screen new developments for legal problems that threaten the coherency of the legal system by allowing for the proliferation of incoherent legal institutions. For example, adhesion contracts present such legal problems for both the common law and civil law, because their proliferation undermines the values that support the enforcement of contracts generally.[64]

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60. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 36–40 (Thomas K. Abbott trans., Dover 2005) (1785). For Kant, the act of promise-keeping exemplifies the first formulation of his Categorical Imperative: "Act only according to that maxim by which you can at the same time will that it should become a universal law." *See generally* Matt McCormick, *Immanuel Kant: Metaphysics*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/kantmeta/#H8 [https://perma.cc/6WKX-Z9KM] (last visited Feb. 27, 2016).

61. This Comment is interested in the legitimacy of governmental action, which includes the enforcement of contracts. To say that the legitimacy of governmental action is purely a moral inquiry is to ignore the practical difficulties associated with various perspectives. Often, the law must make a difficult choice between competing interests, which—in isolation—may all be seen as legitimate.

62. This principle is reflected in the *Restatement (Second) of Contracts*, which suggests an antithetical correlative to promises that are enforceable as a matter of law. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 ("A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

63. *See infra* Part III.

64. The major concern here is not mere "fairness" as a narrow policy goal but instead coherency as a prerequisite for legitimate governmental action. In other words, the concern is not functional but instead foundational. This distinction highlights the novelty of this Comment's approach in comparison to the approach of other scholars, who may arrive at a similar conclusion—that adhesion contracts present problems for contract law—by way of functional means, such as looking to the empirical effect of legal developments on narrow policy goals to tailor responses that further those goals. *See, e.g.*, Slawson, *supra* note 47, at 565–66 ("If contract law is to provide the basis for a democratic system of private law and for a competitive economy which works in the interests of consumers—indeed, if it is to meet the minimal requirements of rationality—it must take into account the two pervasive conditions under which modern contracting takes place. . . .

1. The Role of the Bargain

When considering contracts generally, an important value for both the civil law and the common law is the promotion of "liberty" interests.[65] Although amorphous, this value is best represented in a general contract law requirement—"mutuality of assent." By requiring that both parties agree to the terms of the contract, the law protects the individual's liberty to make autonomous decisions as to the assumption of rights and obligations. Without this requirement, the enforcement of particular terms would at best be arbitrary, undermining basic individual liberty.

This observation does not suggest that contract law must require a subjective "meeting of the minds."[66] Instead, contracts may be enforced in light of the "objective manifestation of mutual assent."[67] The legitimacy of the enforcement, however, is necessarily tied to the reliability of the objective manifestation of consent, which is simply a proxy for actual consent.[68] In this context, one can see the importance of the bargain.

There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest. The individual who is subject to the obligations imposed by a standard form thus gains the assurance that the rules to which he is subject have received his consent either directly or through their conforming to higher public laws and standards made and enforced by the public institutions that legitimately govern him.").

65. *See* Nicholas S. Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172, 172–73 (1965).

66. It is important to note that such a requirement is not indefensible. Ricketts v. Pa. R.R. Co., 153 F.2d 757, 760–61 (2d Cir. 1946) (Frank, J., concurring).

67. RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c ("The element of agreement is sometimes referred to as a 'meeting of the minds.' The parties to most contracts give actual as well as apparent assent, but it is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake.").

68. Judge Frank articulated the paradox that arises when one completely disregards the subjective consent of the parties in favor of the objective manifestation of their consent—actual liberty is sacrificed for apparent liberty:

> The "actual intent" theory, said the objectivists, being "subjective" and putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands. They depicted the "objective" standard as a necessary adjunct of a "free enterprise" economic system. In passing, it should be noted that they arrived at a sort of paradox. For a "free enterprise" system is, theoretically, founded on "individualism"; but, in the name of economic individualism, the objectivists refused to consider those reactions of actual specific individuals which sponsors of the "meeting-of-the-minds" test purported to cherish. "Economic individualism" thus shows

The bargain provides clear evidence that the parties were able to freely and knowingly assent to the contract's terms, preserving the reliability of the manifestation of mutual assent.[69] The offer and the acceptance can be compared for equivalency and tested for vices of consent, such as fraud, duress, and error.[70] If the offer mirrors the acceptance and the bargain is objectively vice-free, the law may safely presume that, in fact, the parties actually consented. On the rare occasion that the objective manifestation of assent as evidenced by the bargain does not reflect the subjective intent of the parties, the law can write off the technical insufficiency of a minority of cases as a necessary cost of maintaining the integrity of the legal institution of contract.

The utility of the bargain breaks down when the "acceptance" merely acknowledges the existence of additional terms while manifesting—at most—nominal consent to such terms. This problem has been recognized in the general commercial context concerning the "battle of the forms."[71] In the typical case, merchants exchange forms with conflicting boilerplate language that would not constitute a binding contract under the traditional mirror image rule but nevertheless act in accordance with the dickered terms of the agreement.[72] There is a breakdown in the bargain, because many terms remain in conflict even after the agreement has been substantially carried out.[73] To cope with the death of the bargain in this context, most jurisdictions have adopted an elaborate statutory scheme.[74] But because consumers do not have their own boilerplates to apply to commercial transactions, a consumer's "acknowledgment" takes on a different character, and the statutory scheme that protects merchants is inapplicable

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> up as hostile to real individualism. This is nothing new: The "economic man" is of course an abstraction, a "fiction."

Ricketts, 153 F.2d at 761 n.2 (Frank, J., concurring).

69. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c.

70. Larry A. DiMatteo, *The Norms of Contract*, 24 HOFSTRA L. REV. 349, 443 (1995); *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 72 cmt. c, 75 cmt. a.

71. *See generally* FARNSWORTH ET AL., *supra* note 58, at 202–04 (discussing the nature of and the general problems presented by the "battle of the forms").

72. *See, e.g.*, Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (2d Cir. 1972) (discussing the application of § 2-207 of the Uniform Commercial Code to the question of whether an arbitration clauses appearing on the back of the defendant-seller's acknowledgment forms were enforceable against the plaintiff-buyer, who accepted delivery of the object of sale).

73. *See* FARNSWORTH ET AL., *supra* note 58, at 203.

74. U.C.C. § 2-207 (1962).

to consumer commercial transactions.[75] Thus, in consumer contracts, the fact that "the adhering party generally enters into [adhesion contracts] without manifesting knowing and voluntary consent to all their terms" presents a significant problem for the traditional role of the bargain that still requires significant attention.[76]

2. The Death of the Bargain in Consumer Contracts

As courts quickly recognized, the proliferation of adhesion contracts meant the end of the bargain in consumer contracts.[77] Even in the best light, a consumer's acceptance of the boilerplate terms of adhesion contracts is more of blind trust or willful ignorance than a sign of knowing and free consent.[78] Although there may be an identifiable "offer" and "acceptance," the primary function of the bargain is muted, because adhesion contracts do "not resemble the Platonic ideal of a list of jointly negotiated terms."[79] Thus, while the shell of the bargain remains, its spirit is dead.

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75. U.C.C. section 2-207 is only applicable when additional or different terms are in the acceptance or confirmation, which typically take the form of boilerplate provisions in a merchant's "Acknowledgement Form." *See* FARNSWORTH ET AL., *supra* note 58, at 203–05.

76. Andrew Tutt, Note, *On the Invalidation of Terms in Contracts of Adhesion*, 30 YALE J. ON REG. 439, 442 (2013).

77. *See, e.g.*, Jones v. Dressel, 623 P.2d 370, 374 (Colo. 1981) (en banc) ("An adhesion contract is generally not bargained for, but is imposed on the public for a necessary service on a take or leave it basis."); Kostelac v. United States, 247 F.2d 723, 728 n.7 (9th Cir. 1957) (equating adhesion contracts to "contracts in which one party in the stronger bargaining position provides the form of the contract which may contain many terms which are not in any sense bargained for between the parties, but are imposed upon the weaker by the dominant party").

78. As courts have noted, "[t]he distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms." Broemmer v. Abortion Servs. of Phx., Ltd., 840 P.2d 1013, 1015 (Ariz. 1992) (en banc) (quoting Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783 (Ct. App. 1976)) (internal quotation marks omitted). Even if there were some indicia of a meaningful choice to enter into specific terms, the complexity of the language and the legal concepts makes these terms unintelligible to most lay consumers. *See* Rakoff, *supra* note 48, at 1226.

79. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003). In fact, courts have acknowledged that a meaningful bargain is so unlikely that it would be unreasonable to assume consumers would even attempt to negotiate the content of boilerplate terms. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) (noting that "[i]t would be entirely unreasonable for [the Court] to assume that respondents [cruise passengers]—or any other cruise passenger—

The death of the bargain in consumer contracts is problematic from a foundational perspective because it exposes weaknesses in the theoretical basis for the enforcement of contracts generally. This idea stems from two sources.

First, consumers generally do not subjectively consent to all the terms in adhesion contracts as a matter of fact. When one recognizes that the majority of consumer contracts can be considered adhesion contracts[80] and the consumers almost never understand the boilerplate terms of such contracts,[81] the only logical conclusion is that the majority of consumer contracts include terms that are not truly consented to.[82] Two counterarguments to this point can be easily disposed of. For one, it may be argued that consumers can give blanket consent without knowledge of the content of the term,[83] but that argument renders consent meaningless. In addition, it may be argued that consumers have a duty to read and understand the terms,[84] but contract law—as an intellectually distinct legal institution—should focus on what parties actually do, not what they should do (negligence is in the realm of tort law). These two counterarguments are even more out of place when considering the treatment of the battle of the forms: If merchants are not expected to analyze boilerplates terms, why should the lay consumer be expected to?

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would negotiate with [the cruise line] the terms of a forum-selection clause in an ordinary commercial cruise ticket"). Many recognize that consumers rarely even try to understand the obscure terms and, of those who do try, virtually none succeed. *See*, *e.g.*, Bakos et al., *supra* note 50, at 35.

80. This conclusion depends on two widely recognized facts. First, "[standard] form contracts probably account for more than ninety-nine percent of all the contracts now made." Slawson, *supra* note 47, at 529. Second, the majority of standard form consumer contracts are adhesionary, at least in the sense that they are "prepared by a party of superior bargaining power for adherence or rejection of the weaker party." Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 9 (La. 2005) (quoting Golz v. Children's Bureau of New Orleans, 326 So. 2d 865, 869 (La. 1976)) (internal quotation marks omitted).

81. *See* Rakoff, *supra* note 48, at 1225.

82. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.").

83. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 360 (1960); *see also* Warkentine, *supra* note 53, at 488–90.

84. *See, e.g.*, John D. Calamari, *Duty to Read: A Changing Concept*, 43 FORDHAM L. REV. 341 (1974).

Second, consumers do not have a meaningful choice to enter into specific boilerplate terms. There are two reasons for this fact. For one, boilerplate terms are often practically identical across producers in the same industry.[85] For example, a person who wants to buy a cell phone may choose a provider, but, if all providers have the same standard form contract, it cannot be said that a consumer could choose to avoid the terms of the contract. In this case, uniformity replaces the traditional monopoly.[86] In addition, adhesion contracts go hand-in-glove with goods and services that are indispensible in modern life. Following the above example, the meaningfulness of the consumer's choice is further degraded by the fact that having a cell phone is indispensable in the twenty-first century.[87]

3. The Significance of the Legal Problem

The combination of these two results—the absence of a consumer's actual consent to all the terms in the contract and the lack of a meaningful choice to enter into a particular boilerplate term—degrades the theoretical basis for enforcing contracts, regardless of the objective manifestation of assent. Although a few isolated instances of theoretical deficiency may not raise much concern, the proliferation of adhesion contracts has the potential to distort the scope of contract law. Such a large-scale promulgation of legal fictions degrades the legitimacy of contract law generally by advancing the merits of form over substance. This development is not only problematic in the functional sense, but also goes to the heart of contract law in the civil law and common law legal systems,

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85. Radin, *supra* note 57, at 635–36. Standard-setting organizations may create concerns of monopolist collusion. *See* Erica S. Mintzer & Logan M. Breed, *How to Keep the Fox Out of the Henhouse: Monopolization in the Context of Standard-Setting Organizations*, 19 INTELL. PROP. & TECH. L.J. 1, 5 (2007). However, this phenomenon does not necessarily require actual collusion. *See* David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 1005–08 (2006) (discussing the boilerplate provisions could be used to facilitate tacit collusion among competitors).

86. Oren Gazal-Ayal, *Economic Analysis of Standard Form Contracts: The Monopoly Case*, 24 EUR. J.L. & ECON. 119, 120 (2007).

87. According to a 2013 study, of American adults 91% owned a cell phone, 81% sent and received text messages, and 60% accessed the Internet. MAEVE DUGGAN, CELL PHONE ACTIVITIES 2013, at 2 (2013), *available at* http://bibliobase.sermais.pt:8008/BiblioNET/Upload/PDF5/003819.pdf [https://perma.cc/47R8-3EEN].

which respectively regard the existence of contractual consent as an essential feature of a binding contract.[88]

88. Keeping with the civil law tradition, Louisiana law defines a contract as "an agreement by two or more parties whereby obligations are created, modified, or extinguished." LA. CIV. CODE art. 1906 (2016). Because a contract results from multiple juridical acts, it is no wonder that consent is an explicit element of a contract. *Id.* art. 1927; ALAIN A. LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A PRÉCIS 4 (3d ed. 2009). In fact, "[a] contract is *formed* by the consent of the parties established through offer and acceptance." LA. CIV. CODE art. 1927 (emphasis added). There is no contract until the parties assent to all the terms. *See id.* art. 1943 ("An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer."). Adhesion contracts present a problem because the manner in which they are executed may suggest "a defect of consent, that is, the absence of a free and deliberate exercise of the will." Ronald L. Hersbergen, *Unconscionability: The Approach of the Louisiana Civil Code*, 43 LA. L. REV. 1315, 1318 (1983).

Like the civil law, the common law likens a contract to an agreement, whereby a party's intent to be legally bound by a promise is of primary concern. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981). The objective theory of contract dominates, however, and the subjective intent of the parties is less of an issue for the common law courts. *See, e.g.*, Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent."); Nycal Corp. v. Inoco PLC, 988 F. Supp. 296, 302 (S.D.N.Y. 1997) ("[W]hen resolving disputes concerning the meaning of ambiguous contract language, unexpressed subjective views have no proper bearing. Only the parties' objective manifestations of intent are considered."). The problem with adhesion contracts for the common law is that they corrode the basis for an objective manifestation of mutual assent—the bargain. *See* Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 204 (2d Cir. 1955) (Frank, J., dissenting) ("The ticket is what has been called a 'contract of adhesion' or a 'take-it-or-leave-it' contract. In such a standardized or mass-production agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract,' cannot be applied rationally. For such a contract is 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather. The insurance policy cases are outstanding examples, but there are

In short, with the loss of the bargain comes the loss of significant evidentiary and theoretical justifications for the enforcement of contracts generally. As for evidentiary justifications, the bargain, which disappears in the context of adhesion contracts, provides clear evidence of actual assent. Without the bargain, other forms of the objective manifestation of mutual assent are inherently less reliable. For example, the mere fact that there is a writing littered with boilerplate terms and a consumer signature somewhere on the page does not provide convincing evidence that the consumer actually agreed to the terms of the boilerplate. This fact is only aggravated by the widespread acknowledgment that most consumers do not even bother to read the terms.[89] In such cases, reliance on the evidentiary value of a written contract is absurd. Thus, the loss of the bargain leaves an evidentiary gap in contract law that cannot be patched with a legal fiction. As for theoretical justifications, the problem runs deeper. If the legal system enforces "agreements" that everyone knows were not—as a matter of fact—agreed to, questions of legitimacy arise and the integrity of the entire legal system is threatened.

Thus, coherency problems associated with adhesion contracts in the civil law and common law can be condensed into one legal problem: the proliferation of adhesion contracts and the resulting death of the bargain strips away theoretical and evidentiary justifications for the enforcement of consumer contracts and, thereby, undermines the legitimacy of the enforcement of contracts generally. To properly solve this legal problem, one must identify *coherent* solutions.

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many others. Our courts, in particular contexts, have, in effect, nullified many provisions of such agreements, if unfair to the weaker party who must take-or-leave." (footnote omitted)).

89. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1269 (1993). Some scholars recognize that it is actually economically inefficient for consumers to read long, complex consumer contracts. Michael I. Meyerson, *The Efficient Form Contract: Law and Economics Meet the Real World*, 24 GA. L. REV. 583, 600 (1990) (finding that "the benefit to be derived from acquiring adequate knowledge of contract terms is usually low and is likely to be far exceeded by the significant costs of acquiring that information. It is, therefore, rational for even a conscientious consumer to pay little, if any, attention to subordinate contract terms.").

II. A PROPOSED SOLUTION TO THE LEGAL PROBLEM: THE DOCTRINE OF UNCONSCIONABILITY

Once a legal problem has been established, one may search for coherent solutions, which take the form of legal institutions. For this reason, the second step in the foundational approach is to account for a proposed solution to the legal problem identified in the first step. Regardless of its origin, the proposed solution's coherency must ultimately be tested. Consequently, the proposed solution is treated as a hypothesis and is evaluated to distill its guiding principles, which will eventually be compared to the general principles of the legal system. To address the legal problem associated with the proliferation of adhesion contracts, this Part will examine a proposed solution from the common law—the doctrine of unconscionability.[90]

A. The Doctrine of Unconscionability in the Common Law

American courts have long recognized the characteristic features of adhesion contracts[91] as well as the general contract defense of unconscionability,[92] which has English roots that can be traced as far back as the seventeenth and eighteenth centuries.[93] American courts, however, were generally hesitant to apply the doctrine of unconscionability to adhesion contracts, fearing that the invalidation of such widely used practices would result in commercial instability.[94] So, courts historically

90. *See generally* Preston & McCann, *supra* note 39 (discussing the history of adhesion contracts and common law responses to problems associated with such contracts).

91. *See, e.g.*, Fish v. Chapman & Ross, 2 Ga. (Kelly) 349, 361–62 (1847). However, the term "contract of adhesion" was not introduced to the American common law until 1919. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 & n.106 (1919).

92. *See, e.g.*, Hume v. United States, 132 U.S. 406, 414 (1889) ("[T]here may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the nonreturn of articles furnished, and these have some value, the amount sued for may be reduced to that value.").

93. *See, e.g.*, Batty v. Lloyd, 23 Eng. Rep. 375 (1682); Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82 (1750).

94. Warkentine, *supra* note 53, at 472.

used other means to police adhesion contracts that sidestepped a direct determination of their conscionability.[95]

1. The Uniform Commercial Code Section 2-302

This judicial "sidestepping" was addressed in the Uniform Commercial Code ("UCC").[96] The drafters of the UCC were concerned with courts policing "unconscionable" contracts "by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract."[97] This concern prompted the drafting of section 2-302, which was "intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability"[98] by giving the court explicit authority to refuse to enforce the entire contract or a particular clause upon finding unconscionably at the time it was made.[99] Addressing the concerns of scholars, this development was expected to promote certainty and clarity by ending courts' use of judicial acrobatics "to protect the weaker contracting party and still keep 'the elementary rules' of the law of contracts intact."[100]

Common law jurisdictions readily adopted the language of UCC section 2-302.[101] Courts, however, have applied the doctrine

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95. *See* U.C.C. § 2-302 cmt. 1 (1962); Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 51 (Mich. 2005) (Kelly, J., dissenting).

96. *See generally* J.H.A., Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401 (1961) (discussing the historical development of section 2-302 of the UCC).

97. U.C.C. § 2-302 cmt. 1.

98. *Id.*

99. U.C.C. § 2-302(1). The court has significant discretion under the rule and, in lieu of complete refusal to enforce a contract or particular clause, "may so limit the application of any unconscionable clause as to avoid any unconscionable result." *Id.*

100. Kessler, *supra* note 32, at 633.

101. By the 1980s, the only states that had not adopted section 2-302 were Louisiana and California. Hersbergen, *supra* note 88, at 1315. The text of UCC section 2-302 has remained unchanged since its adoption:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

inconsistently.[102] As one scholar noted, "[t]he primary problem with this all-purpose weapon is that the concept of unconscionability is vague, so that neither courts, practicing attorneys, nor contract draftsmen can be certain of its applicability in any particular situation."[103]

2. The Application of the Doctrine of Unconscionability

Although the original comments to section 2-302 suggested a basic test for unconscionability,[104] it would be up to courts and scholars to clarify the broad directives of preventing "oppression and unfair surprise" without disturbing the "allocation of risks because of superior bargaining power."[105] Professor Arthur Leff clarified the analysis by introducing a categorization of contractual "defenses" based on either "bargaining naughtiness" or the "evils in the resulting contract."[106] Using this dichotomy, Professor Leff advocated for a distinction between "procedural unconscionability" and "substantive unconscionability,"[107] which was later utilized and developed by common law courts.[108]

Procedural unconscionability—or "bargaining naughtiness"—is *directly* concerned with the means of contractual assent. Courts focus on

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> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302. Louisiana still has not adopted section 2-302 as of January 1, 2016.

102. *See* John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 931 (1969).

103. *Id.*

104. U.C.C. § 2-302 cmt. 1 ("This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.").

105. *See id.*; Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 8 (2012).

106. Leff, *supra* note 50, at 487.

107. *Id.*

108. *See generally* Lonegrass, *supra* note 105, at 8–11 (tracing the jurisprudential development of the various approaches to the application of the doctrine of unconscionability).

the actions and characteristics of the parties to determine whether there was "oppression," "unfair surprise," or some other "specific and objective indicia demonstrating that a consumer was unable to read and understand the terms of the agreement."[109] In contrast, substantive unconscionability—or the "evils in the resulting contract"—is *indirectly* concerned with the means of contractual assent. Instead of focusing directly on the actual bargain, a court will look for an inferred deficiency by asking whether a term is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[110] Thus, both procedural unconscionability and substantive unconscionability are concerned with contracts that are so unreasonable that the mere standard form does not provide for a reliable objective manifestation of mutual assent. Courts generally either require a substantial showing of both of these forms of unconscionability or use a "sliding-scale" approach that incorporates aspects of each of these to a greater or lesser degree.[111]

3. The Guiding Principles of the Doctrine of Unconscionability

Regardless of the exact approach, the principal focus of the unconscionability analysis is on the *means* of contractual assent, rather than the *ends* of contractual assent. In other words, the doctrine of unconscionability is concerned with *objectively how*—not *subjectively why*—the consumer came to assume obligations under the standard form contract.

The guiding principle of the doctrine of unconscionability is the promotion of free choice in contractual formation. Although the standard form contract provides for an objective manifestation of mutual assent, the doctrine of unconscionability recognizes this objective manifestation may not provide the same evidentiary value as in other contexts. Once there is an objective manifestation of mutual assent, a closer look at the means of that assent is meant to ensure a valid procedure, providing the autonomous individual with the tools to advocate for his or her interests and make a free choice to assume obligations. In short, the common law uses the doctrine of unconscionability to ensure procedural safeguards in the bargaining process that preserve the reliability of the objective manifestation of mutual assent in the standard form context.

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109. *Id.* at 9.

110. Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750); *see also* Lonegrass, *supra* note 105, at 9 (noting this formulation has been unchanged for 250 years).

111. Lonegrass, *supra* note 105, at 25.

In light of this purpose, a question naturally arises concerning the applicability of the doctrine of unconscionability in Louisiana's civil law system: should this approach be adopted in Louisiana?[112]

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112. When weighing proposed solutions, this Comment recognizes that it may be useful to cast a wide net, encompassing various jurisdictions and perspectives. Thus, it is important to note at the outset that other civil law jurisdictions have adopted comprehensive statutory schemes that deal directly with the problems presented by adhesion contracts, especially in the consumer context. *See generally* Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT'L L.J. 223 (2006) (surveying global developments in consumer protection initiatives, especially concerning transactions involving the sale of goods). However, this Comment does not address such statutory schemes for three reasons. First, to do so would not efficiently further the primary goal of the Comment, which is to illustrate the practical application of the foundational approach. Second, such statutory schemes are unlikely to be adopted with haste in Louisiana (if adopted at all). Finally, such statutory schemes are not the only potential source of consumer protection.

Although it may be ideal to have an explicit statutory scheme to directly address adhesion contracts, such a scheme is not necessarily required in Louisiana's civil law system, because legislation is neither the fountain of all judicial action nor a straight-jacket for courts. *See* Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT'L L. & COM. REG. 273 (1995); LA. CIV. CODE arts. 1, 4 (2016). In the civil law, the court's role is to consider specific facts and logically apply to those facts general principles of the common good, whether those principles are explicitly identified by the legislature (legislation), implicitly supported by the people (custom), or a matter of pure reason (equity). As explained by Portalis, the civil law distinguishes between legislator and judge:

> There is a science for lawmakers, as there is for judges; and the former does not resemble the latter. The legislator's science consists in finding in each subject the principles most favorable to the common good; the judge's science is to put these principles into effect, to diversify them, and to extend them, by means of wise and reasoned application, to private causes; to examine closely the spirit of the law when the letter kills; and not to expose himself to the risk of being alternately slave and rebel, and of disobeying because of a servile mentality.

Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 772 (1969) (translation by M. Shael Herman). Thus, there is no reason to assume a Louisiana judge must wait for explicit statutory authorization to police adhesion contracts. In fact, some scholars have recommended that judges intervene to police adhesion contracts, but there is disagreement about whether such an intervention requires the adoption of the common law doctrine of unconscionability or merely requires judges to utilize traditional civil law contract principles.

B. The Unconscionability Debate in Louisiana's Civil Law System

Louisiana has not explicitly adopted the doctrine of unconscionability. The Louisiana approach to adhesion contracts—adopted by the Louisiana Supreme Court in *Aguillard v. Auction Management Co.*—focuses exclusively on the element of consent, looking to see if consent was vitiated by any of the traditional vices of consent.[113] In *Aguillard*, the Louisiana Supreme Court did not look to common law jurisdictions for guidance and only mentioned unconscionability when referring to the plaintiff's argument.[114] This is not to say that there are not similarities in the Louisiana and common law approaches. For example, the Louisiana Third Circuit Court of Appeal distilled the *Aguillard* analysis of arbitration clauses into four factors: "(1) the physical characteristics of the arbitration clause, (2) the distinguishing features of the arbitration clause, (3) the mutuality of the arbitration clause, in terms of the relative burdens and advantages conferred by the clause upon each party, and (4) the relative bargaining strength of the parties."[115] Although these factors may relate to procedural and substantive unconscionability, their connection with the common law doctrine seems only coincidental from the supreme court's opinion, which is further evidenced by the lower courts' application of the *Aguillard* analysis.[116] Thus, the extent of Louisiana's actual acceptance of the doctrine remains unclear.

Scholars have debated whether Louisiana should actually accept the doctrine of unconscionability. On the one hand, some civil law scholars have argued that a civilian judge armed with the Louisiana Civil Code is well equipped to deal with adhesion contracts, and thus the adoption of the

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113. Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 10–11 (La. 2005) ("In summation, a contract is one of adhesion when either its form, print, or unequal terms call into question the consent of the non-drafting party and it is demonstrated that the contract is unenforceable, due to lack of consent or error, which vitiates consent. Accordingly, even if a contract is standard in form and printed in small font, if it does not call into question the non-drafting party's consent and if it is not demonstrated that the non-drafting party did not consent or his consent is vitiated by error, the contract is not a contract of adhesion."). One odd feature of the opinion is that the Louisiana Supreme Court seems to equate "adhesion contracts" with what other jurisdictions would call "unconscionable contracts."

114. *Id.* at 14 ("In response, the plaintiffs argued the arbitration clause was adhesionary and *unconscionable* due to defendant's superior bargaining position." (emphasis added)).

115. Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc., 971 So. 2d 1257, 1266 (La. Ct. App. 2007).

116. *See, e.g.*, Hanlon v. Monsanto AG Prods., 124 So. 3d 535 (La. Ct. App. 2013).

unconscionability doctrine is unnecessary.[117] According to this view, unconscionability can be seen simply as "a defect of consent, that is, the absence of a free and deliberate exercise of the will."[118] The Louisiana Civil Code can deal with such a problem in a number of ways. For example, an "adhesion contract" may be considered non-contractual in nature if it is not bilateral or reciprocal,[119] such as the boilerplate language in a receipt that is not brought to the customer's attention.[120] In addition, consent may be vitiated by the traditional vices of consent, especially error or fraud.[121] The Louisiana Civil Code can also address problems of consent indirectly by using methods of interpretation to construe a contract in the consumer's favor, withholding performance in commutative contracts, and invoking imperative rules, such as rescission for lesion beyond moiety.[122]

On the other hand, it has also been argued that the doctrine of unconscionability has a place in Louisiana's civil law system.[123] After a party has objectively manifested consent to clear and unambiguous terms, the requirement of consent is established unless that party can show consent is vitiated.[124] Despite the potential capability of the vices of consent to prevent contractual unfairness, "these concepts do have their origins in antiquated legal systems that never contemplated dealing with

117. *See, e.g.*, Hersbergen, *supra* note 88.

118. *Id.* at 1318.

119. *Id.* at 1320.

120. Bowers v. Fox-Stanley Photo Prods., Inc., 379 So. 2d. 844 (La. Ct. App. 1980).

121. *See generally* Hersbergen, *supra* note 88.

122. *See generally id.* First, ambiguous terms in a contract are interpreted against the drafter, who is not the consumer in the standard form context. LA. CIV. CODE art. 2056 (2016). Second, concerning commutative contracts, "[e]ither party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously." *Id.* art. 2022. Finally, the Civil Code provides for imperative rules, such as rescission of a sale for lesion beyond moiety, that cannot be altered by private acts. *See, e.g.*, *id.* art. 2589.

123. *See* R. Fritz Niswanger, Comment, *An Unconscionability Formula for Louisiana Civilians?*, 81 TUL. L. REV. 509 (2006).

124. *See* Litvinoff, *supra* note 40, at 758 ("Nevertheless, whether the contract is one of adhesion or one merely contained in a standard form, the enforceability of certain clauses, usually of the small print variety, may be questionable because the party now placed in a disadvantageous position by that clause was not aware that he was subscribing to it when he entered the contract. The question, thus, is whether the party gave his consent to the clause in dispute or, when it is clear that it was given, whether that consent was vitiated by error.").

mass, standard form contracting."[125] Thus, the traditional vices of consent—error, fraud, and duress[126]—may not be up to the task of policing all forms of modern adhesion contracts. As a result, the common law doctrine of unconscionability may be useful to add clarity to the application of broader principles that underlie the traditional vices of consent, such as preventing unfair surprise and oppression, abuse of right, equity, and good faith.[127] This may be an acceptable approach for courts faced with the evolving problems of adhesion contracts, who—in the words of Saleilles—may "go beyond the Code, but through the Code."[128]

Although there are tolerable arguments on either side of this debate, it is important to step back and evaluate the approach used to determine the fit of the doctrine of unconscionability in Louisiana's civil law legal system. Because this Comment has identified that the legal problem of adhesion contracts has an impact on the structural integrity of contract law generally, the proposed solutions must be tested for coherency before they can be tested for competency. This is not to say that one should never look for the best solution. Instead, one must determine whether a proposed solution is in the realm of legal possibility before determining whether a proposed solution is ideal.

III. TESTING THE COHERENCY OF PROPOSED SOLUTIONS: THE FOUNDATIONAL METHOD

Once a proposed solution to an established legal problem has been evaluated, its coherency must be tested. For this reason, the third step in the foundational approach is to use the "foundational method" to test the coherency of the proposed solution with the legal systems under consideration. This method involves a deductive process. First, the comparativist must identify a philosophical foundation of each legal system, which is essentially a theoretical basis for the legitimacy of all governmental action. Second, the comparativist must derive general principles from the philosophical foundation. To qualify as general principles (rather than narrow policy objectives), such principles must be individually cogent and collectively coherent. Third, the comparativist must illustrate how the

125. Niswanger, *supra* note 123, at 526.

126. LA. CIV. CODE art. 1948 ("Consent may be vitiated by error, fraud, or duress.").

127. Niswanger, *supra* note 123, at 535.

128. Moreteau, *supra* note 112, at 289 (quoting Raymond Saleilles, *Preface* to FRANCOIS GENY, SCIENCE ET TECHNIQUE EN DROIT PRIVE POSITIF (1913)). This idea embodies the nature of a civil code, which is meant to provide for general rules that have the flexibility to adjust to the needs of an evolving society.

general principles guide existing legal institutions and, thereby, connect the legal system to its philosophical foundation. Finally, the comparativist must evaluate whether the proposed solution is consistent with the general principles and, if so, to what extent. At this point, the fruits of the second step of the foundational approach are put into effect by comparing the guiding principles of the proposed solution with the general principles of the legal system. This Part applies the "foundational method" to test the coherency of the doctrine of unconscionability with the common law legal system and the Louisiana civil law legal system.

For this application of the foundational method, the first challenge is to establish the starting point of the inquiry—the philosophical foundation of the legal system. With this foundation in place, it will eventually be possible to complete two tasks: (1) determining the coherency of the doctrine of unconscionability with a legal system,[129] and (2) deriving other practical solutions to the problems associated with adhesion contracts directly from the general principles of the legal system itself.[130] In other words, distilling the philosophical foundation of a particular legal system will yield both comparative benefits and constructive benefits.

The philosophical foundation of a legal system is a justification for the legitimacy of governmental authority that exists in the abstract. Consequently, to be precise, the challenge is not to find *the* philosophical foundation but instead is to find *a plausible* philosophical foundation that can act as a useful tool to derive general principles and, in turn, determine the coherency of legal institutions.[131] In short, the philosophical foundation is an intellectual tool that has a practical purpose—maintaining the structural integrity of a legal system when discussing the utility of particular legal institutions, such as the doctrine of unconscionability.

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129. *See, e.g.*, *infra* Part III.C.

130. *See, e.g.*, *infra* Part IV.

131. There are two primary reasons for not concerning oneself with the actual philosophical foundation of a legal system here. First, to establish the actual philosophical foundation of a particular legal system would involve a rigorous historical and cultural evaluation that would unduly distract from the immediate question—the coherency of a particular legal institution. Second, although a separate debate about the proper philosophical foundation of a particular legal system is always an option, if the philosophical foundation is plausible, it is highly unlikely that the ultimate conclusion of the method will be different. It is important to remember that the philosophical foundation's plausibility will be tested by comparing its general principles with existing legal institutions in the respective legal system. Thus, there will be little difference in the practical implementation of the foundational approach when using different plausible philosophical foundations.

Social contract theory provides such a tool for both the civil law and the common law. This is not to say that social contract theory is the historical foundation of these legal systems.[132] Instead, social contract theory provides a base from which one can build up a coherent understanding of these legal systems and, thereby, determine the fit of the doctrine of unconscionability within the broader context of the law. Before getting into the mechanics, the reader must understand some essential features of social contract theory, a theory brought up in the Cartesian tradition.[133]

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132. This Comment purposefully ignores the contemporary forms of social contract theory that grew up in the Kantian tradition. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971).

133. To understand social contract theory, one must understand the intellectual approach of the Rationalists. In 1641, René Descartes famously contemplated the basis for *all* of his beliefs and asked, "how do I know there is not something . . . concerning which there is not even the slightest occasion for doubt?" RENÉ DESCARTES, *Meditations on First Philosophy in which the Existence of God and the Distinction Between the Soul and the Body are Demonstrated*, *in* DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 63 (Donald A. Cress trans., 4th ed., Hackett Publ'g Co. 1998) (1641) (describing his task as applying himself "earnestly and unreservedly to [the] general demolition of [his] opinions"). To answer this question, Descartes assumed that everything he "knew" or had ever "known" was an illusion—perhaps brought about by a perpetual dream, insanity, or an evil demon—to find whether there was a perceptible but undeniable truth. *Id.* For Descartes, epistemological reliance on sense perceptions was inherently flawed, because distinguishing between truth and illusion was practically impossible as a result of the very nature of the senses. *Id.* at 60 ("Surely whatever I had admitted until now as most true I received either from the senses or through the senses. However, I have noticed that the senses are sometimes deceptive; and it is a mark of prudence never to place our complete trust in those who have deceived us even once."). Instead, Descartes relies on what he sees as the first undeniable truth: "I am, I exist." *Id.* at 64.

With the aid of reason, this truth could then be used as a foundation for all knowledge as a collection of immutable truths. For example, Descartes derives from the truth of his existence that, *inter alia*, he is a thinking thing and his perceptions, as far as they exist within him, also exist. *Id.* at 70. Other Rationalists would embrace this approach, seeking to deduce practical insights from general principles. *See, e.g.*, THOMAS HOBBES, LEVIATHAN (C. B. Macpherson ed., Penguin Books 1985) (1651).

A. The Basics of Social Contract Theory

Following the analytical method developed by René Descartes,[134] Thomas Hobbes—the "founding father of social contract theory"[135]—sought to strip the study of political thought of any dressing of religious, cultural, moral, or academic bias.[136] By suggesting that the legitimacy of a legal system should be analyzed in the context of human nature and epistemological limitations, Hobbes challenged the dominant view of Aristotle that human beings are political animals by nature and the legitimacy of government is a product of natural order.[137] Ultimately,

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134. René Descartes was a seventeenth century philosopher and mathematician and is considered to be the "founder of modern philosophy." BERTRAND RUSSELL, HISTORY OF WESTERN PHILOSOPHY 511 (Routledge Classics 2004) (1946). By attempting to "construct a complete philosophic edifice *de novo*," Descartes distinguished himself from his predecessors, who could be seen as merely teaching in the ancient Grecian tradition. *Id.*

In particular, Descartes's approach revolutionized political thought and legal theory during the Enlightenment. *See* James V. Schall, *Cartesianism and Political Theory*, 24 REV. POLITCS 260, 260 (1962) ("After Descartes, the scientific and mechanical orientations of thought replaced the traditional Christian and Aristotelian molds in which politics had been considered."). In fact, Descartes's work, like that of other philosophers such as Thomas Hobbes, is largely considered a direct attack on the Aristotelian tradition, which dominated political thought before 1650. *See* Michael Edwards, *Aristotelianism, Descartes, and Hobbes*, 50 HIST. J. 449, 458 (2007) ("Although almost all recent research points in some way to the complexity, significance, and diversity of the Aristotelian tradition, it is equally clear that the *novatores* themselves did not always appreciate these qualities, partly because of their anti-scholastic prejudices, and partly because, in many cases, this was a tradition they first encountered (and perhaps imperfectly understood) in their youth. Descartes's own reading of his Aristotelian context was resolutely blunt. He insisted that 'I do not think that the diversity of the opinions of the scholastics makes their philosophy difficult to refute. It is easy to overturn the foundations on which they all agree, and once that has been done, all their disagreements over detail will seem foolish.'" (footnotes omitted)).

135. *See* S.A. LLOYD, MORALITY IN THE PHILOSOPHY OF THOMAS HOBBES 252 (2007).

136. Hobbes's *Leviathan*, *supra* note 133, was his landmark attempt to develop a true "science of politics." *See generally* Stephen Finn, *Thomas Hobbes: Methodology*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/hobmeth/#H2 [https://perma.cc/MY47-V5BW] (last visited Feb. 27, 2016) (discussing the methodology used in Thomas Hobbes's political theory).

137. *See* ARISTOTLE, *Politics*, *in* SELECTED WORKS 561 (Hippocrates G. Apostle & Lloyd P. Gerson trans., 3d ed., Peripatetic Press 1991).

Hobbes revolutionized how theorists viewed the legitimacy of governmental action by inquiring into the life of mankind without government.[138]

1. The State of Nature

Before delving into the nuances of social contract theory, one must consider a thought experiment: Imagine a world with no social relations, no culture, no legitimate governing authority, and no law. In this "state of nature"—a theoretical time before the birth of the social organization—each person has the natural liberty to do as he or she pleases.[139] The only limits on this natural liberty are products of natural law: the physical ability of the actor and the actor's inclinations (which are inherently self-interested).[140] Because there is no common authority to resolve conflict or determine how limited resources are allocated, life in the state of nature is very insecure.[141]

2. The Social Contract

For the proponent of social contract theory, the state of nature is so undesirable that *a priori* all people would choose to give up their natural

138. *See* HOBBES, *supra* note 133, at 183–88.

139. *Id.* at 187–89.

140. *Id.* at 187.

141. Although all social contract theorists agree that the state of nature is not ideal, they do not agree on the degree of undesirability. *Compare id.* at 186 ("Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."), *with* LOCKE, *supra* note 11, at 108 ("And here we have the plain 'difference between the state of nature and the state of war;' which, however some men have confounded, are as far distant as a state of peace, good-will, mutual assistance and preservation, and a state of enmity, malice, violence, and mutual destruction, are one from another. Men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of nature.").

liberty in exchange for the security of political order.[142] This idea represents the fundamental motivation for the social contract, which is the basis of legitimate governmental authority and, more generally, a legitimate legal system. Under this idea, only the consent of the governed can legitimize the state and its laws.[143] Any other source of authority does not create mutual interests in the preservation of the state and thus the state of nature persists.

The binding nature of the social contract is not a matter of morality per se but is instead a result of reason.[144] People willingly join together and stay together in a political community, because their interests compel them to do so. Because individuals are not able to act contrary to their perceived self-interests, the force of consent is a matter of natural law. Thus, *sincere* consent is the fundamental prerequisite for the assumption of intrinsically binding legal duties (in both public law and private law), but the nature and scope of consent are subject to different interpretations.

3. Perspectives on the Social Contract

Although the above principles unite social contract theories, theorists disagree on the nature and scope of individual assent to the social contract.

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142. *See, e.g.*, HOBBES, *supra* note 133, at 190 (noting the "Second Law of Nature" is "[*t*]*hat a man be willing, when others are so too, as farre-forth, as for Peace, and defense of himselfe he shall think it necessary, to lay down this right to all things; and be contended with so much liberty against other men, as he would allow other men against himselfe*." (emphasis in original)).

143. *See* William A. Edmundson, *Politics in a State of* Nature, 26 RATIO JURIS 149, 151 (2013) ("The state-of-nature tradition is committed to the view that political obligation is fundamentally voluntaristic. It rejects the classical notion that the state stands *in loco parentis*, and that political obligation is non-voluntaristic in much the same way that filial obligation is non-voluntaristic. For the state-of-nature tradition, voluntary consent is the 'gold standard' by which state claims to legitimate authority are to be judged. This sets the bar rather high, and reaching it requires that the state structure be such that it can command universal, free assent, at least at some level of abstraction.").

144. In contrast, Aristotle saw promise-keeping as a virtue that made a person especially well-suited to his ends. *See* ARISTOTLE, NICOMACHEAN ETHICS 75 (Joe Sachs trans., Focus Publ'g 2002). Thomas Aquinas and other late scholastics elaborated on this virtue and concluded that one must keep his or her promises as a matter of moral or "natural" law. *See generally* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 10–29 (1991) (discussing the contributions of Aristotle and Thomas Aquinas to the legal synthesis achieved by the late scholastics in the sixteenth century).

For Thomas Hobbes[145] and John Locke,[146] individuals join together for the sole purpose of protecting individual property interests (broadly defined).[147] In contrast, for Jean-Jacques Rousseau,[148] individuals join together to form a common interest, which is protected by the group collectively.[149] The key difference is whether the legitimacy of the governing authority is derived from either the *means* of the social contract—i.e., the individual's consent to be governed—or the *ends* of the social contract—i.e., the unification of individuals in society and the formation of the general will. As the remainder of this Part will illustrate, the implications of these different "perspectives" on the social contract are reflected in the Louisiana civil law and Anglo-American common law and can serve as the basis for the foundational method's evaluation of the doctrine of unconscionability's coherency with those legal systems.[150]

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145. *See generally* Garrath Williams, *Thomas Hobbes: Moral and Political Philosophy*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/hobmoral/ [https://perma.cc/24ZS-Y7WK] (last visited Feb. 27, 2016) (discussing the life and works of Thomas Hobbes).

146. *See generally* Patrick J. Connolly, *John Locke (1632–1704)*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/locke/ [https://perma.cc/BSC8-FRTF] (last visited Feb. 27, 2016) (discussing the life and works of John Locke).

147. *See infra* Part III.B.

148. *See generally* James J. Delaney, *Jean-Jacques Rousseau (1712–1778)*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/rousseau/ [https://perma.cc/F4TE-VGX5] (last visited Feb. 27, 2016) (discussing the life and works of Jean-Jacques Rousseau).

149. *See infra* Part III.C.

150. This Part utilizes two "perspectives" on the social contract as philosophical foundations of the civil law and common law legal systems for three reasons. For one, the "ends-focused perspective" and the "means-focused perspective" on the social contract suggest general principles that, in turn, can be used to develop a coherent set of legal institutions. Thus, each satisfies the technical requirements of a philosophical foundation. In addition, the "ends-focused perspective" and the "means-focused perspective" on the social contract connect well with the civil law and common law legal systems respectively. Thus, each satisfies the plausibility requirement of a philosophical foundation. Finally, the "perspectives" on the social contract are particularly useful for analyzing the legitimacy of adhesion contracts, because the requirements of a legitimate social contract apply *a fortiori* to the legitimacy of private agreements under the social contract. Thus, each "perspective" will be practically useful for determining the coherency of proposed solutions to the problems associated with adhesion contracts, such as the doctrine of unconscionability. They are intellectual tools with a practical purpose—maintaining the structural integrity of a legal system when discussing the utility of particular legal institutions.

B. Application of the Foundational Method to the Common Law

The "foundational method" (the third step in the "foundational approach") can be applied to the common law to determine whether the doctrine of unconscionability is coherent with the Anglo-American common law legal system. The mechanics of this process are as follows. First, the means-focused perspective on the social contract is employed as a philosophical foundation of the common law legal system, suggesting the theoretical source of all legitimate governmental action and, *a fortiori*, all legitimate private action as enforced through contract law.[151] Second, to facilitate a practical application of this theoretical source of legitimacy, the means-focused perspective on the social contract is used to derive general principles.[152] Third, these general principles guide the development of coherent legal institutions that parallel mainstay institutions characterizing the common law, indicating that general principles derived from the means-focused perspective are—for practical purposes—general principles of the common law.[153] Fourth, by comparing the general principles of the common law with the guiding principles of the doctrine of unconscionability, the foundational method tests the coherency of the doctrine of unconscionability with the common law legal system.[154] Although this method involves an abstraction away from the immediate problem at hand, such an abstraction is necessary to determine the place of the doctrine of unconscionability in the broader context of the common law as a coherent legal system.

1. A Philosophical Foundation of the Common Law Legal System

For the common law to be considered a coherent legal system, there must be a philosophical foundation that serves both as the source of legitimacy of all governmental action and as the antecedent that dictates the relationship among particular legal institutions. As a result, before determining the coherency of the doctrine of unconscionability with the common law, it is necessary to identify a philosophical foundation for the common law. Social contract theory is useful for this purpose, because the social contract signifies the beginning of a legitimate government. Thus, one may examine the nature of the social contract to determine the continued legitimacy of both governmental action and private actions that

151. *See infra* Part III.B.1. The legitimacy of governmental action informs the legitimacy of private action at least to the extent that private action is enforceable as a matter of law.

152. *See infra* Part III.B.2.

153. *See infra* Part III.B.3.

154. *See infra* Part III.B.4.

are legally enforceable. This inquiry involves a fundamental question: why would individuals forfeit their respective natural liberty and submit to the authority of a political state?

One answer to the question of why individuals forfeit their respective natural liberty and join the social contract is focused on the "means" of social organization: autonomous individuals join together in an organized community to protect their individual natural rights from the arbitrary interference of the interests of others, both inside and outside that community, and thus any exercise of authority by that community over individuals must be consistent with the scope of their consent.[155] This Comment views this perspective as "means-focused" in that the logical implications of the social contract must be consistent with the *means* of social organization—the consent of the people. The implications of the means-focused perspective make it a plausible philosophical foundation of the common law as a coherent legal system.[156]

The means-focused perspective suggests limits on the scope of legitimate governmental action. From this perspective, the only purpose of social organization is the protection of broadly defined "property rights,"[157] and there is no greater end to social organization.[158] The social

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155. This statement reflects this Comment's broad characterization of the social contract theories expounded by Thomas Hobbes in *Leviathan*, *supra* note 133, and John Locke in *Two Treatises of Government*, *supra* note 11.

156. *See infra* Part III.B.3.

157. For Hobbes, the overwhelming aversion of mankind is the fear of death. *See* HOBBES, *supra* note 133, at 189 ("A Law Of Nature, (*Lex Naturalis*,) is a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, which he thinketh it may be best preserved."). This idea led Hobbes to believe that individuals could logically submit to a despotic leader as long as that leader kept them relatively safe from outsiders and each other. *See id.* at 228–39 (discussing the rights of the sovereign by institution). In contrast, Locke broadened the interests of mankind to general property interests in life, liberty, and estates. LOCKE, *supra* note 11, at 155. Locke criticized Hobbes's line of reasoning, which suggested "men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay think it safety, to be devoured by lions." *Id.* at 140. Regardless, for both Hobbes and Locke, from the individual's point of view the purpose of social organization is to protect that which is the object of his rational interests, what this Comment calls "broadly defined property rights."

158. *Compare* LOCKE, *supra* note 11, at 141, 155 ("The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."), *with* ROUSSEAU, *supra* note 9, at 148 ("*Each of us places his person and all his power in common under the*

contract does not involve the abandonment of one's private interests, and thus the general interest is merely a collection of distinct private interests.[159] As a result, the people always retain the natural right to resist governmental action that arbitrarily infringes on their right to self-preservation.[160] Where government action exceeds the scope of the consent of the governed, that action is without the foundation for its legitimacy, the social contract is dissolved, and moral duties brought about by positive law are extinguished.[161] Therefore, the legitimacy of government action, whether the creation of law or the enforcement of a "contract," is inseparable from the consent of those governed by the action.[162]

This idea is useful for the present inquiry into the problems associated with adhesion contracts, because the legitimacy of governmental action informs the legitimacy of private action, or, more precisely, the enforcement of private action (i.e. private law). In fact, the legitimacy of governmental action *precedes* the legitimacy of the enforcement of private action. As a result, the means-focused perspective on the social contract can be applied *a fortiori* to private agreements between members of the community. When individuals in a community sincerely consent to an agreement between themselves, the agreement is *a priori* in their perceived private interests and thus is binding as a matter of reason. In addition, because the very purpose of government from the means-focused perspective is to protect property interests broadly defined, the community has an interest in enforcing the valid agreement lest one party arbitrarily exercise authority over another when circumstances change and, thereby, disturb the reason why the latter entered into the social contract.

Although logically sound, this subjective notion of consent presents practical problems, such as whether there is actual consent or merely the illusion of consent.[163] For example, objectively determining whether a

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supreme direction of the general will; and as one we receive each member as an indivisible part of the whole." (emphasis in original)).

159. *See* LOCKE, *supra* note 11, at 156–57.

160. *Id.* at 200–01; *see also* HOBBES, *supra* note 133, at 353.

161. *See* HOBBES, *supra* note 133, at 353, 375; LOCKE, *supra* note 11, at 202–03.

162. When focusing on the means of social organization, this Comment sees the social contract as a "mark of autonomy"—the ultimate example that the legitimacy of government is based on the continued consent of its people.

163. With respect to the legitimacy of governmental action, this question is less of a concern, because the social contract is not thought to be an explicit contract but instead a theoretical agreement from which the law derives a moral force. In the interest of pragmatism, proof of the continued subjective consent of the entire population is neither necessary nor desirable. With respect to the legitimacy of private agreements, however, the objective manifestation of consent

standard form contract that is signed by a party actually reflects the signer's subjective consent is impossible. This is a problem, because, as social contract theorists suggest, only subjective consent is inherently binding as a matter of logic.[164] When government enforces agreements lacking subjective consent, both the agreement and the action of enforcement is illegitimate. When such illegitimate action is conducted on a larger scale, the legitimacy of the entire legal system is threatened. For this reason, legal institutions that determine what agreements should be enforced (for example, the doctrine of unconscionability) must be guided by general principles that are derived directly from the philosophical foundation of the legal system.

2. General Principles of the Common Law

The means-focused perspective on the social contract suggests a number of general principles, which will be useful for comparing foreign legal institutions with and deriving practical legal institutions for the common law as a coherent legal system. Specifically, the means-focused perspective on the social contract suggests four general principles that are especially informative when analyzing the common law's enforcement of contracts in general and adhesion contracts in particular.

First, the means-focused perspective on the social contract is characterized by complete skepticism of human nature. From the means-focused perspective, not only is there no room for altruism but also there is no relinquishment of one's individual self-interests in favor of a broader societal interest.[165] Thus, there is no reason to believe that any particular individual would sacrifice his or her private interests in order to achieve some other goal, such as the administration of justice or the promotion of the public good. In fact, such a sacrifice would be inconceivable in light of human nature.[166]

Second, the means-focused perspective on the social contract is characterized by disdain for the necessity of government. With complete skepticism of human nature comes the need to suppress individual self-

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is extremely relevant, especially—as in the case of adhesion contracts—when the objective manifestation of consent has been recognized to be dubious indicia of subjective intent.

164. As Locke recognized, people will not rebel or see an authority as completely illegitimate for isolated injustices. *See* LOCKE, *supra* note 11, at 201–02. When those injustices reach a critical mass, however, the legitimacy of government and the law is threatened. *Id.*

165. HOBBES, *supra* note 133, at 353–54, 375.

166. *See id.*

interests insofar as those self-interests interfere with the rights of others.[167] Thus, government is a necessary evil.[168] On the one hand, government promulgates rules that limit one's freedom, acting as a cage to contain self-interests. On the other hand, it promulgates rules to protect an individual from the interests of others, acting as a shield from self-interests. Although this arrangement is more desirable than the state of nature, it evokes disdain because it is not ideal from any particular individual's standpoint for three reasons. First, government has no higher purpose than to act as a shield and a cage of individual self-interests.[169] Second, the individual must pay the price of a functioning government, which requires a significant amount of resources.[170] Finally, the concentration of power in the hands of governmental officials leaves the citizen vulnerable to potential abuses.[171] This last problem in particular suggests a need for certain safeguards.

Third, the means-focused perspective on the social contract is characterized by a focus on predictability and the freedom from arbitrary authority. For government to be effective—or even tolerable—one must be able to advocate for his or her individual self-interests with the same vigor as all others.[172] This concern is a matter of equality of opportunity, not equality of outcome.[173] Because all individuals are expected to act in accordance with their respective self-interests and there is no greater purpose of government than to promote individual property interests broadly defined, any attempt by a government to favor one individual's advocacy rights over another must be a result of bias. Predictability and freedom from arbitrary authority ensures a solid foundation for equality of opportunity or, more precisely, equality of advocacy.[174]

Fourth, the means-focused perspective on the social contract is characterized by the predominance of individual liberty interests. As a matter of logic, if legal institutions are to remain true to the social contract, those institutions must be predominantly concerned with the individual liberty interests of the members of the community, whose consent is the basis for all legitimacy.[175] For the means-focused perspective on the social contract, there is no greater end to social organization than to provide each

167. *See* LOCKE, *supra* note 11, at 155.
168. HOBBES, *supra* note 133, at 353–54.
169. *See* LOCKE, *supra* note 11, at 155–57.
170. *See id.* at 163.
171. *See id.* at 189.
172. HOBBES, *supra* note 133, at 385.
173. *See* LOCKE, *supra* note 11, at 160–62.
174. *See id.*
175. *See id.* at 155–56.

individual with protection from the private interests of others.[176] Any broader notion of the "public welfare" should thus be equated to this promotion of general liberty interests.

Without the uniting force of the means-forced perspective on the social contract, circumstances may suggest that these four principles are inconsistent. For example, the predominance of individual liberty interests would seem to suggest that a person should be "free" to consent to any boilerplate language that is presented in a standard-form contract. Because a person is also free to choose whether to read the language or seek outside counsel, it would follow that his or her choice not to do so is an exercise of free will, which should be respected as a matter of principle. In contrast, complete skepticism of human nature would suggest that there can be some agreements that are so onerous that no rational person would freely agree to their terms, and thus the objective manifestation of assent is but a ruse used by well-informed drafters to exploit the intentional ignorance of the law, which elevates form over substance. Although these general principles may sometimes be in tension, such tension is never inevitable when the principles derive from a common source. When faced with practical problems, the role of legal institutions is to both promote the general principles and maintain their coherency. This idea can be seen in legal institutions of the common law, for which the means-focused perspective forms a plausible philosophical foundation.

3. The Connection Between the Common Law Legal System and the Means-Focused Perspective

The general principles of the means-focused perspective yield legal institutions that parallel the mainstay institutions of the common law. As a result, the means-focused perspective can be seen—for all practical purposes—as a foundation for the common law as a coherent legal system. This connection will be useful for evaluating the coherency of new legal institutions with the overall common law legal system. Three features of the common law illustrate the connection between the legal system and the means-focused perspective.

First, the means-focused perspective suggests the importance of an adversarial system of justice. Although complete skepticism of human nature may initially appear to preclude any attempt to establish a system of justice, the means-focused answer is not to suppress self-interest but instead to harness it. In this respect, it is easy to understand the common law support for the adversarial process, both in the functioning of the

176. *See id.*

courts and in the understanding of interpersonal contractual relations.[177] The common law relies on the adversarial system to produce just results, because there is no other logical alternative. Skepticism of human nature does not allow litigants to rely solely on the compassion of opposing counsel, the integrity of the court, the wisdom of the jury, or the obviousness of the law.[178]

Second, the means-focused perspective suggests the need for procedural safeguards. Procedural safeguards in the courtroom and at the negotiating table ensure—to the greatest extent possible—that a given result will be predictable and that one will be free from the arbitrary authority of another. Complete skepticism of human nature makes paternal interventions dubious, and thus extra-procedural protections—such as rules of public order—should be treated with skepticism. In this respect, it is easy to understand the common law's focus on procedural safeguards, especially in the adversarial process.[179] The adversarial process promises a fair opportunity to advocate for one's position, but it does not promise a

177. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371 (2001) ("The traditional premise of American civil adjudication is that ours is an adversary system: Litigation is a process by which an impartial arbiter resolves a dispute between private parties following an adversarial demonstration of privately developed facts and zealously presented legal arguments."); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–83 (1978).

178. This realization limits the viability of any search for the truth and suggests a search for the truth is not the ultimate goal of common law adjudication. *See* Marvin E. Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975) ("We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth. Sometimes, less guardedly, we say it is 'best calculated to getting out all the facts . . . .' That the adversary technique is useful within limits none will doubt. That it is 'best' we should all doubt if we were able to be objective about the question. Despite our untested statements of self-congratulation, we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system. We know that most countries of the world seek justice by different routes. What is much more to the point, we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.").

179. *See, e.g.*, United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

just result.[180] To have such an opportunity, the process must be fair.[181] For the process to be fair, procedural safeguards must limit parties, outsiders, and the judge, alike.

Third, the means-focused perspective suggests the need to limit the power of public officials to give effect to private agreements. Skepticism of human nature and the disdain for the necessity of government imply that the public official should be viewed with increased suspicion, because he or she will often exercise significant authority. In this respect, it is easy to understand the common law's view of the judge, who is both insulated from outside influences and authorized to exercise only limited judicial powers when the language of an agreement is clear.[182] In addition, a predominance of individual liberty interests implies that an individual should be able to enter into any agreement she perceives to be in her self-interests, but human nature suggests that one would not freely enter into an agreement in which she gives up something in exchange for nothing. Thus, only private agreements that are supported by consideration may be deemed a valid contract and enforced by the court, which may not substitute its own idea of a fair exchange for that which is evidenced by the objective manifestation of assent by the parties.[183]

The above discussion is only a sample of the connection between the common law legal system and the means-focused perspective on the social contract. This connection is essential to the final step in the foundational method because the connection establishes that the general principles derived from the philosophical foundation are—for practical purposes—the general principles of the legal system. Thus, in the final step, it is possible to compare the general principles of the legal system with the guiding principles of the proposed solution to determine that solution's coherency.

4. The Coherency of the Doctrine of Unconscionability with the Common Law Legal System

The doctrine of unconscionability fits well in the common law legal system because the doctrine's focus on the means of contractual assent mirrors the means-focused perspective on the social contract. For one, the

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180. *See* U.S CONST. amend. V; *id.* amend. XIV; Zinermon v. Burch, 494 U.S. 113, 125 (1990).

181. *See* Carey v. Piphus, 435 U.S. 247, 262 (1978).

182. *See generally* Seon Bong Yu, *The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries*, 2 INT'L AREA STUD. REV. 35 (1999).

183. *See* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

doctrine of unconscionability reflects a complete skepticism of human nature. Although the standard-form contract standing alone may satisfy the requirement of an objective manifestation of mutual assent, the doctrine of unconscionability allows courts to delve deeper into the procedure and substance of the agreement to find any unfair or oppressive behavior on the part of the drafter. This inquiry is warranted, because the drafter's sole concern is naturally the promotion of its private interests. Second, the doctrine of unconscionability reflects disdain for the necessity of government and focuses on freedom from arbitrary authority. Although judges are empowered to determine the conscionability of contracts as a matter of law, strict application of procedural and substantive unconscionability objective standards act as a limitation on the judge's discretion. Finally, the doctrine of unconscionability allows for individual liberty interests to prevail because it only invalidates a seemingly valid agreement if there is significant evidence that the consumer did not consent, preserving the reliability of an objective manifestation of mutual assent. Therefore, this application of the foundational method suggests the doctrine of unconscionability is readily coherent with the common law system.

C. Application of the Foundational Method to the Civil Law

The "foundational method" can also be applied to the civil law to determine whether the doctrine of unconscionability is coherent with the Louisiana civil law legal system. The mechanics of this process are similar to the application of the foundational method to the common law, which is detailed in the previous section. First, the ends-focused perspective on the social contract is employed as a philosophical foundation of the civil law legal system, suggesting the theoretical source of all legitimate governmental action and, *a fortiori*, all legitimate private action.[184] Second, to facilitate a practical application of this theoretical source of legitimacy, the ends-focused perspective on the social contract is used to derive general principles. Third, these general principles guide the development of coherent legal institutions that parallel mainstay institutions that characterize the civil law, indicating that general principles derived from the ends-focused perspective are—for practical purposes—general principles of the civil law. Fourth, by comparing the general principles of the civil law with the guiding principles of the doctrine of unconscionability, the foundational method tests the coherency of the doctrine of unconscionability with Louisiana's civil law legal system. As with the

184. *See supra* text accompanying note 151.

previous section, this method involves an abstraction away from the immediate problem at hand.

1. A Philosophical Foundation of the Civil Law Legal System

For the civil law to be considered a coherent legal system, there must be a philosophical foundation that ensures both legitimacy and coherency. As a result, before determining the coherency of the doctrine of unconscionability with the Louisiana civil law, it is necessary to identify a philosophical foundation for the Louisiana civil law. As with the common law, social contract theory is useful for this purpose, because the social contract signifies the beginning of a legitimate government, and thus one may examine the nature of social contract to determine the continued legitimacy of governmental and private action.

With respect to the source of a legal system's legitimacy, a second answer to the question of why individuals forfeit their respective natural rights and join the social contract is focused on the "ends" of social organization: autonomous individuals join together in an organized society to unite their private interests to a greater common interest that is pursued and defended by the whole, and thus any legitimate exercise of authority by the society is limited to that which promotes the general welfare of the society.[185] This Comment views this perspective as "ends-focused" in that the logical implications of the social contract must be consistent with the *ends* of social organization—the promotion of the general welfare as a distinct interest. The implications of the ends-focused perspective make it a plausible philosophical foundation of the Louisiana civil law as a coherent legal system.

The ends-focused perspective suggests limits on the scope of legitimate governmental action. From this perspective, the purpose of social organization is to realize and enforce the common good, not merely to protect the private interests of the individuals who joined the social contract.[186] The social contract involves the abandonment of one's private interest, and thus the general interest is that which tends to promote the general welfare, not merely a collection of distinct interests.[187] As a result,

185. This statement reflects the Comment's broad characterization of the social contract theory expounded by Jean-Jacques Rousseau. *See generally* ROUSSEAU, *supra* note 9.

186. *Id.* at 148.

187. *See id.* at 150–51. For Rousseau, the relinquishment of private interests in favor of societal interests was more than a rational step; it was desirable in its on right as a means of being one's own master. *Id.* at 151 ("For to be driven by

the people do not retain any natural rights per se, because any legitimate exercise of authority by the society *a priori* promotes the general welfare.[188] If the exercise of authority does not promote the general welfare (for example by promoting merely private interests), it is illegitimate, the social contract is dissolved, and the exercise of authority is not properly called the administration of "Law."[189]

When considering the source of a government's legitimacy, the ends-focused perspective can be contrasted with the means-focused perspective. When focusing on the *means* of social organization, the social contract is a "mark of autonomy"—the ultimate example that the legitimacy of government is based on the continued consent of its people. Thus, subjective consent alone yields legitimate authority. In contrast, when focusing on the *ends* of social organization, the social contract is a "mark of alignment"—the ultimate example that the legitimacy of government is based on the adherence to the general will. Although consent is an important means to the formation of the general will, subjective consent alone is not enough to legitimize authority over the consenter.[190] There must be consent *plus* the realization of the cause of that consent.[191] With

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appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty.").

188. *Id.* at 150 ("For since the sovereign is formed entirely from the private individuals who make it up, it neither has nor could have an interest contrary to theirs. Hence, the sovereign power has no need to offer a guarantee to its subjects, since it is impossible for a body to want to harm all of its members, and . . . it cannot harm any one of them in particular. The sovereign, by the mere fact that it exists, is always all that it should be.").

189. Rousseau believed this course of events and the destruction of society was inevitable. *Id.* at 192.

190. Rousseau illustrates this point with the example of someone who "consents" to slavery and argues that such consent cannot bring about a duty in any meaningful sense of the term. *Id.* at 146–47 ("Whether it is the statement of one man to another man, or one man to a people, the following sort of talk will always be equally nonsensical. *I make a convention with you which is wholly at your expense and wholly to my advantage; and, for as long as it pleases me, I will observe it and so will you*." (emphasis in original)).

191. This is a matter of pure logic. When a person sincerely consents to something for a purpose, the resulting trade-off must be in that person's interests. The individual is bound to the consent when the purpose is fulfilled and, when the purpose ceases, so does the binding force of the consent. Although it is true that a person can be forced to uphold an empty promise, it is the threat of reprisal—and not consent—that forces the person to act accordingly. Thus, there is no duty to the "promisee" but instead only a "duty" to—or perhaps more precisely an inclination of—the promisor's own self.

respect to governmental action, the cause of consent is merely the mutual adherence to the general will.[192]

This idea is useful for examining problems associated with adhesion contracts, because the legitimacy of governmental action informs the legitimacy of private action. The ends-focused perspective on the social contract can be applied by analogy to private agreements between subsets of the society. The same principles of consent apply; both sincere consent and the realization of the cause for the consent are necessary for the agreement to create binding "law" between the parties.[193] If consent is to be binding as a matter of reason, the cause for the consent must be fulfilled.

An essential limitation on private agreements under the ends-focused perspective is not imposed by the means-focused perspective: Individuals may create "laws" among themselves within society but only as long as those "laws" do not derogate from principles of the common good.[194] The state cannot legitimately enforce an agreement that is inconsistent with the general will, and without state enforcement the agreement is neither theoretically nor practically binding.[195]

Although logically sound, the subjective notions of consent and cause present practical problems, such as whether the actual cause was met or whether there was a cause at all. For example, it is impossible to objectively determine whether a standard form contract that is signed by a party actually reflects her subjective cause. This is a problem, because, as the ends-focused perspective suggests, there must be both subjective consent and realization of the cause for that consent in order to bind a person as a matter of logic.[196] When government enforces agreements lacking such requirements, it is not only the agreement that is illegitimate but also the action of enforcement. When such illegitimate action is conducted on a larger scale, the legitimacy of the entire legal system is threatened. Thus, to maintain legitimacy, legal institutions must be guided by general principles that are derived directly from the philosophical foundation of the legal system.

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192. *See id.* at 148.

193. *See infra* Part IV.

194. *See* LA. CIV. CODE art. 7 (2016). The means-focused perspective on the social contract equates the common good with the collective good of the distinct private interests of the members of the community.

195. *See* ROUSSEAU, *supra* note 9, at 161–62.

196. In contrast, the means-focused perspective does not recognize an abstract common good, and thus the requirement of cause is not necessary; mere consent is sufficient to bind a person under the means-focused perspective.

2. General Principles of the Civil Law

The ends-focused perspective on the social contract suggests a number of general principles, which will be useful for comparing foreign legal institutions with—and deriving practical legal institutions for—the Louisiana civil law as a coherent legal system. Specifically, the ends-focused perspective on the social contract suggests four general principles that are particularly informative when analyzing the civil law's enforcement of contracts generally and adhesion contracts in particular.

First, the ends-focused perspective on the social contract is characterized by incomplete skepticism of human nature. In fact, the ends-focused perspective on the social contract presumes that an individual is able to relinquish his or her private interests in favor of the general interests of society as a whole.[197] For Rousseau, this presumption is essential to the social contract, which provides a solution to the fundamental problem of social organization: "Find a form of association which defends and protects with all common forces the person and goods of each associate, and by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before."[198] The social contract requires "the total alienation of each associate, together with all of his rights, to the entire community," because this act creates an indivisible whole that promotes liberty, equality, and unity.[199]

Second, the ends-focused perspective on the social contract is characterized by the theoretical nature of the sovereign. The sovereign is the unified society in action and is *by definition* only guided by the general will.[200] This is a theoretically distinct entity, rather than a mere collection of individuals.[201] Further, the sovereign is inalienable, indivisible, and absolute.[202] In contrast, the absence of the sovereign implies the non-existence of the society and illegitimacy of the state, regardless of whether a group of individuals has remained in proximity to one another.[203] Thus, while the social contract represents the theoretical birth of society, the sovereign represents its continued life in the abstract.

Third, the ends-focused perspective on the social contract is characterized by a focus on the practical realization of the general will. Because of the theoretical nature of the sovereign, truly realizing the

197. *Id.* at 151.
198. *Id.* at 148 (internal quotation marks omitted).
199. *Id.*
200. *Id.* at 149–50.
201. *Id.* at 150.
202. *See id.* at 153–59.
203. *See id.* at 149–50.

practical implications of the general will is difficult, if not impossible.[204] So, government is concerned with approximating the dictates of the general will to the extent practical, using governmental structure, procedure, and individual accountability.[205] Practical limitations do not stifle the initial inquiry into abstract or subjective ideas.

Fourth, the ends-focused perspective on the social contract is characterized by the predominance of societal interests over individual private interests. Although the promotion of individual private interests may appear to correlate with the common interests in certain circumstances, the concern for legitimate governmental action is *always* the approximation of the general will.[206] In fact, law could be defined simply as "when the entire populace enacts a statute concerning the entire populace."[207] Thus, societal interests must always prevail over individual private interests.[208] The only recourse for the aggrieved individual that finds his or her private interests in opposition to the general will is to either submit to the law or to break ties with the society and return to the state of nature.[209]

These general principles of the ends-focused perspective can be used to derive legal institutions. These legal institutions can be used to address practical problems associated with the legitimacy of private and public action. In addition, because these legal institutions are derived from a common source (the ends-focused perspective on the social contract), they collectively create a coherent body of law that can properly be called a "legal system." As this Comment suggests, the ends-focused perspective on the social contract acts as a sound philosophical foundation for the Louisiana civil law legal system.

3. The Connection Between the Civil Law Legal System and the Ends-Focused Perspective

The general principles of the ends-focused perspective yield legal institutions that parallel the mainstay institutions of the Louisiana civil law. As a result, the ends-focused perspective can be seen—for all practical purposes—as a foundation for the Louisiana civil law as a coherent legal system. This connection will be useful for evaluating the

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204. *See id.* at 162–63.

205. *Id.* at 177.

206. *Id.* at 171, 174–75. In contrast, the means-focused perspective on the social contract equates these two goals.

207. *Id.* at 161.

208. *Id.* at 171.

209. *Id.* at 159.

coherency of new legal institutions with the overall Louisiana civil law legal system. Three features of the Louisiana civil law illustrate the connection between the ends-focused perspective and the Louisiana civil law.

First, the ends-focused perspective suggests the importance of individuals adhering to a set of general citizenly duties. Incomplete skepticism of human nature allows—and the practical realization of the general will requires—individuals to distinguish between actions that promote one's self-interests as an individual and actions that promote one's self-interests as a member of the society.[210] Although the maintenance of the state requires the individual to always choose the latter, it is impossible for the government—either through legislation or *jurisprudence constante*—to always guide the individual. Thus, there is a tension between, on the one hand, the need to ensure the promotion of societal interests over merely private interests and, on the other hand, the ability of the government to communicate exactly what that means beforehand. In this respect, it is easy to understand Louisiana civil law's reliance on broad duties, such as the requirement of good faith.[211] Individuals are not only deemed to know the mandates of positive law but also must act—generally speaking—in a manner that is becoming of a member of society.[212] In contrast with the common law, this broad duty lessens the needed for a strictly adversarial system, both as a procedural system of justice and as a general picture of interpersonal relations.[213]

Second, the ends-focused perspective suggests the need for extra-procedural protection of parties with weaker bargaining power. Because faith in human nature is incomplete and private interests may not supersede public interests, the law must prescribe rules of public order that promote the common good and may not be derogated by private agreement.[214] These rules are not strictly procedural in nature; they create substantive bars on certain actions that would typically allow a party with a stronger bargaining position to take advantage of another. In this respect,

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210. *Id.* at 150.

211. *See, e.g.*, LA. CIV. CODE art. 1983 (2016); *see generally* GUILLAUME WICKER & JEAN-BAPTISTE RACINE, *Good Faith*, *in* GUIDING PRINCIPLES AND REVISED PRINCIPLES OF EUROPEAN CONTRACT LAW (2008).

212. LA. CIV. CODE arts. 5, 1983.

213. Although Louisiana certainly has an adversarial system of justice, the interactions of parties to a contract is not seen as completely adversarial but instead as cooperative in nature. *See, e.g.*, Henry v. Ballard & Cordell Corp., 418 So. 2d 1334 (La. 1982) (supporting a "cooperative venture" view when interpreting an oil and gas lease).

214. *See supra* Part III.C.2.

it is easy to understand Louisiana's reliance on rules of public order that protect parties with weaker bargaining power in a transaction. For example, "[a] buyer is not bound by an otherwise effective exclusion or limitation of the warranty [against rehibitory defects] when the seller has declared that the thing has a quality that he knew it did not have."[215] Thus, any plain language in the contract to the contrary will be null, even if the parties agreed to that language in accordance with proper procedure.[216]

Third, the ends-focused perspective suggests the need of judicial flexibility in the enforcement of private agreements. The general will is superior to any form of its manifestation.[217] Neither legislation nor contract can derogate from the clear mandates of societal interests.[218] In this respect, it is easy to understand the methods of interpretation in the Louisiana civil law legal system as well as the judge's flexibility in utilizing them when enforcing (or not enforcing) private agreements. For example, a judge has the ability to disregard the plain language of a contract if it leads to an absurd consequence in light of public policy.[219] This ability recognizes the nature of the sovereign as an abstract entity, the practical difficulties of ascertaining the mandates of the general will, and the superiority of societal interests over private interests. Further, unlike the common law judge, the civilian judge may be trusted to reason beyond the words of the contract to a greater degree, because civilian skepticism of human nature is incomplete and allows for unselfish actions.[220]

These examples show the connection between the Louisiana civil law legal system and the ends-focused perspective on the social contract. Unlike the means-focused perspective, the ends-focused perspective readily allows for key features of the Louisiana civil law: the role of general duties, the prevalence of rules of public order, and the role of the judge. This connection is essential to the final step in the foundational method, because the connection establishes that the general principles

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215. LA. CIV. CODE art. 2548.

216. In contrast, the common law has been traditionally focused on ensuring a valid procedure in contract formation by focusing on the nature of the promises made, rather than determining the proper outcome *ex ante* through classification of contracts and rules of public order. *See* Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34 H.K. L.J. 339, 348 (2004).

217. ROUSSEAU, *supra* note 9, at 148–50.

218. The structure of the Civil Code as a comprehensive and rational set of rules helps to minimize the risk that its provisions will derogate from the interests of society.

219. *See* LA. CIV. CODE art. 2046.

220. *See supra* Part III.C.2; *see also supra* Part III.B.2.

derived from the philosophical foundation are—for practical purposes—the general principles of the legal system. Thus, in the final step, it is possible to compare the general principles of the legal system with the guiding principles of the proposed solution to determine that solution's coherency.

4. The Coherency of the Doctrine of Unconscionability with Louisiana's Civil Law Legal System

The focus of the doctrine of unconscionability on the means of contractual assent does not fit perfectly with the Louisiana civil law, which is more aligned with the ends-focused perspective on the social contract.[221] For one, the ends-focused perspective reflects an incomplete skepticism of human nature, which suggests that individuals may agree to some terms for reasons other than merely private interests.[222] Thus, while the law should be concerned with oppressive behavior, the means of contractual assent do not paint a complete picture of the relations of parties. Second, the theoretical nature of the sovereign and the focus on the practical realization of the general will suggest that the Louisiana civil law can look beyond the objective manifestation of mutual assent and delve deeper into the purpose of private agreements.[223] Consequently, the civil law does not need to shy away from subjective inquiries, such as determining the actual reason why a drafter included a boilerplate term in a standard form contract. Third, the predominance of societal interests over individual private interests suggests that the law should not be concerned with protecting the integrity of a contract for the sake of the parties alone but instead for the sake of society's interests in maintaining the legitimacy of the institution of contract.[224] This idea suggests the civil law should be concerned with the broader societal ramifications of enforcing certain agreements.

It is true that consent is one of the fundamental prerequisites for legitimate governmental action and the doctrine of unconscionability helps to protect the evidentiary value of the objective manifestation of consent.[225] But the civil law should not only be concerned with the objective manifestation of consent. As the ends-focused perspective illustrates, there should also be a concern for the reason or cause for the consent.[226] So the

221. *See supra* Part III.C.3.
222. *See supra* Part III.C.2.
223. *See supra* Part III.C.2.
224. *See supra* Part III.C.2.
225. *See supra* Part III.B.
226. *See supra* Part III.C.1.

doctrine of unconscionability leaves something wanting in the civil law. Thus, Louisiana must look elsewhere for a coherent way of dealing with the legal problem of adhesion contracts that better reflects the general principles of the Louisiana civil law as a coherent legal system.

IV. SECONDARY INQUIRY: A CIVILIAN ANSWER TO ADHESION CONTRACTS

Once the primary inquiry into the coherency of a proposed solution is complete, one may conduct secondary inquiries to determine the "best" coherent solution to an established legal problem. Although these secondary inquires make up the fourth step in the foundational approach, they are neither uniform in application nor necessarily decisive of the overall inquiry.[227] For example, the doctrine of unconscionability—although readily coherent with the general principles of the Anglo-American common law legal system[228]—leaves something wanting when compared to the general principles of the Louisiana civil law legal system.[229] Therefore, that doctrine is not a completely coherent solution to the legal problem of adhesion contracts for that legal system. Under the fourth step, this result warrants a search for alternative solutions, which must mirror the general foundational approach. Illustrating this point, this Part argues that, although historically underutilized, the civil law requirement of cause presents an alternative coherent solution to the legal problem of adhesion contracts in Louisiana because it fits well with the ends-focused perspective on the social contract, which provides a sound philosophical foundation for the Louisiana civil law as a coherent legal system.

A. The Proposed Solution: The Cause Element

Because the legal problem of adhesion contracts has been established and the proposed solution of the doctrine of unconscionability has proved to be inadequate for Louisiana's civil law legal system, it is necessary to

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227. If the proposed solution is at odds with the general principles of the legal system, then it should be abandoned. If the proposed solution is readily coherent with the general principles, then it can be subject to a narrower policy debate in the functionalist tradition. If the proposed solution is somewhere between these two extremes, the comparativist should reflect on the general principles to find—or craft—another legal institution that may solve the problem identified in the foundational approach's first step.

228. *See supra* Part III.B.4.

229. *See supra* Part III.C.4.

find a new proposed solution to test for coherency. While the doctrine of unconscionability can be useful for Louisiana courts—as it fits well with the requirement of consent in contractual formation[230]—the fact that a standard form contract is "conscionable" should not be the end of the inquiry in Louisiana. In addition to the requirement of valid consent, Louisiana law also requires another element for a contract to be enforceable that is relevant for most standard form consumer contracts—cause.[231] As with any proposed solution, the comparativist must trace the development of this element to determine its guiding principles and compare those principles with the general principles of the legal system under consideration.

1. The Development of Cause

The requirement of cause derives from a Roman law concept—*causa*.[232] Although there is debate over the practical use of *causa* under

230. *See supra* Part III.B–C.

231. LA. CIV. CODE art. 1966 (2016).

232. ZIMMERMANN, *supra* note 13, at 549–51. Although far from settled doctrine, according to some scholars the Roman concept of *causa* likely "meant nothing more than any ground or foundation of the action" in a system that "did not enforce an agreement unless it could be brought under certain well-defined heads of *contracts* or *pacts*." Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 623–25, 630 (1919) ("In the case of formal contracts, that is, of the stipulation in the time of Justinian, the *causa* would thus consist in the observance of the prescribed legal formalities. In the case of consensual contracts it would be the consent of the parties, and in the case of *real* contracts, nominate or innominate, the delivery of the chattel or the performance on plaintiff's part. The *causa* of the *pacta adiecta* would be the original contract and that of the *pacta praetoria* and *pacta legitima* would be simply the fact that the case fell within the terms of the particular edict of the praetor or of a particular statute which gave it such actionable character."). As a result, the Roman concept of *causa* has been equated to "actionability." W. W. BUCKLAND, ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW 232 (1912). In this sense, to say that a contract has a *causa* is a tautology, and there is no requirement of *causa* as a condition precedent of contract formation per se (i.e., a "contract"—or legal enforceable agreement—must have a *causa*—or that which makes it legally enforceable).

However, while a "naked agreement" (i.e. an agreement without a *causa*) would not give rise to a civil obligation, it may give rise to a defense (*exceptio*), allowing a performing party to reclaim the performance. *Id.* at 229–30. This defense was perhaps most useful in formal contracts, such as the stipulation (*stipulatio*). *See generally* ZIMMERMANN, *supra* note 13, at 68–94 (discussing the nature, use and evolution of the *stipulatio* in Roman law). Under general

Roman law, the postglossators Bartolus and Baldus understood *causa* in light of Aristotelian terminology and ethical theory.[233] By the time these scholars fully developed the medieval doctrine of *causa*, it closely resembled two important Aristotelian ideas: liberality and commutative justice.[234] *Liberality*—meaning to give "to the right people, the right amounts, and at the right time"—was reflected in the *causa* of gratuitous contracts, and *commutative justice*—meaning "to exchange so that neither party is enriched at the expense of the other"—was reflected in the *causa* of onerous contracts.[235] Being ends of human existence, these virtues could be seen as logical and moral foundations for legal institutions. Thus, the moral principles could be seen as transcending Roman positive law and may be read into Canon law as a matter of natural equity.[236] But this idea was mostly of theoretical, rather than practical, significance.[237]

The concept of "cause" was given practical application in sixteenth-century France. Although the scientific revolution of the Enlightenment hailed the replacement of Aristotelian virtues with moral principles based on the will, French jurists largely preserved the medieval doctrine of *causa*, relying heavily on the works of Domat and Pothier.[238] The requirement of cause was codified in the French Civil Code in 1804: "An obligation without a cause or on a false cause or on an unlawful cause can have no effect."[239] This idea would be echoed in Louisiana a few years later in the Digest of 1808.[240]

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principles of Roman law, "[u]nless the *causa* was made expressly a condition of its validity the stipulation was originally binding solely by reason of its form." Lorenzen, *supra*, at 627. This would create a problem for the stipulator if he did not receive the return performance contemplated in the stipulation. As a response, overtime "[t]he praetor paralyzed the effect of the formal stipulation by granting to the *promissor* a defense (*exceptio doli*) which enabled him to escape liability by proving that the duty assumed was without cause or was based upon an illicit cause." *Id.* at 627–28. Thus, principles of unjust enrichment and illegality were evident in contract enforcement, rather than contract formation.

233. GORDLEY, *supra* note 144, at 50–51.

234. *Id.* at 55.

235. *See id.* at 55–56.

236. *See id.* at 56.

237. *Id.* at 137.

238. *Id.* at 164. However, the tension between traditional language and innovative theory led to significant confusion among French legal scholars, which persists to this day. *Id.* at 165.

239. CODE CIVIL [C. CIV.] art. 1131 (Fr.).

240. DIGEST OF 1808 bk. III, tit. III, art. 31 (La.).

2. The Use of Cause in Louisiana

In Louisiana today, "[a]n obligation cannot exist without a lawful cause,"[241] which is "the reason why a party obligates himself."[242] As a civilian concept, cause is distinguishable from the common law notion of consideration,[243] which has a primarily evidentiary function under the objective theory of contract.[244] In contrast, the requirement of cause is most useful today in its subjective context, because to consider only the objective cause of nominate contracts would render the doctrine of cause meaningless.[245] For example, although a lender may have an objective cause for entering into the contract of loan (the recovery of the principal plus interest), the lender's subjective cause may be more illicit (for example, to foster illegal gambling).[246] Further, the cause of each party to a contract is significant and "[w]hether shared, common or not, any unlawful or immoral reason should carry with it the absolute nullity of the act of which it meant to be the 'cause.'"[247] This conclusion is a reflection of a guiding principle in the civil law: "[p]ersons may not by their juridical acts derogate from laws enacted for the protection of the public interest."[248]

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241. LA. CIV. CODE art. 1966 (2016).

242. *Id.* art. 1967.

243. *See* ALAIN A. LEVASSEUR, LOUISIANA LAW OF CONVENTIONAL OBLIGATIONS: A PRÉCIS 55–56 (2010).

244. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 230 (Transaction Publishers 2005) (1881) ("It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive and inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise." (footnote omitted)).

245. *See* LEVASSEUR, *supra* note 243, at 64.

246. *See, e.g.*, W.T. West v. Loe Pipe Yard, 125 So. 2d 469 (La. Ct. App. 1960).

247. LEVASSEUR, *supra* note 243, at 65.

248. *Id.*; *see also* LA. CIV. CODE art. 7 (2016). As further noted in the article 7, "[a]ny act in derogation of such laws is an absolute nullity." LA. CIV. CODE art. 7. Because such juridical acts are absolutely null, rather than relatively null, there are broader implications. First, "[a] contract that is absolutely null may not be

3. The Broader Guiding Principles of Cause

Although historically cause has only been invoked to invalidate contracts for illegal or non-existent causes in Louisiana,[249] a broader application of the element is justifiable in light of its development in the Aristotelian tradition. Courts should not only invalidate contracts or terms for illegal or non-existent causes but also for causes that are generally against public policy.

To justify this broader application of the cause requirement today, one may reformulate Aristotelian virtues in light of the ends-focused perspective on the social contract. Instead of being seen as ends in themselves, commutative justice and liberality can be seen as general principles that *a priori* promote the general welfare of society. In other words, the guiding principles of cause can be seen as aligned with the general principles derived from the ends-focused perspective on the social contract.

Rousseau advocated a similar idea when he said: "If one enquires into precisely wherein the greatest good of all consists . . . it boils down to two principal objectives, *liberty* and *equality*. Liberty, because all particular dependence is that much force taken from the body of the state; equality, because liberty cannot subsist without it."[250] For Rousseau, liberty—as in "civil liberty"—meant the ability to have one's actions limited only by the general will[251] and equality meant that no individual have the power or wealth to unjustly limit the liberty of another.[252]

In the private contract context, Rousseau's promotion of liberty and equality can be seen as requiring the promotion the Aristotelian values of liberality and communicative justice, which are the foundation of the contractual requirement of cause. Without the value of communicative justice, there can be no equality, as the ability of one person to enrich himself or herself at the expense of another gives that person the power to unjustly limit the liberty of the other.[253] Without the value of liberality,

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confirmed." *Id.* art. 2030. Second, "[a]bsolute nullity may be invoked by any person or may be declared by the court on its own initiative." *Id.* Third, an "[a]ction for annulment of an absolutely null contract does not prescribe." *Id.* art. 2032. Fourth, "[a]n absolutely null contract . . . is deemed never to have existed." *Id.* art. 2033. Finally, "[a]bsolute nullity may be raised as a defense even by a party who, at the time the contract was made, knew or should have known of the defect that makes the contract null." *Id.*

249. *See, e.g.*, *W.T. West*, 125 So. 2d 469.

250. ROUSSEAU, *supra* note 9, at 170.

251. *Id.* at 151.

252. *Id.* at 170.

253. *See id.* at 170–71.

there can be no liberty, because societal standards are necessary to guide the actions of private parties in a society if those actions are to be considered truly "free."[254] Thus, recognition of both Aristotelian values is necessary to promote the ends of social organization during contractual formation, which, in turn, is necessary to legitimize the enforcement of a contract under the ends-focused perspective.[255]

Expanding this idea, contracts, to the extent that they are enforceable, should only be entered into with a sociable intent that gives deference to the common good and does not take advantage of another's incapacities. Thus, contracts must have a sociable cause, reflecting the principle—common to both Aristotelian virtue and the ends-focused perspective on the social contract—that the law cannot support an action that derogates from the common good.

B. Application of the Foundational Method

The broader use of the requirement of cause fits well with the ends-focused perspective on the social contract and thus can be seen as a coherent legal institution of the Louisiana civil law legal system. First, the cause requirement echoes the incomplete skepticism of human nature by suggesting that parties can have both cooperative and uncooperative reasons for entering into a contract.[256] Second, the cause requirement recognizes that private agreements, although valid on their face, may still have a purpose that deviates from the common good, making them unenforceable by legitimate governmental action.[257] Third, the cause requirement recognizes that the civil law does not have to shy away from the difficult task of determining subjective goals. Just as the legislature must determine the common good in the abstract, the judge must determine the subjective intent of private actors. Practical concerns are met with techniques, such as the use of reason, that are meant to best approximate the theoretical ideal.

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254. *See id.* at 151.

255. *See id.* 150–51, 170–71.

256. Parties may act completely in accordance with their individual self-interests or "sacrifice" their private interests to favor mutual interests, a result that is inconceivable from the means-focused perspective.

257. In contrast, the means-focused perspective does not consider there to be a common good beyond the protection of individuals' property interests broadly defined, and there is no need to consider the impact of a private agreement on society as a whole beyond its implications for individual property interests. Thus, consent alone is what is important from the means-focused perspective.

C. The Doctrine of Unsociability

The broader application of cause can be applied with precision to the problems of adhesion contracts. Adhesion contracts present significant ambiguities concerning the drafter's intent when particular terms are included. The more contracts move away from the essential terms that give rise to obligations, the greater the likelihood that the cause of each obligation will not be readily apparent. For example, a consumer may enter into a contract of sale with an automobile dealership to purchase a car. The objective cause of the seller is readily apparent—the purchase price. Any alternative cause is not likely to be of concern to the buyer, who may appeal to the justice system to correct most wrongs. But, if the seller requires the buyer to sign an agreement with numerous other provisions, questions arise. What is the cause for requiring arbitration in the event of a disagreement (does the seller merely want to limit the available remedies of the buyer)? What is the cause for waiving a warranty (does the seller know the car is a lemon)? What is the cause for a forum selection clause (does the seller want to make it financial infeasible for the buyer to enforce basic rights)?

Thus, the cause element of a contract can present a second hurdle for adhesion contracts. Such contracts may not only have to be "conscionable" but also "sociable." A contract would be "unsociable" when the cause of its terms is against good morals, public order, or express law. In other words, the cause for the party's consent is inconsistent with the ends of social organization. It tends to disrupt the unity of society by seeking to promote private interests over the general interests by, among other things, seeking to be enriched at the expense of another or ignoring the explicit mandates of the common good. This idea, especially in relation to the good morals and public order requirements, should be considered in light of the philosophical foundation of the civil law as seen through the ends-focused perspective of the social contract, which weighs all private action against the common good.

Although it is beyond the scope of this Comment to give a detailed account of how the doctrine of unsociability could be implemented, courts may look to classes of boilerplate terms to see whether or not they have sociable causes supporting their enforcement. Does this particular term seek to limit the rights of the consumer without promoting real efficiency benefits? Does this particular term merely seek to inconvenience the consumer? Does this particular term derogate from the spirit of imperative laws? Can the purpose of this particular term be adequately served by gap-filling provisions and is the choice between the term and the gap-filling provision of no social concern? These are fact-intensive questions that the

civilian judge should be well-equipped to handle, assuming she keeps in mind the underlying foundation of the Louisiana civil law legal system.

CONCLUSION

This Comment presents a new approach to comparative law—the "foundational" approach—that looks to the philosophical foundation of a legal system to determine the coherency of proposed solutions to legal problems. The application of the foundational approach to the doctrine of unconscionability reveals that it is a coherent solution to the legal problem of adhesion contracts for the common law legal system. The doctrine, however, is not completely coherent with the Louisiana civil law legal system. Accordingly, Louisiana courts should focus more attention on the cause requirement as a means of policing adhesion contracts, because the auxiliary boilerplate terms in such contracts often raise questions about the drafter's subjective reason for including those non-essential terms. Illicit intentions have the potential to disrupt foundational principles of the civil law theory of conventional obligations, especially when they are effectuated on such a large scale. Thus, in addition to being "conscionable," adhesion contracts in Louisiana must be "sociable," reflecting the importance of adhering to good morals, public order and express law in contractual formation. This doctrine of unsociability can save the unwary consumer from the malicious boilerplate and, more importantly, maintain the coherency and legitimacy of Louisiana's civil law legal system.

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* J.D./D.C.L., 2016, Paul M. Hebert Law Center, Louisiana State University. The Author would like to thank Professor Melissa T. Lonegrass, whose guidance was essential to the drafting of this Comment. The Author would also like to thank his wife, Sarah, and his parents, Annette and Tim, whose love and support allow him to pursue his academic endeavors with passion and determination.