Contract Law and Inequality

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ABSTRACT: Does contract law have any role to play in tackling economic inequality, one of the most pressing problems of our time? The orthodox answer to this question is no: Contract law should promote autonomy, efficiency, and/or justice in exchange, while distributive objectives should be dealt with exclusively through the fiscal system. While scholars have often debated the question of whether contract law should be reformed to address inequality, that question misses the reality that, at least in some contexts, it already does. This Article shows how courts in South Africa, Brazil, and Colombia—prominent developing countries from different legal traditions —have diverged from orthodoxy to embrace the task of using contract law to address inequality. The emergence of contract law heterodoxy in developing countries draws attention to the existing, if more limited, instances of heterodoxy in the contract laws of the United States and Europe and to the stakes of contract law more generally. This analysis highlights how mounting inequality may increase the appeal of contract law heterodoxy and suggests that the present reign of contract law orthodoxy is neither universal nor inevitable.

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I. Introduction

Economic inequality is one of the most pressing problems facing modern societies, but it remains an open question whether it is one that contract law has any role to play in addressing. The orthodox answer to this question is no—contract law should pursue autonomy, efficiency, or justice in exchange, but not distributive objectives. This orthodoxy is rooted in the idea that

pursuit of distributive objectives through contract law is both illegitimate and ineffective, particularly when initiated by judges as opposed to legislators. Accordingly, distribution should be pursued principally through the fiscal system—taxes and public spending—rather than through courts' rulings in contractual disputes. Critiques of the prevailing orthodoxy struggle with an inconvenient fact: Existing literature suggests that legal systems around the world have converged on contract law doctrines that are insensitive to distributive considerations, part of a broader trend that leaves very few differences of economic significance among contract laws. The absence of concrete experiences with alternatives to contract law orthodoxy casts doubt on the appeal and viability of heterodoxy.

We contribute to this debate by providing examples of contract law heterodoxy in the legal systems of developing countries.[1] Although the potential uses of contract law to mitigate inequality have long been the subject of heated scholarly debate,[2] the comparative dimension of this controversy has been neglected, even though inequality in developing countries is an especially pressing concern.[3] Our analysis unveils how courts in select developing countries have recently diverged from orthodoxy and begun to embrace heterodoxy: the use of contract law to reduce inequality. In particular, we document important instances in which courts in South Africa, Brazil, and Colombia have adopted distinctly heterodox approaches to contract law. The decisions cover an eclectic mix of topics, including general rules on the calculation of prejudgment interest as well as more specific doctrines governing the purchase and sale of real estate and the provision of health insurance, life insurance, and water.

We do not claim that legal heterodoxy prevails in all developing countries or even that it is dominant in the developing countries we focus on in our case studies; indeed, we believe that this is not the case. We also do not maintain that heterodox contract laws actually achieve their intended distributive objectives; they may well be ineffective or backfire. Nevertheless, the greater

1. We use the term developing countries to designate countries historically qualified as part of the Third World and more recently labeled emerging markets or Global South jurisdictions, in contrast to the First World, mature economies of the Global North. Nevertheless, the choice of terminology should not imply a stark dichotomy nor any judgment of inherent superiority or inferiority. Instead, our analysis suggests a continuum of social, economic, and legal challenges across countries belonging to this traditional classification.

2. *See infra* Part II.

3. *Cf.* Aditi Bagchi, *The Political Economy of Regulating Contract*, 62 AM. J. COMPAR. L. 687, 704 (2014) (examining how inequality ought to and will influence contract law in the United States and Europe and arguing that greater "income inequality increases the cost of mandatory terms" (emphasis omitted)). Helen Hershkoff has examined the closely related topic of the use of contract law to protect rights to education and healthcare services in selected developing countries. Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 268, 290–94 (Varun Gauri & Daniel M. Brinks eds., 2008).

incidence of contract law heterodoxy in several large developing countries is noteworthy and likely consequential from an economic standpoint.

The existence of contract law heterodoxy in developing countries has both practical and scholarly implications. From an economic perspective, heterodox approaches to contract law have the potential to alter pricing schemes, contract design, the choice of contracting partners, and incentives for vertical integration. From a theoretical standpoint, the finding of greater contract law heterodoxy in developing countries has important implications for scholarship on comparative contract law, law and development, and contract theory.

To begin, these findings contradict the frequent assumption that contract laws do not differ substantially around the world.[4] The consensus in the literature on comparative law has been that the traditional distinctions between contract law in civil and common law systems either are waning or have limited economic significance.[5] As for comparisons between developed and developing countries, the focus of the literature on the role of contract institutions in development has been on differences in contract enforcement.[6] When institutional economists and international agencies, such as the World Bank, attempt to assess the quality of contract institutions across the globe, they focus exclusively on measures of enforcement (such as the time and costs of legal proceedings and the competence and integrity of courts), completely neglecting potential variations in contract law doctrines.[7] Scholars who have

4. *See, e.g.*, Felipe Jiménez, *Against Parochialism in Contract Theory: A Response to Brian Bix*, 32 RATIO JURIS 233, 236 (2019) (claiming "[t]here is . . . an important level of convergence in the legal texts of different Western systems of contract law" so that "diverse systems of contract law (at least in Western legal cultures, if not beyond) are structurally and functionally consistent"); JAN SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM 187 (Nicole Kornet trans., 2002) (arguing that contract law is the "most uniform" field of private law in Europe and that "the existing uniformity . . . is a result of the dynamic character of the law of contract").

5. *See, e.g.*, Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1814–15 (describing the growing consensus "that there are few if any relevant differences between common and civil law today"). *See generally* GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds., 2000) (finding significant convergence in the outcome of various hypotheticals across legal traditions). *But see generally* Mariana Pargendler, *The Role of the State in Contract Law: The Common-Civil Law Divide*, 43 YALE J. INT'L L. 143 (2018) [hereinafter *The Role of the State in Contract Law*] (explaining the rationale behind the existing distinctions between the common and civil law of contracts).

6. For a rare mention of potential differences in contract law between developed and developing countries, see E. Allan Farnsworth, *A Common Lawyer's View of His Civilian Colleagues*, 57 LA. L. REV. 227, 228 (1996) (briefly alluding to differences between developed and developing countries as one of the cultural differences to be resolved in UNCITRAL and UNIDROIT harmonization efforts).

7. WORLD BANK GROUP, DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES 19 (2020) (describing how the variable "[e]nforcing contracts" aims to measure the "[t]ime and cost to resolve a commercial dispute and the quality of judicial processes for men and women") [https://perma.cc/6HQT-R4XS]. This approach is in sharp contrast to the Doing Business Report's approach to evaluating minority investor protection, which undertakes to

commented on substantive divergences between private law in developed and developing countries have posited that jurisdictions in Latin America and Africa embody "the rule of political law," in which distribution is led by political actors who are susceptible to influence by wealthy as well as poor groups.[8] In contract law at least, the possibility of progressive, judicially led innovations in developing countries—a well-known phenomenon in constitutional law[9]—has been overlooked.

Contract law heterodoxy in developing countries also destabilizes the theoretical foundations of contract law orthodoxy, namely, arguments that distribution through contract law as opposed to the fiscal system is always illegitimate or ineffective. Our findings suggest that the practical appeal of these arguments is contingent rather than universal. Even if contract law orthodoxy is optimal for developed countries, contract law heterodoxy may, in economic parlance, constitute a second-best approach in developing countries, given the limitations of other institutional alternatives in tackling inequality.[10]

We argue that three key features of the countries we study favor the use of contract law to achieve distributive objectives and explain the emergence of heterodox approaches. First, widespread poverty and inequality make the distributions of income and wealth more salient. The fact that these inequalities are often traced to historical injustices such as slavery and colonial exploitation enhances the perceived legitimacy of distributive objectives. Second, the fiscal system has failed to meaningfully reduce persistent inequality. Third, consideration of inequality in contract disputes is often viewed as a constitutional imperative in view of legal commitments to equality.

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measure several substantive components of a country's corporate laws. *Id.* For a discussion of the economic literature's exclusive focus on procedural criteria to measure contract institutions, see Mariana Pargendler, *Comparative Contract Law and Development: The Missing Link?*, 85 GEO. WASH. L. REV. 1717, 1719 (2017) [hereinafter *Comparative Contract Law and Development*].

8. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMPAR. L. 5, 28 (1997) (emphasis omitted) (arguing that in Africa, Latin America, and Eastern Europe, "the outcome of litigation depends on 'who is who' in the political world"); *see also* HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 189–99 (June Abbott trans., 1989) (describing prevalence of redistribution—particularly through lawmaking by the executive branch—in Peru's legal system).

9. *See* Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2017, 2020, 2059 (2020) (describing how courts in various developing countries, as well as a few developed countries, have employed constitutional law to tackle economic inequality); *infra* note 223 and accompanying text.

10. For the original articulation of the theory of the second best in microeconomics, see generally R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). For the application of second-best arguments in the institutional context, see generally Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100 (2008); and Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 COLUM. J. TRANSNAT'L L. 1 (2019) [hereinafter *How Universal is the Corporate Form?*]. We do not take a position here about whether contract law orthodoxy constitutes a first-best approach in the developing world.

For all these reasons, arguments against consideration of distributive concerns in contract law have recently won less traction in Brazil, South Africa, and Colombia than in developed jurisdictions.

Finally, our examination of contract law heterodoxy in developing countries has a deeper methodological implication. Specifically, it illustrates the potential benefits of looking beyond the usual developed country suspects as sites for contract law scholarship and comparative analysis. Explorations of how and why contract law varies from one environment to another can shed a great deal of light on empirical assumptions and prevailing normative and explanatory theories. At the very least, this kind of inquiry can help address the question of whether developing countries are best served by rules of contract law that diverge from those which are suitable for developed countries.[11] We show that analysis of innovations in developing countries can also illuminate how contract law might respond to problems that affect a broader range of countries.

As inequality becomes an increasingly pressing problem around the world, deviations from contract law orthodoxy in developed countries become more plausible. In fact, the highly explicit instances of heterodoxy in the developing world draw attention to the significant—if less salient and often downplayed—elements of heterodoxy in the contract laws of the United States and European jurisdictions. In the real-world operation of different legal systems, the distinction between contract law orthodoxy and heterodoxy is a continuum rather than a dichotomy. Orthodoxy is not, contrary to frequent assumptions, the inevitable or universal "end of history" for contract law.[12] Mounting inequality raises the prospect of public policy interventions

11. The existing literature on contract law has considered a variety of reasons besides economic inequality why contract law in developed and developing countries ought to diverge. *See generally* Marcel Fontaine, *Law Harmonization and Local Specificities – A Case Study: OHADA and the Law of Contracts*, 18 UNIF. L. REV. 50 (2013) (surveying views on whether contract law in West and Central African countries ought to diverge from foreign models to reflect factors such as the prevalence of informality and reliance on customary law). The extent to which economic inequality justifies this kind of divergence has been profitably explored in the literature on corporate and antitrust law. *See, e.g.*, *How Universal is the Corporate Form?*, *supra* note 10, at 7 (suggesting that institutional weaknesses and inequality have led to the weakening of the core legal elements of the corporate form in Brazil); Michal S. Gal & Eleanor M. Fox, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, *in* THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW 319–21 (Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox & David J. Gerber eds., 2015) (listing inequality in developing countries as a factor that should influence the design of competition law regimes).

12. *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (applying Francis Fukuyama's thesis to predict convergence in corporate law worldwide to the narrow goal of shareholder protection). Although less explicitly, contract law scholars have also assumed that orthodoxy is the inexorable end state for the field. *See* Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 378 (2004) (arguing for his preferred approach to interpretation of contractual obligations on the grounds that it will satisfy preferences of contracting parties and maximize social benefits). Admittedly, history has challenged the end of

through contract law in all jurisdictions—regardless of whether one believes they constitute clever remedies or misguided populist responses.

Before proceeding, two caveats are in order regarding the scope of the analysis that follows. First, our analysis leaves out agreements governed by labor and employment law. In contrast to prevailing assumptions of similarities in general contract laws, scholars have documented significant cross-country variations in the law of employment agreements.[13] It is widely accepted that labor and employment law influence both efficiency and the distribution of wealth in society and are used as instruments for addressing poverty and inequality in some developing countries.[14] Labor and employment law feature prominently in proposals to focus on "predistribution"—that is, mechanisms that shape the distribution of income and wealth prior to taxes and transfers.[15] Excluding employment agreements from the scope of this Article likely understates the degree of contract law heterodoxy in developing countries to a significant extent.

Second, contract law heterodoxy is not a unitary phenomenon. Just as we define contract law orthodoxy broadly enough to encompass distinct (and conflicting) normative goals, contract law heterodoxy is used as an expansive category that covers different strategies to address diverse and potentially conflicting conceptions of inequality. Heterodox approaches may be more or

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history thesis for corporate law, as the field has increasingly addressed a broader set of public policy objectives, including the tackling of inequality. *See, e.g.*, Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 970–74 (2020) [hereinafter *Controlling Shareholders in the Twenty-First Century*].

13. *See generally, e.g.*, Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?* 41 L. & SOC'Y REV. 865 (2007) (explaining variation in labor laws across jurisdictions by reference to the timing and nature of industrialization); Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Regulation of Labor*, 119 Q.J. ECON. 1339 (2004) (documenting variations in labor laws across countries and arguing that they can be explained by legal origins); VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001) (describing variations across developed economies in firms' relationships with suppliers of labor and capital).

14. *See generally* Simon Deakin, *The Contribution of Labour Law to Economic and Human Development*, *in* THE IDEA OF LABOUR LAW 156 (Guy Davidov & Brian Langille eds., 2011) (summarizing ways in which labor law can influence efficiency and economic growth but also reflect contingent distributive compromises, in both developed and developing countries); NAT'L BUREAU ECON. RSCH., LAW AND EMPLOYMENT: LESSONS FROM LATIN AMERICA AND THE CARIBBEAN (James J. Heckman & Carmen Pagés eds., 2004) (arguing that rigid labor laws in Latin America increase inequality).

15. *See The Politics of Predistribution: Jacob Hacker Interviewed by Ben Jackson and Martin O'Neill*, 21 RENEWAL 54, 56 (2013) [hereinafter *Hacker*]. Thomas Piketty and coauthors have found that differences in pre-tax income inequality rather than differences in redistribution through taxes and transfers, account for the lower levels of inequality in France compared to the United States. *See* Antoine Bozio, Bertrand Garbinti, Malka Guillot, Jonathan Goupille-Lebret & Thomas Piketty, *Predistribution vs. Redistribution: Evidence from France and the U.S.*, 2–5 (Ctr. for Rsch. in Econ. & Stat., Working Paper No. 2020-24, 2020), http://crest.science/RePEc/wpstorage/2020-24.pdf [https://perma.cc/6946-6G7L].

less tailored to the circumstances of the particular contract parties, or instead operate based on untailored (categorical) assumptions about the majority of similar cases.[16] Contract law heterodoxy may focus on factors such as income, wealth, ability, capabilities, opportunity, poverty, exclusion, race, gender, or historical injustice—and these are only a few of the possible dimensions. While we focus on how contract law heterodoxy in South Africa, Brazil, and Colombia differs from contract law orthodoxy in the developed world, the case studies reveal "varieties of heterodoxy," rather than a single monolithic approach.[17]

The remainder of this Article is organized as follows. Part I focuses on contract law orthodoxy. It begins with the definition of orthodoxy as the rejection of distributive objectives in contract law. It then describes the scholarly consensus that U.S. common law of contracts is overwhelmingly orthodox, identifies the rare examples of heterodoxy in U.S. contract law, and discusses the comparatively limited evidence of heterodoxy in the contract law of leading jurisdictions in continental Europe. Part II presents more robust examples of contract law heterodoxy, drawing upon cases from South Africa, Brazil, and Colombia. Part III offers a theoretical account to explain the observed divergence. The first Section begins by reviewing the arguments typically used to justify contract law orthodoxy. It then posits that the strength of arguments in favor of orthodoxy varies depending on underlying economic conditions, levels of state capacity, and conceptions of the judicial role. Even if there are good reasons for caution about the promise of contract law heterodoxy in reducing inequality, we conjecture that rising global wealth disparities and other forms of convergence between developed and developing societies will stimulate a corresponding greater interest in heterodox approaches to contract law in developed countries.

II. CONTRACT LAW ORTHODOXY

A. DEFINING CONTRACT LAW ORTHODOXY

Although there are profound disagreements about the aims and purposes of contract law, the orthodox view is that contract law generally is not and should not be concerned with the distribution of wealth in society.[18] Liberals

16. *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (detailing the classical distinction between tailored and untailored default rules in contract law).

17. For a related analysis of different formulations of contract regimes inspired by social justice in the European context, see Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L.J. 712, 713 (2004) ("The operationalisation of the welfarist approach on the concrete level of legal rules is not self-evident, as various visions of social justice may justify quite different results."). We leave it to future work to explore in greater depth the contours and implications of the different varieties of contract law heterodoxy.

18. Hugh Collins, *Distributive Justice Through Contracts*, 45 CURRENT LEGAL PROBS. 49, 49 (1992) ("The general view seems to be that the law of contract does not embody as one of its

and libertarians argue that contract law should instead be motivated by the value of individual autonomy, i.e., the value of allowing individuals to make the momentous decision to bind themselves legally or, more broadly, by making it possible for them to pursue their own conceptions of the good in collaboration with others.[19] Law and economics scholars argue that contract law should be designed to promote efficiency, primarily by facilitating mutually beneficial (Pareto-efficient) exchanges.[20] Finally, scholars writing in the Aristotelian tradition focus on how contract law can help to preserve the existing distribution of wealth—which is presumed to be just—by promoting equality in exchange, which entails, among other things, ensuring that the terms of contracts are substantively fair.[21]

Although there is a fair amount of tension between these different intellectual traditions, they all view the pursuit of distributive objectives as beyond the domain of contract law, at least as that body of law is traditionally defined by teachers and scholars. Distributive considerations appear prominently in anti-discrimination law and bankruptcy law, which clearly bear upon the enforcement of contracts. But those bodies of law are traditionally understood to fall outside the bounds of contract law.[22] Teachers and scholars also tend

aims the achievement of a particular pattern of distributive justice."); Robert E. Scott, *A Joint Maximization Theory of Contract and Regulation*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 22, 22 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) ("The contemporary American common law of contracts has largely shed the varied purposes animating its English ancestor, including the pluralist values derived from equity's ex post perspective, in favor of the singular purpose of vindicating ex ante contractual intent."); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1062–63 (2016) (arguing, with extensive citations to supporting literature, that Kaplow and Shavell's argument favoring the fiscal system as opposed to other aspects of the law to achieve distributive goals represents the conventional wisdom among legal economists); Mark Tushnet, *The Inadequacy of Judicial Enforcement of Constitutional Rights Provisions to Rectify Economic Inequality, and the Inevitability of the Attempt*, *in* JUDICIAL REVIEW: PROCESS, POWER AND PROBLEMS 13, 22 (Salman Khurshid, Sidharth Luthra, Lokendra Malik & Shruti Bedi eds., 2020) (claiming that courts are likely to be quite reluctant to use constitutional equality doctrines to reshape private law rules). For a different, though now somewhat dated, assessment, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 586–88 (1982) (arguing that distributive motives are considered less acceptable than efficiency motives but more acceptable than paternalism).

19. For a survey of autonomy-based theories of contract law see, HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS, 19–47 (2017). The literature they survey includes ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); and CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (2d ed. 2015); *see also* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 453 (2019) (claiming that his theory of contract law recognizes parties' "moral power to assert their sheer independence" in relation to others and "to have and to pursue a determinate conception of their good").

20. MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 15–17 (1993).

21. *See generally* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981) (plotting the historical development of the Aristotelian theory of exchange and applying it to contract law).

22. On the boundaries of contract law, see *Comparative Contract Law and Development*, *supra* note 7, at 1735 ("[W]henever regulation of contractual relations becomes too consequential, the

to define the domain of contract law in ways that exclude the statutory schemes that govern specific types of contracts, turning the field into a "law of leftovers."[23] Those statutory schemes may well contain under-appreciated amounts of heterodoxy.[24] In any event, the dominant view, however accurate, is that distribution does not, and should not, influence the core contract law doctrines of general applicability concerning which promises are enforceable, how to determine when promises have not been performed and therefore need to be enforced, or the remedies available to the party seeking enforcement.[25]

It is worth noting that both contract law orthodoxy and heterodoxy acknowledge that contract law affects distributive outcomes. The difference is that the distributive impact is a goal for contract law heterodoxy and merely a product of other goals for contract law orthodoxy. Appreciating the distributive effects of either form of contract law is key, and the reason why we use the term distribution—in lieu of *re*distribution—throughout this Article.

Admittedly, there are points of contact between the orthodox and heterodox approaches when different objectives overlap. For instance, systemic disadvantage may be correlated with the presence of factors that undermine the promotion of autonomy, efficiency, or equality in exchange—factors such as coercion, imperfect information, or substantive unfairness. Within the orthodox position, examples of judicial solicitude for disadvantaged groups may be explained by concern about whether enforcement will promote autonomy or efficiency or equality in exchange, rather than about systemic disadvantage in its own right. It can often be difficult, in practice, to ascertain whether a certain exception to freedom of contract for the benefit of a disadvantaged party is attributable to orthodox or distributive considerations. Orthodox rhetoric may mask distributive objectives, and vice versa.

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field is no longer called contract law, but something else, such as labor law, financial regulation, consumer protection, insurance law, landlord-tenant law, franchise law, etc."). For an exception to the general tendency to exclude anti-discrimination law from the scope of contract law, see TREBILCOCK, *supra* note 20, at 200–04 (discussing distributive justice as a normative basis for anti-discrimination law in the context of a book on the normative underpinnings of contract law).

23. The expression comes from LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 193 (1965). It relates to the frequent tendency in the common law to characterize related fields of highly regulated contracts as something other than contract law. The effect of this artificial compartmentalization is to downplay the actual degree of heterodoxy in U.S. law and beyond. *See id.* at 190–94.

24. We leave it to future work to explore whether a broader focus on statutory schemes governing contract relationships would reveal that heterodoxy is more prevalent in the United States and Europe than suggested by standard orthodox accounts.

25. For discussion of the historical emergence of this view in U.S. law, see Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor'*, 102 GEO. L.J. 1383, 1436–37 (2014) (discussing how, by the 1970s, the concerns of the poor were addressed through antidiscrimination laws and statutory disclosure requirements while unconscionability was no longer characterized as part of the "law of the poor" and was reconceptualized as a response to defects in reasoning).

Moreover, it is important to recognize that the same tenets of contract law orthodoxy may lead to distinct patterns of adjudication owing to differences in factual circumstances. For instance, greater prevalence of inequality and market concentration in developing jurisdictions could prompt more frequent findings of unconscionability for the benefit of the weaker party even under orthodox contract doctrines. The differences in dominant fact patterns are an important, though often overlooked, element in understanding the landscape of contract adjudication in developing countries.[26] We argue, however, that there is more to the story: beyond variations in the incidence of similar doctrines across jurisdictions due to distinct fact patterns, there are noticeable differences in contract law rules and doctrines as well.[27]

In practice, a legal system may embrace orthodoxy in relation to some types of transactions but not others, or place varying amounts of weight on distributive considerations. Therefore, the distinction between what we term orthodox and heterodox approaches to contract law constitutes a spectrum rather than a binary division. As is the case in comparative law more generally, our goal here is to examine differences in emphasis between the contract laws of certain developed and developing countries rather than to identify stark contrasts.[28]

B. ORTHODOXY AND HETERODOXY IN THE UNITED STATES

The common law of contracts in the United States is overwhelmingly orthodox.[29] While there are several doctrines consistent with contract law heterodoxy in that they may be used to protect weaker parties, an orthodox reading of those doctrines is that they are triggered when the potential beneficiary is less informed or is being coerced by the opposing party, or when the transaction deviates significantly from prevailing notions of a fair bargain.[30] They do not key upon whether the person is disadvantaged relative

26. To use an example from Brazil, observers have often blamed judges' ideology for what they perceived as excessive judicial intervention in contract terms. Nevertheless, the greater level of intervention may result from the particular fact patterns before courts. *See* Bruno Meyerhof Salama, *Spread Bancário e Enforcement Contratual: Hipótese de Causalidade Reversa e Evidência Empírica*, 71 REVISTA BRASILEIRA DE ECONOMIA 111, 120–25 (2017) (arguing that extraordinarily high interest rates promote judicial intervention in banking contracts in Brazil).

27. It may also be that developed jurisdictions offer greater regulation of specific types of contracts through dedicated regulatory schemes, thereby addressing certain fact patterns and relieving pressure on contract law (as it is conventionally defined) to tackle them. *See* discussion of functional equivalence *infra* Section IV.C.1.

28. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1163 (2004) ("[T]he issue is not whether there is an absolute difference. Comparative law is the study of *relative* differences.").

29. *See supra* note 18 and accompanying text.

30. Melvin A. Eisenberg, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 206, 257 (Peter Benson ed., 2001) (arguing "the empirical basis for Kronman's positive claim that contract law presently includes rules that serve redistributive ends is inconclusive"

to society as a whole, nor do they explicitly refer to the role of contract law in promoting social justice more generally.

There are important exceptions to the prevailing orthodoxy in U.S. contract law. As far as judicial decisions are concerned, the most famous example of heterodoxy is Judge Skelly Wright's opinion in *Williams v. Walker-Thomas Furniture*.[31] That opinion endorsed the use of the doctrine of unconscionability to avoid enforcement of a sweepingly broad security agreement by a furniture store against a woman who was identified as being on public assistance and responsible for seven children.[32] Although her race was not mentioned in the opinion, it is safe to assume that the court was aware that the customer was Black, as were most of the store's other customers.[33] Judge Wright ruled that the unconscionability doctrine applies when the party seeking relief faces "an absence of meaningful choice . . . together with terms which are unreasonably favorable to the other party."[34] This language could be interpreted to reflect purely orthodox concerns about asymmetric information, coercion, and unfair exchange, and that is now the mainstream understanding of the unconscionability doctrine in the United States.[35]

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because, among other reasons, rules like the warranty of habitability can be explained by concerns about bounded rationality and externalities); *see, e.g.*, RESTATEMENT OF THE LAW CONSUMER CONTRACTS 1 (AM L. INST., Tentative Draft, 2019) (characterizing the fundamental challenge of consumer contract law—including the doctrine of unconscionability—as protection of consumers who lack information about the terms of agreements).

31. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965).

32. *Id.*

33. For confirmation that Ora Williams was African American see Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 926 n.208 (1997). The store was located in a neighborhood in which "over ninety percent of the residents were [B]lack and over forty percent of families lived in poverty." Fleming, *supra* note 25, at 1393. Fleming also notes that Judge Wright was well aware of the fact that the majority of the urban poor at the time were Black. *Id.* at 1386 n.13.

34. *Williams*, 350 F.2d at 449.

35. This understanding of unconscionability is reflected clearly in the Uniform Consumer Credit Code which encourages courts to protect poor consumers, but only if their poverty makes them vulnerable to coercion or unlikely to benefit from the transaction (either because they cannot afford to keep up with their payments or because they have no need to purchase luxury goods on credit). UNIF. CONSUMER CREDIT CODE § 5.108, cmt. at 174–79 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1974) (describing "a sale of goods to a low income consumer without expectation of payment but with the expectation of repossessing the goods sold and reselling them at a profit"; "the sale of two expensive vacuum cleaners to two poor families sharing the same apartment and one rug"; and "threatening that the creditor will have the consumer thrown in jail and her welfare checks stopped if the debt is not paid" as examples of transactions that are unconscionable because the creditor knows "there is no reasonable probability of payment," that the consumer will not benefit from the property transferred, or that the creditor has "us[ed] fraudulent . . . representations such as a communication . . . approved by a government, governmental agency, or attorney at law"). On the modern scholarly understanding of unconscionability, see Fleming, *supra* note 25, at 1386 (arguing that unconscionability "is rarely invoked to protect low-income borrowers" today), and RESTATEMENT OF THE LAW CONSUMER CONTRACTS 1 (AM. L. INST., Tentative Draft, 2019) (characterizing the fundamental challenge of consumer contract law—including the doctrine of unconscionability—as protection of consumers

However, in extrajudicial writings, Wright characterized the *Williams* decision as part of the "law of the poor," a decidedly heterodox label.[36]

The "law of the poor" has not featured prominently in judicial decisions for contracts cases in the United States—with the important exception of the implied warranty of habitability in residential landlord-tenant law.[37] One of the leading decisions in that field is another opinion authored by Judge Skelly Wright, *Javins v. First National Realty*.[38] Judge Wright announced that the decision was motivated in part by a desire to give effect to the expectations of the typical tenant, and in part by concerns about inequality in bargaining power arising from the use of standardized contracts.[39] Attention to these factors is consistent with orthodox concerns about autonomy, efficiency, and justice in exchange. But Judge Wright said that another compelling reason to adopt the implied warranty was to address the inequality in bargaining power caused specifically by "racial and class discrimination."[40] He made it clear that the decision was motivated by systemic concerns, saying "that poor housing [was] detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum."[41] And in private correspondence Judge Wright described the *Javins* decision as part of an effort "to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital."[42] Unlike *Williams v. Walker-Thomas Furniture*, *Javins* was not an isolated decision. The implied warranty of habitability may be the only lasting example of heterodoxy in the U.S. common law of contracts.

Distributive objectives have motivated legislative interventions in certain aspects of U.S. contract law. For instance, in most states implied warranties of repair and habitability in residential leases are codified in statutes, many of

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who lack information about the terms of agreements). Whether interpreted in orthodox or heterodox terms, the conventional view is that the actual application of the doctrine of unconscionability is exceedingly rare. There is emerging evidence, however, of a resurgence in the use of unconscionability by courts. *See, e.g.*, Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 967 (2019) (challenging the conventional view by documenting how "the doctrine has quietly flourished in courts in recent years").

36. *See* Fleming, *supra* note 25, at 1385 n.1 (citing Letter from Hon. J. Skelly Wright to William E. Shipley, The Lawyers Cooperative Publ'n Co. (July 12, 1967) (J. Skelly Wright Papers, 1962–1987, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress)).

37. *See id.* at 1386, 1389.

38. *See generally* Javins v. First Nat'l Realty Corp., 428 F.2d. 1071 (D.C. Cir. 1970) (holding that the warranty of habitability is implied by operation of law through the Housing Regulations for the District of Columbia).

39. *Id.* at 1075–77.

40. *Id.* at 1079.

41. *Id.* at 1079–80.

42. Letter from Hon. J. Skelly Wright to Professor Edward H. Rabin, U.C. Davis Sch. Law (Oct. 14, 1982), *in* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984).

which preceded judicial recognition of such a warranty.[43] Like the decision in *Javins*, those legislative initiatives were motivated at least in part by concerns about poverty and inequality.[44]

There are notable historical examples of legislative interventions enacted in times of economic crisis that have fairly obvious distributive motivations. For instance, there is a long history of U.S. states passing laws that impose moratoria on enforcement of creditors' rights, especially during economic downturns and particularly for the benefit of farmers.[45] The U.S. Supreme Court held that these moratoria do not necessarily violate the U.S. Constitution's Contract clause, which prohibits states from passing laws "impairing the obligation of contracts."[46] It seems reasonably clear that the Contract clause was designed to prevent laws that alter contracts for distributive purposes.[47] The Court, however, upheld the moratoria by arguing that "the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society."[48] The Court endorsed the Supreme Court of Minnesota's finding that "the economic emergency which threatened 'the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence' was a 'potent cause' for the enactment of the statute."[49]

There are, of course, also examples of U.S. legislation pertaining to contracts that have had significant distributive effects, even if that was not their ostensible purpose.[50] For instance, the Credit Card Accountability Responsibility,

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43. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 523–24 (1982) ("In many jurisdictions, statutory change preceded and often precipitated major case-law changes . . . . [O]f at least forty jurisdictions that have accorded new private rights and remedies to tenants whose dwellings do not meet minimum standards of habitability, thirty-eight have now done so by statute.").

44. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 402–04 (2011) (describing redistributive objectives of the tenants' rights movement).

45. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 229–30 (4th ed. 2019); *see generally* Lee J. Alston, *Farm Foreclosure Moratorium Legislation: A Lesson from the Past*, 74 AM. ECON. REV. 445 (1984) (discussing previous legislative attempts at mitigating farm foreclosures).

46. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437–39 (1934) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)) (considering U.S. CONST. art. I, § 10, cl. 1).

47. *See generally* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L. Q. 525 (1987) (arguing based on historical, theoretical, and practical grounds that "the Contract Clause prohibits all retrospective, redistributive legislation which violates vested contractual rights by transferring all or part of the benefit of a bargain from one contracting party to another"); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (arguing that the theory underlying the structure of the Constitution favors interpreting the Contracts Clause to protect against abuses by state governments).

48. *Home Bldg. & Loan Ass'n*, 290 U.S. at 445.

49. *Id.*

50. *See generally* Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211 (2019) (arguing that consumer law can and should be designed to have significant distributive effects).

and Disclosure Act of 2009 ("CARD Act") introduced new disclosure requirements and restricted credit card issuers' ability to raise interest rates and impose certain fees. One study estimates that the CARD Act saved consumers $11.9 billion per year in the first two years after it took effect.[51] The same study also found that consumers with low credit scores saw relatively large declines in fees.[52]

In recent years, legal scholars in the United States have begun to challenge the exclusion of distributive considerations from private law in general and contract law in particular.[53] These works go beyond previous scholarship that questioned whether, as a descriptive matter, U.S. contract law was completely insensitive to distributive considerations.[54] The more recent scholarship represents a revival of normative debates that flourished during the 1970s and 1980s, but subsequently died down along with interest in developing contract law as the "law of the poor."[55]

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51. Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards*, 130 Q.J. ECON. 111, 114 (2015).

52. *Id.* (summarizing a finding that fees charged to borrowers with FICO scores below 660 declined by 5.3 percent of average daily balances as compared to 0.5 percent decline for borrowers with higher FICO scores).

53. *See* Fennell & McAdams, *supra* note 18, at 1128–29; Van Loo, *supra* note 50, at 260; Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 125–30, 135–41 (2008) (suggesting that courts should refuse to enforce contracts where the effect would be to allow one person to exacerbate or exploit distributive injustice by harming a disadvantaged person); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 396–97 (2006) (arguing that redistributive rules of private law involve in-kind distribution of objectively desirable goods that people tend to undervalue, and through a process which affirms the beneficiary's entitlement to the goods and so is an important complement to redistribution of income through fiscal policy); Zhong Xing Tan, *Where the Action Is: Macro and Micro Justice in Contract Law*, 83 MOD. L. REV. 725, 728 (2020) (defending "a 'third way' between 'all or nothing' perspectives on distributive justice in contract law"). For an argument that private law ought to take poverty into account for noninstrumental reasons, see generally Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice (Nov. 3, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637034 [https://perma.cc/E854-RR2S] (arguing that poverty, through its impact on transactional freedom and equal standing, requires accommodation by private law in ways that differ from the requirements of distributive justice).

54. Kennedy, *supra* note 18, at 586 ("The liberals have embraced, in a qualified and ambivalent way, the distributive motive, while the conservatives, with equal qualifications and ambivalence, tend to reject it."). Kennedy and other scholars have also argued that adopting a particular interpretation of contract law often means at least tacitly endorsing a set of distributive outcomes. *Id.* at 609; Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 625–27 (1983) (noting that contract law doctrines determine the extent to which inequalities generated by markets are corrected as opposed to being allowed to accumulate); Collins, *supra* note 18, at 67 ("[T]he choice between different interpretations of the law must depend upon unacknowledged political choices concerning distributive outcomes."). The idea that these sorts of distributional implications are generally "unacknowledged" is consistent with contract law orthodoxy.

55. Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 510–11 (1980); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes,*

Recent contributions to the literature include direct challenges to the orthodox view that fiscal policy is the most effective and legitimate way to achieve distributive objectives in the United States. Zachary Liscow has argued that the general public's innate resistance to redistribution through fiscal policy juxtaposed with their relative receptiveness to distribution through other policy measures necessitates abandoning the orthodox approach of relying exclusively on fiscal policy to achieve redistribution.[56] In addition, in an important series of articles, Helen Hershkoff identifies theoretical and doctrinal grounds for interpreting the common law in light of positive socioeconomic rights set out in state constitutions.[57] These recent heterodox proposals have so far had little impact on U.S. contract doctrine, though they may well gain ground in the future. They are part of a growing and increasingly mainstream scholarly trend of seeking to enlarge the efficiency and distributive objectives to be achieved by any given area of law, a phenomenon that is particularly conspicuous in new economic accounts of environmental law, health and safety regulation, corporate law, antitrust law, and other fields.[58]

Housing Subsidies and Income Redistribution Policy, 80 YALE L.J. 1093, 1197 (1971). There is robust earlier literature on the role of distributive considerations in the law of employment agreements, but, as noted, those are beyond the scope of this Article. *See generally* BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (2001) (examining the first law and economics movement from the 1890s to 1930s). The first law and economics movement beginning in the 1880s and spanning the Progressive Era, unlike its Chicago School successor, paid significant attention to the relationship between law and distribution of wealth. Although the first law and economics movement focused primarily on *legislation*, rather than common law rules, it also focused on private law areas such as contract and property. For a review of relevant works, see Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 993 (1990) (examining the first law and economics movement's "nature and influence on American legal and economic thought, and compar[ing] that movement with the law & economics of today"). For classical works in this tradition, see generally RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH (1914) (explaining the relationship between property and contract and the distribution of wealth); JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) (focusing on an evolutionary and behavioral theory of value); and Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (examining the role of governmental and private coercion in contract law).

56. Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 556–57 (2022).

57. Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1522 (2010); *see* Helen Hershkoff, *Privatizing Public Rights: Common Law and State Action in the United States*, *in* BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS 129 (Tsvi Kahana & Anat Scolnicov, eds., 2016); Helen Hershkoff, Lecture, *The Private Life of Public Rights: State Constitutions and the Common Law*, 88 N.Y.U. L. REV. ONLINE 1, 4–5 (2013).

58. For a discussion of the mounting challenges to the traditionally "modular" approach to law and economics, according to which each area of law should pursue only one efficiency-related objective, see *Controlling Shareholders in the Twenty-First Century*, *supra* note 12, at 969–74. Ricky Revesz has argued that the tax system is ill-suited to redistributing the risk of nonmonetary harm and so environmental law and health and safety regulation should directly account for distributional consequences. *See* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1489 (2018). For examples of works describing or calling for broader efficiency and

C. ORTHODOXY AND HETERODOXY IN CONTINENTAL EUROPE

We now turn to continental Europe, another setting in which contract law orthodoxy largely prevails. The well-known differences between consumer contract law in the European Union and in the United States can be interpreted as divergent responses to concerns about consumer behavioral biases or inequality of exchange. To that extent, both jurisdictions are merely pursuing different versions of contract law orthodoxy.[59] Various continental European countries recognize horizontal effects of fundamental rights on private relations, as does the Court of Justice of the European Union (CJEU).[60] However, the degree to which constitutionalization in continental European contract law is used to achieve distributive objectives remains relatively circumscribed in comparison to the developing countries we discuss in the next Part.

The closest instance of a heterodox approach to contract law is the famous 1993 decision by the German Constitutional Court (*Bundesverfassungsgericht*) in the *Bürgschaft* case, which became the poster child for the consideration of fundamental rights in the interpretation and enforcement of private

distributive objectives in corporate law, see generally Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 J. MGMT. STUD. 887 (2021) (maintaining that "the traditional separation between economic efficiency and distribution . . . is untenable" given regulatory failures, environmental degradation and inequality); Jens Dammann & Horst Eidenmueller, *Codetermination and the Democratic State* 1 (Eur. Corp. Governance Inst., Law Working Paper No. 536/2020, 2021) (defending the promise of employee board representation to protect democratic institutions); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 270 (2017) (arguing that companies should seek to reduce externalities that are not separable from their activities given that the government cannot lead to full internalization of externalities through laws and regulations); Luca Enriques, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 79, 93–100 (3d ed. 2017) (documenting the visible resurgence in the use of corporate law to tackle broader social and economic problems in recent years); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016) (describing uses of corporate governance mechanisms to address problems as varied as systemic risk, corruption, economic development, fraud, and inequality). For examples from antitrust law, see generally Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018) (advocating for the use of antitrust law to combat labor market power and increase worker welfare); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (arguing that antitrust law should be used to fight the political dangers ensuing from economic concentration and resulting inequality); Lee Anne Fennell, *Remixing Resources*, 38 YALE J. ON REGUL. 589 (2021) (arguing that property law should account for both efficiency and distributive aims).

59. For a critical appraisal of European contract law from a mainstream U.S. law-and-economics perspective, see, for example, Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT. L. REV. 109, 109–10 (2013).

60. For a discussion of the latter's caselaw, including regarding the prohibition of gender-based differentiation of insurance premiums, see Olha O. Cherednychenko & Norbert Reich, *The Constitutionalization of European Private Law: Gateways, Constraints and Challenges*, 23 EUR. REV. PRIV. L. 797, 808 (2015).

contracts.[61] The case involved the provision of a hefty personal guarantee (surety) by a twenty-one-year-old daughter for the bank's extension of credit to her father. When she entered into the agreement, the daughter, who lacked either a professional education or a full-time job, earned 1,150 DM per month in a fish factory. By the time her father defaulted and the bank sued her for 160,000 DM, she was a single mother on social security. Her appeal specifically noted that her past income was insufficient to even pay the interest due on the loan, so that "one cannot consider that this present relation can ever be terminated."[62] Therefore, she argued, "courts should deny recognition to contracts that so strongly reduce the freedom of action of one of the contracting parties that she can no longer live with dignity."[63]

In response to these claims, lower courts ruled that the guarantee agreement was contrary to good morals or resulted from a violation of the bank's duty of good faith in having failed to inform its counterparty in the precontractual phase.[64] The higher federal court (*Bundesgerichtshof*), however, found that the foreseeable outcome of overindebtedness did not constitute sufficient grounds to nullify the guarantee as contrary to good morals. Ultimately, the German constitutional court reversed, finding that the enforcement of an agreement characterized by a significant imbalance in bargaining power and resulting in such harsh consequences for the weaker party violated the constitutional rights to human dignity and free development of personality, as well as the principle of the social State (*Sozialstaatsprinzip*).[65] While the court's reasoning in the *Bürgschaft* decision stands out for its appeal to the social State and for its concern about the weaker party, the same result of full discharge would occur in other jurisdictions through different doctrinal routes. In the United States, the daughter could seek a discharge in bankruptcy. In the United Kingdom or the Netherlands, similar results could be attained by citing the bank's duties to inform a counterparty of the risks of providing a surety.[66]

In 1994, just one year after the *Bürgschaft*'s opinion, the Italian Supreme Court (*Corte di Cassazione*) also appealed to constitutional principles in deciding a contract law dispute between a water bottle company and the municipality

61. The description of the case comes from *The Role of the State in Contract Law*, *supra* note 5, at 179–80.

62. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 19, 1993, 89 ENTESCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 220–21 (1994) (Ger.) (translated by author).

63. *Id.* at 220 (translated by author).

64. In requesting the guarantee, the bank's employee apparently told her: "Would you just sign this here, please? This won't make you enter into any important obligation; I need this for my files." Olha Cherednychenko, *The Constitutionalization of Contract Law: Something New Under the Sun?*, 8 ELEC. J. COMPAR. L. 1, 3 (2004) (translating BVerfGE 89, 214 (Ger.)).

65. BVerfGE 89, 232 (Ger.).

66. *The Role of the State in Contract Law*, *supra* note 5, at 180–81.

of Fiuggi.[67] The rent the company owed to the municipality was tied to the sale price of its bottles. The bottle company had frozen the price of its bottles since 1983, despite a currency devaluation and even though its buyers—which were members of the same corporate group—had increased the retail prices of mineral water several times.[68] The *Fiuggi* court found that the company's conduct violated the duty of solidarity enshrined in Article 2 of the Italian Constitution.[69]

A prominent 1996 decision by the French *Cour de cassation* invoked fundamental rights to adjudicate a landlord-tenant dispute.[70] The agreement in question between the tenant and the city of Paris provided for the exclusive use by the tenant and her two children. However, the tenant also accommodated her children's father as well as her sister, leading to notice of termination by the city. The Court invalidated the termination as a violation of the right to private and family life recognized by Article 8 of the European Convention of Human Rights.[71]

As noted by Aurelia Colombi Ciacchi, the *Bürgschaft*, *Fiuggi*, and French housing cases illustrate the potential mismatch between rhetoric and outcomes with respect to social objectives.[72] The German and French opinions relied primarily on liberty rights to achieve quintessential social objectives of helping a poor single mother get rid of an immense debt to a big bank and maintaining housing for a large family. By contrast, the Italian court appealed to social solidarity to achieve a decision in favor of a municipality (not necessarily the weaker party) that would lead to an increase in water prices to consumers.[73] Importantly, the European cases may also be interpreted as attempts to address orthodox concerns about inequality of exchange rather than heterodox considerations of social inequality more generally. At any rate, while noteworthy and widely cited, these cases from the 1990s failed to spur a revolution in contract law toward greater attention to social justice and inequality.

Although we do not see significant deviation from contract law orthodoxy in either continental Europe or the United States, there is greater support for heterodoxy in the European discourse about contract law. On balance, continental European scholars appear to be more likely than their U.S. or UK

67. For a description of the case, see Aurelia Colombi Ciacchi, *Social Rights, Human Dignity and European Contract Law*, *in* CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW 149, 153 (Stefan Grundmann ed., 2008) (citing Cass. 20 aprile 1994, n. 3775, Giust. Civ. 2005, I. 2169 (It.)).

68. *Id.*

69. *Id.*

70. *Id.* at 154 (citing Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 3e civ., March 6, 1996, 93-11.113, Bull. 1996, Civ. III, No. 60, 41 (Fr.)).

71. *Id.*

72. *Id.* at 153.

73. *See id.* at 153–54.

counterparts to defend the role of contract law in the pursuit of social justice. It is common in continental Europe to regard contract law as striking a balance between the fundamental values of autonomy and solidarity,[74] a framing that differs from U.S. scholars' primary focus on efficiency, autonomy, and fairness in exchange.[75] Several jurists who view social justice as a central and traditional objective of contract law launched a manifesto against the European Commission's harmonization initiatives precisely because of its narrow focus on market integration to the detriment of social justice, including the goal of "guarantee[ing] that the rules of the market system do not permit exploitation and social exclusion."[76] At the same time, although contested as too narrow, one influential scholarly view maintains that state interventions to realize social rights should be limited to "extreme cases."[77]

D. THE IMPACT OF THE COVID-19 PANDEMIC

The COVID-19 pandemic threatens to exacerbate inequality in most countries.[78] The pandemic prompted not only moratoria on evictions of residential tenants in various U.S. cities and states, but also new manifestations of contract law heterodoxy in Europe. The German statute "to mitigate the consequences of the Coronavirus crisis" allows consumers to refuse payment of essential continuing obligations if they would not be able to pay for the service without risking either their own subsistence or that of their dependents.[79] A temporary right to refuse performance is also extended to microbusinesses, provided that its exercise does not "endanger the creditor's [] subsistence[,] . . . the reasonable subsistence of [the creditor's] dependents or the economic basis of [the] business" (in which case the debtor may seek to terminate the contract).[80] In linking contract rights to the particular economic situation of the parties—and not to the fairness of the exchange

74. *See, e.g.*, Martijn Hesselink, *The Horizontal Effects of Social Rights in European Contract Law*, 1 EUROPA E DIRITTO PRIVATO 1, 11 (2003) ("Today, it is quite broadly accepted that contract law is best understood as being based on two fundamental - and conflicting - ideas, i.e. autonomy and solidarity.").

75. For an account of one occasion on which United States and European scholars explicitly articulated divergent views on the purposes of contract law, see generally Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 AM. J. COMPAR. L. 479 (2013). Caruso notes that "while still vigorously contested, [the social justice stance] has gained sufficient ground in EU politics to make it difficult for the Commission to enact private-law instruments that would exclusively pursue the goal of market efficiency." *Id.* at 487.

76. Study Grp. on Soc. Just. in Eur. Priv. L., *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653, 664 (2004).

77. *See* Hesselink, *supra* note 74, at 12 (referencing the work of the scholar Canaris).

78. IMF, *A Long and Difficult Ascent*, World Economic Outlook 12–14 (Oct. 2020).

79. For a description of the German statute, see Nico Brunotte & Lennart Elsaß, *The German Bundestag Resolves Amendments to Contract Law to Mitigate the Consequences of the Coronavirus Crisis*, DLA PIPER (May 6, 2020), https://mse.dlapiper.com/post/102g58v/the-german-bundestag-resolves-amendments-to-contract-law-to-mitigate-the-conseque [https://perma.cc/4SL9-G2F9].

80. *Id.*

—this special German legislation reflects a new manifestation of contract law heterodoxy in a developed jurisdiction, even if it is only a temporary response to a time of significant economic crisis and dislocation. We now turn to the description of contract law heterodoxy in developing countries, contexts where economic crisis, dislocation, and inequality are particularly commonplace.

III. CONTRACT LAW HETERODOXY IN DEVELOPING COUNTRIES

In this Part we describe instances in which contract law in three developing countries—South Africa, Brazil, and Colombia—diverges from orthodoxy. Each example involves a doctrine formulated by one of the apex courts of the country which covers an economically important class of transactions. None of our examples involve the law of employment agreements because, as noted above, that is one of the few areas of contract law where scholars have already documented economically significant divergence.[81] Still, our collection of illustrations is eclectic. The contracts in dispute range from agreements for purchase and sale of residential real estate to insurance contracts to agreements for the provision of water. The different examples reveal that contract law heterodoxy, that is endorsement of contract doctrines which embrace distributional goals, has made important inroads into the legal systems of these three countries. They are not, however, intended to suggest that contract law heterodoxy is dominant in any of these legal systems. In fact, even in the areas of law that we canvass, we document tension and conflict between proponents of orthodox and heterodox approaches.

A. *SOUTH AFRICA*

South Africa is perhaps the leading example of a jurisdiction which has recently taken a heterodox approach to the relationship between contract law and inequality.[82] Much of the change has been driven by the incorporation of constitutional principles into contract law. This kind of horizontal application

81. *See supra* notes 13–15 and accompanying text.

82. This is a recent development. As late as 2010, progressive commentators criticized the South African courts for their unduly orthodox approach to contract law. *See* Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. ON HUM. RTS. 403, 468–81 (2010) (criticizing "the freedom-of-contract cases"). The idea of South Africa being a pioneer in this regard may be surprising to economists familiar with the "law and finance" literature, because the seminal contribution to that literature classifies South Africa as a common law jurisdiction and argues for an association between common law origin and relatively low levels of state intervention in markets. *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 288 (2008). Traditional comparativists, however, typically categorize South Africa as a mixed legal system combining elements of English common law, Dutch law, and local customary law. *See, e.g.*, SMITS, *supra* note 4, at 151–86; Jacques Du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 474, 477 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

of constitutional principles is expressly required by the South African Constitution which states: "[W]hen developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[83]

In a prominent series of decisions, the Constitutional Court of South Africa has taken the position that both principles of contract law and decisions about whether to enforce specific contractual terms must conform to constitutional values,[84] which might entail departing from "colonial legal tradition represented by English law, Roman law and Roman Dutch law."[85] Among those constitutional values is "*ubuntu*," an African concept which "emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.'"[86]

1. Prejudgment Interest

In *Paulsen v. Slip Knot Investments 777 Ltd.*, the Constitutional Court explicitly set out that limits on the principle of freedom of contract must be fashioned in light of socioeconomic realities that include substantial amounts of economic inequality and poverty.[87] The appeal concerned the scope of the ancient *in duplum* doctrine, a rule that limits the interest that a creditor can recover on debts in arrears to an amount equal to the principal of the debt. At issue in *Paulsen* was whether the rule applied to interest that accrued after the institution of legal proceedings but before the date of judgment (there was no dispute that interest could accrue after judgment).[88] In a 1997 decision called *Oneanate*, South Africa's Supreme Court of Appeal decided that the *in duplum* rule should be suspended during the pendency of litigation.[89]

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83. S. AFR. CONST., 1996 § 39(2).

84. *See Barkhuizen v. Napier* 2007 (5) SA 323 (CC) at para. 30 (S. Afr.) ("[T]he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights."); *Everfresh Market Virginia v. Shoprite Checkers* 2012 (1) SA 256 (CC) at para. 48 (S. Afr.) ("I accept the contention that a given principle of the common law of contract ought to be infused with constitutional values does raise a constitutional issue.").

85. *Everfresh* (1) SA at para. 23; *see id.* at para. 71 (Moseneke, J., concurring).

86. *Id.* at para. 71 (footnote omitted).

87. *See Paulsen v. Slip Knot Invs. 777 Ltd.* 2015 (3) SA 479 (CC) at para. 66 (S. Afr.) ("We need to look at South Africa's socio-economic realities. A large percentage of the providers of credit are large, established and well-resourced corporates. On the other hand, although there may be what the dissenting judgment refers to as 'stout-boned' credit consumers, it would be ignoring our country's economic reality to suggest that there is any comparison between these corporates and most credit consumers.").

88. *Id.* at para. 96 ("It is settled law that the *in duplum* rule permits interest to run anew from the date that the judgment debt is due and payable.").

89. *See Standard Bank of South Africa Ltd. v. Oneanate Invs. Ltd.* 1998 (1) SA 811 (SCA) at para. 50 (S. Afr.) ("[T]he *in duplum* rule is suspended *pendente lite* . . . ." (emphasis added)).

The debtors in *Paulsen* were sureties for a property developer that had defaulted on a debt of R12 million.[90] The loan agreement specified that interest was to accrue at the rate of three percent per month. Under the traditional *in duplum* rule, the creditor could not have a judgment for more than R24 million. Under the narrower version of the rule favored in *Oneanate*, the creditor was entitled to a judgment for R72 million.[91]

In a split decision, the Constitutional Court in *Paulsen* decided to reinstate the traditional *in duplum* rule. In the main opinion, Justice Madlanga wrote that the court in *Oneanate* misread the relevant authorities and ignored relevant public policy considerations. The overlooked considerations were the risks that modification of the rule would prejudice debtors and inhibit their constitutional right of access to the courts. Justice Madlanga reasoned that "debtors, despite a genuinely held belief that they have a valid defence, may sooner opt to settle a claim than face the potentially financially ruinous interest that would again commence to pile up once court process was served."[92]

Justice Madlanga acknowledged that there were competing policy considerations. In particular, the traditional rule would encourage debtors to prolong litigation by raising frivolous defenses or employing other delaying tactics. This might in turn raise a constitutional concern if it caused creditors to abandon claims against defaulting debtors because the value was eroded by inflation.[93] Pulling in the other direction, though, was the fact that creditors could protect themselves by charging relatively high rates of interest, avoiding lending to debtors who were bad risks, and litigating swiftly.[94] He also noted that debtors' delaying tactics could be addressed by means of summary judgment and punitive costs awards.[95] More importantly, he believed that bearing the costs of prolonged litigation would prejudice debtors more than creditors because although the Paulsens appeared to be "stout-boned commercial parties," debtors generally were more likely to be financially vulnerable.[96]

> We need to look at South Africa's socio-economic realities. A large percentage of the providers of credit are large, established and well-resourced corporates. On the other hand, although there may be what the dissenting judgment refers to as "stout-boned" credit consumers, it would be ignoring our country's economic reality to suggest that there is any comparison between these corporates and most credit consumers. To many credit consumers, who fall on the

90. *Paulsen* (3) SA at para. 2.
91. *Id.* at para. 63.
92. *Id.*
93. *Id.* at para. 65.
94. *Id.* at paras. 81–85.
95. *Id.* at para. 84.
96. *See id.* at para.135 (Cameron, J., dissenting); *id.* at para. 69 (Madlanga, J., majority opinion).

> wrong side of this country's vast capital disparities, astronomical interest may mean the difference between economic survival and complete financial ruin. While in some cases creditors may lose money to inflation during litigation, this is very unlikely to have the same catastrophic effect on the creditor compared to what the accumulation of run-away interest will have on the debtor. If I were to be forced to make a choice between the two, it would be an easy one for me.[97]

Justice Madlanga went on to make it clear that he was particularly concerned about debtors who had been affected by apartheid and either remained financially vulnerable or were just emerging from the ranks of the financially vulnerable.

> It cannot be plausibly gainsaid that for our democracy to be meaningful, it is only fitting that those previously denigrated by racism and apartheid, confined to the fringes of society and stripped of dignity and self-worth must also enter the terrain of meaningful, substantial economic activity. Surely, our hard-fought democracy could not have been only about the change of the political face of our country and such upliftment of the lot of the downtrodden as the public purse and government policies permit. Entrepreneurship and the economic advancement of those with no history of being financially resourced must be given room to take root and thrive. This can hardly happen without finance. The sort of interest to which *Oneanate* exposes our legal system is deleterious to this necessary economic advancement.[98]

Accordingly, Justice Madlanga and the majority of the Constitutional Court decided to limit the creditor's judgment to R24 million.[99]

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97. *Id.* at para. 66 (citation omitted).

98. *Id.* at para. 75 (citations omitted).

99. *Id.* at para. 102. Justice Madlanga's judgment, which was joined by two other judges, characterized the decision as a reinstatement of a common law rule that had been abandoned in error. *Id.* at paras. 89–90. He held that development of the common law in this area should be left to the Legislature. *Id.* at para. 91. In a concurring opinion, Moseneke DCJ, joined by four other judges, preferred to say that the common law had been adapted to conform to public policy considerations and constitutional values and that this was a legitimate exercise of judicial power. *Id.* at para. 109–10 (Moseneke, J., concurring). Although we are excluding labor disputes from the scope of this Article, it is worth noting that the concept of *ubuntu* has been invoked in South African employment law as well. *See Nat'l Union of Metalworkers of South Africa obo Nganezi v. Dunlop Mixing & Tech. Servs. (PTY) Ltd.* 2019 (5) SA 354 (CC) at para. 66 (S. Afr.) ("This Court's development of good faith and *ubuntu* in contractual relationships is intended to infuse good faith into unequal contractual relationships, or more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power over the subordinated party. This is especially so in commercial contracts where the power of one party enables hierarchical exertions over the subordinated other. If the *ubuntu* analogy were appropriately applied here, it would be in relation not to the subordinated employee but to the employer." (emphasis added)).

2. Installment Purchases of Land

South African jurisprudence also prescribes that constitutional principles inform the interpretation of statutory provisions regulating specific contractual provisions. A prominent example of this sort of application of constitutional principles is *Botha v Rich N.O.*, which concerned the statutory rights of purchasers of land who agree to pay in installments.[100] The Alienation of Land Act 1981 authorized a purchaser who paid more than 50 percent of the purchase price to demand that title be registered in their name, subject to the purchaser providing a mortgage in favor of the vendor to secure the purchaser's remaining obligations.[101] The central issue in *Botha* was what happens when a vendor fails to comply with a demand for a transfer? Was a purchaser who defaulted on her payments after paying more than 50 percent of the purchase price only entitled to cancel the contract and recover the amount she paid, or could she, in the alternative, demand specific performance of the obligation to register a transfer? The statute mentioned the possibility of cancellation and restitution but said nothing about specific performance.[102]

In *Botha*, the Court held that the purchaser was entitled to specific performance of the right to a transfer, conditional upon payment of arrears and amounts owed to the local municipality.[103] The Court probably could have reached this result based solely on ordinary principles of statutory interpretation. However, the Court went out of its way to say that the case raised a constitutional issue and that its decision was motivated by the constitutional duty to "promote the spirit, purport and objects of the Bill of Rights."[104] It pointed out that the statute was enacted to protect installment purchasers and was prompted by the collapse of several township development companies in the 1970s.[105] It could have, but did not, note that there was good reason to believe that, in the South African context, people who purchased real estate by installment were likely to be relatively poor.[106]

3. Equality Rights and the Enforcement of Contractual Terms

Concerns about inequality also have influenced the South African Constitutional Court's approach to the enforcement of contractual terms, but

100. *Botha v. Rich N.O.* 2014 (4) SA 124 (CC) at para. 2 (S. Afr.).

101. Alienation of Land Act 68 of 1981 § 27(1) (S. Afr.).

102. *Id.* §§ 27(3), 28(1).

103. *Botha* (4) SA at paras. 37, 49.

104. *Id.* at para. 28.

105. *Id.* at paras. 30–31.

106. *Sarrahwitz v. Maritz N.O.* 2015 (4) SA 491 (CC) at para. 82 (S. Afr.) (Cameron and Froneman, JJ., concurring) ("[P]urchasers who have access to enough money to pay off a property purchase immediately, or within a year, are better-off than those who have to pay in instalments over a period of one year or more. Hence they need less protection than those whose financial circumstances oblige them to pay off their property debt more arduously, over a longer period.").

less profoundly than in cases concerned with the development of principles of contract law. Technically speaking, the Court does not evaluate contractual terms directly against constitutional norms. Instead, contractual terms are evaluated in light of public policy, which is in turn shaped by constitutional values along with more traditional requirements of reasonableness and fairness. Significantly, the Constitutional Court has decreed that the relative bargaining power of the parties to the contract in question ought to be considered in determining whether contractual terms contravene public policy, stating, "This is an important principle in a society as unequal as ours."[107] This contrasts with the approach taken in cases like *Paulsen*, in which the court ignored the fact that the parties seeking relief were "stout-boned" commercial actors.[108] It is not entirely clear, though, what counts as evidence of inequality of bargaining power. For instance, the seminal decision in *Napier v. Barkhuisen* was about whether a limitation of time for bringing claims under an automobile insurance policy was consistent with public policy. The majority in the Constitutional Court decided that there was insufficient evidence that enforcement of the clause was unreasonable.[109] However, the court below noted that the insured drove an expensive automobile (a BMW).[110]

The South African Constitutional Court continues to grapple with the challenges of using contract law to promote equality. Although most of the Court's members appear to be convinced of the legitimacy of the exercise, there remain serious questions about how far they are willing to depart from orthodoxy, as well as ongoing concerns about how to accurately identify disadvantaged parties and how to ensure that the potential benefits of decisions are not erased by changes in contracting practices.

All of these issues were raised, but not necessarily resolved, in *Beadica 231 CC v. Trustees for the time being of the Oregon Trust.*[111] In that case the trial judge allowed a set of franchisees to exercise options to renew their leases even though they failed to comply with a requirement that they give notice of intention to exercise the option more than six months prior to the initial termination date. The franchisees were Black-owned enterprises and acquired their businesses as part "of a [B]lack economic empowerment [transaction]"

107. *Barkhuizen v. Napier* 2007 (5) SA 323 (CC) at para. 59 (S. Afr.). *Cf. id.* at para. 97 (Moseneke, J., dissenting) ("When one weighs whether a contractual term is at variance with public policy, it matters little, or perhaps matters not, what the personal attributes of the party seeking to escape the results of the time bar are. It is not inconceivable that the personal and social station of the claimant may have some bearing on the public policy evaluation, but ordinarily it is not decisive. It is the likely impact of the impugned stipulation that should be determinative of what public notions of fairness may tolerate.").

108. *Paulsen v. Slip Knot Invs. (Pty) Ltd.* 2015 (3) SA 479 (CC) at para. 73 (S. Afr.).

109. *Id.* at para. 84.

110. *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at para. 15 (S. Afr.).

111. *See generally Beadica 231 CC v. Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (CC) (S. Afr.) (discussing when a court may refuse to enforce a contractual term on public policy grounds).

funded by the National Empowerment Fund,[112] a public agency legislatively charged with "facilitat[ing] the redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons."[113]

The trial judge noted that the statutory initiative would be dealt a blow if the lease were cancelled.[114] He found that cancellation would be a disproportionate sanction.[115] He also referred to the competing policy considerations of, on the one hand, legal certainty and, on the other hand, the importance of infusing contract law with good faith and fairness and constitutional values such as *ubuntu*.

The trial decision in *Beadica* was overturned on appeal,[116] and that result was upheld by a divided Constitutional Court. The seven judges in the majority found that the renewal terms were written "in simple, uncomplicated language, which an ordinary person could reasonably be expected to understand," and so the franchisees failed to satisfy their onus of showing that enforcement would be unreasonable.[117] The majority also was unsympathetic to the franchisees' claim that strict enforcement of the renewal provision would violate public policy because it would be inconsistent with the constitutional right to equality.

In her majority opinion, Theron J. strongly rejected the proposition that enforcement of a contractual term would violate the constitutional right to equality merely because it would prejudice a member of a historically disadvantaged group. In fact, she suggested that refusing to enforce the contract would hurt rather than help the cause of equality, worrying that contracting parties would respond to such a legal rule by adjusting other terms of their contracts with members of disadvantaged groups, or refusing

112. *Id.* at para. 2.
113. National Empowerment Fund Act 105 of 1998 § 3 (S. Afr.).
114. *Beadica 231 CC v. Trustees, Oregon Unit Trust* 2018 (1) SA 549 (WCC), at para 39 (S. Afr.).
115. *Id.* at para. 42.
116. *Beadica 231 CC* (5) SA at para. 12.
117. *Id.* at paras. 93–95.

to contract with them altogether.[118] Her concern echoes a recurring theme in legal academics' defenses of contract law orthodoxy.[119]

The two dissenting judgments both argued that there was sufficient evidence to conclude that the franchisees were relatively unsophisticated and in a position of unequal bargaining power compared to the franchisors.[120] The dissenting judges would have found that enforcement in these circumstances was contrary to good faith, public policy, and *ubuntu*.[121] The majority's opinion, however, draws very important boundaries around heterodoxy in South African contract law.

B. BRAZIL

Brazil's contract law is heterodox, both in form and substance. Courts habitually note the "change in paradigm" in private law from a merely "liberal, individualistic, and patrimonial" view of private relations to one which emphasizes "good faith, the social function of contract and property and the valuing of the existential minimum."[122] The effect is that "the right to liberty and party autonomy needs to be weighed against the duty of social solidarity, in the sense that citizens must mutually help each other to preserve humanity and build a free, just, and solidary society that belongs to everyone

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118. The passage merits quoting in full:

> The National Empowerment Fund Act established the Fund to facilitate the redress of economic inequality that resulted from unfair discrimination against historically disadvantaged persons. This falls within the scope of the "measures" envisioned by section 9(2) of the Constitution (as would initiatives funded by the Fund). The applicants have not shown that the failure of their businesses, in these circumstances, would unjustifiably undermine substantive equality. To hold that the failure of a black economic empowerment initiative financed by the Fund renders the enforcement of the renewal clauses deleterious to the constitutional value of equality would have the undesirable result of defeating the Funds own objects. This is because the effect of this finding would increase the risk of contracting with historically disadvantaged persons who benefit from the Fund. If the applicants were to succeed, it would establish the legal principle that enforcement of a contractual term would be inimical to the constitutional value of equality, and therefore contrary to public policy, where enforcement would result in the failure of a black economic empowerment initiative. This could, in turn, deter other parties from electing to contract with beneficiaries of the Fund, or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations. These outcomes would, in effect, undermine the very objects that the Fund and section 9(2) seek to achieve.

Id. at para. 101 (footnote omitted).

119. See the discussion of avoidance *infra* Section IV.C.3.

120. *Beadica 231 CC* (5) SA at paras. 196–98, 202 (Froneman, J., dissenting); *id.* at paras. 224–26 (Victor A.J, dissenting).

121. *Id.* at paras. 201–02 (Froneman, J., dissenting); *id.* at paras. 230–31 (Victor A.J, dissenting).

122. S.T.J., Agravo em Recurso Especial No. 1.681.421-RJ, Relatora: Ministra Maria Isabel Gallotti, 24.08.2020, 2980 Diario da Justiça [D.J.], 27.08.2020, 4 (Braz.) (quoting the decision by the Rio de Janeiro Court of Appeals in the case).

indistinctly."[123] In this view, "solidarity is a guideline, an interpretative value, a guide to distributive justice," while "good faith is the translation of the respect to human dignity" and "represents the functionalization of private relations based on solidarity."[124] The scholarly push for the "constitutionalization of civil law" through horizontal effects of fundamental rights has been highly influential, even if the phenomenon is resented by doctrinal and law-and-economics scholars.[125]

Judicial and scholarly rhetoric on the role of human dignity, the social function of contract, and social solidarity in contract law disputes is pervasive. A search of abstracts (*ementas*) of contract opinions by Brazil's Superior Court of Justice (*Superior Tribunal de Justiça* ("STJ"))[126] alone returned over 1,700 results for "human dignity," over 13,000 results for "social function," and over 780 results for "social justice."[127] However, not all heterodox rhetoric translates into heterodox results, and not all heterodox results are based on heterodox rhetoric. While noting that heterodox rhetoric is widespread, this Section will focus primarily on the distinct contours of the Brazilian contract law regime (heterodox results) that appear to set it apart from the international norm in developed countries.

Brazilian scholars have long argued "that the *substance* of courts' approach to contract enforcement"—rather than the duration and cost of procedures, as assumed by the international literature and the World Bank —is potentially distinct and problematic.[128] According to a survey of Brazilian judges by political scientists in the early 2000s, only 48 percent of respondents argued that contracts must be respected independently of social repercussions, whereas 61 percent of them declared that the achievement of social justice justifies breaches of contract.[129] A famous 2005 article by some of Brazil's most prominent economists blamed the country's "extraordinarily high interest rates" for private credit on legal uncertainty due to courts' "anti-creditor bias," which they attributed, among other things, to "deep social differences and the

123. *Id.* The case in question concerned the abusive use of proxies by the administrator of a housing condominium to repeatedly elect himself and approve his accounts. *Id.*

124. *Id.* at 5.

125. For a critique, see Luciano Benetti Timm, *Ainda sobre a Função Social do Direito Contratual no Código Civil brasileiro: Justiça distributiva* versus *eficiência econômica*, 2 REVISTA DA AMDE 1, 14 (2009).

126. The Superior Court of Justice is Brazil's court of last resort on federal law. Its jurisdiction encompasses all matters of private law, including contract law.

127. Search conducted on the website www.stj.jus.br on Sept. 9, 2020. *See* https://www.stj.jus.br/sites/portalp/Inicio [https://perma.cc/QX5W-N6DQ].

128. *See Comparative Contract Law and Development*, *supra* note 7, at 1736.

129. BOLÍVAR LAMOUNIER & AMAURY DE SOUZA, AS ELITES BRASILEIRAS E O DESENVOLVIMENTO NACIONAL: FATORES DE CONSESNO E DISSENSO 21 (2002). For another prominent survey result along the same lines, see generally ARMANDO CASTELAR PINHEIRO, JUDICIÁRIO, REFORMA E ECONOMIA: A VISÃO DOS MAGISTRADOS (2003).

high levels of income concentration in the country."[130] Since then, a local literature has emerged to challenge both the existence and root causes of the alleged legal uncertainty and anti-creditor bias.[131] Nevertheless, the use of constitutional principles and social considerations in adjudicating contract disputes in Brazil is largely accepted as a descriptive matter, though contested from a normative standpoint.

1. Consumer Housing Purchases and Heterodox Contract Remedies

One notable instance of doctrinal heterodoxy appears in the judicial treatment of contracts for the acquisition of new housing from construction companies. A fairly common market practice is for consumers to acquire new housing through monthly installments before and during construction, effectively prepaying for their unit and helping to finance the housing project. As in South Africa, this longstanding practice likely responds, at least in part, to failures in the country's credit markets, leading to inordinately high interest rates in consumer and financial credit.[132]

In this context, a common fact pattern is the contractual breach by a consumer who is unable or unwilling to make the agreed-upon installment payments. From an orthodox perspective, the legal treatment of this fact pattern should be reasonably straightforward. The construction company should be able to seek enforcement of the contract by demanding payment or to terminate the contract and seek either expectation damages or stipulated damages. In the case of a falling market, expectation damages could be substantial. Stipulated damages clauses in the sales contract could be subject to judicial scrutiny if excessive.

The resolution of this type of dispute in Brazil has differed sharply from the description above. Courts came to recognize consumers' rights to terminate the contract at-will and obtain restitution of circa 85 percent of the installment amounts paid.[133] This solution diverges from standard contract

130. Persio Arida, Edmar Lisboa Bacha & André Lara-Resende, *Credit, Interest, and Jurisdictional Uncertainty: Conjectures on the Case of Brazil*, *in* INFLATION TARGETING, DEBT, AND THE BRAZILIAN EXPERIENCE, 1999 TO 2003, at 265, 270, 286 (Francesco Giavazzi, Ilan Goldfajn & Santiago Herrera eds., 2005).

131. *See, e.g.*, Luciana Luk-Tai Yeung & Paulo Furquim de Azevedo, *Neither Robin Hood nor King John: Testing the Anti-Creditor and Anti-Debtor Bias in Brazilian Judges*, 6 ECON. ANALYSIS L. REV. 1, 17–18 (2015) (finding that decisions by the Superior Court of Justice opinions rule in favor of debtors and creditors in roughly equal proportion); *supra* note 26.

132. The root causes of the financial market failures are contested. One prominent line of work attributes high interest rates to judicial bias toward debtors vis-à-vis creditors. Arida et al., *supra* note 130, at 274. Other commentators blame significant market concentration in the banking sector, as well as macroeconomic conditions. *See, e.g.*, Salama *supra* note 26, at 120–25 (attributing the root of financial shortcomings to high interest rates).

133. *See, e.g.*, S.T.J., Agravo Regimental no Recurso Especial 1.500.990-SP, 3a Turma, Rel. Moura Ribeiro, J. 26.04.2016, DJe 10.05.2016 (Braz.).

law insofar as the construction company has no right to demand performance, and the damages are fixed between 10 and 25 percent of the amounts paid in. In practice, this means that the sole remedy for breach is a court-imposed liquidated damages clause, which easily may be either over or under-compensatory. In other words, the basic notion of contract as an agreement backed by expectation damages is no longer available in this highly significant segment of the Brazilian economy.[134]

No statutory rules prescribe this outcome. The Consumer Protection Code of 1990 (*Código de Defesa do Consumidor*) states that:

> In contracts for the purchase and sale of movable and immovable goods against payment in installments, as well as in fiduciary alienations in guarantee, clauses that establish the total loss of installments paid for the benefit of the creditor claiming the termination of the contract for breach and the repossession of the sold product are deemed to be null and void.[135]

This provision can be understood as a form of statutory constraint on penalty clauses and, as such, is largely consistent with contract law orthodoxy. Brazil's President vetoed another more heterodox provision of the Consumer Protection Code requiring the restitution of all amounts paid minus the economic benefit received.[136]

The heterodox exit option granted to consumers followed from a series of incremental doctrinal steps based on somewhat traditional contract law principles.[137] In the first cases to reach the Superior Court of Justice, the Court

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134. This bears resemblance to the cancellation right afforded by statute in South Africa to installment purchasers of real estate. *See supra* text accompanying note 100–05.

135. Lei No. 8.078, de 11 de setembro de 1990, Diário Oficial da União [D.O.U.] de 12.9.1990, art. 53 (Braz.). European scholars have described Brazil's consumer contracts law as offering a comparatively "very high level . . . of consumer protection, and [a] strong tendency to favour the so-called weaker party." Otavio Luiz Rodrigues Junior & Sergio Rodas, *Interview with Reinhard Zimmermann and Jan Peter Schmidt*, 4 REVISTA DE DIREITO CIVIL CONTEMPORÂNEO 379, 403 (2015) (quoting Jan Peter Schmidt).

136. Brazilian law permits Presidential line vetoes. The original provision approved by Congress (but vetoed by the President) provided that "the debtor will have the right to the compensation or restitution of installments paid by the time of contractual termination, adjusted for inflation, less the economic benefit obtained with use." Mensagem No. 664, de 11 de Setembro de 1990, Diário Oficial da União [D.O.U.] de 12.9.1990, art. 53 §1 (Braz.). This rule is similar to the result later embraced by courts, though it differed by not allowing consumers to sue for termination, and by requiring courts to ascertain the value of the economic advantage obtained by use (rather than universally applying a fixed rate such as 15 percent of payments made). It is noteworthy for offering restitution of benefits enjoyed by the purchaser as the sole remedy for this type of contract breach. The official message accompanying the Presidential veto specifically noted that, in disregarding the various costs incurred by sellers in installment contracts, the rule in question led to "unfair treatment" and "unforeseeable consequences for various sectors of the economy." *Id.*

137. This form of exit rights bears little resemblance to the far narrower cancellation rights awarded by EU law (and also Brazil's Consumer Protection Code) for contracts negotiated at the

held that "the defaulting debtor in principle has no right to request the termination of the contract," a conclusion to be altered only if "there is a supervening fact which is sufficiently strong to justify the breach."[138] The Court then found that currency devaluation and the application of various criteria for inflation adjustment under different national economic plans were supervening facts authorizing the termination of the contract because it was impossible, as a practical matter, for the consumer to perform.[139] The Court also found in such cases that contractual penalty clauses providing for the forfeiture of 90 percent of the amounts paid were abusive under the Consumer Protection Code—also not an outlandish conclusion in view of traditional suspicion of penalty clauses.[140]

In 2002 the Court settled a split between its chambers and confirmed that a consumer purchaser of real estate could unilaterally terminate the agreement due to the "insupportability" of installments. It also permitted the construction company to retain 25 percent of the amount paid "considering not only the costs of the company with the project but also the fact that, in this case, it was the plaintiff who took the initiative to breach the agreement."[141] The dissenting justices argued that the majority's interpretation was unreasonable in effectively implementing a vetoed statutory provision.[142]

Subsequent decisions did away with the requirement of changed circumstances or the impossibility or insupportability of payments by the purchaser, effectively permitting home buyers to terminate purchase agreements at will. Courts also increasingly settled on the retention of a fixed percentage by the construction company, typically 10 or 15 percent of the amounts paid, without examining the particular benefits accruing to the consumer or damages incurred by the company. This form of remedial heterodoxy—in the form of judicially imposed liquidated damages that dispense with proof of benefit or harm—likely responds to the massive caseload facing Brazilian courts. From a functional perspective, courts effectively implied a termination option subject to a small liquidated damages clause in all consumer contracts for the purchase of new housing.

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doorstep or outside of a trader's establishment, which are limited in time to seven days following the purchase.

138. S.T.J., Recurso Especial No. 109.331-SP, Relator: Min. Ruy Rosado de Aguiar, 24.02.1997, D.J., 31.03.1997, 9638, 2 (Braz.).

139. *Id.* at 1 ("[W]hen the breach is justified in view of supervening fact preventing contractual performance, with resulting imbalance due to the devaluation of the currency, the successive application of economic plans and different criteria to adjust the credit amount, the debtor may request the termination of the contract.").

140. S.T.J., Recurso Especial No. 115.671, Relator: Min. Waldemar Zveiter, 08.08.2000, D.J., 02.10.2000, 161, 11 (Braz.).

141. S.T.J, Embargos de Divergência em Recurso Especial No. 59.870, Relator: Min. Barros Monteiro, 10.04.2002, D.J., 09.12.2002, 281, 6 (Braz.).

142. *Id.*

Concerns about inequality and social justice likely played a role in the development of this line of opinions, which effectively shifted labor and real estate market risks from consumers to construction companies.[143] During the period of soaring house prices in the early 2000s, the implied exit option benefited consumers and construction companies alike, as the latter obtained financing from the first purchasers and then resold the units for a higher price if the initial purchasers were unable to pay. The termination agreements written in the shadow of the exit option case law were called "*distratos*"—a term that, according to the Civil Code, designates a mutual agreement to terminate a contract, even though not all terminations were entirely voluntary given the prevailing jurisprudence.[144] Nevertheless, when the housing market bubble exploded around 2014, demand for *distratos*—evidently encouraged by the heterodox jurisprudence—became a major problem for construction companies, some of which filed for bankruptcy during this period.

After significant lobbying from construction companies, a 2018 statute increased the maximum amount that could be retained in case of *distratos* to 50 percent of the amounts paid.[145] Strengthening the force of the contractual obligation was a step toward orthodoxy, although the reform is still heterodox in sanctioning now statutory liquidated damages in lieu of a default of expectation damages.

Brazilian law also provides other instances of heterodox approaches to contract remedies in the name of equality, such as imposing a requirement of symmetry in the application of penalty clauses. This means that if a consumer

143. Brazilian courts have also protected purchasers of housing against the risk of insolvency on the part of construction companies. In the 1990s, Encol, one of the country's major construction companies, went bankrupt, causing great harm to consumers who had prepaid for their housing units. Even though many of Encol's units had been mortgaged to banks and duly registered, the Superior Court of Justice granted consumers who had paid the purchase price full title free of encumbrances, thus eliminating the banks' collateral. *See* S.T.J., Recurso Especial No. 415.667, Relator: Min. Aldir Passarinho Junior, 20.02.2003, 293 Diario da Justiça [D.J.], 07.04.2003, 1–2 (Braz.). Subsequent decisions concerning similar fact patterns invoked the social function of contracts to favor consumer purchasers, noting "the clear and systematic movement in the direction of correcting social distortions, in an attempt to reduce inequalities and afford mechanisms for the judge to seek the achievement of justice in the best possible way." S.T.J, Recurso Especial No. 691.738, Relatora: Min. Nancy Andrighi, 12.05.2005, 371, Diario da Justiça [D.J.], 26.09.2005, 8 (Braz.). The opinion also noted that "the only way to optimize the realization of the principle of equality is by recognizing that, in some situations, the subjects of a legal relation *are not in similar position*. In these cases, in which factual circumstances provoke an imbalance, treating these subjects as *objectively* equal is not enough for the full realization of the principle of equality. It is necessary to rebalance the poles of the relation, establishing exceptional rules that protect the weaker party." *Id.* This resulted in the enactment of a summary of the Court's uniform jurisprudence on the matter through *súmula* 308 in 2005, which states "the mortgage instituted by the construction company and the financing agent, before or after the preliminary agreement for the purchase and sale, has no effects vis-à-vis the purchasers of real estate." *Id.* at 7–8.

144. CÓDIGO CIVIL (C.C.), 2002, art. 472 (Braz.).

145. Lei No. 13.786, de 27 de Dezembro de 2018, DOU de 28.12.2018 (Braz.).

contract only stipulates a penalty for a breach by the consumer (but not by the trader), the same penalty should apply for the benefit of the consumer in case of a breach by the trader. These decisions are generally based on notions of good faith, contractual equilibrium, and the social function of contract, as well as on the overarching purpose of consumer protection.[146] In one such opinion, the Court quotes a scholar noting that the "principle of equilibrium" emerging from the Consumer Protection Code results from "the protection of the consumer in view of their vulnerability" as well as the "protection of economic equilibrium," as a corollary of the principle of equality in the Brazilian Constitution.[147]

The so-called "inversion of penalty clauses" for the benefit of purchasers of housing under construction was the subject of a judgment by the STJ in a collective proceeding which became binding on lower courts.[148] The issue was whether the penalty clause imposed by the contract in the event of a late payment by the consumer may be applied for the benefit of the consumer if the construction company delays the conveyance of the housing unit. The judgment in question was preceded by a public hearing (*audiência pública*) that included testimony by several civil law scholars, economists, as well as associations of consumers and construction companies.[149]

The public hearing dealt not only with technicalities regarding the doctrinal evolution of penalty clauses in Brazil, but also with the broader economic and social stakes of the issue in question. The attorney for the purchaser in the case defended the "heterointegration of the contract, by the judge" as a mechanism to achieve "social justice."[150] One public defender emphasized how it had become commonplace to sell real estate to the poor who could not afford the installments, leading to loss of amounts paid by the consumer when terminating the contract and profits by the construction company in subsequent sales. He argued that lack of proper compensation for consumers in the case of delays would increase construction companies' incentives to make successive sales to persons unable to pay, leading to even

146. *See, e.g.*, S.T.J., Recurso Especial No. 1.614.721-DF, Relator: Min. Luis Felipe Salomão, 22.5.2019, Diário da Justiça Eletrônico [D.J.e], 25.6.2019 (Braz.).

147. S.T.J., Recurso Especial No. 1.548.189-SP, Relator: Min. Paulo de Tarso Sanseverino, D.J.e, 6.9.2017 (Braz.) (quoting Bruno Miragem, Curso de Direito do Consumidor (2014)).

148. Brazil's 2015 Code of Civil Procedure permits the Federal Supreme Court (*Supremo Tribunal Federal*) and the STJ to issue collective judgments that resolve multiple appeals addressing the same question of law—a mechanism designed to enhance efficiency in the adjudication of mass litigation in the country. *See* Lei No. 13.105, de 16 de Março de 2015, Diário Oficial da União [D.O.U.] de 17.3.2015, arts. 1036-41 (Braz.).

149. S.T.J., Recurso Especial No. 1.614.721-DF, Public hearing of Aug. 27, 2018, SUPERIOR TRIBUNAL DE JUSTIÇA JURISPRUDÊNCIA [S.T.J.J.], 28.08.2018 (Braz.). For the role of public hearings in Brazilian judicial proceedings as illustrating the centrality of courts' policymaking role. *See* Mariana Pargendler & Bruno Meyerhof Salama, *Law and Economics in the Civil Law World: The Case of Brazilian Courts*, 90 TUL. L. REV. 439, 452 (2015).

150. S.T.J., Recurso Especial No. 1.614.721-DF, Public hearing of Aug. 27, 2018, at 6.

greater harm to the poorest.[151] Gustavo Franco, a prominent economist and former president of the Brazilian Central Bank, appeared on behalf of an association of construction companies to argue against the inversion of penalty clauses, citing a "peril of populism" by which concerns about the disadvantaged and the weak would end up distorting the system and ultimately hurting the supposed beneficiaries of such a policy.[152] The STJ ultimately sided with consumers to issue a binding statement permitting the inversion of penalty clauses in all subsequent cases involving housing purchases.[153]

2. Health Insurance

There is also some evidence of heterodoxy in the field of insurance contracts. Brazilian courts have adopted pro-consumer approaches in prohibiting denial of coverage due to false statements or omissions of preexisting conditions by the insured, finding that insurance companies should bear the burden of requesting medical examinations. Numerous decisions also grant treatments deemed necessary for the realization of the insured's constitutional right to health despite clear contractual exclusions.[154] Commentators suspect that the near-disappearance of the market for individual (as opposed to collective) insurance contracts in Brazil is at least partly due to the excessively consumer-friendly case law of Brazilian courts.[155]

3. Legislative Backlash Against Contract Law Heterodoxy

Brazil recently witnessed two legislative attempts to mitigate courts' heterodox approaches to contract law through new statutory rules on legal interpretation and application. A 2018 amendment to the Introductory Law to the Brazilian Legal System, which provides general standards of interpretation and choice of law, introduced a new rule that provides that "in the administrative, controlling and judicial spheres, one may not decide based on abstract legal values without considering the practical consequences of the

151. *Id.* at 7.

152. *Id.* at 64.

153. "In a contract of adhesion entered into between a buyer and the construction company, in case there is a penalty clause for the breach of the acquirer, the same shall be considered for the determination of damages for the breach of the seller." Tema Repetitivo 971, S.T.J. Precedentes Qualificados (Tese Firmada for S.T.J., Recurso Especial No. 1.614.721-DF, Public hearing of Aug. 27, 2018).

154. For a detailed analysis of the STJ's jurisprudence on health insurance contracts, see Amanda Salis Guazzelli, *A busca da justiça distributiva no Judiciário por meio das relações contratuais: Uma análise a partir dos planos de saúde* (2013) (Master's dissertation, University of São Paulo), https://www.teses.usp.br/teses/disponiveis/2/2133/tde-28112013-142249/pt-br.php [https://perma.cc/2XEJ-TLJK] (finding support to the hypothesis that judges act in an arbitrary manner in favoring the weaker economic party, and concluding that "the judicial decisions may lead to undesirable effects, such as random wealth redistribution, favoring one individual to the detriment of the collectivity, and the incentive to opportunistic conducts").

155. The few companies that still offer individual health insurance plans charge a price that is 100 percent higher than those under group insurance plans. *Id.* at 37.

decision."[156] The new provision is generally understood as an attempt to mitigate rising legal uncertainty due to an excessive use of broad principles (such as legality or human dignity) in legal decision-making in the country.

In 2019, the new "Law on Economic Freedom," initially enacted by President Bolsonaro as a provisional measure, sought to restrain state interference in economic activity, including private contracts.[157] Among other things, the statute amends the Civil Code to provide that contracts are to be interpreted in favor of economic freedom, that the allocation of contractual risks by the parties shall be respected, and that judicial rewriting of contract terms should only occur in an exceptional and limited manner.[158] In specifically articulating implicit tenets of contract law's orthodoxy, it is difficult to make sense of these new rules except as a reaction to the prevailing heterodox approach of Brazilian courts. Nevertheless, the Law on Economic Freedom does not alter the protections of the Consumer Protection Code, and, at any rate, its practical effects remain to be seen.

C. COLOMBIA

Colombia's Constitutional Court expressly appeals to fundamental rights—such as the right to a vital minimum, health, housing, human dignity, and equality—in resolving disputes involving parties deemed to be weak and vulnerable with respect to contracts for the provision of public services. Colombia's Constitution, enacted in 1991, imposes on the state a duty to ensure the efficient provision of public services to all residents, which may be carried out by the state directly or by private parties subject to state regulation, control, and monitoring.[159] The Constitution goes on to provide that regulation of the provision of public services by statute should take into account the criteria of cost, solidarity, and, most notably for present purposes, income redistribution.[160] However, the Constitutional Court of Colombia has intervened in contract disputes to promote the distributive concerns enshrined

156. Decreto-lei No. 4.657, de 4 de Setembro de 1942, as amended by Lei No. 13.655, de 25 de Abril de 2018, DOU de 26.4.2018 (Braz.).

157. Lei No. 13.874, de 20 de Setembro de 2019, D.O.U. de 20.9.2019 (Braz.).

158. *Id.* art. 1º, § 2º (Braz.) ("all public ordering norms on private economic activities shall be interpreted to favor economic freedom, good faith, and the respect for contracts, investments and property"); *id.* art. 421 (adding a sole paragraph to the effect that "in private contractual relations, the principles of minimum intervention and of the exceptionality of judicial revisions shall prevail"); *id.* art. 421-A ("Civil and business contracts are to be presumed symmetric and on equal forces until there is the presence of concrete elements that justify overcoming the presumption, except for the special legal regimes set forth in special legislation, being it also guaranteed that (i) the negotiating parties may establish objective parameters for the interpretation of contract clauses and the requirements for termination or revision, (ii) the allocation of risks defined by the parties shall be respected and observed, and (iii) contractual revisions shall occur in exceptional and limited manner").

159. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 365.

160. *See id.* art. 367.

in the constitution even in the absence of statutory authorization. Some of its decisions can be justified as orthodox responses to concerns about imperfect information or substantive unfairness, but others appear to produce heterodox outcomes.

Contract cases typically reach the Constitutional Court through *tutela* claims, a type of action guaranteed by the constitution to protect fundamental rights against public authorities, as well as private parties in exceptional circumstances defined by statute.[161] While contract law disputes are generally subject to ordinary jurisdiction and remedies, *tutela* may be invoked by "subjects of special constitutional protection," such as the elderly, the ill, minors, the disabled, female heads of households, and persons earning less than the minimum wage.[162] Contract disputes potentially impinging on fundamental rights such as life, health, or the vital minimum are thus subject to *tutela* claims and constitutional review.[163] The Court's contract law jurisprudence has focused primarily on insurance and public utility contracts.

1. Health and Life Insurance

Colombia's Constitutional Court has decided several cases involving health and life insurance contracts in favor of disadvantaged plaintiffs based on constitutional principles protecting health and the vital minimum. In a 2005 *tutela* decision, the Court found that a private health insurer's refusal to renew a contract, while generally permissible, violated the constitutional right to health given the circumstances of the case. The plaintiff was an elderly person with multiple ailments that urgently required medical treatment, and the health insurance contract in question was in force for over four years. The Court rejected the argument that the social right to health applied exclusively against the state's social security framework, finding that "the contract's object has an inseparable relation to the effects of the constitutional right to health, so that the interpretation of the scope of contract clauses is contingent, in any case, on the need to guarantee the correct exercise of this right."[164] In a subsequent 2011 decision, the Court held that a health insurance company could not terminate a contract for the continued nonpayment of the monthly premium when the insured was HIV-positive, citing the fundamental rights to dignified life, health, personal integrity, social security, and equality.[165] It found that, even though the patient was receiving treatment through

161. *Id.* art. 86.

162. Gabriela Zarante Bahamón, *Constitutionalización y protección de derechos fundamentales en el contrato de seguros: Análisis jurisprudencial-Corte Constitucional de Colombia*, 45 REVISTA IBERO-LATINOAMERICANA DE SEGUROS [REV. IBERO-LATINOAM SEGUROS] 233, 236 (2016) (Colom.).

163. *Id.* at 239.

164. Corte Constitucional [C.C.] [Constitutional Court], julio 8, 2005, Sentencia T-724/05 [Colum.].

165. C.C., octubre 27, 2011, Sentencia T-811-11.

Colombia's standard health coverage, the relevant question was "the abuse of the company as the dominant party of the contract."[166]

In 2019, the Constitutional Court of Colombia reversed its prior case law concerning denial of health coverage for failure to disclose a preexisting condition by considering the insured's fundamental rights and thereby limiting the possibility of coverage denial. It held that an insurer may only deny coverage if it proves the insured's bad faith in failing to disclose the condition and the causal link between the preexisting condition and the medical event in question, imposing on the insurance company the burden of requesting medical histories or examinations. Beyond resorting to the principle of "*pro consumatore*" in contracts of adhesion (akin to the *contra proferentem* doctrine found in most jurisdictions), the Court also grounded its judgment on "the protection of the fundamental right to the 'vital minimum' of persons in situation[s] of vulnerability and manifest weakness."[167]

Concerns about inequality and economic vulnerability in Colombia's contract law are not limited to health insurance contracts. In the same judgment, the Constitutional Court also addressed whether an undisclosed preexisting condition constituted enough grounds for denying coverage to a surviving partner under a life insurance contract. One fairly orthodox argument for upholding coverage in the case was that the life insurance form in question did not provide any space for the insured to disclose preexisting conditions. However, the Court's opinion also paid significant attention to the particular circumstances of the case. Having lost her partner's income, the plaintiff risked losing her home due to missed mortgage payments. The Court thus also grounded its decision on the plaintiff's right to housing and to a vital minimum.[168] The Court specifically noted that the beneficiary was in a "difficult economic situation, for she lacks economic resources as she does not earn income of any sort, nor does she benefit from any pension," and that she and her four-year-old son depended economically on her deceased partner.[169]

2. Access to Water

The Court has also appealed to the fundamental rights to human dignity, life, health, and equality to limit a water company's ability to stop the

166. *Id.* at 8. The Court also argued that the company had tolerated the insured's default and was therefore estopped from seeking termination of the contract (*allanamiento a la mora*).

167. C.C., enero 30, 2019, Sentencia T-027-19. For local commentary, see María Paula Gómez Sáenz & Gonzalo Jiménez Triviño, *Novedad Jurisprudencial: La Corte Constitucional modificó el precedente jurisprudencial en relación com las cargas de la aseguradora frente a la declaración del Estado de riesgo en el contrato de seguros*, 19 UNIVERSITAS ESTUDIANTES BOGOTÁ 211, 220 (2019) (Colom.) (describing the decision as highlighting the constitutional duty of insurance companies vis-à-vis persons of clear vulnerability and weakness).

168. C.C., Expedient T-6.579.174 (Colom.).

169. *Id.* at 23.

provision of water due to nonpayment by "subjects of special protection."[170] The plaintiff in the case was a 54-year-old woman who was the head of her household, physically incapacitated to work, and responsible for two minor sons. While the Court upheld the statutory provision permitting the suspension of supply as a means to promote the efficient, continuous, and uninterrupted provision of public services to all, it also determined that denial of water to subjects of special protection was disproportionate and, therefore, unconstitutional. The Court held that, in response to nonpayment, the company should investigate the credit situation of the user and negotiate payment agreements consistent with their ability to pay. If the payment obligations were still not performed, the company could limit the water supply to 50 liters per person.[171]

D. OTHER EXAMPLES OF HETERODOXY IN PRIVATE LAW: CHINA, INDIA, AND SOUTH AFRICA

South Africa, Colombia, and Brazil are not the only developing jurisdictions that have explicitly embraced heterodoxy in contract law, nor is legal heterodoxy in developing countries limited to contract law. For instance, courts in Macau have adopted a heterodox approach in determining the law applicable to a long-term contract. Although the traditional rule is that the contract will be governed by the statute in force at the time the contract is made, the court held that a new statutory rule would apply immediately whenever it sought to "protect the most socially weak party of the contractual relationship."[172]

Moreover, there is also growing evidence that developing countries frequently follow heterodox approaches in other areas of private law as well. For instance, scholars have documented how the adjudication of tort disputes in China is particularly concerned with distributive considerations, to the point that "when there is a loss and a deep pocket, damage is often awarded in the absence of fault in adherence of distributive justice and principles of fairness."[173] A recent study identified the distributive character of tort litigation in China as a strategy for social stability, with "[l]ocal governments rely[ing] on courts to identify those in need and assign liability to parties with

170. C.C., octubre 3, 2011, Sentencia T-740/11 (Colom.).

171. *Id.*

172. Tribunal de Última Instância, Processo no. 41/2008, decided on Dec. 5, 2008, http://www.court.gov.mo/sentence/pt-53590d04570od.pdf [https://perma.cc/CQJ4-FRJV].

173. Hao Jiang, *Chinese Tort Law in the Year of 2020: Tradition, Transplants, Codification and Some Difficulties*, *in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES (Mauro Bussani & Anthony James Sebok eds., 2d ed., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622837 [https://perma.cc/UC4L-JEV2].

deep pockets in order to reduce the potential financial burden of the state in a system with very limited social insurance."[174]

Strong elements of heterodoxy also appear in the corporate laws of developing countries. India's Companies Act of 2003 contains an innovative regime requiring companies to establish a corporate social responsibility (CSR) committee and spend at least two percent of average net profits on their CSR policy or explain the reasons for noncompliance.[175] The statutory definition of CSR is extremely broad, covering not only matters directly related to the firm's primary activities, but also general social goals such as eliminating "extreme hunger and poverty," "reducing child mortality," mitigating other inequalities, and fighting different diseases.[176] India's new CSR regime is viewed as a political compromise in view of "continued inequality in the face of India's massive economic growth," although it made little dent in reducing extreme inequality and poverty.[177] Nevertheless, scholars have conjectured that, under some conditions, a CSR mandate may serve as an optimal policy response in view of government failures.[178]

Corporate law heterodoxy is also rampant along other dimensions in other developing countries. Brazil has virtually abolished shareholders' limited liability for employee and consumer claims.[179] China not only requires employee board participation on company boards (as do many European countries), but also imposes highly unusual (if circumvented) caps on executive compensation of state-owned enterprises in view of "the worsening of social inequality."[180]

Concerns about equality also feature prominently in South Africa's antitrust law.[181] Aimed at including Black South Africans in the market economy, the 1998 Competition Act included in its Purposes "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy" and "to promote a greater spread of ownership, in particular

174. Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law versus Practical Justice?* 13 J. TORT L. 197, 200–01 (2020).

175. *See* The Companies Act, 2013, §135 (India).

176. *Id.* §135, sched. VII. For a description of the India approach as uniquely ambitious, see Enriques et al., *supra* note 58, at 98.

177. Afra Afsharipour, *Lessons from India's Struggle with Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 363, 379, 386 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

178. *See* Dhammika Dharmapala & Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013*, 56 INT'L REV. L. & ECON. 92, 93 (2018).

179. *How Universal Is the Corporate Form?*, *supra* note 10, at 7–8.

180. Li-Wen Lin, *Behind the Numbers: State Capitalism and Executive Compensation in China*, 12 U. PA. ASIAN L. REV. 140, 158 (2016).

181. Eleanor M. Fox, *South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land Where Markets Were Brutally Skewed*, COMPETITION POL'Y INT'L ANTITRUST CHRON., Dec. 2019, at 1, 5–8.

to increase the ownership stakes of historically disadvantaged persons."[182] Recent amendments introduced additional changes to the Competition Act in 2019 to further encourage ownership and market entry by Black South Africans.[183]

IV. EXPLAINING DIVERGENCE

The decisions and doctrines set out in the preceding Part are difficult to reconcile with contract law orthodoxy. We first explain why defenders of orthodoxy would argue that these alternative approaches are either illegitimate or ineffective. We then identify ways in which economic, political, and legal features of Brazil and South Africa, and to a lesser extent Colombia, deviate from the assumptions that underpin contract law orthodoxy.

A. THE CASE FOR ORTHODOXY

The orthodox view that contract law should not be designed to achieve distributive goals rests on two main sets of arguments. The first set focuses on *legitimacy*. One of those arguments rests on the libertarian proposition that forcible redistribution by the state generally cannot be justified, except, importantly, where it is required to rectify unjust transfers of resources.[184] Since contract law involves enforcement by the state, this view logically seems to rule out redistribution through contract law in most cases.[185] Our impression is that relatively few modern legal scholars endorse this line of argument. A more widely accepted, though controversial, view is that judges lack the legitimacy to decide upon distributive objectives. According to at least some political theories, decisions about the distribution of resources in society are illegitimate unless made by democratically elected officials, which judges often are not.[186] This view is, to be sure, fiercely resisted by critical legal scholars.[187]

The second and arguably most central pillar of contract law orthodoxy is a set of pragmatic arguments about *effectiveness*. The common feature of these

182. *Id.* at 2.

183. *Id.* at 3 & n.7.

184. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 151–53 (1974).

185. Kronman, *supra* note 55, at 473–74.

186. Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 623–24 (2005) (explaining that, under Rawls's first principle of justice, non-constitutional institutions should be designed by a democratically elected legislature).

187. *See, e.g.*, Kennedy, *supra* note 18, at 564–65 ("I will have nothing to say about the impact of 'institutional competence' considerations on the motives for lawmaking I discuss. I assume that the only grounds for distinguishing between courts, legislatures and administrative agencies as lawmakers are (i) that the false consciousness of the public requires it or (ii) that the decision maker has a quite specific theory about how his or her particular institutional situation should modify his or her pursuit of political objectives."); Unger, *supra* note 54, at 565 (questioning "the belief that lawmaking and law application differ fundamentally, as long as legislation is seen to be guided only by the looser rationality of ideological conflict").

arguments is a claim that fiscal policy, meaning the rules and practices concerning taxation and public spending, is superior to contract law as a means of achieving distributive justice.[188] At least five distinct arguments support this conclusion.[189]

1. Accuracy and predictability. Fiscal policies can be conditioned on information—such as parties' income, location, profession, and number of dependents—that may not be available either to a tribunal adjudicating a contractual dispute or to parties when they enter into their contract.[190] This means that rules of contract law conditioned on distributive information not only would be inaccurate, but also would lead to inefficient uncertainty among contracting parties.[191] Under these conditions, fiscal policy will be more accurate; it can be used to improve the wellbeing of a specific group of people without affecting people who are mistakenly identified as members of the group, either by judges, counterparties, or the people themselves.

2. Comprehensiveness. Redistribution through fiscal policy is likely to be more comprehensive.[192] Tax and spending programs can be applied to everyone in society, as opposed to just the parties subject to a given body of contract law. By contrast, when distribution is deliberately altered through regulation of contracts, only people who participate in the relevant transactions will be affected. This is a morally arbitrary basis for determining who should benefit from or be burdened by state-sponsored distribution.[193]

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188. *See* JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION 267–68 (Columbia Univ. Press 2005) (assuming that it would not be "feasible and practicable" to preserve background justice through rules imposed on individuals); TREBILCOCK, *supra* note 20, at 97–101, 248–61 (arguing that contract law should not be used to address systemic inequalities in competitive markets); *see also generally* Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing that redistribution of income through the income tax and welfare system can be more efficient than through other legal rules). For discussion of the ambiguities in Rawls's discussions of whether contract law should be designed to promote distributive justice, see generally Josse Klijnsma, *Contract Law as Fairness*, 28 RATIO JURIS. 68 (2015); Samuel Scheffler, *Distributive Justice, the Basic Structure and the Place of Private Law*, 35 OXFORD J. LEGAL STUD. 213 (2015); and Kordana & Tabachnick, *supra* note 186.

189. David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 446–53 (2003) (discussing various reasons why legal rules should not be used to redistribute income, including the greater efficiency of the tax system, the limited comprehensiveness and accuracy of legal rules, and the ability of contracting parties to avoid redistributive legal rules).

190. *See* RAWLS, *supra* note 188, at 267. Separate institutions are required to preserve background justice because "the rules governing individual agreements and . . . transactions cannot be too complex, or require too much information to be correctly applied." *Id.*

191. *Id.* at 267–68; *see also* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 883, 886–87 (Guenther Roth & Claus Wittich eds., 1968) (claiming that "the modern class problem" has led to demands for "social law" to be based on ethical postulates such as "justice," which, if accommodated, would undermine the formality and rationality and thus calculability of law that has supported capitalist economic development in Continental Europe).

192. *See* Kaplow & Shavell, *supra* note 188, at 675.

193. *See* FRIED, *supra* note 55, at 105–06 (2015); Aditi Bagchi, *Distributive Justice and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193, 197–98 (Gregory Klass, George Letsas

3. Efficiency. Rules of contract law aimed at distributive objectives can induce inefficient behavior—meaning behavior whose costs exceed its benefits—that fiscal policy does not.[194] An example might be a warranty of habitability which requires sellers of buildings to make improvements whose costs exceed their value to certain buyers. In principle, policymakers could confer the same benefit on the relevant buyers more efficiently by granting them a tax credit financed by an increase in income taxes.

4. Avoidance. Perhaps the most powerful argument against using contract law to achieve distributive objectives is that contracting parties may be able to avoid the effects of distribution-motivated rules. The law can mandate that one party to a contract confer a benefit on their counterparty, but the target of the regulation is likely to adjust the price or other terms of the contract, or refuse to contract altogether, in order to offset the costs of the mandate. The overall distributive effects of the intervention will depend on the effects of those adjustments. For example, consider an implied warranty of habitability, in other words, a legal requirement that sellers of real estate provide a contractual guarantee that the property is habitable. It seems reasonable to presume that, all other things being equal, buyers will value such a warranty. All other things are unlikely to remain equal though because sellers may respond to the imposition of a mandatory warranty by increasing prices. As Richard Craswell has shown, the magnitude of the price increase will depend on the extent to which the warranty increases sellers' costs, whether sellers can price discriminate, and the extent to which marginal buyers—whose preferences might be different from those of infra-marginal buyers—value the warranty.[195] The distributive effects of this particular intervention will depend on whether the price increase exceeds the value of the warranty to the relevant buyers.[196]

& Prince Saprai eds., 2014); Eisenberg, *supra* note 30, at 257–58 (Peter Benson ed., 2001) (noting "[i]t is not easy to see" why contract law should require redistribution between parties simply because they have entered into a contract); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 284 (1995) ("Critics further argue that the welfare system provides a more equitable way to redistribute wealth than legal rules do, because legal rules redistribute wealth only to people who happen to be injured or people in the class of those likely to be injured in a way that can be redressed by courts—a small and arbitrarily selected portion of the needy population.").

194. *See* Kaplow & Shavell, *supra* note 188, at 669; Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414, 414–18 (1981).

195. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 363–64 (1991). *Cf.* Ackerman, *supra* note 55, at 1104–10, 1119–34 (analyzing housing code enforcement and special housing subsidies as means of redistributing income from landlords to tenants).

196. Aditi Bagchi takes the strong view that because contracting parties will avoid the effects of rules of contract law that nominally favor poor people through offsetting increases in prices, those rules will actually be disfavored by people with low incomes. Specifically, she claims that in a poor and unequal society, mandatory safety standards and consumer protections are likely to

5. Interdependence. Sometimes the welfare of the people burdened by an intervention motivated by distribution will be intertwined with the welfare of the intended beneficiaries. In the extreme case, distributive concerns are irrelevant to the resolution of contractual disputes because there is complete identity between the interests of the parties to the contract, as in the case where the parties are firms owned by diversified shareholders with equal interests in both firms.[197] This kind of interdependence can also complicate efforts to protect the interests of individual employees or consumers in their dealings with firms. For instance, the individuals may own securities in the affected firms, either directly or through mutual funds or pension plans. Alternatively, the individuals may be employees, or dependents of employees, who hope to benefit from continued employment. In either case, one common critique is that it may be difficult to determine the overall effects of a measure that initially distributes wealth from firms to individuals.[198]

At any rate, contract law provides relatively few ways to avoid this problem because if it influences the distribution of resources, it does so largely by transferring benefits from one party to the contract to the other. Fiscal policy is more flexible. In principle, distribution through the fiscal system can be financed by taxing people whose welfare is independent of that of the intended beneficiaries.

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be disfavored by a relatively large proportion of the population. Therefore, "[m]andatory consumer or employment legislation represents a kind of luxury redistribution that is morally defensible only in countries which are already rich and relatively equal." Bagchi, *supra* note 3, at 702–06. Craswell's analysis shows that as a theoretical matter the prediction is contestable. The empirical basis for Bagchi's claim that people with low incomes are less willing than those with high incomes to trade money for guarantees of safety and product quality is also contestable. She cites an article about whether citizens in western democracies engage in political consumerism, that is to say, regularly purchase products on the basis of political or ethical considerations. Among other things, the authors test the hypothesis that citizens who are relatively well off are more likely to engage in political consumerism. However, they were unable to confirm the hypothesis. Their survey of undergraduate university students in Belgium, Canada, and Sweden found a negative correlation between respondents' political consumerism and their family income. Dietlind Stolle, Marc Hooghe & Michele Micheletti, *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT'L POL. SCI. REV. 245, 258–60 (2005).

197. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 555–56 (2003) ("[I]t is difficult to create distributional benefits for the shareholders who own most business firms.").

198. *See generally* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016) (making this point in the course of arguing that increased antitrust enforcement will not necessarily reduce economic inequality in an advanced economy like that of the United States). Einer Elhauge responded to Professor Crane by arguing that this kind of interdependence is of limited empirical significance in the United States where wealthy people own the vast majority of interests in firms and there is limited sharing of monopoly profits with employees. *See* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1294–97 (2016). Elhauge's critique is even more forceful in developing countries, where stock ownership by society at large tends to be far lower than in the United States. *See* Canzian & Mena, *infra* note 206 and accompanying text.

Distributive contractual rules formulated by judges are particularly vulnerable to complaints of ineffectiveness because judges are presumed to lack the expertise required to address concerns about accuracy, comprehensiveness, and efficiency.[199] However, as our discussion of the Brazilian case shows, courts may be capable of compensating for any inherent lack of expertise by consulting broadly on the distributive ramifications of their decisions. Lack of judicial expertise is even less of an obstacle if judges are merely charged with implementing distribution-motivated contractual rules formulated by the legislative or executive branches.

B. EXPLAINING HETERODOXY

Distributive demands, and the relative legitimacy and effectiveness of judges and fiscal institutions, all vary from time to time and place to place. Accordingly, as Anthony Kronman pointed out in a classic article, the case for contract law orthodoxy is highly contingent on the social and institutional context.[200] For instance, U.S. scholars have occasionally recognized that contract law may be an appealing second best mechanism for achieving distributive goals if the fiscal system cannot be counted on for that purpose.[201] In particular, Lee Fennell and Richard McAdams argue persuasively that various characteristics of U.S. political institutions often will make it more difficult for groups to achieve distributive objectives through fiscal policy than through other legal instruments such as contract law.[202]

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199. *Cf.* Fennell & McAdams, *supra* note 18, at 1121 (arguing that courts are not less trained to conduct distributive analysis than they are to conduct economic analysis).

200. Kronman, *supra* note 55, at 508–10 (observing that several of the arguments in favor of relying on fiscal policy to achieve distributive justice rest on circumstantial factors and none of them rule out the possibility that under certain conditions contract law will be a relatively effective and efficient means of achieving redistribution).

201. Zachary Liscow, *Is Efficiency Biased?* 85 U. CHI. L. REV. 1649, 1664 (2018) (noting that if the assumption that taxes and transfers are used to offset the effects of nontax policies to ensure a fair distribution of income does not hold then "the logic that the distributional consequences do not matter breaks down"). This logic follows from the standard orthodox justification for circumscribing distributional objectives to the tax-and-transfer system. *See* Shavell, *supra* note 194, at 417 ("[I]f the income tax would not be altered on adoption of new liability rules, then in strict logic the argument given for use of efficient rules does not apply.").

202. Fennell and McAdams cite various factors that make it relatively costly, in political terms, to change tax policy to offset distributive effects of legal rules. These include the following factors: Changes in distribution may not be observable or politically salient; the population may be biased against policies framed as taxes; the population may prefer policies structured to remedy specific sources of unfairness rather than to achieve distributive justice; legislative action is more costly than inaction; and tax and non-tax policies with distributive implications are established through a highly decentralized process that involves actors at federal, state, and local levels. Fennell and McAdams cite to and build upon briefer discussions of similar points by Richard Markovits, Brett McDonnell, and Cass Sunstein. Fennell & McAdams, *supra* note 18, at 1053 n.5; *see* Brett H. McDonnell, *The Economists' New Arguments*, 88 MINN. L. REV. 86, 111 (2003); Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511, 556–57, 597–601 (2005); Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POL'Y

We suspect that contract law heterodoxy emerged in developing countries under social, economic, and institutional conditions that deviate substantially from the conditions assumed by the conventional justifications for the orthodox approach. First, substantial and unjustifiable inequality bolsters the legitimacy of state-led efforts to improve the welfare of disadvantaged groups. Profound inequality and segregation also make it easier to aim redistributive measures accurately at relatively privileged actors without affecting members of disadvantaged groups. Second, states that experience high levels of inequality may be unable to achieve adequate distribution solely through fiscal institutions. Third, leading judges in these countries have responded to these circumstances by embracing the idea of transformative constitutionalism, which expressly legitimizes pursuit of distributive objectives by the judiciary in the course of resolving private disputes. We elaborate upon each of these claims in the following sub-Sections.

1. Inequality and Poverty

In North America, Europe, and Asia, economic inequality has only recently emerged as a matter of significant public concern.[203] The situation is different in other parts of the world. When countries are listed in order of their level of income inequality (measured by the World Bank's estimate of the Gini index), countries in Sub-Saharan Africa and Latin America and the Caribbean occupy all of the top places.[204] Among those countries, Brazil and South Africa stand out as the leaders in their respective regions.[205] In fact, Brazil is the democratic country with the highest proportion of income concentrated in the top one percent of earners.[206] In 2015, the bottom 40 percent of the population in South Africa earned just four percent of pre-tax national income. In Brazil the comparable figure was 9.5 percent. By contrast, the average share for that group was 13 percent in the European Union.

REV. 303, 314–15 (2007); Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2502 n.52 (2014).

203. Much of this interest was provoked by the work of Thomas Piketty. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1–2 (Arthur Goldhammer trans., The Belknap Press of Harvard University Press 2017) (2013) (advocating social scientific research on economic inequality). *See generally* Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018) (documenting rise of inequality "worldwide" (but only citing data from OECD countries) and discussing how constitutional law might respond).

204. *Gini Index (World Bank Estimate)*, WORLD BANK, DEV. RSCH GRP., https://data.worldbank.org/indicator/SI.POV.GINI?most_recent_value_desc=true [https://perma.cc/8ZCX-HALJ].

205. *See also* FACUNDO ALVAREDO, LUCAS CHANCEL, THOMAS PIKETTY. EMMANUEL SAEZ, & GABRIEL ZUCMAN, WORLD INEQUALITY REPORT 2018, at 10, 40, 74 (2018) [hereinafter WORLD INEQUALITY REPORT 2018] (showing that Brazil and South Africa have long experienced extremely high levels of income inequality).

206. Fernando Canzian & Fernanda Mena, *Brazil's Super-Rich Lead Global Income Concentration*, FOLHA DE S.PAULO, (Aug. 19, 2019, 12:00 PM), https://temas.folha.uol.com.br/global-inequality/brazil/brazils-super-rich-lead-global-income-concentration.shtml [https://perma.cc/G38E-Q7QQ].

Remarkably, along this dimension, the United States more closely resembles developing countries than other wealthy countries. In 2015, the bottom 40 percent of the U.S. population earned just under eight percent of pre-tax national income.[207]

Patterns of inequality in Brazil and South Africa are noteworthy not only because of their extremely high levels, but also because of their origins. In each case, current economic inequality appears to be, at least in part, the legacy of historical injustice, including notably racially inflicted injustice, due to slavery and extractive colonization. "Brazil was the last major country to abolish slavery," in 1887, and descendants of enslaved people make up a very large proportion of the population in some regions.[208] In 2015, the average income of Afro-Brazilians was just 58.21 percent of that of white Brazilians.[209] As for South Africa, high levels of racial inequality originated during the apartheid era and persisted, or even increased, after its demise in 1994. "In 2015, 47 percent of the households headed by Black South Africans were poor . . . compared to 23 percent for those in households headed by a person of mixed race (colored)" and roughly one percent or less for households headed by Asian and white South Africans.[210]

Inequality may bear upon both the legitimacy and the effectiveness of pursuing distributive objectives through contract law. High levels of economic inequality traceable to historical injustice present a morally compelling case for economic redistribution. Contract law heterodoxy in Brazil and South Africa may be a response to that impulse. Inequality also undermines the argument that distribution-oriented interventions will have indeterminate and possibly perverse effects because the rich and the poor are likely to be less economically interdependent. In developing countries marked by high levels of inequality, firms are more likely to have wealthy families as controlling shareholders, levels of stock ownership by the population tend to be lower, and markets are generally less competitive.[211]

We should stress here the distinction between inequality and poverty, and between distributive objectives and poverty reduction. High levels of

207. All figures extracted from the World Inequality Database, available online at https://wid.world/data.

208. WORLD INEQUALITY REPORT 2018, *supra* note 205, at 74.

209. U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, EIGHTEENTH TO TWENTIETH PERIODIC REPORTS SUBMITTED BY BRAZIL UNDER ARTICLE 9 OF THE CONVENTION, DUE IN 2008, at 11 (2020).

210. NAT'L PLAN. COMM'N SECRETARIAT, DEP'T OF PLAN., MONITORING & EVALUATION, REPUBLIC OF S. AFR., STAT. OF S. AFR. & THE WORLD BANK, OVERCOMING POVERTY AND INEQUALITY IN SOUTH AFRICA: AN ASSESSMENT OF DRIVERS, CONSTRAINTS AND OPPORTUNITIES 13 (2018), https://www.dpme.gov.za/publications/Reports%20and%20Other%20Information%20Products/World%20Bank%20Report%202018.pdf [https://perma.cc/7F2P-489D].

211. *See* Mariana Pargendler, *Corporate Governance in Emerging Markets*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 735, 739–40 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Crane, *supra* note 198, at 1184–85 (2016).

inequality do not necessarily correspond to high levels of poverty; the poorest people in South Africa and Brazil are not necessarily the poorest people in the world. In fact, many countries in Sub-Saharan Africa have larger proportions of the population living in poverty than South Africa. Meanwhile the Americas, Brazil, and Colombia are in the middle of the pack when it comes to poverty. They have more people living below the poverty line than countries such as Chile and Costa Rica, but far fewer than in Haiti, Guatemala, Honduras, or Venezuela.[212] Yet our preliminary research on the latter countries has not turned up evidence of contract law heterodoxy as clear-cut as what we found in Brazil, South Africa, and Colombia. Moreover, European jurisdictions are less unequal than the United States, but comparatively (if marginally) more open to contract law heterodoxy. Accordingly, we tentatively conclude that to the extent contract law heterodoxy is motivated by prevailing economic conditions, the concern is about inequality rather than absolute (versus relative) levels of poverty.

2. State Capacity

Until recently, the conventional wisdom was that developing countries were more unequal than developed countries because their fiscal systems were inefficient, regressive, and far from comprehensive.[213] The stereotypical developing country collected relatively little tax revenue, because of some combination of rampant tax evasion and a plethora of loopholes; had low levels of public spending; and aimed spending at relatively affluent members of the population.[214] Historically, these countries have been chastised for failing to raise taxes on income and capital of the wealthiest portion of the population.

Brazil and South Africa do not entirely fit the conventional narrative. Rather, both jurisdictions stand out among developing countries for the magnitude of distributive efforts through their fiscal systems, including public spending on education and health care.[215] While Brazil's tax system and overall government spending are startlingly regressive, the country did temporarily reduce inequality through a combination of cash-transfer programs and real increases in the minimum wage in the first decade of the 2000s. Notably, Brazil's levels of extreme poverty decreased four-fold from over 34 percent in the early 1990s to 8.4 percent in 2012, though it has slightly

212. *Poverty & Equity Data Portal*, WORLD BANK, http://povertydata.worldbank.org/poverty/home [https://perma.cc/R3Q2-B4N9] (showing poverty headcount at various poverty lines).

213. Richard M. Bird & Eric M. Zolt, *Fiscal Contracting in Latin America*, 67 WORLD DEV. 323, 327 (2015).

214. Edwin Goñi, J. Humberto López & Luis Servén, *Fiscal Redistribution and Income Inequality in Latin America*, 39 WORLD DEV. 1558, 1562–63 (2011).

215. Nora Lustig, *Inequality and Fiscal Redistribution in Middle Income Countries: Brazil, Chile, Colombia, Indonesia, Mexico, Peru and South Africa*, 7 J. GLOBALIZATION & DEV. 17, 20 (2016).

increased in recent years.[216] In South Africa, inequality has increased since the end of apartheid; however, as in Brazil, both the rate and the depth of poverty have declined since apartheid, even taking into account some backsliding after 2011.[217] World Bank analysts attribute South Africa's success in reducing poverty and avoiding greater increases in inequality to its efforts to modernize and expand its tax and social assistance systems.[218]

The distributive policies in Brazil and South Africa reflect high-level commitments by their political leaders. In Brazil, this has been true since the 1990s, and especially since 2002 when the leftist Lula government took power under the slogan *Um Brasil para Todos* (a Brazil for everyone).[219] Meanwhile, in South Africa, the African National Congress ("ANC"), which assumed power in 1994, had a long history of commitment to reversing the economic injustice of the apartheid regime. Its 1955 Freedom Charter proclaimed: "The People Shall Share in the Country's Wealth!"[220] After it took power, the ANC eliminated racial distinctions in social programs, increased social spending and, eventually, introduced a Black Economic Empowerment program aimed in part at redistributing ownership of productive resources to Black South Africans.[221]

The appeal of contract law heterodoxy in Brazil and South Africa may stem from the fact that ambitious, widely endorsed distributive goals are unlikely to be achieved solely through the fiscal system. As we have seen in both countries, fiscal policy has, at best, a modest impact on inequality. Given the limits on state capacity in both countries, there is little reason to believe that further increments in public spending will be effective. Both countries struggle to provide high-quality education and health care to the poor.[222] The

216. *See* Canzian & Mena, *supra* note 206.

217. WORLD BANK, OVERCOMING POVERTY AND INEQUALITY IN SOUTH AFRICA: AN ASSESSMENT OF DRIVERS, CONSTRAINTS AND OPPORTUNITIES 10–11 (William H. Hurlbut ed., 2018). This report cites a South African study that attributes the increase in poverty levels between 2011 and 2015 to "a combination of international and domestic factors such as low and anemic economic growth, continuing high unemployment levels, lower commodity prices, higher consumer prices (especially for energy and food), lower investment levels, greater household dependency on credit, and policy uncertainty." *Id.* at 11 (quoting STAT. S. AFR., POVERTY TRENDS IN SOUTH AFRICA: AN EXAMINATION OF ABSOLUTE POVERTY BETWEEN 2006 & 2015, at 16 (2017)).

218. *Id.* at xxv–xxvi.

219. LEE J. ALSTON, MARCUS ANDRÉ MELO, BERNARDO MUELLER & CARLOS PEREIRA, BRAZIL IN TRANSITION: BELIEFS, LEADERSHIP, AND INSTITUTIONAL CHANGE 128–31 (2016).

220. African National Congress, *The Freedom Charter* (June 26, 1955), https://web.archive.org/web/20110629074215/http://www.anc.org.za/show.php?id=72 [https://perma.cc/5X5M-KMGP].

221. *See generally* Servaas van der Berg, *The Transition from Apartheid: Social Spending Shifts Preceded Political Reform*, 29 ECON. HIST. DEV. REGIONS 234 (2014) (detailing historical spending trends and recounting recent government measures taken to combat the effects of apartheid). *See* Stefano Ponte, Simon Roberts & Lance van Sittert, *'Black Economic Empowerment', Business and the State in South Africa*, 38 DEV. & CHANGE 933, 933–34 (2007); JEREMY SEEKINGS & NICOLI NATTRASS, CLASS, RACE, AND INEQUALITY IN SOUTH AFRICA 340–75 (2005).

222. WORLD BANK, SOUTH AFRICA ECONOMIC UPDATE: FISCAL POLICY AND REDISTRIBUTION IN AN UNEQUAL SOCIETY 38 (2014), https://openknowledge.worldbank.org/handle/10986/20661

combination of ambitious distributive objectives and limited state capacity may explain the appeal of contract law heterodoxy.

3. Transformative Constitutionalism

The legal systems in which we observe contract law heterodoxy are also heterodox in other areas. In fact, Brazil, Colombia, and South Africa are well-known among comparative lawyers for their embrace of a heterodox approach to constitutional law known as "transformative constitutionalism."[223] The term was coined to describe South Africa's distinctive approach to constitutional law and has subsequently been applied to Brazilian and Colombian constitutional law as well.[224]

As its name suggests, transformative constitutionalism starts from the premise that constitutional law should transform rather than simply reflect the society it governs.[225] Proponents argue that the project of social

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[https://perma.cc/J6L6-SYLM] (reporting that South African students score worse on math and reading tests on average than other Southern and Eastern African countries, while spending similarly and that South Africa has comparatively high maternal and infant mortality while having comparatively high health expenditures as a fraction of GDP); JAVIER E. BÁEZ, AUDE-SOPHIE RODELLA, ALI SHARMAN & MARTHA VIVEROS, POVERTY AND SHARED PROSPERITY IN BRAZIL: WHERE TO NEXT? 99–103 (2015), https://elibrary.worldbank.org/doi/full/10.1596/978-1-4648-0357-4_ch3 [https://perma.cc/Y6PU-R5KT] (documenting limits on the quality of Brazilian education and healthcare); *cf.* Servaas van der Berg & Martin Gustafsson, *Educational Outcomes in Post-apartheid South Africa: Signs of Progress Despite Great Inequality*, *in* 10 POLICY IMPLICATIONS OF RESEARCH IN EDUCATION, SOUTH AFRICAN SCHOOLING: THE ENIGMA OF INEQUALITY 25, 29 (Nic Spaull & Jonathan D. Jansen eds., 2019) (documenting rapid improvement in educational outcomes in South Africa (and Brazil) at the beginning of the twenty-first century).

223. *See generally* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Oscar Vilhena, Updendra Baxi & Frans Viljoen eds., 2013) (examining how the highest courts in Brazil, Colombia, and South Africa give effect to rights recognized in their constitutions); CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., 2013) (discussing the jurisprudence of the constitutional courts of India, South Africa, and Colombia on cultural diversity, access to justice, and socioeconomic rights).

224. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998). *But see* Diego Werneck Arguelhes, *Transformative Constitutionalism: A View from Brazil*, *in* THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW 165, 167 (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020) (arguing that Brazil's Supreme Court has been a "late bloomer" compared to Colombia's and that it has at best played a marginal role in fighting poverty and inequality).

225. In Klare's words:

> By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring,

transformation would be doomed to failure if inequality and injustice in the private sphere were shielded from scrutiny. Accordingly, a key precept of transformative constitutionalism is that the constitution is to be used to reshape the laws that govern relations between private actors, including contract law.[226]

While there is debate about whether transformative constitutionalism only appears in developing countries, it definitely relates to societies that have undergone profound political changes.[227] In the paradigmatic cases, those changes included the adoption of new constitutional texts following nationwide consultations and deliberations. Brazil underwent this process in 1988, in the course of transitioning to democracy after a long period of military rule. Colombia's 1991 constitution was adopted in an effort to open up a two-party political system that was captured by a handful of powerful actors, leading to widespread popular frustration and political violence. In South Africa, the 1996 constitution was adopted to mark the end of the apartheid regime and the advent of multiracial democracy.

In each of these cases the reformed constitution clearly was designed to achieve economic as well as political change. The Brazilian constitution is the most explicit. It states that "[t]he fundamental objectives of the [state] are," among other things, "to eradicate poverty and substandard living conditions and to reduce social and regional inequalities."[228] Both the Brazilian and South African constitutions also make special provision for expropriation of rural land for the purpose of land reform.[229] In South Africa, the "commitment to land reform" is listed along with a broader commitment "to reforms to bring about equitable access to all South Africa's natural resources."[230] South Africa's constitution also guarantees, in qualified terms, equitable access to land.[231] Finally, all three constitutional texts guarantee access to key goods such as education, healthcare, housing, and social security.[232]

For present purposes, the critical feature of transformative constitutionalism is that it allows courts charged with resolving contractual disputes to invoke

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> multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.'

Klare, *supra* note 224, at 150.

226. Davis & Klare, *supra* note 82, at 410–11.

227. Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527, 532–33 (2017). *See generally* Versteeg, *supra* note 9 (describing broader concerns about inequality in the constitutional jurisprudence of certain developed countries).

228. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 3 (Braz.); *see also id.* art. 170 (specifying that the economic order must accord "with the dictates of social justice," "the social function of property," and "reduction of regional and social differences").

229. *Id.* art. 184; S. AFR. CONST., 1996 art. 25.

230. S. AFR. CONST., 1996 art. 25(2)–(4).

231. *Id.* art. 25(5).

232. C.F. art. 6 (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 48, 51, 67; S. AFR. CONST., 1996, art. 26, 27, 29.

constitutional norms as a basis for altering the distribution of resources in society, especially when the aim is to reverse inequality that can be linked to historic injustice. This directly contradicts the idea that it is illegitimate for judges to use contract law as a tool for promoting distributive objectives, a key intellectual foundation of contract law orthodoxy.

C. THE SIGNIFICANCE OF HETERODOXY

To this point, our analysis has presumed that contract law heterodoxy matters from a practical standpoint. In this Section, we examine three possible challenges to that conclusion. First, the divergence we observe may be formal rather than functional. Second, heterodox features of contract law may affect a relatively small proportion of the population. Third, firms might take steps to avoid the impact of distributive interventions.

1. Functional Convergence

A classic lesson of comparative law is that not all differences in legal doctrines and styles of legal reasoning translate into distinct outcomes of similar controversies. Instead, many comparative scholars believe that the opposite is true, with different doctrinal labels often bringing about similar or identical results. Prominent comparativists Konrad Zweigert and Hein Kötz famously argued for a presumption of functional similarity in the response of different legal systems to practical problems, despite apparent doctrinal differences.[233] That presumption may well apply to the problems addressed by contract law heterodoxy, even though Zweigert and Kötz limited their analysis to "advanced" legal systems, perhaps in an effort to exclude developing countries.

Our case studies deal primarily with legal arguments about the role of inequality and social rights in the adjudication of contract disputes. As noted throughout the country narratives, we believe that an orthodox approach could lead to the same result in at least some of the cases examined. Although prevalent, functional similarity does not appear to be universal, to the effect that contract law heterodoxy is, in many cases, consequential from an economic standpoint. Moreover, the greater tendency to invoke distributive or social justice considerations in contract law reasoning is interesting in its own right.

A more comprehensive approach to functional equivalence would consider not only whether courts across different jurisdictions would decide a given case in the same way by invoking different contract law doctrines, but also whether they might arrive at similar outcomes by invoking other bodies of law. This kind of functional substitution may well serve to limit the practical

233. *See* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 4 (3d ed. 1998). *See generally* GOOD FAITH IN EUROPEAN CONTRACT LAW, *supra* note 5 (finding significant convergence in the outcome of various hypotheticals).

significance of contract law heterodoxy. For instance, in the United States (and, to a lesser extent, other common law jurisdictions), bankruptcy offers vulnerable parties a fresh start from harsh bargains, while civil law jurisdictions are more likely to offer responses through contract law.[234] U.S. bankruptcy law is considered to offer a safety net which at least partially compensates for a weak welfare state,[235] and several progressive scholars advocate using bankruptcy law to achieve social objectives beyond economic efficiency.[236] More generally, U.S. law often tackles some of the same distributive concerns through specific legislative (rather than judicial) interventions, including in the realm of consumer finance, healthcare, and the provision of public services.[237]

2. Lack of Comprehensiveness

The project of relying on contract law to achieve distributive objectives presupposes a minimum degree of access to formal markets and courts. This means that the impact of contract law heterodoxy is generally limited to parties who were able to enter into contracts with nontrivial stakes and who have access to courts (and, arguably, to future contracting parties whose contract terms are shaped by the courts' jurisprudence). The poorest of the poor, however, are likely to lack access both to significant contracts and to courts, especially when the effects of their poverty are compounded by lack of information or other forms of vulnerability. Consequently, the primary beneficiaries of contract law heterodoxy presumably will be members of the middle class and lower middle class, not the poorest. This limitation of the potential effect of contract law heterodoxy is a concrete manifestation of the problem of comprehensiveness discussed in Part III above.

Lack of comprehensiveness is not a definitive indictment of contract law heterodoxy given growing global concern about the shrinking size and increasing precarity of the middle class. Moreover, the problem appears to be no more acute than the one observed in the context of transformative constitutionalism and the right to health. Various scholars argue that "the

234. *The Role of the State in Contract Law*, *supra* note 5, at 145–46, 175–76.

235. *See, e.g.*, Robert M. Lawless & Elizabeth Warren, *Shrinking the Safety Net: The 2005 Changes in U.S. Bankruptcy Law* 1 (U. Ill. L. & Econ., Working Paper No. LE06-031, 2006) ("The more generous U.S. bankruptcy laws partially compensated for the relatively stingy level of government assistance.").

236. *See generally* David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075 (2000) (explaining Vern Countryman's progressive views on bankruptcy law).

237. *See supra* note 50 and accompanying text; Patient Protection and Affordable Care Act, 42 U.S.C. § 18001(d)(3) (barring discrimination in provision of health insurance against individuals with preexisting conditions). *Cf. generally In re* City of Detroit, No. 13-53846, 2014 WL 6474081 (Bankr. E.D. Mich. Nov. 19, 2014), *aff'd* No. 15-CV-10038, 2015 WL 5461463 (E.D. Mich. Sept. 16, 2015), *aff'd in part, vacated in part* 841 F.3d 684 (6th Cir. 2016) (dismissing a complaint alleging that discontinuing municipal water services constituted a breach of an executory contract and a violation of constitutional rights).

judicialization of the right to health" may be regressive in favoring relatively wealthy citizens with access to courts, unlike public health policies that would benefit the poorest segments of the population.[238]

The fact that the impact of contract law heterodoxy depends on access to courts and formal contracting means that its prospects in any given jurisdiction will depend on a range of institutional arrangements. In the United States, for example, beyond the costs of legal proceedings (including legal representation), the widespread use and enforceability of arbitration clauses in consumer contracts limits the emergence and potential application of heterodox contract law.[239] By contrast, developing countries such as Brazil generally resist the use of arbitration in consumer contracts, which remain subject to judicial review—a mode of dispute resolution more conducive to heterodoxy.[240]

3. Avoidance

A central critique of contract law heterodoxy is that it can backfire. As the argument goes, attempts to favor certain groups in contract disputes may lead to price increases or other unfavorable contract terms that hurt precisely such parties in the future (the risk of "hurting the people you are trying to help"). Courts in developing countries are increasingly cognizant of the distinct ex ante incentives caused by contract law decisions, which can lead judges to pause before seeking to help the disadvantaged party in any given case due to the risk of harming similarly situated parties in the future.[241] This

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238. *See, e.g.*, Carlos Portugal Gouvêa, *Social Rights Against the Poor*, 7 VIENNA J. ON CONST. L. 454, 465–68 (2013); Virgílio Afonso da Silva & Fernanda Vargas Terrazas, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 L. & SOC. INQUIRY 825, 830–31 (2011); Octavio Luiz Motta Ferraz, *Harming the Poor through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1651–68 (2011).

239. *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 26 (2015), https://files.epi.org/2015/arbitration-epidemic.pdf [https://perma.cc/8J3Y-F2HS] (describing the turn to arbitration "in the past three decades [as] . . . a massive shift in the civil justice system that is having dire consequences for consumers and employees"); James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1695 (2017) (positing that, due to the greater use of arbitration of consumer contracts, "the common law doctrines of unconscionability and good faith . . . are essentially frozen in time").

240. Lei No. 8.078, art. 51, § VII, de 11 de Setembro de 1990, CÓDIGO DE PROTECAO E DEFESA DO CONSUMIDOR [C.D.C.] de Setembro 1990 (Braz.) (deeming null and void the clauses that impose mandatory arbitration of consumer contracts disputes).

241. For an example of this concern, expressed by Judge Theron in *Beadica*, see *supra* text accompanying note 118. Brazil's Superior Court of Justice recently reversed its prior decisions to uphold the statutory provision permitting life insurance contracts to exclude coverage if suicide is committed within the first two years of the agreement. While prior decisions emphasized the "requirements of social justice" in imposing coverage in the absence of actual proof that suicide was premeditated, the new caselaw considers the ex ante effects of the statutory regime favoring exclusion as "more humanitarian" in discouraging suicides. For more on this, see generally

may be why most of the examples of heterodoxy we document involve changes in contract law doctrines of relatively broad application—such as rules on prejudgment interest or recovery of partial payments for real estate—that disproportionately benefit members of disadvantaged groups, as opposed to rules targeted solely at members of those groups. These kinds of rulings cannot be avoided simply by discriminating against members of the disadvantaged groups because they apply to transactions with a more broadly defined group of people. Even if the effects of these sorts of heterodox rulings are neutralized by changes in contracting behavior, the intended beneficiaries will not be the only ones to suffer. Therefore, the breadth of these rulings dilutes both their positive effects on intended beneficiaries and the negative effects of any efforts at avoidance.

Another concern is that contract law heterodoxy may impact industrial organization and market structure. By imposing an "equity tax" on the contract law system, heterodox contract laws may encourage firms to eschew contracts entirely, such as by embracing vertical integration. One study by Brazilian economists found that global fast-food chain McDonald's changed its strategy in Brazil from relying primarily on franchisees (as it does in most jurisdictions) to adopting a significant majority of company-owned stores.[242] The shift occurred after courts rewrote the economic terms of franchise agreements based on constraints of Brazil's landlord-tenant laws when franchisees sued following the devaluation of the country's currency in 1999.[243]

Yet increased vertical integration may not be a particularly attractive outcome for developing countries whose economies are already dominated by large business groups. Scholars argue that weak contract institutions are one reason for the prevalence of family-owned business groups in developing countries, as vertical integration and the family's reputation substitute for formal contract enforcement.[244]

Paradoxically, at least some manifestations of contract law heterodoxy may favor relatively large business groups. Not only are they able to avoid market contracting to a greater extent through vertical integration, they also

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Mariana Pargendler, *Análise Econômica e Jurídica da "Presunção de Boa-Fé" no Direito Privado Brasileiro*, *in* ANÁLISE ECONÔMICA DO DIREITO: TEMAS CONTEMPORÂNEOS 841 (Luciana Yeung ed., 2020). Similarly, the Superior Court of Justice has increasingly limited instances of merchants' liability for stolen consumer cars in free adjacent parking lots, noting that liability implies the socialization of risk that will also be borne by consumers who do not use parking lots through higher prices. *See* S.T.J., Recurso Especial No. 1.426.598-PR, Relatora: Ministra Nancy Andrighi, 19.10.2017, Diário da Justiça Eletrônico [D.J.e], 30.10.2017, 9 (Braz.).

242. Vivian Lara dos Santos Silva & Paulo Furquim de Azevedo, *Contratos Interfirmas em Diferentes Ambientes Institucionais: O Caso McDonald's França Versus Brasil*, 41 REVISTA DE ADMINISTRAÇÃO [RA] 381, 382, 389–90 (2006).

243. *Id.*

244. *See e.g.*, Ronald J. Gilson, *Controlling Family Shareholders in Developing Countries*, 60 STAN. L. REV. 633, 641–45 (2007). *See generally* Tarun Khanna & Yishay Yafeh, *Business Groups in Emerging Markets: Paragons or Parasites?*, 45 J. ECON. LITERATURE 331 (2007) (reviewing works suggesting that business groups can respond to weaknesses in contract enforcement).

may be relatively attractive contracting partners because they are less likely to qualify for special legal treatment in the event of a dispute. In short, small businesses may benefit from heterodox contract adjudication, ex post, yet suffer from its expected effects ex ante through price adjustments and lost contracting opportunities. Conversely, firms belonging to large business groups could avoid both effects. What is perhaps even more troubling, by weakening private contracting as a commitment device, heterodox approaches to contract law could raise barriers to entry and again favor business groups with established reputations.

D. PROSPECTS FOR CONVERGENCE

The conditions correlated with the emergence of heterodoxy in Brazil, South Africa, and Colombia are beginning to emerge in the United States and other developed countries. There has been a tremendous rise in economic inequality in the United States and, to a lesser extent, other developed countries, at the end of the 20th century.[245] In many countries, including the United States, inequality is explained in part by a history of racial injustice.[246] This has prompted increased calls for attention to distributive considerations by scholars and political leaders, and lamentations about the state's inability to achieve the desired levels of distribution through tax and transfer schemes.[247] The manifestations of contract law heterodoxy that have emerged in Germany and other countries during the COVID-19 pandemic may mark the beginning of a trend.[248]

If inequality continues to rise, the pressure to abandon contract law orthodoxy in the United States and similarly situated developed countries will become stronger. If and when that happens, scholars and lawmakers in the developed world will benefit from studying the heterodox approaches that have emerged in countries such as South Africa, Brazil, and Colombia.[249]

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245. *See, e.g.*, PIKETTY, *supra* note 203, at 297–98 (2014).

246. For data on racial disparities in income and poverty in the United States, see JESSICA SEMEGA, MELISSA KOLLAR, EMILY A. SHRIDER & JOHN F. CREAMER, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2019, CURRENT POPULATION REPORTS 3–5 & figs. 1–2, 15 & 10 (2021). *See generally* WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY (2020) (calculating economic costs to Black Americans of slavery and post-emancipation discrimination).

247. *See generally* Fennell & McAdams, *supra* note 18 (arguing that political action costs as well as private transaction costs should be taken into account when looking to distribute wealth efficiently); Liscow, *supra* note 56 (arguing that the tax system has failed to redistribute wealth); Bozio et al., *supra* note 15 (examining changes over time in pretax and post-tax inequality in the United States and France); *Hacker*, *supra* note 15 (interviewing political scientist Jacob Hacker about his idea of predistribution, which refers the government shaping distribution of income and opportunity through means other than taxing and providing benefits).

248. *See supra* Section II.D.

249. For an example of research in this vein, see generally Hershkoff, *supra* note 3 (examining the use of contract law to protect rights to education and healthcare services in certain developing countries).

Whether contract law heterodoxy is viewed as a promising policy alternative or as an ill-devised strategy, its real-world significance shows how inequality might affect the operation of foundational private law institutions.

V. CONCLUSION

Documenting examples of contract law heterodoxy in developing countries illuminates both the factors shaping legal developments in developing countries and the normative stakes of contract law more generally. Contrary to conventional understandings, private law in developing countries is not merely a flawed copy of foreign counterparts or a remnant of indigenous (and backward) customs. Nor do the differences between developed and developing countries concern exclusively the efficiency of judicial enforcement. Instead, the economic, social, and institutional challenges faced by developing countries have promoted adaptations to contract law adjudication, including notably greater concern for distributive outcomes. While it is unclear whether this stance is beneficial, it is likely consequential from an economic standpoint.

The emergence of heterodox legal approaches in developing countries also draws attention to the potential link between inequality and the delegitimization of orthodox contract law doctrine. Economic dislocation during the Great Depression and the COVID-19 crisis also prompted more heterodox approaches to contract law in developed countries. For those opposing contract law heterodoxy, this may offer a warning on the importance of mitigating inequality through other means. For those favoring contract law heterodoxy, it may show the feasibility of a broader array of tools to fight social injustice. At any rate, the phenomenon reveals that contract law around the world is not as orthodox and uniform as scholars typically assume and that there are valuable lessons to be learned from turning the lens of legal scholarship toward developing countries.