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The "New Conservatism" in Contract Law and the Process of Legal Change

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THE "NEW CONSERVATISM" IN CONTRACT LAW AND THE PROCESS OF LEGAL CHANGE

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This essay raises four related and important questions. First, what do analysts mean when they assert that there is a "new conservatism" in contract law?[1] Second, is there evidence to support their claim? Third, assuming at least some recent and interesting change in the judicial approach to contract law, what caused the change? Finally, what does the new approach, whatever it is called, indicate about the nature of private contract law and the process of legal change? All of these questions are incredibly complex and daunting. Here I present only some tentative views.

I. WHAT DOES "NEW CONSERVATISM" IN CONTRACT LAW MEAN?

I shall discuss the definitions of "new conservatism" set forth by others who have commented on recent developments in private law. First, the "new conservatism" constitutes a "retrenchment" in the extent to which private contract law protects the underclasses. For example, one analyst has written that recent contract decisions demonstrate a "judicial tilt away from underdogs, back toward the privileged beneficiaries of classical contract law."[2] Second, the "new conservatism" constitutes a more formal, inflexible and rule-oriented application of

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[1] The term was used in the title of the joint program on contract, property, and tort law at the 1998 annual meeting of the American Association of Law Schools. *See* Jay Feinman, Notes to AALS Joint Program on Contract, Property, and Tort Law, San Francisco (Jan. 11, 1998) (unpublished, on file with the American Association of Law Schools); *see also* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

[2] Mooney, *supra* note 1, at 1170–71. In his important and provocative article, Professor Mooney calls this "new conceptualism," but asserts that it "reflects and reinforces" a "resurgent intellectual and political conservatism" in contract law. *Id.* at 1135; *see also* Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Rises from the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483, 515 (1994) (arguing that tort remedies have been rejected "in favor of traditional, limited contract remedies"); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1354 (1996) ("According to the courts, the absence of equal bargaining power or the opportunity to bargain does not necessarily signal unfair surprise or oppression . . . .").

contract law.[3] Indeed, commentators see a link between these two characteristics of today's contract law.[4] They reason that courts fixated on creating and applying "rules" tend to preserve and protect society's elites. This is because rules deter courts from assessing both the fairness of the bargaining process and the resulting exchange in situations where the stronger party can dictate terms.[5] Rules also bar courts from enforcing the stronger party's oral inducements that are omitted from the written contract.[6]

There is, of course, plenty to quarrel about within these definitions and explanations of "new conservatism." For example, is contract law that favors elites or prefers rules over standards necessarily conservative? Do contract "rules" inherently favor the stronger party? Because labeling is both controversial and unnecessary for the issues discussed here, I shall dispense with the reference to "new conservatism" wherever possible. Regardless of what we call formal contract law that favors elites, a more interesting question is whether these characteristics actually exist in today's contract law.

II. Do Recent Decisions Demonstrate a Turn to Formal Contract Law that Favors Elites?

I am unconvinced that 1990s contract law has increasingly favored "economically privileged parties."[7] The claim appears to be based in part on a "trend" in recent decisions to favor "sellers, banks, insurers, and employers" over "buyers, borrowers, policyholders, and employ-

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[3] *See* Mooney, *supra* note 1, at 1133–34; *see also* E. Allan Farnsworth, *Developments in Contract Law During the 1980s: The Top Ten*, 41 Case W. Res. L. Rev. 203–04, 225 (1990) (claiming that in the 1980s courts ended the expansion of unconscionability and retreated from accepting changed circumstances or impracticability); Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 Nw. U. L. Rev. 254, 254 (1995) ("A consensus extracted from this Symposium is that . . . conceptualism has indeed been reborn (if it ever died) in the guise of a new formalism . . . ."). *See generally* Daniel Farber, *The Ages of American Formalism*, 90 Nw. U. L. Rev. 89, 91–94 (1995) (discussing the periods of American formalism).

[4] "Conceptualist decisionmaking has, in general, profoundly conservative political implications." Mooney, *supra* note 1, at 1135; *see also* James A. Webster, Comment, *A Pound of Flesh: The Oregon Supreme Court Virtually Eliminates the Duty to Perform & Enforce Contracts in Good Faith*, 75 Or. L. Rev. 493, 508 (1996) ("According to the realists, the law had become tailored to the interests of those in superior bargaining positions, who could take refuge in formalist doctrines such as the parol evidence rule to enforce the written terms of a contract, and simultaneously keep from the trier of fact the evidence of the parties' actual agreement, which frequently resided outside of the written contract.").

[5] *See* Mooney, *supra* note 1, at 1132, 1206; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

[6] *See* Mooney, *supra* note 1, at 1147; *see also* Webster, *supra* note 4, at 508.

[7] *See* Mooney, *supra* note 1, at 1135.

ees."[8] The problem is that, in the cases identified to support the claim or as an abstract matter, the former parties are not always "privileged" and the latter parties are not always "underdogs." For example, the losing parties in cases that supposedly evidence the "new conservatism" include land developers, commercial buyers, contractors, and business lessees (the latter even including the Oakland Raiders).[9] In addition, many contracts cases in the 1990s protect true underdogs, so it is difficult to establish any "trend."[10]

Similarly, recent contract cases do not appear to exemplify a genuine paradigm shift away from flexibility and egalitarianism toward "the abstract conceptualism of classical contract law."[11] It is true that some recent cases have, for example, applied the "indefiniteness" doctrine to dismiss claims and the parol evidence rule to bar the admissibility of evidence to interpret terms, while others balked at enforcing agreements-to-agree.[12] This "trend" allegedly evidences a "resurrection" of formal rules that prevent enforcement of the true agreement between the parties.[13] These rules have always existed in courts' arsenals, however, and I doubt that their recent use constitutes a major change in the direction of contract law. Moreover, many recent cases appear to buck this "trend."[14] I am more comfortable with the proposition that

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[8] *Id.* at 1206.

[9] *See, e.g.*, Lower Kuskokwim Sch. Dist. v. Alaska Diversified Contractors Inc., 734 P.2d 62 (Alaska 1987) (losing party a contractor); Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33 (Alaska 1983) (losing party a commercial buyer); Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd., 243 Cal. Rptr. 300 (Cal. Ct. App. 1988) (losing party the Oakland Raiders); Clampitt v. A.M.R. Corp., 706 P.2d 34 (Idaho 1985) (losing party a developer). The best support for the proposition that underdogs frequently lose is in the employment arena because of the presumption of "at-will" employment. *See* Wagner v. Glendale Adventist Med. Ctr., 265 Cal. Rptr. 412, 421 (Cal. Ct. App. 1989).

[10] *See, e.g.*, Velarde v. Pace Membership Warehouse, Inc., 105 F.3d 1313 (9th Cir. 1997) (employer's attempt to introduce parol evidence excluded); Reeves v. Alyeska Pipeline Serv. Co., 926 P.2d 1130 (Alaska 1996) (employee may proceed on express and implied contract, promissory estoppel, quasi-contract, breach of good faith and tort against employer); Cox v. Lewiston Grain Growers, Inc., 936 P.2d 1191 (Wash. Ct. App. 1997) (seed company's disclaimer of warranties and limited remedy unenforceable).

[11] *See* Mooney, *supra* note 1, at 1132–33; *see, e.g.*, Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OR. L. REV. 643, 644 (1995) (arguing that courts allow unrestricted extrinsic evidence); Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1162 (1998) ("[I]n significant respects, contemporary contract interpretation has come to reject the classical model."). Professor Mooney sometimes writes only in terms of "tilts," but in his conclusion he refers to the cases he discusses as a "considerable and alarming retreat" from the Realist movement. Mooney, *supra* note 1, at 1205.

[12] Mooney, *supra* note 1, at 1136–39, 1145–46, 1170.

[13] *See id.* at 1170.

[14] *See, e.g.*, Reeves, 926 P.2d at 1142 (employee able to proceed on a claim of restitution); Feurzeig v. Insurance Co. of the W., 69 Cal. Rptr. 2d 629, 632 (Cal. Ct. App. 1997) (taking into

recent reported decisions demonstrate an incremental enhancement of rules that favor the enforcement of written contracts over alleged oral, less formal representations or agreements. My own study of promissory estoppel cases in the mid-1990s illustrates the dramatic lack of success of the promissory estoppel theory which, in part, stems from a preference for the enforcement of written contracts.[15]

A judicial preference for rules that favor written contracts, however, does not necessarily mean that courts are less likely to enforce real agreements between parties. After all, if the parties' agreement is indefinite on important terms and the parties disagree about the content of those terms, or if the parties debate whether they even entered into an enforceable agreement, it is not self-evident why enforcement of a contract more often than not supports the real agreement between the parties. Similarly, if one party wants to introduce extrinsic evidence contradicting a written contract, it is not clear why admitting that evidence more likely furthers the parties' real intentions.

It is even less clear why a judicial preference for rules that favor written contracts more often than not benefits one group over another. Rules that support written contracts can protect underdogs as well as disadvantage them. One need only think of the recent practice of long distance telephone carriers to change a customer's service provider without consent.[16] The FCC's response was to promulgate rules requiring written evidence of a customer's intent to change service providers.[17]

I will not try to resolve here whether the recent judicial trend toward rules that favor written contracts should be praised or lamented. The arguments are well-rehearsed[18] and boil down to an

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account the insured's sophistication); Berg v. Hudesman, 801 P.2d 222, 230 (Wash. 1990) (lowering most barriers to extrinsic evidence).

[15] *See* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998).

[16] *See In re* Unauthorized Changes of Consumers' Long Distance Carrier, 10 F.C.C.R. 9560, 9579 (1995).

[17] *See id.* In addition, before an advocate of purchasers of consumer goods would want to reject the paradigm of written contracts, she would have to be convinced that nefarious sellers make and then deny oral representations that favor buyers (such as product warranties) more often than they falsely assert oral terms that hurt buyers (such as terms providing for additional compensation).

[18] *See generally* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 186–90 (1965) (demonstrating importance of extrinsic evidence); Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 61–62 (1985) (advocating that an "increased confidence in the reliability of oral testimony" has occurred concurrently with a "decreased belief in the sanctity of written contracts");

empirical question of whether one approach or the other better deters fraud and opportunism in the formation and performance of contracts.[19] Despite claims one way or the other, the empirical evidence has neither been collected nor is it readily obtainable.[20] I turn instead to the important question of what accounts for the trend toward the enforcement of written contracts.

III. WHAT ACCOUNTS FOR THE NEW EMPHASIS ON WRITTEN CONTRACTS?

If there is a new judicial emphasis on the enforcement of written contracts, what accounts for it? I offer a two-part explanation for this "tilt" in the law. First, it is not a stretch to say that public opinion about the merits of the welfare state, the role of courts in a democratic society, and the importance and power of markets changed during the 1980s and early 1990s.[21] Specifically, people have become more distrustful of big government, more wary of non-democratic institutions such as the judiciary, and more respectful of market exchange. My second and more controversial assertion is that judicial decisions applying private law reflect these changes in public opinion.

Karl N. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 746–47 (1931) (acknowledging the costs and benefits of enforcing written agreements); Morris G. Shanker, *In Defense of the Sales Statute of Frauds and Parole Evidence Rule: A Fair Price of Admission to the Courts*, 100 COM. L.J. 259, 260 (1995) (focusing on misunderstandings inherent in oral communication); L. Vold, *The Application of the Statute of Frauds Under the Uniform Sales Act*, 15 MINN. L. REV. 391, 393–94 (1931) (arguing that writing prevents fraud and prevents misunderstandings).

[19] The dominance of one approach or another will have real consequences for particular litigants, of course. *See infra* notes 47–48 and accompanying text.

[20] To get a good feel for the importance of empirical evidence in a related area, and the immense barriers to obtaining it (and hence the ultimate indeterminacy of policy analysis), one should read the symposium in the Cornell Law Review, *The Priority of Secured Debt*, 82 CORNELL L. REV. 1279 (1997). Most of the contributors, including the drafters of the new Article 9 of the Uniform Commercial Code, lament the lack of empirical evidence and comment on the difficulties of collecting it. *See* Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349, 1370 (1997) ("Empirical testing of our hypotheses concerning the behavioral effects (or lack thereof) of both current law and a subordination [of a secured creditor priority] regime will be enormously difficult."); *see also* Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1382 (1997) ("In the Article 9 reform process three observations about empirical studies are important: 1) we cannot wait for the definitive study before we make policy decisions, 2) we have to acknowledge that any empirical evidence is likely to be indirect and only suggestive, and 3) we have to be more creative in our approaches to gathering empirical data.").

[21] *See, e.g.*, Bob Herbert, *A Revolution Subsides*, N.Y. TIMES, Oct. 23, 1997, at A27; John B. Judis, *Democrats' White Middle Class Woes*, THE NEW REPUBLIC, Mar. 4, 1996, at 4.

The reasons for changes in public opinion are obviously very complex. Still, perspectives are undoubtedly influenced by major events, distinct trends, and vivid symbols,[22] such as the fall of communism, the failure of "War on Poverty" welfare programs to improve conditions for the poor,[23] and the significant decrease in unskilled workers' real wages during a period of rising taxes.[24] Such events, trends, and symbols ignited both intellectual writers and interest groups committed to the cause of diminished government to further attempt to influence public perceptions.[25] Combined with people's natural tendency to become impatient with, and challenge, the status quo,[26] this environment created the appropriate recipe for a transformation in public opinion.

In such an environment, it is unremarkable that legislative policy would reflect shifts in public opinion.[27] More controversial is the assertion that judges allow public opinion to influence decisions in which they apply private law[28] and, more specifically, that public opinion has contributed to a move by judges to prefer written contracts.

Another possible explanation for the change in judicial approach is that plaintiffs, encouraged by the previous willingness of courts

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[22] *See* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 314–15, 328 n.231 (quoting Mark H. Moore, *What Sort of Ideas Become Public Ideas?*, *in* THE POWER OF PUBLIC IDEAS 55, 83 (Robert B. Reich ed., 1990) ("[I]deas seem to become anchored in people's minds through illustrative anecdotes, simple diagrams and pictures . . . .")).

[23] *See, e.g.*, James Traub, *Nathan Glazer Changes His Mind Again*, N.Y. TIMES, June 28, 1998, § 6 (Magazine), at 24.

[24] *See* Judis, *supra* note 21, at 4. "[S]ymbols dominate the large discussion because they evoke vivid images that abstract policy norms do not." Blatt, *supra* note 22, at 328.

[25] Stephan Salisbury, *Right Turn*, PHILADELPHIA INQUIRER, Aug. 24, 1997, at E3 (funding of conservative groups by philanthropies influences conservative shift).

[26] *See* ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 27 (1986) ("With the acceleration in the rate of social change, humans become creatures characterized by inextinguishable discontent.").

[27] *See* Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 75 (1983).

[28] Information regarding the effect of public opinion on judges is anecdotal and sketchy. *See* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1836–37 (1995). Nevertheless, academics and judges turn to public opinion surprisingly often in order to mount arguments for legal change. *See generally* Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 328–34 (1982) (arguing changes in public norms require modernization of marriage law); Peter R. Teachout, *Uneasy Burden: What it Really Means to Learn to Think Like a Lawyer*, 47 MERCER L. REV. 543, 569 (1996) (suggesting that law should require a limited duty to rescue based in part on "a general societal judgment"); Michael Tonsing, *Punitive Damages: A Candle in the Wind*, 43 FED. LAW. 8, 9 (1996) (referring to a judge who wrote that "it is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages from injury to reputation greater, by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable").

to find obligations outside of written contracts, brought increasingly weaker cases for doing so. Thus, a case-selection effect could explain the trend toward decisions emphasizing the importance of written contracts. Indeed, there are other plausible explanations for the new emphasis on written contracts.[29]

Perhaps a case-selection effect or another reason explains some of the shift in doctrine, but I want to emphasize the importance of public opinion because "the atmosphere of opinion cannot be shut out of . . . court rooms."[30] Of course, judges are supposed to resist public opinion and decide cases based on the rule of law. No doubt judges are often successful in withstanding fleeting changes in attitudes caused, for example, by publicity over a particular event (such as lawyer-instigated publicity designed as strategy in a particular trial).[31] When public opinion takes the form of sustained, generalized changes in perspectives and values, however, judges are, for many reasons, far less likely to resist the tide.[32] For example, a public perspective may become so dominant that a judge may take it for granted and incorporate it subconsciously.[33] In addition, judges may openly embrace public opinion because they believe good policy decisions should con-

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[29] For example, the power of a judge's rhetoric alone might persuade other courts to follow a new approach. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 148–53 (1990); Robert A. Hillman, *"Instinct with an Obligation" and the "Normative Ambiguity of Rhetorical Power,"* 56 OHIO ST. L. J. 775 (1995).

[30] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 172 (1911); *see also* Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 102 (1922) ("Decisions often result from changing social conditions. . . ."). For a recent discussion, see Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 235 (1999) ("[J]udges as human beings, cannot help but be influenced by their life experiences.").

[31] *See* Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381, 2402 (1997) ("The passion of the moment and streets must almost always be kept a safe distance away from the courthouse."). For a good discussion of public opinion, see Moses, *supra* note 28, at 1831.

[32] *See* Ruti G. Teitel, edited transcript published in *Symposium, Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1121, 1153 (1995) ("[T]he fact that the law is written is only one element of what makes law positive and . . . there are others, such as a broader understanding of . . . public perception."); *see also* Bellacosa, *supra* note 31, at 2393–94 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 152 (1921) ("If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.")).

[33] Perhaps Justice Rehnquist said it best:

> Somewhere "out there"—beyond the walls of the courthouse—run currents and tides of public opinion which lap at the courthouse door . . . . [I]f these tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse. This is not a case of judges "knuckling under" to public opinion and cravenly

sider the "value preferences" of the citizenry.[34] Further, judges may adopt public opinion to enhance or maintain their reputations or, in the case of elected judges, to solidify their hold on their positions.[35]

For better or worse, then, the tide of opinion embracing private markets and judicial restraint, and rejecting government regulation and judicial activism, appears to have reached the courts. Moreover, such public opinion has contributed to decisions that sanctify written contracts, which are, of course, the archetypical form of exchange in a world of free markets and "freedom of contract."

IV. The New Emphasis on Written Contracts and the Process of Legal Change

This section asserts that the capacity of the common law to change, evolve and adjust, reflected in the new emphasis on written contracts, demonstrates a healthy, functioning legal system.

A healthy legal system is neither too static nor too dynamic.[36] Instead, the components of the system, such as lawmakers, lawyers, citizens, institutions, and structures, are permanently changing and adapting to one another. Complexity theorists refer to systems that exhibit such characteristics as being "on the edge of chaos" and believe that this state ensures survival of the system.[37] For example, Professor

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> abandoning their oaths of office. Judges, as long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.

William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 Suffolk U. L. Rev. 751, 768 (1986).

[34] *Cf.* Blatt, *supra* note 22, at 331 (discussing the "extraction of specific policy goals from popular symbols").

[35] In 1994, the American Judicature Society reported that 27.6% of state judges indicated that they were "more sensitive to public opinion" because of retention elections. *See* John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50, 53 (1996); *see also* Norman Dorsen, *How American Judges Interpret the Bill of Rights*, 11 Const. Commentary 379, 388 (1994). There, Dorsen states:

> [P]ublic opinion has a powerful effect on judges, including Supreme Court Justices, even though lifetime tenure insulates them from crass retribution for their decisions. . . . Put another way, judges . . . do not live in a disembodied vacuum, but exist as part of the hard real world where their decisions will be closely reviewed by every segment of society and ultimately redound to each judge's enhanced or impaired reputation. This is bound to influence decision-making.

But see Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107, 1127 (1995) (arguing that lifetime judges can resist public opinion).

[36] *See* Bellacosa, *supra* note 31, at 2393 ("The paradoxical swings, tensions, and realities in law and jurisprudence temper the necessity of having to rule in cases without the benefit of perfectly clear vision and knowledge.").

[37] *See* M. Mitchell Waldrop, Complexity: The Emerging Science at the Edge of Order and Chaos 293, 320–22, 330 (1992).

Reynolds has utilized complexity theory to show that adaptation and change in government ensures that no particular coalition or group can permanently enjoy the upper hand.[38] Instead, government is a "moving target" that avoids stagnation and "status quo" politics.[39]

If contract law is "on the edge of chaos," we can expect further movement on questions such as whether to create and enforce rules that favor written contracts. Indeed, at some point, the pendulum is likely to swing in the direction of de-emphasizing written contracts.[40] Impatience of the citizenry with the legal and political status quo will again prime the pump. Then events and trends that underscore and symbolize the importance of government's role in society will transform public opinion, which, in turn, will influence the judicial application of contract law. Judges will become more active because they will perceive that the written-contract filter precludes enforcement of too many "real" agreements and representations. These observations about legal change are, of course, hardly a revelation. Arthur Schlesinger Jr. posited the existence of "political cycle[s]," consisting of "a continuing shift in national involvement, between public purpose and private interest."[41] Grant Gilmore observed the "alternating rhythms of classicism and romanticism" in literature and the arts and their implications for law.[42]

> [R]ight in between the two extremes [of order and chaos] . . . at a kind of abstract phase transition called "the edge of chaos," you also find complexity: a class of behaviors in which the components of the system never quite lock into place, yet never quite dissolve into turbulence either. . . . These are the systems that can be organized to perform complex computations, to react to the world, to be spontaneous, adaptive, and alive.

Id. at 293.

[38] Glen Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635, 1645 (1995).

[39] *Id.* at 1646.

[40] A new trend may already have begun. *See, e.g.*, Velarde v. Pace Membership Warehouse, 105 F.3d 1313 (9th Cir. 1997) (employer's invocation of parol evidence rule denied); Powers v. Dickson, Carlson & Campillo, 63 Cal. Rptr. 2d 261 (Cal. Ct. App. 1997) (although finding an arbitration clause binding, the court approved of precedent invoking exceptions to binding arbitration); Fillinger v. Northwestern Agency, Inc., 938 P.2d 1347 (Mont. 1997) (no "absolute" duty to read insurance policy). *See generally* Claire Moore Dickerson, *Cycles and Pendulums: Good Faith, Norms, and the Commons*, 54 WASH. & LEE L. REV. 399 (1997).

[41] SCHLESINGER, *supra* note 26, at 27.

[42] GRANT GILMORE, THE DEATH OF CONTRACT 112 (2d ed. 1995). For an imaginative effort to account for the "oscillations between periods of intense preoccupation with public issues and of almost total concentration on individual improvement and private welfare goals," see ALBERT HIRSCHMAN, SHIFTING INVOLVEMENTS 3 (1982) (each stage creates "disappointment," which leads to change).

The middle and late 1990s have already seen a change in public opinion that will lead to a new "tilt" in doctrine.[43] The public exhibited a great deal of sympathy for striking UPS workers.[44] Public opinion endorsed boosting the minimum wage.[45] The public, including Reagan Democrats, disapproved of Newt Gingrich's extremist strategies.[46] If my argument about the connection between public opinion and judicial decisions is correct, judicial decisions will, in time, reflect the change in public opinion,[47] with some analysts inevitably lamenting "the new liberalism" in contract law.

Obviously, all is not rosy with this picture of legal change. One problem is that at any given time there are real costs to real people who are out of step with the prevailing view of the substantive law. Some parties who lose promissory estoppel claims would probably win them in an atmosphere that considers legal rules "protection" rather than "intrusion." Moreover, only in such an environment would parol evidence offered to rebut the terms of a written contract see the light of day. Compounding the problem, judicial decisions begin to reflect public opinion only after the passage of time. Therefore, a party may lose a promissory estoppel claim when the tide of public opinion favors the party, but this sentiment has not yet reached the courts.

An even larger problem is that public opinion may be unjust or illogical, or it may contradict perfectly valid instrumental goals of the law. There are, in fact, plenty of reasons why public opinion may suffer from such infirmities: people may form their opinions based on defective or limited information;[48] people's expectations may be unreasonably low;[49] dominant interest groups may have too much influence over public discourse;[50] and the public's perspective may be too fleeting.[51]

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[43] On all of these trends, see Herbert, *supra* note 21, at A1 (Americans unsettled about the "conservative revolution").

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See supra* note 43.

[48] *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 794 (1994) ("people may be unaware of their alternatives" when forming opinions).

[49] *See id.* ("If people expect to get nothing from the legal system, they may be pleasantly surprised to receive a little.").

[50] *See id.* ("[A] dominant group can define the consciousness of an entire society . . . .").

[51] *See* Douglas Lind, *Free Legal Decision and the Interpretive Return in Modern Legal Theory*, 38 AM. J. JURIS. 159, 179 (1993) (Public opinion may be too "unstable an indicia of legal meaning.").

On the other hand, when people form a "broad value consensus on core beliefs,"[52] there are good reasons for judges to pay attention. Stagnant law that deflects public discourse may be more costly and unjust than law that encompasses the tide of opinion.[53] Moreover, our deeply ingrained American values, goals and traditions—including individualism and entrepreneurship[54] on the one hand, and cooperation and communitarianism on the other—should ordinarily form boundaries and confine public opinion to acceptable, even desirable parameters. Ultimately, in the unusual case, when public opinion is seriously inconsistent with societal norms, judges should be able to perceive the aberration and resist it.[55]

For better or worse, this depiction of law suggests that law includes what is written in the books, but it also encompasses public opinion and even a judge's perception of public discourse.[56] Law is, therefore, in part political, subjective, and indeterminate. Lawyers must be cognizant not only of legal rules, but also of current events and political and social tides. This is not to say that doctrine is unimportant. It influences the actions of most parties, who never go to court. It decides many cases. Nevertheless, in the close case a lawyer should never focus solely on legal rules.

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[52] Tyler & Mitchell, *supra* note 48, at 795.

[53] *See* Teitel, *supra* note 32, at 1153 ("In a totalitarian country, we might very well expect a gap between the law as it is written and the people's understanding of the law. . . . The danger sign is clear: lack of integration between the public perception of law as lawful and the law as written."). A good example of a set of rules in need of overhaul, at least in part because of inattention to public opinion, are rules governing marriage. Although society is increasingly tolerant of "pluralism in family forms," few laws allow marriage parties to personalize their own arrangements. *See* Marjorie M. Shultz, *supra* note 28, at 247 (quoting Marvin B. Sussman, *Family Systems in the 1970s: Analysis, Policies and Programs*, 396 ANNALS 40, 42 (1971)).

[54] *See* Harris & Mooney, *supra* note 20, at 1371 ("Entrepreneurship is an indelible feature of the American social fabric.").

[55] *See* Kevin Cole & Fred C. Zacharias, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System*, 69 S. CAL. L. REV. 1627, 1654 n.111 (1996) ("Appellate courts almost uniformly have presumed that the judges can withstand the pressures [of public opinion] and decide cases independently.").

[56] *See, e.g.*, Teitel, *supra* note 32, at 1153 (referring to a "multiplicity of sources of the rule of law" including "societal consensus"). Other factors determining outcomes include a judge's personal values and her evaluation of the instrumental effects of a decision.