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# Contracts Then and Now: An Appreciation of Friedrich Kessler

George L. Priest<sup>†</sup>

Succeeding generations of Contracts scholars too young to have attended Friedrich Kessler's Contracts course<sup>1</sup> can only imagine its content from Fritz's powerful writings and from his enduring casebook.<sup>2</sup> The modern Contracts course as taught today, however, is surely different. Today, Contracts is a course addressing the regulation of private transactions in which our courts, as self-conscious social engineers, are evaluated in terms of their ability to define rules that optimally assign risks and informational burdens in order to broadly enhance societal welfare. There is little question today that the role of courts in resolving contract disputes is to regulate underlying behavior and to protect parties in unequal bargaining positions. Courts must also define what are called "default" rules—rules to control where the parties' meaning or intent is unclear—with attention to problems of monopoly or economic power, differential informational advantages, and relative risk-bearing ability.<sup>3</sup> These are not unimportant issues to a modern society, and the concepts and principles of modern Contracts are necessary implements in every lawyer's tool chest. Nevertheless, as a course in applied regulation, Contracts today is not always a class favorite and, to many, lacks the drama and apparent relevance of more popular Yale Law School courses, such as those on discrimination, free speech, or constitutional interpretation.

The Contracts course taught by Fritz Kessler, in contrast, was hardly lacking in drama or relevance.<sup>4</sup> Kessler saw the various doctrines of contract law and the principle of freedom of contract as intimately tied to the great issues of the modern world: the apparent decline of modern capitalism; the threatened capture of democracy by industrial interests; and the exploitation

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1. Including myself (however middle-aged).

2. FRIEDRICH KESSLER, *CONTRACTS: CASES AND MATERIALS* (3d ed. 1986) (with Grant Gilmore & Anthony T. Kronman). Remaining references to the casebook will be to the earlier edition, from which I first taught and first learned Fritz's ideas: FRIEDRICH KESSLER, *CONTRACTS: CASES AND MATERIALS* (2d ed. 1970) (with Grant Gilmore) [hereinafter *KESSLER, CASEBOOK*].

3. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *YALE L.J.* 729 (1992).

4. Again, to my great personal regret, these observations derive largely from inference from Fritz's writings, and from one thrilling lecture that Fritz gave to Dean Kronman's and my combined Contracts classes in the mid-1980's.

and strangling of the common consumer in a web of contractual obligation. He viewed the courts as accomplices throughout, well meaning but naive, clinging by rote to tired doctrines of promise and assent, yielding to an instinct for justice in a confused manner and without regard to developing a coherent theory of contractual interpretation.<sup>5</sup>

Trained under Weber and surely influenced by the fascist German experience from which he fled (to Yale Law School) in 1934, Kessler believed that fundamental changes had occurred in the character of Western economies that deeply threatened democratic societies and individual freedoms.<sup>6</sup> According to Kessler, “the process of capitalistic expansion” was gradually “slowing up,”<sup>7</sup> leading to the disruption of social systems in Western cultures and “the decline of the free market system.”<sup>8</sup> Kessler was principally concerned by the increase in the size of industry and the consequent aggregation of economic power. The “social order” had deteriorated “into the pluralistic society of our days with its powerful pressure groups.”<sup>9</sup> Kessler saw modern economies as increasingly dominated by large industrial empires,<sup>10</sup> resulting from “the innate trend of competitive capitalism towards monopoly.”<sup>11</sup> “[T]he capitalistic system has within itself forces which, if unchecked, will inevitably change a free enterprise system into monopoly capitalism and a liberal democracy into a pluralistic society which knows nothing but divided loyalties.”<sup>12</sup>

According to Kessler, monopoly capitalism itself was a form of fascism. In his writings, Kessler did not distinguish between the German and American experiences nor between political and economic fascism. Kessler was concerned about the decline of freedom in any dimension and saw the greatest threat to the West as the decline in economic freedom resulting from monopoly capitalism. “[T]he rise of fascism in our industrial world has made us realize that democratic freedom is not inevitable. Industrial man living in a mass society has to choose between democracy and totalitarian dictatorship.”<sup>13</sup> Kessler saw the growth of industrial fascism of the last forty years in the

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5. For a similar—though much richer—description of Kessler’s views emphasizing his devotion to contract theory, see Grant Gilmore’s tribute upon Fritz’s retirement, *Friedrich Kessler*, 84 YALE L.J. 672 (1975).

6. This discussion draws from a more extensive description of Fritz’s extraordinary influence on the development of our modern civil liability regime—especially products liability—in George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 483–96 (1985) [hereinafter Priest, *Invention*].

7. Friedrich Kessler, *Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking About Law and Justice*, 19 TUL. L. REV. 32, 50 (1944) [hereinafter Kessler, *Natural Law*].

8. *Id.* at 33.

9. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 641 (1943) [hereinafter Kessler, *Contracts of Adhesion*].

10. *See, e.g., id.* at 632.

11. *Id.* at 640.

12. Kessler, *Natural Law*, *supra* note 7, at 52–53.

13. *Id.* at 33.

increase in vertical integration and the development of sophisticated marketing techniques for controlling product distribution.<sup>14</sup> Single firms were now able “to control and regulate the distribution of goods from producer all the way down to the ultimate consumer.”<sup>15</sup>

According to Kessler, the principal technique for achieving vertical integration, the principal tool of mass marketing and, thus, the principal implements of corporate fascism were contracts and the creation of ironclad contractual obligations. The formation of large industrial empires had been made possible by contract and by standardized contracts in particular.<sup>16</sup> In one set of studies, Kessler examined modern franchise and agency distribution programs, and uncovered standardized contracts incorporating requirements provisions, output provisions, exclusive dealing provisions,<sup>17</sup> tying arrangements,<sup>18</sup> and a wide range of industry- or firm-specific restrictions on distributor behavior.<sup>19</sup> Kessler saw these various contractual restraints as conferring extraordinary economic power on producers while victimizing distributors.

In another set of studies, Kessler examined contracts extended directly to consumers, such as insurance contracts,<sup>20</sup> and found even more egregious constraints on freedom. His deservedly famous essay *Contracts of Adhesion—Some Thoughts About Freedom of Contract*<sup>21</sup> described the plight of consumers, in need of necessary goods and services, who can only accept the terms of the standardized contracts offered them, without bargaining and without effective choice. In modern times there is no shopping around for better terms “either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.”<sup>22</sup>

In both commercial and consumer contexts, thus, the use of standardized contracts enabled powerful industrial interests to simultaneously expand their authority and restrict the risks to which they were exposed. The standardized contract had become a “weapon of industrial warfare,”<sup>23</sup> and was responsible for the rise of monopoly capitalism. Kessler concluded that modern contractual practice was the principal threat to contemporary political and economic freedom.

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14. See Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1136 (1957) [hereinafter Kessler, *Automobile Dealers*].

15. Kessler, *Contracts of Adhesion*, *supra* note 9, at 632.

16. *Id.*

17. Friedrich Kessler & Richard H. Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959).

18. *Id.* at 61–62.

19. See generally Kessler, *Automobile Dealers*, *supra* note 14.

20. See, e.g., Friedrich Kessler, *Forces Shaping the Insurance Contract*, 1954 INS. L.J. 151; Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law* (pt. 1), 74 YALE L.J. 262 (1964) [hereinafter Kessler, *Protection of the Consumer*].

21. Kessler, *Contracts of Adhesion*, *supra* note 9.

22. *Id.* at 632.

23. KESSLER, CASEBOOK, *supra* note 2, at 7.

Kessler's vision of vertical integration and the use of standardized contracts as forms of totalitarianism was a part of a broader theory that explained the importance of contract law to the course of modern history since the Middle Ages. Following Weber, Kessler regarded contract law as the essential link between the economic character of society and the extent of available freedom. According to Kessler, contract law had made possible the escape from feudalism into the modern world.<sup>24</sup>

The triumph of capitalism during the eighteenth and nineteenth centuries, with its spectacular increase in the productivity of labor, was possible only because of a constant refinement of the division of labor. This development in turn presupposed that enterprisers could depend on a continuous flow of goods and services exchanged in a free market.<sup>25</sup>

Contract law, thus, "became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way."<sup>26</sup> For the development of industry, it was necessary that the legal system facilitate maximum opportunities for productive exchange at a minimum cost of compliance with legal formalities.<sup>27</sup> "Society, therefore, has to give the parties freedom of contract."<sup>28</sup> The concept of freedom of contract "is the inevitable counterpart of a free enterprise system."<sup>29</sup>

Kessler's modern studies, however, demonstrated that the role of the principle of freedom of contract in the development of Western economies had dramatically changed. Though in the eighteenth century the principle of freedom of contract had introduced an unprecedented scope of individual liberty by facilitating commerce, in the modern world it had become an instrument of coercion. According to Kessler, freedom of contract in the context of mass production and mass distribution was an illusion. Standardized contracts allowed the party with stronger bargaining power to impose its will on the weaker party.<sup>30</sup>

Kessler, thus, turned Maine's theory of status to contract on its head.<sup>31</sup> In today's economies, contract was employed to reinstitute a form of feudal subjugation that had been cast off centuries earlier. "Standard contracts . . . [had] become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own

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24. Kessler, *Contracts of Adhesion*, *supra* note 9, at 640-41.

25. KESSLER, *CASEBOOK*, *supra* note 2, at 2.

26. Kessler, *Contracts of Adhesion*, *supra* note 9, at 629.

27. *Id.*

28. *Id.*

29. *Id.* at 630; *see id.* at 640.

30. *Id.* at 632.

31. *See id.* at 641. Kessler's *Contracts of Adhesion* was written for a Symposium in which several essays examined the current relevance of Maine's theory.

making upon a vast host of vassals.”<sup>32</sup> The ancient principle of freedom of contract had become an instrument of oppression comparable to those employed by totalitarian political regimes. “Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.”<sup>33</sup> Kessler declared in a near-brilliant aphorism that in the modern world the exercise “of freedom of contract” had become “the exercise of power by contract.”<sup>34</sup>

Kessler criticized courts that blindly enforced to the letter the terms of standardized franchise or insurance contracts as unwitting accessories to the modern exploitation of economic power. Giving force to the terms of contracts of adhesion—terms that were dictated, not negotiated, and dictated by the more powerful interest—served only to aggravate existing inequalities.

With the decline of the free enterprise system . . . the meaning of contract has changed radically. Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege.<sup>35</sup>

Of course, not all modern courts were insensitive to differences in economic power, but Kessler saw efforts to redress the problem as unsystematic and ineffectual. In his study of automobile franchise agreements, for example, he provided instances in which courts had interpreted a franchise contract to redress some form of economic coercion by the manufacturer, only to have the manufacturer subsequently redraft the standard agreement to recapture the economic advantage.<sup>36</sup> Where standardized contracts and contracts of adhesion prevailed, this problem could not be solved without broader measures.

Kessler outlined new principles of contractual interpretation that he believed would provide courts sufficient authority to offset the power of industrial interests. His famous and influential article (with Edith Fine) “*Culpa in Contrahendo*”<sup>37</sup> set forth the importance to modern contract law of broad application of the principles of good faith and fair dealing, elaborating points that he had made in his more specific studies of contractual behavior.<sup>38</sup>

32. *Id.* at 640.

33. *Id.*

34. *Id.*

35. *Id.*

36. Kessler, *Automobile Dealers*, *supra* note 14, at 1150–53, 1164–65.

37. Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

38. For example, Kessler, *Automobile Dealers*, *supra* note 14, at 1145, 1149, 1177, 1189.

In this and in other respects, I believe, Kessler viewed himself as an activist reformer. He identified himself with the realist reform effort and viewed his work as part of the sustained attack on the substantive due process approach of the Supreme Court. In a revealing essay describing philosophical bases for the reformulation of contract law, Kessler described a “new sociological school of thought,” legal realism, which is committed to the important task “of constantly testing out the desirability, efficiency and fairness of inherited legal rules and institutions in terms of the present needs of society.”<sup>39</sup> The legal realists stood in opposition to a school of analytical jurisprudence, “which claims that the function of law is to be limited to ‘the care of security.’”<sup>40</sup> According to Kessler, “In time of transition like ours, the inherent weakness of this kind of positivism becomes apparent, and the doctrine that it is not wisdom but authority that makes a law becomes a dangerous slogan.”<sup>41</sup> Perhaps descriptive of the group of Yale Law School realists of his generation working for social reform, Kessler explains:

Challenged by . . . the ever-increasing tension between political democracy and capitalism, many of the modern realists have devoted their energies not to efforts at improving analytical theories, but to the task of rebuilding our democracy in accordance with the new social needs. They have joined the New Deal and its agencies, abandoning Locke’s idea of the neutral state and returning to Bentham’s state of social reforms in the interest of the greatest happiness of the greatest number. Law to them is more than an argumentative technique . . . . It is a unified attempt at freedom and social justice.<sup>42</sup>

Although not fully appreciative of the full range of Kessler’s ideas when I first taught from his Casebook, these surely are the themes of the course: from Kessler’s introductory essay, “Contract as a Principle of Order,” to Chapter 3 illustrating the erosion of the doctrine of privity of contract, to Chapter 5 addressing “Bargaining and Economic Liberty,” through the later chapters, almost never taught today, such as Chapter 17, “Contract as a Device for Industrial Integration,” Chapter 18, “Automobile Dealer Franchises: Vertical Integration by Contract,” and the concluding Chapter 19, “Status and Contract in Insurance.”<sup>43</sup>

Quite obviously, however, in comparison to the themes of Kessler’s Contracts course, our modern course seems dull and bloodless. Kessler saw the reform of contract law as essential to the preservation of capitalism and democracy, to the control of industrial empires, and to the protection of the

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39. Kessler, *Natural Law*, *supra* note 7, at 52.

40. *Id.* at 52.

41. *Id.* at 53.

42. *Id.* at 54.

43. KESSLER, CASEBOOK, *supra* note 2.

citizen-consumer. Modern concerns over risk allocation and optimal default rules as implements of social engineering seem a pale contrast.

But to compare the Contracts course under Kessler to the modern Contracts course in these terms alone is unfair because it ignores Kessler's intervening influence on modern contract law. Kessler invoked the great themes of capitalist development, the control of industrial empires, and the redress of inequalities of power to press courts to abandon their reliance on formalistic doctrines and, instead, to become social engineers. Kessler saw reform where courts declaimed rote commitment to interpreting contracts according to their letter and began to seriously consider as significant elements of contractual interpretation differential economic power, the allocation of risks in the context of unequal bargaining ability, and relative informational advantages.

Our modern Contracts course is different from Kessler's, thus, because Kessler's approach has prevailed. The principle of liberty of contract as an element of substantive due process jurisprudence is largely dead. Our courts have become self-conscious social engineers. The reality of differential market power, informational advantages, and relative risk-bearing abilities have become foundational elements of modern contractual interpretation.

Of course, one can question whether, as Kessler believed, standardized contracts and even contracts of adhesion always serve exploitative purposes.<sup>44</sup> In addition, judicial efforts—inspired by Kessler—to redress apparent economic inequalities between manufacturers and consumers through innovative legal doctrines are open to criticism.<sup>45</sup> Yet it is far from clear that Kessler would not join at least some of these concerns. Kessler strongly advocated contract, rather than tort law, as the appropriate doctrinal base for addressing the problem of inequalities in power.<sup>46</sup> This view has become increasingly popular in modern times,<sup>47</sup> although often without reference to Kessler's powerful advocacy.

Yet, in an age in which Kessler's vision of our courts as social engineers has triumphed, such disputes are disputes over engineering mechanics, not over the grand issues of capitalism or the control of industry, nor even over the role of contract law in modern society. Necessarily, the modern Contracts course is less stirring and dramatic than Kessler's, as a settled peace is less stirring and dramatic than Kessler's struggle to convince the world of his ideas.

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44. George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

45. See, e.g., Priest, *Invention*, *supra* note 6; George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

46. See, e.g., Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887 (1967); Kessler, *Protection of the Consumer*, *supra* note 20.

47. See, e.g., PAUL H. RUBIN, *TORT REFORM BY CONTRACT* (1993).





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