

PROMISES, POLICIES, AND PRINCIPLES: THE SUPREME COURT AND CONTRACTUAL OBLIGATION IN LABOR RELATIONS

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When the United States Supreme Court decides which promises made in the labor relations context should be enforced, and how to interpret those promises, has the Court treated those promises differently from the way the legal system has generally treated promises? Specifically, have policies (in particular, federal labor policy and its goals of wealth redistribution and industrial peace) played a predominant role, or have principles (in particular, notions of freedom of contract and the autonomy and will of contracting parties) played a predominant role? This Article maintains that the Court’s treatment of labor relations promises from the Wagner Act’s passage in 1935 to the Warren Court era’s end in 1969 was consistent with Professor Grant Gilmore’s famous “death of contract” thesis regarding contract law, as well as the predominant legal thinking of the time, the “legal process school.” Specifically during this time period, whether the Court enforced a particular labor relations promise, and how those promises were interpreted was determined by balancing competing policies, with federal labor policy being the most important. But in the early 1970s the Court shifted to treating principles (specifically, freedom of contract and the autonomy and will of the parties) as the primary bases for enforcing labor relations promises. This latter approach was correct because it is consistent with congressional intent.

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INTRODUCTION

When the U.S. Supreme Court decides which promises made in the labor relations context should be enforced, and how to interpret those promises, has the Court treated those promises differently from the way the legal system has generally treated promises? Specifically, have policies (in particular, federal labor policy and its goals of wealth redistribution and industrial peace) played a predominant role, or have principles (in particular, notions of freedom of contract and the autonomy and will of contracting parties) played a predominant role?¹

This Article maintains that the Court’s treatment of labor relations promises from the Wagner Act’s passage in 1935² to the Warren Court era’s end in 1969 was consistent with Professor Grant Gilmore’s famous “death of contract” thesis regarding contract law,³ as well as the predominant legal thinking of the time, the “legal process school.”⁴ Specifically, during this time period, whether the Court enforced a particular labor relations promise, and how that promise was interpreted, was determined by balancing competing policies, with federal labor policy being the

¹ Throughout this Article, I use the terms “policy” and “principle” in the sense used by Professor Ronald Dworkin. “Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.” Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975).

² National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

³ See GRANT GILMORE, *THE DEATH OF CONTRACT* 1 (Ronald K. L. Collins ed., 2d ed. 1995) (arguing that contract law was “dead”).

⁴ See David Kennedy & William W. Fisher III, *Introduction* to *THE CANON OF AMERICAN LEGAL THOUGHT* 11 (David Kennedy & William W. Fisher III, eds., 2006) (discussing the “legal process” school).

most important. And if Stewart Macaulay was the “Lord High Executioner of the Contract is Dead school,”⁵ the Warren Court was the Lord High Executioner of the “collective bargaining agreements are dead” school, with the high-water mark reached in 1964 in *John Wiley & Sons, Inc. v. Livingston*.⁶

But in the early 1970s—starting in 1972 with *NLRB v. Burns International Security Services, Inc.*,⁷ soon after the “legal process” consensus was shattered⁸ and Gilmore asked whether contract law would be resurrected⁹—the Court shifted to treating principles (specifically, freedom of contract and the autonomy and will of the parties) as the primary bases for enforcing labor relations promises. This shift coincided with the rise of freedom of contract arguments by legal scholars arguing from both principles-based positions—scholars such as Charles Fried¹⁰ and Randy Barnett¹¹—and policy-based positions—scholars such as Richard Posner.¹² The shift also coincided with the revival of libertarianism in political philosophy, spearheaded by Robert Nozick’s 1974 publication of *Anarchy, State and Utopia*.¹³

Part I of this Article explores legal thinking about contract law from the late nineteenth century to the present. Part II discusses those situations in which the Supreme Court has jurisdiction over labor relations promises. Part III discusses how the Court has treated promises made in the context of labor relations since the mid-1930s. Part IV addresses whether the Court’s treatment of labor relations promises from the mid-1930s to the late 1960s is more consistent with congressional intent than the Court’s treatment of labor relations promises from the 1970s to the present. Finally, this Article concludes that the latter approach is more consistent with congressional intent.

⁵ GILMORE, *supra* note 3, at 113 n.1.

⁶ 376 U.S. 543 (1964).

⁷ 406 U.S. 272 (1972).

⁸ Kennedy & Fisher III, *supra* note 4, at 11. The legal process consensus was shattered in the few years around 1968. *Id.*

⁹ See GILMORE, *supra* note 3, at 112 (“Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?”).

¹⁰ See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14 (1981) (arguing that the underlying basis for contract law is the moral obligation to keep a promise).

¹¹ See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269–71 (1986) (arguing that the underlying basis for contract law is the consent of the parties to be legally bound).

¹² See ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1–9 (1979); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 1–8 (1972).

¹³ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

I. JUDICIAL REASONING ABOUT CONTRACT LAW

A. *Various Substantive Principles and Policies a Court Might Pursue in Deciding Whether to Enforce a Promise and How to Interpret it*

Before addressing judicial reasoning about contract law, it is useful to identify the various principles and policies a court might consider when deciding which promises to enforce, and how to interpret those promises it does enforce.

A court might consider five principles. The first principle is protecting the promisee's "reliance interest," which is the promisee's interest in not being placed in a worse position than before the promise was made because of the promisor's promise and its non-performance.¹⁴ This interest includes the expenses the promisee incurred in anticipation of performance and would have recouped had there been performance; harm caused by faulty performance (such as personal injury or property damage); expenses the promisee incurred in attempting to mitigate damages after the breach that would not have been incurred had there been performance; and any psychological harm caused by disappointed expectations.¹⁵ The reliance interest is particularly strong because the promisor has caused harm to the promisee, and causing harm to another is a generally recognized basis for requiring compensation under the concept of corrective justice.¹⁶ The more tangible the harm, the greater the interest in protecting it (for example, psychological harm has traditionally received little protection from the legal system).¹⁷ The doctrine of prom-

¹⁴ See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941) ("A second substantive basis of contract liability lies in a recognition that the breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise will be fulfilled.").

¹⁵ I have included within the reliance interest category, as a substantive basis for enforcing a promise, any harm (tangible or intangible) caused by the promisor not keeping her promise, including the psychological harm from disappointed expectations. This category does not, however, consider "harm" to be a simple failure to receive what was promised. With respect to psychological harm from a breach, Professor Fuller stated as follows:

The breach of a promise arouses in the promisee a sense of injury. This feeling is not confined to cases where the promisee has [tangibly] relied on the promise. Whether or not he has actually changed his position because of the promise, the promisee has formed an attitude of expectancy such that a breach of a promise causes him to feel that he has been 'deprived' of something that was 'his.'

L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 57 (1936). I have included psychological harm in the reliance interest category because the harm is caused by reliance. The promisee's reliance is in the form of expecting the promisor to keep her promise. Thus, the promisee has changed her position as a result of the promise, even if it is only a psychological change of position.

¹⁶ See Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1317 (2006) ("Corrective justice[.] . . . requires compensation for a wrongful harm that has occurred.").

¹⁷ See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 324 (1983) ("Traditionally, courts were

issory estoppel is based on protecting the reliance interest.¹⁸ The difficulty with the reliance interest is that the legal system often permits persons to inflict harm on others without paying compensation when the actor's conduct is considered justified.¹⁹ Thus, the mere fact that a person's act or omission caused harm to another does not mean the person who caused the harm should be required to compensate the victim.

The second principle courts might consider is protecting the promisee's "restitution interest," which is the promisee's interest in receiving compensation for benefits provided to someone else.²⁰ The restitution interest is stronger than the reliance interest because it combines a loss by the promisee with a benefit received by the promisor.²¹ The doctrine of promissory restitution is based in part on protecting the restitution interest.²² Yet, the difficulty with this interest is that the legal system does not require compensation for all benefits received. The legal system only requires compensation when it is "unjust" to not pay for the benefit,²³ which results in the difficult determination of when non-payment results in injustice.

The third principle is protecting the promisor's "autonomy interest," which is the promisor's interest in making her own choices.²⁴ Because our society values freedom, this principle is strong.²⁵ This principle would arguably support the enforcement of all promises, not simply

extremely reluctant to compensate plaintiffs for emotional harms except as an adjunct to awards of damages for other injuries that the courts deemed more concrete and easier to value.").

¹⁸ See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1196–98 (1998).

¹⁹ See, e.g., *Vegehlahn v. Guntner*, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting) ("[I]n numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified."); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) ("Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition.").

²⁰ See Fuller, *supra* note 14, at 812.

²¹ *Id.*

²² See generally Stanley Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1116–19 (1971) (explaining how rules governing promises for benefit received are anchored in restitution).

²³ See RESTATEMENT OF RESTITUTION § 1 (1937) ("A person who has been *unjustly* enriched at the expense of another is required to make compensation to the other." (emphasis added)).

²⁴ See FRIED, *supra* note 10, at 13 ("In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself."); Fuller, *supra* note 14, at 806 ("Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations.").

²⁵ See Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 605 (1998) (noting that a core value of our society is "freedom or autonomy.").

those given for consideration or that cause reliance.²⁶ A difficulty with this principle is that persons do not always make good choices. Also, persons might choose to break their promises, which arguably should be protected under the autonomy principle as well.²⁷

The fourth principle is the moral obligation to keep a promise.²⁸ This principle focuses on sanctioning the promisor for engaging in wrongdoing (breaking a promise), whereas the autonomy principle focuses on respecting the promisor's choices. The enforceability of any promise might be based, at least in part, on this principle, and courts implicitly invoke this principle by requiring a lesser degree of certainty for the recovery of damages when a breach is willful.²⁹

The fifth principle is the "relief-of-hardship" principle, which "calls for courts to let one party out of his bargain in exceptional cases where enforcement would be unduly harsh, or, where the content of the bargain is in doubt, to place the burden on the party best able to spread the loss or absorb it."³⁰ The doctrines of unconscionability and impracticability are based on this principle.³¹

Additionally, there are three policies that a court might consider when deciding whether to enforce a particular promise, and how to interpret it. The first is avoiding the private vengeance that might result if a

²⁶ See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1127 (2001) ("[T]he fostering of autonomy implies enforcement of all promises . . .").

²⁷ Professor Fried attempts to explain away the paradox as follows:

The only mystery about this is the mystery that surrounds increasing autonomy by providing means for restricting it. But really this is a pseudomystery. The restrictions involved in promising are restrictions undertaken just in order to increase one's options in the long run, and thus are perfectly consistent with the principle of autonomy—consistent with respect for one's own autonomy and the autonomy of others.

FRIED, *supra* note 10, at 14.

²⁸ See P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 2–3 (4th ed. 1989) ("[B]ehind a great deal of the law of contract there lies the moral principle that a person should fulfil his promises and abide by his agreements [A]t least one strong undercurrent in contract law does derive from the idea that a person ought to keep his word, and that promises impose moral obligations."); FRIED, *supra* note 10, at 8 ("By promising we transform a choice that was morally neutral into one that is morally compelled.").

²⁹ See *Laurin v. DeCarolus Constr. Co.*, 363 N.E.2d 675, 678 (Mass. 1977) (relying on the "deliberate and willful nature of the breach in determining damages"); *Groves v. John Wunder Co.*, 286 N.W. 235, 236 (Minn. 1939) (same); RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981) ("A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts.").

³⁰ Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 815 (1961).

³¹ Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 136 (1992).

promisee cannot obtain redress from a court.³² Although this policy is strong, criminal law is already a deterrent to private vengeance.³³

The second policy is promoting exchange.³⁴ Facilitating the exchange of goods and services is valuable because an exchange presumably makes both parties better off, thereby increasing societal wealth.³⁵ Contract law promotes exchange because “[o]ne or both parties will have to perform in the future, which means that the other party has to *trust* him so to perform, [and] has to have confidence that he will perform.”³⁶ By imposing a sanction for breaching a contract, “[c]o-operation then becomes much easier, and exchanges are facilitated.”³⁷ Of course, persons might have different views on which contract doctrines help promote exchange. For example, some might favor contract rules severely limiting government interference, and others might favor rules providing the government with a substantial regulatory role.

The third policy is distributive justice, which advocates moving wealth from society’s wealthier members to its poorer members.³⁸ Courts that enforce promises to charities in the absence of apparent consideration or reliance presumably rely on this principle.³⁹ The difficulty with this policy is that contract law is not particularly well suited for

³² See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 5–6 (6th ed. 2009) (“It is well-recognized that the law of crimes and torts owe their origin to the state’s desire to eliminate private vengeance and to minimize other forms of self-help. It is not as well known that contract law has the same genesis . . . Anthropology and history prove that a basis of contract law is the desire to keep the public peace.”).

³³ See James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1403 n.10 (2002) (noting that one of the purposes of criminal law is deterrence).

³⁴ See ATIYAH, *supra* note 28, at 3 (“Contract law is . . . in large part, the law of exchange, the law which regulates the methods by which individuals exchange goods and services usually in return for money.”); Macaulay, *supra* note 30, at 813 (“Clearly, contract is a legal device primarily designed to support the market institution . . .”).

³⁵ See KRONMAN & POSNER, *supra* note 12, at 2 (recognizing that exchange increases societal wealth).

³⁶ ATIYAH, *supra* note 28, at 6 (emphasis in original).

³⁷ *Id.* at 7.

³⁸ See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472–73 (1980) (“[I]t has sometimes been suggested that the law of contracts should also be used as an instrument of distributive justice and that those responsible for choosing or designing rules of contract law—courts and legislatures—should do so with an eye to their distributional effects in a self-conscious effort to achieve a fair division of wealth among the members of society.”).

³⁹ See, e.g., *I & I Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 534 (N.Y. 1938) (finding consideration and enforcing promise based on an implied condition that the charity continue with its work); *Allegheny Coll. v. Nat’l Chautauqua Cnty. Bank*, 159 N.E. 173, 176 (N.Y. 1927) (holding that promise of funds to college was supported by consideration because promisor stated that the gift was to be named after her); RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981) (promise to charity enforceable under promissory estoppel even without reliance); *Id.* cmt. f (“American courts have traditionally favored charitable subscriptions . . . and have found consideration in many cases where the element of exchange was doubtful or nonexistent.”).

wealth redistribution; the government's use of its taxing power is likely more effective.⁴⁰

In deciding which promises to enforce, and how to interpret them, a court is required to assign weight to these various principles and policies based on their perceived importance, and also consider whether they are matters appropriate for a court (as opposed to a legislature) to consider. As discussed in the next section, the weight given to these various principles and policies has varied in different eras. After assigning weight to these principles and policies, the court must decide whether any benefits from enforcement are outweighed by the enforcement costs to society (in the form of judicial resources).

A court must also decide the form that contract rules will take. As Professor Duncan Kennedy notes:

There are . . . two opposed modes for dealing with questions of the form in which legal solutions to the substantive problems should be cast. One formal mode favors the use of clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing ad hoc decisions with relatively little precedential value.⁴¹

Jurists who value individualism (autonomy) over altruism (wealth redistribution) tend to favor rules, whereas jurists who value altruism over individualism tend to favor standards.⁴² But as Judge Richard Posner stated, "No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards."⁴³ Examples of rules include requirements of form, such as requiring that a contract covering a particular matter be evidenced by a signed writing to be enforcea-

⁴⁰ On this point, one scholar has argued:

Contract law's failure to embrace redistribution as a core goal can be justified on the grounds that contract cannot do this job well. Contract law rules are often a crude, temporary, and puny means of redistribution. For example, a contract rule that redistributes wealth from landlords to tenants is crude because it does not help the homeless or affect wealthy non-landlords, while it does affect relatively poor as well as rich landlords. Furthermore, this sort of rule is temporary in that increased costs of a rule frequently can be passed along (to the tenants), or investments can be shifted to avoid the costs of the rule. Finally, given the extremes of wealth and poverty in our society, contract rules are a small, slow way to achieve redistribution. Taxes and transfer payments are a better way to maintain a pattern of distributive justice.

See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 714 (1990).

⁴¹ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

⁴² *Id.*

⁴³ *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 657 (7th Cir. 2000).

ble.⁴⁴ The requirements of form provide evidence of the transaction, which reduces the cost of enforcement; act “as a check against inconsiderate action,” which promotes the principles of autonomy and relief from hardship; and provide a method for parties to give intended legal effect to their transactions, which promotes autonomy and exchange.⁴⁵

B. *Theories of Contract Law Through the Ages*

In 1974, Grant Gilmore, a professor at Yale Law School, famously argued that contract law had died.⁴⁶ He asserted that although contract law had been “alive and well in the nineteenth century,” it had been “dying a lingering death” since around the 1920s.⁴⁷ He argued that by the time Arthur Corbin’s famous contracts treatise was published in 1950, “the process of decay and disintegration was already apparent.”⁴⁸

The “contract law” that Gilmore maintained had died has been called “classical contract law.”⁴⁹ Classical contract law’s origins date to the late eighteenth century, when the industrial revolution created a need for rules of commercial law.⁵⁰ According to Gilmore, Oliver Wendell Holmes provided the theory’s broad philosophical outline in the late nineteenth century in his book *The Common Law*, and Samuel Williston provided the scholarly detail in his 1920 contracts treatise.⁵¹ Thus, it was the “Holmes-Williston construct” of classical contract law to which Gilmore referred.⁵² Scholars have identified the publication of the *Restatement (First) of Contracts* in 1932 as classical contract law’s high-water mark.⁵³

Classical contract law had several characteristics. First, it was a general theory of contract law that applied to all contracts irrespective of subject matter, as opposed to having separate doctrines applicable to different types of contracts such as sales contracts, employment contracts, and insurance contracts.⁵⁴ According to Gilmore, Christopher Columbus

⁴⁴ See, e.g., U.C.C. § 2-201 (1977).

⁴⁵ Fuller, *supra* note 14, at 800–01.

⁴⁶ See GILMORE, *supra* note 3, at 1 (“WE ARE TOLD that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore.”).

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 6.

⁴⁹ See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 681 (1984).

⁵⁰ See GILMORE, *supra* note 3, at 10; W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 9 (1996).

⁵¹ GILMORE, *supra* note 3, at 15.

⁵² See *id.*

⁵³ Knapp, *supra* note 18, at 1193–94.

⁵⁴ See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20–24 (1965).

Langdell, the Dean of the Harvard Law School from 1870 to 1895,⁵⁵ with the publication of his contracts casebook in 1871⁵⁶ and his *Summary of the Law of Contracts* in 1880,⁵⁷ originated the idea that a general theory of contract law should exist.⁵⁸ Holmes, with the publication of *The Common Law* in 1881, also tried to make sense of contract law as a whole.⁵⁹ In 1920, Samuel Williston complained in the introduction to his famous treatise that the law of contracts “tends from its very size to fall apart,” and asserted that “[i]t therefore seems desirable to treat the subject of contracts as a whole, and to show the wide range of application of its principles.”⁶⁰

Consistent with the desire for a general theory of contract, the American Law Institute (ALI) published the *Restatement (First) of Contracts* in 1932, with Williston as its Reporter.⁶¹ The ALI’s motive for restating the rules of contract law (and the rules of other areas of the common law) was to “clarify and simplify the law and to render it more certain”⁶² The ALI maintained that “the vast and ever increasing volume of the decisions of the courts establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable has resulted in ever increasing uncertainty in the law.”⁶³ Thus, classical contract law placed a high premium on certainty, even at the expense of occasional injustice.⁶⁴

Classical contract law’s second characteristic concerned the mode “for dealing with questions of the form in which legal solutions to the substantive problems [of contract law] should be cast,”⁶⁵ with classical contract law preferring rules to standards.⁶⁶ This preference for rules was consistent with a desire for certainty and a desire to restrain official arbitrariness (which helped separate law and politics, or at least helped

⁵⁵ ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN*, 1817–1967, at 162 (1967).

⁵⁶ C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871).

⁵⁷ C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (1880).

⁵⁸ GILMORE, *supra* note 3, at 13.

⁵⁹ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

⁶⁰ SAMUEL WILLISTON, *THE LAW OF CONTRACTS* iii (1920).

⁶¹ See *RESTATEMENT (FIRST) OF CONTRACTS*, intro. ix (1932) (identifying Williston as the Reporter).

⁶² See *id.* at intro. viii.

⁶³ *Id.*

⁶⁴ See LANGDELL, *supra* note 57, at 20–21 (asserting that the “mailbox rule” should be rejected even if its rejection would result in injustice because the rule does not logically follow from contract law’s governing principles).

⁶⁵ Kennedy, *supra* note 41, at 1685.

⁶⁶ See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 767 (2002).

create the appearance of separation).⁶⁷ This preference for rules over standards was exhibited in giving primacy to written documents over oral terms (as evidenced by the plain meaning doctrine and the parol evidence rule).⁶⁸

Classical contract law's third characteristic was to derive its rules through deduction from abstract, axiomatic principles, an approach (derivatively) called "formalism" or "conceptualism."⁶⁹ Fourth and finally, these axiomatic principles were to be premised on the idea of freedom of contract, the idea that individuals should have the power to enter into contracts and have them enforced without government interference (other than enforcing them, of course).⁷⁰

But what were the principles or policies that generated the idea of "freedom of contract"? Here, classical contract law revealed its susceptibility to decay. Classical contract law and its goal of freedom of contract were premised on both a principle and a policy that were to some extent inconsistent.

One basis for classical contract law and its goal of freedom of contract was liberalism, the political philosophy that emphasized an individual's right to freedom from state coercion.⁷¹ For example, to the "judges of the eighteenth century theories of natural law meant that men had an inalienable right to own property, and therefore to make their own arrangements to buy or sell or otherwise deal with that property, and hence to make their own contracts for themselves."⁷² Liberalism, as applied to contract law, found expression in the "will theory of contract."⁷³ Under this theory, which Langdell advocated,⁷⁴ courts simply implemented the desires of the contracting parties.⁷⁵ Yet, will theory is not simply the right to freedom from state coercion; it includes the right to have the state enforce one's contract rights, which are rights against other individuals.⁷⁶

Under this approach, the parties' will was the most important basis for a court's decision in a particular case.⁷⁷ As such, judicial reasoning

⁶⁷ See Kennedy, *supra* note 41, at 1688 ("It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty.").

⁶⁸ See Knapp, *supra* note 66, at 767.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ SLAWSON, *supra* note 50, at 10–11.

⁷² ATYAH, *supra* note 28, at 8 (referring to English judges).

⁷³ See Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933) (discussing the will theory of contract).

⁷⁴ See *id.* (identifying Langdell as a will theorist).

⁷⁵ See *id.* at 575–76.

⁷⁶ See *id.*

⁷⁷ See *id.*

would (presumably) remain apolitical, and the approach resembled a Kantian approach premised on moral responsibility for one's actions.⁷⁸ Such an idea was consistent with the prevailing nineteenth century notion that judges, even with respect to the common law, did not make law but rather "found" it.⁷⁹ The idea of freedom of contract as a natural right was also part of the movement away from government paternalism and toward individualism.⁸⁰ As Professor Atiyah noted with respect to England:

[T]his rejection of paternalism was actually part of a reform movement which was closely allied to the political movement towards democracy. It was the reformers of the 1830s who proclaimed their faith in individualism, their belief that the mass of the people could be trusted to look after their own interests⁸¹

Thus, classical contract law was based largely on the principle of autonomy.

But classical contract law and its goal of freedom of contract were also based on a policy, that of protecting and promoting the free market.⁸² This policy emphasized the benefits of competition and granting persons the freedom to set prices and other terms of their bargains.⁸³ In contrast to the pre-political principle of liberalism, this was a utilitarian policy designed to increase societal welfare.⁸⁴ Holmes, whose 1881 publication of *The Common Law* demonstrated a desire for unifying theories of law, approached contract law from a policy-based vantage point.⁸⁵ For example, by 1897, with the publication of his article *The Path of the Law*, Holmes argued that contract doctrines were based on policy choices, and he "openly accepted . . . utilitarianism as the goal of law."⁸⁶ Thus, Holmes, who did much to establish the objective theory of contracts and the requirement of a bargain as primary doctrines of classical

⁷⁸ See Kaplow & Shavell, *supra* note 26, at 1104 n.322 (equating the "will theory" with Kantianism).

⁷⁹ SLAWSON, *supra* note 50, at 10.

⁸⁰ ATIYAH, *supra* note 28, at 8–10.

⁸¹ *Id.* at 10.

⁸² See SLAWSON, *supra* note 50, at 10.

⁸³ *Id.*

⁸⁴ See Dworkin, *supra* note 1, at 1068 ("Economic efficiency is a collective goal: it calls for such distribution of opportunities and liabilities as will produce the greatest aggregate economic benefit defined in some way.").

⁸⁵ See HOLMES, *supra* note 59.

⁸⁶ William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* lvii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

contract law, did so for policy reasons, not reasons of principle.⁸⁷ Therefore, classical contract law was also based on the policy of promoting exchange.

Accordingly, the phrase “freedom of contract” (the governing idea of classical contract law) might describe an abstract pre-political individual right or, in contrast, a utilitarian goal to increase societal welfare.⁸⁸ Presumably, for those who supported the goal of freedom of contract, a theory based on individual rights as opposed to collective goals seemed more impervious to the criticism that judges were making law. Judges were simply enforcing pre-political individual rights, not making policy choices that were better left to the legislature. Also, an individual right was likely less impervious to qualification and competing interests than a mere policy.

Classical contract law’s leading doctrines, presumably deduced from these “large, abstract, and integrated theories”⁸⁹ such as autonomy and efficiency, were as follows: (1) the parties’ power to choose the contents of their contracts;⁹⁰ (2) contract liability based on voluntarily assumed duties, not state imposed duties (thus, there should be a clear distinction between contract law and tort law);⁹¹ (3) objective determinations of whether duties were voluntarily assumed and what those duties were;⁹² (4) promises were only enforceable if part of a bargained-for-exchange, which required mutual assent and consideration;⁹³ (5) limited

⁸⁷ See *id.*

⁸⁸ See Dworkin, *supra* note 1, at 1069 (“The same phrase might describe a right within one theory and a goal within another . . .”).

⁸⁹ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 49 (1992).

⁹⁰ SLAWSON, *supra* note 50, at 3.

⁹¹ *Id.*; see also GILMORE, *supra* note 3, at 16–17 (“Contractual liability . . . was to be sharply differentiated from tort liability and there was to be no softening or blurring of the harsh limitations of contract theory by the recognition of an intermediate no-man’s-land between contract and tort . . .”).

⁹² GILMORE, *supra* note 3, at 16–17. Interestingly, this brought tort law’s “reasonable person” standard into contract law. See *Ricketts v. Pa. R.R. Co.*, 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring) (stating that contract law, through the use of the objective theory of contracts, “transferred from the field of torts that stubborn anti-subjectivist, the ‘reasonable man.’”).

⁹³ GILMORE, *supra* note 3, at 19–20. Gilmore’s argument that the “balance-wheel of the great machine was the theory of consideration” and that Williston was one of the architects of classical contract law, seems contradicted by Williston’s Model Written Obligations Act, which rendered a promise enforceable without consideration, as long as the promisor made a written statement of an intention to be legally bound. See JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 188 (9th ed. 2008) (discussing Model Written Obligations Act). Also, the *Restatement (First) of Contracts* recognized sham consideration as rendering a promise enforceable, see *RESTATEMENT (FIRST) OF CONTRACTS* § 84 illus. 1 (1932) (providing that sham consideration in the amount of \$1 is valid consideration to make an enforceable promise of a gift worth \$5,000), and Williston was the Reporter for the *Restatement (First) of Contracts*. See *id.* at ix. Accordingly, it appears Williston did not believe an actual bargained-for

excuses for non-performance of a contractual duty;⁹⁴ and (6) limited damages.⁹⁵

Although the fourth and fifth doctrines appear paradoxical (enforce few promises but provide few excuses for non-performance), Professor Duncan Kennedy noted that they both flow from a desire to promote individualism as opposed to altruism:

The individualist position is the restriction of obligations of sharing and sacrifice. This means being opposed to the broadening, intensifying and extension of liability *and* opposed to the liberalization of excuses once duty is established. This position is only superficially paradoxical. The contraction of initial liability leaves greater areas for people to behave in a self-interested fashion. Liberal rules of excuse have the opposite effect: they oblige the beneficiary of a duty to share the losses of the obligor when for some reason he is unable to perform. The altruist position is the expansion of the network of liability and also the liberalization of excuses.⁹⁶

These six doctrines, however, disclosed classical contract law's fault lines. If classical contract law was premised on doctrines deduced from general principles, and some of the established doctrines did not flow from those general principles, the entire project would be subject to criticism. The consideration requirement and the objective theory of contracts exposed the project's weakness. For example, Gilmore argued that Holmes wanted liability reduced to avoid discouraging socially useful activities;⁹⁷ this was consistent with his emphasis on policies (and utilitarianism), not principles. To reduce liability, the stricter requirement of consideration, which required a bargained-for exchange, replaced the "benefit-detriment" test for rendering a promise enforceable.⁹⁸ However, if contract law was primarily premised on implementing the

exchange should be necessary to render a promise enforceable. *See id.* § 84 *illus.* 1. Rather, he appears to have simply desired some formality to show that the promisor intended the promise to be legally binding and had perhaps given the matter sufficient thought. *See id.*

⁹⁴ GILMORE, *supra* note 3, at 49–53.

⁹⁵ *Id.* at 16, 58.

⁹⁶ Kennedy, *supra* note 41, at 1735 (emphasis in original).

⁹⁷ *See* GILMORE, *supra* note 3, at 18.

⁹⁸ *See id.* at 19–20 ("The balance-wheel of the great machine was the theory of consideration . . ."); *see also* HOLMES, *supra* note 59, at 293–94 ("[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.").

parties' will (the principle of autonomy), this would render consideration unnecessary to enforce a promise.⁹⁹

Also, the objective theory of contracts, while perhaps consistent with the will theory if one considers an objective manifestation as the best evidence of subjective intent,¹⁰⁰ fits more comfortably within a utilitarian approach than the will theory.¹⁰¹ For example, Mark DeWolfe Howe argues that what drove Holmes's emphasis on objective tests was a desire to avoid the damaging effects Kantian ethics (which were premised on autonomy and not utilitarianism) could have if imported into American law.¹⁰² Thus, classical contract law's consideration requirement and objective approach suggest that utilitarianism was its primary basis, and that the will theory was advanced to make it appear judges were not engaged in lawmaking and policy choices.

Other classical contract law doctrines fit more comfortably into both a utilitarian approach and the will theory. For example, the doctrine that adequacy of consideration should not be assessed could be premised not only on the utilitarian notion that parties are best able to judge what is a good deal for them,¹⁰³ but also on the will theory because the parties voluntarily agreed to the bad deal.¹⁰⁴ The doctrine that excuses for non-performance apply narrowly could be justified by the utilitarian view that too many excuses would threaten contractual stability,¹⁰⁵ as well as by the will theory in that a party who promised to perform should be held to that promise unless the promisor conditioned performance on the non-occurrence of the particular event.¹⁰⁶ The doctrine of limited damages

⁹⁹ See Kennedy & Fisher III, *supra* note 4, at 212; see also FRIED, *supra* note 10, at 35 (arguing against the consideration doctrine).

¹⁰⁰ See, e.g., Fuller, *supra* note 14, at 808 (arguing that the principle of autonomy and the objective theory of contracts were not inconsistent).

¹⁰¹ See Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 296–97 (2008) (noting the utilitarian bases for the objective theory of contracts).

¹⁰² Mark DeWolfe Howe, *Introduction* to OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* xi, xv–xvi (Mark DeWolfe Howe, ed., Little Brown & Co. 1963).

¹⁰³ See RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (1981) (“Valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions.”).

¹⁰⁴ See Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 587 (1994) (“Under the will theory, judges no longer looked at the fairness of the contract terms; rather, they focused on whether the minds of the parties had met. If they found a meeting of the minds, the contract would be enforced as written, regardless of the fairness of the terms. Adequacy of consideration was no longer used as a means of invalidating contracts.”).

¹⁰⁵ See Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CALIF. L. REV. 1123, 1172 (1986) (“[E]xercise and modification doctrines are expanding because of a perceived need to respond to the reality of incomplete contracting. But these expanding doctrines threaten contractual stability . . .”).

¹⁰⁶ See *Paradine v. Jane*, 82 Eng. Rep. 897, 897 (K.B. 1647) (“[W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may,

could be justified on utilitarian grounds in that it would encourage parties to enter into contracts,¹⁰⁷ and the will theory in that the breaching party had not consented to greater liability.¹⁰⁸

In any event, in the late nineteenth century the fault lines underneath classical contract law's surface were a concern for another day. The principle of autonomy and the policy of promoting exchange each supported contract doctrines that promoted individualism and freedom of contract. In fact, during this era the devotion to freedom of contract was so strong that the freedom to bind oneself to a contract was construed as a constitutional right.¹⁰⁹

Not surprisingly, the effect of classical contract law's indifference to a contract's subject matter and its emphasis on bargained-for exchanges and rules over standards, was the protection of the free market against incursions in the name of social policy. Although scholars dispute whether the supposed builders of this general theory of contract (Langdell, Holmes, and Williston) really had a "theory,"¹¹⁰ or were simply describing what they saw, classical contract law was perceived as protecting the strong at the expense of the weak and eschewing justice. Critics of classical contract law also "foreground[ed] a link between the (gap-ridden) legal formalist methods of thinking and (politically retrograde) laissez-faire individualism and voluntarism."¹¹¹

Classical contract law's emphasis on rules, such as the consideration requirement, appeared to even wreak havoc on the encouragement of bargains. According to Gilmore, Williston used the consideration doctrine to deny enforcement to all sorts of promises, such as promises to keep an offer open, to modify a contract, and to discharge a debt.¹¹² If the consideration doctrine was designed to render bargains enforceable, why should courts not enforce a promise to keep open an offer of a bargain? Would not the enforcement of such a promise, even without con-

notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.").

¹⁰⁷ See Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1096 (2000) (noting that limitations on damages encourage contract-making). Holmes's most celebrated example of keeping damages low is his *Swift v. Tyson* era gloss on the *Hadley* rule. See *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544–46 (1903).

¹⁰⁸ See *Globe*, 190 U.S. at 543 (arguing that damages should be based on the tacit consent of the breaching party to be liable for such loss at the time the contract was entered into).

¹⁰⁹ *Lochner v. New York*, 198 U.S. 45, 53 (1905). While the Court has not expressly overruled *Lochner*, *West Coast Hotel Company v. Parrish* is often cited for the proposition that *Lochner* is no longer good law. See 300 U.S. 379 (1937).

¹¹⁰ See Peter Benson, *Introduction to THE THEORY OF CONTRACT LAW: NEW ESSAYS* 2 n.4 (2001) (arguing that Langdell, Holmes, and Williston did not have a general theory of contract).

¹¹¹ Kennedy & Fisher III, *supra* note 4, at 210.

¹¹² GILMORE, *supra* note 3, at 23–36.

sideration, promote exchanges? Classical contract law's obsession with rules seemed to harm its own interests at times, making the whole project look silly.

Furthermore, requiring new consideration for agreements to modify a contract (meaning consideration different from "re-promising" to perform one's existing contract duty), seemed contrary to freedom of contract and promoting exchanges. As Professor John Dawson observed:

Any performance that was already due under an existing obligation was erased—deleted—as a permissible subject of new agreement, unless it was modified in some minor way. Otherwise, in any dealings with the person to whom the performance was due it could not form part of an agreed exchange, no matter how convincing the evidence might be that the exchange was desired—bargained for—by both. Thus, within the limits of the obligation their agreement had created, the parties had destroyed their own power to contract.¹¹³

According to Gilmore, signs of decay in classical contract law were already apparent when the ALI published the *Restatement (First) of Contracts* in 1932. Gilmore believed the Restatement projects were in fact life support efforts.¹¹⁴ He argued that the *Restatement (First) of Contracts* was itself schizophrenic, "poised between past and future."¹¹⁵ The decline of classical contract law was not surprising because its building blocks were not particularly strong. As previously discussed, many of its supporters argued it was premised on promoting the will of the parties,¹¹⁶ but the legal realists pointed out that the objective theory of contracts and courts filling in gaps in contracts with implied terms were inconsistent with the will theory.¹¹⁷ Legal realists also attacked the idea that judges could or were deciding cases through deductive reasoning from a few

¹¹³ JOHN P. DAWSON, *GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED* 210 (1980).

¹¹⁴ GILMORE, *supra* note 3, at 74. Gilmore was not the first to make this argument. Felix Cohen made this argument as early as 1935 in his classic article attacking legal formalism, an article sparing not even Cardozo from withering (and thoroughly entertaining) criticism (much in the style of Gilmore). See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833 (1935) ("The age of the classical jurists is over, I think. The 'Restatements of the Law' by the American Law Institute is the last long-drawn-out gasp of a dying tradition."). Gilmore also argues that Holmes's theory of contract law "was in its origins, and continued to be during its life, an ivory tower abstraction. Its natural habitat was the law schools, not the courts." GILMORE, *supra* note 3, at 19.

¹¹⁵ GILMORE, *supra* note 3, at 66, 72.

¹¹⁶ See Cohen, *supra* note 73.

¹¹⁷ See *id.* at 575–77.

general principles.¹¹⁸ Legal realists pointed out that courts retained significant discretion in applying legal doctrine, such that courts were in part engaging in policy making when deciding cases.¹¹⁹ For example, Wesley Hohfeld famously pointed out as early as 1913 the errors often made in formalist deductive reasoning.¹²⁰

Arthur L. Corbin led the attack on classical contract law in the early twentieth century with a series of law review articles¹²¹ and perhaps also in his role as Special Adviser on the ALI Committee on Contracts.¹²² Gilmore argued that Corbin's role as Special Adviser resulted in the *Restatement (First) of Contract's* schizophrenic quality, vacillating between bargained-for exchange and reliance as the basis for the enforcement of promises.¹²³ In 1936, Lon Fuller (though not a legal realist) questioned the basis for awarding expectation damages, arguing that it could not be explained by the will theory of contracts.¹²⁴ At the same time, opposition to the free market ideology undermined the economic underpinnings of classical contract law, with Robert Hale pointing out that a government's failure to regulate was as much a policy choice as regulation.¹²⁵

Revealing classical contract law's faulty foundations opened the opportunity to demolish what was perceived as an unjust structure and to build a better one. But while the legal realists' argument that judges make policy choices ultimately became mainstream legal thought,¹²⁶ the legal realists failed to devise a generally-accepted answer to the question of how courts should resolve such choices.¹²⁷ Thus, while the legal realists successfully undermined the "principled" basis for classical contract law (the will theory) and the "policy" basis (no government regulation of the economy), they did not agree on a solution to replace classical contract law.

¹¹⁸ Brian Leiter, *American Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 249, 262–63 (Dennis Patterson, 2d ed. 2010).

¹¹⁹ See BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 3–4 (2004).

¹²⁰ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

¹²¹ See HORWITZ, *supra* note 89, at 49 (identifying Corbin as the central legal figure in contract law challenging the will theory through "a series of monumentally influential articles on particular aspects of contract law between 1912 and 1918 . . .").

¹²² See GILMORE, *supra* note 3, at 66–79.

¹²³ *Id.* at 71.

¹²⁴ Fuller & Perdue, *supra* note 15, at 58.

¹²⁵ Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *POL. SCI. Q.* 470 (1923).

¹²⁶ See Eskridge & Frickey, *supra* note 86, at lviii ("[B]y the 1930s the scholars actively writing in American public law generally agreed that law is the creation and elaboration of social policy.").

¹²⁷ See *id.* at lxv ("The realists tended to approach law from a positivist stance, at least temporarily accepting the law as it was and studying its regularities . . .").

Starting in the 1940s, the “legal process” school arose and de-radicalized legal realism, and by the 1950s was the predominant mode of legal thought.¹²⁸ The legal process approach arose in part because “the New Deal and war experiences had given government a good name.”¹²⁹ Under this approach, a government decision was acceptable as long as it was made by the appropriate decision maker articulating a reasoned analysis.¹³⁰ Scholars also came to accept that common-law judicial reasoning involved a balancing of competing policies when the law had conflicts, gaps, or ambiguities.¹³¹ Also, with the decline of formalism came a new emphasis on standards instead of rules.¹³²

For contract law, the seminal legal process piece was Lon Fuller’s 1941 article *Consideration and Form*.¹³³ Fuller eschewed grand theories of contract law and argued that contract doctrines should be assessed by how well they implement a series of procedural and substantive policies imminent within contract law.¹³⁴ He asserted that “each doctrine, in each application, will represent an ad hoc amalgam of different—even conflicting—policies, whose particular significance and net direction can only be assessed on a case-by-case basis, doctrine-by-doctrine basis.”¹³⁵ Fuller rejected the idea that contract law could be traced to a single fundamental principle such as “will,” and argued that “contract law served several functions, which were often in conflict.”¹³⁶ He argued that “policy analysis requires nuanced reasoning about the appropriate weight to be given various policies in particular cases and when interpreting particular rules.”¹³⁷ Professor Duncan Kennedy has argued that Fuller’s article inaugurated the method of “conflicting considerations” jurisprudence.¹³⁸ The legal process school would prevail until the mid-1960s.¹³⁹

¹²⁸ Kennedy & Fisher III, *supra* note 4, at 210.

¹²⁹ *Id.* at 209.

¹³⁰ *Id.* at 246.

¹³¹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, in THE CANON OF AMERICAN LEGAL THOUGHT 603, 606 (David Kennedy & William W. Fisher III, eds., 2006) (By the 1950s it was accepted “that sensible judicial practice, particularly in the face of conflicts, gaps, or ambiguities in the legal materials, required judges to reason about consequences, about the distributional effects of their decisions It was well understood, moreover, that doing so would require the judge to balance conflicting policies and purposes.”); see generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205–99 (1995) (providing a thorough discussion of the legal process school).

¹³² See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1259 (1985) (recognizing that the decline of formalism resulted in the greater use of standards).

¹³³ Fuller, *supra* note 14.

¹³⁴ See *id.* at 799–800.

¹³⁵ Kennedy & Fisher III, *supra* note 4, at 213.

¹³⁶ *Id.*

¹³⁷ *Id.* at 213–14.

¹³⁸ Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 94 (2000).

¹³⁹ Kennedy & Fisher III, *supra* note 4, at 243.

During the legal process era, classical contract law (according to Gilmore) died.¹⁴⁰ During this era, legislatures and courts interfered with classical contract law doctrines in various ways, including protecting the promisee's reliance and restitution interests.¹⁴¹ Particular inroads on classical contract law included: (1) the rise of promissory estoppel as a substitute for a bargain,¹⁴² (2) increased recoveries under a restitution theory,¹⁴³ (3) the expanded availability of excuses for non-performance,¹⁴⁴ (4) expanded remedies for breach,¹⁴⁵ (5) the development of the doctrine of unconscionability,¹⁴⁶ (6) the rise of the implied covenant of good faith and fair dealing,¹⁴⁷ and (7) decreased emphasis on the written document.¹⁴⁸

Notable examples of the inroads on classical contract law included the spread of promissory estoppel into commercial transactions in cases such as *Drennan v. Star Paving Co.*¹⁴⁹ in 1958 (decided by Justice Traynor and implicitly rejecting a Learned Hand opinion)¹⁵⁰ and *Hoffman v. Red Owl Stores, Inc.*¹⁵¹ in 1965. Traynor's opinion in *Drennan* was particularly significant because it not only imported promissory estoppel into a commercial transaction, but also because the promise that formed the basis for the claim was implied.¹⁵² To make matters worse (for classical contract supporters), Traynor stated that the promise was "implied in fact or law," apparently believing it did not matter which it was.¹⁵³ Promissory estoppel could even be used to enforce a promise that was part of a bargained-for-exchange that was otherwise unenforceable because it lacked material terms.¹⁵⁴

Article 2 of the Uniform Commercial Code (UCC)—primarily written in the 1940s¹⁵⁵—represented the most radical break from classical contract law. Its most important change was perhaps not a shift in the substantive principles or policies underlying contract law, but a shift

¹⁴⁰ GILMORE, *supra* note 3, at 1.

¹⁴¹ *Id.* at 61–93.

¹⁴² *Id.* at 73.

¹⁴³ *Id.* at 81.

¹⁴⁴ *Id.* at 89–91.

¹⁴⁵ *Id.* at 91–93.

¹⁴⁶ D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 6–7 (2009).

¹⁴⁷ *Id.*

¹⁴⁸ Knapp, *supra* note 66, at 767–69.

¹⁴⁹ 333 P.2d 757 (Cal. 1958).

¹⁵⁰ The Learned Hand opinion is *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

¹⁵¹ 133 N.W.2d 267 (Wis. 1965).

¹⁵² 333 P.2d at 760.

¹⁵³ *See id.*

¹⁵⁴ *See, e.g.,* *Wheeler v. White*, 398 S.W.2d 93, 96–97 (Tex. 1965).

¹⁵⁵ Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 25 (2007).

from rules-dominance to standards-dominance.¹⁵⁶ The UCC signaled this change by defining “agreement” as “the bargain of the parties *in fact* as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance”¹⁵⁷ Thus, while re-emphasizing classical contract law’s principle of autonomy,¹⁵⁸ the UCC directs courts to consider all evidence to determine the agreement’s content, rather than apply rigid rules.

Under the UCC a contract could be established even if it was unclear when it had been formed,¹⁵⁹ and even if the offer and the acceptance conflicted.¹⁶⁰ Even a Cardozo opinion was rejected, as the UCC provided that a court could enforce a contract that failed to identify the price for the goods by supplying the omitted term (as long as the parties intended to form a contract).¹⁶¹ Furthermore, no matter how complete a written contract appeared, evidence of trade usage, course of dealing, and course of performance were admissible to determine the agreement’s terms.¹⁶² The desire to get at the “real deal,” and not let rules get in the way, expanded beyond the UCC. For example, in California, the parol evidence rule was almost obliterated¹⁶³ and the plain meaning doctrine rejected because words only have meaning in context.¹⁶⁴

But the UCC also included many provisions designed to provide for more government regulation of contracts. As Professor Franklin Snyder notes:

[Karl Llewellyn, the father of the UCC] believed that government control of industry during World War II proved that managed production was less ‘blind and wasteful’ than the previous laissez-faire regime. In short, he wanted to replace (though the word he used

¹⁵⁶ See Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 Nw. U. L. REV. 254, 260 (1995) (noting the UCC’s emphasis on standards).

¹⁵⁷ U.C.C. § 1–201(3) (1977) (emphasis added).

¹⁵⁸ See John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 21 (“The core of the prism is a sophisticated judicial appreciation of the search for the legitimate and reasonable factual bargain of the parties regardless of which facet of the prism is used to illuminate the controversy before the court.”).

¹⁵⁹ U.C.C. § 2–204(2).

¹⁶⁰ *Id.* § 2–207.

¹⁶¹ *Id.* § 2–305. The Cardozo opinion is *Sun Printing & Publishing Ass’n v. Remington Paper & Power Co.*, 235 N.Y. 338 (1923).

¹⁶² U.C.C. § 2–202.

¹⁶³ See *Masterson v. Sine*, 436 P.2d 561, 564–66 (1968); see also Madeline Plasencia, *Who’s Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215, 241 (1997) (asserting that *Masterson* and two other decisions virtually eliminated the parol evidence rule in California).

¹⁶⁴ See *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644–45 (Cal. 1968).

was ‘adjust’) the rough-and-tumble hard bargaining of classical capitalism with a ‘balanced’ statute that would specify the rights and obligations of the parties. What business people actually *wanted* was largely irrelevant.

Llewellyn had an objective in drafting Article 2. He was not fixing an ‘outdated’ legal system Rather, he objected to the social and political premises on which that system was based and wanted to wipe it away. He wanted to replace the largely laissez-faire rules of classical contract law with a New Deal regulatory scheme, to ‘carry on the program of the National Recovery Act after it was declared unconstitutional’ by establishing a mechanism for enforcing ‘fair commercial practices.’ He was trying to impose ‘his own normative vision’ of a marketplace purged of sordid, unregulated competition of the actual business world of his day, and policed by merchant groups and the state.¹⁶⁵

But while these various inroads into classical contract law would make their way into the *Restatement (Second) of Contracts*, some scholars maintain that the general outlines of classical contract law remained and current contract law is therefore best described as “neo-classical.”¹⁶⁶ While perhaps true, there is still no doubt that inroads were made.

When the legal process consensus was shattered in the late 1960s, it was replaced by “an array of methodologies associated variously with economics, sociology, liberal theory, and the work of critical legal studies scholars.”¹⁶⁷ Some even suggested that contract law did not really matter.¹⁶⁸ Importantly for our purposes, though, contract law theories premised on the principle of autonomy reemerged, with Charles Fried publishing *Contract as Promise* in 1981 in response to theorists such as Gilmore who had argued that contract law was dead, having been subsumed into tort law.¹⁶⁹ Fried argued that “[t]he regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligation as essentially self-imposed, is a fair implication of liberal individualism.”¹⁷⁰

¹⁶⁵ Snyder, *supra* note 155, at 14 (emphasis in original) (footnotes omitted).

¹⁶⁶ See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738 (2000).

¹⁶⁷ Kennedy & Fisher III, *supra* note 4, at 11.

¹⁶⁸ See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55 (1963).

¹⁶⁹ FRIED, *supra* note 10.

¹⁷⁰ *Id.* at 2.

The policy of using law to promote efficiency also reemerged in the 1970s with the law and economics movement.¹⁷¹

II. THE SUPREME COURT'S AUTHORITY OVER LABOR RELATIONS PROMISES

Unlike a state common law court, the Supreme Court only has authority over contract matters to the extent the U.S. Constitution provides it with authority. The Constitution vests the Supreme Court with the "judicial Power,"¹⁷² and relevant to our purposes, this power extends to all cases "arising under . . . the Laws of the United States."¹⁷³

A. *The Wagner Act of 1935*

In the early 1930s, scholars viewed labor relations as an area where notions of freedom of contract resulted in injustice. For example, Morris Cohen argued that in certain areas, including labor relations, there was no true freedom of contract.¹⁷⁴ As Duncan Kennedy recognized, Cohen "wanted to argue that regulation in areas like labor law was justified because there was no 'real freedom' under freedom of contract because of unequal bargaining power, and that regulation actually increased 'real freedom.'"¹⁷⁵

In 1935, Congress responded to concerns that there was no true freedom of contract in labor relations by enacting the National Labor Relations Act, also known as the Wagner Act (the Act or Labor Act).¹⁷⁶ The Wagner Act was "perhaps the most radical piece of legislation ever enacted by the United States Congress."¹⁷⁷ It was a triumph of an instrumentalist, as opposed to an individualist, conception of law, and part of an attack started in the 1900s upon the will theory of contracts. It was also part of the return to status from contract. Duncan Kennedy describes the idea of removing labor contracts from the domain of traditional contract law as follows:

Instrumentalizing the contract principle in this way gave a new twist to the argument for 'segregating the will theory, or freedom of contract. The segregation argument

¹⁷¹ See, e.g., POSNER, *supra* note 12; Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

¹⁷² U.S. CONST. art. III, § 1.

¹⁷³ *Id.* § 2.

¹⁷⁴ Cohen, *supra* note 73, at 590 n.27.

¹⁷⁵ Kennedy, *supra* note 138, at 151.

¹⁷⁶ National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

¹⁷⁷ See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265 (1978).

was that law makers should depart from freedom of contract whenever they concluded that the instrumental benefits of adhering to it were outweighed by the drawbacks. There were two important reasons for choosing another regime than freedom of contract. First, parties within some specified sub-domain of the economy, such as labor management relations, were not really 'free'. That is, there was grossly unequal bargaining power, so that the benefits of the property/contract regime would be distributed in a manner not legitimated by "true consent." Second, the practical or real world results of operating the regime were inconsistent with 'the public interest,' defined either in terms of spill-over effects, for example labor unrest disrupting the economy, or in terms of a very loose conception of the common or national good.¹⁷⁸

Congress enacted the Wagner Act under its power to regulate interstate commerce, and two years later the Supreme Court declared the Act constitutional.¹⁷⁹ The fact that the Wagner Act was passed under Congress' commerce clause power shows that the Act was primarily a policy statute, and not primarily premised on principles. The Wagner Act, at least on its face, gave little power to the Supreme Court over matters involving labor relations promises. The Court was simply provided with appellate jurisdiction over unfair labor practice cases decided by a newly formed agency, the National Labor Relations Board (NLRB).¹⁸⁰ Congress likely created an administrative agency to hear such cases because it was perceived that courts did not have the time or the special abilities to hear labor cases;¹⁸¹ it was dissatisfied with the courts' development of labor policy;¹⁸² it wanted an agency that, freed from stare decisis, would be flexible and able to experiment with labor policies;¹⁸³ and it was cus-

¹⁷⁸ Kennedy, *supra* note 138, at 123–24.

¹⁷⁹ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

¹⁸⁰ National Labor Relations Act, 49 Stat. 449, § 10(e), (f) (codified as amended at 29 U.S.C. § 160(e), (f)).

¹⁸¹ See 1 NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1428 (1985) (recording Senator Wagner as stating, "For years lawyers and economists have pleaded for a dignified administrative tribunal, detached from any particular administration that happens to be in power, and entitled to deal quasi-judicially with issues with which the courts have neither the time nor the special facilities to cope.").

¹⁸² See Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 59 n.5 ("The creation of the Board . . . may fairly be viewed as the result of congressional dissatisfaction with judicial lawmaking in the area of labor law.").

¹⁸³ Samuel Estreicher, *Policy Oscillation at the Labor Board*, 37 ADMIN L. REV. 163, 167 (1985); Winter, *supra* note 182, at 55.

tomary at the time to create administrative agencies to enforce such statutes.¹⁸⁴

There were various principles and policies underlying the Act. The Act's general purpose was "to promote union organization and to make unions powerful."¹⁸⁵ But why? First, as previously mentioned, Congress believed that employees did not have true freedom of contract when negotiating with employers.¹⁸⁶ Thus, the Act promoted the principle of autonomy (albeit by restricting employers' autonomy). Second, the Act sought to redistribute wealth from employers to employees.¹⁸⁷ The Act's specific provisions sought to accomplish this by giving legal protection and support to collective bargaining.¹⁸⁸

But the Act's ultimate goals were policy goals, not the principles of autonomy and redistribution of wealth. According to the Act's declaration of policy, promoting employee autonomy would reduce industrial strife, including strikes, which had burdened or affected commerce.¹⁸⁹ Wealth redistribution would increase employee purchasing power, which would in turn temper recurrent business depressions.¹⁹⁰ Thus, although

¹⁸⁴ Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 321 (1987) (quoting Leon H. Keyserling, Senator Robert F. Wagner's legislative assistant at the time of the Wagner Act's drafting, and its principal draftsman, as stating, "The administrative provisions are merely commonplace to any administrative statute that has to be enforced.").

¹⁸⁵ Klare, *supra* note 177, at 283 n.56; *see also* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958) ("The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards."); Clyde Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 571-72 n.151 (1969) ("A central purpose of the labor relations statutes was to 'equalize bargaining power' by creating collective economic strength on the employees' side to match the collective economic strength on the employers' side.").

¹⁸⁶ *See* National Labor Relations Act, ch. 372, 49 Stat. 449, § 1 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)) (noting that employees "do not possess full freedom of association or actual liberty of contract.").

¹⁸⁷ *See id.* (noting that employer practices had diminished wages).

¹⁸⁸ *See id.* (stating that the Act's goal is to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.").

¹⁸⁹ *See id.* (stating that "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . ."); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife.").

¹⁹⁰ National Labor Relations Act, ch. 372; *see also* IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 90 (1950) ("Industrial concentration, the declaration argued, destroyed the worker's bargaining power, leaving him with an inadequate share of the national wealth. A redistribution of income by collective bargaining would raise those at the bottom and remove inequalities within the wage structure. This would benefit society as a whole by creating mass purchasing power to fill in the troughs in the business cycle.").

the Act promoted the principles of autonomy (in certain ways) and wealth redistribution, its primary goal was a policy: improving the economy.¹⁹⁰

With *Lochner*'s demise in the 1930s,¹⁹¹ Congress had the power to abrogate traditional contract law, and the Wagner Act altered classical contract law (and its emphasis on autonomy) in several specific ways. First, the Act required employers to negotiate with unions over the terms and conditions of employment.¹⁹³ This deviated from classical contract law's refusal to compel persons to negotiate with each other, which was grounded in notions of autonomy.¹⁹⁴ The Supreme Court ultimately construed this duty to negotiate as including a requirement that employers and unions share relevant information during the contracting process, another infringement upon autonomy.¹⁹⁵

Second, the Act (as construed) prohibited employers from negotiating with individual employees once a union became the employees' representative.¹⁹⁶ This infringed upon the autonomy of employers and employees to deal directly with one another.

Third, the Act prohibited employers from refusing to employ, or from terminating, persons because they had engaged in union activities.¹⁹⁷ As has been recognized, this had a strongly anti-contractualist overtone.¹⁹⁸ The at-will employment doctrine was a logical outgrowth of classical contract law. If contract law was premised on the autonomy of persons, an employer should not be held liable for ending an employment relationship unless the employer had made a promise of job security.¹⁹⁹

¹⁹⁰ Of course, this stated policy basis might have been based on needing to demonstrate that the Act was within Congress' Commerce Clause power.

¹⁹¹ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁹³ 29 U.S.C. § 158(a)(5) (2006) (providing that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . .").

¹⁹⁴ See Harry H. Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 468 (1964) ("No one thinks of the collective bargaining agreement as the perfect example of a free contract. In labor relations there is no freedom of choice, for example, with respect to one's contracting partner."). As Dean Shulman noted, "if the law commands that some particular item must be made the subject of bargaining and may not be the object of a firm demand for unilateral control, then to that extent the law interferes with the parties' autonomy and shapes the content of their bargain." Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1001 (1955).

¹⁹⁵ See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) (holding that employer had duty to disclose financial information to union when employer refused wage increase based on alleged inability to pay).

¹⁹⁶ See ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 510–11 (2d ed. 2004).

¹⁹⁷ See 29 U.S.C. § 158(a)(3) (providing that it is an unfair labor practice for an employer to discriminate based on union activities).

¹⁹⁸ Klare, *supra* note 177, at 294, n.91.

¹⁹⁹ See Natalie Bucciarelli Pedersen, *A Subjective Approach to Contracts?: How Courts Interpret Employee Handbook Disclaimers*, 26 HOFSTRA LAB. & EMP. L.J. 101, 105 (2008)

Fourth, by making a certified union the exclusive representative of all the employees in the designated bargaining unit, the Act bound employees to the terms of an agreement they had perhaps never consented to, a significant infringement on autonomy.²⁰⁰ Thus, once a union is established, the Act ensures that “[t]he individual employee loses almost entirely his freedom of contract.”²⁰¹

But the infringement on autonomy was supposed to end there. Senator Walsh, the Chairman of the Senate Committee on Education and Labor, stated:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, “Here they are, the legal representatives of your employees.” What happens behind those doors is not inquired into, and this bill does not seek to inquire into it.²⁰²

Similarly, in upholding the Act’s constitutionality, the Court stated that “in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.”²⁰³ The Court further stated that “[t]he act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer ‘from refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine.’”²⁰⁴ The Supreme Court reemphasized this in a subsequent opinion:

The National Labor Relations Act is designed to promote industrial peace by encouraging the making of vol-

(noting the relationship between the at-will employment doctrine and the will theory of contracts).

²⁰⁰ See 29 U.S.C. § 159(a) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of *all* the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” (emphasis added)).

²⁰¹ Summers, *supra* note 185, at 531. Further elaborating on this premise, Summers explains, “[the employee] is barred from bargaining on his own behalf or through any other representative, and he is bound by the agreement made by the majority union even when he is not a member, prefers individual bargaining, and opposes the specific terms negotiated by the union.” *Id.*

²⁰² 79 CONG. REC. 7660 (1935).

²⁰³ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

²⁰⁴ *Id.* at 45 (quoting *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 549 n.6 (1937)).

untary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.²⁰⁵

Congress thus viewed the Act as promoting freedom of contract, not infringing upon it.²⁰⁶ As stated by the late Dean Shulman, "[t]his limited intervention by the law, it is argued, is not an impairment of the freedom of contract but rather a means of making it effective."²⁰⁷ As he recognized, "[t]his bare legal framework is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor. On the contrary, it merely establishes the conditions necessary for the exercise of that autonomy."²⁰⁸ In this sense, it is purely a procedural statute.

But the extent to which the Wagner Act replaced common law contract doctrine is an issue that has divided scholars. Some maintain that the Wagner Act removed collective bargaining law from the realm of contract law.²⁰⁹ For example, Professor Karl Klare stated, "[I]t is widely believed today that the Wagner Act effected a detachment of labor relations from the law of contracts that had previously governed it."²¹⁰ But Klare also maintains that this is misleading, and that "[c]ontract is alive and well in the law of labor relations."²¹¹

At the time of the Act's passage, it was not clear how much the government would interfere with the substantive terms of employ-

²⁰⁵ *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401–02 (1952).

²⁰⁶ *See id.*

²⁰⁷ Shulman, *supra* note 194, at 1001–02.

²⁰⁸ *Id.* at 1000.

²⁰⁹ *See* FRIEDMAN, *supra* note 54, at 24 ("The most dramatic changes touching the significance of contract law in modern life . . . came about, not through internal developments in contract law, but through developments in public policy which systematically robbed contract of its subject matter. Some of the best known of these developments have been mentioned—labor law, antitrust law, insurance law, business regulation, and social welfare legislation. The growth of these specialized bodies of public policy removed from 'contract' (in the sense of abstract relationships) transactions and situations formerly governed by it.").

²¹⁰ Klare, *supra* note 177, at 293.

²¹¹ *Id.* at 293–94.

ment.²¹² As Professor Klare notes, “[i]f the duty to bargain were, as once feared, to be interpreted as requiring the making of objectively reasonable proposals and counterproposals, it threatened to involve the state directly in the determination of terms and conditions of employment, a manifest threat to traditional contractualist notions.”²¹³

B. *The Taft-Hartley Act of 1947*

After the Wagner Act’s passage, critics argued that the statute “was one-sided legislation, slanted heavily in favor of organized labor”²¹⁴ After World War II, a campaign to amend the Act was launched, relying upon public belief that unions had been acting irresponsibly and improperly by striking during the war; using mass picketing during strikes; engaging in secondary boycotts; engaging in jurisdictional disputes with other unions; and engaging in misconduct in internal union affairs.²¹⁵ As a result, in 1947 the Republican controlled Congress enacted, over President Truman’s veto, the Taft-Hartley Act of 1947, also known as the Labor Management Relations Act.²¹⁶

Importantly, Section 301(b) permitted unions to sue and be sued, reversing the common law rule.²¹⁷ But the most important provision of the Taft-Hartley Act for purposes of this Article is § 301(a), which provided:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.²¹⁸

On its face, § 301(a) was simply procedural, doing nothing more than providing federal courts with original jurisdiction over suits alleging

²¹² See *id.* at 288 n.73 (noting that Congress did not think through the problem of whether Section 8(a)(5)’s duty to bargain would permit “the NLRB to engage in substantive scrutiny of employer proposals in the course of its administration”).

²¹³ *Id.* at 294 n.91 (citation omitted).

²¹⁴ 1 THE DEVELOPING LABOR LAW 32 (John E. Higgins, Jr., ed., 5th ed. 2006).

²¹⁵ *Id.* at 33.

²¹⁶ *Id.* at 40–41.

²¹⁷ See *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957) (“Section 301(b) makes it possible for a labor organization, representing the employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301(b) in other words provides the procedural remedy lacking at common law.”).

²¹⁸ Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136, § 301 (1947).

the breach of a collective bargaining agreement.²¹⁹ The legislative history reveals that the provision's purpose was simply to ensure that unions (in addition to employers) would be bound by collective bargaining agreements.²²⁰ The Act's legislative history further provided that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law"²²¹ Also, the agreement's substance was not to be dictated by the government.²²²

But the Taft-Hartley Act might have unintentionally opened a can of worms. If any tension existed between freedom of contract and the Wagner Act's goals of industrial peace and redistributing wealth, the task of accommodation would now be for the federal courts in addition to the NLRB, inasmuch as the federal courts were given jurisdiction over the alleged breach of collective bargaining agreements.²²³

III. THE SUPREME COURT AND LABOR RELATIONS PROMISES

A. *The Supreme Court and Labor Relations Promises During the Contract is Dead/Legal Process Era (1940s to 1969)*

The Supreme Court's first significant ruling regarding labor relations promises after the Wagner Act came in 1944 in *J.I. Case Co. v. NLRB*.²²⁴ In *J.I. Case*, the Court addressed how promises in individual employment contracts were to be treated once the NLRB certified a

²¹⁹ See Donald H. Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 446 (1955).

²²⁰ The Senate Report provided:

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements . . . should be enforceable in the Federal courts.

Textile Workers Union, 353 U.S. at 454 (quoting S. Rep. No. 105, at 16 (1947)).

²²¹ H.R. Rep. No. 510, at 41-42 (1947) (Conf. Rep.).

²²² See Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 3 (1958) ("The terms of the bargain are not determined by the government"); Summers, *supra* note 185, at 531 ("Although the law requires bargaining and channels the bargaining process, it does not compel agreement nor dictate the terms of settlement. The substantive terms are those negotiated and agreed to by the parties in a bargained exchange.") (footnotes omitted).

²²³ See Wellington, *supra* note 194, at 479 ("[T]o the extent that litigation under the section exposes tension between the policies of industrial peace and freedom of contract, the task of accommodation . . . is a task for the courts alone.").

²²⁴ 321 U.S. 332 (1944).

union as the exclusive representative of a group of employees.²²⁵ Under traditional contract law doctrine, the Court would have no basis for holding individual employment contracts superseded by a collective agreement unless the individual employee and the employer agreed that the collective agreement would act as a substituted agreement.

In *J.I. Case*, an employer offered one-year employment contracts to its employees.²²⁶ The employees were not required to enter into the contracts as a condition of employment, but about 75% of them did.²²⁷ At the time these contracts were formed, the employees lacked union representation.²²⁸ Accordingly, the individual employment agreements were lawfully obtained.²²⁹ Four and a half months after the individual contracts went into effect, a union petitioned the NLRB for certification as the exclusive representative of the production and maintenance employees.²³⁰ The employer maintained that the individual contracts were a bar to the union's petition.²³¹ The NLRB rejected the employer's position and directed an election.²³² The union won, and the NLRB certified the union as the employees' exclusive representative.²³³ When the union sought to bargain, the employer refused to bargain over any matters covered by the individual contracts until they expired.²³⁴

The Wagner Act (as amended by the Taft-Hartley Act) does not explicitly address the effect of individual contracts on the duty to bargain. The NLRB, however, found the employer's refusal to have violated § 8(a)(5) of the Act and directed the employer, among other things, to stop giving effect to the individual contracts.²³⁵ Despite a court of appeals order enforcing the NLRB's order, the individual contracts expiring, and a collective agreement having been entered into between the parties, the Supreme Court heard the case because "[t]he issues are unsettled ones important in the administration of the Act."²³⁶

The Court noted that "[c]ontract in labor law is a term the implications of which must be determined from the connection in which it appears."²³⁷ The Court then stated that once an employee is employed, he "becomes entitled by virtue of the Labor Relations Act somewhat as a

²²⁵ *Id.* at 334.

²²⁶ *Id.* at 333.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 334.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

third party beneficiary to all benefits of the collective trade agreement, even if on his own terms he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits”²³⁸

The Court acknowledged, however, that the Act did not include an express provision regarding the existence of individual contracts and a collective agreement.²³⁹ The Court nevertheless made a strong statement in favor of the Act’s policies, and the trumping of individual contracts that impeded those policies:

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the term of the collective bargaining agreement. ‘The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.’ Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.²⁴⁰

The Court then held that because the collective agreement is to serve the Act’s contemplated purposes, an individual employment contract could not effectively waive any of the benefits of the collective bargaining agreement.²⁴¹ The Court stressed that

The very purpose of providing by statute for collective agreement is to supersede the terms of separate agreement of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.²⁴²

In response to the argument that some employees might be able to negotiate individual contracts more favorable to them than the collective agreement, and that restricting his ability to do so infringed upon his

²³⁸ *Id.* at 336.

²³⁹ *Id.*

²⁴⁰ *Id.* at 337 (citation omitted) (quoting *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940)).

²⁴¹ *Id.* at 338.

²⁴² *Id.*

freedom of contract, the Court stated that such contracts could be disruptive to industrial peace because they would interfere with union organizing in that such advantages would often be earned at the expense of some group, and under the Labor Act, the majority rules.²⁴³ Under the Act's philosophy, individual advantages "will generally in practice go in as a contribution to the collective result."²⁴⁴ Thus, in *J.I. Case*, the statute's policy goals outweighed the importance of autonomy for individual employees and their employers.

The Court's decision in *J.I. Case* correctly minimized the autonomy principle. First, the employment of those employees who had individual contracts was in no way threatened. Thus, the most important aspect of the parties' autonomy—the agreement to have an employment relationship—remained intact. Second, a collective agreement would replace the individual employment contracts, and it was possible, perhaps even likely, that the terms of the collective agreement would be more favorable to the employees than those in the individual agreements (thereby promoting wealth redistribution). Third, the individual contracts threatened the union's success, and thus the Act's policy goals outweighed the autonomy principle. Fourth, the case upheld the NLRB's decision in an unfair labor practice proceeding, and the NLRB "is vested with authority to develop 'national labor policy'"²⁴⁵

What is most significant, however, about the *J.I. Case* decision is not its holding, but rather the fact that the Court did not have to hear the case at all, but chose to anyway. The Court did so to send a strong message that policy concerns would prevail over notions of freedom of contract for individual employees and their employers.

In 1953, the Warren Court era began and would last until 1969.²⁴⁶ During this era, the enactment of § 301 in 1947 gave rise to the Supreme Court's leading cases involving labor law promises and collective bargaining agreements. With jurisdiction over disputes involving alleged breaches of collective bargaining agreements, the key question was whether the Court would follow classical contract law doctrine or the legal process approach of balancing competing principles and policies (the "contract is dead" approach).

The Court's 1956 decision in *Mastro Plastics Corp. v. NLRB* sent an early message that the Warren Court intended to follow the "contract is dead" approach.²⁴⁷ In that case, the union and the employer entered

²⁴³ *Id.* at 338–39.

²⁴⁴ *Id.* at 339.

²⁴⁵ Matthew Finkin & Sanford Jacoby, *The National Labor Relations Board in Comparative Context*, 26 COMP. LAB. L. & POL'Y J. 159, 219 (2005).

²⁴⁶ BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 263 (1993).

²⁴⁷ 350 U.S. 270 (1956).

into a collective bargaining agreement that included a no-strike promise by the union.²⁴⁸ During the agreement's term, the employer engaged in unfair labor practices in an effort to rid itself of the incumbent union and replace it with another union.²⁴⁹ In response, the employees went on strike.²⁵⁰ The employer terminated the striking employees, and the employees asserted their termination was an unfair labor practice.²⁵¹ In defense the employer relied on the no-strike provision.²⁵²

Even though the Court acknowledged that the case "turn[ed] upon the proper interpretation of the particular contract," it then stated that the contract must be read "in the light of the law relating to it when made."²⁵³ Although the no-strike provision was a broad promise "to refrain from engaging in any strike or work stoppage during the term of this agreement," the Court interpreted the provision as prohibiting only economic strikes.²⁵⁴ The Court suggested that although the privilege to engage in an unfair labor practice strike could be contractually waived, any such waiver would need to be explicit.²⁵⁵ Thus, the Court injected federal labor policy into the interpretation of a collective bargaining agreement.

The next term (in 1957), the Court again made it clear that federal labor policy would play a significant role in the interpretation of collective bargaining agreements. In *Textile Workers Union v. Lincoln Mills of Alabama*,²⁵⁶ the court held that the substantive law to be applied in a § 301 suit "is federal law, which the courts must fashion from the policy of our national labor laws."²⁵⁷ The emphasis on federal labor policy indicated that Courts were not to simply draw the substantive law from classical contract law.²⁵⁸

²⁴⁸ *Id.* at 281.

²⁴⁹ *Id.* at 271–74.

²⁵⁰ *Id.* at 274.

²⁵¹ *Id.* at 273–76.

²⁵² *Id.* at 277.

²⁵³ *Id.* at 279.

²⁵⁴ *Id.* at 281. Professor Cox maintained that the Court's decision "violates the plain and inherently sensible meaning of the words" Cox, *supra* note 222, at 17.

²⁵⁵ *Mastro*, 350 U.S. at 283.

²⁵⁶ 353 U.S. 448 (1957).

²⁵⁷ *Id.* at 456; *see also* *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983) ("[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.") (internal quotation marks omitted); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560 (1968) (holding that state courts must apply federal law in § 301 suit); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962) (same).

²⁵⁸ Summers, *supra* note 185, at 526.

The Supreme Court's treatment of arbitration decisions in the "*Steelworkers Trilogy*" in 1960 further demonstrated that the Warren Court treated promises in labor relations differently from the way the legal system had treated promises under classical contract law. In the *Steelworkers Trilogy*, the Court relied heavily on the federal policy "to promote industrial stabilization through the collective bargaining agreement."²⁶⁹ In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,²⁶⁰ the Court addressed whether the employer had breached the collective bargaining agreement by refusing to submit to arbitration a dispute over the contracting out of work.²⁶¹ The collective bargaining agreement provided that "[i]f agreement [over a dispute about the collective bargaining agreement] has not been reached the matter shall be referred to an impartial umpire for decision."²⁶² The agreement also provided, however, that "matters which are strictly a function of management shall not be subject to arbitration."²⁶³ The employer argued that contracting out work was strictly a management function and therefore was not covered by the arbitration provision.²⁶⁴

The Court, in holding that it was for the arbitrator to decide whether the matter was subject to arbitration, created a strong presumption in favor of arbitration, rather than simply directing the court or arbitrator to conduct a standard contract analysis.²⁶⁵ The Court noted that "[c]omplete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike."²⁶⁶ The Court noted the different role arbitration provisions play in commercial contracts and collective bargaining agreements: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."²⁶⁷ The Court therefore held that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an

²⁶⁹ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (citing *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 453–454 (1957)).

²⁶⁰ 363 U.S. 574.

²⁶¹ *Id.* at 577.

²⁶² *Id.* at 576.

²⁶³ *Id.* at 583.

²⁶⁴ *Id.* at 584.

²⁶⁵ *See id.* at 585; *see also* HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 103 (1968) ("Lower courts then are to approach the question of whether to order arbitration armed with a strong affirmative presumption, a very strong presumption indeed.").

²⁶⁶ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960).

²⁶⁷ *Id.* at 578.

interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”²⁶⁸

The Court’s opinion was grounded on two different notions. First, it was grounded in a legal process notion that arbitrators have more institutional competence than judges to address such issues.²⁶⁹ Second, it was grounded in the notion that arbitration promotes industrial peace.²⁷⁰ And as the late Professor Wellington recognized, this basis was contrary to freedom of contract: “whatever the reasoning of the Court, the majority opinion makes clear that in a suit to compel arbitration there is to be no thoroughgoing judicial inquiry into whether the reluctant party in this case promised to submit this dispute to arbitration.”²⁷¹

The Court severely limited federal court review of an arbitrator’s decision construing a collective bargaining agreement in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*²⁷² (another case in the *Steelworkers Trilogy*). Initially, the Court seemed to emphasize traditional contract analysis when discussing the arbitrator’s role:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.²⁷³

However, by refusing to review the merits of an arbitrator’s construction of a collective bargaining agreement,²⁷⁴ the Court ceded tremendous power to arbitrators, who would often be indifferent to the niceties of traditional contract doctrine.

²⁶⁸ *Id.* at 582–83.

²⁶⁹ See Wellington, *supra* note 194, at 482–83 (“[T]he Court reasoned that since, as a matter of comparative competence, the labor arbitrator has a substantial advantage over the lay judge, every opportunity ought to be utilized to allow the better qualified decision-maker to pass upon the central issue in the case.”).

²⁷⁰ See *id.* at 483 (“The second reason adduced by the Court to support its rule is the statutory policy of industrial peace . . .”).

²⁷¹ *Id.*

²⁷² 363 U.S. 593 (1960).

²⁷³ *Id.* at 597.

²⁷⁴ See *id.* at 599 (“[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”).

In fact, in *United Steelworkers of America v. American Manufacturing Co.*²⁷⁵ (the third case in the *Steelworkers Trilogy*) the Court chastised the lower courts for their “preoccupation with ordinary contract law,”²⁷⁶ and rejected the *Cutler-Hammer* doctrine that treated the interpretation of a collective bargaining agreement as an issue of law that courts were just as capable of performing as arbitrators.²⁷⁷ The Court even recognized that a single collective agreement could have varying meanings when it acknowledged that an arbitrator might be willing to entertain contract disputes that a court would deem without merit.²⁷⁸ The Court viewed arbitration as a stabilizing influence, and stated that “[i]n our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve.”²⁷⁹ The Court’s *Steelworkers Trilogy* therefore emphasized the policy of industrial peace and deemphasized the autonomy principle.

In 1962, in *Local 174, Teamsters v. Lucas Flour Co.*,²⁸⁰ the Court addressed whether a no-strike provision should be implied into a collective bargaining agreement. In *Lucas Flour*, the parties had entered into a collective agreement that included a provision providing for arbitration over any dispute, but which did not include an express no-strike provision other than one precluding a strike during an arbitration relating to the agreement’s interpretation.²⁸¹ When the employer fired an employee, the union called a strike to force the employer to rehire the employee.²⁸² The employer brought suit against the union asserting that the strike was in breach of the collective bargaining agreement.²⁸³

The Court held that even though the agreement did not include an express no-strike provision covering the instant strike (and in fact included a no-strike provision covering a different situation), a strike to compel the resolution of a grievance is contrary to an agreement that includes a provision to settle grievances by arbitration.²⁸⁴ The Court

²⁷⁵ 363 U.S. 564 (1960).

²⁷⁶ *Id.* at 567.

²⁷⁷ *Id.* In *International Association of Machinists v. Cutler-Hammer, Inc.*, a New York appellate court held that “[i]f the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.” 67 N.Y.S.2d 317, 318 (App. Div.), *aff’d* 297 N.Y. 519 (1947), *overruled by* *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960).

²⁷⁸ *Am. Mfg. Co.*, 363 U.S. at 567.

²⁷⁹ *Id.*

²⁸⁰ 369 U.S. 95 (1962).

²⁸¹ *Id.* at 96.

²⁸² *Id.* at 97.

²⁸³ *Id.*

²⁸⁴ *Id.* at 105.

stated that “[t]o hold otherwise would obviously do violence to accepted principles of traditional contract law.”²⁸⁵ But the Court provided no explanation as to how a contrary holding would do violence to accepted principles of traditional contract law and did not even specify what those principles were. It then moved quickly to the true basis for its holding, federal labor policy, stating: “Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare.”²⁸⁶

Justice Black dissented, criticizing the Court for creating, instead of finding, a no-strike provision.²⁸⁷ (I quote Justice Black’s dissenting opinion at some length, because it shows just how far the Court’s opinion deviated from traditional contract interpretation.) Justice Black stated:

The Court now finds—out of clear air, so far as I can see—that the union, without saying so in the agreement, not only agreed to arbitrate such differences, but also promised that there would be no strike while arbitration of a dispute was pending under this provision. And on the basis of its ‘discovery’ of this additional unwritten promise by the union, the Court upholds a judgment awarding the company substantial damages for a strike in breach of contract.²⁸⁸

Black argued that the Court was vacating and amending the collective bargaining agreement,²⁸⁹ and pointed out that the parties knew how to include a no-strike provision when they wanted one.²⁹⁰ He stated that: “I had supposed, however—though evidently the Court thinks otherwise—that the job of courts enforcing contracts was to give legal effect to what the contracting parties actually agreed to do, not to what courts think they ought to do.”²⁹¹

In response to the Court’s statement that a contrary holding “would obviously do violence to accepted principles of traditional contract law,”²⁹² Black asserted:

I have been unable to find any accepted principle of contract law—traditional or otherwise—that permits courts to change completely the nature of a contract by adding new promises that the parties themselves refused to

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 106 (Black, J., dissenting).

²⁸⁸ *Id.* at 106–07.

²⁸⁹ *Id.* at 107.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 108.

²⁹² *Id.* at 105.

make in order that the new court-made contract might better fit into whatever social, economic, or legal policies the courts believe to be so important that they should have been taken out of the realm of voluntary contract by the legislative body and furthered by compulsory legislation.²⁹³

Black made it clear that he was not suggesting a collective bargaining agreement could not have implied terms, but that an implied no-strike clause could not be found in this agreement:

I do not mean to suggest that an implied contractual promise cannot sometimes be found where there are facts and circumstances sufficient to warrant the conclusion that such was the intention of the parties. But there is no factual basis for such a conclusion in this case and the Court does not even claim to the contrary. The implication of a no-strike clause which the Court purports to find here—an implication completely at war with the language the parties used in making this contract as well as with the normal understanding of the negotiation process by which such contracts are made—has not been supposed by so much as one scrap of evidence in this record. The implication found by the Court thus flows neither from the contract itself nor, so far as this record shows, from the intention of the parties. In my judgment, an ‘implication’ of that nature would better be described as a rigid rule of law that an agreement to arbitrate has precisely the same effect as an agreement not to strike—a rule of law which introduces revolutionary doctrine into the field of collective bargaining

Whatever else may be said about [the Taft-Hartley Act], it seems plain that it was enacted on the view that the best way to bring about industrial peace was through voluntary, not compelled, labor agreements. Section 301 is torn from its roots when it is held to require the sort of compulsory arbitration imposed by this decision.²⁹⁴

Accordingly, as forcefully demonstrated by Justice Black, the *Lucas Flour* decision was premised on federal labor policy, and had nothing to do with promoting the autonomy principle.

²⁹³ *Id.* at 108 (Black, J., dissenting).

²⁹⁴ *Id.* at 109–10.

The high-water mark of the “collective bargaining agreements are dead” school arose two years later in 1964 over the issue of whether a collective bargaining agreement could be binding on an un-consenting successor employer.²⁹⁵ In *John Wiley & Sons Inc., v. Livingston*,²⁹⁶ a union entered into a collective bargaining agreement with Interscience Publishers, Inc.²⁹⁷ The agreement did not include a provision making it binding on Interscience’s successors.²⁹⁸ Four months prior to the expiration of the agreement’s term, Interscience, for bona fide reasons, merged with John Wiley & Sons, Inc., a larger company without a union, and Interscience ceased doing business as a separate entity.²⁹⁹ Wiley maintained that the merger terminated the agreement, whereas the union maintained that Wiley was required to recognize certain “vested” employee rights under the agreement.³⁰⁰ One week before the agreement’s expiration, the union filed a § 301 action to compel Wiley to submit to arbitration the dispute about whether Wiley was bound by certain terms in the agreement.³⁰¹ The union did not sue under § 301 for the breach of the agreement’s substantive terms; rather, it merely sued for breach of the arbitration provision.³⁰²

The primary question before the Court was therefore whether the agreement’s arbitration provision survived the merger³⁰³ and not whether any substantive provisions were binding on Wiley.³⁰⁴ The union relied on New York law, which provided that when corporations consolidate “such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corpora-

²⁹⁵ See Note, *The Successor Employer’s Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston*, 82 HARV. L. REV. 418, 420 (1968) (“When the original contracting employer transfers his enterprise to a successor who does not consent to be bound by the terms of the collective bargaining agreement, and the union sues to compel the new employer to arbitrate the status of specific contractual rights under the old agreement, the courts face squarely the issue of the nature of the collective bargaining agreement and their own role in enforcing it.”).

²⁹⁶ 376 U.S. 543 (1964).

²⁹⁷ *Id.* at 544.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 544–45.

³⁰⁰ *Id.* at 545; see also Harry E. Reagan, III, Note, *The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor*, 113 U. PA. L. REV. 914, 924 n.53 (1965) (“Vested rights in this context refer to continuing obligations which an employer is not free to disregard even upon termination of the contract, such as pension payments.”).

³⁰¹ *Wiley*, 376 U.S. at 546.

³⁰² See Reagan, *supra* note 300, at 924 (“[T]he union sought only to compel arbitration, the only contract breach alleged having been the successor’s refusal to arbitrate.”).

³⁰³ *Id.*

³⁰⁴ See Note, *supra* note 295, at 422 (“The Court’s holding in *Wiley* covers only the duty to arbitrate; the Court’s opinion explicitly leaves the question of the status of the employees’ rights under specific contract provisions to the arbitrator.”).

tion had itself incurred such liabilities or obligations.”³⁰⁵ Alternatively, the union argued that the arbitration provision should bind Wiley as a matter of federal law.³⁰⁶

The Court first held that federal law controlled.³⁰⁷ The Court then provided a cryptic holding:

We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.³⁰⁸

The Court relied primarily on the federal policy in favor of settling labor disputes by arbitration, stating that, “The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees’ claims continue to be resolved by arbitration rather than by ‘the relative strength . . . of the contending forces.’”³⁰⁹ Consistent with the decisions previously discussed, the *John Wiley* decision was thus based on promoting federal labor policy. As one commentator stated, “the Court did not initially examine the terms of the collective bargaining agreement as a whole in order to determine whether the imposition of the duty to arbitrate on the nonconsenting successor could be justified on any doctrine of implied consent”³¹⁰

But the Court’s discussion disclosed the confusing interplay between federal labor policy and consent notions of contract duty. The Court was compelled to acknowledge that its holding could not be squared with traditional contract doctrine, but its explanation seemed to keep one foot in such doctrine, as perhaps it was required to do because it acknowledged that a duty to arbitrate can only be based on a contract.³¹¹

The Court began by emphasizing federal labor policy, and deemphasizing traditional contract doctrine. The Court stated that “[w]hile the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bar-

³⁰⁵ *Wiley*, 376 U.S. at 547–48, 548 n.2 (quoting N.Y. BUS. CORP. LAW § 906 (McKinney 2003)), formerly § 90 of the N.Y. Stock Corporation Law, McKinney’s Consol. Laws, c. 59).

³⁰⁶ *Id.* at 548.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 549 (quoting *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)).

³¹⁰ Note, *supra* note 295, at 422–23.

³¹¹ *Wiley*, 376 U.S. at 550.

gaining agreement is not an ordinary contract.”³¹² The Court then relied on “the principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that ‘an interpretation that covers the asserted dispute’ be favored.”³¹³ The Court then took the position that all that was necessary to potentially bind Wiley was “a contract,” even if it had not been signed by Wiley.³¹⁴ The Court, again relying on “the impressive policy considerations favoring arbitration,”³¹⁵ stated: “We thus find Wiley’s obligation to arbitrate this dispute in the Interscience contract *construed in the context of a national labor policy*.”³¹⁶

But the Court then returned to the language of consent:

We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives [T]here may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved.³¹⁷

In essence, the Court required “that the underlying contract [be] at least ‘reasonably related’ to the party being forced to arbitrate.”³¹⁸ Strangely, though, satisfaction of this test would somehow be equated with a type of consent by the successor. The Court, despite relying on federal labor policy, seemed uncomfortable with detaching its rule completely from the classical contract law notion of autonomy. But the Court’s effort was unconvincing, and simply highlighted the fact that the Court had reached the high-water mark of the “collective bargaining agreements are dead” era. As one commentator recognized:

[T]he Court’s assertion that Wiley’s duty to arbitrate is based upon the contractual obligation of its predecessor construed in light of the national labor policy favoring arbitration seems on initial analysis to be a fiction; indeed, the Court could be said to be imposing a duty to

³¹² *Id.* (footnote omitted); see also Note, *supra* note 295, at 420 (“Under ordinary contract rules, the nonconsenting successor is not bound by the old agreement . . .”).

³¹³ *Wiley*, 376 U.S. at 550 n.4 (emphasis in original) (citation omitted) (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83).

³¹⁴ *Id.* at 550.

³¹⁵ *Id.*

³¹⁶ *Id.* at 550–51 (emphasis added).

³¹⁷ *Id.* at 551.

³¹⁸ Note, *supra* note 295, at 427.

arbitrate, independent of any manifestation of Wiley's willingness to submit to arbitration, in order to preserve labor peace.³¹⁹

An important issue that the Court declined to address was whether any of the substantive rights (not the arbitration provision) under the agreement that might have vested with respect to Interscience would bind Wiley. The Court concluded that it was the arbitrator's decision whether the union's claims had merit, and that it was "sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable"³²⁰ Thus, the Court indicated that an arbitrator could reasonably conclude that Wiley was bound by certain of Interscience's substantive contract duties if the corollary employee contract rights had "vested" prior to the merger.³²¹

The Court was therefore holding that an un-consenting successor can possibly be bound to some of the substantive terms of the predecessor's collective agreement. Accordingly, any suggestion that *Wiley* was simply about the federal labor policy of encouraging arbitration to resolve disputes is misplaced, and the decision rejected the importance of the autonomy principle more than is commonly thought. Rather, the decision was a strong statement that the federal labor policy of preventing industrial strife would be promoted by binding successors to the substantive terms of the predecessor's collective bargaining agreement. As stated by the Court: "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."³²²

An interesting aspect of *Wiley* is that the Court could have disposed of the case under "the general rule that in the case of merger the surviving corporation is bound to the contracts of the disappearing corpora-

³¹⁹ *Id.* at 423.

³²⁰ *Wiley*, 376 U.S. at 555; *see also* Reagan, *supra* note 300, at 915 ("The Court declined to decide whether the successor was bound by the substantive provisions of the predecessor's agreement. It decided only that the successor was obligated to arbitrate the successorship issue as well as the substantive questions of contract interpretation.").

³²¹ Interestingly, the Court provided no guidance as to what test the arbitrator should apply in determining whether a successor employer was bound by a particular substantive provision in the collective bargaining agreement between the predecessor and the union. It has been recognized that "giving the arbitrator authority to determine which substantive provisions of the contract will carry over takes him outside his accustomed role of interstitial interpretation and application of the 'common law of the shop.'" Note, *supra* note 295, at 426. It has also been recognized that the court would be required to fulfill this role if the collective bargaining agreement did not contain an arbitration provision. *Id.* at 433.

³²² *Wiley*, 376 U.S. at 549.

tion.”³²³ As has been noted, the ultimate holding was “consistent with heretofore unchallenged principles of corporation-contract law that although a successor is not bound by the contracts of the predecessor employer following a purchase of the predecessor’s business, the successor is bound by such contracts after a merger in which the predecessor’s business is absorbed into that of the successor.”³²⁴

But the Court chose not to rely on this reasoning (simply noting that “the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor”),³²⁵ and instead relied on federal labor policy.³²⁶ Like the Court’s decision in *J.I. Case* in 1944 (where the Court chose to hear the case to send a message that federal labor policy would predominate when deciding which labor relations promises to enforce and how to interpret them), the Court avoided an easy way out, and instead reaffirmed that in the area of labor relations, contract law was dead.

Thus, from the passage of the Wagner Act through the Warren Court era, the Court, when deciding which labor relations promises to enforce, and deciding how to interpret them, gave tremendous weight to federal labor policies. In this respect, its approach to collective bargaining agreements was consistent with the legal process approach to contracts in general, in which competing principles and policies were balanced.³²⁷ Interestingly, though, federal labor policy was given so much weight that other principles and policies were virtually banished from the equation. Accordingly, if classical contract law had died during this era, collective bargaining agreements had suffered the same fate.

B. The Tide Turns: The Court and Labor Relations Promises, 1970s to Present

In the 1970s, when the legal process consensus was shattering, and Grant Gilmore was wondering if classical contract law would be resurrected, the Court shifted course and began emphasizing freedom of contract notions in addressing promises in labor relations. And it began by significantly undercutting, if not overruling *sub silentio*, the *Wiley* opinion, when it revisited the successorship issue in 1972 in *NLRB v. Burns International Security Services, Inc.*³²⁸

³²³ Note, *supra* note 295, at 420 n.7.

³²⁴ Reagan, *supra* note 300, at 915.

³²⁵ *Wiley*, 376 U.S. at 308.

³²⁶ Reagan, *supra* note 300, at 915 (“Although *Wiley* involved a merger situation, the Supreme Court brushed aside this narrow ground of decision, stating that it was not bound by state law, and held that it was to apply or fashion federal law in actions for breach of contract brought under section 301 of the Labor Management Relations Act.”) (footnotes omitted).

³²⁷ See Kennedy, *supra* note 138.

³²⁸ 406 U.S. 272 (1972).

In *Burns*, the predecessor employer and the union entered into a three-year collective bargaining agreement.³²⁹ The predecessor had a contract to provide security services to Lockheed Aircraft Service Co., and when that contract expired shortly after entering into the collective agreement, the successor employer won the contract with Lockheed.³³⁰ The successor retained twenty seven of the predecessor's employees, and brought in fifteen of its own employees.³³¹ The union demanded that the successor recognize it as the employees' bargaining representative and that the successor honor the collective bargaining agreement with the predecessor.³³² The successor refused, and the union filed unfair labor practice charges against the successor.³³³ The NLRB found that the successor violated §§ 8(a)(1) and 8(a)(5) of the Labor Act by failing to recognize the union and failing to honor the predecessor's collective bargaining agreement.³³⁴

The union's decision to file an unfair labor practice charge as opposed to suing the successor under § 301 meant that the Court (after an NLRB decision) would ultimately have to address whether it was unlawful for the successor to refuse to honor the collective bargaining agreement, and it could not simply refer the issue to arbitration, as in *Wiley*. And importantly, after the NLRB heard the case, it held that the entire collective bargaining agreement had to be honored (not just the arbitration provision).³³⁵

The Court quickly made it clear that the tide had turned in favor of the autonomy principle. The opinion began with a strong statement in favor of freedom of contract principles, indicating that "Congress has consistently declined to interfere with free collective bargaining"³³⁶ The Court then quoted a prior decision in which the Court stated that one of the Labor Act's fundamental policies is freedom of contract.³³⁷ The Court also emphasized Congress' recognition in 1935 of the importance of freedom of contract by quoting the following committee statement:

The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an

³²⁹ *Id.* at 275.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 275–76.

³³³ *Id.* at 276.

³³⁴ *Id.*

³³⁵ *Id.* at 276 n.2.

³³⁶ *Id.* at 282.

³³⁷ *Id.* at 284 (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)).

agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.³³⁸

But for the Court to rule in favor of the successor, it needed to distinguish *Wiley*. The Court in *Wiley* had held that it was possible for certain substantive terms to be binding on a successor.³³⁹ The Court first distinguished *Wiley* on the grounds that *Wiley* was a § 301 action whereas this was an unfair labor practice (ULP) proceeding, and the NLRB's powers in a ULP proceeding are expressly limited by § 8(d) (which provides that the duty to bargain "does not compel either party to agree to a provision or require the making of a concession").³⁴⁰ The Court then asserted that the *Wiley* decision emphasized "[t]he preference of national labor policy for arbitration as a substitute for tests of strength before contending forces"³⁴¹ The Court referred to "*Wiley's* limited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes"³⁴²

But the Court understated the significance of *Wiley's* holding. The Court in *Wiley* held that the union's claims were not unreasonable, and could possibly prevail at arbitration.³⁴³ And if they could possibly prevail at arbitration, the Court was announcing that the substantive terms of the predecessor's collective agreement could potentially bind an un-consenting successor employer.³⁴⁴ Also, if there was no arbitration agreement the court would have to resolve the issue of whether the successor was bound by any substantive terms. Thus, as previously discussed, *Wiley* could not have been simply about the preference for arbitration to resolve disputes. It is true the enforceability of the arbitration provision against the successor was influenced by the policy in favor of arbitration, but there were other substantive provisions that an arbitrator could still find binding. Thus, the Court's effort to distinguish *Wiley* based on the arbitration provision was unconvincing, and simply masked the fact the Court was breaking sharply with the *Wiley* decision's rejection of the autonomy principle.

As previously noted, the Court, in an effort to distinguish *Wiley*, also maintained that the NLRB's power to hold substantive provisions enforceable was more constrained than the arbitrator.³⁴⁵ The Court be-

³³⁸ S. Rep. No. 573, at 12 (1935).

³³⁹ See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555 (1964).

³⁴⁰ *Burns*, 406 U.S. at 285.

³⁴¹ *Id.* at 286 (quoting *Wiley*, 376 U.S. at 551).

³⁴² *Id.*

³⁴³ *Wiley*, 376 U.S. at 555.

³⁴⁴ See *id.*

³⁴⁵ *Burns*, 406 U.S. at 285.

lieved that § 8(d) prohibited the imposition of substantive terms without agreement, and relied on the Act's legislative history.³⁴⁶ This is curious. The Court could have taken issue with whether a successor's refusal to honor the collective bargaining agreement, even if wrongful, would have been a § 8(a)(1) and §8(a)(5) violation. The Court could easily have held it was not, finding that Congress rejected the idea that a breach of a collective bargaining agreement would itself be an unfair labor practice.³⁴⁷ But the Court's argument seemed to suggest that an arbitrator has the power to impose contract terms upon the successor but the NLRB does not. This seemed nothing more than an effort to distinguish *Wiley* and avoid overruling it.

The Court also suggested that the factual background of *Wiley* that might have permitted a finding by the arbitrator that substantive terms were binding did not exist in the present case.³⁴⁸ For example, the Court stated that *Wiley*

dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation. Here, there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations.³⁴⁹

This effort to distinguish *Wiley* was similarly unconvincing because the Court in *Wiley* rejected reliance on state law.³⁵⁰ Accordingly, all of the Court's efforts to distinguish *Wiley* reveal that the Court was in fact basing its decision on a principle that was incompatible with *Wiley*—the autonomy principle.

The Court then returned to contract notions, stating that the facts were insufficient “for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.”³⁵¹ The Court then invoked the idea of freedom of contract and its underlying autonomy principle:

³⁴⁶ See *id.* at 282.

³⁴⁷ See *NLRB v. Strong*, 393 U.S. 357, 361 n.5 (1969) (“Congress established the judicial remedy of § 301 of the Labor Management Relations Act . . . in lieu of a proposal to make breach of a collective bargaining agreement itself an unfair labor practice.”).

³⁴⁸ *Burns*, 406 U.S. at 286.

³⁴⁹ *Id.* (citation omitted).

³⁵⁰ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964).

³⁵¹ *Burns*, 406 U.S. at 287.

This bargaining freedom means . . . [the parties] are free from having contract provisions imposed upon them against their will. Here, Burns had notice of the existence of the Wackenhut collective-bargaining contract, but it did not consent to be bound by it Nothing in its actions . . . indicated that Burns was assuming the obligations of the contract, and 'allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.'³⁵²

The Court then sowed the seeds of confusion by stating, in dicta, what appeared to be an argument in favor of never having the substantive terms be binding on a successor (despite its failure to expressly overrule *Wiley*) based on the policy of promoting exchange:

[H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would have unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.³⁵³

The Court also noted that if the terms of the collective bargaining agreement were binding on a successor, the discharge and grievance procedures would be as well, and thus any limitations on termination of employment would be applied to the successor's decision whether to hire

³⁵² *Id.* (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)).

³⁵³ *Id.* at 287–88.

any of the predecessor's employees.³⁶⁴ The Court further noted that "the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor."³⁶⁵ The Court also noted that the union would have no duty to bargain with the successor for a modification of the contract during its term; the employer might inherit contract duties accrued under prior contracts between the union and the predecessor; and under the NLRB's contract-bar rule could not challenge the union's majority support during the contract's term.³⁶⁶

Thus, just eight years after the high-water mark of the "collective bargaining agreements are dead" era was reached in 1964 in *Wiley*, the Court all but overruled *Wiley*. This sent a strong message that the autonomy principle would be given much more weight than during the legal process era.

The Supreme Court soon extended the emphasis on autonomy to labor law promises that were not included in collective bargaining agreements. In 1983 the Supreme Court in *Belknap, Inc. v. Hale*³⁶⁷ addressed whether the Wagner Act preempts a state-law claim by replacement workers who were promised permanent employment but then terminated at the strike's conclusion to make room for returning strikers. In the case, the union called a strike after the employer and the union reached impasse on a new collective agreement.³⁶⁸ The employer advertised for employees to "permanently replace striking warehouse and maintenance employees."³⁶⁹ When the employer hired the replacement workers, each replacement worker signed a statement indicating that he or she was hired "as a regular full time permanent replacement to permanently replace" a designated employee.³⁶⁰ The employer also reassured the replacement workers in a letter:

We recognize that many of you continue to be concerned about your status as an employee. The Company's position on this matter has not changed nor do we expect it to change. You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect here at Belknap [W]e have made it clear to the

³⁶⁴ *Id.* at 288.

³⁶⁵ *Id.* at 288–89.

³⁶⁶ *Id.* at 289–90.

³⁶⁷ 463 U.S. 491 (1983).

³⁶⁸ *Id.* at 494.

³⁶⁹ *Id.*

³⁶⁰ *Id.* at 494–95.

Union that we have no intention of getting rid of the permanent replacement employees just in order to provide jobs for the replaced strikers if and when the Union calls off the strike.³⁶¹

Thereafter, the employer and the union entered into a strike settlement agreement that resolved not only the strike, but an unfair labor practice charge as well.³⁶² Under the agreement, the employer promised to reinstate the striking employees.³⁶³ When the employer laid off the replacement workers to make room for the returning strikers, the replacement workers sued the employer in state court for misrepresentation and breach of contract.³⁶⁴ The replacement workers alleged that the employer knew its promise to them that they would not be displaced was false, and that in any event, the promise was breached.³⁶⁵ The replacement workers sought damages.³⁶⁶

The issue before the Supreme Court was whether the Labor Act preempted the replacement workers' claims,³⁶⁷ and the Court held that it did not.³⁶⁸ The Court characterized a system in which an employer was free to breach its promise to the replacement workers with impunity as a "lawless regime"³⁶⁹ and emphasized the "solemn promises of permanent employment" the employer gave the replacement workers.³⁷⁰ The Court, in discussing the effects of rendering the employer's promise unenforceable, relied in part on potential replacement workers likely being discouraged from accepting employment based on the knowledge that the employer's promise is unenforceable.³⁷¹ Thus, the Court based its decision on the moral obligation to keep a promise and the policy of promoting exchanges.

The Court also revisited the *J.I. Case* issue in 1987 in *Caterpillar Inc. v. Williams*.³⁷² In *Caterpillar*, the plaintiffs worked for the defendant at its San Leandro, California, facility.³⁷³ The plaintiffs initially

³⁶¹ *Id.*

³⁶² *Id.* at 496.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 496–97.

³⁶⁶ *Id.* at 497.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 500. The Supreme Court noted in dicta that an order of reinstatement would be preempted if it required the firing of a striker entitled to reinstatement. *Id.* at 511 n.13. The court noted that "[t]o do so would be to deprive returning strikers of jobs committed to them by the national labor laws." *Id.*

³⁶⁹ *Id.* at 500.

³⁷⁰ *See id.* at 506.

³⁷¹ *See id.* at 502.

³⁷² 482 U.S. 386 (1987).

³⁷³ *Id.* at 388.

held positions covered by a collective bargaining agreement, but were then promoted or moved to a position outside the agreement's coverage.³⁷⁴ The plaintiffs alleged that while they were in positions outside the agreement's coverage, they were promised job security and that if the San Leandro facility ever closed, they would be given other employment within the company.³⁷⁵ The plaintiffs further alleged that in reliance on these promises they remained employed with the company instead of seeking employment elsewhere.³⁷⁶ Thereafter, the plaintiffs were downgraded to positions covered by the collective bargaining agreement, but their supervisors orally assured them that the downgrade was temporary.³⁷⁷ The employer then notified the plaintiffs that the San Leandro facility was closing and that they would be laid off.³⁷⁸

The plaintiffs sued the employer in state court alleging the employer breached its individual employment contracts with them by laying them off.³⁷⁹ The employer removed the action to federal court, arguing that any individual employment contracts "were, as a matter of federal substantive labor law, merged into and superseded by the . . . collective bargaining agreements."³⁸⁰

The Court held that the suit was not removable to federal court because the plaintiffs' claims were not based on the breach of a collective bargaining agreement, but were based on the breach of individual employment contracts.³⁸¹ The employer argued, however, that when the plaintiffs returned to the bargaining unit their individual contracts were subsumed into, and eliminated by, the collective agreement under the holding in *J.I. Case*.³⁸² The Court, however, rejected the argument, noting that *J.I. Case* had held that not every individual employment contract was automatically superseded by a collective agreement, and the employer could raise this issue in the state court proceeding.³⁸³ Thus, unlike *J.I. Case*, the Court now emphasized the autonomy principle, and deemphasized federal labor policy.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 388–89.

³⁷⁶ *Id.* at 389.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 390.

³⁸⁰ *Id.* (alteration in original).

³⁸¹ *See id.* at 394.

³⁸² *Id.* at 395–96.

³⁸³ *Id.* at 396–98.

Recently, as the importance of labor unions has declined,³⁸⁴ and the importance of “minimum-terms legislation” has increased,³⁸⁵ the Court’s most important rulings regarding labor relations promises have involved their interplay with federal anti-discrimination statutes. These cases are interesting in that they inject a policy consideration external to the federal labor laws: the federal policy prohibiting employment discrimination based on certain characteristics, such as race, sex, age, and disability (among others).³⁸⁶

For example, in *14 Penn Plaza LLC v. Pyett*,³⁸⁷ the Court addressed whether a collective bargaining agreement’s arbitration provision required employees to submit their age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA) to arbitration.³⁸⁸ The Court, which concluded that they did, framed the issue as whether the ADEA (not the NLRA) removed such claims from being subject to a collective bargaining agreement’s arbitration provision.³⁸⁹ The Court framed the issue that way for the following reason:

As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange. ‘Judicial nullification of contractual concessions . . . is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract.’³⁹⁰

³⁸⁴ See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 360 (2002) (noting that the importance of unions has declined over the prior fifty years).

³⁸⁵ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 368 (2004) (“[F]rom the 1960s to the 1980s, as unionism declined, individual employment law expanded and specific, substantive federal regulations on workplace issues increased from about forty-four to over two hundred.”).

³⁸⁶ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (2008) (prohibiting discrimination based on race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2008) (prohibiting discrimination based on age); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2008) (prohibiting discrimination based on disability). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (referring to the “important congressional policy against discriminatory employment practices.”).

³⁸⁷ 129 S. Ct. 1456 (2009).

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1465.

³⁹⁰ *Id.* at 1464 (Stewart, J., concurring in part and dissenting in part) (alteration in original) (quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 328 (1974)) (internal quotation marks and brackets omitted).

After concluding that the ADEA did not preclude the arbitration of such claims, the Court stated that “there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the [employer], and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims”³⁹¹ And even if there might be concerns about whether such claims were suitable for an arbitration conducted by the union, the Court stated that “it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.”³⁹² Thus, continuing with a trend started in the 1970s, the Court’s decision emphasized notions of freedom of contract and downplayed judicial policymaking.

C. Conclusion with Respect to the Supreme Court and Labor Relations Promises

As has been shown, from the passage of the Wagner Act in 1935 through the end of the Warren Court era in 1969, the Court, when deciding which labor relations promises to enforce and how to interpret them, rejected classical contract law and its emphasis on freedom of contract.³⁹³ Rather, consistent with the legal process school that prevailed during this time period, the Court weighed competing principles and policies in deciding which labor relations promises to enforce and how to interpret them.³⁹⁴ Importantly, the Court gave the federal labor policy of reducing industrial strife tremendous weight, virtually to the exclusion of all other principles and policies.³⁹⁵ The Court’s approach was consistent with the idea that contract law during this period was “dead.”³⁹⁶

But starting in the 1970s, the tide turned and the Court, in deciding cases involving labor relations promises, has emphasized the principle of autonomy, the principle that a promise should be kept for moral reasons, and the policy of promoting exchange by enforcing the parties’ agreement.³⁹⁷ Thus, at least for labor relations promises, Gilmore’s question in 1974 about whether classical contract law would be resurrected was answered in the affirmative. But which approach is correct?

³⁹¹ 129 S. Ct. at 1466.

³⁹² *Id.* at 1472 (alteration in original) (quoting *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008)).

³⁹³ See *supra* Part III.A.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ See *supra* Part I.B.

³⁹⁷ See *supra* Part III.B.

IV. THE APPROPRIATE ROLE OF FEDERAL LABOR POLICY WHEN THE SUPREME COURT ENFORCES AND INTERPRETS LABOR RELATIONS PROMISES

The Supreme Court, when deciding an unfair labor practice case under the Wagner Act, or a case involving an alleged breach of a collective bargaining agreement under the Taft-Hartley Act of 1947, must apply the substantive law set forth in those statutes. Thus, determining which approach is correct (either an approach emphasizing the federal labor policy of reducing industrial strife or an approach emphasizing the autonomy principle) requires an analysis of legislative intent. As discussed below, such an analysis discloses that Congress likely intended the Supreme Court to give little weight to federal labor policy when deciding which labor relations promises to enforce and how to interpret them.

Under the Wagner Act, prior to its amendment by the Taft-Hartley Act in 1947, Congress surely intended the Court to have a limited role in enforcing and interpreting labor relations promises, and also intended the Court's role in formulating federal labor policy to be limited. The Wagner Act created a series of "unfair labor practices," but it did not create a private cause of action over which federal courts would have original jurisdiction. Rather, original jurisdiction was vested in the NLRB.³⁹⁸

Also, even though the Supreme Court and the courts of appeals exercise appellate jurisdiction over unfair labor practice cases, Congress intended the NLRB to play the primary role in implementing and developing federal labor policy.³⁹⁹ In fact, Congress intended the NLRB to act as a "supreme court" of labor relations.⁴⁰⁰ This is not surprising, because the historical context surrounding the Wagner Act's passage was one in which courts, including federal courts, had done a poor job in the area of labor relations, having consistently adopted anti-union rules of law.⁴⁰¹ Accordingly, the evidence is strong that Congress, when it enacted the Wagner Act in 1935, did not intend the Supreme Court to play a significant role in implementing federal labor policy. Of course, because Congress gave the Court appellate jurisdiction over unfair labor practice cases decided by the NLRB, the Court was required to at least ensure that the NLRB's policy choices were reasonable.⁴⁰²

³⁹⁸ See 29 U.S.C. § 160 (2006) (providing the NLRB with original jurisdiction over unfair labor practice cases).

³⁹⁹ Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 185 (2008).

⁴⁰⁰ J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 191 (1968).

⁴⁰¹ GORMAN & FINKIN, *supra* note 196, at 2-4.

⁴⁰² O'Gorman, *supra* note 399, at 190.

The evidence is also strong that Congress did not intend the Supreme Court to give substantial weight to federal labor policy when exercising appellate jurisdiction in a case under § 301 of the Taft-Hartley Act. As has previously been discussed, on its face § 301 was simply procedural, doing nothing more than providing federal courts with original jurisdiction over suits alleging the breach of a collective bargaining agreement.⁴⁰³ Also, the Taft-Hartley Act's legislative history reveals that the provision's purpose was to simply ensure that unions would be bound by their collective agreements with employers. The Senate Report provided:

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements . . . should be enforceable in the Federal courts.⁴⁰⁴

Thus, § 301's purpose was to promote the policy of industrial peace, but this was to be accomplished by enforcing collective bargaining agreements against unions when they breached them.⁴⁰⁵ There is no evidence that Congress intended the Supreme Court, when it was exercising appellate jurisdiction over a § 301 case, to inject federal labor policy into the decision of whether to enforce a labor relations promise and the decision of how it should be interpreted.

Other portions of the legislative history support this conclusion. The legislative history suggests § 301 was no more than a procedural statute, providing that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law"⁴⁰⁶ And it is generally agreed that the govern-

⁴⁰³ See *supra* Part II.B.

⁴⁰⁴ S. Rep. No. 105, at 16 (1947).

⁴⁰⁵ See *id.*

⁴⁰⁶ H.R. Rep. No. 510, at 41–42 (1947) (Conf. Rep.).

ment was not to dictate the agreement's substance.⁴⁰⁷ Thus, Congress likely intended § 301 to do no more than ensure that collective bargaining agreements were as enforceable as other contracts.

Interestingly, the late Harry H. Wellington, a noted legal process scholar, consistent with a legal process approach, did not fault the Court for considering industrial peace as a relevant consideration in competition with freedom of contract, but simply faulted the Court for not getting the balance correct.⁴⁰⁸ He believed that the Court overstated the threat to industrial peace from strikes over collective bargaining disputes, relying on Professor Stewart Macaulay's famous argument that contract law is not particularly important to contract disputes⁴⁰⁹ and on the fact that strikes over contract disputes are not that common.⁴¹⁰ Professor Clyde Summers likewise defended the Court's use of federal labor policy, even if the Court's performance could be faulted:

Courts are not ideal institutions for performing this function, and schoolboy learning teaches that policy choices are for the legislature. Certainly this counsels the courts to tread softly in the area, but for them to refuse to perform this function altogether would be to reject an historically established responsibility. Indeed the history of Section 301 of Taft-Hartley suggests that the courts may do a more responsible and workable job of developing the law of collective bargaining agreements than Congress. That section, as written by Congress, left every significant question unanswered—what substantive law was to be applied, what remedies were to be available, whether state courts should be given jurisdiction, what role should be given to arbitration, and what role should be given the NLRB. The Court's performance in giving this vacuous section sense and content may be faulted, but it hardly demonstrates that the courts are less competent than Congress to perform this function, or that courts should stay their hand until Congress has given guidance.⁴¹¹

⁴⁰⁷ See Cox, *supra* note 222, at 3 ("The terms of the bargain are not determined by the government . . ."); Summers, *supra* note 185, at 531 ("Although the law requires bargaining and channels the bargaining process, it does not compel agreement nor dictate the terms of settlement. The substantive terms are those negotiated and agreed to by the parties in a bargained exchange.") (footnotes omitted).

⁴⁰⁸ See Wellington, *supra* note 194, at 490.

⁴⁰⁹ See *id.* at 490 n.111 (citing Macaulay, *supra* note 168).

⁴¹⁰ See *id.* at 490–91.

⁴¹¹ Summers, *supra* note 185, at 560–61 n.126.

Conversely, one student author has argued that in the context of the successorship cases previously discussed, federal courts do not have authority under § 301 to implement federal labor policy:

[S]ection 301 of the Labor Management Relations Act would not seem to accord the federal courts power to impose a duty to arbitrate on the basis of the relative interests of employers and unions. The judicial role under section 301 should be confined to enforcing private arrangements reached by the parties through the statutorily structured process of collective bargaining; judicial imposition of a duty to arbitrate in pursuit of a public policy of avoiding strikes would be a departure from the institutional role accorded the federal courts in the complex of arrangements for private and public ordering established by Congress. Thus, for example, it is clear that if the original collective bargaining agreement with Interscience had not had an arbitration provision, the Court could not, under section 301, have imposed a duty to arbitrate in *Wiley*, even though the likelihood of labor strife and the relative interests of the employees and employer might have argued strongly for arbitration [A] judicial decision to impose a duty to arbitrate without the consent of all affected parties would appear to require clear legislative sanction.⁴¹²

This same student author argued that “attempts by courts so to impose on the parties their views on what is appropriate in industrial relations are among the very evils which the national labor policy has sought to eliminate.”⁴¹³

Wellington’s and Summers’s arguments are unpersuasive. If the Court has done a poor job of implementing federal labor policy, this confirms Congress’s original belief that the courts are not well equipped for making labor relations policy. Thus, there exists a practical reason why courts should avoid implementing federal labor policy when interpreting labor relations promises. With respect to Summers’s argument that there is reason to believe the Court has done a better job than Congress at developing federal labor policy, this depends on one’s view of good labor policy. What if the Court had implemented federal labor policy in a “bad” way? Would the Court then lose the power to consider federal labor policy? Whether Congress gave the Court the power to

⁴¹² Note, *supra* note 295, at 423–24 (footnote omitted).

⁴¹³ *Id.* at 426.

consider federal labor policy should determine whether the Court has such a role, not whether one agrees with the Court's policy choices.

With respect to Summers's arguments that the Court avoiding federal labor policy would involve "reject[ing] [its] historically established responsibility," his only support that it is the Court's responsibility is to point to Congress's failure to provide clearer guidance regarding how to decide such cases.⁴¹⁴ Such an argument fails for two reasons. First, as previously discussed, the legislative history of the Taft-Hartley Act reveals that Congress's intent was to make collective bargaining agreements as enforceable as other contracts.⁴¹⁵ Its purpose in doing so was to ensure that unions would be held responsible for breaches of their agreements. Thus, there exists evidence that Congress intended the Court to treat such contracts like other contracts, which would ordinarily not include injecting policy issues into the enforceability and interpretation questions. Second, it is more likely that the absence of express directives from Congress means Congress intended the Court to interpret labor relations promises like any other promises. If Congress intended to vest the Court with a policymaking role when interpreting labor relations promises, there would likely be evidence of such an intention.

But an important question remains unanswered. If Congress simply granted the Court the authority and responsibility to treat collective bargaining agreements like other contracts, what principles and policies did Congress believe should be considered in traditional contract cases? The Taft-Hartley Act was enacted in 1947, at the dawn of the legal process era, and as classical contract law was dying.⁴¹⁶ The Act was, therefore, enacted during the time of transition from classical contract law to the legal process approach.⁴¹⁷

The drafters of the Taft-Hartley Act surely understood that contract law was primarily based on the common law, and thus contract doctrine was subject to change. Accordingly, it is likely that Congress did not intend the Court to forever interpret collective bargaining agreements according to, for example, the rules set forth in the *Restatement (First) of Contracts*. But, as we know, Congress intended them to be treated like other contracts.⁴¹⁸ Thus, although Congress likely intended the Court to use doctrines that were only just developing (such as expanded use of impracticability, good faith, and unconscionability), it also likely intended such doctrines to receive no special treatment because of "federal labor policies."

⁴¹⁴ See Summers, *supra* note 185, at 560 n.126.

⁴¹⁵ See *supra* Part II.B.

⁴¹⁶ See *id.*

⁴¹⁷ See *supra* Part I.B.

⁴¹⁸ See *supra* Part II.B & notes 406–07 and accompanying text.

CONCLUSION

This Article has shown that from the Wagner Act's passage in 1935 until the end of the Warren Court era in 1969, the Supreme Court injected a heavy dose of federal labor policy into the enforcement and interpretation of labor relations promises. This approach was consistent with Grant Gilmore's famous argument that contract law was dead. But at the time Gilmore was speculating as to whether contract law would rise again, the Supreme Court eschewed policy considerations and began enforcing and interpreting labor relations promises based on the will of the parties. This approach is preferable, because it is consistent with congressional intent.

