

*A Comparison of British and
American Attitudes Towards the
Exercise of Judicial Discretion
in Contract Law*

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THIS PAPER HAS evolved from my comments on Mr J Wightman's conference paper which now forms chapter 5 of this book. That paper does an excellent job defining the customary understandings that can arise in a contracting community, and making the case for inclusion of those understandings in the judicial definition of the terms of the contract. The paper then turns to consumer transactions and again makes an excellent case for why understandings not incorporated in the written contract are likely to arise and should be included in the contract, but those implicit understandings are likely to be unilateral expectations on the consumer's side.

While I fully support Wightman's analysis and recommendations, at the conference I commented that implicit understandings in contract, both mutually shared ones and unilateral expectations, are often not precise. The understanding is commonly that contracting behaviour will fall within certain parameters. Certain actions related to contractual performance would clearly fall outside those parameters, but there are likely to be a number of possible actions that would fall within

¹ I am grateful for helpful comments on an earlier draft from Professors D Campbell, H Collins, S Macaulay, and I Ramsay. I wish to thank Jason Keener, JD, 2002, University of Wisconsin, for excellent research assistance in the preparation of these remarks.

those parameters. My point is not original, and has been developed extensively by many authors, most recently by Collins.²

An implication of this observation is that judicial recognition of implicit understandings does not leave courts simply with the complex fact-finding task of ascertaining the implicit understandings. Disposition of a case often requires determination of a precise term to govern the parties' relationship—for example, when expectation remedies are sought, it is necessary to define the particular performance that the court will use in calculating what benefits proper performance of the contract would have yielded for the party deemed not in breach. Consider a contract for the sale of a good or service in which an agreed index to adjust the price to reflect inflation fails, for unanticipated reasons, to provide a price consistent with customary understandings. If the court is to order specific performance, or award the buyer damages because it has negotiated a substitute purchase in the face of the seller's refusal to perform, the court will have to provide some substitute for the failed index.³

There are essentially four distinct approaches a court can take when confronted with a gap in implicit understandings. The court could resort to a precise (ie unambiguous) statement in the written contract, in order to avoid the exercise of judicial discretion that would be required to complete the parties' implicit understandings. If one assumes that the court would have enforced a precise implicit understanding even though inconsistent with express written terms, by definition enforcement of the precise terms of the written contract would be inconsistent with the parties' intentions. Alternatively, the gap in the implicit understandings could be filled with some kind of default (or 'off the rack') term—by which I mean a term that statutory or decisional law stipulates will be implied in all contracts of a particular type where the parties have not explicitly agreed to an alternative. These default terms may or may not fall within the range of acceptable terms established by the parties' implicit understandings, and if they do not, then enforcement of the default term once again ensures a result inconsistent with the parties' intentions at the time of contract. Still another possibility is for the court to declare the contract invalid because of the uncertainty in the parties' agreement. Both American and British

contract law continue to recognise a doctrine decreeing that a contract intended by the parties to be enforceable can nonetheless be invalid for indefiniteness, but application of the doctrine is increasingly uncommon in both countries. And it seems particularly ironic for a court to declare unenforceable for indefiniteness a contract that contains a written term with the required specificity, but which term is deemed inconsistent with a vaguer implicit understanding.⁴ The final option is for the court to invent a term to fill the gap. The court will be 'making a contract for the parties', something that centuries of decisions in both countries state that courts should not do. To be sure, the implicit understandings will set parameters on the range of terms that will be deemed consistent with the implicit understandings, and this will limit the extent of the court's discretion. The court will have to turn to other considerations in setting a precise term within these limits, however, and unless it simply adopts a formulaic solution—like splitting the difference between the parameters established by the implicit understandings—normative judgements about fairness or efficiency of differing alternative solutions are likely to be made.

During the discussion at the conference, I came to appreciate that the academics in the room differed in how comfortable they were with the fourth alternative listed above—having judges make discretionary, policy-based decisions that in effect 'make a contract' for the parties. Almost everybody in the room purported in principle to favour judicial recognition of implicit contract terms, but many were uncomfortable with displacing a written contract term capable of easy and predictable application with an implicit term that required judicial discretion in specifying its application to the facts.⁵ Generalisations are difficult and risky, but on the whole it seemed to me that the academics from the UK (the vast majority at the conference) were less comfortable with such displacement of a specific written term than were the Americans (only a few of us). It has often been observed that there is a difference in the opinion writing style of British and American judges, with the former more enamoured of detailed analysis of precedents and the latter much

⁴ For a recent summary of American law on need for definiteness, see Allan Farnsworth, *Contracts*, 3d edn (New York, Aspen Law and Business, 1999) 207–22.

⁵ Such would be the concern with the results reached in the American cases discussed at the end of my colleague Stewart Macaulay's chapter, for example. It is also a basic concern raised in Professor Lisa Bernstein's recent work. Eg Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms', (1996) 144 *University of Pennsylvania Law Review* 1765.

² H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999) ch 7 149–73.

³ Eg *Alcoa v Essex Group*, 499 F Supp 53 (WD Pa 1980), discussed extensively by my colleague, Stewart Macaulay, in his chapter in this volume.

more prone to appeal of policy justifications for a judgement.⁶ Judges were not present at the conference, however; this was a room full of academics, most of whom I believe identified themselves as left of centre. Since the conference I have been speculating about what might account for these differences between academics of similar political outlook in countries whose legal systems claim common origins, and where knowledge of each other's precedents and leading academic works is commonplace. This comment summarises my speculations to date.

This comment is being written in response to discussions at a conference on implicit understandings in contract, but the issues respecting the exercise of judicial discretion are quite similar to other issues in contract law. The most obvious connection is with the problem of completing gaps in the explicit terms of written contracts. Many academics favour resort to predetermined default rules in such circumstances rather than a completion of the contract by a judge after a contextualised inquiry about what provision makes the most sense in the circumstances. Their reasons for this position are very similar to the reasons these same academics oppose judicial completion of gaps in implicit contracts, focusing on the disadvantages of judicial discretion.⁷

Another set of issues in contract law that concern the exercise of judicial discretion involve the use of very general regulatory standards like good faith or unconscionability in determining the validity of contracts that some would consider too one-sided or unfair. These general standards require discretionary specification by courts in their application. There are important differences between this category of issues and the gap-filling issues I am primarily addressing. Most importantly, application of a general regulatory standard in a particular case can specify that standard in a way in which the decision will have precedential force in other cases involving similar contract terms.⁸ For the most part when courts fill in a contractual gap after a contextualised

inquiry into the circumstances, the decision establishes that courts will complete contractual gaps in this way, but it has little other precedential effect. The precise term used to fill the gap is dependent on the particular facts of the case. Nonetheless there are important similarities between gap filling issues and the use of general regulatory standards. Both raise the issue of the appropriateness of the exercise of judicial discretion in contract law. Persons who oppose the completion of contractual gaps through contextualised inquiry by a court are likely also to oppose the use of very general regulatory standards, preferring instead legal tests for validity that provide judges with more specific guidance about what contracts should be ruled invalid. Furthermore, similar values are likely to guide the exercise of judicial discretion in the two circumstances. In applying general regulatory standards courts are likely to balance concerns of efficiency and fairness in deciding whether to override the apparent intent of the parties. And in completing contractual gaps, courts can rely on the intent of the parties to setting parameters on the exercise of discretion, but are likely to draw on some balance of efficiency and fairness concerns in deciding upon a particular term within those parameters.

Before speculating about what might account for differences between centre-left UK and American academics on these issues, I should mention briefly the general reasons why people are likely to be uneasy about the exercise of judicial discretion in contract law. One set of reasons is associated generally with what I will call 'rule of law' ideals. One key idea associated with the phrase 'rule of law' is the idea of equal justice before the law, meaning that all persons should be treated the same before the court. It is the facts of the case, not a litigant's relation to the judge, that should determine the outcome. That ideal is much easier to achieve if judicial outcomes are determined by analytic logic and not by discretionary, policy-influenced judgments by the judge, for it is difficult to ensure consistency in policy preferences across a large judiciary. A second set of ideas associated with the rule of law phrase concerns the appropriate role of the judiciary in a democracy. Grounded in democratic theory and the separation of powers, these ideas emphasise that the judiciary is not accountable democratically, and hence should not be in a position to make decisions about the substantive content of government policy.

Another set of ideas commonly employed to oppose the exercise of judicial discretion is generally associated with centre-right political thought in the United States and is grounded in concerns about

⁶ Karl Llewellyn was well known for such observations. See William Twining, *Karl Llewellyn and the Realist Movement* (London, Weidenfeld and Nicolson, 1973) 210-15.

⁷ See Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87.

⁸ See *Armendariz v Foundation Health Psychcare Services*, 24 Cal 4th 83, 6 P 3d 669 (CA 5 Ct, 2000) (setting standards for application of the unconscionability doctrine to arbitration provisions in employment and consumer form contracts). Courts do not always set precedents in applying general regulatory standards, however; sometimes they limit their decision to the circumstances of the case under consideration.

economic efficiency. Predictability of judicial decisions—assumed to be inconsistent with the exercise of judicial discretion—is desirable, it is argued, because it lessens the amount of contingency planning in a well-run contractual transaction. Equally important, US advocates of formalism believe judicial predictability reduces the costs of dispute settlement when disputes do occur. If both parties share similar beliefs about the likely outcome of litigation, they are more likely to settle their case, saving unnecessary litigation expenses.⁹ The centre-left in the US may agree that there are efficiency costs associated with judicial discretion, but tends to emphasise what it sees as the benefits of judicial discretion. It associates judicial discretion with redistributive ideas, and fears that an emphasis on predictability of result will inevitably favour enforcement of the literal or most evident interpretation of the actual wording of a written contract. It is the most powerful party in a transaction that normally exerts the greatest influence on that wording. If the contract is to be interpreted according to its plain or dictionary meaning, it will be to the advantage of the parties primarily responsible for that language. So the centre-left seeks to establish checks on superior bargaining power manifested in the language of written contracts by appealing to what it deems to be the real intent of the parties, exhibited in implicit understandings.

LEGAL CULTURE

There is one self-evident explanation for the American-British differences that I speculate exist and seek to explain. Legal realism happened in America. American academics of centre-left persuasion are taught to admire the legal realists, who for the most part shared the redistributive goals of the centre-left. Neil Duxbury, a contemporary British commentator on American juridical thought, has commented as follows on the influence of legal realism on American legal academics: '[A]n American legal academic without a perspective on legal realism is as improbable as an American legal academic without a word

processor.'¹⁰ In my judgement the statement is more true for the centre-left than for the centre-right in America. For the centre-right, law and economics has dislodged legal realism as a foundation for analysis.

The most famous of the legal realists in contract law was Karl Llewellyn, and his work is well known and respected by most centre-left contracts scholars in America today. Llewellyn shared the scepticism of most realists about the ability of legal doctrine to truly limit judicial discretion. Like most realists he found judicial discretion in ascertaining and applying legal rules inevitable; in the area of contracts in particular, he went further and positively championed the benefits of judicial discretion. He had great confidence in the ability of the judge to discern not only the parties' implicit understandings but also the practical implications of his/her decisions in the commercial world—what he called judges' 'situation sense'. The costs associated with unpredictability which are commonly cited as a reason to avoid judicial discretion did not bother Llewellyn greatly, for he had confidence that the courts would factor these potential costs into their thinking. They would exercise their discretion wisely and in a way that persons familiar with the case would regard as reasonable and not unexpected. By granting judges discretion we could achieve an ideal balance between predictability and change.¹¹

Although legal realism certainly crossed the Atlantic and had influence in Great Britain, neither realism nor Llewellyn ever became so central to contracts scholarship in Britain as they did in America. Furthermore in Britain more attention than in America has been paid to HLA Hart and his emphasis on the rule-boundedness of judicial decisions. The differences between HLA Hart and the legal realists are often exaggerated. Hart did not claim that rules controlled all legal decisions beyond the finding of facts, hence he accepted the existence of judicial discretion in considerable degree. And most legal realists, certainly including Llewellyn, did not deny the influence of rules on judicial outcomes.¹² But the emphasis was different. Llewellyn emphasised

¹⁰ Neil Duxbury, 'A Century of Legal Studies', in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, forthcoming).

¹¹ The best and most comprehensive account of Llewellyn and his work is Twining, n 6 above. Twining discusses Llewellyn's sometimes mysterious concept of 'situation sense' at 216–29.

¹² For the best account of Llewellyn's sophisticated and nuanced view of the role of rules, see Twining, n 6 above, Appendix B, 488–96 (entitled 'A Restatement of Llewellyn's Theory of Rules').

⁹ Two recent articles advancing these arguments are Robert Scott, 'The Case for Formalism in Relational Contract' (2000) 94 *Northwestern University Law Review* 847 and Eric Posner, 'A Theory of Contract Law Under Conditions of Radical Judicial Error' (2000) 94 *Northwestern University Law Review* 749. See also Alan Schwartz, 'Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies' (1992) 21 *Journal of Legal Studies* 271.

the limits on rules, and stressed the influence and desirability of other factors on judicial outcomes. Hart made his name demonstrating that rules made a difference, and the very serious problems for rule of law concerns that would result if they did not.

MATERIAL CONDITIONS

In this section I suggest that differing attitudes towards the exercise of judicial discretion in enforcing incomplete agreements result in part from the different circumstances in which the discretion is exercised. My essential intuition is that the costs and benefits of judicial discretion in the administration of contract law differ between the two countries. This is because the countries' two principal law-making institutions, the judiciary and the legislature, differ significantly. As a result, persons with similar political values might sensibly favour greater exercise of judicial discretion in the US than in Britain.

I must initially make one important disclaimer. In the following discussion I will be discussing and contrasting the judiciary and the legislature in the two countries. My knowledge about American institutions is much greater than it is of British institutions, and hence it is likely my intuitions and assumptions about the capacities and limitations of these institutions are sounder for the former than the latter.

The Legislature

One of the important differences between the two countries is the nature of their legislatures. Britain's legislative system ensures that the same political party controls both the executive and the legislature, and that there is party discipline in the legislature. As a result, when there is legislative inaction in the face of perceived injustice, there is at least some possibility that the electorate will hold the party in power accountable for perpetuating an injustice. This is less likely in the United States. The lack of party discipline in the legislature, and the inability of the legislature to displace the executive by a vote of non-confidence, makes it very difficult for the electorate to hold accountable any political actor when a legislature simply fails to act. The person responsible for legislative inaction is often the chair of some legislative committee, and he or she is likely to come from what

Americans call a 'safe' district—one in which the possibility of electoral defeat for his/her political party is remote. The lack of party discipline is at least partly responsible for the tendency of American voters not to hold accountable, for inaction, the political party to which the legislative committee chair belongs. And the net effect is to make inaction by far the most desirable course of action for many legislators. Recorded votes can get an individual legislator in trouble in a forthcoming election; inaction gets nobody in trouble.

This bias towards inaction does not prevent the enactment of all legislation in America concerning contract law. When legislatures do act, however, the legislation is likely to concern some very particular matter where important campaign contributors have an interest. Alternatively, a particular legislator may be able to get a Bill passed on a specific matter in the interest of a particular constituent. For example, Wisconsin passed legislation concerning the consequences to an employer of including a overly broad restrictive covenant in an employment contract. The Wisconsin Supreme Court, in a decision explicitly changing established precedent, adopted a position favouring severability, allowing the employer to enforce as extensive a covenant as the court deemed reasonable.¹³ Shortly thereafter the Wisconsin legislature adopted a statute altering this result (prospectively only) and providing that the employer was entitled to no protection from employee competition if the written contract contained an overly broad covenant.¹⁴ The legislation was drafted and pushed through the Wisconsin legislature by the state legislator in whose district resided the losing party (Torborg) in the Supreme Court decision.¹⁵

My position is that in the United States there is far less legislation about contract law than is desirable, including about important issues of consumer protection. The prominence of the Uniform Commercial Code [UCC] over the past 50 years might seem inconsistent with this emphasis on the unimportance of legislation, but in fact the story of how the UCC was drafted and enacted largely supports my analysis. The UCC is unique legislation. The first drafts were crafted almost solely by a group of elite academics, led by Karl Llewellyn.¹⁶ The effort

¹³ *Fullerton Lumber Co v Torborg*, 270 Wis 133, 70 NW 2d. 585 (1955).

¹⁴ Wis Stats §103.465.

¹⁵ The full story of this litigation and its legislative aftermath is told in Richard Danzig, *The Capability Problem in Contract Law* (Mineola Foundation Press, 1978) 44–67.

¹⁶ Allen R Kemp, 'Uptown Act: A History of the Uniform Commercial Code: 1940–49', (1998) 51 *Southern Methodist University Law Review* 275.

was sponsored and paid for by two private organisations who were autonomous from and independent of any legislative process. Ultimately, of course, the Code was introduced in and enacted by state legislatures, but rarely with significant legislative debate.¹⁷ In between the original drafts and later introduction in state legislatures, the Code came under scrutiny by affected business interests, which led to significant changes. In Article 2—the part of the UCC having greatest relevance to contract law—these changes tended to replace specific provisions with sections phrased in general language and subject to varying interpretations when applied to particular facts. The tendency towards very general language is partly reflective of the preferences of its principal draftsman, Karl Llewellyn, but it is also the product of lobbying by business interests seeking to blunt the desires of some academics for a contract law that would more closely regulate the exercise of superior bargaining power.¹⁸ These business interests believed, correctly as it has turned out, that very general language would limit the influence of the Code on the course of contract law.¹⁹ It is often not clear today that the result reached in a case under the UCC is different from what the judge would have decided if the Code had never been enacted. There has recently been an attempt to draft a revised Article 2, using more specific provisions that would very likely influence outcomes in future contract cases. It has been impossible for the elite academic organisations that continue to sponsor the UCC and changes in it to obtain a consensus on these changes, however, and the effort to make significant changes in Article 2 has been abandoned. This experience confirms my conviction that little significant concerning contract law ever happens in the United States.

Contracts scholars today would have difficulty determining whether the UCC or the two Restatements of Contracts have had greater influence on the course of contract law. I doubt that any section of Article 2 of the UCC has had as much influence on the content of contract law

¹⁷ Robert Braucher, 'Legislative History of the Uniform Commercial Code' (1958) 58 *Columbia University Law Review* 798. There was significant legislative activity in New York, where the legislature directed the New York Law Reform Commission, a state agency, to review the then current draft in detail. Significant amendments to the Code resulted. No other state repeated this process, however.

¹⁸ See Allen R Kamp, 'Downtown Code: A History of the Uniform Commercial Code 1949–1954' (2001) 49 *Buffalo Law Review* 359.

¹⁹ I have written frequently about the desirability of more and better legislation, especially in the consumer protection area. See eg William C Whitford, 'Contract Law and the Control of Standardized Terms in Consumer Contracts: An American Report' (1995) 3 *European Review of Private Law* 193.

as has Section 90—the promissory estoppel provision—of the original Restatement of Contracts. The Supreme Court of virtually every state has adopted promissory estoppel as part of the common law of that jurisdiction. The concept was virtually invented by the first Restatement of Contracts.²⁰ The Restatements are drafted and published by the American Law Institute, a private organisation consisting of elite academics and practitioners, and have no formal legal status.²¹ Nonetheless, it can be seriously contended that they have had more influence than the UCC over the development of contract law, illustrating the limited influence of legislation.

The principal relevance of the lack of significant American legislation in contract law is to justify a tradition of judicial activism in formulating rules of law. I am not the first observer of differing American and British judicial traditions to have pointed to legislative inadequacies in the United States as an explanation for greater judicial activism in the United States.²² Usually the discussion is in the context of justifying constitutional and administrative judicial review of an activist nature. I believe that legislative inactivity and irresponsibility in the United States is particularly marked with respect to contract law, and hence that the case for judicial activism in contract law is especially strong. If courts did not innovate in contract law, the law in most respects would be frozen.

In Britain the calculus regarding the desirability of judicial activism is different. While the legislative institution is surely not perfect, I am assuming that between Parliament and administrative rule-making agencies, more action can be expected than I find in the United States. And there are real deficiencies in relying on the judiciary as a change agent for contract law. In the first place, there are real limits on the capacity of a judiciary to change the law in any reasonably sensible way. Judges lack the means to carefully research issues for themselves, being largely dependent on information that the parties bring them. While

²⁰ For an interesting history of the drafting of Section 90, see Grant Gilmore, *The Death of Contract*, 2nd edn (Columbus, Ohio State University Press, 1995) 73–81.

²¹ For background on the ALI, which also sponsors the Uniform Commercial Code, see NEH Hull, 'Restatement and Reform: A New Perspective on the Origins of the American Law Institute' (1990) 8 *Law and History Review* 55.

²² See the wonderful little book by Louis Jaffe, *English and American Judges As Lawmakers* 69 (Oxford, Oxford University Press, 1969) 69: 'It would seem that the English Parliament is potentially capable of dealing with more of the country's law needs than our legislatures. If so, the demand for judicial lawmaking in England may be to that extent less'.

legislatures frequently act simply on the basis of information provided by lobbyists representing well endowed interests, they at least have greater capacity than courts to research issues thoroughly. Furthermore, courts can act only when they happen to get a case raising an issue with respect to which there is a need for change in the governing law. Legislatures have the capacity to act independently of the happenstance that some aggrieved party has litigated a case to the appellate level.²³ Finally, in Britain concern has been expressed about the homogeneity of backgrounds of judges in the higher appellate courts.²⁴ Perhaps there a system which depended on judicial activism as an agent of change would be more tilted towards the interests of established classes than a system more dependent on the legislature for legal change.

This comment is primarily about the exercise of judicial discretion to complete gaps in contractual understandings. Nonetheless, I think the United States' tradition of judicial activism in formulating the basic rules of contract law, which I attribute importantly to legislative inadequacy, bears on the topic under discussion in the following two ways. First, and most importantly, a tradition of judicial activism at least requires acceptance of the legitimacy of the exercise of judicial discretion in a legal system that professes allegiance to the rule of law. From the perspective of rule of law values, there is no real difference between judicial formulation of rules of law and judicial formulation of contractual terms—both kinds of decisions are discretionary. Second, the alternatives to the exercise of judicial discretion in the enforcement of incomplete contracts are less attractive in a jurisdiction where legislatures cannot be relied upon to cure inadequacies in contract law. Those alternatives are principally either (1) where it is the implicit understandings that are incomplete, to enforce unambiguous terms in the written contract even though the court believes they do not express the parties' intentions, or (2) to fill the gap with a default term established by judicial precedent or statutory provision to complete all gaps of a particular type. The former alternative is likely to empower the stronger party in the contractual relationship, who is likely to have greater influence on the content of the written contract. It can be seen as less attractive in legal systems in which it is more difficult to rely on

²³ My colleague, Neil Komisar, has written frequently and convincingly about the limitations of the judiciary as a policy-maker. Eg Neil Komisar, *Imperfect Alternatives* (Chicago, University of Chicago Press, 1994) 123–50.

²⁴ See John Griffith, *The Politics of the Judiciary* 5th edn (London, Fontana, 1997) 295, 338.

legislation to check excessive exercise of this bargaining power. The latter alternative is similarly unattractive because legislation is less available to alter default rules that were poorly designed or have become antiquated. To be sure, judicial activism is always a possible cure for these legislative inadequacies, and often resorted to in the United States, but if judicial activism—requiring the exercise of judicial discretion—must ultimately be relied upon, the reasons for avoiding exercise of judicial discretion in the completion of incomplete contract terms are less compelling.

The Judiciary

Though the United States and Britain are both common law jurisdictions, there are great differences in the institutional structure of their judiciaries. One of the biggest differences relates to America's federalism. Britain has only two jurisdictions for purposes of contract law, and there is but a single system of courts in each jurisdiction. America has 51 separate jurisdictions for purposes of contract law, where virtually all the law is state and not federal. In each of those jurisdictions there are two systems of courts, state and federal. Either party to a contract may bring a case into federal court if the amount in dispute exceeds \$75,000 and the parties are citizens of different states. Because corporations are considered citizens of the state of their incorporation, regardless of where they do business, in practice federal courts hear many of the most important contracts cases. When federal courts hear a case involving contract law, with rare exceptions they are supposed to apply the substantive contract law of the state whose law is applicable under conflict of law rules. In practice, however, federal courts often invent their own views of what the state law is, failing to faithfully follow relevant state court precedents.²⁵ As a result, for purposes of contract law there is effectively somewhere between 51 and 102 separate jurisdictions in the United States.

²⁵ There is no single authoritative study establishing this proposition, but examples are easy to come by. I document one such divergence between federal and state law with respect to the parole evidence rule. The Seventh Circuit rather clearly fails to follow applicable Illinois state court precedent when deciding cases governed by Illinois law. See William C Whitford, 'The Role of the Jury (and the Fact/law distinction) in the Interpretation of Written Contracts' [2001] *Wisconsin Law Review* 931, 959–62.

The second important institutional difference concerns methods of judicial selection. In England and Wales, the larger of the two British jurisdictions, most important contracts cases are heard initially by the High Court. This court's jurisdiction is carefully limited, so the number of judges is not large. In 1996 in all of England and Wales there were less than 100 High Court judges, and only 35 judges in the Court of Appeal.²⁶ Recruitment to the High Court is for the most part limited to barristers with substantial experience (say 20 years). Experienced barristers represent a very small part of the total legal profession in the United Kingdom. Many of these experienced barristers will have had a substantial background in commercial law matters before appointment. Judicial appointments are made by the Lord Chancellor, a member of the Cabinet, and are therefore technically political. By tradition, however, the Lord Chancellor pays close attention to the views of existing judges and leaders of the Bar. Appointment of actively political persons is very rare.²⁷

Judicial selection is quite different in the United States. Contract cases in federal courts tend to be important ones, and most federal judges have substantial legal experience before appointment. However, the selection process is much more politicised than in Britain. Political parties, or important people within them, are likely to be the most influential persons in judicial selection. Increasingly federal court appointees have held the position of prosecutor or some other semi-political position before appointment. Potential appointees come from a much wider section of the Bar than is the case with respect to England's High Court. Appointments of leading practitioners from the private Bar—persons who are more likely than most lawyers to have had substantial experience with sophisticated questions of contract law—are increasingly uncommon in the United States.²⁸ Judicial selection in state courts is different, and so diverse as to make difficult easy summary here. A majority of states have some type of election process.²⁹ In some juris-

dictions those elections are partisan, with political parties playing an explicit role in selecting candidates. In many jurisdictions the elections are non-partisan, and usually in those jurisdictions an incumbent judge is re-elected. When vacancies arise between elections, commonly the Governor of the State is the appointing authority, making initial selection of judges not that different from the federal system (where the President is the appointing authority). Virtually all members of the Bar are deemed qualified for appointment or election to a trial court, but as with federal courts former prosecutors are over-represented. Members of State Supreme Courts, the court with the most important law-making responsibility with respect to contracts, commonly have substantial experience before selection, but once again selection from the experienced practising Bar is not common. Promotion of a lower court judge to the State Supreme Court is much more common.

A goal of limiting judicial discretion in contract law requires a legal system in which judges can be expected to follow pre-established rules for ascertaining an outcome whenever there is a gap in the parties' understandings. As discussed above, the most likely alternatives to exercise of judicial discretion to complete the contract are (1) where the gap is with respect to implicit understandings, enforcement of an unambiguous term in the written contract, or (2) completion of the contract with some pre-established default rule for contracts of this type. In the United States, predictability in outcome of contract cases is hard to find. In the first place, there are 50 to 100 different jurisdictions. Academics nonetheless tend to write about contract law in general, as if there are not many separate jurisdictions. From this perspective academics are bound to find inconsistency in decisions. As the realists were fond of pointing out, and more recently participants in the critical legal studies movement as well,³⁰ consistency in decisions is not a characteristic of American contract law. Courts may be more faithful than academics to the idea that each jurisdiction is entitled to its own version of contract law, so that all that matters is consistency within a jurisdiction, not between jurisdictions. Nonetheless, it is frequent for a state court to cite a decision in another state as 'persuasive' precedent, and the American tradition of relative ease in overruling controlling precedent leads to an unpredictability about whether a court will be persuaded or instead follow a different precedent in its own jurisdiction. Furthermore contract

²⁶ Griffith, n 24 above, 22.

²⁷ See Robert Stevens, 'The Independence of the Judiciary: The Case of England' (1999) 72 *Southern California Law Review* 597, 613–14; Griffith, n 24 above, 8–22.

²⁸ See Sheldon Goldman *et al*, 'Clinton's Judges: Summing Up the Legacy' (2001) 84 *Judicature* 228.

²⁹ There has been recent concern expressed about the potentially corrupting influence of campaign contributions on judicial performance in states where elections are used to select judges, but there is not yet an analysis on how this effect might influence the development of contract law. See David Barnhizer, "'On the Make': Campaign Funding and the Corrupting Of the American Judiciary' (2001) 50 *Catholic University Law Review* 361.

³⁰ See Claire Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997.

cases in a particular jurisdiction are filed in both state and federal courts, and as I have mentioned previously, federal courts are not always faithful to their obligation to apply the law laid down by the state courts. What all this means is that in America, when a court refuses to 'make a contract for the parties' in order to fill a contractual gap, there is still a reasonable likelihood that the court will exercise discretion with respect to whether to enforce an unambiguous written term or apply a default rule, and if the latter with respect to what default rule to apply. If discretion is likely to be exercised anyhow, why not have the court simply fill in the gap based on what seems efficient and fair in all the circumstances of the particular case?

Predictability in judicial decisions requires that judges sometimes exercise self-restraint and set aside their personal preferences for how a case should be decided in order to maintain a line of precedent. Llewellyn often pointed out that a set of precedents at variance with strongly held views of a group of judges was not likely to be stable because those judges would look for some way to rationalise a distinction and reach the desired outcome. This is all the more the case in a system in which there is no consistency of precedent. Judges asked to set aside their personal preferences in order to uphold the predictability yielded by a stable set of precedents will find it easier to do if they can assume that other judges holding different personal preferences will do the same when those views clash with established precedent. If judges of only one political perspective exercise restraint, the inevitable long run effect will be to 'tilt' the law away from that perspective.

I believe that precisely this concern has influenced many American judges not to follow existing precedent when they disagree with its import. A good example in contract law is two recent decisions by the Seventh Circuit, in which the court invented a new doctrine allowing sellers of pre-packaged goods in stores or of mail order goods to have included in the contract boilerplate disclaimers that the consumer did not have a chance to inspect until well after the purchase transaction.³¹ Both opinions were written by a well known, right-of-centre judge who has long championed judicial restraint and emphasised the importance of predictability in contract law. Yet in these cases the judge wrote very activist decisions that were wholly without previous authority, either in the applicable state or in federal courts, and that were inconsistent

³¹ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (1996) and *Hill v Gateway 2000 Inc* 105 F 3d 1147 (1997).

with what had been generally accepted principles of contract formation. The newly established doctrines were championed by the affected industries, who had made unsuccessful efforts to have them established by legislation. The Seventh Circuit delivered these business interests a victory by judicial decree.

I have argued that the English judiciary assigned important contract cases are, on average, better quality than their American counterparts. If true, one might expect that academics would be more supportive of having English judges exercise discretion in filling contractual gaps. After all, English judges should be better able than American judges to do a good job drawing on efficiency and fairness concerns to complete the contracts. One argument that centre-right American academics give for encouraging judges to enforce unambiguous meanings of written contracts, or in their absence to apply pre-established default terms, is precisely that American judges are sufficiently ignorant of the commercial settings in which important contracts are made that they are not likely to do a very good job in exercising discretion to complete contractual gaps.

I suspect, however, that the superior quality of the British judiciary in fact influences even centre-left academics to favour a more formalist approach to incomplete contracts. Clearly there are benefits to predictability of decision. Such predictability is difficult to achieve in the United States by reason of its chaotic court structure. But the quality of the judiciary also plays a role. Better quality judges are more likely to know existing precedent and apply it in a logical and consistent way. So ironically, while a higher quality judiciary implies that English judges would do a better job in completing incomplete contracts, it also implies that they will do a better job in administering a precedent system in a consistent manner. In such a system predictability may be easier to achieve if courts deal with contractual gaps by adopting the alternatives to the exercise of discretion to invent the missing terms after a contextualised inquiry into the circumstances of the parties and the transaction.

SUMMARY AND CONCLUSIONS

I began by hypothesising that British and American centre-left contracts scholars have differing attitudes towards how to fill gaps in the understandings of parties to contracts. American scholars, I have

postulated, are more willing to have courts use their discretion to fill in the missing term, after conducting a contextualised inquiry into the bargain and subsequent contractual performance seeking to learn what term would best serve the parties' concerns about efficiency and fairness. British scholars, I suggested, are more reluctant to have courts make such wide-ranging inquiries because principle seems incapable of limiting the court's discretion in setting the appropriate term. The arguments on this issue closely parallel the arguments that can be made in favour of and against the use of very general regulatory standards, like good faith or unconscionability, to limit one-sided or unfair contracts. I hypothesise a similar difference in attitudes about such standards as well, with American centre-left contracts scholars more welcoming of such standards, which require extensive judicial discretion in their specification of particular fact situations.

Accepting this hypothesis as valid, though unproven, I have ventured explanations for the differences in attitudes. One set of explanations rests in what I have called legal culture—by which I mean the legal culture of the centre-left contracts scholar. On the average, American scholars are much more under the influence of Karl Llewellyn and his faith in the wisdom of the judge than are British scholars. But I have also suggested that differences in what I have called material conditions could contribute to the differences in opinion. The material conditions that I have identified relate not to differences in business conditions but in the nature of the American and British legislative and judicial institutions. I have suggested that the American legislative process is so unresponsive to contract law issues that Americans are forced to promote judicial activism with respect to doctrine, as well as the exercise of judicial discretion in the filling of contractual gaps, as a way of avoiding legal paralysis. I have further argued that there are qualities in the American judiciary—primarily related to America's federal structure and also its methods of judicial selection—that make it difficult to achieve predictability in judicial decision, even when it is precedent and not judicial discretion that is supposed to guide judicial decision. As a consequence, the most important benefit sought to be achieved by limiting the exercise of judicial discretion, which is predictability in decision, is hard to achieve in America.

What this analysis suggests is that the ideal approach to filling contractual gaps in one country may not be the ideal approach in the other. There are no doubt advantages to what I have identified as the approach favoured by American centre-left academics. When a court

exercises discretion to fill a contractual gap, it is likely to try to guess what terms the parties would have negotiated if they had put their minds to it, informed themselves adequately, and bargained in a situation in which each is free of serious economic compulsion. The result is likely to be more respectful of the parties' autonomy or freedom of contract than the alternatives to the exercise of judicial discretion. One principal alternative to the exercise of discretion is application of a pre-established default term, which at best represents what typical contractual parties might have negotiated. Hopefully a court can do better in estimating what the particular parties would have negotiated through making a contextualised inquiry. The other principal alternative to the exercise of discretion, available where the contractual gap is in implicit understandings, is enforcement of unambiguous language in the written contract. In a legal regime that recognises implicit understandings in the belief that the written language of a contract frequently fails to state the parties' real understandings—and this is a regime favoured by centre-left contracts scholars of both countries where the implicit understandings are determinate—enforcement of the written contract where there are inconsistent though indeterminate implicit understandings is almost certain to reach a result contrary to at least one party's expectations.

Freedom of contract is a cherished value, and need not be defended solely or even primarily on efficiency grounds. But predictability in the law is also an important value. Centre-right academics in America are particularly fond of predictability, since they believe it contributes to the overall efficiency of contracts, and to the economy in general, even if at a cost to party autonomy in a particular case. I suspect my political soulmates, the centre-left British contracts scholars, are more attracted to predictability because of what I have called rule of law values. There is something to be said for having important policy decisions made by electorally responsible legislatures, where that is possible. There is even more to be said for judicial decisions not seeming to be determined by which judges happen to be assigned to the case, yet the latter appearance is hard to avoid where judges are given too much unbounded discretion. Where these rule of law values are practically achievable in a meaningful way, foregoing the advantages of the exercise of judicial discretion is an understandable choice. Where these rule of law values are not practically achievable, as I have suggested is the case in America, it seems wiser to favour the widespread exercise of judicial discretion.