

GIFT PROMISES AND THE EDGE OF CONTRACT LAW

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Contract law is celebrated for empowering private parties to enact customized legal rules. Anyone can summon state actors to enforce personally tailored laws that govern private agreements. Yet this unique power is obviously limited in scope and context, and it is important to consider where and why we draw these borders. One can write a contract that annuls tort liability, for instance, but criminal laws cannot be overruled by contract—even in a hypothetical lawless commune where everyone is willing to accede to the change.

One of the most interesting and persistent theoretical borderlands relates to gift promises. The consideration doctrine formally bars gift promises from the domain of contract law, but there are a number of side doors—such as reliance, moral obligation, and irrevocable trusts—that permit some gratuitous promises to be treated like contractual obligations. These one-way promises do involve future transfers, after all, and they feel very close to bilateral exchange. Contract law has refused to convert all gift promises into binding obligations, however, and it has even made it more difficult to form mindful commitments here by repealing the efficacy of the seal.

But there is another, previously unexplored dimension to this puzzle. Contract law embraces special rules that protect third-party beneficiaries—outsiders who enjoy legal enforcement rights despite a lack of privity. Moreover, these rights can be vested as irrevocable. This Article argues that this obscure corner of contract law should receive independent legal significance, such that a mindful promisor should be able to recruit a willing counterparty to make a binding gift promise in any context. It demonstrates this third-party beneficiary technique, evaluates the implications for the borders of contract law, and concludes that vested third-party beneficiary rights are a feasible (though unexpected) device for moving gift promises comfortably into the realm of contract law.

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I. INTRODUCTION

I promise to give you my car next month. You say OK. We have a clear agreement, but will my promise be enforced by law? The answer is no, as every first-year contracts student should know, because the deal lacks consideration. I am free to change my mind, and you are powerless to sue if I keep the car.

Why do we have this requirement? Why limit legal protection for promises to bargained-for exchange? And even if this is a sensible rule most of the time, why do we make it immutable, such that a promisor can never make a binding gift promise, even if she desperately wishes to do so? Why not have a special talisman or symbol or chalice of binding that an enlightened promisor can sip from to invoke the authority of law for seriously-intended gift promises?¹

These are classic questions for contract law theorists. Lon Fuller raised the topic in the 1940s, concluding that consideration *is* a formality, akin to the seal, because bargained-for exchanges are taken seriously.² Gift promises, on the other hand, are causal—thrown out without much

1. Both Homer and Herodotus describe a ceremonial libation, used to sanctify serious promises. See IAN AYRES & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 49 (7th ed. 2008).

2. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941) (famously suggesting that consideration plays evidentiary, cautionary, and channeling roles in contract law).

care and thus categorically undeserving of legal enforcement.³ Law and economics scholars—including Richard Posner, Charles Goetz, and Robert Scott—arrive at a similar destination through a different route, arguing that enforcing gift promises might generate private gains for promisor and promisee but still lead to a net loss in social welfare due to administrative costs and other distortions.⁴ Said differently, the consideration doctrine arguably focuses the power of law on the category of promises most likely to increase social welfare by bolstering agreements where parties pursue reciprocal gain through value-enhancing trade. Other scholars disagree, claiming that the theoretical costs of enforcing gift promises are overstated or that more nuanced rules of enforcement can be adopted to distinguish casual promises from serious commitments and thereby support incremental private gains.⁵

In actuality, of course, the formal mandates of consideration have tailored a straightjacket that is far too tight. We loosen the buckles to enforce gift promises in several situations, such as when a promisee reasonably and detrimentally relies on the promise,⁶ or when the promisor is a goods merchant who pens an irrevocable offer.⁷ A few jurisdictions seem to go further, at least on paper, by stating that an *ex ante* moral obligation can support a subsequent gift promise.⁸ And there is also the strategy of moving the problem outside of contract law by creating an irrevocable trust to lock in present commitment to a future gift.⁹ The case law suggests, however, that notwithstanding these many exceptions, gift promises are still often denied the enforcement power of contract law.¹⁰

3. As Fuller puts it,

Where the element of exchange is removed from a case, the appeal to judicial intervention decreases both in terms of form and of substance. The appeal is diminished substantively because we are no longer in the field which is in modern society the most obviously appropriate field for the rule of private autonomy. From the formal standpoint, when we lose exchange, we lose the formal guaranties which go with the situation of exchange.

Id. at 819.

4. See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1305 (1980) (cautioning that legal enforcement may chill the practice of making gift promises); Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 415 (1977) (describing both administrative costs and error costs relating to the legal enforcement of gift promises).

5. See, e.g., Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 40 (1992) (questioning many of the arguments for denying legal enforcement of gift promises); Robert A. Prentice, “Law &” *Gratuitous Promises*, 2007 U. ILL. L. REV. 881 (questioning similar arguments using an analysis grounded in behavioral economics); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401, 419–20 (1991).

6. See *infra* Part II.B.1.

7. See *infra* Part II.B.5.

8. See *infra* Part II.B.2.

9. See *infra* Part II.B.7.

10. We can observe numerous cases each year where the legal need to keep a promise vaporizes under the consideration requirement. For just a few recent examples, see *Schatzki v. Weiser Capital Mgmt.*, No. 10 Civ. 4685, 2012 WL 169779, at *10 (S.D.N.Y. Jan. 19, 2012) (“Because the . . . [Plaintiff] . . . lacks consideration, it lacks mutuality and is merely a gratuitous promise, not actionable under New York law.”); *Lawley v. Siemons*, No. 11–12822, 2011 WL 6000797, at *8 (E.D. Mich. Nov. 30, 2011) (“It appears that Defendant merely made a gratuitous promise to [Plaintiff]. Such a promise, however, does not create a contract under Michigan law.”); *Sfredo v. Sfredo*, 720 S.E.2d 145, 156 (Va. App. 2012) (stating nominal consideration is akin to a gift promise and not legally enforceable). Importantly, these cases do not necessarily suggest that the promisor was seeking, *ex*

But there is another, previously unexplored dimension to this puzzle. Contract law embraces special rules that protect third-party beneficiaries—outsiders who enjoy legal enforcement rights despite a lack of privity. Moreover, these rights can be vested, such that they are irrevocable even without soliciting consent from the beneficiary. In this Article, I argue that this obscure corner of contract law should receive independent legal significance so that a mindful promisor should be able to recruit a willing counterparty to make a binding gift promise in *any* context, not just in one of the limited circumstances mentioned above.

How would this work? As I will demonstrate, any promisor wishing to make a binding gift promise would locate a willing counterparty and strike a “host” deal with that counterparty that also carries an explicit and irrevocable “parasitic” gift promise to the third-party beneficiary. Admittedly, there is some legal uncertainty about whether such an arrangement would be annulled as a pretextual bargain or enforced as a mixed motive exchange. But I contend that this should satisfy the bargaining requirement of contract law, if structured correctly, and thereby allow the third party to legally enforce the gratuitous promise.

So what? Why should we care about the existence of an obscure legal device that frees would-be gift promisors from the shackles of consideration? Clearly, if we do not wish gift promises to be legally binding, then we should close this loophole in contract law. If, however, irrevocable gift promises are desirable under certain circumstances—perhaps with some accompanying formality—then we must question whether vested third-party beneficiary rights are a sensible device for establishing this formality. I argue that the law of third-party beneficiaries is an unusual, and perhaps unanticipated, vehicle for making binding gift promises—but that the technique I describe contains cautionary and evidentiary features that cause it to serve as a reasonable indicator of serious gift promises. The theoretical borders of contract law should be expanded to include gift promising, and this Article offers a “new seal,” one forged in the law of third-party beneficiaries, that should empower private actors to muster legal backing for these commitments.

The Article is organized into three short sections. Part II outlines the historical exclusion of gift promising from contract law and reviews the modern exceptions to this doctrine. Part III presents the third-party beneficiary technique, walking first through the basic doctrine and then through the exact steps that any promisor might take to craft a binding gift promise. Part IV considers the implications of this doctrinal bypass by revisiting the normative debate on whether contract law should enforce gift promises, and by arguing that third-party beneficiary law should receive independent legal significance—and thereby expand the edge of contract law. A brief conclusion summarizes the Article.

ante, to mindfully create a binding gift promise. Rather, the enforcement power of contract law is simply unavailable to the plaintiffs in the context of these cases. That is, the *ex post* claims fail.

II. GIFT PROMISING AND THE LAW

One of the most challenging tasks for contract theorists is to define and delineate the appropriate scope of the law. How far should freedom of contract extend and allow individuals to muster state backing to solidify customized agreements? Conversely, when should lawmakers refuse to enforce promises, providing freedom from contract and preserving space for individuals to change their minds without legal consequence? Relatedly, what types of promises go too far, such that we are uncomfortable permitting willing parties to engage in private ordering? Negotiating the precise borders of contract law is a thorny endeavor, and the decisions here have meaningful consequences for social behavior.

One of the most interesting and persistent theoretical borderlands relates to gift promises. The consideration doctrine formally bars gift promises from the domain of contract law, but there are a number of side doors—such as reliance, moral obligation, and irrevocable trusts—that permit some gratuitous promises to be treated like contractual obligations. These one-way promises do involve future transfers, after all, and they feel very close to bilateral exchange. But contract law has refused to convert all gift promises into binding obligations. The only way to understand this part of the frontier is to begin with the consideration bulwark against gift promising and to then consider the various side doors and tunnels that permit certain types of unilateral promises to slip through the borders and receive the backing of law.

A. *The Consideration Bulwark*

The consideration doctrine is familiar and merits only brief discussion. Contract law does not treat all promises as binding; to gain the power of legal enforcement, a party must typically establish that consideration is present. In a casual sense, consideration simply means a deal, or an exchange of something of value. But contract law has developed more technical rules related to consideration.¹¹

First, while most deals will confer both a legal benefit and a legal detriment to the promisor and the promisee, this need not always be the case. For example, I receive nothing of value if I promise to pay you \$5000 in exchange for your promise not to smoke during the next year.¹² But you have incurred a sufficient legal detriment and can sue me for

11. *Restatement (Second) of Contracts* Section 71 defines consideration as follows:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of: (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. . . .

RESTATEMENT (SECOND) OF CONTRACTS: REQUIREMENT OF EXCHANGE; TYPES OF EXCHANGE § 71 (1981).

12. The warm glow I may enjoy from helping you kick the habit is an insufficient legal benefit in this context.

breach if I fail to pay.¹³ Either a benefit to the promisor or a detriment to the promisee will suffice.

Second, the consideration doctrine also requires a bargain. It is not enough that an exchange of benefits or detriments has occurred. A plaintiff must also establish that each promise serves as a reciprocal inducement for the other. Courts differ over the amount of evidence necessary to establish the presence of this bargain,¹⁴ though contextual norms of enticement will usually apply.¹⁵ It is clear, however, that consideration requires a quid pro quo and that conditional gifts,¹⁶ or other unbargained-for exchanges, do not normally clear the bar. Christmas is not a contract.

A number of legal implications follow from the consideration requirement, but, for our purposes, a naked gift promise obviously lacks consideration. A promisor can make a present gift—which becomes irrevocable under property law.¹⁷ Or she can make a binding promise of future exchange.¹⁸ But it has long been stated that one cannot make a binding future gift promise in contract law.¹⁹

B. *Some Side Doors and Tunnels*

In actuality, however, a number of side doors and tunnels have arisen over the years, and these exceptions *do* support legally binding gift promises in limited contexts. Some of these crossings are broader than others, however, and a few seem to be dead-letter law or abandoned efforts to expand the borders of contract law.

I. *Reliance*

The concept of reliance, also known as promissory estoppel, is perhaps the most significant exception to the consideration requirement.²⁰

13. This is illustrated by the famous case of *Hamer v. Sidway*, 27 N.E. 256, 259 (N.Y. 1891) (upholding an uncle's promise to pay \$5000 if nephew abstained from alcohol, tobacco, gambling, and swearing). The argument that you have not incurred a detriment because quitting smoking is good for you falls flat; foregoing anything that you have a legal right to do is a sufficient detriment.

14. A few courts seem to require evidence of negotiations or even haggling. *See, e.g.*, *Jara v. Suprema Meats Inc.*, 121 Cal. App. 4th 1238, 1252 (2004); *Bogigian v. Bogigian*, 551 N.E.2d 1149, 1152 (Ind. Ct. App. 1990). But this is an exaggerated view of the bargaining requirement and not the prevailing approach.

15. *See, e.g.*, *Pennsy Supply, Inc. v. Am. Ash Recycling Corp.*, 895 A.2d 595 (Pa. Super. Ct. 2006) (“The bargain theory of consideration does not actually require that the parties bargain over the terms of the agreement. . . . [W]hat is required . . . is that the promise and the consideration be in ‘the relation of reciprocal conventional inducement, each for the other.’”) (quoting E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 2.6 (1990) (citing O. HOLMES, *THE COMMON LAW* 293–94 (1881))).

16. A conditional gift, such as “I promise to give you my car if you come by to pick it up,” may impose a detriment on the promisee, but this detriment is not sought by the promisor in exchange for the promise. I do not care if you come by to get the car; I am just telling you how to accept the gift.

17. E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 132–42 (1998).

18. *Id.* at 43–54.

19. *See* sources cited *supra* note 5.

20. Quasi-contract is the other fundamental alternative to bargained-for consideration. But quasi-contract, grounded in the law of restitution, is used to allow a party to recover payment in situations

Famously enshrined in *Restatement (Second) of Contracts* Section 90, the theory states that a promise can be legally binding, without consideration, when it induces reasonable and detrimental reliance by a promisee.²¹ For example, Grandpa promises to give his granddaughter Katie \$100,000 next month so she does not have to work, and Katie relies on this promise to quit her job. There is no consideration here—Grandpa is not bargaining for Katie to quit—but the promise may be legally binding under a reliance theory.²²

Reliance reaches broadly, and some will recall how Grant Gilmore boldly predicted that this exception would swallow the consideration rule.²³ But this was a dramatic overstatement, and more recent studies of the reliance doctrine show that judicial use of the theory is modest.²⁴ Consideration continues in the vanguard of contract law, and pending dramatic circumstances, such as those in the example above, someone wishing to make a legally binding gift promise cannot normally draw upon reliance theory to accomplish the task.

There are at least three concerns. First, a promisee must actually rely on the gift promise, in a reasonably foreseeable and detrimental manner, before the commitment becomes binding under a reliance theory.²⁵ This is not something that a promisor can typically control. Indeed, it is possible that a promisee will not rely, in many cases, out of a fear that the promisor will renege and that the transaction costs of enforcing the claim will dwarf any benefits. Second, even if a claim can be made out under promissory estoppel, the recovery may be benchmarked to the extent of the reliance, not the full amount of the promise.²⁶ Finally, there is nontrivial doctrinal uncertainty about what type of reliance is sufficient

where they would have made a contract if they could have, but they did not. It is a robust alternative theory for providing compensation for the conferral of a benefit, but it is only tangentially related to the issue of consideration. For quasi-contract imposes an exchange—benefit for benefit—in situations where it is just to repay one party. Said differently, quasi-contract should not be seen primarily as an exception to consideration, but rather as an exception to the agreement process.

21. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90 (1981).

22. See *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898). The actual facts of the case were not so extreme, as Katie had secured a replacement job by the time of the lawsuit. *Id.* at 366.

23. GRANT GILMORE, *THE DEATH OF CONTRACT* 72 (1974).

24. See Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975) (critiquing Gilmore's claims); see also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 904–06 (1985) (finding somewhat broader acceptance of reliance during a later time period than Henderson); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 344 (1969) (finding that courts primarily used promissory estoppel in situations where the parties also faced contractual liability for bargain promises—and not in other circumstances that also apparently met Section 90's less stringent requirements); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580–84 (1998); Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 49–51 (1996).

25. The law is more accommodating, however, for donative promises made to charitable organizations. A reliance claim will typically result in legal enforcement of these promises even if the charity cannot show any specific change in position that resulted from the pledge. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(2).

26. See *id.* § 90(1); Speidel, *supra* note 24, at 1178.

to seal a gift promise. For all of these reasons, the doctrine of reliance cannot be viewed as a convenient vehicle for making binding gift promises.

2. *Moral Obligation Plus Subsequent Promise*

A moral obligation (typically arising from past consideration) followed by a subsequent promise is the second possible loosening of the consideration requirement. It is clear that past consideration is not normally legal consideration; how could the bargaining requirement be satisfied? But when an *ex post* promise is made in acknowledgement of an already-conferred benefit, contract law flirts with the possibility that this promise may be legally binding. If, for example, you return my lost puppy and I gratefully promise you \$100 next week as thanks, I would normally not be legally held to my word. We have not bargained for this exchange; I am just thanking you for something that you have already done. You might, however, try to enforce my promise under a moral obligation claim.

Restatement (Second) of Contracts Section 86(1) recognizes this borderline theory, which rests somewhere between gift promise and quasi-contract, by stating that “[a] promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.”²⁷ A few states bolster this provision with statutory support,²⁸ and Gilmore hypothesized, much less famously, that this theory would strike a second fatal blow to consideration.²⁹

But even Robert Braucher, first Reporter for *Restatement (Second)*, acknowledged that the theory of moral obligation plus subsequent promise “bristles with nonspecific concepts.”³⁰ Indeed, it raises far more questions than it answers: What counts as a sufficient moral obligation or past consideration? What theory of morality is in play? How close in time must the moral obligation and subsequent promise occur? How connected must the subsequent promise be to the prior moral obligation? And so on.³¹

Moreover, *Restatement (Second)* Section 86(2) seems to scale back the theory significantly by stating that “[a] promise is not binding under Subsection (1) . . . if the promisee conferred the benefit as a gift or for

27. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE FOR BENEFIT RECEIVED § 86(1).

28. See, e.g., CAL. CIV. CODE § 1606 (West 2013); N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 2013).

29. See GILMORE, *supra* note 23, at 72.

30. Robert Braucher, *Continuation of Discussion of the Restatement of the Law, Second, Contracts*, 42 A.L.I. Proc. 273 (1965).

31. The various challenges, ambiguities and limits are assessed in Stanley Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971); Jean Fleming Powers, *Rethinking Moral Obligation as a Basis for Contract Recovery*, 54 ME. L. REV. 1 (2002); Steven Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045 (1992).

other reasons the promisor has not been unjustly enriched”³² It is not clear, then, that this theory adds much beyond quasi-contract.³³ In any event, a search of the cases suggests that the theory is almost never used to upend the consideration requirement,³⁴ and I would contend that this is essentially empty law.

3. *The Seal*

Once upon a time, pressing a wax seal to a written document would render the promise legally binding. Later this was relaxed, such that writing the word “seal” or “L.S.” (*locus sigilli*, meaning “place of the seal”) would accomplish the same result. In both cases, the formal deliberation thought to have accompanied use of the seal gave the law comfort that the promise therein was seriously considered and worthy of enforcement.³⁵

But over the past century, the power of the seal has crumbled. The Uniform Commercial Code makes it quite clear that seals are inoperative: “[E]very effect of the seal which relates to ‘sealed instruments’ as such is wiped out insofar as contracts for sale are concerned.”³⁶ Approximately two-thirds of the states have enacted statutes that explicitly deprive the seal of binding effect.³⁷ And judges have insisted for decades now that the seal is meaningless in contract law.³⁸

Surprisingly, *Restatement (Second)* maintains a provision that seems to support the efficacy of the seal. According to Section 95, “In the absence of statute a promise is binding without consideration if (a) it is in writing and sealed; and (b) the document containing the promise is delivered; and (c) the promisor and promisee are named in the document”³⁹ But this must also be understood as dead letter law. Courts do not cite to Section 95 to support a promise without consideration, and

32. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE FOR BENEFIT RECEIVED § 86(2).

33. See Henderson, *supra* note 31, at 1116–18 (arguing that what Section 86 gives with one hand in part (1) is taken away with the other hand in part (2)).

34. See Edwin Butterfoss & H. Allen Blair, *Where is Emily Litella When You Need Her?: The Unsuccessful Effort to Craft a General Theory of Obligation of Promise for Benefit Received*, 28 QUINNIPIAC L. REV. 385, 415 (2010) (“Since the adoption of Section 86 . . . there have been only eight cases applying the material benefit rule to enforce a promise.”). The authors go on to argue that most of these cases involve the reinstatement of a debt obligation that was previously unenforceable due to bankruptcy or some other procedural bar such as the statute of limitations. *Id.* For an example of a case rejecting the moral obligation doctrine, see *Dementas v. Estate of Tallas*, 764 P.2d 628, 634 (Utah Ct. App. 1988).

35. See Eric Mill Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617, 628–32 (1993).

36. U.C.C. § 2-203, cmt. 1 (1977).

37. LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 11 (8th ed. 2006).

38. See, e.g., *In re Greene*, 45 F.2d 428, 430 (S.D.N.Y. 1930) (“The presence of the seal would have been decisive in the claimant’s favor a hundred years ago. Then an instrument under seal required no consideration, or, to keep to the language of the cases, the seal was conclusive evidence of consideration. In New York, however, a seal is now only presumptive evidence of consideration . . . [and] this presumption was amply rebutted in this case” (citations omitted)).

39. RESTATEMENT (SECOND) OF CONTRACTS: REQUIREMENTS FOR A SEALED CONTRACT OR WRITTEN CONTRACT OR INSTRUMENT § 95(1).

scholars generally assume that the time when a seal could render gift promises binding has passed into oblivion.⁴⁰

4. *The Uniform Written Obligations Act*

In 1925, the National Conference of Commissioners on Uniform State Law (NCCUSL) decided to fill the void created by the abolition of the seal. The result was the Uniform Written Obligations Act, recommended statutory language stating that “[a] written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.”⁴¹ Such a rule would clearly open the doors for gift promises of any sort.⁴²

Unfortunately for NCCUSL, no one came to this party. Only one state, Pennsylvania, adopted and retained the statute,⁴³ and NCCUSL was forced to retitle the Act the *Model* Written Obligations Act. This Act does get some use in Pennsylvania,⁴⁴ but it plays no broader role in contract law.

5. *The Merchant’s Firm Offer*

One continuing exception to the consideration doctrine is the merchant’s firm offer rule. As U.C.C. Section 2-205 describes, “An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for a lack of consideration”⁴⁵

This should be contrasted with the common-law rule stating that a gift promise not to revoke an offer is ineffective. I can promise, promise, promise that I will not revoke my offer to you before this Friday and pull the plug without consequence two minutes later.⁴⁶ Under Section 2-205, however, the rule is indeed different, and even a quick review of the case

40. See, e.g., Holmes, *supra* note 35, at 637–38; Joseph Sipur, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is Not Binding but Should Be*, 97 Nw. U. L. REV. 1809, 1812 (2003).

41. UNIF. WRITTEN OBLIGATIONS ACT § 1 (1925).

42. See William Foster Reeve, III, *The Uniform Written Obligations Act*, 76 U. PA. L. REV. 580, 584 (1928).

43. See Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1479 (2009). Utah initially adopted this statute but soon repealed the law. *Id.* The Pennsylvania statute is codified at 33 PA. CONS. STAT. ANN. § 6 (West 2011).

44. See, e.g., *Kia v. Imaging Scis. Int’l, Inc.*, 735 F. Supp. 2d 256, 265 (E.D. Pa. 2010); *McGuire v. Schneider, Inc.*, 534 A.2d 115, 118 (Pa. Super. Ct. 1987), *aff’d per curiam*, 548 A.2d 1223 (Pa. 1998).

45. U.C.C. § 2-205 (1977). The text goes on to describe the limitations on the length of a firm offer (in no event may the irrevocability exceed three months) and the signature requirement in more detail. *Id.*

46. See, e.g., *Dickinson v. Dodds*, 2 Ch. D. 463 (Cal. Ct. App. 1876).

law confirms that a merchant's firm offer will be binding when the prerequisites are met.⁴⁷

But note the very limited context for this gift promise exception. First, it will only work for goods transactions. Second, it will only work if the promisor is a merchant; you or I cannot normally make a firm offer. Third, it only works for a limited time and if signed by the merchant. Finally, and most importantly, the substantive domain of promising is extremely narrow—we are talking here only about irrevocable offers. No other type of gift promise is supported by Section 2-205.

6. *Modification*

Contract modification also enjoys relaxed treatment of the consideration doctrine. Historically, a modification affecting the obligations of just one party was invalidated for failure of consideration under the preexisting duty rule.⁴⁸ Said differently, the modification was understood as a second contracting effort, and failure to establish bargained-for consideration in the modification would render any purported change null. Over time, however, both the U.C.C. and the common law recognized that this often led to harsh results and started to treat modifications differently. Today, a modification without consideration is legally binding as long as it is made in good faith (for goods contracts)⁴⁹ or as long as some unexpected change has occurred in the relationship (under common-law jurisdictions that accept the *Restatement (Second)* test).⁵⁰ But again, this rule takes effect only in a narrow range of circumstances, as it requires both a prior contractual relationship and a bona fide agreement to modify. Certainly it does nothing to support broader gift promises.

7. *The Irrevocable Trust*

Thus far, the gift-promising side doors have either been quite limited in context or dead-letter law. But it is possible to move outside contract law and replicate the effects of a gift promise by combining a present transfer of property with the separate legal personhood of a trust.⁵¹ Step one is to establish an irrevocable trust that instructs the trustee to give some property to a named beneficiary at a future time. Step two is to make a binding present transfer of the item to the trust. I could, for example, transfer the title of my car to an irrevocable trust today and instruct the trustee to let me drive the car for the next four weeks and then

47. See, e.g., *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1121 (5th Cir. 1985); *Friedman v. Sommer*, 471 N.E.2d 139, 140 (N.Y. 1984).

48. See E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* §§ 4.21–4.25 (3d ed., Little, Brown & Co. 2004); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 64 (4th ed. 2001).

49. U.C.C. § 2-209(1).

50. *RESTATEMENT (SECOND) OF CONTRACTS: MODIFICATION OR EXECUTORY CONTRACT* § 89(a). See, e.g., *Angel v. Murray*, 322 A.2d 630, 636 (R.I. 1974) (adopting the Restatement test for modification).

51. See, e.g., Prentice, *supra* note 5, at 905 n.141; Siprut, *supra* note 40, at 1829 n.125.

give the car to you at the end of the month. Once this is accomplished I cannot get the car back; title has passed out of my hands. And you have clear rights, as trust beneficiary, to receive the car when the month is up. Thus, I have effectively accomplished, via property law and trust law, the elusive gift promise thought to be forbidden by contract law.

This is not a technique that is familiar to non-lawyers, however, and we might question why the ability to make a binding gift promise lies only with those who have the knowledge and resources to create a trust. The transaction costs here may also be significant, in some cases, eating up the benefits of gift promising.

More importantly, however, this strategy is difficult to employ for some types of gift promises. Use of a trust typically requires the immediate transfer of property and precludes gift promises involving future services or property that the promisor does not currently possess.⁵² For instance, I can make a binding promise to give you my car next month via irrevocable trust. But what if I want to make a binding gift promise to *personally wash* your car next month? How do I reduce that promised action into a tangible asset that can be irrevocably transferred today into a trust? Or what if I want to make you a binding promise today to give you a car next month that I have not yet purchased? I do not have the pink slip to sign over to the trust. Even with an irrevocable trust, then, the context for gift promising seems limited.

Moreover, the use of a trust also causes the gift promise to be subjected to different legal rules. For example, if I make you a binding gift promise (using one of the exceptions listed above), but enter into bankruptcy before the promise is carried out, then your claim is subject to the bankruptcy process.⁵³ Use of an irrevocable trust, on the other hand, renders the claim bankruptcy-remote (assuming no fraudulent transfer).⁵⁴ For this reason, the irrevocable trust strategy does not perfectly replicate a gift promise in contract law.

It turns out, however, that a party who really wants to bind herself to a gift promise need not bother with irrevocable trusts and property law. There is another dimension to this puzzle, residing soundly within contract law, that should unlock the door to mindful gift promising.

III. THIRD-PARTY BENEFICIARY GIFT PROMISING

Contract law allows third-party beneficiaries to maintain direct claims against a breaching promisor, and, under certain circumstances, recover damages despite a lack of privity.⁵⁵ This may be unexpected to

52. The reader will hopefully find it self-evident that if you do not have something, then you cannot place it in a trust.

53. See ARTHUR H. BOELTER, REPRESENTING THE BANKRUPT TAXPAYER § 5:110 (2013).

54. *Id.*

55. See RESTATEMENT (SECOND) OF CONTRACTS: INTENDED AND INCIDENTAL BENEFICIARIES § 302; FARNSWORTH, *supra* note 48, § 10.3; MURRAY, *supra* note 48, § 130; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 17.4 (6th ed. 2009).

some, as these rights receive little attention in contract law scholarship. I will quickly trace the requirements for establishing valid third-party beneficiary rights and then turn to the issue of how these rights can be vested (rendered irrevocable) in the third party. Armed with this background, I can present my primary argument: that vested third-party beneficiary rights should be able to carry legally binding gift promises.

A. *Third-Party Beneficiary Rights in Contract Law*

Third-party beneficiary rights are an overlooked corner of contract law. Arthur Corbin was obsessed with the issue in the 1920s, penning six articles over a twelve-year period,⁵⁶ but it has attracted little commentary in recent years.⁵⁷

In order for these rights to attach, a third party must establish that she is an “intended beneficiary,” as opposed to a mere “incidental beneficiary” (who does not receive outsider rights). As these terms suggest, the classification is ultimately grounded in the intentions of the promisor and promisee. If A and B state in their contract that C is an intended beneficiary of the deal, then C has an easy claim to the rights. But the initial counterparties do not need to name an intended beneficiary with specificity. The counterparties can designate a general class of beneficiaries,⁵⁸ or a given third party might even argue that he is an intended beneficiary notwithstanding the fact that the contract says nothing at all about the rights of outsiders.⁵⁹

Restatement (Second) offers a helpful synthesis of the rule: “Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties”⁶⁰

56. Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 46 L. Q. REV. 12 (1930); Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 YALE L.J. 1008 (1918); Arthur L. Corbin, *Contracts for the Benefit of Third Persons in Connecticut*, 31 YALE L.J. 489 (1922); Arthur L. Corbin, *Contracts for the Benefit of Third Persons in the Federal Courts*, 39 YALE L.J. 601 (1930); Arthur L. Corbin, *The Law of Third Party Beneficiaries in Pennsylvania*, 77 U. PA. L. REV. 1 (1928); Arthur L. Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds*, 38 YALE L.J. 1 (1928).

57. Notable exceptions include Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992); Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

58. See RESTATEMENT (SECOND) OF CONTRACTS: IDENTIFICATION OF BENEFICIARIES § 308 (“It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.”); see also *Sec. Fund Servs., Inc. v. Am. Nat'l Bank & Trust Co.*, 542 F. Supp. 323, 329 (N.D. Ill. 1982) (“[I]t is not necessary for the third party who is benefitted by the contract to be named therein if he is otherwise sufficiently described or designated.”); *Pappas v. Jack O. A. Nelson Agency, Inc.*, 260 N.W.2d 721, 725–26 (Wis. 1978) (“[T]he precise identity of the third-party beneficiary need not be ascertainable at the time of the agreement so long as the agreement specifies or identifies a group or class to whom the party must belong to benefit thereby.”).

59. I have questioned the wisdom of this latter approach elsewhere, suggesting that it can open the door to specious litigation. See George S. Geis, *Broadcast Contracting*, 106 Nw. U. L. REV. 1153 (2012).

60. RESTATEMENT (SECOND) OF CONTRACTS: INTENDED AND INCIDENTAL BENEFICIARIES § 302(1). This section goes on to require that “either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the

Identifying whether a specific claimant is an intended or incidental beneficiary is not always an easy task. Sometimes the initial counterparties do spell out their intentions clearly. In a life insurance contract, for example, the insured promisee will typically designate an express beneficiary who can sue the promisor (the life insurance company) if it refuses to pay on a valid claim. But for many contracts, the initial parties are not so clear about their desired treatment of outside enforcement rights, and the case law is cluttered with the claims of would-be beneficiaries.⁶¹ Most of the litigation, however, deals with this classification question, and there is no doubt that an explicitly designated third-party beneficiary can recover directly from a breaching promisor.⁶²

B. *Vesting the Rights*

Now suppose that two initial counterparties grant express rights to a third-party beneficiary. Later, however, both promisor and promisee have a change of heart, and they decide to modify the initial agreement to annul all outsider rights. Does the modification stick, causing the third-party beneficiary rights to evaporate? Or are the rights somehow vested in the third party such that they cannot be clawed back by subsequent counterparty agreement?

Contract law has struggled with this question of revocability. Some early cases treated the situation just like any other contract renegotiation, holding that a valid modification could indeed extinguish the third-party beneficiary rights.⁶³ Other courts, however, were less comfortable with this result, ruling that the initial counterparties were unable to revoke the third-party beneficiary status because these rights had automatically vested with the outsider.⁶⁴

The drafters of *Restatement (First)* tried to clear up this vesting problem, but unfortunately they took a controversial position that only added to the confusion. According to *Restatement (First)* Sections 142–43, outside contract rights were not vested for one type of third-party beneficiary (the creditor beneficiary), but were vested for a second type of beneficiary (the donee beneficiary).⁶⁵ The distinction here is unimportant for our purposes, but it is worth noting that many third-party

promisee intends to give the beneficiary the benefit of the promised performance.” *Id.* (emphasis added).

61. See Geis, *supra* note 59, at 1163–67.

62. See *id.* at 1163.

63. See, e.g., *Biddel v. Brizzolara*, 30 P. 609, 612 (Cal. 1883); *Gilbert v. Sanderson*, 9 N.W. 293, 295 (Iowa 1881).

64. See, e.g., *Filley v. Ill. Life Ins. Co.*, 137 P. 793, 794 (Kan. 1914); *Marquet v. Aetna Life Ins. Co.*, 159 S.W. 733, 735 (Tenn. 1913).

65. RESTATEMENT (FIRST) OF CONTRACTS §§ 142–43 (1932). The creditor beneficiary and donee beneficiary classifications were an unwieldy distinction of *Restatement (First)* that focused on whether the promisee sought to grant rights to a third party in order to repay some prior obligation or in order to convey a straightforward gift. *Id.* §§ 133, 135–36. This distinction was ultimately abandoned in *Restatement (Second)*, though the terms are still used from time to time to describe a third-party beneficiary situation. RESTATEMENT (SECOND) OF CONTRACTS: INTENDED AND INCIDENTAL BENEFICIARIES § 302.

beneficiary claims fell into the latter category, causing *Restatement (First)* to effectively lean towards a default rule of irrevocability. It was hardly clear, however, why resolution of the vesting question should turn on differences between creditor and donee beneficiaries.⁶⁶

Indeed, in the ensuing years, many courts and commentators rejected *Restatement (First)*'s solution to the vesting problem,⁶⁷ and the drafters of *Restatement (Second)* advanced a very different approach.⁶⁸ *Restatement (Second)* Section 311 abandoned the bifurcated treatment of vested rights in favor of a unilateral presumption of revocability.⁶⁹ But, importantly, it also established three situations where the rights would become irrevocably vested in the third party. First, the rights vest at the time of contract formation if the promisor and promisee state expressly that the third-party rights are not subject to alteration.⁷⁰ Second, the rights vest after the creation of a contract if a third-party beneficiary learns of her status and materially changes her position in justifiable reliance on the promise before an attempted modification.⁷¹ Finally, the rights also vest under *Restatement (Second)* if a third-party beneficiary either files a lawsuit or manifests assent to her rights, at the behest of the promisor or promisee, before an attempted modification.⁷²

These vesting rules are admittedly puzzling. It is hardly obvious, for instance, why two parties should be able to create a binding anti-modification clause for third-party rights but not for any other contracting term. Yet this unusual treatment is very clearly expressed in *Re-*

66. See Eisenberg, *supra* note 57, at 1416–17.

67. See, e.g., *McCulloch v. Canadian Pac. Ry.*, 53 F. Supp. 534, 544 (D. Minn. 1943); *Wolosoff v. Gadsden Land & Bldg. Corp.*, 18 So.2d 568, 570 (Ala. 1944); William H. Page, *The Power of the Contracting Parties to Alter a Contract for Rendering Performance to a Third Person*, 12 WIS. L. REV. 141, 151 (1937). For a recent example of legal evolution in this area, see David A. Rahnis, *Contracting Parties Retain Power to Discharge or Modify Duties Without Third-Party Beneficiary's Assent*, 86 ILL. B. J. 103 (1998) (analyzing the Illinois Supreme Court case of *Olson v. Etheridge*, 686 N.E.2d 563 (Ill. 1997), which changed the law in that state from automatic vesting of all third-party rights upon creation of the contract to the modern approach).

68. See RESTATEMENT (SECOND) OF CONTRACTS: VARIATION OF A DUTY TO A BENEFICIARY § 311.

69. *Id.* § 311(2).

70. *Id.* § 311(1). This is a very different approach from the normal treatment of contract modification, which states that any clause purporting to annul subsequent modification is invalid. See Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law & Economics of Contract Modifications*, 81 N.Y.U. L. REV. 487, 491 (2006). The logic here, that there is no way to lock the door against modifications, was famously set forth by Judge Cardozo in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 387 (N.Y. 1919) (“Those who make a contract may unmake it. The clause which forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived.”). Yet when we move to the rights of third-party beneficiaries, the law is clearly different: “The parties to a contract cannot by agreement preclude themselves from varying their duties to each other by subsequent agreement. . . . But they can by agreement create a duty to a beneficiary which cannot be varied without the beneficiary’s consent.” RESTATEMENT (SECOND) OF CONTRACTS § 311 cmt. a.

71. RESTATEMENT (SECOND) OF CONTRACTS: VARIATION OF A DUTY TO A BENEFICIARY § 311(3). As the language suggests, this exception is closely related to—and likely overlaps significantly with—a reliance theory of promissory liability. See *supra* Part II.B.1.

72. RESTATEMENT (SECOND) OF CONTRACTS: VARIATION OF A DUTY TO A BENEFICIARY § 311(3); see also FARNSWORTH, *supra* note 48, § 10.8 (noting that “[a]ll courts agree” with this proposition). Some courts will presume this assent if the third-party beneficiary is an infant. See RESTATEMENT (SECOND) OF CONTRACTS § 311 cmt. d; MURRAY, *supra* note 48, § 131.

statement (Second).⁷³ The second vesting rule is not as unusual, though it is unclear what this adds, if anything, over a baseline theory of reliance. And why should assent of an outsider to third-party enforcement rights have any legal impact on the modification powers of the initial counterparties? Again, the legal treatment here is very different from our normal rule that assent to a gift promise is meaningless.⁷⁴ Nor is it clear why a promisor or promisee might seek this third-party assent. Perhaps the drafters of *Restatement (Second)* did not give much thought to these questions, assuming that the issue would arise infrequently. Or maybe there is some other fundamental justification for changing the rules of contract law when a bilateral relationship becomes multilateral (more on this shortly).⁷⁵

In any event, this approach *is* the prevailing law,⁷⁶ and the implications of vested third-party rights are intriguing. A creative and motivated party should be able to use this obscure feature of contract law to sidestep the consideration doctrine and construct a legally binding gift promise.

C. *How to Make a Binding Gift Promise*

Return with me, for a moment, to the beginning of this Article: I promise to give you my car next month. You say OK. We have a clear agreement, but my promise is legally unenforceable.

Now consider this alternative. I agree to loan a friend \$100 in exchange for a return promise that she will repay the money (perhaps with a small interest charge) at the end of the month. This is the “host” contract. But the agreement also houses a “parasitic” gift promise: Right above the signature line, we agree that, as part of our deal, I also promise to give *you* my car next month. Further, my friend and I explicitly state that you are an intended beneficiary of this agreement and that your third-party rights are vested and not subject to alteration. If I change my mind at the end of the month, can you legally force me to honor my gift promise?

This is admittedly a close call that will turn on whether the host contract with my friend is understood as a legally binding obligation or a sham transaction. Clearly there is an agreement, but will the deal satisfy the bargained-for consideration requirement?⁷⁷ Loan contracts take place all the time, and I really do want the \$100 back from my friend. The primary motivation for negotiating the host contract, however, seems to be my desire to make a binding gift promise to you for the car—not to lend my friend \$100. It is possible, then, that the entire agreement

73. RESTATEMENT (SECOND) OF CONTRACTS § 311 cmt. a.

74. See Eisenberg, *supra* note 57, at 1419–21.

75. See *infra* Part IV.B.

76. See, e.g., MURRAY, *supra* note 48, at 866.

77. See *supra* notes 14–16 and accompanying text.

will be judged a mere pretense, not a genuine bargain, and that the host deal will be annulled for lack of consideration.⁷⁸

But should this really be the legal outcome? The story grows more complicated now that we have brought in a third party, and courts routinely uphold agreements involving mixed motives.⁷⁹ According to *Restatement (Second)*, “[t]he fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.”⁸⁰ For this reason, even though the exchange of value in the host contract may not be the primary motivation for the deal, it might nevertheless establish a valid agreement. With many third-party beneficiary claims, the initial counterparties do not say a word about third-party rights—yet these contracts do not run afoul of the bargaining requirement.⁸¹ The counterargument might be that those other transactions are *real* ones between promisor and promisee, while this transaction could somehow be seen as less genuine.

Can we strengthen the case for a bona fide bargain even further? One idea would be to attach the third-party beneficiary gift promise to a more substantial contract, such as a home mortgage or an apartment rental agreement. It is difficult to argue that these are not genuine transactions, and third-party beneficiary provisions are not separately subjected to the bargaining requirement. As we have seen, the law will uphold the claims of some beneficiaries even when the outsider rights are not mentioned at all in the contract.⁸²

It is true that executing this technique requires the cooperation of a compliant promisee. Any would-be gift promiser needs a counterparty to create the host contract that will carry the gift promise to the beneficiary. In some contracting situations, it might be quite unusual to make such a request: Imagine asking your landlord, for instance, if you can insert a third-party beneficiary clause into your rental agreement. Such an odd request would likely raise eyebrows, though a bank or some other party might be willing to include these clauses—perhaps as a marketing technique—if there was sufficient promisor demand. Indeed, the clause

78. Recall that a pretense of exchange seeking to support a one-way promise will not be enforced. See *RESTATEMENT (SECOND) OF CONTRACTS* § 71 cmt. b, illus. 5 (“A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for \$1000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A’s promise to pay \$1000.”).

79. See, e.g., *First Commerce Corp. v. United States*, 60 Fed. Cl. 570, 584–85 (Fed. Cl. 2004) (“[T]he ‘bargained for’ concept is limited by the fact that promisor and promisee may have more than one motive and that even an ‘incidental’ consideration is bargained for.”), *vacated on other grounds* 63 Fed. Cl. 627 (Fed. Cl. 2005).

80. *RESTATEMENT (SECOND) OF CONTRACTS: CONSIDERATION AS MOTIVE OR INDUCING CAUSE* § 81(1). Comment b goes on to add that “[u]nless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor’s desire for the consideration is incidental to other objectives and even that the other party knows this to be so.” *Id.* § 81 cmt. b. In this example, the loan contract is not pretense—I really want my \$100 back.

81. See, e.g., *Bybee v. Abdulla*, 189 P.3d 40, 49 (Utah 2008) (“Third-party beneficiary litigation is typically prosecuted by one who is asserting her status as a third-party beneficiary to claim the benefit of some right for which she did not expressly bargain.”).

82. See *supra* notes 58–61 and accompanying text.

should evoke no real concern on the part of the promisee since it will never be liable for a promisor's refusal to complete the gift. The commitment runs from promisor to beneficiary.

For this reason, I do not think that locating an amenable promisee would be a difficult task for most gift promisors. Many of us have friends or colleagues who would be willing to play counterparty to a host contract. Indeed, we might even expect that an independent market solution would emerge to satisfy the demand for host contracts. An entrepreneur could launch a new company, "Make_your_gift_promise_here.com" (MYGPH.com), with the following business plan: The site will borrow \$100 (or some other amount) from anyone seeking to make a gift promise and repay this sum after a short period of time. Further, MYGPH.com will happily include the third-party beneficiary gift promise term in the agreement. Indeed, this is the whole purpose of the relationship, and MYGPH.com is willing to negotiate such terms to make money from the interest that it earns during the micro-loan. This arrangement should almost certainly survive the bargaining requirement, as both promisor and promisee explicitly want and understand the presence of the parasitic third-party clause. The promisor is doing this to make a gift promise, and MYGPH.com is doing this to support the creation of the gift promise. That is a fundamental part of the negotiated deal. Undoubtedly other arrangements are possible.

The careful reader will note that this structure essentially resurrects nominal consideration: The promisor makes a binding gift promise in exchange for a few days of foregone interest. Such an arrangement would be unenforceable if conducted via a direct bilateral transaction. But, as structured above, it should now be binding because contract law treats third-party rights quite differently.

An interesting analogy can be drawn here with the notion of independent legal significance in corporate law.⁸³ Just because a transaction might be expressly prohibited under one section of corporate law does not mean that it cannot be accomplished with a different structure that references another provision of the law. The most famous examples involve merger transactions, where parties are sometimes able to avoid the legal implications of a statutory merger by structuring their deal as an asset sale or tender offer.⁸⁴ Contract law and gift promising should be understood in a similar manner: different legal treatment should be possible for economically comparable acts, as long as the parties take an alternative legal route.

83. See, e.g., 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* § 9.4 (3d ed. 2007) ("The doctrine [of independent legal significance] has become a keystone of Delaware corporate law and is continually relied upon by practitioners to assure that transactions can be structured under one section of the General Corporation Law without having to comply with other sections which could lead to the same result."); C. Stephen Bigler & Blake Rohrbacher, *Form or Substance? The Past, Present, and Future of the Doctrine of Independent Legal Significance*, 63 *BUS. L.* 1 (2007) (describing the application and history of the independent legal significance doctrine).

84. See Bigler & Rohrbacher, *supra* note 83, at 7, 9.

Assuming, then, that the host contract can be structured to survive the bargaining requirement, will the parasitic gift promise have binding effect? Can I still change my mind and refuse to give you the car? First, unlike many litigated disputes involving third-party rights, it is clear that you are an intended beneficiary of the contract. We expressly state this in the agreement, and that will be conclusive.⁸⁵ So the existence of third-party rights, the typical topic of contention in this area, is not at issue.

Second, if I do change my mind, can I return to the promisee and ask that the third-party beneficiary clause be rescinded? Here, the answer should clearly be no. By stating expressly in the contract that the third-party rights are not subject to alteration without your consent, these rights have vested.⁸⁶ Nothing I try will take away your ability to sue me for breach if I refuse to give you the car. You can always choose not to pursue this claim, of course, thereby abandoning your rights to receive the car.⁸⁷ But I cannot change my mind unilaterally to rescind the gift promise. The law of third-party beneficiaries is simply different from that of two-way promising. When cast as a third-party transaction, the gift promise should be legally binding and irrevocable—even though the outsider makes no agreement and pays no consideration.⁸⁸ I am not aware of efforts to make a binding gift promise in this manner, but a thorough analysis suggests that any such attempt should succeed.

Interestingly, there is comparative legal precedent for this type of gift promising. French law will enforce a gift promise, typically when three requirements are met: (1) the promisor executes the gift in writing; (2) this is done in the presence of notaries; and (3) the gift is formally accepted by the promisee.⁸⁹

But France also treats gift promises as legally binding when the promisor makes something called a “disguised donation.”⁹⁰ This is a transaction that is falsely clothed in something other than a gift, such as a fictional bargain or the acknowledgement of a nonexistent debt.⁹¹ The

85. See RESTATEMENT (SECOND) OF CONTRACTS: IDENTIFICATION OR BENEFICIARIES § 308.

86. See *id.* § 311(2).

87. One possible concern with this framework might arise from the fact that the host contract promisee can still enforce the gift promise even if the beneficiary is willing to abandon the claim. This could create a nuisance if a promisor is forced to defend a lawsuit when the beneficiary is willing to relinquish the gift. But it should raise few practical concerns, since the beneficiary could just return the property (or claim) to the promisor after the fact. It is also difficult to imagine many circumstances where a beneficiary is willing to abandon her claims, yet the host contract counterparty doggedly presses for fulfillment of the gift promise. One interesting example might be a situation where a promisor contracts to give negative value property (such as a gas station with an environmental liability) to a third-party beneficiary who does not wish to accept the gift. The law does not usually force anyone to accept a gift, but what should happen, in this case, if the promisee sues to enforce the third-party-beneficiary clause?

88. There are other ways to render the gift promise irrevocable. For instance, I might ask you to agree to accept the benefit, and thereby vest the rights under *Restatement (Second)* Section 311, or you might detrimentally rely on the promise to vest your rights under Section 311. RESTATEMENT (SECOND) OF CONTRACTS: VARIATION OF A DUTY TO A BENEFICIARY § 311(3). But a clear statement of irrevocability at the outset is the easiest way to accomplish the task.

89. See CODE CIVIL [C. CIV.] arts. 931–933 (Fr.) (John H. Crabb trans. 1995).

90. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 12 (1979).

91. See *id.* at 12–13.

logic here seems to be that if a promisor is going out of her way to arrange this type of deliberative fictional transaction, then she must understand the seriousness of her actions and really intend to make the gift promise legally binding.⁹² In other words, the disguised donation is just another breed of formality.

The third-party beneficiary gift promise has some obvious similarities to a French disguised donation. Both techniques seem to involve use of a transactional fiction. And both techniques are so unusual that the respective legal systems might reasonably infer that a promisor will only take this action in mindful pursuit of binding gift promises.

The next question, then, is how contract law should respond to the possibility that binding gift promises can be created through vested third-party beneficiary rights. The answer turns on a normative claim about the desirability of permitting legally enforceable gift promises, a practical claim about the best way to identify legal obligations in this area, and a theoretical claim about the proper scope of contract law.

IV. SETTING THE BORDERS OF CONTRACT LAW

Should the law support binding gift promises? Such a question goes to the heart of bargained-for consideration and contract theory. As mentioned above, influential scholars have argued that the answer is no because gift promises are offered casually and without an expectation of legal enforcement.⁹³ Certainly if I promise to take my daughter to the park after lunch and a rainstorm makes me rethink the outing, it makes no sense for contract law to step in and hold me liable for breach. But this presupposes that all gift promises are treated equally, and any objection to legally enforceable gift promises might fall away if we can sort out two questions: (1) can incremental social welfare arise through the making of a binding gift promise in some circumstances; and (2) can we identify an appropriate mechanism for distinguishing “casual” gift promises (which might still be legally revoked) from “serious” gift promises (which cannot)?

A. *Should Contract Law Support Gift Promising?*

Let us start with the first question on the utility of gift promising. Legal scholars have spent considerable time asking why someone might wish to make a binding gift promise instead of just giving the gift now or, alternatively, waiting until the time is ripe to announce and conduct the transfer. Why bother with an *ex ante* promise for an *ex post* gift?

The answer, perhaps obvious, is that making a binding gift promise empowers the recipient to rely on the promise today instead of waiting to see if the promisor will follow through with the gift tomorrow.⁹⁴ Accord-

92. *Id.* at 13.

93. See sources cited *supra* notes 2 and 4.

94. See Shavell, *supra* note 5, at 402–03, 406.

ingly, the recipient can make specific investments that will increase her overall welfare when the promise is eventually carried out. But a promisee may only be willing to make customized investments⁹⁵ if she knows that the promise will really be honored. Trust only goes so far, and circumstances change. This is a familiar justification for using the power of the law to enforce conventional contractual agreements, and nothing changes when we apply the justification of bargained-for exchanges to one-way promises. Failure to provide any vehicle for making binding gift promises should theoretically reduce social welfare.⁹⁶

Take our simple example: I promise to give you my car next month. You would like to rely on this promise, either by taking some action that will enhance your value from the car (such as buying a customized stereo system on an eBay auction) or by refraining from taking some action that you would otherwise need to take (such as expending search costs for a backup vehicle).

Yet you are worried about my fickleness and therefore unwilling to rely on my promise until I actually give you the car. The eBay auction may expire without your bid, or you may waste time shopping for automobiles. I could solve this problem by giving you the gift today, of course, but I may not be able to do so (perhaps I need the car for the next month, or, more generally, I plan to fund some other gift with an illiquid asset).⁹⁷ If, however, I really do want to maximize the value of my gift to you, then I would wish for a way to convince you that my promise is iron-clad. Said differently, failure to let me effectuate a binding gift promise reduces our joint surplus. I would either need to give you more, to gross up the net value that you place on my gift, or you would need to abandon promise-specific investments and be content with less.

For this reason, the optimal theoretical approach requires a more nuanced rule.⁹⁸ Most gift promises could be treated as casual promises,

95. Gift promisees will typically retain incentives to make reliance investments that are not unique to a given promise. For example, if you know that you will buy a used car elsewhere if I happen to renege on my gift promise to give you my vehicle, then you may be quite comfortable purchasing a general stereo system that works with any model of car. You may not, however, elect to buy a stereo that works only with *my* model of car, due to a fear that I will back out of the gift. There will therefore be an erosion of social welfare if the customized investment would bring you greater satisfaction. Of course, this also assumes that there is a benefit to making the investment prior to receiving the gift. If, for example, the custom stereo appears on a short-term eBay auction, and you decide not to bid, then the chance to make this investment may be lost. On the other hand, if you can just purchase the custom stereo from a retail store if I do give you the car, then welfare loss from foregone customized investment may be minimal. For a more thorough treatment of relationship-specific investment in the traditional contracting context, see Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541 (2003).

96. See Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 *STAN. L. REV.* 481 (1996); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 *J. L. & ECON.* 691 (1983) (describing the reliance justification for traditional contract enforcement); Shavell, *supra* note 5, at 402–04 (describing the reliance justification for binding gift promises).

97. See Shavell, *supra* note 5, at 402.

98. See, e.g., Kull *supra* note 5, at 60–64 (arguing that a promisor should have flexibility for “vary[ing] the degree to which we warrant the intentions we disclose”); Posner, *supra* note 4, at 412 (using an example where a binding gift promise might increase the net present value of a gift annuity because the promisee could use a lower discount rate to value the total gift); Shavell, *supra* note 5 (analyzing the economic justification more formally).

allowing the promisor complete freedom to change her mind prior to the rendering of the gift. At the other end of the spectrum, bargained-for exchanges would, of course, be binding under traditional contract theory. There is room in the middle, however, for binding gift promises, and the goals of contract law might be better served by establishing some third way for a mindful gift promisor—who really wants to bind herself—to accomplish this task.

This is certainly consistent with numerous scholarly inquiries into the issue. According to Samuel Williston, “It is something, it seems to me, that a person ought to be able to do, if he wishes to do it,—to create a legal obligation to make a gift. Why not? . . . I don’t see why a [party] should not be able to make himself liable if he wishes to do so.”⁹⁹ Allan Farnsworth expressed a similar opinion, claiming that “the abolition of the seal without the substitution of some other formality seems rash. To deny the power to make enforceable promises on the ground that an appropriate formality cannot be fashioned seems absurd.”¹⁰⁰ Richard Posner similarly laments the decline of the seal.¹⁰¹ Steven Shavell states that “[a] recommendation about the law that . . . seems obvious on its face . . . is that donors should be able to bind themselves to give gifts.”¹⁰² And Andrew Kull contends that “[i]f contract law exists to extend the potential reach of private action, rather than to protect individuals against the consequences of their own acts, gratuitous promises (seriously intended) should plainly be enforced.”¹⁰³

But this position is not universal. The State of Utah, for example, repealed the Uniform Written Obligations Act shortly after becoming the second state to adopt this rule that written statements invoking legal backing for gift promises would render the promises binding.¹⁰⁴ In connection with this reversal, the Utah Code Commissioners offered this exaggerated statement on the perils of binding gift promises: There was “no more vicious statute in the written laws of any civilized nation [It would] enable confidence men and swindlers to enforce written promises . . . which they may obtain from the unwary . . . and to take from such unfortunate persons a defense that has been recognized . . . in the courts of all civilized nations since the dawn of history.”¹⁰⁵

Other commentators fret that moving to a bifurcated rule for gift promising would raise new complications and distortions. Richard Posner, for instance, expresses concern about litigation costs and legal error arising from ambiguity over which legal rule applies to a given set of

99. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, AND PROCEEDINGS OF THE ANNUAL MEETING 194 (1925).

100. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 82 (1998).

101. See Posner, *supra* note 4, at 420.

102. Shavell, *supra* note 5, at 419.

103. Kull, *supra* note 5, at 61.

104. See *supra* Part II.A.4.

105. Douglas H. Parker, *Notes: The Status of the Common Law Seal Doctrine in Utah*, 3 UTAH L. REV. 73, 95 n.166 (1952) (citation omitted).

facts.¹⁰⁶ Charles Goetz and Robert Scott worry that enforcing some gift promises will chill the making of other, beneficial (though legally unenforceable) gift promises.¹⁰⁷

Further, there is the problem of what, if anything, the law should do when a promisor makes a binding gratuitous promise and then experiences a dramatic change of circumstances. The two classic problems here are improvidence and ingratitude. Many civil law countries support binding gift promises—but only with a complex set of codas that allow the promisor to revoke her gift if, for example, she suffers from extreme financial hardship or gives birth to a new heir.¹⁰⁸

Similarly, these jurisdictions often allow a promisor to back out of the gift when the promisee behaves badly. These latter cases can make for amusing reading—“I only slapped your son because he was rude to my daughter”—but highly uncertain law.¹⁰⁹ Moreover, in the United States, we do not typically condition promissory obligations on situational consistency. That is, contractual performance is not normally extinguished due to ingratitude, improvidence, or some other change in events.¹¹⁰ In any case, if a gift promisor wants to take the risk that her fortunes may change, or that her promisee may grow sour, why not permit such action? Alternatively, if she wishes to make the gift but reserve an out for improvidence or ingratitude, then it is possible to write the appropriate conditions into that promise.¹¹¹

I suspect, therefore, that most of the concerns over binding gift promises have to do with the challenge of finding a suitable mechanism for distinguishing type one “casual” promises from type two “serious” promises. Can we impose a sufficient fortress that renders most gratuitous promises revocable but also lowers a drawbridge for those who really do wish to move inside a different legal regime and invoke the authority of law? This is an important question, because, as mentioned above, it is entirely possible that any gains from a regime permitting binding gift promises will be more than eaten up by the resulting administrative costs, error costs, and distorted private incentives of a bifurcated rule.¹¹²

B. *Identifying Serious Gift Promises*

Familiarity breeds comfort, and, to a great degree, the challenge of identifying serious gift promises lies in the recognition that yesterday’s formality becomes today’s monotony. Once upon a time pressing a seal

106. Posner, *supra* note 4, at 414–15.

107. Goetz & Scott, *supra* note 4, at 1305.

108. See Eisenberg, *supra* note 90, at 13–18 (describing the French and German approach to these issues).

109. *Id.*

110. There are a few extreme exceptions to this rule, however, such as bankruptcy, impracticability, impossibility, and frustration of purpose, which do serve to qualify performance obligations in very limited circumstances. See, e.g., FARNSWORTH, *supra* note 48, §§ 9.2–9.9 (discussing mistake, impracticability, and frustration).

111. See Kull, *supra* note 5, at 63–64.

112. See Posner, *supra* note 4, at 414–16.

into hot wax meant something, but today a typewritten “L.S.” is glossed over, invisible to the lay promisor. Once upon a time a promisor only sought the return promise of a peppercorn to support her mindful gift promise, but today we worry that nominal consideration traps the unwary. The same fears apply to irrevocable gift promises under the Model Written Obligations Act—explicitly in Utah, and implicitly in forty-eight other, nonenacting states.¹¹³ Giving the power of the law to “serious” gift promises requires a strong filter to screen “casual” promising, and even those favorably inclined toward supporting unilateral commitment worry that unsuspecting promisors will get caught up in the trap or that administrative efforts will swamp welfare gains.

How, then, should we evaluate the strategy, outlined above, of using a third-party beneficiary transaction to make a binding gift promise? On the one hand, it is absolutely implausible that courts or legislators created third-party beneficiary rights in contract law with an eye towards empowering committed gift promisors. Third-party beneficiary law is not a stealth Model Written Obligations Act. But it turns out, on the other hand, that there are several reasons why third-party beneficiary transactions might actually serve as a reasonable indicator of serious gift promises in a way that resists the typical erosion of historical contractual formalities.

First, this structure is complex and unusual, causing the third-party beneficiary sidestep to serve as a reasonable cautionary device. Unwitting promisors may glance over the seal or ignore the peppercorn, but why would anyone go through the hassle of locating a host contract counterparty and explicitly negotiating irrevocable third-party beneficiary rights if he did not wish to invoke the power of the law? Indeed, the transactional strategy I describe above requires a promisor to both identify the beneficiary with specificity and state explicitly that the rights are vested. The third-party-beneficiary sidestep is thus analogous to a French disguised donation or an irrevocable trust: the fact that a promisor must leap over several salient hurdles to complete the transaction serves as a warning that real legal implications will follow. There is little reason to bother with such a curious agreement if one does not wish to mindfully make a binding promise.¹¹⁴

Second, the third-party beneficiary sidestep has some palpable evidentiary benefits. One recurring worry in the gift promising debate is that liberal legal enforcement will result in illegitimate claims. In a world where naked gift promises are binding, for instance, a scoundrel niece might falsely claim that uncle promised to pay her college tuition. To be sure, these false claims are subject to evidentiary scrutiny; the niece would still need to convince a court of her accusation. But a fear of false

113. See *supra* note 105 and accompanying text.

114. Arguably, the language and presence of the third-party beneficiary provision also provides more warning to the uninformed promisor than the words “L.S.” or the presence of the seal. It is more difficult to gloss over this provision, especially as it involves a promise that is not directly related to the host contract.

gift promise assertions—or, more benignly, misunderstood statements about present intentions that fall short of a gift promise in the mind of the promisor¹¹⁵—prompted Fuller to argue that contract law should not bother to back gift promises.¹¹⁶ Rather, the law should save its powder for consideration-based exchanges, which allegedly provide greater evidence about a transaction's legitimacy.¹¹⁷

The third-party beneficiary framework, however, mitigates these evidentiary concerns by providing for an automatic witness in the form of the host contract counterparty. It is more difficult for a bogus beneficiary to assert a unilateral claim because the initial counterparty might be brought in to testify on the scope of the host agreement and the presence of the purported parasitic gift promise. Likewise, we will have another independent take on whether a beneficiary received irrevocable rights or whether the promisor preserved some flexibility to scale back the commitment through the use of conditions or the absence of vesting. As an added bonus, we might expect that many of these promises would be reduced to writing, though this is not an absolute requirement.¹¹⁸

To be sure, channeling gift promises through a third-party beneficiary commitment does not completely eliminate the possibility of mistaken intentions or illegitimate claims. It is always possible, of course, for a defrauding beneficiary to recruit a confederate to play the role of fictional host contract counterparty.¹¹⁹ And there is still the possibility that the mere context of gift promising reduces incentives to clarify details or document the precise contours of a promise when compared to bargained-for exchange transactions, where each side might seek to hammer out more details during the negotiations. But moving to a three-party transaction should at least limit the scope of evidentiary error, and any blatant attempt to defraud now requires a conspiracy.

For these reasons, I would suggest that the third-party beneficiary framework actually serves as a reasonable indicator of serious gift promises. I am not arguing that third-party rights were ever established with the explicit purpose of sidestepping consideration. But the overall structure of embedding a gift promise to a beneficiary in a host contract with another entity offers both cautionary and evidentiary protections—similar to those involved in the creation of a trust—that should mitigate many of the traditional concerns about legally binding gift promises.

115. Consider the ambiguities latent in a statement from uncle to niece along the lines of “I wish to pay for your college tuition.” Uncle may mean this as a current aspiration, while niece may hear an unequivocal gift promise.

116. See Fuller, *supra* note 2, at 819.

117. *Id.* This claim that one-way gift promises contain less evidentiary content is open to question. See, e.g., Kull, *supra* note 5, at 52–54.

118. Third-party beneficiary rights (including vested rights) do not require written confirmation unless the provisions of some other doctrine, such as the statute of frauds, apply to the transaction. See, e.g., FARNSWORTH, *supra* note 48, §10.3 (describing the modern rule of contract rights of third parties).

119. Along these lines, the defrauding party might also try to use a corporation, partnership, or some other incorporeal legal entity to lock in the fictitious promise.

V. CONCLUSION

The edge of contract law eludes precise definition. Scholars have long celebrated freedom of contract and the many benefits of private ordering.¹²⁰ But a host of concerns—including commodification, externalities, coercion, paternalism, and discrimination—all suggest that the power to contract needs to be limited in scope and context.¹²¹ Clearly some activity must be placed beyond the reach of contract law.

But the case for excluding gift promises, long considered a necessary byproduct of the consideration doctrine, is exceptionally weak. As long as the law can impose sufficient cautionary and evidentiary mechanisms, there should be no reason to prohibit a mindful party from invoking the power of law in this context. Indeed, the theoretical benefits of contract law would be amplified by granting gift promisors a way to commit.

This Article has explored a previously overlooked strategy to support binding gift promises in contract law. By moving into the multilateral world of third-party beneficiary law, a dedicated promisor can capitalize on the ability to vest rights with an intended gift beneficiary. So structured, one should be able to accomplish a feat in contract law that cannot be attained via bilateral relationship. This is a sensible outcome. More generally, the Article advocates a concept of independent legal significance in contract law. Third-party beneficiary rights should receive greater theoretical attention, as this neglected doctrinal alcove offers some very intriguing possibilities for pushing out the edge of contract law.

120. See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962) (“The possibility of coordination through voluntary co-operation rests on the elementary—yet frequently denied—proposition that both parties to an economic transaction benefit from it, *provided the transaction is bilaterally voluntary and informed.*”) (emphasis added in original).

121. For excellent discussions of these concerns, see MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993); Todd D. Rakoff, *Too Many Theories*, 94 MICH. L. REV. 1799 (1996) (reviewing Trebilcock’s book).