CHAPTER EIGHT
THEOLOGIANS AND CONTRACT LAW: COMMON THEMES

Through a close reading of primary sources, the preceding chapters have explored how moral theologians developed substantive doctrines of contract. Taking their elaboration of a general law of contract as a starting point, we proceeded to consider the limitations that they recognized to the natural freedom of the parties to create contractual obligation according to their will. Those limitations derived from vices of the will, statutory form requirements, and the immoral nature of the object of the contract. A remedy was also given to re-balance overly one-sided bargains. Despite the great variety of opinions on almost every subject, and, accordingly, the problematic character of making sweeping generalizations, at this point the lawyerly abilities of the moral theologians should be beyond doubt. This ability is reflected not only in their astounding mastery of technical legal argument, but also in their commitment to finding the right balance between conflicting principles underlying contract law (freedom and justice), between the conflicting values promoted by rivaling institutions of power (Church and State), and between the opinions of Roman canon authorities and the voices of renewal (medieval and modern). This final chapter proposes to restate some of the major conclusions attained in this study through the lens of those conflicts.

---

The history of the emergence of the principle that all agreements, however naked, are binding (\textit{pacta quantumcumque nuda sunt servanda}) is not without its ironies. If ‘canon lawyers’ such as Huguccio started advocating the enforceability of promises on moral grounds by the end of the twelfth century, the truly juridical analysis of contractual obligation was not completed until the beginning of the seventeenth century in the work of ‘moral theologians’ such as Lessius.\footnote{1974 Cf. supra p. 123–124 and p. 200–201.} While Huguccio founded contractual obligation on the equation of promises and oaths, and on the sinfulness of violating promises, Lessius explained that the promisor conveyed a right upon the promisee to enforce the obligation which he incurred through the promise. In the eyes of the medieval ‘canonist’, contracts were binding because the promisor otherwise sinned against the divine prohibition on lying and perjury. In the view of the early modern ‘moral theologian’, contracts were binding not merely because violating promises is tantamount to sin, but primarily because the contracting parties establish a horizontal relationship of rights and obligations by virtue of their mutual consent.

Regardless of the apparent irony—at least in the eyes of a contemporary readership\footnote{1975 The irony only holds, of course, if we stick to the conventional classification of Huguccio as a canonist and Lessius as a moral theologian. In reality, though, those classifications are modern and problematical if applied to the past. For one thing, the origins of the disciplinary distinction between canon law and theology cannot be traced back earlier than the eleventh century, but the boundaries between the two disciplines remain very porous until at least the thirteenth century; cf. J. Gaudemet, \textit{Théologie et droit canonique, Les leçons de l’histoire}, Revue de droit canonique, 39 (1989), esp. p. 11–12, where he notes that the Council of Trent and the ‘second scholastic’ offer particular examples of the ongoing interconnectedness between canon law and theology. For another, it seems that the sharp distinction between law, theology and morality is the legacy of the Reformation, particularly of early eighteenth-century Protestant natural lawyers such as Christian Thomasius.}—that sometimes ‘canon lawyers’ reasoned in a distinctly moral way and ‘moral theologians’ in a distinctly juridical way, the victory of consensualism and the rise of a general category of contract can be read as the moral transformation of the civilian tradition. The Roman law was notoriously reluctant to enforce contracts by virtue of consent alone, except in the case of a limited set of consensual contracts. Elsewhere, \textit{causa} in the sense of \textit{datio} or \textit{factum} beyond consent was required,