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Unpredictability in Contract Law

Nicholas Walter*

ABSTRACT

For as long as contract law has been a discipline, it has been talked of as a science: a rigid, knowable set of rules that only need to be understood and applied correctly. Moreover, making contracts is exclusively in the control of the parties to them. Therefore, if parties want to guarantee a particular result, all they have to do is study the rules of contracting and draft a contract that does what they want. This is reflected in various phrases that courts frequently use: courts tell us that they "do not make contracts for the parties," and are simply applying "generally applicable principles of contract law."

This Article argues that this view of contract law is false. Courts *do* make contracts for the parties. Therefore, we are not in perfect control of our contracts. Moreover, courts make contracts in different ways. The phrase "generally applicable principles of contract law" does not accurately reflect the reality of contract law. Not only do courts make contracts, but they lead us to believe that contracts are all subject to the same rules—when they are not.

All this suggests that our contracts are much less predictable than courts imply they are. But there is more. The structure of the court system itself militates against predictability. The discretionary nature of high court judicial review in various jurisdictions, such as California and New York, allows a divergence between how contract law is expounded and how it is actually applied. And jurisdictions with non-discretionary high court review are not any likelier to have a more precise contractual jurisprudence.

This Article argues that we would be better off if it was acknowledged that the contracts we enter into are, to some degree, inherently unpredictable. Doing so would align the rhetoric of contract

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law with its reality and make it more likely that contracting parties actually obtain the results they seek.

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> *Law, considered as a science, consists of certain principles of doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.*[1] – Christopher Columbus Langdell

I. INTRODUCTION

Dean Langdell's words, quoted above, are seductive. Langdell suggested that contract law was a perfectly knowable discipline: it consists of a set of rules, which one merely has to learn. The implications of this are clear. If one knows the rules and how to apply them, and takes care in drafting the contract, the result will be perfectly predictable.

Even now, Langdell's view is extremely influential. Because contract law has a set of fixed, knowable rules, which one only needs to know how to apply, the parties to a contract are the authors of their own fate. The parties may get the rules wrong or may make a mistake in the drafting. In that case, they will not get the result they want. But that is their fault. Contract law is like a computer programming language: learn the rules and use the right inputs, but don't blame the language if your program crashes.

If contract law is the programming language, then courts are the user interface. And courts frequently remind the user that it is the user, not the court, that is in charge. Courts, we are told, "do not make contracts for the parties."[2] Our notions of contractual predictability and certainty require this to be true. If courts could make up contracts, we would have less confidence in our ability to order our affairs—in the integrity of our programming language, so to speak.

But what if this isn't true? What if courts do make contracts? This Article argues that they do. Therefore, contract law is inherently less determinate than we would like to think. And this warrants a change in how we talk about it.

1. CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

2. A phrase that is used so much that it has been termed a "slogan." Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1181 (1983). The phrase has a long history. Back in 1859, the California Supreme Court declared "[c]ourts do not make contracts for men." Bensley v. Atwill, 12 Cal. 231, 239 (1859). And, of course, it is still used today. *See, e.g.*, Daneshgari v. Patriot Towing Servs., LLC, 864 S.E.2d 710, 713 (Ga. Ct. App. 2021); Export Dev. Can. v. E.S.E. Elecs., Case No. CV 16-02967, 2017 WL 3868795, at *9 (C.D. Cal. Sept. 5, 2017). For a general discussion of the use of the phrase, *see infra* Part III.A.

For the most part, courts apply what they term the "objective" theory of contracts. Under this theory, a contract's meaning is determined not by what one or both of the parties to it believe that it means, but by what would be understood "by an objective, reasonable third party."[3] A range of rules is invoked in aid of the court's work; for example, the court will give the contract its plain meaning.[4] But what the court does *not* try to do under the objective approach is divine what the parties thought they actually agreed to—that is, their "subjective" belief about what the contract means. In all this, the court will insist that it is *not* making a contract for the parties. Instead, it is finding the contract that the parties have made.

But in what sense is it true that the court is simply finding, rather than making, a contract? For a start, we usually don't speak in terms of courts *finding* common law, of which contract law is a part; we freely admit that they make it. Contracts should not be any different. More fundamentally, the rules that are used in the objective theory often seem hard to apply; there is a huge number of them, and they confer a great degree of discretion on the court. In fact, the court may even have discretion to decide whether or not a case should be decided under the rubric of contract law altogether. The lawyer trying to apply contract law may feel like the disgruntled philosopher who, after years of study, realizes that he can know nothing at all.[5]

The claim that courts do not make contracts is a legal fiction. Like all legal fictions, it should be interrogated closely to see why it exists and whether we should retain it—or whether it unduly interferes with our understanding and application of the law. This Article argues that courts use this fiction as a way of "apologizing"—to apply the term used by Professor Lon Fuller—for a dramatic result of interpretation. We can also identify various historical changes that have pushed courts to maintain the fiction. These include the decline of the traditional view of contractual interpretation and the greater pressure on courts to avoid resolving disputed matters of interpretation; the rise of party testimony, which increased the chance that a court's ruling would be at odds with the apparent evidence; and the rise of the summary judgment procedure, which forced courts to resolve more contractual interpretation disputes than they would need to otherwise.

3. Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010); *accord, e.g.*, Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 361 N.E.2d 999, 1001 (N.Y. 1977); Brant v. Cal. Dairies, Inc., 48 P.2d 13, 16 (Cal. 1935). This Article draws principally from sources in California, Delaware, and New York, because of the importance of these jurisdictions for contract law and the instructive differences in their court systems. *See infra* Part IV.C.

4. *See, e.g.*, Ellington v. EMI Music, Inc., 21 N.E.3d 1000, 1003 (N.Y. 2014).

5. JOHANN WOLFGANG VON GOETHE, FAUST: PART ONE, l. 364 (1806).

But there is little benefit to retaining the fiction. The effect of the dogma that courts do not make contracts is to reinforce the Langdellian notion that contract law is perfectly knowable and predictable—which is far from true. As humans, we like being able to believe that we can control our surroundings. But a false belief that we are perfectly in control of our contracts serves us ill.

Courts do make contracts. But it does not follow that courts make all kinds of contracts in the same way. Indeed, they almost certainly do not. And so this Article proposes another change in how we, and courts, talk about contract law: we should cease relying on the maxim that there are "generally applicable principles of contract law."[6] The notion that there are generally applicable principles that will apply to a dispute between large corporations in the same way as to a disagreement between two individuals is false. This Article urges that this phrase, too, be excised from the judicial lexicon.

More generally, however, we should change our expectations of contract law. It is impossible for the rules of contract law to be as precise as Langdell desired. There will always be some inherent unpredictability in the rules of contract law, which has nothing to do with the indeterminacy that is inherent in the words that the parties use. As an initial matter, and as has been often remarked upon, the only contract cases that arrive in courtrooms are the difficult ones—which by definition are also the unpredictable ones. But the structure of the court system itself affects how cases are decided. In jurisdictions where a high court has non-discretionary review, the contract doctrine approved by the high court will appear somewhat imprecise and to contain internal conflicts. In other jurisdictions, where the high court has the ability to pick and choose which cases to hear, contract law, as expressed by the

6. For examples of this extremely common phrase, see ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (Easterbrook, J.) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general . . . ."); Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1049 (2d Cir. 1982) ("Interpretation of indenture provisions is a matter of basic contract law."); Santleben v. Cont'l Airlines, Inc., 178 F. Supp. 2d 752, 754 (S.D. Tex. 2001) ("The general principles of contract interpretation govern travel contracts."); Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply."); La Jolla Beach & Tennis Club, Inc. v. Indus. Indemnity Co., 884 P.2d 1048, 1053 (Cal. 1995) ("While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (quoting Bank of the W. v. Superior Ct., 833 P.2d 545, 551–52 (Ca. 1992))); Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 170 (N.Y. 2002) ("[L]ong-settled common-law contract rules still govern the interpretation of agreements between artists and their record producers."). The U.C.C. itself provides that it shall be "supplement[ed]" by "principles of law," including contract law principles. U.C.C. § 1-103 (AM. L. INST. & UNIF. L. COMM'N 1977).

high court, has the potential to look neater and cleaner—but cases may still be decided contrary to parties' expectations, precisely because a lower court's rulings may escape top-level appellate review. Where each jurisdiction falls depends on the court system in that state and the rules governing precedent. Either way, total predictability in contract rules is illusory. This is all the more reason for courts to be accurate about how they are actually deciding cases: parties should be aware that the rules of contract law are a moving target.

Part II of this Article argues that courts do, in fact, make contracts. Part III sets out why the claim that they do not is a legal fiction and should be treated as such. Part IV proposes changes in how we, and courts, approach contract law: it argues that we should abandon confusing mantras such as "courts do not make contracts" and "generally applicable principles of contract law." Part IV further argues that we should accept limits to the predictability of contract law based on the reality of how high courts review and decide cases. Part V concludes.

II. "COURTS DO NOT MAKE CONTRACTS": REASONS TO DOUBT

I begin by arguing that courts do, in fact, make contracts. I then argue that the claim that they do not is a legal fiction.

A. *Initial Skepticism*

A healthy dose of skepticism should incline us against the view that courts do not make contracts.

First, even under a quintessentially common-law notion of contracts—per which a contract is not an agreement that needs to be kept, but where the promisor has the option either to perform or pay damages—a contract is akin to law for the parties.[7] But for the best part of 100 years, since *Erie Railroad v. Tompkins* in 1937, lawyers have been unlikely to claim that courts simply *find* law and more likely to claim that they *make* it.[8] This is a realist, positive view of public law. There does not seem any reason to be less realist when it comes to private law.

This is particularly true when we consider how courts are to apply the objective approach to contractual construction. There is a huge range of rules for courts to choose from in deciding the dispute, and this huge range makes the outcome of many cases uncertain. Should rule *R* trump rule *S*? When courts have the discretion to apply certain rules rather than

7. *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 256 (1881). In civil law jurisdictions, a contract is explicitly a "law for the parties." *E.g.*, LA. CIV. CODE ANN. art. 1983 (2022).

8. *See generally* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019) (discussing the post-*Erie* history).

others, we should be even less confident that courts are finding contracts, rather than making them.

A second reason to doubt that courts do not make contracts lies in the nature of contracts and the objective theory itself. There is no consensus on what exactly society seeks to achieve through contract law. But one basic position is that through contract law, society allows us to make binding promises to each other.[9] This allows us to order our affairs: we can plan to buy that car or take that job. It also allows us to assume moral obligations towards each other, which is important to our autonomy rights.[10] Predictable contract law is also essential to economic efficiency: if we could not predict how our contracts will be interpreted, we would not enter into them and would pass up wealth-creating opportunities.[11]

There is thus an economic and moral component to contract law. And, as to both of these components, what each party believes it has promised and has been promised—its subjective understanding of the contract, rather than the view of the third-party outsider espoused by the objective approach—is important. From an economic perspective, a party cares most that the court enforces what she has actually bargained for, not that the court enforces what a third-party would have believed was agreed.[12] And vindicating our autonomy rights depends principally on our own subjective view of what we have promised: we have the most

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9. *See generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATIONS (1981). For a more nuanced self-appraisal of *Contract as Promise*, see Charles Fried, *The Ambitions of* Contract as Promise, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17 (Gregory Klass et al. eds., 2014). Seana Shiffrin has argued that contract law may not be moral enough. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

10. *See, e.g.*, Dori Kimel, *Neutrality, Autonomy and Freedom of Contract*, 21 OX. J. LEGAL STUD. 473 (2001).

11. A utilitarian posits that society enforces contracts because it is motivated by efficiency concerns—the desire to maximize social wealth. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 115–17 (8th ed. 2011); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1264 (1980) (assuming that the purpose of contract law is to "yield[] the maximum net social benefits from promise making"); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 550–56 (2003). These are, of course, not the only theories of contract law. Another theory is that society's decision to allow parties to enter into contracts is a means of social control, driven by the political preferences of the time. *See generally, e.g.*, Robert Lee Hale, *Coercion and Redistribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), *cited in* Fried, *supra* note 9, at 19. A more benign theory posits that society allows parties to enter into contracts as a means to allow parties to establish communities—in other words, to establish society itself. *See generally, e.g.*, Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

12. She may also care that the court enforces what a third-party believes that the parties had agreed: this affects her future reliance interests. But for the present, she cares most that the court enforces what she thinks she had agreed.

autonomy when the court enforces what we actually promised, not what a third party thinks we promised.[13] This is the natural appeal behind the subjective theory of contracts, whereby the court attempts to divine (perhaps impossibly) what the parties actually intended and where they had a "meeting of the minds."[14]

But the objective theory does not seek to discover what the parties have actually promised; instead, it looks at what a reasonable observer would believe they had promised. In doing so, the objective theory misses one of our strong intuitions behind the purpose of contract law. Indeed, doctrines of mistake in contract law provide that a court may find that two parties have entered into a contract, but may then "reform" the contract to express the parties' "real agreement."[15] These doctrines are of limited application and require strong evidentiary showings.[16] But they also reflect our understanding that the objective theory cannot fully account for everything that we would want it to. Interpreting a contract from the vantage point of a third party, *without* adopting the view of one or both of the parties who were involved in making the agreement, creates cognitive dissonance.

Nor is the objective theory necessarily easy to use at the drafting stage. Parties can certainly bear in mind that their contract, if it leads to litigation, will be interpreted according to the objective theory. But it is also quite common for parties to reach a meeting of the minds on a particular point and then agree to document it with language that, upon review by a court later, leads to a quite different conclusion. Parties may have various reasons to do this. They may have agreed to a particular phrasing for business reasons, expecting that no dispute will ever arise.[17] Or they may have been unsure about how a court would interpret it, but were willing to roll the dice. Or they may have thought it was clear enough—or, may just have been sloppy. But however a dispute arises,

13. Again, enforcing what a third party thinks we promised may vindicate our autonomy rights. But, we have the most autonomy when the court enforces what we actually promised.

14. *See, e.g.*, Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 429 (2000) (noting that the subjective theory of contracts is "appealing").

15. *See, e.g.*, Cerberus Int'l Ltd. v. Apollo Mgmt. LP, 794 A.2d 1141, 1151 (Del. 2002).

16. *See id.*; *see also, e.g.*, Lakshmi Grocery & Gas, Inc. v. GRJH, Inc., 30 N.Y.S.3d 743, 745 (App. Div. 2016) (showing of mutual mistake requires clear and convincing evidence).

17. For example, one party may have a pre-approved form and may seek to use that form to avoid getting approval again. The language in the form may be interpreted consistently with the parties' shared intent and inconsistently with that intent. Even if the inconsistent interpretation is the one that would more likely be adopted by a court, the parties may quite rationally choose to use the form to avoid the burden of changing it.

the court will again be forced to disregard certain evidence of the parties' intent in applying the objective theory, which is a difficult task.

The difficulty of the court's task should lead us to think that, as in any human endeavor, the court may fail to follow its own self-imposed rules—and thus may impose its own view of the contract on the parties. The next two sections explore in more detail how this may happen.

B. *Grants of Discretion*

There are numerous ways in which the court can influence the ultimate result in a dispute, short of finding facts. This latter qualifier is important: a court has the most power in a dispute when it is *both* the factfinder *and* the lawgiver, and the judge's discretion in factfinding is very considerable—just like the jury's. (So considerable that the judge and the jury are free to arrive at diametrically opposite results on the same issue.[18]) But in general, a court will only sit as the factfinder in a case where there is a disputed issue of fact where the parties have consented to waive a jury trial,[19] or where the dispute can be heard by a court with equitable jurisdiction.[20]

Nevertheless, a court has enormous influence over what facts are found even when it is not the factfinder. Much of this influence lies in the summary judgment procedure, which has been described as a tool to "transfer decision making power away from the jury."[21] The court can choose which rules to apply, and it can choose how to apply them. This exercise of discretion may be aptly termed contract-making.

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18. *See, e.g.*, Stonewall Ins. Co. v. Asbestos Claims Mgm't Corp., 73 F.3d 1178, 1197 (2d Cir. 1995) (upholding contradictory bench trial and jury trial verdicts on the same issue).

19. In federal court, the right to a jury trial may be waived "knowingly and intentionally." Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977). California bars pre-dispute waivers of jury trials altogether. *See, e.g.*, Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 213 Cal. Rptr. 3d 410, 418 (Ct. App. 2017); *see also* Handoush v. Lease Fin. Grp., LLC, 254 Cal. Rptr. 3d 461 (Ct. App. 2019) (refusing to uphold forum selection clause that chose forum where jury trial waiver would be enforced), *review granted*, 457 P.3d 502 (Cal. 2020), *review dismissed*, 471 P.3d 328 (Cal. 2020).

20. The most prominent example of this is the Delaware Court of Chancery. The Court of Chancery is an equitable court, but its jurisdiction includes the construction of certain types of contract and corporate instruments. DEL. CODE ANN. tit. 8, § 111(a); *see infra* Part II.C.4. In addition, the Court of Chancery may also resolve contractual disputes if it determines, at the outset of the dispute, that equitable relief may be warranted. *See, e.g.*, Prestancia Mgmt. Grp., Inc. v. Va. Heritage Found., II LLC, No. Civ.A. 1032-S, 2005 WL 1364616, at *3 (Del. Ch. May 27, 2005).

21. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 531 (2009).

1. Choosing the Rules

The objective theory has built up around it a huge set of rules that determine how a court is to determine what a reasonable observer would believe. For example:

- The court will enforce an unambiguous document as written.
- The court will enforce a contract according to its plain terms. A court will not assume that words have special meanings.
- Notwithstanding the prior rule, terms of art will be given technical meanings, not necessarily their plain meaning.
- Notwithstanding the prior rules, a court will not simply look at the plain words on the page, but must look at the context in which the agreement was made.
- The meaning of the contract must be fair and reasonable.
- A court will give effect to all the provisions of the contract.
- Despite the need to look at context, a court will place greater weight on specific language than general language.
- A term will retain the meaning that it would have had at the time of contracting, unless the evidence suggests that its meaning should be deemed to change.[22]

And so on and so forth. One treatise notes that "scores" of these rules can be found.[23] Of course, with scores of rules available, the court has much discretion in how it resolves a case.[24] That suspicion is bolstered by the fact that there seem to be so many principles a lawyer can draw on that when she consciously attempts to "construe" a contract—as opposed to simply reading the words and understanding it without engaging in a deliberate legal exercise—a colorable argument can often be made on both sides of an issue.[25] The court has considerable discretion in how it resolves such disputes.

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22. For these rules, see GLEN BANKS, NEW YORK CONTRACT LAW §§ 9:2, 9:5, 9:7, 9:8, 9:9, 10.7, 10.8 & 10.18 (2015).

23. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, § 3.13, at 156 (5th ed. 2003).

24. It has been noted that this problem also applies to statutory construction. *See, e.g.*, Karl N. Llewellyn, *Remarks of the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (statutory canons and counter-canons). For a more recent discussion of this problem, see Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), https://bit.ly/3kwrfp0 (noting the "elasticity" and "ambiguity" of a method of statutory construction that relies on 57 different canons). In a recent oral argument, Justice Elena Kagan even suggested doing away with statutory canons of construction altogether. *See* Transcript of Oral Argument at 59, Ysleta del Sur Pueblo v. Texas, 142 S.Ct 1929 (2022) (No. 20-493).

25. A nice recent example of this is the New York Court of Appeal's decision in *CNH Diversified Opportunities Master Account, L.P.* v. *Cleveland Unlimited, Inc.*, 160 N.E.3d 667 (N.Y. 2020), where both the four judges in the majority and the three judges

2. Ambiguity

In many cases, the most important single source of judicial discretion is the ability of a court to decide that a contract is—or is not—ambiguous. For a long time, courts have held that whether an agreement is ambiguous or not is a question of law, not fact, and it is only after a question of fact has been presented that the matter is put to a jury (and potentially out of a judge's hands).[26]

This gives a court considerable leeway. Courts have the power to dismiss a claim, or grant a motion for judgment on the pleadings, for breach of contract by simply holding that the language is unambiguous as a matter of law.[27] The evidence that a party may introduce to oppose dismissal, or in favor of a motion for judgment on the pleadings, varies depending on the jurisdiction—and may leave the court with considerable discretion. In some jurisdictions, the court may be limited to considering the "four corners" of the document; in others, a party may be permitted to introduce parol evidence to demonstrate ambiguity, although the judge may refuse to consider evidence that is not "objective."[28] Even where the judge is limited to the four corners of the

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in the vigorous dissent relied on "principles of contract interpretation." *Id.* at 672; *id.* at 679 (Fahey, J., dissenting) (calling the principles "basic" to boot).

For a persuasive demonstration of some of the weakness of classical doctrines of contract interpretation, see Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997). Zamir notes that courts interpreting contracts follow a hierarchy of rules, in which the starting point is the plain language of the parties' agreement, and the ending point may be more general principles such as good faith and the accomplishment of the parties' reasonable expectations. Zamir contrasted this classical hierarchy with the approach promoted by Karl Llewellyn, under which courts would seek to determine the "bargain in fact" by looking at the terms of the contract, the parties' course of dealing with each other, the commercial context of the contract, and general standards in the trade. On Llewellyn's account, there is "no necessary hierarchy among these sources." *Id.* at 1719. Zamir by contrast flipped the classical hierarchy and argued that it was more descriptively accurate to say that courts began with general principles of fairness and ended with the express terms of the agreement. *See id.* at 1751–53. This Article takes a different approach and reaches different conclusions from Zamir's, but shares its skepticism of the helpfulness of standard contract law principles.

26. *See, e.g.*, Kenyon v. Knights Templar & Masonic Mut. Aid Ass'n, 25 N.E. 299, 300 (N.Y. 1890) ("It may preliminarily be observed that, as a general rule, the construction of a written instrument is a question of law for the court to determine . . . ."); *see also, e.g.*, Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

27. *See, e.g.*, Allied Capital Corp. v. GC-Sun Hldgs., L.P., 910 A.2d 1020, 1030 (Del. Ch. 2006).

28. *Compare, e.g.*, Bailey v. Fish & Neave, 868 N.E.2d 956, 959 (N.Y. 2007) (holding that extrinsic evidence may not be introduced to show ambiguity), *with* Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644–45 (Cal. 1968) (opposite). *See also* Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 174 (N.Y. 2002) (comparing the New York and California approaches); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1599 (2005) (discussing *Pacific Gas and Electric*).

document, however, she must still construe the document as a whole.[29] The document may total hundreds, if not thousands, of pages—and is thus potentially a fertile source of evidence that the court may use to help interpret the words at issue, or that one party may use to proffer evidence of ambiguity.[30] If the court declines to dismiss a claim on the ground that the language is unambiguous, one or both parties may move for summary judgment.[31] In litigation, of course, *both* parties routinely move for summary judgment on the grounds that the language of the contract is unambiguous and in their favor, and that the other side's interpretation is not merely wrong but is *unreasonably* wrong, such that summary judgment should be granted. Courts are generally skeptical that such disagreements are evidence that the text is, in fact, ambiguous; rather, courts are fully aware that the summary judgment practice is "the focal point of litigation" and that the parties' claims that the text is unambiguous in their favor are litigating positions.[32] The result is that judges have "broad discretion" to decide what a reasonable interpretation of a contract is.[33]

3. Mistake and Gap-Filling

The doctrine of mistake in contract law, which I identified earlier as a way for courts to escape undesirable results that would be produced by the objective theory of interpretation, is also a source of judicial discretion. A party seeking to avoid a contract may allege that there was a mutual mistake between the parties on the substance of the contract, or that it has been tricked into agreeing to a contract that is different from

29. *See, e.g.*, *Kass*, 696 N.E.2d at 180–81; GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P., 36 A.3d 776, 779 (Del. 2012).

30. *See, e.g.*, Posner, *supra* note 28, at 1606 (citing S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 50 F.3d 476 (7th Cir. 1995) (involving a contract that was over 2,000 pages long)).

31. Federal Rule of Civil Procedure 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). For state court equivalents, see, for example, DEL. R. SUPER. CT. 56(c); N.Y. CPLR 3212(b); CAL. CODE CIV. P. 437(c).

32. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 240 (2011); *see, e.g.*, Gibraltar Priv. Bank & Tr. Co. v. Bos. Priv. Fin. Holdings, C.A. No. 6276, 2011 WL 6000792, at *2 (Del. Ch. Nov. 30, 2011) ("[B]oth [parties] argue that [the contract] is unambiguous and that their respective interpretation is the only reasonable interpretation."); United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810, 830 (Del. Ch. 2007) ("Ambiguity does not exist simply because the parties disagree about what the contract means."); *see also* Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 861 (2004).

33. Wood, *supra* note 32, at 240.

that which it intended.[34] Establishing mistake requires carrying a heavy burden.[35] Nevertheless, the court has discretion in determining whether the evidence is strong enough to put the mistake and reformation claims to a jury.

Another source of judicial discretion is whether the court should fill a gap—perceived or otherwise—in a contract. It has long been observed that every contract is incomplete: the parties cannot bargain to cover every contingency that arises.[36] Courts are thus frequently faced with two questions: first, whether there is a gap that must be filled in a contract; and second, how to fill it. Both questions leave scope for discretion. The first requires a court to decide whether a contract explicitly addresses a situation—in other words, whether the contract is incomplete.[37] In some situations, the question is easy: for instance, a purchase contract may omit a price term.[38] In other cases, the question is more difficult.[39] And the court's view of what constitutes a gap that can be filled may change over time, as discussed below.[40]

If the court decides that there is a gap, the court must decide how to fill it. In general, when courts fill gaps, the rule they adopt is to imply what the court believes the parties would have wanted.[41] But on other occasions, courts impose terms that they did *not* believe that the parties

34. The seminal case of mutual mistake is *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), a split decision of the Michigan Supreme Court. In *Sherwood*, plaintiff bought a cow for $80, on the understanding it was barren. It turned out that the cow was pregnant, making it worth ten times as much. For unilateral mistake, see, for example, Greater N.Y. Mut. Ins. Co. v. U.S. Underwriters Ins. Co., 827 N.Y.S.2d 147, 149 (App. Div. 2007).

35. *See, e.g.*, Chimart Assocs. v. Paul, 489 N.E.2d 231 (N.Y. 1986) (party may defeat attempt to show mutual mistake by demonstrating that it knew what it was bargaining about); *Greater N.Y. Mut. Ins. Co.*, 827 N.Y.S.2d at 149 (showing of unilateral mistake requires alleging fraud with particularity); *see also* cases cited at notes 15–16 (discussing evidentiary standard).

36. *See, e.g.*, Posner, *supra* note 28, at 1582–83.

37. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 120 (1989).

38. *See id.* at 96–97.

39. For example, a contract may apparently leave certain terms of a share repurchase undefined, and a court may be faced with the question of whether or not the contract contains the entire agreement of the parties or whether there is scope for discretion by seller or buyer. *See, e.g.*, Jordan v. Duff & Phelps, 815 F.2d 429 (7th Cir. 1987); Blaustein v. Lord Balt. Cap. Corp., 84 A.3d 954 (Del. 2014).

40. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976) (noting difference between Williston's and UCC's approaches as to whether a contract is void for indefiniteness).

41. *See, e.g.*, Ayres & Gertner, *supra* note 37, at 89–90. Ayres and Gertner point out that it is possible to view every contract as a simply a deviation from default rules, the most important of which is that in the absence of any contractual relationship between the parties, there is no contract. Thus, if a contract is silent as to the quantity of goods to be purchased, the default quantity—zero—prevails and there is, in effect, no contract. A court that holds that there is a gap in a contract has held that the parties have failed to contract around whatever the underlying default term is. *See id.* at 120.

wanted: for example, if no quantity term is specified in a purchase contract, the courts will set the quantity to zero, effectively voiding the contract.[42] This is difficult to reconcile with courts' claims that they will not "make the contract for the parties." And how the gap should be filled is invariably a source of contention in litigation. One scholar has argued that because it is often very difficult to determine the parties' expectations in any meaningful sense, "general principles of fairness" should often prevail.[43] Of course, the court's view of fairness is simply that: the court's. And even where courts are not so bold as to claim that they are simply acting equitably in interpreting contracts, there is still scope for discretion in determining how to fill a gap.

4. Good Faith

Every contract is deemed to include an implied covenant of good faith and fair dealing; this is typically defined as a "pledge that neither party shall do anything which would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[44] The term "good faith" is extraordinarily malleable. In one of the leading cases, *Market Street Associates v. Frey*, Judge Posner defined acting in bad faith as "tricking" the other party when exercising contractual rights.[45] What constitutes "tricking" is unclear. Judge Posner suggested that "tak[ing] deliberate advantage of an oversight by your contract partner concerning his rights" might suffice.[46] This would be news to many commercial lawyers, who tend to believe as a descriptive matter that sophisticated contractual counterparties are aware of their rights, and that it is socially useful as a normative matter that such sophisticated contractual counterparties should be deemed to be aware of their rights.[47]

42. *See id.* at 95–97. This is traditionally expressed as quantity being a mandatory term for the contract.

43. *See, e.g.*, E. Allan Farnsworth, *Disputes Over Omissions in Contracts*, 68 COLUM. L. REV. 860, 891 (1968).

44. Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291 (N.Y. 1995); *see also, e.g.*, Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979) ("The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement."). The duty of good faith is very frequently related to the question of gap-filling, noted above: when a contract is silent on a particular topic, one party argues that the implied covenant requires the other to act in a certain way to avoid depriving the first party of the benefits of the contract. For a well-known example of this, see *Kirke La Shelle Co.* v. *Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933); *see also* Daniel Markovits, *Good Faith as Contract's Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272, 276 n.32 (Klass et al. ed., 2014) (criticizing *Kirke La Shelle*).

45. Market St. Assocs. Ltd. P'Ship v. Frey, 941 F.2d 588, 596 (7th Cir. 1991).

46. *Id.* at 594.

47. *Contra id.* For strong holdings that commercial parties are entitled to rely on their counterparties' words and actions, both at the contract formation and execution

In *Frey*, the district court had granted summary judgment to the defendant on the ground that the plaintiff had acted in bad faith, and the Seventh Circuit reversed, holding that the district court had "jumped the gun" in deciding this fact-intensive question before trial.[48] It is uncertain whether *Frey* is good law, but it is certainly influential.[49] On the other hand, where the parties explicitly *contract* to give themselves discretion, however, the courts generally leave the exercise of such discretion untouched; in such cases, there is no room for judicial discretion.[50]

Parties worried that their counterparties may not act in good faith to achieve a certain result under the contract, but also worried about the looseness of the contractual standard of good faith, may bargain for a "best efforts" or "reasonable best efforts" covenant instead.[51] It is not always clear whether such covenants place a greater burden on a party than the duty to act in good faith.[52] In fact, it is not always clear what they mean at all.[53] Ultimately, the question of whether a party has used

stages, see *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. J.P. Morgan Chase Bank, N.A.*, 103 A.3d 1010 (Del. 2014) (UCC termination statement was effective even though lender did not intend to release lien), and *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, C.A. No. 2018-0927, 2019 WL 1223026, at *3 (Del. Ch. Feb. 14, 2019) (party was permitted to exercise contractual right to terminate merger agreement where counterparty had "simply forgot[ten]" to extend the agreement, even though the party kept its decision confidential and knew that it would harm the counterparty). The result in *J.P. Morgan* is particularly striking: the Delaware Supreme Court noted that the importance of "permitting parties to rely in good faith on the plain terms of authorized public filings." *J.P. Morgan*, 103 A.3d at 1016. This logic was apparently rejected by a bare majority of the California Supreme Court in *City of Manhattan Beach v. Superior Court*, 914 P.2d 160 (Cal. 1996), which concerned the interpretation of a publicly recorded property deed in Los Angeles. *See id.* at 179–80 (Mosk, J., concurring in part and dissenting in part). The very different status of the parties in the two cases may explain the difference in result. *See infra* Part IV.B.

48. *Market St. Assocs.*, 941 F.2d at 597. On remand, the trial court reached the same conclusion, finding that the plaintiff-appellant had not acted in good faith, and the United States Court of Appeals for the Seventh Circuit affirmed. *See* Market St. Assocs. Ltd. P'ship v. Frey, 21 F.3d 782, 787 (7th Cir. 1994).

49. *See, e.g.*, Todd Rakoff, *Good Faith in Contract Performance: Market Street Associates Ltd. Partnership v. Frey*, 120 HARV. L. REV. 1187 (2007), *cited in* Markovits, *supra* note 44, at 290 n.66. It is far from clear that the case would have come out the same way if it had been decided elsewhere. *Vintage Rodeo* is a good example to the contrary.

50. *See, e.g.*, Blaustein v. Lord Balt. Cap. Corp., 84 A.3d 954 (2014); Related Westpac LLC v. JER Snowmass LLC, C.A. No. 5001, 2010 WL 2929708 (Del. Ch. July 23, 2010).

51. *See, e.g.*, LOU R. KLING ET AL., NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.06 (2022).

52. *See id. Cf.* Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614 (2d Cir. 1979) (Friendly, J.) ("Even without the best efforts clause Falstaff would have been bound to make a good faith effort . . . .").

53. For a survey of the confusion, with a proposal of how to fix it, see Kenneth A. Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, 74 BUS. LAW. 677 (2019). For two cases illustrating the confusion, *compare* MBIA Ins. Corp. v.

the appropriate amount of effort or not boils down to a question of fact—and, yet again, is a source of judicial discretion.

These grants of discretion require courts to make a choice: they cannot *not* exercise their discretion (unless they dismiss the case on entirely separate grounds, such as lack of personal jurisdiction). In this sense, it is fair to say that courts are engaging in contract-making.

C. The Flexible Scope of Contract Law

Finally, the changing scope of contract law is a sign that, at least at times, courts do make contracts.

The classic historical account of contract law's development runs more or less as follows. What we now call contract arose out of the action of assumpsit, which itself was merely an allegation by a plaintiff that the defendant had "assumed" an obligation to do something.[54] This action itself began as an action of trespass on the case, which can be traced back to an English statute from the end of the thirteenth century.[55] Assumpsit began slowly to overtake the forms of action that were most commonly used to remedy breaches of an agreement, namely, debt, detinue, and covenant.[56] Debt, which was the most important of these for medieval contract law, covered an action for the return of a sum of money owed.[57] Detinue overlapped with debt to some extent, but was most commonly an action for the return of bailed property.[58] Covenant was a somewhat rarer action for breach of executory agreements based upon a deed.[59] The more flexible action for assumpsit grew in importance and by the early 1600s had become the preferred action to recover on a debt.[60]

Patriarch Partners VIII, LLC, 950 F. Supp. 2d 568, 618 (S.D.N.Y. 2013) ("A contractual requirement to act in a commercially reasonable manner does not require a party to act against its own business interests, 'which it has a legal privilege to protect.'" (quoting Citri-Lite Co. v. Cott Beverages, Inc., 721 F. Supp. 2d 912, 924 (E.D. Cal. 2010))), *with* Rex Medical LP v. Angiotech Pharms., 754 F. Supp. 2d 616, 624 (S.D.N.Y. 2010) (holding that the argument that a party that was required to use "commercially reasonable efforts" did not have to act against its economic self-interest was "utter and complete nonsense").

54. HOLMES, *supra* note 7, at 247; A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 3 (1987).

55. *See* GILMORE, THE DEATH OF CONTRACT 95 (1974); SIMPSON, *supra* note 54, at 198 (citing a case 592 years ago).

56. *See* SIMPSON, *supra* note 54, at 6.

57. *Id.* at 6, 88.

58. *Id.* at 58–59.

59. *See, e.g.*, *id.* at 43.

60. *Id.* at 297–98. The chief advantage of assumpsit was that the plaintiff was guaranteed a jury trial. In an action for debt, by contrast, the defendant could "wage his law," meaning that if he was able to find 12 people to testify (truthfully or falsely) that he did not owe the money claimed, the suit would be dismissed. *Id.* at 298.

In the overall scheme, contract law as we now know it remained fairly unimportant until the end of the eighteenth century, and was treated as secondary to other branches of law.[61] It then suddenly flowered amid the industrialization of the nineteenth century: courts no longer regulated the prices of commodities, nor focused on the fairness or otherwise of bargains.[62] But along with industrialization came danger. Contract law is not well-suited to protecting ordinary people going about their daily lives. Tort law, employment law, and health and safety legislation arose to limit contract's reach.[63]

The upshot of contract's crab-like historical journey is that it is not clear where it starts and ends. The following examples show how contract overlaps with other fields—and how a court may have to decide whether to treat the dispute as a contract one or not.[64] Not every case will force a court to confront this question; in fact, most will not. But a court's ability to choose to put a case in the contract bucket or not underscores the amount of discretion that a court retains when dealing with contract cases. Deciding whether or not a case implicates a contract is antecedent to the court's construction of that contract. By lumping a case into the contract category, the court can decide that there is a contract, even if the parties thought there was none; by taking it out, the court can destroy a contract, at least as the parties originally understood it.

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61. *See, e.g.*, P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 102 (1979) ("In Blackstone's world, or at least in Blackstone's *Commentaries*, contract not only played a very small part in the legal scheme, but its role was principally that of an appendage to the law of property."). Brian Simpson has challenged the view that contract law was unimportant to Blackstone: in Simpson's view, the lack of prominence of contract law in the *Commentaries* is simply due to the fact that Blackstone was following the organizational structure of another treatise author, Matthew Hale. *See* A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 532, 545–56 (1979). Nevertheless, if contract law had been seen on a par with property and other fields of law, one wonders why Blackstone would not have adopted a different organizational structure.

62. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 179 (1977) ("It was part of a movement, which had begun in England during Mansfield's tenure and continued throughout the nineteenth century, toward overthrowing the traditional role of courts in regulating the equity of agreements."); SIMPSON, *supra* note 54, at 167–80.

63. *See generally* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC (2006) (describing the growth of the tort law regime in the wake of the Civil War). For example, until 1916 it was unclear whether it was possible to bring a product liability action in tort. *See generally* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.).

64. In the *Lochner* era, whether a dispute is labelled as a "contract" case could be the difference between whether it was governed by the Constitution or not. *See* Muhlker v. Harlem R.R. Co., 197 U.S. 544, 575 (1905) (Holmes, J., dissenting).

1. Tort

The origins of modern contract law lie in tort, but the two bodies are sufficiently distinct that the parties may dispute whether their dispute is one of contract or tort (or "quasi-contract," which is closer to a species of tort).[65] If there is a disagreement on this point, one side will argue that the dispute is not governed by the subject matter of the contract at hand, and so it is entitled to remedies based on negligence or general principles of equity; the other will argue that a dispute *is* governed by the subject matter of the contract, which dictates the appropriate remedy. A court will have discretion to decide under which rubric a case should be decided.[66]

A court may also decide that a dispute that formerly fit into one category now fits into another. For example, in the leading New York case of *CBS Inc. v. Ziff-Davis Publishing Co.*, decided in 1990, the appellant had contracted to buy the respondent's publishing businesses and had entered into a contract in which the seller warranted the truthfulness of its financial information.[67] The appellant then investigated the information and was led to believe that it was untrue—but the parties agreed that the sale would go ahead, with each side reserving its rights. The appellant then sued for breach of the warranty, and the respondent sought to dismiss the suit on the ground that the appellant had *not* relied on the truthfulness of the financial information, because the appellant had expressly queried it. The lower courts granted the respondent's motion to dismiss on tort law principles.[68] The New York Court of Appeals held that the case was a contract case and reversed. (Numerous other jurisdictions have now followed *Ziff-Davis*.[69])

A court can also choose to redefine contract law to include the tort law principles that it previously spurned. Throughout much of the last century courts did so, and contract law adopted new principles such as promissory estoppel, third-party beneficiary rights, and even the duty to

65. GILMORE, *supra* note 55, at 96–98.

66. *See, e.g.*, Clark-Fitzpatrick v. Long Island R.R. Co., 516 N.E.2d 190, 193–94 (N.Y. 1987) (affirming dismissal of causes of action sounding in tort and quasi-contract, where written contract governed parties' relationship); *cf.* Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 568 (7th Cir. 2012) (describing Illinois's "economic loss rule," whereby a claim arising from a contractual relationship cannot lead to extra-contractual damages).

67. CBS Inc. v. Ziff-Davis Publ'g Co., 553 N.E.2d 997, 998 (N.Y. 1990).

68. The courts noted that the appellant had failed to show reliance on the information. *See id.*

69. *See* Eagle Force Holdings, LLC v. Campbell, 187 A.3d 1209, 1236 n.185 (Del. 2018).

act in good faith.[70] Courts can also append tort law to contract: for example, willful breach of an insurance contract in California will give rise to a tort claim, although non-insurance cases are treated differently.[71] In some cases, it may make little difference whether the case is formally analyzed as one of contract or tort.[72]

2. Property

The line between contract law and property law is likewise blurred.[73] The essential difference between the two is that contract law establishes the rights of a party vis-à-vis another identified party (*in personam* rights), while property law establishes the rights of a party as against the entire world (somewhat confusingly described as *in rem* rights).[74] Contract law is easily customizable; property law contains immutable rules. What the parties are permitted to regulate by contract has changed over the years—most notably with regard to landlord-tenant law. And while some of these changes have come from governmental authorities,[75] others have come from courts, or the two acting in tandem. Thus, in the well-known *Javins v. First National Realty Corp.* case, the D.C. Circuit held, per Judge Skelly Wright, that—in effect—Washington, D.C.'s property code was an immutable part of any contract, and so the lessor had an unwaivable duty to maintain the property in habitable condition.[76] The *Javins* decision shifted the habitability of the residence from a matter of contract to property.

Remarkably, though, the *Javins* decision claimed that it was doing the exact opposite, and that it was continuing the "trend toward treating leases as contracts."[77] Under a traditional conception of "property" law,

70. *See, e.g.*, GILMORE, *supra* note 55, at 79–84; *see also, e.g.*, Kennedy, *supra* note 40, at 1686–87 (quoting FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS, CASES AND MATERIALS 1118 (2d ed. 1970)).

71. *See, e.g.*, Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 273 (Cal. 2004).

72. This is particularly true in light of the relaxation of damages rules applying to contracts. *See, e.g.*, Kennedy, *supra* note 40, at 1686, 1701 n.41.

73. For a detailed discussion of this topic, see Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

74. *See id.* at 782 (noting that "rights in rem rights are not really rights against a thing"). A more precise but less catchy description might be rights *in mundum de re*, or rights "against the world concerning a thing." *See, e.g.*, Jeanne L. Schroeder, *Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.*, 46 SYRACUSE L. REV. 999, 1018 n.70 (1996) (discussing this point).

75. The most widely known recent example of these being the federal moratorium on evictions during the COVID-19 pandemic. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

76. *See Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081–82 & n.58 (D.C Cir. 1970).

77. *Id.* at 1075.

the lessor would have won the case.[78] To escape this result, the court held that it was applying a more modern, contractual doctrine—but then made this *new* contractual doctrine immutable, giving it the force of a property right. Nor was it obvious that the remedy the court granted was proper as a matter of contract. The court asserted, without citation, that "under contract principles . . . the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations."[79] But "under contract principles" as they are more generally understood, the tenant would have been obligated to keep paying rent in order to continue to occupy the apartment and would *not* have been able to exercise the self-help option of occupying the apartment without paying rent.[80] It is fairer to read the *Javins* decision as shifting the law governing landlord-tenant relations from contract to property than it is to read it as an application of contract law; I return to the court's pronouncement that it *was* applying contract law below.

3. Securities

Cases concerning securities again may raise the question of whether the dispute should be governed by contract law at all. A prime example is the Ninth Circuit case of *Freeman Investments, LP v. Pacific Life Insurance Co*.[81] The plaintiffs had alleged that a life insurance company had overcharged them for the cost of insurance, in violation of the investment terms. The plaintiffs claimed that the company had misrepresented its fees—which would bring the complaint under the purview of the Securities Litigation Uniform Standards Act ("SLUSA"), which bars state law claims alleging misrepresentation in connection with a covered security.[82] Had it? The Ninth Circuit ruled that the claim was *not* covered by SLUSA, because the plaintiffs' claim could be viewed as a simple contract claim. The Ninth Circuit instructed the district court to permit the plaintiffs to amend the complaint to remove any allegations of misrepresentation.[83] As it happens, they chose not to: perhaps they thought that a contractual claim, sans allegations of misrepresentation, would not be viable.[84]

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78. *Cf.* Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647) (lessee was liable for rent even when he had been expelled from his property in time of war).

79. *Javins*, 428 F.2d at 1082.

80. *See, e.g.*, ESPN, Inc. v. Off. of Comm'r of Baseball, 76 F. Supp. 2d 383, 397–98 (S.D.N.Y. 1999) (distinguishing landlord-tenant law on this point).

81. *See generally Freeman Invs., LP v. Pac. Life Ins. Co.*, 704 F.3d 1110 (9th Cir. 2013).

82. 15 U.S.C. § 78bb.

83. *See Freeman*, 704 F.3d at 1116.

84. Order Dismissing Case, Freeman Invs., L.P. v. Pac. Life Ins. Co., Case No. SA CV 08-cv-1134 (C.D. Cal. July 29, 2014).

Rossdeutscher v. Viacom, from Delaware, is a similar example.[85] In 1994, Viacom acquired the Paramount film studio and Blockbuster video rental chain (remember that?) with consideration that included contingent value rights, or CVRs. The CVRs acted as a form of price protection to the selling shareholders: if the buyer's stock did not reach certain targets, the selling shareholders were entitled to a payout that was inversely related to the buyer's stock price, to make them whole. Viacom redeemed the CVRs in 1995, but two years later, it was revealed that Viacom had deliberately inflated its stock price and massively reduced the amount it had to pay out.[86] The plaintiff brought suit alleging that Viacom had violated the implied covenant of good faith and fair dealing.[87] The Delaware Superior Court ruled that the plaintiff's suit was really a securities action and that the plaintiff was not permitted to repackage a securities action as a contract action—particularly when the action would have been time-barred if brought as a securities action in federal court. The Delaware Supreme Court said no: "[i]f contract theories and federal securities theories are not identical—and they are not—it follows that federal and common law claims can proceed independently."[88]

4. Corporations

The lack of consistency that courts show in deciding whether to resolve a dispute under contract law or a different rubric is perhaps best illustrated by corporate law. Courts frequently repeat the maxim that the standard rules of contract interpretation apply to disputes over the meaning of companies' charters and bylaws.[89] But the idea that the corporate charter is a "contract" in any ordinary sense is, of course, entirely wrong.[90] A share of stock is bought by a stockholder who likely

85. *See generally* Rossdeutscher v. Viacom, Inc., 768 A.2d 8 (Del. 2001).

86. *See id.* at 14.

87. *See id.* at 15.

88. *Id.* at 19.

89. *See, e.g.*, Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply.").

90. See ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 169–70 (1932), on this point. In words that could have been written today, the authors asserted:

> The basic theory underlying all of these mechanisms [providing rights to security-holders in a corporate charter] is that of a free contract . . . . [The security-holder] is thus deemed to have agreed to the existence and use of all of the mechanisms mentioned in this chapter, and several more besides. Accordingly, when the directors vary his participation in assets, he is faced with a doctrine that accuses him of having directly agreed to the situation in which he finds himself. Of course, the 'contract' is a fiction of law;

has no idea what the charter says.[91] It is thus possible that the supposed "contract" will be highly unfavorable to the stockholders, or to a group of them. It is also possible that the unfavorable nature of the charter will not be fully reflected at all times in the market price for the stock.[92] And in the case of bylaws, the corporation can often change them at will, making them a most remarkable "contract." Some courts have refused to hold that bylaws are contracts for this very reason.[93]

If corporate documents are contracts, they are contracts with special rules, which are rather opaque. A prime illustration of one of these rules is that courts should construe ambiguous corporate charters in favor of the stockholders.[94] (This rule is indeed quite special: it originally said the precise opposite.[95]) Yet in various cases, the Delaware Supreme Court

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> shareholders do not bargain with their corporation and strike an agreement on the terms of the corporation law and the charter before the stock is sold.

Id. Cf. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 1005–06 (2d. ed. 1886) ("The statement that a charter of incorporation is a contract conveys no definite idea to the mind, unless the parties to the supposed contract and the terms of their agreement are understood.")

91. *See* BERLE & MEANS, *supra* note 90, at 170 n.59 ("In the course of his practice of law, one of the writers has never come across a shareholder who had read the corporation charter, let alone the underlying corporation act. In practice, only counsel for the organizing group have thoroughly digested either the one or the other, until a controversy arises."). I believe the same sentiment still obtains today.

92. This is true for several reasons. For a start, market prices are not perfectly efficient. Second and relatedly, it may not be clear how a court will interpret a corporate charter. And third, it may be that the rights attaching to certain classes of stock change depending on what is happening to the corporation. For this latter point, see Avner Kalay et al., *The Market Value of Corporate Votes: Theory and Evidence from Option Prices*, 69 J. FIN. 1235 (2014).

93. *See, e.g.*, Galaviz v. Berg, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011).

94. *See, e.g.*, Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 310 (Del. Ch. 2002). *Cf.* Zamir, *supra* note 25, at 1723–24 (noting the application of the rule of "interpretation favoring the public" in other contexts).

95. The origin of this doctrine can be traced back to the *Charles River Bridge* case, in which the Supreme Court ruled that ambiguous corporate charters must be resolved "in favor of the public." Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 544 (1837). In this case, "the public" actually meant the public, as opposed to the shareholders, and in later opinions, courts read *Charles River Bridge* as holding that "charters are to be construed most favorably for the state." Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210, 223 (1860). Over time, though, states got out of the business of granting monopolistic corporate charters by special act, and stockholders got out of the business of managing companies. *See, e.g.*, Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 101–03 (1999); BERLE & MEANS, *supra* note 90, at 47–111 (describing the separation of ownership and control in the first part of the twentieth century); ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 450–54 (1977) (describing the separation of ownership and control after the First World War). This shifted the focus of litigation from between the stockholder-managers, on the one hand, and the state, on the other, to between the stockholders and the managers. And because the stockholders had not been able to negotiate the terms of the charter, ambiguities in it were to be construed in their favor. *See, e.g.*, *Harrah's*

has chosen not to apply this particular rule of (corporate-contractual?) construction, instead preferring to rely on different, and more quintessentially "contractual," principles. Thus, in the 2010 *Airgas v. Air Products* case, when faced with an ambiguous charter, the Delaware Supreme Court relied on common "practice and understanding" to interpret it.[96] And in *Activision Blizzard v. Hayes* in 2013, the Delaware Supreme Court again eschewed this rule, holding that the charter was not ambiguous and then focusing on "form over substance."[97] It would be a bold person who would predict whether a court would interpret a dispute under a corporate charter or bylaws as a matter of ordinary contract law, corporate law, or something in between.

* * *

The ability courts have to place some disputes in the "contract" bucket and not others is another source of their discretion in dealing with (supposed) contract disputes. All of this discretion, which courts must exercise, gives them considerable power over the outcome of a contract case. So courts are involved in making contracts. And as to some contracts, the court's involvement is so great that we could reasonably say that the court is "making" them.

This is important. Our longstanding views of contract law, as set out above, are that *we* make and control our own contracts. This is encapsulated in the mantra discussed above: "courts do not make contracts." If we are fooling ourselves, or are willingly being fooled by the courts, we should try to understand why. The next Part embarks on this exercise.

III. THE "MAKING CONTRACTS" FICTION

In Professor Lon Fuller's terminology, the claim that courts do not make contracts is a legal fiction. Legal fictions are, in his words, "an awkward patch applied to a rent in the law's fabric of theory."[98] If we remove the patch, we may "trace out the patterns of tension that tore the fabric and at the same time discern elements of the fabric itself that were previously obscured from view."[99]

Fuller explored at length the reasons why we have so many fictions in our law. Historical fictions, Fuller surmised, "introduce new law in the guise of old."[100] Nonhistorical fictions have a very different purpose.

Entm't, 802 A.2d at 311 (noting that public stockholders are "not a party" to the drafting of corporate charters).

96. Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1191 (Del. 2010).

97. Activision Blizzard, Inc. v. Hayes, 106 A.3d 1029, 1034 (Del. 2013).

98. LON FULLER, LEGAL FICTIONS viii (1967).

99. *Id.*

100. *Id.* at 56.

They may be a mere shorthand for something else: for example, when we say that a corporation has "personality," we do not mean that it *is* a person (much less that it is fun to chat with at a cocktail party).[101] Rather, we mean that it has some limited, but too complicated to describe, set of attributes that we usually associate with natural humans—for example, the right to sue and be sued.[102] Other nonhistorical fictions are "apologetic": they are designed to hide from us an unpleasant reality. Fuller gave the example of the fiction that everyone is deemed to know the law: of course, *no one* knows all the law, but pretending that they do saves us from grappling with the reality that we punish people for things that they didn't know were illegal.[103] Other fictions are whimsical or fanciful: attempts to entertain the reader.[104] And, Fuller noted, some nonhistorical fictions are simply recycled versions of historical fictions that have become thoroughly ingrained in our way of thought.

This Part first looks at *when* the court invokes the "not making contracts" fiction, with reference to well-known cases from commercial law, insurance, restructuring, and consumer law. It then explores *why* the court invokes the fiction.

A. *When Does the Court Invoke the Fiction?*

1. Commercial Law

In *Reiss v. Financial Performance Corp.*, the New York Court of Appeals ruled that, under the language of a contract, a plaintiff corporation and a former director were entitled to exercise warrants to buy shares in the defendant corporation for perhaps one-fifth of their proper value, because of a drafting error.[105] What was clearly an oversight on the part of the defendant corporation became a roughly $700,000 windfall for the plaintiffs.[106] Too bad: courts may not "by

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101. *See id.* at 82.

102. For a recent study of what corporate constitutional rights there are and are not, see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014).

103. FULLER, *supra* note 98, at 84; *see also* Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE CRIMINAL LAW" 43 (Timothy Lynch ed. 2009) ("[M]ost people have committed at least one crime carrying serious consequences . . . .").

104. *See* FULLER, *supra* note 98, at 85.

105. *See* Reiss v. Fin. Performance Corp., 764 N.E.2d 958, 961–62 (N.Y. 2001). The defendant corporation had undergone a stock split, which increased the value of the stock five times, but the warrants that the plaintiffs had been issued did not provide for any simultaneous adjustment. *Id.* at 959–60.

106. *See id.* at 958–59.

construction add or excise terms and thereby make a new contract for the parties."[107]

The Delaware Supreme Court has also invoked this mantra.[108] For example, in *Nemec v. Shrader*, the court ruled that a defendant corporation was entitled to redeem the stock options of retired partners of a firm *at any time* of its choosing, in accordance with the literal language of the contract.[109] The corporation chose to redeem the shares shortly before it entered into a merger, coincidentally transferring $60 million in wealth from the retired partners to the partners negotiating the transaction. The retired partners sought refuge in a venerable rule of contract law, the implied covenant of good faith and fair dealing, but lost: the court held that "[p]arties have a right to enter into good and bad contracts, the law enforces both."[110]

Interestingly, the decision in *Nemec* prompted a then-rare dissent by two of the five judges, who would have held that the implied covenant applied. And Delaware has also refused to adhere to a literal interpretation of contracts, even between sophisticated parties. In the 2017 *Chicago Bridge & Iron* case, the Delaware courts were faced with an inartfully drafted contract concerning the sale of a company that built nuclear power plants.[111] The buyer claimed that the seller owed it over $2

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107. *Id.* at 961.

108. This idea can be traced back at least 500 years—for as long as contract law has existed. Thus, Brian Simpson quotes a case from the yearbook in the thirty-ninth year of the reign of Henry VI:

> For a condition should be taken according to the words and their meaning, and not according to the intent. Thus it has been adjudged . . . that where a condition was that if the defendant did *not* pay to the plaintiff £10 by a certain day then the obligation for £100 should lose its force, and the defendant pleaded that he did *not* pay him £10, that for his non payment he should avoid the obligation for £100. And yet it seemed that this was not the plaintiff's intention, but according to how the words are, so ought judgment to be given accordance to the meaning of the words. And Prisot C.J. affirmed the said case, for he said that he was of counsel in the said matter when he was serjeant.

SIMPSON, *supra* note 54, at 102 (quoting 39 Hen. VI, M. f. 9, pl.15) (1460)).

109. *See* Nemec v. Shrader, 991 A.2d 1120, 1123 (Del. 2010).

110. *Id.* at 1126. It is perhaps unsurprising that cases involving the redemption of employees' stock in the case of mergers lead to hotly contested contractual disputes. In *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987), the Seventh Circuit produced three opinions on the question of whether an employee could recover damages from his former employer, which had not disclosed to him that it had negotiated the price and structure of a merger agreement by the time he left the firm. *See id.* at 434. The controlling opinion held that the employee had stated a claim. In *Berreman v. West Publishing Co.*, 615 N.W.2d 362 (Minn. Ct. App. 2000), the Minnesota Court of Appeals held that, in a similar situation, an employee could *not* recover damages where the company had negotiated the price and structure of the deal two months *after* he left the company.

111. Chi. Bridge & Iron Co. v. Westinghouse Elec. Co. LLC, C.A. No. 12585, 2016 WL 7048031 (Del. Ch. Dec. 5, 2016), *rev'd*, 166 A.3d 912 (Del. 2017).

billion because the seller's accounting practices weren't compliant with Generally Accepted Accounting Principles.[112] The trial court sided with the buyer, but the Delaware Supreme Court reversed. What mattered here was the "commercial context" of the deal: the high court accepted that the seller had wanted to get rid of its loss-making (and liability headache-inducing) subsidiary for free.[113] This reasoning helped arrive at a sensible result, but it also showed the limits of interpreting contracts based on the words alone—and the court did *not* declare that it was merely interpreting the parties' contract.[114]

2. Insurance Law

Three seminal asbestos-related decisions from insurance law illustrate the use and non-use of the fiction. In *Insurance Company of North America v. Forty-Eight Insulations* in 1980, the Sixth Circuit held that asbestos insurance coverage is triggered at the moment that a victim is exposed to asbestos fibers and that all insurers in future years are co-liable for the harm that results, even if there is no new exposure to asbestos in those years.[115] The court was unsure how it should interpret the policies at issue, but noted that "linguistic uniformity" was *not* key and fell back on the principle that "[i]nsurance contracts are meant to cover the insured." In rejecting "linguistic uniformity," the court also avoided the claim that it was interpreting the contract solely in accord with the text of the parties' agreement—and thus declined to invoke the fiction. The following year, in *Keene Corp. v. Insurance Company of North America*, the D.C. Circuit held that each insurer in each year is entirely liable for the injury, not just its pro rata share (however that might be measured).[116] The court held that it intended "interpret these contracts in a manner that is equitable and administratively feasible and

112. *See Chi. Bridge & Iron*, 2016 WL 7048031, at *4–5.

113. *See Chi. Bridge & Iron*, 166 A.3d at 913–14, 927.

114. Other parts of the Delaware Supreme Court's opinion suggest that the court could have arrived at this result by looking solely at the plain words of the contract; the court asserted that the Court of Chancery in *Chicago Bridge & Iron* had "rewritten" the contract. *Chi. Bridge & Iron*, 166 A.3d at 928. The Delaware Supreme Court's opinion was certainly more convincing, although it seems to be overstating it that the Court of Chancery "rewrote" the contract. For a recent example of when the Delaware Court of Chancery held that the contractual terms were clear and that it was not free to look at extrinsic evidence of the parties' commercial relationship, see *AM General Holdings, LLC v. Renco Group, Inc.*, C.A. Nos. 7639, 7668, 2020 WL 3484069 (Del. Ch. June 26, 2020). *See also* JOHN K. DIMUGNO & PAUL E. B. GLAD, CALIFORNIA INSURANCE LAW HANDBOOK § 61:12 (2022) (arguing that a regime of objective contractual interpretation that purports to consider the "world at large contains the seeds of its own destruction").

115. *See* Ins. Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212, 1223 (6th Cir. 1980).

116. *See* Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1047–50 (D.C. Cir. 1981).

that is consistent with insurance principles, insurance law, and the terms of the contracts themselves."[117]

The *Keene* decision, unlike *Forty-Eight*, thus nodded to the principle that courts should not make contracts, while threatening to override it, if necessary, with considerations of "equity." These decisions took different approaches to contractual interpretation. What they had in common was that they were both bad news for insurers.

But in another critical decision interpreting an asbestos-related insurance policy, the court *did* declare that it was constrained by "the language the contracting parties chose."[118] In 2007, in *London Market Insurers v. Superior Court*, a California court held that each set of claims by an individual claimant under an insurance policy is a separate occurrence, which means that an insurer *cannot* aggregate all claims and only pay them up to a single "per occurrence" limit in the policy. The same fact was common to this decision as to the previous decisions: it was bad news for the insurer. Unlike *Forty-Eight* and *Keene*, though, the decision squarely placed responsibility for the outcome on the parties and their choice of language.

3. Restructuring

In *NML Capital v. Argentina* in 2012, the Second Circuit upheld a decision by a New York district court that Argentina had violated a provision of its bond indentures preventing it from subordinating any notes.[119] The district court held that this extraordinarily high-profile dispute was a "simple question of contract interpretation": did the contract that Argentina entered into permit it to refuse to repay certain notes?[120] The Second Circuit sided with the district court in holding that there was a "strong public interest in holding the Republic to its contractual obligations."[121] What makes the case interesting is that although the court echoed the mantra that it would not make contracts, the court could also certainly have reached the opposite conclusion, if it wanted: the contractual provision at issue was clear as mud. (One party confessed in a refreshing moment of candor that "no one knows what the clause really means."[122]) The appeals court seemed comforted by the fact that a dispute like this was very unlikely to recur, because parties were no longer entering into the kinds of contract at issue.

117. *Id.* at 1041.
118. London Mkt. Insurers v. Superior Ct., 53 Cal. Rptr. 3d 154, 171 (Ct. App. 2007).
119. NML Cap., Ltd. v. Republic of Arg., 699 F.3d 246, 250 (2d Cir. 2012).
120. *Id.* at 258.
121. *Id.* at 256.
122. *Id.* at 258 (admission of Argentina).

Contrast the reasoning and rhetoric in *NML Capital* with the bankruptcy court decision confirming the restructuring of the cable company Charter.[123] Charter's credit agreement had a covenant providing that if bondholders formed the largest "group" by voting control, then a change of control was deemed to have occurred, and the company was in default.[124] The term "group" was to have the same meaning as in Section 13(d) of the Securities Exchange Act of 1934.[125] The court held that "[b]ecause the covenant functions as a trigger to a potential default under a credit facility, it should be construed narrowly so as to enable the Borrower to engage in permissible corporate engineering."[126] It is not clear what this principle means, as the invocation of "permissible corporate engineering" assumes its own conclusion.[127] But unlike in *NML Capital*, there was no hint of the rhetoric of not making contracts. The end result was that the restructuring plan was approved—which was clearly the result that the judge thought was good for society.[128]

4. Consumer Law

Finally, a hornbook consumer law case shows the use and non-use of the fiction. In *Williams v. Walker-Thomas Furniture Co.*, a majority of the D.C. Circuit held that a contract between a hire-purchase shop and a mother-of-seven on welfare was potentially unconscionable.[129] The majority held that the doctrine of unconscionability should apply to the contract and remanded the case to the lower court to examine whether and how the doctrine applied. But the dissent emphasized that the "law for so long has allowed parties such great latitude in making their own contracts," and would have joined the courts below in upholding the

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123. *See In re* Charter Commc'ns, 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

124. *Id.* at 238–39.

125. *Id.* at 238 & n.13.

126. *Id.* at 238.

127. And in the event, it is not clear how, if at all, the court did in fact apply this principle: the court suggested that it was interpreting the word "group" to mean something somewhat *different* from its common understanding (would arguably have been error), but never spelled out quite how. *Id.* at 238–39.

128. "[Plan confirmation] represents a major achievement for the Debtors and its stakeholders that should enable [the company] to flourish as a restructured and recapitalized enterprise." *Id.* at 271. It may be of relevance that the court that decided this case was a bankruptcy court, which is sometimes said to have a pro-debtor slant, even though it is tasked with applying the exact same state contract law.

129. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965). For an interesting analysis of the unconscionability doctrine, and an effort to shift the debate around it from questions of paternalism to the appropriate scope of accommodation, see Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFAIRS 205 (2000).

contract.[130] (Indeed, the contract at issue has been defended by academics.)[131]

Consumer law's unconscionability standard is exceptionally vague: unfairness does not suffice.[132] For that reason, courts frequently look to procedural unconscionability—some defect in the bargaining process—to determine whether a contract should be upheld or not.[133] This provides a sensible guidepost for the court: if the bargain really is one that no person of sound mind would enter (the usual definition of unconscionability), there has likely been some deception in the bargaining process. But even though courts can use this helpful guide, they still resort to the mantra that they do not write contracts.[134] So deep goes the fiction in the law.

B. *Why Does the Court Invoke the Fiction?*

1. Contract Interpretation Versus Formation

In every contract case, a court will be faced with two questions, which it must answer explicitly or implicitly. The first is: *is this case about a contract?* This question can arise in two ways. The first, more simple way, is if the court is faced with a question of contract formation: have the parties formed a valid contract? The second way is when the court is asked to determine whether the parties' dispute should be governed by contract principles or principles of other law, as discussed above in Part II.C. The parties may well agree that the case involves a valid contract; if so, the court can implicitly adopt their agreement and proceed to the next question. But the question sometimes has to be litigated.

The second question is: *how are the rules to be applied?* The law must be applied to facts. The judge will have the chance to decide those facts herself at summary judgment or, if the trial is a bench trial, after hearing all the evidence. Even in a jury trial, the judge will be able to influence how the jury finds facts.

The examples above all share one feature in common: they all relate to the interpretation and construction of contracts, not to their formation.

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130. *Walker-Thomas*, 350 F.2d at 450 (Danaher, J., dissenting).

131. *See, e.g.*, M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 786 n.123 (1969) (noting that *Walker-Thomas* was "innovative"); Arthur Allen Leff, *Unconscionability and the Code — the Emperor's New Clause*, 115 U. PA. L. REV. 485, 551–55 (1967) (noting the significance of *Walker-Thomas*).

132. *In re* Hennel, 80 N.E.3d 1017, 1024 (N.Y. 2017).

133. *See, e.g.*, Armendariz v. Found. Healthcare Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); Lawrence v. Miller, 901 N.E.2d 1268, 1271–72 (N.Y. 2008).

134. *See, e.g.*, Botein, Hays, Sklar & Herzberg v. Polymetrics Int'l, Inc., 81 Misc. 2d 398, 400 (N.Y. Civ. Ct. 1975).

This is noteworthy. While hundreds or thousands of examples of the mantra that courts do not make contracts for the parties (or of its sister phrases, that courts simply enforce contracts as made by the parties, or the like) can be found, I have not located any from cases that do not relate to contract interpretation.[135]

It is only in relation to the second question that the court invokes the mantra that courts do not make contracts. To be sure, cases about contract interpretation outnumber cases about contract formation.[136] But when it comes to contract formation, or the application of contract law to disputes, courts do not invoke the fiction—even though it would be even *more* apposite in a case about contract formation to declare that "courts do not make contracts" than in a case about contract interpretation. To use Fuller's phrase, courts appear to see the need to "apologize" for their reasoning when they are interpreting contracts, rather than making them.[137]

What is it about contract interpretation that provokes courts to engage in this fiction? In the examples given above, the court invoked the fiction while explaining results that are eyebrow-raising. In *Reiss*, the company claimed that it was forced to pay out a windfall; in *Nemec*, the retired partners said they were being stiffed; in *NML Capital*, a sovereign nation argued it was being held hostage by vulture hedge funds; in *London Market*, the insurers claimed they were on the hook for potentially limitless harms; and in *Walker-Thomas*, the dissent would have held that a hire-purchase store was allowed to repossess four years' worth of purchases from someone who had been charged predatory rates of interest. I do not suggest that any of these decisions (or the would-be decision, in the case of the dissent) was wrong or right. My point is simply that they are remarkable.

But that is all that the decisions seem to have in common. It does not seem that the use of the maxim can be attributed to any particular type of contract law philosophy. The decisions in *Reiss* and *Nemec* have an individualistic slant; the decision in *London Market* seems much more utilitarian. The decision in *NML Capital* can be seen as vindicating autonomy rights, economically efficient, or even a means of social control.[138] All that unites them is that they are eye-catching.

But in cases where the court must answer the first question noted above—*is this case about a contract?*—the maxim is not applied. In

135. A search on a commercial database revealed almost 1,000 examples stretching back over 200 years. *See also* Rakoff, *supra* note 1, at 1181.

136. An electronic search reveals that interpretation cases may in fact outnumber formation cases very considerably — by a margin of 5 or 6 to 1. *Cf.* Posner, *supra* note 28, at 1583 (noting that contract interpretation is a "judicial staple").

137. *See supra* note 103 and accompanying text.

138. *See supra* note 11.

cases where the court is purporting to transfer the subject of the dispute from one area of law to contract law, such as the *CBS* and *Javins* cases discussed earlier, this is not surprising. Asserting that the court does not "make contracts" has no rhetorical power when the case is about the correct legal framework for the parties' dispute; it is entirely irrelevant. But even in cases about contract formation, courts do not seem to recite the maxim, although here it would be at its most apposite.[139] The question in such cases is whether the *parties* have made a contract or not, and so, if the court finds that they have, it would be easy for the court to reiterate that *it*, as the court, has not.

What explains the absence of the fiction here? Results in cases involving contract interpretation are more difficult for the courts to justify. In a case about contract formation, the question of whether a contract has been formed or not is a factual matter, and therefore one that a court may avoid dealing with altogether, instead passing it to the jury. If the court finds that a contract has been formed, it will be as a result of considerable analysis, and the final contract will likely be sensible and reasonable—else, the court would be inclined to find that *no* contract had been formed. But this is not true of contract interpretation cases, where the language is clear as day, yet one side can protest that the result is unreasonable. Here the court gets apologetic, in Fuller's term.

2. Historical Considerations

We can also identify certain changes in contract law that have made courts more likely to declare that they are not making contracts for the parties, and which apply with particular force in cases of contract interpretation.

The decline of the traditional view of interpretation. The "traditional view" of contractual interpretation, as expressed by Justice Story in 1840, was that the "interpretation of written instruments properly belongs to the court and not to the jury."[140] This view likely reflected the view that jurors might be unsophisticated and uneducated—and perhaps even illiterate and so unable to offer any informed judgment on a written contract.[141] But this view, even in Story's time, was subject to limits. Story conceded that there were cases where the "different senses of the words used" or the "indeterminate reference to unexplained circumstances" created issues that "may be left to the consideration of

139. *Cf. supra* note 135 and accompanying text.

140. Brown & Co. v. M'Gran, 39 U.S. (14 Pet.) 479, 493 (1840), *cited in* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.14 (3d ed. 2004).

141. FARNSWORTH, *supra* note 140, at § 7.14.

the jury."[142] Commercial contracts, in Story's view, were especially likely to be subject to this rule.

Commercial contracts only grew in importance after Story was writing. (Indeed, the same judge, two years later, unified much contract law across the United States in *Swift v. Tyson*.)[143] And the traditional view itself came under pressure—with, in the 1960s, Judge Friendly opining that *any* interpretive dispute might be sent to the jury.[144] Was every dispute of interpretation to become a question for a jury? Clearly, this did *not* happen, and we may surmise that courts did not want it to happen. Denying that they were deciding contracts, and maintaining the fiction that they were simply finding law, helped.[145]

Party testimony. Another important change was the relaxation of the rules barring parties from testifying in their own cause.[146] Up until the nineteenth century, parties and other "interested persons" were barred from testifying. The rule, of course, had a perfectly rational basis: an interested person was most likely to be susceptible to perjury.[147] It also had the effect of blinding the court to the best evidence about a dispute, as Jeremy Bentham noted.[148] Accordingly, in the middle of the nineteenth century, courts and legislatures began to relax the prohibition on parties—the only people who could really know what their agreement was meant to mean—testifying.[149]

The courts' change enabled an approach to contractual interpretation that is more in accord with our intuitions of what contract law should do, as argued above: the parties could present evidence of what they actually intended and what they believed their contract to be. But this evidence had to be carefully controlled.[150] So courts created a

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142. *M'Gran*, 39 U.S. (14 Pet.) at 493.

143. *See generally* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); *see id.* at 19 (arguing that there should be "one same law for all people and all time").

144. Meyers v. Selznick Co., 373 F.2d 218, 222 (2d Cir. 1966).

145. It is worth noting that even at a very early stage, courts were wont to resort to the maxim that they would not "make contracts for the parties." Rivers v. Gruget, 2 Nott & McC. 265, 267 (S.C. 1820). The *Rivers* case was telling: in this case, the court set aside a jury verdict.

146. *See* Perillo, *supra* note 14, at 457–63.

147. *See id.* at 458.

148. *See id.* (discussing Bentham's *Judicial Evidence*).

149. *See id.* at 458–60.

150. Up until the second half of the nineteenth century, courts would sometimes charge the jury that, in interpreting the promisor's intentions, the relevant inquiry was how the promisor believed the promisee had understood it. *See id.* at 460. This rule had the advantage of tying the meaning of the contract closely to the intentions of the parties to it, consistent with our understanding of how contract law should operate: if the court found that the promisor and the promisee shared a subjective understanding of what was intended, the court could enforce a contract that was truly made by the parties. *See supra* Part III.A. At the same time, the rule limited the ability of a promisor to dupe a promisee: if the promisor knew that the promisee was interpreting his words in a sense different

new rule: what was now relevant was how a *reasonable third party* in the position of the promisee would interpret the promisor's words, not how the promisee actually understood them. All of a sudden, the objective approach came under serious pressure. A court could be presented with strong evidence that the parties to a contract were using words in an idiosyncratic or unique way that they understood perfectly well at the time—but would still be required to come to another conclusion.[151] Bolstering the final decision with the incantation that courts do not make contracts for the parties makes it more justifiable.

The rise of summary judgment. Finally, the adoption and rise of the summary judgment procedure had a pronounced effect on how litigants and courts approached contract cases. Summary judgment was introduced, in a limited fashion, in New York in 1921, although it had previously been used in other states.[152] The original New York procedure was limited to actions on debts; it provided a way for the plaintiff to obtain a judgment, without trial, in cases where the defendant had interposed a sham or frivolous answer.[153] In that respect, it was a pro-creditor law, allowing a creditor to recover more quickly.[154] But it rapidly spread to matters where the interpretation of the contract was at issue.[155] In 1933, New York's procedure was amended to allow for summary judgment in actions upon almost any contract, and to allow either party to seek summary judgment.

As discussed above, the rise of the summary judgment procedure focused in the courts power that would likely otherwise have been left to the jury. This put further pressure on the courts' decision-making. In the face of a realist trend to acknowledge that differences in interpretation would be questions of fact, the courts were forced to justify why they

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from what he intended, the promisee's interpretation would govern, not the promisor's. But, the rule was vulnerable to party testimony: promisor could testify that he believed that promisee understood his meaning to be something different from what the promisee actually meant.

151. *See supra* note 17 and accompanying text.

152. Leonard S. Saxe, *Summary Judgments in New York: A Statistical Study*, 19 CORNELL L.Q. 237, 237 (1934); *see also* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929) (surveying early forms of the summary judgment procedure); Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952) (comparing Minnesota's practice to other systems).

153. *See* Saxe, *supra* note 152, at 237.

154. *See, e.g.*, Appelbaum v. Gross, 117 Misc. 140 (N.Y. Sup. Ct. 1921); Montgomery v. Lans, 194 N.Y.S. 96 (App. Div. 1922). It may be no coincidence that both the summary judgment procedure and the action of assumpsit expanded throughout contract law from initial use in recovering on debts. *See supra* note 60 and accompanying text. To obtain a judgment for recovery on a sum of money owed is, in theory, an extremely simple action. By using the same procedure in other disputes, the plaintiff would imply that that the dispute was equally simple.

155. *See, e.g.*, Laudisi v. Am. Exch. Nat'l Bank, 146 N.E. 347 (N.Y. 1924).

should be deciding factual questions on their own. A short answer suffices: the courts are not deciding factual questions on their own, for there are no material factual questions. The court is simply saving everyone's time. But because the court's role looks so important upon summary judgment, it helps to stress that the court is *not* making a contract; it is simply choosing the only reasonable interpretation of what the parties agreed.

IV. THE LANGUAGE OF CONTRACT LAW: THE LIMITS OF CONTRACTUAL PREDICTABILITY

We are now in a position to reevaluate what courts mean when they declare that they do not create contracts for the parties. Courts are deeply involved in "making" contracts, both in the sense of forming them and interpreting them; to assert that they are not is incorrect. But courts restrict their use of this fiction to situations when they are interpreting contracts and the result is striking for some reason. In other types of contract cases, where the court may have exercised its discretion just as much and had an equal influence on the final result, the court does not protest that it does not make contracts for the parties. The fiction is used in the context of interpretation—the most prevalent kind of contract case—even though it could be used (with equal falsity) in other kinds of contract cases. Most obviously, the fiction masks the reality that courts are involved in making contracts. The corollary is that it also masks the degree to which the parties to a contract do not have as much power over it as they may think or want to believe they have.

We should decide, per Fuller's instruction, whether this fiction is useful or not. Fuller did not completely reject the use of legal fictions; instead, he urged that we should "drop the fiction out of the final reckoning."[156] So just as the calculus student might solve an integration problem by inserting a dummy variable and then removing it before presenting a final answer, the legal scholar should take the fiction out of the final answer—at least, when it risks affecting the end result.[157] Some fictions are inevitable and useful; some are not. If the making-contracts fiction is helpful, we should keep it; if it is not, it should go.

In Part IV.A below, I argue that this mantra is unhelpful and should be rejected. And in Part IV.B, I argue that its close cousin, the phrase "generally applicable principles of contract law," should also be rejected. In Part IV.C, I set out further reasons why we should be less confident about our ability to predict contract law: our understanding of contract

156. FULLER, *supra* note 98, at 118 (discussing Hans Vaihinger's *The Philosophy of "As If"*).

157. *See id.* at 121.

law depends on cases, but litigated cases themselves are a poor source of principles, and the nature of the court system itself tends to defeat any attempt to create rigorous rules and precedent.

A. "Courts Do Not Make Contracts"

When the court invokes the "not making contracts" fiction, it does so in the context of an apparently remarkable result, likely reached through a literal application of the contractual language. At best, the maxim merely reminds us that the court is applying the language literally. Although apologizing for the result ("it's not my fault"), the court clearly believes that this is the appropriate outcome. Almost certainly, one of the parties will have argued for it. In similar cases in the future, the parties can be aware that the court will construe their language in a literal way.

For several reasons, courts would be better off simply saying what they are doing—that in the particular case before them, they deem it expedient to apply the language particularly literally. Any benefits to the fiction are very weak—at most.

First, there does not seem to be any serious benefit to "apologizing" for the result of a case. The court has deemed the outcome suitable for a reason: perhaps because this is an area of law where the parties need especial certainty.[158] If the court has another reason for applying the contract language particularly literally—for example, it is unsympathetic to one of the parties—it would be as well for the court to state that too. (If the court is unwilling to state it, then it may not be a good ground for decision.) The court may, to a small extent, increase the apparent legitimacy of its decision by claiming that it is simply implementing the parties' will. But explaining its rationale more accurately would create as much legitimacy.

More importantly, by asserting that courts do not make contracts, the court implies that parties, both present and future, have full autonomy in entering into transactions. This may be a very real benefit. We *want* to believe that we have autonomy rights in entering into transactions.[159] The

158. *See, e.g.*, Off. Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. 103 A.3d 1010, 1016 (Del. 2014) (Parties need to be able to rely with especial certainty on UCC filings).

159. More generally, we want to believe that we have autonomy rights: a lack of autonomy prevents us from being moral agents. Free will is thus frequently treated as a prerequisite in religious and philosophical systems. *See, e.g.*, AUGUSTINE, ON THE FREE CHOICE OF THE WILL 2.18.48.185 (Peter King trans., Cambridge Univ. Press 2010) (c. 390) (God has endowed humans with free will); IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 5:29–31 (1788) (our obligation under moral law requires us to be free); JOHN MILTON, PARADISE LOST xii.587 (1667) (freedom is necessary for happiness). Some have gone so far as to claim that even if we have no free will in a traditional sense,

archetypal situation where contracting parties would want to believe that they have full autonomy is when they are sophisticated, well-counseled, and can take time to get their agreement right.

But even in such a situation, it may be that the parties do *not* want full autonomy, for two reasons. First, parties want to be able to enter into contracts that can account for multiple or even infinite states of the world; they do not want to have to try to anticipate every state of the world and test how contract law principles might apply to it. In such cases, parties would prefer to set out a general framework for their transaction, perhaps by using standards of conduct, and leave to the court the burden of deciding how their contract works in any given situation.[160]

And second, where litigation occurs, it is quite plausible that parties do not really want courts to apply fixed legal principles (even if such principles existed) and to construe contracts as if they were running a computer code, but instead always want courts to be able to exercise their discretion and obtain a fair result. The parties may be perfectly happy for the court to consider how they are, to look into the nature of the relationship, and to arrive at whatever result seems just in the circumstances.[161]

There is some evidence to support this latter view. One clue comes from arbitration, where parties agree *not* to have their cases decided in the court system. Arbitrators have a reputation for "splitting the baby." Despite this reputation, people keep using arbitration, and the rulings get enforced. In federal court, it is virtually impossible for a court to review an arbitral award concerning a question of contractual interpretation.[162]

One would think that getting an accurate, or predictable, result based on the contractual text would be foremost among the parties' concerns in choosing where to litigate a dispute. Arbitration has some advantages over the court system, such as privacy and speed, but these hardly seem strong enough to persuade the parties to use a forum where

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we are still obligated to believe in it. *See* SAUL SMILANSKY, FREE WILL AND ILLUSION 145–91 (2000).

160. *See* Ronald J. Gilson et al., *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 60–63 (2014); Kennedy, *supra* note 40, at 1699–1701.

161. Professor Fuller noted that this was one reason why arbitration was increasingly popular in commercial disputes. *See* Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 637–38 (1958).

162. Some federal courts adhere to the "manifest disregard of the law" standard for reviewing arbitral awards. In the Second Circuit, even a "barely colorable justification" will suffice to uphold an awards, and this standard "essentially bars review" of questions of contractual interpretation. T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010). In other federal courts, such as the Fifth Circuit, the "manifest disregard of law" standard does not apply at all. *See, e.g.*, Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009).

the language of their underlying contract, which they have presumably bargained for carefully, may be less likely to be upheld. Rather, it seems likely that parties don't mind arbitrators' baby-splitting. In New York, a recently proposed Senate bill would have allowed state courts to vacate an arbitral award on the grounds of "manifest disregard of law."[163] A local bar association opposed this bill because it was believed that arbitrators should be permitted to decide cases however they like, and the bill failed to advance.[164] As far back as 1957, Fuller was lamenting that contractual formalism in law courts had "reached a stage approaching crisis as commercial cases are increasingly being taken to arbitration."[165] The reason for this, he said, is that "arbitrators are willing to take into account the needs of commerce and ordinary standards of commercial fairness."[166] This is likely what parties want. After all, commercial contracts are signed by businesspeople, not lawyers.

If there are no serious benefits to the fiction that courts do not make contracts, what are the downsides? For a start, it creates the impression that contracts can be perfectly determinate—something that by most accounts is implausible.[167] Parties reading the decision may believe that they can cover off every eventuality, or nuance in meaning, in their agreement, which is highly unlikely.

Second, and more importantly, the fiction is completely general in scope: *all* contracts are made by the parties and *only* the parties. But as correctly reformulated—"the court deems that this contract should be construed particularly literally"—the fiction, by definition, is not general in scope.

What the parties value more than autonomy in contracting is being able to predict with some degree of confidence how their contract will be construed. This is necessarily true: there can be no autonomy without being able to predict the outcome of a dispute. Parties who want autonomy must also want certainty of prediction. But the converse is not true: a party who wants certainty of prediction may not also want autonomy. Parties frequently want to enter into contracts knowing that there are legal bounds to how it will be interpreted—for example, that

163. S.B. S2396, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

164. N.Y.C. BAR, REPORT ON LEGISLATION BY THE ARBITRATION COMMITTEE AND INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE 4–6 (2022), https://bit.ly/3ysHhE5.

165. Fuller, *supra* note 161, at 637.

166. *Id.* at 638.

167. *See, e.g.*, Timothy A.O. Endicott, *Linguistic Indeterminacy*, 16 OX. J. LEGAL STUD. 667, 668–69 (1996); *see also* Fuller, *supra* note 161, at 661–69; Peller, *supra* note 25, at 1160–70; Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 192–93 (2002) (arguing that objective theories of contractual interpretation suffer because they do not take into account inevitable ambiguities in language).

they will not be charged a usurious rate of interest. Even in the case of sophisticated commercial parties, as I have discussed, the parties may value a "fair" result more than a legally correct one.

Predictability requires predictable rules. The "courts do not make contracts" fiction hampers predictability. First, by denying the court's role in the dispute, it hampers the parties' ability to predict how the court itself will act when faced with a dispute—which may in turn affect how they write their contract. Second, it suggests wrongly that all contracts are treated—and should be treated—alike. Candor is the courts' best option here: some contracts get construed more literally than others.

B. "Generally Applicable Principles of Contract Law"

Courts do get involved in making contracts—but they make them in different ways. A court will approach a contract involving very sophisticated parties in different ways from one involving consumers; the insurance case will be treated differently from the credit agreement dispute. How should contract law account for this?

In an influential work, Professors Alan Schwartz and Robert Scott divided the "broad domain" of contractual relations into four groups.[168] These types are: (1) sales between firms; (2) sales between individuals; (3) sales by a firm to an individual; and (4) sales by an individual to a firm. In this scheme, contracts in the second category are regulated principally by family law and property law; contracts in the third category fall under consumer protection law, property law, and securities law; and contracts in the fourth category generally involve the sale of labor, which are governed by employment law.[169] Only contracts that fall into the first category are what Schwartz and Scott term "the main subject of what is commonly called contract law."[170]

This division immediately raises questions. For a start, if contract law is typically about firm-firm relations, why are so many cases involving individuals part of the classical contractual canon? Moreover, it is immediately obvious that these categories are not watertight. Schwartz and Scott define a "firm" as a corporate entity with five or more employees, a limited partnership, or a professional partnership.[171] It seems doubtful that they would claim that a company with five employees could never be considered alike with a company that has four employees, or that a law firm set up by an experienced solo practitioner could not be treated on a par with a partnership set up by two friends straight out of law school. If one or both of the parties were not

168. Schwartz & Scott, *supra* note 11, at 543.
169. *Id.* at 544.
170. *Id.*
171. *See id.* at 545.

considered firms, then presumably their dispute would be regulated by whatever contract law exists for the other categories, which is likely found lurking in the interstices of much statutory law. It seems rather more plausible, and in accord with our intuitions, that a court would view contract law as a continuous whole, with gradations between the categories.[172]

Despite this, courts almost certainly do resolve at least some disputes in Schwartz and Scott's Category One in different ways from disputes in other categories. Sometimes, courts will suggest that different rules apply to particularly sophisticated parties: the contracts between such parties are to be enforced "according to their terms."[173] (It is here that the court may add that it does not make contracts.) Occasionally, and rather dramatically, this principle might actually make a difference.[174] And oral contracts, the least sophisticated form of contract, are subject to different rules from written contracts.[175] Henry Maine famously argued that a feature of early law was the shift "from status to contract"; it appears likely that status is simply a part of contract.[176]

Lawyers instinctively recognize that courts decide different kinds of contract cases in different ways. Parties citing precedent will naturally

172. Even this is quite certainly too simple. There is no reason why there should be merely one smooth spectrum of contractual law governing firm-firm relations at one end and individual-individual relations at the other. More likely, a court would see various different spectrums tending in different directions at different points. And whatever "function" represents the court's view of contract law, there is also no reason why it should be continuous at all points. For example, a state may provide a tiered minimum wage based on the location of the employee or the size of the employer. The parties are free to contract for a higher wage, but cannot contract for a lower one, and the permitted range of the parties' bargaining choices varies non-continuously based on changes in the characteristics of the employee or employer. These non-continuous breaks in the function are generally likely to be the result of the positive statute law that Schwartz and Scott mention as governing the cases that fall outside of their Category 1.

173. *See, e.g.*, Vt. Teddy Bear Co. v. 538 Madison Realty Co., 807 N.E.2d 876, 879 (N.Y. 2004).

174. *See, e.g.*, Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544, 555 (Del. Ch. 2001).

175. The parol evidence rule can, by definition, have no application to an oral contract, and a court may be more likely to void an oral contract for inadequate consideration than a written one. Lord Mansfield described the consideration requirement as a rule of evidence, not of contract law. *See* Pillans v. Van Mierop, 3 Burr. 1663, 1669 (Eng. 1765). While this view has never been accepted, it seems obvious that a court will be much less likely to enforce an oral contract supported by a peppercorn's consideration than a written one. Occasionally, a court may require an oral contract to be proved by clear and convincing evidence, rather than a mere preponderance of the evidence. *See, e.g.*, Friedlander v. Friedlander, 58 A.2d 782, 788 (N.J. Ch. 1948). For example, the Statute of Frauds typically bars the enforcement of oral contracts with a term greater than one year. *See, e.g.*, CAL. CIV. CODE § 1624(a)(1) (West 2022); N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (Consol. 2022).

176. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 183 (10th ed. 1906) (1861).

cite cases with a similar subject matter to their current dispute. The parties may thus agree on the right category; for instance, in an insurance dispute, they may cite only insurance-related case law and may invoke insurance-specific canons of construction.[177] They may also cite evidence that relates to the particular subject matter at hand, such as evidence of trade practices.[178] And the court's approach is driven by the particular subject matter of the dispute. The Uniform Commercial Code (UCC) sets out specific rules for sales of goods, but not services.[179] As to some transactions, the UCC forces a particular mode of interpretation; in the domain of secured transactions, for example, the UCC specifically commands courts to ignore the plain language of the parties' contract, if necessary, and to treat all contracts as subject to its Article 9 "regardless of [their] form" (and apparently the parties' intent).[180]

Yet even though we recognize that courts treat different contracts in different ways, contract law and courts sometimes push us to think that all contracts are treated alike. Understandably so: since Langdell, contract law has been one discipline. And courts frequently recite that they use "generally applicable principles of contract interpretation" in resolving cases.[181] In fact in California, by statute, courts must interpret all contracts "by the same rules."[182]

But courts do not follow these strictures. For example, in insurance (where California law plays an outside role), courts do *not* apply the

177. For example, the *contra proferentem* rule is a well-known canon applied as a "tiebreaker" and particularly used in insurance disputes, when it is invoked in favor of the insured. *See* BANKS, *supra* note 22, at § 10.24; Posner, *supra* note 27, at 1607–08 (discussing the rule). Commercial contracts almost invariably contain clauses providing that the principle of *contra proferentem* shall not apply to their construction. BANKS, *supra* note 22, at § 10.24; *see, e.g.*, AM. BAR ASS'N, MODEL STOCK PURCHASE AGREEMENT (2d ed. 2010). In the case of insurance contracts, however, the rule of *contra proferentem* is often treated as a mandatory rule. *See* Ethan J. Leib & Steve Thel, Contra Proferentem *and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 788–91 (2014).

178. *See, e.g.*, Sharple v. AirTouch Cellular of Ga., Inc., 551 S.E.2d 87, 90–91 (Ga. Ct. App. 2001) (relying on evidence of trade practices in reversing grant of summary judgment). As a general matter, parties engaged in a trade are deemed to have adopted the meanings ascribed to words in the trade when they use those words in their contracts. *See, e.g.*, PERILLO, *supra* note 23, at § 3.17; BANKS, *supra* note 22, at § 9.32. Even here, though, the court may have considerable freedom of what it chooses to admit as a trade practice. For a prominent example of this, see Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960); *see also, e.g.*, Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 512 (2d Cir. 1977) (exhibiting skepticism toward expert testimony on trade practices).

179. *See, e.g.*, U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM'N 2002).

180. *Id.* § 9-109(a)(1).

181. *See* cases cited *supra* note 6.

182. CAL. CIV. CODE § 1635 (West 2022) ("All contracts, whether public or private, are to be interpreted by the same rules . . . .").

same rules as for other contracts.[183] The courts resolve the apparent conflict with the command of the civil code by claiming that insurance contracts have "special features" to which the "ordinary rules of contractual interpretation" apply.[184] And in other areas of contract law too, one finds courts interpreting contracts in different ways. This Article has discussed some; others are not hard to find.[185]

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183. The plain language governs, if it is indeed plain in the court's view; but if there is ambiguity, the court must look to the "objectively reasonable expectations of the insured" (as opposed to both parties), and if the ambiguity is still not resolved (perhaps if there is no evidence of those reasonable expectations), the court resolves ambiguities "against the insurer." Minkler v. Safeco Ins. Co., 232 P.3d 612, 617 (Cal. 2010); *see also, e.g.*, Gray v. Zurich Ins. Co., 419 P.2d 168, 274 (Cal. 1966); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.6 (8th ed. 2011). In addition, any clause placing limitations on coverage "must be conspicuous, plain and clear." MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1207 (Cal. 2003). On top of all this, insurance disputes are frequently characterized by a desire to produce what appears to be a fair result, no matter how clear the policy language and how well informed the insured. *See, e.g.*, Robert E. Keeton, *Insurance Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 963–65 (1970). The result is confusing. In the case of ambiguity, ordinary contractual principles apply, but with a twist: the contract will be interpreted in accordance with the reasonable expectations of the insured and not the insurer. Softening this principle slightly is the fact that the insured will be forced to live by those reasonable expectations — even if it now wishes that the contract were interpreted according to the insurer's expectations.

A case in point, with some overlaps with the asbestos litigation described above, is the dispute over the meaning of the word "occurrence" in the policies providing coverage for the attacks on the World Trade Center. The court noted that the insureds would have reasonably expected the definition of occurrence to be broad — potentially incorporating multiple events in a time period — because this would limit the number of per-occurrence deductibles that the insureds would have to pay under each claim. *See* SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, 467 F.3d 107, 115 (2d Cir. 2006). By contrast, the insurers would have wanted the definition of occurrence to be narrow, because this would increase the number of individual claims and thus the deductibles to be paid, reducing the insurers' out-of-pocket payment. Underlying the assumptions of both parties was that premise that it was unlikely that a single claim would breach the per-occurrence limit on payments—such that it would be valuable to the insureds to split claims and the insurers to aggregate them. This unlikely scenario is, of course, what transpired in the attack on the World Trade Centers. The insureds could not escape their own expectations—and so lost. *See id.*

In other respects, insurance law can be positively acontractual: the words on the page do not matter (!) no matter how clear they are, because the courts either assume that the policyholder has not read them (!!), or because the courts refuse to give them their clear meaning (!!!). *See, e.g.*, C&J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1107 (2006).

184. Powerine Oil Co. v. Superior Ct., 118 P.3d 589, 597 (Cal. 2005).

185. *See supra* Part II.C.4 (corporate law disputes). Arbitration clauses in contracts, while purely contractual, are arguably interpreted in different ways from other clauses, because of federal case law supporting arbitration. *See, e.g.*, David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 662–70 (2020) (describing how the Supreme Court has interpreted the Federal Arbitration Act to preempt state law). Numerous projects support treating consumer contracts differently from other kinds of contract. *See, e.g.*, RESTATEMENT OF CONSUMER CONTS. (AM. L. INST., Tentative Draft 2019).

The assertion that courts interpret all kinds of contracts in the same way, or in accord with generally applicable rules, is a source of confusion—and again, lack of predictability. As with the incorrect claim that courts do not make contracts, it has some benefits. It potentially simplifies contract law; and it allows courts to rely on decisions in all areas of contract law, even when there is not a case in point in the specific area at hand. But as noted earlier, there is a huge number of principles that courts can rely on in applying the objective approach to contracts. Courts, in being candid that they affect the contracts they are interpreting, could also give the parties greater certainty by making more of an effort to explain *why* they are choosing to apply the particular principles they apply in any given case.

Such an effort could come at relatively low cost. Indeed, any time a court follows precedent from the same area of contract law as the dispute it is adjudicating, the court is implicitly observing that different types of cases should be decided under different rules. But it would behoove courts, and treatises, to recognize that courts make different kinds of contracts in different ways—and that, when it comes to contract interpretation, the invocation of "generally applicable" principles has little value.

C. The Limits of the Predictability of Contract Law

Cleaning up the way in which we speak about contract law would pay dividends. We have less control over our contracts than we think. But we would also do well to consider: can contract law ever become as predictable as Langdell would have had us think?

The answer is no, and perfect predictability is impossible. As this Article has discussed and has been frequently acknowledged, all contracts are incomplete in some way, and words inevitably fall short of precision.[186] But the judicial system itself places its own constraints on predictability. The best-known constraint comes from the fact that, by and large, only hard cases get litigated[187]—and hard cases often make bad law. It is this law that then finds its way into the treatises or the hornbooks. All judicial decisions have been described as a "choice

186. *See supra* note 167 and accompanying text.

187. *See* George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 19–24 (1984) (where stakes are equal between the parties and the parties are experienced, the litigation rate will be low and each side will win 50% of the time). There are numerous possible formulations of Priest's and Klein's hypothesis. It has been shown that the statement of the hypothesis that the plaintiffs' actual trial win rate will be closer to 50% than it would have been if *all* cases had gone to trial is only true under certain assumptions about the quality of the parties' information. Yoon-Hoo Alex Lee & Daniel Klerman, *The Priest-Klein Hypothesis: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59, 69–70 (2016).

between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case," and this principle seems to apply with especial force to contract cases.[188]

Another very important constraint comes from the structure of the court system. In some jurisdictions, contract law, as expounded by the highest court, may bear the impression of being clean and precise—but the actual decisions handed down by the courts may fail to match that reality. In other jurisdictions, contract law may appear somewhat messier, but court decisions may adhere closer to the doctrine—such as it is. This is likely a function of the structure of and relationship between the trial and appellate courts.

Not all precedent is created equal. By definition, a trial court order from San Francisco has less precedential weight than a ruling by the California Supreme Court, and the same goes for a Manhattan Supreme Court order as compared to a ruling from the New York Court of Appeals. But courts can attempt, to an extent, to calibrate the future impact of their decisions. For a start, a court often has the ability to decide whether to cause a decision to be published in an official reporter or to make it available online only. (The term "publication" is now a misnomer.) In some jurisdictions, such as Delaware, parties in a future case may rely on any decision by a court, whether published or unpublished, and the cited-to court will accord it the weight it deserves.[189] An opinion that is published, however, is seen as having greater weight for the future, usually because it resolves a disputed legal issue. In other jurisdictions, such as California, strict rules prevent the use of all non-published opinions.[190] Appellate courts in California can decide for themselves whether to publish an opinion, and if so which parts of it. Other jurisdictions fall somewhere between these extremes. For example, in Minnesota, a decision that is designated as unpublished "must not be cited as precedent"[191]—but the parties can probably get away with it anyway.[192] The approach in the federal courts mirrors that in Delaware: courts "may not prohibit or restrict the citation" of decisions, but a court can choose whether to cause it to be officially published or not, which affects its precedential weight.[193]

188. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 216 (1931), *quoted in* Gary Peller, *The Metaphysics of American Law,* 73 CALIF. L. REV. 1151, 1215–16 (1985). For example, the plain meaning rule contradicts the rule that courts should examine the context of the parties' relationship.

189. *See, e.g.*, Aprahamian v. HBO, Inc., 531 A.2d 1204, 1207 (Del. Ch. 1987).

190. *See, e.g.*, CAL. R. CT. 8.1115(a) (providing that unpublished California appellate opinions may not be cited).

191. MINN. STAT. § 480A.08(3)(b) (2023).

192. This author has.

193. FED. R. APP. PRO. 32.1(a).

Some courts have a much more effective way of controlling the precedential weight of their decision: not deciding at all. The U.S. Supreme Court is a passed master in this area, but some state high courts can also play this game.[194] This likely affects the substantive development of contract law, both where high courts can decline to hear cases and where they cannot.

This Article has relied heavily on examples of law from California, Delaware, and New York. California and New York have a three-tier judicial system; Delaware does not. Each state provides for an appeal as of right[195]—but in California and New York, appeals in contract cases generally go to the intermediate appellate court, and do not go to the highest court.[196] In both California and New York, the high court has discretionary review over any decision, and it takes such appeals extremely rarely.[197]

In Delaware, by contrast, an appeal will go straight to the Supreme Court. The court may choose to sit en banc (with all five justices) or in a panel of three.[198] In addition, the Delaware Supreme Court may also choose to affirm without an opinion in an unpublished table ruling. But in *every* contract case, there will be a decision with a high court affirmance or reversal. In this regard, the Delaware Supreme Court may sit as a court of error correction, whereas its sister courts in California and New York do not.

The effect of this is to allow a deviation between contract doctrine, as it is expounded in the decisions by the California and New York high courts, and its actual implementation in the intermediate appellate courts—whereas no such deviation between theory and practice is possible in Delaware. This is not to suggest that intermediate appellate

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194. *See generally* Alexander M. Bickel, *The Supreme Court — 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961) (discussing the Court's discretionary declining of jurisdiction).

195. *See* CAL. CIV. PROC. CODE §§ 901 *et seq.*; N.Y. C.P.L.R. 5701 (McKinney 2022); DEL. CONST. art. IV § 17.

196. In California, "unlimited" civil appeals, meaning appeals where the amount in controversy is over $25,000, are taken to the court of appeal. CAL. CIV. PROC. CODE § 904.1. "Limited" civil appeals — meaning appeals where the amount in controversy is $25,000 or less — go to the appellate department of the relevant superior court. *Id.* § 904.2. In New York, any dispute originating in the supreme court can be appealed to the appellate division. N.Y. C.P.L.R. 5701(a)(1) (McKinney 2022).

197. According to the latest statistics, the New York Court of Appeals agreed to hear only 16 civil appeals in 2021, despite receiving almost 1,000 motions for leave to appeal. *See* N.Y. STATE UNIFIED CT. SYS., 2021 ANNUAL REPORT 57 (2021), bit.ly/3GZZVbu. The latest statistics for the California Supreme Court show that it received 774 petitions for review of civil cases in the 2018–19 fiscal year, and granted only 22 of them. *See* JUD. COUNCIL OF CAL., 2020 COURT STATISTICS REPORT 16, https://bit.ly/3lgkqrG.

198. *See* DEL. CONST. art. IV, § 12; DEL. SUP. CT., INTERNAL OPERATING PROCEDURES 9–10 (n.d.), https://bit.ly/3Tc5Fn2.

judges in California or New York ignore the law as it is set out in high court decisions.[199] It is to make the uncontroversial point that if the California or New York high courts observe a decision that they believe is inaccurate as a matter of law, but appears fair, they can choose to ignore it. The Delaware Supreme Court has no such luxury. Moreover, in California and New York, in exceptional and non-jury cases, the intermediate appellate court can exercise fact-finding powers, which may make it easier for them to arrive at a "fair" decision.[200]

It would be surprising if this did not have an effect on the development of the law by the high courts. In Delaware, high court contract law decisions must always marry law and justice. In California and New York, they need not: a "fair" but "unlawful" result can be ignored. One might therefore expect that Delaware Supreme Court decisions (and decisions from other states without intermediate appellate courts) will be more fact-oriented than decisions from states such as California and New York, as they will attempt to explain in more detail why their particular version of contract law is germane to the applicable facts. By contrast, the high courts in California and New York may choose to rule on cases where the law does not need to be finely tailored to the facts, and so may speak in broad pronouncements—confident both that the result clearly fits the law, and that the intermediate appellate courts may choose to ignore that law when justice so requires.[201]

The limited empirical evidence on this point does indeed suggest that commercial parties see New York contract law as providing some advantages over Delaware's. For the most part, when sophisticated parties with the freedom to choose their own governing law are entering into an agreement *other* than a merger, they will be more likely to choose New York law than Delaware.[202] In some contractual settings, such as financing, rigid certainty is better for the parties than contractual rules

199. For a discussion of the role of the Appellate Division of the Supreme Court in New York, see James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459 (1975).

200. CAL. CIV. PROC. CODE § 909; N.Y. CONST. art. vi, § 5; *see, e.g.*, Diaz v. Prof. Comm. Mgmt., Inc., 225 Cal. Rptr. 3d 39, 57–60 (Ct. App. 2017) (appellate court using its factfinding powers to ensure a prompt and fair result); N. Westchester Prof. Park Assocs. v. Town of Bedford, 458 N.E.2d 809, 812–13 (N.Y. 1983) (Appellate Division may "render the judgment it finds warranted as to the facts" following a bench trial).

201. *Cf.* Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 368 (1932) (contrasting the "long view" of the appellate judge with the perspective of the trial judge).

202. *See generally* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009).

that allow the court to exercise discretion.[203] This is not to say that Delaware, and other states, cannot also tailor their contract law to particular circumstances—quite clearly they can.[204] But the Delaware Supreme Court never has the ability to duck a decision altogether in order to preserve the theoretical consistency or unity of its contract law.

It is fair to surmise that in Delaware and other states with non-discretionary high court review, contract law doctrine may lack some precision; the high court may be forced to affirm some decisions that, if it were solely concerned with doctrinal purity, it would not have.[205] Likewise, in New York, California, and states with discretionary review, the law as expounded by the high court may appear purer than the non-discretionary-review states—but there may be a gulf between the decisions that are handed down by the intermediate appellate courts and the few cases heard by the high court. For example, even in New York, the preferred choice of governing law for debt documents, it is not clear that courts will always apply the law with the rigidity that parties expect.[206] By contrast, in Delaware, the parties may find it harder to distill contract principles from high court decisions—but they may find less of a gap between their expectations of how the contract will be construed and how it is actually construed. The parties should be aware that the neat precedent they seek to apply from a high court may not produce the result they hope for.

Moreover, there may be a gap between how a court applies its own law and how the same law is applied by a court from another state. The default, of course, is for the law governing a dispute not to differ from the law of the forum. But cases where the governing law differs from the forum law are common. And in these cases, we would have reason to expect that the law might be applied differently from in its home state, in a way that goes beyond mere errors of analysis.[207] A court could

203. *See, e.g.*, Banque Worms v. BankAmerica Int'l, 570 N.E.2d 189, 195 (N.Y. 1991) (adopting discharge-for-value rule out of a "concern for finality in business transactions").

204. *See, e.g.*, Off. Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A., 103 A.3d 1010, 1017–18 (Del. 2014).

205. Even in a summary affirmance in Delaware, the court frequently affirms "on the basis of" the opinion below. *See, e.g.*, Ravenswood Inv. Co., L.P. v. Estate of Winmill, 210 A.3d 705 (Del. 2018) (table). And even where that language is lacking, it is hard to see an affirmance as anything other than an endorsement of the trial court's decision, unless the Supreme Court specifically cabins its ruling. *See, e.g.*, Akorn, Inc. v. Fresenius Kabi AG, 198 A.3d 724, at *1 & n.5 (Del. 2018) (table) (containing limiting language).

206. *See, e.g.*, LCM XXII Ltd. v. Serta Simmons Bedding, LLC, 21 Civ. 3987, 2022 WL 953109, at *14–16 (S.D.N.Y. Mar. 29, 2022) (adopting broad view of implied covenant in tension with literalist reading of opinion employed elsewhere)

207. Every court will concede that it is more likely to make mistakes of foreign than domestic law.

reasonably take the view that when the parties have bargained for the use of law different from that of the forum, they should be deemed more sophisticated than the average litigant—and so a court should apply the rules of contract interpretation with that in mind. Or the court could see the use of foreign law as an escape: if the result appears unfair to one side, the court may be able to blame the application of foreign law. Or the court, being less familiar with how cases are usually decided in the state of the governing law, may be swayed more by the decisions of the highest court of that state—and again, it may arrive at results that would not be reached by a domestic court. The degree and manner in which the contract decisions of courts applying foreign law differ from those of the foreign courts themselves require further study.[208] But the choice of the forum also affects predictability, and parties should take this into account when they form their expectations of how their dispute will be decided.

V. CONCLUSION

Contracts can be unpredictable. So, unfortunately, is contract law. But courts should do whatever is possible to make the jurisprudence of contracts as easy to understand as possible. This Article has proposed dropping two peculiarly unhelpful maxims that are strewn about judicial opinions: that "courts do not make contracts" and that there are "generally applicable principles of contract law."

But more importantly, we should be alert to the fact that contract law is unpredictable and that it can never obtain the precision and certainty that is sometimes attributed to it. This may be no bad thing, but the way in which we talk about contract law should reflect this fact. It is one thing to make a contract in the knowledge that it may not be construed as one expects. One can plan for that contingency. It is quite another to be caught off-guard because one was certain that the court would construe the contract in a certain way. The language of contract law should not allow us false dreams of predictability.

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208. Likewise worthy of study is how high courts resolve questions of contract law certified to them by courts of another state. For an example of reluctance by the court of one state to deviate from how it perceived another state's law to be, see Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine Partners 2006, L.P., 93 A.3d 1203, 1207 (Del. 2014) ("The Delaware courts are not the proper forum for this sort of judicial innovation in New York law . . . .").