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PROMISES, COMMITMENTS, AND THE FOUNDATIONS OF CONTRACT LAW

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Does one have an obligation to keep one's promises? I answer this question by distinguishing between two broad conceptions of promising. On the *normativized* conception of promising, a promise is made when an agent validly offers to undertake an obligation to the promisee to perform some act (i.e., give up a liberty-right in relation to her) and the promisee validly accepts the offer. Keeping such promises is morally obligatory by definition. On the *non-normativized* conception, the nature of promising does not *conceptually* entail any connection with the obligation to keep promises. A promise might be understood, for example, as an assertion that one will do something along with special assurance that one will do so and an invitation to rely on that assurance. A particularly attractive and relevant non-normativized account of promising takes promising simply to be *giving one's word* concerning one's future conduct. So understood, it is plausible—as a substantive matter—that one has an obligation to (1) alert the promisee, if one realizes that he will not perform the promised action, and (2) apologize and compensate the promisee if one does not perform the action, but one has no obligation to perform the promised action.

PROMISES, EXPECTATIONS, AND RIGHTS — *Eduardo Rivera-López* — 21

I address the problem of why promises create obligations. First, I spell out and object the so-called "expectational account" according to which the duty to keep our promises arises from the fact that, when we promise to do something, we create an expectation in the promisee, which we have the duty not to disappoint. It has been claimed that this account is circular since we can only raise the expectation, in the appropriate sense, if we already have the moral duty to keep our promise. I argue, against Scanlon and others, that such circularity is unavoidable. In the second section, I develop an alternative approach. Based on some ideas by H. Hart, H. Steiner, E. Mack, and others, I hold that the normative force of promises should be explained by its connection to the normative force of rights. Promising to do X should be understood as an act of surrendering our liberty-right not to do X. The central question is, therefore, how we come to have the moral power to limit our liberty-rights. My suggestion is that such power is conceptually linked to the very idea of exercising rights.

KANT ON "WHY MUST I KEEP MY PROMISE?" — *B. Sharon Byrd and Joachim Hruschka* — 47

This Article claims that for Kant a contractual obligation generates a universal right, meaning a right against everyone. Accordingly, a right to performance of a contract is more similar to a right in rem than to a right in personam, and failing to perform a contract is more similar to theft than to moral failure to do as promised. Part I shows that for Kant accepting a promise means taking possession of the promisor's choice to commit an act in the future. Part II explains why it is possible to acquire someone else's choice and how one does so in fact. Part III considers why the two parties' bilateral will can legislate so that

everyone recognizes the contractual claims it generates and thus why a court will enforce these claims in the civil social order. The Closing Comments explain why Kant says that the duty to keep one's promise is a categorical imperative for which any further proof is impossible—indeed as impossible as it would be to prove that three lines are needed to construct a triangle. Our conclusion is that seeing contractual claims as Kant does resolves most of the modern debates over a grand unified theory of contract.

RATIONAL CHOICE AND REASONABLE INTERACTIONS — *Bruce Chapman* — 75

Game theory probably offers the most well-known account of how rational agents interact in strategic situations. The rational thought processes that are involved, while enormously sophisticated, remain very private for each agent. Less well known is the alternative account that is offered by law and legal theory, an account where agents interact, and understand their interaction, under the idea of public (or objective) reasonableness. This Article argues, using some simple examples, that the legal account does better than the game theoretic account in explaining the actual levels of cooperation and coordination we observe across rational individuals in strategic situations.

A CONTRACTARIAN APPROACH TO UNCONSCIONABILITY — *Horacio Spector* — 95

In this paper I discuss two nonpaternalistic defenses of the doctrine of unconscionability in contract law. The first approach, proposed by Seana Shiffrin, relies on the moral ban to collaborate with other agents' immoral plans. Because this prohibition falls also on the judge, she must refrain from enforcing unfair or exploitative contracts. The second approach regards the unconscionability doctrine as one limitation on freedom of contract that rational contractors would choose in the course of adopting the fundamental terms of social cooperation. I assess the implications and merits of the two approaches. The contractarian approach is capable of justifying procedural unconscionability, but not substantive unconscionability. I maintain that this implication accords better with the conception of individual rights as freely alienable rights, which is central to individual autonomy in contractual settings.

DOES TODAY'S INTERNATIONAL TRADE AGREEMENT BIND TOMORROW'S CITIZEN? — *Gopal Sreenivasan* — 119

Focusing on the example of the General Agreement on Trade in Services (GATS), this Article begins by describing an important analogy between domestic Bills of Rights and enforceable international trade agreements. Both effectively disable the majority in later generations from certain exercises of its domestic legislative power. While there is some kind of democratic presumption against disabling the majority in any generation from exercising domestic legislative power, various argumentative strategies have been employed to defeat this presumption in the domestic constitutional case. This Article reviews these strategies and argues next that they cannot be generalized to the case of international trade agreements. Hence, there remains a democratic presumption against the effective disabilities that the GATS imposes on majorities in later generations in signatory jurisdictions. In the particular case of the health or education sectors, this Article concludes, more strongly, that the effective disabilities to exercise domestic legislative power imposed by enforceable international trade agreements are substantively unjustified. In these respects, such agreements are not morally binding on later generations.

STUDENT NOTES

TANKS IN THE STREETS: SUVS, DESIGN DEFECTS, AND ULTRAHAZARDOUS STRICT LIABILITY — *Kevin Case* — 149

SUV rollover crashes have been well-publicized and thoroughly litigated. Less attention has been paid to the lethal risks created by SUVs—particularly the latest "behemoth" SUVs like Hummers—to the occupants of other vehicles and pedestrians. Due to the design of SUVs, which are stiffer, heavier, and ride higher than cars, a collision between an SUV and a passenger car often results in catastrophic damage and injury to the occupants of the car, particularly when an SUV strikes a car broadside. Moreover, the design features of SUVs that create these dangers provide no utility or value to society. The "benefit" provided by an SUV consists of nothing more than a feeling of power and control that is purely personal to the driver of the SUV—a marginal benefit that pales in comparison to the risks created. This Note suggests two possibilities for addressing the extraordinary dangers of SUVs. The first approach is to litigate the dangerous features of SUV design as a "design defect" under products liability law. The second, more radical approach is to allege that driving a large SUV like a Hummer is an

ultrahazardous activity. Although courts have not applied the doctrine of ultrahazardous strict liability to automobiles, this Note suggests that the nature of the risks created by SUVs justifies strict liability under both the Restatement of Torts and other, more traditional applications of ultrahazardous strict liability.

RE-ENFRANCHISEMENT LAWS PROVIDE UNEQUAL TREATMENT: EX-FELON RE-ENFRANCHISEMENT AND THE FOURTEENTH AMENDMENT

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Individuals convicted of a felony lose the right to vote at least temporarily in most states, and ex-felons are disenfranchised for life in seventeen states. There are often procedures by which ex-felons may regain the right to vote in the lifetime disenfranchisement states, but the procedures vary widely and are often unclear and unrealistic. The right to vote is fundamental once provided by a state, and wealth discrimination coupled with a fundamental right merits strict scrutiny. While ex-felon disenfranchisement may be constitutional, once a state provides a procedure by which ex-felons may regain the right to vote, that procedure must not restrict access to the fundamental right to vote on the basis of wealth. This Note explores the background of felon voting laws, analogous challenges to poll taxes and literacy tests, and wealth discrimination jurisprudence. After an analysis of past and current challenges to ex-felon re-enfranchisement laws, this Note examines current re-enfranchisement laws and finds them unconstitutional.

IT'S AS CLEAR AS MUD: A CALL TO AMEND THE FEDERAL TRADEMARK DILUTION ACT OF 1995

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The Federal Trademark Dilution Act ("FTDA") has failed to protect, in the manner intended by Congress, the subset of trademarks that have achieved a high threshold of fame from subsequent uses that dilute or tarnish those trademarks. Courts have applied inconsistent measures of fame to the trademarks of the litigants before them and a poor wording choice in the drafting of the FTDA has led the Supreme Court to conclude that famous trademarks must sustain actual harm to their distinctiveness before their owners can receive the equitable remedy provided under the Act. Based on the legislative history of the Act, both of these situations are contrary to Congress's intent, and they reduce the effectiveness of the FTDA. This Article argues that Congress should now amend the FTDA to create a famous mark register, which will lead to more consistent determinations of the fame of a trademark, and will clearly permit an equitable remedy before famous trademarks lose any of their distinctiveness.

AMENDING THE NATURAL BORN CITIZEN REQUIREMENT: GLOBALIZATION AS THE IMPETUS AND THE OBSTACLE

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With the rise of non-native-born American politicians, the natural born citizen requirement in the United States Constitution has received much publicity. This note examines the history and background of the requirement that our President be born in this country. This note then focuses on how the increase of globalization should compel Americans to pass a constitutional amendment to repeal the natural born citizen requirement and discusses the reasons why many Americans oppose such a constitutional amendment. The note then explores some of the current misconceptions about globalization and concludes that Americans' fears and misconceptions of globalization may very well prevent the success of a constitutional amendment.