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Rediscovering Williston

Mark L. Movsesian*

Abstract

This Article is an intellectual history of classical contracts scholar Samuel Williston. Professor Movsesian argues that the conventional account of Williston's jurisprudence presents an incomplete and distorted picture. While much of Williston's work can strike a contemporary reader as arid and conceptual, there are strong elements of pragmatism as well. Williston insists that doctrine be justified in terms of real-world consequences, maintains that rules can have only presumptive force, and offers institutional explanations for judicial restraint. As a result, his scholarship shares more in common with today's new formalism than commonly supposed. Even the undertheorized quality of Williston's scholarship—to contemporary readers, the least appealing aspect of his work—makes a certain amount of sense, given his goals and intended audience.

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I. Introduction

For more than a hundred years now, we have been encountering Samuel Williston.¹ Architect of the fundamental concepts of classical contract law, author of a monumental treatise,² Reporter on the first Restatement of Contracts:³ Williston's impact on American jurisprudence has been enormous and enduring. In his day, he was by far the most famous American law professor, regarded both inside and outside the academy as our preeminent legal scholar.⁴ Even many Progressives and Realists who devoted their careers to debunking Williston's careful doctrinal system treated him with affection and respect.⁵ Arthur Corbin referred to Williston as his "older brother" in the law.⁶ Karl Llewellyn dedicated a book to Williston as "the maker and builder of our law of Sales."⁷ When he died in 1963 at the age of 101, *Time* magazine took notice, honoring Williston in an obituary entitled *A Yankee Socrates*.⁸

1. Williston's first law review article, a signed student piece, appeared in 1888. Samuel Williston, Note, *The Right to Follow Trust Property When Confused with Other Property*, 2 HARV. L. REV. 28 (1888) [hereinafter Williston, Note]. His last, opposing adoption of the Uniform Commercial Code, appeared sixty-two years later. Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950) [hereinafter Williston, *Law of Sales*].

2. SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920). This treatise is currently in its fourth edition. RICHARD A. LORD, *WILLISTON ON CONTRACTS* (4th ed. 1990).

3. RESTATEMENT OF CONTRACTS (1932).

4. See, e.g., Erwin N. Griswold, *In Memoriam: Samuel Williston*, 49 A.B.A. J. 362, 362 (1963) (noting that "Williston was, by common consent, the greatest law teacher of his time"); Samuel Williston, CURRENT BIOGRAPHY 651, 651 (1954) (referring to Williston as "[t]he dean of the American legal profession").

5. See LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 25 (1986) ("A first-generation realist . . . treated [Williston] respectfully as [a] brilliant but misguided scholar[.]"); see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 289 (1973) ("Williston, whatever his limitations, was admired and liked by those who disagreed with him.").

6. Arthur L. Corbin, *Samuel Williston*, 76 HARV. L. REV. 1327, 1327 (1963).

7. KALMAN, *supra* note 5, at 25 (internal quotations omitted). Another prominent Realist, Walter Wheeler Cook, pushed Yale to give Williston an honorary degree. "Let's give the degree once on the ground of scholarship," Cook advised. Corbin, *supra* note 6, at 1328 (internal quotations omitted).

8. *A Yankee Socrates*, TIME, Mar. 1, 1963, at 65. In 1946, Dorothy Canfield Fisher included Williston in a series of biographical sketches of prominent Americans, along with the

And his memory lingers on. More than fifty years after his last article and more than eighty years after his most important work, Williston's name still appears on lists of the most widely-cited legal scholars.⁹ His doctrinal system remains the basis of our everyday law of contract; his insights provide the starting point for contemporary academic treatments of central theoretical issues: the bargain requirement,¹⁰ interpretation and the parol evidence rule,¹¹ and party autonomy.¹² Williston's views on the objective theory of contract are a staple of the first-year curriculum.¹³ One can safely say that every American lawyer has read, or at least heard, something about him.

Yet, paradoxically, for the last few decades the academic literature has not taken Williston's jurisprudence all that seriously. The cite count is high, but scholars have tended to look to Williston only in passing, referencing him when they have needed a source for some black-letter proposition or some point of legal history. In part, this indifference stems from the fact that most of Williston's work is of a doctrinal and case-oriented style that has fallen out of vogue.¹⁴ In large part, though, the academy's unwillingness to engage Williston has reflected the portrait of him left by later Realists like Grant Gilmore,¹⁵ whose *The Death of Contract* famously depicts Williston as a

likes of Dwight Eisenhower, Eleanor Roosevelt, and Robert Frost. DOROTHY CANFIELD FISHER, *AMERICAN PORTRAITS* 45 (1946).

9. See William M. Landes & Richard A. Posner, *Citations, Age, Fame, and the Web*, 29 J. LEGAL STUD. 319, 333, 336 (2000) (including Williston among legal scholars to whom World Wide Web and Lexis-Nexis searches found the most references); Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 425 (2000) (including Williston on a list of legal scholars cited between 1000 and 1500 times in legal and social science articles from 1956 to 1999).

10. See, e.g., Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1880–82, 1881 n.7 (2001) (stating that Williston and other classical contract scholars are responsible for the "framework" of "our current understanding of the [consideration] doctrine").

11. See, e.g., Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 199–202 (1998) (discussing Williston's approach to the parol evidence rule).

12. See, e.g., Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 58–60 (1995) (discussing Williston's views on freedom of contract).

13. See, e.g., THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* 451 (4th ed. 2004) (discussing Williston's objective approach); LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 362 (6th ed. 1996) (discussing the "strict objectivism of classical contract law" as evidenced by Williston); RICHARD E. SPEIDEL & IAN AYRES, *STUDIES IN CONTRACT LAW* 239 (6th ed. 2003) (discussing the objective theory of contracts).

14. See Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321 (2002) (noting that "[t]raditional doctrinal scholarship is disvalued at the leading law schools").

15. See KALMAN, *supra* note 5, at 25 (stating that later Realists "were less likely to know

reductive and dreary scribe.¹⁶ Over time, the conventional wisdom has lumped Williston together with the great villains of contemporary jurisprudence, the classical formalists, portraying him as a mindless reactionary obsessed with logic and conceptual abstraction.¹⁷ Even the much-touted "new formalism" of the 1990s tended to keep its distance from Williston, contrasting its empirical justifications with the essentialism of the classical model.¹⁸

In the last couple of years, however, scholars have begun to show a new respect for Williston's jurisprudence. Some of these scholars reject Gilmore's characterization and argue that elements of Williston's jurisprudence are both practical and sophisticated. For example, in an article in the *Yale Law Journal*, Alan Schwartz and Robert Scott attempt to restore a "Willistonian" approach to the interpretation of certain contracts between firms.¹⁹ In the absence of externalities, they argue, Willistonian formalism best suits the profit-

Williston . . . and more prone to attack [him] with great vigor"). On Gilmore's characterization as a Realist, see Dennis J. Hutchinson, *Remembering Grant Gilmore*, 6 GREEN BAG 2d 67, 71 (2002) (stating that Gilmore is rightly seen as a practitioner of Legal Realism).

16. See GRANT GILMORE, *THE DEATH OF CONTRACT* 14 (1974) [hereinafter GILMORE, *DEATH OF CONTRACT*] (stating that Williston "pieced together" the general theory of contract law "in meticulous, although not always accurate, scholarly detail"); see also Charles M. Yablon, *Grant Gilmore, Holmes, and the Anxiety of Influence*, 90 NW. U. L. REV. 236, 239 (1995) (discussing Gilmore's depiction of Williston). Gilmore had a mixed view of Williston. While Gilmore sometimes depicts Williston as "a plodding scrivener," Braucher, *supra* note 12, at 58, he also pays credit to Williston's ingenuity and technical expertise. See GILMORE, *DEATH OF CONTRACT*, *supra*, at 43 (alluding to Williston's "very considerable ingenuity"); *id.* at 59 (arguing that Williston and Corbin's "joint participation . . . insured the extraordinarily high technical quality" of the *Restatement of Contracts*); see also GRANT GILMORE, *THE AGES OF AMERICAN LAW* 134 n.12 (1977) [hereinafter GILMORE, *AGES*] (praising Williston as "the most ingenious system-builder in the history of our jurisprudence").

17. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 543 (1973) (stating that Williston's treatise "was, from the standpoint of legal or social thought, volume after volume of a heavy void"); *id.* at 593 (arguing that Williston's treatise lacked "any ethical, economic, or social notions whatsoever"); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 201 (1977) (arguing that Williston's formalism "disguise[d] gross disparities of bargaining power"); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 798 (2002) (arguing that Williston's "mindset" exemplified classical contract law's disinterest in real-world effects); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1591 (2001) (stating that Williston's "writings are wholly bereft of policy discussion").

18. See David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842-43 (1999) (distinguishing between "essentialist" formalism of the classical period and contemporary formalism); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 619 (1999) (distinguishing between modern and classical formalism); Robert E. Scott, *The Case For Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 851 n.11, 874 (2000) (distinguishing between old and new formalism).

19. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 549 (2003).

maximizing goals of commercial parties; as a result, his approach can serve as the foundation for a new "law merchant for our time."²⁰ Similarly, Todd Rakoff argues that Williston's work on contract interpretation "contains writing of considerable subtlety" that should "be treated as a legitimate part of the modern conversation."²¹ Some scholars actually embrace the conceptualism with which critics have charged Williston. For example, Peter Benson recently has set out to complete what he perceives to be Williston's central project—presenting a coherent, autonomous account of contract law that relies solely on the unifying principles implicit in legal doctrine.²²

What accounts for this renewed interest in Williston's jurisprudence? Part of the explanation lies in the cyclical nature of legal scholarship.²³ American contract law tends to fluctuate between formalist and nonformalist periods, and we live in something of a formalist moment.²⁴ In contrast to the scholarship of a generation or two ago, today's cutting-edge work in contracts values bright-line rules, objective interpretation, and freedom of contract. These were central themes of classical formalism as well, and it is only natural that, whatever their initial misgivings, today's new formalists should seek to learn more about the views of their academic ancestors.

In addition, there is a growing disquiet in the academy about the promise of contract theory. While the fundamental doctrines of contract law are not controversial, little agreement exists on their theoretical justification.²⁵ Numerous contenders have appeared—autonomy theories, consent theories, efficiency theories, pluralist theories, relational theories, and others—but no one theory has seemed capable of providing a satisfactory comprehensive account.²⁶ Even the most influential of these explanations, the law-and-

20. *Id.* at 550.

21. Todd D. Rakoff, *Introduction to Symposium: Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278, 1283 (2002).

22. Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW 118, 123–27 (Peter Benson ed., 2001).

23. See GILMORE, AGES, *supra* note 16, at 18 (noting "periodic swings toward and away from formalism" in "academic legal literature").

24. See Charny, *supra* note 18, at 842 (stating that contemporary commercial law is in a "phase of 'anti-antiformalism'"); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133 (1995) (arguing that contemporary contract law is "retreat[ing]" to the formalism of classical contract law).

25. See Benson, *supra* note 22, at 118 ("[T]he definitions of and mutual connections between the various principles of contract law are for the most part well-settled and no longer subject to controversy. . . . The same cannot be said, however, of efforts to understand the law at a reflective level.").

26. See *id.* (discussing the "multiplicity of competing theoretical approaches"). For excellent accounts of the various theories, see Randy E. Barnett, *A Consent Theory of Contract*,

economics model, may now have reached a point of diminishing marginal returns.²⁷ In light of this impasse, Williston's doctrinal scholarship, long ignored, seems worthy of a second look.

Finally, recent years have seen a surge of interest in classical jurisprudence generally.²⁸ There exists an important and growing collection of intellectual histories of late-nineteenth and early-twentieth century legal thinkers.²⁹ Much of this scholarship seeks to correct misconceptions about classicism, restoring subtleties that conventional depictions have suppressed.³⁰ For example, Burlette Carter, Bruce Kimball, William LaPiana, and Tony Sebok all offer new accounts of C.C. Langdell that highlight what the authors believe to be overlooked complexities in Langdell's work.³¹ Stephen Feldman explains apparent tensions in classicism through the framework of Aristotelian

86 COLUM. L. REV. 269, 271-91 (1986); Peter Benson, *Introduction*, in *THE THEORY OF CONTRACT LAW* 1, 4-18 (2001).

27. See, e.g., Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 829-30 (2003) (suggesting "skepticism about how much additional value economics has to offer to understanding contract law today").

28. For examples of works discussing classical jurisprudence, see generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 9-64 (1995); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* (1998); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 497-507 (2003); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 596-619 (1997); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 247-84 (2003); *Forum: Once More Unto the Breach: Late Nineteenth-Century Jurisprudence Revisited*, 20 LAW & HIST. REV. 541 (2002); *Forum: That Impecunious Introvert From New Hampshire: Re-Imagining Langdell*, 17 LAW & HIST. REV. 57 (1999).

29. For examples, see Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495 (1997); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577 (2002); Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215 (1995).

30. See, e.g., David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQUIRIES IN LAW 541, 541-42 (2003) (stating that "the late nineteenth-century scholars formed a . . . sophisticated American school of historical jurisprudence that merits further study"); *id.* at 546 (explaining that "the nineteenth-century scholars were much more sophisticated and complex than portrayed by the summary, and sometimes condescending, comments of their successors").

31. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE* 169 (1994) ("Langdell was neither intellectually perverse nor unimaginative, nor stupid."); ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 83-97 (1998) (rejecting the argument that Langdell "embraced transcendentalism"); W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 136 (1997) (rejecting the view that Langdell was "an inflexible formalist"); Bruce A. Kimball, *"Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57, 60-61 (1999) (arguing that certain "newly examined writings . . . call for a reconsideration of the conventional judgment about [Langdell's] intellectual work").

philosophy and maintains that Langdellians, in their rejection of natural-law explanations for legal rules, were America's first modernists.³² And, using the work of John Chipman Gray as an example, Stephen Siegel argues that, conventional critiques notwithstanding, most classical legal scholarship had a firm grounding in social norms.³³

The time is thus ripe for a rediscovery of Williston, for a thorough reexamination of his work. When one takes the time to read Williston, one sees that the conventional account presents an incomplete and distorted picture of his jurisprudence.³⁴ Although much of his work can strike a contemporary reader as arid and conceptual, there are strong elements of pragmatism as well. Williston tempers his emphasis on formal logic with a concern for the real-world effect of legal rules, his advocacy of economic individualism with a recognition of the need for some market regulation. Williston's work has more balance and nuance, and shows more continuity with contemporary contracts scholarship, than we commonly suppose.

For example, Williston is a formalist. He stresses the importance of coherent general principles, clear rules, and logical analysis.³⁵ But his jurisprudence is not essentialist. He does not argue that a proper metaphysical conception of contract requires formalism; indeed, a distrust for abstract speculation is a strong theme in his work.³⁶ Rather, Williston advocates formalism on pragmatic grounds. For him, formalism's appeal lies in the fact that it promotes the important everyday benefits of simplicity, predictability,

32. See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1434–38 (1997) (drawing an analogy between Aristotelian philosophy and Langdellian jurisprudence); *id.* at 1393 ("Langdellian legal scientists repudiated this premodern faith [in natural law principles] and instead began the characteristically modernist quest for an Archimedean point, a new ground for legal knowledge."); *id.* at 1441 (referring to Langdellians as "the first modernist American jurists").

33. See Siegel, *supra* note 17, at 1516–18 (stating that most classical scholars thought that law properly reflected social mores).

34. See Arthur J. Jacobson, *The Equitable Administration of Long-Term Relations: An Appreciation of Judge Clark's Opinion in Parev Products*, in JUDGE CHARLES EDWARD CLARK 45, 48 (Peninah Petruck ed., 1991) (noting that "[t]he story the neoclassicists told of . . . Williston was often mistaken").

35. See, e.g., SAMUEL WILLISTON, LIFE AND LAW 213–14 (1941) (arguing for "broad[] generalizations and syntheses" as well as logical coherence in law).

36. See, e.g., *id.* at 203 (discussing the danger posed by abstract inquiry in law); *id.* at 207 ("[Law] is a practical profession and must be carried on by lawyers . . . rather . . . than metaphysicians."); SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW 127–28 (photo. reprint 1986) (1929) (stating that law is a "pragmatic science" that "can rarely deal with the absolute").

and comprehensibility.³⁷ Moreover, Williston understands that practical concerns may require courts to forgo formalism on occasion. Although he is reluctant to depart too quickly from logic, Williston recognizes that legal rules can have only presumptive effect and that they must sometimes take a back seat to what he calls "practical convenience."³⁸ "[L]aw is made for man," he chides, "not man for the law."³⁹

Similarly, the conventional portrayal of Williston as a reactionary is simplistic.⁴⁰ Though he is an economic individualist—in his autobiography, Williston writes that he formed his political beliefs on the philosophy of Benjamin Franklin, the person he considers "the most interesting American"—he is not doctrinaire about it.⁴¹ Williston criticizes other formalists for refusing to acknowledge that legal rules must evolve in light of changing social conditions,⁴² and he himself occasionally espouses positions that are "mildly liberal" in early twentieth-century terms.⁴³ For example, in his statutory drafting, he rejects what he considers to be "the more obviously barbarous applications" of *caveat emptor*.⁴⁴ Similarly, in an article titled *Freedom of Contract*, Williston criticizes the *Lochner* Court for endorsing an extreme version of liberty of contract and for refusing to uphold reasonable public

37. WILLISTON, *supra* note 35, at 213; see Samuel Williston, *Change in the Law*, 69 U.S. L. REV. 237, 239–40 (1935) (arguing that law must be clear, predictable, and logically coherent).

38. 3 WILLISTON, *supra* note 2, § 1321, at 2373 ("It may be conceded that practical convenience is of more importance than logical exactness, but yet the considerations of practical convenience must be very weighty."); Samuel Williston, Book Review, 35 HARV. L. REV. 220, 221 (1921) [hereinafter Williston, *Book Review*] (reviewing SIR FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT* (9th ed. 1921)) ("No one will dispute that logic should be the servant not the master of practical convenience.").

39. 1 WILLISTON, *supra* note 2, § 119, at 256.

40. See Allen D. Boyer, *Samuel Williston's Struggle With Depression*, 42 BUFF. L. REV. 1, 23 (1994) (noting that "[t]here is . . . little which is reactionary about [Williston's] philosophy").

41. WILLISTON, *supra* note 35, at 323; see also *id.* at 335 (discussing his belief in "the theories of Emerson and Franklin"). Williston claimed to read "every new biography of [Franklin] and also much that he wrote." *Id.* at 323. For more on Williston's economic individualism, see Samuel Williston, *The Law School*, HARV. L. SCH. BULL., July 1948, at 5 (discussing the political economy of the Harvard Law faculty in the 1890s).

42. WILLISTON, *supra* note 35, at 200.

43. Harold C. Havighurst, Book Review, 48 YALE L.J. 352, 354 (1938) (reviewing SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* (1936)); see also Edwin W. Patterson, Book Review, 30 COLUM. L. REV. 908, 908 (1930) (reviewing SAMUEL WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* (1929)) (stating that Williston's "present" views are "liberal" in twentieth-century terms). Williston, wrote Havighurst, "is a conservative only in the sense in which Holmes was a liberal." Havighurst, *supra*, at 354.

44. Samuel Williston, *Rescission For Breach of Warranty*, 16 HARV. L. REV. 465, 475 (1903).

health regulations and other Progressive legislation.⁴⁵ Williston does not oppose reform in itself; he simply believes that legislatures, not courts, should bear responsibility for social change. One can thus explain Williston's conservatism as principally an institutional point—compared to legislatures, courts lack the information and expertise necessary to engage in beneficial social experimentation.⁴⁶

In his insistence that law be justified on the basis of real-world effects, his rejection of metaphysics, his belief that rules can have only presumptive force, and his institutional explanations for judicial restraint, Williston shares much in common with today's new formalists—more than the conventional account would lead us to suppose.⁴⁷ Although Williston differs on the value of systematic jurisprudence and the determinacy of doctrine, he shares with contemporary scholars the conviction that one must ultimately defend law, not in terms of internal coherence, but in terms of conformity to beneficial social policy. In his fundamentally pragmatic approach, Williston resembles the new formalists more than he does classicists like Langdell and their relatively few modern counterparts.⁴⁸

In one important respect, though, the conventional account portrays Williston correctly. Williston's jurisprudence strikes a contemporary academic reader as greatly undertheorized. Much of his writing—his treatment of contract remedies, which Fuller and Perdue famously critiqued, is a notable example—simply details the workings of black-letter rules; policy justifications are nowhere to be found.⁴⁹ Moreover, when Williston does make policy arguments, he tends to limit himself to shorthand references, pointing out that a rule does or does not comport with undefined notions of "inherent justice"⁵⁰ or

45. Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 375–77 (1921).

46. For a similar point by a contemporary law-and-economics scholar, see MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 248–50 (1993) (discussing the reasons why courts in contract cases lack the capacity to address larger societal issues).

47. For thoughtful pieces distinguishing the new formalism from classical formalism, see Grey, *supra* note 28, at 499; Thomas C. Grey, *The New Formalism* 28, at http://papers.ssrn.com/paper.taf?abstract_id=200732 (Sept. 6, 1999) [hereinafter Grey, *New Formalism*] (unpublished manuscript, on file with the Washington and Lee Law Review).

48. See Grey, *New Formalism*, *supra* note 47, at 28 (contrasting the essentialism of classical formalism with the pragmatism of the newer version).

49. See Benson, *supra* note 25, at 2 (discussing Fuller and Perdue's critique of Williston's treatment of the expectation interest).

50. See, e.g., 3 WILLISTON, *supra* note 2, § 1510, at 2686 (explaining the "inherent justice" of liability for honest misrepresentation); Samuel Williston, *The Law of Contracts Since the Restatement*, 23 A.B.A. J. 172, 172 (1937) (discussing the "unjust conclusion" that courts properly have tried to avoid in cases regarding the revocation of offers).

"practical convenience."⁵¹ These vague allusions can strike a contemporary academic reader as unsatisfying, even banal.⁵²

The lack of delineation makes a certain amount of sense, however, once one appreciates Williston's goals and intended audience. Unlike today's academics, who write principally for the community of other scholars, Williston directs his work primarily towards commercial lawyers and their clients.⁵³ Such people, who must understand law on an operational level, have relatively little interest in theoretical accounts.⁵⁴ They want a comprehensible, predictable set of rules by which to plan their transactions, and they are much more comfortable than scholars with common-sense appeals to rough justice; they rely on such intuitive judgments all the time.⁵⁵ Indeed, more complicated explanations of law's effects, or more controversial accounts of law's justifications, can create obstacles for people in business. As Richard Posner argues, everyday commerce depends on the ability of parties to displace debates about "deep issues" that have little practical payoff and that can "disrupt and even poison commercial relations among strangers."⁵⁶

Indeed, Williston's jurisprudence has some surprising affinities with what Posner calls "everyday pragmatism" in law.⁵⁷ Although this approach does not deny the possibility of richer explanations of law—as discussed below, Williston has some good things to say about sociological jurisprudence and the law-in-action school, the predecessors of today's empirical jurisprudence—it treats them as basically beside the point.⁵⁸ It views contract law principally as a rough-and-ready device to help practical people achieve their commercial goals with elementary justice.⁵⁹ This approach cannot satisfy all intellectual

51. See, e.g., 3 WILLISTON, *supra* note 2, § 1307, at 2357 (discussing "claims of practical convenience" regarding doctrine of anticipatory breach); Samuel Williston, *Liability For Honest Misrepresentation*, 24 HARV. L. REV. 415, 436 (1911) (rejecting the argument that "practical convenience" requires treating misrepresentation as part of negligence law).

52. Cf. Posner, *supra* note 27, at 831 (arguing that, from the perspective of contemporary scholarship, the economic insights of earlier scholars "seem banal").

53. Cf. Posner, *supra* note 14, at 1320–21, 1324 (explaining that earlier legal scholarship was directed at judges and lawyers, while contemporary legal scholarship is intended to be read primarily by other professors).

54. See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 41 (2003) (arguing that certain legal theory "has little to contribute to law at the operational level").

55. See Posner, *supra* note 14, at 1319 (noting tendency of lawyers and judges to "toss around" ideas like "'fairness' and 'justice' . . . as if they were perfectly intuitive").

56. POSNER, *supra* note 54, at 12.

57. *Id.* at 49.

58. See *infra* notes 426–43 and accompanying text (discussing Williston's views on sociological jurisprudence and law-in-action).

59. See POSNER, *supra* note 54, at 49–56 (discussing everyday pragmatism).

ambitions about law; indeed, intellectual modesty is one of its hallmarks.⁶⁰ But it does have the benefit of conforming to the perceptions most Americans have about the proper ends of the legal system.⁶¹ Indeed, the everyday pragmatism of Williston's jurisprudence reflects some of the most identifiable and enduring American values—the values of that "most interesting American," Benjamin Franklin⁶²—individualism, practicality, and common sense. In rediscovering Williston, we rediscover some of the most fundamental assumptions of our commercial republic.⁶³

This Article proceeds as follows. Part II begins with a brief survey of Williston's career and then shows how, in the conventional account, Williston's work differs from today's contracts scholarship. Part III restores a more correct and balanced version of Williston's jurisprudence. It explores Williston's rejection of essentialism, his belief in the presumptive nature of legal rules, and his moderate and institutional approach to freedom of contract. It also discusses the undertheorized quality of much of Williston's scholarship and argues that Williston's reliance on intuitive justifications for legal rules makes sense in light of his goals and intended audience. Throughout, Part III addresses a variety of problems in contract theory that continue to inspire heated debate today: the bargain requirement and promissory estoppel, the objective theory of interpretation, the proper scope of party autonomy, and the value of empirical research.

II. Williston and the New Formalism

A. Williston's Career

Samuel Williston arrived at Harvard Law School as a first-year student in the fall of 1885, and, with a few brief interruptions, he remained there for the rest of his long career.⁶⁴ The case-study method that Dean C.C. Langdell had introduced at Harvard was still controversial in 1885; indeed, Williston had hesitated to go to Harvard because he feared that his education there would be too impractical.⁶⁵ Whatever his initial reservations, though, Williston thrived at

60. *Id.* at 49–50.

61. *Id.* at 50.

62. WILLISTON, *supra* note 35, at 323.

63. See POSNER, *supra* note 54, at 11–12, 49–50 (discussing the values of everyday pragmatism).

64. WILLISTON, *supra* note 35, at 71.

65. *Id.*

Harvard. He became a member of the first board of editors of the *Harvard Law Review* and earned extraordinarily high grades, graduating at the top of his class in 1888.⁶⁶ After graduation, in a pattern that would become standard for aspiring law professors, Williston spent a year as a law clerk to Supreme Court Justice Horace Gray and did a short stint as an attorney in a Boston firm.⁶⁷ He returned to Harvard to join the faculty as an assistant professor in the fall of 1890 at the age of twenty-nine.⁶⁸

For the next sixty years, Williston actively pursued a life of teaching, scholarship, and occasional practice. Like many law professors, Williston developed his specialty more or less by accident. Two first-year courses were open at Harvard in the fall of 1890, torts and contracts, and a senior colleague chose torts.⁶⁹ Williston quickly developed a reputation as one of the ablest and most engaging teachers on the Harvard faculty, a reputation he kept throughout his career.⁷⁰ Though his method was Socratic, he was by all accounts genuinely respectful of students, avoiding histrionics and cheap appeals to authority.⁷¹ Indeed, a concern for students features strongly in his jurisprudence. As I discuss further below, Williston favored formalism in part because of what he saw as its pedagogical advantages.⁷²

Still, Williston's impact on American law primarily came, not through his teaching, but through his scholarship and statutory drafting. The length of his academic career alone is staggering. His first piece as a professor, a treatment of a bankruptcy question, appeared in 1891;⁷³ his last, an article opposing the

66. *Id.* at 83, 87; see also Austin Wakeman Scott, Book Review, 54 HARV. L. REV. 352, 353 (1940) (reviewing SAMUEL WILLISTON, *LIFE AND LAW* (1940)) (discussing Williston's class rank at Harvard Law School); Bruce Wyman, *Samuel Williston, Professor of Law*, 23 GREEN BAG 613, 613 (1911) (discussing Williston's student days at Harvard Law School).

67. WILLISTON, *supra* note 35, at 87–101 (discussing his clerkship); *id.* at 107–28 (discussing his time as an attorney).

68. Wyman, *supra* note 66, at 614. Williston was appointed an assistant professor without the customary probationary period as instructor. *Id.*

69. WILLISTON, *supra* note 35, at 132.

70. For examples of the numerous tributes to Williston's teaching ability, see ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 201, 216–17, 221 (1967), and Felix Frankfurter, *Samuel Williston: An Inadequate Tribute to a Beloved Teacher*, 76 HARV. L. REV. 1321, 1322–23 (1963).

71. See Scott, *supra* note 66, at 352 (discussing Williston's teaching methods).

72. See KALMAN, *supra* note 5, at 46–47 (noting that Williston favored formalism because it "taught students to think clearly and logically").

73. Samuel Williston, *Can An Insolvent Debtor Insure His Life for the Benefit of His Wife*, 25 AM. L. REV. 185 (1891). Williston wrote two pieces as a student: Williston, *Note*, *supra* note 1, and Samuel Williston, *Note, History of the Law of Business Corporations Before 1800* (pts. 1 & 2), 2 HARV. L. REV. 105 (1888).

UCC, appeared in 1950 when Williston was eighty-eight years old.⁷⁴ All told, Williston wrote more than fifty articles covering the fundamental doctrines of contract law, including offer and acceptance, consideration, interpretation, defenses, and remedies.⁷⁵ In addition, he wrote or edited eighteen casebooks and produced several treatises on commercial law subjects like bankruptcy and negotiable instruments.⁷⁶ Two of these treatises, the 1909 work on sales⁷⁷ and the monumental 1920 work on contracts,⁷⁸ brought him particular acclaim. The five-volume contracts treatise was especially influential and quickly became a standard source both in the courts and the academy.⁷⁹

Williston's activities as a statutory drafter also had great influence. Along with others at the turn of the twentieth century, Williston perceived that the diversity of state commercial laws posed an impediment to national economic development.⁸⁰ He was unwilling to assign a general regulatory power to the federal government, though.⁸¹ Rather than create a new "bureaucracy" in Washington, Williston argued that lawyers should convince state governments to adopt uniform legislation on commercial subjects,⁸² and he devoted a great deal of his career to drafting and lobbying for such laws.⁸³ He turned out to be extremely able at it, producing model statutes on sales, warehouse receipts, bills of lading, and stock certificates.⁸⁴ Even his harsh critic Grant Gilmore

74. Williston, *Law of Sales*, *supra* note 1; see also Erwin N. Griswold, *Samuel Williston—1861–1963*, 76 HARV. L. REV. 1324, 1325 (1963). Williston was still regularly working in his office at age ninety. *Professor Williston Feted By Faculty; Spends Ninetieth Birthday At His Desk*, THE HARV. L. SCH. RECORD, Oct. 3, 1951, at 1.

75. Melvin I. Urofsky, *Entry on Samuel Williston*, DICT. AM. BIO. 791, 792 (John A. Garraty ed., Supp. 7, 1961–1965); see also HARVARD LEGAL ESSAYS, WRITTEN IN HONOR OF, AND PRESENTED TO JOSEPH HENRY BEALE AND SAMUEL WILLISTON 548–51 (1934) (listing Williston's articles).

76. Urofsky, *supra* note 75, at 792.

77. SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* (1909).

78. WILLISTON, *supra* note 2.

79. Urofsky, *supra* note 75, at 792.

80. See WILLISTON, *supra* note 35, at 217 (arguing that varying state commercial rules caused "expense" and "annoyance"); see also WILLISTON, *supra* note 36, at 74–75 (arguing that "interference with business by differences of law in the several States is a matter of serious importance").

81. "[U]nless the entire framework of our government is changed," he believed, "most of what is known as private law must remain the separate law of each individual state." WILLISTON, *supra* note 35, at 217. Williston did help draft a federal statute on bills of lading in interstate commerce, known as the Pomerene Act after its Senate sponsor. *Id.* at 225.

82. *Id.* at 217–18.

83. *Id.* at 217–29.

84. Urofsky, *supra* note 75, at 792.

conceded that Williston was "one of the best statutory draftsmen . . . ever."⁸⁵ By one estimate, at least thirty-six states adopted statutes that Williston had written.⁸⁶

Williston's work as Reporter on the influential Restatement of Contracts is well known. The American Law Institute (ALI) began compiling its restatements of the law in the early 1920s, and Williston, fresh off his work on the contracts treatise, was an enthusiastic participant in the project.⁸⁷ Williston believed that American case law had become dangerously complex and difficult for lawyers to research; the Restatement could help ameliorate the problem by setting forth the rules in a simple and comprehensive way.⁸⁸ The Restatement project drew sharp criticism from Realist critics who derided what they saw as the project's conceptualism and bias against reform.⁸⁹ For Williston, though, the Restatement's appeal lay precisely in its moderation. Less rigid than a legislative code, the Restatement could both harmonize conflicting precedents and allow room for future growth in the law.⁹⁰ It is worthwhile to note that Williston chose the Progressive Arthur Corbin as his assistant on the project⁹¹ and that, the conventional wisdom notwithstanding, Williston championed the Restatement's major innovation in contract law, Section 90's version of the doctrine of promissory estoppel.⁹²

85. GILMORE, AGES, *supra* note 16, at 134 n.12.

86. Urofsky, *supra* note 75, at 792.

87. See TWINING, *supra* note 5, at 273–74 (describing the genesis of the Restatement project); WILLISTON, *supra* note 35, at 310–11 (same).

88. See WILLISTON, *supra* note 35, at 309–11 (discussing Restatement project).

89. See, e.g., GILMORE, DEATH OF CONTRACT, *supra* note 16, at 58–59 (arguing that "the Restatement project" was "a reaction of the legal establishment of the time to the attack of the so-called legal realists"); WIECEK, *supra* note 28, at 199 (discussing Realist objections to the Restatement project).

90. See WILLISTON, *supra* note 36, at 94–95, 99, 104–05 (discussing the purposes and goals of the Restatement).

91. TWINING, *supra* note 5, at 397 n.31; see also Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 B.U. L. REV. 511, 519–21 (1990) (explaining the reasons for Williston's choice of Corbin).

92. Cf. ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 45–47 (1997) (discussing Williston's role in the debates surrounding Section 90's adoption). For more on Williston and promissory estoppel, see *infra* text accompanying notes 269–99.

B. *Williston and the New Formalism*

For most of his career, Williston received nearly universal recognition as America's preeminent contracts scholar. Lawyers and academics repeatedly described his work as authoritative, even "epochal."⁹³ Even Progressives and some early Realists went out of their way to praise Williston's erudition and intellectual honesty.⁹⁴ For example, in his review of the 1920 contracts treatise, Arthur Corbin applauded the fact that Williston had refused to "dodge the hard questions or gloss them over with specious distinctions. We may differ with him in his conclusions occasionally, but it will never be because he has failed to present the facts and the arguments with intellectual honesty."⁹⁵ Realist Walter Wheeler Cook acknowledged the immense undertaking that the treatise represented and praised Williston's "patience," "thoroughness," and "sanity."⁹⁶

93. Herman W. Oliphant, Book Review, 19 MICH. L. REV. 358, 360 (1921) (reviewing SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920)).

94. To be sure, some Realist critics did allege that Williston was too quick to dismiss as aberrations cases that did not fit within his doctrinal scheme. For example, Cook famously argued that Williston failed to pay sufficient attention to cases holding that the mailbox rule did not apply to life insurance policies. Walter Wheeler Cook, *Williston on Contracts*, 33 ILL. L. REV. 497, 511–15 (1939) (reviewing SAMUEL WILLISTON & GEORGE J. THOMPSON, *THE LAW OF CONTRACTS* (1936–1938)); see also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 46 & n.169 (1983) (discussing Cook's critique); Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 3–5 (1939) (reviewing SAMUEL WILLISTON & GEORGE J. THOMPSON, *THE LAW OF CONTRACTS* (1936–1938)) (arguing that Williston "rejected as freaks far too many cases which are really significant"). But these critics did not accuse Williston of dishonesty; they alleged, simply, that in certain instances Williston placed too much emphasis on doctrinal certainty at the expense of evolving caselaw. See Cook, *supra*, at 514 (stating that Williston failed to recognize "the complexity of the law of contracts"); Fuller, *supra*, at 5 (arguing that the failure to consider cases "which do not fit into its systematics" is the "most serious defect" in Williston's contracts treatise). For more on Williston's willingness to accept doctrinal change, see *infra* notes 310–32 and accompanying text.

95. Arthur L. Corbin, Book Review, 29 YALE L.J. 942, 942 (1920) (reviewing SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920)).

96. Walter Wheeler Cook, Book Review, 21 COLUM. L. REV. 395, 398 (1921) (reviewing SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920)). Interestingly, in light of what was to become one of the principal charges against him, both Corbin and Cook faulted Williston's treatise for being insufficiently analytical. Both believed that the treatise would have been improved by a more rigorous application of Hohfeldian terminology—a more careful distinguishing "between facts and their legal consequences, between the different meanings given to the word right, etc." *Id.*; see also Walter Wheeler Cook, Book Review, 20 COLUM. L. REV. 716, 716 (1920) (reviewing SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920)); Corbin, *supra* note 95, at 942. Another Realist, Herman Oliphant, had a similar critique. Oliphant, *supra* note 93, at 358 (arguing that "the value of the book would have been added to if, by a judicious use of more incisive terminology, sharper distinctions had been made"). For more on Williston's views of Hohfeldian analysis, see *infra* notes 418–25 and accompanying text.

Karl Llewellyn dedicated a casebook to Williston as "the maker and builder of our law of Sales."⁹⁷

But Williston lived a long time, long enough to see his reputation start to decline. As the twentieth century progressed, critics began to paint a much more negative picture of Williston and his scholarship. In part, the change can be explained by the fact that fewer of the critics actually knew him. As Laura Kalman points out, later Realists who never had a personal relationship with Williston were more prone to attack him.⁹⁸ But more than lack of acquaintance explains the changing treatment. The Realists became increasingly scathing in their denunciations of classical formalism as years passed, and Williston, who had written the most important contracts treatise and had worked as Reporter on the Restatement, served as a convenient target. The Realists' intellectual heirs picked up the charge,⁹⁹ and over time the critiques have hardened into a conventional wisdom about Williston. The academy has come to view Williston as more or less interchangeable with Langdell and other classicists, and, as such, qualitatively different from today's new formalists.¹⁰⁰

The conventional wisdom holds that Williston differs from the new formalists in four important and related ways. First, Williston allegedly takes an essentialist view of contract law. That is, Williston joins other classicists in believing that "contract" is, philosophically speaking, a concept with an essence, an irreducible descriptive and normative core.¹⁰¹ Under this view, contract law consists of a set of axioms that follow from a true understanding of that essence and a set of rules that follow from the axioms.¹⁰² Some writers

97. KALMAN, *supra* note 5, at 25 (internal quotations omitted).

98. *Id.*

99. See Joseph Perillo, *Samuel Williston*, in *THE OXFORD COMPANION TO AMERICAN LAW* 839 (2002) (discussing how "[m]embers of the critical legal studies movement demonized" Williston in the 1960s and 1970s).

100. As one commentator has observed, "[m]uch of Williston's reputation . . . involves the attribution of guilt by association." Boyer, *supra* note 40, at 3. For recent examples of the tendency to equate Williston and Langdell, see Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 *DENV. U. L. REV.* 661, 666 (1998) (characterizing Williston as "very Langdellian"); Grey, *supra* note 28, at 501 (arguing that Williston was "Langdellian in approach"); and Knapp, *supra* note 17, at 766, 798 (stating that Williston and Langdell both exemplified classical contract analysis).

101. See Charny, *supra* note 18, at 842 (discussing the essentialism of classical contract law); Grey, *supra* note 94, at 48-49 (same).

102. See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 *CAL. L. REV.* 1743, 1751 (2000) (arguing that classicists "conceived contract law as a small set of core doctrines—axioms—that were justified on the ground that they were self-evident, and as a larger set of doctrines that were justified largely on the ground that they could be deduced from the axioms").

portray Williston's essentialism as Platonic, as positing the real existence of the concept of contract in some independent realm of abstract forms.¹⁰³ Others portray Williston's essentialism as more Aristotelian, as holding that the concept of contract does not have an independent existence but somehow inheres in real-world transactions.¹⁰⁴ Either way, the key point is that contract law draws its justification from its conformity with a proper understanding of contract *as a concept*, without regard to the practical effect contract law has in terms of efficiency or other values.¹⁰⁵

To make this discussion more concrete, consider the most famous example of essentialism in classical contract law, an example that comes, not from Williston, but from Langdell.¹⁰⁶ Under the familiar "mailbox rule," an acceptance of an offer made by correspondence is effective immediately upon dispatch—at the moment the offeree puts the acceptance out of his or her control—even if the offeror has not yet received it.¹⁰⁷ Langdell rejected this rule.¹⁰⁸ To him, the essence of contract lay in the concept of promise, and the essence of promise lay in communication to the promisee.¹⁰⁹ A promise that the promisee had not received was, by definition, not a promise at all; thus, an acceptance could take effect only upon receipt by the offeror.¹¹⁰ Langdell recognized that there might be practical arguments for the mailbox rule. He noted that judges had "claimed that purposes of substantial justice, and the interests of contracting parties as understood by themselves, [would] be best served by holding that the contract is complete the moment the letter of

103. See Knapp, *supra* note 17, at 798 (suggesting that Williston believed that "judicially-created 'law' . . . descend[s] from some Platonic realm of disinterested abstraction").

104. See Feldman, *supra* note 32, at 1435–38 (discussing analogies between classical legal scholarship and Aristotelian philosophy). For more on Aristotelian philosophy and its application to private law, see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 19, 56–83 (1995); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 977–85 (1988).

105. See Eisenberg, *supra* note 102, at 1750 (explaining that classical contract law maintained that fundamental doctrines were self-evident and allowed "no room" for "justifying doctrinal propositions on the basis of moral and policy propositions").

106. For good discussions of this example, see *id.* at 1750, 1751; Grey, *supra* note 94, at 3–4.

107. See E. ALLAN FARNSWORTH, *CONTRACTS* § 3.22 (3d ed. 1999) (discussing "[c]ontracts by [c]orrespondence").

108. See C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 15 (2d ed. 1880) (arguing that "[t]he acceptance . . . must be communicated to the original offeror, and until such communication the contract is not made").

109. See *id.* (arguing that "communication to the offeree is of the essence of every offer").

110. See Grey, *supra* note 94, at 4 (discussing Langdell's views regarding the mailbox rule).

acceptance is mailed," and that some had posed cases showing that Langdell's approach "would produce not only unjust but absurd results."¹¹¹ For an essentialist like Langdell, though, these practical arguments were "irrelevant."¹¹² Once one understood the true nature of a promise, nothing else could matter.

A few formalists today, most notably Benson and Weinrib, continue to embrace a kind of essentialism in contract law.¹¹³ But most new formalists reject essentialism. They advocate formalism, not because it coheres with abstract concepts like "contract" and "promise," but because it advances important pragmatic values like certainty, stability, and efficiency.¹¹⁴ For example, Lisa Bernstein writes that formalist adjudication by private arbitral regimes benefits contracting parties by promoting clarity and predictability.¹¹⁵ A comprehensive set of bright-line rules, she argues, reduces transaction costs and makes misunderstandings less likely.¹¹⁶ Moreover, if disputes do arise, a formalist approach improves the chances of settlement "by making arbitral outcomes relatively predictable."¹¹⁷ Similarly, Schwartz and Scott advocate formalist interpretation of certain business contracts, at least as a default position, as a means of promoting efficiency.¹¹⁸ They believe that a plain-meaning approach, coupled with a "hard" version of the parol evidence rule and strict enforcement of merger clauses, best suits the presumed goals of contracting parties—maximizing the joint gains from transactions.¹¹⁹

Second, Williston allegedly shares the classicists' belief in the ineluctability of legal rules. Classicism taught that judges should apply common law doctrines with relentless logic, without allowing for any

111. LANGDELL, *supra* note 108, at 20–21.

112. *Id.* at 21. Langdell did go on to demonstrate that, assuming practical arguments were relevant, he could muster some in favor of his own position. *Id.*

113. See, e.g., Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 70–93 (2003) (discussing punitive damages and disgorgement of gains in terms of corrective justice). See generally Benson, *supra* note 22, at 123–25 (describing a "public and non-foundational" approach to contract law).

114. See Grey, *New Formalism*, *supra* note 47, at 4, 28–29 (discussing the pragmatic nature of the new formalism).

115. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735–44 (2001) (describing and discussing advantages of formalist approach of cotton industry arbitration tribunals).

116. *Id.* at 1741–42.

117. *Id.* at 1742.

118. Schwartz & Scott, *supra* note 19, at 547.

119. *Id.*; see also *id.* at 544–46 (discussing the authors' "efficiency theory").

exceptions based upon new social propositions or the harshness of particular results.¹²⁰ For example, classical contract law held that promises unsupported by consideration—gift promises—were unenforceable.¹²¹ As a result, a court should not enforce a gift promise even in circumstances where the promisee reasonably had relied on the promise to his detriment.¹²² People might recoil at the idea that a promisee would have to bear the loss in these circumstances, but a court could not ignore the rule about gift promises simply because the rule led to a harsh or unfair result.¹²³ Just as classicists denied the role of real-world concerns in the formulation of legal rules, they denied the role of real-world concerns in the application of rules as well.

By contrast, the new formalists believe that legal rules have merely presumptive force.¹²⁴ They argue that when pragmatic or ethical considerations counsel strongly against the application of a rule in a particular case, a court should not insist on applying the rule.¹²⁵ For example, Frederick Schauer endorses a "new" version of formalism that he calls "presumptive positivism."¹²⁶ Under this approach, legal rules create "presumptive rather than absolute" constraints for courts, "thereby . . . allowing for the possibility of override in particularly exigent circumstances."¹²⁷ Similarly, Randy Barnett's "consent theory" of contract relies heavily on presumptions in explaining the proper limits of objective interpretation and the role of contract defenses.¹²⁸

120. Eisenberg, *supra* note 102, at 1752–53 (criticizing this aspect of classical legal reasoning).

121. I draw this example from Eisenberg. *See id.* (discussing "donative promises").

122. *See* FARNSWORTH, *supra* note 107, § 2.19, at 91 (discussing the traditional rule).

123. *See* Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841, 846 (1990) (noting that the traditional rule "ignored the promisor's role in inducing reliance and unjustifiably allowed promisors to avoid responsibility for consequences that they knew were likely to result from their actions").

124. *See* Grey, *supra* note 28, at 499 (discussing the "presumptive" nature of contemporary formalism).

125. *See id.* (noting that Justice Scalia "admits to being a 'faint-hearted' (meaning only presumptive) formalist overall: Considerations of acceptability can override all the formal virtues when their demands are insistent enough"); *see also* Grey, *New Formalism*, *supra* note 47, at 4 (discussing how Scalia's writings indicate that "rule-of-law virtues . . . have only presumptive controlling force on judges"); *id.* at 23 (discussing how, for new formalists, principles serve as "presumptions, rather than as rules that must dictate results when they apply").

126. FREDERICK SCHAUER, *PLAYING BY THE RULES* 197, 203 (1991); *see also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 546–48 (1988) (discussing "presumptive formalism" and suggesting it be called "presumptive positivism").

127. SCHAUER, *supra* note 126, at 196.

128. Barnett, *supra* note 26, at 307–19 (describing the role of presumptions in consent theory).

While the parties' consent makes out a prima facie case of contractual obligation, Barnett argues, the case may be rebutted by a showing of circumstances, generally coterminous with traditional contract defenses, that deprive that consent "of its normal moral, and therefore legal, significance."¹²⁹

Third, Williston's defense of freedom of contract allegedly sets him apart from the new formalists. Here again, the conventional wisdom draws a distinction between Williston's essentialism and the pragmatism of contemporary scholarship. According to the conventional wisdom, Williston shares the classical belief that freedom of contract is a conceptual imperative, a principle that follows necessarily from an understanding of contracts' true nature.¹³⁰ This essentialism supposedly leads Williston to reject all limits on party autonomy, even limits based on health and safety grounds—to endorse, along with other classicists, the *Lochner* Court's holding that the Constitution prohibits legislation that interferes with parties' right to contract on terms they see fit.¹³¹ The association with *Lochner* casts a reactionary taint on Williston, and in fact some scholars have suggested that Williston's essentialism masks an anti-egalitarian bias. For example, Morton Horwitz writes that Williston's objective theory of contracts acts to "disguise gross disparities of bargaining power under a facade of neutral and formal rules."¹³²

By contrast, contemporary defenses of freedom of contract tend to rely on functional arguments. Most of these defenses come from the law-and-economics perspective and stress the efficiency gains that result from honoring party autonomy.¹³³ Contracts increase efficiency by allowing parties to trade goods and services to other parties who value them more highly.¹³⁴ As a result, law-and-economics scholarship teaches, society generally should refrain from interfering with parties' choices, for example, by prescribing minimum wage terms in employment contracts.¹³⁵ Society can better address distributional

129. *Id.* at 318.

130. See Mooney, *supra* note 24, at 1133 (discussing the "classical, conceptualist ethic emphasizing . . . 'freedom of contract' and marketplace economics").

131. See Grey, *supra* note 28, at 494–96 (discussing the "canonical" connection between Langdellism and *Lochnerism*). For further discussion of *Lochner v. New York*, 198 U.S. 45 (1905), see *infra* notes 303–04, 307–08 and accompanying text.

132. HORWITZ, *supra* note 17, at 201.

133. See F.H. Buckley, *Introduction to THE FALL AND RISE OF FREEDOM OF CONTRACT* 1, 7 (F.H. Buckley ed., 1999) ("[T]he intellectual revival of freedom of contract has been led by scholars in the law-and-economics tradition.").

134. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 71–72 (1995) (discussing economics of voluntary exchange).

135. See *id.* at 88 (arguing that it is "unwise" for the state to impose minimum wage laws).

concerns through tax-and-transfer measures.¹³⁶ Law-and-economics scholarship does accept regulations that weed out contracts that do not reflect real choice—contracts based on deception or threats, for example—as well as contracts that involve some market failure, such as the presence of externalities.¹³⁷ Generally speaking, though, most law-and-economics scholars hold that the efficiency losses that result from broader limitations on party autonomy outweigh the benefits.¹³⁸

One important strand of law-and-economics scholarship addresses freedom of contract from the point of view of institutional competence. This scholarship, too, relies on pragmatic arguments. In his influential book, *The Limits of Freedom of Contract*, Michael Trebilcock dismisses abstract inquiries into the proper scope of party autonomy.¹³⁹ Such inquiries involve the balancing of a multitude of conflicting social values and are thus likely to be unsuccessful. Rather, scholars should focus on a more practical question, namely, determining which government actor seems most likely to reach an appropriate balance among these many social values.¹⁴⁰ For example, Trebilcock writes, courts typically lack the information and expertise necessary to engage in a sensitive evaluation of social conditions. As a result, courts typically should refrain from invalidating private transactions on the basis of wider social values.¹⁴¹ Regulators, by contrast, are more likely to have "an appropriately systemic perspective."¹⁴² They are thus better equipped than courts to identify those market failures, such as information asymmetries and collective-action problems, that may justify invalidating private agreements.¹⁴³

Finally, in today's terms, Williston's work seems strikingly undertheorized.¹⁴⁴ Like other classical scholars, Williston devotes himself

136. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (3d ed. 2003) (stating that "redistribution through the government's tax and transfer system may be cheaper and is likely to be more precise").

137. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 40–43 (3d ed. 2000) (discussing market failures); EPSTEIN, *supra* note 134, at 80–82 (discussing standard contract defenses like misrepresentation and duress).

138. See, e.g., EPSTEIN, *supra* note 134, at 82–89 (rejecting attempts to expand traditional limitations on freedom of contract to cover more intrusive regulation of bargains); Buckley, *supra* note 133, at 11 (noting that law and economics scholars have rebutted "[m]any of the broader objections to free bargaining").

139. TREBILCOCK, *supra* note 46, at 248.

140. *Id.*

141. *Id.* at 248–50.

142. *Id.* at 251.

143. *Id.* Like most other law-and-economics scholars, Trebilcock expresses reluctance to extend contract regulation beyond the context of market failures. *Id.* at 251–53.

144. See Benson, *supra* note 26, at 2 (stating that Williston's work is "untheoretical").

primarily to doctrinal analysis—to the identification and development of the principles that underlie judicial decisions and, to a lesser extent, commercial statutes.¹⁴⁵ Williston's work is not merely descriptive; he seeks connections among doctrines, critiques incoherence, and suggests ways to harmonize apparently inconsistent precedents.¹⁴⁶ But apart from occasional references to common sense and other intuitive notions, policy arguments do not interest him.¹⁴⁷ Williston largely ignores big-picture questions about the political and economic goals of contract law; he does not look to other disciplines to gain a deeper understanding of the legal system.¹⁴⁸ Moreover, Williston shows little inclination to do empirical work on the complex ways in which legal rules interact with commercial practice.¹⁴⁹ "[F]rom the standpoint of legal or social thought," Lawrence Friedman laments, Williston's work amounts to "volume after volume of a heavy void."¹⁵⁰

By contrast, contemporary scholarship seeks to give formalism a stronger theoretical foundation. Straightforward doctrinal analysis does not appeal to the new formalists; they care much more about explaining the legal regime in terms of functional utility.¹⁵¹ Moreover, when they make claims about formalism's practical benefits, the new formalists do not rely on common-sense intuitions. Rather, they attempt to back up their assertions with sophisticated

145. Cf. Posner, *supra* note 14, at 1316 (describing traditional legal scholarship).

146. See Benson, *supra* note 26, at 3 n.4 (stating that Williston and other classical contracts scholars "systematically present[ed] the legal point of view by clarifying definitions . . . and by exploring . . . their implications and their conceptual interconnections").

147. For example, Duncan Kennedy complains (somewhat unfairly, as it turns out) that "Williston offer[s] no policy rationale at all for objectivism." Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94, 130 (2000). For more on Williston's explanation of the objective theory of contract interpretation, see *infra* notes 370–97 and accompanying text.

148. For example, Williston rejects the idea that law professors should mix class discussion of legal questions with extra-legal topics like "political economy, sociology, [and] philosophy," as such material would detract from subjects of "more direct professional importance." Samuel Williston, Book Review, 43 HARV. L. REV. 972, 974 (1930) (reviewing J.H. LANDMAN, *THE CASE METHOD OF STUDYING LAW* (1930)).

149. Writing of empirical work in 1929, Williston observes:

[T]hough well-settled general business custom should generally determine the desirable rule of law, it is easy to verify the statement that on many matters business custom varies widely not only in different parts of the United States, but within the limits of a single city. It is not infrequently better to make business custom follow the law than to seek to apply the opposite method.

WILLISTON, *supra* note 36, at 150.

150. FRIEDMAN, *supra* note 17, at 543.

151. See Pildes, *supra* note 18, at 619 (stating that new formalists "functionally assess[]" legal rules "in terms of how they interact with social norms").

economic models and empirical studies.¹⁵² For example, in defending objective contract interpretation, Schwartz and Scott rely on the insights of contract theory.¹⁵³ This branch of microeconomics, they argue, demonstrates why firms generally prefer objective interpretation to more contextual approaches. Similarly, in explaining the benefits of formalism, Bernstein has conducted a number of empirical studies of private arbitral regimes that show how a combination of formalist adjudication and informal reputational sanctions can serve the needs of contracting parties.¹⁵⁴ Even those relatively few contemporary formalists who embrace essentialism show more interest in theory than Williston does. One cannot really imagine Williston making the effort to demonstrate, as Weinrib does, the ways in which contract remedies cohere with Kantian notions of corrective justice.¹⁵⁵

III. Rediscovering Williston

This Part restores a more correct and balanced version of Williston's jurisprudence, filling in the pragmatic and flexible aspects of his work that the conventional account ignores. First, Part III.A discusses Williston's rejection of essentialism. Williston endorses axiomatic legal reasoning on pragmatic grounds; both in defending the use of general principles and in deriving the principles themselves, Williston emphasizes real-world advantages, not conformity to abstract philosophy. Next, Part III.B discusses Williston's views on the presumptive nature of legal logic. It shows that Williston is willing to forgo the rigid application of rules in circumstances where they would lead to seriously undesirable social consequences.

Part III.C explores Williston's views on legal reform and freedom of contract. Although Williston is somewhat conservative, he is hardly

152. See *id.* (stating that new formalism "is motivated, justified, and understood in precisely the modernist, hyper-policy analytic vein that constitutes the direct rejection of Langdellian formalism"); Posner, *supra* note 27, at 879–80 (contrasting the economic sophistication of contemporary contract scholarship with the methodological sloppiness of contract scholarship before the 1970s).

153. See Schwartz & Scott, *supra* note 19, at 548 ("We draw heavily on contract theory to construct our normative theory of contracts.").

154. See, e.g., Bernstein, *supra* note 115, at 1735–45 (discussing cotton arbitrators); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769–71 (1996) (discussing feed and grain arbitrators).

155. See Weinrib, *supra* note 113, at 57–58 (discussing "[t]he Kantian account of contractual right"); *id.* at 65–70 (discussing "Kant's views about contractual entitlement"); *id.* at 102 (discussing "the Kantian account of contract").

reactionary. Williston does not oppose reform in itself; he merely believes that reform should proceed gradually so as not to upset settled expectations. Moreover, he takes a moderate view of freedom of contract, criticizing the "more obviously barbarous applications" of *caveat emptor*¹⁵⁶ and what he believes to be the extreme libertarianism of the *Lochner* Court.

Finally, Part III.D discusses the undertheorized quality of Williston's scholarship. While Williston's reliance on intuitive justifications for legal rules can strike a contemporary academic reader as unsophisticated, his approach makes a certain amount of sense in light of his goals and intended audience. Indeed, Williston's common-sense jurisprudence shares some surprising affinities with what Richard Posner calls "everyday pragmatism" in law,¹⁵⁷ a rough and ready approach that devalues high theory.

This Part presents a number of examples to support its claims about Williston. It draws on his occasional jurisprudential pieces as well as his doctrinal scholarship; it also looks to some of the many statutes he drafts over the course of his career. Williston's output is enormous, and one needs to be selective. Nonetheless, this Part discusses examples that, taken together, give a fair account of the body of his work. It focuses on several problems in contract theory that continue to inspire heated debate today: the bargain requirement and promissory estoppel, the objective theory of contract interpretation, the proper scope of freedom of contract, and the value of empirical research.

A. Pragmatism and Ideal Rules

Like other classical formalists, Williston favors the use of general principles in legal reasoning. He sees contract law as a kind of "science"—a system of fundamental axioms, relatively few in number, that can provide the basis for deductive reasoning.¹⁵⁸ For example, in an address he gives to the American Bar Association's Section on Legal Education early in his academic career, Williston argues that the scholar should gear his work to "the ideal rules:"

This means that he must keep his own mind and that of his students constantly addressed to the general rule, free from arbitrary exceptions, and must use the particular cases to bring the rule out, rather than emphasize the importance of inconsistencies and peculiarities. *For the ideal of the law is*

156. Williston, *supra* note 44, at 475.

157. POSNER, *supra* note 54, at 49.

158. See, e.g., Williston, *supra* note 37, at 239–40 (advocating "a systematic jurisprudence").

towards a few general principles, while in practice, with the increasing complexity of human affairs, the number of minor rules and applications is always increasing.¹⁵⁹

Similarly, the preface to the 1920 contracts treatise laments the fact that "[t]he law of contracts . . . tends from its very size to fall apart," and argues that a focus on "fundamental principles" provides a necessary unity to the field.¹⁶⁰ Indeed, Williston's chief complaint against the Realists is that they treat the law as a set of narrow, unrelated categories—a "wilderness of single instances."¹⁶¹

Yet Williston's endorsement of "ideal rules" does not stem from an essentialist understanding. It is "[o]bvious," he writes, that "contractual liability, like all other liability," is ultimately "based on policy."¹⁶² Williston does not perceive contract as a Platonic entity; for him, there is no brooding omnipresence in the sky. Nor does Williston think of himself as discovering, in Aristotelian fashion, contract's immanent structure. Like the new formalists, Williston views law as a social construct that one must justify in terms of real-world benefits. Law is a "science," he writes, "but it is a pragmatic science."¹⁶³ Williston favors formalism precisely because of its practical advantages.

For example, Williston argues that general legal concepts promote predictability in commercial relationships.¹⁶⁴ If law were merely a collection of particularized rules without unifying principles, he argues, lawyers could not advise clients with any degree of accuracy.¹⁶⁵ Parties could not feel secure about their contractual rights and duties, and they might be less likely to enter into mutually beneficial agreements. Moreover, uncertainty would promote costly litigation that would drain the resources of the parties and the public at

159. Samuel Williston, *The Necessity of Idealism in Teaching Law*, 2 AM. L. SCHOOL REV. 201, 201 (1908) (emphasis added).

160. 1 WILLISTON, *supra* note 2, at iii.

161. Williston, *supra* note 37, at 240 (internal quotations omitted); *see also* WILLISTON, *supra* note 35, at 213 (criticizing Realists). For more on Williston's critique of the Realists, *see infra* notes 444–58 and accompanying text.

162. Williston, *supra* note 45, at 368.

163. According to Williston:

Law is a science but it is a pragmatic science. It can rarely deal with the absolute. Questions of how far and how much constantly intrude, and the questions of degree thus introduced require for their solution determination of doubtful facts and comparative valuing of interests, which have no mathematical equivalents.

WILLISTON, *supra* note 35, at 202.

164. *See* Williston, *supra* note 37, at 239 (discussing "systematic jurisprudence"); WILLISTON, *supra* note 36, at 75 (discussing the importance of "concise absolute rules" in commercial law).

165. *See* WILLISTON, *supra* note 35, at 213 (discussing difficulty of learning and applying a body of law that lacks "connecting threads of principle").

large.¹⁶⁶ Williston frequently points out that the success of a legal system depends not only on its capacity to reach acceptable results at trial but also on its capacity to delineate rights and duties without the need for litigation.¹⁶⁷

Williston recognizes that there is a potential practical downside to the use of general concepts in law. Categorical principles can lead to harsh results in particular cases.¹⁶⁸ But he believes that this danger is exaggerated.¹⁶⁹ Legal complexity also can cause hardship, for example, by creating traps for the unwary or opportunities for sharp practice. By adhering to general concepts, judges can reduce these potential dangers. Moreover, categorical principles can help rein in willful judges who might be inclined to decide a matter on the basis of personal whim rather than "the general justice of the case."¹⁷⁰ In any event, as discussed below, Williston believes that legal rules should have only presumptive effect and that in particularly exigent circumstances judges should refrain from applying them.¹⁷¹

Williston's pragmatism is also evident in the way he derives the general principles themselves. Like other classical scholars, Williston takes a positivist view of law.¹⁷² Under this view, law is simply the command of the sovereign, the set of rules that the state requires its subjects to obey. Thus, Williston does not attempt to derive the principles of contract law from metaphysical philosophy. Such an approach would be a waste of time—"an excursion into

166. *Cf. id.* at 213 (discussing effect of legal uncertainty on litigation).

167. "The law is not important solely or even chiefly for the just disposal of litigated cases. The settlement of the rights of a community without recourse to the courts can only be satisfactorily arranged when logic is respected." Samuel Williston, *Repudiation of Contracts (Part II)*, 14 HARV. L. REV. 421, 438 (1901) [hereinafter Williston, *Repudiation (Part II)*]; see also 3 WILLISTON, *supra* note 2, § 1321, at 2373 (restating Williston's belief in the value of settling disputes via logical rules without litigation); WILLISTON, *supra* note 36, at 2 ("[T]he great triumph of a system of law is that justice is thereby attained in the vast majority of cases without litigation."); Samuel Williston, *Gifts of Rights Under Contracts in Writing by Delivery of the Writing*, 40 YALE L.J. 1, 14 (1930) (stating that litigation over certain assigned contract claims is not desirable).

168. See WILLISTON, *supra* note 36, at 2–3 (acknowledging that general principles can create hardships); Samuel Williston, *Fashions in Law with Illustrations from the Law of Contracts*, 21 TEX. L. REV. 119, 134 (1942) (noting that "insistence on applying strictly in all cases a . . . recognized principle may . . . produce an unfortunate result in a particular case").

169. WILLISTON, *supra* note 36, at 97 (providing examples of how general rules can promote justice).

170. *Id.* at 59; see also Williston, *supra* note 168, at 138 (suggesting that the "evasion of general rules" can promote excessive discretion in judges).

171. See *infra* notes 245–99 and accompanying text (discussing Williston's views on the presumptive force of legal principles).

172. See Kennedy, *supra* note 147, at 129 (characterizing Williston as "a Holmesian positivist").

cloud-land."¹⁷³ Instead, Williston looks to case law. Judicial decisions about contracts provide the raw materials for his systematic jurisprudence.¹⁷⁴

Before explaining how Williston goes about this task, it is useful to underscore the pragmatism that is inherent in the starting point. Critics condemn Williston's reliance on general principles as disdainful of real-world concerns. But a jurisprudence that adheres closely to case law is unlikely to ignore social propositions. The judges who wrote the opinions on which Williston relies were members of American society, and one can safely assume that over the course of years on the bench they developed a working knowledge of American commercial practice.¹⁷⁵ Even discounting for occasional bias and incompetence, one cannot assume that these judges routinely rendered decisions at odds with that practice.¹⁷⁶ A jurisprudence that builds on case law is thus at least as likely to reflect actual social propositions as one that looks to metaphysical systems for its justification. As Williston writes, sticking to decided decisions can protect against an academic tendency "to get too far from the earth."¹⁷⁷

How, then, does Williston derive the ideal rules? Williston does not often describe his methodology, but one can piece it together from his occasional jurisprudential writings and from the corpus of his work. Williston believes that a scholar must study a body of case law and identify "the principles, whether clearly formulated or not . . . , which underlie the decisions."¹⁷⁸ In a largely inductive process, the scholar must observe the data—that is, read the cases—and, reasoning upward, discover the general principles that the data reflect.¹⁷⁹ Once identified, the principles serve as a kind of canon by which one can judge the correctness of the cases themselves. Sound cases conform to the principles; unsound cases do not. Williston captures this idea in a phrase he

173. WILLISTON, *supra* note 35, at 203.

174. See Williston, *supra* note 159, at 201 ("Good teaching of law . . . always occupies itself with the concrete . . ."); *id.* at 203 (asserting that a law student should "study[] the actual decisions of the court" and not "get too far from the earth in theoretical jurisprudence").

175. See Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 65 (2003) (stating that "common law judges of the formalist era were the products of the American society in which they worked" and their "concepts had some substantial relation to practice").

176. See *id.* ("It would be surprising in the extreme if [these judges] came up with conclusions . . . alien to the conventional understandings and traditions of [their] society.").

177. Williston, *supra* note 159, at 203.

178. *Id.* at 202.

179. See Feldman, *supra* note 32, at 1434 (explaining that classicists believed that the "axiomatic principles of the common law . . . were to be initially discovered by reasoning inductively upward from the cases").

often repeats: "*stare principii*."¹⁸⁰ Although courts should generally follow precedent in the interests of stability, wrong decisions ultimately should not stand in the way of sound principles.¹⁸¹

Nonetheless, Williston does not believe that a scholar can identify legal concepts solely through induction. Various "principled" accounts of doctrine can exist. The scholar must develop the best account—the one that relies on concepts that are general, uniform, consistent with the body of law as a whole, and, crucially, in tune with real-world needs. Williston makes this point repeatedly. The ideal rule, he writes in 1908, should not "violate sound views of political economy;" it should "conform to the usages or requirements of business."¹⁸² Similarly, in an article entitled *Change in the Law*, which he writes in 1935, Williston insists that a legal principle should not only be general and coherent, but "should also conform to social needs and not violate what may be called the mores of the community."¹⁸³ Indeed, because "social needs" and "mores" change over time, legal principles must themselves evolve.¹⁸⁴ "To the extent that social needs and mores change, legal principles should change" too.¹⁸⁵

Williston thus believes that one must justify a legal principle largely in terms of its practical benefits. One could give several examples of his methodology, but consider only two. The first, an example that Williston himself uses to explain the derivation of legal principles, relates to the specific enforcement of real estate transactions.¹⁸⁶ Williston poses the following hypothetical. Suppose that two parties, seller and purchaser, make a contract for the sale of improved land. After the parties sign the contract, but before seller actually transfers the property to purchaser, an accident causes damage to the building on the land without the fault of either party. Must purchaser nonetheless take the land and pay the original contract price? The majority

180. See, e.g., Williston, *supra* note 37, at 239 (arguing for "a fuller recognition of *stare principii* as a qualification of *stare decisis*," a recognition that would "involve[] both a greater willingness to overrule outworn cases and outworn principles, and a greater frankness in so doing"); see also Grey, *supra* note 94, at 26 (discussing Williston's use of this phrase).

181. See Williston, *supra* note 37, at 239 (arguing that courts should be more "willing[] to overrule outworn cases and outworn principles").

182. Williston, *supra* note 159, at 202.

183. Williston, *supra* note 37, at 239.

184. *Id.*

185. *Id.*

186. For discussions of this example, see WILLISTON, *supra* note 35, at 259–60; Williston, *supra* note 37, at 240–41. See generally Robert L. Flores, *Risk of Loss in Sales: A Missing Chapter in the History of the U.C.C.: Through Llewellyn to Williston and a Bit Beyond*, 27 PAC. L.J. 161 (1996) (discussing Williston's treatment of risk of loss).

view among courts at Williston's time was that purchaser must do so. Even though purchaser was not in possession of the property, the reasoning went, purchaser was the equitable owner. As a result, purchaser bore the risk of loss from accidental damage.

Williston believes that the majority rule is unsound.¹⁸⁷ On correct principle, seller should bear the risk of loss; *stare principii* requires courts to overturn decisions endorsing the majority rule. Williston attacks the majority rule on both theoretical and practical grounds. First, he points out, the majority rule is based on a misunderstanding of the concept of equitable ownership. By definition, an equitable owner has the right to rents and profits from the land. But before the transfer of possession, purchaser does not enjoy these rights; seller does. As a result, purchaser cannot be said to be the true equitable owner.¹⁸⁸ Moreover, Williston continues, the majority rule is inconsistent with case law in related areas.¹⁸⁹ For example, under standard impossibility doctrine, a party is not required to pay for the use of real property that has been damaged by accident.¹⁹⁰ Thus, according to Williston, a court should not force a purchaser to accept conveyance of real property in similar circumstances.¹⁹¹

The majority rule thus has "as little support in the decisions as it does in principle."¹⁹² In addition, Williston argues, the majority rule makes no sense as a practical matter.¹⁹³ Most parties would assume, reasonably, that seller bears the risk of loss until transfer of possession.¹⁹⁴ By upsetting settled expectations, the majority rule serves only to surprise and confuse parties.¹⁹⁵ Moreover,

187. WILLISTON, *supra* note 35, at 259. For Williston's full treatment of this problem, see 2 WILLISTON, *supra* note 2, §§ 928–54, at 1765–1809; see also Samuel Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 HARV. L. REV. 106, 121–30 (1895) (examining the "propriety" of imposing the risk of loss on the purchaser).

188. See Williston, *supra* note 37, at 241 (arguing that a purchaser cannot be an "owner in equity" unless "the purchaser is given possession and the right to rents and profits of the estate"); see also 2 WILLISTON, *supra* note 2, § 938, at 1782–83 (arguing that a purchaser is not entitled to the rights of ownership until he achieves possession under the contract).

189. 2 WILLISTON, *supra* note 2, § 943, at 1791.

190. 2 *id.* at 1791–92 (discussing *Taylor v. Caldwell*, 122 Eng. Rep. 309 (Q.B. 1863)).

191. See 2 *id.* at 1791 (arguing that *Taylor* is "indistinguishable" from the risk-of-loss situation "on any sound principle").

192. 2 *id.* § 937, at 1781.

193. See Flores, *supra* note 186, at 185–86, 191 (discussing Williston's treatment of practical considerations in the risk-of-loss context). According to Flores, Williston is the first scholar to pay serious attention to practical considerations in risk-of-loss law. *Id.* at 186.

194. See 2 WILLISTON, *supra* note 2, § 940, at 1785 (discussing the intentions of the parties in this situation).

195. See Williston, *supra* note 37, at 241 (stating that the majority rule would "surprise most laymen").

"[t]he practical advantages of leaving the risk with [seller] until transfer of possession are obvious."¹⁹⁶ It is always "wiser to have the party in possession of property care for it at his peril, rather than at the peril of another."¹⁹⁷ Indeed, in the typical case, seller already has an insurance policy on the property at the time of contract. Purchaser, by contrast, does not.¹⁹⁸

Another example of the role of pragmatism in Williston's derivation of legal principles involves, perhaps surprisingly, the consideration requirement. Williston devotes substantial time to consideration over the course of his career, working out the contours of the bargain principle in a series of articles and in his contracts treatise.¹⁹⁹ Most of his writing on the subject, one must concede, tends to support the conventional wisdom about him. The reader finds page after page of close doctrinal argument that bears little apparent relation to practical concerns. It can be pretty heavy going. For example, in a fairly lengthy article entitled *Consideration in Bilateral Contracts*, which he writes in 1914, Williston sets out to clear up the confusion that exists on the question whether, and under what circumstances, a promise can serve as "a sufficient consideration for a counter-promise."²⁰⁰ After meticulously demonstrating the flaws in other scholars' attempts to resolve the matter, Williston announces his own conclusion, justified as a matter of logic alone, a triumph of abstraction:

The result of [my] argument is that no briefer definition of sufficient consideration in a bilateral contract can be given than this: Mutual promises each of which assures some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another.²⁰¹

196. 2 WILLISTON, *supra* note 2, § 942, at 1790.

197. 2 *id.*

198. 2 *id.* at 1791.

199. For examples of Williston's work on consideration, see generally 1 WILLISTON, *supra* note 2, §§ 99–204, at 188–410; Samuel Williston, *Accord and Satisfaction*, 17 HARV. L. REV. 459 (1904); Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503 (1914) [hereinafter Williston, *Bilateral Contracts*]; Samuel Williston, *Contracts for the Benefit of a Third Person*, 15 HARV. L. REV. 767 (1902); Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1894) [hereinafter Williston, *Successive Promises*]; Samuel Williston, *The Effect of One Void Promise in a Bilateral Agreement*, 25 COLUM. L. REV. 857 (1925); Williston, *supra* note 50.

200. Williston, *Bilateral Contracts*, *supra* note 199, at 518.

201. *Id.* at 527–28. For more on Williston's definition of consideration and his differences with other formalists on the question, see JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 174–75 (1991).

Consideration in Bilateral Contracts shows Williston at his most abstract. But it does not reflect the whole picture. On other occasions, Williston discusses consideration in substantially more pragmatic terms. For example, consider Williston's defense of the pre-existing duty rule. The rule, which prohibits certain contract modifications, arises in situations like the following.²⁰² Suppose that a builder contracts to build a house for a landowner. The builder begins work, but he decides that he has made a bad deal and informs the landowner that he will not complete the house at the agreed price. However, if the landowner agrees to pay him more money, the builder will agree to complete the house. The landowner agrees to the additional compensation, and the parties make a second contract. After the builder builds the house, the landowner refuses to pay the additional compensation. What result?

Under the pre-existing duty rule, the landowner's promise to pay the additional compensation would be unenforceable. Williston endorses this result in an early article entitled *Successive Promises of the Same Performance*.²⁰³ Williston defends the rule in part on logical grounds. Because the builder already has a contractual obligation to complete the house, the landowner derives no legal benefit from the builder's second promise. As a result, there is no consideration to support the landowner's promise to pay additional money for the work.²⁰⁴ But Williston also points out that the rule serves the very practical concern of preventing what contemporary writers refer to as the "'hold-up game.'"²⁰⁵ In a situation like the hypothetical case, there is strong reason to believe that the landowner's promise to pay more money for the same work is the product of "compulsion"; enforcing the landowner's

202. See Christopher T. Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs*, 38 SAN DIEGO L. REV. 53, 62 (2001) (describing the pre-existing duty rule).

203. Williston, *Successive Promises*, *supra* note 199.

204. See *id.* at 30 ("Granting that a benefit or advantage moving from the promisee to the promisor is a good consideration, surely nothing can be regarded by the law as a benefit to the promisor unless it is something more than what he was already entitled to."); see also 1 WILLISTON, *supra* note 2, § 130, at 276 (arguing that "performance under the second agreement" is not "a legal benefit to the promisor since he was already entitled to have the work done"). Alternatively, one might say that builder's second promise cannot create any new legal detriment to builder, "since . . . he was already bound to do the work." *Id.*

205. See, e.g., Richard A. Epstein, *Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1297 n.31 (2002) (quoting *Angel v. Murray*, 322 A.2d 630 (R.I. 1974)). In circumstances not presenting the hold-up game, Williston suggests that a statute be enacted to make certain written promises to modify binding even in the absence of consideration. See *infra* notes 212-17 and accompanying text (discussing Williston's support for the Uniform Written Obligations Act).

promise in these circumstances would be "very harsh."²⁰⁶ Williston makes a similar point elsewhere, using the example of a debtor attempting to renegotiate the terms of his debt:

[I]f the law were otherwise [that is, if there were no pre-existing duty rule], debtors would demand discounts on their just debts even more freely than they do If my debtor owes me ten dollars, and he says, "Well, I will pay you eight," the implication, if not spoken in terms, is readily implied, "If you won't take eight you won't get any until a long time," or "at the tail end of a lawsuit." It is not desirable that a bargain forced on a creditor in this way should be enforceable.²⁰⁷

Indeed, in a 1937 article entitled *The Law of Contracts Since the Restatement*, Williston defends the consideration requirement on entirely pragmatic grounds.²⁰⁸ In the article, Williston addresses complaints about the technicality of the requirement and the fact that it "not infrequently" produces undesirable results.²⁰⁹ In answering these complaints, Williston does not argue that the doctrine is essential to contract's "true" nature or that it is consistent with a "correct" theory of the parties' rights. Rather, he argues that consideration is a necessary evil, a concession to reality. Courts simply cannot enforce every promise, he reasons; the law needs some screening mechanism. Consideration serves that function tolerably well, certainly as well as proposed substitutes like the civil law concept of "cause."²¹⁰ Moreover, even if one could come up with a better test for enforceability in the abstract, the consideration requirement is already deeply embedded in American law. Abolishing the doctrine would disturb settled business expectations and cause great confusion as the courts defined the contours of whatever new test took its place.²¹¹

Williston's understanding of consideration as a practical device explains his consistent support for a reform that would have abolished the requirement in circumstances showing clearly that the promisor intended to be legally bound. In 1925, Williston drafts the Uniform Written Obligations Act, a model statute providing that a signed written promise would be enforceable, even without consideration, if the writing stated that the promisor intended it to be

206. Williston, *Successive Promises*, *supra* note 199, at 31, 32. For some reason, this practical argument does not make its way into the treatise's discussion of the pre-existing duty rule. See generally 1 WILLISTON, *supra* note 2, §§ 130–131b, at 275–89.

207. SAMUEL WILLISTON, *PROBLEMS IN THE MODERN LAW OF CONTRACTS* 10 (1933).

208. See Williston, *supra* note 50, at 173 (presenting a pragmatic argument for retaining the consideration requirement despite its shortcomings).

209. *Id.*

210. *Id.*

211. *Id.*

legally binding.²¹² The common law had allowed such a result under the doctrine of the sealed instrument, but the use of seals had presented too great a possibility of fraud, and by the early twentieth century most states had abolished the doctrine.²¹³ Williston views the Written Obligations Act as a "moderate and reasonable" substitute.²¹⁴ In the presence of a writing signed by the promisor, he believes, proof of a bargain should be unnecessary; only a misguided conceptualism would forbid a promisor from making a binding gratuitous promise if he clearly expressed his desire to do so.²¹⁵ Despite Williston's efforts, only two states adopt the statute, a failure that genuinely puzzles him.²¹⁶ "[P]robably," he reflects, the act's proponents had "inadequately presented" it to state legislatures.²¹⁷

The emphasis on pragmatic values, evident in the risk-of-loss example and in at least some of his writing on consideration, makes plain that one should not think of Williston as an essentialist.²¹⁸ Indeed, Williston often criticizes what

212. *Id.* at 175.

213. *See id.* at 174 (listing the twenty-seven states that had abolished "the distinction between sealed and unsealed written contracts"); *see also* WILLISTON, *supra* note 201, at 9 (explaining the problems with seals).

214. Williston, *supra* note 50, at 175. "It is most unfortunate," Williston writes in the 1920 contracts treatise, "if no method be left in a system of law by which a confessedly voluntary promise may be binding." 1 WILLISTON, *supra* note 2, § 219, at 432.

215. WILLISTON, *supra* note 207, at 9. Williston believes that the Uniform Written Obligations Act will allow contract modifications in cases that do not present the danger of the hold-up game. *See* Williston, *supra* note 50, at 175 (discussing the Act). For more on the pre-existing duty rule and the hold-up game, *see supra* notes 202–07 and accompanying text.

216. Williston, *supra* note 50, at 175. "That any serious consequences can follow from making consideration unnecessary where such is the deliberate intention of the parties seems to the last degree improbable." Samuel Williston, *In Reply to Prof. Oliphant*, 14 A.B.A. J. 554, 554 (1928).

217. WILLISTON, *supra* note 35, at 227.

218. Another example of the interplay between logic and practical justice in Williston's jurisprudence involves anticipatory repudiation. Suppose that a contract between *A* and *B* provides that *A* will render performance on a specified date. Before that date, *A* repudiates the contract by stating that he does not intend to perform when the date arises. Under the doctrine of anticipatory repudiation, *B* would no longer have a duty to perform its obligations under the contract and could sue *A* immediately for breach. *See* FARNSWORTH, *supra* note 107, § 8.20, at 602 ("[C]ourts have accepted the general rule that an anticipatory repudiation gives the injured party an immediate claim to damages for total breach, in addition to discharging that party's remaining duties of performance.").

Williston accepts the idea that *B* no longer should have a duty to perform in these circumstances, reasoning that "[e]very consideration of justice requires" that result. Williston, *Repudiation (Part II)*, *supra* note 167, at 434. For decades, however, and in the face of a growing consensus against him, Williston rejects the idea that *B* should be allowed to bring an immediate action for breach. Williston's objections are principally based on logic: Allowing such an action would be incoherent because *A* technically could not be said to have breached

he sees as essentialism in the work of others. For example, despite the conventional tendency to link them, Williston often distances himself from Langdell.²¹⁹ In his autobiography, Williston criticizes Langdell's "extremely conservative" thinking, chiding Langdell for refusing to consider cases decided after 1850 and for being unwilling to accept "changes in law as a constant and necessary process, however gradual and slow."²²⁰ Echoing Holmes' famous jibe, Williston refers to Langdell as "a legal theologian," a "stern[] Calvinist" who focused on logical abstractions at the expense of real-world conditions.²²¹ One can hardly imagine Williston asserting, as Langdell did with respect to the mailbox rule, that concerns about substantial justice and the interests of the contracting parties are "irrelevant" to legal analysis.²²²

In fact, in his rejection of metaphysics and his embrace of pragmatism, Williston shares more in common with today's new formalists. Of course, one should not overstate the analogy. Williston focuses primarily on doctrinal system building; he does not give policy arguments nearly the same degree of attention as black-letter analysis. Moreover, compared to the new formalists, Williston is noticeably undertheorized. Williston does not attempt to support

until the specified date. See 3 WILLISTON, *supra* note 2, § 1296, at 2345 ("One who contracts to do a certain thing on a certain contingency or at a certain time does not and indeed cannot break that promise unless the contingency happens or the time arrives."); Williston, *Repudiation (Part II)*, *supra* note 167, at 428 (arguing that, "[f]rom a technical point of view," the absence of a breach "seems obvious"). Williston also argues, however, that allowing an immediate action would create "objectionable" practical problems, *id.* at 439, and would also be unjust to *A*, who would be "held liable on a promise he never made." *Id.* at 438. Interestingly, towards the end of his career, Williston backs off his position on anticipatory repudiation, conceding somewhat sheepishly that his rejection of the right of immediate action might have carried logic a bit too far. See Williston, *supra* note 168, at 134 n.32 ("The present writer's published opposition to the doctrine of anticipatory breach may perhaps be cited as [an] instance of . . . restricted adherence to logical consequences from inadequate premises."). For more on Williston's views regarding anticipatory repudiation, see Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 602–05, 609 n.252 (2001).

219. See Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 464 n.218 (2000) (noting Williston's portrayal of Langdell as "weird or, at least, quirky").

220. WILLISTON, *supra* note 35, at 200. Williston writes that Langdell's conservatism resulted in part from Langdell's poor eyesight, "an infirmity which overtook him before he had been teaching in Cambridge many years," which caused him to stop reading cases. *Id.*

221. *Id.* For more on Holmes' jibe, see Siegel, *supra* note 17, at 1524.

222. See *supra* notes 106–12 and accompanying text (discussing Langdell's stance on the mailbox rule). The 1920 contracts treatise notes the logical flaws in the mailbox rule but accepts it as an established doctrine and does not spend much time discussing it. 1 WILLISTON, *supra* note 2, § 81, at 143–44. The 1936 treatise states that "the law is so well settled as to make discussion academic." 1 SAMUEL WILLISTON & GEORGE J. THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* § 81, at 237 (rev. ed. 1936).

his assertions about practical benefits with empirical data or sophisticated economic models; as in the risk-of-loss example, he prefers to rely on common-sense notions about practical advantages or business convenience and to leave it at that. Even his concept of *stare principis* is more or less intuitive. Williston never attempts to develop a theory that explains when, precisely, a court should abandon precedent in favor of correct principle.²²³

This Article addresses these aspects of Williston's scholarship below. For now, the key point is that, both in defending an axiomatic jurisprudence and in deriving the axioms themselves, Williston emphasizes real-world benefits, not conformity to abstract philosophy or adherence to judicial fiat. In this way, Williston's jurisprudence is properly seen as pragmatic, not dogmatic.

B. Legal Logic and the Role of Presumptions

Williston maintains that logic plays a vital role in the proper functioning of a legal regime. Once one has identified a field's general principles, logic provides the basis for developing those principles into a set of clear rules for the resolution of legal disputes.²²⁴ For example, the consideration principle necessarily implies the traditional rule about gift promises. The consideration principle teaches that only promises that result from bargains are enforceable. As gift promises by definition do not result from bargains, they are, as a matter of logic, unenforceable. Thus the traditional rule: Parties who rely on gift promises, even reasonably, can receive no redress from the courts.

For Williston, the central tasks of both scholar and judge follow from this understanding of law. The scholar should trace the application of a field's general principles in a wide variety of factual settings and construct a systematic doctrinal jurisprudence, a comprehensive set of rules established on the basis of analytic logic.²²⁵ As anyone who has read his work can attest, Williston pursues this task with tenacity and skill. The judge, in turn, should decide a legal dispute by applying the correct rule to the facts of a case and declaring the logically necessary outcome. The judge should not make an

223. See Grey, *supra* note 94, at 26 ("[S]tare decisis jostled against what Williston called *stare principis*, without any formal higher level principle to decide between them.").

224. See Eisenberg, *supra* note 102, at 1750–51 (discussing the deductive method in classical contract law).

225. See WILLISTON, *supra* note 35, at 108 ("It is also part of a teacher's work to a greater or less extent to systematize the law . . ."); see also Williston, *supra* note 168, at 133 (discussing the approach of classical legal scholars); Williston, *supra* note 37, at 238–39 (discussing classical legal pedagogy).

exception to a logically determinative rule simply because he thinks the equities of a case require it.²²⁶

The stress on analytic logic can make Williston's work seem arid and abstract. Once again, though, it is important to appreciate why Williston endorses logic in law.²²⁷ Williston does not favor doctrinal coherence for its aesthetic qualities, its elegance and symmetry.²²⁸ Rather, he believes that analytic logic serves at least three highly important practical values.²²⁹ First, there are pedagogical benefits. Logic makes it easier to learn and understand the law.²³⁰ Without logic, legal doctrine becomes a mass of unrelated rules and exceptions, a "dead weight" that the mind can lift only with great difficulty.²³¹ Moreover, a focus on formal logic tends to equalize relations between professor and student, thus promoting more "profitable discussion in class."²³² A professor who relies on "assertions of economic and social desirability, incapable of proof," can simply over-awe students into submission, but no amount of professorial prestige can make "inconclusive logic satisfactory."²³³

226. See WILLISTON, *supra* note 35, at 215 (discussing judicial temptation to make exceptions "to avoid a harsh application of a general rule").

227. One commentator argues that the concern with logic reflects Williston's psychological troubles, in particular, his lifelong struggle with what we would today recognize as depression. See Boyer, *supra* note 40, at 3-4, 33-37 (positing a connection between Williston's psychological maladies and his formalistic, logical approach to contract law). In this account, formalism appealed to Williston's "need for order," *id.* at 4, "a deep-seated fear of being out of control" and "a fear of formlessness." *Id.* at 36. Though intriguing, this asserted link between depression and formalism seems ultimately unpersuasive. There surely have been many depressed law professors other than Williston, both in his time and in ours, and formalism apparently has not attracted most of them. Besides, as the text demonstrates, Williston's concern for logic in law is tempered by his strong interest in the practical effect of legal rules. See *infra* notes 245-99 and accompanying text (discussing Williston's views on the presumptive force of legal rules).

228. For example, Omri Ben-Shahar argues that formalism should be justified, not on the basis of its "aesthetic" claims, "but from its effect on the individuals whose behavior the [legal] system aims to regulate." Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 782 (1999). Williston would quite agree.

229. Cf. Williston, *Book Review*, *supra* note 38, at 221 (discussing the "high practical value of logic").

230. See Williston, *supra* note 37, at 240 ("Law must be reasonable not only in order to be respected, but to be understood even by lawyers. That means not only that the results reached shall be just, but that they shall be logical deductions from settled principles.").

231. WILLISTON, *supra* note 35, at 213; see also Samuel Williston, *Book Review*, 44 HARV. L. REV. 1005, 1006 (1931) (reviewing ARTHUR B. KEITH, *ELEMENTS OF THE LAW OF CONTRACTS* (1931)) ("It is impossible to obtain any grasp of the law except by acquiring capacity to reason from its fundamental principles.").

232. WILLISTON, *supra* note 35, at 209.

233. *Id.*

Second, logic promotes predictability and stability in law, which in turn promote the security of transactions. "[I]t is common sense," Williston writes, that "comparative certainty . . . as to one's rights and duties can come only from a recognition of legal principles, and a logical application of them."²³⁴ The comparative certainty that logic provides allows parties to plan their transactions more effectively and eliminates much in the way of unnecessary and costly litigation, an advantage that Williston perceives as "the great triumph of a system of law."²³⁵ In a legal regime based on logic, he writes approvingly, "a majority of the people go through life with their rights and duties so clearly settled by established legal rules that no contest arises over them."²³⁶ Of course, commercial practices may evolve over time, and Williston does not believe that legal rules should be static. But even as practices evolve, logic can impart a necessary stability to law, insuring that the rules do not change so abruptly as to surprise or confuse the regulated parties.²³⁷

Third, logic makes the legal system more acceptable to the general public. "Law must be reasonable . . . in order to be respected," Williston writes.²³⁸ If citizens see that legal rules follow closely from first principles—that lawyers cannot sabotage litigation with arbitrary and unpredictable exceptions—they will more strongly support the legal system. Moreover, logic protects public liberty by acting as a restraint on the whims of judges. Without logic, "[j]urisdiction exercised by courts of law, with all traditional forms, may become as personal as that exercised by a sovereign."²³⁹ Such "personal" jurisdiction would injure social cohesion; the public would come to resent the idea that it must answer to the idiosyncrasies of other citizens. People prefer "to be subjected rather to what seems an inanimate rule," Williston writes, "than to the unbridled will of one of their fellow creatures."²⁴⁰

"What seems an inanimate rule." Note that for all his emphasis on logic, Williston recognizes that law ultimately involves more than the mechanical derivation and application of rules. Williston maintains a fairly active legal practice throughout his academic career; he knows that the idea that judges simply announce predetermined results is a "fiction," a "delusive belief."²⁴¹ A

234. Williston, *supra* note 37, at 239.

235. WILLISTON, *supra* note 36, at 2.

236. Williston, *supra* note 37, at 239.

237. "Unless logic can in the main be trusted, no one can safely advise on the new problems which are constantly arising." Williston, *Book Review*, *supra* note 38, at 221.

238. Williston, *supra* note 37, at 240.

239. WILLISTON, *supra* note 35, at 214–15.

240. WILLISTON, *supra* note 36, at 2.

241. *Id.* at 141.

lawyer, he writes, quickly learns "that when the equities of a case are strongly against him, the fact that logical deductions from established rules are in his favor may not save him from an adverse decision."²⁴² Clever judges can always find ways to pick and choose among facts and rules in order to reach satisfactory results in particular cases.²⁴³ Williston does not argue that logic makes law determinate; rather, he argues that logic makes law *more* determinate, and that greater determinacy creates important social benefits.²⁴⁴

Moreover, Williston does not believe that courts *should* apply rules in a mechanical way. Law is a pragmatic enterprise that must serve social needs.²⁴⁵ If logical application of a rule leads to seriously undesirable social consequences, the rule should not be followed. In explaining this belief, Williston draws a distinction between geometric logic and legal logic, a distinction that will surprise people who hold the conventional view of him.²⁴⁶ Geometric logic, Williston writes, is conclusive; its "arguments aim at demonstrative certainty."²⁴⁷ Legal logic, by contrast, is a matter of "[p]resumptions and probabilities;"²⁴⁸ it indicates the likely result, at least in the absence of serious practical difficulties. So, for example, when Realist Walter Wheeler Cook quips that formal logic is so indeterminate that it cannot even definitively resolve a dispute whether "Socrates is mortal,"²⁴⁹ Williston answers:

If we can say, almost all men are mortal, though occasionally one may be found who is not, the judicial conclusion in a particular case is likely to be that Socrates is mortal unless it can be shown that there are some peculiar circumstances in the facts of his case rendering the rule that applies to most men inapplicable to him. A great deal of legal and judicial reasoning is like that.²⁵⁰

242. WILLISTON, *supra* note 35, at 215.

243. *See id.* (noting "the ability of the court to make without contradiction more or less persuasive arguments for distinctions in fact or law in troublesome cases").

244. *See* WILLISTON, *supra* note 36, at 156–57 (describing legal logic as a matter of probabilities).

245. *See* WILLISTON, *supra* note 35, at 202 (describing law as "a pragmatic science").

246. *See* WILLISTON, *supra* note 36, at 157 n.2 (discussing the difference between the "logic of probabilities" in law and the "logic of certainty" in subjects like geometry) (internal quotations omitted).

247. *Id.* (quoting BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 68 (1924) (internal reference omitted)).

248. *Id.* at 157.

249. *Id.* at 153–54.

250. *Id.* at 156–57.

Thus, like the new formalists, Williston maintains that rules should have merely presumptive force.²⁵¹ In an appropriate case, logic must take a back seat to familiar Willistonian concerns about "practical convenience" and rough justice.²⁵² "No one will dispute," he writes, "that logic should be the servant not the master of practical convenience, and that where logic and convenience are clearly at war, logic must yield."²⁵³ Of course, deciding precisely when logic and convenience are clearly at war is a matter of judgment, and, as Lon Fuller trenchantly observed, Williston is "slow to declare logic in distress."²⁵⁴ Given the advantages that logic creates for the legal system, Williston believes that courts should depart from the analytic method only on the strongest arguments from social policy.²⁵⁵ But in the end, social welfare, not logic, controls: "[L]aw is made for man, and not man for the law"²⁵⁶

One can appreciate the role that presumptive rules play in Williston's jurisprudence by examining his treatment of consideration. As discussed above, consideration brings out the logician in Williston—never is his writing more formal and axiomatic. Even in this context, however, Williston understands that particularly exigent circumstances may require courts to forgo the straightforward application of rules. Notably, Williston becomes more flexible about consideration as his career progresses. As time goes by, he shows a greater willingness to set aside the bargain requirement because of pragmatic concerns.²⁵⁷

For example, every first-year law student knows Williston's early views on the revocation of an offer for a unilateral contract. By definition, the consideration for such an offer is complete performance by the offeree; as a matter of logic, therefore, the offeror should be able to revoke the offer, without liability, anytime before the offeree has completely performed. The 1920 contracts treatise adopts this position. Thus, Williston writes, "if A offers one hundred dollars if B will complete a piece of work, and B sets about the work

251. See *supra* notes 124–29 and accompanying text (discussing new formalism).

252. WILLISTON, *supra* note 35, at 311. See Williston, *Repudiation (Part II)*, *supra* note 167, at 438 ("It may be conceded that practical convenience is of more importance than logical exactness . . .").

253. Williston, *Book Review*, *supra* note 38, at 221.

254. Fuller, *supra* note 94, at 10.

255. See Williston, *Repudiation (Part II)*, *supra* note 167, at 438 (arguing that "considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts").

256. 1 WILLISTON, *supra* note 2, § 119, at 256.

257. See E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1453–54, 1460 (1987) (discussing changes in Williston's jurisprudence over time).

and nearly finishes it," "A" may nonetheless revoke the offer.²⁵⁸ Williston concedes that allowing "A" to revoke in these circumstances will cause "hardship" to "B," and that, "to avoid [this] hardship," some commentators had argued that one should regard the offer "as containing by implication a subordinate offer to hold the main offer open for a reasonable time."²⁵⁹ Williston applauds the impulse behind this implied-option argument—he suggests that legislatures should pass a statute making the offer irrevocable in these circumstances—but he ultimately rejects it as "artificial."²⁶⁰ Logic requires that the offeror have the capacity to revoke. "[A]ny other result" would require "either a violation of recognized principles of contract, or the invention of new ones."²⁶¹

Over time, though, Williston reconsiders his views.²⁶² The Restatement, on which Williston serves as Reporter, adopts the implied-option argument in 1932,²⁶³ and the 1936 edition of the contracts treatise endorses that "advanced position" as well.²⁶⁴ Williston still regards it as "difficult" to explain "on theory" why the offeror should not be able to revoke in these circumstances.²⁶⁵ But recognition of the "great injustice"—no longer simply "hardship"—of denying relief to an offeree who has begun work in reliance on an offer leads Williston to accept the need for an exception.²⁶⁶ Rather than rely on "fictitious interpretation[s]," the Restatement wisely makes a "direct statement" forbidding revocation.²⁶⁷ Given the offeree's "justifiable reliance," this is one of those

258. 1 WILLISTON, *supra* note 2, § 60, at 100. Students will recognize the classic classroom hypotheticals involving an offeree who almost makes it to the top of the flagpole or across the Brooklyn Bridge. See, e.g., K. N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 785, 787 n.9 (1939) (discussing the flagpole and bridge hypotheticals).

259. 1 WILLISTON, *supra* note 2, § 60, at 100, 101.

260. 1 *id.* at 101–02; see also 1 *id.* § 60a, at 102–03 (discussing statutory solution in civil law).

261. 1 *id.* § 60, at 100.

262. See Farnsworth, *supra* note 257, at 1451–52, 1453–54 (discussing how Williston's views evolved over time).

263. RESTATEMENT OF CONTRACTS § 45 cmt. b (1932).

264. Williston, *supra* note 50, at 172. The preface to the revised edition of the treatise makes plain that Williston had "personally examined every section" of the revised work "and either collaborated in its production or approved its form." 1 WILLISTON & THOMPSON, *supra* note 222, at v.

265. 1 WILLISTON & THOMPSON, *supra* note 222, § 60, at 165.

266. 1 *id.*

267. Williston, *supra* note 50, at 172.

particularly exigent circumstances in which real-world consequences trump the application of a formal rule.²⁶⁸

Williston's reference to the offeree's "justifiable reliance" suggests another important example of his willingness to forgo the rigid application of a rule: His embrace of promissory estoppel. That doctrine, perhaps the most significant exception to the bargain principle, allows courts to enforce certain promises, even without consideration, in circumstances where promisors have induced reasonably foreseeable reliance on the part of promisees. The conventional story, popularized by Gilmore, holds that Williston reluctantly agrees to include a promissory estoppel provision in the Restatement only after his adviser Arthur Corbin embarrasses him by pointing out a number of cases relying on the doctrine.²⁶⁹ In fact, though, nobody has to shame Williston into accepting promissory estoppel.²⁷⁰ On the contrary, Williston repeatedly claims credit for having invented the doctrine and for making it a success.²⁷¹ Indeed, according to Corbin, Williston helps "bludgeon[]" advisers into going along with promissory estoppel,²⁷² and the records of the ALI discussions on the

268. *Id.* (stating that an offeree's "justifiable reliance" serves as the "equivalent of consideration" in these circumstances).

269. See GILMORE, *DEATH OF CONTRACT*, *supra* note 16, at 61–65 (discussing the purported debate between Corbin and Williston over Section 90); HILLMAN, *supra* note 92, at 43–44 (describing roles of Corbin and Williston); see also Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 962 (noting that the "Gilmore/Corbin story" has "achieved the status of an originary myth among contracts scholars"). Gilmore claimed to have heard the story directly from Corbin, but the endnotes to *Death of Contract* suggest that Gilmore was exaggerating for effect. His conversations with Corbin, he writes, "took place twenty years ago and the events which Professor Corbin was describing had taken place twenty or thirty years before that. Obviously there is bound to be a certain amount of slippage between what really happened and this second-hand reconstruction of what happened." GILMORE, *DEATH OF CONTRACT*, *supra* note 16, at 128 n.135. In correspondence with Robert Braucher, Corbin shared credit with Williston for the success of Section 90. Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher Annotated*, 50 WASH. & LEE L. REV. 755, 768–69 (1993).

270. See, e.g., James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 566–67 (1995) (discounting the conventional story and describing Williston's key role in developing the doctrine of promissory estoppel); Mike Townsend, *Cardozo's Allegheny College Opinion: A Case Study in Law as an Art*, 33 HOUS. L. REV. 1103, 1123 & n.120 (1996) (stating that "it appears that something is left out of the traditional story").

271. So, for example, in a lecture he gives to Cincinnati lawyers in 1933, Williston crows, "I have invented a name for the basic reason for supporting [reliance cases] . . . and I seem to have made it go at least in one or two States." WILLISTON, *supra* note 207, at 15; see also Williston, *supra* note 50, at 173 n.15 (suggesting that Williston created the term "promissory estoppel").

272. Perillo, *supra* note 269, at 769 (quoting a 1961 letter from Corbin to Braucher).

Restatement suggest that, more than anyone else, Williston champions the doctrine against its conservative detractors.²⁷³

As in the unilateral contract example, Williston endorses promissory estoppel only gradually.²⁷⁴ The 1920 contracts treatise collects several cases enforcing gratuitous promises that had induced reasonably foreseeable reliance on the part of promisees. Although one might try to explain these decisions in terms of estoppel, Williston writes, the cases do not really implicate that doctrine, since estoppel ordinarily involves some misrepresentation of fact.²⁷⁵ Instead, "the term 'promissory' estoppel or something equivalent should be used."²⁷⁶ Williston concedes the "intrinsic merit" and "justice" of enforcing such promises and hints that a doctrine of promissory estoppel could answer frequent complaints about the "technicalities" of the consideration requirement.²⁷⁷ He even suggests a historical precedent, noting that "it may fairly be argued that the fundamental basis of . . . contracts historically was action in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price."²⁷⁸ Nonetheless, he concludes that a doctrine of promissory estoppel would "much exten[d] liability on promises" and that "the great weight of authority" opposed the idea.²⁷⁹

Thus, even before the Restatement project gets underway, Williston is toying with the idea of promissory estoppel.²⁸⁰ Within a few years, as Reporter on the Restatement, Williston comes to support the doctrine enthusiastically. Indeed, he himself drafts the Restatement's version of promissory estoppel, the famous Section 90: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is

273. See *Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. APP. 85–114, 126 (1926) [hereinafter *ALI Proceedings*] (discussing Section 88, the predecessor of Section 90). In the interests of convenience, I refer to Section 90 by its final section number throughout this discussion.

274. See Farnsworth, *supra* note 257, at 1460–61 (discussing Williston's evolving views on reliance and his eventual endorsement of Restatement Section 90).

275. 1 WILLISTON, *supra* note 2, § 139, at 307–08.

276. 1 *id.* at 308.

277. 1 *id.* at 313.

278. 1 *id.* Williston mentions this idea again briefly in a commentary prepared for the ALI. *Commentaries on Contracts Restatement No. 2*, 4 A.L.I. PROC. 14 (1926) [hereinafter *ALI Commentaries*] (prepared by Samuel Williston, Reporter) (discussing old action of assumpsit). For more on Williston's suggestion of a historical precedent to promissory estoppel, see Farnsworth, *supra* note 257, at 1457.

279. 1 WILLISTON, *supra* note 2, § 139, at 313.

280. See Gordley, *supra* note 270, at 567 (discussing Williston's treatment of promissory estoppel in his 1920 contracts treatise); Perillo, *supra* note 269, at 769 n.40 (same).

binding if injustice can be avoided only by enforcement of the promise."²⁸¹ What accounts for Williston's newfound commitment? His commentary on Section 90, prepared for ALI members, suggests that a few cases decided after the 1920 treatise had increased his confidence in the courts' willingness to accept the new doctrine.²⁸² But a few new cases cannot supply the true explanation for such a radical change.²⁸³ Something else is at work. Williston comes to believe that pragmatic concerns make an exception to the bargain requirement necessary in these circumstances: Justice requires holding a promisor to his promise in circumstances where the promise induces definite and foreseeable reliance on the part of the promisee.

In defending Section 90 at a meeting of the ALI, Williston makes clear that consideration can serve only as a presumptive requirement in contract law, and that there must be some escape when the requirement leads to seriously unjust results.²⁸⁴ For example, he concedes that the language of Section 90, particularly its reference to "injustice," is somewhat vague.²⁸⁵ But that vagueness is unavoidable:

Unquestionably, the word "injustice" . . . leaves a certain leeway one way or the other to the judge. As someone expressed it, in regard to this section, if you bind up too closely, with definite mathematical rules the law of consideration, the boiler will burst. You have got to leave the court a certain leeway outside of those mathematical and exact rules. This section is, so to speak, the safety valve for the subject of consideration.²⁸⁶

To be sure, if the new doctrine were not entirely to supplant the consideration requirement, the exception had to remain fairly narrow—hence Williston's insistence that only foreseeable, "definite and substantial" reliance, not reliance alone, could make a promise binding.²⁸⁷ Still, some "safety valve" was

281. RESTATEMENT OF CONTRACTS § 90 (1932). On Williston's authorship of Section 90, see Perillo, *supra* note 269, at 769 & n.40.

282. See *ALI Commentaries*, *supra* note 278, at 14–18 (discussing cases); Gordley, *supra* note 270, at 567 (discussing Williston's use of case law in defending promissory estoppel).

283. See Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 854–55 (1997) (arguing that Williston does not endorse Section 90 because it states existing law but because he approves of its social consequences).

284. See DeLong, *supra* note 269, at 963 (discussing Williston's views on Section 90). "Williston seems to have considered Section 90 to be a tool with which courts could achieve *ex post* equitable results in cases in which the doctrine of bargain contract would almost, but not quite, fit . . ." *Id.*

285. See *ALI Proceedings*, *supra* note 273, at 86 (noting that "the meaning [of injustice] is purposely left somewhat indefinite"); see also *id.* at 100–01, 109 (discussing indefiniteness of Section 90).

286. *Id.* at 86.

287. See *id.* at 90, 92–93, & 97 (discussing the need for a narrowed definition of reliance in

essential, and Section 90 seemed a worthwhile device, even if its precision was not "mathematical."

Williston's support for promissory estoppel as an exception to the bargain requirement, along with his recognition of the necessarily vague contours of the doctrine, shows that he does not endorse rigidity in the application of legal rules. One aspect of his defense of promissory estoppel does tend to support the conventional wisdom about Williston, however. During the ALI discussions, several questioners ask Williston which measure of damages should be available under promissory estoppel: the expectation measure, which attempts to place the injured party in the position he would be in had the promisor kept his promise, or the reliance measure, which attempts to place the injured party in the position he would be in had the promisor never made the promise.²⁸⁸ The language of Section 90 does not explicitly address the issue.

Somewhat surprisingly, Williston takes the position that the full expectation measure of damages is the proper remedy. The expectation measure, Williston explains, is the standard remedy in a contract action; once you decide to impose liability on a promise, no other measure should be available.²⁸⁹ Moreover, he argues, the cases that establish the doctrine support

Section 90); *ALI Commentaries*, *supra* note 278, at 20 (describing the requirement of "definite and substantial" reliance); *see also* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 123–27 (1991) (discussing Williston's endorsement of requirements of foreseeability, definiteness, and substantiality). A debate currently rages over the relative importance of reliance to promissory estoppel. *Compare* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 904 (1985) ("[R]eliance is no longer the key to promissory estoppel."), *and* Yorio & Thel, *supra*, at 167 (arguing that reliance is not essential), *with* DeLong, *supra* note 269, at 948 (arguing that "[c]ontemporary courts rigorously enforce" the reliance requirement), *and* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580–81 (1998) (stating that cases "underscore the immense importance of reliance").

As I discuss in the text, Williston believes that reliance is necessary but not sufficient to support an action for promissory estoppel. To use Randy Barnett's phrase, Williston believes that there must be "reliance plus something." Randy E. Barnett, *Foreword: Is Reliance Still Dead?*, 38 SAN DIEGO L. REV. 1, 2 (2001); *see also* Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 522 (1996) (discussing how, in the "new consensus" view of promissory estoppel, "the existence of detrimental reliance alone does not tell you when reliance will be protected"). For Williston, that "something" is a promise that the promisor should have foreseen would cause the promisee to rely "in certain definite ways." *ALI Proceedings*, *supra* note 273, at 89.

288. *See ALI Proceedings*, *supra* note 273, at 95–96, 98–99, 101–02, 103–04, 110–11 (recording questions posed to Williston regarding the measure of damages due an injured party under Section 90). For more on the expectation measure, *see* FARNSWORTH, *supra* note 107, § 12.1, at 756. For more on the reliance measure, *see id.* at 758.

289. *ALI Proceedings*, *supra* note 273, at 103–04.

the award of expectation, not reliance, damages.²⁹⁰ Williston's position comes through clearly in an oft-quoted exchange with lawyer Frederick Coudert, concerning a hypothetical case in which an uncle promises \$1000 to his nephew Johnny, knowing that Johnny will use the money to buy a new car:²⁹¹

MR. COUDERT: Would you say, Mr. Reporter, in your case of Johnny and the uncle, the uncle promising the \$1000 and Johnny buying the car—say, he goes out and buys the car for \$500—that uncle would be liable for \$1000 or would he be liable for \$500?

MR. WILLISTON: If Johnny had done what he was expected to do, or is acting within the limits of his uncle's expectation, I think the uncle would be liable for \$1000; but not otherwise.

MR. COUDERT: In other words, substantial justice would require that uncle should be penalized in the sum of \$500.

MR. WILLISTON: Why do you say "penalized"?

...

MR. COUDERT: Because substantial justice there would require, it seems to me, that Johnny get his money for his car, but should he get his car and \$500 more? I don't see.

...

MR. WILLISTON: Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made . . . [I]t seems to me you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the *status quo*.²⁹²

Critics at the time and since have condemned Williston's insistence on expectation damages as excessively conceptual.²⁹³ Indeed, Williston's rigidity

290. *Id.* at 99; see also Yorio & Thel, *supra* note 287, at 122 (discussing Williston's use of reported cases at ALI proceedings).

291. For discussions of this exchange, see, for example, Yorio & Thel, *supra* note 287, at 116–17, and HILLMAN, *supra* note 92, at 45–46.

292. *ALI Proceedings*, *supra* note 273, at 98–99, 103–04.

293. Williston's views on remedies under Section 90 occasioned Fuller & Perdue's famous critique of his conceptualism. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 64–65 (1936) (rejecting Williston's position on expectation damages under Section 90); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 401, 405–06, 413 (1937) (discussing the measure of recovery under Section 90). For more recent criticism, see Eisenberg, *supra* note 283, at 834 (stating that, in justifying his position, "Williston fell back on the extreme conceptualism of which he was occasionally capable").

in this regard is puzzling, both because it contradicts his general flexibility on promissory estoppel and because it is inconsistent in spirit with other statements he makes on the question. In other sections of the ALI discussion, Williston concedes that a promisee's effective recovery may be limited to the reliance measure. Section 90, he reminds his listeners, makes a promise binding only if there is no other way to avoid injustice. If a court can find a way to restore a promisee to the position he was in before the promisor made the promise, there will be no injustice; the court should not enforce the promise in those circumstances.²⁹⁴ This would be the outcome, Williston believes, in "some," even "many," promissory estoppel cases.²⁹⁵

For example, suppose the uncle promises \$1000, and Johnny buys a car for \$500. What if, perhaps with some pressure from the court, the uncle subsequently agrees to reimburse Johnny for the \$500 or arranges to have the dealer take back the car and return Johnny's cash? Could Johnny still enforce the uncle's promise? Williston believes that the answer is no.²⁹⁶ Justice would not require the enforcement of the uncle's promise in these circumstances; Johnny has been restored to his original position and should be content. Although this result is technically consistent with Williston's insistence that breach of promise, as such, requires the award of expectation damages—the whole point is that the court does not enforce the uncle's promise, but merely restores the status quo between the parties²⁹⁷—it seems plain that as a practical matter Johnny has received the reliance measure of damages as a remedy for his uncle's breach.

It is hard to know what to make of Williston's rigidity with regard to remedies under Section 90.²⁹⁸ Perhaps, having endorsed a major and admittedly "vague" exception to the consideration requirement, he cannot bring himself to jettison yet another fundamental principle of contract law. Perhaps he views fine distinctions between "enforcing promises" and "restoring the

294. *ALI Proceedings*, *supra* note 273, at 91.

295. *Id.*

296. *Id.* at 110–11.

297. *See id.* at 94 (distinguishing between restoration of the status quo and enforcement of "the actual promise that is made").

298. The availability of expectation damages in contemporary promissory estoppel actions is a matter of some debate. Compare Gordley, *supra* note 270, at 569 (noting studies showing that "courts . . . rarely protect only the promisee's reliance interest"), and Yorio & Thel, *supra* note 287, at 130 (arguing that the routine remedy is either specific performance or expectation damages), with Eisenberg, *supra* note 283, at 856–57 (disputing Yorio & Thel's claim), and Hillman, *supra* note 287, at 580–81 (noting that the data "suggest[s] the willingness of courts to grant reliance damages to successful litigants").

status quo" as intellectually elegant.²⁹⁹ In any case, Williston's rigidity on remedies should not blind us to the larger point of the promissory estoppel example—Williston's willingness, when circumstances require it, to forgo the logical application of a rule in favor of practical concerns and rough justice.

C. Doctrinal Reform and Freedom of Contract

Richard Epstein recently has drawn a distinction between two types of contract scholarship: "contracts small" and "contract large."³⁰⁰ "Contracts small" relates to contract law at the doctrinal level; it focuses on the rules of contract formation and performance, the everyday "stuff of lawyer's law."³⁰¹ "Contract large," by contrast, encompasses broader questions of political theory.³⁰² In particular, it relates to debates about free-market capitalism and the proper role of the state in regulating private agreements—debates that Americans typically associate with *Lochner v. New York*³⁰³ and other turn-of-the-century Supreme Court decisions on "liberty of contract."³⁰⁴ Epstein notes that commentators tend to link these two types of scholarship. For example, liberal critics posit an "intimate connection between the formal doctrines" of classical contract law—the consideration requirement, the objective theory of interpretation, and so on—and "the political philosophy of laissez-faire."³⁰⁵

The conventional wisdom certainly posits such a connection in Williston's case. Both with respect to "contracts small" and "contract large," the conventional wisdom portrays Williston as a reductive reactionary. At the doctrinal level, Williston supposedly believes that the rules of contract law must be rigid and unchanging, secure against reforms that seek to adapt the legal regime to new social realities.³⁰⁶ At the political level, Williston allegedly

299. At least one member of Williston's ALI audience thought this distinction was a "trick" to get out of a bad result, *ALI Proceedings*, *supra* note 273, at 111, and one present-day commentator apparently agrees. See Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 25 n.77 (1979) (stating that Williston's solution to the problem "seems overly ingenious").

300. Richard A. Epstein, *Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT 25* (F.H. Buckley ed., 1999).

301. *Id.* at 26.

302. *Id.* at 25–26 (distinguishing between "contract large" and "contracts small").

303. *Lochner v. New York*, 198 U.S. 45 (1905).

304. *Id.* at 56.

305. Epstein, *supra* note 300, at 26.

306. See WIECEK, *supra* note 28, at 93 (describing "Langdellianism" and its impact on Williston); see also TWINING, *supra* note 5, at 338–39 (discussing Llewellyn's critique of

joins other classicists in endorsing *Lochner's* conception of freedom of contract as a fundamental right that precludes all but the most lenient state regulation.³⁰⁷ Along with other classicists, Williston thus has become a target for critics who see *Lochner's* insistence on state neutrality as a mask for anti-egalitarian, probusiness bias.³⁰⁸ Classicists like Williston, the critics contend, ignore the often pronounced power differentials that render suspect the very idea of private agreements.³⁰⁹

This conventional account paints a very distorted picture of Williston's jurisprudence. First, as should be clear by this point, Williston does not oppose doctrinal reform as a categorical matter; indeed, as demonstrated above, he champions one of the greatest doctrinal innovations of the twentieth century, the doctrine of promissory estoppel.³¹⁰ Williston does not believe that contract law should be static.³¹¹ He understands that law is a social enterprise that must reflect social conditions, and he recognizes that, as social conditions change, legal rules must change too.³¹² Indeed, Williston criticizes other classicists, including Langdell, for failing to acknowledge these facts.³¹³

Williston simply maintains that reform should be careful and gradual and that lawyers should be cautious about overthrowing settled doctrine in the hopes of establishing a better legal regime.³¹⁴ Once again, Williston defends

Williston's contract jurisprudence); Flores, *supra* note 186, at 165–66 (discussing the "conventional painting of Williston as the enemy of needed modernization").

307. See WIECEK, *supra* note 28, at 103 (arguing that classical ideology rejected most public regulation of contracts); *id.* at 105 (associating Williston with this ideology). Thomas Grey recently argues that Holmes first made the link between classical formalism and *Lochner* and that the link quickly became "canonical." Grey, *supra* note 28, at 476–77, 494–96.

308. See Grey, *supra* note 94, at 33 (discussing the political critique of classicism as probusiness); see also HORWITZ, *supra* note 17, at 201 ("The emergence of the objective theory . . . is another measure of the influence of commercial interests in the shaping of American law.").

309. See HORWITZ, *supra* note 17, at 201 (arguing that Williston's formalism "disguis[e]d gross disparities of bargaining power under a facade of neutral and formal rules of contract law").

310. See *supra* notes 270–99 and accompanying text (discussing Williston's advocacy of promissory estoppel).

311. See Flores, *supra* note 186, at 166 (rejecting "the conventional view" of Williston and discussing his doctrinal innovations with respect to "risk of loss in sales of land").

312. See *supra* notes 162–63 and accompanying text (explaining that Williston views law as a social construct that must be justified in terms of real-world benefits); *supra* notes 184–85 and accompanying text (explaining that Williston believes that legal rules must evolve with social norms).

313. See *supra* notes 219–21 and accompanying text (discussing Williston's criticisms of Langdell).

314. See, e.g., WILLISTON, *supra* note 35, at 207–08 (discussing proposed reforms in legal

his position on pragmatic grounds. Reforms, even beneficial reforms, can impose costs that reformers tend to miss. For example, longstanding rules can create expectations on the part of lawyers and their clients about the way business is conducted. Even if they improve on traditional doctrine, new rules and terminology can upset these expectations and throw commercial practice into confusion and uncertainty.³¹⁵ At the very least, lawyers and their clients will have to learn the new rules and adjust their behavior. Courts will have to clarify the inevitable ambiguities that new legal language creates. Depending on the scope of the reforms in question, these endeavors may entail substantial time and expense.³¹⁶

For reasons such as these, Williston tends to favor established rules and terminology.³¹⁷ Unless one can show pretty clearly that a proposed reform will improve existing law—a showing that he believes he can make with respect to promissory estoppel—Williston thinks it is "safer" to stick to the "trodden" path.³¹⁸ This pragmatic conservatism explains in part Williston's unwillingness to jettison the consideration requirement.³¹⁹ It also explains the most famous example of Williston's resistance to reform, his opposition to the Uniform Commercial Code. Just after the Second World War, the ALI and the National Conference of Commissioners on Uniform State Laws sponsored the preparation of a comprehensive code to govern commercial transactions in the United States.³²⁰ The project, with Realist Karl Llewellyn as Chief Reporter, produced a draft in the spring of 1949, the "heart" of which was Article 2, dealing with the sale of goods.³²¹ Article 2 did not simply amend the Uniform Sales Act that Williston had drafted a half-century before; it totally replaced the earlier statute. Very little of Williston's language remained; indeed, the UCC's drafters prided themselves on their innovative approach to sales law.³²²

terminology).

315. See, e.g., Samuel Williston, *The Word "Equitable" and its Application to the Assignment of Choses in Action*, 31 HARV. L. REV. 822, 822–23 (1918) (arguing that because "[w]e are addressing a profession steeped in the old words and phrases . . . we must generally be content with received terminology").

316. For a contemporary discussion of these issues, see generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

317. See Williston, *supra* note 315, at 822–23 (discussing his use of the word "equitable").

318. Samuel Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?*, 30 HARV. L. REV. 97, 100 (1916).

319. See *supra* note 211 and accompanying text (discussing Williston's defense of consideration as a doctrine embedded in American law).

320. FARNSWORTH, *supra* note 107, § 1.9, at 32.

321. *Id.* at 33 (internal quotations omitted).

322. See *id.* (discussing the Code's "entirely new approach to the law" of sales).

Williston hesitates before commenting publicly on the new Code, worrying that his status as drafter of the prior Act will make his criticisms seem defensive or self-interested.³²³ In the end, though, he comes out against Article 2. In his very last law review article, which he writes in 1950 at the age of eighty-eight, Williston strongly criticizes the Code's drafters for ignoring the costs of their "radical[]" reform.³²⁴ Some business practices may have changed since enactment of the Uniform Sales Act, he concedes, and perhaps the changes would justify some amendments, but business practices had not changed so drastically as to justify the Code's complete overhauling of American sales law.³²⁵ Moreover, even if the "customs of buying and selling" had changed dramatically, Llewellyn owed it to the legal profession to couch his new rules in familiar language.³²⁶ In the Sales Act, Williston had assiduously tracked the language of existing commercial law;³²⁷ Llewellyn, by contrast, had gone out of his way to introduce a wealth of new phrases and "rules which have never existed anywhere."³²⁸ It will take "[y]ears" and "countless cases" before courts will be able to determine even reasonably certain boundaries for the Code's new concepts, Williston predicts,³²⁹ and in the meantime commercial transactions will be thrown into "a chaotic condition."³³⁰

In retrospect, of course, Williston's prophecies of chaos seem silly. Every American state (except Louisiana, a civil law jurisdiction) has adopted Article 2 with only minor variations, and the great commercial dislocations that Williston

323. See TWINING, *supra* note 5, at 460–61 n.56 (discussing Williston's response to the Uniform Commercial Code).

324. Williston, *Law of Sales*, *supra* note 1, at 565 ("I did not . . . imagine a project to restate or to reform the law so radically as the proposed Code seeks to do.").

325. See *id.* at 563 (arguing that "in the main, customs of buying and selling have not changed, and . . . the proper remedy for . . . changes in business customs is the enactment of amendments, not wholesale repeal").

326. See *id.* ("[I]f an entire revision should be attempted, so much of the phraseology of existing statutes as states undisputed rules should be retained . . ."); see also *id.* at 564–65 (criticizing the Code's use of novel language).

327. See *id.* at 564 (discussing how the Uniform Sales Act was "identical in most respects" to the already-existing English Sale of Goods Act).

328. *Id.* at 565 ("The new Code . . . proposes many rules which have never existed anywhere, and often adopts unusual language."); see also TWINING, *supra* note 5, at 289–90 (discussing correspondence between Williston and Llewellyn concerning Llewellyn's use of new terminology in the Code).

329. Williston, *Law of Sales*, *supra* note 1, at 565 (arguing that "[u]nder a statute as long as the proposed Code . . . the determination of countless cases will be necessary to give reasonable certainty to the law").

330. *Id.* at 563. For more on Williston's general objections to the Code, see TWINING, *supra* note 5, at 287–90.

envisioned have not come to pass.³³¹ But Williston's skill at prediction is not the important issue. The key point has to do with the precise nature of Williston's objections to the Code. Despite his overheated rhetoric—a reflection, perhaps, of his advancing age—Williston rejects the UCC on relatively narrow grounds.³³² He does not oppose doctrinal reform in principle; rather, he opposes what he perceives to be unnecessarily sweeping doctrinal reform that threatens to create more practical problems than it solves.

The conventional wisdom also distorts Williston's views with respect to "contract large." When it comes to freedom of contract, Williston is hardly an unthinking reactionary. To be sure, Williston is temperamentally an economic individualist. In his autobiography, he writes that he formed his political philosophy on the works of Benjamin Franklin—"the most interesting American"³³³—and that nineteenth-century apostle of self-reliance, Ralph Waldo Emerson.³³⁴ Williston values the ideal of individual achievement and extols the virtues of economic competition.³³⁵ He greatly distrusts organized labor—in the 1920 contracts treatise, he suggests that the law should treat unions as illegal combinations in restraint of trade³³⁶—and he opposes the centralized bureaucratic machinery of the New Deal.³³⁷ Indeed, Williston helps lead a fight by members of the Harvard faculty against Franklin Delano Roosevelt's Court-packing plan, motivated at least in part by a desire to correct the public impression that law professors wholly supported Roosevelt's larger political program.³³⁸

331. FARNSWORTH, *supra* note 107, § 1.9, at 32.

332. See Flores, *supra* note 186, at 217–18 (speculating that Williston's advanced age may have contributed to his criticisms of the Code).

333. WILLISTON, *supra* note 35, at 323.

334. *Id.* at 335.

335. In old age, Williston recalled:

When I was young I tried as hard as possible to beat out the other fellow. If I had had security, I probably would not have tried so hard. In these United States one cannot avoid competition . . . and one better be as smart as he can. I recognize it is hard for the person on the losing side of the competition. It's a hard thing of life, but nevertheless we have to try to achieve the best, and that cannot be done without competition. It is a race and I believe in the race.

Samuel Williston—1861–1963, 35 N.Y. ST. B. J. 105, 105 (1963).

336. See 3 WILLISTON, *supra* note 2, §§ 1655–1656, at 2915–19 (discussing trade unions).

337. See, e.g., WILLISTON, *supra* note 35, at 180 (suggesting his distrust of the labor movement); *id.* at 335 (expressing concern about the New Deal).

338. See Kyle Graham, *A Moment in The Times: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151, 158 & n.45, 160–61 (2002) (discussing Williston's role in opposing the Court-packing plan). For more on Williston's association with the conservative "Pound" wing of the Harvard Law faculty, see KALMAN, *supra* note 5, at 60.

But Williston is not doctrinaire about laissez-faire capitalism.³³⁹ Indeed, as one commentator observes, Williston occasionally espouses positions that are "mildly liberal" in early twentieth-century terms.³⁴⁰ As a pragmatist, Williston understands that freedom of contract cannot be the only public value and that the law must strike a balance between party autonomy and other social concerns like public health and safety. Williston does not think that courts should attempt to strike this balance, of course. As explained above, Williston believes that judges should generally stick to established rules; he does not think they should have discretion to settle broad social questions in the context of particular cases.³⁴¹ Yet Williston does not object to legislative attempts to ameliorate the harshness of the free market. Indeed, as discussed below, he occasionally drafts such legislation himself.

Williston's thoughts on the matter appear most clearly in a remarkable piece, *Freedom of Contract*, that he writes in 1921.³⁴² Given the conventional wisdom, one might expect Williston to offer a full-throated defense of libertarianism in contract law. In fact, he devotes much of his time to debunking the notion of absolute liberty of contract. During the late eighteenth and early nineteenth century, he explains, "metaphysical and political philosophers"—never a complimentary designation from Williston—had preached "[a] gospel of freedom" and laissez-faire economics.³⁴³ This "theorizing" had made a strong impact on American contract law, which had adopted extremely individualistic doctrines about parties' capacity to make agreements free from state regulation.³⁴⁴

By the twentieth century, however, the "tide" had turned against freedom of contract, and Williston makes plain that he favors the direction of the

339. See Grey, *supra* note 28, at 502 (stating that "Williston gave no support to constitutional liberty of contract") (internal quotations omitted); see also Grey, *supra* note 94, at 33–35 (discussing the moderation of classicists on political issues).

340. Havighurst, *supra* note 43, at 354.

341. See *supra* note 226 and accompanying text (discussing Williston's view of a judge's proper role).

342. Williston, *supra* note 45. For more on this article, see Braucher, *supra* note 12, at 59–60.

343. Williston, *supra* note 45, at 366.

344. See *id.* at 367 (describing the effect of laissez-faire philosophy on the development of contract law); see also Williston, *supra* note 168, at 134 (discussing wide scope of freedom of contract before the twentieth century). Williston argues that libertarian theories had a pronounced effect on nineteenth-century American contract law for the simple reason that there was no opposing theory for them to "contend with and dethrone." Williston, *supra* note 45, at 367. "It was comparatively easy" for nineteenth-century judges to adopt laissez-faire economics as a theory of contract, "since any inconsistency with earlier notions was not obvious enough to be disturbing." *Id.*

change.³⁴⁵ Experience shows, he writes, "that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare."³⁴⁶ Legislatures must balance the legitimate claims of party autonomy against other social interests like public health and safety. Once legislatures have done so, courts should stay out of the way. Williston denounces the *Lochner* Court's willingness to obstruct "reasonable social experiment[s]"³⁴⁷ and gives a list of salutary laws that might once have offended notions of liberty of contract, but fortunately do so no longer: rate regulations for common carriers, statutes providing standard terms in insurance contracts, limitations on interest rates that creditors may charge "the necessitous poor,"³⁴⁸ and even minimum wage laws.³⁴⁹

As *Freedom of Contract* demonstrates, Williston's approach to the concept is both pragmatic and institutional—pragmatic in its recognition that freedom of contract must be balanced against other social interests and institutional in its focus on assigning the balancing to the correct governmental actor. This approach resonates with at least some of the current law-and-economics literature on party autonomy, most notably Michael Trebilcock's work, discussed earlier.³⁵⁰ To be sure, Williston's argument is not as theoretically rich as Trebilcock's. Unlike Trebilcock, Williston does not offer a careful comparison of the perspectives of judges and legislators; he does not explain public regulation in terms of information asymmetries and other market failures. These terms would have been completely foreign to Williston. Nonetheless, Williston's approach is close in spirit to Trebilcock's, and the affinities should make us wary of dismissing Williston's ideas as archaic and reactionary.

Williston's moderation appears not only in jurisprudential articles like *Freedom of Contract* but also in his work as a statutory drafter. No concept so typifies freedom of contract as *caveat emptor*, the doctrine that courts will not intervene to rescue buyers who have not taken reasonable steps to protect themselves.³⁵¹ Given the conventional wisdom, one would expect Williston to

345. See Williston, *supra* note 45, at 374–75 (discussing situations where unlimited freedom of contract does not serve the public interest).

346. *Id.*

347. *Id.* at 376; see also *id.* (arguing that the *Lochner* Court "paid scant respect to the opinion of the New York legislature that a limitation of working hours in bakeries to ten hours would promote health, morals and general welfare").

348. *Id.* at 375.

349. For discussion of these examples and others, see *id.* at 374–75, 377–78.

350. See *supra* notes 139–43 and accompanying text (discussing Trebilcock's views on institutional competence).

351. For a discussion of the development of the doctrine of *caveat emptor*, see Alan M.

enshrine the doctrine in the statutes he drafts. But Williston's statutory work demonstrates an uneasiness with *caveat emptor*. One important example involves the provision he writes for the Uniform Sales Act on a buyer's remedies for a seller's breach of warranty.

Suppose that a buyer purchases defective goods from a seller who has warranted their quality. Established law at the time Williston drafts the Sales Act provided that the buyer could keep the goods and sue the seller for damages, measured as the difference in value between the goods as warranted and the goods as delivered.³⁵² If the seller had known about the defects, established law also gave the buyer the option to rescind the sale, return the goods, and recover the purchase price.³⁵³ But what if the seller had not known about the defects? The English Sale of Goods Act, which served as Williston's principal model,³⁵⁴ did not allow the buyer to rescind the contract in those circumstances. American jurisdictions were divided on the question,³⁵⁵ though the weight of authority apparently favored the English rule.³⁵⁶

A drafter who favored an unmitigated right to contract easily could have adopted the English rule for the American statute. But Williston does not adopt the English rule. Instead, he drafts a provision for the Sales Act that allows rescission even where the seller's misrepresentation was innocent.³⁵⁷ Williston argues that a buyer's right to rescind in these circumstances creates practical advantages. For example, allowing rescission for honest as well as fraudulent misrepresentation saves litigation costs by obviating the need for difficult and time-consuming inquiries about the seller's state of mind when he gave the warranty.³⁵⁸

Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 391–94 (1996).

352. WILLISTON, *supra* note 77, § 608, at 1009.

353. *Id.* at 1010; *see also* WILLISTON, *supra* note 35, at 260–61 (discussing this hypothetical).

354. *See* WILLISTON, *supra* note 35, at 261 ("I had followed [the English statute] in most particulars in drafting the American act."); *see also* Williston, *Law of Sales*, *supra* note 1, at 564 (noting that the Sales Act mostly "followed the English statute both in substance and in the use of identical words").

355. WILLISTON, *supra* note 77, § 608, at 1011.

356. Samuel Williston, *Rescission For Breach of Warranty*, 4 COLUM. L. REV. 195, 211 (1904). The fact that the weight of authority supports the English rule does not stymie Williston, of course. "[T]he really vital question," he writes, "is not whether the courts of ten or twelve or fourteen jurisdictions or more or less support the . . . rule but what is the intrinsic merit of the rule itself." *Id.*

357. Unif. Sales Act § 69(1)(d), 1 U.L.A. 295 (1950).

358. WILLISTON, *supra* note 77, § 608, at 1010–11.

More importantly, Williston believes that the rescission remedy promotes commercial good faith. Williston does not feel comfortable leaving parties entirely to fend for themselves in the marketplace. Whatever the demands of freedom of contract, the law should step in when one party seeks to take unfair advantage of the other. Williston explains his reasoning thus:

The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. The desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. Do merchants who value their reputation for fair dealing take back goods which they have untruthfully, though innocently, asserted possessed particular qualities? Do reasonable buyers who have bought goods under such circumstances expect the seller to take back the goods and refund the price[?] These are the essential inquiries, and there can be little doubt of the answers The morality of taking advantage afterward of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale.³⁵⁹

In the end, Williston writes, the English rule represents nothing more than "the principle of *caveat emptor*."³⁶⁰ As a result, the English rule "may well be swept away, as the more obviously barbarous applications of the doctrine have already been."³⁶¹

D. Legal Scholarship and Everyday Pragmatism

Thus far, this Article has shown that the conventional wisdom distorts Williston's work in three significant ways. First, Williston is not an essentialist. He defends axiomatic jurisprudence in terms of real-world benefits, not conformity to a "true" conception of contract.³⁶² Second, Williston does not argue that legal rules are ineluctable. He contends that rules should have only presumptive force and that courts should depart from logic in

359. *Id.* at 1010. For another example of this sort of reasoning in Williston's work, see Williston, *supra* note 51, at 437 (arguing that defendant should be liable for honest misrepresentation, as "[i]t should not lie in the mouth of the man who induced [plaintiff's] reliance to assert that the reliance was negligent").

360. Samuel Williston, *Rescission for Breach of Warranty*, 16 HARV. L. REV. 465, 475 (1903).

361. *Id.*

362. See *supra* Part III.A (explaining Williston's views on the real-world benefits of axiomatic jurisprudence).

particularly exigent circumstances.³⁶³ Finally, Williston is not dogmatic about freedom of contract. He takes a functional approach that stresses the need for judicial restraint and legislative balancing of public values.³⁶⁴ Williston's views thus have some striking affinities to contemporary contract scholarship. In these aspects of his work, Williston is closer in spirit to the new formalists than to classicists like Langdell.

But there is one sense in which the conventional account paints an accurate picture of Williston's jurisprudence. Compared to the new formalists, Williston's work is dramatically undertheorized. The new formalists rely on empirical data and sophisticated economic models to support their doctrinal prescriptions; Williston makes only shorthand references to concerns about rough justice and "practical convenience."³⁶⁵ The undertheorized character of Williston's scholarship comes through in some of the examples already discussed. Consider Williston's common-sense approach to risk of loss,³⁶⁶ his more-or-less intuitive concept of *stare pricipiis*,³⁶⁷ his endorsement of the vague "injustice" language of Section 90,³⁶⁸ and his rejection of *caveat emptor* as a violation of roughly defined norms of commercial good faith.³⁶⁹

Another important example involves Williston's approach to contract interpretation. Along with his views on the bargain requirement, Williston's objective theory of interpretation is probably the most famous (or infamous) aspect of his jurisprudence today.³⁷⁰ Much contemporary scholarship dismisses Willistonian interpretation, associating it with a simplistic and pedantic textualism.³⁷¹ It should come as no surprise that Williston's approach is in fact

363. See *supra* notes 245–99 and accompanying text (discussing role of presumptions in Williston's jurisprudence).

364. See *supra* notes 333–61 and accompanying text (discussing Williston's functional approach to freedom of contract).

365. See, e.g., Williston, *supra* note 51, at 436 (discussing "practical convenience"); Williston, *Repudiation (Part II)*, *supra* note 167, at 438 (same). For discussion of the new formalists, see *supra* notes 151–55 and accompanying text.

366. See *supra* notes 186–98 and accompanying text (discussing risk of loss).

367. See *supra* notes 178–81 and accompanying text (discussing Williston's concept of *stare pricipiis*).

368. See *supra* notes 285–87 and accompanying text (discussing Williston's defense of Section 90).

369. See *supra* notes 351–61 and accompanying text (discussing Williston's uneasiness with *caveat emptor*).

370. See Perillo, *supra* note 219, at 472 (noting that Williston "is famous or infamous—depending on one's point of view—for propagating the objective approach to contract formation and interpretation").

371. See, e.g., Michael L. Boyer, *Contract as Text: Interpretive Overlap in Law and Literature*, 12 S. CAL. INTERDISC. L.J. 167, 171–72 (2003) (characterizing Williston's approach

a great deal more complex than that.³⁷² In the 1920 contracts treatise, Williston sets forth an intricate interpretive regime, one that combines both subjective and objective elements.³⁷³ In defending that regime, though, Williston relies on the same sort of unadorned, intuitive arguments that characterize the rest of his work.

For purposes of interpretation, Williston divides contracts into two categories: informal contracts, both oral and written, and integrated contracts, in which the parties adopt a writing as "the full and final statement of [their] agreement."³⁷⁴ With respect to the first category, Williston argues that the "standard for interpretation" should be:

[T]he sense in which the party who used the words should reasonably have apprehended that the other party would understand them. When A offers his promise for B's and B accepts, A will be bound not only by any meaning which A knows, but also any meaning which A ought to know that B will attach to A's words.³⁷⁵

That meaning could turn on the parties' shared subjective understanding. Notwithstanding the complaints about his relentless objectivism, Williston believes that, in this context, parties could contract with reference to a "code peculiar to themselves."³⁷⁶ So, for example, parties could agree privately that "horse shall mean cow, or that buy shall mean sell," and a court would enforce the agreement on those terms.³⁷⁷ The fact that reasonable outside observers would understand the parties' language differently would not change the outcome.

to the parol evidence rule as a "mechanical conception" involving "[a] blind faith in language"); Mooney, *supra* note 24, at 1147 & n.77 (stating that classicists like Williston "expressed strong faith in the objectivity of language, a faith that served as the conceptualist foundation for premodern interpretive doctrines").

372. See Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269, 296 (2000) (describing Williston's approach as a "fine-spun matrix" and an "elaborate framework"); Perillo, *supra* note 219, at 431 (discussing "the complex architecture of Williston's objective theory of interpretation").

373. 2 WILLISTON, *supra* note 2, §§ 601–62. For helpful descriptions of Williston's theory of interpretation, see JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3.11, at 150–53 (4th ed. 1998); Cunningham, *supra* note 372, at 296–97.

374. 2 WILLISTON, *supra* note 2, § 604, at 1162–63. Williston also places in the second category the "very unusual" situation "where the parties to [an] oral agreement assent to a particular form of words as the definite and conclusive statement of their agreement." 2 *id.*

375. 2 *id.* § 605, at 1163.

376. 2 *id.* at 1164.

377. 2 *id.* "To be sure," Williston cautions, "clear proof will be needed in order to convince a tribunal that such was the agreement of the parties." 2 *id.*

With respect to the second category, Williston does advocate an objective approach.³⁷⁸ If the parties adopt a writing as the embodiment of their agreement, their subjective intent should no longer matter. In those circumstances, a court should give the parties' language the meaning that an outside observer would understand, regardless of the parties' shared private belief.³⁷⁹ Indeed, the parties to an integrated agreement might find themselves bound to a meaning "different from that which either [one] justifiably attached to the words."³⁸⁰

In defending this bifurcated approach to interpretation, Williston draws a common-sense distinction between informal and integrated contracts. While the new formalists rely on empirical studies and economic models to explain their interpretive methodology, Williston goes on an intuitive sense of what parties must be thinking. In an informal contract, he argues, the parties do not focus so much on the words they employ to describe their agreement. Their "minds . . . are not primarily addressed to the symbols which they are using; they are considering the things for which the symbols stand."³⁸¹ Thus, a subjective approach, one that turns on the parties' actual understanding, makes sense in that context. In an integrated agreement, by contrast, the parties do focus on the words—they "assent[] to the writing as the adequate expression of the things to which they agree."³⁸² The writing should thus supersede whatever private understandings the parties may have had; the writing, and not the parties' subjective intent, should determine the contours of their agreement.³⁸³

Having explained why an objective approach should apply to an integrated agreement, Williston goes on to define the precise sort of objective standard that a court should use. For Williston, there are two contenders: the "normal

378. See 2 *id.* §§ 606–07, at 1164–71 (arguing for an objective standard for integrated agreements); see also CALAMARI & PERILLO, *supra* note 373, § 3.11(a), at 150–51 (describing Williston's objective standard with respect to integrated agreements).

379. See 2 WILLISTON, *supra* note 2, §§ 610–11, at 1175–81 (discussing interpretation of integrated agreements); see also CALAMARI & PERILLO, *supra* note 373, § 3.11(a), at 150–51 (discussing Williston's standard with respect to integrations).

380. 2 WILLISTON, *supra* note 2, § 607, at 1170; see also 1 *id.* § 95, at 181. Williston notes that the parties may be able to obtain relief under the equitable doctrine of reformation, another example of his willingness to forgo the application of a presumptive rule in exigent circumstances. 2 *id.* § 606, at 1165; see also 3 *id.* § 1552, at 2753 (describing reformation as a "limitation necessary to work justice"); Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85, 92–93 (1919) (describing the reformation doctrine as matter of justice).

381. 2 WILLISTON, *supra* note 2, § 606, at 1165.

382. 2 *id.* (emphasis added).

383. See CALAMARI & PERILLO, *supra* note 373, § 3.11(a), at 151 (discussing this aspect of Willistonian interpretation).

standard," that is, the "common and normal sense of" the writing's language,³⁸⁴ and the "local standard," that is, "the natural meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and with such circumstances as surrounded its making."³⁸⁵ Williston opts for the local standard, a standard that includes any applicable trade usages.³⁸⁶ Once again, Williston explains his choice in common-sense terms. The "normal" standard would provide a bit more certainty than the local standard but would be excessively rigid.³⁸⁷ The local standard, by contrast, provides "a reasonable degree of certainty" without posing as many traps for careless parties.³⁸⁸

One final aspect of Williston's interpretive method deserves mention. Much in Willistonian interpretation depends on whether the parties have made an integrated agreement. That question, in turn, implicates Williston's views on the application of the parol evidence rule and his famous debate on the

384. See 2 WILLISTON, *supra* note 2, § 603, at 1162 (describing the "popular"—normal—standard).

385. 2 *id.* § 607, at 1167. Williston borrows these terms from Wigmore. See 2 *id.* § 603, at 1162 (discussing Wigmore's definitions of "popular" and "local" standards); see also Rakoff, *supra* note 21, at 1284–85 (discussing Williston's debt to Wigmore).

386. See 2 WILLISTON, *supra* note 2, § 608, at 1171–72 (stating that "[t]he local standard is preferable to the normal standard"); see also 2 *id.* § 603, at 1162 (describing local standard as "including the special usages of a religious sect, a body of traders, an alien population, or a local dialect") (internal quotations omitted); 2 *id.* § 650, at 1258 (citing approvingly cases "where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest").

387. 2 *id.* § 608, at 1171–72.

388. 2 *id.* at 1171. Williston's endorsement of the local rather than the normal standard highlights another way in which the conventional wisdom distorts his jurisprudence. Critics often condemn Williston for supporting a simplistic version of the "plain-meaning rule"—for arguing that a court should interpret contract language in light of ordinary meaning, without any investigation of the context in which the parties were working. See, e.g., Boyer, *supra* note 371, at 171–72 (arguing that the Willistonian belief in "plain meaning" represents "[a] blind faith in language"); Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 187–90 (1989) (discussing Llewellyn's disagreement with Williston's plain meaning rule). But Williston expressly rejects that version of the rule. "Contracts apparently clear in their meaning," he argues, "may be shown by usage or the surrounding circumstances to be ambiguous or perhaps clearly to mean something different from the normal or ordinary meaning of the language." 2 WILLISTON, *supra* note 2, § 609, at 1173. Williston maintains that evidence of context and local usage, including trade usage, should "always be admissible" to show the local meaning of the parties' language. 2 *id.* § 629, at 1214. Indeed, even evidence of the parties' negotiating history should be admitted to prove or to clarify ambiguities about local meaning—though not, of course, to show the parties' unexpressed intent. 2 *id.* § 630, at 1217–18.

subject with Arthur Corbin.³⁸⁹ The debate covers some difficult ground, but we can focus on Williston's key points.

How should a court determine whether a writing is an integration? Williston proposes a two-part test. If the writing contains a "merger clause"—a term expressly providing that the writing constitutes an integration—the clause should be conclusive.³⁹⁰ If the writing does not contain such a "wise provision," the court must determine the matter by interpreting the writing in light of all surrounding circumstances other than prior negotiations and contemporaneous oral agreements.³⁹¹ This is the crux of Williston's disagreement with Corbin; Corbin argued that a court should consider such extrinsic evidence in deciding whether the parties had made an integrated agreement.³⁹²

In defending his position, Williston does not engage in anything like the intellectual calisthenics that characterize contemporary defenses of a "hard" parol evidence rule.³⁹³ He does not talk about efficiency, the incentives for parties, or the balance that typical firms would strike between precise expression and transaction costs.³⁹⁴ Indeed, he gives hardly any explanation at all. He notes only that allowing courts to consider prior negotiations or contemporaneous agreements would render the parol evidence rule a mere presumption.³⁹⁵ A writing that appeared to be a complete integration would thus give the parties little security, as one of them could always rebut the presumption by showing the existence of an oral side agreement—even one

389. For a summary of this debate, see FARNSWORTH, *supra* note 107, § 7.3, at 434–35.

390. 2 WILLISTON, *supra* note 2, § 633, at 1226.

391. 2 *id.* at 1227.

392. See FARNSWORTH, *supra* note 107, § 7.3, at 435 (describing Corbin's position); Ross & Tranen, *supra* note 11, at 202 (describing the Williston-Corbin debate).

393. See, e.g., Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 540–68 (1998) (discussing the "soft" and "hard" versions of the parol evidence rule); Schwartz & Scott, *supra* note 19, at 590–91 (same).

394. Cf. Posner, *supra* note 27, at 880 ("The literature now speaks in an economic idiom, with concepts like transaction cost, risk aversion, default rule, and efficiency substituting for similar but vaguer notions in the earlier writings."); Schwartz & Scott, *supra* note 19, at 544–50 (outlining the authors' "efficiency theory" of contract law).

395. 2 WILLISTON, *supra* note 2, § 633, at 1226. As discussed earlier, Williston generally believes that a presumptive rule should be set aside when adhering to the rule would create bad practical results. See *supra* notes 245–56 and accompanying text (addressing Williston's views on presumptive rules). In the case of the parol evidence rule, however, Williston believes that setting aside the rule would itself create bad practical results. See *infra* notes 396–97 and accompanying text (discussing Williston's views on the practicalities of the parol evidence rule).

"repugnant to the writing."³⁹⁶ As a result, the "practical value" of the parol evidence rule "would be much impaired."³⁹⁷

Williston's penchant for abbreviated policy arguments—his tendency to describe the effect of legal rules in intuitive terms—can strike a contemporary academic reader as unsophisticated, even banal.³⁹⁸ Contemporary scholars are accustomed to richer accounts, both normative and positive, of legal rules and their operation.³⁹⁹ Unlike Williston, most scholars today would not think it sufficient to defend doctrine, or explain its effect in the real world, by making shorthand references to undefined notions of "justice" and "practical convenience." Williston's repeated reliance on such vague concepts, his use of common sense as a method of legal reasoning, makes him seem thoughtless and unambitious—a failure—for all his success in formulating a lasting doctrinal system.⁴⁰⁰

One should not be too quick to dismiss Williston on this basis, however. Before one can judge a body of scholarship, one needs to understand the scholar's goals and intended audience. Williston's differ greatly from those of contemporary scholars. Today, most legal scholars think of themselves as writing primarily for other academics. Their task, as they perceive it, is to formulate new accounts of law and law's social impact and to defend those accounts within the scholarly community.⁴⁰¹ Rather than as adjuncts to the bar, they see themselves principally as members of the broader university world; indeed, they increasingly attempt to map law in terms of other disciplines, like economics or political science.⁴⁰² They write in an academic idiom, one that prizes theoretical novelty and rigor and argumentative subtlety.

Williston understands the enterprise of legal scholarship quite differently. He does not direct his work primarily toward other law professors—given the small number of law schools at the time, that would have been a narrow

396. 2 WILLISTON, *supra* note 2, § 633, at 1226.

397. 2 *id.*

398. *Cf.* Posner, *supra* note 27, at 831 (arguing that "from a modern perspective" economic insights of earlier scholars "seem banal").

399. *See id.* at 879–80 (contrasting contemporary contracts scholarship with earlier work).

400. *Cf.* Posner, *supra* note 14, at 1316 (discussing the "untheorized" quality of traditional legal scholarship) (internal quotations omitted).

401. *See id.* at 1321 (discussing contemporary scholarship at leading law schools); *see also* Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1217 (2002) (stating that law professors no longer direct their work at practitioners, policymakers, or judges).

402. *See* Posner, *supra* note 14, at 1321–22 (discussing law-and-economics and contemporary constitutional law scholarship); Sullivan, *supra* note 401, at 1217 (discussing the "law-and" phenomenon).

readership indeed—but toward practicing professionals.⁴⁰³ As explained above, Williston believes that his most important task as a scholar consists of creating a doctrinal system that attorneys and businesspeople can use on an everyday basis, one that simplifies the law and makes it more comprehensible.⁴⁰⁴ Williston sees himself, not so much as a participant in the academic world, but as a member of the bar.⁴⁰⁵ Late in his career, remembering his early Harvard colleagues, he gives a description that could apply to himself as well. Thayer and Ames, he recalls, "did not conceive of themselves as jurists, but as lawyers. . . . They felt themselves engaged in a practical profession, and in the training of young men for that profession. As such, they were pragmatists."⁴⁰⁶

Given his goals and his intended audience, Williston's reliance on intuitive justifications seems more plausible. Lawyers rely on rough judgments about fairness and practicality all the time.⁴⁰⁷ So do their clients: Even if "business people" do not carefully reason out legal problems, Williston writes, "they do have an instinct" about their proper resolution.⁴⁰⁸ Lawyers and their clients work with law on an operational level, and they typically have little interest in rich theoretical accounts.⁴⁰⁹ Particularly in the commercial context, complex and controversial normative accounts of law can have a negative payoff. As Richard Posner argues, everyday commerce depends on the ability of parties to displace debates about "deep issues" that can "disrupt and even poison commercial relations among strangers."⁴¹⁰

Indeed, Williston's scholarship shares some important affinities with what Posner calls "everyday pragmatism" in law, an approach that rejects abstract speculation and theoretical subtlety in favor of rough-and-ready solutions to legal problems.⁴¹¹ At first, this may seem a surprising claim. Posner is a

403. See Posner, *supra* note 14, at 1320 (discussing traditional legal scholarship's emphasis on writing for the legal profession); see also Sullivan, *supra* note 401, at 1217 (discussing changes in legal scholarship).

404. See *supra* note 225 and accompanying text (explaining Williston's views on legal scholarship).

405. As Richard Posner notes, legal scholars traditionally "identified with the legal profession rather than with their colleagues in other departments of their university. They even dressed like lawyers rather than like professors." Posner, *supra* note 14, at 1315.

406. WILLISTON, *supra* note 36, at 119.

407. See Posner, *supra* note 14, at 1319 (noting how "'fairness' and 'justice'" are "terms that lawyers and judges like to toss around as if they were perfectly intuitive").

408. WILLISTON, *supra* note 207, at 22.

409. See POSNER, *supra* note 54, at 11–12 (discussing "everyday" pragmatism).

410. *Id.* at 12.

411. *Id.* at 11–12, 49–56 (discussing "everyday" pragmatism).

resolute antiformalist; the idea that he and Williston could share a common legal outlook goes against all conventional understanding.⁴¹² On closer analysis, though, one discovers that Williston and Posner agree on some central jurisprudential claims: the irrelevance of metaphysics, the reliance on common-sense judgment, and the insistence on real-world feasibility. The two scholars lie on the same continuum; the differences between them are largely ones of degree.

To be sure, Williston values the formalist virtues more than Posner does. Williston does not think that the difference between adjudication and policymaking is quite so narrow.⁴¹³ He would not agree that a judge should simply "try to make the decision that is reasonable in the circumstances, all things considered."⁴¹⁴ But recall that Williston "embrace[s] formalism as a pragmatic strategy."⁴¹⁵ Williston is not an essentialist; he endorses formalism for what he sees as its significant practical advantages.⁴¹⁶ Moreover, Williston recognizes that judges must set formal logic aside when faced with particularly exigent circumstances.⁴¹⁷ Williston and Posner agree that law must be justified, ultimately, by pragmatic considerations. The difference is that Williston thinks formalism can promise much more in this regard than Posner thinks it can.

Williston's embrace of everyday pragmatism appears not only in his own scholarship, but also in his evaluation of others' scholarship. For example, his distrust of abstract speculation causes him to reject Hohfeldian legal analysis, widely popular in the American legal academy in the late teens and early twenties. Largely ignored today, Hohfeldian theory sought to explain law in terms of certain fundamental concepts, law's "lowest common denominators."⁴¹⁸ By focusing on these bedrock principles, Hohfeld believed,

412. On Posner's antiformalism, see Cox, *supra* note 175, at 61; Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 424–25 (1990).

413. See POSNER, *supra* note 54, at 74 (arguing that the "gulf between judges and politicians is narrower than the official picture of the judiciary would have it").

414. *Id.* at 73 (internal quotations omitted).

415. "Legal formalism and legal pragmatism are opposites, with the important qualification that a pragmatic judge might in some circumstances decide to adopt a formalist rhetoric for his judicial opinions—might even decide to embrace formalism as a pragmatic strategy rather than just as a pragmatic rhetoric." *Id.* at 19.

416. See *supra* Part III.A (discussing practical advantages of formalist derivation of legal principles); Part III.B (discussing relationship between logic and pragmatism in Williston's jurisprudence).

417. See *supra* Part III.B (discussing the role of presumptions in Williston's jurisprudence).

418. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 58 (1913) (internal quotations omitted); see TWINING, *supra* note 5, at 34 (discussing Hohfeld's impact on legal scholarship).

one could more fully appreciate law's "unity" and "harmony."⁴¹⁹ Hohfeld set out to clarify the confusion that he believed lawyers and judges created by referring to these principles in ambiguous ways.⁴²⁰ So, for example, Hohfeld famously argued that the term "rights," as used in legal parlance, actually referred to at least four distinct concepts: rights, powers, privileges, and immunities.⁴²¹

Williston admires some aspects of Hohfeld's work; for example, he asks Corbin to keep an eye out for Hohfeldian issues in preparing the Restatement.⁴²² He concludes, however, that on the whole Hohfeldian analysis is too contrived to be of practical importance. Philosophers might find the different uses of the word troublesome, Williston writes, but most lawyers have a tolerably good instinct for the varying meaning of the word "rights" in legal analysis.⁴²³ Despite Hohfeld's claims of improvement, the new terminology would only introduce confusion where none existed. Moreover, Williston argues, it makes little sense to hold lawyers and judges to a pedantic standard of precision. Law is for the real world, and a jurisprudence that "endeavor[s] for perfect distinctions" and "contains a large number of unusual words is not likely to be adopted by those who actually control" the law's development.⁴²⁴ "The language of philosophical or scientific jurisprudence can never be the common speech of lawyers."⁴²⁵

Williston's everyday pragmatism also comes through in his measured assessment of the "sociological jurisprudence" of Progressives like Roscoe Pound.⁴²⁶ The Progressives—Williston refers to them as followers of the

419. Hohfeld, *supra* note 418, at 60.

420. TWINING, *supra* note 5, at 34.

421. Hohfeld, *supra* note 418, at 30.

422. TWINING, *supra* note 5, at 397 n.31.

423. See WILLISTON, *supra* note 36, at 133–34 (discussing Hohfeld's analysis concerning the various meanings of the word "rights").

424. WILLISTON, *supra* note 35, at 207. In another article that touches on Hohfeldian analysis, Williston writes:

We are addressing a profession steeped in the old words and phrases, and all the sources of our law in judicial decisions and statutes are expressed in them. While, therefore, new terminology is occasionally unavoidable, and not infrequently helpful if its equivalence to or difference from older expressions is clearly indicated, we must generally be content with received terminology, making the precise sense in which we use it as clear as may be.

Williston, *supra* note 315, at 822–23.

425. WILLISTON, *supra* note 35, at 207.

426. See *id.* at 208–09 (discussing differences between classical and "functional" approaches); see also WILLISTON, *supra* note 36, at 139–40 (discussing Pound's impact on the development of law as a "social science[']"). For more on Pound's sociological jurisprudence,

"functional approach"⁴²⁷—saw themselves as the law's great pragmatists.⁴²⁸ They rejected what they called the "mechanical jurisprudence" of classical formalism,⁴²⁹ arguing that one must understand law, not as an autonomous set of axioms, but as a flexible tool for promoting beneficial social ends.⁴³⁰ They believed that scholars should forgo speculation and focus on "instrumental problem solving."⁴³¹ They argued, too, for more empirical scholarship—for the study of "law in action" as opposed to "law in books."⁴³²

As far as Williston is concerned, he and the functionalists differ only in degree. The functionalists place a somewhat greater "stress . . . upon the practical social or economic effect of deciding a given legal problem in one way or another," and they care somewhat less about the formulation of general principles to guide legal analysis.⁴³³ But, Williston believes, the functionalists' vision of law as a mechanism for promoting social welfare is entirely consistent with his own.⁴³⁴ Moreover, while he shows no inclination to do empirical work himself, Williston has surprisingly good things to say about law in action. Williston argues that empirical research, particularly on procedural issues, can provide "necessary information on which the development of the law may properly proceed."⁴³⁵ He cites, among others, a study that his Harvard colleagues Frankfurter and Pound had conducted on criminal justice in Cleveland, and another that the Yale Law School faculty had done on civil procedure in Connecticut.⁴³⁶

see, for example, SEBOK, *supra* note 31, at 33 (describing sociological jurisprudence as "Pound's . . . contribution to legal theory"). See generally Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

427. WILLISTON, *supra* note 35, at 208.

428. See Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 497–500 (1996) (reviewing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)) (discussing Progressive jurisprudence).

429. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608–09 (1908) (calling for rejection of "mechanical jurisprudence").

430. See Grey, *supra* note 428, at 498 (stating that Progressives viewed law "as a means to an end, a socially embedded and purposive set of activities aimed at satisfying human wants collectively expressed as public policies").

431. *Id.* at 498.

432. See generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). See also Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1342 (2002) (discussing Progressive calls for empirical scholarship).

433. WILLISTON, *supra* note 35, at 208.

434. *Id.* at 208–09.

435. WILLISTON, *supra* note 36, at 146.

436. *Id.* at 145.

Still, Williston thinks that practical problems inherent in empirical scholarship counsel caution.⁴³⁷ "It is generally impossible to obtain a controlled experiment of the effect of a legal rule," he writes.⁴³⁸ "So many factors enter into the ultimate result that reasonable certainty as to the effect of the rule is hard to obtain."⁴³⁹ That does not mean that empirical work should cease, only that scholars should be wary of relying too heavily on studies that are frequently ambiguous.⁴⁴⁰ Fortunately, he believes, some of the practical benefits of traditional legal analysis do not require scientific confirmation.⁴⁴¹ Common sense suggests that, all things being equal, simplicity, predictability, and logical coherence in law promote social welfare.⁴⁴² As a result, Williston argues, the burden is on the Progressives. Unless empirical work clearly shows that traditional legal reasoning leads to bad social results, jurisprudence should stick to standard doctrinal arguments.⁴⁴³

Finally, one can understand Williston's rejection of Realism in pragmatic terms. Like the Progressives, the Realists questioned the certitude of formal rules and emphasized the need for policy arguments in legal reasoning. The Realists carried these themes much further than the Progressives, however.⁴⁴⁴ Although the Progressives never wholly abandoned the idea that law must be organized around broad principles—a fact that Williston notes approvingly—the Realists ridiculed formalism's concern with conceptual analysis.⁴⁴⁵ Much more than the Progressives, the Realists insisted that abstract logic hid the reality of law, that legal outcomes depended, not on deductive reasoning, but on

437. *Id.* at 150–51.

438. *Id.* at 150.

439. *Id.*

440. *See id.* at 151 (stating that "[t]he fact that" empirical "investigations . . . may prove barren is no reason why every investigation of fact that shows a chance of profitable results should not be undertaken").

441. Williston states this proposition as follows:

[A]s to some things investigation is not necessary to prove that they are of social advantage. The proposition for instance can safely be made that, other things being equal, simplicity of law is desirable. So also the greater degree of certainty with which a court's decision on a given state of facts can be predicted, the better it is for society, other things being equal.

Id. at 151.

442. *Id.* at 151–52, 151 n.7.

443. *Id.* at 151–52.

444. *See Grey, supra* note 428, at 500–02 (discussing Realist jurisprudence).

445. *See WILLISTON, supra* note 35, at 208–09 (discussing the functional approach); Grey, *supra* note 428, at 500–01 (discussing Realist jurisprudence).

"narrow type situations" that one could not organize into predictable doctrinal categories.⁴⁴⁶

Williston's negative reaction to Realism results at least in part from generational and temperamental differences. The bombastic and self-congratulatory tone of some Realist scholarship grates on him.⁴⁴⁷ For example, Williston writes in his autobiography, the Realists claim as central tenets of their creed the ideas that legal doctrines are "in flux," that judges create "new law," that law must be "a means to social ends," and that scholars must be prepared to re-examine the purposes and effects of rules.⁴⁴⁸ These are hardly novel insights, he notes; others had them before.⁴⁴⁹ He takes issue with the notion that the Realists have discovered that law has a necessary relationship with justice. "Consideration of the justice of existing rules of law was not wholly disregarded by teachers of a former generation," he insists.⁴⁵⁰ "[B]rave men lived before Agamemnon."⁴⁵¹

Moreover, Williston argues, the Realists' "frenzy" has led them to make the very error that they charge against the formalists—the Realists overgeneralize.⁴⁵² Although at any given time some legal doctrines are in a state of "flux," not all doctrines are unstable. "[T]he every-day law of real and personal property, of contracts, and of torts" is not so fluid as to prevent parties from planning their affairs with reasonable certainty.⁴⁵³ Similarly, while "[s]ome judges . . . decide cases first and find the best available reasons afterwards," it does not follow that all judges do so.⁴⁵⁴ Not every case presents an opportunity for this sort of behavior, and anyways, not all judges would be willing to cheat. Finally, even if deductive logic does not completely explain many legal decisions, it does not follow that lawyers should simply cast logic

446. Grey, *supra* note 428, at 500.

447. Llewellyn's exaggerated rhetoric must have particularly irritated Williston. One can hardly imagine a style more different from Williston's own dry, measured exposition. Compare 1 WILLISTON, *supra* note 2, §§ 22–98, at 25–187 (discussing offer and acceptance) with Llewellyn, *supra* note 258, at 782–83 (same).

448. WILLISTON, *supra* note 35, at 210–11.

449. See *id.* at 211 ("Professor Llewellyn admits that none of these points are wholly new . . .").

450. Williston, *supra* note 148, at 972. "[T]hough it was rather the effect on individuals than on society to which attention was directed, it may be said of most rules of law that the rule that is just with reference to the individuals concerned, is also that which is most desirable for society as a whole." *Id.*

451. *Id.*

452. WILLISTON, *supra* note 35, at 211.

453. *Id.*

454. *Id.* at 212.

aside.⁴⁵⁵ Legal logic is always a matter of probabilities; even imperfect doctrinal coherence serves a vital role in promoting the predictability and fairness of the legal system.⁴⁵⁶

In short, Williston believes that the Realists lack balance and perspective. The Realists spoil whatever valid points they make about law—and Williston concedes that the Realists make some—by carrying them too far.⁴⁵⁷ Williston's rejection of Realism thus comports with his overall conception of legal scholarship as a pragmatic endeavor.⁴⁵⁸ In their exaggerated diagnosis of crisis and their inflated claims about the possibility of reform, he believes, the Realists ignore the central pragmatic virtues of moderation and reasonableness. Ironically, despite their intent to make law conform more closely to facts on the ground, the Realists create a jurisprudence too extreme and impractical to be of use in the everyday world.

IV. Conclusion

Several years ago, Thomas Grey suggested a model of legal history as the history of philosophy.⁴⁵⁹ In that model, the legal historian does not focus so much on the development of legal doctrine or the ways in which legal thought relates to larger social and political themes. Rather, the historian seeks to explain how a body of jurisprudence "[was] experienced by those legal intellectuals who [found] it appealing."⁴⁶⁰ To do this, the historian tries to fashion a true account of the jurisprudence—an account the intellectuals themselves would have endorsed—and to explain it in a contemporary idiom.⁴⁶¹

455. *See id.* at 213–14 (discussing benefits of logical coherence in law, even though "cases are not always decided in accordance with logical deductions").

456. *See id.* at 213 ("Many illustrations could be given where broader syntheses have not only made the law simpler, more reasonable, more scientific, and easier to learn and to apply, but also more just.").

457. *Id.* (stating that he would only "make a direct frontal attack" on one Realist claim, namely, "the belief in the desirability of grouping legal situations in narrower categories than has been customary").

458. *See supra* notes 403–17 and accompanying text (discussing pragmatic character of Williston's scholarship).

459. Grey, *supra* note 428, at 511.

460. *Id.*

461. *Id.* at 511. As Grey states:

One must step out of the historian's external and explanatory mindset, and approach the theory not as an object of study but as a body of ideas offered for acceptance. This means formulating it in its most attractive light, at least for a present reader who is willing to make some effort to enter imaginatively into the

The historian tries to imagine how legal intellectuals of past generations would present their arguments to audiences today—how they would justify their positions and answer criticisms.⁴⁶² The historian who pursues this model becomes, in Grey's words, "the translator for our time of Langdell, or Roscoe Pound, or Jerome Frank, or Lon Fuller."⁴⁶³

Or Samuel Williston. This Article has pursued, with respect to Williston, the model that Grey suggests. It has tried to take Williston on his own terms, to understand what he found appealing about formalism in contract law and to present his scholarship in an unbiased way. It has attempted to restore a more balanced and correct version of his jurisprudence, a jurisprudence that has had tremendous impact on the course of American law. Taken as a whole, Williston's work has more balance and nuance, and shows more continuity with contemporary contracts scholarship, than we commonly suppose.

theory's original historical context.

Id.

462. *See id.* ("In this mode, the author . . . tries to speak for the Classicist, or the Realist, and invites questions from the reader . . . along the lines of 'How would you deal with this problem?' or 'How can you defend against this objection?'").

463. *Id.* at 512.

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