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Book Review: Contract Law and Modern Society - The Law of Contract, by H. Collins

CONTRACT LAW AND MODERN SOCIETY

The Law of Contract. By H. Collins. London: Weidenfeld & Nicholson, 1986.

*Reviewed by Iain Ramsay.**

What a thing does is only one of the things that it means, but everything that it means is something else that it does. . . .¹

Arthur Leff

During the past decade, there has been a remarkable resurgence of theoretical scholarship attempting to explain and justify the law of contract.² The new system builders have assiduously attempted to provide a variety of intellectual scaffoldings for contract similar to earlier attempts in the law of torts.³ The concept of promise, efficiency, reasonable reliance, and the new paternalism have all been proffered as explanations and justifications for the possible patterns of reasoning in appellate decisions.⁴ In addition, the relational perspective has drawn attention to the importance and limits of contract as an organizational framework for a vast number of business and social relations.⁵ Several areas of law are being reconceptualized through the lens of contractual analysis;⁶ it seems

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¹ A. Leff, "Law and" (1978) 87 Yale L.J. 989.

² See *infra*, note 4 for some recent examples; for an excellent summary of the role of theory in contract law, see M. Bayles, "The Purpose of Contract Law" (1983) 17 Val. U.L. Rev. 613.

³ See, in relation to tort law, I. England, "System Builders: A Critical Appraisal of Modern American Tort Theory" (1980) 9 J. Leg. Stud. 27.

⁴ C. Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981); A. Kronman & R. Posner, *The Economics of Contract Law* (Boston: Little Brown, 1979); R. Posner, *Economic Analysis of Law*, 2d ed. (Boston and Toronto: Little Brown) c. 4 at 65; P. Atiyah, "Contracts Promises and the Law of Obligations" (1978) 94 L.Q. Rev. 193; G. Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974); D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Maryland L. Rev. 563 and the early article by Fuller and Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52.

⁵ O. Williamson, *Markets and Hierarchies* (New York: Free Press, 1979); Alchian and Demsetz, "Production, Information Costs, and Economic Organisation" (1972) 62 Am. Ec. Rev. 777. See also the work of Ian R. Macneil; for example, *The New Social Contract* (New Haven, 1980) and the symposium on Macaulay's work in (1985) Wisc. L. Rev. 461.

⁶ For example, the area of regulatory enforcement (see *infra*, note 89) and corporate law. For critiques of these forms of analysis in these areas, see G. Winter, "Bartering Rationality" (1985) 19 L. and Soc'y Rev. 219 and V. Brudney, "Corporate Governance, Agency Costs, and The Rhetoric of Contract" (1985) 85 Colum. L. Rev. 1403.

at times that the world of human relations would be completely based on voluntary exchange — but for transaction costs. Contract appears indeed to have been resurrected as living law, metaphor, and myth.⁷ What do these developments signify? How do we compare and evaluate competing explanations and justifications? What are the implications of these theories for legal teaching and research? Do these academic flurries reflect broader social concerns or dissatisfaction with contract law and practice?

These issues may be approached initially through an analysis of Hugh Collins's provocative and elegantly written monograph, *The Law of Contract*.⁸ This book represents a significant advance in English contracts scholarship. It rejects the picture of contract law as an autonomous area of legal argument, separate from issues of moral, social, and political value. On the contrary, arguments in contract law are inextricably intertwined with those values.⁹ Contract law is, in Collins's view, a contested concept: it speaks with different voices.¹⁰ Consequently, contract law reasoning is "controversial, . . . cannot produce definitive answers to disputes by reference to authority, and its conclusions are constantly challenged and restated in the light of experience and changing moral and political values."¹¹ Analysis of contract law reveals competing interpretations of the nature of social justice and social interaction in society.

It is important to understand Collins's message. It is *not* that moral and political issues are an interesting addition to traditional legal reasoning as evidenced in texts such as Cheshire and Fifoot,¹² Anson,¹³ or Waddams.¹⁴ Rather, it is that arguments concerning the scope of promissory estoppel or the protection of pre-contractual reliance are inherently ethical and political in nature. The issues cannot be adequately understood except in terms of competing and often contradictory values. This concept of law, as presented by Collins, reflects generally the approach of Ronald

⁷ Gilmore, *supra*, note 4.

⁸ H. Collins, *The Law of Contract* (London: Weidenfeld and Nicolson, 1986).

⁹ *Ibid.* at x.

¹⁰ C. Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982).

¹¹ Collins, *supra*, note 9.

¹² Cheshire, Fifoot and Furmston, *Law of Contract*, 11th ed. (London and Toronto: Butterworths, 1986).

¹³ Anson's *Law of Contract*, 26th ed. (Oxford: Clarendon Press, 1984).

¹⁴ S.M. Waddams, *The Law of Contracts*, 2d ed. (Toronto: Canada Law Book, 1984).

Dworkin¹⁵ and more specifically Roberto Unger's vision of contract law as competing principle and counterprinciple.¹⁶ This vision in turn draws on Kessler and Gilmore's seminal work on contract as a metaphor for competing political visions of freedom and social control.¹⁷

The concept of contract law as a coherent and relatively discrete set of legal principles, albeit peppered with anomalies and exceptions, still retains a powerful hold over the English and Canadian academy and textbook. The idea that contract law is political is regarded by many scholars as perhaps worthy of mention in an introductory lecture but extraneous to the analysis of specific doctrines.¹⁸ By challenging these cherished assumptions, Collins's work has evoked a relatively sceptical and even vitriolic response in élite English reviews.¹⁹ But make no mistake, contract scholarship is part of the battle over the future of legal scholarship and teaching, issues clearly of contemporary relevance in both Canada and the U.K.²⁰ Although I shall disagree with several of Collins's arguments, he is absolutely right in locating debate in contract scholarship at the political and moral level.

Collins develops two interpretive models to outline competing visions of contract law, describing them as the 'facilitative' and the 'regulatory' models. The former is associated with the liberal ideals of allowing individuals to pursue voluntary choices in the marketplace; its fulcrum is the concept of voluntary consent. The latter represents communitarian values associated with the growth of the welfare state; these include assistance to the weak and vulnerable, fairness, altruism, and redistri-

¹⁵ Compare, for example, Collins, *supra*, note 8 at xi with R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986) at 11. "[L]aw is our most structured and revealing social institution. If we understand the nature of our legal argument better, we know better what kind of people we are."

¹⁶ Collins acknowledges specifically this debt noting that Unger's "influence upon the text . . . is pervasive." For example, his use of "relationships of dependency" seems to be drawn from Unger. See R. Unger, *Law in Modern Society* (New York: Macmillan, The Free Press, 1976). For Unger's vision of contract law, see "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 563.

¹⁷ F. Kessler & G. Gilmore, *Contracts Cases and Materials*, 2d ed. (Boston: Little Brown, 1970). This work appears to have had significant influence on much of the work of the Critical Legal Studies movement in relation to contract. Duncan Kennedy dedicates "Legal Formality" (1973) 2 J. Leg. Stud. 351 to Kessler and indicates at various points in his work a debt to Kessler. Kessler, a German *émigré*, must undoubtedly have been influenced by Weber's work on contract and power. Kessler may thus be seen as part of an intellectual chain connecting the work and concerns of one of the major European grand theorists with the modern Critical Legal Studies movement.

¹⁸ See, e.g., Cheshire, Fifoot & Furmston, *supra*, note 12 at c. 2

¹⁹ F. Reynolds, (1986) 102 L. Q. Rev. 628 (scepticism); A. Weir, (1986) 46 Cam. L.J. 503 (vitriol).

²⁰ See, e.g., Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983).

bution.²¹ As part of this welfare state, contract law jettisons the concept of voluntary consent as the sole test of contractual responsibility. Courts ensure the substantive fairness of market outcomes by imposing an ideal conception of market relations where there appears to be significant unfairness in market outcome. He argues that this latter model better explains the modern law of contract, is more in line with the interdependence of modern business relationships, and has greater moral force.²² In contrast, the ideals underlying the facilitative model — liberty, equality, and reciprocity — have, in his view, long ago lost their moral force and explanatory power.

The regulatory model, according to Collins, also better explains the form of the modern law.²³ Within the classical facilitative model, the law was a set of clear judicial rules, separate from politics and morality and applied logically by an impartial judiciary. This served the purposes of providing clear boundaries for private action, a sharp distinction between the public and private realm, and political legitimacy for the judiciary. In contrast, the modern law exhibits two contrasting developments. First, there has been an unwillingness on the part of society to accept the distributive outcomes of the facilitative model. This has resulted in legislative regulation of a variety of relationships (for example, consumer, labour, insurance, and so on). Second, judges have balked at the injustice flowing from the logical application of rules and have manipulated doctrines to achieve substantive justice. Ultimately, certain judges have been willing to articulate new open-textured substantive principles, such as the doctrine of inequality of bargaining power. These developments require the judiciary to balance competing ethical values. In consequence, the discourse of contract law cannot be separated from moral and ethical discourse and there has been a movement from formal to substantive rationality.

Broad standards applied by the judiciary are, however, a limited tool for the detailed regulation necessary in modern life. The second development is, therefore, the growth of bureaucratic regulation that supplants judicial regulation of contract fairness. Collins senses dangers in this trend since bureaucratic regulation raises the danger of bureaucratic domination and may unnecessarily constrict the efficiency of the market. Collins's response is corporatism, which is intended to steer a middle course between unbridled *laissez-faire* and bureaucratic domination.²⁴

²¹ Collins, *supra*, note 8 at 1.

²² *Ibid.* at 2.

²³ *Ibid.* at 15-21.

²⁴ *Ibid.* at 203-209.

Codes of practice enforced by private groups in the shadow of government review become a primary method of implementing regulation, and Collins points to modern consumer protection measures as an example of corporatism. This development in turn obliterates the clear distinction in the classical model between public regulation and private action and breaks down the traditional boundaries of private and public law.

Collins's work is both an explanation and justification for a particular vision of contract law in modern society. The argument of the book would have been clearer if he had separated more sharply normative arguments from causal and functional explanations. At one level, he treats appellate contract argument as a rhetorical metaphor for competing visions of society; one based on the market values of consent and risk taking and the other drawing on the values of trust, confidence, and benevolent paternalism. At this level, the argument is both expressive and idealist — contract law creates “the detailed ideal of social justice by which people judge their behaviour,”²⁵ and contractual reasoning is part of a continuing conversation in which we attempt to develop some sense of ourselves and society.

Given the analogy of continuous dialogue, why should we accept his regulatory vision of contract? There is little sustained normative argument on this topic throughout the book. Indeed, the further I proceeded the more I was confronted either with assertions that paternalism was the better explanation for a doctrine²⁶ or that a judicial approach was correct.²⁷ The argument often comes close to a type of evolutionary functionalism similar to that found in Atiyah's *Rise and Fall of Freedom of Contract*,²⁸ society has changed, *ergo* the law must change to meet society's needs. This causal explanation also underlies the advent of corporatism, which appears to have closed out the debate between competing visions by suggesting that society is now based on consensus rather than conflict. I doubt that Collins would wish to commit himself to this position given his assumption that contract discourse cannot avoid “open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.”²⁹ It would have been better, perhaps, if he had avoided the temptation to have a happy ending and recognised that contract is a vast continuum of principle and counterprinciple.³⁰

²⁵ *Ibid.* at 6-7.

²⁶ *Ibid.* at 122.

²⁷ *Ibid.* at 133.

²⁸ P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

²⁹ Unger, *supra*, note 16 at 564.

³⁰ Kessler & Gilmore, *supra*, note 17 at 2.

Having disposed of these methodological issues, I wish to pursue three closely related, but distinct, arguments in Collins's text:

- (1) *The contract failure hypothesis*: In contemporary society, voluntary exchange in the market may no longer lead to mutually beneficial results for the contracting parties.
- (2) *The interdependence thesis*: Market relationships have become more complex, so that contracts are no longer exercises in individual risk taking but rather cooperative ventures.
- (3) *The institutional argument*: Corporatism is the appropriate model for harnessing the benefits of both private markets and public regulation.

The relationship between voluntary market exchange — the institution of freedom of contract — and power and domination in society has long been a central theme to students of law in modern society. Weber's work, for instance, was animated by a deep concern that freedom of contract might reinforce the power of existing holders of property rights to coerce individuals in both the labour and consumer markets. Kessler's seminal writings on contract,³¹ influenced both by Weber and the Frankfurt School's vision of a coming authoritarianism,³² described how contract might be used to build industrial empires. Collins follows the path of these writers and appears often to be merely amplifying Weber's famous passage on freedom of contract. Given its enormous influence, it is worthwhile setting it out fully:

The development of legally regulated relationships toward contractual association and of the law itself toward freedom of contract, especially toward a system of free disposition within the framework of regulated legal-type transactions, is usually regarded as signifying a decrease of constraint and an increase of individual freedom. . . . [T]he formal empowerment to set the content of contracts in accordance with one's desires and independently of all official form patterns, in and of itself by no means makes sure that these formal possibilities will in fact be available to all and everyone. *Such availability is prevented above all by the differences in the distribution of property as guaranteed by law.* . . . [Emphasis added.]

It is necessary to emphasize strongly this aspect of the state of affairs in order not to fall into the widely current error that that type of decentralization of the lawmaking process which is embodied in this modern form of the schematically delimited autonomy of the parties' legal transactions is identical with a decrease of the degree of *coercion* exercised within a legal community as compared with other communities, for instance, one organized along socialist lines. . . .

A legal order which contains ever so few mandatory and prohibitory norms and ever so many 'freedoms' and 'empowerments' can nonetheless in its practical

³¹ See, e.g., F. Kessler, "Contracts of Adhesion — Some Thoughts about Freedom of Contract" (1943) 43 Col. L. Rev. 629.

³² See the discussion of Kessler's work in G. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law" (1985) 15 J. Leg. Stud. 461.

effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion.³³

Weber's arguments have sometimes been used in conjunction with studies of bureaucracy to produce images of a modernity — dominated by large private and public bureaucracies whose impersonal authoritarianism has replaced the paternalist and hierarchical structures of pre-industrial society and where freedom of contract provides its ideological underpinning. At times, Collins paints with this broad brush and categorises consumers as being in "a relation of dependence"³⁴ to producers. Yet in other passages, he draws attention to the importance of markets as a valuable means of providing goods and services.

If the concept of power in contractual relations is to be given some meaningful content and analytical bite, sharper concepts than "relation of dependence" must be provided. This issue is of both theoretical and practical importance. The growth of unconscionability and inequality of bargaining power as a mainspring for both judicial and legislative regulation of the marketplace has been accompanied by a surprising lack of precision as to their meaning or the identity of an unconscionable transaction.³⁵ Only by prising open the assumptions and objectives underlying voluntary market exchange is it possible to answer such questions.

A voluntary market exchange might be judged unfair either by reference to market values or wider social objectives. A market-based definition of unfairness could be identified initially by reference to those conditions that prevent an individual making a rational and voluntary choice in a market. This might occur through monopoly (either market wide *or* situational — "the only tug in the storm"),³⁶ information failures (for example, misrepresentation) or, what Eisenberg has dubbed, "transactional incapacity"³⁷ (caused by high pressure sales techniques). These are either failures in the process of contracting or in the market structure. The remedy for these failures might be through competition policy or the provision of greater information (for example, through truth in lending,

³³ M. Weber, *Law in Economy and Society*, ed. by M. Rheinstein (Cambridge, Mass.: Harvard University Press, 1966) at 188-89

³⁴ Collins, *supra*, note 8 at 120-22.

³⁵ The literature on unconscionability is vast. Useful explorations of its meaning and limits may be found in Eisenberg, "The Bargain Principle and its Limits" (1982) 95 Harv. L. Rev. 741; Kennedy, *supra* note 4; M.J. Trebilcock, "An Economic Approach to the Doctrine of Unconscionability" in J. Swan & B. Reiter, eds, *Studies in Contract Law* (Toronto: Butterworths, 1980) 379; R. Hasson, "Unconscionability and Good Faith in the New Sales Act — Confessions of a Doubting Thomas" (1979) 4 Can. Bus. L.J. 383.

³⁶ Trebilcock, *ibid.* at 392-96.

³⁷ Eisenberg, *supra*, note 35 at 763.

cooling off periods, and so on). The goal is, therefore, to correct the failures so that market *processes* might more closely approximate a situation where voluntary exchanges will result in Pareto improvements and, ultimately, Pareto optimality; that is, a situation where no further mutually beneficial transactions will occur. There are, however, a vast number of Pareto optimal outcomes dependent on the particular distribution of property rights and Collins is clearly concerned with the distributive fairness of market *outcomes*. Unfairness is identified, therefore, with the existing distribution of property rights and the potential disparity in the resources and talents available to individuals to make advantageous bargains. These sentiments echo Weber's critique and have long been an argument both for state regulation of property rights and the redistribution of wealth.³⁸ There is, however, controversy among liberals over the comparative effectiveness and fairness of contract law as a redistributive mechanism compared with redistribution through the taxation and social security system.³⁹

A more subtle insinuation of distributive issues is introduced by Anthony Kronman.⁴⁰ He argues that it is impossible to avoid distributive judgments in establishing the ground rules for voluntary exchange. Thus, we must determine such difficult questions as when it is legitimate to permit one party with superior information to take advantage of it in the marketplace. Since the concept of voluntariness helps us little in this endeavour, the thin end of this distributive wedge creates problems for theorists who wish to rationalise contract purely in terms of private autonomy and freedom. Collins exploits the elastic notion of voluntariness to argue that it ought no longer to be the touchstone of contractual responsibility. It is equally plausible, however, to maintain voluntariness and to adopt something akin to the Rawlsian difference principle in order to determine the distribution of initial property rights in market information.⁴¹ That we cannot avoid distributive judgements does not entail the rejection of voluntariness.

Kronman's article does draw attention to the fact that contract law functions within certain ground rules established by society. Much of consumer protection legislation is intended to change the ground rules, for example, by preventing sellers from taking advantage of superior information. These markets clearly may still be efficient within this

³⁸ J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 65-75.

³⁹ A. Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 472.

⁴⁰ *Ibid.*

⁴¹ Kronman adopts this principle but mistakenly calls it a Paretian principle.

particular distributive framework. Critics of consumer protection legislation cannot argue, therefore, that this legislation results in inefficiencies. It is primarily the inherently political distributive issue that is at stake.

Collins also appears to reject a further assumption in the economic market model — that individuals are the best judges of their own interests. Paternalism is an important justification for regulating contract relations. In summary, Collins's broad claims of exploitation and relations of dependency may be collapsed into three theories — market failure, distributive goals, and paternalism.⁴² Collins often refers to the consumer marketplace as an arena of producer domination and to consumer transactions as "relations of dependence." Consequently, it is useful to test these theories in the context of this market. The dependence image of the lone consumer pitted against the large organization gains credence from a conceptualization of contract as an individual transaction. However, consumer contracts are primarily mass-produced *products* whose terms are determined by the aggregate of market forces rather than individual bargaining.⁴³ Thus, a finding of market failure based on information failure will require analysis of conditions in a particular market.⁴⁴ It is, for example, not necessary for *all* consumers to be informed or to read the terms of contracts for a market to work relatively competitively.⁴⁵ Provided a certain proportion do so at the margin, business may respond to the preferences of this group.

During the 1960s and 70s, there was a broad sentiment that business exploited consumers through the use of carefully limited warranties and exception clauses. However, many argue that contemporary markets are more competitive and consumers better informed.⁴⁶ The current proliferation of automobile warranties might, for example, be contrasted with the apparently dismal warranty coverage shown in the seminal case of *Henningsen v. Bloomfield Motors*.⁴⁷ I do not wish to argue that consumer markets are perfect. However, overarching arguments based on exploitation or "relations of dependency," not only lack coherence as explanatory theories, but are a poor substitute for careful analysis of conditions in particular markets. There are also important institutional implications in changing the focus from the individual transaction to the market

⁴² See generally Kennedy, *supra*, note 4.

⁴³ A. Leff, "Contract as Thing" (1970) 19 Am. U.L. Rev. 131.

⁴⁴ See generally A. Schwartz & L. Wilde, "Intervening in Markets on the Basis of Imperfect Information" (1979) 127 U. Pan. L. Rev. 630.

⁴⁵ *Ibid.*

⁴⁶ This is implicit in the work of Priest, "A Theory of the Consumer Product Warranty" (1981) 90 Yale L.J. 1297.

⁴⁷ (1960), 32 N.J. 358, 161 A. 2d 69.

conditions. Courts are unlikely to be well suited to collect and assess systematic information on market conditions.⁴⁸ Nor will they be able to order appropriate remedial action, such as plain language legislation or greater consumer information. These factors suggest that much of the continued focus on judicial control of standard-form consumer contracts is misguided. While there may always be a residual role for judicial adjudication of pathological cases, they ought not to play a major regulatory role.

Are the terms of standard consumer transactions likely to be distributively unfair? A running theme in consumer protection has concerned the protection of lower income consumers, particularly in housing, rental, and credit markets. I am sceptical about the effectiveness of judge-made contract law as a redistributive mechanism. The institutional limitations of courts and the strong incentive of regulated parties to avoid the bite of judicial action suggest that it is unlikely to have a major distributive impact.⁴⁹ Experience of judicial price control of interest rates indicates that it is, at best, likely to be a poor substitute for more systematic attempts to address the problems of low income consumers. For example, the extortionate credit bargain provisions of the British *Consumer Credit Act 1974*⁵⁰ are of little significance in the regulation of the price terms of credit transactions.⁵¹ Further, the history of the unconscionability section of the American *Uniform Commercial Code* shows that it has stimulated far greater academic commentary than social change.⁵²

Paternalism overrides individual preferences by substituting the paternalist's judgment for that of the individual protected. It may often be difficult to distinguish those situations where paternalistic measures are justified by reference to an individual's real preferences and those where individual preferences are overruled.⁵³ The rediscovery of paternalism in the common law of contract has been primarily a consequence of economic analysis, whose sharp individualistic premises could not justify

⁴⁸ See Trebilcock, *supra*, note 35 at 391 and 396-406; Hasson, *supra*, note 35.

⁴⁹ Many writers are sceptical of the impact of private law judicial decision making. See Epstein, "The Social Consequences of Common Law Rules" (1982) 95 Harv. L. Rev. 1717 at 1744-51; Unger, *supra*, note 15 at 581; and Cranston, "What do Courts do?" (1985) Civ. Just. Q. 123.

⁵⁰ *Consumer Credit Act 1974* (U.K.), c. 39, ss 147-49.

⁵¹ The Office of Fair Trading in the U.K. is unable to give guidelines on the meaning of ss 147-149 since each case must depend on "all the facts."

⁵² W.C. Whitford, "Structuring Consumer Protection Legislation to Maximise Effectiveness" (1981) Wisc. L. Rev. 1018.

⁵³ J. Kleinig, *Paternalism* (Totowa, N.J.: Rowman and Allanheld, 1983) and I. Ramsay, *Rationales for Intervention in the Consumer Marketplace* (London: Office of Fair Trading (U.K.), Occasional Paper, 1984) at 56-57.

anomalies such as the penalty rules or even non-disclaimable warranties.⁵⁴ Paternalism seemed the only pigeon-hole available. In such a climate, the issue becomes *when* paternalism is a useful justification for striking down a contract. Two contrasting decisions of the Supreme Court of Canada suggest the need for thinking through this issue. In *Clarke v. Thermidaire*,⁵⁵ a freely negotiated liquidated damages clause was struck down because the consequences of enforcement seemed, with judicial hindsight, to be too unfair. Chief Justice Laskin's justification was pure paternalism: the courts had a dispensing power to protect a contracting party against her own mistakes.⁵⁶ In contrast, the Court in *Dyck v. Manitoba Snowmobile Association Inc.* exhibited little paternalistic concern for a young person who hastily signed a waiver before entering a snowmobile race in which he was severely injured; he had made a free choice to accept the terms and must be bound by the limitation of liability.⁵⁷ Which consumer contract terms should be struck down on paternalistic grounds — exclusion clauses, limitations of liability for negligently caused personal injury, acceleration clauses? These are clearly political questions and, again, raise the issue of the legitimacy of judicial regulation. It may be true, as Duncan Kennedy claims, that paternalism reflects an "element of real nobility"⁵⁸ when used to strike down consumer contracts "designed to perpetuate the exploitation of the poorest class of buyers on credit."⁵⁹ However, the limitations of courts in achieving any systematic redistributive impact on consumer markets suggests a symbolic, rather than substantive, impact.

Is there more to contract power than these efficiency, distributive, and paternalist arguments? A diverse body of recent work by economists and organisational theorists suggests that large private bureaucracies — although ultimately disciplined by the capital and consumer markets — retain significant discretionary power over how, when, and where to market products and services.⁶⁰ There is rarely one obvious strategy to maximise profits. Charles Lindblom, for example, argues that this phenomenon poses "an increasingly serious threat to popular control" through the market system.⁶¹ He concludes:

⁵⁴ Kronman & Posner, *supra*, note 4 at 253-61.

⁵⁵ (1974), [1976] 1 SCR. 319.

⁵⁶ *Ibid.* at 330-31.

⁵⁷ *Dyck v. Manitoba Snowmobile Association Inc.* (1985), [1985] 1 S.C.R. 589.

⁵⁸ D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685 at 1777.

⁵⁹ *Ibid.*

⁶⁰ E. Herrman, *Corporate Power, Corporate Control* (Cambridge: Cambridge University Press, 1981); C. Stone, *Where the Law Ends* (New York: Harper and Row, 1975).

⁶¹ C. Lindblom, *Politics and Markets* (New York: Basic Books, 1976) at 155.

A textbook "theoretical" dismissal of the importance of the phenomenon of corporate discretion on delegated decisions takes roughly this form. Consumer control will drive each firm to find the one correct maximum profit decision of all delegated issues. If consumer control fails to do so, it is because of monopoly; and at that point the discussion turns back again to the familiar problems of monopoly. The fact is, however, that even under highly competitive conditions, corporate executives cannot . . . unerringly find one correct solution to their complex problems. Since they cannot, they have to exercise discretion. Even in principle there is no one least-cost solution to a complex problem.⁶²

This concept of power is not captured by traditional market failures and clearly merits further investigation.

In summary, I offer two conclusions. First, Collins's broad claims on contract power need to be reduced to more specific rationales — efficiency, redistribution, and paternalism — if they are to have explanatory bite or provide a coherent framework for regulation. Second, judicial decisions may be a poor second best in addressing problems of contract power in mass markets.

A major argument of Collins's work is the greater degree of interdependence in contemporary market relations, resulting in greater reliance between firms and the consequent need for doctrine to adjust to these changes. Business transactions are no longer high risk gambles but rather cooperative ventures.⁶³ This "new spirit of commercial law,"⁶⁴ which some scholars see reflected in various parts of the American *Uniform Commercial Code*⁶⁵ and the growth of reliance-based doctrines, does gain some support from recent judicial rhetoric.⁶⁶ Markets have indeed become more complex through product differentiation, internationalisation, and so on. The complex web of relationships surrounding the automobile industry mean that no western government may allow a major company to declare bankruptcy.⁶⁷ It is, however, necessary to separate out different markets rather than to accept a rather overarching interdependence thesis. Certain markets involve no long-term relationships between parties, whereas others, like requirements contracts, may do so. In some contracts, each party may be effectively locked in through a major capital investment

⁶² *Ibid.*

⁶³ Collins, *supra*, note 8 at c. 10.

⁶⁴ *Alcoa v. Essex Group Inc.* (1980), 499 F. Supp. 53, Teitelbaum J. [hereinafter *Alcoa*]

⁶⁵ J. Feinman, "Critical Approaches to Contract Law" (1982-83) 30 UCLA L. Rev. 829 at 836-37.

⁶⁶ *Alcoa*, *supra*, note 64; but note the limits of interdependence when a union attempted to prevent U.S. Steel moving out of a company town, basing its action on promissory estoppel. See *Local 1330, United Steel Workers v. United States Steel Corp.* (1980) 631 F.2d 1264 (6th Cir.).

⁶⁷ R. Reich, "Bailout: A Comparative Study of Law and Industrial Structure" (1985) 2 Yale J. Reg. 163.

in the particular transaction.⁶⁸ In such transactions, it will be in both parties' rational *self-interest* to cooperate during performance and to plan against opportunism. Co-operation thus arises, not from altruistic concern or "a communitarian ideal of concern for the interests of others,"⁶⁹ but from more traditional self-interested reasons.

One of the most interesting developments in contracts scholarship has been the investigation of private ordering and institutions alternative to the state that might reduce uncertainty and conflict in contractual relationships.⁷⁰ Macneil's work on relational contracts,⁷¹ Williamson's analysis of the different forms of contractual governance,⁷² and Macaulay's empirical studies of manufacturing firms and the automobile industry⁷³ are examples of this phenomenon. These studies raise questions regarding the significance of contract law, as reflected in current appellate doctrine, to contract relationships; only very rarely will long-term relationships surface in appellate litigation. Collins unfortunately neglects much of this literature. One consequence is that his examples of co-operation and interdependence tend to be drawn from appellate cases and from sales law. For example, the classic case of *Drennan v. Star Paving*,⁷⁴ where a main contractor's reliance on a subcontractor's bid was protected notwithstanding the absence of any contract between the parties, is hardly a paradigm of long term interdependence. The same is true for consumer contracts, where the parties may often have little concern for long-term relationships (beyond market reputation). Collins's focus on appellate doctrine means that, although his text is in many ways radical, it is limited by the classical framework of appellate case law. The reader does not get any real sense of the changed nature of modern markets and their relationship to contract law.

A fascinating example of this phenomenon is provided in a highly suggestive essay by Robert Kagan.⁷⁵ Kagan found that, although, during the period of 1940–70, there was a large growth in credit and delinquent debts in the USA, there was also an actual decline in debt litigation

⁶⁸ On transaction-specific investments see Williamson, *supra*, note 5.

⁶⁹ Collins, *supra*, note 8 at 1.

⁷⁰ A. Kronman, "Contract Law and the State of Nature" (1985) J.L. Econ. & Org. 5.

⁷¹ *Supra*, note 5.

⁷² *Ibid*; and see "Contract Analysis: The Transaction Cost Approach" in P. Burrows & C. Veljanovski, eds, *The Economic Approach to Law* (London and Toronto: Butterworths, 1981) at 39.

⁷³ Macaulay surveys his work over the past two decades in "An Empirical View of Contract" (1985) Wisc. L. Rev. 465.

⁷⁴ (1958) 51 Cal. 2d 409, 333 P. 2d 757.

⁷⁵ R.A. Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts" (1984) 18 L. Soc'y Rev. 323.

in appellate and first instance courts. After exploring a number of potential explanatory factors, such as legal rationalization, changes in litigation costs, and the political activity of debtors, he suggested the growth of "systemic stabilisation"⁷⁶ as a primary factor. This concept describes "the development of large-scale economic and social institutions that ameliorate the conditions that cause individual conflicts or that provide collective, administrative remedies (as contrasted to case-by-case legal remedies)." These included "methods of loss spreading, diversification, insurance, and economic stabilization . . . which encourage the absorption of losses rather than protracted litigation."⁷⁷ Examples of this phenomenon were governmental maintenance of economic stability during this period and the rise of large diversified lending organisations with the ability to reschedule debts and build a certain bad debt level within their portfolios. In addition, the widespread availability and acceptance of bankruptcy as a type of socially provided insurance for credit breakdown was a further factor drawing business from the courts. Kagan argues that the development of these routinized procedures also reflected a cultural willingness to view the default debtor as an unfortunate victim of changed circumstances rather than a delinquent to be subjected to the rigours of court enforcement. Credit casualties were to be permitted a speedy re-entry to the credit market, which had clearly become a central and generally beneficial institution in society. This seemed partly to mirror the thesis that "as the commercial spirit advances — that is, as people lend and borrow, trust and are trusted more — the severity of the law for the fulfilment of these contracts diminishes."⁷⁸

Kagan's work draws attention to the complex relationships between changes in markets and market organisation, the role of the state in regulating these changes and their cumulative impact on the functioning of the legal system. It raises questions about the role and significance of contracts within and between bureaucracies. His description also seems to mirror the interdependence thesis regarding the modern economy. But whose interests are served by these developments? What values are furthered or sacrificed? Ought we to interpret those developments towards rationalised bureaucracy as a loss of individual freedom? And how should we characterise the role of the state in maintaining systemic stability? As "responsive law"⁷⁹ or a Habermasian crisis management?⁸⁰

⁷⁶ *Ibid.* at 352.

⁷⁷ *Ibid.* at 352 and 365.

⁷⁸ Robert Lowe, quoted in G. Rubin & D. Sugerman, eds, *Law, Economy and Society: Essays in the History of English Law* (Abingdon: Professional Books Ltd, 1984) at 289.

⁷⁹ P. Nonet and P. Selznick, *Law and Society in Transition: Towards Responsive Law* (New York: Octagon Books, 1978).

⁸⁰ J. Habermas, *Legitimation Crisis* (London: Heinemann, 1976).

The introduction of corporatism by Collins towards the end of the book is intended to close the apparent conflict between a neo-conservative vision of markets and individualism and bureaucratic regulation. This middle way will harness the benefits of markets to further the public interest, incorporating private actors in the implementation of regulatory policies and avoiding the inefficiencies and threats to freedom from imposed bureaucratic regulation. Rules are negotiated rather than imposed, although the state is the moving force in securing agreement. Consensus is the underlying goal rather than the continuing conflict implicit in the traditional pluralist model of government. The justification for corporatism is based primarily on the limitations of the polar opposites of markets and bureaucracy. It also provides a solvent for the conflict between individualism and communitarianism.

When writers describe the dangers of bureaucracy, their argument often rests on images of the impersonal Weberian official acting without fear, favour, or passion. In recent years, deregulatory rhetoric has fuelled criticisms of government bureaucracy.⁸¹ Much of this latter literature seems to have influenced Collins's critique. It is, however, necessary to probe the assumptions concerning bureaucracy. Much of the critique is American and must take some sense from that context.

Bureaucracy and government regulation are a relatively recent phenomenon in the history of the USA.⁸² There is no long European tradition of a state bureaucracy with a relatively high degree of respect and authority.⁸³ Regulatory agencies are a modern exception to the rule of the private market, and their legitimacy is viewed by many as resting on the extent to which they effectively mimic market conditions or correct market failures. Agencies may act as market policemen but must be careful not to impose their values or visions of society on market participants.⁸⁴ The public and private realm must remain separate. For example, the Federal Trade Commission was humbled in its attempts to regulate unfair advertising regarding psychological claims, which appealed to status needs or played on emotional weakness. Dubbed "The

⁸¹ R.L. Rabin, "Federal Regulation in Historical Perspective" (1986) 38 Stan. L. Rev. 1189 at 1316-26.

⁸² See the interesting discussion of the US regulatory crisis from a German perspective in N. Reich, "The Regulatory Crisis — Does it Exist and Can it be Solved" (1984) Govt. & Pol'y 177.

⁸³ See G. Wilson, "Social Regulation and Explanations of Regulatory Failure" (1984) Political Stud. 203 at 224-25.

⁸⁴ See the useful comparison of the US policeman role to the broader variety of Canadian regulatory objectives in R.D. Cairns, *Rationales for Regulation Technical Report No. 2* (Ottawa: Economic Council of Canada, 1980).

National Nanny" by the Washington Post, in relation to its proposals to regulate children's advertising,⁸⁵ it has retreated to the position where unfairness is to be defined in terms of situations where rational consumers are unlikely to be able to protect themselves against costly mistakes in the market.⁸⁶ In short, the values of the market rule.

Distrust of bureaucracy and the state is a theme in both conservative and radical critiques in the United States.⁸⁷ The Critical Legal Studies movement, for example, sometimes appears committed to the values of small-scale communities that will reflect both a personal autonomy, reminiscent of Henry Thoreau, and the active sharing and participation of socialism. Is this critique of bureaucracy justified? Is it likely that contemporary society could do without bureaucracies?⁸⁸ In our second-best world, does bureaucratic regulation have advantages over corporatism? There is little *systematic* evidence on the comparative advantages of these styles of regulation.⁸⁹ Moreover, it is difficult to draw clear lines between the supposed imposition of control associated with bureaucratic regulation and the softer negotiation style of corporatism. Almost all policy making and implementation will involve interaction between public and private groups. The information and resource constraints of bureaucrats and the benefits of voluntary compliance conspire to make negotiation and soft law the dominant form of regulation.⁹⁰ Corporatism draws attention therefore to an ever present phenomenon — that regulation is a bargaining process.⁹¹ A key question is who wins and loses (public bureaucrats, private industry, consumers, or politicians) from this process? Collins demonstrates an optimism that we will all benefit in terms of efficiency, distributional concerns, and participation. Perhaps he should have applied his views on contract to the issue of regulation. For example, certain groups may have unequal bargaining power in this process, such as the unorganised and the inarticulate. Government regulation may favour the interests of small closely knit groups over large diffuse interests like

⁸⁵ See R. Pertschuk, *Revolt against Regulation* (Berkeley: University of California Press, 1982) at 69.

⁸⁶ See discussion of this standard in N. Averitt, "The Meaning of 'Unfair Acts or Practices' in Section 5 of the Federal Trade Commission Act" (1981) 70 Geo. L. J. 225.

⁸⁷ O. Fiss, "Why the State?" (1987) 100 Harv. L. Rev. 781.

⁸⁸ *Ibid.* at 794.

⁸⁹ Compare, for example, E. Bardach & R.A. Kagan, *Going By the Book: The Problem of Regulating Unreasonableness* (Philadelphia: Temple University Press, 1982) advocating the benefits of soft enforcement with the critique by R.L. Abel, (1984-5) 84 Mich. L. Rev. 772.

⁹⁰ S. Breyer, *Regulation and its Reform* (Cambridge, Mass.: Harvard University Press, 1982) at 118 (on standard setting).

⁹¹ See C. Veljanovski, "Regulatory Enforcement" (1983) 5 L. & Pol'y Q. 75; Law Reform Commission of Canada Report No. 86 Relational Implantation (Ottawa, 1986).

consumers.⁹² The new professionals spawned by the welfare state (for example, alkali inspectors, consumer protection officers, *et cetera*,) will have a vested interest in the continuation of particular programmes.⁹³ Politicians seeking re-election will have an interest in wooing marginal voters.⁹⁴

In accepting the legitimacy of such a bargaining process, a major issue is to structure participation so that distributive outcomes will not be skewed to favour unnecessarily any particular group. One of the intriguing characteristics of this political bargaining process is that it is *unending*.⁹⁵ The implications of this for the participants involved and the strategies involved must obviously be of interest to students of long-term contractual relationships.

Collins's work is addressed primarily to an English audience. I have already alluded to the dominance of a particular style of legal thought in English contracts scholarship. The power of the traditional contracts textbook in English legal education has been documented on many occasions.⁹⁶ At times it seems impossible to escape from the frozen deadness of its grasp. The richness of recent contracts literature and the impossibility of understanding contract law without thinking, at the very least, about what it is for ought to have led to their demise. Yet their doctrinal pseudo-purity continues to survive in an instrumental world of bureaucratic regulation. Collins is absolutely right here; their apparent neutrality conceals the unexpressed premises on which they are based — freedom of contract, individualism, and so on. Doctrine masks the values. Most texts have only been able to maintain any semblance of coherence by relegating exceptions to different areas of law and by downplaying vast areas of statutory regulation. Yet every year, incoming students implicitly imbibe the ideas of freedom of contract and individual bargaining. All other values must be defined in terms of these apparently dominant values. There is no contingency or anxiety concerning the right values. These points are so trite and obvious that I hesitate to repeat them.

Yet the reception given Collins's text in élite English law reviews suggests the continued vitality of black-letter appellate contract law. There

⁹² See A. Downs, *An Economic Theory of Democracy* (New York: Harper, 1957); D. Mueller, *Public Choice* (Cambridge: Cambridge University Press, 1979); and the useful discussion in M.J. Trebilcock *et al.*, *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1982).

⁹³ See M. Hill & G. Bramley, *Analysing Social Policy* (Oxford: Blackwell, 1986).

⁹⁴ Trebilcock *et al.*, *supra*, note 92 at 33.

⁹⁵ *Ibid.* at 8-10.

⁹⁶ See, for example, the early work by W.L. Twining, "Is Your Textbook Really Necessary?" 11 (1970) *J. Soc'y of Pub. Tchr.* L. 81.

is the assumption that any attempt to introduce 'external issues', such as politics or economics, must be reserved for specialized courses. Thus, one reviewer suggests that Collins's book would be helpful to the "better third year students who have covered the groundwork of contract law and whose general awareness needs sharpening."⁹⁷ It is all perhaps too complex for the incoming student who is still expected to digest convoluted judgments and the obscurities of Megarry and Wade.

Modern contract scholarship is beginning to make clear Llewellyn's argument that contract law had the modest role of "providing a framework for well-nigh every type of group organisation and for well-nigh every passing or permanent relationship between individuals and groups."⁹⁸ Llewellyn's conflation of the law of contract with "the law of relationships" underscores its potential significance as a key to understanding the nature of society and law in society. Ultimately contract law fascinates because it is a prism for thinking of our continuing dilemmas: the tensions between individualism and community, the role of bureaucracy in modern life, the relative merits of private markets and public control, and the relationship between the private and public realm. The challenge for scholars and teachers is to incorporate the necessary empirical and theoretical material to illustrate the richness of these themes. Collins's text provides a straightforward and provocative introduction to many of these issues.

⁹⁷ Reynolds, *supra*, note 19 at 628.

⁹⁸ K. Llewellyn, "What Price Contract: An Essay in Perspective" (1931) 40 Yale L.J. 704 at 736-37.