

# Contracts I: Fall 2021

*Law 102 (03), Wednesdays 9:50–11:50 am*

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## ***First Assignment***

The assignment for the first class is the readings for Class 1 below.

## ***The Course***

Contracts I is the first part of a two-part course, with Contracts II to follow in the Spring Term. The two courses are separate, with different exams and different subject matters. Contracts I examines introductory problems of contract law. What is the reason for enforcing contracts? How are contracts formed? Contracts II asks when contracts properly formed should not be enforced, what is their content if they're enforceable and what remedies are available on breach.

Your course materials are Robert E. Scott and Jody S. Kraus, *Contract Law and Theory* (5<sup>th</sup> ed.) ("Scott"); and James E. Byrne, *Restatement 2<sup>nd</sup> and US UCC Article 2: The Texts, The Comments, & The Illustrations* (5th ed.).

The first 125 pages of the Scott & Kraus casebook offer an overview of all of contract law, with the same issues subsequently repeated in the remainder of the book. As students find this a little confusing, we'll depart from the casebook's approach and integrate material from the first 125 pages into the body of the syllabus. We'll also depart from the casebook's idiosyncratic placement of the consideration doctrine before offer and acceptance. In both of these ways, we *will* be following the structure of a traditional contracts law course.

If I thought it helpful, I'd assign a treatise. I don't and I won't. On occasion I'll refer you to an article you might read. Apart from that, the assiduous student can easily find further readings on the web, and at times I'll assume that you've done that. I'll also assume that you've been taught how to access periodical literature off Lexis and (from the GMU Library web site) JSTOR. And there's always wikipedia...

The first class will examine at a well-known case (*Williams v. Walker-Thomas*) that raises many of the issues with which we'll deal in this course and in Contracts II. We'll follow this up with two classes on why contracts should be enforced, in the absence of vitiating factors such as fraud or duress. This will serve as an introduction to the economic way of thinking about contracts, and integrate material you'll see in other courses in the law school. I won't assume any prior knowledge of economics.

After class 3, we'll turn to standard questions of contract law, beginning with the requirements for formation of a contract: Offer and Acceptance and Consideration. The first seven classes should be seen as a unit, and a mid-term exam will follow. The remaining classes deal with special problems that arise in long-term contracts.

Most of the courses you'll take in law school are either based upon contracts or can be explained as the product of a hypothetical bargain. For that reason, your course in Contracts I and II will look at some of the foundational questions of private ordering, questions you'll see discussed in your other law school courses.

### *Administrative Matters*

The class will be an extended conversation about a fundamental institution of private ordering. For the most part, the problems we'll encounter can be answered by the application of common sense—a proposition I'll test by asking you to think about the contours of contract law before and during class. Each student is expected to be prepared for every class, and to be ready, willing and able to answer any questions regarding the assigned reading material. Occasionally you'll encounter unfamiliar legal terms in your readings, and when this happens you are responsible for looking them up in a legal dictionary such as Blacks (which is available on Lexis and Westlaw).

When you speak in class, address yourself to the entire class. If you're in the front row and whisper, people at the back won't hear you. Neither will I, for that matter. You are aspiring members of a profession whose members must speak out, if they are to be successful. We aren't meant to be potted plants.

Once each year a student tells me he's erased a file—which is why I recommend saving files on the cloud, through programs such as Dropbox.

I use PowerPoint, and will post my slides on my web site after each class. You'll find them at <http://buckleysmix.com> (“blog”), under “Contracts I.” These may be downloaded and saved by you, but not shared with anyone outside of this class.

PowerPoint has its pluses and minuses. It's useful to highlight a point, and invaluable when illustrating a technical issue in economics. That said, it can lull students into a state of passivity. Don't let that happen. For my part I'll try to avoid that by calling

on you to answer questions. For your part, you should want to discuss ideas and cases in class. It's the only way to learn.

You are not permitted to tape our classes or record them by any electronic means.

My office is on the 4th Floor, and my phone number is 703-993-8028. I encourage you to contact me at fbuckley@gmu.edu. If you anticipate that you will be stopping by my office, please drop me an email. If my door is open and if I'm not on the phone, feel free to drop in.

I won't schedule regular office hours unless you tell me there's a demand for them. My experience is that, if you want to reach me, you'll want to do so pronto without waiting for the next scheduled office hours. In that case, you'll find it more convenient to schedule the meeting yourself, in which case you'll find me open to meet with little delay.

In past years I've on occasion joined groups of students for dinner—dutch—at the Huong Viet restaurant in the Eden Centre (where Wilson Blvd. meets Seven Corners). Like many fine restaurants and hot dog stands, it doesn't take credit cards. If this is of interest, you'll let me know.

### ***Student Bios***

This is a professional school, and you are more than a group of students. You are colleagues. To that end you should look to each other as friends and associates, and I invite you to link with each other on social media, for example through a FaceBook group. In past years I've invited students to send me a 1-3 paragraph bio, which I've posted on the blog. I invite you to do so again this year.

### ***Grading and Exam***

There will be a one-hour mid-term exam during class time on the eighth week. The final exam will be on Wed., Dec. 1 at noon.

In both cases the exam will be Open Code, which means that you can bring your statutory supplement into the exam room. You will be permitted to annotate it with any notes that you make in it yourself and also add post-it notes, but you may not add any pages to it. You will not be permitted to bring in any other materials, such as the casebook.

For the final grade I reserve the right to increase a student's grade *upward* by one mark (e.g., B+ to A-) on the basis of exemplary class participation, and on average have done so for about 10 per cent of the students.

# Syllabus

## Contracts I (Fall 2021)

Class	Questions	Assignments
Aug. 25	<p><b><i>Introduction</i></b></p> <p>Did Mrs. Williams have meaningful choices? What remedy did Walker-Thomas seek? What is a meeting of the minds? What are the arguments for and against enforcing the contract here? What does justice in contracting mean? Is there anything wrong with secured lending? With secured lending in which an interest in after-acquired property is retained by the secured party? Even in the case of consumer goods?</p> <p>Should Aristotle’s idea of distributive justice inform the contours of contract law? What did he mean by corrective justice, and how would it apply in contract law?</p>	<p>Scott 1-4, 52-65</p> <p>UCC §§ 2-302, 9-201, 9-204</p> <p>Aristotle, Nicomachean Ethics, at blog</p> <p>Watch some “Caught in Providence” videos on YouTube or FB</p>
Sept. 1	<p><b><i>Bargaining Gains</i></b></p> <p>Binding contracts can be seen as a method of tying one’s hands and binding oneself to perform, and thereby solving a Prisoners’ Dilemma problem. What problems arise when bargains are not enforced?</p>	<p>Bentham, at blog</p> <p>Printing and Numerical Registering Co. v. Sampson, at blog</p> <p>Heritage Economic Freedom rankings, at <a href="http://www.heritage.org/index/ranking">http://www.heritage.org/index/ranking</a></p> <p><a href="http://www.youtube.com/watch?v=uAcVrcrqhn8&amp;feature=fvwrel">http://www.youtube.com/watch?v=uAcVrcrqhn8&amp;feature=fvwrel</a></p>

	<p>Can one expect the parties to exploit all profitable bargain opportunities? If so, why are there wars?</p>	<p><a href="http://www.youtube.com/watch?v=ED9gaAb2BEw&amp;feature=related">http://www.youtube.com/watch?v=ED9gaAb2BEw&amp;feature=related</a></p> <p>Garrett Hardin, The Tragedy of the Commons, at blog</p> <p>Coase Theorem, at blog</p> <p>Paul Johnson, “Transaction Costs,” in <a href="http://webhome.auburn.edu/~johnspm/gloss/transaction_costs.phtml">http://webhome.auburn.edu/~johnspm/gloss/transaction_costs.phtml</a></p>
<p>Sept. 8</p>	<p><b><i>Why enforce contracts?</i></b></p> <p>What are bargaining gains, from an economic perspective? What costs are associated with the non-enforcement of contracts? How do you understand detrimental and beneficial reliance?</p> <p>Why should promises be enforced at law? Why shouldn't they?</p>	<p><a href="http://www.youtube.com/watch?v=XFQ5LC5LK4w&amp;feature=related">http://www.youtube.com/watch?v=XFQ5LC5LK4w&amp;feature=related</a></p> <p>Hobbes, at blog</p> <p>Buckley, Just Exchange 38-41, at blog</p> <p>Buckley, Just Exchange, at 138-41 (at top), at blog</p> <p><i>Suggested:</i> Akerlof, The Market for Lemons, 84 Q.J. Econ. 488 (1970)</p> <p><i>Suggested:</i> Jules L. Coleman, Efficiency, Utility and Wealth Maximization, 8 Hofstra L. Rev. 509 (1980)</p> <p><i>Suggested:</i> Reciprocal Altruism, at <a href="http://en.wikipedia.org/wiki/Reciprocal_altruism">http://en.wikipedia.org/wiki/Reciprocal_altruism</a></p> <p><i>Suggested:</i> Robert Axelrod, The Evolution of Cooperation, at <a href="http://www-ee.stanford.edu/~hellman/Breakthrough/book/pdfs/axelrod.pdf">http://www-ee.stanford.edu/~hellman/Breakthrough/book/pdfs/axelrod.pdf</a></p>
<p>Sept. 15</p>	<p><b><i>Why Enforce Contracts?</i></b></p>	

	<p>Are there reasons to enforce contracts, apart from economic gains?</p> <p><b><i>Quasi-Contract</i></b></p> <p>How does quasi-contract differ from contract law? Why was quasi-contractual recovery denied in <i>Bailey v. West</i>? What is an “officious volunteer”?</p> <p><b><i>Offers</i></b></p> <p>What is privity of contract? What are third party beneficiaries?</p> <p>When is a statement that one proposes to do <i>x</i> in the future not a promise to do <i>x</i>? What is the objective standard of promising?</p>	<p>Hume, Treatise (Of the Obligation of Promises), at blog</p> <p>Scott 23-30</p> <p>Scott 4-13</p> <p><i>Moses v. Macferlan</i>, at blog</p> <p>Restatement § 19, 86</p> <p><i>Suggested Background Reading</i>: Maitland, The Forms of Action at Common Law, at blog</p> <p>Restatement §§ 1-5, 302, 16, 20</p> <p>Scott 14-23</p>
<p>Sept. 22</p>	<p><b><i>Offer and Acceptance</i></b></p> <p>What constitutes an offer and acceptance? In what sense are the rules of offer and acceptance like a coordination game? What is the difference between an offer and an “invitation to treat”?</p> <p>Why do the rules of Offer and Acceptance matter?</p> <p>What’s the difference between an offer and a “mere puff”? What does “simplex</p>	<p>Coordination Games, at <a href="http://en.wikipedia.org/wiki/Coordination_game">http://en.wikipedia.org/wiki/Coordination_game</a></p> <p>Scott 203-16</p> <p><i>Carlill v. Carbolic Smoke Ball</i>, at blog</p> <p>Scott 217- 35</p> <p>Restatement §§ 22-26, 50, 30, 35-36, 41-42, 56, 63-65, 67</p>

	<p>commendatio non obligat” mean? What is an offer to the public?</p> <p>What is a “merger clause”?</p> <p>What is an “agreement to agree”?</p> <p>What is the Leval test?</p> <p>What constitutes an acceptance? Must an acceptance be communicated?</p>	
Sept 29	<p><b><i>Revocation, Counter-offer and Formation under the UCC</i></b></p> <p>Why is there a legal difference between contracts <i>inter praesentes</i> and contracts <i>inter absentes</i>? Just how would you express the “mailbox rule”?</p> <p>When should an offeror be permitted to withdraw an offer? When should an offeree be permitted to withdraw an acceptance? When might silence constitute acceptance?</p> <p>Is there a special problem when unilateral contracts are revoked? What is a counter-offer and what are the “mirror image rule” and the “last shot” doctrines? What’s the difference between a counter-offer and simple dickering?</p> <p>What is the “Battle of the Forms” and how do common law principles and the UCC deal with it? How does UCC § 2-207 change the common law of offer and acceptance?</p>	<p>Scott 246-49</p> <p>Restatement §§ 36, 42, 40, 63, 69, 45, 39, 59, 38, 61</p> <p>Scott 249-78</p> <p>UCC § 2-207</p>
Oct. 6	<p><b><i>Consideration</i></b></p>	<p>Scott 42-52, 131-51</p> <p>Restatement § 17, 21, 71-74, 79, 81-86, 95-98</p>

	<p>What is the consideration doctrine and what purpose does it serve? How has the doctrine evolved? Should the parties be permitted to bargain around the doctrine? How might gratuitous promises be made enforceable (and why might the promisor want to make them so?) Suppose I want to give you my junk heap of a car—how might I do so?</p> <p>What is the past consideration doctrine?</p> <p>Does the promisor’s motive matter?</p> <p>What does mutuality on obligation mean?</p>	<p>UCC §§ 2-203, 2-206, 2-102, 2-104(1), 2-105(1),</p> <p>Gifts at law, at <a href="https://en.wikipedia.org/wiki/Gift_(law)">https://en.wikipedia.org/wiki/Gift_(law)</a></p> <p>Williams v. Carwardine, at <a href="http://www.bailii.org/ew/cases/EWHC/KB/1833/J44.html">http://www.bailii.org/ew/cases/EWHC/KB/1833/J44.html</a></p>
Oct. 13	Mid-term exam in class	
Oct. 20	<p><b><i>Promissory Estoppel</i></b></p> <p>What is promissory estoppel? Does it represent a challenge to contract law? Can you explain why promissory estoppel should ground liability?</p> <p>Should charitable subscriptions be treated differently? What about family promises, employment contracts and promises to insure? What makes each different?</p>	<p>Scott 152-93</p> <p>Restatement §§ 90</p>
Oct. 27	<p><b><i>The Material Benefits Rule</i></b></p> <p>Explain why the material benefits rule can be seen as an application of quasi-contract liability. What does the promise add? Why is it a “material” benefits rule? How does the “double trust” problem arise?</p>	<p>Scott 193-200</p> <p>Restatement § 86</p>

	<p><b><i>Irrevocable Offers</i></b></p> <p>What purposes might option contracts serve when supported by consideration? In what circumstances should a promise unsupported by consideration be found irrevocable?</p> <p>What's so special about construction contracts? Might similar problems arise in a non-construction context?</p> <p>What's the rationale for the UCC firm offer rule?</p> <p><b><i>Relational Contracts and Preliminary Agreements</i></b></p> <p>What are relational contracts and why, if at all, should they be treated differently from other contracts?</p> <p>When should preliminary agreements be enforced? When should an agreement not be enforced because it is indefinite?</p>	<p>Scott 235-46</p> <p>Restatement §§ 25, 45, 54, 62, 87</p> <p>UCC § 2-205</p> <p>Scott 281-89</p> <p>Restatement §§ 33, 21, 26-27, 90</p> <p><i>Suggested:</i> Lester Telser, A Theory of Self-enforcing Agreements, 53 J. Bus. 27 (1980), available on JSTOR.</p>
<p>Nov. 3</p>	<p><b><i>Post-contractual Opportunism</i></b></p> <p>What is asset specificity? Bilateral monopoly? Post-contractual opportunism? How might you expect to find these issues in franchise contracts? How does Article II of the UCC deal with the problem?</p> <p><b><i>Risk, Uncertainty, Indefiniteness</i></b></p> <p>What is a complete contingent contract? What's the difference between risk and uncertainty? How might contract draftsmen react to uncertainty? How</p>	<p>Scott 289-301</p> <p><i>Suggested:</i> Timothy J. Muris, Opportunistic Behavior in the Law of Contracts, 65 Minn. L. Rev. 521 (1980-81)</p> <p>Risk vs. Uncertainty, at <a href="http://economistsview.typepad.com/economistsview/2010/06/risk-versus-uncertainty.html">http://economistsview.typepad.com/economistsview/2010/06/risk-versus-uncertainty.html</a></p>

	<p>should a court handle “agreements to agree” and memorandums of understanding?</p> <p><b>Good Faith Norms</b></p> <p>Why did Cara want out in Brown v. Cara?</p>	<p>Scott 30-42, 301-306</p> <p>Restatement §§ 21, 27, 33-34, 204</p> <p>UCC §§ 1-102, 2-103(1)(b), 2-204, 2-208, 2-305, 2-308, 2-309</p> <p>Scott 306-17</p> <p>UCC § 1-201(20)</p>
Nov. 10	<p><b>Requirements Contracts</b></p> <p>What are output and requirement contracts? Why are courts concerned about the quantity of goods to be provided? What does good faith mean here? Is there a good faith issue when prices go down as well as up?</p> <p><b>Output Contracts</b></p> <p>How is Feld v. Levy like Empire Gas?</p> <p><b>Distributorships</b></p> <p>What was the economic rationale for finding a binding contract in Wood v. Duff-Gordon?</p>	<p>Scott 317-32</p> <p>UCC § 2-306</p> <p>Scott 332-41</p> <p>Feld v. Henry S. Levy &amp; Sons, 373 N.Y.S.2d 102 (1975).</p> <p>UCC §§ 1-201(20), 1-304, 2-103(1)(b), 2-104(1), 2-204, 2-306</p> <p>Scott 341-55</p> <p>UCC §§ 2-205</p> <p>Agency Costs, at <a href="http://en.wikipedia.org/wiki/Agency_cost">http://en.wikipedia.org/wiki/Agency_cost</a></p>
Nov. 17	<p><b>Termination Clauses and Non-competes</b></p>	

	<p>What duties should be implied in distributorship agreements? What are agency costs and how might they arise in a distributorship or franchise agreement? Can you explain why non-competes should sometimes be struck down?</p> <p><b><i>Contract Modification</i></b></p> <p>Why might the parties agree to a “no-modification” clause?</p>	<p>Scott 355-80</p> <p>Restatement §§ 186-88</p> <p>Just for fun, watch <i>Moneyball</i> (2011).</p> <p>Scott 380-96</p> <p>Restatement §§ 72, 73, 86, 89, 175, 176, 186, 188, 311</p> <p>UCC §§ 2-209, 1-304</p>
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