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## ESSAY

### FROM LANGDELL TO LAW AND ECONOMICS: TWO CONCEPTIONS OF *STARE DECISIS* IN CONTRACT LAW AND THEORY

Jody S. Kraus\*

*I*N his classic monograph, *The Death of Contract*, Grant Gilmore argued that Christopher Columbus Langdell, Oliver Wendell Holmes, and Samuel Williston trumped up the legal credentials for their classical bargain theory of contract law. Gilmore's analysis has been subjected to extensive criticism, but its specific, sustained, and fundamental charge that the bargain theory was based on a fraudulent misrepresentation of precedential authority has never been questioned. In this Essay, I argue that Gilmore's case against the classical theorists rests on the suppressed premise that the precedential authority of cases resides in the express judicial reasoning used to decide them. In contrast, I argue that the classical theorists implicitly presuppose that the precedential authority of cases consists in the best theory that explains their outcomes, even if that theory is inconsistent with the case's express judicial reasoning. The classical view of precedential authority completely defuses Gilmore's charge of fraud. In Gilmore's view, merely demonstrating the inconsistency between the proposition for which the classical theorists cited a case and the express reasoning in that case suffices as proof of misrepresentation. But in the classical theorists' view, the express reasoning in a case is simply a theory of its precedential authority, which, like any theory, can be wrong. Thus, the classical theorists simply reject Gilmore's claim that a case cannot properly be cited for a proposition inconsistent with its express reasoning. The real dispute, then, between Gilmore and the classical theorists is over the nature of precedential authority and not the content of contract law.

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*Having reframed the classic death-of-contract debate, I then trace these competing conceptions of precedential authority through the major schools of contemporary contract theory. I argue that a contract theory's embrace of one view instead of the other can be explained by the relative priority it accords to each of the two components in a conception of adjudicative legitimacy. A conception of adjudicative legitimacy consists in a theory of what it means for a decision to be based on law and a theory of what is required for law to be justified. I explain why theories according priority to the former tend to subscribe to the precedents-as-outcomes view, while theories according priority to the latter tend to favor the express reasoning view. The Essay concludes by arguing that the economic analysis of contract law subscribes to the precedents-as-outcomes view and therefore is the contemporary jurisprudential successor to the late nineteenth-century classical theorists.*

#### INTRODUCTION

In *Harris v. Watson* (1791), Lord Kenyon held that “[n]o action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship.”<sup>1</sup> His decision was based expressly on a “principle of policy”: “if sailors were . . . in times of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.”<sup>2</sup> In *Stilk v. Myrick* (1809), Lord Ellenborough held that an action did not lie on a captain’s promise to pay the remaining sailors the wages of two sailors who had deserted the ship in a foreign port.<sup>3</sup> One report of *Stilk* quotes Lord Ellenborough as stating “I think *Harris v. Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of considera-

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<sup>1</sup> (1791) Peake 102, 102, 170 Eng. Rep. 94, 94 (K.B.).

<sup>2</sup> *Id.*

<sup>3</sup> (1809) 2 Camp. 317, 170 Eng. Rep. 1168 (K.B.).

tion.”<sup>4</sup> In 1920, Samuel Williston, the author of the first modern treatise on contracts and then-future reporter of the *Restatement of the Law of Contracts*, agreed with Lord Ellenborough, citing both *Harris* and *Stilk* for the proposition in Section 130 of his treatise that a performance or promise to perform any obligation previously existing under a contract with the promisee is not valid consideration.<sup>5</sup> In his classic 1974 monograph, *The Death of Contract*, Grant Gilmore claimed “there is no conceivable way in which *Harris v. Watson* can be taken to have been decided on consideration theory.”<sup>6</sup> According to Gilmore, either Lord Ellenborough actually decided *Stilk* on the public policy ground stated in *Harris* but his reasoning was misreported, or he intentionally misinterpreted the ruling in *Harris* because he was “an owner’s man all the way who would use any theory, however far-fetched—even ‘want of consideration’—to strike down seamen’s wage claims.”<sup>7</sup> As to why Williston cited *Harris* and *Stilk* as authority for *Restatement* Section 130, Gilmore remained agnostic between the possibilities of “deliberate deception” and “unconscious distortion.”<sup>8</sup>

An “owner’s man all the way,” “deliberate deception,” and “unconscious distortion”? Those were fightin’ words in 1974, and they still are today. Gilmore was taking aim at Williston’s efforts to marshal cases as precedential authority for the “bargain theory of consideration,” which, together with the objective theory of intent, comprised the doctrinal core of the nineteenth-century classical conception of contract law. The doctrine of consideration holds that promises are not legally enforceable unless supported by consideration. The bargain theory, famously championed by Oliver Wendell Holmes,<sup>9</sup> defines consideration as a performance or return

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<sup>4</sup> 2 Camp. at 319, 170 Eng. Rep. at 1169.

<sup>5</sup> 1 Samuel Williston, *The Law of Contracts* § 130 (1931).

<sup>6</sup> Grant Gilmore, *The Death of Contract* 30 (Ronald K.L. Collins ed., Ohio State Univ. Press 2d ed. 1995).

<sup>7</sup> *Id.* at 29–30 & 127 n.57.

<sup>8</sup> *Id.* at 30.

<sup>9</sup> Holmes wrote that:

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.

promise that is “bargained for,” and states that a performance or return promise is bargained for if it is “sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>10</sup> Gilmore claimed that Langdell single-handedly “launch[ed] the idea that there was—or should be—such a thing as a general theory of contract,” that Holmes created the “broad philosophical outline” of that theory, and that Williston fraudulently legitimated the theory in the “meticulous, although not always accurate, scholarly detail” of case law.<sup>11</sup> *Stilk* and *Harris* are Exhibits A and B in Gilmore’s brief to expose Williston’s fraud.

Gilmore’s specific claim is that Holmes and Williston<sup>12</sup> committed fraud by citing cases for doctrinal propositions that were unsupported by, and in some cases contradicted by, the express judicial reasoning of those cases. Once Gilmore purports to demonstrate the gap or inconsistency between the classical theorists’ reading and the express reasoning of a case, he concludes that the classical theorists engaged in either deliberate deception or unconscious distortion. The conclusion is a non sequitur. Gilmore’s critique presupposes that an interpretation of a case is proper only

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Oliver Wendell Holmes, *The Common Law* 230 (Mark DeWolfe Howe ed., Belknap Press of Harvard Univ. Press 1963) (1881).

<sup>10</sup> Restatement (Second) of Contracts § 71 (1981). The *Restatement of the Law of Contracts* incorporated the bargain theory of consideration in § 75 by defining consideration for a promise as “an act other than a promise, or . . . a return promise, bargained for and given in exchange for the promise.” Restatement of the Law of Contracts § 75 (1932).

<sup>11</sup> Gilmore, *supra* note 6, at 15.

<sup>12</sup> Gilmore never provides an example of a case that Langdell allegedly misinterpreted. Instead, he claims Langdell based his theory of contract on an unreasoned and dogmatic explanation of a set of precedents that itself was unrepresentative of American contract law:

[Langdell’s contracts casebook], according to Langdell, was to contain—and presumably did contain—all the important contract cases that had ever been decided. “All the cases” turned out to be mostly English cases, arranged in historical sequence from the seventeenth century down to the date of publication; the English cases were occasionally supplemented by comparable sequences of cases from New York and Massachusetts—no other American jurisdictions being represented. The Summary [of the Law of Contracts, which Langdell added as an appendix to the second edition of his casebook in 1880], . . . is devoted almost entirely to explaining which of the cases in the main part of the casebook are “right” and which are “wrong.” The explanation, typically, is dogmatic, rather than reasoned; Langdell knew right from wrong, no doubt by divine revelation . . . .”

Gilmore, *supra* note 6, at 13.

if it constitutes a plausible interpretation of the express judicial reasoning in the case. In contrast, Holmes and Williston implicitly presupposed the view that the doctrine a case sets as a precedent is the one that best explains its outcome, regardless of whether that doctrine is also a plausible interpretation of, or even consistent with, the express reasoning offered by the deciding judge. On their view, the express reasoning in a case is merely a theory, rather than constitutive statement, of the doctrinal precedent set by that case. The bare outcomes of cases, and not the express reasoning in cases, provide the data that doctrinal theories must explain and justify. On this view, the outcome is the only component of a case's precedential authority that is exclusively within the control of the deciding judge. Even the outcome's correct characterization for purposes of identifying a case's precedential authority, beyond the mere description of which party prevailed, is determined by the doctrinal interpretation that best explains why the prevailing party won.<sup>13</sup> For convenience, I will refer to this view, somewhat mislead-

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<sup>13</sup> Karl Llewellyn defined the first question of case interpretation as an inquiry into what the court *actually decided* in a given case: judgment reversed, and new trial ordered. And the question of what express ratio decidendi it announced. These are facts of observation. They are the starting point of all discussion. Until you have them there is no use doing any arguing about anything.

K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 76 (1960). The second question, however, is

*what the rule of the case is*, as derived from its comparison with a number of other cases. This is not so simple, but the technical procedures for determining it are clear. Skilled observers should rather regularly be able to agree on two points: (i) the reasonably safe maximum rule that case can be used for; (ii) the reasonably certain minimum rule the case must be admitted to contain.

Id.

Llewellyn referred to the view of precedential authority that identifies cases with the minimum rule as the "orthodox" or "strict" view of precedent. According to the orthodox view, "[t]he express ratio decidendi is prima facie the rule of the case, since it is the ground upon which the court chose to rest its decision." Id. at 66. In contrast, Llewellyn referred to the view of precedential authority that identifies cases with their maximum rule as the "loose" view:

the view that a court has decided, and decided authoritatively, *any* point or all points on which it chose to rest a case, or on which it chose, after due argument, to pass. . . . In its extreme form this results in thinking and arguing exclusively from *language* that is found in past opinions, and in citing and working with that language wholly without reference to the facts of the case which called the language forth.

Id. at 67-68.

ingly, as the view that the precedential authority of cases resides in their outcomes alone, or the precedents-as-outcomes view for short.<sup>14</sup> In contrast, if precedential authority resides in express judicial reasoning, the doctrine established by a case is identical to the justification for the outcome of that case expressly articulated by the judge who decided it, regardless of whether that justification provides an adequate or consistent, let alone compelling, explanation for that outcome.<sup>15</sup>

Acknowledging the existence and plausibility of these competing views of the nature of precedential authority defuses Gilmore's incendiary charge that the classical theorists engaged in fraud or negligent misrepresentation. Instead, it exposes a much deeper disagreement, submerged below the surface of Gilmore's complaint, over the role of express judicial reasoning in the proper interpretation of precedent and over the role of *stare decisis* in transforming

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Note that Llewellyn's two conceptions both identify precedential authority with the express language of cases. While the orthodox view limits the rule of a case to the express reasoning that determined its outcome (its *ratio decidendi*), the loose view includes as the rule of a case potentially all express reasoning in that case, regardless of whether it was outcome determinative in that case (*obiter dicta*). In contrast, the precedents-as-outcomes view I identify and associate with the classical theorists rejects the claim that the rule of a case is necessarily defined by its express reasoning, including express reasoning that Llewellyn would characterize as its *ratio decidendi*. For the classical theorists, the *ratio decidendi* consists in the best theory of the case's outcome, and the express reasoning of the case is just one theory among others.

<sup>14</sup> It is misleading only because the doctrinal precedent set by a case, on this view, consists not merely in its outcome, but rather in the theory that best explains and justifies that outcome, together with other outcomes that the theory treats as related. So characterized, however, the precedents-as-outcomes view confronts a bootstrap problem: If case outcomes are the data that legal theories explain, then they must be identifiable pretheoretically. Yet even a minimal characterization case requires some theory for determining which facts are relevant. The precedents-as-outcomes view need not claim, however, that outcomes can or must be characterized independently of theoretical presuppositions. Rather, it characterizes case outcomes by making the fewest theoretical presuppositions possible and identifies precedential authority with the theory that best explains those outcomes. In contrast, the express reasoning view holds that precedential authority resides entirely in the court's express reasoning. It therefore treats competing theories of case outcomes that are inconsistent with the express reasoning of those cases as irrelevant to a case's precedential authority.

<sup>15</sup> For a detailed argument that economic contract theories embrace the precedents-as-outcomes view and deontic (that is, nonconsequentialist) contract theories endorse the express reasoning view, see Jody S. Kraus, *Philosophy of Contract Law in The Oxford Handbook of Jurisprudence and Philosophy of Law* 687 (Jules Coleman & Scott Shapiro eds., 2002).

bad precedents into good law. In this Essay, I reexamine Gilmore's case against the formalists and argue that it is constructed almost entirely on the suppressed premise that the precedential authority of cases resides in their express judicial reasoning. Against all but one of Gilmore's charges of improper citation of legal authority, the classical theorists can effectively defend their treatment of precedent as proper by arguing that their interpretation of a case provides the best explanation and justification of its outcome, regardless of its relationship to the express judicial reasoning in the case. Against the remaining charge, the classical theorists' view of *stare decisis* explains why they would insist that a doctrine entailed by their conception of contract law is a valid part of American contract law even though a well-known contrary line of cases left the question concededly unsettled. This reexamination, then, demonstrates that Gilmore's conclusions simply beg the question against the classical theorists' implicit view of the nature of precedential authority and the role of *stare decisis*. Gilmore's debate with the classical theorists only appears to be over the substantive doctrinal content of late nineteenth-century contract law. Although he evidently did not realize it, Gilmore's real disagreement with the classical theorists is over the nature of precedential authority. And that debate was never engaged because neither Gilmore nor the classical theorists explicitly articulated, let alone defended, their views of precedential authority.

The question then naturally arises why the classical theorists would implicitly subscribe to the precedents-as-outcomes view and why Gilmore would reject it. I argue that the choice a theorist makes between the two views of precedential authority is likely to be influenced by the relative weight the theorist assigns to each of the two prongs of a conception of adjudicative legitimacy: a theory of what it means for a decision to be *based on* law and a theory of what is required for law to be *justified*.<sup>16</sup> Thus, the first prong of a conception of adjudicative legitimacy provides an explanation that connects the outcome of a case with the legal rules and principles that are supposed to explain that outcome. For example, a legal

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<sup>16</sup> The claim here is not that a conception of adjudicative legitimacy logically entails any particular view of precedential authority, but only that some pairings of particular conceptions of adjudicative legitimacy with certain views of precedential authority will be more theoretically congenial than others. See *infra* Part I and Section II.B.



rule or principle might be connected to the outcome of a case because it uniquely determines that outcome given the facts of the case. Alternatively, the legal rule or principle might be merely consistent with the outcome of a case even though it falls short of uniquely determining it. The second prong of a conception of adjudicative legitimacy assumes that case outcomes can be satisfactorily explained by the legal rules and principles of those cases but seeks to explain why those rules and principles would justify those outcomes. For example, suppose the outcome of a case was uniquely determined by the application of a legal rule instructing a judge to flip a coin to determine which litigant should prevail. The second prong of a conception of adjudicative legitimacy must explain why the coin-toss rule is justified as a method of determining which party should win. Ultimately, the second prong must explain why the legal rules and principles of a case justify the state in exercising coercion to enforce the court's judgment. The second prong therefore must invoke a moral or political theory that explains why coercive state enforcement of a particular legal regime is justified. I argue that the classical contract theorists were attracted to the view of precedents-as-outcomes because their more general jurisprudential view, which Thomas Grey has termed "classical orthodoxy,"<sup>17</sup> places almost exclusive priority on the first prong of adjudicative legitimacy—explaining how the legal rules and principles of a case lead to its outcome.

The formalism underlying the classical theory of contract law, of course, ultimately succumbed to legal realism, and later to Critical Legal Studies ("CLS"). Legal realists such as Gilmore, and CLS theorists such as Duncan Kennedy and Roberto Unger, argued that the legal reasoning of contract decisions played little or no role in explaining, let alone justifying, those decisions. In the same period Gilmore wrote *The Death of Contract*, Charles Fried published the first contemporary deontic theory of contract law and Charles Goetz, Robert Scott, and Richard Posner published explanatory economic theories of contract law. Both the deontic and economic theories of contract were responses to the legacy of legal realism and CLS. But Fried's deontic theory exclusively challenged their skepticism about the possibility of satisfying the second prong

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<sup>17</sup> Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1, 2 (1983).

of a conception of adjudicative legitimacy for contract law—the prong that purports to prove that the state is justified in exercising coercion to enforce the rules and principles of contract law. Fried’s concern was to demonstrate that the legal rules and principles of contract law are grounded in a moral theory that justifies the exercise of state coercion. He gave virtually no thought to the question of how those rules and principles are connected to the outcomes of contract cases. Fried’s theory implicitly relies on the express reasoning view of precedential authority. I argue that this view is conducive to his view that contract law is justified by the moral promise principle. The economic analysts, however, primarily challenged the realist and CLS skepticism over the possibility of satisfying the first prong of a conception of adjudicative legitimacy—the prong that purports to explain how the legal reasoning in contracts cases connects to their results. Like the classical contract theorists, the economic analysts implicitly believed that legal reasoning can explain a case outcome only if it uniquely determines it. In this respect, the explanatory economic analysts inherited the jurisprudential mantle of the nineteenth-century classical contract theorists.

The thesis of this Essay is that the competing conceptions of contract law advanced in both classical and contemporary theories of contract can be properly understood, compared, and assessed only by identifying the view of precedential authority to which each implicitly subscribes. This view will be influenced by the relative priority each theory accords to the two different prongs of a conception of adjudicative legitimacy: explaining how a contract case outcome is based on the contract law that is supposed to explain it and explaining why the state is justified in exercising coercion to enforce contract law. Part I presents the tenets of “classical orthodoxy” that explain and motivate the formalists’ conception of contract law, their adherence to the precedents-as-outcomes view of precedential authority, and their conception of *stare decisis*. It then carefully examines Gilmore’s critique of the classical conception of contract law, including the bargain theory of consideration and the objective theory of intent, and argues that Gilmore’s critique begs the question against the classical theorists’ view of precedents-as-outcomes. Part II then introduces contemporary deontic theories of contract and argues that Charles Fried’s theory implicitly pre-

supposes that the precedential authority of cases resides exclusively in their express judicial reasoning. It also explains why Fried would be attracted to this view. Part III supports the claim that economic analysts of contract law subscribe to the precedents-as-outcomes view by reviewing excerpts from the joint scholarship of Robert Scott and Charles Goetz, and the early scholarship of Richard Posner. It also tries to explain why explanatory economic analysts would find this view congenial to their approach to contract law.

#### I. CLASSICAL ORTHODOXY AND ITS AFFINITY TO THE PRECEDENT-AS-OUTCOMES VIEW

When Christopher Columbus Langdell joined the Harvard law faculty as Dean and began preparations for teaching contract law in 1870, he set out to design a course that would treat the subject of contract law as a science. For Langdell, that meant adhering to the tenets of what Thomas Grey has termed “classical orthodoxy.”<sup>18</sup> On loose analogy with geometry, classical orthodoxy postulated that a field of law amenable to scientific analysis is governed by a few general master principles from which more precise legal rules could be deduced. Those rules, in turn, are applied to the specific facts of a dispute to determine a result. But how did classical orthodoxy identify the principles of contract law in the first place? Were the principles of contract law ultimately external to the contracts cases, and the cases themselves mere evidence of those principles, as antebellum jurisprudence had traditionally conceived much of the common law?<sup>19</sup> Or did those principles not only reside in but originate from contract case law itself? According to Grey’s lucid explication, classical orthodoxy induced the general principles of contract law from the cases themselves, whose ultimate authority was derived from the principle of *stare decisis*. Once a line of cases was sufficiently established, the principle induced from those cases constituted a principle of law.

Langdell invented the law casebook—his most enduring tangible legacy—as a pedagogical device for illustrating how the principles

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<sup>18</sup> Grey, *supra* note 17, at 2.

<sup>19</sup> See, e.g., Llewellyn, *supra* note 13, at 43–44 (1960); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 23–27 (2001).

of contract law could be found in contracts cases. Had Langdell's examination of contracts case law led him to conclude that the set of principles underlying the cases was logically incoherent or internally inconsistent—or worse, that no set of principles could be induced from the cases because they were hopelessly vague—he would no doubt have abandoned his conception of contract law as legal science. (Indeed, this was Langdell's view of public law.)<sup>20</sup> But instead, Langdell's analysis of the cases led him to conclude that contract law was comprised of a logically consistent set of basic principles from which the correct rules of contract law could be derived. Those principles provided the logical basis for his evaluation of all contract decisions. Any case decided contrary to the rules logically entailed by the general principles of contract law was wrongly decided. All cases following the principle or rule in an erroneously decided case would also be dismissed as incorrect, unless and until those decisions accumulated over time and became an established line of precedent. In that event, the erroneous rule would be transformed into good law under the principle of *stare decisis*. Langdell and his followers hoped, of course, that their clarification of the internal logical structure and principles of contract law would enable judges to decide cases accordingly, and that erroneous decisions would be quickly identified and rejected as bad precedent, rather than repeatedly reaffirmed to the point where they would acquire the force of law by virtue of brute persistence. Indeed, Williston, a disciple of Langdell and fellow traveler in classical orthodoxy, took this position, which, in turn, was the *raison d'être* of the *Restatement* project he pioneered.<sup>21</sup>

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<sup>20</sup> See Grey, *supra* note 17, at 34 (“The classicists did not regard public law, including constitutional law, as amenable to scientific study at all. . . . Constitutional law was unscientific, because hopelessly vague . . .”).

<sup>21</sup> See Samuel Williston, *Change in the Law*, 69 U.S. L. Rev. 237, 239 (1935) (“I believe also that the best path at the present time and in the future for judicial decisions is in a fuller recognition of *stare principis* as a qualification of *stare decisis*. This involves both a greater willingness to overrule outworn cases and outworn principles, and greater frankness in so doing.”); Samuel Williston, *Fashions in Law with Illustrations from the Law of Contracts*, 21 Tex. L. Rev. 119, 133 (1942) (“Though Langdell's colleagues differed from him in many ways, they agreed in seeking fundamental legal principles and testing them by observing their logical consequences in every conceivable aspect. If precedents conflicted with some of these consequences, and no good reason could be found for the precedents, they were criticized. *Stare principis*, rather

Grey's discussion explains the foundational role classical orthodoxy accords to *stare decisis*. But the principle of *stare decisis* is only a part of the broader theory of precedential authority to which classical orthodoxy subscribes. As noted in the Introduction, classical orthodoxy paired its claim that contract law consisted in general principles induced from contracts precedents with the precedents-as-outcomes view of precedential authority. This view, of course, differs from the view that the precedential authority of a case resides in express judicial reasoning, regardless of whether that reasoning provides an adequate or consistent, let alone compelling, explanation for that outcome.

We can speculate that the adherents of classical orthodoxy were attracted to the precedents-as-outcomes view because they aspired to impose scientific rigor—or their late nineteenth-century conception of it—on contract law by demonstrating that it was coherent, conceptually ordered, precise, complete, and determinate. Classical orthodoxy would find the precedents-as-outcomes view congenial because it would likely view the outcome of a case as the law's closest analogue to the empirical data of the hard sciences that inspires classical orthodoxy. There can be no doubt that the outcome of a case has the force of law—the judicial order at the end of every case is legally authoritative and binding on the legal officials to whom it is directed. What a judge says about his decision could be arguable and fallible, but under the principle of *res judicata*, his ruling for one party over the other undeniably has the force of law unless and until it is overturned on appeal.

In addition, by treating outcomes as the only legal facts established by a judicial decision, classical orthodoxy maximizes its ability to unify contract law under a small and coherent set of principles induced from prior decisions. At the same time, it minimizes the extent to which the principle of *stare decisis* can undermine the coherence of contract law over time. Similarly, cases whose express reasoning would otherwise render them inapposite as illustrations of the application of rules derived from those principles can serve as ideal illustrations provided only that their outcomes are consistent with those rules. Simply put, the view that precedential au-

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than *stare decisis*, controlled much of the thought in the school.”); see also William Draper Lewis, Introduction in *Restatement of the Law of Contracts*, at viii–ix (1932).

thority resides in case outcomes alone increases the flexibility of the cases to accommodate a more theoretically elegant theory of contract law. Treating case outcomes as legal wheat, and express judicial reasoning as legal chaff, maximizes the prospects of maintaining the scientific respectability of the law. Or as Gilmore might have put the point had he considered it, if cases are treated as the legal “data” for a “science” of contract law, the view that the precedential authority of cases resides exclusively in their outcomes is more conducive to data manipulation than the view that assigns precedential authority to express judicial reasoning as well.

Classical orthodoxy’s aspiration to scientific rigor was not, however, an end in itself. Classical orthodoxy aspired to demonstrate the scientific rigor of contract law in order to establish the legitimacy of contract decisions.<sup>22</sup> Classical orthodoxy is motivated by the same conception of adjudicative legitimacy described in the Introduction: that cases should be decided on the basis of justified law. Demonstrating that contract cases were legitimately adjudicated, therefore, required an account of what it means to decide a case on the basis of law and for the law to be justified. The formalists focused almost exclusively on developing a theory of the former. In their view, a case is decided on the basis of law only if its outcome is uniquely determined by the applicable law. Classical orthodoxy itself is designed to insure that this requirement will be satisfied. According to classical orthodoxy, the rules governing contract cases are mutually consistent, well-ordered, and comprehensive. This means that every possible contract case will always be governed uniquely by a contract rule that determines a unique result. Classical orthodoxy is therefore designed to insure that the outcomes of contracts cases are uniquely determined by contract rules, and thereby legitimate because decided on the basis of law.

The system of classical orthodoxy also acknowledged that determinacy of outcomes was merely a necessary condition for adjudicative legitimacy. It recognized that the legal rules that determined the outcomes must themselves be justified for the decision to be legitimate. Classical orthodoxy accounted for the justification of legal rules by allowing that considerations of “acceptability” were to be taken into account during the process of inducing gen-

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<sup>22</sup> See, e.g., Grey, *supra* note 17, at 12–13.

eral principles of contract law from prior contracts cases. But classical orthodoxy paid little more than lip service to this dimension of adjudicative legitimacy. Its principal agenda was to demonstrate the adjudicative legitimacy of contract law by explaining how contract law determined outcomes in contract cases. In sum, the contract law the formalists identified and subsequently enshrined initially in Williston's contracts treatise, and later in the highly influential *Restatement of Contracts*, was ultimately a product of their view that contract adjudication must be legitimate, that legitimacy requires that case results be determined by the application of rules derived from a small set of principles induced from prior contracts cases, and that precedential authority is governed by *stare decisis* and resided in case outcomes alone, rather than express judicial reasoning.

#### A. Gilmore's Critique of the Bargain Theory of Consideration

That classical orthodoxy in fact subscribed to the view that precedential authority resides in case outcomes alone is evident from a careful analysis of Gilmore's critique of Williston's use of precedential authority in his treatise on contracts. Let us return to the discussion of *Stilk v. Myrick* and *Harris v. Watson*—the first two of four exhibits Gilmore offers as evidence that the formalists' bargain theory of consideration originated in fraud—and in particular, to his argument that Section 130 of Williston's contracts treatise was a product of unconscious distortion or deliberate deception. Williston cites *Stilk* and *Harris* as illustrations of the result compelled by the rule governing the enforceability of agreements to modify prior agreements, which is itself logically entailed by the consideration principle.<sup>23</sup> Gilmore claimed that Langdell and Holmes had insufficient case law authority from which to induce the general principle of bargained-for consideration in the first instance. But Williston offered neither *Stilk* nor *Harris* as authority for the bargain theory of consideration itself. Instead, he cited them as authority for rules that are derivable from that principle. Once we grant that the bargain theory of consideration is a principle of contract law (based on other precedents), the rule that modifications are unenforceable absent fresh consideration follows as a

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<sup>23</sup> Williston, *supra* note 5, at § 130.

matter of logic. *Stilk* and *Harris* are illustrative authority for that proposition by virtue of their outcomes alone. In both cases, an agreement to modify a preexisting agreement is held unenforceable because it is unsupported by additional consideration. Even if other explicit reasons might have been offered for those decisions by the judges who decided them, or were otherwise available to explain them, Williston (like Langdell) treated them as rightly decided because their result was logically compelled by a general principle of contract law he took to be independently established.

While Williston's citation of *Stilk* conceivably could be based on its express judicial reasoning (as quoted in only one of two reports of the case), his citation of *Harris* could not. The only noncynical explanation for Williston's citation of *Harris* is that he believed the legal authority of a case resides ultimately in its outcome and is not controlled by its express judicial reasoning. Moreover, this is precisely the view of precedential authority Lord Ellenborough explicitly embraced in *Stilk* when he said: "I think *Harris v. Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported."<sup>24</sup> For Lord Ellenborough, and later Williston, the "true principle" of law a case sets as a precedent is the one that provides the most fundamental ground for the decision, irrespective of the express reasoning in the opinion. In fact, in his critique of Williston's analysis of *Dickinson v. Dodds* (1876),<sup>25</sup> Gilmore himself appeared to realize that Williston's analysis presupposes this view of precedential authority.<sup>26</sup>

*Dickinson* is the third exhibit Gilmore offered as evidence that Williston systematically distorted precedent to fit his theory of contract law. In *Dickinson*, Dodds made an offer on a Wednesday to sell land to Dickinson and at the same time promised that the offer would be "left over" until Friday morning. But before Dickinson attempted to accept the offer on Thursday evening, Dodds sold the land to Allan.<sup>27</sup> In Gilmore's view, the statement that the offer would be "left over" is ambiguous between an expiration date for a

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<sup>24</sup> (1809) 2 Camp. 317, 319, 170 Eng. Rep. 1168, 1169 (K.B.).

<sup>25</sup> (1876) 2 Ch.D. 463.

<sup>26</sup> See Gilmore, *supra* note 6, at 31–33.

<sup>27</sup> *Dickinson*, 2 Ch.D. at 463–64.



revocable offer and a promise not to revoke the offer.<sup>28</sup> In addition, citing the opinion of Lord Justice Mellish in *Dickinson*, Gilmore claimed that the court held for Dodds solely on the ground that Dickinson's mind could not have met with Dodds's mind after Dodds sold the land to Allan.<sup>29</sup> But Williston cited *Dickinson* as the leading case authority for Section 55 of his treatise on contracts, which states that "offers unless under seal or given for consideration may be revoked at any time prior to the creation of a contract by acceptance."<sup>30</sup> Gilmore concluded that Williston distorted the ruling in *Dickinson*:

[T]he Holmesians, describing themselves as objectivists, had nothing but scorn for "subjective" or "meeting of the minds" theory. The case was therefore restated as one involving, on the facts, an offer clearly meant to be irrevocable and the result was explained on the ground that Dodds had received no "consideration" for the assurance of irrevocability.<sup>31</sup>

In fact, Gilmore's analysis of *Dickinson* can be refuted even on its own terms.<sup>32</sup> But even if we were to concede Gilmore's description

<sup>28</sup> Gilmore, *supra* note 6, at 31.

<sup>29</sup> *Id.* at 31–32.

<sup>30</sup> Williston, *supra* note 5, at § 55.

<sup>31</sup> Gilmore, *supra* note 6, at 32.

<sup>32</sup> Here, Gilmore himself is playing fast and loose with *Dickinson*. Even a superficial reading of Lord Justice James's opinion, the other opinion in *Dickinson*, proves that the court expressly decided the case, at least in part, on consideration theory:

"This offer to be left over until Friday . . ." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning . . . [I]t is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum* was not binding, and that at any moment before a complete acceptance by *Dickinson* of the offer, *Dodds* was as free as *Dickinson* himself.

2 Ch.D. at 472. Moreover, Lord Justice Mellish begins his opinion by explicitly agreeing with Lord Justice James on this question:

I am of the same opinion. . . . [T]his being only an offer, the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind *Dodds*. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning.

*Id.* at 473–74. It is therefore quite clear that both opinions in *Dickinson* interpret Dodds's statement that his offer would be "left over" until Friday morning as a promise not to retract his offer until Friday morning, and both Justices rule that this promise is unenforceable for lack of consideration.

of the facts and express judicial reasoning in *Dickinson*, his critique of Williston's analysis of *Dickinson*, like his critique of Williston's analysis of *Harris* and *Stilk*, presupposes that the precedential authority of cases resides in their express reasoning rather than in their outcomes alone. Yet even Gilmore appeared to realize that Williston treated results, rather than judicial reasoning, as the only authoritative component of cases when he wrote that "[t]he result in *Dickinson v. Dodds* commended itself to the Holmesian theorists more than the facts or Mellish's reasoning did."<sup>33</sup>

For Williston, it would not have mattered if the *Dickinson* court had not expressly based its opinion on the consideration principle. Since the consideration principle made Dodds's promise not to revoke his offer unenforceable, it was the proper ground for the decision even if consideration was not the express judicial ground for deciding the case. Gilmore noted that Section 55 of Williston's treatise not only declares offers revocable absent consideration, but further states that offers remain revocable even if the offer is expressly held open for a definite period of time and the offeror promises not to revoke it. Gilmore wrote:

Williston evidently treats the second and third propositions . . . as logical deductions from the general principle. Williston, when he wanted to, could read cases accurately; in this instance he did not bother to pretend that the subordinate propositions were directly

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But the ruling that the promise to hold the offer open was not enforceable was not sufficient to decide the case. The Justices still had to consider whether a contract was formed when *Dickinson* attempted to accept Dodds's offer. Both opinions concluded that acceptance did not occur because, on the version of the meeting of the minds theory to which Lord Justices James and Mellish subscribed, *Dickinson* lacked the power to accept Dodds's offer once he knew that Dodds had sold the property to Allan. *Id.* Thus, while Gilmore was right that *Dickinson* was decided in part on the basis of the meeting of the minds theory, he was wrong that this is the sole basis of the opinion. And he was certainly wrong that Williston distorted the facts by interpreting the term "left over" to mean "held open" and that Williston ignored or distorted the express reasoning in *Dickinson* when he cited it as authority for the proposition that a promise to hold an offer open is unenforceable if not supported by consideration. But as I argue in the text below, even if Gilmore had been right, Williston's citation of *Dickinson* would have constituted distortion only if its precedential authority is presumed to reside in its express judicial reasoning, rather than its outcome alone.

<sup>33</sup> Gilmore, *supra* note 6, at 32.

involved in *Dickinson v. Dodds*. It was enough that they “logically” followed from it.<sup>34</sup>

Although Gilmore was mistaken that these propositions cannot be directly supported by *Dickinson*,<sup>35</sup> Gilmore was right to conclude that it would be enough for Williston that they logically followed from it. In fact, on Williston’s view, the subordinate propositions follow from the general principle of consideration, as does the main proposition of Section 55. Moreover, except for the unfortunate and relatively rare instance of an erroneous but established line of cases, Williston did not need to read the opinions to identify the legal rules they stood for. Those rules could be deduced from the general principles of contract law alone.

Classical orthodoxy’s implicit view that the precedential authority of cases resides in their outcomes alone dissolves Gilmore’s critique of Williston’s analysis of *Harris, Stilk*, and *Dickinson*. Similarly, classical orthodoxy’s view that *stare decisis* has the power to transform erroneous decisions into law undermines Gilmore’s critique of Williston’s analysis of *Foakes v. Beer* (1884),<sup>36</sup> the final exhibit Gilmore offered as evidence of Williston’s fraudulent support for the bargain theory of consideration.<sup>37</sup> In *Foakes*, the court held unenforceable an alleged agreement to discharge interest due on a debt in return for full payment of the outstanding principal.<sup>38</sup> In this case, Gilmore conceded that the judge actually cited lack of consideration as the ground for the decision, but the judge did so based on a dictum in a case decided in 1602 by Lord Coke, despite Lord Coke’s having rejected that theory in subsequent cases and the existence of substantial case law that found such releases enforceable, both in express reasoning and result.<sup>39</sup> Williston cited the case as authority for Section 120 of his treatise, which explains that any agreement to discharge a debt in return for payment of a lesser amount is unenforceable unless supported by separate consideration above and beyond the payment of part of the amount due.<sup>40</sup>

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<sup>34</sup> *Id.* at 33.

<sup>35</sup> See *supra* note 32.

<sup>36</sup> (1884) 9 App. Cas. 605 (H.L.) (appeal taken from England).

<sup>37</sup> Gilmore, *supra* note 6, at 33–36.

<sup>38</sup> 9 App. Cas. 605.

<sup>39</sup> Gilmore, *supra* note 6, at 35.

<sup>40</sup> Williston, *supra* note 5, at § 120.

Acknowledging the substantial case law to the contrary, Williston wrote that Section 120 nonetheless “has at least the merit of consistency with the general rule of consideration governing the formation and discharge of contracts.”<sup>41</sup>

By characterizing Williston’s cautious statement as a “note of somewhat muted triumph,” Gilmore implied that Williston was conceding that Section 120 lacks sufficient precedential authority to constitute an accurate statement of settled law.<sup>42</sup> In Gilmore’s view, Williston’s authority for Section 120 is so obviously weak that it exposes the fraud that Williston otherwise manages to submerge just below the surface of his analysis of contract law throughout his entire treatise. But once Williston’s position is viewed in light of classical orthodoxy’s view of *stare decisis*, Gilmore’s interpretation of Williston’s analysis cannot be sustained. Williston’s claim is that Section 120 is correct because it is entailed by the general principle of (the bargain theory of) consideration. However, he acknowledged that if it gains sufficient acceptance, a line of cases reaching results inconsistent with this rule might dislodge the rule under the principle of *stare decisis*. Williston’s position is that a contrary line of cases does exist, that it is based on erroneous reasoning because it is logically contradicted by the principle of consideration, but that it is an open question which line of cases will ultimately gain acceptance and become part of contract law. Williston was merely pointing out that the line of cases supporting Section 120 is the correct one, and for that reason should win out, even if under *stare decisis*, its merits cannot guarantee that it will.

### B. Gilmore’s Critique of the Objective Theory of Intent

The bargain theory of contract is just one of two essential doctrines in the core of the classical theory of contract. The other doctrine, also championed by Holmes, is the objective theory of intent which underwrites the doctrines of offer and acceptance governing contract formation. In the classical conception, a contract is formed when an offeror makes an offer to an offeree, which the offeree accepts in return. The question then arises whether a person makes or accepts an offer only by subjectively intending to do so, or can

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<sup>41</sup> Id.

<sup>42</sup> Gilmore, *supra* note 6, at 35–36.

do so merely by engaging in conduct that communicates an offer or acceptance, whether intentionally or not. Holmes answered that the law of offer and acceptance was governed solely by the outward expressions of intent and not the subjective state of mind. The first *Restatement* embeds this objective theory of intent in Section 20, which states:

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but . . . neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.<sup>43</sup>

The comment to Section 20 further provides that "if the manifestation is at variance with the mental intent . . . it is the expression which is controlling. Not mutual assent but a manifestation indicating such assent is what the law requires."<sup>44</sup> The *Restatement (Second) of Contracts* follows suit.<sup>45</sup>

The sole exhibit in Gilmore's brief to undermine the credentials of the objective theory of intent is Holmes's analysis of *Raffles v. Wichelhaus* (1864).<sup>46</sup> In that case, the plaintiff was a seller of cotton who contracted with the defendant buyer for the sale of 125 bales of cotton to be shipped from Bombay to Liverpool. Seller tendered delivery of the cotton when it arrived in Liverpool on a ship named *Peerless*, which had departed from Bombay in December, but the buyer refused to accept and pay for delivery of the cotton. The buyer's defense was that he had understood the term "Peerless" to refer to a ship of that name departing Bombay in October, not December. The court ruled in favor of the buyer without stating the ground for its ruling. But the court interrupted defense

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<sup>43</sup> Restatement of the Law of Contracts § 20 (1932).

<sup>44</sup> Id. § 20, cmt. a.

<sup>45</sup> "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts §17(1) (1981). "Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance." Id. at § 18. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Id. at § 2(1).

<sup>46</sup> (1864) 2 H. & C. 906, 159 Eng. Rep. 375 (Exch.).

counsel during oral argument to announce its decision from the bench immediately after he had argued that because both parties did not intend to refer to the same ship named *Peerless*, “there was no consensus ad idem [agreement as to the same thing], and therefore no binding contract.”<sup>47</sup> Because the court never inquired into the reasonableness of either party’s understanding, Gilmore surmised that the court must have deemed it sufficient to void a contract that the parties did not share the same subjective understanding of the meaning of a material term in their agreement.<sup>48</sup>

But when Holmes analyzed *Raffles*, he argued that:

The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct. If there had been but one “Peerless,” and the defendant had said “Peerless” by mistake, meaning “Peri,” he would have been bound. The true ground of the decision was not that each party meant a different thing from the other, as is implied by the explanation which has been mentioned, but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another.<sup>49</sup>

Gilmore sarcastically derided Holmes’s analysis as “an extraordinary tour de force,” arguing that “[t]he magician who could ‘objectify’ *Raffles v. Wichelhaus* . . . could, the need arising, objectify anything.”<sup>50</sup> But on the view that the precedential authority of a case resides in its outcome alone, Holmes’s objective intent theory of the case is not fraudulent, even if, as Gilmore claimed, the court decided the case on the ground that the parties lacked a shared subjective intent. The validity of Holmes’s theory turns on its plausibility as an explanation and justification of the case outcome alone, not on its consistency with the deciding court’s express reasoning. Holmes’s explanation of the case is that when the parties said “Peerless,” they were in effect saying different things. Holmes’s point, of course, is not that the parties uttered different sounds, but that their utterances of the same sound counted as “saying” the same word only if each party had sufficient reason to

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<sup>47</sup> 2 H. & C. at 907, 159 Eng Rep. at 376.

<sup>48</sup> Gilmore, *supra* note 6, at 43–44.

<sup>49</sup> Holmes, *supra* note 9, at 242.

<sup>50</sup> Gilmore, *supra* note 6, at 45.

know the ship to which the other intended to refer by uttering the name "Peerless." To be sure, according to the objective theory of intent, the mere lack of subjective agreement is not fatal to contract formation, as it is on the subjective theory. But even the objective theory of intent requires *objective* agreement for contract formation. If each party reasonably but erroneously believes that the other party is referring to the same thing, then even shared objective intent is lacking and formation does not occur. Although the court in *Raffles* did not inquire into the reasonableness of the buyer's erroneous belief that the seller was using the term "Peerless" to refer to the ship departing Bombay in October, Holmes can be read as fairly inferring that the court implicitly treated that belief as reasonable. After all, the case reveals no reason for either party to have known that there were two ships named *Peerless* departing Bombay and arriving in Liverpool. Holmes's theory of *Raffles* is therefore plausible as an explanation and justification of its outcome, even if inconsistent with the court's implicit ground of decision.<sup>51</sup>

Thus, according to Gilmore, the device Holmes used to perpetrate his fraudulent "reinterpretation" of *Raffles* was the idea that a case has a "true ground of decision," which may be different

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<sup>51</sup> For the same reason, Holmes's objective intent account is just as plausible as Gilmore's subjective intent account of the court's implicit ground of decision. When the court interrupted following defense counsel's argument that there was no *consensus ad idem*, it could be fairly read as treating either the lack of subjective intent or the lack of objective intent as dispositive. Notably, in commenting on the first *Restatement's* embrace of Holmes's interpretation of *Raffles*, Arthur Corbin endorsed it as correct:

[T]he actual decisions being rendered cannot be explained and their rules restated without making use of the objective theory. . . . With respect to the case of the ship "Peerless" . . . it is believed that there was no contract, not because of the absence of a meeting of two hypothetical "minds," but because the objective expressions of the two parties were not in agreement and did not so identify the subject matter of the contract as to make it enforceable. In the light of the surrounding facts, the words used by the two parties might equally well be taken to express any one of the following: (1) agreement to sell the cotton on the October "Peerless"; (2) agreement to sell the cotton on the December "Peerless"; (3) a promise to sell cotton on the October "Peerless" and a return promise to buy cotton on the December "Peerless"; (4) a promise to sell cotton on the December "Peerless" and a return promise to buy cotton on the October "Peerless."

Arthur Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 Iowa L. Rev. 19, 34-35 (1929).

than, and even contradictory to, the express or implied ground of the judges who decided the case.<sup>52</sup> But here again, Gilmore failed to grasp that the formalists regarded precedential authority as residing in case outcomes alone, not in the express, or even implied, reasoning of the judges deciding cases. On this view, the real doctrine (or “true ground”) of cases is the “theory” of the doctrine that best explains the case outcomes. Holmes was cheating only on the view that the precedential authority of a case resides in the express or implied reasoning of the judge deciding it, a view that Holmes (like Lord Ellenborough before him) quite explicitly rejected.

## II. FROM FORMALIST TO DEONTIC THEORIES OF CONTRACT

I have so far focused on Gilmore’s criticisms of Williston’s use of legal authority to support core doctrines in the classical conception of contract law. But Gilmore also famously argued that even though the bargain theory of contract law actually became law at some point (in his view, largely as a result of the formalists’ considerable efforts to make it the law), it was nonetheless almost completely reabsorbed into tort law during the first half of the twentieth century. Indeed, Gilmore predicted that the first-year course in contracts would soon be replaced by a course entitled “contorts.” So Gilmore’s assault on contracts was double-edged: contracts as a distinctive and unified body of law did not exist prior to the successful efforts of Langdell, Holmes, and Williston to manufacture it out of whole cloth,<sup>53</sup> and it was eroded by tort law after its crea-

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<sup>52</sup> Gilmore, *supra* note 6, at 45, 46.

<sup>53</sup> “Until the late eighteenth century there was no such thing as a . . . law of contracts. Before then there were cases . . . about contracts. But cases are one thing and a systematically organized, sharply differentiated body of law is quite another thing.” Gilmore, *supra* note 6, at 9. “For [Justice Joseph] Story, then, there was no such thing as a generalized law of—or theory of—contract. . . . Story, indeed, during his astonishingly productive career, wrote treatises on most . . . specialized bodies of law; it never occurred to him to write a treatise on ‘Contracts.’” *Id.* at 12. Justice Story’s son, William Wetmore Story, wrote the *Treatise on the Law of Contracts Not Under Seal* (1844), revised and expanded in the 1847 second edition. But this treatise did not attempt to present contracts as a unified field but instead treated it as consisting in independent branches corresponding to different types of transactions, each governed by distinct doctrine (for example, contracts of factors, brokers, auctioneers, executors and administrators). *Id.* at 116 n.16. Even *Parsons on Contracts* (1853), written by Theophilus Parsons, the Dane Professor of Law at Harvard Law School from 1848



tion.<sup>54</sup> Taken as a whole, Gilmore's thesis is that contract law never was nor could be maintained as a conceptually unified and distinctive body of law. In fact, Gilmore's thesis was shared by other prominent twentieth-century contract scholars, such as Patrick Atiyah and Lon Fuller, who argued that the origins and current doctrine of contract law were grounded in the concern to protect individuals' reliance interest, rather than expectancy interest, as classical theory maintained.<sup>55</sup> It is not difficult to understand why this would offend the jurisprudential sensibilities of adherents to classical orthodoxy. If true, then contract law might be scientifically disreputable and contract law adjudication might be illegitimate. Whether so-called "contract" decisions were adjudicatively legitimate would depend on whether tort law, which really governed them, is amenable to a scientifically respectable analysis that demonstrated its adjudicative legitimacy. But by Gilmore's time, classical orthodoxy had long been discredited, both by developments in scientific theory and the legal realist movement.<sup>56</sup>

Although adherents of classical orthodoxy were nowhere to be found by the time Gilmore published his critique, his thesis resonated in two of the most heated debates of late twentieth-century legal and political theory. The Critical Legal Studies movement had begun to resuscitate, in new form, some of the claims of legal realism.<sup>57</sup> In particular, CLS shared legal realism's claim that for-

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until 1870, "also turns out to be, on examination, simply a treatment, seriatim, of the several types of 'commercial contracts' identified by Justice Story and analyzed in his own Commentaries and in his son's two Treatises." *Id.*

<sup>54</sup> "[T]he theory of contract, as formulated by Holmes and Williston, seems to have gone into its protracted period of breakdown almost from the moment of its birth." Gilmore, *supra* note 6, at 63. "During the past forty years we have seen the effective dismantling of the formal system of classical contract theory. We have witnessed what it does not seem too farfetched to describe as an explosion of liability." *Id.* at 72.

<sup>55</sup> See, e.g., P.S. Atiyah, *Promises, Morals, and Law* (1981); P.S. Atiyah, *Essays on Contract* (1986); L.L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52 (1936).

<sup>56</sup> As Gilmore pointed out, the realists ironically used Langdell's Socratic case method to prove that any formal construction of legal doctrine could be equally deconstructed by the same method. "By the 1930s, at least in the law schools, the Langdellian position had become untenable—and, in an unkind reversal, the case method of teaching had been turned on its head and used to disprove everything its inventor had held dear." Gilmore, *supra* note 6, at 65.

<sup>57</sup> For an excellent critical introduction to CLS, see Mark Kelman, *A Guide to Critical Legal Studies* (1987). For an overview of American Legal Realism, see Brian Le-

mal doctrinal analysis was nothing more than conceptual window dressing. But CLS coupled doctrinal skepticism with the claim that the law's pretense of formal and objective validity was used systematically to advance particular political interests at the expense of other interests. CLS not only questioned law's legitimacy indirectly by asserting its lack of conceptual integrity, but also directly by claiming that it served as a tool to provide pretextually objective justifications for social decisions in favor of particular social interests or points of view. Since liberalism was often advanced as the political theory that provided an objective justification of the legal system, the CLS movement was intended as an attack on the integrity of liberalism as well. In short, CLS asserted the adjudicative illegitimacy of all law, and the cornerstone of its critique was the claim that law's formal categories and doctrines were both artificially manufactured (to serve particular interests under the guise of liberalism) and demonstrably indeterminate or contradictory.

At the same time that the CLS movement was emerging, a renaissance in both jurisprudence and political philosophy was well under way. In jurisprudence, Ronald Dworkin had just argued that even hard cases had right answers.<sup>58</sup> In contrast to H.L.A. Hart's positivism, Dworkin's rights theory held that the law always included principles of political morality sufficient to resolve any dispute not covered by positive legal rules.<sup>59</sup> In political philosophy, Rawls had just published *A Theory of Justice*, which was widely regarded as making a brilliant and ground-breaking argument for the claim that political coercion could be justified on the basis of universally justified (liberal) principles of justice.<sup>60</sup> Against this intellectual backdrop, Gilmore's critique was naturally perceived as ammunition for the CLS critique of law's conceptual integrity and legitimacy. In response, Charles Fried's *Contract as Promise*

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iter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *Tex. L. Rev.* 267 (1997), and Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (2007).

<sup>58</sup> Ronald Dworkin, *Taking Rights Seriously* 81–130 (1977).

<sup>59</sup> For Hart's classic statement of American legal positivism, see H.L.A. Hart, *The Concept of Law* (1961). For Dworkin's critique of Hart's positivism, see Dworkin, *supra* note 58, at 14–45; see also Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 65–217 (2001).

<sup>60</sup> John Rawls, *A Theory of Justice* (Belknap Press 1999) (1971).

emerged as the first contemporary, comprehensive, deontic theory of contract.

### A. Charles Fried's *Contract as Promise*

Charles Fried begins his book, *Contract as Promise* (1981), with the proclamation that “[t]he promise principle . . . is the moral basis of contract law.”<sup>61</sup> Fried’s theory of contract is motivated by the attacks on the classical conception of contract leveled by Gilmore and other contemporaries. Together, these attacks rejected the idea that contract was a body of law capable of unification under any single concept, principle, or theory that distinguished it as a coherent and distinctive body of law. In particular, these critics denied that contract law could be explained or justified by the will theory—the view that the obligations contract law enforced are self-imposed. By rejecting the will theory, these critics denied that contract law could be justified on the ground that it respected “the dispositions individuals make of their rights, [and thereby] carries to its natural conclusion the liberal premise that individuals have rights.”<sup>62</sup> The heart of Fried’s claim is that the will theory, properly understood, can explain and justify contract law.

Like the formalists, Fried defends the claim that contract law has an “essential unity” and “offers a distinct and compelling ground of obligation.”<sup>63</sup> And like the formalists, his ultimate motivation is to vindicate the adjudicative legitimacy of contract law. But as we have seen, for the formalists the primary strategy for proving the adjudicative legitimacy of contract law was to demonstrate how contract law could provide the basis for a decision in a case (for them, how the law could determine the outcome in a case), rather than proving that the law was itself justified. Their efforts to prove the coherence of contract law were part of their effort to show how contract law determined results in cases. If contract law could not be conceptually unified, contract law would be comprised of a hodgepodge of case types that applied unsystematically, unpredictably, and incoherently to particular cases. In contrast, Fried’s effort to prove the coherence of contract law is not motivated by a

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<sup>61</sup> Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 1 (1981).

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.* at 6.

concern to explain how contract law provides the basis of decisions, let alone determines results, in contracts cases. For Fried, the primary challenge of demonstrating the adjudicative legitimacy of contract law is proving that contract law itself is justified by a compelling moral principle. So for him, the attacks on the conceptual unity of contract law undermined the prospect that contract law could be justified by subsuming it under a single moral principle.

Fried's strategy is to prove the adjudicative legitimacy of contract law by demonstrating that a single moral principle both renders contract law's otherwise distinct doctrines coherent and provides its deep moral justification. He argues that contract law is justified because it enforces the moral obligations of promisors, and the correlative moral rights of promisees, that arise out of the act of promising. By making a promise, an individual invokes the social convention of promising, which invites the promisee to trust the promisor. Trust, in turn, enables individuals to give effect to their will, to pursue their lives autonomously by cooperating with others. The institution of promising enables individuals to invoke morality to pursue their own conceptions of the good freely and effectively. As such, promising is vital to the liberal conception of the self and society. By making a promise, a promisor incurs the moral obligation to keep the trust he willfully invited. By breaking his promise, the promisor abuses this trust.<sup>64</sup> Contract law serves to prevent or remedy such morally impermissible abuses of trust.<sup>65</sup> Thus, Fried's central claim is that contract law is justified because it enforces the moral obligation to keep promises, which in turn is central to liberal individualism.

In the development of contract theory, Fried's theory is most important for both its emphasis on defending the distinctiveness

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<sup>64</sup> See *id.* at 8, 16.

<sup>65</sup> In Fried's words,

[T]rust becomes a powerful tool for our working our mutual wills in the world. . . . The device that gives trust its sharpest, most palpable form is promise. By promising we put in another man's hands a new power to accomplish his will, though only a moral power: What he sought to do alone he may now expect to do with our promised help, and to give him this new facility was our very purpose in promising. By promising we transform a choice that was morally neutral into one that is morally compelled. Morality . . . is itself invoked, molded to allow us better to work that particular will.

*Id.* at 8.

and coherence of contract law and the implicit theory of precedential authority on which Fried relies in mounting that defense.<sup>66</sup> We have seen that Williston implicitly subscribed to the view that precedential authority resides in case outcomes, rather than express judicial reasoning. Fried implicitly subscribes to the opposite view. Indeed, the doctrinal inspiration for his theory of contract as promise is Section 1 of the second *Restatement*, which states that “[a] contract is a promise . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.” Rather than relying directly on express judicial reasoning, Fried typically treats Williston’s treatise itself, along with both Restatements, as sources of contract doctrine equally as authoritative as the cases themselves. The best example is Fried’s analysis of the consideration doctrine. Fried considers the doctrine because it is widely regarded to be an essential component of contract law. The bargain theory of consideration is the cornerstone of the formalists’ unified conception of contract law, and yet it appears to be a clear counterexample to Fried’s thesis that contract doctrine can be explained and justified by the moral promise principle.<sup>67</sup> If Fried’s thesis is correct, then contract law should enforce all morally binding promises. But the consideration doctrine is used to prevent the legal enforcement of a large class of promises that are morally binding.

Fried’s analysis of the consideration doctrine begins by identifying the doctrine with its formulations in the first and second Restatements, and Williston’s and Arthur Corbin’s descriptions of it

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<sup>66</sup> Because they are not germane to the present discussion, I do not discuss two fundamental criticisms of Fried’s theory that have featured prominently in contract theory scholarship. The first critique is that Fried’s theory presupposes without argument that the law should enforce the moral obligation to keep promises. Given the well-developed arguments against legal moralism, defense of Fried’s theory requires either a defense of legal moralism or an argument for why the legal enforcement of morality is justified in the case of promises. The second is that his theory is unfalsifiable because it defines contract law as those doctrines that can be explained by the promise principle, rather than claiming that the promise principle can explain most doctrines that are widely regarded, pretheoretically, to be core contract doctrines. See Kraus, *supra* note 15, at 703–15.

<sup>67</sup> Although Fried can dismiss most cases not explicable in terms of the moral promise principle by relegating them to other areas of the law (such as tort law), there is no plausible alternative doctrinal home for the consideration cases. Even for Fried, the consideration doctrine, if internally coherent, is a counterexample to his theory.

in their treatises. Although these descriptions sometimes quote directly from cases, more often they represent the authors' views of the rules and principles implicitly, if not explicitly, underlying the cases. Accordingly, Fried identifies the consideration doctrine with two propositions culled from Williston's treatise and the Restatements:

(A) The consideration that in law promotes a mere promise into a contractual obligation is something, or the promise of something, given in exchange for the promise. (B) The law is not at all interested in the adequacy of the consideration. The goodness of the exchange is for the parties alone to judge—the law is concerned only that there *be* an exchange.<sup>68</sup>

Fried then goes on to consider ten classic consideration cases and concludes that propositions (A) and (B) cannot explain their outcomes. The reason, Fried argues, is that (A) affirms exchange while (B) affirms freedom of contract, yet “[t]hese two ideas turn out to be contradictory.”<sup>69</sup> In short, (A)'s requirement that something be given in exchange for a promise is, in principle, eviscerated by (B)'s prohibition against judicial inquiry into the adequacy of the thing given in exchange for a promise. Fried's analysis of the ten cases is, therefore, purely illustrative. His proof of the internal incoherence of the consideration doctrine follows from his analysis of (A) and (B) alone. And it is on this ground that Fried rejects the consideration doctrine as inexplicable and unjustifiable, thereby removing an otherwise serious obstacle to his argument that contract doctrine can be explained and justified by the promise principle. In Fried's words, the bargain theory of consideration and its doctrinal extensions<sup>70</sup> are “obviously gibberish.”<sup>71</sup> The consideration doctrine is no counterexample to Fried's thesis because it is incoherent and therefore cannot be explained or justified by *any* theory of contract law. Since it is incoherent, it should be rejected as bad law or no law at all.

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<sup>68</sup> Fried, *supra* note 56, at 29.

<sup>69</sup> *Id.*

<sup>70</sup> These second *Restatement* sections state rules for enforcing promises made for benefits received (the material benefit rule, § 86), modifying agreements (§ 89), and reviving otherwise unenforceable debts (§§ 82 and 83).

<sup>71</sup> Fried, *supra* note 56, at 32.

Evidently, it did not occur to Fried that statements of doctrine in Williston's treatise and the Restatements were themselves not always the result of an effort to summarize the express judicial reasoning in the dominant case law, but instead represented a deliberate effort to articulate a principle or rule that best accounted for the case outcomes, whether or not it coincided with the express reasoning in the most important or majority of cases. When Fried concludes that a contract doctrine, as stated in Williston's treatise or the Restatements, cannot render the case outcomes coherent, he dismisses the doctrine itself, rather than the particular statement of it, as incoherent. Here Fried's implicit assumption is either that Williston and the authors of the Restatements accurately described the express judicial reasoning in the cases allegedly supporting the doctrine Williston states, or that Williston's or the Restatements' version of the doctrine, whether or not an initially accurate account of express judicial reasoning, has been expressly accepted in judicial decisions since, in effect transforming it into express judicial reasoning. Either way, the irony is that Williston himself would not regard a demonstration that his own statements of contract doctrine failed to explain the case outcomes, or were internally incoherent, as grounds for concluding that there is no coherent doctrine that adheres in the case outcomes. Rather, just as a scientist confronted with disconfirming but accurate data would reject his theory, and not the recalcitrant data, Williston would have rejected his own account of the doctrine and attempted to identify a more satisfactory theory of the doctrine that better accommodated the case outcomes in question. That Fried does not follow suit indicates that he treats the precedential authority of cases as residing in the (secondary sources he takes to be proxies of) express judicial reasoning in the cases rather than the principle or rule that best explains the case outcomes, whether or not the judges who decided the cases expressly identified the same or a different principle or rule as the ground for their decisions.

*B. Fried's Affinity to the Express Reasoning View of Precedential Authority*

Just as the formalists' theory of the adjudicative legitimacy helps explain their view that precedential authority resides in case outcomes, Fried's theory of adjudicative legitimacy helps explain his

implicit embrace of the view that precedential authority resides in express judicial reasoning (or what he regarded as authoritative summaries thereof). By treating express judicial reasoning as mere theories of doctrines, and not the doctrines themselves, the formalists maximized the likelihood that a small set of unifying principles, and derivative rules, would be able to account for the large body of cases applying contract law. In contrast, the common premise in all of Fried's doctrinal arguments is that precedential authority resides in express or implied judicial reasoning rather than case outcomes alone. This view of precedential authority allows Fried to raise the bar against competing explanations and justifications of contract law. By treating judicial reasoning as the doctrine itself, rather than a fallible theory of the doctrine, his view of precedential authority eliminates competing theories that can account for case outcomes only by rejecting the actual judicial reasoning used in contracts cases. Moreover, it allows Fried to take full advantage of the normative language and structure of contract cases to vindicate his claim that the moral promise principle justifies contract law. Indeed, if we take the express statements of cases (or their summaries in treatises and restatements) to constitute contract doctrine, the idea of *Contract as Promise* could hardly be more intuitive: The *Restatement (Second) of Contracts* defines contract in terms of promise.<sup>72</sup> Finally, unlike the formalists, Fried is not concerned that identifying doctrine with express judicial reasoning will constrain his theory's ability to provide a unified account of case outcomes with different or inconsistent express judicial reasoning. Fried's objective is not to subsume as many cases as possible, or even a pre-theoretically identified core of cases, under the promise principle. Instead, his goal is to establish that the core of contract law can and should be defined only by those doctrines grounded in the moral promise principle. Fried accomplishes this simply by stipulating that the cases invoking express judicial reasoning based on the moral promise principle constitute the core of contract law. All other cases, on Fried's view, simply fall outside the province of contract law.<sup>73</sup>

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<sup>72</sup> Restatement (Second) of Contracts § 1 (1981).

<sup>73</sup> See *supra* text accompanying note 62.



Although Fried's view of precedential authority is ideally suited to his defense of this claim, he never acknowledges that a full theory of adjudicative legitimacy not only requires a theory of the justification of contract law but also an account of how contract law provides the basis for deciding outcomes in contract cases. Indeed, one of the central criticisms of deontic theories of contract in general, and Fried's theory in particular, is that the deontic concepts that, in their view, comprise contract doctrine lack the capacity to provide the basis for deciding which party should prevail in contracts cases.<sup>74</sup> While serious theories of judicial decisionmaking differ in their accounts of how law provides the basis for deciding cases, and certainly have divergent answers to the question of whether law can or should determine case outcomes, deontic theories such as Fried's typically ignore the burden of addressing this essential component in a theory of adjudicative legitimacy.

### III. THE ECONOMIC ANALYSIS OF CONTRACT LAW

Gilmore's assault on formalist contract theory, together with the CLS critique of law, implied that any attempt to provide a unified theoretical account of contract law was bound to fail. Fried's theory of contract as promise defended the claim that contract law could be unified under a single theoretical account. In that sense, Fried's theory shared the formalists' aspiration to demonstrate the internal coherence of contract law. But his theory's studied indifference to explaining case outcomes flaunted the central concern that motivated the formalists to provide a unified account of contract: to prove that contract case outcomes were determined by the largely mechanical application of legal rules, rather than the operation of judicial discretion.

Developing alongside Gilmore's critique and Fried's response was the nascent field of law and economics. The first generation of scholars offering an economic analysis of contract law seemed to conceive of their enterprise much as the formalists conceived of theirs. Both the classical theorists and economic analysts subscribed to the precedents-as-outcomes view because it maximized their ability to reconcile case law with their conception of contract

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<sup>74</sup> See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *Mich. L. Rev.* 489 (1989).

law, which often was unsupported by the express judicial reasoning in contracts precedents. But the classical conception of contract law was premised on the view that only a formal system of contract law could produce determinate case outcomes. The economic conception of contract law, however, was premised on the view that economic reasoning was at least in principle capable of uniquely determining case outcomes, while the express reasoning of contracts cases typically was not.

A representative example of early explanatory economic analysis is Charles Goetz and Robert Scott's classic 1980 article, "Enforcing Promises,"<sup>75</sup> which appears to embrace something like the formalists' conception of precedential authority. In that article, Goetz and Scott conceive of their enterprise as an attempt to demystify the otherwise unhelpful doctrinal rhetoric of promissory estoppel by providing an account that explains how actual case outcomes are determined in adjudication. Consider their analysis of Section 90 of the *Restatement (Second) of Contracts*. That section states that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."<sup>76</sup> Goetz and Scott presume that the term "reasonable" offers no concrete guidance for how judges should or will decide cases under Section 90 and offer their theory as an explanation of the meaning of the key substantive language in Section 90:

In order to discourage the promisee from overrelying, the promisor must not be held liable for damages when the promisee knew or should have known that the marginal cost of self-protection was lower than the corresponding marginal reduction in prospective regret costs. *This rule gives meaning to the concept of "reasonable reliance."*<sup>77</sup>

Goetz and Scott clearly regard the purely doctrinal accounts of when promissory liability will be imposed as unilluminating because they fail to explain the pattern of outcomes in cases. For ex-

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<sup>75</sup> Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *Yale L.J.* 1261 (1980).

<sup>76</sup> *Restatement (Second) of Contracts* § 90 (1981).

<sup>77</sup> Goetz & Scott, *supra* note 75, at 1280 (emphasis added).

ample, they write that the pattern of enforcement under the bargain theory

typically has been explained in terms of differences in the magnitude of either actual or likely reliance. Neither explanation is persuasive. . . . The enforcement pattern could be explained if, during entry into, and exit from, bargaining, reassurance were cheaper than precaution. Then, the risk of a regret contingency could be allocated more cheaply by adjusting reliance once the promise is made rather than restricting the promise itself.<sup>78</sup>

They then conclude that “the design of the consideration model can be explained persuasively by an analysis of efficient risk allocation.”<sup>79</sup>

Like the formalists, Goetz and Scott take legal doctrine to consist in the best explanation of the pattern of outcomes in contract cases rather than the rhetoric of the judicial reasoning in contracts cases. Again, in discussing promissory estoppel, Goetz and Scott write that “[a]lthough the *rhetoric* of some [promissory estoppel cases] suggests that reimbursement damages are the preferred recovery under promissory estoppel, the *outcomes* imply that courts are animated by the same [economic] concerns that have produced the design of the consideration model.”<sup>80</sup> After presenting their economic analysis of the optimal promissory enforcement regime, Goetz and Scott conclude that “a substantial congruence exists between traditional contract rules and optimal promissory enforcement. Indeed, this congruence offers a persuasive explanation for the peculiar *patterns* of promissory liability observed in *actual practice*.”<sup>81</sup> Finally, in their conclusion, Goetz and Scott claim that “[e]conomic concepts are useful . . . in specifying the effects of legal objectives and in observing and isolating systemic patterns of enforcement. . . . [S]ystematic collection and observation of data increases understanding of the regulation of behavior by legal rules.”<sup>82</sup> For Goetz and Scott, then, the task of explanatory eco-

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<sup>78</sup> Id. at 1294–95.

<sup>79</sup> Id. at 1296.

<sup>80</sup> Id. at 1315 (emphasis added).

<sup>81</sup> Id. at 1265 (emphasis added).

<sup>82</sup> Id. at 1321.

conomic analysis is to explain how outcomes are determined in contracts cases.

Of course, since Goetz and Scott do not reflect on the jurisprudential foundations of their project, we can only speculate that their conception of legal explanation derived from the same kinds of considerations that I have argued motivated the formalists. That speculation finds support in one of the few explicit reflections to be found in the early law-and-economics literature. Richard Posner, the chief exponent of the positive economic analysis of law, published the first treatise on law and economics in 1972.<sup>83</sup> In the third edition of his treatise, published in 1986, Posner describes what he takes to be the motivating aspirations of positive economic analysis of law. Just as Fried seeks to demonstrate the unity of contract law using a deontic principle, Posner begins by affirming the aspiration to demonstrate the underlying coherence, or unity, of the law using an economic principle: "The law is a system; it has a unity that economic analysis can illuminate."<sup>84</sup> But the similarity between Fried's and Posner's conceptions of legal theory ends there. Posner goes on to explain that economic analysis seeks to explain the "legal rules and outcomes" of the common law.<sup>85</sup> More specifically, he argues that the "true grounds" of decisions often are not reflected in judicial rhetoric: "It is an advantage of economic analysis rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves."<sup>86</sup> Moreover, Posner claims that the "economic theory of law is the most promising positive theory of law extant. While . . . other social scientists besides economists also make positive analyses of the legal system, their work is thus far insufficiently rich in theoretical or empirical content to afford serious competition to the economists."<sup>87</sup>

Posner's remarks suggest an affinity between his conception of explanatory economic analysis and the formalists' conception of

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<sup>83</sup> *The Death of Contract* was published in 1974 and *Contract as Promise* was published in 1981.

<sup>84</sup> Richard Posner, *Economic Analysis of Law*, at xx (3d ed. 1986).

<sup>85</sup> *Id.* at 21.

<sup>86</sup> Richard Posner, *Economic Analysis of Law* 6 (1st ed. 1972).

<sup>87</sup> See Posner, *supra* note 84, at 24.

law as a legal science.<sup>88</sup> In particular, both aspire to demonstrate the scientific respectability of areas of law by demonstrating how the legal rules determine outcomes in cases. Posner's economic analyses of substantive areas of law, especially the common law areas such as contracts and torts, consist in direct application of economic principles to the outcomes of cases, not the doctrinal statements of the judges who decided the cases. Posner's analysis of *Bentley v. State*<sup>89</sup> is typical.<sup>90</sup> In that case, Bentley was hired by the state of Wisconsin to build new wings for the state capital building according to architectural plans supplied by the state's architect. When the wings collapsed due to poor design, the state sued Bentley. The court held for Bentley. Without even citing the judicial reasoning of the case, Posner explains it by demonstrating why the state was the cheapest insurer of the risk that the architectural plans were defective: "[I]t is unlikely that Bentley was a better insurer than the state. Bentley would probably have to go out and buy an insurance policy; the state could self-insure against the particular risk."<sup>91</sup> As his analysis of *Bentley* makes clear, Posner takes the explanatory success of economic analysis to consist in its ability to correctly determine case outcomes. Like the late nineteenth-century contract formalists before him, Posner's explanatory economic theory prescind from the details of doctrinal rhetoric and claims to have unearthed a basic principle of economics that un-

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<sup>88</sup> Thomas Grey also observes that the law-and-economics movement generally, and Richard Posner's work in particular, has a Langdellian foundation:

A movement in legal theory that has closer links to the Benthamite dream of policy science is the school of law and economics. But, on closer inspection, that school turns out to be neo-orthodox too. Its leader, Richard Posner, says that economic analysis cannot supplant, but only predict and criticize, a course of legal decision carried on case-by-case according to orthodox methods. And Posner finds "efficiency," with all the connotation of approval that term carries in his theory, in the content as well as the methods of Langdellian private law.

Grey, *supra* note 17, at 51.

<sup>89</sup> 41 N.W. 338 (Wis. 1889).

<sup>90</sup> Another example is Posner's discussion of causation in torts cases: "The results in these cases seem to owe little to refined notions of causation, and much to considerations of (economic) policy, yet they are conventionally discussed by lawyers under the rubric of cause in fact." Posner, *supra* note 84, at 169.

<sup>91</sup> *Id.* at 83.

derwrites the application of legal doctrines to individual cases.<sup>92</sup> Unlike his formalist predecessors, Posner made several initial attempts to establish the credentials of economic analysis under the second prong of adjudicative legitimacy as well. Unfortunately, his efforts to explain how legal rules and principles based on various notions of efficiency could justify the exercise of political coercion were entirely unsuccessful.<sup>93</sup>

### CONCLUSION

Gilmore's *The Death of Contract* is a landmark of twentieth-century contracts scholarship. It was the first major occasion for reflection on the legal credentials, and therefore the credentialing process, of modern American contract law. If we take Gilmore at his word, the lesson of his book is that the core legal principles of American contract law were virtually a complete fabrication, imagined by a few elite members of the nineteenth-century bar and legal academy and transformed into actual law through brazen and bald-faced lies backed by the sheer force of their influential personalities. It is always dangerous to take Grant Gilmore at his

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<sup>92</sup> Describing the seminal status of Ronald Coase's famous article "The Problem of Social Costs," 3 J.L. & Econ. 1 (1960), in the history of the economic analysis in law, Posner claims that:

An important although for a time neglected feature of Coase's article was its implications for the positive economic analysis of legal doctrine. Coase suggested that the English law of nuisance had an implicit economic logic. Later writers have generalized this insight and argued that many of the doctrines and institutions of the legal system are best understood and explained as efforts to promote the efficient allocation of resources . . . .

Posner, *supra* note 84, at 20. Posner then claims that:

Although few judicial opinions contain explicit references to economic concepts, often the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions. Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds, many of which may turn out to have an economic character. . . . It would not be surprising to find that legal doctrines rest on inarticulate gropings toward efficiency, especially when we bear in mind that many of those doctrines date back to the late eighteenth and the nineteenth century, when a *laissez faire* ideology based on classical economics was the dominant ideology of the educated classes in society.

*Id.* at 21.

<sup>93</sup> For a brief review of Posner's early attempts to defend the principle of wealth maximization, see Jody S. Kraus, Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy, 11 Phil. Issues 420, 428–31 (2001).

word. If we give Gilmore the charitable interpretation he refused to give to the classical theorists, the real lesson is that appearances can be deceiving, as much in law as in life. While Gilmore showed how the classical theorists' conception of contract law might appear to be inconsistent with the precedent they cited on its behalf, whether it constitutes a reasonable use of precedent turns, unsurprisingly, on one's view of how precedents should be interpreted.

I have argued that the true disagreement between Gilmore and the classical theorists is over the question of whether the precedential authority of cases resides in their express judicial reasoning or in the doctrine that best explains their outcomes.<sup>94</sup> Once that dispute is settled, the matter of determining the content of late nineteenth-century (or any period of) American contract law is comparatively straightforward. I have also argued that the fundamental stakes in the debate over the nature of precedential authority lie in the theory of adjudicative legitimacy. The precedents-as-express-reasoning view typically fares well in explaining how a theory of contract law can satisfy the first prong of adjudicative legitimacy:

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<sup>94</sup>The deontic critique of the economic analysis of the common law sets out what is perhaps the best known objection to the view that the precedential authority of cases consists in the best theory of their outcomes and not in their express or implied judicial reasoning. In Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 Va. L. Rev. 287 (2007), I consider the claim advanced by deontic theorists that the economic analysis is disqualified as an explanation of the common law because it lacks an adequate account of express judicial reasoning in common law cases. That critique argues that any explanation of the common law must explain or adequately explain away the fact that common law judges use express reasoning that is often couched in deontic terms which are inconsistent with the exclusively consequentialist reasoning of the economic analysis. I argue that the economic analysis has a plausible account for this divergence based on semantic evolution and therefore does not presuppose that judges either conspire to mislead others or delude themselves. The deontic critique of the economic analysis of the common law sets out what is perhaps the best known objection to the view that the precedential authority of cases consists in the best theory of their outcomes and not in their express or implied judicial reasoning. Apart from this debate, many additional obstacles confront the precedents-as-outcomes view. For example, John Rawls's highly influential theory, *Political Liberalism*, holds that the justification of political coercion must be provided using public reason, which in turn requires that judicial reasoning be publicly accessible. If express judicial reasoning provides either no guide or an opaque guide to the legal reasoning on which the case was actually decided and the precedential authority for which the case stands, then arguably Rawls's public justification requirement is not met in most common law decisions. I discuss this point in Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 Wm. & Mary L. Rev. 1773, 1785 (2007).

the requirement that contract law be capable of justifying the exercise of political coercion implicitly threatened as enforcement for any judicial judgment. The precedents-as-outcomes view typically fares better in explaining how a theory of contract law can satisfy the second prong of adjudicative legitimacy: the requirement that contract law be capable of explaining how the outcome of the case resulted from the legal rules and principles that are supposed to explain it.

Gilmore's true legacy is his call on contract theorists to reflect on the nature of their enterprise. That reflection reveals that just as the classical theorists and Gilmore were talking past each other, because they subscribed to incompatible views of the nature of precedential authority, so too contemporary deontic contract theorists such as Charles Fried, and contemporary explanatory economic analysts of contract law such as Charles Goetz, Robert Scott, and Richard Posner, are talking past each other for the same reason. History repeats itself, especially if we fail to notice and heed its lessons. Contract theory, like any theory of law, ultimately rests on basic jurisprudential views about the nature of law, legal authority, and political legitimacy. By exposing these jurisprudential foundations, contract theorists can move beyond the current impasse that impedes productive discussions between competing types of contract theory. My hope is that contract theorists might then settle on common philosophical denominators to underwrite a joint theoretical enterprise to understand and evaluate contract law. More modestly, I hope adherents of each competing school of contract theory at least no longer suppose that they can engage in meaningful dialogue with each other without first clarifying the philosophical assumptions at the foundation of their separate enterprises.