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# The Interpretive Project and the Problem of Legitimacy

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# RULES, PRINCIPLES, OR JUST WORDS?

# THE INTERPRETIVE PROJECT AND THE PROBLEM OF LEGITIMACY†

*Barbara K. Bucholtz*‡

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† This Article was originally presented as a paper entitled, "The Common Law Rules of Statutory and Contract Construction: When Does the Deployment of Their Conflicting Canons Become Simply a War of Words and How Can the Danger Be Avoided?" The paper was presented at the *Hadley v. Baxendale* Conference, "The Common Law of Contracts as a World Force in Two Ages of Revolution," held at the University of Gloucestershire, Gloucester, England, June 7–8, 2004. Thanks to Marsha Huie and Marty Belsky for their comments on earlier versions of this Article. The inspiration for my thesis is Frank Michelman's recent scholarship calling into question our notions of legitimacy. *See, e.g.*, Frank I. Michelman, Modus Viventi Postmoderus*? On* Just Interpretations *and the Thinning of Justice*, 21 Cardozo L. Rev. 1945 (2000); Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?* 67 Brook. L. Rev. 963 (2002); Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: A Comment on van der Walt and Botha*, 9 Constellations 246 (2002); Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, *in* Habermas and Pragmatism 113 (Mitchell Aboulafia et al. eds., 2002); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 Mod. L. Rev. 1 (2003). Michelman's concern is with constitutional law but his inquiries apply with equal force to the common law and its rules of interpretation.

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## I. Introduction

It is remarkable that the common law remains as vibrant and as vulnerable today as it was in the nineteenth century. Its vibrancy continues to be illuminated by its responsiveness to societal changes; its vulnerability continues to reflect the flip-side of that responsiveness: an inherent indeterminacy. The analysis that follows investigates the feasibility of maintaining the former characteristic while curtailing the latter, and it is limited to the common law in its interpretive capacity. The principal focus of the analysis is, in keeping with the theme of the conference, the common law of contracts. From that perspective, the Article articulates the problem of indeterminacy in contract cases and proposes a resolution. The crux of my argument is that indeterminacy undermines the legitimacy of the common law to the extent that interpretation in a particular case seems arbitrary or worse—biased and partisan. The antidote might be an interpretive rule regime that compels transparency in judicial decisionmaking. The obvious venue for the project is the Restatement. Because, contract law is primarily interpretive, a re-articulation of the Restatement (Second) of Contracts, which captures and makes explicit the predominance of interpretation in contract law and the availability of alternative interpretive rules at each step of judicial decisionmaking in contracts cases, would encourage judges to make their interpretive choices explicit and their reasoning more apparent. This, in turn, would constrain indeterminacy by holding judges responsible for persuading us that their choice of interpretive rules in a particular context was neither arbitrary, nor biased, nor partisan, but a legitimate choice among competing alternatives.

Some forty years before *Hadley v. Baxendale*[1] was decided, an influential German jurist, Frederich Karl von Savigny, published his authoritative commentary on the law. It was entitled *Of the Vocation of Our Age for Legislation and Jurisprudence.*[2] In that text, he derided

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1. 156 Eng. Rep. 145 (Ex. 1854).

2. The Great Legal Philosophers 290–300 (Clarence Morris ed., 1991) (reprinting selected excerpts from Frederick Charles von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence (Abram Hayward trans., 1831)). Savigny wrote extensively about law. His treatise on the law of possession was considered a landmark, but he is best known as a scholar of the common law. Savigny argued that the law of a nation, like its language must have an organic connection with the people which allows it to develop as the nation, itself, develops. Savigny believed that a nation thrives under a legal system which incorporates customary principles, "the aggregate existence of the community, which it does not cease to be" which are continuously reinterpreted by the courts to keep pace with evolution of the nation. *Id.* at 291. Codification, he argued, severs the law's organic connection with a nation's past and imposes an artificial rigidity upon the law so that it could not accommodate the future. Thus, he found Third Century (C.E.) Roman law a useful paradigm because it "[held] fast by the long-established, without allowing [itself] to be fettered by it . . . [and it] exhibit[ed] everywhere a gradual, wholly-organic development." *Id.* at 294. Only in the Sixth Century when Rome was in de-

legal systems dominated by a system of codified law, and he extolled the virtues of legal systems rooted in historical, customary principles and reinvigorated through judicial interpretation.[3] Savigny's treatise was intended as a response in opposition to attempts to draft a comprehensive code for the German states,[4] but his arguments continue to resonate as the fundamental tenets of historical jurisprudence and to explain the enduring strength of those customary legal systems for which the common law is the most notable exemplar.[5]

Indisputably, the common law owes its redoubtable success to its singular ability to facilitate evolutionary change in a society by addressing new conditions with the cultural authority of historically-rooted principles.[6] Famously, the common law views law not as a static body of rules but as an ongoing process of synthesizing the old with the new.[7] And it is that perspective that makes the common law,

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cline, did Rome codify its law. "If, in the first place, we consider the juridical works of Justinian, consequently, that form in which the Roman law has come down to modern Europe, we cannot but remark a season of decline in them." *Id.* at 293. For Savigny codification was a symptom of a nation in decline.

3. *See id.* 290–300.

4. *Id.* at 289.

5. Savigny was one of the leading lights of the nineteenth century school of historical jurisprudence. Late nineteenth and early twentieth century scholars recognized the important insights of the historical school: that legal precepts are rooted in the history of a society and that all law, whether codified or customary requires interpretation or elaboration in particular court cases. *See, e.g.*, Jean Dabin, *General Theory of Law*, *in* THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN (Kurt Wilk trans., Harvard Univ. Press 1950). Nevertheless, they have also pointed out that there is nothing sacrosanct about the evolutionary development of law through judicial interpretation. To varying degrees, judicial interpretation is always subjective. *See, e.g.*, EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll trans., Transaction Publishers 2002) (1936). Ehrlich states, "The Historical School of jurisprudence has taken infinite pains to show how "customary law" or, to put it more accurately, legal propositions of "customary law," arise immediately in the popular consciousness. It is a vain endeavor . . . ." "The judge is never delivered up to the legal proposition, bound hand and foot, without any will of his own, and the more general the legal proposition, the greater the freedom of the judge . . . ." Finally, "In the case of a judge . . . the value of the performance is decisive of the success of his intellectual labor. If the legal proposition is good and practical, its chances of gaining recognition are as fair as the chances of a good and practical idea in any other sphere . . . ." *Id.*

6. Discussion of the common law are, of course, legion. *But see*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9 (Yale Univ. Press 1921).

7. *See id.* "The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalization from particulars." *Id.* at 22–23.

> "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated."

in both its law-making and its law-interpreting functions, so uniquely suited to act as a model for accommodating the radical technological, social, and economic changes that roil the world, threatening to destabilize developing nations and emerging transnational organizations.

Nevertheless, it is also apparent that this very strength of the common law—its mediating capacity which is attributable to its inherent flexibility—is also its inherent weakness. I will explicate that problem by focusing on one aspect of the common law: its interpretive capacity. That is, the interpretive rules it applies to private contracts and to public statutes.[8] For purposes of my argument, I will treat the two rule regimes together.[9] These interpretive rules, like the common law of which they are a part, share a remarkable capacity to endure, to remain relevant, and to accommodate change. Their enduring relevance, of course, is made possible because they operate by applying broad-based principles to specific situations—an operation that per-

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*Id.* at 23 (quoting Munroe Smith).

8. The interpretive function is not entirely a species of common law rules. Both federal statutes and state statutes occasionally establish rules for construing particular statutes and types of contracts. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2089 n.10 (2002) (listing state interpretive codes).

9. It is readily apparent that while statutory construction and interpretation of contracts are not identical enterprises, they are sufficiently similar to be treated for purposes of this discussion, as synonymous. For purposes of this discussion, they share a dominant characteristic: flexibility, which is both their strength and their Achilles' heel. And they each fit within the rubric of "interpretive regime" defined by William Eskridge and Philip Frickey as follows:

> An interpretive regime is a system of background norms and conventions against which the Court will read statutes [or contracts]. An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes [or contracts] will be read, what presumptions will be entertained as to statutes' [or a contract's] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities.

William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1993). At the same time it must be said that differences between the two regimes abound. An exhaustive list of differences would be unwarranted here but, as a striking example, legislative history as an interpretive tool in statutory construction opens a Pandora's Box that has no discernible counterpart in contract interpretation. *See, e.g.*, Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. (forthcoming 2005); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000); John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000); Jonathan R. Siegel, *Timing and Delegation: A Reply*, 53 VAND. L. REV. 1543 (2000); Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366 (1998); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1991); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1977).

mits a certain flexibility. But flexibility can lead to indeterminacy, which threatens to undermine credibility and, with it, the perceived legitimacy of the common law process itself. Put cryptically, we may ask: if contractual or statutory words can reasonably be interpreted to mean a variety of things, then what legitimacy does a court decision that chooses a particular meaning have?

I will explore the problem as follows. Part I lays out the underlying premise of the article: that a relative indeterminacy is endemic to the interpretive project. Part II develops the premise by showing how indeterminacy has become a critical problem in today's legal climate. Part III identifies several proposals for addressing the indeterminacy problem in statutory interpretation. Notably, recent scholarship about the indeterminacy problems of interpretation deals almost exclusively with the issue in the statutory context. The magnitude of that scholarship is, arguably, some evidence that Part II's analysis of the effects of result-oriented judicial activism accurately describes an incipient crisis in legitimacy.

Part IV addresses the indeterminacy problem in the context of contract law. Using the *Hadley* case as a venerable model, I argue that interpretation is endemic to contracts law issues; however, courts often fail to articulate their ubiquitous selection and application of interpretive rules. Moreover, the Restatement itself fails to reflect and to make manifest the ubiquity of interpretive rule selection in contract law. A re-articulation of the Restatement, I conclude, could ameliorate the indeterminacy problem (without sacrificing the flexibility the common law permits) if it revealed the overarching presence of interpretive rule selection in contract law decisions. A simple paradigm shift of the rules is all that is required.

## II. Common Law Rules of Interpretation and the Indeterminacy Problem

A logical starting point for explicating the indeterminacy problem is Karl Llewellyn's famous Vanderbilt Law Review article, where he argued persuasively that the canons of interpretation form a point/counterpoint system for legal argument and not a formula for pinpointing a pre-ordained legal result.[10] As Llewellyn explained decades ago in the Vanderbilt piece, for every rule there is its mirror opposite.[11] With

10. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950).

11. Llewellyn invites the reader to view the interpretive enterprise as a dueling match, wherein opposing arguments are characterized as fencing maneuvers. So, for example, "Thrust": "It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned (*ejusdem generis*)" is followed by "Parry": "General words must operate on something. Further, *ejusdem generis* is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended." *Id.* at 405 (citations omitted).

regard to statutory interpretation, for example, he pointed out that the interpretive canon that declares, "A statute cannot go beyond its text"[12] can be blocked or confronted by the opposing canon that "[t]o effect its purpose a statute may be implemented beyond its text."[13] Similarly, in contract law the "Four Corners Rule" of contract interpretation[14] can be contradicted by the rule that the court may interpret the words of the contract in light of the context and circumstances in which it was drafted.[15] In other words, the point (interpretation is textbound) is contradicted by the counterpoint (interpretation may go beyond the text). As we know, this list of conflicting pairs of canons is extensive. Moreover, across this interpretive divide, judges can also launch entirely different principles at a statute or a contract. For example, in the context of statutory construction, the canon that the plain meaning is paramount might be trumped by an appeal to legislative history whereby congressional committee reports might be said to reveal more about the legislative intent of the statute than its explicit words do or socio/economic change might be relevant to enlighten us as to what the legislature would have intended the words to mean in a new and different situation. This surfeit of interpretive tools raises the obvious question: how are we to rank the relative importance or authority of conflicting rules so as to preserve the legitimacy of the interpretive enterprise?

Some jurists and scholars have attempted to clarify the problem and diminish the cacophony of competing rules by pointing out that each of them is an iteration of a particular theory about interpretation. Theories like textualism[16] or intentionalism[17] have been developed

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12. *Id.* at 401.

13. *Id.*

14. *See, e.g.*, E. Crossroads Ctr., Inc. v. Mellon-Stuart Co., 205 A.2d 865, 866 (Pa. 1965) ("When a written contract is clear and unequivocal, its meaning must be determined by its contents alone."); Best v. Realty Mgmt. Corp., 101 A.2d 438, 440 (Pa. Super. Ct. 1953) ("A court is not authorized to construe a written contract in such a way as to modify the plain meaning of its words, under the guise of interpretation.").

15. And, in that regard, extrinsic evidence is admissible, even where the parole evidence rule applies, as long as the evidence offers a reasonable interpretation of the written contract. *See, e.g.*, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644–45 (Cal. 1968).

16. The most renown textualist on the bench today is certainly Justice Antonin Scalia. His classic statement of textualism can be found in his 1977 work. *See* SCALIA, *supra* note 9; *see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 119 (1998); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

17. A prominent jurist who advocates that theory is Justice John Paul Stevens. His whimsical statement of the case for intentionalism is introduced in the following:

> The Duke of Gloucester, later King Richard the Third, begins his opening soliloquy with the famous line: "*Now* is the winter of our discontent." The listener, who at first assumes that the word "now" refers to an unhappy winter, soon learns that war-torn England has been "[m]ade glorious by this son of York." It is now summer not winter and "[g]rim-visag'd War hath

and have imposed a kind of analytical order on the rules by assigning them to theoretical categories. But it is unclear how one theory, as opposed to another, actually does a better job of divining the intent of the legislature (in the case of textualism) or that of the parties to a contract (in the case of intentionalism). Theoretical categories simply do not resolve the legitimacy problem.[18] The same can be said for attempts to categorize the rules by their purposes or characteristics.[19]

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> smooth'd his wrinkled" forehead. Words—even a simple word like "now"—may have a meaning that is not immediately apparent.

John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1373 (1992) (quoting WILLIAM SHAKESPEARE, THE TRAGEDY OF RICHARD THE THIRD act 1, sc. 1, line 1 (G. Blakemore Evans ed., 1974) (emphasis added)); *see also* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994). A related theory has been dubbed "purposivism"; it looks to an assumed purpose of the statute. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

18. Some jurists and scholars dodge the legitimacy bullet by positing more pragmatic solutions. Adrian Vermeule points out the costly and ultimately futile search for the "right" interpretive rule should be abandoned in favor of picking a rule consistently: "It is more important that judges select *one* answer and apply it consistently over time than that they select the *right* answer. If the default rules [both statutory and contract interpretive canons are commonly referred to as "default" rules] are fixed, Congress [or, one assumes, the parties to a contract] can, over time, incorporate the content of the background rules into its [their] anticipations of judicial behavior." Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 140 (2000). Another pragmatic choice (with significant normative overtones) has been suggested by Judge Posner who has argued that interpretation should be resolved in favor of the rule that yields the preferred best result in light of its effects in the future. Richard A. Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 235 (Morris Dickstein ed., 1998); *see also infra* notes 46–53, 61–66 and accompanying text.

19. Eskridge, Frickey, and Garrett divide the canons into three categories: "textual" (the application of the rule is within the text, for example: the specific controls the general); "substantive" (a presumption "of so long continuance . . . so universal and so reasonable in itself, as that the presumption is violent that the parties contracted with reference to it, and made it a part of their agreement." Walls v. Bailey, 49 N.Y. 464, 472–73 (1872)); and "reference" or canons which look to other sources ("extrinsic aids") for interpretive assistance, for example: legislative history (statutes) or past performance, prior dealing or usages of the trade (contracts). WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 818 (3d ed. 2001) (cited in Adam W. Kiracofe, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosekranz's Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 574 n.15 (2004)). On the other hand, Stephen Ross has assigned the canons to one of only two categories: "descriptive" or "normative." Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?* 45 VAND. L. REV. 561, 563 (1992). Beginning with Llewellyn's declaration that a statute "'must be read in the light of some assumed purpose' if it is to make any sense," *id.* at 578, Professor Ross explains that Llewellyn's catalog of canons "are principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language." *Id.* at 563. Professor Ross identifies normative canons

So Llewellyn's thesis remains unassailable: the rules of interpretation are tools of argument in a particular case rather than formulas for determining legal results—and the validity of Llewellyn's insight simply underscores the inherent indeterminacy of the interpretive project.

## III. Factors That Raise Issues of Illegitimacy in Interpretation

The indeterminacy problem has always been with us; it is endemic to the interpretive project. However, in today's climate it seems to be especially troubling, presenting what may become a real challenge to the presumption of legitimacy in judicial interpretation. In the current era, indeterminacy has been exacerbated or, at the very least, it has been made more evident by three principal factors: (1) jurisprudential scholarship, (2) judicial activism by, especially, the U.S. Supreme Court and (3) the obvious diversity of viewpoint that characterizes the legal culture in which judicial decisions are rendered both domestically and transnationally.

### A. *Jurisprudence and the Problem of Legitimacy*

With regard to jurisprudence, the first factor that seems to magnify the indeterminacy problem is the substantial body of scholarship, which has contributed significantly to our understanding of how legal rules operate by revealing the illusory nature of law's essentialist claims.[20] In diverse and interesting ways, this scholarship has deep-

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as "principles, created in the federal system exclusively by judges, that do not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective." *Id.* And he cites Judge Wald's example of a presumptive construction to avoid interference with states' rights in the absence of a clear congressional intent to interfere. *Id.*; *see also infra* notes 41–43 and accompanying text.

20. *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991) (explaining how "critical legal studies" has been assimilated in legal studies albeit in a diluted form). I refer here generally to the leftist ("critical legal") theorists who in the 1970s and 1980s challenged formalism and its belief in objectivity under the mantra of "law is politics." *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); J.M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L. REV. 392 (1987); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). In developing its distinctive viewpoint the Crits crossed disciplinary boundaries and drew insights and methods from literary, hermeneutical, structural, psychological, and social theory both in the Anglo tradition and from the Continent. Their view was especially informed by the postmodernist sensibility in philosophy generally of which, I would argue, the Crits project is a part. The postmodernist turn pervades discourse in virtually every discipline and imposes a hue of skepticism wherever its discerning eye alights. For a broad survey of postmodernism, see THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE (Hal Foster ed., 1983).

ened our awareness and given us new clarity of vision by convincingly demonstrating law's contingent meanings.[21] This skepticism has become so pervasive that it has metamorphosed from a radical outlier position to a widely-accepted, not to say commonplace, body of assumptions about the law within established academic thought.[22] In recent decades, as its initial iconoclastic status has given way to an established theoretical position, the success of this skeptical turn of mind has left in its wake the demise of Cartesian certainties. This loss, or at least erosion, of an essentialist foundation has had a destabilizing effect on law's legitimizing function. If all legal rules, like all other human constructs, are relatively indeterminate and contingent (as the skeptics insist), where in this shifting terrain of uncertainty can law stake a convincing claim to the terra firma of legitimacy?[23]

In fulfilling its legitimizing function, law has traditionally relied upon some sort of essentialist basis. It has appealed to something outside of itself that legitimizes it and by which (or through which) it claims authority to legitimize its separate performances or applications. But these skeptical insights challenge the very notion of an objective fundamental essence or authority upon which the idea of legitimacy has traditionally rested. So the skeptical turn in jurisprudence generally compounds the indeterminacy problem in contract and statute interpretation, specifically.

### B. *Judicial Activism and the Problem of Legitimacy*

Another factor that exacerbates the problem of indeterminacy in legal interpretation is the perception that the U.S. Supreme Court appears to be increasingly result-oriented in its decision making: first reaching a result that comports with its own policy preferences and then working backwards to construct a rationale to support that re-

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21. For purposes of this investigation into statutory and contract interpretation, see, for example, Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1982). Two examples of interdisciplinary scholarship that creatively highlight the indeterminacy of legal rules are Steven Winter's path-breaking work on law and cognitive theory, STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001), and Jack Balkin and Sanford Levinson's enlightening construct of law as a performance art, as well as their investigation of canons, LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000).

22. Even naturalists now define philosophical questions to include empirical facts or evidence about knowledge and how the mind works. *See, e.g.*, ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD (1999).

23. In light of postmodern skepticism, even an enlightened, neo-pragmatic, and largely, postmodernist approach to statutory interpretation has run afoul of a postmodernist critique when it attempts to employ postmodernism as a basis for statutory interpretation. *See* Schanck, *supra* note 21, at 2569–70 (arguing that Eskridge and Frickey's attempt to justify their largely pragmatic approach to statutory interpretation relies on a "pragmatic epistemology" which renders it inconsistent with postmodern theory.). In other words, postmodernism cannot serve as the foundation for a new theory of statutory interpretation. *See id.* at 2589.

sult—an approach that may appear somehow "unprincipled." This perception has recently generated a whole spate of articles seeking to come to terms with the quandary of activist decisionmaking.[24]

It is now, perhaps, the consensus view that the Rehnquist Court is an activist Court and that its activism is associated with the positions it began to take a number of years ago with regard to Federalism and other headline-grabbing constitutional issues.[25] Less well-known and less publicly controversial is that some of its decisions have been resting, not on constitutional authority, but on the canons of interpretation[26] (both statutory and contract interpretation),[27] and it is those decisions that are most germane to my thesis today because they demonstrate how result-oriented activism might undermine the perceived legitimacy of judicial decisions. We know that rules of interpretation form an ostensibly restraintist and narrow basis for judicial decision making and one that appears to be singularly deferential to the drafting parties (or to the legislature, in the case of statutory interpretation). What happens when it becomes increasingly evident that these restraintist rules are being used to achieve activist ends? Do the judicial opinions seem less principled as a consequence of the apparent activism? Do their outcomes seem less legitimate? And if so, can the taint of these decisions affect our perception of the legitimacy of other judicial decisions or the interpretive function of the courts generally?

24. *See, e.g.*, Herman Schwartz, Introduction to The Rehnquist Court: Judicial Activism on the Right (Herman Schwartz ed., 2002); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. Colo. Rev. 1217 (2002).

25. *See generally* Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-related Cases on Its 2000-2001 Docket*, 37 Tulsa L. Rev. 305 (2001).

26. *See generally* Barbara K. Bucholtz, *Employment Rights and Wrongs: ADA Issues in the 2001-2003 Supreme Court Term*, 38 Tulsa L. Rev. 363 (2002).

27. For example, in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Court was required to construe both the nature, and legal effect, of the contractual arrangement between the employer and its employees with regard to seniority issues and to determine how to interpret the ADA's mandate of a "reasonable accommodation" for a "qualified" individual. *Id.* at 393–97 (quoting 42 U.S.C. §§ 12112(a), (b)(5)(A), 12111(8), (9)(B) (1994)). At issue was a nonbinding seniority system which the employer reserved the right to modify at will. *Id.* at 394. Barnett was refused a job transfer because of a job-related injury but the employer argued that the seniority system precluded the transfer and that Barnett's request was unreasonable. *Id.* at 395–97. A majority of the Court agreed, stating that accommodation is not reasonable if it imposes an "undue hardship" on an employer by requiring it to contravene a nondiscriminatory seniority system. *Id.* In dissent, Justice Souter pointed out that the majority's interpretations of the contract and of the statute were flawed: the nonbinding seniority system would probably not be considered a contractual arrangement in state court and the legislative history of the provision at issue expressly provided that seniority systems were only one factor to be considered in assessing the reasonableness of an accommodation. *Id.* at 421–23 (Souter, J., dissenting). For a more complete discussion of *U.S. Airways* and the interpretive conventions used in the case, see Bucholtz, *supra* note 26, at 374–77.

In posing these questions, I rely on three assumptions. First, it is commonly understood that a certain amount of "legislating from the bench" is endemic to judicial decisionmaking. The act of interpretation and application ineluctably creates new law: at the very least it must be said that by deciding what the law requires in a particular case, a judicial decision forecloses all other possibilities of what it might have required. If a city ordinance banning vehicles from city parks is interpreted by a court to exclude only 4-wheeled motorized vehicles, then henceforth "vehicles" for purposes of the ordinance cannot mean any other kind of vehicles. Thus, all judicial decisions are, to that extent, activist. But judicial activism can, of course, mean much more. Here I use the term to describe decisions which overturn, either directly (explicitly) or indirectly (by interpretive devices that significantly undermine existing law), legislative enactments and judicial precedents.

Second, I do not argue that judicial activism is necessarily reprehensible. On the contrary, there may be very good reasons for invalidating statutes and overturning precedents. By the same token, activism in other contexts might be considered unjustified. How we might distinguish legitimate from illegitimate activism will be considered in Parts III and IV of this article. Here, I simply demonstrate how activism in the current Court masks itself in the cloak of techniques we typically associate with judicial restraint: the rules of statutory construction.

Third, I assume that when most decisions in an area of law are ostensibly reached by technical application of facially neutral interpretive rules, such that the rules selected consistently work to the disadvantage of a particular group or class, while selection of equally applicable interpretive rules would consistently work to the advantage of that group, then the activism appears to be result-oriented: working from a desired policy preference backwards to an interpretive rationale. This is particularly so when the selected rules interpret statutory law in ways that disadvantage the group the law was designed to protect. Recent Supreme Court decisions interpreting the Americans with Disabilities Act (ADA)[28] illustrate this dynamic and show that the ADA has become fertile ground for the majority's activism.[29] As

28. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

29. Recent cases construing the ADA in the Rehnquist era include: Barnes v. Gorman, 536 U.S. 181 (2002); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998). For a more detailed discussion of these cases see Bucholtz, *supra* note 26.

a typical example, *Sutton v. United Air Lines, Inc.*[30] is a *tour de force* of statutory interpretation and an elaborate example of Llewellyn's point that for every valid and relevant rule of statutory construction there is an opposite and (usually) equally valid and (arguably) relevant rule.

In *Sutton*, opposing rules focused on the issues of: (1) requisite deference to agency interpretation (2) the ubiquitous plain meaning rule (3) the deference which should be accorded to congressional findings (4) when legislature history is an appropriate interpretive tool, and (5) what it means to read a statute as a consistent whole to avoid eviscerating any part of it. When one reads through these recent ADA opinions, including *Sutton*, what first strikes you is the obvious lack of interpretive coherence in the reasoning of the Justices. In what appears to be a virtual melee of rule-hurling, Justices occasionally even contradict themselves in their selection of rules. For instance, in *Sutton* the majority narrowed the application of the ADA by interpreting its language (that the ADA affords protection only where a "physical or mental impairment" or disability "substantially limits" one or more of the major life activities of an individual)[31] to exclude correctable disabilities like myopia.[32] Writing for the 5-4 majority in *Sutton*, Justice O'Connor declined to defer to the regulations promulgated by the three implementing agencies of the ADA (Equal Employment Opportunity Commission (EEOC), Justice Department, and Department of Transportation), which had uniformly interpreted the ADA language to consider covered disabilities without regard for the availability of "mitigating measures." She reasoned that, "no agency has been delegated authority to interpret the term 'disability'"[33] and, in any case, she added, the meanings of the term "disability" and of "substantially limits" are plain under the ADA.[34] But in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[35] where the Court held that the employer was not obligated by the ADA to accommodate the employee's carpal tunnel syndrome and related afflictions she had developed on the job site because these maladies did not "substantially limit" her "major life activities," Justice O'Connor actually relied on the EEOC regulations defining "substantially limit" to reach her conclusion on behalf of the majority.[36]

The ADA decisions, reached by the Court over a period of three recent terms, are textbook examples of Llewellyn's "thrust" and "parry" analysis of the interpretive rules. They also show how policy

30. *Sutton*, 527 U.S. at 471.
31. *Id.* at 482.
32. *Id.* at 494.
33. *Id.* at 479.
34. *Id.* at 481–82.
35. 534 U.S. 184 (2002).
36. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 194, 195–96 (2002) (quoting 29 C.F.R. § 1630.2(j) (2001)).

preferences by an activist majority can be realized through selective rule application. Almost without exception[37] all of the ADA decisions during this period reached results that narrowed either the scope of the statutes or the employee rights they were designed to protect. And it is especially important to notice that the ADA is a remedial or prophylactic statute usually considered to be entitled to broad or liberal interpretation, if the legislative intent is to be observed.[38] In the ADA decisions, it is hard to resist the conclusion that facially deferential rules of statutory construction had, in fact, been selected and deployed to achieve a certain result which was in conflict with the prophylactic intent of the legislation at issue.

Common law rules of interpretation simply do not tell us how to locate legitimate judicial interpretations and to distinguish them from illegitimate ones. Activist judicial interpretations bring that problem to our attention.[39]

### C. *Pluralism and the Problem of Legitimacy*

A final factor that exacerbates the apparent indeterminacy of interpretation and the incipient problem of illegitimacy is our relatively recent awareness that different socio-cultural perspectives can render very different but arguably valid narratives about a particular legal issue. That is to say, a third reason why the normative value of canon selection might seem more problematic today is that both domestically and globally we are much more cognizant of the putative validity of diverse viewpoints than we were in previous eras. A polity characterized by an apparent homogeneity creates a sense that dominant viewpoints (including interpretive viewpoints) are objectively normative. That might describe American society in earlier decades. But in today's pluralistic polity, where diverse voices are acknowledged both domestically and globally, that apparent consensus may break down. In previous decades what appeared to be quite plain and unambiguous now reveals itself to be fraught with multiple meanings and possibilities.

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37. In *Bragdon v. Abbott*, 524 U.S 624, 655 (1998), the Court ruled that the ADA protects individuals who have tested positive for HIV.

38. The express purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (2000).

39. There is at least some evidence that the majority's activism did not "get it right" in interpreting other remedial employment legislation. The Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2d Sess. 2004); Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. (2d Sess. 2004), would reverse some of the activist judicial decisions that narrowed the remedies available under the 1964 Civil Rights Act, the Equal Pay Act, and the Age Discrimination in Employment Act. *Wide Ranging Rights Bill Would Expand Title VII, Equal Pay Act, Remove Damage Cap*, 72 U.S. L. Wk. 2477 (Feb. 17, 2004).

So, these are three factors—jurisprudence, judicial activism, and social pluralism—that have increased our awareness that the common law, with its capacity to endure in periods of societal change and to maintain societal stability in spite of that change, also runs the risk of delegitimizing the judicial functions of interpretation because its very strength—flexibility—is also its most menacing weakness. What then can be done about it? How do we rescue the interpretive method of common law rules from this precipice of illegitimacy?

## IV. Proposals for Addressing the Indeterminacy Problem in Statutory Interpretation

### A. *Proposals for the Replacement of Common Law Interpretive Rules With Statutory Interpretive Rules*

With regard to the indeterminacy problem arising from statutory interpretation in federal courts, competing approaches have emerged in recent scholarship. Some scholars advocate the abandonment, or at least a drastic restriction of the common law interpretive regime, itself, by congressional enactment of interpretive rules.[40] Critics point out, however, that among other problems with this proposal is its vulnerability to a constitutional challenge: under separation of powers doctrine, can Congress impose an interpretive method on the judiciary?[41] Another approach is advocated by Professor Ross. He takes what contracts professors typically call an "information-forcing" approach to the indeterminacy problem of statutory interpretation. In sum, he argues that if Congress is displeased with the way the courts have used the canons to interpret its legislation, then Congress can trump the courts' interpretations by drafting statutes with the canons, and their uses, in mind. That means, *inter alia*, that the statutes, themselves, should expressly indicate how the courts should construe any statutory language they contain that is likely to be subject to the vagaries of canonical selection.[42]

40. *See* Rosenkranz, *supra* note 8 (Rosenkranz invokes the federal rulemaking authority as a curative for the indeterminacy problem.). For other scholarship advocating some form of legislative response to the indeterminacy problem of the common law interpretive rules see Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. Legis. & Pub. Pol'y 333, 345 n.59 (2004).

41. For a compilation of scholarship making that argument see O'Connor, *supra* note 40, at 348 n.78.

42. With regard to what Professor Ross has called "normative" canons (canons or "presumptions" reflecting judicial policy, generally, rather than legislative intent, specifically), see Ross, *supra* note 19, at 563, he advocates that legislators be made aware of how courts are using these presumptions:

> One workable approach would be for the Congressional Research Service's American Law Division to compile and publish periodically a list of normative canons being employed by the courts. This "checklist" could then be used by attorneys on the staff of the House and Senate Legislative Counsels. For example, when draft legislation appears to impose duties on state governments, these attorneys could notify the author of the bill that express

### B. *Proposals for Assigning Hierarchical Weights to Various Common Law Interpretive Rules*

Other scholars counsel that the courts should cultivate their own garden by emphasizing certain policy-driven canons (what Stephen Ross has called "normative" canons)[43] over an array of available alternatives. Professor Eskridge, for example, in several articles has advocated a canon selection that favors a contemporary gloss on statutory texts: reading statutes to give effect to contemporary values and goals.[44] Other scholars have weighed in on both sides of the viability of legislative history as an interpretive tool.[45]

On balance, common law based corrective measures for addressing the unacceptable levels of indeterminacy which currently plague statutory interpretation appear more likely to succeed than do proposals for a statutory preemption of the interpretive rules. Not only is a legislated regime of statutory interpretation likely to face a successful constitutional challenge but there is also a certain futility in attempting to close statutory gaps and resolve statutory ambiguities with statutory rules.[46] Moreover, in attempting to substitute a legislative regime for interpretation of legislation, Congress might well find itself

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> abrogation of state sovereign immunity will be necessary to secure judicial enforcement of these duties, and the legislator then would be able to make a judgment about the political viability of such an express provision.

*Id.* at 571–72 (citation omitted). With regard to what Professor Ross has called "descriptive" canons ("principles that involve predictions as to what the legislature must have meant, or probably meant"), see *id.* at 563, he advocates clarity of drafting, "[T]he key strategy for Congress in ensuring that its policy preferences are not frustrated by judicial abuse of descriptive canons is to manifest unequivocally its purpose." *Id.* at 573–74. And to the extent that legislative history reveals that purpose, Ross lays out a series of Congressional maneuvers that could deflect judicial skepticism about the infirmity of legislative history as an interpretive resource. *Id.* at 574–78.

43. *Id.* at 563–64.

44. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14–25 (1994); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

45. For an overview of that debate, see Solan, *supra* note 9. Professor Solan calls the debate, "Perhaps the greatest controversy over statutory interpretation during the past two decades." *Id.* And after summarizing the case against the use of legislative history as an interpretive tool (it has been called variously "undemocratic," "unreliable," "incoherent," and "unresponsive to changes in the interpretive environment over time."), Solan develops an argument in favor of using legislative history in statutory construction, proposing that it is both inescapable and reasonable. *Id.*

46. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 504 (1989) (arguing that interpretation inevitably requires reliance on underlying principles); *see also* THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 292 (pointing out the impossibility of a comprehensive preemption of customary law by code law); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 121 (1839) ("Construction is unavoidable. Men who use words, even with the best intent and great care as well as skill, cannot foresee all possible complex cases . . . .").

"dancing the quadrille."[47] Thus, as between the proposals that advocate a statutory approach to the indeterminacy problem and the common law proposals identified above, the common law approach would appear to have a better chance of success.

However, the common law proposals discussed in this section may face an insurmountable problem of demonstrating in some conclusive way that a particular hierarchical weighting of the rules is superior to all other alternatives. While each of the proposed hierarchical systems has merit, it is not clear that any one of them should be decisive in all cases. There seems to be no essentialist basis for establishing, *ex ante*, a hierarchical valuation for different kinds of interpretive rules. It is, perhaps, for that reason that some scholars take a pragmatic approach.[48]

Some of the recent scholarship on statutory interpretation faults the judicial practice of invoking interpretive rules as if the rules themselves had talismanic powers.[49] These scholars expressly reject the approach taken by those who would rank the various interpretive rules according to an *ex ante* value system. According to this critique, the only viable solution is a pragmatic one—judicial persuasion. Judges must persuade us of the legitimacy of their decisions by elaborating their reasoning. They must explain why, given the facts of a particular case, the text before it, and the availability of several opposing but also applicable rules, one rule is to be preferred over any of the alternatives. In other words, we should postulate that legitimacy resides in the persuasiveness of the reason for choosing a particular interpretive rule in a particular case, rather than deceive ourselves that it is the rule itself or rule theory from which it derives that imparts authority.

Consonant with that approach is Gary O'Connor's recent article in which he proposes that the American Law Institute (ALI) promulgate a "Restatement of Statutory Interpretation." His path-breaking proposal uses the Restatements of Contracts as inspiration and model for the project.[50] Noting the obvious overlap between contract and statutory interpretation, O'Connor argues that it is a closer fit than the "evidence rules/interpretive rules" analogy upon which the Rosenkanz proposal for a legislated regime of interpretive rules is pre-

47. See Justice Rehnquist's opinion stating: "'in this Court the parties [or, for purposes of this Article, read "Justices"] changed positions as nimbly as if dancing a quadrille.'" Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 539–40 (1978) (quoting Orloff v. Willoughby, 345 U.S. 83, 87 (1953)). Professor Eskridge has said, "Statutory interpretation is the Cinderella of legal scholarship. Once scorned and neglected . . . it now dances in the ballroom." ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION, *supra* note 44, at 1. Cinderella dances the quadrille.

48. *See supra* notes 37–39 and accompanying text.

49. For an excellent discussion of this approach see Ruth Sullivan, *Statutory Interpretation in the Supreme Court of Canada*, *at* http://aix1.uottawa.ca/~resulliv/legdr/siinscc.html (last visited Feb. 13, 2005) (on file with the Texas Wesleyan Law Review).

50. O'Connor, *supra* note 40.

mised.[51] His proposal is simply that the ALI should initiate a Restatement project for statutory interpretation.[52] He suggests that resources for compiling a list of the extant rules of statutory interpretation might include: Sutherland's treatise; the lists of canons identified by Professor Eskridge and by Professor Llewellyn; state legislation covering statutory interpretation; West's Topical Index on Statutes; rules of statutory interpretation employed in other common law countries; the Uniform Statute and Rule Construction Act of 1993, and appellate court (both state and federal) decisions.[53] He also suggests how the Restatement might be organized,[54] and he discusses, without resolving, the divisive issue of how to regard legislative history.[55]

O'Connor makes a persuasive case for handling the troubling issue of indeterminacy in statute construction by delineating consensus views of judge-made (and, in some cases, legislatively crafted) rules using the common law method of Restatements—the time-honored method by which the common law has kept rule proliferation within some kind of manageable scale and measurement. Indeed, O'Connor's proposal has great promise: it maintains the flexibility of the common law approach to statutory interpretation without permitting that approach to get unduly "messy"[56] or to reach a level of indeterminacy that threatens to delegitimize the interpretive project.[57]

## V. Implementing a Pragmatic Approach to the Indeterminacy Problem in Contract Interpretation

When we turn to the Restatement (Second) of Contracts (Restatement), the model upon which the O'Connor proposal is expressly

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51. *Id.* at 349–50. O'Connor also cites a number of articles that view statutory and contract interpretive rules as analogous. *Id.* at 350 n.92.

52. *See id.* at 351–52 (for a description of the American Law Institute and its procedures).

53. *Id.* at 352–53.

54. What follows is the proposed organizational structure:

Chapter I: Intrinsic or Grammatical Aids to Interpretation
Chapter II: Extrinsic Aids to Interpretation
Chapter III: Interpretive Presumptions—General
Chapter IV: Interpretation of Repealing Acts, Amending Acts, and Acts Incorporating Other Statutes
Chapter V: Interpretation of Consolidating and Codifying Acts
Chapter VI: Interpretation of Particular Kinds of Statutes
§ 601 Appeals, Statutes Authorizing . . . .
§ 602 Deportation, Statutes Authorizing . . . .
§ 603 Penal Statutes . . . .
§ 604 Tax Statutes . . . .
Chapter VII: Retroactivity.

*Id.* at 354.

55. *Id.* at 355.

56. *Id.* at 335.

57. *See supra* Part II, notes 21–37 and accompanying text.

based, we see that the model, itself, may require ALI attention if the pragmatic approach to common law rule selection is to succeed. While the O'Connor proposal clearly maps the interpretive rules, the Restatement seems to exhibit a "messiness" in that regard: a failure expressly to illuminate the interpretive process. And it is to that "messiness" that we should next turn. The overarching organizational scheme of the Restatement is logical: following, as it does, (after a section on the meaning of terms) the sequential issues about contracts in the order by which the court must address them: formation, enforceability, nonperformance, third party interests, and remedies.[58] This ordering of the issues makes abundant sense because a court would typically not address, for example, a remedies issue unless it first found that a valid, enforceable contract had been formed and subsequently breached. The organizational structure is sound, to that extent. But then, a certain "messiness" insinuates itself into the Restatement, and into our way of understanding its rules, and how the interpretive process works within each of these sequential issues.

We have come to view the Restatement as a system of "default rules." The "default rule paradigm,"[59] described in the scholarship of Charles Goetz and Robert E. Scott, views contract law as filling gaps in incomplete contracts such that the probable intent of the parties is realized and uncertain judicial outcomes as well as transaction costs are reduced. To the extent that parties understand which of the rules the court will supply in contracts where there is a gap or missing term and to the extent that parties reject these default rules, they will supply their preferred terms expressly. That is, Restatement rules fill gaps in contracts where the parties fail to supply express terms and these default gap-fillers are considered to be terms most parties in similar contractual arrangements would include. Default rules, then, are "majoritarian." Furthermore, the default rules may also be "information forcing." That is, a party's awareness of a default rule may cause that party to disclose information to the other party so as to avoid imposition of the default rule whenever it would create an unfavorable result.[60]

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58. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 2–16 (1981). Broken down by chapter, the issues can be found as follows:

Formation issues: Chapters 2–4
Enforceability issues: Chapters 5–9
Nonperformance issues: Chapters 10–12
Third party issues: Chapters 13–15
Remedies issues: Chapter 16.

*Id.*

59. Charles Goetz and Robert E. Scott are usually credited with conceptualizing the law of contract as a set of default rules which come into play to fill gaps in incomplete contracts. For a reassessment of the twenty-five year old paradigm, see Robert E. Scott, *Rethinking the Default Rule Project*, 6 VA. J. 84 (2003).

60. *Id.* at 85.

Indeed, the *Hadley* case we celebrate at this conference is an example of how default rules can be information forcing.[61] *Hadley* is, famously, a case about remedies. It limits the damages recoverable by the non-breaching party. It states the rule that damages incurred by the non-breaching party as a consequence of a breach must be foreseeable to be recoverable.[62]

To summarize the familiar story, the only crank shaft at plaintiffs' grist mill broke, causing the mill to shutdown. Plaintiffs sent the shaft to defendants for delivery to a company engaged to make a new one. But defendants delayed in delivering the shaft; the delay amounted to a breach, and as a consequence of the breach, plaintiffs lost several additional days worth of operating profits.[63]

The court decided that, lacking knowledge that the broken shaft was plaintiffs' only shaft, the defendants could not have foreseen and, therefore, should not be liable for plaintiffs' damages caused by the negligent delay.[64] *Hadley* is, perhaps, our most famous illustration of how the default rule paradigm works.

At the same time, it also demonstrates the overarching role of interpretation in contract law: before the court can invoke and apply a default rule, it must first interpret the contract. *Hadley* is an example of that dynamic, as well. In *Hadley*, the court said:

> Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred . . . .[65]

In *Hadley*, as a preliminary matter the court interpreted the contract in light of its terms and surrounding circumstances. The court

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61. *Id.*

62. For an overview of the case see JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 14.5 (5th ed. 2003). Perillo notes that the two rules stated in *Hadley* are that: damages from breach are limited 1) to those "'fairly and reasonably be considered . . . arising naturally, i.e., according to the usual course of things, from such breach of contract . . .'" and 2) and to those "'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'" *Id.* at 569 (quoting Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854)). These two rules were landmark because, prior to the case, damage awards were "left to the unfettered discretion of the jury." *Id.* at 568.

63. Hadley v. Baxendale, 156 Eng. Rep. 145, 146 (Ex. 1854).

64. *Id.* at 151. "[W]e find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill." *Id.*

65. *Id.*

had to find that the breaching party could not reasonably foresee the consequential damages suffered by the mill owners before it found that the default rule applied. Neither the contract terms nor the context in which they were conceived made defendants aware of the potential for damages caused by an unwarranted delivery delay. As a subsequent British case put it, "The first question [in *Hadley* situations] is, what did the parties forecast as the probable course of events in relation to the contract when it was made?"[66] And that, of course, is an interpretive exercise.

Interpretation is endemic to the judge's job in a contracts case. Default rules may be paradigmatic, but, as a preliminary and penultimate matter, contract law is a regime of interpretive rules. Therefore the Restatement itself may need re-viewing and re-iteration. Returning to the organizational structure of the Restatement, we see that nothing in its organizational structure indicates the pre-eminence of the interpretive project in contract law. Indeed, when Gary O'Connor looks to the Restatement as a model for interpretive rules, he locates them, as other scholars have, in various and sundry places but certainly not as a part of each sequential question and certainly not in any predictable order.[67] O'Connor specifically identifies the following sections of the Second Restatement as the interpretive sections: § 21 (Intention to be Legally Bound); § 200 (Interpretation of Promise or Agreement); § 201 (Whose Meaning Prevails); § 202 (Rules in Aid of Interpretation); § 203 (Standards of Preference in Interpretation); § 204 (Supplying an Omitted Essential Term); § 206 (Interpretation Against the Draftsman); § 213 (Parol Evidence Rule); § 214 (Evidence of Prior Contemporaneous Agreements or Negotiations); § 216 (Consistent Additional Terms); §§ 219-223 (Scope as Affected by Usage).[68] And it is not surprising that he does so because that is the way the organizational structure of the current Restatement presents the interpretive project in contract law. In fact, that structure is misleading because it fails to reveal the pervasive and systematic nature of interpretation.

A recapitulation of the Restatement to show how, as to each sequential question (formation, enforceability, nonperformance, third parties interests, and remedies), interpretation plays a preliminary and overarching role should be considered by the ALI. This kind of recapitulation would buttress the credibility of judicial decision-making by making the interpretive project in contract law more coherent and by making the interpretive choices available to the judges more transparent. In an era where the legitimacy of judicial decisionmaking is being

66. Patrick & Co., Ltd. v. Russo-British Grain Exp. Co., (1927) 28 Lloyd's List L. Rep. 358, 360 (K.B.).

67. O'Connor, *supra* note 50, at nn.86–91 and accompanying text.

68. *Id.*

called into question, this kind of recapitulation might have special merit.

## VI. Conclusion

Common law rules remain the preferred regime for interpreting contracts and statutes because of their Janus-like flexibility. But flexibility carries with it the problem of indeterminacy which can undermine perceptions about the legitimacy of judicial decisionmaking. Indeterminacy can be constrained by holding judges responsible for persuading us that one interpretive rule, in a particular case, is a better choice than any of its available competitors. With regard to contract interpretation, the Restatement should be recapitulated to illuminate the interpretive process in rule selection. That illumination, in turn, should facilitate our ability to evaluate a court's rule selection and its attempts to persuade us of its validity. All of which are, I argue, crucial to facilitate the selection and reasoning process of the interpretive project which is crucial to perceptions of legitimacy in judicial decisionmaking.