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Abstract: The current structure of American contract law may limit the availability of adequate remedies for citizens within certain socioeconomic strata who, in the formation of a contract, often experience an asymmetry of information, financial resources, and lack what is broadly termed social capital. This paper further argues that this population might be better served by expanding how the court interprets and applies the doctrine of unconscionability through a reexamination of the foundational principles that led to its codification in the 1950s in the Uniform Commercial Code. Throughout this paper, I will also consider how several foundational principles of Catholic Social Teaching closely align with the foundational principles of American law and unconscionability, namely: solidarity, subsidiarity, a clarified accounting of freedom and equality, and, most importantly, the absolute dignity of the human person. By coming to a better understanding of these foundational principles shared across the American legal and Catholic intellectual traditions, we will be better suited to judge the appropriate application of the doctrine of unconscionability itself.

Introduction to the Problem of Unconscionability

Nora Viola was employed as a healthcare administrator at the Ambulatory Surgery Center of North Nassau, where she was a shareholder as well. In January 2007, Ms. Viola was abruptly terminated. Almost immediately, her company began to demand that she sell her interest in the firm. The employment agreement she entered into stipulated that employees fired with cause—e.g., upon an employee’s conviction or if an employee is negligent in his or her duties—must sell his or her shares back to the company upon termination. However, the employment agreement also stipulates that any employee terminated without cause must sell his or her shares back to the company. When Ms. Viola refused to sell her shares, given that she was terminated without cause (a violation of the employment agreement), the company sued her. Essentially, this amounts to “a contract that actually rewards one of the contracting parties for its own breach of the contract.”

If this contract seems absurd, it is. The court saw it as such—and as “oppressive, unjust and unreasonable.” However, these qualities alone do not make a contract unenforceable; what could is a determination of unconscionability. Unconscionability is, without a doubt, among the most morally significant American legal concepts; indeed, few other codified legal concepts explicitly ask legal professionals—judges, lawyers, etc.—to, in essence, make moral judgments. There is no doubt that, within the Uniform Commercial Code, as well as in common law, there are explicit and implied moral issues in the consideration of concepts such as good faith, misrepresentation and fraud, and the relative status of contracting bodies. Of course, a living, breathing Judge, although operating within a fundamentally secular framework, will take into consideration her own experiences from her moral and spiritual life. In what cases might we see the values of Catholic Social Teaching enter into this reasoning—even if the Judge may not be Catholic?
In the broadest of terms, the unconscionability doctrine allows a court to declare a contract void if the contract is “such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.” In Ms. Viola’s case, the questions of shares, buybacks, and rightful termination can seem rather corporate, narrow in scope, and, perhaps, removed from everyday life. But, contained in unconscionability is the potential for a remarkable realignment of how contracts might be formed and executed upon, and, thus—given how a contract seems to lie at the bottom of most of the things we do—a genuine means to reshape how we interact with each other in society. As a primary example, the doctrine of unconscionability could be used as a singularly effective mechanism to ameliorate the vast problems presented by inequality of bargaining power, especially to those in lower socioeconomic strata. However, unconscionability’s potential power to reshape socioeconomic relations brought pause to as many as it excited—if not more—and many saw it as leading down a slippery slope that would ultimately deteriorate a value at the core of the American legal system: freedom of contract.

Inequality is reckoned a growing problem in contemporary society and one that the Church has placed more emphasis on since the ascension of Pope Francis. The appropriate role of the legal system in relieving or aggravating inequality is, correspondingly, a matter of great debate. We will work to understand how the current structure of American contract law may, in fact, limit the availability of adequate remedies for citizens within certain socioeconomic strata who, in the formation of a contract, often experience an asymmetry of information, financial resources, and lack what is broadly termed social capital. This paper further argues that this population might be better served by expanding how the court interprets and applies the doctrine of unconscionability through a reexamination of the foundational principles that led to its codification in the 1950s in the Uniform Commercial Code. Throughout this paper, we will also consider how several foundational principles of Catholic Social Teaching closely align with the foundational principles of American law and unconscionability, namely: solidarity, subsidiarity, a clarified accounting of freedom and equality, and, most importantly, the absolute dignity of the human person. By coming to a better understanding of these foundational principles, which are shared across the American legal and Catholic intellectual traditions, we will be better suited to judge the appropriate application of the doctrine of unconscionability itself.

**A Comparative Accounting of the Philosophical Foundations of Law: From St. Thomas to the Framers**

We must return to the idea of unconscionability’s inherent moral character in order to consider the idea holistically. As this moral character—and the demands it puts on judges, lawyers, and other legal professionals—is somewhat irregular, it is vital to form a working understanding on how morality is found to operate—and permitted to operate—within a secular legal system. A brief review of the Catholic intellectual tradition, which much of the liberal thought that formed the basis of the American legal tradition was in dialogue with, will help elucidate modern legal concepts and, moreover, allows us to trace the corresponding development of the body of Catholic thought known as Catholic Social Teaching, beginning, most notably for our purposes, with the Papal Encyclical *Rerum novarum* published in the late 19th Century. Understanding the one will better illuminate the other and, naturally, further illustrate some important similarities.
As we begin our discussion, it is important to establish the “first principles” of what lies at the basis of the American regulatory framework and how this basis is not at all so alien to the concepts at the heart of Catholic Social Teaching, despite the clear secular-ecclesiastic divide. The fundamental social ends are, in many cases, quite similar: freedom, fundamental equality, and the dignity of the human person. The quibbles arise when we start asking how we get there and whether or not we have achieved these ends. Naturally, the ultimate ends of the Church are profoundly different from the secular ends embedded within the American legal system. For that reason, we shall attempt to limit our analysis to the social ends of the Church as outlined in the body of thought known as Catholic Social Teaching. However, as has been pointed out time and time again, the unfortunate tendency to shoehorn concepts of Catholic Social Teaching into a purely secular framework can be problematic. In all discussions of the lessons of Catholic Social Teaching for secularly-oriented domains, it is vital to maintain a balance between learning from analytically rich concepts and maintaining their theoretical foundations.

Today, even after the “End of History” and the “triumph of western liberal democracy,” the ability of liberal society to deliver on these fundamental social ends is coming increasingly into question. The Church is certainly not least among those doing the questioning, returning to prominence as representing a non-“third way” third way between capitalism and socialism. Just as Pope John Paul II was a central figure in the debate between communism and capitalism, Pope Francis has emerged as a staunch critic of what he sees as an increasingly unbridled free market capitalism. His first Apostolic Exhortation, Evangelii gaudium, clearly defined the Church’s stance and his point of emphasis:

Just as the commandment “Thou shalt not kill” sets a clear limit in order to safeguard the value of human life, today we also have to say “thou shalt not” to an economy of exclusion and inequality. Such an economy kills...Today everything comes under the laws of competition and the survival of the fittest, where the powerful feed upon the powerless. As a consequence, masses of people find themselves excluded and marginalized: without work, without possibilities, without any means of escape.

Here, Pope Francis is clearly offering a systemic and plainly harsh critique of the broader social world we inhabit. The “law” counterposed to the transcendental “commandment” is not any kind of political or legal framework—capitalist, communist, or otherwise; instead, Pope Francis is referencing another sort of law that transcends these formulations: the survival of the (economically) fittest. Presumably, he places this “law” at the center of his critique, as opposed to, say the free market capitalism of America or the “free market communism” of China, because each political system and its legal framework has become more of a footnote than the main event, which seems to transcend these divisions: i.e., unabashed and, as Pope Francis provocatively phrases it, deadly inequality. So, the problem—inequality—is clear, but what role does the state and, for our purposes, the law, have in addressing it?

It is, perhaps, useful to look back on a time, not so long ago, when the Church was more involved in deeply and openly discussing the nature of the world’s major political and legal systems. In celebration of the centennial of Rerum novarum, the foundational document of modern Catholic Social Teaching, and, as it happens, in the same year as the collapse of the Soviet Union, Pope John Paul II wrote,

[C]an it perhaps be said that, after the failure of Communism, capitalism is the victorious social system...If by "capitalism" is meant an economic system which recognizes the
fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative... But if by "capitalism" is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative. (Emphasis added)\textsuperscript{17}

This fascinating passage relates what is, perhaps, one key difference between the dominant liberal view of capitalism and the Church’s: for liberal society, capitalism \textit{eo ipso} is believed to lead to the achievement and distribution of social ends, whereas, for the Church, \textit{regulated} capitalism is at the service of these ends. More than that, Pope John Paul II defines the “juridical” sphere as the necessary ingredient for putting capitalism in society’s service; it, therefore, gives the law a profound moral and even theological weight beyond its oft-repeated “mechanical” functions, namely the maintenance of order and efficient markets.\textsuperscript{18}

Today, the vocabulary of Catholic Social Teaching, and its emphasis on human freedom and dignity, would certainly be familiar to an American legal scholar. To the many not acquainted with the Catholic intellectual tradition, this close relationship can be surprising. Perhaps at the core of this common misconception is the attempt to impose a unified theory of secular law onto the Catholic tradition, which recognizes a series of classifications of law that derive from one eternal law; i.e., the Catholic intellectual tradition recognizes that different forms of law operate in different, discrete spheres.\textsuperscript{19} Finally, as we transition from a more foundational discussion of Catholic moral tradition, we must offer a definition of Catholic Social Teaching and how it may be understood as a unique body of thought with the broader Catholic intellectual tradition.

One of the grand narratives of American history, and, indeed, one that is often expressed in the debates inherent to legal discourse, is the degree to which the government can and should meddle in the day-to-day affairs of the individual. To some extent, this line of thought mirrors the debate surrounding the proper relationship between church and state, which was conducted within an environment of early America’s latent disestablishmentarianism.\textsuperscript{20} Two lawyers, Alexander Hamilton and Thomas Jefferson, who, today, are more famous for their status as founding fathers, famously took opposite sides of the debate and continue to exemplify their respective schools of thought to this day.

The former, a Federalist, stood for a more muscular government presence in American life. Hamilton’s government would be a tool to spur economic development, regulate trade, and, though often through less than obvious channels, regulate individual behavior more broadly. His championing of the First Bank of the United States, the national assumption of state (formerly colony) revolutionary war debts, and the creation of the Society for the Establishment of Useful Manufactures in Paterson, New Jersey all point towards this general orientation of thought.\textsuperscript{21}

Jefferson, by contrast, sought to limit the influence of government in everyday life and frowned on an expanding government and statutory apparatus, which he saw as a malevolent force that would crush the dream of the nascent yeoman republic he so cherished. His was the voice that spoke loudest in the Declaration of Independence, which, in many ways, forms the philosophical foundation of a country that seeks to enshrine “certain unalienable Rights...Life, Liberty and the pursuit of Happiness.”\textsuperscript{22} Again, this essential debate continues to this day and the
arguments of each side have not changed much. Crudely, we may transpose Hamilton’s views to “contemporary” liberal school of American legal thought and Jefferson’s with the conservative. Fundamentally, their ultimate points of departure rely on differing views of human nature and the place government has in addressing the consequences of it.

The whole purpose of regulation reveals itself by nature of its identity as the truest expression of government governing. Such thinking belies the foundational system of our government itself, as evidenced in the Federalist Papers:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.23

The assumption, therefore, at the center of American secular government, which explains the necessity of government itself, is that human beings are no angels. It may, perhaps, be presumptuous to read Madison’s choice of “angels” as gesturing towards a religious theme, but it is, nonetheless, tempting to point out the parallel between the Enlightenment conception of man and its antecedent, the discourse around postlapsarian man (“fallen man”), as expressed in Christian thought—and St. Augustine most profoundly.24 We would not be mistaken to see the outlines of the concept of original sin, and, more precisely, the accounting of its consequences for human nature, in later thought that presupposes our nature as self-interested.25 Indeed, it is important to note that beliefs regarding the consequences of original sin on human nature were never entirely abandoned by later political philosophers—they were often simply secularized.26

Humanist and Enlightenment political theory generally takes its starting point with pronouncements on the relative inclinations of human nature. To Machiavelli, “it is necessary…to presuppose that all men are bad,”27 which doesn't mark too far a jump from original sin. To Rousseau, men are, essentially, innately good and “corrupted” by civilization.28 Again, what we see here is, at the kernel, a secularized account of pre and postlapsarian man. To simplify, what the Church has historically identified as concupiscence, Enlightenment thinkers gesture towards in their conceptualizing of human nature as inclined towards ill, or, at the very least, self-interest.29 A key difference is that concupiscence is often interpreted to mean the abandonment of reason for the base instincts, whereas the pursuit of one’s self-interest can be founded on reason and exercised with sophisticated instrumental rationality. It is necessary to emphasize that the secularization of this concept does not correlate to atheism; many of the great Enlightenment thinkers were, at the very least, deists;30 Locke himself was a religious, if somewhat cautious, Christian.31 Hobbes, to take another example, rejects the “schoolmen” more than central tenets of Christianity itself.32 A clearer break comes with the deepening establishment of the public and private sphere, which, in many respects, amounted to a rejection of the Catholic Church and the role of the Church as religious mediator.33

To return to Rousseau’s accounting of human nature, we can see that, in some ways, it appears as both the mirror image of and an identity to St. Thomas’ own: “…human beings by nature have a capacity for virtue, but they need to arrive at the very perfection of virtue by some training.”34 Rousseau’s concept of perfectibility and a mutable human nature is certainly not altogether different.35 Though this “training” towards “perfection” consists of many things, for St. Thomas, the law—human, natural, and divine law—is a central part of it. The proper formation
and interpretation of the law is essential for this training, of course, and necessarily requires virtuous framers and interpreters. In American society, the doctrine of unconscionability may provide a unique tool to correct or reinvigorate the virtue of the law, but its success is tied directly to the virtue of the actors and the form of the system in which they operate.

An important takeaway from this discussion is the presence of an essential duality in Catholic thought between, as St. Augustine expressed it, the City of God and the Earthly City and the further division of particular forms of law appropriate to each sphere.\(^36\) Whereas the secular law of the Enlightenment tradition attempts to create in the Earthly City something of the City of God, the Thomist tradition views this as inherently impossible given man’s nature, which, imbued with original sin, necessitates redemption by Christ and achieving a state of blessed happiness in communion with God.\(^37\) Alternatively, it might be said that the American legal system has no pretensions towards establishing a City of God in the Earthly City—despite the “shining City on a hill” rhetoric—and that it is the separation of church and state that casts itself as the foundational principle.\(^38\) Separation of church and state, notwithstanding foundational Judeo-Christian principles, leads us to reliance on certain virtues as a means of establishing our Earthly City; these secular virtues—e.g., freedom, equality, and human rights—have extraordinary and powerful parallels within Catholic Social Teaching.

Although the Catholic intellectual tradition has no concept that maps directly on to the American legal system’s concept of the separation of church and state, it is important to understand the somewhat parallel principle of the taxonomy of laws, as exemplified by St. Thomas’ discussion in the *Summa Theologica*.\(^39\) There are four classifications of law: eternal, divine, natural, and human. Roughly speaking, each classification of law derives from the one preceding it, though the derivation of divine law is somewhat more complex as it fills in the “gaps” left by natural and human law by helping “direct human beings to their [ultimate] end” when the others fall short.\(^40\) St. Thomas essentially follows St. Augustine in his understanding of eternal law to be that of “supreme reason” and accessible only to God, who is, likewise, the only eternal being.\(^41\) Natural law, put simply, is the “participation in the eternal law by rational creatures…”\(^42\) St. Augustine believes that natural law is “written” or “inscribed” on the hearts of human beings—language which remains notably consistent in early modern and Enlightenment thought.\(^43\) Moreover, natural law is said to “originate with rational creatures” and is mutable only beyond its first precept.\(^44\) This first precept, that “we should do and seek good, and shun evil,” though frustratingly abstract, is the base from which all other natural law is derived.\(^45\) Natural law is considered to be self-evident in rational creatures (human beings), which confirms one of its most important features;\(^46\) that is, natural law does not need to be divinely revealed but is accessible to all who choose to seek it through reason, albeit, perhaps, with some “training.” This basic proposition is vitally important for understanding Catholic Social Teaching, especially as it relates to its application within modern secular society. To put it succinctly, Catholic Social Teaching is a means to make natural law human.

Perhaps we might follow St. Thomas in asking what the purpose of human law is if we already have a universal and self-evident system of natural law.\(^47\) On the one hand, human law is the further translation of the natural law into a form of law more appropriate for the sphere of human activity and, on the other, the movement from general precepts to particulars. In general, human law is meant to allow for the pursuit of the common good in a means best suited to a particular society.\(^48\)
In a Thomist framing, all law is ordered towards the common good. This remains true in Catholic Social Teaching, wherein the “common good” remains both one of the central concepts and one of the central ends. In fact, if law runs counter to the common good, it should not be understood as law. It is also important to note, with Yuengert, that “the ultimate purpose of the common good—the end of the social order—is the person,” an idea that, once again, highlights the shared language, if different orientation, between Catholic Social Teaching and the liberal tradition. The natural law, moreover, is essentially the yardstick by which we judge whether or not a human law is a “perversion” of law and thus no law at all: “And a human law diverging in any way from the natural law will be a perversion of the law.” Though this idea may seem somewhat platitudinous to the modern reader, it is important to note that the common good is the point of departure and the “measure” by which the goodness of a law is to be determined. Later thinkers, perhaps beginning with Bernard Mandeville and continuing through to Adam Smith to Ayn Rand, believed that the best way to achieve the common good was not to take it as a point of departure, but rather the good of each individual; i.e., if each individual is left to pursue his or her own good, the common good will be achieved.

And, here, we come to the essential foundation of modern Catholic Social Teaching’s legal voice and a following explanation of its role. In discussions of law, let us understand Catholic Social Teaching to be a body of thought that can practically guide us towards an understanding of what could correct the failings of human law and bring our society closer to the natural law. Let us also understand it to be a body of thought that takes, as its point of departure, the common good—with an understanding that the common good cannot be claimed without a presupposition of human dignity. While both Catholic Social Teaching and its intellectual antecedents generally demonstrate an understanding of the vital importance of individual rights—and, notably, individual property rights—such things are at the service of the common good and not the other way around; Pope John Paul II critiques the more individualistic approach to the common good in his 100th Anniversary examination of Rerum novarum, “…there is a growing inability to situate particular interests within the framework of a coherent vision of the common good. The latter is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person.” As further illustration, the right to private property, for example, is not held to be an absolute right but one subordinated to the common good of all (following St. Thomas Aquinas, for example).

A broader takeaway of this discussion, and one more immediately applicable to American law, is to grasp just how closely we can see the idea of unconscionability in the Catholic intellectual tradition and, particularly, its suggestion as to the appropriate interplay between human and natural law. An appeal to the doctrine of unconscionability is, in many respects, a mechanism by which the court can appeal to natural law within a positive and essentially secular legal framework. However, as we shall see below, the constancy of this measuring of the human law against the natural law in the Catholic tradition is absent in the American legal system. Though unconscionability exists as a codified legal concept, its use is rare and its disuse is predicated on a commitment to other values that, in some cases, can be antithetical to the ends established in the broad canon of Catholic Social Teaching. Such values that come into play when thinking about unconscionability, namely freedom of contract, though
broadly shared by the principles of Catholic Social Teaching, ought to be questioned as to the way they take shape in the real economy as organized by the American legal system.

Though the American Court, generally speaking, no doubt aims to achieve the common good when handling matters beyond the horizon of just a few particular individuals, it often does so following the more fundamental philosophical orientation as described above (i.e., the protection of individual freedom as the best means to the common good). In the society of growing inequality that Pope Francis describes, some form of remediation is required by the creation and application of a meaningful legal framework that seeks to address these inequalities (remember Pope John Paul’s appeal in Centesimus annus). Because of the court’s essential commitment to freedom of contract and a parallel commitment to the necessity of “efficient” contracts, this can be hard to achieve. However, the doctrine of unconscionability presents an opportunity to reorient the American legal system’s approach to the common good by distinctly considering the significantly unequal position of those in lower socioeconomic strata—and seeking to help.

The “Peril” of Unconscionability

The American legal system’s approach to unconscionability is a fascinating window onto our shifting views on the role of the courts, and, indeed, the law, more generally. Admitting the application of the doctrine of unconscionability into American courts with regular frequency would be tantamount to the acceptance of several key critiques of the philosophical foundations of the American legal system; it would mean a further weakening of the freedom of contract, the deeper consideration of the relative bargaining power of contracting parties when determining the validity of a contract, and, perhaps most audaciously, having the court weigh a contract’s value to the parties to it. However, such paradigm shifts in the social ideologies that color the courts’ course are, in fact, not at all unusual in a body that, paradoxically, attempts to limit the influence of these very same ideological influences.  

Such steps away from what, today, is taken as the American legal tradition, however, would lead us to ground familiar to Catholic Social Teaching, given its demonstrated willingness to recognize the inequalities and inequities that seem, in its view, to necessarily operate within a lightly regulated free market economy. Indeed, according to the contemporary Church, the massive social change fomented by the industrial revolution resulted in the solidifying of “two classes separated by a wide chasm.” In Rerum novarum, for example, we see Pope Leo XIII seek to “define the relative rights and mutual duties of the rich and of the poor, of capital and of labor,” articulating the Church’s belief that the duties of members of certain groups operating within the economy are distinct from those of the individual alone. Moreover, for the Church, “there naturally exist among mankind manifold differences of the most important kind; people differ in capacity, skill, health, strength; and unequal fortune is a necessary result of unequal condition.” Whether or not we share the Church’s view on the variation of natural abilities among individuals, we must note the Church’s willingness to recognize the very idea of distinction openly and weigh its import when considering economic fact. This is perhaps even better illustrated by placing aside the natural essentialist language and observing how the Church understands an individual’s membership in a certain class—i.e., a purely social phenomenon—to define his or her social position and “relative” equality: “…the laboring man is, as a rule, weak and unprotected…” Here, a man is necessarily weak insofar as he is a member of a particular
class—not because of an essential or innate limitation in his person. Much of *Rerum novarum* is devoted to outlining what these protections might be—famously including the Church’s support for labor unions—though it rarely delves deeply into specifics.  

American contract law does have some formal constructs that take into account the relative capacities of parties to a contract—literally, capacity—but the definition, at least today, is quite limited.

One of the ascendant criticisms of the idea of adding special legal protections for those in lower socioeconomic strata is that the market corrects for the disadvantages levied by one’s position in that strata better than the legal system could. For example, banks will typically only make loans to asset-poor individuals with a high interest rate—perhaps one so high that it could be held usurious by law. Critics of so-called “usury laws” argue that a loan considered usurious could have been used to start the next Apple and that, but for the higher reward for the lender due to the risk, loans to asset-poor individuals would not be made. Perhaps, but this is not true a vast majority of the time. More often, the loans or financing mechanisms available to asset-poor individuals do not lead to upward mobility and, in fact, can further solidify financial hardship—thereby causing a great deal of damage to the common good.

If we take one of the fundamental tensions in our economic system to be between whether market-based or legal-based corrections offer stronger resolutions to social ills, we ought to consider how a broader application of the doctrine of unconscionability could provide an antidote to this basic tension; i.e., does it provide a way to protect the disenfranchised without drastically altering the broader legislative framework and legal system? But, on the other hand, it certainly would call into question the broader application of a truly fundamental concept in the American legal system: freedom of contract.

**Foundations of American Regulation—Its Ebb, Its Flow**

If we were to choose a period of American history at random, one of the ways to best understand the general mores of that era would be to ask: “to what degree we can see the state meddling in daily life?” Generally speaking, there has been a trend towards the allowance of such “meddling,” by way of legislatively-propagated regulations and their executive administration—though the ebb and flow of this movement has tilted towards “the ebb” beginning with the Rehnquist Court in the mid-1980s and has continued up to the contemporary Roberts Court. Although seemingly somewhat removed from this macro process, contract law stands at the foundation of this discussion. Contracts are an essential part of our economy since they form the legal foundation for nearly every transaction—from the purchase of used furniture to the sale of one’s own labor. Moreover, the contracts clause of the Constitution, which essentially guarantees that the government cannot relieve the obligations of a contracting party, is a *sine qua non* for a modern economy.

Although popular opinion no doubt influences the movement towards more or less regulation, decisions as to the expansion or contraction of individual freedom essentially revolve around the ever-arcane interpretation of two clauses of the United States Constitution: the Commerce Clause and the Necessary and Proper Clause. Though perhaps somewhat less influential, the Tenth Amendment and the Supremacy Clause have also played a defined role in this long debate. Though their application to the regulation of individual freedom might not be readily apparent, and is certainly not explicit in the wording of these clauses, they are, more often than not, used as the elemental foundation for the majority of federal regulatory statutes,
which can be incredibly wide ranging and diverse. For example, the Commerce Clause served as the foundation for the Pure Food and Drug Act of 1906 and the 19th Century Bank of the United States, respectively—two vastly different federal enterprises. Generally speaking, a broader interpretation of the Commerce Clause paved the way for the programs of the Progressive Era, which, in turn, ushered in the modern legal system of administrative law. It also did much to advance the cause of civil rights, as expressed by statute—namely the upholding of the Civil Rights Act of 1964. The Commerce Clause was also supposed as the foundation for the Patient Protection and Affordable Care Act (commonly, “Obamacare”), a famously sprawling piece of legislation, though its Commerce Clause basis was later struck down by the Supreme Court of the United States, but the law was, nevertheless, essentially upheld on the basis of the taxing power.

Nevertheless, even the relative decline in government regulation in the past three decades—relative to the era beginning with the “switch in time that saved nine” in 1937 to the retirement of Chief Justice Warren Burger in 1986, during which time the regulatory or “liberal” impulse was ascendant—in no way amounts to an absolute reduction of government regulation to a level on par with what would be familiar to the 19th Century American lawyer. Though, for example, some still question the necessity of the Federal Reserve and even wonder at its role in causing economic depression and recession, its existence is, generally, taken for granted and accepted as a vital part of the modern American economy, as well as its accompanying legal framework. Its 19th Century analogue, the First and Second Banks of the United States, were both eventually abolished after a heated, multigenerational debate that stood at the center of American government and even populist politics, as best exemplified by Andrew Jackson’s 1832 campaign for reelection.

The expansion of regulatory public policy requires the active or tacit ascension of the courts—and, especially, the Supreme Court of the United States. Because so many federal programs hinge on a broad interpretation of the Commerce Clause, Constitutional challenges to various regulatory programs enacted through legislation can often determine the fate of a given program. For example, in United States v. Morrison, the Supreme Court struck down a significant portion of the law as its foundation on the Commerce Clause was held to stand on an overly broad interpretation. Though there might be some correlation to the political orientation of the legislative branch, the executive branch, or the people more broadly, the Supreme Court’s own orientation can often stand counter to the others. Most famously, and as will be discussed in some more detail below, President Franklin Roosevelt’s New Deal agenda continuously faced a road block in the Supreme Court.

Today, formal social protections are most often granted through general law and express themselves in the adoption of public policy. Despite what seems to be an ever narrowing and targeted regulatory framework, any system that strives for the universal applicability of the law and, which, at the same time, eschews the promulgation of “special” or “particular” legislation, cannot overtly introduce legislation that moves the law to treat individuals differently. Therefore, the sorts of distinctions between classes and individual capacity as recognized by Catholic Social Teaching would, today, be alien and, indeed, outside the explicit scope American legislation. In the past, various American jurists have gestured towards a body of law that could be called the “law of the poor,” which some, including Judge Skelly Wright, thought would be a growing body of law; for the most part, it has not turned out that way.
There are, to be sure, clear examples of particular legislation disguised as general law; these often consist of classifications or eligibility requirements. Though law can enact policies that benefit certain groups based on, for example, an income below a certain level, it cannot require that the same group uniformly be barred from entering into agreements. Generally speaking, anything that bends too far towards paternalism or a strong limitation of personal autonomy has been avoided.

The American legislative system, and others like it, must necessarily maintain a mechanism by which the particulars of an individual case can be judged (and, ideally, in a uniform and standard fashion for all). Furthermore, as the legislative function of American society is supposed to be utterly outside of the court’s discretion, any action by the court that would seem to indicate a belief—one way or the other—on, for example, the merits of a law or the genuine value of a contract is often interpreted as judicial activism or, more colloquially, “legislating from the bench” and typically held to be highly inappropriate. Screeds against the judicial activism of Supreme Court judges have become ever more common from both the right and the left. Moreover, and following from the former sentiment, the inclusion of an explicitly moral judgment in a ruling—often labeled as bias—is also generally deemed to be taboo. Therefore, for the court to deem a contract “unconscionable” would seem to be outside of its established set of prerogatives. Instead, it is held, to ban a species of agreement that might conceivably be contracted for and that might be deemed unconscionable, such as the extension of a loan with an usurious interest rate, is a measure best left to the appropriate legislature—i.e., left to the “will of the people.”

**The Formation of the Doctrine of Unconscionability, and its Two Parts**

An orientation towards an exclusively legislative remedy is, however, not entirely the case. It was recognized that some contracts would simply be too lopsided or injurious to one of the parties, despite the presence of a limiting public policy framework, that the court should be able to exercise some manner of discretion. The notion of an unconscionable contract has been with us since at least the codification of Roman law and comes to us more directly from the courts of Equity that developed in the early modern English legal system. The modern doctrine of unconscionability was, in many respects, developed for and codified in the Uniform Commercial Code (“UCC”) as an antidote to this basic problem; § 2-302 of the UCC states: “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

Naturally, the interpretation of this section and its application in an actual legal case hinges on the court’s more specific interpretation of the meaning of “unconscionability” itself; indeed, the definition in the above clause is essentially tautological. That being said, a clear and formal definition of unconscionability would be problematic but from the other side of the horizon; that is, a strictly defined definition of unconscionability would mean the adoption of a standard moral system that would have to be uncomfortably shoehorned into any number of particular cases. And, the surprising inclusion of the broad phrase “any unconscionable result” (emphasis added) seems to widen and muddle its scope even more; we must ask: what is a result? To whom can we apply this unconscionable result—only the parties to the contract? Their
children? Their business associates? And so forth, *ad infinitum*. Again, one cannot help but wonder at the codified suggestion that a judge be permitted to introduce her own understanding of what is conscionable and unconscionable in a court of law. This is particularly true for a legal system that attempts to operate outside of a set moral paradigm.  

In short, we are left with two fundamental problems that are constituent to any examination of unconscionability. First, how do we define unconscionability? Really, is it a concept worth defining in a fixed manner or do we settle for a protean definition alone? Perhaps the latter option might be better so long as its outer limits are clarified. Second, how do we define result? Or, at the very least, how do we *limit* the definition?  

A first step might be to break the concept down into its constituent parts before a working definition is decided upon. Although not abundantly clear from the codified version of unconscionability, it, almost necessarily, requires that one break the concept down into procedural (“bargaining naughtiness”) and substantive (the “evils in the resulting contract”) parts.  

The basic distinction emerged most prominently from Arthur Allan Leff’s seminal article on the subject, which appeared relatively soon after unconscionability’s codification in the UCC. Today, when courts review a contract for the presence of unconscionability, they will typically perform the “Leff” Test—i.e., they will attempt to discern if the contract is both procedurally and substantively unconscionable; most courts do not hold it enough for one or the other to be met alone. In summary,  

> Courts focus on “the size and commercial setting of the transaction . . . , whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power.” On the “substantive” side, the courts analyze whether the actual terms of the contract "unreasonably favor" the party against whom unconscionability is urged.

It is not hard to map the idea of substantive unconscionability on to the corpus of Catholic Social Teaching. As the Church, if it were put in a position to do, would likely be far more willing to make value judgments on a given transaction than the American courts, this is unsurprising.  

Somewhat less obviously, the idea of procedural unconscionability is also at home in Catholic Social Teaching. In *Rerum novarum*, Pope Leo XIII writes that, when entering into a contract to perform labor, a worker must only perform the terms of the agreement if it is made “freely and equitably.” This would seem to meet Leff’s standard of procedural unconscionability, barring the practice of “bargaining naughtiness.”  

Just as Leff’s article has colored much of the proceeding discourse on unconscionability, so too has Judge J. Skelly Wright’s opinion on the case of a shifty Washington, DC used furniture dealer dominates the modern consideration of unconscionability. Indeed, the seminal case on modern unconscionability is often considered to be *Williams v. Walker Thomas Furniture*, presided over by Judge Wright. In the case, Ms. Ora Lee Williams entered into several lease agreements for various pieces of furniture from a discount furniture concern, Walker Thomas Furniture, over a six-year period. Though Ms. Williams made her payments regularly, according to an obscure provision of the contract, she could only take title to an item after all of her balances were paid off for each item. When she did eventually default on a stereo payment, the company attempted to repossess all of the furniture she thought she held title to. Wright found the contract to be unenforceable on account of its unconscionability, which he
essentially defined as “to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”

In retrospect, it is rather odd—or perhaps fitting—that one of the most unconventional, perhaps radical, lower court judges would hold such a pivotal place in the history of such an unconventional concept. Indeed, there is perhaps no better exemplar of the liberal school of judicial thought in the 3rd quarter of the 20th Century than Judge Wright. As Louis Seidman writes, a former clerk of Judge Wright himself, “it would have been hard to find any judge, sitting on any court in the United States, who was to the left of Judge Wright.” Even in era of a more liberal bench, as things were at that time, Judge Wright was considered to be on the “fringe.”

Today, it is still certainly possible to place judges into certain ideological camps, all the way up through the United States Supreme Court. We may also know a judge to hold a particular view towards the method by which he or she interprets law (e.g., Originalism) and this is usually held to be generally appropriate. However, it far rarer for members of the bench to openly espouse overtly political or social goals, as Judge Wright had no qualms doing. Indeed some of his statements can be rather shocking: “[the Supreme Court is] more than a law court – it is a policy court, or, if you will, a political court. It is an instrument of government, and while most judges have the habit, through long years of precedent, of looking backward, the Supreme Court must look forward through a knowledge of life, of people, of sociology, of psychology.”

Though he followed in the tradition of liberal justices such as Brandeis, Stone, and Holmes, Wright’s use of the unconscionability clause marks a departure. The legacy of the liberal justices of the early 20th Century, in macro terms, was to clear the way for the broad-based federal regulation of the economy; upon achieving a “more often than not” majority, their rulings put to bed the latent embrace of laissez-faire ideology in the Lochner era. Rulings of the post-Lochner Court on the commerce clause—for example, NLRB v. Jones and Laughlin Steel Corp, Katzenbach v. McClung, and Heart of Atlanta Motel Inc., v. United States—all presented a marked expansion of the federal government’s ability to regulate the affairs of individuals. Moreover, in every one of these cited cases, as well as many others, these regulations or measures of federal oversight were often aimed towards assistance to those in a lower socioeconomic strata or, at the very least, disenfranchised—whether for steelworkers fighting for the right for union representation or blacks in the Jim Crow South.

Where Judge Wright differed was his understanding of the Court’s position vis-a-vis social change. As opposed to opening the gates for social change, driven by legislation, the Court was to be the change. His mechanism for this was unconscionability. In his opinion, Wright emphasized the need for the court to have an understanding of the context of the transaction and that a test to determine unconscionability could never be “mechanically applied.” At the time, many thought his ruling would lead to a “slippery slope” in which the application of unconscionability would become ever more common, especially as a defense against predatory business dealings towards the poor. Though this did not come to pass, the case remains an important backdrop for the broader debate on contracts and the responsibilities of the parties, and, of course, the courts.

Echoing Judge Wright’s opinion, it is widely held that there is no “bright line” by which the court can define unconscionability, even if it were to be uniformly accepted that the court’s powers allow it to uneventfully void a contract according to this doctrine. Uncovering a metric for how to apply this idea is a fundamental challenge and one that Catholic Social Teaching can
help us answer by serving as a touchstone towards an understanding of the doctrine’s foundational principles. Moreover, it is essential that we continue our examination of the basic theoretical framework that creates the context of the American legal system in order to understand why unconscionability is so rarely successfully argued as grounds to void a contract.

**The Challenge of Unconscionability: Application**

In the most basic of terms, the primary barrier to the common application of unconscionability is our commitment to the freedom of contract and our corresponding belief that such freedoms should only be limited through a formally democratic process—i.e., through *general* legislative action. However, and important for our analysis, is the basic point that a contract, even if it contains apparently unequal terms, constitutes a kind of a legislative process in itself. The legal scholar Karl Llewellyn believed that a one-sided contract—including, we might suggest today, the form contract—constituted “the exercise of unofficial government of some by others, via private law.” Even though the *Lochner* Era, which maintained a fundamental “belief” in the freedom of contract, is now long passed, our society, nonetheless, bends towards the abstract idea of freedom of contract and the right of the consumer to choose and the provider to entertain that choice despite the moral implications of the act—which may be deleterious to the consumer, the provider, both, and/or the common good. It must also be said that our commitment to this idea is quite dubious. Minimum wage laws, which, in fact, were the impetus for the conclusion of the *Lochner* Era, are a clear example of this. In a capitalist economy, negotiating one’s wages is clearly a fundamental activity and may be one of the most important contracts an individual enters into. However, the court saw that the naming of a minimum wages was within a state’s “police power.” Again, the question is not so much whether freedom of contract can be limited, but by whom?

The guiding principles of American contract law are a product of the Enlightenment’s reinterpretation of rationalism that aimed to place it outside of the intellectual tradition driven by the Church. One prominent strain of thought that emerged was liberalism. Most fundamentally, contracts are to be made between private parties without the state infringing on the contents of the contract except in exceptional circumstances—a principle that mirrors liberalism’s basic commitment to the distinction between the public and private sphere. These liberal principles, in turn, are, in America, often interpreted through the traditions of Capitalism and Utilitarianism. A secure contract is a necessary antecedent of capitalism and is seen as a way to serve the common good without an undue amount of state interference. Indeed, as discussed above, the basic “unit” of our contemporary orientation within mainstream American society remains the individual and the achievement of the common good is seen, not as an end in itself, but as a happy byproduct of an individual’s pursuit of her self-interest in a somewhat managed fashion. Most decisions and macro policy considerations are formed according to an essentially utilitarian framework—we can see this in welfare economics—of the greatest good for the greatest number, naturally emphasizing efficiency. A prominent view, as expressed notably by Judge Richard Posner, holds that contracts ought to basically function according to this same logic as well, as evidenced by the form contract and efficient markets theorists more broadly.

If we presume, which we often do, that a contract is a necessary tool for promoting *any* approach towards the “common good” in modern society, we must ask how it manages to do...
There are three basic options. First, what we contract for *is* of genuine value and the achievement of that good or service helps us achieve our true end as a human person. This would most closely resemble a Catholic view. Second, what we contract for is *satisfying* to us, even if it may not in fact be good for us or even within what our “enlightened” self-interest might recommend. This would meet the utilitarian standard, but can essentially be discredited when we begin to ask about the nature of satisfaction and how it might differ between parties. Finally, *what* we contract for is irrelevant to the basic idea that we are given the freedom to contract in the first place; the very act’s freedom is a good in itself. In basic terms, this is the ascendant view today and the corollary of the view that a contract is a necessary and an efficient means for allocating goods and services throughout society—“the normative position assumes that contract law should be efficient” (emphasis added).

This final approach has multiple problems. First, it does not ask what the value of the contract is and to whom it provides value. Second, it implies that freedom is basically equitably distributed across contracting parties and that the bargaining power of each party is also essentially equal. As has often been pointed out by the Church, this basic Weltanschauung is often ill-suited to account for the real-world disparity between actors or acknowledge the implications of qualitative differences between these actors. As the Congregation for the Doctrine of the Faith states in *Instructio De Libertate Christiana Et Liberazione*, “freedom demands conditions of an economic, social, political and cultural kind which make possible its full exercise.” Indeed, modern liberal society is founded upon the expansion of freedom and, with respect to contracts, we must view the presence or absence of freedom critically insofar as the same “right to freedom” of one individual may exceed the very same “right to freedom” of another when placed in the context of a given society’s legal and economic framework.

In short, for the purposes of our discussion of contracts, it is not terribly problematic to conflate freedom and equality—if only in this limited way. The reality of freedom of contract is often based on the relative position of each party to the contract; freedom of contract, strictly speaking, does not exist in situations in which inequality of bargaining power is evident (e.g., in contracts of adhesion). Unsurprisingly, then, our society’s commitment to freedom and equality *before the law* can sometimes limit the genuine presence of these very same principles. Our freedoms when dealing with each other are, on the one hand, zealously guarded, and, on the other, quite limited and carefully regulated. Daniel Finn uses the concept of the “character of freedom” to describe a way in which we might approach and explain this problem. That is, the idea of freedom or a commitment to it has little value in itself unless we are willing to qualitatively evaluate it and determine what its character is; this consideration arises in tandem with observations of the presence or absence of genuine equality.

Of course, it is not at all unreasonable to suggest that, in the formation of a contract, one party may be coming to the bargain with more resources, knowledge, and ability. This imbalance can express itself in several ways and it often does so along a spectrum rather than in an either/or manner. As a basic example, one party may have the counsel of an attorney and the other may not. One party may have the counsel of a $75 an hour attorney and the other a $500 an hour attorney. One party may have the counsel of a $500 an hour attorney and the other a $500 an hour counsel who was also a former Governor. In any of those scenarios, one party clearly has an advantage over the other, and, though extreme, these instances are more aligned with the rule than the exception.
If we step away from this sort of example, as well as any of the other members of the unfortunately massive set of predatory, but common, contracting practices—such as the type outlined in the Williams case—we can find another rather typical example, the “standard” or “form” contract, that will better allow us to gaze deeper, into the foundation of a legal system founded on a largely utilitarian orientation towards capitalism. Except in very rare cases, and certainly in most everyday ones, a form contract represents a clear imbalance of bargaining power.\(^\text{122}\) And it is not as if this fact is a mystery to either party; it is widely known and accepted. Indeed, one of the most common limitations on freedom of contract is through the form contract, which is accepted as both a necessity for a complex and large capitalist society and, in fact, as something that helps keep the “cost of doing business” down through its efficiencies (imagine the professional costs if every contract for things as diverse as a parking garage ticket to an insurance policy had to be negotiated each and every time);\(^\text{123}\) clearly, the purveyor of the form contract has a clear advantage over the recipient.\(^\text{124}\) Essentially, the explanation behind the form contract is that it is, in the final analysis, beneficial for society. The next question, though, must be: according to what analysis? There is no doubt that form contracts build in an immense degree of efficiency into society that would be grossly limited otherwise. Perhaps the solution is to define certain limitations to form contracts by statute, which limit unconscionable behavior.

In keeping with the “rationalized” language comfortable to capitalism, it is supposedly easier to establish these limitations according to a quantitative metric. For example, some states have instituted “caps” on interest rates, a modern embodiment of usury laws, or established minimum wage laws.\(^\text{125}\) Under this theory, the application of unconscionability in the courts becomes unnecessary, as a legislative fix can be supplied for an ever-increasing number of issues that could be deemed unconscionable.

It is far harder, however, to determine a “cap” for contract terms after which point the contract becomes unconscionable or otherwise morally repugnant. Unfortunately, we cannot say that this type of morally repugnant contract does not exist, despite the best efforts of our legislators. Indeed, this is exactly the danger Judge Wright spoke to when he pointed out the impossibility of a “mechanically applied” solution to unconscionability. Indeed, as Judge Jasen writes—notably in the same general era of the “liberal” Judge Wright—“Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract's commercial setting, purpose, and effect.”\(^\text{126}\) Ironically, our commitment to formally universal law, and equality before it, sometimes limits our ability to void these sorts of contracts. According to this paradigm, we must typically assume, on the one hand, a neglect of the particulars of a given case, and, on the other, the basic assumption that every person, despite his or her socioeconomic status, is approaching the law equally.

Perhaps the chief struggle in any society devoted to the fundamental principle of equality before the law is, on the one hand, the maintenance of this principle, and, on the other, the recognition that the universality of the law or, perhaps more importantly, the elemental legal principles underlying the law, can perpetuate systemic inequality and social degradation. The ability to fully “access” the remedies granted by the law are plainly limited to certain members of society by economic factors and can be more insidiously limited by other elements of one’s social position more broadly. More than that, a commitment to the rule of law does not at all guarantee the quality or, even less so, the virtue of a law.\(^\text{127}\) However, any process that would seem to acknowledge such differences at the legislative level, despite being able to, perhaps,
more fairly meet the standards of distributive and communicative justice, would question foundational principles of the American legal system.

Unsurprisingly, providing solutions to this problem using the strategies characteristic of the legislature are highly problematic. A law, which, for example, said that all individuals lacking a high school diploma could not enter into contracts would, at best, be highly paternalistic, and, at worst, a plain and unambiguous violation of our society’s commitment to equality. That being said, such considerations do have an analogue in contract law and in the legal system more broadly: capacity. Barring certain individuals, based on a carefully defined set of characteristics, from entering into contracts or engaging with the law by other means, is acceptable. Mentally incompetent individuals, for example, are typically barred from entering into contracts due to capacity. Today, capacity seems like a relatively straightforward and innocuous concept. However, this was not always the case. Up through the early 20th Century, married women, for example, did not typically have capacity. Expanding who may not have capacity to contract would recall a period of immense paternalism and positively limit autonomy in a backwards manner. A better solution would take into account capacity in a non-technical sense if necessary, but not to make capacity necessary for one’s entrance into a contract.

What about “misrepresentation and fraud” or “good faith”? These concepts would seem to already inhabit much of the same space that unconscionability does and provide similar protections. However, there are two major differences readily apparent. The first is that both of these considerations would, typically, only meet one of the two benchmarks established by the “Leff” Test. Both would appear to correspond most neatly to procedural unconscionability and be somewhat lacking with regard to substantive unconscionability. We often think of “good faith” negotiations, for example, which clearly take place in the formation of the contract. Then, with regard to misrepresentation and fraud, most considerations of fraud revolve around the negotiation of the contract as well, in that one party is withholding information from the other purposefully. Now, the second consideration that differentiates these two concepts from unconscionability is the idea that neither of these capture any sort of the systemic aspects that lead to inequality of bargaining power. That is to say, people in lower socioeconomic strata can be fraudulent and negotiate in bad faith, irrespective of their socioeconomic position. A key aspect of a possible unconscionable contract is it may be, strictly speaking, legal. Unconscionability provides protections of a somewhat similar nature socioeconomically oriented, but, again, is not confined exclusively to procedural matters.

The potential for the unconscionability doctrine to serve as a protective mechanism for those in lower socioeconomic strata is further highlighted by the Court’s extension of its use to those where inequality of bargaining power is evident. On speaking of the formulation of a “test” for the application of unconscionability, Judge Wright states, “In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made” (Emphasis mine). Though recognizing that this is a departure from the widely held belief that the court should never judge the “terms” or the value of a contract, Judge Wright viewed it as a necessity. Of course, the knowledge of the circumstances of a particular contract cannot be known to a legislature—nor should they be considered if we wish to hold our commitment to general law; rather, they can only be known to the court hearing the case. The court’s exercise of its right to declare contracts unenforceable due to their unconscionability is a unique solution to a problem that cannot help.
but exist under general law, unless we were to greatly expand our application of capacity or be
more comfortable with a more universal paternalistic approach. Moreover, it allows for the
differentiation of actors in a way that the law cannot (or ought not).

Understanding and Testing Unconscionability through Subsidiarity and Solidarity

In evaluating applications of unconscionability, by probing the Church’s own understanding of
subsidiarity and solidarity, we might be better suited to find a remedy to the “slippery slope”
problem often expressed in relation to unconscionability. The most commonly referenced
account of subsidiarity from the body of Catholic Social Teaching comes from the following
passage in *Quadragesimo anno*, which is typically held to be its first major appearance:

> Just as it is gravely wrong to take from individuals what they can accomplish by their own
initiative and industry and give it to the community, so also it is an injustice and at the same time a
grave evil and disturbance of right order to assign to a greater and higher association what lesser
and subordinate organizations can do. For every social activity ought of its very nature to furnish
help to the members of the body social, and never destroy and absorb them.135

Though subsidiarity is often viewed as a principle by which power is devolved, it is just as much
about the appropriate organization of the hierarchies of power and decision-making, with the aim
of empowering each level, top to bottom, appropriately. When subsidiarity is applied in secular
contexts, as has become fashionable, it is typically limited to speaking about governance and,
more specifically, devolution.136 One must not forget the basic reason for the Church’s
formulation of the concept of subsidiarity in *Quadragesimo anno*: the collapse of civil society by
the growing state, leaving only the state and the individual behind. Therefore, it is somewhat
ironic that the secular adoption of subsidiarity is often applied within the bureaucratic apparatus
of a state (or transnational body, such as the European Union).137 In regard to the Welfare State
or “Social Assistance State,”

> ...the principle of subsidiarity must be respected: a community of a higher order should not
interfere in the internal life of a community of a lower order, depriving the latter of its functions,
but rather should support it in case of need and help to coordinate its activity with the activities of
the rest of society, always with a view to the common good...the Social Assistance State… [is]
dominated more by bureaucratic ways of thinking than by concern for serving their clients… In
fact, it would appear that needs are best understood and satisfied by people who are closest to
them and who act as neighbors to those in need.138

We may view the courts as somewhat of a middle ground that absolves itself of many of the
problems of a large bureaucratic apparatus while bringing to bear the resources of a modern state,
offering means to help individuals as circumstance prescribes. Of course the court familiar with a
given case is far better equipped to make a judgment about the fairness of a contract than those
dozens of degrees removed from it. But the court is, by the same token, equally ill-equipped to
create generally applicable law. I do not want to mislead and suggest that this is what the Church
had in mind, but I do believe a judge, and certainly a jury, can act as a “neighbor” or from a
neighborly bearing. Another “safety valve” may be seen in the useful function of
unconscionability in that it provides the impetus for eventual legislative action, when appropriate.
This again relates to the dual directionality of subsidiarity; sometimes a legislative solution is
best and this ought to figure in the court’s thinking and limit the legislative application of
unconscionability as Leff imagined.139
The principle of solidarity, and the assumptions that surround it, likewise inform the limits of the application of unconscionability. Instead of maintaining a sometimes-limited formal commitment to the equality of bargaining power—or, alternatively, recognizing that this inequality must be stomached for the sake of efficiency—a recognition of the presence of the concept of solidarity at the heart of unconscionability could provide a much needed remedy to those experiencing the worst of this inequality. We see language in the various definitions of unconscionability either stating or implying what “no man” would do or ought do; at its core, the doctrine asks us to place ourselves in the shoes of the wronged and determine if his or her dignity has truly been offended or if that were the explicit or implicit intent of the other party. It asks us, perhaps, following the words of Pius XI, to step in “as occasion requires and necessity demands.”[^140] With some limiting guidelines provided by subsidiarity, solidarity can help inspire the “neighborliness” of those, such as judges and juries, who might not be neighbors in a stricter sense. It also inspires a line of thought offering an alternative orientation towards the common good as a more paramount end in itself. By expanding the court’s discretion in its ability to acknowledge the absence of commutative justice in a contract through unconscionability the problems engendered by our formal commitment to equality might be curtailed.

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3 Warshawsky, J. 2007
4 Uniform Commercial Code. §2-302 (amended 2007). And Restatement (Second) of Contracts § 208 (1981). The UCC states: “(1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result; (2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”
5 The Uniform Commercial Code, for example, makes a distinction between a merchant and non-merchant and applies certain more rigorous standards to the merchant in his or her dealings. Uniform Commercial Code. §2-104 (amended 2007)
6 W. H. Page, *The Law of Contracts*. W.H. Anderson Company, 1920. I have deliberately chosen a somewhat antiquated definition of unconscionability to set out with, as it helps us understand what the origin point of the doctrine essentially was. Though the definition has certainly been refined and the saucy language dulled, the kernel of the idea remains.
7 Consider a basic, and generally accepted, definition “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement (Second) of Contracts § 1 (1981). Therefore, any transaction is essentially a contract, and we may interpret this broadly. If I park in a parking lot, for example, by my taking a ticket at the entrance, I am entering into a contract.
8 The “dean” of the critique of unconscionability, Arthur Leff, worried about the applications of the clause by “the judicial bureaucracy, on an ad hoc case-by-case basis essentially unrestrained by legislative or administrative guidance…”Arthur Leff, “Unconscionability and the Crowd-Consumers and the Common Law Tradition,” Faculty Scholarship Series, January 1, 1970, [http://digitalcommons.law.yale.edu/fss_papers/2821](http://digitalcommons.law.yale.edu/fss_papers/2821). Pp. 353
9The Pontiff’s first Apostolic Exhortation is a sure example, as will be discussed further below: Pope Francis, *The Joy of the Gospel: Evangelii gaudium* (Washington, DC ; Vatican City: United States Conference of Catholic Bishops, 2013). For popular accounts, see: Andrew Brown, “Pope Francis Condemns Inequality, Thus Refusing to Play the Game | Andrew Brown,” The Guardian, April 28, 2014,

Pope Leo XIII, Encyclical letter Rerum novarum, 1891. As we will demonstrate in only a summary fashion below, much American legal thought rests, fundamentally, on the liberal tradition, which was, in turn, a response to Scholasticism and, alternatively, Aristotelianism broadly understood.

C.f., “…it bears emphasis that [solidarity and subsidiarity] are indivisible from the broader framework of Catholic social thought. Try as they might, modern secularists have not been able to maintain either doctrine’s vibrancy without taking account of the theologically informed anthropological presumptions from which both doctrines arise.” Robert K. Vischer, “Solidarity, Subsidiarity, and the Consumerist Impetus,” in Scaperlanda/Collett, Recovering Self-Evident Truths: Catholic Perspectives on American Law. Washington, D.C: The Catholic University of America Press, 2007.

Unsurprisingly, Pope Francis criticizes this triumphalism, “We are far from the so-called “end of history”, since the conditions for a sustainable and peaceful development have not yet been adequately articulated and realized.” Evangeli gaudium, 59. This is in reference to: F. Fukuyama, The End of History and the Last Man, Reissue edition. New York: Free Press, 2006.

“The Church’s social doctrine is not a ‘third way’ between liberal capitalism and Marxist collectivism, nor even a possible alternative to other solutions less radically opposed to one another: rather, it constitutes a category of its own. Nor is it an ideology, but rather the accurate formulation of the results of a careful reflection on the complex realities of human existence, in society and international order, in the light of faith and of the Church’s tradition.” John Paul II, Sollicitudo rei socialis, 1987. Para. 42.


Evangeli gaudium, 2013, I. 53


The scholar Tamar Frankel writes, “Some of the conditions that enhance market efficiencies can be imposed and regulated privately by market participants. However, it is not always possible for these participants, acting separately, to create and enforce all these conditions on their own. Therefore, some of these conditions must be established by law.” She goes on to note that even Hayek, the free market thinkers’ free market thinker, concedes that “his spontaneous order can rest ‘on rules which are entirely t.”

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“…it bears emphasis that [solidarity and subsidiarity] are indivisible from the broader framework of Catholic social thought. Try as they might, modern secularists have not been able to maintain either doctrine’s vibrancy without taking account of the theologically informed anthropological presumptions from which both doctrines arise.” Robert K. Vischer, “Solidarity, Subsidiarity, and the Consumerist Impetus,” in Scaperlanda/Collett, Recovering Self-Evident Truths: Catholic Perspectives on American Law. Washington, D.C: The Catholic University of America Press, 2007.

Unsurprisingly, Pope Francis criticizes this triumphalism, “We are far from the so-called “end of history”, since the conditions for a sustainable and peaceful development have not yet been adequately articulated and realized.” Evangeli gaudium, 59. This is in reference to: F. Fukuyama, The End of History and the Last Man, Reissue edition. New York: Free Press, 2006.
exercise of right reason. Therefore, it is somewhat ill-founded, as least in this regard, to view the natural law tradition of the Enlightenment as a deep break from that of the Scholastics.


24 Many see Romans 5:12-21 as the theological origin for the concept of original sin, “Therefore, just as sin came into the world through one man, and death through sin, and so death spread to all men because all sinned for sin indeed was in the world before the law was given, but sin is not counted where there is no law…Therefore, as one trespass led to condemnation for all men, so one act of righteousness leads to justification and life for all men.” For an excellent scholarly accounting of Augustine’s view, see: Jesse Couenhoven, “St. Augustine’s Doctrine of Original Sin,” Augustinian Studies 36, no. 2 (2005): 359–96.


26 Schmitt, Carl, and Tracy B. Strong. Political Theology: Four Chapters on the Concept of Sovereignty. Translated by George Schwab. 1st Edition. Chicago: University Of Chicago Press, 2006. Pp. 36. Cf., “All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development-in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology.”

27 Niccolo Machiavelli, Discourses on Livy, trans. Harvey C. Mansfield and Nathan Tarcov, Chicago: University of Chicago Press, 1998, 15. “As all those demonstrate who reason on a civil way of life, and as every history is full of examples, it is necessary to whoever disposes a republic and orders laws in it to presuppose that all men are bad, and that they always have to use the malignity of their spirit whenever they have a free opportunity for it.”


30 Voltaire, a near synonym for the Enlightenment, is one such example,” I cannot imagine how the clockwork of the universe can exist without a clockmaker.” Quoted from Robert K. Logan, The Poetry of Physics and the Physics of Poetry (World Scientific, 2010).


33 A window onto the arrival of this mode of thought can be the expansion of deism. An interesting study comes from S.J. Barnett, who, while acknowledging the deists distaste for the Church, attempts to dispense the idea of a widespread deist movement and argues, instead, that it was relatively confined to a set of elite “philosophes.” (Many of whom we still read today!) S. J. Barnett, The Enlightenment and Religion: The Myths of Modernity (Manchester University Press, 2003). Pp. 13-14.

34 Summa, I-II, Question 95. A. 1. “Was it Beneficial That Human Beings Established Laws?” This is also not to say that human nature is an amorphous, dynamic concept, but rather that it contains within it a capacity for growth and development.

35 Op. Cit., Rousseau, 140-3

36 City of God, St. Augustine, XIV.28. An excellent summary of the two cities doctrine appears in David VanDrunen, Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought (Wm. B. Eerdmans Publishing, 2009), Pp. 22.

37 Summa Contra Gentiles, St. Thomas Aquinas, Book III, Chapter XVII, “That All Things are Directed to One End, Which is God”


39 I am in no way suggesting that the Catholic intellectual tradition lacks a concept of the separation of church and state; in fact, it is one of the inventors, if not the inventor of the idea. When we talk about the separation of church and state today, it typically is not along the lines of the concepts of separation that flowed from the long and complex exegesis of the “two swords” doctrine (Luke 22:38), but rather a stand in for the idea of two discrete spheres: the public and the private. For an unparalleled study of the history of church and state relations in the High Middle Ages, which was the culmination of centuries of debate and colored every further debate thereafter, see the


41 On Free Choice, St. Augustine, I, 6, n. 15 (PL 32:1229)

42 Summa, I-II, Question 91. A. 2. “Is There a Natural Law in Us?”

43 C.f., On the Sermon On the Mount, St. Augustine, chp. 2. art. 32 and Confessions II, 4 (PL 32:678)


45 Gratian, Decretum I, dist. 5, preface.

46 Summa, I-II, Question 94. A. 2. “Does the Natural Law Include Several Precepts or Only One?” Good is broadly defined, following an Aristotelian framework, as “what all things seek.”

47 Confessions, St. Augustine, II, 4 (PL 32:678)

48 C.f., Question 95 in the Summa

49 Summa, I-II, Question 91. A. 3. “Are There Human Laws?” “Just so, human reason needs to advance from the precepts of the natural law, as general and indemonstrable first principles, to matters that are to be more particularly regulated. And we call such regulations decided by human reason human laws, provided that the other conditions belonging to the nature of law are observed, as I have said before.”

50 Summa, I-II, Question 90. A. 2: “Is Law Always Ordered to the Common Good?”

51 In the Compendium of the Social Doctrine of the Church, the common good is one of the paramount themes, the first principle to be examined in the explication of the “Principles of the Church’s Social Doctrine” section, and is referenced 143 times throughout the tract; by comparison, “equality” is referenced 24 times. Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church, 1st edition. Città del Vaticano: Washington, D.C: United States Conference of Catholic Bishops, 2005.

52 C.f., On Free Choice, I, 5, n. 11 (PL 32:1227)


54 Summa, I-II, Question 94. A. 2: “Is Every Human Law Derived From the Natural Law?”


56 C.f., Rerum novarum, 99-107; 131-133. Moreover, rights should not be conflated with a more holistic understanding of the fulfillment of an individual’s dignity.

57 Centesimus annus, V. 47

58 Ibid, IV. 30. This should not be mistaken for an argument for socialism, as the role of the state in the Catholic view cannot be central in the proper dispensation of property. Further Catholic critiques of too universal a state will be discussed below.

59 As will be discussed below, the courts—led by the Supreme Court of the United States—have experienced several major ideological shifts throughout the 20th Century. Two of the most important are the end of the Lochner Era (1937) and the end of the Burger Court (1986). In summary, the Lochner Era refers to a period of time in which the Court limited regulatory legislation and was thought to generally follow a “laissez faire” ideology. The Warren and Burger Courts were notable for several decisions that are often said to fall on the “liberal” (as in contemporary common usage, not as in classical liberalism) end of the spectrum.

60 Rerum novarum, I. 19. Cf. Notably, while the Church views the classes—simply defined as labor and capital—as immutable facts of modern economic life, the proposition promoted most famously by Marxism that they are in perpetual conflict is viewed by the Church as “the great mistake.”

61 Rerum novarum, I. 47

62 Rerum novarum, I. 4

63 Ibid, I.17. Note the repeated use of the qualifying adverb “naturally,” which suggests the existence of these inequities prior to society.

64 Ibid, I.20.

In most cases, reflecting their “capacity,” minors can disaffirm contracts. Restatement (Second) of Contracts § 12 (1981).

This idea often manifests itself in critiques of welfare legislation. For a cutting review, as well as a historical comparison, of this debate, see Margaret R. Somers and Fred Block, “From Poverty to Perversity: Ideas, Markets, and Institutions over 200 Years of Welfare Debate,” American Sociological Review 70, no. 2 (April 1, 2005): 260–87, doi:10.1177/000312240507000204.

Another interesting example is microlending. Microlending, which, almost as a rule, deals with asset-poor individuals, would seem to hold high interest rate loans as particularly noxious. However, because of the number of small loans issued by a typical micro lender, interest rates must rise in order to meet the lender’s fixed costs. Christian E. Weber, “In Defense of Apparently ‘Usurious’ Interest Rates for Micro Loans: A Pedagogical Note,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 1, 2007), http://papers.ssrn.com/abstract=982253. Pp. 7.


Cf., William Rehnquist, CJ, United States v. Lopez. 1995., William Rehnquist, CJ, United States v. Morrison. 2000., and John Roberts, CJ, National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services. 2012. Last case is of particular note. The Court, which upheld the constitutionality of most of the Affordable Care and Patient Protection Act (often called “Obamacare”), did not uphold it on the powers granted to the federal government by the Commerce Clause but rather by federal government’s the taxing power. Though this could mean a significant reduction in the power and applicability of the Commerce Clause, we have yet to see a new case of similar stature arrive in the Supreme Court where a weakening of the clause might be solidified.

The contracts clause of the United States Constitution was drafted, largely, as a response to state legislatures relieving influential persons of their debt obligations. Any form of investment at a meaningful level, particularly in the early years of the country, would have been impossible without the clause; it reads, “No State shall…pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” U.S Const. art. I. §10. cl. 1

U.S Const. art. I. §8. cl. 3: “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” and U.S Const. art. I. §8. cl. 18: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

U.S Const. amend. X. §1: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” and U.S Const. art. VI. cl. 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Tom C. Clark, J, Heart of Atlanta Motel v. U.S (Supreme Court of the United States 1964).

Supra note 67.


Rehnquist writes, “(a) The Commerce Clause does not provide Congress with authority to enact [Violence Against Women Act of 1994]’s federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds...Petitioners assert that § 13981 can be sustained under Congress’ commerce power as a regulation of activity that substantially affects interstate commerce. The proper framework for analyzing such a claim is provided by the principles the Court set out in Lopez. First, in Lopez, the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court’s conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence are not, in any sense, economic activity. Second, like the statute at issue in Lopez, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ regulation of interstate commerce. Although Lopez makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce.” William Rehnquist, CJ, United States v. Morrison. 2000.


83 For example, Pennsylvania divides its cities according to a classification system. Cities with 1 million or more people belong to Class 1, cities between 250,000 and 999,999 are Class 2 cities, and cities with less than 249,999 are Class 2A cities. However, Philadelphia is the only Class 1 city, Pittsburgh is the only Class 2 City, and Scranton is the only Class 2A city. Thus, it is easy for the Legislature to make laws targeted at each of these cities without formally violating the letter of the State Constitution’s ban on particular legislation. (Pennsylvania Constitution, art. 3. § 20. In Article III, Section 32). Indeed, the Legislature is explicitly banned from “Regulating the affairs of counties, cities, townships, wards, boroughs, or school districts,” it uses this classification system to do so anyway.

84 An important exception are those instances in which the maintenance of one’s own personal autonomy infringes on others’ in keeping with liberal tradition (“Your right to swing your arms ends just where the other man's nose begins.”) Often misattributed to Oliver Wendell Holmes Jr., this famous line actually appeared in an essay by the civil libertarian Zechariah Chafee. Zechariah Chafee Jr., “Freedom of Speech in War Time,” Harvard Law Review 32, no. 8 (June 1, 1919): 932–73, doi:10.2307/1327107.


89 Supra note 8.

90 W. S. Holdsworth, “The Early History of Equity,” Michigan Law Review 13, no. 4 (February 1, 1915): 293–301, doi:10.2307/1274509. Pp. 294-5 trace how ideas of equity from canon jurists, especially regarding “conscience,” made their way into the Court of Chancery, “Conscience must decide how and when the injustice caused by the generality of rules of law is to be cured. It is, in fact, the executive agent in the work of applying to individual cases the dictates of the law of God and of reason upon which these ecclesiastical chancellors considered equity to depend.”
We must also look to the Restatement of Contract’s (Second) similar language, though not having the force of law, is important in the consideration of those contract disputes outside the scope of the UCC: “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”

Consider legal systems operating within a particular system—e.g., Islamic law (Iran) or Marxism-Leninism (the USSR, in principle). “All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha’ of the Guardian Council are judges in this matter.” Constitution of the Islamic Republic of Iran, § 1. Art. 4.


Cf., Pope John Paul II, On Human Work: Laborem exercens (Boston, MA: Pauline Books & Media, 1981), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html. §8. Also Centesimus annus, IV. 40: “It is the task of the State to provide for the defence and preservation of common goods such as the natural and human environments, which cannot be safeguarded simply by market forces. Just as in the time of primitive capitalism the State had the duty of defending the basic rights of workers, so now, with the new capitalism, the State and all of society have the duty of defending those collective goods which, among others, constitute the essential framework for the legitimate pursuit of personal goals on the part of each individual.”

Rerum novarum, I. 20

Judge J. Skelly Wright, Williams v. Walker-Thomas Furniture Company. 1965. (Note the passage of the Leff Test in this case).


Ibid. Pp. 4


Seidman. Pp. 7-8


Louis Brandeis, Harlan Stone, and Oliver Wendell Holmes were all Supreme Court Justices, who were appointed by Presidents Wilson, Franklin Roosevelt, and Theodore Roosevelt (all, more or less, “Progressives.”)

The opening paragraphs of the Lochner decision sum up the case—and the basic ideological orientation—nicely: “The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power. Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor. There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified a health law to safeguard the public health, or the health of the individuals following that occupation.” Rufus Wheeler Peckham, J, Lochner v. New York (Supreme Court of the United States 1905). See also, George Sutherland, J, Carter v. Carter Coal Co. (Supreme Court of the United States 1936). George Sutherland, J, Adkins v. Children’s Hospital (Supreme Court of the United States 1923).


C.f., Fleming 1385-6; 1402.

Supra note 69. One example of such law, as will be discussed below, are regulations that define the boundaries of labor contracts (e.g., minimum wage, maximum hours, and etc.)

Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 YALE L.J. 704, 731 Note the extra legal implications, as well as the deviation from the American commitment to general law.

Charles Evan Hughes, CJ, West Coast Hotel Co. v. Parrish (Supreme Court of the United States 1937).

There are some exceptions, such as historical and environmental preservation. However, as a counterexample to the exception, arguments for and against action on climate change are often made on utilitarian grounds. From one point of view, we should try to limit greenhouse gas emissions because it will, in turn, limit the economic damage to both developed and developing countries; this will make our lives better (though in the future). From another point of view, taking action on climate change will reduce our economic output and, thus, make our lives worse (though in the present). Interestingly enough, this debate exposes a complication to the basic utilitarian framework—the greatest good to the greatest number—by asking “when?”


This discussion closely follows the formulation in Rougeau, 2010.


C.f., Daniel D. Barnhizer, “Inequality of Bargaining Power,” University of Colorado Law Review 76, no. 139 (January 2005), http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1106&context=facpubs. Pp. 201-202. To take from the canonical study, Kessler writes, “In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts...Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.” Friedrich Kessler, “Contracts of Adhesion--Some Thoughts about Freedom of Contract,” Columbia Law Review 43 (1943): 629–42. Pp. 632


This is a particularly well-known problem as the ranks of public defenders dwindle. Cf., Stephen Bright, “Legal Representation for the Poor: Can Society Afford This Much Injustice?,” Faculty Scholarship Series, January 1, 2010, http://digitalcommons.law.yale.edu/fss_papers/3456.


Leff puts it well, in discussing how unconscionability might affect form contracts more broadly, “If this new device, however, is making all printed forms open to after-the-fact ad hoc judicial second guessing, there is the danger that the efficiency of mass transactions will be seriously impaired.” Leff, 1967. Pp. 504.

For a novel take on this issue, see Riley’s discussion of contracts in reality television: “Contestants [on reality shows] have less familiarity with the language of the industry and are less able to negotiate individual contracts. Most sign form contracts that are essentially contracts of adhesion created by production companies and

Contrast this commitment with our discussion of a Thomist accounting of law above. Agreeing with Augustine, for example, St. Thomas writes, “Augustine says in his work On Free Choice: “Unjust laws do not seem to be laws.” And so laws have binding force insofar as they have justice.” St. Thomas Aquinas, I-II, Question 95. A. 2. “Is Every Human Law Derived from Natural Law?”


Pope Pius XI, Quadragesimo anno (Vatican City: Typis Polyglottis Vaticanis, 1931), https://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-ano.html.


Centesimus annus, V. 48

Supra note 8.

Quadragesimo anno, 80