

On the Dangers of Beautiful (Contract) Theory

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Prince Saprai, [Contract Law Without Foundations: Toward a Republican Theory of Contract Law](#) (2019).

Is there a moral principle that animates contract law everywhere? In his thoughtful book that elegantly spans high theory and ground-level doctrine, [Prince Saprai](#) argues that there is not. While contract law in Great Britain might be designed to promote trust through cooperative relations, that is not its exclusive purpose. Moreover, even that purpose is contingent on the particular normative priorities of the British with respect to contract. Saprai says that contract theorists, especially those who promote the idea that contract law tracks promissory morality, are not just wrong about their primary claim but also about their underlying assumption that contract law has an essential governing moral principle that is independent of the commitments of those who use it in a given time and place.

Saprai suggests that contract theorists tend to overclaim in another respect as well. Whatever the constitutive purpose of contract law in a jurisdiction, that purpose is usually not determinative of doctrine in any complete way. There are many ways to interpret the purpose and how it is best served by rule choices. Even systems that espouse the same purpose for contract law are likely to diverge in their substantive doctrines.

The pluralism we should expect from divergent purposes and varied interpretations of even coincident purposes is not a cause for concern. While some dominant views of contract seem to proceed as if there is one optimal law of contract in relation to which each body of actual law is but a pale shadow, Saprai takes pluralism of purpose and doctrine as evidence of legitimacy. The most exciting chapter in Saprai's book is Chapter 4, in which he elaborates the republican character of his theory and sources it to Dworkin's view of law more broadly. Saprai reads Dworkin to recommend that scholars not impose a favored moral principle on a body of law but instead uncover it from the ground up in the particular laws of a jurisdiction. Local priority, or looking first to the rules of the immediate area of law that governs a legal question, helps jurisprudence to track how citizens understand questions in each domain. By so tethering doctrine to popular understanding of relevant moral principles, local priority renders legal doctrines accessible to citizens. It is essential to the legitimacy of law, on the republican view, that citizens be able to directly engage and take ownership of law, including contract law.

The picture that Saprai paints is an attractive one. One might reject the idea of a universal contract law, though, without fully embracing the republican alternative he offers. In particular, one might endorse pluralism on avowedly liberal grounds – liberal democratic grounds. The line between a republican and democratic account of contract is not bright but Saprai would seem to emphasize the significance of civic engagement with the law and with one another, and borrowing from Pettit, the commitment to non-domination in one's social relations rather than rights against the state alone. But civic engagement, or the conditions of public discourse, are important to modern theories of liberal democracy too. Liberal theory might also offer a more compelling account of why private domination is an affront to the liberal subject than does republican theory, which tends to take the ideal of non-domination as more a starting point.

Of course, much of liberal theory fails to concern itself seriously with private domination. The trouble is,

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this is also true of common law contract. Although Saprai teases out contract doctrines that appear protective of weaker parties as evidence of its fidelity to the non-domination principle, these doctrines appear to operate on the margins. As Saprai himself acknowledges, it is not clear that contract on the whole promotes non-domination among participants in the institution. A republican theory of contract must contend with the facts of rampant domination no less than liberal theory. In light of their influence over mainstream discourse, liberal theorists of contract might need to grapple with a further worry that their historical lack of attention to the problem of domination has actually enabled institutional neglect of the problem – but this worry is justified only to the extent that liberal theories of contract really do track how people think about contract after all.

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