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### Foreword to Reviews (Books on the Law of Contracts)

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## REVIEWS

### Foreword

*Lisa Bernstein*†

The past several years have seen the publication of numerous books and compilations of essays on the law of contracts. Some of these books have taken a single “Law and . . .” approach to the subject in an effort to demonstrate the promise of a particular analytical approach,<sup>1</sup> while others have advocated for changes in the ways that courts interpret contracts<sup>2</sup> or have focused only on particular types of agreements.<sup>3</sup> In contrast to these efforts, the three books reviewed here all focus on *contract doctrine*, both as it evolved through the common law and as it exists today. And all three valiantly attempt to highlight and explain its core features.

In *Reconstructing Contracts*, Professor Douglas Baird draws on the work of Justice Oliver Wendell Holmes and Judge Richard Posner (along with some of Baird’s own writings on the economic analysis of law) to bring a pragmatic understanding to the law of contract by exploring the *purposes* that various doctrines need to serve.<sup>4</sup> As Baird observes, “The test of a formal rule should not be some inner logic but rather the way it channels

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<sup>1</sup> See generally, for example, Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford 2012) (applying insights from behavioral law and economics to consumer contracts); Victor Goldberg, *Framing Contract Law: An Economic Perspective* (Harvard 2006); Gregory Klass, George Letsas, and Prince Saprai, eds, *The Philosophical Foundations of Contract Law* (Oxford forthcoming 2014).

<sup>2</sup> See, for example, Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* 87–103 (Cambridge 2013) (arguing in favor of the neoformalist approach to contract interpretation); Steven J. Burton, *Elements of Contract Interpretation* 193–226 (Oxford 2009) (arguing for objective contextualism as an interpretive approach); Catherine Mitchell, *Interpretation of Contracts* 108–23 (Rutledge 2007) (exploring the strengths and weaknesses of realism and neoformalism, while integrating insights from the organizational-management literature and illustrating her points with examples from English contract law).

<sup>3</sup> See generally, for example, Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton 2013).

<sup>4</sup> See generally Douglas G. Baird, *Reconstructing Contracts* (Harvard 2013).

behavior.”<sup>5</sup> Although deeply sympathetic to the need for clear rules that facilitate certainty and the ability of private parties to shape their transactions, Baird squarely rejects Langdellian formalism<sup>6</sup> as well as the search for any one “legal theory” that can explain all doctrine. Baird’s methodology, like his conclusions about the goals that contract law should serve, is squarely in the pragmatic camp.

In *Foundational Principles of Contract Law*, Professor Melvin Eisenberg exhaustively surveys the doctrines long taught in the traditional contracts curriculum.<sup>7</sup> He describes his book as having “two facets—one normative [and] one positive.”<sup>8</sup> He takes pains to highlight the legal realist approaches used in decided cases and to downplay the formalist strands that he finds within each doctrinal area. Analytically, Eisenberg devotes the bulk of his normative analysis to justifying realist approaches to contract law. He pays especially close attention to the need for all doctrines to be applied in ways that are highly contextualized and particularized, while caricaturing and minimizing the intellectual importance of realism’s primary modern alternative—neoformalism. He describes the neoformalist approach as a form of “hard literalism”<sup>9</sup> and spends a substantial portion of several chapters dismissing and discrediting the approach. However, in choosing to engage primarily with a neoformalist straw man of his own making, and in failing to engage with empirical work that documents business transactors’ preferences for adjudicative formalism,<sup>10</sup> Eisenberg’s attempt to justify realism is far

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<sup>5</sup> Id at 150.

<sup>6</sup> See id (dismissing Langdellian formalism and characterizing it as the belief that “[t]here were principles in the great beyond that were fixed and immutable”).

<sup>7</sup> See generally Melvin A. Eisenberg, *Foundational Principles of Contract Law* (Oxford forthcoming 2014). Citations in this Foreword refer to the July 22, 2013 manuscript of the book.

<sup>8</sup> Id at 22.

<sup>9</sup> Id at ch 25 § B.

<sup>10</sup> See generally, for example, Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 *Cardozo L Rev* 1475 (2010); Theodore Eisenberg and Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 *Cardozo L Rev* 1475 (2009); Stuart Popham, *The View of European Business: Survey Results* (Clifford Chance 2008) (documenting the preference of EU business transactors for relatively formalist English law); Morgan, *Contract Law Minimalism* (cited in note 2); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 *U Pa L Rev* 1765 (1996) (documenting the grain industry’s preference for formalism); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 *Mich L Rev* 1724 (2001) (documenting the cotton industry’s preference for formalism).

weaker than it would have been had he deployed his deep understanding of doctrine and his knowledge of economics to engage the neoformalists on the basis of their empirical findings and more nuanced analytical arguments.

Finally, in *Contract Law: Rules, Theory, and Context*, Professor Brian Bix, covering much of the same doctrinal terrain as Eisenberg, provides a more evenhanded discussion of the doctrine in the traditional curriculum.<sup>11</sup> He succinctly and clearly highlights the core features of each doctrine from a number of illuminating perspectives—law and economics, law and philosophy, and law and norms—while arguing that the search for a monist legal theory of contracts is a fool’s errand. In this respect, his work shares an important ethos with Baird, who concludes that, “[e]ven if the tools we use to map the world are imperfect, we can make progress in understanding the law of contracts and the way that it facilitates mutually beneficial bargains,”<sup>12</sup> a goal that each of the three books reviewed here can—in its own distinct way—fairly be said to further.

Nevertheless, while each of these books is highly successful on its own terms, there is a curious backward-looking quality to all of them. By focusing largely on the classic cases studied by all first-year law students, they together provide a deep and nuanced understanding of the commercial transactions of a bygone era; yet each fails (to a greater or lesser extent) to engage with the ways that contract law might need to change to support the types of commercial transactions that have become central to the economy over the past two decades, such as outsourcing agreements,<sup>13</sup> contracts for innovation,<sup>14</sup> and complex contracts for the provision of IT services.

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<sup>11</sup> See generally Brian H. Bix, *Contract Law: Rules, Theory, and Context* (Cambridge 2012).

<sup>12</sup> Baird, *Reconstructing Contracts* at 150 (cited in note 4).

<sup>13</sup> See generally Lisa Bernstein, *Merchant Law in a Modern Economy*, in Klass, Letsas, and Saprai, eds, *The Philosophical Foundations* \*16 (cited in note 1), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2242490](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242490) (visited Nov 3, 2014) (arguing that the law of sales is ill suited to transactions between large multiagent entities and modern outsourcing transactions).

<sup>14</sup> See Ronald J. Gilson, Charles F. Sabel, and Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Colum L Rev 431, 448–58 (2009) (arguing that modern contract law is ill suited to supporting contracts for innovation); Matthew C. Jennejohn, *Contract Adjudication in a Collaborative Economy*, 5 Va L & Bus Rev 173, 223–35 (2010) (discussing changes to contract law and contract adjudication that can better support innovative collaboration).

Of course, it may be that the contract law we have is fully up to the task of supporting (or quickly evolving to support) exchange in a modern economy, making the consideration of these changes unimportant. As Judge Frank Easterbrook observes in his essay *Cyberspace and the Law of the Horse*, which explores whether there is a need for a separate set of rules governing cyberlaw, it is folly to “struggle to match an imperfect legal system to an evolving world that we understand poorly.”<sup>15</sup> Rather, lawmakers should “do what is essential to permit the participants in this evolving world to make their own decisions. That means three things: make rules clear; create property rights where now there are none; and facilitate the formation of bargaining institutions.”<sup>16</sup> Alas, as Eisenberg’s doctrinal discussion reveals, none of the equivalent predicates for a successful adaption of contract law in general or the law of sales in particular robustly exists in US contract and sales law. As a consequence, change may be needed, and all of the books reviewed here would have been stronger had they fully considered whether and how the law of contracts and the law of sales may need to change (or not) to meet the demands of a modern economy.

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<sup>15</sup> Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U Chi Legal F 207, 215.

<sup>16</sup> *Id.* at 215–16.