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Contract's Covert Meddlers

Sarah Winsberg

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Scholars of contract law typically examine contracts as bargains between two parties. This approach elides an additional, key function of many contracts: to shape existing relationships to the satisfaction of a third party, often one more economically powerful than either of the two bargainers. Third-party litigants, especially creditors, have historically advocated for their own interests and interpretive paradigms so strongly that they have sometimes gained priority over the actual intentions of the two bargainers.

This Article recovers the story of how a group of frequent-flier third parties—mainly creditors of small businesses—shifted the rules of contracts between partners in early America. By arguing for reinterpretation of small business contracts, creditors fundamentally transformed labor and ownership practices. Curiously, third-party influence on contracts is rarely studied by either historians or legal scholars. This Article follows its tracks through the slow evolution of common law doctrine across the nineteenth century.

Today's contract law still chooses between the interests of third parties and those of contracting parties themselves. These choices, however, go unacknowledged and undertheorized both by the courts making them and in later analysis. Contract law therefore allocates the burdens imposed by unfavorable interpretive rules without examining who will bear the cost or why they should. Uncovering this hidden element of doctrine allows us to appraise whether it matches the values that contract law intends to uphold.

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INTRODUCTION

Every contract exists within a larger world. It meddles in the interests of a wide variety of other actors: the parties' customers and suppliers, their investors and employees, their creditors and debtors, and more.[1] Some of these third parties, in turn, want to meddle back.[2] They ask courts to enforce their own understandings of the contract, if it is disputed, over those of the parties. They seek default rules favoring their interests, and they may even try to limit which kinds of contract will be legally enforced. When third parties—often creditors—succeed in shaping doctrine, they constrain or replace parties' power to form relationships on their own terms.

This Article recounts a troubling historical example of creditor influence on contract doctrine. In the early nineteenth century, creditors argued strenuously for new rules governing partnership contracts within the small stores and workshops that owed them money. These contracts were, at the time, small businesses' most important tool to organize their own internal structure. By revisiting

1 *See* David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 987 (2021).

2 *See* Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REGUL. 211, 218–19 (2015).

long-forgotten state court cases and contemporaneous legal literature, I show how this litigation ultimately erased an alternate system of norms and legal dispute resolution within American small business in favor of a rigid distinction between partnership and employment. Setting aside and even criticizing parties' actual intentions, courts, at the behest of creditors, imposed new limitations on the ways these businesses could mix relationships of labor, ownership, control, and liability. The undesired transformation of these small businesses, and the lost promise of their now-vanished contractual norms, demonstrate the dangers of unexamined third-party influence on contract doctrine.

Hiland Barton's hotel in Eagle Bridge, New York was one of those small businesses, unwillingly transformed in 1864.[3] Hiland ran his hotel with the periodic assistance of his brother Eli, who lived at the hotel with his own wife and children and also operated a small store nearby.[4] The hotel relied on liquor dealer John Conklin for its libations—and it was the hotel's running debt to Conklin that would soon bring the brothers onto unexpected legal terrain. When Conklin's agent arrived to check in on the hotel's needs, he found Eli on the job. Eli told the agent, "[W]e are out of Bourbon, and I guess you had better send it up," busying himself with the hotel's daily chores as Conklin's agent observed.[5]

No intentionally formed contract bound the Barton brothers' relationship of mutual aid. But Conklin, suing the hotel for its outstanding balance on the liquor, asked the court to read one in. Conklin argued that Eli's words had implied that he was Hiland's partner.[6] That implication, in turn, would make Eli as liable for the hotel's liquor debts as Hiland was—even if they had never intended to form a partnership and would not be held partners for other purposes.[7] The New York Supreme Court sided with Conklin, placing responsibility for the miscommunication squarely on the Bartons' shoulders.[8] To the court, Eli's loose language of familial entrepreneurial cooperation ought, instead, to have matched the precise business norm of the merchant he was dealing with: "[H]e should have said, with frankness, that he was not a partner, and have repudiated the idea that he had any connection with his brother's business."[9] Of course, it would have been difficult for Eli to repudiate any connection with his brother's business while simultaneously assisting with its liquor

3 Conklin v. Barton, 43 Barb. 435, 435 (N.Y. Gen. Term 1864).
4 *Id.* at 439.
5 *Id.* at 443.
6 *Id.* at 439.
7 *Id.* at 440.
8 *Id.* at 441.
9 *Id.*

purchases. But to the judges considering the case, the Bartons held the responsibility to arrange their own relationship on terms familiar to potential third parties like Conklin—or risk having a court do it for them.

A century earlier, in eighteenth-century Anglo-America, sophisticated merchants and local small entrepreneurs like the Bartons would have lived in essentially separate worlds. Back then, each group resolved disputes in its own kind of legal forum, and each held established, shared norms that shaped and limited the terms of the contracts made within the community.[10] In the early decades of the nineteenth century, however, merchants with cosmopolitan ties began to take a greater interest in local enterprises.[11] When their loans to and investments in these concerns went bad, requiring retrospective inquiry into authority and liability within these small businesses, merchant third parties asked courts to reread small business contracts according to merchant norms and background rules, even if those readings went against the parties' actual intentions.[12] Courts responded to their concerns, reshaping doctrine and rewriting contracts to oblige third-party creditor litigants.

In cases like *Conklin v. Barton*, creditors of small businesses disputed with their borrowers over the kind of participation that would mark someone as "partner" within the enterprise, a key question that determined who could be liable for debts, among other related issues.[13] Litigants debated what should be assumed about a business's ownership, control, and labor, and whether contracting parties deserved to be penalized if they had not rendered their relationships legible to the sophisticated commercial world. Small businesses and their creditors brought different expectations to the contracts they formed. Each group relied on a robust set of background rules, generally known within the community and enforced by law, to fill out the terms of their contracts beyond those specified. Creditors, however, conducted a successful campaign to force small businesses into a choice between two business forms, neither of which precisely matched their intentions.[14]

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10 *See infra* Part II.

11 *See infra* Section III.B.

12 "[B]ackground rules," as explained by Richard Craswell, are the default rules, interpretive rules, and unwaivable limits that supplement a contract's text. *See* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489–90 (1989).

13 For a summary of this question in present-day law, see ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP, §§ 2.01–2.11 (1st ed. Supp. 2012).

14 *See infra* Part III.

Just as in the nineteenth century, today's courts regularly adjudicate between third-party interests and parties' own interests—even though they frequently fail to recognize it. Indeed, substantial parts of present-day contract doctrine, particularly in substantive areas like partnership law, likely reflect third-party advocacy for default and interpretive rules that favor their interests.[15] This allocation of interpretive priority may well have advantages in some instances. In other instances, however, it is harmful, as my historical research shows. What is striking is that the balance of third-party and contracting-party interests often goes unexamined as a matter of doctrinal principle and substantive fairness. The tension between third-party and contracting-party expectations is an invisible element of contract's background rules requiring further analysis across the substantive contexts in which it appears. By continuing to let it go unexamined, courts perpetuate burdens on contracting parties ill-positioned to avoid them.

The pattern of unseen, yet influential third-party influence extends beyond doctrine to individual contracts. Third-party pressure evades regulation meant to improve fairness in vulnerable contractual contexts like employment, tenancy, and consumer credit and sales. Landmark twentieth-century legislation, from the Fair Labor Standards Act to the Fair Housing Act, aimed to remediate inequalities of bargaining power in contexts where one party may be particularly disadvantaged in negotiation. These efforts, however, have important loopholes because they do not consider third-party pressure.

In Part I of this Article, I discuss conceptual strategies this Article employs to better reveal third-party creditor influence on the law. First, drawing on "history of capitalism" historical methodology, I focus on multi-party financial networks rather than on the binary, hierarchical relationships that often characterized earlier economic and labor histories. Second, I conceive the terrain of contract doctrine as broad in subject matter—including substantively specific areas like partnership contract. This approach allows me to observe how courts form default and interpretive rules across varied substantive contexts.

In Part II, I then analyze two separate early American worlds of contract law, and of partnership, showing how they relied on differing assumptions and contract background rules. In early American small business, partnership functioned importantly as a labor relationship, linking labor with capital. For more sophisticated merchants, it mainly united multiple sources of capital and then divided the profits between contributors.

In Part III, I show how pressure from third-party creditors produced a clash between these legal systems. Although American

15 *See infra* Part IV.

higher courts were initially content to let local courts resolve disputes over business structure according to the expectations of local economic actors, creditors protested. American lawyers, urged on by merchants extending credit more and more broadly, began to expand the realm of commercial law to include ordinary trade and the labor enabling it. Creditors, and lawyers supporting their agenda, wanted to apply commercial law's bright-line rules for identifying partnership even to small businesses. They initially succeeded, although courts soon began to balk at the unexpected outcomes this rule often produced for the parties. Yet even their attempts at modification continued to prioritize third-party expectations over the intentions of contracting parties themselves.

This pattern of change has not been confined to the nineteenth century, as I explain in Part IV. Today, too, third parties regularly sue to enforce their preferred contract interpretation. Because common law is built on precedent, this litigation in the aggregate shapes the rules of contract. Yet scholars and judges alike have often failed to think systematically about when third parties deserve special consideration and when their understandings ought to lose. When legislators have set out to regulate contracts, moreover, they too have overlooked the role of third-party pressure, creating ever-widening loopholes as a result.

This historical account makes several vital contributions to our understanding of contract law. First, it reveals that our assumptions about the interests that contract law balances are incomplete and undertheorized. Contract rules may prioritize promisees over promisors or vice versa, for example,[16] but they also choose between both parties' interests and those of present and future third parties. Second, it tracks the ways that third parties themselves intervene in that legal balance to promote their own interests. With law's help, third-party influence can be transformative, remaking relationships on new terms. Finally, it shows how devilishly tricky it can be to trace third-party influence in doctrine, because courts have traditionally treated third-party interests as more "objective" than those of the parties or viewed harms they suffer as indicative of fraud. Yet by reconstructing a clear and pivotal history of third-party influence in the past, this Article paves the way toward reexamination of present-day doctrine.

16 *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (surveying schools of thought in contract theory).

I. CONCEPTS FOR LOCATING THIRD-PARTY INFLUENCE

No contract exists in a vacuum. Every agreement is surrounded by the parties' present and potential future relationships.[17] These intersections create third parties who may well have an interest in influencing the terms of the contract or its subsequent interpretation. Very often, they succeed. Yet in most respects, contract theory takes little account of the influence and interests of specific third parties, and has little to say about whether and when third-party interests ought to prevail.[18]

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17 These patterns are reinforced by the "increased intensity and complexity of human interaction" within the modern economy. PATTERNS OF A NETWORK ECONOMY 2 (Börje Johansson, Charlie Karlsson & Lars Westin eds., 1994).

18 Here, some qualification is in order, as there are several cabined areas of law in which courts and the scholars observing them do explicitly weigh the competing interests of contracting parties and third parties. First, I omit consideration of those contracts in which the parties intend to benefit third parties; that is, those falling within third-party beneficiary doctrine. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (AM. L. INST. 1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."). Third-party beneficiary doctrine solves the problem of privity, allowing someone not a party to the contract to enforce it nonetheless, but because the doctrine rests directly on the intent of the contract parties, conflict between contracting-party intention and third-party conflicting interpretation does not arise in the same way in these contracts. Moreover, it has generally been interpreted relatively narrowly. *See* David G. Epstein, Alexandra W. Cook, J. Kyle Lowder & Michelle Sonntag, *An "App" for Third Party Beneficiaries*, 91 WASH. L. REV. 1663, 1668 (2016). Another exception is, of course, in the law of bankruptcy, which explicitly balances the interests of parties whose contracts cannot all be performed at once. Yet because not every indebted or even insolvent business files for bankruptcy, these cases are only a fraction of those in which third parties—including creditors—assert their interests. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 8–9 (1986).

As Aditi Bagchi has explained, "Philosophers of contract tend to take the dyadic (two-party) nature of private litigation, and of contracts in particular, to imply that only the rights and duties of litigants toward each other are relevant to resolving their dispute." Bagchi, *supra* note 2, at 219. Fortunately, however, there is a "relatively nascent literature" that constitutes an important exception, including Bagchi's own work. Bagchi, *supra* note 2, at 212; Hoffman & Hwang, *supra* note 1, at 988; *see also* Daniela Caruso, *Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective*, 59 HARV. INT'L L.J. 389, 404 (2018); Kishanthi Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 329 (2021). This recent work examines externalities of contracts; that is, their economic impact on third parties and on society—but it aims its attention at weak third parties in need of bolstered legal protection. *Id.* Indeed, theorists like Bagchi argue that contract law accedes *too little* to third-party interests. Bagchi, *supra* note 2, at 212. They analyze vulnerable third parties who bear the brunt of harm of corporate contracts—for example, workers whose dangerous labor results from agreements forming international supply chains. Caruso, *supra*, at 389–93; *see also* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 192 (2021) (identifying harms to third-party non-signatory litigants created by contracts' forum selection clauses). This Article builds on this emerging line of research by showing that, in

This Article makes methodological and theoretical choices designed to highlight long-submerged third-party influence, as I discuss in this Section. First, in choosing an arena in which to study the history of contract, I have deliberately picked the small business and its web of relationships with bigger players, rather than the large industrial workplaces that informed an earlier contract history scholarship, much of it produced in the 1970s. I argue that these scholars, writing at the end of American industrialism, asked historical questions befitting their contemporary context. Postindustrial capitalism demands a different kind of contract history that can historicize new economic structures. Next, I define contract law's domain broadly, drawing on nineteenth-century understandings of what counted as contract. This approach reveals that subject-specific defaults, interpretive rules, and even constraints are entirely typical of contract, and not in tension with it. It therefore better enables comparison and evaluation of contract default rules, including those with third-party effects.

A. Toward a New History of Contract

Historians have spilled much ink on the history of contract law, and for good reason.[19] For a generation of scholars in the late 1960s–80s, contract law held the essence of capitalism and its origins could help reveal what capitalism really meant, for good or ill.[20] Legal historians pointed out ways that contract law had once been different, and had been molded into its current form by particular societal interests.[21] They argued that contract law had been a key source of injustice, and might still be rewritten to mitigate and undo those effects.[22] Their opponents, scholars of legal theory and of law and economics, though divergent on many points, together fired back with analysis of contract law as representing timeless values of promise,

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other contexts, contract doctrine often accedes to third parties too much rather than too little.

19 *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE (2007); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975).

20 *See, e.g.*, Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 570, 577–78.

21 *See, e.g.*, P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 1 (1979); LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 9–10 (1965); GRANT GILMORE, THE DEATH OF CONTRACT 3 (1974); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 917–18 (1974); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

22 *See* Gordon, *supra* note 20, at 570–71.

choice, and efficiency.[23] For them, contract law was ancient and had changed slowly, and its developments represented progress in response to new economic needs.

Their debate was defined by the moment when it occurred. Scholars like Morton Horwitz and P.S. Atiyah, who recovered older, fairness-based values within contract law, wrote at the peak of a long period of American industrialization, during a transition whose eventual outcome was not yet clear.[24] Through the lens of contract, they debated what this now-receding order had meant, whether its tradeoffs had been worth it, and what might come next.[25] At bottom, the question was whether the kinds of arguably unequal transactions that had formed and maintained industrial America—between corporation and assembly-line worker, between wealthy land buyer and hard-up farmer-seller, between mill operator and put-upon neighbor—were fair to individuals and beneficial to society; and if not, what might replace them.

This classic work in legal history remains foundational in contracts scholarship. Still, in crucial ways, it belongs to its moment. In the factory, especially as imagined through the lens of Marxist class struggle, the lines of hierarchy, interest, and contracting had been relatively simple.[26] Workers toiled, owners profited, and the contract

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23 On contract as promise, see, for example, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (1981). On contract as choice, see, for example, Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783, 783 (1992). On contract as efficiency, see, for example, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

24 On the 1970s as the beginning moment of "the destruction of an economic order that seemed so rooted and pervasive," see, for example, Jefferson Cowie & Joseph Heathcott, *Introduction* to BEYOND THE RUINS: THE MEANINGS OF DEINDUSTRIALIZATION 2–4 (Jefferson Cowie & Joseph Heathcott eds., 2003).

25 Critical scholars identified modern contract with industrialization and wondered what might replace it after the decline of both. Atiyah, for example, thought the substantive fairness of premodern contract might be revived in a new age. *See* ATIYAH, *supra* note 21, at 716–79. Duncan Kennedy, similarly, saw the legal tendency toward rigid enforcement of contracts as born of the "nineteenth century . . . proposition[] that no man was his brother's keeper." Kennedy, *supra* note 21, at 1686 (quoting F. KESSLER & G. GILMORE, CONTRACTS, CASES AND MATERIALS 1118 (2d ed. 1970)). Opponents rejected emphasis on the Industrial Revolution, arguing that the essential qualities of contract were timeless ones: "[F]rom the fact that contract emerged only in modern times . . . it does not follow that therefore the concept of contract as promise . . . was itself the invention of the industrial revolution; whatever the accepted scope for contract, the principle of fidelity to one's word is an ancient one." FRIED, *supra* note 23, at 2.

26 Horwitz, Atiyah, and contemporaries were influenced by contemporaneous strands of Marxism in economic and labor history, as both critics and admirers were quick to note. *See, e.g.*, Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042, 1044 (1993) (book review).

was the tool for bending those interests into synchrony.[27] It was no wonder that scholars of the 1970s seldom contemplated those other workplaces, whose importance would grow in the decades after this scholarly debate, in which power emanated not from the employer but from powerful interests external to the employment relationship.

History remains one of our most powerful tools for finding and understanding elements of doctrine that, far from being natural or neutral, embody preferences we no longer remember or recognize. If history once helped us understand what industrialization had meant in the law at a moment of postindustrial transition, the discipline is now well-equipped to offer new kinds of insight. In the past fifteen years, historians have developed new methodology for understanding economic relationships. The work of self-identified "historians of capitalism" has revived and reoriented history of the economy by emphasizing how money, finance, and the intellectual tools they require create exploitation.[28] For example, historians of capitalism have studied how slavery and enslaved peoples' experiences changed in an era of rising financial sophistication, and how slavery was enabled by northern investment and northern institutions.[29] Histories of capitalism include victims—desperate slaves, oppressed wage workers, and more—but few villains: individual employers are much less consequential in these accounts than is the system of finance and investment in which they inhabit middle rungs.[30] Historians of capitalism have seldom directly considered contract law.[31] But, as I

27 Here, legal historians echoed the factory-centric approach of contemporary labor historians. The "new labor history" of the 1960s–70s saw workers as fundamentally in opposition to bosses and aimed its attention mainly at the factories and other large workplaces best embodying this class division, even when such workplaces were relatively rare. For description of the new labor history movement, and critique of what it left out, see Bruce Nelson, *Class, Race and Democracy in the CIO: The "New" Labor History Meets the "Wages of Whiteness,"* 41 INT'L REV. SOC. HIST. 351 (1996).

28 For a sampling of key work, see AMERICAN CAPITALISM: NEW HISTORIES (Sven Beckert & Christine Desan eds., 2018).

29 For representative work within a large and growing field, see SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY (2014); DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION (2017); WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET (1999).

30 *See, e.g.*, SETH ROCKMAN, SCRAPING BY: WAGE LABOR, SLAVERY, AND SURVIVAL IN EARLY BALTIMORE (2009). Oppressive conditions were created not by individuals but by "a political economy that dictated who worked where, on what terms, and to whose benefit." *Id.* at 5.

31 For important exceptions, see generally Christine Desan, *Beyond Commodification: Contract and the Credit-Based World of Modern Capitalism*, *in* 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS—ESSAYS IN HONOR OF MORTON J. HORWITZ 111 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010); KREITNER, *supra* note

demonstrate in this Article, the history-of-capitalism approach should lead contracts scholars to place individual contracts in the context of other financial relationships.

B. "Of the Subject-Matter of Contracts"[32]

Where do the terms of a contract come from? One answer: the written agreement of the parties. Yet in every time and place, the explicit meaning of a contract's written terms have told only part of the story.[33] Contracting parties also rely on background rules: the defaults, interpretive assumptions, and binding limits that fill in inevitable blanks.[34] Where they work well, at least in most scholars' view, these rules bear some relationship to the business norms of the contracting parties: contract background rules may even explicitly incorporate merchant usage or reasonable conduct, as the Uniform Commercial Code does today.[35]

The structural role of background rules within contract law, however, is hard to pin down. Legal scholars frequently analyze background rules as a core feature of contract law.[36] For some, however, background rules represent something other than contract law—and, indeed, as such rules accumulate and are applied by courts in varied situations, they eventually redefine disputes that might once have been contractual as belonging to some other area of law.[37] This Article

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19; Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383 (2014).

32 JOSEPH CHITTY, JR., A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON xi, 92 (London, S. Sweet 1826). Chitty's work was soon reprinted in Boston and Philadelphia and, with added American annotations, became a leading reference for American lawyers. *See* Sarah Winsberg, Recategorizing Early American Law: Legal Literature and Knowledge Formation in the Early Republic, *in* Lawyers and the Boundaries of Labor: 1780–1860 (forthcoming 2022) (Ph.D. dissertation, University of Pennsylvania) (on file with author).

33 Craswell, *supra* note 12, at 489–90.

34 *Id.*

35 *See, e.g.*, U.C.C. § 1-103(a)(2) (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE LS.2020) ("[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are . . . to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.").

36 *See* Craswell, *supra* note 12, at 489–90; *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989); Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 652 (2006); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 618 (1990).

37 *See* Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 812 ("[W]hen problems become socially

adopts the first, broader view: background rules are key elements of the law of contract. Nineteenth-century legal thinkers endorsed this approach. They saw "the subject matter of contracts"—including background rules—as crucial to the law and enforcement of agreements.

When English legal treatise-writer Joseph Chitty sat down to summarize contract law in 1826, he offered his readers some information on principles applicable to all contracts. Chitty defined the term "Contract," for example, and he also discussed assent, consideration, and contract interpretation.[38] Quickly, though, Chitty's attention turned from contracts in general to particular kinds of contracts. In a single, much-subdivided "chapter" that spanned over a hundred pages, Chitty outlined the doctrines applicable to contracts based on their subject matter. Some principles applied to relatively broad areas of contract law—contracts for sale of real property, for debt, for services and works. Others were much narrower: contracts for apothecary services, with inn-keepers, for wagers, and so on. For each, Chitty showed how courts and occasionally legislatures had developed specific ways to interpret, and sometimes constrain, these contracts. The "[s]ubject [m]atter of [c]ontracts" was so important to Chitty that, by his second edition in 1834, the chapter had expanded to nearly half the book.[39]

For Chitty and contemporary Anglo-American legal thinkers, the structure of contract doctrine was clear. Contract was a concept that described and regulated a broad array of agreements and relationships. At the same time, contract doctrine also included rules specific to the varied types of contracts. These rules offered defaults, interpretive paradigms, and hard limits developed by common law and occasionally by statute to serve the needs of these varied contract settings. Present-day contracts treatises are, of course, no longer usually written this way.[40] Treatises may refer to the underlying subject matter of contracts and the rules that have developed around it—but they usually do not take on the task of summarizing or analyzing

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significant enough to be litigated with any frequency, they tend to be 'removed' to new areas of the law where contract doctrine is either irrelevant or plays a minor role.").

38 CHITTY, *supra* note 32, at 1. Chitty defined contract as "every description of agreement, or obligation, whereby one party becomes bound to another, to pay a sum of money, or perform, or omit to do, a certain act." *Id.*

39 CHITTY, *supra* note 32, at 92; JOSEPH CHITTY, JR., A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTIONS THEREON (London, S. Sweet 1834) (1826).

40 *See, e.g.*, E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS (3d ed. 2004), xi–xxii.

different corners of the business world and the rules evolved to govern them.[41]

Nonetheless, this Article argues, the subject matter of contracts remains a vital aspect of contract doctrine. In the language of modern contract theory, the subject matter of contracts is its area-specific background rules: defaults, interpretive rules, and constraints.[42] Viewed narrowly, the modern subject matter of contracts includes the default rules most classically identified with this field of law: those rules found, for example, in the Uniform Commercial Code.[43] Viewed a bit more broadly, such rules would certainly include those of partnership contracts, given their common law lineage and tight link with commercial law.[44] Viewed even more expansively, the subject matter of contracts includes the rules and constraints for all kinds of present-day contracts, from employment and landlord-tenant contracts to marriage and corporate charters.[45]

A broad understanding of the scope of contract law—sometimes termed "contractarianism"—is at times associated with an anti-regulatory perspective.[46] Legal thinkers who see the corporation as a "nexus of contracts," for example, often oppose mandatory corporate law provisions that parties cannot disclaim via contract.[47] Their opponents deny that contract can fully describe these relationships and advocate regulation.[48] Chitty and his contemporaries, however,

41 *Chitty on Contracts* itself, now in its 33rd edition as of 2019, remains an interesting exception. It continues to devote an entire volume, one of two, to "Specific Contracts," including agency, employment, insurance, sales, and more. *See* JOSEPH CHITTY & HUGH G. BEALE, CHITTY ON CONTRACTS (33d ed. 2019).

42 Craswell, *supra* note 12, at 505; *see* Ayres & Gertner, *supra* note 36, at 88; Ben-Shahar & Pottow, *supra* note 36, at 652; Johnston, *supra* note 36, at 618. Hanokh Dagan and Michael Heller offer a similarly broad theory of the subject matter of contracts, though to different ends, in *The Choice Theory of Contracts*. HANOKH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017).

43 *See, e.g.*, FARNSWORTH, *supra* note 40, index.

44 *See* BROMBERG ET AL., *supra* note 13, at § 1.02(b) ("Courts and lawyers have said that the U.P.A. [Uniform Partnership Act] merely codifies or includes the common law.").

45 *See, e.g.*, Henry Hansmann, *Corporation and Contract*, 8 AM. L. & ECON. REV. 1, 1–3 (2006) (noting that corporate charters are contracts, and that corporations rarely alter the default terms set by statute); LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 230 (1981).

46 For an overview, see RICHARD HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 79–124 (1997).

47 *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 408–09 (1989) (reviewing contractarian corporations scholarship).

48 Some of contractarianism's opponents have been legal historians. Legal historians like Lawrence Friedman recount how, in a variety of areas, disputes once governed by common-law contract principles grew new subject-specific rules that soon constituted areas of law in themselves. *See* Stewart Macaulay, *Foreword* to FRIEDMAN, *supra* note 21, at iii (2011)

embraced a different kind of contractualism, one in which regulation of contract simply becomes part of the "subject matter of contract."

When we understand contract law as a bedrock legal structure on which subject-specific background rules also hang, as Chitty did, we gain analytic insight. Some kinds of background rules are visible and obvious in effect, especially those that aim to shield the little guy, as in employment law. Background rules that protect the powerful are often more difficult to suss out, however, as my historical research demonstrates. Lining up varied contractual contexts as structurally similar but substantively distinct allows for illuminating comparison. We can ask: Why, through the processes of common law or statute, have we chosen these background rules for this kind of contract? And for whose benefit do those rules operate?

II. PRECURSORS

Background rules define the terrain of contract law in every era and setting—and in early America, they differed from the setting of locally centered economic bargains to that of cosmopolitan merchants. In local-level American law, some kinds of contracts—especially the long-term work contract of apprenticeship or indentured servitude—recorded most of their terms explicitly and in writing. These contracts had major stakes for local governments because of their relationship with poor relief and social control, hence their rigorous formality.[49] Other contracts, including those dividing work and ownership within small businesses, were more often verbal, and relied heavily on background rules to fill in those details not specified by the parties. Disputes over these contracts were the domain of justice courts, where justices incorporated unwritten yet legalistic principles of decisionmaking alongside those more formally delineated.

Within the world of merchants, default rules had equal significance. Eighteenth-century Anglo-American merchants benefitted from the ongoing project of Lord Mansfield and the Court of King's Bench, who were diligently constructing a newly modernized

(over a decades-long study of Wisconsin Supreme Court decisions, "the subject matter of pure contract was taken away by other bodies of law" including "insurance, employment, and trade regulation."). Under a Chitty-style frame of analysis, however, it is possible to conceive fields of law as remaining fundamentally contractual even as they accumulate new and important background rules.

49 Another kind of contract most often formalized in writing was the land sale: also a bargain with significant public stakes. *See, e.g.*, Reeve Huston, *Land Conflict and Land Policy in the United States, 1785–1841*, *in* THE WORLD OF THE REVOLUTIONARY AMERICAN REPUBLIC: LAND, LABOR, AND THE CONFLICT FOR A CONTINENT 324, 325 (Andrew Shankman ed., 2014); JOHN G. WELLS, WELLS' EVERY MAN HIS OWN LAWYER, AND UNITED STATES BOOK FORM 28 (Providence, R.I., D. Kimball & Co. 1857).

commercial law meant to govern and reflect transatlantic merchant practice of the time. These two distinct worlds of economic norms and legal resolution operated harmoniously by dividing the turf of contract dispute between them, rarely crossing paths—at least for the time being.

A. Local-Level Contract Law in Early America

The defining feature of early American law was its pluralism; that is, different legal systems regulated different people in different respects.[50] Contract law was no exception. Whole categories of contracts were generally regulated not by the main body of common law deployed by state supreme courts, but instead by a subset, "justices' law," specific to certain kinds of disputes with little money at stake. Within the domain of justices' law, moreover, contracts took two different forms. Some contracts, especially long-term labor agreements like indenture and apprenticeship, were highly formal and highly specified by the parties. These contracts required such an approach because of their consequential social stakes. Other contracts, like those of more casual workers or of partners in small enterprise, were often unwritten. These contracts frequently relied for key terms on default rules that translated community norms and expectations into legal outcomes, where the parties had not specified otherwise.

1. The Domain of Justices' Law

In early America, cases with monetary stakes below a certain threshold were heard by justices of the peace in town justice courts.[51] Like manorial courts, borough courts, and more, justice courts were

50 In discussing early America in this Section, I refer to the period roughly from the seventeenth through early nineteenth centuries. On the sociological concept of legal pluralism, see Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988). On pluralism as a defining feature of early American law, see, for example, THE MANY LEGALITIES OF EARLY AMERICA (Christopher L. Tomlins & Bruce H. Mann eds., 2001); LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900 (2010).

51 *See* James A. Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 556 (Christopher Tomlins & Michael Grossberg eds., 2008). On justice courts, see LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009); Brendan Gillis, Conduits of Justice: Magistrates and the British Imperial State, 1732–1834 (May 2015) (Ph.D. dissertation, Indiana University) (ProQuest); Sung Yup Kim, Justices of the Peace, Lawyers, and the People: Local Courts and the Contested Professionalization of Law in Late Colonial New York (Aug. 2016) (Ph.D. dissertation, Stony Brook University) (ProQuest).

part of a long English tradition of competing and overlapping jurisdiction: different venues drew authority and method from different legal traditions, and accordingly offered their services to litigants on different terms. These plural legal traditions overlapped and crossed paths, and all could ultimately be appealed to central courts, in theory.[52] Still, the law of justice courts differed meaningfully from that of central courts. Rather than consulting the full panoply of common law doctrine, justices applied local statutes crafted for justice court use, alongside what English and American legal elites sometimes termed "justices' law," a locally varying, often orally transmitted set of legal traditions.[53]

What was justices' law? One way to understand this form of legal knowledge is as simply another branch of common law, dealing with those topics that most often came before justices of the peace. Indeed, any eighteenth-century law bookseller could point interested readers toward a shelf full of English lawbooks on the topic of "Justices of the Peace," filed carefully between, for instance, those on "Entries of Declaration, etc." and those on "Maxims and Grounds of Law."[54] On the other hand, though, justices' law could also be understood as something much more intentionally separate from common law. On this view, emphasized by historian Laura Edwards, justices' law represented a competing jurisdiction with distinct and potentially conflicting rules, characterized largely by localized norms and judicial discretion.[55] Indeed, early eighteenth-century English reformers had taken steps precisely to heighten colonial justices' discretion and separate them further from more formalized common law: for example, by banning practicing lawyers from serving as justices.[56]

The feature of justices' law most distinct from its formalized counterpart, as Edwards has explained, was its treatment of disputes with a public dimension, including crimes and other issues seen as breaching the "peace."[57] The "peace" was a flexible legal concept that

52 Henretta, *supra* note 51, at 560.

53 "[J]ustices' law" was a term used to describe this sphere of law by some, though not all, contemporaneous legal thinkers. *See, e.g.*, Conley v. Good, 1 Ill. (Breese) 135, 136 (Ill. 1825) ("The justices' law requires the justice to decide the case according to law and equity, and dispenses with written pleadings.").

54 These headings are taken from JOHN WORRALL, BIBLIOTHECA LEGUM (London, 4th ed. 1738) (1731).

55 *See* EDWARDS, *supra* note 51, at 3–7.

56 Gillis, *supra* note 51, at 29. Gillis argues that eighteenth-century British law deliberately emphasized discretion for justices of the peace, particularly in the colonies, because discretion made magistrates an adaptable, powerful tool for maintaining order within empire. *See id.* at 110.

57 EDWARDS, *supra* note 51, at 106–07.

helped protect order and maintain hierarchy.[58] The weight of a litigant's demands and/or witness's testimony was adjudicated through her "credit," or local reputation, which would be tied to her status position but also might fluctuate based on the character her neighbors had observed in her.[59] Using the rubric of the "peace," a justice could, for example, protect an enslaved woman's possession of cloth that had been taken by someone else and order it returned to her, on the grounds that the theft had disturbed the peace.[60] Under a common law analysis, the enslaved woman would not be considered to own the cloth in the first place, and in fact could not have testified in court at all. Still, because he began by classifying the case as one of justices' law and not of property law, the justice would never have opportunity to reach these alternate common law questions.[61] Even at its most capacious, however, justices' law was legalistic. Within a given locality, litigants could generally expect consistent procedure and similar logics of disposition from case to case.[62]

Low-value civil matters, especially debt cases, were another major part of justices' law, perhaps the most numerous kind of case on the docket in many jurisdictions.[63] Their status as breach-of-peace cases, or as some other part of justices' law, may have varied by time and place.[64] Either way, here, too, justice law adjudication did not look quite like its common law counterpart. Book debt, meaning debt recorded in an account book rather than memorialized in a formal instrument enabling easier collection, dominated.[65] The debts themselves were mainly delayed payments incurred for normal exchange rather than borrowed cash: for example, many cases

58 *Id.*

59 *Id.* at 112–13.

60 *Id.* at 133–36.

61 *See id.* at 135.

62 For example, in one North Carolina district, as Edwards documents, litigants seeking reconsideration petitioned justices using very similar, form-like language and formatting, apparently crafting their petitions using the form and the type of supporting reasoning that would be expected in that jurisdiction. *Id.* at 60.

63 In two late eighteenth century upstate New York counties, debt cases represented at least 89% of litigation. *See* Sung Yup Kim, *"In a Summary Way, with Expedition and at a Small Expence": Justices of the Peace and Small Debt Litigation in Late Colonial New York*, 57 AM. J. LEGAL HIST. 83, 89 (2017).

64 In Middlesex County, Massachusetts in the early eighteenth century, private civil disputes could be addressed by a court with jurisdiction to keep the peace. *See* Hendrik Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 284 (1976). In early nineteenth-century North Carolina, the "peace" framework did not apply to cases that the court categorized as purely civil, not implicating public interests; justices would decide these cases with somewhat greater attention to formal common law. EDWARDS, *supra* note 51, at 60.

65 Kim, *supra* note 51, at 68.

demanded wages for laborers' past work.[66] Many justice courts employed regularized, but simplified procedure.[67] Procedure aside, common law technicalities contributed little to the way justices resolved these cases: justices generally examined bills and account books to determine the amount and validity of the debt, and summoned witnesses if the debt was disputed.[68]

Where justices' law principles were implicated, they could be applied not only by justice courts but also by higher local courts or even higher state courts hearing cases on appeal. For example, Edwards finds even Judge Elihu Bay, then sitting on the Court of General Sessions, an intermediate-level trial and appellate court, applying a legal principle nowhere to be found in formal lawbooks.[69] It seems likely that local courts would have applied justices' law much more often than appellate courts did.[70] The boundaries of justices' law, then, were defined primarily by legal substance: it resolved certain kinds of disputes with primarily local-level significance. That substance overlapped often, but not entirely, with the justice court venue.

Evidence of justices' law practices remains frustratingly scarce in many respects. Justices generally recorded the outcome of each case in a docket book, but its reasoning much more seldom; the same habits were typical for judges in local trial and lower appellate courts.[71] Moreover, many such records have been lost over time, although scarce surviving records of justice court reasoning have informed fascinating recent historical work. Yet because examining these unsorted manuscript records is painstaking, historians seldom research specific justices' law questions and their typical resolution.[72] Collecting and separating on-point cases from among all those heard has, at least thus far, generally proved prohibitive beyond the most commonly encountered issues. As a result, compelling evidence of justices' law practice on particular legal questions comes instead from appellate decisions. Appellate court decisions often recorded evi-

66 *Id.* at 70.

67 *Id.* at 85–87.

68 *Id.* at 86.

69 EDWARDS, *supra* note 51, at 26; R.W. Gibbes, *Early History of the Judiciary of South Carolina*, *in* 1 JOHN BELTON O'NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA ix, ix–xi (Charleston, S.C., S.G. Courtenay & Co. 1859); O'NEALL, *supra*, at 53–59.

70 Indeed, Edwards finds county courts, in addition to justice courts, operating in ways "typical of localized law." *Id.* at 220–21.

71 *Id.* at 23.

72 Edwards, for example, examined records difficult to decipher because they were "written in a crabbed hand and sometimes streaked with water damage and age," not to mention "the past depredations of large insects and small mammals," organized and labeled, at best, only by date and case heard. *Id.* at 22.

dence and reasoning originally considered at trial, providing indirect evidence of local legal norms—particularly where local legal norms clashed with new, competing applications of commercial law.[73]

2. Formal Local-Level Contracts

Perhaps the paradigmatic formal contract in early America was the apprenticeship contract or indenture. Long-term, youth-oriented labor agreements served a crucial social function for early American towns: an indentured servant or apprentice would be housed, fed, and hopefully deterred from crime by his employer and would not make demands on the local poor relief system.[74] Short-term, casual labor made no such guarantee against destitution, and therefore held much less importance in the hierarchy of early American political concerns. Because long-term labor contracts held such significance not only for the parties, but also for towns and their poor relief duties, these contracts were heavily formalized. They also crossed the boundaries of common law and justices' law: these contracts were the subject of much attention in both justice of the peace manuals and commercially focused lawbooks.[75]

Towns were vital early American political units, accounting for much of the government service that a typical citizen might experience.[76] Towns had two central responsibilities that account for their interest in the law of labor contracts. First, towns saw themselves as legally mandated to provide poor relief for the destitute who were "settled" within their communities, as opposed to recent arrivals.[77]

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73 *See infra* Part III.

74 Ruth Wallis Herndon & John E. Murray, *"A Proper and Instructive Education": Raising Children in Pauper Apprenticeship*, *in* CHILDREN BOUND TO LABOR: THE PAUPER APPRENTICE SYSTEM IN EARLY AMERICA 3, 3–9 (Ruth Wallis Herndon & John E. Murray eds., 2009).

75 *See, e.g.*, J. DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 273 (New Bern, N.C., James Davis 1774); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 218–24 (Windham, Conn., John Byrne 1795).

76 For a classic account of towns and other units of local and state government as the central backbone of regulation in the nineteenth-century United States and earlier, see WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 10 (1996).

77 I refer here to towns, though the relevant local political unit sometimes varied, as did the details of poor relief systems. Still, American colonies shared a heritage in English laws of poor relief and settlement, and consistently allocated this responsibility in significant part to towns, counties, or parishes. On New England, see, for example, CORNELIA H. DAYTON & SHARON V. SALINGER, ROBERT LOVE'S WARNINGS: SEARCHING FOR STRANGERS IN COLONIAL BOSTON (2014); on the mid-Atlantic, see, for example, ROBERT E. CRAY, JR., PAUPERS AND POOR RELIEF IN NEW YORK CITY AND ITS RURAL ENVIRONS, 1700–1830 (1988); and on the South, see, for example, Alan D. Watson, *Public Poor Relief in Colonial North Carolina*, 54 N.C. HIST. REV. 347 (1977).

That duty had high stakes: each poor family represented a significant cost for the town that had to provide for them, and towns were quite interested in deflecting responsibility where possible. In New England, for example, towns "warn[ed]out" poor arrivals, notifying them that any responsibility for future indigence would remain with the family's prior locale.[78] Towns frequently litigated with each other to determine which town would be on the hook.[79] Second, towns held responsibility for redressing crimes within their borders, and they often strove to prevent these moral lapses in the first place by shielding residents from the temptations of idleness (itself a frequently punished crime in seventeenth-century colonies).[80] Early America's exceptionally youthful population compounded these challenges: in the 1760s and 1770s, the proportion under age twenty approached or exceeded half in most American colonies.[81] The vigorous young were more likely participants in crime and disorder,[82] and, without accumulated life resources, they were especially vulnerable to poverty.[83]

Long-term labor relationships, when successful, provided vital assistance to towns on both these counts. Arrangements like indenture and apprenticeship involved more than just labor: employers had to provision these workers, and conceptually, they were part of the household, even if on terms unequal in treatment and social status to other household members.[84] The household patriarch had not only the right to their labor, but also the right to exercise a more personal discipline. Most such workers, though not all, were children or young adults, because they outnumbered their elders and because early

78 On warning out, see DAYTON & SALINGER, *supra* note 77, at 1–2, 4; see also RUTH WALLIS HERNDON, UNWELCOME AMERICANS: LIVING ON THE MARGIN IN EARLY NEW ENGLAND 2 (2001).

79 Surviving reports of this kind of case are voluminous and fascinating: they persisted past the colonial period well into the early national period and nineteenth century. To take just one example, see Respublica v. Caernarvon Twp., 2 Yeates 51 (Pa. 1796) (determining whether pauper Catherine M'Donald had obtained a settlement in the town of Caernarvon, and therefore a right to receive relief from the town, when her then-husband bought a lot there).

80 *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 34 (1993).

81 ROBERT V. WELLS, POPULATION OF THE BRITISH COLONIES IN AMERICA BEFORE 1776: A SURVEY OF CENSUS DATA 269 (1975).

82 On fears of children extending into the nineteenth century, see, for example, Laura Jean Soderberg, "Vicious Infants": Antisocial Childhoods and the Politics of Population in Antebellum U.S. Literature (2016) (Ph.D. dissertation, University of Pennsylvania) (ProQuest).

83 *See, e.g.*, John E. Murray, *Bound by Charity: The Abandoned Children of Late Eighteenth-Century Charleston*, *in* DOWN AND OUT IN EARLY AMERICA 213 (Billy G. Smith ed., 2004).

84 *See* CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA (2002).

Americans viewed labor for another as, aspirationally, just a life stage: workers hoped to graduate eventually to land ownership or another form of self-employment. Long-term labor agreements thus allowed towns to delegate the responsibilities of providing for poor youth and policing their behavior.[85]

Because long-term labor relationships had such important stakes for towns, they required highly formal contracts, which were in turn interpreted in accordance with a voluminous body of doctrine on the subject.[86] Contracts of apprenticeship and indenture, unusually among common-law contracts of the time, were invalid unless put in writing; a contemporary legal writer found this requirement "a very reasonable provision; for room is left for controversy, from the uncertainty of parol testimony."[87] Cases on the books specified the nature of the relationship further, explaining who was entitled to any wages earned by the worker outside the household; how the enforceability of the contract would vary if signed by the minor worker, his parents, or both; how the relationship could be ended; whether it could be transferred to a new master; and more.[88] Other cases addressed legal questions relating to the practice of "binding out," in which town officials identified children of impoverished families and assigned them to work, in exchange for sustenance, for another local family.[89]

The law of long-term labor contracts, then, mandated explicit, written spelling out of parties' commitments, limited and interpreted by doctrine spanning legal fora from highest to lowest. Had these relationships been governed by a more permissive set of background rules requiring less explicit specification of intentions, they would have been much less useful to towns. Without legal oversight, a master might shirk his responsibilities to the apprentice by treating him poorly or by pawning him off on someone else the apprentice had never agreed to work for: that would put the apprentice in a more

85 On labor relationships as social control, see CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865, at 228–29 (2010).

86 On the formal requirements of labor contracts for children, see HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 271–87 (2005).

87 TAPPING REEVE, THE LAW OF BARON AND FEMME; OF PARENT AND CHILD; OF GUARDIAN AND WARD; OF MASTER AND SERVANT; AND OF THE POWERS OF THE COURTS OF CHANCERY 342 (New Haven, Conn., Oliver Steele 1816). Reeve surveyed all relevant legal materials he could find, including both English law he found still relevant and early American statutes and precedents. *Id.* at Preface.

88 *Id.* at 341–46.

89 *Id.* at 342–43. In addition to caselaw, this practice was also generally described and regulated by local statute.

vulnerable position, with only poor relief as backstop.[90] Without the prospect of legal enforcement, moreover, an apprentice might unilaterally end the relationship midway through, reducing the master's incentive to take on future children since he could not assume that investment in a young, unskilled child would eventually pay off with years of work from a more capable, older teen.[91] Towns would not force master and servant to remain together in every circumstance, but they wanted maximum clarity as to how these socially important relationships would function and when they might dissolve. That would put clear limits on their own poor relief responsibilities.

3. Unwritten Contracts and Default Rules

Apprenticeship and other long-term, formal contracts were not the only ways to create labor relationships, nor necessarily the most common. Across early America, workers frequently worked by the day, week, year, or task.[92] These contracts, however, were typically formed without writing. Nor were they shaped by a large body of commercial- or property-law doctrine, or even written justices' law or state statute: one legal writer reported, of day labor, "there is nothing peculiar," identifying no cases or laws of interest on the topic.[93] Precisely because these relationships were given less attention in written legal sources, few records survive, and it is impossible to know the exact rate of casual wage work across the colonial period.[94] Still, casual labor was always common practice, even as it received very little legal attention.[95]

One way of interpreting these relationships would be to understand them as noncontractual. Because they did not interact much with the highest-level, most well-documented parts of the legal

90 *Id.* at 345–46.

91 *See id.* at 344.

92 *See* David W. Galenson, *The Settlement and Growth of the Colonies: Population, Labor, and Economic Development*, *in* 1 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES, THE COLONIAL ERA 135, 166–69 (Stanley L. Engerman & Robert E. Gallman eds., 1996).

93 *See* REEVE, *supra* note 87, at 347; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *414. Blackstone noted that English "labourers . . . hired by the day or the week" were subject to statutes containing "many very good regulations" compelling them to work in certain circumstances. 1 BLACKSTONE, *supra*, at *414 (emphasis omitted). But such statutes, unlike English caselaw, did not necessarily have effect in America. Indeed, annotating Blackstone, St. George Tucker responded to this language within the *Commentaries* by noting, "[t]he laws of Virginia are perhaps defective in this respect," containing no such corresponding regulations. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 426 n.6 (Philadelphia, William Young Birch & Abraham Small 1803).

94 Galenson, *supra* note 92, at 166.

95 *Id.*

system, they might exemplify noncontractual exchange, a kind of relationship classically identified by Stewart Macaulay.[96] I argue, however, that these historical relationships of casual labor are better characterized as contracts, if relatively informal ones.[97] Workers could and did turn to the legal system to resolve disputes: they simply did so in local courts whose processes relied on oral legal knowledge to supplement common law doctrine not designed for their purposes. That oral legal knowledge likely included background rules encapsulating community norms for casual labor contracts, supplementing parties' explicit agreement.[98] For example, in one eighteenth-century New York justice court, it appears that parties usually specified the unit of labor (time or work product) and amount of compensation.[99] They relied on oral-legal-knowledge default rules to fill in certain other terms of the bargain: for example, that unpaid wages could be recovered as book debt.[100]

Among these casual labor disputes falling outside early American common law doctrine, but inside local law's jurisdiction, were those involving workers whose role lay on the boundary of labor and ownership. As I next explore, in early American small businesses, owners nearly always worked, and workers often came to own. They mixed contributions of labor, investment, and control in ways unfamiliar to modern business practice, through agreements that lay outside the scope of then-current commercial doctrine on partnership contracts.

4. "Partner Wanted"

How do you tell the difference between a business's co-owner and someone who is involved in another way, like an investor, lender, employee, or contractor? Sometimes parties explicitly label their relationship through written contract. Still, in the eighteenth century and now, the law will also read in a partnership where the relationship meets certain criteria: crucially, division of the profits between the putative partners will often lead to a finding that a partnership has been formed. As I next discuss, this area of doctrine was gaining precision and clarity in the transatlantic world of Anglo-American

96 Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963).

97 Macaulay's concept is a spectrum from noncontract to contract: the relationships I discuss here, like those in his research, did likely include elements of nonplanning. *Id.* at 57. Still, for the reasons I discuss, I find contract to be the more valuable conceptual tool.

98 Kim, *supra* note 51, at 70–73.

99 *Id.* at 71.

100 *Id.* at 72.

mercantile law in the eighteenth century.[101] But outside that sophisticated sphere, though early Americans might often call themselves "partners," partnership doctrine had little sway. That was in large part because of the context and purpose of early American businesses themselves.

The vast majority of early American businesses were small.[102] As late as 1880, even in the urban center of Philadelphia and in the relatively scalable industry of manufacturing, most laborers shared a workplace with twenty or fewer compatriots.[103] Earlier and outside the big city, businesses tended to be smaller: many were owned and staffed by a single family household, with wives acting as husbands' surrogates as needed.[104] In this context, partnerships were driven first and foremost by the need for more labor. That gave them a kinship with other kinds of labor arrangements. Moreover, when businesses hired employees instead of making partners, they often used pay and investment structures tied to the business's success, seeking investment from these employees and paying them bonuses, commission, or even salary itself based on the level of profits. Indeed, small businesses had little cash, so it was only logical that compensation would bear a significant relationship with the enterprise's profits, and that an employee might be encouraged to invest capital if available.[105] The result was an ill-defined and, in practice, often inconsequential line between relationships of co-ownership and relationships of employment. Whether in partnership, employment, or in an undefined relationship of joint enterprise, small businessmen consistently mixed relationships of ownership, investment, salary, and profit sharing in ways unfriendly to rigid doctrinal categorization.

Consider, for example, a math problem of the period. A Pine Plains, New York justice of the peace engaging in some self-study posed himself the following question involving a merchant and a young fellow. If the young fellow could contribute £100 to the venture to receive £40 of salary and returns, £200 to receive £55, and £300 to

101 *See infra* Section II.B.

102 *See* WALTER LICHT, INDUSTRIALIZING AMERICA: THE NINETEENTH CENTURY 33–35 (1995).

103 *Id.* at 34.

104 Ulrich describes wives working in this capacity as "deputy husband[s]." LAUREL THATCHER ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650–1750, at 9 (1982).

105 Small businesses lacked cash not only because of their size, but also because most business was conducted on credit in early America. *See* Daniel Vickers, *Errors Expected: The Culture of Credit in Rural New England, 1750–1800*, 63 ECON. HIST. REV. 1032, 1034–35 (2010).

receive £70, what was the young fellow's salary?[106] The magistrate successfully performed his arithmetic: every additional £100 invested would earn this young fellow £15 per year in salary. Yet the magistrate might equally have posed the problem as a legal one: What, exactly, was the relationship between the young fellow and the merchant? This young fellow probably did not meet the definition of a partner, since his salary was fixed and not tied to profits. But if he were classed as an employee, or legal "servant," his position would be a strange one: What if he were fired shortly after putting in the money?

That the official, writing around 1845, did not ask these legal questions reflected just how unremarkable such arrangements remained from the eighteenth through the mid-nineteenth century, despite their potential complications if subject to commercial law's inquiry. Entrepreneurs seeking help, and the clerks joining them, constantly mixed relationships of labor, investment, and profit. They made arrangements other than simple wages for employees and chose partnership even when one partner contributed only his labor.

This kind of relationship, in which one partner funded the enterprise while the other offered only his work, appeared daily in the newspapers in thousands of "Partner Wanted" advertisements from the colonial period through the mid-nineteenth century and beyond. A New York bookseller and printer in 1798, for instance, sought a partner because he had "more business than can be done without an INTERESTED ASSI[S]TANT," promising, "[t]he Terms will be made easy," and specifying only that "[o]ne acquainted with a Book-Store and accounts will be preferred."[107]

Why seek a partner when looking for an assistant? Economic historian Naomi Lamoreaux has documented many such "partnerships" in Boston in the 1840s, in which one partner was the existing owner of an enterprise, while a second, joining partner was wholly inexperienced and brought only his labor to the venture.[108] Lamoreaux hypothesizes that the junior partners insisted on these arrangements because they resisted the potential stigma of being a mere employee.[109] Of course, sometimes junior partners did invest:

106 J.D. Jordan, Book of Surveying Exercises and Notes on Property and Estate Lw (1845) (unpublished journal) (on file with the Arthur W. Diamond Law Library); *see* S. JOURNAL, 64th Sess. 302 (N.Y. 1861) (noting Jordan becoming a justice of the peace). In addition to math problems, Justice Jordan's other major project in his exercise book was an alphabetical list of legal terms and their definitions collected from various reference books, though he only made it to the letter "P." Jordan, *supra*.

107 *A Partner Wanted*, GREENLEAF'S N.Y. J., & PATRIOTIC REG., May 26, 1798, at 4.

108 Naomi R. Lamoreaux, *The Partnership Form of Organization: Its Popularity in Early-Nineteenth-Century Boston*, *in* ENTREPRENEURS: THE BOSTON BUSINESS COMMUNITY, 1700–1850, at 269, 269–95 (Conrad Edick Wright & Katheryn P. Viens eds., 1997).

109 *See id.* at 287–88.

another 1798 ad offered "a very Lucrative and Genteel Business" to any young man with three hundred to five hundred dollars at the ready.[110] Even where new partners committed substantial sums, though, "partner wanted" ads shared the page with ads for clerks, journeymen, and apprentices, suggesting that these "situations," as job-seekers might call them,[111] were different more in degree than in kind. Aspiring partners might settle for employment, at least temporarily.

Gratuities, commissions, profit-splitting, and investment alongside salary: all these variations linked a junior's compensation to the earnings of the enterprise. In doing so, they elevated rising young men away from the wage labor fate they feared and helped proprietors avoid the fixed expense of promised regular pay. But would these arrangements raise legal complications? In the eighteenth century, the answer was generally no. If a small business's participants were unlucky enough to be caught up in a dispute that might raise the issue, the outcome would likely be determined through local legal processes, without recourse to commercial law. But by the nineteenth century, the question had become a trickier one as American small business began to confront a new commercial world and its legal demands.

B. The Mercantile Law of Contracts for Partnership

While early Americans within local economies united their labor in small shops, farms, and workshops, a cadre of merchants in the Anglo-Atlantic world joined forces under an entirely different set of legal rules. They benefitted from eighteenth-century England's innovative golden age of commercial law development, spearheaded by the Court of King's Bench's Lord Mansfield.[112] Mansfield served an extraordinarily long and influential term of over thirty years, beginning in 1756.[113] Under his guidance, the court attuned itself to the customs of the merchants who had recently elevated England to a newly powerful stature in world trade, through a robust commerce with England's own colonies and others.[114] The court then reconciled and incorporated those customs into the language of common law itself, providing new clarity and specificity on topics including contracts, insurance, bankruptcy, financial instruments, and more.[115]

110 *A Partner Wanted*, N.Y. GAZETTE & GEN. ADVERTISER, Jan. 2, 1798.

111 *See, e.g.*, *Situation*, WEBSTER'S DICTIONARY (4th ed. 1830).

112 On Mansfield, see generally NORMAN S. POSER, LORD MANSFIELD: JUSTICE IN THE AGE OF REASON (2013); JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 3–11 (2004).

113 OLDHAM, *supra* note 112, at xi, 3–11.

114 *See id.*

115 *See id.*

The work of Mansfield and the King's Bench coincided with an unprecedented boom in treatises and other legal literature: in greater and greater numbers, legal writers strove to summarize and sort caselaw to render it coherent and easily applied.[116] The target of all this activity, when it came to commercial law topics, was both exceptionally important and relatively narrow within the broader English and American social context; Mansfield and his peers were writing law for an emerging transnational class of merchants. That certainly included Americans, who continued to cite English commercial cases and treat them as authoritative well into the nineteenth century and beyond.[117] The law of contracts for partnership belongs to this development. Merchants' partnership disputes received significant attention from the King's Bench under Mansfield.[118] In American courts, early cases often covered the same mercantile terrain, resolving partnership disputes over transatlantic voyages, imported whale oil, and cross-country timber shipments.[119]

Despite the limited scope of the kinds of businesses they meant to address, English and American treatise writers still wrestled to establish when merchants were partners and when they were mere collaborators. One merchant might sell to another, might pay him for assistance with transport, might rely on him to communicate with distant trade networks, and more.[120] How could a legal observer determine whether they had legally become partners? Most obviously, they could formally contract to be partners, often making use of a standard printed form that would, in theory, remove all controversy. For instance, an 1802 London form book offered for copying the agreement of four partners to collaborate to import goods from "beyond the seas": the agreement left no doubt that all four were

116 A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 636 (1981).

117 Consider, for example, leading legal periodical *The American Jurist*. Its section digesting recent significant cases gave equal attention to English cases and American ones. *See, e.g.*, *Digest of English Cases*, 27 AM. JURIST & L. MAG. 192, 192–203 (1842); *Digest of American Cases*, 27 AM. JURIST & L. MAG. 203, 203–37 (1842).

118 *See, e.g.*, Fox v. Hanbury (1776) 98 Eng. Rep. 1179; 2 Cowp. 445; Jestons v. Brooke (1778) 98 Eng. Rep. 1365; 2 Cowp. 793; *see also* WILLIAM WATSON, A TREATISE ON THE LAW OF PARTNERSHIP 192–200, 278–286 (London, A. Straham & W. Woodfall 1794).

119 *See, e.g.*, Baxter v. Rodman, 20 Mass. (3 Pick.) 435 (1826); Rice v. Austin, 17 Mass. (17 Tyng) 197 (1821); JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW 61–74 (2d ed. 1846) (discussing *Baxter* and *Rice*).

120 JOSHUA MONTEFIORE, COMMERCIAL AND NOTARIAL PRECEDENTS: CONSISTING OF ALL THE MOST APPROVED FORMS, SPECIAL AND COMMON, WHICH ARE REQUIRED IN TRANSACTIONS OF BUSINESS 251–261 (London, R. Phillips 1802).

partners, including the two deputized to manage the enterprise's affairs on the ground in England and abroad.[121]

Once they were partners, the fates of two traders were significantly linked, particularly in case of commercial misfortune. Both partners could equally draw on the partnership's credit and resources in the course of business for the enterprise. And, if business failed, creditors could pursue both the partnership's assets and the personal resources of each partner.[122] Savvy partners could create variations on this structure. Contractual provisions might change the partners' profit split: say, 70–30 instead of 50–50.[123] Partners might also limit when and how one or both partners could take certain actions on behalf of the partnership.[124]

Even if two traders did not intend to become partners, though, if they merely "h[e]ld[] [them]sel[ves] out" as partners—that is, if they each signed on behalf of the partnership without qualification or otherwise made themselves appear to be partners—that could make them into partners too, at least when it came to others who had done business with what they thought was a partnership.[125] But those trading with merchants had to watch the paperwork carefully and understand the norms of the market to know whether their perceptions of partnership would be legally recognized. One commonly cited 1780 case found that, in a complex transaction involving sales of East India tea, a now-bankrupt broker had acted only for himself and not as partner to any of the dealers he supplied.[126] Disappointed banker creditors claimed they had understood the collaboration as a partnership, but witnesses familiar with such dealings testified that all should have understood that "the money was lent to the broker alone."[127]

Certain financial arrangements could also create a partnership, even if the putative partners did not intend one. Specifically, if they agreed to split the profits of their enterprise, they would likely be

121 *Id.* at 251–52.

122 GEORGE CAINES, 1 AN ENQUIRY INTO THE LAW MERCHANT OF THE UNITED STATES; OR, LEX MERCATORIA AMERICANA, ON SEVERAL HEADS OF COMMERCIAL IMPORTANCE 420 (New York, Isaac Collins & Son 1802).

123 *See id.* at 422.

124 *Id.* at 423.

125 *Id.* at 424.

126 Hoare v. Dawes (1780) 99 Eng. Rep. 239, 240; 1 Dougl. 371, 372; *see also* POINTS IN LAW AND EQUITY, SELECTED FOR THE INFORMATION, CAUTION, AND DIRECTION, OF ALL PERSONS CONCERNED IN TRADE AND COMMERCE; WITH REFERENCES TO THE STATUTES, REPORTS, AND OTHER AUTHORITIES, UPON WHICH THEY ARE FOUNDED 159 (London, A. Strahan & W. Woodfall 1792).

127 *Hoare*, 99 Eng. Rep. at 240.

partners.[128] The foundational, and later controversial, 1775 English case *Grace v. Smith* established the parameters of this rule, by determining whether two former partners who entered into a loan had inadvertently created a new partnership in doing so.[129] Traders Smith and Robinson split up after only months of partnership. Robinson agreed to buy out Smith's share in the business, but to enable him to do so Smith loaned Robinson a substantial sum at five percent interest plus a fixed annuity. Robinson's solo efforts led to bankruptcy, and his creditors sought out Smith. Chief Justice De Grey began his analysis with the rule that would govern such cases, "[e]very man who has a share of the profits . . . ought also to bear his share of the loss."[130] In other words, if Smith stood to take a share should the enterprise experience success, then he should equally owe creditors in case of failure. But De Grey determined that Smith's interest on the loan he made was different from a share of the profits. Although Robinson would necessarily pay Smith by using some of the profits he was making, that was different from a share "payable out of the profits" themselves.[131] Against the possible argument that such a distinction was too difficult to apply, De Grey defended it "not more nice than usually occurs in . . . trade or usury."[132]

The profits rule was not only a matter of labeling. For legal thinkers of the time, it had moral weight. As the King's Bench explained in *Waugh v. Carver*, a subsequent case affirming the principle, a share of profits had to come with the burden of liability because "by taking a part of the profits, [a putative partner] takes from the creditors a part of that fund which is the proper security to them for the payment of their debts."[133] It seemed to the judges a matter of fairness that all profit sharers had to "stand in a just situation with regard to the creditors of the house."[134]

It was not only lending and investment that could lead to inadvertent partnership via profit sharing—and now and then, somewhat less elite participants in the market might be found partners too, if convenient to third-party interests. *Waugh*, building on *Grace v. Smith*, addressed the case of ship agents who each agreed to confine their business offerings to different territories, and in compensation to offer each other a share of the profits they earned.[135] Holding for the

128 *See* CAINES, *supra* note 122, at 420.
129 Grace v. Smith (1775) 96 Eng. Rep. 587, 588; 2 Black. W. 998, 1000–01.
130 *Id.*
131 *Id.*
132 *Id.*
133 Waugh v. Carver (1793) 126 Eng. Rep. 525, 525; 2 H. Bl. 235, 235.
134 *Id.* at 533.
135 *Id.* at 525.

agents' creditors, the court found them responsible for each other's debts, even though they had specifically contracted to avoid such liability.[136] An insistent attorney argued that agents, who served merchants in their transactions, were not themselves "traders" and could not therefore be partners—just as fishermen or artisans teaming up would not be considered participants in this formal mercantile relationship.[137] Still, the justices found these agents close enough. On the other hand the law excluded the commercial world's lowliest members, the seamen who staffed its ships, from potential partnership. Even though seamen were traditionally paid a percentage of the profits of each voyage upon arrival, a recognized customary exception held that this could not make them partners. Affirming this older rule, an 1826 Massachusetts case explained that if seamen were partners as a result of ships' pay structure, it would be "exceedingly inconvenient, and would, no doubt, entirely break up the peculiar mode of conducting these voyages."[138]

The settled formal law of partnership, as Anglo-American legal writers described it, was designed around the priorities of its mercantile participants.[139] It differentiated partners from merely collaborating traders or agents based on their financial participation in the venture, and it understood which exceptions, like those of seamen, had already become accepted and understood.

III. CLASH OF TWO LEGAL FRAMEWORKS

As American legal thinkers tried to integrate small business into the rules of mercantile law, they faced a clash of background rules. Mercantile law, thanks to the careful work of Lord Mansfield and the King's Bench, had incorporated and streamlined the expectations of a small but economically important group of merchants mainly carrying out lucrative colonial trade and related ventures. Meanwhile, American local courts evaluated business relationships with the awareness that the amount and type of labor that a person performed within a business often served to define his role.

Within these two systems, partnership represented two different concepts. Under mercantile law and merchant practice, a partnership either existed or it didn't, based on the enterprise's financial structure—and the difference was vital for evaluating the risk and

136 *Id.* at 532.

137 *Id.* at 531.

138 Baxter v. Rodman, 20 Mass. (3 Pick.) 435, 438 (1826).

139 These developments are often attributed to the influence of Lord Mansfield, Chief Justice of the Court of King's Bench from 1756–1788. *See* OLDHAM, *supra* note 112, at 79–208.

consequences of failure in the context of high-value yet perilous transactions at the mercy of fickle seas and changing financial currents. Under small-business norms, which made their way into local adjudications, partnership was a basket of possible rights and responsibilities—entitlement to business assets, control and autonomy in operating it, reputation within the community, liability for failure, and more—and it would take real inquiry into the circumstances to understand what combination had been at play within the enterprise at issue at the moment in question.

Those two systems clashed as markets became more integrated. When more sophisticated merchants loaned money to, sold on credit to, and invested in small businesses, they expected their own norms to control. Equally, small businesses did not anticipate that transacting with new kinds of business associates would alter the meaning of the agreements they had made within their own enterprises. The crux of the question was this: In an early American business, a junior collaborator and worker in a business might receive a share of profits as his payment, might invest in the enterprise, and might gain more autonomy and control within the business as he continued to work, all without formalizing his role relative to his more senior collaborator. Was the junior liable for the business's debts? Local courts had ways to resolve this question without resorting to analogy with mercantile law. Though evidence of their practices survives only piecemeal, it appears that local courts often placed less emphasis on an enterprise's financial structure and more on the ways that each participant's labor for the business and behavior within the community suggested which responsibilities and rights he had taken on.

Courts had a variety of options for resolving this clash of norms. They might have privileged the assumptions and understandings that structured small businesses, requiring creditors and investors who placed low-value sums in the hands of small businesses to understand those enterprises on their own terms. Instead, high courts stuck with what they knew, imposing Lord Mansfield's rules on the small businesses newly crowding their dockets. Siding with third-party creditors, legal thinkers adopted commercial law's narrower vision of what kinds of relationships would be formed and how they would be interpreted. In any given case, a junior business member was either a partner and therefore liable, or not a partner and therefore free from liability—but also therefore stripped of the special, elevated role within the business that local partnership rules had implied.

In drawing the distinction, legal thinkers first tried to craft a bright-line test, in which partnership would follow automatically from a firm's financial set-up and on-paper structure, matching the analogous rule that differentiated partnership from other relationships

within merchant businesses. But as cases accumulated, legal thinkers observed the surprising and unfair outcomes that this rule could create, imposing devastating liability on members of small businesses who, even if they were "partners," clearly had not expected such an outcome. Gradually, they retreated from the firmest version of the rule, settling instead on the idea that a worker who received payment in the form of profits was something different from a partner—though where the boundary lay between a partner contributing labor and a worker paid in profits remained in dispute. To justify unexpected outcomes for small businesses, courts and legal thinkers increasingly began to blame them for setting up these structures in the first place. Small businesses ought to have known their responsibility to conform with commercial law, and if they had failed to do so, they deserved their fate. Legal handbooks and magazines therefore urged businessmen to educate themselves in the forms courts expected and to set up their businesses accordingly.

A. Enabling Local Difference

One way for an appellate court to resolve the conflict in a case where local legal norms clashed with mercantile expectations would have been to ignore it—that is, to treat its resolution as relatively unimportant from the perspective of commercial doctrine, guided mainly by factual inquiry conducted below in accordance with localized norms, with little room for more sophisticated legal input. Appellate courts were certainly interested in the high-stakes partnership disputes of merchants debating the boundaries of their responsibility for expensive transactions: but when it came to a small-town general store, for example, there was not necessarily any need to ensure this little enterprise matched those legal arrangements.

That was the approach that higher courts seem to have taken around the turn of the nineteenth century. As these courts began to record in writing the cases they thought were legally significant, they hardly ever included cases of disputed partnership involving low-level, ordinary businesses. To the extent that such cases were appealed to high courts in the first place (likely relatively rarely), court reporters did not believe they embodied legal principles worth preserving.[140]

In *Drake v. Elwyn*, an 1804 New York case, however, court reporter George Caines made the unusual choice to preserve a dispute over ownership of a small family-run store.[141] Caines, who authored the pioneering treatise *Lex Mercatoria Americana* about a year earlier, was

140 On early court reporters' practices and decisionmaking in preserving cases heard in courts, see Winsberg, *supra* note 32, at 15.

141 Drake v. Elwyn, 1 Cai. 184, 184 (N.Y. Sup. Ct. 1804).

especially interested in identifying a truly American, as opposed to English, commercial law.[142] His assigned post as court reporter of New York's intermediate appellate "supreme" courts, moreover, likely exposed him to more lower-value cases than did his alternate beat, reporting cases from New York's actually supreme Court of Errors.[143] *Drake* is therefore one of the earliest published cases in which community partnership norms collided with creditor expectations.

Still, in resolving it, the court exemplified a hands-off approach to local-level adjudication. In New York in 1800, the court found, John Elwyn and father and son Peter and Samuel Wittaker together ran a general store.[144] But who owned the store? This deceptively simple question was not so easy, because Elwyn and the Wittakers, like many small entrepreneurs of their era, had joined forces without formally designating who was a partner in the business, and who worked for pay. If all had gone well, the question might never have required definitive resolution. It might also have been resolved in local court. But Elwyn & Co.'s debts, and the insistence of their creditors Drake and Pinkney, forced the issue.[145] If Elwyn and Co. owed money, that meant each of the firm's partners was personally liable for the debt. Elwyn admitted he was a partner, and so did the younger Wittaker, Samuel, but both were insolvent.[146] The question in *Drake v. Elwyn*, then, was the status of the father, Peter.[147] The store's creditors took the alleged partners from justice court to the intermediate appellate New York Supreme Court. At this early date, though, the appellate court remained deferential to the community-centered, jury-driven approach of the court below.[148]

At trial, the evidence collected had focused squarely on the work that each of the firm's members had performed, and on how it would have been perceived by the community. Peter had been in the store as often as the other two men, witnesses reported, and one had seen him draw spirits for a customer.[149] All three had traveled up the Hudson to buy goods, and when asked if they were planning to keep store, Peter had answered, "yes, we are going to try it."[150] Peter had

142 *See* CAINES, *supra* note 122, at 3.
143 *See id.*
144 *Drake*, 1 Cai. at 184.
145 *Id.*
146 *See id.*
147 *Id.*
148 *See* N.Y. STATE CT. OF APPEALS & N.Y. STATE ARCHIVES & RECS. ADMIN., "DUELY & CONSTANTLY KEPT": A HISTORY OF THE NEW YORK SUPREME COURT, 1691–1847 AND AN INVENTORY OF ITS RECORDS (ALBANY, UTICA, AND GENEVA OFFICES), 1797–1847, at 20–21 (1991).
149 *Drake*, 1 Cai. at 184.
150 *Id.*

collected payment from customers, too.[151] Yet Peter was very old and illiterate; perhaps he merely assisted the other two.[152] On the other hand, some people thought it was Peter and Elwyn who owned the store, while young Samuel was merely a clerk.[153] Adding to the difficulties, the business had not apparently gone by a single consistent name that might indicate its proprietors.[154]

As it considered the record, the New York Supreme Court affirmed this community-centered course inquiry, in an opinion by a young James Kent.[155] The evidence was enough to suggest there might be such a firm as "Elwyn & Co."; from there, "of course it belonged to the jury" to consider whom it comprised.[156] Luckily for the creditors, the jury had sided with them: it found both father and son had been partners and were liable for the store's debts.[157]

Despite their victory, Drake and Pinkney, and other potential creditors of small firms like this one, might not be entirely satisfied with the case's outcome. Under *Drake v. Elwyn*, there was no easy way for a creditor to know who within an informally organized small business would likely be liable for its debts. Partners could be distinguished from clerks in how they spoke about the business, in what kinds of tasks they took on, and in how they compared in status and skills. Because it depended on circumstance, partnership could also shift over time: for example, had the business lived longer, father Peter might have aged out of partnership as his son gained more experience and authority. A neighbor could glean this kind of information, but a more distant lender or supplier on credit would be less likely up to speed.[158] Indeed, in subsequent decades, local courts' community-centered examination of the relationships involved would be received rather differently by appellate courts. Creditor-litigants like Drake and Pinkney urged appellate courts to exert more control—and to adjudicate cases that matched their expectations, often at the expectations of either community members or of the contractors themselves.

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151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 185.

156 *Id.*

157 *Id.* at 184.

158 *See* BRUCE H. MANN, NEIGHBORS & STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT (G. Edward White ed.,1987). Unfortunately, the record reveals little about creditors Drake and Pinkney. *Drake*, 1 Cai. at 184. A general store's creditors might commonly include its suppliers, who typically provided goods on credit, or those who had invested capital in the business. But whether, here, Drake and Pinkney did so more as community members or as more sophisticated merchants remains uncertain.

But even as creditors encouraged higher courts to crack down on local legal norms, many American voters held the opposite view. In New York and several other states, legislators enlarged justice courts' jurisdiction by raising the maximum monetary threshold of the cases they heard, gaining popular acclaim from voters who resented their encounters with commercial law's assumptions in higher courts.[159] The boundaries of two previously mostly separate legal domains were in flux, and across the legal system, courts, legal thinkers, and litigants alike were still working out what would happen when they overlapped.

B. Commercial Law's Takeover

As the nineteenth century went on, sophisticated commercial men were increasingly likely to do business with smaller enterprises operating according to different norms. The first half of the nineteenth century was the scene of America's "first industrial revolution," a transformation in how Americans worked, produced, bought, and sold that nonetheless little resembled the railroad and factory-centered growth that would come later in the century.[160] Though a few large-scale enterprises anticipated larger patterns, the vast majority of production still occurred in small settings: farms, workshops, and stores in which one or two proprietors worked alongside a small number of hired or bound workers.[161] Still, the context of that work, and the relationships it produced, were changing and becoming more commercial. Farmers, artisans, small storekeepers, and others became more closely linked with larger markets.[162] That meant they would encounter merchants, especially creditors, who wanted them to conform to the same legal rules they employed with one another.

Could commercial law apply to small enterprises quite different from the litigants whose cases had produced these doctrines? Creditors began to argue in court that it could and should apply. Many American legal treatise writers thought so too, and they were eager to take up the project of showing how it could be done. They believed that the American economy's rapid growth would be limited if so many Americans were allowed to continue resolving disputes outside the

159 Kim, *supra* note 51, at 390–460.

160 LICHT, *supra* note 102, at 129.

161 *Id.*

162 *See* CHRISTOPHER CLARK, THE ROOTS OF RURAL CAPITALISM: WESTERN MASSACHUSETTS, 1780–1860 (1990); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846 (1991); JONATHAN PRUDE, THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSETTS, 1810–1860 (1983); LICHT, *supra* note 102.

bounds of formal law.[163] As Vermont legal writer Daniel Chipman explained in 1822, while "the plain principles of the natural law" might have sufficed in an uncomplicated early society, the United States' recent "advances in wealth and refinement" demanded "settled and uniform administration of justice."[164] Whereas earlier writers, like Caines, had described the law regulating primarily the disputes of the wealthiest and most commercially sophisticated, this new generation of legal writers aimed to document and regularize case outcomes involving more ordinary litigants. American legal writers aimed to explain, and in doing so regularize, relationships of labor, profit, and investment outside the realm of transatlantic trade.

As legal writers took up the new project of regularizing an expanded commercial world, their attention to the contractual topics once vital to towns—indenture, apprenticeship, and other long-term labor relationships—waned. One reason was that long-term labor contracts were in steady decline: increasingly, they did not appear viable as a complete solution for towns' poor relief problem, which would have to be addressed in other ways outside the realm of contract doctrine.[165] Another was that officials and observers, like legal writers, began to see economic growth as a desirable social goal. Intellectual historians have found that whereas early modern thinkers had often focused on shepherding full and appropriate use of a fixed pot of resources, nineteenth-century thinkers saw expanded possibilities, alongside novel dangers, imagining for the first time an economy that could boundlessly expand and grow.[166] That gave creditors' logic in arguing for a new and bigger commercial world a new weight.

New concepts of the economy spurred reinterpretations of the transactional behaviors of early Americans. James Kent wrote in 1828, "[p]artnerships have grown with the growth, and multiplied with the extension of trade."[167] What did Kent mean by the "extension of trade"? He meant, in part, that the nation's economy was growing by any measure. But he was also describing, and perhaps advocating for, a change in Americans' understanding of which activities counted as

163 Formal law's encroachment on local justice is described, from the perspective of the justice courts, in EDWARDS, *supra* note 51. On the rise of American legal doctrine as a form of empire-building, see DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830 (2005).

164 DANIEL CHIPMAN, AN ESSAY ON THE LAW OF CONTRACTS: FOR THE PAYMENT OF SPECIFICK ARTICLES v, xi (Middlebury, Vt., Daniel Chipman 1822).

165 *See* Holly Brewer, *Apprenticeship Policy in Virginia: From Patriarchal to Republican Policies of Social Welfare*, *in* CHILDREN BOUND TO LABOR: THE PAUPER APPRENTICE SYSTEM IN EARLY AMERICA 183, 184 (Ruth Wallis Herndon & John E. Murray eds., 2009).

166 *See, e.g.*, JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S 25–51 (1984).

167 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (New York, O. Halsted 1828).

"trade": small-scale farming and crafts and their local-level distribution, long conducted in informal economies of barter and credit, could now be understood as part of the nation's commercial life, too, alongside the more sophisticated activities of coastal shippers and merchants. Kent explained, "[i]t is not essential to a legal partnership, that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, artisans, or farmers; as well as between merchants and bankers."[168] Expanded application of older partnership principles would make things easier for merchants and bankers trying to determine the potential liability of artisans and farmers. But it was not without controversy: the 1830 American editor of an English treatise noted two American cases in which parties raised the question whether attorneys were really "traders" subject to the mercantile law of partnership.[169] As a party in one of these cases had argued, the rule requiring special procedures between partners "ought not to be extended to cases other than those relating to trade and commerce."[170] However, the argument failed, and by 1837, the same editor had added an additional case from the same court affirming that attorney partners were no different from their financier counterparts.[171]

Creditors of small businesses were gaining traction in their effort to recover against parties involved with those businesses according to the rules of mercantile law. Yet as courts and legal writers attempted to use the existing law of partnership contracts to regulate liability within an emerging world of commercialized small enterprise, they encountered a local understanding of partnership that was often at odds with the mercantile-inspired doctrine they were trying to apply. Legal thinkers of the period hoped to describe rules for the entire commercial world as they saw it, at least when it came to questions of liability. The question was how they would incorporate the messy and experimental world of early American small business.

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168 *Id.* at 6.

169 *See* NIEL GOW, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP 6 n.1 (Edward D. Ingraham ed., Philadelphia, Robert H. Small, 2d Am. ed. 1830) (1825) (first citing Westerlo v. Evertson, 1 Wend. 532 (N.Y. Sup. Ct. 1828); and then citing Marsh v. Gold, 19 Mass. (2 Pick.) 285 (1824)).

170 *Westerlo*, 1 Wend. At 533.

171 *See* NIEL GOW, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP: WITH AN APPENDIX OF PRECEDENTS 6 n.1 (Edward D. Ingraham ed., Philadelphia, Robert H. Small, 3d American ed. 1837) (1825) (citing Warner v. Griswold, 8 Wend. 665 (N.Y. Sup. Ct. 1832)).

C. A Bright-Line Test

If small-town grocery stores were legally just like East India traders, and if their workers were no different from other kinds of entities that might interact with a business, then the rules established by Lord Mansfield and his London contemporaries could be easily applied. *Grace v. Smith* had held that "[e]very man who has a share of the profits . . . ought also to bear his share of the loss."[172] In other words, a payment taking the form of a share of the profits would be assumed to imply full liability on the part of the recipient for losses, too. A "lender" who took his payment in the form of a percentage of the profits rather than repayment plus interest had in fact taken on the financial relationship of an investor; under *Grace v. Smith* fellow merchants interested in the enterprise could expect that purported lender to be on the hook as partner.[173] That assumption—that profit sharing produced partnership—was an interpretive norm produced within the elite transatlantic mercantile context which allowed third-party potential investors and lenders to understand whose wealth and reputation were on the line within the enterprise.[174] Shared norms, in turn, meant that contracting parties themselves took on obligations voluntarily. As an early American expounder of mercantile partnership law put it, "free will is the very essence of partnership."[175]

By analogy, anyone working within an enterprise who received his pay in the form of a percentage of the profits had been transformed, just as thoroughly, into a partner by virtue of that relationship. Yet upon closer inspection, the commercial law analogy had certain flaws in the context of small business labor relationships. Cases like *Grace v. Smith*, including similar mercantile adjudications in American courts, attempted to distinguish those intimately involved in a trading venture from those merely peripherally involved.[176] But in cases of American small enterprise, everyone agreed that the people involved had gone into business together. Rather, the question was who held the power (and therefore legal rights and responsibilities) within the

172 Grace v. Smith (1795) 96 Eng. Rep. 587, 588; 2 Black. W. 998, 1000–01.

173 *Id.*

174 The rule also reflected a policy mandate within common law reserving limited liability—the ability to invest in an enterprise without putting one's own wealth at risk—for enterprises receiving the blessing of incorporation, or, later on, limited partnership. I explore the lasting effects of partnership doctrine produced in the context of scarce and closely-guarded limited liability within present-day work law in Sarah Winsberg, Liability and its Limits in the History of the Gig Economy (July 15, 2021) (unpublished manuscript) (on file with author).

175 CAINES, *supra* note 122, at 420.

176 The leading case was Dob v. Halsey, 16 Johns. 34 (N.Y. Sup. Ct. 1819).

relationship.[177] Still, throughout the 1820s, 1830s, and 1840s, many courts and legal thinkers insisted on following the logic of this analogy without exception—pay out of the profits means third parties can expect partnership—despite its flaws. They did so at the behest of creditor litigants, prioritizing creditors' expectations over others, and critiquing or reinterpreting the relationship-centered logic of lower courts.

Judges and legal thinkers adopted creditors' logic in part because it was so neat. In the view of one author, the law of partnership as developed by Lord Mansfield and his compatriots exemplified "comparative perfection and comprehensive character and enlightened liberality."[178] Maintaining that perfection while applying partnership law to such different business contexts would be difficult. Creditors' suggestions offered an easy way around the complexity.

The New Hampshire Superior Court took precisely this bright-line approach in *Brown v. Cook* in 1824, finding for creditor Benjamin Brown against an assistant in cattle sales.[179] There, the court declared, "[n]othing can be clearer" than that two men who "share between them the profits of the business indefinitely" would always be considered partners.[180] The facts of the case, however, had been murkier than that language implied. Indeed, for the lower court, the outcome had been heavily fact driven. The creditor who initiated the case, Benjamin Brown, claimed the proceeds of the sale of two of his oxen. Brown had hired another man, Cook, to take Brown's oxen to market and sell it.[181] Cook, in turn, had delegated the task to an associate of his, Robbins. Robbins sold the oxen and collected the proceeds—but neither Cook nor Robbins ever turned them over to Brown. Brown sued both men, and the question was whether he could recover from both as partners, or whether, as Robbins and Cook claimed, Cook was simply Robbins's agent.[182] To find the answer, the lower court had heard "much evidence" on either side.[183] Cook claimed his role in simply "collecting cattle" was not enough for partnership: the real solo work was Robbins's in driving them to market, generally a long and arduous journey from inland farm to coastal market.[184] In the end, a jury nonetheless found that the two

177 *See, e.g.*, *supra* notes 149–57.

178 STORY, *supra* note 119, at vii.

179 Brown v. Cook, 3 N.H. 64, 64 (1824).

180 *Id.* at 65.

181 *Id.* at 64.

182 *Id.*

183 *Id.*

184 *Id.* On the trials of cattle's journey to market in New England and beyond, see BERNARD BAILYN, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY 95

were partners. But in the hands of the New Hampshire Superior Court, their painstaking inquiry had become simple and obvious, driven by a single element of the relationship.

Pennsylvania's *Purviance v. McClintee*, in 1820, appears to represent a similar transformation in logic from trial to appeal. Like *Brown*, *Purviance* rigorously enforced *Grace v. Smith*'s rule in spite of evidence that the parties had meant to create a different kind of relationship, using abstract formal legal logic to affirm a lower court verdict likely guided by more humanitarian motives.[185] Young Samuel Dryden Jr. had agreed to manage a general store in Ohio, funded by Pennsylvania merchant Samuel Purviance, and to split the store's profits.[186] When the store foundered, Dryden Jr. borrowed a significant sum from his father. Although evidence to this effect was not allowed to be introduced, Dryden claimed he had given his father's money straight to Purviance, who used it to pay personal debts that Purviance had incurred before their joint venture.[187] Dryden's father died shortly afterward, and his estate tried to recover the loan from Purviance, claiming that the money had been loaned to both Purviance and Dryden Jr. as partners. Purviance objected: Dryden Jr., he argued, was only a clerk, and the loan, or maybe gift, was an issue between father and son.[188]

Here, it was the more senior of the pair who had tried to evade liability, and the lower court had refused to let him do it. Although the Court of Common Pleas had invoked the profits rule, Purviance's dubious behavior—seeking out the money of a vulnerable junior's parent and then denying responsibility—likely had much to do with the case's outcome before the jury. The Pennsylvania Supreme Court, by contrast, aimed to make a broader statement about the relationship between a small enterprise and its creditors. Chief Justice Tilghman declared that "creditors should not be deprived of that fund to which they looked for payment" based on the "secret agreements of merchants."[189] Those "secret agreements," of course, would be Dryden and Purviance's own understanding of the enterprise they had created—but to Chief Justice Tilghman, such understandings needed to be easily legible to a third-party creditor or they could not be upheld.

(1955); CHRISTOPHER KNOWLTON, CATTLE KINGDOM: THE HIDDEN HISTORY OF THE COWBOY WEST 17 (2017).

185 Purviance v. McClintee, 6 Serg. & Rawle 259, 261 (Pa. 1820).

186 *Id.* at 259–60.

187 Purviance v. Dryden, 3 Serg. & Rawle 402, 403 (Pa. 1817).

188 *McClintee*, 6 Serg. & Rawle at 259.

189 *Id.* at 261.

Some legal thinkers advanced a modified bright-line approach, also borrowed from English courts, that distinguished gross profits from net profits.[190] If an enterprise member received a share of its earnings before subtracting expenses, that could be understood as just a commission on sales, no partnership implied. By contrast, if he got a share of the profits after expenses, that setup looked more like a dividend, which indicated partnership and therefore liability for debts.

Other thinkers felt that even this modification bent too far in the direction of acknowledging contractors' own intentions, and in consequence did not sufficiently protect creditors. Justice Gibson of the Pennsylvania Supreme Court, examining the liability of a grocery store clerk to a creditor of the store, declared that where payment from profits occurs, "it is of no importance that a contract of partnership was not intended."[191] Indeed, it seems especially unlikely that this particular grocery clerk and grocery manager had intended a partnership because the clerk's profits share had been a mere seven percent of the total, a bonus on top of the yearly salary he would also receive.[192] But to Gibson, "public policy" demanded rigorous enforcement of bright lines around partnership; he found it "particularly strange that [the rule] should have been relaxed in cases like the present."[193] It was only Gibson's reverence for English commercial law that led him to reluctantly embrace the gross profits/net profits distinction: given the international nature of merchants' dealings, he opined, "we are bound by the decisions of foreign courts on commercial questions, as firmly as we are by our own."[194] English mercantile law would govern the dealings of this little Philadelphia grocery, whatever the intentions of its actual participants. Only a quirk in commercial doctrine had saved the grocery clerk from unexpected liability for all of the store's debts.

D. Beyond the Bright-Line Test

Examining this state of affairs, in which many judges were prepared to impose partnership against the intentions of the parties themselves, some legal thinkers balked. As one writer wondered in frustration, "Why should the creditor's contract displace the contract of the immediate parties?"[195] These writers worried that prioritizing creditors' expectations over parties' own intentions undermined the

190 *See, e.g.*, *Ex parte* Hamper (1811) 34 Eng. Rep. 156, 159; 17 Ves. Jun. 403, 412.
191 Miller v. Bartlet, 15 Serg. & Rawle 137, 139 (Pa. 1827).
192 *Id.* at 138.
193 *Id.* at 139.
194 *Id.* at 140.
195 STORY, *supra* note 119, at 56 n.2.

contractarian principles to which commercial law purportedly committed itself. At the same time, though, legal writers, perhaps even more than judges, were excited to take on the project of expanding commercial law to fit a wider range of cases, including those that would previously have been settled according to local legal norms. Legal writers therefore wrestled with the clash in values that this juxtaposition created.

Exemplifying this tension was the work of Joseph Story, Supreme Court Justice and towering legal writer of the era.[196] Story's series of "commentaries" in the 1830s and '40s, modeled on the English text *Blackstone's Commentaries*, emerged as standard references to be studied, abridged, and improved by others.[197] When Story took on partnership, in 1841, his title reflected his understanding of the subject: Story would cover "[p]artnership[] as a Branch of Commercial and Maritime Jurisprudence," tracing its lineage directly to the English commercial law developments of the previous century and beyond.[198] Story was largely happy with partnership doctrine as it had developed in England: he praised its "comparative perfection and comprehensive character and enlightened liberality," which, he believed, resulted mainly from the "learned labors of the English Bar and Bench."[199] American legal effort, too, had "contributed its own share towards expounding and enlarging them, so as to meet the new exigencies and progressive enterprises of a widely extended international commerce."[200] But it was precisely that extension to the local economies of the nineteenth-century United States that created disruptions in a previously self-contained and coherent system, casting doubt on the partnership ideal that "[t]he essence of the contract of partnership . . . consist[s] in consent."[201]

Involuntary partnership worried Story, who was preoccupied with a particular kind of "predicament": a young man would take up a position assisting a more established businessman, to be paid based on the business's profits, either instead of a salary or in addition.[202] Suddenly, the business would find itself bankrupt, and hungry creditors would pursue not only the risk-taking merchant, but the hapless young clerk as well.[203] If anyone who paid a percentage of the

196 *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 193 (1985).

197 *Id.*

198 STORY, *supra* note 119, at i, vii.

199 *Id.* at vii.

200 *Id.*

201 *Id.* at 11.

202 *See id.* at 58.

203 *See id.* at 46–59.

profits was automatically a partner, creditors would win against the clerk. Even a more nuanced rule, distinguishing a commission on sales or gross profits from a share of net profits after expenses, would still include as partner many juniors who had never expected such liability. Story asked, in an outraged footnote, why a clerk should be responsible to creditors, when the parties had not intended it, and when he "has trusted to his personal security, and only had a general confidence, that he was doing a profitable business."[204] Story advocated a blanket exception for those whose share of profits was "mere compensation for labor and services."[205] The alternative, he argued, "must always carry in its train serious mischiefs, or ruinous results, never contemplated by the parties."[206] A subsequent editor added, "Perhaps there is no other instance in commercial law, where so many confessedly harsh decisions have been based on so obvious a fallacy."[207]

Story and his editor must have been thinking of cases like that of poor John Feltz, in the rural Laurens district of South Carolina.[208] In 1817, Feltz had joined forces with William Simpson, a more established merchant, to found a store. Feltz would manage the store and sell its goods, mostly on credit, in exchange for a third of the profits once customers paid up.[209] What was the relationship between Feltz and Simpson? For nineteen months after Feltz and Simpson first went into business together, there was no need to establish the difference. Feltz lived off the cash he collected, and kept careful records of what customers owed, in anticipation of splitting profits once they paid.[210]

Unfortunately, the store burned down, taking with it much of the stock, as well as most of the records.[211] All the store had earned were the meager cash payments Feltz had lived on, and the store's losses from the fire likely nearly equaled those earnings.[212] Simpson, likely anticipating the need to pay back the store's creditors, sued to settle up with Feltz. He demanded Feltz give the money back, with interest, arguing that Feltz was a partner and therefore liable for the fire losses.[213] A local chancery court sided with Feltz, viewing him "in no

204 *Id.* at 56 n.2.

205 *Id.* at 58.

206 *Id.* at 59.

207 JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW 62 n.3 (John C. Gray, Jr. ed., 6th ed. 1868).

208 *See* Simpson v. Feltz, 6 S.C. Eq. (1 McCord Eq.) 213, 213 (1826).

209 *Id.* at 213. Feltz kept store for "nineteen months" ending "the first of January 1819," so he must have taken up in the position in 1817. *Id.* at 216, 215.

210 *See id.* at 213, 216.

211 *Id.* at 214.

212 *Id.* at 213–14, 219.

213 *Id.* at 217.

other light than that of a hireling . . . . His being paid in meal or malt did not vary his duties," nor did Simpson's actual choice to pay Feltz "a share of the profits" in lieu of "standing wages."[214] South Carolina's highest court disagreed, finding that Feltz's pay out of the profits necessarily made him a partner.[215] Refusing to consider that the parties might have intended to give Feltz a percentage of the sales realized, the judges instead found that sharing profits meant partnership, and partnership meant equal liability for loss. "The parties had all embarked their fortunes in one common concern," the court explained, so Feltz would have to pay up.[216] Indeed, under the court's ruling, if the store's debts exceeded what it had made, Feltz would be just as liable to creditors as Simpson.

The higher court's ruling was in many ways understandable. Feltz was no mere laborer: he worked with relative independence and had significant responsibility for the fate of the business. An uncharitable observer might even assign Feltz partial blame for the store fire: after all, as the man on the ground, he had as much opportunity as anyone to notice and remediate fire safety risks. Debt and failure were risks of business, and from the court's perspective, Feltz had taken them on as much as Simpson had. On the other hand, Simpson's superior position in the relationship was evident: Simpson chose and built the store's site, and he chose and supplied its products. Feltz was simply executing Simpson's vision. For an observer like Story, that was what made his liability for losses unfair.[217]

Story wished he could replace caselaw as it existed with a doctrine that better prioritized the intent of purported partners. Under his ideal rule, no partnership would ever be inferred "unless such were the intention of the parties, or unless they had so held themselves out to the public."[218] Story even spoke admiringly of Roman law, which, he explained "deemed all contracts to be made only between the immediate parties thereto," and did not legally acknowledge any impacts on third parties without equitable intervention from the

214 *Id.* at 216.

215 *Id.* at 220.

216 *Id.*

217 Or, at least, it likely would have: Story avoided citing *Simpson v. Feltz* and several similar prominent cases by name, even though they appeared in contemporary texts that he consulted while writing his treatise, and even while critiquing this type of outcome generally. For citations of *Simpson* elsewhere, see JOHN COLLYER, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP 8, 15, 50, 186 (O.L. Barbour ed., Springfield, Mass., G. & C. Merriam, 2d American ed. 1839) (1832); GOW, *supra* note 169, at 12. Story extensively referenced both Collyer's treatise and Gow's. *See, e.g.*, STORY, *supra* note 119, at 29 n.2. By criticizing the outcome of cases like *Simpson* without directly citing them, Story must have hoped to marginalize them.

218 STORY, *supra* note 119, at 56.

Praetor himself.[219] Constrained by caselaw as it existed, however, Story was forced to acknowledge that "the common law has already settled it otherwise; and therefore it is useless to speculate upon the subject."[220]

Still, Story endeavored to move closer to his intent-favoring partnership ideal by carving out a labor exception to the general rule that a share of profits would create partnership. He collected numerous cases that supported him in that view: grocery clerks, cattle-pasturers, seamen, oyster-dredgers, constructors of turnpike roads, textile workers, and others had all been found not partners even if their earnings came in the form of profits.[221] In these instances, according to Story, the purpose of sharing profits with the junior business member was not to create partnership, but "to excite his diligence, and secure his personal skill and exertions."[222] Once this distinction was clearly understood, Story felt, the problem of involuntary partnership would largely dissipate. By separating true partnership from enterprises where a share of profits functioned only as a salary, he argued, partnership law could once again attain the ideal state in which "the agreement and intention of the parties themselves should govern all the cases."[223]

Though Story advocated for parties' intent, however, he missed the ways that even his most optimistic solutions in fact continued to undermine intent in favor of third-party expectations. Like the colleagues he criticized, Story continued to assume that either parties intended to create a relatively equal relationship of decisionmaking, risk-sharing, and ownership, or they had meant to create a fully unequal relationship of mere hiring. In Story's world, a store manager like Feltz would be free from the risk of unexpected liability—but he would also be deprived of the status he had perhaps sought out in the first place, which would have elevated him beyond mere employee.

Empowered by logic similar to Story's, Massachusetts Justice Samuel Hubbard, in 1845, was relieved to avoid imposing joint liability in a case where he felt the contracting parties had not intended partnership. He declared, "We are not then called upon, by any stubborn rules of law, to create a relation between the parties which was never intended, and thus turn an agent into a partner, for the benefit of third parties whose interests are not affected by the mode of payment."[224]

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219 *Id.* at 57–58.
220 *Id.* at 56.
221 *Id.* at 61–74.
222 *Id.* at 75.
223 *Id.* at 76.
224 Bradley v. White, 51 Mass. (10 Met.) 303, 304–05 (1845).

Following Story, subsequent legal writers increasingly accepted the distinction he had embraced. Even more, they began to view that distinction as obvious and easy to spot. But who, exactly, would be doing the spotting? Story's know-it-when-you-see-it approach, even as it claimed to prioritize contracting parties' intentions, nonetheless implicitly privileged the expectations of a sophisticated creditor as to how business would usually be done, over either explicit agreements to the contrary, or competing local norms that might have interpreted the arrangement. Writer William Bateman declared in 1860 that the difference between partnership and employment, was actually "obvious if we but consider the relations in question."[225] As an example, Bateman discussed the "quite usual" agreement to compensate seamen with a share of their ship's profits, an arrangement which, he noted "has never been supposed" to create partnership.[226] The reason that receiving a share of profits did not make a seaman a partner was not because of the intentions declared within the contract itself, but instead because everyone who dealt with shipping knew that seamen weren't partners: "The distinction, even though seemingly refined, is definitely established by a series of adjudications, and is not now to be questioned. . . ."[227]

For observers like Bateman and Story, you ought to be able to tell a partner from an employee simply by looking at the two parties. That principle, which implicitly placed a lawyer or merchant like the author himself in the role of observer, benefitted creditors and investors by making impossible or very difficult those business arrangements that would be unfamiliar to them. One easy quality for creditors to observe was an imbalance in wealth and class between the two parties, something that could easily be perceived by potential creditors, and did not require knowledge of the negotiations and arrangements between the two parties. Partners were expected to be richer and more established than those they employed—and lawyers and judges deployed this instinctive rule of thumb. In an 1858 case before an intermediate-level New York court, noted for posterity by New York case digester Charles Brightly, the creditor of a failed hay-buying scheme argued that wealthy merchant Hall could not possibly be the mere agent or employee of two smaller merchants Wardwell and Bardwell, because "Hall was the capitalist; Wardwell and Bardwell were

225 WILLIAM O. BATEMAN, THE GENERAL COMMERCIAL LAW, AS RECOGNIZED IN THE JURISPRUDENCE OF THE UNITED STATES 553 (Philadelphia, T. & J.W. Johnson & Co. 1860).

226 *Id.* at 551.

227 *Id.* at 551–52.

poor."[228] According to this creditor, the three could be partners, or the wealthy Hall could have employed the two poorer men, but the reverse could not plausibly be imagined. His argument succeeded: the three men were found partners.

By 1860, the underlying British commercial law that had initiated this debate was itself evolving. In *Cox v. Hickman*, the court concluded that, even when it came to distinguishing partners from creditors or investors, taking a share of the profits was not conclusive proof of partnership, but only presumptive.[229] That change in doctrine gave further support to legal thinkers advocating for a labor exception to the profits-partnership rule.

Yet even as legal writers assured their readers that there ought to be no problems distinguishing a hired worker from a partner, cases occupying the supposedly rare middle ground nonetheless piled up. In Missouri in 1866, for example, Judge Nathaniel Holmes expected that the line between partnership and work for hire should be clear but was exasperated to find that litigants had confused the matter.[230] In *Meyers v. Field*, plaintiff Henry Meyers was a dry goods clerk running a store at the behest of defendants who supplied his stock, taking part of the profits while turning over the rest to his backers in the form of agreed wholesale prices.[231] A few years later, his backers seized back the premises, and the plaintiff argued he was still owed over $1700 in profits. Both the pleadings and the underlying business arrangements involved frustrated Judge Holmes. The original contract, which did not label the business a partnership, appeared to Judge Holmes to be either a fraudulent attempt at evading the law, or so incompetent that its participants deserved their fate. He complained,

> The arrangement seems to have been one of those not uncommon attempts . . . , either designedly, or in ignorance of the law, . . . to avoid the name, duties, liabilities and responsibilities of partners . . . while entering into agreements and transactions which, by the law of the land, constitute them partners, whatever they may please to say or think about it, or by whatever name they may choose to call it.[232]

To recover in court, Judge Holmes insisted, this ill-treated junior would have to conform the facts of his case to a claim of either partnership or compensation for service. Until then, his claim would

228 Fitch v. Hall, 16 How. Pr. 175, 179 (N.Y. Sup. Ct. 1858); *see* 2 FREDERICK C. BRIGHTLY, A DIGEST OF THE DECISIONS OF THE COURTS OF THE STATE OF NEW YORK, FROM THE EARLIEST PERIOD TO SEPTEMBER 1875, at 2840 (New York, Banks & Bros. 1875).

229 Cox v. Hickman (1860) 11 Eng. Rep. 431, 446–47; 8 H.L.C. 268, 306–07.

230 Meyers v. Field, 37 Mo. 434, 439 (1866).

231 *Id.*

232 *Id.*

be thrown out. Judge Holmes's exasperation suggested that he had faced this problem before, and likely would again.

E. Local Small-Business Norms as Fraud and Mistake

Judge Holmes's suggestion that the purported partners were to blame for the legal confusion their arrangements had caused exemplified an increasingly common position among legal thinkers. If legal thinkers could not work out a clear and easily applied default rule with results less harsh than those of the original bright-line test, it must be because small businesses themselves were trying to evade or ignore the business norms they ought to understand. The idea that contested partnership might indicate fraud was not new: as far back as *Purviance v. McClintee* in 1820, Chief Justice Tilghman had justified his application of the bright-line rule that a share of profits mandated partnership with the remonstrance, "[i]n the present state of the world, we cannot afford to part with any of the safe-guards against fraud."[233]

Yet with the decline of the original bright-line rule, judges' suspicion of relationships mixing work and ownership served a new purpose, providing weight and justification to decisions firmly planting enterprises on one side or the other. In 1848, evaluating potential partnership within a small cotton factory where the alleged partner had been paid a fraction of profits, a New York court acknowledged that the mere fact of a "fluctuating and dubious compensation" would not be enough to establish partnership, even though it "might serve as a cover for usury."[234] But that gratuitous expression of distaste certainly did not hurt in the court's ultimate conclusion that the "true meaning" of the contracting parties' agreement constituted partnership and that a local referee had erred in finding otherwise.[235]

Fifteen years later, the same court applied similar logic to the dispute between liquor dealer John Conklin and brothers Hiland and Eli Barton, proprietors, respectively, of a hotel and store in Eagle Bridge, New York.[236] In the court's view, if creditor Conklin had misunderstood the nature of the brothers' business relationship, it must have been because Eli Barton had violated "his plain duty . . . to speak and to state fairly and honestly how the facts were."[237] The record gave no indication that Eli had been intentionally dishonest.

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233 Purviance v. McClintee, 6 Serg. & Rawle 259, 261 (Pa. 1820).

234 Everett v. Coe, 5 Denio 180, 182 (N.Y. Sup. Ct. 1848).

235 *Id.* at 184.

236 Conklin v. Barton, 43 Barb. 435, 435–36 (N.Y. Gen. Term 1864); *see supra* notes 3–9 and accompanying text for my earlier discussion of the case.

237 *Conklin*, 43 Barb. at 440.

Nevertheless, Eli could not be permitted to "exonerate himself from responsibility."[238] Eli was liable for the hotel's debts and, in the judges' view, he deserved his fate. In an ironic twist, Eli Barton fired back with a counterclaim: he argued that Henry Backman, Conklin's agent who had delivered the liquor, was himself Conklin's partner, and Conklin had therefore erred by not joining him as plaintiff.[239] But even though Backman received a portion of Conklin's profits, that payment for Backman's labor comfortably fit the now-established profits-as-wages exception.[240] Conklin and Backman's hierarchical arrangement had now found a place within commercial law, while the Bartons' relationship of mutual aid continued to challenge its boundaries.

In cases like *Conklin v. Barton*, courts penalized small businesses for representing relationships as joint efforts without intending the new legal definition of partnership. Those results were fair, in the courts' eyes, because simply by adopting business forms falling in between or outside the rules of commercial law, small businesses approached fraud. Furthering the goal of discouraging use of older partnership forms, legal writers also began a broadly targeted education campaign. The Philadelphia *Journal of Law*, addressed not only to lawyers but to "the People of the United States," was one effort at education.[241] The motto of the journal, "[i]gnorance of the law excuseth no man," was both an encouragement to readers and something of a threat to those who turned their attentions elsewhere.[242] In particular, the anonymous Philadelphia lawyers responsible for the journal wanted to reach commercial men, explaining that they could not afford to remain unfamiliar with the many laws that would "affect them in the pursuit and transaction of their ordinary business."[243] In addition to warnings, the journal also tried happier inducements: each issue included jokes, anecdotes, and strange or exciting cases, aiming for "instruction without tediousness, and amusement without frivolity."[244] Despite its brief run, from 1830–31, the journal achieved nationwide circulation, joining forces with the *Journal of Health* to find

238 *Id.* at 441.

239 *Id.* at 437.

240 *Id.* at 438.

241 *Ass'n of Members of the Bar*, *Introduction*, 1 J.L. 1, 2 (1830). My use of popular legal materials like the *Journal of Law* represents methodological innovation. These magazines, newspapers, novels, handbooks, and more constitute rich and fascinating source material that have rarely been incorporated into accounts of doctrinal change and its social impact. *See* Winsberg, *supra* note 32, at 2.

242 *Ass'n of Members of the Bar*, *supra* note 241, at 1.

243 *Id.*

244 *Id.* at 2.

agents available to sell subscriptions in every state.[245] Similar legal journals, later ones often growing out of earlier efforts, also targeted both lawyers and interested laymen by providing up-to-the-minute, easily digestible legal information.[246]

The *Journal of Law* strongly advised all those entering a partnership to place their intentions in writing: "The memory of witnesses is frail . . . [and] the defect of proof would place confidence at the mercy of dishonesty."[247] If partnership was not the goal, its writers advised, workers for hire should avoid "intermeddling with the profits" of the business.[248] To do so was "like approaching a magazine, with a lighted match. By extreme caution you may escape, but one instant of heedlessness, involves you in ruin."[249] If all those going into business followed this advice, there would be no difficulty in determining which people owned the enterprise and were responsible for it.

Beyond periodicals, legal writers promoted clearly defined labor contracts in "every man his own lawyer" volumes. Published at an increasingly rapid rate, these works gave brief explanations of commonly used legal principles alongside legal forms that could be repurposed for typical transactions.[250] In doing so, they imagined audiences of smaller commercial men and farmers, rather than coastal merchants, and adjusted their offerings accordingly. The 1831 *Ohio Pocket Lawyer*, for example, included separate forms for a partnership agreement, an "[a]greement with a [c]lerk or [w]orkman," and other agreements, forms which would prevent or resolve disputes about the nature of the relationship.[251]

These manuals purported to empower and protect small businessmen by giving them the tools to understand the legal principles that would be used to interpret their bargains. Indeed they

245 *Ass'n of Members of the Bar, Notices and Advertisements*, 1 J.L. 160, 160 (1830) (providing that "[a]ll agents for the Journal of Health, are also authorized to receive subscriptions for this work," at a cost of $1.50 per year).

246 Similar law journals of the era included, for example, John E. Hall's Philadelphia publication *The American Law Journal* (1808–10 and 1813–17), revived in 1821 as *The Journal of Jurisprudence*, and *The Jurisprudent* (published in Boston weekly from 1830–31). *See* 8 DICTIONARY OF AMERICAN BIOGRAPHY 138–39 (Dumas Malone ed., 1932); *The Jurisprudent*, PRINCETON U. LIBR., https://catalog.princeton.edu/catalog/99114358313506421 [https://perma.cc/A55R-9UGM].

247 *Law of Partnership*, 1 J.L. 241, 243 (1831).

248 *Id.* at 249.

249 *Id.*

250 *See* Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 LEGAL ETHICS 115, 119 (2017).

251 *See* THE OHIO POCKET LAWYER, FORM BOOK, OR SELF-CONVEYANCER: CONTAINING ALL THE NECESSARY LEGAL FORMS, USED IN THE STATE OF OHIO 52–53, 77–92 (A. & E. Picket eds., Wheeling, Va., A. & E. Picket 1831).

did: legal writers were right to warn readers against ignorance of the emerging doctrine of merchants' contract law as applied to small local businesses. But the reason small businessmen had to learn to conform their enterprises to the options laid out by merchants' partnership law was that courts had decided not to honor the system of contract interpretation and default rules that had previously governed these businesses. Manuals, magazines, and other popular sources helped enforce a new third-party-favoring approach to contract's background rules.

Legal writers did not succeed entirely in their campaign of persuasion: cases involving enterprises straddling the partnership/employment line remained a constant fixture in courts through the nineteenth and early twentieth centuries, in part because the small business form in which one partner contributed cash while the other contributed labor remained so common.[252] But they did persuade each other, and courts, that the dilemma in these cases ultimately represented failure on the part of the contracting parties who had created the enterprise. This rule—that contracting parties' intentions could not take a form that failed to match the expectations of third-party creditors—would last even as the importance of partnership as business form ultimately declined.[253]

By using fraud and mistake to justify prioritizing third-party interests, judges and writers had both transformed contract law and thoroughly camouflaged their work in the process. The legal system had faced a conflict between the background rules favored by one group, entrepreneurs contracting within their own local small businesses, and another, the third-party creditors and investors of those businesses. It chose third parties. By recasting contractual terms less intuitive to third parties as fraudulent or mistaken, however, judges

252 In 1942, for example, an American Law Reports annotation found numerous instances in which "the express provisions of a contract, if considered separately, may be typical, some of a partnership and others of an employment relation," explaining that "[i]t is this situation which gives rise to the problem with which this annotation is concerned." E.H. Schopflocher, Annotation, *Partnership as Distinguished from Employment (Where Rights of Parties Inter Se or Their Privies Are Concerned*, 137 A.L.R. 6 (1942). In this era, partnership/employee disputes developed a new significance: the boundary line became a key area of contestation for worker benefits eligibility, as I explore elsewhere. *See* Winsberg, *supra* note 174. At both the state and federal level, a determination of partnership could disqualify workers from workman's compensation, unemployment benefits, and more. This line of cases related to and informed the simultaneously emerging distinction between employee and independent contractor. *See generally id.*

253 With the rise of LLCs in the 1990s, more small businesses chose that form instead of partnership, reducing the importance of the partnership/employee boundary line for creditors; still, partnership law's legacy in work law continued to grow in importance. *See* Winsberg, *supra* note 174.

and writers made their decision look like not a choice at all, but simply an expression of logic and morality. Future generations would forget the third-party-favoring transformation of partnership contracts because the long process of common-law evolution had covered its tracks as it rolled forward.

Conventional wisdom holds that the nineteenth century was for better and worse the peak of freedom of contract.[254] It was the era, in our memory, when parties were most at liberty to choose any terms they could agree upon, without intervention from either the hierarchical strictures of the feudal past, or the regulatory cosseting that would come later.[255] Yet upon closer inspection, contract law at its Industrial Revolution peak remained as full of limitations, default assumptions, and arbitrary interpretive rules as it ever had been, continuing to guide or force parties' agreements onto select, legally enforceable paths. What began to change in the nineteenth century was the function of those constraints, which increasingly shifted toward prioritizing the expectations of third parties who held financial interests in the bargains of others. Creditors fought—and in many respects won—a battle to shape partnership contract doctrine to their advantage.

IV. GRAPPLING WITH THIRD-PARTY PRESSURE IN MODERN CONTRACT LAW

The process that transformed partnership contract to favor third-party interests over those of contracting parties was not unique to the nineteenth century, nor to partnership. Contract law continues to balance the competing interests of intervening third parties against those of contracting parties.[256] Yet observers and practitioners have been curiously silent on this aspect of doctrine, and to the choice between competing values that it represents. Nor have they considered third-party pressure itself as an important feature of many bargains. This inattention has had consequences. No systematic analysis of the larger issue informs judges' piecemeal adjudications between

254 *See, e.g.*, GILMORE, *supra* note 21; Harold C. Havighurst, *Limitations Upon Freedom of Contract*, 1979 ARIZ. ST. L.J. 167, 167 (1979); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 365–66 (1921).

255 For the classic statement of the law's progression "from [s]tatus to [c]ontract," see HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 170 (London, John Murray 1861) (emphasis omitted).

256 *See* Bagchi, *supra* note 2, at 211 (identifying elements of contract law that currently favor third-party perspectives in contract interpretation, notably in the interpretation of merger contracts).

contracting parties and third parties who hope to meddle in their bargains.

In this Part, I first consider the powerful project of finding and revealing contract's third-party preferences. Since the nineteenth century, contract law has included many background rules prioritizing third-party viewpoints in various substantive contexts, often without acknowledging them as such. Some of these rules may well be neutral or even salutary: they distribute the benefit that comes with having one's viewpoint enforced in ways that are consistent with social good. Others stifle or misinterpret parties' efforts in ways echoing the nineteenth-century small business experience. Some may even have elements of both qualities. Where contract rules create previously unacknowledged distributive consequences between third parties and contracting parties, they might be revised within common-law doctrine, or left in place but limited or compensated for legislatively. The first step, however, is identifying and acknowledging third-party preference within the law.

Next, I extend my argument outside the terrain of doctrine and into legislation. I consider how legislative limits could, but do not currently, remediate the effects of third-party pressure on individual contracts. Redressing unfair results that might otherwise be produced through contract is not a new legislative project. Yet lawmakers have consistently focused their efforts on injustice created by differences in power between the two contracting parties. In one such moment of reform, spanning the middle decades of the twentieth century, legislators created new limits on certain kinds of contracts, including employment, housing, and consumer credit and sales, designed to protect the weaker party in each of those bargains. Because lawmakers gave little thought to third-party influence on contracts, however, they created legislative exceptions that systematically excluded many bargains with small businesses from protection, even where the moving force behind the bargain came from a much larger third party. Recent evolutions in enterprise and labor structure have only exacerbated the impact of these loopholes. Deeper attention to third-party pressure, though, could correct those oversights relatively easily.

A. Third-Party Preference in Contract's Background Rules

The background rules of contract law matter.[257] Through default rules, interpretive rules, and limits on contract terms, the law wrestles with how bargains incomplete on the page can be shaped to better reflect what parties would have wanted, to promote social good and

257 "Background rules" are the defaults, interpretive rules, and unwaivable limits that supplement a contract's text. *See* Craswell, *supra* note 12, at 489–90.

economic efficiency, or for other projects.[258] Though parties can theoretically bargain around background rules, doing so has costs, often prohibitive ones. Haggling over contract terms damages relationships, implying a stance of reduced trust and inviting contemplation of worst-case scenarios.[259] The legal project of identifying and altering undesirable terms creates costs of time and money, too.[260] The burdens of departing from the norm are weighty: even minimal transaction costs associated with departing from default rules can prevent a bargain altogether.[261] And of course all these burdens weigh more heavily on parties who are less legally sophisticated and whose smaller-stakes bargains are more readily swamped by transaction costs.[262]

In recognition of the importance of these background rules, courts, scholars, and doctrinal projects like the Restatement and Uniform Commercial Code constantly weigh their distributional consequences between the two contracting parties.[263] Should the drafter's perspective prevail, for example, or that of the party who mainly accepted terms written by its counterpart?[264] Within particular kinds of contracts or contract terms, what defaults promote creation of more economic value by the parties, and which ones most fairly distribute the burden of departing from the norm?[265] To answer these questions, scholars and lawyers consider the respective positions of each party and the consequences for each of the potential default rules.[266]

Rules benefitting third parties at the expense of contracting parties have equally significant distributive consequences compared to those that settle interpretive disputes between two contracting parties. Yet their consequences have hardly been examined, either by commentators and codifiers of contract law, or by scholars.[267] This

258 *See id.* at 491.

259 *See* Ben-Shahar & Pottow, *supra* note 36, at 652; Ayres & Gertner, *supra* note 36, at 88; Johnston, *supra* note 36, at 618.

260 Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 264 (1985).

261 *See* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 733, 746 (1992).

262 *See, e.g.*, Ben-Shahar & Pottow, *supra* note 36, at 676 n.117.

263 *See, e.g.*, Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1523 (2016) ("A long-standing project of academics and lawyers attempts to supplement common law contract rules with substantive default rules and default standards.").

264 *See, e.g.*, Ayres & Gertner, *supra* note 36, at 105 n.80.

265 *Id.* at 91.

266 *See id.* at 92–95.

267 *See supra* Part I.

enormous oversight leaves room for a cavalcade of accidental injustice, invisible within unexamined and seemingly neutral rules.

Third parties indeed now benefit from many of contract's background rules. When they intervene to promote an alternate interpretation of a contract, they often win. Unwary enterprises whose structure is interpreted by third-party observers as partnership are still today liable on that basis, even if their intentions were something else entirely.[268] When one party has a fiduciary duty to another on the basis of a contract between them, that duty is sometimes interpreted to extend to an interested third party.[269] In the context of mergers, one of the few relatively well-studied areas of third-party influence, elements of doctrine promote third-party interpretations of contracts over those of either of the parties, too.[270] For example, if a merger agreement affects the rights of creditors of either of the two parties, ambiguities in the nature of those effects may be decided in favor of the creditors.[271] Beyond explicit elements of doctrine, courts also seem inclined to favor third-party interpretations more generally, without acknowledging that they are doing so. For example, though the Uniform Commercial Code authorizes courts to enforce the customs of particular industries where they appear to have informed the parties' understanding of their contract, a preliminary examination suggests that they are less likely to do so where a third-party litigant from another industry alleges they did not share that understanding.[272]

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268 *See* BROMBERG ET AL., *supra* note 13, § 2.12(b) (delineating modern theory in which purported partners may be liable to third parties where they have held themselves out as partners, and noting that "[i]t is sometimes quite ambiguous whether the representation of association in business amounts to a representation of partnership"). For cases privileging third-party interpretation of ambiguous statements potentially establishing partnership, see, for example, O'Brien & Gere Engineers, Inc. v. Taleghani, 525 F. Supp. 750, 753, 759 (E.D. Pa. 1981) (in a case of two Iranian citizens who believed their business to fall within the Iranian legal concept of an "establishment," nonetheless finding that the purported partner's "contention that he was unaware of the significance of his representations . . . that he was a partner . . . is immaterial"); Phillip Van Heusen, Inc. v. Korn, 460 P.2d 549, 550 (Kan. 1969) (imposing partnership liability on a father and son on the basis of a letter explaining the two were "planning to start a clothing business"); Volkman v. DP Associates, 268 S.E.2d 265, 268 (N.C. Ct. App. 1980) (holding that partnership liability was potentially established by the statement "I am happy that we will be working with you" and other behavioral cues).

269 Bagchi, *supra* note 2, at 246.

270 *Id.* at 212.

271 *Id.* at 250.

272 *See* U.C.C. § 1-303 (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2020). For a case declining to find merchant custom informing a contract in the face of third-party challenge, see, for example, Blonder & Co. v. Citibank, N.A., 808 N.Y.S.2d 214, 216–19 (N.Y. App. Div. 2006) (finding no accepted custom relating to typical letter of credit practice in interpreting the contract between two parties who, as part of the deal, sought a letter of credit from a third-party bank).

These third-party victories may produce both undesirable consequences and beneficial ones. In some instances, as in this Article's historical example, a powerful third party—say, a creditor of one party—lobbies to enforce its expectations and interpretations over the competing norms of the industry that the contracting parties themselves belong to.[273] In other instances, a vulnerable third party has relied on its own understanding of a contract, and asks for protection by the law from an alternate interpretation that would impinge on its interests: say, an employee of a company merging with another who argues for a particular interpretation of that merger agreement.[274] In other cases, both dynamics are at stake.

Each scenario calls for action on the part of contract law. But how can we tell them apart? The answer, I hypothesize, depends in large part on the kind of bargain at issue. Different third parties exert different kinds of pressure over merger contracts compared to employment contracts compared to consumer contracts, and more. These subject-specific branches of law—corporate and business law, employment law, commercial law, and so on—already contain many of the interpretive and default rules that regulate contracts in these areas. It is in these branches of doctrine that, in many cases, third parties have had the opportunity to produce favorable rules. Conversely, these are also the places where the real-world impact of third-party-favoring doctrine can be evaluated.

Across-the-board modification of the common law of all contracts is therefore likely not the ideal tool for remedying the excesses of third-party interaction with contracts. Blanket interpretive rules—like Aditi Bagchi's proposal to interpret contract terms, when ambiguous, in favor of third-party interests—run the risk of creating new unfairness when they mean to balance the scales.[275] This holds particularly true where the ambiguity results from a difference in business norms and understandings between the kinds of people who are typically the contracting parties, and those who are typically interested third parties. There, the identity of each group matters in determining who needs contract law's protection.

Efforts to discern third-party interests in contract law are enormously important, yet require painstaking, clear-eyed work. Default rules in general often fly under the radar: legal analysis may fold them into the interpretation of the contract in general, without stopping to identify their application and recognize its impact.[276] When it comes to third parties, that effect grows even more pro-

273 *See supra* Part III.

274 *See* Bagchi, *supra* note 2, at 250–51.

275 *Id.* at 212.

276 Craswell, *supra* note 12, at 516.

nounced. Camouflaged beneath judicial language of "objectivity" and ease of interpretation lurk real choices about who must act to avoid an unintended consequence, and what sacrifices they must make to assure legal success in doing so. Judges and scholars alike therefore often fail to notice elements of contract doctrine that systematically favor particular third parties. Examining the historical transformation of partnership contracts, however, reveals what has long remained obscure. Armed with the insight that third-party preference in contract doctrine can transform whole worlds of business practice, leaving unsuspecting contracting parties to face unintended outcomes, legal analysts today must examine when and how it does so and with what consequences.

B. Legislative Remedies for Third-Party Pressure on Individual Contracts

Modern contract rules derive not only from common law, but also from legislation. Failure to consider the contractual role of third parties has had consequences here, too. In this Section, I move from third parties' influence on contract doctrine in general, to the pressure they may place on individual contracts. In the mid-twentieth century, lawmakers took on the project of remedying unequal bargaining power in contracts involving especially high human stakes and especially vulnerable parties. Their effort constitutes one of the central accomplishments of twentieth-century lawmaking; yet because reform energy focused squarely on the unequal two-party relationship, with almost no thought given to third-party pressure, these laws have left open important loopholes.

From the 1930s through the 1970s, federal and state legislatures placed new bounds on the ways parties could make contracts of employment, tenancy, consumer credit and sales, and more, preventing the more powerful party in each case from including provisions in conflict with vital societal norms.[277] In federal employment law, new limits ranged from the limits on pay, hours, and work conditions imposed by laws like the Fair Labor Standards Act of 1938 and the Occupational Safety and Health Act of 1970, to the antidiscrimination provisions of the Civil Rights Act, and many more.[278] New limits on housing contracts included those imposed by

277 For an overview of work legislation following these reforms, see, for example, PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990). For the history of their creation, see, for example, JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE (2006).

278 Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241

the Fair Housing Act in 1968.[279] States and localities, too, created new rules for work and housing contracts: for example, a wave of new legislation beginning in the 1960s replaced or modified the common law of landlord-tenant contracts.[280] In Washington, D.C., and elsewhere, new laws regulated installment sales and other "unconscionable" sales contracts.[281] These laws singled out situations in which one party to the contract was much stronger than the other, preventing that party from imposing certain terms that legislatures declared unfair and socially undesirable.[282]

To scholars, these developments appeared to mark the end of an era. Grant Gilmore famously declared the "[d]eath of [c]ontract" in 1974, while P.S. Atiyah declared the "[f]all of [f]reedom of [c]ontract" a few years later.[283] They and others argued that the growth of contract-limiting regulation, in combination with courts' strengthening of doctrines like unconscionability and promissory estoppel, were replacing consensual contract with other kinds of mutual obligation—perhaps for the better. As it turned out, contract was alive and well.[284] New bounds on contract were, in the end, no different from old bounds on contract. They placed outer limits on the content of certain kinds of bargains without otherwise undermining contract as doctrine and practice.[285] Despite their nonlethality to contract in general, though, these efforts to remedy particular consequences of unequal bargaining power were significant and lasting. When it came to specific kinds of contracts like employment and tenancy, legislation and regulation did important

(codified as amended at 42 U.S.C. §§ 2000e–2 to –3); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–78).

279 Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–31).

280 *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982).

281 *See* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1425–29 (2014) (discussing the District of Columbia Consumer Credit Protection Act of 1971, Pub. L. No. 92-200, sec. 4, § 28-3805, 85 Stat. 665, 670 (codified as amended at D.C. CODE ANN. § 28-3805 (West 2021))).

282 For example, a 1968 federal commission observed that unscrupulous lenders "take advantage of their superior knowledge of credit buying by engaging in various exploitative tactics," ultimately leading to consumer credit reform. *Id.* at 1425–26 (quoting NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 140 (1968)).

283 GILMORE, *supra* note 21 at 3; ATIYAH, *supra* note 21, at 1.

284 *See* Ellen A. Peters, *Foreword*, 90 NW. L. REV. 1, 5 (1995).

285 *See, e.g.*, Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMPAR. LAB. L. & POL'Y J. 351, 364 (2007) ("Public law sets boundaries on private ordering, for example, through 'public policy' limits on enforceability of contracts.").

work to remediate unequal bargaining power by imposing constraints on contracts.[286]

Across the board, however, the lawmakers searching for unequal bargains in contract law gave little thought to the idea that third parties might be responsible for them. As a result, they left loopholes that in part undermined their intended goals. Contract-limiting statutes made exceptions where the more powerful party—employer, landlord—was in fact not particularly powerful. Nearly all mid-twentieth century employment legislation exempted employers whose workforces were below a certain size.[287] These exceptions had logical appeal. If employment legislation meant to place outer limits on contract terms where the bargaining parties were in vastly unequal positions, it stood to reason that, if the employer was in fact not particularly large then no such inequality was at issue.

These exceptions presume, however, that the pressure toward unfair contracts comes from the employer itself. They therefore ignore the ways that these small entities may face pressure from third-party creditors, investors, or part-owners in their bargains with employees. That gap in the law leaves real potential for unfair and unforeseen outcomes. A modern contract-maker—say, an employee—as she bargains with the small business in front of her, may be unaware of the third-party interests invisibly shaping the deal. Or, she might be well aware of the business's affiliation with a third party, for example, a franchisor—but not understand that being the employee of a franchise or subcontractor drastically alters the protections available

286 KLEIN, *supra* note 277, at 3–4.

287 In order of ascending thresholds, see, for example, Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e(b)) (applying Title VI anti-discrimination protections only where employers have at least fifteen employees); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101, 104 Stat. 327, 330 (codified as amended at 42 U.S.C. § 12111(5)(A)) (applying protection against disability discrimination in employment only where employers have at least fifteen employees); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11, 81 Stat. 602, 605 (codified as amended at 29 U.S.C. § 630(b)) (applying protection against age discrimination only where employers have at least twenty employees, an expansion from the statute's initial threshold of fifty employees); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101, 107 Stat. 6, 7 (codified as amended at 29 U.S.C. § 2611(4)(A)(i)) (applying requirement of unpaid family or medical leave only where employers have at least fifty employees). Even where contract-limiting employment laws apply to employers of all sizes, third parties who influence contract terms nonetheless evade liability for the penalties these laws impose except in very limited circumstances. *See, e.g.*, Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §3(g), 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. § 203(g)) (applying limits on employee wages and hours, among other protections, to anyone who "suffer[s] or permit[s]" an employee to work regardless of the employer's size). FLSA's uniquely broad definition of "employer" encompasses a small set of third parties, but remains limited to the very most involved. *See infra* note 294.

to her relative to being an employee of the larger company. Most importantly, even if she understands the deal and its limitations precisely, she may well accept it anyway because she faces the kind of bargaining pressure produced by a very large company, the third party, even though her actual co-bargainer is a small business exempt from oversight.

Such scenarios are omnipresent and growing in significance within the evolving twenty-first century economy. In the world of business, large players remain the very small minority. Over 99% of firms are small businesses.[288] And when it comes to employment, an especially high-stakes contract, 49% of private-sector employees bargain with a small business employer.[289] Small businesses, because they are small, are often significantly beholden to larger and more powerful players. Those larger players, if they choose, can exert significant influence on small businesses' internal contracts. To take an especially obvious case, 2% of businesses are franchises, directly beholden to a franchisor, who may very well dictate key terms of employment agreements.[290] Other small businesses are subcontractors for larger ones: at tech giants like Google, Amazon, and Facebook, for example, armies of small subcontractors are the ones directly responsible for employing many of the janitors, content moderators, software engineers, and more who work on behalf of these companies.[291] Others, for example, start-ups, have taken on investment capital explicitly conditioned on the investors' ability to direct some of the business's behavior, potentially including its contracts with others.[292] Finally, some may be in debt to a demanding creditor; or they may rely in large part on a single customer or supplier with the ability to dictate terms.[293]

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288 OFF. OF ADVOC., SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS 1 (2012).

289 *Id.*

290 *Id.* at 3.

291 J. Alden Estruth, *Subcontracting: Silicon Valley's Riskiest Work*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/11/16/subcontracting-silicon-valleys-riskiest-work/ [https://perma.cc/VVL5-PWM5].

292 *See, e.g.*, Steve Blank, *How to Make Startup Stock Options a Better Deal for Employees*, HARV. BUS. REV. (Apr. 3, 2019), https://hbr.org/2019/04/how-to-make-startup-stock-options-a-better-deal-for-employees [https://perma.cc/7NWM-9QUG] (noting that "VCs have intentionally changed the more than 50-year-old social contract with startup employees" by, for example, pressuring founders to offer stock options to employees on less favorable terms).

293 *See, e.g.*, Tomas Jandik & William R. McCumber, Creditor Governance 1 (Oct. 2018) (unpublished manuscript), https://ssrn.com/abstract=3209460 (arguing that creditors meaningfully influence companies' ongoing management decisions even when debt is not in default).

What should we make of these strong influences on a small business's contracts? One answer is: nothing. They are part of the bundle of preferences that any contractor brings to its bargains. Indeed, part of the structure of contract law is that, absent special circumstances, the reasons for a party's preferences have no effect on the contract itself.[294] The contract simply enforces the choices that each party has made in deciding to contract.[295] Of course, this is true enough. But, as I have discussed above, contracts are regulated and limited in some contexts because lawmakers have determined that these contexts are likely to produce bargains so unfair that they are socially undesirable.[296] Third-party pressure thus deserves more examination, to determine in what circumstances it may rise to that level.

Legislative efforts to identify and redress unfair pressure in contracts, then, have imagined that pressure as coming from bargaining parties and have focused their attention accordingly. But addressing this blind spot would not be conceptually difficult. Legislators and regulators could simply make small-business exceptions more limited, adjusting their breadth to reflect the pressure the vulnerable party is actually up against where a third party is heavily involved. They could even hold third parties responsible for regulatory penalties in some instances.[297] By understanding the pervasive

294 *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 73 (2006).

295 Barnett, *supra* note 16, at 299.

296 *See supra* notes 280–82 and accompanying text.

297 Fair Labor Standards Act enforcement, particularly under a short-lived Obama-era interpretation and related caselaw, offers a suggestive example of liability for highly involved third parties. An employer who violates FLSA's wage and hour requirements must pay back wages and penalties. Fair Labor Standards Act, 29 U.S.C. § 216(b) (2018). A "joint employer" who is not the employer of record but is nonetheless heavily involved in determining the employee's work conditions may be equally liable as an employer. 29 C.F.R. §§ 791.1–791.2 (2020). Under the Obama Administration's "economic realities" test, the joint employer category was expanded further, growing to encompass certain relatively involved franchisors and contractors employing subcontractors. *See* U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2016-1 (Jan. 20, 2016), 2016 WL 284582. The Fourth Circuit took the analysis one step further by considering a third party's control of an employer just as important as its control of the employee: it held DirectTV a potential joint employer of its subcontractors' employees on the basis of DirectTV's direction and control of its subcontractors. Hall v. DIRECTV, 846 F.3d 757, 761 (4th Cir. 2017). Trump Administration regulation retracted the economic realities test in favor of a narrower approach limiting joint employer analysis to the most clear-cut cases of third-party supervision of employees. 29 C.F.R. §§ 791.1–791.2 (2020). Current proposed regulation would revive the Obama-era approach to joint employment. *See* Robert J. Simandl & John A. Rubin, *Labor Law Reform on the Horizon: Ten Things to Watch Under the PRO Act*, NAT'L. L. REV. (Feb. 16, 2021), https://www.natlawreview.com/article/labor-law-reform-horizon-ten-things-to-watch-under-pro-act [https://perma.cc/HX6U-RHZ8].

influence on internal contracts by third parties, then, we can find and undo past omissions.

CONCLUSION

When the members of a firm take a loan, they invite a new party into their existing contractual relationship. They welcome in a competing set of interpretive norms and default rules, perhaps fundamentally altering the terms on which they work together, often without even realizing that they have done so. That was what happened to, for example, the Barton brothers in 1864, who had no idea that a simple liquor purchase on credit could recast their relationship of mutual aid as equivalent to formal co-ownership because it replaced their own interpretive norms with those of their creditor.[298]

It took many decades to construct this third-party-favoring state of affairs. In the eighteenth and early nineteenth centuries, local courts trying low-value cases had tended to interpret small businesses' contracts in light of local small-business norms. Higher courts handling higher-stakes cases, meanwhile, had constructed an emerging commercial law doctrine around the norms of the community of merchant traders whose disputes it resolved. In the mid-nineteenth century, these formerly separate business and legal worlds collided because the expansion of markets led sophisticated merchants to loan to and invest in local operations. American courts and legal thinkers experimented with a variety of approaches to mediate between them. Ultimately, courts sided with the merchants in their role as third parties. Their business norms, and the contract interpretive and default rules that enforced them, could and would displace the competing norms that had previously governed small businesses.

The rise of partnership contract's third-party preference was as influential as it was unobserved. Where contracting parties' intentions clashed with third-party interpretive norms, courts reinterpreted the parties' efforts as fraud or mistake. That left the third-party perspective as the "objective" interpretive view. Yet third-party meddling, though camouflaged, is not invisible. It alters and constrains contractual relationships, especially those of parties too small or unsophisticated to fight back. By uncovering it, we unearth new opportunities to make contract's boundaries and defaults fairer to each of its participants.

298 Conklin v. Barton, 43 Barb. 435, 435 (N.Y. Gen. Term 1864).