USING AGENCY LAW TO DETERMINE THE BOUNDARIES OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES

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One of the more perplexing constitutional issues the Supreme Court has recently addressed is the relationship between the Free Speech Clause and the Establishment Clause in cases involving the religious speech of students. *Widmar v. Vincent*[1] and *Santa Fe Independent School District v. Doe*[2] are two Supreme Court opinions representative of this issue. In *Santa Fe*, the Court considered an Establishment Clause challenge to a school district policy which "permitted" elected student speakers "to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[3] In order to determine whether the pre-game speech would be delivered, and by whom, a series of two elections were to be held by Santa Fe high school students.[4] The first election determined whether the "brief invocation and/or message" would be delivered before the football game.[5] If the students voted in favor of having a speech delivered, a second election would determine who would be responsible for delivering a speech of his or her choosing.[6] The Court upheld the Establishment Clause challenge to the school district policy, over a vigorous dissenting opinion penned by Justice Rehnquist.[7]

In *Widmar*, the Court entertained a challenge under the Free Speech Clause to a policy of the University of Missouri-Kansas City which prohibited the use of University buildings "for purposes of religious worship or religious teaching."[8] The Free Speech claimants were student members of the religious group "Cornerstone," who had been denied access to university facilities for purposes of holding their group meetings.[9] The Supreme Court determined that the university regulation was unconstitutional viewpoint discrimination against the religious speech of the student group and struck down the regulation under the Free Speech Clause.[10]

Cases involving the religious speech of students, of which *Widmar* and *Santa Fe* are representative, are perhaps so conceptually interesting because of the seeming tension in these cases between the values attributed by the Court to the Free Speech and Establishment Clauses. An expansive interpretation of the

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1. 454 U.S. 263 (1981).
2. 530 U.S. 290 (2000).
3. *Id.* at 298 n.6.
4. *See id.* at 297-98.
5. *See id.*
6. *See id.* at 298.
7. *See id.* at 317-18 (Rehnquist, J., dissenting).
8. Widmar v. Vincent, 454 U.S. 263, 265 (1981).
9. *See id.*
10. *See id.* at 265-74.

Establishment Clause would seem to preclude a university from allowing expressly religious speech and worship on university property, but the Court in *Widmar* required the university to allow this student speech under the Free Speech Clause. Conversely, a rigorous application of the Free Speech Clause would seemingly prohibit a school from denying an opportunity for an elected student speaker to address the assembled crowd before a football game simply because the speaker might choose to speak from a religious perspective, yet the Court in *Santa Fe* concluded that the Establishment Clause required the school to "silence" this student speech. Thus, student religious speech is in some circumstances protected by the Free Speech Clause or prohibited by the Establishment Clause. In fact, for these types of cases, there is seemingly very little space between the operation of these two Clauses. The Supreme Court has even alluded to the possibility that *both* Clauses might be applicable in some factual settings.[11] Thus, in performing a legal analysis of issues involving student religious speech, the most important issue seems to be resolving which of the two constitutional provisions is controlling.

Widmar, and to a lesser extent *Santa Fe*, answers the question of which clause is controlling by asking whether the school has created a limited public forum for the expression of speech. In *Widmar*, the Court determined that the university had created a public forum when it allowed registered student groups to use its facilities for the purposes of student meetings. Because a public forum had been created, preventing the Cornerstone group from using University facilities constituted unconstitutional discrimination against religious speech. In *Santa Fe*, the Court explained that the "pregame ceremony is not the type of forum discussed in [*Widmar* and other limited public forum cases.] The Santa Fe school officials simply do not evince either by policy or by practice, any intent to open the [pregame ceremony] to indiscriminate use, . . . by the student body generally."[12] This conclusion that the Santa Fe school district had obviously not intended to open up the pregame ceremony as a limited public forum informed the Court's decision that the Establishment Clause, rather than the Free Speech Clause, was controlling.

Answering the "which clause controls" question by asking whether the school created a limited public forum seems an unsatisfactory way for analyzing student religious speech questions. Indeed, the Court acknowledged the limited usefulness of this approach when it distinguished the student pregame speaker in *Santa Fe* from a "newly elected prom king or queen."[13] The Court seemed to be thinking of a situation in which an overtly religious student is elected prom king,

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11. *See, e.g.*, Rosenberger v. Univ. of Va., 515 U.S. 819, 838 (1995) ("We granted certiorari on this question: 'Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.'").

12. *Santa Fe*, 530 U.S. at 303 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988) (internal quotations omitted)).

13. *See id.* at 305.

and then, pursuant to a school policy that allows the prom king to address the students at the award ceremony, the prom king engages in a speech with a religious message or perhaps a direct prayer. Because the Court distinguished that situation from the student-elected speaker in *Santa Fe*, it seems safe to conclude that the Court would determine that the Free Speech Clause would be controlling in the prom king situation. The prom king's speech would not violate the Establishment Clause and the Free Speech Clause would prohibit the school from attempting to silence the religious aspects of the prom king's speech.

Yet, despite the fact that the Free Speech Clause would control the prom king hypothetical, no one could seriously contend that the school had created a limited public forum for "'indiscriminate use' . . . by the student body generally."[14] The limited public forum analysis, then, seems a poor choice for determining which of the two clauses of the First Amendment is controlling. Another approach is needed.

The Supreme Court, in *Santa Fe* and in other cases, has referenced an approach which better addresses the conflict between the Free Speech and Establishment Clauses. Under this approach, the Court simply determines who the speaker is: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[15] Thus, if the speaker is the student, the speech is protected and the Free Speech Clause prevails, whereas if the speaker is the school, the Establishment Clause prevails. The Court in *Santa Fe* even seemed to acknowledge that the "Who is the speaker?" approach is preferable to the limited public forum approach when it stated the following: "A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."[16] In this statement, the Court apparently concedes that the limited public forum question is relevant only because it might be illustrative of the controlling question, which is whether the speech is private student speech or government (school) speech.

If the dispositive question in these cases is ascertaining who exactly is the speaker, the next challenge becomes developing a cohesive analytical approach by which to answer this question. Agency law might be particularly helpful in this pursuit.[17] Agency law is specifically devoted to delineating the legal relationships and legal obligations between various parties.

In the student religious speech cases, the student is the actual one engaging in the physical act of speaking. In *Widmar*, it was students who were engaged in "prayer, hymns, Bible commentary, and discussion of religious views and

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14. *Id.* at 303.

15. *See id.* at 302 (quoting Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (opinion by Justice O'Connor)).

16. *Id.* at 303 n.13.

17. Or, instead, perhaps this idea is merely a desperate attempt by the author to find some cohesion and unity in a year that includes teaching Torts, Corporations, and Constitutional Law II.

experiences."[18] Similarly, the speech in question in *Santa Fe* was the proposed speech by the elected student before home football games.[19] Just because a student is the actual one to physically engage in the speech, however, is not necessarily determinative on the question of whether the speaker is the school or the student. Indeed, as an entity, the government can only act through agents representing the government. Viewed in this context, the question is simply a straightforward agency question as to whether the student is speaking on his or her behalf or as an agent of the government. The analysis that agency law has developed to approach these issues would thus seem particularly relevant to the analogous constitutional law issue.

Determining that the identity of the speaker is really a question of agency law and is a start in developing a systemic analytical approach to the problem. Of course, there are subtleties within agency law for determining when a "principal" (in this case, the school) can be liable to a third party (in this case, the Establishment Clause plaintiff) based on the action of an agent (in this case, the student religious speaker). Traditionally, there are two different approaches within agency law to determine the principal's liability. These two approaches depend on whether the plaintiff is making a claim in tort or contract.[20] Modern agency law is perhaps more nuanced in its approach to determining the liability of a principle to a third party for the conduct of an agent. The traditional tort/contract bipartite approach, however, remains instructive and worth exploring as a potential vehicle by which to better comprehend constitutional law cases involving student religious speech. First, however, it is perhaps best to start with an explanation of the two traditional approaches used within agency law to determine the liability of a principal to a third party based on conduct of the agent.

If a third party asserts a contract claim against a principal based on an agreement made between the third party and the agent, the third party must prove that the agent had either express actual authority, implied actual authority, or apparent authority to enter into a contract with the third party on behalf of the principal.[21] An agent has express actual authority when the principal specifically authorizes the conduct by the agent.[22] Thus, if an employee's job description in a contract includes ordering supplies for the business, the agent has express actual authority to make contracts on behalf of the principal for the purchase of supplies. An agent has implied actual authority (frequently called incidental authority) to partake in any conduct that is incidental to fulfilling the agent's express actual authority.[23] Thus, for instance, an agent's express authority to manage a store would include the incidental authority to order supplies for the store. If an agent has neither express nor implied actual authority to act on behalf of the principal,

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18. Widmar v. Vincent, 454 U.S. 263, 263 n.2 (1981).
19. *See Santa Fe*, 530 U.S. at 297-98.
20. *See* DAVID EPSTEIN ET AL., BUSINESS STRUCTURES 36-41 (2002).
21. *See id.* at 38; *see also* RESTATEMENT (SECOND) OF AGENCY § 26 (1958).
22. *See* EPSTEIN ET AL., *supra* note 20, at 38.
23. *See id.* at 39.

an agent can nevertheless bind the principal in contract if the agent had apparent authority. Under apparent authority, conduct by the principal leads the third party to reasonably believe that the agent had actual authority to bind the principal contractually.[24] Thus, if an employee does not have authority to purchase on behalf of the principal business, a decision by the principal business to honor previous purchases by the employee would create a reasonable impression by the supplier that the employee had actual authority to order supplies for the principal. If the principal subsequently refused to honor a purchase order made by the agent on the grounds that the agent had no authority to place orders for the principal, the principal would nevertheless be liable to the third party supplier based on the principal's conduct in honoring the previous purchases made by the agent with the third party supplier. The agent would have "apparent authority" to bind the principal, even if the agent had no actual authority to contract on behalf of the principal.

Determining when a principal is liable to a third party for the tortious conduct of an agent is somewhat less nuanced than the analysis for contract claims. A principal is liable for the torts of his or her agent when: (1) a master/servant, as opposed to an independent contractor, relationship exists, and (2) the agent's tortuous conduct is committed within the scope of the agency relationship.[25] The analysis should be familiar to most lawyers. Whether a master/servant relationship exists,[26] as opposed to an independent contractor relationship, depends on the principal's right to control the agent in the particulars of his or her performance.[27] If a principal can control the particulars of the agents work, a master/servant relationship exists and the principal can be liable for the torts committed by the agent in the course of the agency relationship.[28] Conversely, if the details of the task in question are left to the agent, with no right of the principal to control the agent's conduct, the relationship is one of an independent contractor, and the principal cannot be liable for the torts of the independent contractor.[29]

Modern agency law supplements the traditional bipartite approach in various ways. For instance, under the Restatement (Third) of Agency section 7.08, an "apparent authority" analysis is used to determine the liability of a principal for the torts "committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its

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24. *See id.*; *see also* RESTATEMENT (SECOND) OF AGENCY § 27 (1958).

25. *See* EPSTEIN ET AL., *supra* note 20, at 41; *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

26. Or, the more modern term: employer/employee relationship. EPSTEIN ET AL., *supra* note 20, at 41.

27. *See id.* at 40. The Restatement (Second) of Agency defines the master/servant relationship. An important ingredient is the degree of control that the master has over the servants' actions. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

28. *See* EPSTEIN ET AL., *supra* note 20, at 40.

29. *See id.*

commission."[30] In an attempt to provide a demonstration for this somewhat confusing language, the Restatement gives an illustration in which a retail salesperson agent makes false statements to a consumer to induce the customer to purchase goods.[31] Under this example, the Restatement concludes that the principal storeowner is liable to the customer because of the conduct by the principal creating an impression that the salesperson had apparent authority to act on behalf of the principal.[32] There are numerous ways in which to reach the conclusion that the principal store owner in that hypothetical would be liable to the customer (presumably for the difference in the value of the goods, as promised compared to the actual value of the goods). For our purposes, however, it is only necessary to note that the underlying theory by which the customer would seek recover under that hypothetical could just as easily be viewed as a "contractual" claim as a "tort claim." Thus, although section 7.08 of the Restatement speaks in terms of "apparent authority" and "liability for a tort committed by an agent,"[33] it seems that the traditional bipartite approach remains valid. Under this bipartite approach, when a third party seeks recover from a principal based in tort, the relevant analysis will be whether the principal exercises sufficient control over the agent and whether the agent was acting within the scope of the agency relationship. When the third party's recovery is based in contract, however, the relevant analysis will be whether the agent was actually authorized by the principal to engage in the conduct or whether the principal had created a reasonable impression with the third party that the agent was authorized to engage in the conduct.

As it turns out, the Supreme Court has borrowed from each of these two traditional agency approaches in adjudicating religious speech cases. In *Santa Fe*, for instance, the Court seemed, in certain portions of the opinion, to particularly emphasize the amount of control which the school, or perhaps the student body electorate, maintained over the student speaker: "[T]he school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message."[34] "The message is broadcast over the school's public address system, which remains subject to the control of school officials."[35]

> The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals

30. RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006).
31. *See id.*, Illustration 1.
32. *See id.*
33. *See id.*
34. Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 (2000).
35. *Id.* at 307.

> and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.[36]

"For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause."[37] "One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control."[38]

In addition to the above tort liability analysis, however, the Court in *Santa Fe* also seemed to borrow from the contract liability analysis from agency law:

> In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." [Wallace v. Jaffree, 472 U.S. 38, 73 (1985)] (O'Connor, J., concurring in judgment); see also [Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995)] (O'Connor, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.
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> The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school.[39]

By asking whether the "objective observer" would perceive the student speech as an endorsement of religion by the school, the Court is basically using the apparent authority analysis from agency law to determine when a principal can be bound in contract by the conduct of its agent. Under the apparent agency analysis, a principal is bound by the contract entered into on his or her behalf by the agent because of conduct taken by the principal which would lead a third party to believe that the agent has the authority to make the contract on behalf of the principal. In applying the "objective observer" analysis, the Court in *Santa Fe* similarly focused on the actions of the school which would lead the audience to believe that the student speaker had authority to speak on behalf of the school:

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36. *Id.* at 306.
37. *Id.* at 317 n.23.
38. *Id.* at 310.
39. *Id.* at 308.

> The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. . . . It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation.
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> The delivery of such a message-over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer-is not properly characterized as "private" speech.[40]

Thus, even within the Supreme Court's analysis in the *Santa Fe* case, there are two different conceptual approaches used to determine whether the school or student would be the speaker were the elected student allowed to perform the pregame speech. In one approach, the Court focuses on the likely perception of those attending the football game. The approach in which the Court analyzes the Establishment Clause challenge by considering the likely message received by the audience has been advocated in particular by Justice O'Connor,[41] and not without criticism.[42] This approach is closely analogous to the agency approach for determining the liability of the principal when the third party is seeking recovery in contract. In the other approach, rather than focusing on the likely perception of the listeners, the Court concerns itself with the actual control which the school can assert over the student religious speaker. This analysis is closely analogous to the agency approach for determining the liability of a principal for the tortious conduct of the principal's agent.

The "control" and "objective observer" approaches will often produce the

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40. *Id.* at 307-08, 310.

41. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772-73 (1995) (O'Connor, J., concurring) ("[B]ecause it seeks to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community, the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." (citations and internal quotation marks omitted)).

42. *See, e.g.*, Alifair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1052 (2005) (criticizing the "reasonable observer" test).

same result. The more control that a school asserts, or is able to assert, over a student's speech, the more likely it is that an observer will consider the real speaker to be the school. Thus, the two tests do not appear to be diametrically opposed. However, it is possible to conceive of cases in which the control analysis might conclude that the student is the relevant speaker, while the "observer" analysis might conclude that the student is merely speaking on the government's behalf. Indeed, Justice O'Connor's "reasonable observer/endorsement" approach (loosely borrowed by Justice Stevens in *Santa Fe*) has been deemed worthy of criticism by conservatives who fear that the test will effectively allow a heckler's veto over religious speech by those most offended or sensitive to religious ideas.[43] It seems that there is enough of a difference between the "control" and "objective observer" approaches used simultaneously in *Santa Fe* that the Court might someday be forced to choose between these two approaches. Again, it appears that agency law might be helpful in making this determination. Determining whether the Establishment Clause claimant in student religious speech cases is more analogous to the tort or contract claimant in the agency context is a neutral approach in considering which test should be used. If the Establishment Clause claim is most analogous to a contract claim, the "objective observer" type of approach, in which the ultimate benchmark is the likely perception of the audience, is warranted. However, if the Establishment Clause claim is more analogous to a tort claim, the focus should not be on the perceived reaction of the audience but rather on the actual ability of the school to control the student speech within the course of their relationship.

On first analysis, it is tempting to find the contractual analogy most relevant. If government, and particularly written constitutions, are nothing more than a social contract by those in society, an Establishment Clause claim can be seen as a breach of this social contract. On closer inspection, however, this analogy is misplaced. Under the Locke social contract theory, the contract claim would be based on the United States Constitution and, more particularly, the Establishment Clause. The breach would be the conduct of the agent in breaking the contract on behalf of the principal. Under typical agency analysis, however, the relevant question is not whether the agent had the power to *break* the contract on behalf of the principal, but whether the agent had the power to *bind* the principal to a contract. The Locke analogy, thus, is incomplete.

The question is best answered by focusing on the difference in contract law and tort law regarding who provides the "rules" or "laws" which control. One of the fundamental tenets of contract law is that individual parties can supply the law that will determine the parameters of their relationship. If parties, through mutual agreement, can determine what conduct is expected of the other, the parties can rely on this agreed-upon conduct in conducting their affairs. The contracting parties supply the law that will govern their behavior towards each other. Tort

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43. *See* Doe v. Small, 964 F.2d 611, 730 (7th Cir. 1992) (Easterbrook, J., concurring) ("The Free Exercise Clause offers special protection for religious speech. If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum.").

law, however, functions in a different manner. Tort law provides the "rules" or law that will govern individual's behavior towards others in society in the absence of explicit agreements between the parties.[44] The plaintiff and defendant in an automobile accident are likely strangers who have never had a chance to determine the behavior expected towards each other; tort law thus fills this void by creating a body of law to apply to these situations. Often times, juries (applying vague legal standards such as "reasonableness" in a negligence claim) will supply the appropriate level of conduct between these two strangers. Other times, causes of action such as battery or assault will supply the relevant legal standard (such as the prohibition against intentionally causing harmful or offensive bodily contact, or the apprehension thereof). The critical factor is whether the parties supply the rules or law which control, or whether they are provided by the legal system.

Viewed in this context, it seems clear that the Establishment Clause claimant is most analogous to the tort claimant. Neither the school, the student religious speaker, nor the offended listener provided the rules which govern their situation. They are not contracting parties that can determine beforehand what type of speech will be permitted or prevented. Rather, the standard which governs is coming from outside this relationship, specifically, under the Establishment Clause. The Establishment Clause law or rule is supplied by the legal system, much like the battery cause of action or negligence standard are imposed on society participants. The parties cannot negotiate around this standard or reformulate it to "fit" the desires of the relevant parties, like they could do in a contractual relationship.

Because the Establishment Clause claimant is most analogous to the tort claimant, the "who is the speaker" question should be determined according to the agency rules applicable to tort claimants. Thus, the relevant questions are the "control" and "score of relationship" questions rather than the "objective observer" analysis. In future religious speech cases, the Court should answer the "who is the speaker" question by incorporating this analogous agency tort liability analysis.

Of course, neither the tort nor contract agency approach seems to be required under the Constitution. That is not the argument advanced in this Article. Rather, agency law seems to provide a useful conceptual approach to addressing these issues. The Court should not ignore this potentially valuable resource.

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44. Indeed, many aspects of tort law explicitly seek to limit the scope of tort liability to instances in which the parties are not able to negotiate the parameters of their relationship. For example, recovery under a negligence cause of action for pure economic damages is usually precluded.