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## A FORMALIST THEORY OF CONTRACT LAW ADJUDICATION

Felipe Jiménez\*

### *Abstract*

*Formalism has a bad name. It is often seen as a naïve and unsophisticated approach to the adjudication of legal disputes. This negative view of formalism is widespread in American legal culture and has been particularly influential in contract law. This Article challenges this prevailing view and argues that a formalist theory of adjudication is the best approach to resolve contractual disputes.*

*The argument of this Article starts from the assumption that contract law is not morally justified because of its enforcement of promissory rights or some other dimension of interpersonal morality. Instead, like contemporary law and economics, this Article assumes as its starting point that the law of contracts is an instrumentally justified legal institution (i.e., an institution justified because of its valuable social consequences). Starting from this assumption, this Article asks what approach to the adjudication of contractual disputes facilitates the achievement of contract law's instrumental goals. Against the common assumption, the answer is that a formalist approach—the specific contours of which are set out below—would be instrumentally best. This is because formalism, with its commitment to an ex-post, rule-bound, doctrinalist, and modest approach to legal adjudication, has important instrumental benefits. Formalism contributes to simple, generalizable, and cost-effective decision-making; it is consistent with the institutional competence of courts; reduces the risks and overall costs of legal mistakes; and increases predictability, protecting contractual parties' legitimate expectations. Moreover, formalism is an adequate means to deal with value pluralism and is consistent with the main values served by the law of contracts, such as autonomy and efficiency.*

*Thus, encouraging judges to make socially optimal decisions in contractual disputes might not be the optimal strategy. The overall socially optimal outcome might, instead, be achieved through a decision procedure that directs judges to decide by applying pre-existing doctrine and expanding it incrementally. If that is the case, then, despite their disagreement about contract law's foundations, instrumentalist and*

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*formalist theorists might agree about the narrower question of how judges should decide contractual disputes.*

## I. INTRODUCTION

Formalism “has a bad name.”<sup>1</sup> The label invites associations with the exploitation of the weak by powerful commercial interests,<sup>2</sup> as well as with a naïve and mythological view of legal institutions.<sup>3</sup> In contract law, specifically, formalism has been commonly seen as a set of “ivory tower abstraction[s]”<sup>4</sup> and “mystical absolute[s].”<sup>5</sup> Its defenders feel compelled to explain why it is not a “[s]tupid [t]hing.”<sup>6</sup>

Thus, labeling something—a form of legal reasoning, a theory of adjudication, an approach to statutory interpretation, or an interpretive account of the law—as formalistic is a dismissive gesture, a warning sign that tells us we are better off not wasting our time. As the saying goes, at least in American legal academia, “we are all realists now,”<sup>7</sup> and an important part of being a realist is thinking that legal materials do not determine case outcomes. The actual work, or so we are told, is always done by policy.<sup>8</sup>

This Article defies this trend and marks a departure from the conventional wisdom. It argues for formalism as the best normative theory of contract law adjudication.<sup>9</sup> It attempts to show, in other words, that things go better if we actually

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<sup>1</sup> P.S. Atiyah, *Form and Substance in Contract Law*, in *ESSAYS ON CONTRACT* 119 (1990). See also Frederick Schauer, *Formalism*, 97 *YALE L. J.* 509, 509 (1988) (noting that, “[w]ith accelerating frequency, legal decisions and theories are condemned as ‘formalist’ or ‘formalistic’”); Martin Stone, *Formalism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 166 (Jules Coleman & Scott Shapiro eds., 2004) (highlighting that “few terms have been used more often to criticize legal thought and practice”).

<sup>2</sup> See, e.g., Morton J. Horwitz, *The Rise of Legal Formalism*, 19 *AM. J. LEGAL HIST.* 251, 251 (1975) (discussing the change in the legal system from an “expression of the moral sense of the community” to an entity that serves commercial interests).

<sup>3</sup> Or, using Cohen’s language, with “transcendental nonsense.” Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 811 (1935).

<sup>4</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 18 (1995) (regarding classical contract theory).

<sup>5</sup> *Id.* at 98.

<sup>6</sup> See Paul Troop, *Why Legal Formalism Is Not a Stupid Thing*, 31 *RATIO JURIS* 428, 428 (2018).

<sup>7</sup> Joseph William Singer, *Legal Realism Now*, *CALIF. L. REV.* 465, 467 (1988).

<sup>8</sup> Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 *U. PA. L. REV.* 2019, 2021 (2015) (noting that when gaps in legal materials are identified, we ask and are expected “to articulate the ‘policy’ considerations that explain” legal outcomes).

<sup>9</sup> Theories of adjudication can be positive or normative. A positive theory of adjudication attempts to explain how judges in fact decide cases. A normative theory is

ask judges not to resort to policy when deciding contractual disputes, but to instead *apply the law*. Given formalism's disrepute in American legal culture,<sup>10</sup> as well as how little has been done to identify the precise target of the criticisms, a fully articulated description and a robust defense of formalism are crucial. This Article attempts to be a contribution, focused specifically on contract law, in both of these respects: it sets out the specific features of a formalist theory of adjudication and offers a normative argument for its implementation in contractual disputes.

As will become clear below, formalism has a certain resemblance,<sup>11</sup> in its operation, to the non-instrumental views of private law theorists like Ernest Weinrib<sup>12</sup> and Peter Benson.<sup>13</sup> However, unlike Weinrib and Benson, in this Article I start from a thoroughly *instrumentalist* justification of contract law. Thus, the Article assumes a very different view about contract law's foundations and their relationship to contract law adjudication.<sup>14</sup> Moreover, formalism is not based on philosophically thick commitments. It does not rest on a Kantian reconstruction of private rights or on an elucidation of the conditions that allow for the reciprocal freedom of purposive agents. Instead, it coheres with the more traditional, bread-and-butter approach of the doctrinal lawyer, who aspires to achieve systematicity and coherence at a much lower level of abstraction, and whose tools are not found in the philosophy of Kant or Hegel, but in the precedents, doctrines, and treatises of the law of contracts. The question, then, is whether this less philosophically ambitious theory of adjudication is normatively desirable. Thus, while the complete

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concerned with how judges ought to decide cases—how they should use legal reasons and materials in the justification of their decisions. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 295 (1997); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L. J. 82, 110 n.37 (1986).

<sup>10</sup> P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 29 (1991) (noting that “the term ‘formalism’ is today often used in American and, to a lesser extent, in English legal writing and legal theory, to refer to such vices as conceptualism, over-emphasis on the inherent logic of legal concepts, the over-generalization of case-law, and the like”).

<sup>11</sup> *But see* Part III.F.

<sup>12</sup> *See, e.g.*, Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003) (discussing the limits that the internal justificatory structure of private law places on contract remedies).

<sup>13</sup> *See, e.g.*, Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1079–80 (1989) (arguing for an autonomous, internalist, and non-distributive conception of the law of contracts); Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1673–74 (2006).

<sup>14</sup> *See generally* Felipe Jiménez, *Two Questions for Private Law Theory*, (Univ. of So. Cal. Gould Sch. of Law 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3452909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452909) [<https://perma.cc/8AFN-8J2W>] (arguing that private law theory ought to separate questions about the foundations of private law from questions about the adjudication of private law disputes).

clarification of formalism as an approach and the normative argument for it will rest on philosophical considerations, the approach itself is not philosophically ambitious. This, as will become clearer below, is a feature, not a deficit.

Precisely because formalism is unashamedly doctrinal, it is also distinct from the interpretive textualism of Scalia<sup>15</sup> and its staunch preference for rules as opposed to standards.<sup>16</sup> While formalism is sympathetic to the value of rules in the cost-effective resolution of easy cases and recommends limiting attention to semantic (as opposed to pragmatic) considerations in adjudication, it also acknowledges the need for adjudicating hard cases and for the incremental development of law beyond the pure semantic meaning of legal materials. In this aspect, the notion of *legal principles*, as I will explain below,<sup>17</sup> plays a crucial role.

Formalism is thus neither metaphysical nor textualist. And it rests on a normative argument about what approach to contract law adjudication would make things go best. Because of this, the question this Article asks is the following: If contract law is morally valuable and politically justified because of its good social effects, such as its contribution to market exchange and economic efficiency, how should judges decide contractual disputes? The answer is that they should follow a formalist theory of adjudication such as the one presented in this Article. Thus, this Article describes formalism as a theory of adjudication, setting out its main features, and offers a normative argument in favor of its use as the appropriate approach to contract law adjudication.

I will begin by clarifying the precise meaning of formalism and setting out its specific features—for now, a concise idea will suffice: formalism recommends applying the limitedly enriched literal meaning of the legal rules and doctrines of contract law and their settled doctrinal construction, without directly considering the instrumental purposes of contract law. Thereafter, I will argue that instrumentalists—those who, like law and economics scholars, believe that contract law's value derives from its contribution to social welfare<sup>18</sup>—should see formalism as the appropriate approach to the adjudication of contractual disputes. Indeed, formalism is a decision procedure that, in the long run, and given the current state of the law of contracts, maximizes the instrumental efficacy of contract law.<sup>19</sup> The reasons underlying this claim, as I will explain, are connected to several of formalism's advantages, including that it contributes to simple, generalizable, and cost-effective decision-making; it is consistent with the institutional competence of courts; it reduces the risks and overall costs of legal mistakes; and it increases predictability, protecting contractual parties' legitimate expectations. Moreover, formalism is an adequate means to deal with value pluralism and is consistent with

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<sup>15</sup> See generally, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>16</sup> See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>17</sup> See *infra* Part V.

<sup>18</sup> See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2006).

<sup>19</sup> See *infra* Part VI.

the main values plausibly served by the law of contracts, such as autonomy and efficiency. Thus, we are not *all* realists now; nor should we be.

Part II of the Article describes the instrumentalist starting point of my argument, as well as some of the argument's additional assumptions. Part III states and describes the main structural features of formalism as a theory of adjudication, focusing particularly on its operation in routine or easy cases. Because questions about the right normative theory of adjudication are comparative, Part IV offers a brief sketch of some possible alternative theories. Part V moves on to describe formalism's operation in hard cases, and how a formalist theory of adjudication can make sense of the idea of adjudication as application of pre-existing law even in such cases. Part VI supplements the description of formalism with actual examples from contract law. Part VII contains the normative argument for formalism and offers a series of instrumentalist considerations in favor of its use as the best approach towards the adjudication of contractual disputes. Finally, the conclusion refers to the comparative advantages of formalism over other theories of adjudication, and argues that, because of these advantages, instrumentalist and non-instrumentalist scholars could agree at the level of adjudication about the value of a formalist approach, despite their deeper disagreements about contract law's normative foundations.

## II. PREMISES

### *A. An Instrumentalist View of Contract Law's Foundations*

The disagreement between non-instrumentalist and instrumentalist views of contract law is a disagreement about its value. Non-instrumentalist conceptions see contract law as valuable because of its recognition of private individuals' power to form and change their legal relations.<sup>20</sup> Contract law, under these accounts, reflects a certain "morality of interpersonal interaction."<sup>21</sup> An instrumental view of contract law, on the other hand, claims that the moral justification of contract law is given by its valuable social consequences. The justification of contract law does not lie in the moral dimension or juridical structure of private interaction, but rather in the social effects that contract law produces.<sup>22</sup> The economic analysis of contract law is a good

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<sup>20</sup> Peter Benson, *Contract*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 29, 37 (Dennis Patterson ed., 1996) (noting that autonomy theories—which constitute an instance of non-instrumentalist theories—"view contract law as a legal institution that recognizes and respects the power of private individuals to effect changes in their legal relations *inter se*, within certain limits").

<sup>21</sup> ARTHUR RIPSTEIN, *PRIVATE WRONGS* xi (2016).

<sup>22</sup> See Liam Murphy, *The Practice of Promise and Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 151, 153–54 (Gregory Klass et al. eds., 2014).

example of an instrumentalist perspective. Instrumentalism, however, is also compatible with a more pluralistic account of the foundational goals of contract law.<sup>23</sup>

The starting point of my argument is, in this sense, instrumentalist. Of course, not everyone agrees with the instrumentalist view of contract law. But it is, at least, a *prima facie* plausible view about the practice. My focus here is not, however, the ultimate moral foundation of contract law. Instead, I pursue a second-order question. If one thinks that contract law's best justification is instrumental, what would that fact entail for the approach we should use to adjudicate contractual disputes? While many theorists are instrumentalists when it comes to both contract law's foundations and to contractual adjudication,<sup>24</sup> it is not evident that the instrumentally best strategy for adjudicating contractual disputes is itself instrumental. An instrumentalist justification of contract law is compatible with a non-instrumentalist approach to adjudication. Indeed, it is perfectly feasible to disentangle the justification of a legal practice and the justification of actions and decisions within it.<sup>25</sup> And, if my normative argument proves persuasive, an instrumentalist view of contract law might *require* a non-instrumentalist theory of adjudication.

I am not the first to suggest an instrumentalist argument for a formalist approach to contract law. There is a growing neo-formalist revival in contract law,<sup>26</sup> particularly in the work of legal economists.<sup>27</sup> But my argument is different from

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<sup>23</sup> My view includes contract law's contribution to the development and sustainment of markets and their economic effects, but also other goals, such as the expansion of personal autonomy, and the advancement of a modest—yet important—conception of social equality.

<sup>24</sup> See generally, e.g., Richard Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235 (Morris Dickstein ed., 1998).

<sup>25</sup> See generally John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955) (showing the importance, for moral theories, of distinguishing between justifying a practice and justifying a particular action falling under it); see also Lewis A. Kornhauser, *Preference, Well-Being, and Morality in Social Decisions*, 32 *J. LEGAL STUD.* 303, 326 (2003).

<sup>26</sup> See generally David Charny, *The New Formalism in Contract*, 66 *U. CHI. L. REV.* 842 (1999) (identifying a formalist trend in contract theory); Mark Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 *IUS GENTIUM* 115 (2006) (distinguishing between classical and more recent versions of formalism in contract doctrine); John Murray, *Contract Theories and the Rise of Neoformalism*, 71 *FORDHAM L. REV.* 869 (2002) (characterizing recent contract theory as “neoformalist”).

<sup>27</sup> See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 *U. PA. L. REV.* 1765 (1996); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 *U. CHI. L. REV.* 710 (1999) [hereinafter Bernstein, *Article 2's Incorporation Strategy*]; Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 *CARDOZO L. REV.* 1443 (2008); JONATHAN MORGAN, *CONTRACT LAW MINIMALISM: A FORMALIST RESTATEMENT OF COMMERCIAL CONTRACT LAW* (2013); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L. J.* 541 (2003) [hereinafter Schwartz & Scott,

these views in at least three differences from those of such scholars. The first difference is that, while neo-formalists usually restrict the scope of their arguments to contracts between sophisticated firms, my argument provides an account that aims to be applicable to all types of contractual disputes. The second difference is that, while I also start from an instrumentalist perspective, I remain open about the precise identity of contract law's goals and would hold a more pluralistic view of them. In my view, the valuable social effects of contract law are diverse and irreducible to a single metric of efficiency. The third difference is that my focus is not on the interpretation of *contracts*, but on the interpretation of *contract law* (i.e., not on contracts as instruments used between private parties, but on contract law as the set of legal rules governing such instruments).<sup>28</sup>

Regardless of these differences, the central claim of this Article is consistent with the general spirit of the neo-formalist approach: the best way for contract law to achieve its instrumental goals is by not pursuing them directly.

### B. Some Additional Assumptions

Before making the normative argument, let me state the additional assumptions—beyond the instrumentalist starting point—that I make in this Article.

First, I ignore collegiality. Against actual reality, I will assume that all courts are composed of one single judge. By making this assumption, I am able to ignore the complexities of collegial judicial decision-making,<sup>29</sup> which arguably complicate any plausible theory of adjudication given the possibility of internal disagreement and the need for collective deliberation.

Second, I assume that whatever theory of adjudication is best should be—and will be—implemented in a coordinated way. In other words, I assume that an attractive theory of adjudication should be suitable for implementation by a multiplicity of judges; and that, as a matter of fact, at any given moment only one theory of adjudication will be followed by *all* judges.

Third, I assume that a theory of adjudication should apply primarily to cases that fall under the broad terms of pre-existing legal materials (e.g., statutes, judicial

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*Contract Theory*]; Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010) [hereinafter Schwartz & Scott, *Contract Interpretation Redux*]; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (1999).

<sup>28</sup> On the distinction, see Lewis Kornhauser & W. Bentley MacLeod, *Contracts Between Legal Persons*, in THE HANDBOOK OF ORGANIZATIONAL ECONOMICS 918 (Robert Gibbons & John Roberts eds., 2012). See also Menachem Mautner, *A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements*, 10 TEL AVIV U. STUD. L. 239, 240 (1990).

<sup>29</sup> See generally Lewis Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J. L. ECON. & ORG. 441 (1992) (describing the problems and complexities that collegiality may generate for judicial decision-making procedures).



opinions, and administrative regulations).<sup>30</sup> This assumption helps me to clarify how the theory of adjudication applies to most routine cases, and to address its operation in hard cases only once we have a clear grasp of how it routinely operates to address “everyday” contractual disputes.<sup>31</sup>

The fourth assumption I make is that the theory of adjudication will be applied in the present circumstances of contract law, as it exists in most liberal Western jurisdictions, such as the U.S., Germany, or England. Thus, I would readily accept that, in different historical circumstances (e.g., when the common law of contracts was starting to develop) and economic or sociocultural conditions, a very different theory from the one I propose might be the most attractive approach.

Finally, I assume that a normative theory of adjudication has two (artificially separated) components: interpretation and construction. Interpretation is the determination of the *communicative content* (i.e., the linguistic meaning) of legal materials.<sup>32</sup> The task of interpretation requires determining what a certain legal material *means*. Construction is the determination of the *legal implications* (i.e., legal rules, doctrines, rights, and obligations) that derive from those legal materials.<sup>33</sup> The task of construction requires determining what the legal impact of those materials is. Importantly, the determination of the legal implications might simply consist of replicating the meaning of the legal materials, applying it to the case at hand, or might instead translate it into more complex forms of legal doctrine.

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<sup>30</sup> Formalism does not presuppose a specific view about the concept of law. It assumes a thin and common-sense view of what types of texts and artifacts constitute legal materials (i.e. a more or less minimal and pre-theoretical account of what counts as law, such as the one that both positivists and non-positivists might share as the minimal social conditions of legal validity, or of what counts as the relevant coordination artifacts that a theory of adjudication should take into account).

<sup>31</sup> Thus, I try to avoid the fixation with hard cases that characterizes a lot of contemporary legal thinking. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 (1985) [hereinafter Schauer, *Easy Cases*] (with reference to contemporary constitutional theory).

<sup>32</sup> I use the term “interpretation,” thus, in a wide sense, not exclusively restricted to cases of semantic vagueness or unclear meaning.

<sup>33</sup> In making these distinctions, I follow Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833–35 (1964); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103–08 (2010) [hereinafter Solum, *The Interpretation-Construction Distinction*]; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480–84 (2013); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L. Q. 1095, 1097 (1995). For an excellent analysis in contract law, see generally Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J.L. & PUB. POL’Y (forthcoming 2020) (discussing the distinction and relationship between interpretation and construction in contract and constitutional theory).

## III. FORMALISM, DEFINED

There are several forms of formalism,<sup>34</sup> and the recent literature characterizes formalism in different ways.<sup>35</sup> Because of this, any argument about formalism should clarify what it means by the term.<sup>36</sup> By formalism, I mean a theory of adjudication that recommends a strict adherence to the literal meaning (limitedly enriched by public facts about the historical context and other objective features that determine meaning) of the legal rules and doctrines of contract law and their settled doctrinal construction, without directly considering the instrumental purposes of contract law. This entails that formally applicable legal rules and their accompanying doctrines should not be set aside by judges to achieve contract law's goals. Thus, formalism demands taking communicative content as mostly determined by literal meaning, with very limited consideration of pragmatic and contextual elements. It also requires constructing the legal upshots of literal meaning—its legal content—taking into consideration only that narrowly construed meaning and its settled doctrinal interpretation.

Given the main features of the theory of adjudication I defend, the term 'formalism' is an apt label. Still, I do not attempt to defend the theory as the best version of formalism, an account of the necessary and sufficient conditions of the concept, or its historically accurate reconstruction. The label captures the central tenets of the theory of adjudication I will defend. But one should not read too much into the label. The central normative claim of this Article is for the theory of adjudication to be adopted, not for the appropriateness of the label I use to designate it.

To flesh out in more detail what I mean by formalism, the rest of this part sets out the central traits of the theory: retrospectivity, rule-boundedness, decisional restriction, doctrinalism, and nuanced literalism.

*A. Retrospectivity*

Retrospectivity means that the adjudicator's decision should look backwards; it should focus on past events as the basis for their decision. This trait of formalism is opposed to the *ex-ante* perspective characteristic of consequentialist decision-

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<sup>34</sup> Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607 (1999).

<sup>35</sup> According to Brian Leiter, formalism is characterized by two traits: it sees law as "rationally determinate," and adjudication as autonomous from non-legal normative reasoning. Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 111 (2010). See also Larry Alexander, "*With Me, It's All er Nuthin*": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999); Schauer, *supra* note 1, at 510; Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1112 (2003).

<sup>36</sup> As noted by BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 160 (2009).

making.<sup>37</sup> Retrospectivity demands courts to take an *ex-post* orientation to determine the rights and duties of the parties.<sup>38</sup> The role of the judge is to decide cases by applying the preexisting legal materials to the dispute at hand, without resorting to prospective considerations.

### B. Rule-Boundedness

Under formalism, judges should treat the available legal materials and doctrine as providing and establishing serious rules (rules applying and giving a solution to all cases that fall under their terms) governing their decisions, which should be applied without further inquiry into goals and consequences.<sup>39</sup>

Rule-boundedness is not conceptually necessary. It is part of a normative theory of adjudication. Thus, rule-boundedness does not rest on a conceptual claim about legal rules being determinate,<sup>40</sup> exclusionary,<sup>41</sup> leading to all or nothing application,<sup>42</sup> etc. On the contrary, there are different ways to justify decisions and actions on the basis of rules,<sup>43</sup> and the very same legal texts may be treated differently by interpreters. Different legal systems and cultures may approach the interpretation of their rules—and even of the same rules, in the case of legal transplants—in different ways.<sup>44</sup> If rules are treated as exclusionary reasons, this is because of the interpreter's approach, and not because of their "ruleness."<sup>45</sup> Thus, one should not assume that legal rules necessarily lead to formalistic application,

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<sup>37</sup> For Jody Kraus, the preference for an *ex ante* or an *ex post* approach to adjudication is one of the fundamental methodological disagreements between what he calls *economic* and *deontic theories*. Jody S. Kraus, *Philosophy of Contract Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 687, 701–03 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro ed. 2004).

<sup>38</sup> Benson, *supra* note 20, at 52.

<sup>39</sup> On the idea of a "serious rule," see Alexander, *supra* note 35, at 541.

<sup>40</sup> *Cf. Id.* at 544.

<sup>41</sup> *Cf. JOSEPH RAZ, PRACTICAL REASON AND NORMS* 73–76 (1999).

<sup>42</sup> *Cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY* 24 (1977) (arguing that "[r]ules are applicable in an all-or-nothing fashion"). Thus, for all his criticism of the *model of rules*, Dworkin saw rules exactly as his positivist opponents saw them. See Timothy Endicott, *Are There Any Rules?*, 5 *J. OF ETHICS* 199, 201–04 (2001).

<sup>43</sup> Thus, here I depart from Rawls's analysis in Rawls, *supra* note 25, at 4 (arguing that one must distinguish "between the justification of a rule or practice and the justification of a particular action falling under it").

<sup>44</sup> This is clear in comparative law. Comparative analyses do not simply resort to a comparison of legal norms, but transcend textual analysis in order to take a broader look at the legal culture, and at the way in which lawyers and scholars approach legal materials. See generally Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 *INT'L & COMP. L. Q.* 495 (1998) arguing for comparative analysis transcending the surface level of legal rules and for a greater engagement with legal culture and legal reasoning.

<sup>45</sup> FERNANDO ATRIA, *ON LAW AND LEGAL REASONING* 97 (2002).

that they apply in an all-or-nothing fashion, etc. It is true, as Rawls claimed, that to engage in a practice means to follow its rules.<sup>46</sup> However, there are different ways of following and applying rules, and the decision regarding how to follow and apply them is, in the end, normative.<sup>47</sup> The normative force of rules depends, in the end, on normative considerations, and not just on their semantic applicability or legal validity.<sup>48</sup>

Because of this, formalism does not rest on supposedly conceptual characteristics of legal rules. Instead, it claims that judges ought to decide cases by applying legal rules and doctrines as generally exclusionary and infeasible mandates (i.e., as *serious rules*), because of the normative considerations supporting that approach.

### C. Decisional Restriction

Formalism argues that the adjudication of contractual disputes should be based on a limited domain of reasons connected to pre-existing legal materials (i.e. ‘legal reasons’). This notion of decisional restriction is connected to the idea that there is a limited domain of acceptable arguments in legal discourse, so that not every argument counts as an acceptable argument for a particular decision or interpretation.<sup>49</sup>

Decisional restriction might make the adequate adjudicative decision differ from what would be the best all-things-considered decision in the case at hand. Still, it is compatible with adjudicative decisions incorporating what Eisenberg calls “social propositions,” such as moral norms, policies and experiential propositions<sup>50</sup>—whether such incorporation is dictated by pre-existing legal materials or seems necessary given the particularities of the case. The peculiarity is that, for being incorporated, such propositions must be formulated in terms of criteria that are connected to the pre-existing legal materials.<sup>51</sup> They must be justified

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<sup>46</sup> Rawls, *supra* note 25, at 26.

<sup>47</sup> Rawls himself acknowledged this. *See id.* at 29.

<sup>48</sup> Frederick Schauer, *Rules and the Rule-Following Argument*, 3 CAN. J.L. & JURISPRUDENCE 187, 192 (1990) (arguing that “rules do not determine their own application”); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 126 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES] (arguing that “the process of taking a rule to be applicable depends not only on the rule’s own designation of applicability, even presupposing internal validity, but of something external to that rule and to the rule-system of which it is a part”). *See also* STANLEY CAVELL, THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY 303 (1979).

<sup>49</sup> On the idea of law as a limited domain, *see* Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1914–15 (2004).

<sup>50</sup> MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 14–32 (1988).

<sup>51</sup> GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 59 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., The European University Institute Press Series) (1993).

“on legal grounds,”<sup>52</sup> and be translated into reasons<sup>53</sup> that arise from, or can be connected to, pre-existing legal materials.

Note that decisional restriction is possible even if one denies the idea of law as a distinct domain, as Dworkin’s *one system view*—which claims that law rightly understood is a subset of political morality<sup>54</sup>—does, and as some more recent similar views, such as Kornhauser’s *eliminativism*<sup>55</sup> and Greenberg’s *moral impact theory*,<sup>56</sup> do. Under these views, it might at first seem that judges cannot rely on a limited domain of *legal* reasons for their decisions, because what judges ought to do is underdetermined by legal materials. The theory of adjudication, under this view, is a freestanding decision procedure, and governs how judges should decide cases without any need for first finding out “what the law is.”<sup>57</sup> The existence of legal materials is just one of the relevant facts to be taken into consideration when deciding a particular dispute.

I am skeptical about the relevance of jurisprudence for normative theories of adjudication: at least, it is not *necessary* for judges to have a philosophical theory about the content and the grounds of law in order to fulfil their role as adjudicators.<sup>58</sup> However, even assuming that the jurisprudential views of Dworkin, Kornhauser or Greenberg are right, and that jurisprudence has a bearing on adjudication, decisional restriction is still possible. Indeed, a normative theory of adjudication is a moral argument about how judges ought to decide cases. This means that, as a moral argument, it takes into consideration all the relevant concerns that Dworkin and Greenberg claim are part of legal decision-making. Moreover, a normative theory of adjudication is precisely what Kornhauser’s *eliminativism* requires. If the case for formalism is morally sound, then one can perfectly say, with Dworkin and Greenberg, that the moral impact of legal materials is given by the limitedly enriched semantic content of legal materials and their settled doctrinal construction, because this is the morally adequate effect that said materials have on our moral obligations.<sup>59</sup> And, with Kornhauser, one could claim that decisional restriction does not derive from the concept of law, but simply from the right account of how judges should decide cases—though, admittedly, in such a case decisional restriction would not

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<sup>52</sup> JAN M. SMITS, *THE MIND AND METHOD OF THE LEGAL ACADEMIC* 61 (2012).

<sup>53</sup> See Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 462 (1989) (noting the possibility of translation of “social” propositions into “legal” propositions).

<sup>54</sup> See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* ch. 19 (2011).

<sup>55</sup> See generally Lewis A. Kornhauser, *Doing Without the Concept of Law* (N.Y. Univ. Sch. of Law, Working Paper No. 15–33, 2015). For criticism, see LIAM MURPHY, *WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 88–102 (2014).

<sup>56</sup> See generally Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014).

<sup>57</sup> Kornhauser, *supra* note 55, at 3.

<sup>58</sup> MURPHY, *supra* note 55, at 8.

<sup>59</sup> Of course, Dworkin and Greenberg would disagree with this view about the moral impact of legal materials. They would reject decisional restriction. But this is a substantive disagreement that we might have *even* within the one-system framework they prefer.

refer to “legal” reasons, but to reasons “extracted from the limited domain of relevant legal materials.”<sup>60</sup> While formalism’s talk of “legal materials” and “legal reasons” is apt to make this point, the point can also be made without any reference to the *legal* character of those materials and reasons (i.e., without assuming a definite concept of law that is necessarily independent from moral considerations).<sup>61</sup>

#### D. Doctrinalism

Formalism is not just about legal materials. It is also about legal doctrine. Legal doctrine is the construction of the legal implications of legal rules and materials by past judges and scholars, using a specifically juristic approach.<sup>62</sup> At least in American legal academia, this approach has been increasingly decaying.<sup>63</sup> Formalism goes against this trend.

A doctrinalist approach attempts to achieve the explanation and systematization of contract law from an internal perspective. Here, ‘contract law’ is understood as the content and reasons derived from legal materials and their correct interpretation. Doctrine should be built based on such materials.<sup>64</sup>

This point about legal materials as the starting point of doctrinalism is worth emphasizing and explaining further. Formalism is premised on a strong distinction between justifying legal norms and applying them.<sup>65</sup> Doctrinalism is, in this sense, an internal perspective<sup>66</sup> that provides an internal justification (i.e., a justification for particular decisions as application of pre-existing legal norms).<sup>67</sup> It places a big emphasis on conceptual elaboration and classificatory taxonomy,<sup>68</sup> and on the

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<sup>60</sup> This brings home Murphy’s point about how artificial and full of paraphrases our discourse about law becomes if we accept *eliminativism*. MURPHY, *supra* note 55, at 90, 99.

<sup>61</sup> Again, formalism rests on a thin and common-sense view of what types of texts and artifacts count as legal materials, and because it does not rely on a specific jurisprudential view about the grounds of law, it is compatible with seeing those past “legal” materials as the relevant past authoritative decisions or the relevant coordination artifacts that a theory of adjudication should consider (in case one prefers to take a one-system or eliminativist view of the concept of law). Nothing of substance, in the end, turns on whether we call these reasons and materials “legal”—I simply prefer these terms rather than the more convoluted terms the eliminativist would.

<sup>62</sup> SMITS, *supra* note 52, at 7.

<sup>63</sup> Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 *passim* (1987).

<sup>64</sup> ALEKSANDER PECZENIK, ON LAW AND REASON 274 (2008).

<sup>65</sup> See KLAUS GÜNTHER, THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW 248, 256 (1993) *see generally* Rawls, *supra* note 25.

<sup>66</sup> SMITS, *supra* note 52, at 20.

<sup>67</sup> AULIS AARNIO, REASON AND AUTHORITY: A TREATISE ON THE DYNAMIC PARADIGM OF LEGAL DOGMATICS 189 (1997).

<sup>68</sup> A relevant example of this emphasis on classification and taxonomy in the common law is the work of Peter Birks. *See generally* PETER BIRKS, UNJUST ENRICHMENT (2005) (arguing for the relevance of taxonomy in the law of unjust enrichment); PETER BIRKS, THE

artificial maps<sup>69</sup> developed by judges and legal writers that provide a reconstruction of legal concepts and their mutual relationships.

Doctrinalism thus understood finds its models in the work of classical German jurists, such as Savigny,<sup>70</sup> and less recently, in the work of the late scholastics.<sup>71</sup> Doctrinalism also fits comfortably with the classical legal treatise or textbook and is consistent with the traditional approach of the American Law Institute's Restatements.<sup>72</sup> It is a key feature of the traditional common law approach, which has allowed it to endure, as Balganesch and Parchomovosky put it, "over time and context, and in the face of changing social values and preferences."<sup>73</sup> Because of this, doctrinalism is not just the work of scholars, although it does see the upshots of legal materials as partly determined by their work.<sup>74</sup> Doctrinal categories, taxonomies, and concepts are also—and in some cases, mostly—derived from the work of judges, particularly (or perhaps, more evidently) in common law systems.<sup>75</sup>

### *E. Nuanced Literalism*

In terms of the distinction between communicative content and legal content, formalism claims that (i) the communicative content of legal texts should be derived from their semantic content, with limited contextual and pragmatic additions; and

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ROMAN LAW OF OBLIGATIONS (Eric Descheemaeker ed., 2014) (offering a taxonomy of the Roman law of obligations).

<sup>69</sup> Alan Watson, *Artificiality, Reality and Roman Contract Law*, 57 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 147, 147 (1989).

<sup>70</sup> SMITS, *supra* note 52, at 16–17; KAIUS TUORI, ANCIENT ROMAN LAWYERS AND MODERN LEGAL IDEALS: STUDIES ON THE IMPACT OF CONTEMPORARY CONCERNS IN THE INTERPRETATION OF ANCIENT ROMAN LEGAL HISTORY 59 (2007).

<sup>71</sup> On the late scholastics, see Helge Dedek, *The Splendour of Form: Scholastic Jurisprudence and Irrational Formality*, 5 LAW & HUMAN. 349 (2011) (offering an analysis of the connections between contemporary legal discourse and Scholastic jurisprudence); JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1993) [hereinafter GORDLEY, MODERN CONTRACT DOCTRINE] (offering a reconstruction of contract law on the basis of the work of the late scholastics); JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT (2006) (offering a theory of private law based on the work of classical jurists, including the late scholastics).

<sup>72</sup> See Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1317 (2001).

<sup>73</sup> Shyamkrishna Balganesch & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1243 (2015).

<sup>74</sup> See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 346–48 (1991) (analyzing legal scholarship as a "legal formant" or a source of law).

<sup>75</sup> See JOHN MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA ch. 6 (3d. 2007).

(ii) the legal implications of those texts should be determined by applying this communicative content along with their settled doctrinal construction to the case at hand.

When scholars and practitioners discuss what a certain legal text “means,” they refer to diverse things such as literal meaning, contextual meaning, intended meaning, etc.<sup>76</sup> Semantic content is the most basic building block of meaning. It is determined by the semantics and syntax of the relevant expression.<sup>77</sup> Thus, semantic content is settled by the lexical meaning of the words used and the sentence’s syntactic structure.<sup>78</sup> It is, in brief terms, the artificially isolated linguistic meaning of the text.<sup>79</sup> One level up the ladder is assertive content, which considers the specific context in which the semantic content was issued or uttered,<sup>80</sup> and the specific content that the speaker or issuer intended to communicate.<sup>81</sup>

Of course, there is a gap between semantic content and legal content—between what the text’s literal meaning communicates and the legally correct answers. Thus, I agree with the claim that, in principle, “literal meaning cannot be decisive of what’s legally correct.”<sup>82</sup> But I agree only in principle, since there might sometimes be good normative reasons to make what’s legally correct a reflection of literal meaning. This is precisely what the normative argument for formalism claims should happen in easy cases. However, in many circumstances judges will need to make certain assumptions about the contexts in which the legal materials were enacted or issued in order to unpack their communicative content.<sup>83</sup> I also accept that context might play a semantic role, supplying additional information to that derived exclusively from literal meaning.<sup>84</sup> Finally, under formalism, public facts about “the relevant

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<sup>76</sup> Richard H. Fallon, *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1239 (2015) (noting that “in claiming what a statutory or constitutional provision means, judges, lawyers, and scholars often invoke or refer to what I characterize as its literal or semantic meaning, its contextual meaning as framed by the shared presuppositions of speakers and listeners, its real conceptual meaning, its intended meaning, its reasonable meaning, or its previously interpreted meaning”).

<sup>77</sup> Andrei Marmor, *Can the Law Imply More than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83, 84 (Andrei Marmor & Scott Soames eds., 2011).

<sup>78</sup> ANDREI MARMOR, *THE LANGUAGE OF LAW* 22–23 (2014).

<sup>79</sup> Solum, *The Interpretation-Construction Distinction*, *supra* note 33, at 98.

<sup>80</sup> Marmor, *supra* note 78, at 84.

<sup>81</sup> Greenberg, *supra* note 56, at 1292.

<sup>82</sup> Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD J. LEGAL STUD. 255, 256 (2010). *See also* Mark Greenberg, *The Standard Picture and Its Discontents*, in OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 42 (Leslie Green & Brian Leiter eds., 2011).

<sup>83</sup> As suggested by John Searle, *Literal Meaning*, 13 ERKENNTNIS 207, 207 (1978).

<sup>84</sup> Jason Stanley & Zoltán Gendler Szabó, *On Quantifier Domain Restriction*, 15 MIND & LANG. 219, 229 (2000).



context and the relevant legal background<sup>85</sup> have a role in enriching semantic content. Thus, formalism advocates a nuanced form of literalism, which gives salient relevance to semantic meaning but does not require inferring meaning exclusively from semantic content in every possible instance. This semantic content might be enriched by narrow context (i.e., by “matters of objective fact to which the determination of the semantic contents of certain expressions are sensitive,”<sup>86</sup>) as well as by limited pragmatic considerations.

Formalism also admits that even this enriched literal meaning can be insufficient to determine the meaning of an authoritative legal text fully and univocally.<sup>87</sup> But formalism is not just committed to nuanced literalism. Its elements operate jointly, and thus doctrinalism plays a crucial role in determinatively specifying the legal implications of ambiguous or equivocal legal materials. Semantic meaning does not exhaust the extension of doctrinal concepts. On the contrary, the legal culture’s use of those concepts constitutes a “specialized usage”<sup>88</sup> which helps determine that extension. This means that semantic content, under formalism, is *doctrinally* enriched. The semantic content of legal materials might be incomplete and vague, but legal doctrine also governs formalist adjudication.<sup>89</sup> Formalism is thus, primarily, a doctrinalist position. It sees the importance of semantic meaning and the value of restricting contextual and pragmatic considerations for settling the communicative content of legal materials. At the same time, it replaces a stubborn attachment to texts with a more nuanced attention to the ways in which these texts are enriched by the conceptual taxonomies and systematic relationships between legal concepts and doctrines that characterize our legal practices.

#### F. Corrective Justice?

Formalism presents certain similarities to some existing non-instrumental views of contract law adjudication. For instance, the ideas of decisional restriction and retrospectivity seem particularly consistent with corrective justice perspectives in private law.<sup>90</sup> Because of this, it might be useful to clarify the relationship between the two views.

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<sup>85</sup> MARMOR, *supra* note 77, at 115.

<sup>86</sup> Kent Bach, *Context Dependence*, in THE BLOOMSBURY COMPANION TO THE PHILOSOPHY OF LANGUAGE 153, 156 (Manuel García-Carpintero & Max Kölbel eds., 2014).

<sup>87</sup> See MARMOR, *supra* note 78, at 83–84 (underlining the limitations of semantic content).

<sup>88</sup> Balganesch & Parchomovsky, *supra* note 73, at 1257.

<sup>89</sup> Troop, *supra* note 6, at 434.

<sup>90</sup> See generally, e.g., Weinrib, *supra* note 12 (offering a corrective justice view of contract remedies); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (2012) [hereinafter WEINRIB, PRIVATE LAW] (arguing that private law is an autonomous, non-instrumental practice supported by its own rationality based on notions of Kantian right and corrective justice).

Corrective justice is the form of justice that rectifies inequalities in interpersonal transactions.<sup>91</sup> As a form of justice, corrective justice stands in contrast to distributive justice, which deals with the distribution of goods and burdens across society.<sup>92</sup> The judge's role when adjudicating a contractual dispute, under a corrective justice view, is simply to grant a remedy that rectifies the breach of contractual duty.<sup>93</sup>

Formalism, on my account, achieves something akin to corrective justice, rectifying breaches of contract through the strict application of the remedial rules and doctrines of contract law. Crucially, however, it is *legal* corrective justice, not *natural* corrective justice, that is being achieved.<sup>94</sup> The baseline for rectification is not provided by corrective justice as an abstract principle of interpersonal morality, but by the legal rules themselves. The same can be said of the remedial response that restores the promisee to that baseline.

Moreover, while Weinrib and others are right when they highlight the bipolar and retrospective features of private law adjudication,<sup>95</sup> they get things backwards, in my view, when they assume that these features can also be a self-standing justification of private law. Indeed, although judges are crucial institutional agents in private law, what they do (or ought to do) is not the whole story about private law. Unjustifiably, corrective justice scholars universalize the institutional position of the judge, transforming it into the whole justificatory theory of private law. The mistake is to assume that, since the judge should only consider reasons of corrective justice, it must be the case that private law is justified *only* on the basis of corrective justice. On the contrary, the fact that a judge should only consider a limited type of reasons for her decision does not mean that these are the only reasons in favor or against such decision.<sup>96</sup> There is no justification for assuming that the reasons that should be relevant to one particular institution exhaust the reasons justifying or explaining the practice that institution is a part of. In fact, we might have very good reasons for judicial decisions to be motivated by the rectification of the breach of legal rights by private parties, and not by the underlying goals of contract law. But transforming the theory of adjudication into the whole justificatory structure underlying private law and contract law is unwarranted. Thus, although formalism presents some similarities with corrective justice, the starting point and foundations of the two theories are extremely different.

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<sup>91</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 178 (1980). See also Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (characterizing corrective justice as the rectification of interpersonal injustice).

<sup>92</sup> See FINNIS, *supra* note 91, at 166.

<sup>93</sup> See WEINRIB, *PRIVATE LAW*, *supra* note 90, at 136–40.

<sup>94</sup> See Jeremy Waldron, *Does Law Promise Justice*, 17 GA. ST. U. L. REV. 759, 773 (2001) (making the distinction between legal and natural corrective justice).

<sup>95</sup> See WEINRIB, *PRIVATE LAW*, *supra* note 90, at ch. 5.

<sup>96</sup> See John Gardner, *The Purity and Priority of Private Law*, 46 U. TORONTO L.J. 459, 463–64 (1996).

## IV. ALTERNATIVE THEORIES

From an instrumentalist perspective, the question about the correct approach towards the adjudication of contractual disputes is comparative. An instrumentalist argument in favor of a theory of adjudication depends on the assessment of its costs and benefits,<sup>97</sup> as compared to feasible alternatives, all of which turns on empirical facts.

This empirical assessment, however, is not the path pursued here. While, admittedly, a definitive instrumentalist defense of formalism requires this empirical evaluation, the claim is more limited: there are generally good instrumental reasons to assume a formalistic approach in the adjudication of contractual disputes. The balance of considerations makes formalism the most plausible candidate as the correct theory. This approach is compatible with empirical evidence having the final say. In the absence of such evidence, my claim is that we have generally good reasons to strive for a much more constrained approach to the adjudication of contractual disputes.

But, again, evaluating such reasons turns on the alternatives. For such purposes, this part of the Article presents a sketch of some stylized normative theories of adjudication that might serve as comparative benchmarks: conventionalism, pragmatism, and interpretivism. My account is partly based on Dworkin's taxonomy of rival conceptions of law in *Law's Empire*.<sup>98</sup> However, I treat each of these theories as a normative theory of adjudication, and my own reconstruction departs in important respects from Dworkin's characterization. Also, while in each case I refer to the work of several theorists, I should not be interpreted as claiming that, for instance, Hart or Raz are conventionalists in the terms in which I define the term. What I am trying to do is to capture, by drawing a somewhat impressionistic picture, some familiar and plausible ways of approaching what judges should do when adjudicating contractual disputes, in order to later contrast these potential approaches with formalism.

*A. Conventionalism*

Conventionalism is arguably the standard lay view of adjudication. It is the view that underlies judicial nomination processes and much of the opposition to judicial activism and "legislation from the bench." Conventionalism claims that judges ought to decide cases by applying pre-existing valid legal rules independently of their normative desirability, whenever those rules give a clear answer to the case at hand.<sup>99</sup> In such cases, one could say, the case belongs to the core of the *valid* legal

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<sup>97</sup> See LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 42-50 (2008) (offering a cost-benefit comparison of different approaches to common law reasoning).

<sup>98</sup> RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

<sup>99</sup> *Id.* at 114-74.

rule. Legal validity, on the conventionalist picture, rests on social facts, like social conventions or legal officials' practices,<sup>100</sup> such as Hart's rule of recognition.<sup>101</sup> In other cases, belonging to the penumbra of legal rules, judges should engage in interstitial and discretionary law-making, but their activity in such cases should be constrained by the existing legal rules to some extent.<sup>102</sup> Thus, conventionalism does not endorse judicial discretion as synonymous to caprice,<sup>103</sup> since unregulated cases are governed by laws that guide and constrain what judges can do. But after that general guidance, judges do need to make choices among the possible solutions.<sup>104</sup>

In terms of the key features of formalism that I identified above, conventionalism is similar to formalism in its analysis of easy cases belonging to the core of legal rules. It is consistent with retrospectivity. It also sees adjudication as rule-bound. It also accepts a thin and limited version of decisional restriction, in the sense that judges should apply valid legal sources in easy cases. In hard cases, however, judges should make new law, relying on moral and other non-legal considerations,<sup>105</sup> and partly on existing law. Conventionalism is not evidently committed to doctrinalism. In fact, it might be inconsistent with some of its aspects, such as systematicity (i.e., the view of legal norms as part of a complex system of interconnected concepts and institutions).<sup>106</sup> Finally, it is not necessarily committed to nuanced literalism (though it might be), because it is compatible with different ways of determining the communicative content of legal texts.

Conventionalism is, however, committed to a certain view about the connection between communicative and legal content: identity. The rules to apply are whatever norms are to be found in the legal materials. And the rules coincide with actual sentences and utterances in legal texts.<sup>107</sup> For conventionalism, once the communicative content of legal texts has been figured out, there is nothing left for

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<sup>100</sup> *Id.* at 114–15.

<sup>101</sup> See H. L. A. HART, *THE CONCEPT OF LAW* 100–110 (1994).

<sup>102</sup> See generally Joseph Raz, *The Inner Logic of the Law*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 249 (1995) (arguing that the exercise of judicial discretion is directed and subject to specific duties). On the distinction between core and penumbra, see generally H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1957); see also HART, *supra* note 101, at 124–154.

<sup>103</sup> See Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L. J.* 823, 847–48 (1972) (arguing that judicial discretion is different from arbitrary judgment).

<sup>104</sup> See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 181 (1979).

<sup>105</sup> *Id.* at 49–50.

<sup>106</sup> See generally Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 *COLUM. L. REV.* 16 (2000) (arguing in support of systematicity and its technical vocabulary).

<sup>107</sup> Although such utterances need not be taken in isolation from their context and may be “pragmatically enriched.” Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS.* 423, 423 (2008).

the judge to do—if she is to act as a judge—but apply it.<sup>108</sup> On the other hand, if there is no communicative content, there is no legal content: for conventionalism, there is no law apart from the communicative content derived from authoritative sources.<sup>109</sup> Here is, again, where discretion comes in. This, as I will expand upon later, has important implications—and marks an important difference with formalism—in the treatment of hard cases.

### B. Pragmatism

Pragmatism as a theory of adjudication (which is not necessarily connected to philosophical pragmatism)<sup>110</sup> claims that judges ought to come up with optimal decisions, all-things-considered, without regard to consistency with past decisions, as an end in itself.<sup>111</sup> The pragmatic judge does see legal materials, as Posner argues, as potentially valuable sources of information.<sup>112</sup> Thus, pragmatism does not entirely ignore legal constraints. From a pragmatist perspective, moreover, judges ought to consider the systemic consequences of their decisions,<sup>113</sup> and take into account the values of continuity, coherence, impartiality, and predictability—but as values always open for tradeoffs.<sup>114</sup> Thus, because of the evident beneficial consequences of rules, a pragmatic judge should sometimes decide cases quickly, on the basis of legal materials' plain meaning.<sup>115</sup> But this is always for each judge to decide on her own. When deciding a case, the judge must try to compare the benefits of adherence to legal materials to the costs of failing to innovate when the decisions recommended by the legal materials are inadequate.<sup>116</sup> Posner's suggestion about how to strike this balance is telling: "make the most reasonable decision you can, all things considered."<sup>117</sup>

In terms of the key features of formalism that I identified above, pragmatism decidedly rejects all of them. Its rejection is not an absolute one, since pragmatism might recommend deciding some cases using formalist techniques, and hence

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<sup>108</sup> Thus, according to conventionalism, "the primary way in which law is determined is that the linguistic content of a legally authoritative pronouncement becomes a legal norm simply because it was authoritatively pronounced." Greenberg, *supra* note 82, at 54.

<sup>109</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 116–17.

<sup>110</sup> Matthew H. Kramer, *The Philosopher-Judge: Some Friendly Criticisms of Richard Posner's Jurisprudence*, 59 *MOD. L. REV.* 465, 475–76 (1996).

<sup>111</sup> Posner, *supra* note 24, at 238.

<sup>112</sup> *See id.*

<sup>113</sup> RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 59 (2003) [hereinafter POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*].

<sup>114</sup> *Id.* at 60–61.

<sup>115</sup> *Id.* at 62–63.

<sup>116</sup> *See id.* at 63–64. In this aspect, pragmatism advocates something along the lines of what Alexander and Sherwin call a "natural model" of decision-making. *See* ALEXANDER & SHERWIN, *supra* note 97, at 39.

<sup>117</sup> POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 113, at 64.

adhering to those features. However, this can only be decided case-by-case by the pragmatist judge. For instance, a pragmatic judge might recognize that legal doctrine plays a relevant role in generating expectations and facilitating commerce.<sup>118</sup> But her deference to doctrine is not decided *ex ante* and across the board, as formalism suggests, but in each particular case. In fact, as Posner's own recent characterization of his work as a judge shows, a much cruder approach to adjudication, under which legal materials provide few constraints, might be compatible with pragmatism.<sup>119</sup>

### C. Interpretivism

Interpretivism defends several claims about the role of judges. For example, interpretivism claims that, when adjudicating, judges must have at least an implicit theory about the point of legal practice as a whole, about the goal or principle that best justifies it.<sup>120</sup> Additionally, according to interpretivism, the correct underlying theory is that legal practice secures a form of equality among citizens and morally justifies the exercise of political power. This general purpose of law leads to the view that the legal rights and obligations of parties follow not just from authoritative sources, but also from the moral and political principles presupposed by those sources as their best possible justification.<sup>121</sup>

The adjudicative approach advocated by interpretivism has three steps. First, the judge identifies a set of legal materials that might apply to the case at hand.<sup>122</sup> Second, she must construct a justification that fits most of those legal materials and shows them in their best light, as expressing a coherent conception of justice.<sup>123</sup> Third, she must adjust her pre-interpretive view considering that justification, discarding some of the presumptively applicable materials as "mistake[s]."<sup>124</sup> Judges, under this view, enforce the rights of citizens as they flow from past political decisions and their best justification. Adjudicative decisions are, figuratively speaking, a part of a long novel written by different authors.<sup>125</sup> The best justification of the previous chapters determines whether a proposition of law is true or false.<sup>126</sup> In summarized terms, judges ought to decide cases in ways which are consistent

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<sup>118</sup> *Id.* at 95.

<sup>119</sup> "I pay very little attention to legal rules, statutes, constitutional provisions," Judge Posner said. "A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?" Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> [<https://perma.cc/Q96U-G3HH>].

<sup>120</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 87–88.

<sup>121</sup> *Id.* at 95–96.

<sup>122</sup> *Id.* at 65–66.

<sup>123</sup> *Id.* at 66.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 228–32.

<sup>126</sup> *See id.* at 225–26.

with the principles that morally justify legal practices. These principles allow for the resolution of hard cases.

In terms of the key features of formalism, interpretivism accepts complex versions of some of them and rejects others. Generally, under interpretivism, interpretation is connected to large issues of moral and political theory that transcend the relationship between the parties and the limited domain of contract law. Retrospectivity is relevant for interpretivism, in its account of the relevance of past political decisions.<sup>127</sup> Interpretivism rejects rule-boundedness because it places a big emphasis on principles of political morality. It also rejects decisional restriction, since judges ought to decide cases based on eminently normative considerations. Regarding doctrinalism, the taxonomies and classifications of legal doctrine are, for interpretivism, a matter of local priority. Thus, they might be relevant if they track the right moral principles, but the judge might suggest their modification when this is what best coheres with the justification of legal practice.<sup>128</sup> Finally, interpretivism rejects nuanced literalism, since the best interpretation of legal practices might recommend deciding in ways which are inconsistent with the limitedly enriched literal meaning of legal texts.

However, the most important divergence between interpretivism and formalism is connected to their treatment of hard cases. I turn to this issue in the next part.

## V. HARD CASES AND DEVELOPING THE LAW

Judges, particularly in common law systems, change the law while applying it.<sup>129</sup> Sometimes, they go beyond the texts of legal materials, generating new solutions to hard cases, *developing the law* by adapting it to changing circumstances. These innovations may expand or contract the presumptive scope of application of legal materials,<sup>130</sup> as a means to achieve adequate outcomes in legal adjudication.

Formalism is not just a theory about easy cases, and it has the resources to guide judicial development in hard cases—without endorsing judicial legislation.<sup>131</sup> On the contrary, under formalism, the development of law might still count as *applying the law*.<sup>132</sup>

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<sup>127</sup> *Id.* at 227–28.

<sup>128</sup> *See id.* at 250–54 (describing the doctrinal compartmentalization of law).

<sup>129</sup> *See* Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 588–89 (Jules Coleman & Scott J. Shapiro eds., 2002); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 112–17 (2009).

<sup>130</sup> MATTHIAS KLATT, *MAKING THE LAW EXPLICIT: THE NORMATIVITY OF LEGAL ARGUMENTATION* 5 (2008).

<sup>131</sup> *See id.* at 4–15 (discussing the contrast between judicial legislation and judicial development, highlighted by the German doctrine of the *wording of the statute*).

<sup>132</sup> Despite the talk of “applying the law” that will characterize a lot of this part of my argument, what I mean by this expression is just the idea of applying the pre-existing legal materials. This is consistent, as I have said above, with an eliminativist or one-system jurisprudential view.

It is important to note that, for some cases to be hard, there must be a significant proportion of easy cases (i.e., cases that can be solved by adjudicators by *simply* applying the semantic content of the relevant legal materials and their related doctrines). The distinction between hard and easy cases depends on acknowledging the existence of both types.<sup>133</sup> Arguably, easy cases constitute the core of contract law adjudication. Of course, it is easy to understand why legal theorists tend to focus on hard cases decided by appellate courts. But, *pace* Dworkin, hard cases are not the most common instance.<sup>134</sup> Still, any plausible theory of adjudication should be able to account for hard cases, even if they are not as important or common as they sometimes seem.

There are two ways in which a case might be hard. First, it may be unclear what the communicative content of a legal rule is, either because the relevant legal materials are semantically obscure, or because they simply remain silent on the case at hand. Second, it might be that the communicative content is clear, but its application to the case at hand is inconsistent with the purposes of contract law.<sup>135</sup> In the first case, adjudicative institutions need to make a decision even though there is no clear answer provided by legal materials; in the second, there is a clear answer, but the answer is inadequate. I call the first type of case a semantically hard case, and the second type a normatively hard case.<sup>136</sup> Thus, we can build the following scheme of hard cases:

<b>Semantically Hard Cases</b>	<b>Normatively Hard Cases</b>
Unclear Answer	Unacceptable
No Answer	Answer

In a case of Unclear Answer, it is uncertain what the communicative content derived from legal materials is. This might be because of the unclear meaning of an expression or its vagueness,<sup>137</sup> or because legal materials contain different propositions with inconsistent implications. In a case of No Answer, there is simply no proposition in the legal materials that is applicable to the case at hand. Finally, in the case of Unacceptable Answer, there is no question about the semantic content,

<sup>133</sup> In all of this, of course, I am presupposing that rules are semantically autonomous from their underlying justifications. Otherwise, there could not be any possible conflict between the rule and its justification. (All cases would be easy.) See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 153 (2d ed., Hart Pub. 2005); see also Ángeles Ródenas, *En La Penumbra: Indeterminación, Derrotabilidad y Aplicación Judicial de Normas*, 24 DOXA 63, 72–73 (2001) (Spain).

<sup>134</sup> See Schauer, *Easy Cases*, *supra* note 31, at 407.

<sup>135</sup> See Manuel Atienza & Juan Ruiz Manero, *Rules, Principles, and Defeasibility*, in *THE LOGIC OF LEGAL REQUIREMENTS* 238, 243 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012); see also Stone, *supra* note 1, at 179.

<sup>136</sup> For a similar taxonomy, see Stone, *supra* note 1, at 179.

<sup>137</sup> See Schauer, *Easy Cases*, *supra* note 31, at 405–06.



but the application of that semantic content to the case is normatively unacceptable.<sup>138</sup>

Legal principles are the main mechanism that formalism proposes to address these cases. This mechanism is connected to the doctrinalist perspective of formalism and allows judges to apply legal materials beyond their literal scope, or to avoid the application of *prima facie* applicable materials to a particular case. One might say, following Savigny, that in the first case, communicative content is simply indefinite, and legal principles determine and refine that relatively inchoate meaning into determinate legal content, and that, in the second, the communicative content is definite but erroneous because it diverges from “the actual thought of the law.”<sup>139</sup> In the latter case, legal principles *correct* the communicative content for the purpose of constructing legal content.

The notion of *the actual thought of the law* as a guiding (albeit metaphorical) criterion shows that a judge can admit the existence of normatively hard cases and the need to solve them satisfactorily without endorsing discretion or ceasing to apply the law. Indeed, the same reasons that might lead to an insistence on a rule-bound approach to adjudication would continue to exist in hard cases. Once the legal materials run out, or we are persuaded that their application provides an evidently inadequate answer, there is no transformation in the role that judges ought to have. It is not the case that, beyond legal materials, the judge is left with nothing but “policy.”<sup>140</sup> Hard cases should not lead to an abandonment of the commitments that underlie the adjudication of easy cases. If there are good reasons for formalism in the routine operation of contract law adjudication, those reasons subsist in hard cases.

Still, hard cases do require a certain movement beyond legal materials and towards normative foundations. Precisely, under formalism, legal principles play a mediating function between legal materials and their underlying instrumental justification. In this way, they allow for deciding hard cases taking into account their peculiarity, but consistently with the rest of the theory of adjudication. Importantly, these principles are *legal* principles—not in the theoretically ambitious sense that they are “part of the law,” but in the more mundane sense that they are connected to pre-existing legal materials.

The use of the term *legal* is also important because it highlights a distinction between formalism and Dworkin’s interpretivism. Interpretivism also uses principles as means to address hard cases.<sup>141</sup> Under formalism, however, even though legal principles relate to the underlying justifications of contract law,<sup>142</sup> they

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<sup>138</sup> *Id.* at 415–16.

<sup>139</sup> FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 179, 186 (William Holloway trans.) (1867).

<sup>140</sup> Stone, *supra* note 1, at 192.

<sup>141</sup> See DWORKIN, *supra* note 42, at 81.

<sup>142</sup> See EISENBERG, *supra* note 50, at 80.

are not coextensive with them. They are internal or mid-level principles<sup>143</sup> that don't justify contract law, but rather are themselves justified by the underlying purposes of the practice, occupying a middle ground between the latter and authoritative legal materials. For instance, the principle of good faith, which has been understood as implicit in Article 1134 of the French *Code Civil* and has been recognized in American law by the Restatement,<sup>144</sup> can be appealed to directly by a judge in order to adjudicate a hard case. However, good faith is not a consideration that justifies the whole practice of contract law, but a principle that is internal to the practice and simultaneously mediates between the internal discourse of contract doctrine and the instrumental purposes that underlie it.<sup>145</sup> The formalist conception of legal principles is thus similar to the notion of *regulae iuris* (i.e., of statements or maxims that systematize parts of the legal system).<sup>146</sup> These principles are implicit in legal materials, and are not a mere matter of substantive justice or social morality; they are indissolubly connected to authoritative legal sources.<sup>147</sup> In contrast, for Dworkin, a principle "is a requirement of justice or fairness or some other dimension of morality."<sup>148</sup> While Dworkinian principles are most naturally understood as wholesale, foundational principles of political morality, formalist principles are internal, mid-level, and legal.

There is a second crucial difference. Interpretivism understands principles in opposition to instrumental goals or *policies*. While principles stand for requirements of justice or political morality,<sup>149</sup> policies stand for the advancement of collective goals.<sup>150</sup> Only the former, and not the latter, should guide adjudication.<sup>151</sup> Under formalism, on the other hand, legal principles mediate between the available legal materials and their instrumental justifications, and are themselves part of an instrumental social practice. They are indissolubly connected to policy considerations (even if they do not coincide with them).

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<sup>143</sup> Cf. Michael D. Bayles, *Mid-Level Principles and Justification*, 28 NOMOS 49, 49–50 (characterizing the notion of mid-level principles); Kenneth Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12 LAW & PHIL. 121, 122 (1993) (building on Bayles's work to argue that "mid-level principles serve to promote the rule of law").

<sup>144</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

<sup>145</sup> Here, I follow Fernando Atria, *Jurisdicción e Independencia Judicial: El Poder Judicial Como Poder Nulo*, 5 REV. ESTUDIOS DE LA JUSTICIA 119, 120–21 (2004) (Chile); Fernando L. Atria, *La Relevancia Del Derecho Civil (a Propósito de Barros, Tratado de Responsabilidad Extracontractual)*, 8 REV. ESTUDIOS DE LA JUSTICIA 219, 225–26 (2006) (Chile).

<sup>146</sup> Manuel Atienza & Juan Ruiz Manero, *Sobre Principios y Reglas*, 10 DOXA 101, 105 (1991) (Spain). See also PETER STEIN, *REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* (1966).

<sup>147</sup> *Id.* at 112.; see also Graham Virgo, *Doctrinal Legal Research*, in THE NEW OXFORD COMPANION TO LAW 339, 339–40 (Peter Cane & Joanne Conaghan eds., 2008).

<sup>148</sup> DWORKIN, *supra* note 42, at 22.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 82.

<sup>151</sup> *Id.* at 84.

How do legal principles operate, according to formalism? First, they expand the communicative content of existing legal materials to cover new cases, in the circumstances of No Answer. Second, they guide the construction of the legal content of legal materials whose communicative content is unclear, in cases of Unclear Answer. In these two types of situations, in which legal principles operate similarly to analogies,<sup>152</sup> linguistic indeterminacy need not lead to legal uncertainty.<sup>153</sup> Third, legal principles restrict the application of *prima facie* applicable legal materials in cases of Unacceptable Answer. In this latter situation, principles lead to defeasibility (a familiar version of which is distinguishing a precedent).<sup>154</sup> legal norms are subject to implied exceptions which have not been specified *ex ante*,<sup>155</sup> and which reduce their scope of application.<sup>156</sup> In these three cases, legal principles constitute mechanisms for the construction of legal content in hard cases.

Legal principles are already present in contemporary legal systems. A basic interpretive principle in many of them is that every behavior not expressly mandated or prohibited is allowed.<sup>157</sup> While some have seen this standard as a “closure rule” that shows the inexistence of gaps “when the law is silent,”<sup>158</sup> I think it is rather a principle mediating between rules and considerations of political morality. In any case, the example is useful because it shows how gaps in the communicative content of legal materials do not imply that judges should make law.<sup>159</sup>

There are also examples of legal principles working like this in contract law. I return to good faith, a general principle recognized by most American jurisdictions.<sup>160</sup> Although good faith has been criticized for its open-ended character,

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<sup>152</sup> For an analysis of analogy along similar lines, see NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 206 (2009); see also RAZ, *supra* note 104, at 180–209.

<sup>153</sup> Balganesch & Parchomovsky, *supra* note 73, at 1272.

<sup>154</sup> See Riccardo Guastini, *Defeasibility, Axiological Gaps, and Interpretation*, in *THE LOGIC OF LEGAL REQUIREMENTS* 182, 188 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012).

<sup>155</sup> Juan Carlos Bayón, *Why Is Legal Reasoning Defeasible?*, 2 *DIRITTO & QUESTIONI PUBBLICHE* 1, 11 (2002) (It.).

<sup>156</sup> Guastini, *supra* note 154, at 188.

<sup>157</sup> See HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW* 85 (1997).

<sup>158</sup> See, e.g., RAZ, *supra* note 104, at 75–77.

<sup>159</sup> David Lyons, *Open Texture and the Possibility of Legal Interpretation*, 18 *LAW & PHIL.* 297, 300–02 (1999).

<sup>160</sup> See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 *HARV. L. REV.* 369, 369 (1980) (noting that most American jurisdictions recognize the duty to perform in good faith as a general principle); U.C.C. § 1-203 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (recognizing the obligation of good faith in the performance and enforcement of all contracts); RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (same).

it has been able to accommodate different normative commitments while maintaining a stable “jural meaning,”<sup>161</sup> as a standard of contract interpretation and an implied covenant in every contract.<sup>162</sup> In both cases, good faith acts as an open-ended placeholder which “serves to exclude many heterogeneous forms of bad faith.”<sup>163</sup> Because of this open-ended character, the principle of good faith needs to be disciplined, and—as legal principles in general, according to formalism—specified and articulated into specific criteria of application<sup>164</sup> through doctrinal construction, both by courts and scholars. As Summers has argued, this is precisely what has happened in the case of good faith.<sup>165</sup> As a consequence, judges applying the principle have meaningful guidance, and they do not simply make new law.<sup>166</sup> On the contrary, they are able to effectuate the intention of the parties and protect their reasonable expectations,<sup>167</sup> doing justice “according to law.”<sup>168</sup> The principle of good faith, moreover, when recognized by the Second Restatement, was based on pre-existing legal materials, such as judicial opinions, statutory developments, and doctrinal scholarship.<sup>169</sup> However, good faith goes beyond these legal materials, connecting them to the instrumental foundations of contract law, policing advantage-taking<sup>170</sup> and allowing for voluntary cooperation between strangers.<sup>171</sup>

To contemporary ears, the idea that even when judges develop the law or devise creative solutions to legal problems—they still resort to pre-existing legal sources—might sound strange. It certainly contrasts with the commonplace observation that

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<sup>161</sup> Balganesch & Parchomovsky, *supra* note 73, at 1246–47.

<sup>162</sup> Burton, *supra* note 160, at 371.

<sup>163</sup> Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968).

<sup>164</sup> See Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 820 (1981) (suggesting a need for judges to “try to articulate criteria to be used to decide whether particular conduct claimed to be in bad faith really is so”).

<sup>165</sup> *Id.* at 822 (explaining how doctrinal and judicial developments have led to the formulation of more determinate criteria and application contexts for the duty of good faith the formulation of “lists of criteria” by judges and scholars, and the “accumulation of experience with respect to some contexts,” are all examples of ways in which “good-faith law” is becoming fully formed).

<sup>166</sup> See *id.* at 823–24 (discussing the steps judges can take in novel cases posing an issue of good faith under the Restatement (Second) of Contracts in order to ensure predictability and uniformity in the application of law).

<sup>167</sup> Burton, *supra* note 160, at 371.

<sup>168</sup> Summers, *supra* note 163, at 198.

<sup>169</sup> See *id.* at 812 (explaining that the “accumulation of case law imposing a duty of contractual good faith outside contexts of ‘good-faith purchase’ was considerable” at the time Restatement (Second) of Contracts was being drafted).

<sup>170</sup> See Daniel Markovits, *Good Faith as Contract’s Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272, 275 (Gregory Klass et al. eds., 2014).

<sup>171</sup> See *id.* at 292–93.

judges legislate interstitially and at least sometimes make law,<sup>172</sup> and with the common ridicule that is usually attached to the ‘declaratory theory of law,’<sup>173</sup> which, in Lord Reid’s words, was nothing but a fairy tale.<sup>174</sup>

Of course, there is an obvious sense in which judges *do* make law, all the time. Sometimes legal materials fail to provide answers. Sometimes they provide unclear or unacceptable answers. In these cases, judges go beyond those materials. But there is also an important truth in the notion that, even in such cases, judges “declare the law.”<sup>175</sup> Indeed, the slogan can be seen as a vindication of the incrementalist and minimalist character of the common law.<sup>176</sup>

This is not just a change in the language we use to describe what is going on. Because formalism is committed to doctrinalism, the use of the word *declaration* is also the claim that the communicative content of legal materials does not exhaust the restricted domain of reasons that the judge can consider in making her decision.<sup>177</sup> This helps to explain why formalism places such a big emphasis on doctrinal construction. Unlike the ‘scarecrow’ versions of formalism we are used to, the theory of adjudication this Article argues for understands that adjudication involves much more than the syllogistic application of legal rules or their blind application despite changing social circumstances. Instead, it admits that adjudication involves complex processes and should allow for contract law to develop, claiming nevertheless that this should not mean giving up on legal formality—and the advantages that, as I will argue, it possesses. Formalism values legal formality, and its reliance on conceptual stability and doctrinal tradition, precisely as a means to allow for change “with minimal structural disruption.”<sup>178</sup>

## VI. EXAMPLES

Up to this point, I have set out the main features of formalism and its commitments, as well as its operation in hard cases. I have also explained how legal

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<sup>172</sup> As Justice Holmes noted in *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917).

<sup>173</sup> For critical analysis, see generally Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421 (2013) (defining the declaratory theory of law and offering an argument in its support).

<sup>174</sup> Lord Reid, *The Judge as Law Maker*, 12 J. SOC’Y PUB. TCHRS. L. 22, 22 (1972).

<sup>175</sup> Martin Krygier, *Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law*, 9 U.N.S.W.L.J. 26, 26–27 (1986).

<sup>176</sup> Balganesch & Parchomovsky, *supra* note 73, at 1267.

<sup>177</sup> See Beever, *supra* note 173, at 440. (“All of this is to say that the declaratory theory has a serious point. What is the difference between changing the law in a legislative way and developing the law by adapting and repairing the law’s seamless web? The answer seems to be that a change is a development if it fits within or is somehow guided by consideration of the law’s web or mosaic. The law in the relevant respect, then, is not just that which has been decided in the relevant cases, it is also to be found in this more abstract picture of a web or mosaic.”).

<sup>178</sup> Balganesch & Parchomovsky, *supra* note 73, at 1247–48.

principles and concepts, such as good faith, play a crucial role in formalist adjudication. In order to make formalism more concrete, I will focus on a few examples of decisions that can be interpreted as deploying a formalist approach to contract law adjudication.

The logical place to start, in my view, is in Cardozo's contract jurisprudence. Indeed, as Corbin noted, one of the central components of Cardozo's genius was his ability to expand contract doctrine without overthrowing old doctrines and establishing new ones, striking a balance that allows for the evolution of contract doctrine without sudden change,<sup>179</sup> molding doctrine without repudiating it.<sup>180</sup> Consistently with Corbin's views, modern commentators have characterized Cardozo's jurisprudence as a "thickly textured doctrinalism," which allowed for the incremental evolution of the common law.<sup>181</sup> Cardozo was able to invoke traditional contract doctrine "to reach legal conclusions that others would have been hard pressed to see."<sup>182</sup>

An obvious example is *Wood v. Lucy, Lady-Duff Gordon*.<sup>183</sup> In this decision, Cardozo found an implied promise to use reasonable efforts—a "forerunner of what became the implied duty of good-faith performance."<sup>184</sup> The opinion was an extraordinary innovation that kept traditional doctrine congruent with contemporary commercial reality.<sup>185</sup> What's remarkable, from a formalist perspective, is that this extraordinary innovation was achieved not by imposing an obligation that would secure whatever goals Cardozo thought underpinned the law of contracts. Instead, Cardozo interpreted the agreement and its context using the traditional tools of contract interpretation and old legal standards governing it, such as the notions that "[a] promise may be lacking, and yet the whole writing may be 'instinct with an obligation,'" <sup>186</sup> that courts "are not to suppose that one party was to be placed at the mercy of the other,"<sup>187</sup> and that the acceptance of an exclusive agency is an assumption of duty.<sup>188</sup>

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<sup>179</sup> See Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408, 408–09 (1939).

<sup>180</sup> See *id.* at 438–39.

<sup>181</sup> Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1381 (1994–1995).

<sup>182</sup> *Id.* at 1391.

<sup>183</sup> 118 N.E. 214 (1917).

<sup>184</sup> Cunningham, *supra* note 181, at 1397.

<sup>185</sup> *Id.*

<sup>186</sup> 118 N.E. at 214 (quoting *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (1909); *Moran v. Standard Oil Co.*, 105 N.E. 217, 221 (1914)).

<sup>187</sup> *Id.* (quoting *Hearn v. Charles A. Stevens & Bro.*, 97 N.Y.S. 566, 570 (1906); *Russell v. Allerton*, 15 N.E. 391, 391 (1888)).

<sup>188</sup> *Id.* (citing *Phoenix Hermetic Co. v. Filtrine Mfg. Co.*, 150 N.Y.S. 193 (1914); *W. G. Taylor Co. v. Bannerman*, 97 N.W. 918 (1904); *Mueller v. Bethesda Mineral Spring Co.*, 50 N.W. 319 (1891)).

Cardozo's analysis of consideration and promissory estoppel in *Allegheny College*<sup>189</sup> is a less well-known but even better example of the doctrinalist balance between change and tradition. In this decision, Cardozo started his analysis by claiming that the classical view of consideration as a "detriment to the promisee sustained by virtue of the promise . . . is little more than a half truth."<sup>190</sup> Cardozo argued that such half-truths can sometimes perpetuate themselves as whole truths, as he proceeded to analyze the law governing charitable subscriptions and whether their enforcement "can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel."<sup>191</sup> In his analysis, Cardozo argues:

Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.<sup>192</sup>

Intelligently, Cardozo maintains a balance between the need to maintain consistency with the "distinctive features of the legal system" and the very changes and irregularities of form that those features undergo as a consequence of the legal system's need to adapt to new realities and resolve gaps and inconsistencies. The decision is also noteworthy because Cardozo's analysis is successful at showing how this novel type of situation can be adequately dealt with even "within the mould of consideration as established by tradition."<sup>193</sup>

Analyzing this decision, scholars have claimed that the opinion "may be a perfect example of common law incrementalism," in which Cardozo works "closely with the legal concept of consideration."<sup>194</sup> In this way, *Allegheny College* "showcases the role that legal concepts play in underwriting the process of

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<sup>189</sup> With this, I do not mean to suggest that Cardozo's overall approach towards adjudication was formalist in my sense of the term. His decision in *Allegheny College* is just an example of an innovative decision within formalist parameters, even if Cardozo's overall jurisprudence takes a different approach. However, I do think there are certain connections between formalism, and particularly formalism in hard cases, and Cardozo's understanding of adjudication. For an overview of that understanding, see generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>190</sup> *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank of Jamestown*, 159 N.E. 173, 174 (1927) (citations omitted).

<sup>191</sup> *Id.* at 175.

<sup>192</sup> *Id.* (citations omitted).

<sup>193</sup> *Id.*

<sup>194</sup> Balganesch & Parchomovsky, *supra* note 73, at 1269.

incremental doctrinal change.”<sup>195</sup> In similar terms, Curtis Bridgeman has argued that the decision is “subtle and insightful,”<sup>196</sup> demonstrating a balance between the technical doctrines of contract law and the relevant factual context of the contractual relationship—in this case, of charitable subscriptions.<sup>197</sup> In this way, Bridgeman argues, Cardozo was applying formal rules while, at the same time, being attentive to context and to the nuanced variations that are possible within doctrinal conceptualism.<sup>198</sup>

These features of the *Allegheny College* decision, along with *Wood v. Lucy*, are an example of Cardozo’s broader jurisprudence, which—while not, strictly speaking, formalist—was both innovative and traditional.<sup>199</sup> Richard Posner, in his book on Cardozo, sometimes claims this was a form of concealment.<sup>200</sup> At other times, however, he notes that Cardozo’s balanced jurisprudence was an outstanding example of common law incrementalism.<sup>201</sup> Others, like John Goldberg, claim that Cardozo was a sophisticated doctrinalist judge, and one of the most accomplished anti-Realist judges of the twentieth century.<sup>202</sup> In my view, there is no need to adjudicate this dispute one way or the other: the very dispute shows that, in different senses, it might very well be the case that Cardozo, at least in *Allegheny College*, was both creating law (since, for him, after all, judge-made law was one of “the existing realities of life”)<sup>203</sup> and applying it—that he was innovating intelligently and with close attention to practical consequences, while making use of the resources available in the legal culture and the pre-existing legal materials. And this duality is exactly what formalism argues for in hard cases.

Thus, formalism admits the existence of interstitial law-making authority. Moreover, it accepts that in some instances—in hard cases—the exercise of such authority is desirable. At the same time, however, formalism stands for the proposition that, even in such cases, judges should decide by applying “ascertained legal principles . . . according to a standard of reasoning which is not personal to the judges themselves,” under the assumption “that there exists a definite system of accepted knowledge or thought and that judgments and other legal writings are

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<sup>195</sup> *Id.*

<sup>196</sup> Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 152 (2005).

<sup>197</sup> *Id.* at 152–53.

<sup>198</sup> *Id.* at 166–67.

<sup>199</sup> As he wrote: “In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the ratio decidendi; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.” CARDOZO, *supra* note 189, at 28.

<sup>200</sup> See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 13 (1993).

<sup>201</sup> See *id.* at 95.

<sup>202</sup> John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1423 (1999).

<sup>203</sup> CARDOZO, *supra* note 189, at 10.



evidence of its content.”<sup>204</sup> In this way, formalism is based on a relevant distinction between extending the application of doctrinal principles, developing the law to adjust to new realities or to avoid undesirable results, and abandoning the limited domain of legal reasons in a pursuit for justice or the instrumental efficacy of contract law.<sup>205</sup> Judges, under formalism, are supposed to justify their decisions by resorting to a limited domain of reasons, whether that is achieved through nuanced literalism or through the more creative application of the authorized institutional and doctrinal tradition.<sup>206</sup>

## VII. FORMALISM, DEFENDED

Now let us turn to the normative argument on behalf of formalism. Some scholars base formalistic approaches on fidelity to the traditions of the common law,<sup>207</sup> or on the idea of private law as a self-sufficient justificatory structure.<sup>208</sup> The argument I will make, however, is based on the idea that formalism, to be plausible, should be defended pragmatically rather than on principle, and on the basis of its consequences.<sup>209</sup> I also avoid defending formalism on the basis of claims about the nature of language, interpretation, or law.<sup>210</sup> The argument for formalism that this Article puts forward depends on the social effects it may have rather than on conceptual purity.<sup>211</sup>

But how should one assess the consequences of theories of adjudication? For the purposes of my argument, I will assume that the best theory of adjudication is that which achieves, in the long run, the largest proportion of correct decisions (or, conversely, the fewest and least costly mistaken decisions), at the lowest cost possible.<sup>212</sup> By *correct decisions*, I mean decisions which, in the aggregate, maximize the achievement of contract law’s underlying goals. What’s relevant is not whether the theory achieves the correct decision in each specific case, but whether the overall result is the best possible balance of correct decisions, incorrect

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<sup>204</sup> Owen Dixon, *Concerning Judicial Method*, in *JESTING PILATE AND OTHER PAPERS AND ADDRESSES* 152, 155–56 (1997).

<sup>205</sup> *Id.* at 158.

<sup>206</sup> Martin Krygier, *Law as Tradition*, 5 *LAW & PHILOS.* 237, 245 (1986).

<sup>207</sup> See John Gava, *Can Contract Law Be Justified on Economic Grounds?*, 25 *U. QUEENSLAND L.J.* 253, 261 (2006).

<sup>208</sup> See generally WEINRIB, *PRIVATE LAW*, *supra* note 90.

<sup>209</sup> Cf. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, *U. CHI. L. REV.* 636, 641 (1999).

<sup>210</sup> Cf. Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 *CONST. CMT.* 193, 207 (2015).

<sup>211</sup> Cf. Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 *U. CHICAGO L. REV.* 781, 783 (1999) (arguing that formalism can be defended “only if the patterns of conduct it brings about are superior . . . to those inspired by a nonformalist approach” and if it promotes “mutually beneficial exchanges”).

<sup>212</sup> See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 47 (1999) [hereinafter *SUNSTEIN, ONE CASE AT A TIME*].

decisions, and costs—including both operative costs and total costs of mistakes (which are a function of the number of mistaken decisions and their costs). Thus, the evaluation is wholesale rather than retail.

This consequence-based approach towards the justification of formalism has a respectable tradition in contract scholarship.<sup>213</sup> Think, for instance, of the work of Samuel Williston. As Movsesian has argued, Williston's formalism was not essentialist, but was rather based on its practical advantages.<sup>214</sup> Formalism, for Williston, promoted simplicity and predictability.<sup>215</sup> Like Williston, my argument starts from the notion that contract law is best justified in terms of instrumental goals. From this perspective, adjudication should facilitate the attainment of those goals. Because of this, I offer a general argument showing that the balance of reasons weighs in favor of formalism in contract law adjudication. This is just a starting point that needs to be supplemented with further empirical research.<sup>216</sup> But the general case is strong, and it highlights the direction in which such empirical inquiry should move.<sup>217</sup>

My claim, in short, is that allowing judges to always ask the question, '*Is this application of the legal materials and their doctrinal construction sound in instrumental terms?*' is not the best path towards the achievement of contract law's goals. Instead, such achievement requires a formalist approach based on treating legal materials as providing serious rules,<sup>218</sup> and applying those rules by considering their semantic content, limitedly enriched by contextual factors, as constructed by the doctrinal tradition.

Under formalism, adjudicative decisions are not fine-grained judgments that take into account all the relevant considerations. This means that formalism has important costs, and that whatever benefits it may help achieve are obtained at the expense of some sub-optimal decisions. But the implementation of any theory of adjudication entails tradeoffs.<sup>219</sup> In the final analysis, whether one theory of adjudication is preferable to another depends on their empirical effects. But in the

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<sup>213</sup> It has also been acknowledged as a perfectly reasonable approach in the realm of general theories of adjudication. Posner, *supra* note 24, at 236.

<sup>214</sup> Movsesian, *supra* note 26, at 128.

<sup>215</sup> Mark Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 213 (2005) [hereinafter Movsesian, *Rediscovering Williston*].

<sup>216</sup> In the end, all theories of adjudication defended in terms of consequences require this empirical grounding. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 3–5 (2006).

<sup>217</sup> Non-instrumentalist formalists, of course, do not see the need to ask these questions. For them, contract law is an immanent justificatory structure. But, from an instrumentalist perspective, arguing for formalism, or for any other theory of adjudication for that matter, is a matter of overall consequences.

<sup>218</sup> See *supra* note 39 and accompanying text.

<sup>219</sup> See, e.g., Posner, *supra* note 24, at 238 (explaining that “[t]here is often a tradeoff between rendering substantive justice in the case under consideration and maintaining the law's certainty and predictability”).

absence of full empirical evidence, there is a strong general case to be made in favor of formalism in the adjudication of contractual disputes. Due to the general rejection and even ridicule of formalism,<sup>220</sup> this general presumptive or *prima facie* case for its use is valuable, and shows that, while the final word pertains to real-world effects and empirical evidence, *a priori* there is no reason to presume formalism would be undesirable. On the contrary, there are several reasons that provide strong support for the plausibility of a generally formalistic approach to contract law adjudication.

*A. Simplicity, Generalizability, and Reduction of Decision Costs*

Tailored and fine-grained decisions may seem ideal at the retail level. Particularized and detailed attention to the complexities of each case would arguably be the ideal solution if all that mattered was getting it right in the specific case. But getting it right in the specific case is not all that matters, particularly if getting it right demands decisions the content of which cannot be easily communicated. Fine-grained approaches to adjudication can present significant communicative costs.<sup>221</sup> The decisions achieved through them might not be effective in guiding citizens' behavior and might increase transaction costs. Formalism may lead to less fine-tuned decisions at the retail level, but, at the wholesale level, secures the significant advantages of simplicity and generalizability. The messages generated by formalism are clear and simple,<sup>222</sup> an advantage that is fundamental when communicating legal standards to large audiences.<sup>223</sup>

Moreover, formalism might be epistemically less demanding than other approaches that require more attention to the specific case, such as pragmatism. Judges are not capable of taking into consideration all the relevant data that an all-things-considered decision procedure would demand to be considered. Formalism

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<sup>220</sup> See *supra* notes 1–8 and accompanying text.

<sup>221</sup> Smith, *supra* note 35, at 1116.

<sup>222</sup> A similar claim in the area of property is made by Smith. *Id.* at 1108. Importantly, Smith draws a contrast between property and contract, particularly in Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055, 2073 (2015). For him, “contract . . . can contain more information, and can even use language idiosyncratic to the two parties . . . because, generally speaking, this contract is not relevant to anyone other than the parties . . .” Smith, *supra* note 35, at 1110. This *might* be true with regards to the interpretation of contractual *instruments* (though, for reasons similar to those explored here, I doubt that is the case), but is certainly not correct regarding the interpretation of contract *law*, which, just like property, establishes general rules and norms which are communicated and applied to a wide array of individuals and firms.

<sup>223</sup> Smith, *supra* note 35, at 1111.

decreases the costs of adjudicative decisions, and by taking many (otherwise relevant) considerations off the table, allows decision-makers to focus on a limited set of relevant considerations in more detail,<sup>224</sup> decreasing decisional complexity.<sup>225</sup>

Of course, simplicity is not all that matters. But the simplicity achieved by nuanced literalism, together with well-designed legal texts and settled, sound doctrines, present outstanding benefits. Accuracy is costly.<sup>226</sup> Formalism decreases such costs and, coupled together with reasonably acceptable rules and doctrines, as seems to be the case in contemporary contract law, is more capable of achieving a reasonable balance than more particularistic or purposive approaches to adjudication, such as pragmatism and interpretivism.

But for formalism to reduce decision costs, legal rules must be taken as *serious rules*.<sup>227</sup> A serious rule “purports to state a prescription applicable to every case that falls within the rule’s factual predicate or hypothesis.”<sup>228</sup> Accordingly, formalism requires judges to apply rules based on their literal meaning, limitedly enriched, and as constructed by contract doctrine, without any further consideration into underlying purposes. The reason for this is that those underlying considerations are very often concealed, and—if contemporary contract theory is a reliable indication—their precise identity is unclear. Uncertain conjectures about underlying values make decision-making more complex and costlier, while providing limited, if any, benefits. Indeed, by their very nature, conjectures can very well be substantively mistaken. This is an evident risk with an interpretivist theory of adjudication.

Moreover, even if we agreed on contract law’s foundations, the very complexity of private law interactions, and the relevance of stability and reliance in their development, suggests that the simple legal doctrines and clear-cut rules generated by a formalist approach may deal with this complexity better than more ambitious approaches.<sup>229</sup> We should not lose track of “the virtue of deciding many questions up front and across the board,”<sup>230</sup> and of the advantages of using blunt and narrowing devices that cut off access to communicative features that, in other contexts, might be relevant.<sup>231</sup>

This simplicity comes at a cost. Following legal rules and doctrines without consideration of their underlying purposes will sometimes result in morally sub-

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<sup>224</sup> See SCHAUER, *PLAYING BY THE RULES*, *supra* note 48, at 229–30.

<sup>225</sup> Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., no. 2, 2011, at 29.

<sup>226</sup> Schwartz & Scott, *Contract Interpretation Redux*, *supra* note 27, at 930.

<sup>227</sup> See Alexander, *supra* note 35, at 551–52.

<sup>228</sup> *Id.* at 541.

<sup>229</sup> See Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, U. TORONTO L.J. 1, 6–7 (2019).

<sup>230</sup> Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 963 (2009).

<sup>231</sup> Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 252 (1990) [hereinafter Schauer, *Statutory Construction*].

optimal results—for instance, when the lack of a formality prevents the enforcement of an otherwise legitimate and jointly beneficial bargain. The benefits of formalism, however, may still outweigh its moral cost.<sup>232</sup> More importantly, when the application of legal materials, literally interpreted and doctrinally constructed, is clearly inconsistent with *any* plausible rationale or instrumental value of contract law, then formalism provides a remedy that can preserve some of the benefits of rule-boundedness and decisional restriction, but still deal with these hard cases: legal principles.

### *B. Institutional Considerations*

Deciding on the best theory of adjudication depends on an assessment of institutional capacities.<sup>233</sup> In this aspect, it is generally accepted that judges are ill-equipped for the complex calculation of the consequences of their decisions.<sup>234</sup> They lack relevant information, and their ability to foresee the consequences of their decisions is severely limited.<sup>235</sup> Moreover, adjudicative decisions are focused on particular situations and their idiosyncratic characteristics, rather than on the aggregative analysis of all relevantly similar situations and their shared features. On the face of these facts, formalism may be the best pragmatic response to the institutional characteristics of judges and adjudication.<sup>236</sup> As Williston once argued, courts, in contrast to legislatures, lack the appropriate means and perspective to engage in large-scale institutional design and social experimentation.<sup>237</sup>

Similarly, Jonathan Morgan has convincingly argued that economic regulation is beyond the capacity of courts.<sup>238</sup> This is particularly relevant from the perspective of efficiency. As is well-known, law and economics, despite its impressive development during the past fifty or sixty years, still lacks the resources to deliver univocal recommendations for contract law.<sup>239</sup> If that is the case, then judges, who typically lack sophisticated economic training, are in a much worse position if we ask them to devise efficient decisions.<sup>240</sup>

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<sup>232</sup> See Alexander, *supra* note 35, at 551; see also Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L., ECON. & ORG. 150, 151 (1995).

<sup>233</sup> VERMEULE, *supra* note 216, at 2.

<sup>234</sup> MACCORMICK, *supra* note 152, at 103–04.

<sup>235</sup> SUNSTEIN, ONE CASE AT A TIME, *supra* note 212, at 47.

<sup>236</sup> See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887–88 (2003).

<sup>237</sup> Movsesian, *Rediscovering Williston*, *supra* note 215, at 215.

<sup>238</sup> See MORGAN, *supra* note 27, at 121.

<sup>239</sup> See generally Eric A. Posner, *A Theory of Contract Law under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000) [hereinafter Posner, *Theory of Contract Law*] (noting that courts may be “radically incompetent” when it comes to optimally enforcing contracts).

<sup>240</sup> MORGAN, *supra* note 27, at 121.

This phenomenon is not simply an issue of economic training, however. The factors contributing to courts' institutional inadequacy to achieve socially optimal results are a consequence of the very way in which courts and adjudication are structured.<sup>241</sup> Courts have limited empirical data regarding the possible effects of their decisions.<sup>242</sup> The dispute is framed by the litigants' submissions.<sup>243</sup> And such disputes are not necessarily a representative sample of the whole cluster of cases to which the decision might be applicable.<sup>244</sup>

Because of this, consequentialist reasoning about the attainment of contract law's purposes—even if the identification of such purposes were easy and indisputable—should not be the central concern of adjudication, which seems ill-equipped to deal with such considerations. Issues of legal interpretation are not just to be resolved at the substantive level—*how should this legal text be interpreted?*—but, more importantly, are to be settled in institutional terms—*how should this or that institution, with its abilities and limitations, apply this legal text?*<sup>245</sup> Thus, we shouldn't be blind to institutional considerations. Of course, a full consideration of institutional competences is inevitably empirical and situated. But given a few structural features of adjudication, like the ones I have mentioned, it seems clear that institutional considerations present a forceful reason favoring formalism. Judges are appointed because of their legal training and knowledge,<sup>246</sup> they should stick to do what they are trained to do.

### C. Reduction of the Risks and Costs of Mistakes

A third reason for formalism is given by the risk of judicial mistakes,<sup>247</sup> since, as Schauer notes, when we allow decision-makers to consider every relevant factor to reach the best decision in the particular case, they might still fail.<sup>248</sup> One need not endorse the view that courts are radically incompetent when it comes to enforcing contracts to accept this.<sup>249</sup> It is just a matter of human fallibility, combined with some of the structural features of adjudication I already noted.

The cost of adjudicative mistakes is a function of their number and magnitude.<sup>250</sup> For the purposes of my argument, I will leave aside factual and empirical mistakes. Also, I will focus exclusively on hard cases, particularly cases

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<sup>241</sup> *Id.* at 160.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 162.

<sup>244</sup> *Id.* at 163.

<sup>245</sup> Sunstein & Vermeule, *supra* note 236, at 886.

<sup>246</sup> MORGAN, *supra* note 27, at 166.

<sup>247</sup> See Sunstein, *supra* note 209, at 651.

<sup>248</sup> SCHAUER, PLAYING BY THE RULES, *supra* note 48, at 149–50.

<sup>249</sup> For Eric Posner, such radical incompetence is a “regrettable but unavoidable fact.” Posner, *Theory of Contract Law*, *supra* note 239, at 754.

<sup>250</sup> SUNSTEIN, ONE CASE AT A TIME, *supra* note 212, at 49.

of Unacceptable Answer, which arguably present the best scenario for more open-ended and less restrained decision-making procedures than formalism.

Courts could be mistaken on at least three levels when deciding a hard contractual case. First, courts might be mistaken about the foundational goals of contract law; second, even if they identify the goals correctly, they might be mistaken about the supposed contradiction between such goals and the decision recommended by the formal application of legal rules; third, if the contradiction does exist, they might be mistaken about how to resolve it.

At the first level, there is simply no agreement regarding the foundations, goals, and moral justifications underlying contract law. We still lack a generally accepted theory of contract.<sup>251</sup> We also haven't found a way to adjudicate among these views, partly because of diverging methodological commitments.<sup>252</sup> This entails that (i) it is quite likely that a judge will be mistaken about the foundational goals of contract law, and that different judges will hold different and incompatible views about them (which means that any theory requiring judges to decide on the basis of those foundations will be unfit to be applied in a coordinated way); and (ii) since the identification of contract law's foundations is contested, the identification of which applications are problematic and which are not will be tainted by the same disagreement. In terms of several central legal values, such as coherence, predictability, and treating like cases alike,<sup>253</sup> this is a recipe for disaster. On the contrary, a formalist theory of adjudication may produce adequate results even for a diversity of foundational theories.<sup>254</sup> It might be a sub-optimal alternative when compared to what any specific judge would consider as the best theory, but it is optimal as a coordinated solution among different judges.

At a second level, even if we could agree on the foundations of contract law, the identification of which rule-applications are inconsistent with them is also subject to significant disagreement. At this second level, the interpretation and construction of the rule might be mistaken. There could also be a mistake in the identification of its application as inconsistent with the foundational goals of contract law. An easy example is the efficiency of contract remedies. Imagine we all agreed that contract law serves efficiency. Let us assume that a certain jurisdiction

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<sup>251</sup> Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 276 (1995); GORDLEY, *MODERN CONTRACT DOCTRINE*, *supra* note 71, at 230; STEPHEN WADDAMS, *PRINCIPLE AND POLICY IN CONTRACT LAW: COMPETING OR COMPLEMENTARY CONCEPTS?* 15 (2011).

<sup>252</sup> Kraus, *supra* note 37.

<sup>253</sup> See generally LON FULLER, *THE MORALITY OF LAW* (1964) (offering an account of the value of legality centered around the virtues of coherence, predictability, and treating like cases alike); Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979) (exploring the meaning of the "rule of law" and its requirements); see also SCHAUER, *PLAYING BY THE RULES*, *supra* note 48, at 135.

<sup>254</sup> Making the general point regarding consequentialism, see VERMEULE, *supra* note 216, at 7; see also Joseph Raz, *Reasoning with Rules*, in *BETWEEN AUTHORITY AND INTERPRETATION* 203, 219 (2009).

provides specific performance for the breach of a specific type of contract. Under a pragmatist approach, the rule should be set aside if in a given instance it would be, all-things-considered, inefficient to grant specific performance. However, the determination of the most efficient remedy—even at a general level, but particularly in the specific case—is an extremely complex task, and even legal economists who have focused a significant part of their academic careers on it have been unable to reach a clear conclusion.<sup>255</sup> Pragmatism would generate significant risks of mistake if applied to remedial decisions. While a formalistic approach might end up strictly applying rules that also lead to inefficient outcomes, at least this would have the benefit of being a consistently predictable, and thus less costly, mistake—and one which legislatures and regulators, given their greater ability to gather systemic and aggregate information about large sets of contractual activities, might be better situated to correct.

At a third level, even ignoring mistakes about foundational goals and about the inadequacy of rules, judges may be mistaken as to what the best solution would be. Again, contract remedies give a good example. Let us assume, again, that we all agree that efficiency is the sole foundational goal of contract law. Let us further assume that legal economists had a clear view about the inefficiency of specific performance, but that in a given jurisdiction it is the remedy prescribed by legal texts. A pragmatist theory of adjudication might recommend setting aside the specific performance remedy in such cases, based on its inconsistency with efficiency. However, the efficient remedy is again unclear. It might be expectation damages, reliance damages, restitution, or any proportion (say, 66% of expectation damages) or combination of them (say, 50% of expectation damages and 17% of reliance damages).<sup>256</sup> The likelihood of a judge failing to determine the efficient remedy, again, is extremely high.

This is even more problematic when there is simply no sound empirical evidence available for judges regarding the likely impact of legal rules and remedies. We thus need decision protocols that do not depend on this unattainable data.<sup>257</sup> Otherwise, if we direct judges to base their decisions on social consequences, we might end up inviting idiosyncratic or intuitive considerations to take the place of (unavailable) empirical findings.<sup>258</sup> Instead, formalism's decisional restriction advocates for a certain caution, narrowness in development, and self-limitation under uncertainty.<sup>259</sup>

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<sup>255</sup> See, e.g., Posner, *Theory of Contract Law*, *supra* note 239.

<sup>256</sup> Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 111 (2000); Murphy, *supra* note 22, at 164–65.

<sup>257</sup> See Peter Cane, *Consequences in Judicial Reasoning*, in OXFORD ESSAYS IN JURISPRUDENCE 41, 43 (Jeremy Horder ed., 2000).

<sup>258</sup> *Id.* at 58.

<sup>259</sup> With regards to what he calls 'incrementalism,' see Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1566–67 (2010).



*D. Predictability, Certainty, and the Protection of Legitimate Expectations*

Even if courts were perfect Herculean figures incapable of mistakes,<sup>260</sup> formalism still might be preferable because of its predictability, certainty, and the protection of legitimate expectations, all of which are crucial for contract law's valuable effects. Whatever goals and social purposes underlie contract law, they are not achieved directly, but through the interaction of private individuals. In this aspect, for contract law to achieve its goals, people need to actually engage in contracting. At the same time, non-simultaneous exchange requires some form of assurance that performance will occur.<sup>261</sup> Otherwise, contractual parties are stuck in a prisoner's dilemma, in which each party's incentives push them to defect rather than to cooperate.<sup>262</sup> In order to avoid this dilemma, contract enforcement gives assurance with regards to the future conduct of contractual parties, deterring opportunistic behavior.<sup>263</sup>

For formal contract enforcement to achieve such goals, however, it must be certain and predictable. This is particularly true for long-term contractual investments in developed economies and complex markets,<sup>264</sup> which require a high degree of formality.

Formal and general legal concepts, as Williston argued a long time ago, promote predictability in contractual relationships, while uncertainty is costly, particularly since the legal system should be able to determine rights and obligations without resorting to litigation.<sup>265</sup> Predictable and clear-cut rules achieve such delineation without the costs of a more tailored approach. Indeed, for the recipients of rules, more information is not necessarily better.<sup>266</sup> On the contrary, they need to navigate the complexity of their private interactions, and for such purpose clear-cut rules may be a crucial mechanism.<sup>267</sup> This is particularly true in contract law, in which predictability about future behavior is essential. A coherent and predictable body of law allows individuals to plan with confidence, and to settle their disputes without the need to recur to litigation.<sup>268</sup>

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<sup>260</sup> They are not. See VERMEULE, *supra* note 216, at 29, 107.

<sup>261</sup> Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 346 (2009).

<sup>262</sup> FRANCIS H. BUCKLEY, *JUST EXCHANGE: A THEORY OF CONTRACT* 36–38 (2004).

<sup>263</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 117 (2011).

<sup>264</sup> Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1519 (2006); see also Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 709 (1913).

<sup>265</sup> Movsesian, *supra* note 26, at 129.

<sup>266</sup> Smith, *supra* note 35, at 1140.

<sup>267</sup> Similarly, with regards to clear-cut concepts in property, see Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2099 (2012).

<sup>268</sup> Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTRALIAN L. REV. 1, 97 (1996).

Moreover, when *serious* legal rules are in place and they are applicable, judges can expect parties to have followed those rules for guidance.<sup>269</sup> In the case of contract law, this means that judges who want to decide predictably ought to apply the rules as they were found by the parties when planning their affairs and executing their contracts. Uncertainty may limit the value of contractual instruments as planning devices, as has been attested by the growing critical literature on the Uniform Commercial Code's *incorporation strategy*.<sup>270</sup> On the other hand, through its use of doctrinal concepts and principles, a formalist approach achieves an equilibrium between development and stability.

### *E. Dealing with Value Pluralism*

Another reason for formalism in adjudication is given by foundational value pluralism. Whatever one might say about the normative foundations of contract law, and even if pluralism is not the correct account of such foundations, as a matter of descriptive sociology the fact of theoretical pluralism—of people holding diverse, conflicting, and potentially incommensurable values—in contract theory is.

Despite these conflicting values, judges must decide disputes. One path towards those decisions could be to try to achieve the best possible judgment by combining and weighing competing principles, trying to strike the right balance. But this might lead to *ad hoc* decisions and inconsistency. One reasonable way to avoid *ad hoc* decisions and inconsistency, even if foundations are plural or at least contested, is to adopt a formalistic approach to adjudication that refuses to take into consideration such foundations. Formalism avoids these disagreements by refusing to adjudicate them in order to decide contractual disputes, resorting to formal rules rather than to foundational principles.<sup>271</sup>

However, one could acknowledge pluralism and claim, nevertheless, that adjudication should not ignore underlying values. For instance, Aditi Bagchi has recently defended a view of contract as *imperfect procedural justice*, according to which judges should constantly refer to the normative principles underlying contract law.<sup>272</sup> Bagchi's claim is that the justification of contract law should inform

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<sup>269</sup> Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEG. STUD. 165, 185 (1982).

<sup>270</sup> See generally Bernstein, *Article 2's Incorporation Strategy*, *supra* note 27 (raising concerns about the Uniform Commercial Code's attempt to increase flexibility through the incorporation of business practices and standards). For a more general analysis, see Lisa Bernstein, *Merchant Law in a Modern Economy*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 238 (Gregory Klass et al. eds., 2014); Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157 (2004–2005).

<sup>271</sup> Again, there is some analogy here with judicial minimalism. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 212, at 5, 11.

<sup>272</sup> Aditi Bagchi, *Contract as Procedural Justice*, 7 JURIS. 147, 491 (2016).

adjudication,<sup>273</sup> because contracting is an imperfect means to achieve normative ends, a mechanism that normally reaches those ends but may nevertheless fail to do so. Bagchi argues that pluralism and this view of imperfect procedural justice go easily together, because the odds that a specific set of rules will consistently serve several distinct goals are low.<sup>274</sup>

For Bagchi, because contractual exchange is a useful yet imperfect mechanism for achieving valuable social goals,<sup>275</sup> contract law should be understood and interpreted in terms of those ends. Judges should use evaluative considerations in the very course of applying the rules of contract law.<sup>276</sup> For her, this is in some sense inevitable, since legal doctrines and rules do not apply themselves, and are indeterminate regarding case outcomes.<sup>277</sup> Values do not simply justify contract law. They should be invoked and pursued in its everyday operation.<sup>278</sup>

One possibility Bagchi doesn't consider is that it might be the case that respect for the values justifying contract law precisely requires not trying to achieve those values when adjudicating disputes. For instance, if one thinks that personal autonomy and efficiency are values underlying contract law, a view which is at least plausible, we might have good reasons for judges not to read too much of those normative commitments into authoritative legal texts. If efficiency and autonomy have anything to do with allowing parties to satisfy their preferences, then a theory of adjudication that prevents judges from trying to actively achieve efficiency and autonomy seems at least compelling.<sup>279</sup> Respect for autonomy and efficiency might require a certain deference for parties' own judgments.

Moreover, the claim that legal materials are indeterminate seems to be an exaggeration. Indeed, this is untrue at least for judges working in present-day jurisdictions, given the fact that most of the legal texts for contract law are part of a larger and settled systematic web of doctrines and legal principles. If one understands legal norms as including this systemic web—as one should—then the indeterminacy claim seems much less attractive. Moreover, we might devise mechanisms, such as internal mid-level principles, that allow us to deal with indeterminacy when we encounter it, without resorting to foundational values. This, again, might combine the benefits of serious rules with the normative weight of foundational values, without falling into unpredictability.

At a deeper level, whatever one can say about the foundations of contract law, there is today simply no consensus about them. Seeing contract as an *imperfect procedural* mechanism might make sense in a world where we agreed on contract's foundations. However, in our world, in which we lack such a consensus, things might work better, to use Rawls's framework, if we see contract as a case of pure

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<sup>273</sup> *Id.* at 4.

<sup>274</sup> *Id.* at 9.

<sup>275</sup> *Id.* at 29.

<sup>276</sup> *Id.* at 29–30.

<sup>277</sup> *Id.* at 33.

<sup>278</sup> *Id.*

<sup>279</sup> *See infra* Part VII.F.

procedural justice, that is, a case where “there is no independent criterion for the right result,”<sup>280</sup> not because we think there is no right result, but because, given the fact of theoretical disagreement, the right result never appears *in propria persona*, but always “in the form of somebody’s controversial belief.”<sup>281</sup>

Against this backdrop, formalism allows for *incompletely theorized agreements* between people that differ starkly on fundamental values.<sup>282</sup> This is extremely relevant, because a theory of adjudication must be susceptible of application by a diversity of courts. From this perspective, theories of adjudication solve coordination problems between adjudicators. As a coordinating solution, formalism avoids the pitfalls of a “theoretically optimizing but likely self-defeating search for first-best solutions by multiple decisionmakers with different goals and different perspectives.”<sup>283</sup>

#### *F. The Rule of Contract Law and Its Instrumentality: Autonomy and Efficiency*

A long tradition sees the rule of law as an instrumental virtue of law, conformity to which is morally required because it is necessary to allow law to perform its functions.<sup>284</sup> In this part, I will analyze formalism’s instrumental value in terms of efficiency and personal autonomy, two values that might plausibly underlie contract law. Regarding these values, formalism presents at least one significant advantage over other views: it allows parties to set the terms of their interaction, to know where they stand, and to avoid being subject to the wide range of possible decisions that a less constrained judge might take.<sup>285</sup>

The connection between stable rules and personal autonomy makes intuitive sense. The connection was aptly drawn in Hayek’s discussion of the rule of law, according to which obedience to general, abstract and prospective rules is not subjection to someone else’s will.<sup>286</sup> Hayek, in my view, was mistaken when he assumed that the resulting freedom obtained simply as a consequence of the structure of legal rules. Instead, freedom obtains as a consequence of the adjudicating institutions’ attitude towards those norms. Formalism provides a way in which such an attitude can be fostered. But Hayek’s insight about the connection between legal formality and personal freedom is fundamental. Just as important is Hayek’s view

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<sup>280</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 75 (1971).

<sup>281</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 111 (1999).

<sup>282</sup> Cass R. Sunstein, *Rules and Rulelessness* 18 (Coase-Sandor Institute for Law & Economics Working Paper No. 27, 1994) [hereinafter Sunstein, *Rules and Rulelessness*] (defining incompletely theorized agreements as “agreements among people who disagree on questions of theory or on fundamental values”).

<sup>283</sup> Schauer, *Statutory Construction*, *supra* note 231, at 232.

<sup>284</sup> RAZ, *supra* note 104, at 226; *see also* FULLER, *supra* note 253, at 153–57.

<sup>285</sup> In this aspect, the argument for formalism echoes Judge Posner’s analysis of the parol evidence rule in *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1373 (7th Cir. 1990).

<sup>286</sup> F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1978).

of contract as one of the legal instruments “that the law supplies to the individual to shape his own position.”<sup>287</sup> This observation remains true only if the individual’s power to shape his own position is not affected by *ex post* adjustments to the applicable legal rules governing such power. If that is the case, then contract law can effectively work towards securing personal autonomy by establishing a general framework under which individuals are free to pursue their own projects and desires.<sup>288</sup> Formal contract law provides stability and assurance to interpersonal relationships, and this allows individuals to “choose styles and forms of life, to fix long-term goals and effectively direct one’s life towards them.”<sup>289</sup>

The contribution of formalism to markets and economic efficiency is also easy to see. The case, again, is made by Hayek. As he argues, allowing individuals to rely on stable legal frameworks within which they may plan their activities also enables them “to make the fullest use” of their knowledge.<sup>290</sup> Under a formalist approach, the rules of contract law can thus work as what Sunstein calls *privately adaptable rules*, which allocate initial entitlements but maximize private flexibility and adaptation in achieving ultimate outcomes, minimizing information costs for governments.<sup>291</sup> Again, we must recall that, whatever goal contract law achieves, it does so through the contractual activities of individuals.

From the perspective of efficiency, moreover, contract law should help parties maximize their joint gains.<sup>292</sup> In recent economic contract theory, Schwartz and Scott have convincingly argued that there are good efficiency reasons, at least at the level of contracts between sophisticated parties, for a generally formalistic approach, combining interpretive approaches such as plain meaning, a hard parol evidence rule, and the strict enforcement of merger clauses,<sup>293</sup> along with a narrow evidentiary basis.<sup>294</sup> This is what sophisticated parties, focused on maximizing their joint gains, would prefer.

Although there is not nearly enough empirical evidence to conclusively confirm Schwartz’s and Scott’s theory, there is *some* empirical evidence available. Lisa Bernstein has shown in her studies, for instance, that commercial parties in trust-based settings, such as the cotton industry and the New York diamond market, prefer formalistic adjudication.<sup>295</sup> At a wider level, various empirical studies have shown

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<sup>287</sup> *Id.* at 154.

<sup>288</sup> F.A. HAYEK, *THE ROAD TO SERFDOM* 76 (2d prtng. 2001).

<sup>289</sup> RAZ, *supra* note 104, at 220.

<sup>290</sup> HAYEK, *supra* note 286, at 156–57; *see also* F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945) (arguing that the market as a social institutions makes better use of a society’s dispersed existing knowledge than a central authoritative structure).

<sup>291</sup> *See* Sunstein, *Rules and Rulelessness*, *supra* note 282, at 59.

<sup>292</sup> Schwartz & Scott, *Contract Theory*, *supra* note 27, at 544.

<sup>293</sup> *Id.* at 547.

<sup>294</sup> *Id.* at 569.

<sup>295</sup> Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. LEG. STUD.* 115, 115–117 (1992); Lisa Bernstein, *Private*

that parties to international transactions prefer English, New York, and Swiss law, three relatively formalistic systems of contract law.<sup>296</sup> Within the United States, empirical evidence shows that New York law is the dominant legal framework chosen by public companies, and that New York is also the preferred forum.<sup>297</sup> In contrast, few parties choose California, an economically significant State with a contextualist and less formalistic approach to contract adjudication.<sup>298</sup> Moreover, as any practicing transactional lawyer can attest, commercial parties often ask courts, in their contracts, to ignore prior negotiations, oral discussions, and course of conduct, and to limit their analysis to the ‘four corners’ of the contract.<sup>299</sup> Assuming that parties want to maximize their joint gains, and considering that these clauses are negotiated *ex ante*, such clauses “likely represent efforts by the contracting parties to maximize the joint value of the undertaking.”<sup>300</sup> This means: formalistic devices increase the joint value of contractual transactions and are thus more efficient.

### VIII. CONCLUSION

There is a strong general case to make for what I have called *formalism* as the right approach to the adjudication of contractual disputes. The claim is strongest when formalism is compared to pragmatism. In this part, however, I make some closing suggestions as to why formalism might be generally preferable when compared to other possible theories as well (such as interpretivism and conventionalism), admitting, again, that these arguments are general, and would need to be supplemented with further empirical evidence.

In hard cases, conventionalism’s response, as we have seen, is discretion. Admittedly, Raz and others have argued that discretion is still constrained by law.<sup>301</sup> But they never explain just how those constraints work. Instead, formalism argues for internal, doctrinal, mid-level principles. Adjudicating these cases through internal principles rather than resorting to discretion is normatively preferable for two reasons. The first is the problem of human fallibility and the risks of mistakes analyzed above, especially since we are dealing with power-conferring social institutions (whose use by individuals cannot be controlled nor predicted). The second reason is given by the protection of the practice of contracting and the expectations fostered by it; any deviation from the rules, even when their application

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*Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724–25 (2001).

<sup>296</sup> MORGAN, *supra* note 27, at 182.

<sup>297</sup> Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073 (2009).

<sup>298</sup> Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1477–78 (2010).

<sup>299</sup> Schwartz & Scott, *Contract Interpretation Redux*, *supra* note 27, at 954–56.

<sup>300</sup> Miller, *supra* note 298, at 1477.

<sup>301</sup> See Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823, 847–48 (1972) (arguing that judicial discretion is different from arbitrary judgment).

could lead to sub-optimal results, can affect the stability of expectations and the practice of contracting. Again, this does not mean that judges should deny or ignore the existence of hard cases. But it does counsel for a more formalistic approach towards these situations than engaging in all-things-considered discretionary decisions, or in the indeterminately constrained discretion proposed by conventionalism.

What about interpretivism's Herculean principles? It might seem that, unlike pragmatism and conventionalism, interpretivism provides a good mechanism for dealing with hard cases. However, the empirical demandingness of all-things-considered calculations and pragmatic consequentialist considerations finds a parallel in the normative demandingness of the task that Dworkin entrusts to adjudicators.<sup>302</sup> Hercules is Hercules precisely because he is unlike any judge we know of. Judges are constrained by time and resources, and might not be able to engage with large issues of political morality. Moreover, both personal autonomy and social equality might be hurt by Herculean judges, willing to engage into deeply contested and uncertain issues of political morality in order to solve contractual disputes. In these circumstances, the best theory of adjudication might be one that recommends modesty and decisions based on less abstract principles operating at a lower level of generality.<sup>303</sup>

In his early critique of Hartian positivism, Dworkin expressed his dissatisfaction with what he saw as Hart's all too quick embrace of discretion in cases that went beyond the core of pre-existing legal rules, which also led to the admission that judges decide cases by making retroactive law.<sup>304</sup> However, the problem with Dworkinian principles is that they are unable to avoid the problem of *ex post facto* lawmaking. Under formalism, when judges recognize new rights, remedies, or defenses by applying a principle, they do so by connecting their innovation to already existing authoritative legal materials that are part of the relevant legal tradition.<sup>305</sup> They attempt to show that, in an important sense, they are part of those materials, rightly understood.<sup>306</sup> While Dworkin incorporates attempts to achieve something similar through the desideratum that principles should fit the legal materials,<sup>307</sup> his principles are still broad principles of political morality: "principles of justice, fairness, and procedural due process."<sup>308</sup> Interpretivism asks

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<sup>302</sup> Tomasz Gizbert-Studnicki, *The Normativity of Rules of Interpretation*, in PROBLEMS OF NORMATIVITY, RULES AND RULE-FOLLOWING 243, 250 (Michał Araszkiewicz et al. eds., 2015).

<sup>303</sup> See Ronald Dworkin, *Earl Warren Is Dead*, THE NEW REPUBLIC (May 12, 1996) <https://newrepublic.com/article/62143/earl-warren-dead> [<https://perma.cc/5EMT-PRXE>].

<sup>304</sup> DWORKIN, *supra* note 42, at 30–39.

<sup>305</sup> See Edgar Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143, 1163 (1977).

<sup>306</sup> See Rolf Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151, 154 (1971).

<sup>307</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 65–68.

<sup>308</sup> *Id.* at 225.

the judge to decide hard cases by testing whether her interpretation could form part of a coherent political theory,<sup>309</sup> and shows the legal record as the morally best it can be.<sup>310</sup> In contrast, formalism's legal principles are mid-level. They operate at a lower level of abstraction than principles of substantive political morality. They are doctrinal, not political. They are elaborations of contract doctrine, conceptual devices built and developed by the legal tradition—and, particularly, by prior scholars, judges, and jurists. Turning Dworkin's metaphor upside down, one could thus say: formalism advocates for a catholic, rather than a protestant, jurisprudence. With this, I mean that while Dworkinian principles are substantive principles of political morality that "each citizen has a responsibility to identify,"<sup>311</sup> formalist legal principles are doctrinal, technical, and thus are not directly identified by private citizens, but rather reach those citizens as mediated by an authoritative legal tradition. As such, they avoid, in a way in which Dworkinian principles do not, retroactive law-making.

Formalism does not suggest that judges should completely ignore the issue of the political and moral foundations of contract law. After all, the whole basis of the theory of adjudication is that it best achieves contract law's foundational goals. But they should address cases modestly, either by applying the limitedly enriched semantic content of legal texts and resorting to their settled doctrinal construction, or, when this is not possible, by applying mid-level legal doctrinal principles.

Finally, since formalism avoids grand changes and reorientations of prior jurisprudence, it also decreases the magnitude and costs of mistakes when they happen.<sup>312</sup> In this, formalism and its insistence on mid-level principles are more consistent with rule of law values like predictability than are abstract Dworkinian principles.<sup>313</sup> Mid-level principles are less unpredictable than large-scale foundational ones, and in their consistent and disciplined application they decrease legal indeterminacy.<sup>314</sup> Mid-level principles are more consistent, in the end, with all the values traditionally associated with the rule of law, than Dworkinian principles of substantive political morality. While we can and do disagree about whether freedom or social equality are more important, or about whether a particular rule serves equality or hinders it, it is harder to disagree about the principle of good faith. Thus, resolving disputes on the basis of principles like the latter achieves greater predictability than resolving them on the basis of grand and abstract political values.

For these reasons, there is a strong general case in favor of a formalist approach to contract law adjudication. While a final assessment of the comparative advantages of different theories of adjudication turns on empirical facts, I have argued that, in the absence of such evidence, we should resist the call for more open-ended, particularistic, or politically ambitious theories. Formalism, with its decisional

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<sup>309</sup> *See id.* at 245.

<sup>310</sup> *See id.* at 248.

<sup>311</sup> *Id.* at 190.

<sup>312</sup> Here, formalism resembles judicial minimalism, as described by SUNSTEIN, ONE CASE AT A TIME, *supra* note 212, at 4.

<sup>313</sup> Henley, *supra* note 143, at 121.

<sup>314</sup> *See id.* at 126.



restriction, incremental development, and rule-bound character, is at least *prima facie* preferable—which means that instrumentalists and non-instrumentalists might end up agreeing, to some extent, at the level of adjudication.