Michigan Law Review

Volume 85
Issue 5 *Issue 5&6*

1987

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Recommended Citation

E. A. Farnsworth, *Contracts Scholarship in the Age of Anthology*, 85 MICH. L. REV. 1406 (1987).
Available at: <https://repository.law.umich.edu/mlr/vol85/iss5/46>

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CONTRACTS SCHOLARSHIP IN THE AGE OF THE ANTHOLOGY

*E. Allan Farnsworth**

As every fledgling law student knows, a revolution in legal education began in the fall of 1870 when Christopher Columbus Langdell opened his course in contracts at the Harvard Law School by asking, "Mr. Fox, will you state the facts in *Payne v. Cave?*"¹ Langdell's casebook, published in 1871, ushered in what I call the Age of Anthology in American contracts scholarship.²

Although it is not our habit to speak of casebooks as anthologies, Langdell could not have been unaware of *The Golden Treasury*, Francis Turner Palgrave's famous anthology of lyric poetry, published only a decade before.³ Like Palgrave, Langdell arranged his selections on chronological principles, to show historical development.⁴ And like Palgrave's florilegium, Langdell's collection was pristine, without comment by the editor and unadulterated by extraneous material — a true "gathering of flowers."⁵ Much the same can be said of the volumes of contracts cases compiled by Williston, Huffcut and Woodward, Keener, Corbin, and Costigan, who kept the Age of the Anthol-

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The *Michigan Law Review* invited me to review Langdell's contracts casebook when it was reprinted in 1983, but I concluded that I could not do so. Nagging questions about its place in contracts scholarship, however, provoked me to the inquiries that resulted in what follows. I am grateful to the *Review* for publishing something quite different from what they invited, and after so long a delay. For suggestions, I am grateful to Bruce A. Ackerman, Sheldon W. Halpern, Michael H. Hoeflich, Margaret N. Kniffen, Robert M. Loyd, Janet L. Richards, Jeffrey P. Trout, and G. Edward White.

1. 2 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 372 (1908).

2. This article does not, with minor exceptions, discuss casebooks or scholarship in fields other than contracts. This is not only because contracts is the field in which Langdell produced the first casebook but also because it is the field that I know best. Whether some of what I say here is true of other fields is for the reader to decide.

3. F. PALGRAVE, THE GOLDEN TREASURY OF THE BEST SONGS AND LYRICAL POEMS IN THE ENGLISH LANGUAGE (1861).

4. *Id.* at xi. Grant Gilmore deprecated Langdell's practice of arranging English cases and then American cases in chronological order within each subject matter. G. GILMORE, THE DEATH OF CONTRACT 13 (1974). But in the nineteenth century, literary anthologies came to be organized on just such chronological principles. See 1 THE NEW ENCYCLOPAEDIA BRITANNICA 443 (Micropaedia 15th ed. 1974).

5. This is the meaning of the Greek from which "anthology" is derived. The classic anthology is Meleager's *Garland*, a collection of short epigrammatic poems, some by Meleager himself, compiled in the first century B.C. See 1 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 4, at 443.

ogy alive during the next half century. They, too, adhered by and large to the tradition of apparent neutrality begun by Langdell.

The Age — at least as I conceive it — came to an end in the 1940s when the true anthology passed out of fashion. Casebooks had outgrown their primal purity and had become mixtures of “cases and materials” in which the views, opinions, and theories of interventionist editors are frankly and unapologetically expressed and openly and vigorously supported, not only by cases but by selections from secondary sources. This change was, in contrast to that sparked by Langdell, a gradual transformation, wrought by a variety of twentieth-century casebook editors. The most influential were Patterson and Goble, who published in 1941, Fuller, who published in 1947, and Kessler and Sharp, who published in 1953. The Age discussed in this article thus spans some eighty years between the publication of Langdell’s anthology and the appearance of these modern casebooks.

In the first part of this article, I trace the history of the Age. I observe that for nearly forty years, from 1881 to the time of World War I, there was a significant decline in contracts scholarship and conclude that the principal explanation for these lean years lies in the shift in scholars’ focus from an audience of practitioners to one of students that resulted from the introduction of the case method. In the second part of the article, I look at the way in which the anthologists wielded the considerable influence that each had when only a few contracts casebooks dominated the market. I consider also such matters as their heavy emphasis on English cases, their exclusion of such major topics as remedies, and their abstinence from the use of anything other than cases. I conclude that although these early anthologists were blatant in their attempts to simplify and to rationalize the state of contract law, their espousal of particular doctrines was more restrained and subtle. In the third and final part of the article, I examine the way in which these early anthologists espoused particular doctrines in two specific and related areas: reliance on an offer of a unilateral contract and reliance on a gratuitous promise. I conclude that though the anthologies reflected the anthologists’ views on these matters, the anthologies themselves had little impact on the development of doctrine.

I. HISTORY OF THE ANTHOLOGY

A. *What Came Before the Age: 1800-1870*

Contracts scholarship was slow in coming to this side of the Atlantic. During the early part of the nineteenth century, American lawyers leaned heavily on English writers. William Blackstone’s influential *Commentaries* on English law, which was available in American editions from the beginning of the century, paid little atten-

tion to contracts,⁶ but subsequent English authors who devoted entire books to contracts were also well known in America and were favored with American editions. They included John Joseph Powell, Joseph Chitty, Charles Greenstreet Addison, Stephen Martin Leake, and John William Smith.⁷ But neither of the two great American treatise writers of the early nineteenth century, James Kent and Joseph Story, had much to say about contracts as such,⁸ and it was not until the century was roughly half over that the subject began to capture the fancy of American authors. The best known and most influential works were by William Story and Theophilus Parsons.⁹

William Story, son of the great Joseph, began his legal career by combining the practice of law with the writing of treatises. His one-volume work on contracts appeared in 1844, only four years after his graduation from the Harvard Law School, and quickly became a standard in its field.¹⁰ In 1856, however, after editing the fourth edition of his treatise, Story gave up the practice of law and the writing of law books for the temptations of sculpture, in which he was also accomplished, and settled in Rome. His treatise survived one more edition in 1874.

Story's work soon had a formidable competitor, for in 1853 Theophilus Parsons, Dane Professor at the Harvard Law School, published a two-volume treatise on contracts.¹¹ Parsons, an indefatigable

6. For a brief discussion of Blackstone's treatment of contracts, see F. KESSLER, G. GILMORE & A. KRONMAN, *CONTRACTS: CASES AND MATERIALS* 42-46 (3d ed. 1986).

7. There were also American editions of Sir Edward Fry's work on the specific performance of contracts. For discussion of nineteenth-century English works on contracts, see Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. REV. 247, 250-57 (1975).

8. See J. KENT, *COMMENTARIES ON AMERICAN LAW* (1826-1830). Although Kent's four-volume work devoted considerable space to such commercial topics as agency, partnerships, bailments, negotiable paper, and maritime law, the only organized discussion of contract was of the contract of sale of goods, which filled some seventy pages in the part on personal property. See 2 *id.* at 363-436.

Although Story, as Gilmore points out, wrote treatises on many specialized bodies of law, "it never occurred to him to write a treatise on 'Contracts.'" G. GILMORE, *supra* note 4, at 11. Story did, however, produce a one-volume commentary on the law of bailments in 1832 and a two-volume commentary on equity jurisprudence in 1836, the latter including such aspects of contract law as mistake, fraud, specific performance, and assignments.

Two early American works were G. VERPLANCK, *AN ESSAY ON THE DOCTRINE OF CONTRACTS* (1825) (a short volume inquiring into "How Contracts are Affected in Law and Morals by Concealment, Error, or Inadequate Price") and D. CHIPMAN, *AN ESSAY ON THE LAW OF CONTRACTS FOR THE PAYMENT OF SPECIFICK ARTICLES* (1822) (a small volume directed more at the practitioner).

9. Another, lesser known, writer of this era was Theron Metcalf. See T. METCALF, *PRINCIPLES OF THE LAW OF CONTRACTS* (1867), a short text that saw a second edition in 1888 by F. Heard. See also C. BROWNE, *A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS* (1857), which had later editions in 1863, 1870, 1880, and by J. Bailey in 1895.

10. W. STORY, *A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* (1844). The fourth edition in 1856, the last edition prepared by Story, was in two volumes, a reaction in part to Parsons' two-volume work.

11. T. PARSONS, *THE LAW OF CONTRACTS* (1853). Beginning with the fifth edition in 1866 there were three volumes.

writer who went on to author seven more treatises, had a felicity of style, a clarity of statement, and a penchant for generalization that made his contracts treatise a huge best seller.¹² As one reviewer wrote,

[T]he law is presented in a style of transparent clearness, and the points are stated with mathematical precision — the author never allowing himself to be turned aside from the precise matter in hand, and carefully excluding everything that can divert the mind from following the discussion to its legitimate results.¹³

It endured through nine editions, the last in 1904.¹⁴

B. *The Age of Anthology Begins: 1871-1880*

One of the young law students who helped Parsons to prepare his footnotes later spent sixteen years as a bookish lawyer in New York City and then was called back in 1870 to take Parsons' place as Dane Professor. During the spring of that year he collected cases and by fall Christopher Columbus Langdell was able to put in the hands of his students the advance sheets for the book of *Cases* that ushered in the Age of Anthology.¹⁵

By present-day standards, it was a curious work. It contained 336 cases, only slightly edited, without commentary. Only twenty-two of the cases were American, mostly from Massachusetts and New York. Virtually all of the rest were English, many of these having been decided before 1700. The cases were divided into but three chapters entitled "Mutual Consent," "Consideration," and "Conditional Contracts," leaving the rest of the subject of contracts untouched.¹⁶

12. See 2 C. WARREN, *supra* note 1, at 312.

13. Notice of New Book, 2 AM. L. REG. 190, 190-91 (1854) (quoting from an unidentified source). As Parsons himself put it, "I have endeavored to state in the text what I think to be the law; and in the notes I have endeavored to enable the reader to judge for himself whether I am right." 1 T. PARSONS, *supra* note 11, at ix (1853).

Williston said of his predecessor as Dane Professor of Law that though Parsons' works were "more voluminous" than Greenleaf's, "probably it may be said without undue harshness, that they were deservedly less influential in the development of the law." S. WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 111 (1929).

14. The ninth edition was described as an "antiquity" by a reviewer who thought that the work "in and of itself has no place in the modern scientific development of study and instruction in the law of contracts — unless it be to mark a phase of their history." Book Review, 5 COLUM. L. REV. 71, 71 (1905).

15. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871) [hereinafter C. LANGDELL, *CASES*]. This was not, however, the first collection of leading cases. The best-known of several English collections is J. SMITH, *A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW WITH NOTES* (1838-1840). Nor was it even the first use of cases for law teaching. See J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 261 (1950) (describing John Norton Pomeroy's use of cases at New York University Law School in the 1860s).

16. In 1983 the casebook was reprinted by the Legal Classics Library with a helpful introduction by Thomas G. Barnes that discusses the casebook. The numbers of cases given in this article accord with those in the introduction. Counting cases is not, however, an exact science. Thus *Kingston v. Preston* is not counted because Langdell presented it as part of the opinion in

Nevertheless, for the better part of a century Langdell's *Cases* and its heavily revised descendants were carried to first-year law classes throughout the United States.¹⁷

Langdell made few changes when a second edition was issued in 1879,¹⁸ having already given over the contracts course to his disciple James Barr Ames. The second edition was noteworthy not for its cases but for its appendix, a short text of some 250 pages, which was separately published with minor revisions as Langdell's *Summary* in 1880.¹⁹ Unlike the works of Story and Parsons, which were addressed primarily to practitioners, the *Summary* was written mainly for students. Its sixteen chapters, oddly arranged in alphabetical order, covered only the areas dealt with in the casebook, and the list of cases discussed in the *Summary* is substantially the same as that contained in the casebooks.²⁰ A hostile reviewer conceded that "it is a valuable review of the matter presented in the cases" and that "it performs one important office: it points out which of them are overruled."²¹ Nevertheless, courts often cited it and, though it was never revised, citations continued through the first third of this century, even after Williston's treatise appeared.²²

The popularity of the *Summary* is somewhat surprising in view of Langdell's propensity for espousing views that did not stand the test of time.²³ He wrote that the "consequences of a contract's being unilateral or bilateral are many and important"²⁴ and laid great stress on a

Jones v. Barkley, and *Haigh v. Brooks* and *Brooks v. Haigh* are counted as one case because Langdell so presented them.

17. Williston added a second volume in 1894. See text at note 54 *infra*. The Langdell-Williston combination then saw six editions under Williston's name in 1903, 1922, 1930, 1937, 1949, and 1954, the last edition edited by William Tell Laube.

18. Langdell deleted "some of the less important cases," some 30 in all, and added some 20 cases.

19. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880) [hereinafter C. LANGDELL, SUMMARY]. In a few instances, signaled in the preface, Langdell added footnotes in this edition to indicate a change of view.

20. Since the book as a whole was to be only a fragment, it was not thought worth while to divide it into chapters and sections, to be arranged in consecutive order, but the easier method was adopted of treating the different subjects separately and independently, and arranging them in alphabetical order.

Id. at v.

21. Book Review, 5 S. L. REV. 872, 873 (1880). For a more favorable assessment by Woodruff, see Book Review, 6 CORNELL L.Q. 130 (1920), describing Langdell's *Summary* as "an intense and relentless re-examination of the foundations of the subject."

22. For examples from cases in the New York Court of Appeals, see *Mascioni v. I.B. Miller, Inc.*, 261 N.Y. 1, 4, 181 N.E. 473, 473-74 (1933); *Coletti v. Knox Hat Co.*, 252 N.Y. 468, 472, 169 N.E. 648, 649-50 (1930); *Petterson v. Pattberg*, 248 N.Y. 86, 88, 161 N.E. 428, 429 (1928); *Allegheny College v. National Chautauqua Bank*, 246 N.Y. 369, 373, 381, 159 N.E. 173, 174, 177 (1927).

23. Grant Gilmore unkindly characterized Langdell as "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius." G. GILMORE, THE AGES OF AMERICAN LAW 42 (1977).

24. C. LANGDELL, SUMMARY, *supra* note 19, § 187. See generally *id.* §§ 183-87.

distinction that has been abandoned in the *Restatement (Second) of Contracts* "because of doubt as to [its] utility."²⁵ He inveighed against the mailbox rule, though he conceded that "it has been supposed to be pretty well settled . . . that the contract is complete the moment the letter of acceptance is mailed."²⁶ He argued against the "common opinion" — today generally accepted — that a binding agreement not to revoke an offer makes the offer irrevocable, contending that an irrevocable offer is a "legal impossibility" and that such an agreement is therefore "not a contract of which it is possible for equity to enforce specific performance."²⁷ He also seems to have been bested by Williston in a law review debate over Langdell's attempt to apply the notion of legal detriment to the enforceability of mutual promises.²⁸

Langdell was not, however, the only American scholar active in

25. RESTATEMENT (SECOND) OF CONTRACTS § 1 reporter's note (1981). As Llewellyn had pointed out, "The analysis which to all of us has been as if eternal, with its neatly boxed 'Did A want a promise or an act?' . . . appears in print first less than seventy years ago." Llewellyn, *Our Case Law of Contract: Offer and Acceptance* (pt. 1), 48 YALE L.J. 1, 32-33 (1938). Llewellyn advocated relegating "that great dichotomy of the first year classroom" to "the freak-tent." *Id.* at 36. See also Pettit, *Modern Unilateral Contracts*, 63 B.U. L. REV. 551 (1983).

26. C. LANGDELL, SUMMARY, *supra* note 19, § 14; see Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 34 (1983). This did not even earn Langdell a citation in the only two modern cases to have seriously questioned the rule. *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955); *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949).

27. C. LANGDELL, SUMMARY, *supra* note 19, § 178.

28. The incident suggests the level of discourse of the time. In § 84 of his *Summary*, Langdell had written that it sometimes happens that a promise to do something will be consideration when actually doing it will not be. He had in mind the situation in which C makes a promise to A in return for A's promise to C to render a performance that A already owes to B. Langdell thought that A's promise was consideration for C's promise, though A's actual performance would not have been because of the preexisting duty rule. Pollock agreed, but Williston thought otherwise, as did Anson, and took issue with Langdell and Pollock in the *Harvard Law Review*. See Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1894).

Williston proposed a test under which a promise would be consideration only if the promisor promises "something the performance of which will be, or may be, a detriment." *Id.* at 36. Williston considered the argument that A, by making the second promise to C, incurs a detriment because A is now under two obligations rather than one. But Williston thought this reasoning fallacious because it assumes that A's second promise is binding, which in turn assumes that C's counterpromise is binding, the very point in dispute. He added that the same problem of circularity arises in the case of every bilateral contract.

Langdell responded seven years later, explaining that a writer should not remain silent in the face of an assertion that "seems nearly equivalent to asserting that he is either incompetent or dishonest," noting that he would have replied sooner but "it was not till about a year ago that my attention was first called to the article." Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496, 498 & n.1 (1901). Langdell explained that Williston's point was not a matter for him to have dealt with in § 84, where his disputed statement was found, but rather in § 81, where the enforceability of exchanges of promises was discussed in general. There was therefore "no begging the question in the passages which have been quoted. . . . Everything necessary to raise that question . . . I assumed to exist, and, therefore, I assumed that each of the promises, if supported by a sufficient consideration, was binding." *Id.* at 501-02. For the reader who remained unconvinced, Langdell added that even if he and Pollock had begged the question, "the only consequence is that we have not proved the proposition which we were supporting, — not that the proposition itself is untrue." *Id.* at 498.

Williston later wrote that though Langdell had written that Williston had accused him of intellectual dishonesty or of incompetence, this did not hurt their personal relations, which were "so slight because of [Langdell's] reticent and aloof habits that our difference of opinion on the

the field of contracts during the first decade of the Age of Anthology. In the fall of 1880, the year that the *Summary* appeared, Oliver Wendell Holmes delivered twelve lectures that in the following year became his book *The Common Law*.²⁹ Although Holmes was under forty and not yet a professor or a judge, the three lectures allotted to contracts — totalling less than a hundred pages — were to have a lasting impact on the subject.

Holmes made three notable contributions. One was his advocacy of the bargain theory of consideration, in which he delivered the celebrated aphorism that “[c]onsideration is a form as much as a seal” and formulated the requirement of a “relation of reciprocal conventional inducement” between consideration and promise.³⁰ Another was his espousal of the objective theory of contract: “The law has nothing to do with the actual state of the parties’ minds.”³¹ A third was his description of the remedial consequences of a breach of contract, under which the “only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.”³² Less notable was his advocacy of the now-discredited “tacit agreement test,” under which in applying the rule of *Hadley v. Baxendale*, a defendant was not liable for a risk “unless the assumption of that risk is to be taken as having fairly entered into the contract.”³³ Holmes, of course, had an advantage not given to Langdell in adding permanence to his views: he could repeat them from the bench and was not reluctant to do so.³⁴

During the same decade, important developments in contracts scholarship were also occurring in England, with the appearance of works by Sir Frederick Pollock and Sir William Anson. The English legal historian A.W.B. Simpson has written that “the tradition of treatise writing by academics began with Pollock and Anson,” noting that earlier authors had written “as young men to advertise themselves, or

law of consideration caused no friction.” S. WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 138 (1940).

29. O.W. HOLMES, *THE COMMON LAW* (1881).

30. *Id.* at 273, 293-94.

31. *Id.* at 309.

32. *Id.* at 301.

33. *Id.*

34. On consideration, he rephrased his aphorism likening consideration to a seal in *Krell v. Codman*, 154 Mass. 454, 456, 28 N.E. 578, 578 (1891) (“consideration is as much a form as a seal”), and used the notion of reciprocal “conventional inducement” in *Wisconsin & Mich. Ry. v. Powers*, 191 U.S. 379, 386 (1903) (“not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting”). On the remedial consequences of breach of contract, his views are reflected in *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903) (“If a contract is broken the measure of damages generally is the same, whatever the cause of the breach.”). *Globe Refining* also expressed the “tacit agreement” test. 190 U.S. at 543 (“extent of liability . . . should be worked out on terms which it fairly may be presumed [the defendant] would have assented to if they had been presented to his mind”).

simply to make ends meet.”³⁵ The works of Pollock and Anson were to wield great influence in the United States.

In 1876 Pollock, then of Cambridge and later of Oxford, published his *Principles*, a one-volume treatise that was to have several American editions, including one by Williston in 1906.³⁶ The book's impact in America was not enhanced by its abstraction and sophistication, and its usefulness was diminished because it did not treat the subjects of performance and discharge.³⁷ Nonetheless, it won immediate respect on both sides of the Atlantic, and its influence on this side continued well into the present century.

In 1879 Anson, of Oxford, published his *Principles*, a short book directed at students in the recently established course in contracts at that university.³⁸ It was both more elementary and more comprehensive than Pollock's book and enjoyed great popularity in the United States, where it went through many American editions, including three by Corbin in 1919, 1924, and 1930. As late as 1919, a reviewer hailed it as “probably the best short book yet published” on contracts,³⁹ though not all judgments were so favorable.⁴⁰

C. *The Lean Years: 1881-World War I*

After such an auspicious first decade, it might have been expected

35. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 664 (1981) (footnote omitted). Simpson also notes that Leake apparently was encouraged to write his work on contracts “after his deafness had ruined his law practice.” *Id.*

36. F. POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* (1876). On Williston's edition, see text at note 65 *infra*.

37. In the preface to his sixth edition in 1893, Anson wrote that Pollock did not write “for beginners” and that Pollock's book was “a treatise on the Formation of Contract.” W. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* v-vi (6th ed. 1893).

38. W. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* (1879). The first American edition was by O. Aldrich in 1880. On Corbin's editions, see text following note 65 *infra*.

39. Arant, Book Review, 29 YALE L.J. 134, 134 (1919). Pollock thought Anson to be “the best elementary book yet in existence on any topic of English law.” F. POLLOCK, *PRINCIPLES OF CONTRACT: BEING A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND* xi (3d ed. 1881).

40. A Canadian reviewer wrote that “to the frequently repeated assertion that Anson on Contracts is the best book on the subject, I am still constrained to say, ‘Possibly, but what a distressingly humiliating confession!’” Ewart, Book Review, 33 HARV. L. REV. 626, 629 (1920).

There were also, of course, less influential American works that appeared during this time. One of these was F. HILLARD, *THE LAW OF CONTRACTS* (1872), a two-volume work by a writer of treatises on various subjects. Another was J. BISHOP, *THE DOCTRINES OF THE LAW OF CONTRACTS* (1878), in which the author, also a treatise writer, endeavored in less than 300 pages “to present the body of the law of contracts, without its bloat, in form to be examined and reexamined, by old and young, the learned and the unlearned.” *Id.* at iii. This work was superseded by a much larger — one is tempted to say bloated — work entitled *COMMENTARIES ON THE LAW OF CONTRACTS* (1887), which had a second edition in 1907 by M. Early. And the employment at will doctrine, also known as “Wood's rule,” had its origins in H. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* § 134, at 272 (1877). See also J. POMEROY, *A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS* (1879) (a one-volume work that had subsequent editions in 1897 and 1926).

that the beginning of the Age of Anthology heralded a burgeoning of contracts scholarship in America. Moreover the decade had been an important one for legal scholarship in other fields as well.⁴¹ Yet the delivery of Holmes' lectures in 1880 was followed by nearly forty lean years. It was as if Langdell and Holmes, along with Anson and Pollock, had said all that was worth saying on the subject of contract law. Not until the publication of Williston's treatise in 1920 was there an event to rival those of the period 1871-1880.⁴²

Indeed, though law teaching may have entered the Age of Anthology in 1871 with the publication of Langdell's casebook, no competitor in the field of contracts appeared for two decades. Then, in 1891, William Albert Keener published a strange amalgam of two English works.⁴³ The cases were taken from those used by Gerard Brown Finch, an Englishman who, inspired by Langdell, had edited a collection of English contracts cases in an unsuccessful attempt to introduce the case method in England.⁴⁴ Since only one of Finch's cases was American, only one of Keener's was.⁴⁵ Keener interspersed Finch's cases among text from Stephen Martin Leake, the best of the early English writers on contract law.⁴⁶

It appears that Keener needed a contracts casebook in a hurry. A chaired professor at Harvard and a gifted practitioner of the case method,⁴⁷ he had been lured away by Columbia in 1890.⁴⁸ His arrival at a school led by Theodore Dwight, who had raised the lecture method to a high art, produced a paroxysm like the one that had ear-

41. "The year 1872 was remarkable for a group of law books of prime importance In the next two years came three books of value The year 1876 was fruitful in important works" C. WARREN, *A HISTORY OF THE AMERICAN BAR* 551-52 (1911).

42. Gilmore's "Age of Faith" encompassed both the beginning of the age of anthology and the lean years, running "roughly from the Civil War to World War I." G. GILMORE, *THE AGES OF AMERICAN LAW* 41 (1977). Schlegel writes of the growth of American legal education during a period whose "outside parameters are 1870 and 1921." Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 317 (1985).

43. W. KEENER, *SELECTIONS FROM LEAKE'S ELEMENTS OF THE LAW OF CONTRACTS AND FINCH'S CASES ON CONTRACTS* (1891).

44. G. FINCH, *A SELECTION OF CASES ON THE ENGLISH LAW OF CONTRACT* (1886).

45. *Eliason v. Henshaw*, 17 U.S. (4 Wheat.) 225 (1819) (offer sent from Harper's Ferry asking for acceptance "by return of wagon" was not accepted by response sent to Georgetown, though received there by offeror). See W. KEENER, *supra* note 43, at 153.

46. Woodruff characterized Leake as "the earliest of the satisfactory elementary works on the modern law of contracts." Woodruff, *Book Review*, 5 CORNELL L.Q. 222, 222 (1920). For more on Leake, see note 35 *supra*.

47. Keener, though still in his thirties, already had a two-volume casebook on quasi-contracts to his credit. W. KEENER, *A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS* (1888-89).

48. For varying accounts of the circumstances, see *A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* 118-19 (1955); 2 C. WARREN, *supra* note 1, at 444; S. WILLISTON, *supra* note 28, at 130.

lier seized Harvard.⁴⁹ When Dwight and his followers left Columbia in 1891, Keener replaced him, becoming dean of the school and professor in the course in contracts, a course with no casebook other than Langdell's. He later rationalized his borrowing from Finch and Leake by explaining that "to plunge a beginner . . . into a mass of conflicting authorities, must produce great confusion of thought, resulting in discouragement . . . and causing a loss of valuable time."⁵⁰ Nevertheless, he abandoned his experiment with unseemly haste and in 1898 published another two-volume casebook on contracts containing nearly 470 cases that filled over 1800 pages.⁵¹ The cases were not taken from a previous collection and had no introductory text that would prevent "confusion of thought." A brief preface makes no mention of his experiment with the earlier casebook.

Before Keener's second effort, there had already appeared another casebook remarkable for its selection of cases. In 1894 Ernest W. Huffcut of Cornell, who in the following year was to publish an American edition of *Anson*,⁵² had teamed with Edwin Hamlin Woodruff of Stanford and later Cornell to produce a one-volume casebook that contained only American cases, English cases having been omitted because of "the limits of a single volume" and because "excellent collections of English cases are already available."⁵³ The nearly 240 cases filled 700 pages and were organized along the lines of Anson's text. The casebook went through a fourth edition in 1925.

In the meantime, Langdell's *Cases* did not go untended. In 1894, Samuel Williston, who had begun teaching contracts at Harvard in 1890, in the wake of Keener's departure, added under his own name the second volume that Langdell had never gotten to, with just over 150 cases in some 600 pages.⁵⁴ He expanded Langdell's chapter on conditions, added new chapters on impossibility, illegality, joint obligations, discharge, and assignment, and included some new cases bringing Langdell's volume up to date. Then in 1903 and 1904, Williston, acknowledging his debt to Langdell, brought out again under his own name a two-volume casebook containing some 460 cases in nearly 1400 pages.⁵⁵ He added a hint of an authorial presence by noting that "to cover the subject fairly in two volumes of reasonable size, I have been obliged frequently to shorten the reports of cases."⁵⁶ The invis-

49. 2 C. WARREN, *supra* note 1, at 502-03.

50. Keener, *Methods of Legal Instruction*, 1 YALE L.J. 143, 148-49 (1892). In his first year at Columbia, Keener taught equity jurisdiction and real estate in addition to quasi-contracts.

51. W. KEENER, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1898). A one-volume revision was published in 1914 by Wormser and Loughran.

52. See text at note 64 *infra*.

53. E. HUFFCUT & E. WOODRUFF, AMERICAN CASES ON CONTRACT iii (1894).

54. 2 S. WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1894).

55. S. WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1903-1904).

56. *Id.* at iii. John Chipman Gray had used no less than six volumes for his cases on prop-

ble hand of the anthologist was already at work.

In 1892 Clarence Degrand Ashley of New York University published a slender volume, mixing cases with condensed cases and problems, for use at his school.⁵⁷ But like the few other casebooks that appeared during this period,⁵⁸ it is of little interest today.

While this may have been the Age of Anthology, it was not the Age of the Treatise. The most serious new work in the tradition of Story and Parsons was a three-volume treatise published in 1905 by William Herbert Page, of Ohio State and later of Wisconsin.⁵⁹ Although it may have been, as one reviewer put it, a "successful[] attempt to delve into every crevice of contract law,"⁶⁰ it was uncritical and unimaginative.⁶¹ It had a second edition in 1920-1922⁶² but never gained the popularity of the author's similar work on wills.⁶³

During these lean years, many leading writers contented themselves with the preparation of new editions of established works, particularly English ones. Gustaves H. Wald of Cincinnati did American editions of Pollock's text in 1881 and 1885. Jerome Cyril Knowlton of the University of Michigan did an American edition of *Anson* in 1887, and Huffcut added two more in 1895 and 1906. Williston produced a revision of *Parsons* in 1893⁶⁴ and an American edition of Wald's *Pol-*

erty. J. GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1888-1892).

57. C. ASHLEY, CONTRACTS: EXTRACTS, CITATIONS, CONDENSED CASES AND STATEMENTS (1892). There was a second edition in 1899 and a third and much larger edition in 1912.

58. See E. HOPKINS, SELECTED CASES ON THE LAW OF CONTRACTS (1896) (arranged with reference to Clark's handbook). For a collection of digests from Williston's and Keener's casebooks, see C. HELM, A TREATMENT OF THE FUNDAMENTAL PRINCIPLES OF THE LAW OF CONTRACTS (1914). See also E. DUTTON, PRINCIPLES AND CASES ON THE LAW OF CONTRACTS (1915), a slender volume with introductory text for each subject.

59. W. PAGE, THE LAW OF CONTRACTS (1905). Page later served as an adviser for the *Restatement of Contracts*. An earlier two-volume work by a treatise writer is F. WHARTON, A COMMENTARY ON THE LAW OF CONTRACTS (1882).

60. Book Review, 15 YALE L.J. 108, 108 (1905).

61. See Book Review, 6 COLUM. L. REV. 129, 130 (1906) ("rarely does more than reproduce the reasoning given in the cases"); Book Review, 19 HARV. L. REV. 312, 312 (1906) ("neither a first-class digest nor a first-class treatise").

62. It filled seven volumes, but the reviews did not improve. See Gardner, Book Review, 43 HARV. L. REV. 984, 985 (1930) ("the book does not become more thoughtful as it expands").

63. W. PAGE, A CONCISE TREATISE ON THE LAW OF WILLS (1901). Later editions appeared in 1926, 1941, and 1960-1965, expanding the original single volume to eight.

64. The preface noted that "the text with slight exceptions remains unchanged from the last edition." T. PARSONS, THE LAW OF CONTRACTS vii (S. Williston 8th ed. 1893). One reviewer noted that the revision had been "very conservatively done." Book Review, 8 HARV. L. REV. 65, 65 (1894). Another, less charitably, was "much disappointed to find that Professor Williston has failed even more signally than did his predecessor. He seems to have regarded the text, as it fell from the pen of Professor Parsons, as something too sacred to be either altered, amended, or repealed." Book Notice, 3 YALE L.J. 105, 106 (1894). Williston later wrote that in addition to supplementing his income with the honorarium provided by Parsons' estate, he hoped to have "in a smaller way" the sort of distinction that Holmes had gained by editing Kent's *Commentaries*. S. WILLISTON, *supra* note 28, at 136-37.

lock in 1906.⁶⁵ Corbin did the first of his three American editions of the already popular *Anson* in 1919. With the exception of a few additions by Williston to *Pollock* and by Corbin to *Anson*, these works produced no scholarship of lasting interest.⁶⁶ Their dependence on the leading casebooks is evident from Corbin's wry comment that Williston's *Pollock*

may be used with great convenience in connection with Professor Williston's recent collection of cases on contracts, the notes in which frequently appear bodily in the new edition of *Pollock*, and the cases printed therein at length [in most chapters] being very largely the ones discussed and criticised by *Pollock* in the text and by the American editors in the notes.⁶⁷

This was not a time for serious treatise writers, like Story and Parsons, who had written primarily for practitioners. With the coming of the Age of Anthology, the day had dawned for a new form of discursive legal prose — the student handbook. Lawrence Friedman writes, with some hyperbole, that "Langdell drove the textbooks and treatises out of the temple of legal education."⁶⁸ But if the temple was — at least ultimately — emptied of "textbooks and treatises" in the sense of Story's and Parsons', it was then crammed with student handbooks. It is one of the ironies of the introduction of the case method of instruction that its spread brought the proliferation of texts contrived to unlock its mysteries. The rapidly developing student market craved student handbooks to accompany the anthologies.⁶⁹

One of the better of these was a small volume by Edward Avery Harriman of Northwestern, which appeared in 1896 and was "intended especially for the use of students."⁷⁰ To this end it included

65. In the main, the American additions appear as footnotes, many of which were updated by Wald before his death in 1902. Williston added text on third party beneficiaries and discharge, much of which had already appeared in law review articles. Corbin offered the backhanded compliment that there was "no other treatment of the subject open to so few objections as is this." Corbin, Book Review, 15 YALE L.J. 310, 310 (1906).

66. Woodruff wrote that since Corbin was "so admirably equipped for writing a book of his own on the principles of contracts . . . it appears to be an unwarranted expenditure of effort for him to gloss secondarily the work of another, even if it be so well established a treatise as that of *Anson*." Woodruff, *supra* note 46, at 222. Another reviewer of Corbin's *Anson* noted that *Anson's* treatment of third party beneficiaries and conditions being less satisfactory than that of other topics, there was ample justification for Corbin's edition, which added material on these subjects. Arant, *supra* note 39, at 134.

67. Corbin, *supra* note 65, at 311. Williston later admitted that he was encouraged to think he could "produce a valuable edition without great delay" by the circumstance that he had just brought out a "liberally annotated" edition of his casebook. S. WILLISTON, *supra* note 28, at 262; see also C. HELM, *supra* note 58 (containing digests of cases from Williston's and Keener's casebooks).

68. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 624 (2d ed. 1985).

69. On the expanding market, see R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s, at 73-84 (1983).

70. E. HARRIMAN, ELEMENTS OF THE LAW OF CONTRACTS viii (1896). The book covered its subject in just over 300 pages. Citations were to *Langdell* and *Williston* and to *Huffcut & Woodruff*. When a second and larger edition appeared in 1901 it added citations to *Keener*.

indications of where cases cited were found in the leading casebooks of the day. Ashley published a similar work in 1911, over half of which consisted of a single chapter on formation.⁷¹ Although he protested that his aim was not "to prepare a text solely for the use of students," but rather to "aid the efforts being made to place the law on a more philosophic and satisfactory basis,"⁷² it was no mere coincidence that Ashley's text appeared only a year before the revised and enlarged edition of his casebook.⁷³ In the same year George Purcell Costigan, then of Northwestern and later of Stanford, published a slender volume dealing with performance of contracts, noting that its purpose was "assisting students to understand a troublesome part of the law of Contracts."⁷⁴ Whatever their popularity with students, none of these texts achieved the scholarly respectability of their famous forerunner, the *Summary*, that had sprung from what Ashley called "the master mind of C.C. Langdell."⁷⁵

Scholarly respectability was not, however, the goal. As the case method spread and as, by the beginning of the century, law schools grew in number to roughly 120 and student enrollment soared to over 14,000,⁷⁶ it became apparent that this was a market in which money was to be made. The production of student handbooks by authors who lacked the academic credentials of Ashley, Costigan, or Harri-man, bid fair to become a cottage industry.⁷⁷ One of the first of these books was a "hand-book" on contracts by William Lawrence Clark,⁷⁸ an author of texts on a variety of subjects who later attained an unenviable immortality in the field of contracts when his suit against his publisher produced a notable dictum by the New York Court of Appeals on Clark's lack of sobriety.⁷⁹ Replete with blackletter statements of principles, Clark's handbook made "no attempt to be original for the mere sake of originality" — nor, it seems, for any other

71. C. ASHLEY, *THE LAW OF CONTRACTS* (1911).

72. *Id.* at vii.

73. See note 57 *supra*.

74. G. COSTIGAN, *THE PERFORMANCE OF CONTRACTS* iii (1911). The book was a revised and enlarged version of Costigan, *Conditions in Contracts*, 7 COLUM. L. REV. 151 (1907).

75. C. ASHLEY, *supra* note 71, at viii (quoting an earlier edition of his casebook). Ashley, incidentally, was a Columbia, not a Harvard, graduate.

76. See Huffcut, *A Decade of Progress in Legal Education*, 25 REP. A.B.A. 529, 530 (1902).

77. It has been estimated that a thousand or so legal treatises were published in the last half of the nineteenth century. See L. FRIEDMAN, *supra* note 68, at 624.

78. W. CLARK, *HAND-BOOK OF THE LAW OF CONTRACTS* (1894). In its nearly 800 pages it cited almost 10,000 cases. *Id.* at iii.

79. *Clark v. West*, 193 N.Y. 349, 86 N.E. 1 (1908). Clark was to get \$2 per page for a three-volume work on corporations, plus an additional \$4 per page if he abstained from liquor. In holding that West had waived the condition, the court said, "It is not a contract to write books in order that the plaintiff shall keep sober, but a contract containing a stipulation that he shall keep sober so that he may write satisfactory books." 193 N.Y. at 357, 86 N.E. at 3-4. The case still finds favor in several casebooks.

cause.⁸⁰ A deluge of similar works testifies to their commercial potentiality.⁸¹ There was thus no shortage of writing about contract law. The difference was that it was largely oriented toward students and no longer toward the bar.

Toward the end of the nineteenth century, however, a distinctive new outlet for legal scholarship emerged, the student-edited university law review. The *Harvard Law Review* appeared in 1887, the *Yale Law Journal* in 1891, the *Columbia Law Review* in 1900, and the *Michigan Law Review* in 1902. In 1896 the University of Pennsylvania Law Department took over the *American Law Register*. By 1920 the number of such publications was approaching twenty.

Leading American writers on contracts were quick to take advantage of the opportunity offered by the law reviews. A compilation in 1931, under the auspices of the Association of American Law Schools, of selected readings on contracts gives a rough idea of the use of law reviews by writers in that field.⁸² The names of Corbin, Williston, Ashley, and Ames are prominent in the years before 1920,⁸³ yet the total number of articles by American authors in that period is only slightly larger than the number published in the single decade of the 1920s.⁸⁴ Moreover, many of the articles that appeared during the lean years were brief and of narrow compass, as if inspired by classroom discussions of casebook cases.⁸⁵ By and large, the lean years for con-

80. W. CLARK, *supra* note 78, at iii. In justice to Clark, it should be added that one reviewer wrote that in spite of this "modest disclaimer of originality, Mr. Clark shows that he has not been content to follow the loose statements of either books or cases." Book Notice, 4 YALE L.J. 126, 126 (1895).

81. Other texts include G. ARCHER, *THE LAW OF CONTRACTS* (1916); W. BRANTLY, *LAW OF CONTRACT* (1893); J. HARE, *THE LAW OF CONTRACTS* (1887); J. LAWSON, *THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS AT LAW AND EQUITY* (1893); H. WILLS, *PRINCIPLES OF THE LAW OF CONTRACTS* (1909); see also R. RALSTON, *THE PRINCIPLES OF THE LAW RELATING TO THE DISCHARGE OF CONTRACTS* (1886). As for the difficulties that the anthologists had in finding publishers for casebooks where "no publisher was willing to risk publishing more than a few isolated volumes," see Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 317 (1985).

82. *SELECTED READINGS ON THE LAW OF CONTRACTS* (1931). The committee that compiled and edited the volume consisted of George J. Thompson of Cornell (Chairman), George K. Gardner of Harvard, George W. Goble of Illinois, and James M. Landis of Harvard. They were able to include enough articles that it is difficult to think of obvious candidates that they omitted. That they were not infallible is suggested by the omission of Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 40 (1917) ("there has clearly been a long-enduring tendency in English law from status to contract, and — in the last two generations — an equally distinct veering back to status"). They also omitted Costigan's article on conditions. See note 74 *supra*. But there is no indication that they favored the new at the expense of the old.

83. For some of Corbin's contributions, see note 170 *infra*.

84. I have ignored book reviews and student notes, all of which were after 1920. The slight difference in favor of the period prior to 1920 disappears if Williston, whose output was predominantly before 1920, is eliminated.

85. See, e.g., Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897), a fifteen-page article in good part on the English case of *Scott v. Avery*, a case used by Williston in 1894, and its subsequent history in England and the United States. See also G. WHITE, *TORT*

tract scholarship on the shelves of the law libraries were reflected in the pages of the law reviews. It was a sign of dependence on anthologies when Keener, writing about the specific performance of contracts in the inaugural issue of the *Columbia Law Review*, expressed regret "that circumstances, beyond his control, have compelled [the author] to confine the citation of cases almost exclusively to those found in his Cases on Equity Jurisdiction."⁸⁶

D. *Why the Lean Years?*

Why were there so many lean years of contracts scholarship between the delivery of Holmes' lectures in 1880 and the publication of Williston's treatise in 1920? What happened to contracts scholarship after 1880?

I believe that the most plausible explanation for the lean years lies in the conditions of law teaching that followed the introduction of the case method. Professors who lectured had to organize and describe. In every set of lecture notes was the germ of a legal treatise.⁸⁷ After the revolution in law teaching inspired by Langdell, professors taught from cases and could seek refuge in the Socratic method to avoid organization and description.⁸⁸ We can surmise this from anecdotes of how the method was practiced by its legendary masters, from the narrow focus of many of the early law review articles, and from the alphabetical organization of Langdell's *Summary*. As Simpson has pointed out, with the case method there came "a need for a type of literature that generations of American academics have spent their energies in producing."⁸⁹ And as another English academic, William Twining, has observed, the "judgment of history may well be that, for all its virtues, the American casebook tradition has been a major brake on progress in American law schools, by absorbing energies which might otherwise have been more fruitfully employed."⁹⁰ Not only did the

LAW IN AMERICA: AN INTELLECTUAL HISTORY 34-35 (1980), describing articles in the early volumes of the *Harvard Law Review* in the form of comments on cases.

86. Keener, *The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract*, 1 COLUM. L. REV. 1, 1 (1901).

87. Even before Langdell, however, law professors did not always lecture. Lawrence Friedman describes the method used at Harvard during its "dark age" prior to 1870 as the "text-book method," in which assigned portions of a textbook were studied and then recited on. L. FRIEDMAN, *supra* note 68, at 610.

88. In 1902, Huffcut reported that 12 schools had completely adopted the case method, 34 had not done so at all, and 48 had some mixture. Most of the prominent law schools were among the first to convert to the case method. Huffcut, *supra* note 76, at 541; *see also* L. FRIEDMAN, *supra* note 68, at 616-17.

89. Simpson, *supra* note 35, at 677. Simpson admits, however, that since the great American treatises came after Langdell's time, in the long run "there is no sense in which Langdell's ideas can be said to have destroyed the treatise." *Id.*

90. W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 57 (1973). Twining adds that "to the outsider it seems to stretch ordinary usage to include this activity under 'research.'" A hostile reviewer of the second edition of Langdell's *Cases* complained that such

coming of the Age of Anthology absorb the energies of contracts teachers, but it diverted their attention from the world of the bar to that of the law student, a student who was generally both less well educated and less carefully selected than the student of today. In doing this, it changed the nature of contracts scholarship in important ways.

Before the Age of Anthology, what was taught about contract law reflected what was written about it. During the Age the reverse was true: what was written about contract law reflected what was taught about it. The anthologies became the grist in the teacher's scholarly mill. Langdell's *Summary* is a prime example, for it was truly a product of his teaching. Its analysis was abstract and theoretical because his teaching was abstract and theoretical. It made heavy use of English cases because his teaching made heavy use of English cases. This tendency of scholarship to mirror teaching had two particularly deleterious effects on scholarship.

The first of these was superficiality. It would be a mistake to overestimate the extent to which the use of anthologies was intended to stimulate the student's critical faculties. If the student whom Langdell asked to state the facts in his first case, *Payne v. Cave*,⁹¹ had perused the rather extraordinary outline that served as an "index" to the first edition of Langdell's *Cases*, he would have found the rule of that case under the heading "bidding at auction." For it was there recorded in the index that bidding is "a mere offer, and revocable until the hammer falls," citing to *Payne v. Cave* on page one. A student who had the advantage of the *Summary* that accompanied Langdell's second edition could find more:

It was decided in *Payne v. Cave* that a bid at an auction is in the nature of an offer, which is accepted by knocking down the hammer; and perhaps it is too late to question the correctness of the decision. On principle, however, it is open to much doubt.⁹²

Thus no sooner had the anthology been introduced than means were wanted to lessen the rigors that it inflicted, and much energy was channeled into providing those means. Users of Langdell's *Cases* had Langdell's *Summary* and Harriman's cross references, which also served for Keener's casebook. Users of Huffcut and Woodruff's casebook had Huffcut's *Anson*. Users of Ashley's casebook had

books "are not to be named in comparison with any of the books which have been written by the previous Dane professors of law in Harvard University," i.e., the elder Story and Parsons. Book Review, *supra* note 21, at 873.

91. See 2 C. WARREN, *supra* note 1, at 372.

92. C. LANGDELL, *SUMMARY*, *supra* note 19, § 19 (footnote deleted). Langdell went on to argue that putting goods up for auction was an offer and the bid was therefore an acceptance, creating a contract with the condition that no one else shall bid higher. Another indication that Langdell's commitment to his own method was not as firm as has generally been supposed is that with increasing age and failing eyesight, he abandoned the method and stated and analyzed the cases himself. See 2 C. WARREN, *supra* note 1, at 458.

Ashley's text. There were also, of course, student texts unrelated to any casebook.⁹³

The tendency of scholarship to mirror teaching produced a second deleterious effect on contracts scholarship by severely confining its scope. As long as law professors wrote for a student audience about what they taught in their courses, their writing would range no more widely than the curriculum allowed. And during the lean years, the parol evidence rule, damages, specific performance, and restitution were all taught in separate courses and not in the course in contracts. The tyranny of the curriculum thus imposed a powerful restraint upon the scholarly activities of contracts teachers, channeling much of that activity into discussion of consideration and of offer and acceptance.

In spite of the inhibiting effects of the anthologies, a few exceptional treatises appeared during the lean years, but in fields other than contracts. Thus the spread of the case method did not prevent John Henry Wigmore, who brought the method to Northwestern, from publishing his monumental treatise on evidence in 1904-1905.⁹⁴ Nor did it stop Keener from publishing his treatise on quasi-contracts in 1893 nor Frederic Campbell Woodward of Stanford from publishing his treatise on the same subject in 1913.⁹⁵ But the years from 1881 to World War I seem also to have been lean ones in most fields. Charles Warren noted that compared to earlier years, "[t]he twenty years from 1880 to 1900 were less fruitful of great works,"⁹⁶ and Lawrence Friedman wrote that "the treatises after 1870 seemed somewhat drier and less imaginative than the best work of the prior generation."⁹⁷ This confirms the suspicion that, despite the growth of Langdell's practice of hiring full-time academics rather than lawyers and judges, the spread of Langdell's own case method is in good part to be blamed for the lean years. This is not, however, to say that it was the only cause.

The lean years may have been due in part to the conditions of American society as the Golden Age drew to a close in the late nineteenth century. Henry Steele Commager called the decade of the

93. See text at notes 70-81 *supra*. For a casebook written to go with a text, see note 58 *supra* (on Hopkins and Clark).

94. For a description of Wigmore's "great zeal for the case method," see W. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 35 (1977).

95. John Norton Pomeroy's three-volume *A Treatise on Equity Jurisprudence* was published in 1881-1883, but the work must have been done largely in the seventies. On Pomeroy's method of teaching, see J. HURST, note 15 *supra*.

96. C. WARREN, *supra* note 41, at 554.

97. L. FRIEDMAN, *supra* note 68, at 625. I have not attempted to survey fields other than contracts. For discussion of John Chipman Gray's *THE NATURE AND SOURCES OF THE LAW* (1909) and Roscoe Pound's contemporary law review writing, see Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America — Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 446-48 (1986). For discussion of works on corporate law, largely by practitioners, see Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985). For discussion of torts, see G. WHITE, *supra* note 85, at 20-62.

1890s "the watershed of American history," separating "an America on the whole self-confident, self-contained, self-reliant, and conscious of its unique character and of a unique destiny" from "the modern America . . . troubled with the problems that had long been thought peculiar to the Old World; experiencing profound changes . . . and trying to accommodate its traditional institutions and habits of thought to conditions new and in part alien."⁹⁸ Beginning roughly in the mid-eighties Americans were "for the first time . . . confronted with a challenge to their philosophical assumptions."⁹⁹ James Willard Hurst described a similar watershed in American law. He called the years 1800-1875 "above all else, the years of contract in our law." At the end of this period there was a shift from "a pattern of surprisingly deliberate and self-conscious policy . . . that law should increase men's liberty by enlarging their practical range of options" to "an unpatterned . . . drift and default of policy, through which the legal order profoundly affected the accumulation and control of capital and thus contributed to creating a new challenge . . . to liberty."¹⁰⁰

The scholarship of Story, Parsons, and Langdell was surely better suited to an orderly universe with unity, harmony, and familiarity than to a universe beset with instability, ferment, and discord. Was confidence in a mechanical, descriptive, and abstract approach so shaken that contracts scholarship lay dormant for nearly four decades? Were the practitioners of this approach unable to adapt to a new and more challenging intellectual climate? In a time that inspired Henry Adams, William James, and Thorstein Veblen, was there no inspiration for contracts scholars?¹⁰¹

Some of the explanation for the lean years may lie on a purely personal level. George Knowles Gardner of Harvard suggested this when he wrote in 1937 that "the faith of Ames and Keener could not, in their time, raise up a prophet comparable to the great teacher [Williston] who for five decades has spread the faith of Savigny, Pollock,

98. H. COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880's* 41 (1950).

99. *Id.* at 43. Howard Mumford Jones describes the period from the inauguration of Hayes in 1877 until the sinking of the battleship *Maine* in 1898 as "a period probably as tension-ridden as any other quarter of a century in our national history and certainly the most ominous era since the close of the Civil War," and says that the period from 1865 to 1915 "seldom exhibited more distressing traits of irrational disorder than it did in the 1890s, years in which the conflicts sometimes seemed uncontrollable." H. JONES, *THE AGE OF ENERGY: VARIETIES OF AMERICAN EXPERIENCE 1865-1915*, at 338, 387 (1971).

100. J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 18, 53 (1956).

101. For a suggestion that this was so, see G. WHITE, *supra* note 85, at 23, 26 (emphasis deleted), explaining that one assumption of "a revolution in the process of acquiring and conveying knowledge" that occurred in the late nineteenth century was "that knowledge was neither finite nor fixed in content," and pointing out that though "Langdell's perception of legal science was revolutionary in the methods of acquiring knowledge it espoused," it was "static in the dogmatic orthodoxy it adhered to."

and Langdell."¹⁰² After Langdell there was only Williston at Harvard, and he was beset with illness and preoccupied with sales law until nearly the end of the first decade of this century.¹⁰³ Corbin did not arrive at Yale until 1903.¹⁰⁴ Is it possible that contracts scholarship waited nearly forty years for Williston to mature and for Corbin to become established because there were no competitors of their stature? Columbia's Keener, whose scholarly production in contracts was largely limited to casebooks, was succeeded in 1902 by Charles Thaddeus Terry, whose consummate skill in the classroom was not coupled with a scholarly bent.¹⁰⁵ Few other schools could attract persons of outstanding ability and offer them the time and resources to be productive scholars. If Harriman, Huffcut, and Ashley were exceptions, their energies must have been drained by preparing casebooks and student texts.

E. *The Years of Revival: World War I-1930*

Whatever the explanation of the lean years, at last a revival came. As a student of American history has written, "Everybody knows that at some point in the twentieth century America went through a cultural revolution. . . . Most people place the dividing line at the end of the First World War."¹⁰⁶ Although it is difficult to pinpoint the beginning of the revolution in contract law and it is plain that the first stirrings were earlier, the publication in 1920 of Williston's "magisterial" four-volume treatise¹⁰⁷ surely signaled the end of the lean years. When the decade of the twenties opened, Williston, about to turn

102. Gardner, Book Review, 51 HARV. L. REV. 188, 189 (1937). Gardner was lamenting the emphasis on promise as opposed to "the sense of indebtedness for past cooperation" as a basis for contractual obligation.

103. Williston's treatise on sales was published in 1909. The Uniform Sales Act, which he drafted, was promulgated in 1906. A second edition of his casebook on sales appeared in 1905. Williston, who had been plagued by illness during this time, had a dramatic improvement in his health in 1912. See S. WILLISTON, *supra* note 28, at 163.

104. See W. TWINING, *supra* note 90, at 27-29 (describing Corbin's concern with overcoming "the inadequacies of the Yale system" that confronted him when he joined that faculty).

105. Terry continued to practice while he taught and was active in the National Conference of Commissioners on Uniform State Laws, of which he became president. See A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY, *supra* note 48, at 192-97. His principal contribution to contracts scholarship in a period of over two decades seems to have been his book review of Williston's treatise, which appears in 34 HARV. L. REV. 891 (1921). It was not until Terry's departure and the arrival of Herman Oliphant in the early 1920s that Columbia again had a scholar in the field of contracts. Oliphant, however, also worked in trade regulation.

106. H. MAY, THE END OF AMERICAN INNOCENCE: A STUDY OF THE FIRST YEARS OF OUR OWN TIME 1912-1917 at ix (1959).

107. S. WILLISTON, THE LAW OF CONTRACTS (1920). The word "magisterial" is Gilmore's, who described Corbin's as "even greater." G. GILMORE, *supra* note 4, at 6. For a less flattering assessment, see L. FRIEDMAN, *supra* note 68, at 626, 692 ("from the standpoint of legal or social thought, volume after volume of a heavy void"; "volume after volume, solid, closely knit, fully armored against the intrusion of any ethical, economic, or social notions whatsoever"). Whatever one's assessment, the treatise was not improved in later editions.

sixty, had been teaching for thirty years. Corbin, in his late forties, had been teaching for nearly twenty years. Indeed, if we are to believe Grant Gilmore, the "main lines" of Corbin's six-volume treatise,¹⁰⁸ "the greatest law book ever written[,] . . . had no doubt been thrown down by 1920,"¹⁰⁹ though it was not published until 1950. The appearance of Corbin's *Anson* in 1919 suggests that Corbin had at least thought through many of the hard questions of organization and scope that confront a treatise writer. If the preparation of casebooks diverted these two giants from more serious pursuits, it also gave them a chance to try out some of the ideas needed in a treatise.

By the end of the twenties Williston and Corbin and their contemporaries had already accomplished more than had been accomplished during all of the lean years. It was during the twenties that the *Restatement of Contracts* — "one of the great legal accomplishments of all time"¹¹⁰ — was largely written.¹¹¹ It was during this time that leading academics in the field of contracts sought to reassert their influence over the bar. In his 1929 lectures at Virginia, Williston recalled that Lord Coke had thought it "the part of a good judge to magnify his office" and likened professors to judges in this regard. "So I make no apology for taking an enlarged view of the office of those who have followed the same occupation as my own."¹¹² The pace of production of casebooks also quickened. Into a world that for half a century had known at most three casebooks of consequence (*Langdell & Williston*, *Keener*, and *Huffcut & Woodruff*), there suddenly burst two more in 1921, quickly followed by a new edition of Williston's casebook in 1922.

In 1921, Corbin published his contracts casebook, a single volume containing almost 600 cases and filling nearly 1500 pages. It was to have two more editions, the last in 1947.¹¹³ In the same year Costigan, then at Northwestern, published a competing book, also a single volume with more than 500 cases in over 1450 pages.¹¹⁴ Its life was extended for decades when it was taken over by Harold Shepherd of

108. A. CORBIN, CORBIN ON CONTRACTS (1950-1951).

109. G. GILMORE, *supra* note 4, at 57-58.

110. *Id.* at 59.

111. See RESTATEMENT OF CONTRACTS ix (1932). Begun in 1923, it was almost finished by the end of the decade, though it bears the publication date of 1932. In 1928 a revision of the first 177 sections was published as a preliminary official draft. *Id.* at x.

112. S. WILLISTON, *supra* note 13, at 107. He went on: "Teachers of law exercise their influence on its development in two ways. First, by the direct influence of their teaching on their pupils, and, second, by their writings." *Id.* at 107-08. Williston himself also exercised his influence through the American Law Institute and the National Conference of Commissioners on Uniform State Law.

113. A. CORBIN, CASES ON THE LAW OF CONTRACTS (1921).

114. G. COSTIGAN, CASES ON THE LAW OF CONTRACTS (1921). There was a second edition in 1932 and a third edition in 1934, the year of Costigan's death.

Cincinnati and later Duke and Stanford.¹¹⁵ The year 1922 saw the publication of the second edition of Williston's casebook. By eliminating what one reviewer described as "elaborate footnotes" and cutting down on the statute of frauds, Williston managed to add "upwards of sixty new cases"¹¹⁶ — a total of over 400 in just over 1050 pages. Williston succeeded in staying within a single volume — an important step in the face of the single-volume anthologies of Corbin and Costigan.¹¹⁷

The production of books and the efforts at restating did not deter scholars from writing law review articles, which appeared in increasing numbers and became more ambitious in scope, some plainly inspired by the activity of restating.¹¹⁸ The number of law school law reviews, short of a score at the start of the decade, more than doubled by decade's end.

F. *The End of the Age: 1930-World War II*

As the Age of Anthology progressed, virtually every entering law student came to learn contracts from a casebook.¹¹⁹ Before the Age began, a professor's reliance on Parsons or Story might give his lectures some similarity to those of his colleagues.¹²⁰ With the introduction of the case method, the casebook itself became the common denominator of legal instruction. The editors of the leading casebooks were in a position to determine to a large extent what would be taught in American law schools.

In contrast to the casebook market today, with a score of competing works vying for adoption, during the first half century of the Age of the Anthology the number of leading casebooks was severely limited. For two decades, Langdell's casebook had no peer at all. It had no real rival until 1898, when Keener's two-volume second effort appeared. Williston responded with his two volumes in 1903. When,

115. Shepherd published a revision of Costigan's third edition in 1939, second and third editions without Costigan's name in 1946 and 1952, and a fourth edition with Harry H. Wellington of Yale in 1957.

116. Amram, Book Review, 70 U. PA. L. REV. 373, 373 (1922).

117. In addition to the three casebooks discussed, Frederick Adams Whitney of St. John's published *LEADING CASES ON THE LAW OF CONTRACTS* (1926), a collection emphasizing New York cases.

118. Thus the *Restatement* inspired a heated debate between Whittier and Corbin. See Whittier, *The Restatement of Contracts Again*, 15 IOWA L. REV. 278 (1930), which answered Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19 (1929), which responded to Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441 (1929). See also Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611 (1930). During this period Corbin wrote most of his six influential articles on third party beneficiaries, described by Anthony Waters as "The Campaign of 1918-1930." Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1150 (1985) (emphasis deleted).

119. See note 88 *supra* and sources cited therein.

120. For a description of pre-Langdell Harvard, see note 87 *supra*.

nearly two decades later, casebooks by Corbin and Costigan were published in 1921, Herman Oliphant of Columbia rejoiced that teachers of contracts, "fortunate in having a choice between two such excellent classroom tools as the case-books of Professors Williston and Keener," now had two more to choose from,¹²¹ and Grover Cleveland Grismore of Michigan exulted that the "teacher of Contracts has an imposing array from which to choose."¹²²

With serious treatise writing in a decline and law reviews in their infancy, the editing of casebooks and of related student texts was, if not the only game in town, a particularly attractive one. It was also a game limited, by present-day standards, to very few players — not more than three or four serious contenders from 1870 to 1930. This oligopoly did not begin to break down until the 1930s. Although Williston's third edition in 1930 was declared by one reviewer to be "most assuredly the best collection of cases on Contracts now published,"¹²³ and Costigan's second edition in 1932 was deemed by another to be "the best case book ever published on the subject of contracts,"¹²⁴ other academics nevertheless dared to enter the lists.

Grismore was the first, in 1931, to invade what he admitted was "a field in which the handiwork of masters is already available."¹²⁵ Harold C. Havighurst of Northwestern followed in 1934,¹²⁶ as did Page in 1935.¹²⁷ The year 1935 also saw the publication by Edwin Wilhite Patterson of Columbia of an unwieldy but influential two-volume work, designed to be used with a third volume not yet prepared, in an eight-hour course in contracts.¹²⁸ The third volume, by George Washington Goble of Illinois, appeared in 1937,¹²⁹ and, in 1941, the three volumes were compressed into the single volume by Patterson and Go-

121. Oliphant, Book Review, 16 ILL. L. REV. 645, 645 (1922); *see also* Book Review, 8 VA. L. REV. 315, 315-16 (1922) ("There have been so many casebooks on Contracts put upon the market that the question is constantly being raised as to which one is to be used . . .").

122. Grismore, Book Review, 20 MICH. L. REV. 373, 374 (1922).

123. Hildebrand, Book Review, 17 CORNELL L.Q. 319, 322 (1932).

124. Goble, Book Review, 27 ILL. L. REV. 592 (1933).

125. G. GRISMORE, *CASES ON THE LAW OF CONTRACTS* iii (1931). A second edition appeared in 1946.

126. H. HAVIGHURST, *A SELECTION OF CONTRACT CASES AND RELATED QUASI-CONTRACT CASES* (1934). There was a second edition in 1950.

127. W. PAGE, *CASES AND READINGS ON THE LAW OF CONTRACTS* (1935).

128. E. PATTERSON, *CASES AND MATERIALS ON CONTRACTS II* (1935). The first volume was entitled "Performance of Contracts" and the second "Rescission, Reformation, and Quasi Contracts." At the time, an eight-hour course in contracts was not a novelty, for Page's casebook was also designed for such a course. *See* W. PAGE, *supra* note 127, at iii.

129. G. GOBLE, *CASES AND MATERIALS ON CONTRACTS I* (1937). Earlier it had been written that Karl Nickerson Llewellyn of Columbia, whose casebook on sales had appeared in 1930, was expected to do the third volume. Reeve, Book Review, 22 VA. L. REV. 843, 844 (1936). (Since the styles of Llewellyn and Patterson were like oil and water, I have tried to verify this, but without success. Three of Patterson's former student assistants have no recollection of plans to include Llewellyn. However, the library of the Columbia School of Law contains a nine-page mimeographed "Introduction to Contracts" written by Llewellyn for his 1933-1934 class.)

ble that was to become the best seller in its field.¹³⁰ In 1938, George Knowles Gardner of Harvard brought out his casebook on contracts.¹³¹

The pace of casebook publication picked up after the Second World War, with books by Lon L. Fuller of Harvard in 1947,¹³² by Addison Mueller of Yale and later UCLA in 1951,¹³³ and by Friedrich Kessler of Yale and Malcolm Pitman Sharp of Chicago in 1953.¹³⁴ Enough competitors have followed that there are now about a score on a market that is vastly greater than the market on which Corbin, Costigan, and Williston competed in the 1920s.¹³⁵ One can rightly say, as did Isaac Maurice Wormser of Fordham back in 1950, "There are now so many good casebooks on the subject of Contracts that there is truly an embarrassment of riches."¹³⁶ Certainly the oligopoly has vanished. And just as certainly, in competition with the outpouring of law review articles and of university-press books and even the writing of treatises, the preparation of casebooks is no longer the dominant force that it once was.¹³⁷

130. E. PATTERSON & G. GOBLE, *CASES ON CONTRACTS* (2d ed. 1941). There was a third edition in 1949 and a fourth edition, with Harry Willmer Jones, in 1957. (A reviewer of the third edition noted that because the 1941 book was designated a "second edition[,] . . . it fell victim to the tyranny of labels and was ignored by the book reviewers." Levin, Book Review, 44 ILL. L. REV. 739, 739 (1949).) Subsequent editions in 1965, 1972, and 1980 bear the names of Edward Allan Farnsworth and William Franklin Young and, in 1965 and 1972, of Jones.

131. G. GARDNER, *A SELECTION OF CASES AND MATERIALS ON THE LAW OF CONTRACTS* (1938).

132. L. FULLER, *BASIC CONTRACT LAW* (1947), described as "probably the first post-realist contracts text." Klare, Book Review, 54 N.Y.U. L. REV. 876, 882 (1979). There have been subsequent editions with Robert Braucher in 1964 and with Melvin Aron Eisenberg in 1972 and 1981.

133. A. MUELLER, *CONTRACT IN CONTEXT* (1951). A successor, much changed, appeared in 1971 under the name *Contract Law and Its Application*, with Arthur I. Rosett as coauthor. It had a second edition in 1977 and a third, with Gerald P. Lopez, in 1983.

134. F. KESSLER & M. SHARP, *CONTRACTS: CASES AND MATERIALS* (1953). Later editions have dropped Sharp's name and added Grant Gilmore in 1970 and Anthony T. Kronman in 1986.

135. Here is what I believe to be a complete list of commercially published casebooks since the Second World War. Citations are to the most recent editions, with former authors in brackets. ANDERSON (1950); CALAMARI & PERILLO (2d ed. 1977); CLOSEN, FERBER, PERLMUTTER & WEINBERG (1980); CORBIN (3d ed. 1947); CRANDALL & WHALEY (1987); DAWSON, HARVEY & HENDERSON (4th ed. 1982); FARNSWORTH & YOUNG [Patterson, Goble, Jones] (2d ed. 1980); FESSLER & LOISEAUX (1982); FREEDMAN (1973); FULLER & EISENBERG [Braucher] (4th ed. 1981); HAMILTON, RAU & WEINTRAUB (1984); JACKSON & BOLLINGER (2d ed. 1980); KESSLER, GILMORE & KRONMAN [Sharp] (3d ed. 1986); KNAPP & CRYSTAL (1986); MACNEIL (2d ed. 1978); MCGOVERN & LAWRENCE (1986); MUELLER, ROSETT & LOPEZ (3d ed. 1983); MURPHY & SPEIDEL (3d ed. 1984); MURRAY (3d ed. 1983); REITZ (1975); SHEPHERD & WELLINGTON [Costigan] (4th ed. 1957); SIMPSON (1956); SUMMERS & HILLMAN (1987); VERNON (1980); WILLISTON & LAUBE [Langdell] (6th ed. 1954). In two instances (*McGovern* and *Mueller*), earlier casebooks have not been listed though they might be regarded as distinct because their later casebooks are not held out as later "editions."

136. Wormser, Book Review, 3 J. LEGAL EDUC. 145, 147 (1950).

137. In addition to the treatises of Corbin and Williston, there are three one-volume texts, aimed at lawyers and judges as well as at students, by Calamari & Perillo, Farnsworth, and

Furthermore, as the pace of publication quickened, the nature of the casebook was transformed from the pristine "gathering of flowers" that Langdell had brought forth in 1871 to something quite different. Thus, in reviewing *Kessler and Sharp*, Benjamin Kaplan reported that "far from being a neutral anthology" it was "rather a rich critique of the law of contracts" in which "the editors wear their heart on their sleeve."¹³⁸ In an expanding market, casebook editors made overt attempts to achieve product differentiation. The Age of the Anthology had ended.

For roughly eighty years, however, a small number of contracts scholars whose names graced the spines of casebooks had enjoyed an unparalleled opportunity to shape the thinking of virtually every American lawyer. In Part II of this article I turn to how those early anthologists used that opportunity to exert an influence on the scope of their subject, on its organization, on the precedents that came to be "leading cases," and on contract doctrine.

II. THE INFLUENCE OF THE ANTHOLOGISTS

A. *On Scope*

How did the early anthologists help to define the scope of their subject? For the most part, their contributions were limited to exclusions. A present-day reader of one of these early anthologies is thus struck not by what is to be found but by what is missing.

A patient reader of the early treatises of Story and Parsons could have found something on most of the topics now included in books on contract law. The early treatises dealt with such general topics as consideration, mutual assent, capacity, fraud, illegality, the statute of frauds, interpretation and construction (including the parol evidence rule), performance and breach, assignments, discharge, and damages. The most notable omissions were specific performance and restitution. To find all these general topics, however, one had to pick one's way through seemingly endless discussions of such specific types of contracts as, to borrow Gilmore's catalog, those "of factors, brokers, auctioneers, executors and administrators, trustees, seamen, corporations, guardian and ward, masters of ships, guarantors, landlord and tenant — and on and on in a never-ending list."¹³⁹

Murray, and one aimed primarily at lawyers by Hunter. Authors of university-press books on contracts include Dawson (two), Fried, Gilmore, Havighurst, and Macneil. In a sense, we have come full-circle since Holmes.

138. Kaplan, Book Review, 63 YALE L.J. 1039, 1039 (1954). It may have been a sign of the times that published in the same year was H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953), described by a reviewer as "so much more than a casebook should pretend to be" as to justify description as "the definitive text on the subject." Kurland, Book Review, 67 HARV. L. REV. 906, 906-07 (1954).

139. G. GILMORE, *supra* note 23, at 45.

The anthologists made two kinds of exclusions. First, they omitted many of the general topics that had been covered by the treatise writers but which were dealt with in other law school courses. Second, they declined to treat the many specific contracts of which the treatise writers were so fond.

Langdell's *Cases* was, as he admitted, of limited scope. It only began the subject of contracts, embracing no more than the general topics of mutual assent, consideration, and conditional contracts. The last of these contained cases on what we would now call constructive conditions of exchange, including *Kingston v. Preston* and *Boone v. Eyre*. But it omitted *Hochster v. de la Tour*, decided in 1853, because the chapter did not cover anticipatory repudiation, and it left out *Taylor v. Caldwell*, decided in 1863, because the chapter did not deal with impossibility. It was Langdell's expectation that his initial casebook would "be followed by other volumes upon the same plan,"¹⁴⁰ but no such volume appeared until Williston produced his in 1894.

Even with Williston's additions, the scope of the two volumes was still limited. Williston included *Hochster v. de la Tour* but not *Taylor v. Caldwell*. Though he did not deal with third-party beneficiaries as such, he added *Lawrence v. Fox*, decided in 1859, to Langdell's section on "From Whom the Consideration Must Move." But he still omitted *Hadley v. Baxendale*, decided in 1854, because he had nothing on damages, *Lumley v. Wagner*, decided in 1852, because he had nothing on specific performance, and *Britton v. Turner*, decided in 1834, because he had nothing on restitution. He also had nothing on the statute of frauds or on the defenses of mistake, misrepresentation, or duress.

Keener's 1898 anthology was broader in scope. He put *Lawrence v. Fox* in a separate section on third-party beneficiaries, had a separate chapter on duress, and included *Hadley v. Baxendale* in a chapter on contract remedies. But this chapter did not include equitable remedies, and he had nothing on the equitable defenses of mistake and misrepresentation and nothing on the statute of frauds or restitution.

Of the leading nineteenth-century anthologies, the most extensive in scope was that of Huffcut and Woodward. They had, with minor exceptions, simply followed Anson. In addition to what was in the other two casebooks, they had a chapter on capacity, a chapter on the "reality of consent" that included mistake, misrepresentation, and duress, a section on the statute of frauds, a section on remedies that included not only damages but specific performance and injunction, and a chapter on rules of evidence related to interpretation. There was still nothing on restitution.

Startling as most of these omissions may seem to the contemporary

140. C. LANGDELL, *CASES*, *supra* note 15, at vii.

reader, they were largely beyond the control of the anthologists. They were due to the tyranny of the curriculum.¹⁴¹ The exclusionary effect of the curriculum was notable in four areas. First, the course in equity subsumed defective consent, particularly mistake and misrepresentation. Second, the courses in damages and equity claimed remedies, notably damages for breach of contract and specific performance, respectively. Third, the course in quasi-contracts dealt with restitution. Fourth, the course in evidence covered the parol evidence rule.

As late as Corbin's and Costigan's 1921 editions and Williston's 1922 edition, none of the above topics was included. There was still no *Sherwood v. Walker* on mistake, no *Laidlaw v. Organ* on misrepresentation, no *Hadley v. Baxendale* on damages, no *Lumley v. Wagner* on specific performance, no *Britton v. Turner* on restitution, no *Pym v. Campbell* on the parol evidence rule — simply because none of those topics was included in these leading casebooks. Keener had used *Hadley v. Baxendale* and Huffcut and Woodward had used *Sherwood v. Walker* and *Laidlaw v. Organ*, but these early anthologists had not influenced the leaders of the 1920s. The major influence for including defective consent, restitution, and the parol evidence rule — and at least a significant force in favor of adding damages — was Patterson's two-volume work which was not published until 1935, and then as a result of curricular reform.¹⁴² For decades the tyranny of the curriculum took a heavy toll of topics that were excluded from anthologies of contracts cases.

This toll was reflected in turn in contracts scholarship. Contracts teachers naturally tended to write about the topics that were touched on in the anthologies from which they taught. Thus questions of consideration and mutual assent, which bulked large in the anthologies,

141. That a narrow view of the scope of contract law was not peculiar to casebook editors can be seen from a glance at the scope note for contracts in the century edition of the *American Digest*, which digested American cases to 1896. Among the topics excluded are capacity, illegality, statutes of frauds, parol evidence, damages, specific performance, and assignments. All of these exclusions have persisted through the latest *Decennial Digest*, the ninth.

142. Mulder, Book Review, 36 COLUM. L. REV. 342, 344 (1936) (describing as a "welcome innovation" Patterson's "more than cursory treatment of the Parol Evidence Rule"); Reeve, *supra* note 129, at 845 (describing as a "distinct advantage" Patterson's "bringing together of Contracts, Quasi-Contracts . . . and Damages"); see also Levin, *supra* note 130, at 739 (describing as a "distinctive feature" of the 1941 edition of *Patterson & Goble* "the conception that a contracts course should include substantial portions of the law of damages, quasi contracts and the parol evidence rule"). Havighurst's casebook, published the year before Patterson's, was entitled *A Selection of Contract Cases and Related Quasi-Contract Cases*, but it does not seem to have had the impact of Patterson's and did not, for example, include *Britton v. Turner*. Not everyone agreed as to the desirability of integration, even as late as 1950. See Wormser, *supra* note 136, at 145 (doubting "the wisdom of teaching the Parol Evidence Rule . . . as it is taken up fully in the course on Evidence" and "of including cases on the measure of damages for breach of contract" since a "course on Damages . . . is given in almost every law school"). The integration of remedies was not an innovation of Patterson's. Grismore's 1931 casebook and Costigan's second edition in 1932 had chapters on damages that included, for example, *Hadley v. Baxendale*, and Havighurst's 1934 casebook included *Lumley v. Wagner*. Corbin's second edition in 1933 had a chapter on remedies that included both of those cases.

sparked endless debate. Because of the exclusions imposed by the curriculum, remedial aspects of contract law, which were absent from the anthologies, received little attention from contracts scholars. Although specialists in remedies wrote about such matters, the divisions of the curriculum discouraged any integrated analysis of the law of contracts and the law of remedies. It cannot be mere coincidence that the first significant discussions of damages measured by reliance rather than by expectation came during the decade of the thirties, when the subject of damages was, for the first time, generally taught as part of the contracts course.¹⁴³

While the early anthologists' exclusion of such general topics as remedies may be a cause for regret, few would shed tears over their exclusion of special contracts. Neither Langdell nor his successors emulated the early treatise writers in their devotion to these. Gilmore succumbed to hyperbole, however, in arguing that in the early books "general theoretical discussion — the consideration doctrine, the theory of conditions, the requirement of mutual assent — was minimal or nonexistent" and in crediting Langdell with "the almost inadvertent discovery of the general theory of Contract."¹⁴⁴ While Gilmore's statement may have been true for Kent and the elder Story, it was not true for the younger Story, for Parsons, or for other writers of treatises on contracts that would have been in Langdell's library.¹⁴⁵ True, their works contained elaborate treatments of special contracts because, unlike Langdell's, they were directed at practitioners rather than students.¹⁴⁶ But far from being mere collections of such treatments, these books contained full discussions of the general topics mentioned above.

When Langdell consulted the 1856 fourth edition of Story's work on contracts, newly expanded to two volumes, he found not only discussion of many special branches of the law of contracts, but two chapters on mutual assent and consideration that filled over 120 pages.¹⁴⁷ When he turned to the 1866 edition of Parsons' work, newly

143. In addition to Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936-1937), see the excerpt from Gardner, written in 1934, which appears at page 297 of Fuller's 1947 casebook (expressing the "Tort Idea . . . that one ought to pay for losses which others suffer in reliance on his promises").

144. G. GILMORE, *supra* note 23, at 45; G. GILMORE, *supra* note 4, at 12. Gilmore saw the law of contract before Langdell as conceived largely in terms of "the various specialties — negotiable instruments, sales, insurance and so on." *Id.* at 11.

145. Even the first volume of Nathan Dane's *Abridgment*, published in 1823, had 23 pages on consideration under the heading "Contracts and Consideration" and 13 pages on damages under another heading. Additional general discussion appeared in the discussion of debt in volume 5, published in 1824.

146. Thus the advertisement in Story's second edition announced that the inclusion of "[m]any new branches of the subject of Contracts," such as the contracts of factors, brokers, seamen, and masters of ships, would "render it more valuable to the profession." W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL ix (2d ed. 1847).

147. Similar observations could be made of American editions of English works. In the 1860

expanded to three volumes, which proclaimed the addition of new material on special matters,¹⁴⁸ he found that it continued to treat many general matters, with some sixty pages on consideration and mutual assent¹⁴⁹ and a remarkable development of the subject of performance.¹⁵⁰ Among these general topics the emphasis was, to be sure, very different from what it is today. The authors stressed questions of formation and of validity, at the expense of interpretation and construction and of performance. Thus, though the great case of *Hochster v. de la Tour* had been decided in 1853, it seems not to have aroused immediate interest among treatise writers on either side of the Atlantic.¹⁵¹ And when formation and validity were discussed, much more attention was given to consideration, capacity, and the statute of frauds than to mutual assent. Though *Adams v. Lindsell* had been handed down in 1818, most of the leading English cases dealing with mutual assent in contracts by correspondence came too late even for inclusion in Langdell's first edition.¹⁵²

Some of the emphasis on general principles of contract law may have been unwilling as well as unwitting. Langdell himself planned further volumes, which might have dealt with special contracts.¹⁵³ And Williston noted with regret that to keep down the size of his 1894 volume, he had omitted some "chapters of the law which, though perhaps naturally included under the general title of the law of contracts, may be better taught by themselves or in connection with some other

American edition of *Chitty*, a substantial part of the work was devoted to general contract law, including some 50 pages on consideration and mutual assent. J. CHITTY, A TREATISE ON THE LAW OF CONTRACTS, AND UPON THE DEFENSES TO ACTIONS THEREON 8-60 (J.C. Perkins 10th Am. ed. 1860). The 1856 edition of *Smith* had almost 40 pages on consideration and mutual assent and devoted less than a quarter of its space to special contracts. J. SMITH, THE LAW OF CONTRACTS (4th Am. ed. 1856).

148. These included contracts of shipping and of marine, fire, and life insurance. 1 T. PARSONS, THE LAW OF CONTRACTS vii (5th ed. 1866).

149. *See id.* at 425-85. Indeed, account being taken of size of page and print, Parsons' discussion of "consideration" is nine-tenths as long as Langdell's. Even taking account of Parsons' inclusion of several pages on "failure of consideration," it is six-sevenths as long.

150. It came in three fragments: an early discussion of a few pages on "failure of consideration," a later chapter on "construction" and interpretation of contracts, and a section on performance in the chapter on defenses. *See id.* at 462-66; 2 *id.* at 491-566, 636-75.

151. It is not in Story's fourth edition (1856) nor in the sixth American edition of Smith's *Leading Cases* (1866).

152. *E.g.*, *Tinn v. Hoffman & Co.*, 29 L.T.R. 271 (Ex. Ch. 1873); *Household Fire & Carriage Accident Ins. Co. v. Grant*, 4 Ex. D. 216 (C.A. 1879); *Byrne & Co. v. Leon Van Tienhoven & Co.*, 5 C.P.D. 344 (1880); *Henthorn v. Fraser* [1892] 2 Ch. 27 (C.A.). Earlier American cases include *Eliason v. Henshaw*, 17 U.S. (4 Wheat.) 225 (1819) (discussed in note 45 *supra*); *Mactier's Admrs. v. Frith*, 6 Wend. 103 (N.Y. 1830).

153. Langdell's agenda is reminiscent of Blackstone's: "[T]here arise three points to be contemplated in all contracts; 1. The *agreement*: 2. The *consideration*: and 3. The *thing* to be done or omitted, or the different species of contracts." 2 W. BLACKSTONE, COMMENTARIES *442. If Langdell had expanded his treatment of the third of these, he might have dealt with "the different species."

title of the law."¹⁵⁴ Among these were some of the specific types of contracts covered by the earlier treatises. Furthermore, the interest in general principles rather than specialized types of contracts may have been as much a product of the 1870s as of Langdell's own mind. Both Pollock's and Anson's books emphasized general principles, and Leake's, while oriented toward the practitioner, laid far more stress on general principles than did, for example, either Addison or Chitty. Nonetheless, though Langdell and the other early anthologists may not deserve credit for discovery of "the general theory of contract," they bear the main responsibility for the emphasis that we place today on general principles at the expense of special contracts.

In view of the preoccupation of early treatise writers with special contracts, it is striking that none of the early anthologists thought to explore how general contract principles were applied in particular contexts. In contrast to the treatise writers, the anthologists conceived of contract law as generally applicable to all kinds of contracts, much as they conceived of it as applicable to all jurisdictions. Corbin wavered in 1921 when, in developing the subject of conditions, he devoted separate subsections to "contracts of service," "certificate of architect or engineer," and "charter parties — leases."¹⁵⁵ But it was Havighurst who in 1934 first constructed an entire contracts casebook by grouping cases "according to subject matter and not according to the doctrines employed," beginning with contracts for services and ending with contracts for the sale of goods.¹⁵⁶ His experiment did not, however, survive his first edition, and the same fate befell Mueller's short-lived casebook centered on a contract for the construction of an apartment house.¹⁵⁷ The emphasis on general principles remained unshaken by these experiments.

B. *On Organization*

What did the early anthologists contribute to the organization of

154. 2 S. WILLISTON, *supra* note 54, at v. It is suggestive that the index to his *Cases* listed, under conditions precedent: leases, policies of insurance, charter parties, building contracts, contracts of apprenticeship, and sales of personal property.

155. He deleted the last of these in 1933, but added others, including "installment contracts — land," "installment contracts — goods," and "installment contracts — labor and construction."

156. Havighurst argued that this enabled "the student more easily to master the facts of a case and to see each situation as a living problem rather than as merely dead material for logical dissection." He acknowledged his debt to Dean Leon Green, "whose reclassification of tort cases suggested to me the desirability of a similar undertaking in the field of contracts." H. HAVIGHURST, *supra* note 126, at iii, v.

157. A. MUELLER, *supra* note 133. Later casebooks by Mueller are not listed as revisions of Mueller's original casebook. The latest, *Mueller, Rosett & Lopez*, ends with chapters on sale of goods, personal service contracts, and construction contracts. A. MUELLER, A. ROSETT & G. LOPEZ, *CONTRACT LAW AND ITS APPLICATION* 649-933, chs. 5-7 (3d ed. 1983).

their subject? Questions of organization seem not to have caused much concern to nineteenth-century contracts scholars.

The early American treatise writers were heavily influenced by their fascination with the particular and gave little attention to matters of organization. Thus a reader of the 1853 edition of *Parsons* encountered twenty-two chapters on "Parties to a Contract," including "Outlaws, Persons Attainted, and Persons Excommunicated," before coming upon "Consideration and Assent." The reader then found twelve chapters on "The Subject-Matter of Contracts," ranging from sale of real and personal property to bailment and carriers before reaching such matters as interpretation and construction, defenses, and damages.¹⁵⁸

For Langdell, organization posed no problem. Parsons' treatise, stripped of the chapters on parties and subject matter, had placed consideration first, then mutual assent, and then — under interpretation and construction — conditions. Langdell's anthology simply followed this sequence. Langdell may have shared Parsons' lack of concern with organization, as the alphabetical scheme of his *Summary* suggests.¹⁵⁹

When Williston came to organizing his two volumes in 1903, he also began with formation, but then made a major innovation by turning to "parties affected by contracts." Here he grouped third-party beneficiaries, assignments, and joint obligations. He then went on to the statute of frauds, performance, illegality, and discharge. This early placement of third-party problems was plainly influenced by such treatise writers as Parsons, who had placed his twenty-two chapters on parties near the beginning. It persisted in Williston's later editions, in his treatise, and in the *Restatement of Contracts*.¹⁶⁰

The other early anthologists used a different plan for their casebooks. Hufcut and Woodruff in 1894 simply adopted Anson's chronological organization. They traced the development of the contract from formation through discharge in four major parts: first, formation of contracts; second, operation of contracts — including third-party beneficiaries, assignments, and joint obligations;¹⁶¹ third, interpretation of contracts; and fourth, discharge of contracts — including not only discharge by agreement, but also discharge by performance, by breach (including a few cases on remedies), and by impossibility. As Anson put it in his preface, "I have tried to show how a contract is made, what is needed to make it binding, what its effect is, how its

158. See T. PARSONS, *supra* note 11.

159. See note 20 *supra*.

160. In Williston's fifth edition, the parol evidence rule and the statute of frauds were inserted before third-party problems, and in the sixth edition by Laube third-party problems were put even later.

161. Anson did not include the topic of joint obligations.

terms are interpreted, and how it is discharged and comes to an end."¹⁶² Keener's 1898 casebook used a similar scheme, divided into three parts: first, formation of contracts; second, operation of contracts — beginning with a chapter on third-party problems; and third, discharge of contracts — dealing with discharge not only by agreement but also by impossibility, as well as with illegality and duress.¹⁶³

Decades later, Corbin was to begin, much as Langdell had, with mutual assent, consideration, and conditional contracts, and then go on to matters relating to performance, including impossibility. He then took up discharge, and only then third-party problems, followed by illegality and finally the statute of frauds.¹⁶⁴ Placing third-party problems so near the end was a sharp departure from the tradition borrowed by Williston from Parsons — a departure that was to find favor among modern casebook editions and in the second *Restatement*. But since Corbin, like Langdell and Williston, had nothing on remedies, he was spared the most vexing problem that now faces editors of contracts casebooks — where to locate that topic.

For those of the early anthologists who did deal with remedies, the location of the topic seems to have been a subject of some embarrassment. Huffcut and Woodruff relegated remedies — as did Anson — to a section in a chapter on discharge by breach, in their part on discharge of contracts. Keener devoted a whole chapter to remedies in his part on operation of contracts. Remedies then dropped from sight until the 1930s because of the organization of the curriculum. In 1933, when Corbin added a chapter on remedies to his second edition, he located it in the middle, after breach and before discharge. In 1941, Patterson and Goble did much the same, placing remedies in the middle after the statute of frauds and before failure of conditions. It remained for Fuller in 1947 to take the bold step of putting remedies up front under the heading "the general scope of the legal protection accorded contracts."¹⁶⁵ Karl Klare has written that this signalled a cen-

162. W. ANSON, *supra* note 38, at v.

163. See W. KEENER, *supra* note 51. Keener's 1891 casebook, based on *Finch & Leake*, had proceeded from formation to capacity, mistake, fraud, and duress, and then to illegality, to discharge — including discharge by performance and breach as well as by agreement — and then to damages, and finally to assignment. See W. KEENER, *supra* note 43.

164. See Whittier, Book Review, 31 YALE L.J. 220, 220 (1921) ("There is no attempt to follow the order of Anson on Contract which the author has recently edited."); see also Hopkins, Book Review, 2 U. TORONTO L.J. 191, 191 (1937) (noting that Patterson "freely admits that [his] order of treatment does violence to the amalgam of logic and chronology (associated with Sir William Anson) which has thus far governed the compilation of contracts case-books").

165. L. FULLER, *supra* note 132, at 1. The first to put remedies at the beginning of a casebook, however, was Patterson, who did so in his incomplete set of volumes published in 1935.

Professor Patterson starts his book in Volume 1 with a novel idea which may well, in the practical proof of class room teaching, have great value, namely, to preface conditions with some 80 odd pages of cases on damages which must impress forcibly upon the students that what the plaintiff recovers in the normal law suit on a contract is a judgment for money damages.

tral message of the legal realist: "[I]t is impossible to understand the nature of legal rights and relationships or to logically deduce remedial conclusions from them without knowing what courts can and actually will do to and for litigants."¹⁶⁶ This placement of remedies, together with its inevitable emphasis on the nature of the remedial interests that the law seeks to protect, has found favor with other casebook editors.¹⁶⁷

But remedies aside, most contemporary contracts casebooks, though varying considerably in organization, still show the influence of the traditional chronological scheme of organization attributed to Anson, with the principal difference that third-party problems are often relegated to a place nearer the end.¹⁶⁸ With the possible exception of third-party problems, casebook organization, including the location of remedies, seems not to have had a dramatic effect on the organization of treatises or the second *Restatement*.¹⁶⁹

C. On Precedents

If the early anthologists in the field of contracts were to see their influence on that subject's scope checked by the curriculum and their influence on its organization only indifferently felt, they were to suffer no such disappointments with respect to their influence on precedents. The most popular of their cases, reused in anthology after anthology, were to become part of the taught tradition of American contract law, revered as "leading cases" by the many lawyers whose first acquaintance with the field came from reading those cases. Where did these early anthologists get their cases? The problem of case selection had a special urgency for Langdell and Keener, both of whom found themselves thrust into teaching contracts on short notice.

Sometimes the cases came as a kind of by-product, as they did for Huffcut, who must have read all the cases in his all-American anthology of 1894 while preparing his 1895 American edition of *Anson*. And

Reeve, *supra* note 129, at 844.

166. Klare, *supra* note 132, at 882.

167. Notable for placing remedies first are *Dawson, Harvey & Henderson and Jackson & Bollinger*. See also *Farnsworth & Young*. However, in the latest edition of *Fuller & Eisenberg* the subject of remedies is now put off until the fourth chapter.

168. One notable departure is that of Kessler and Sharp in 1953 who made a grand division between "Contract and the Free Enterprise System" and "Irregularity, Inequality, and Imperfect Competition" — highlighting two sections of the law of contracts "governed by principles which are inconsistent with if not diametrically opposed to each other." F. KESSLER & M. SHARP, *supra* note 134, at vii, viii, 2. This organization has been abandoned in the most recent edition and has not been followed by others.

169. Contemporary casebooks show great variety in the organization of cases within a topic, though there is a tendency to begin a topic with an old and seminal case if one is used. Langdell carried the chronological method to an extreme. See note 4 *supra* and accompanying text. Neither Keener nor Huffcut and Woodward was so wedded to jurisdictional or chronological ordering, and their successors surely have not been.

a generation later, Corbin must have read all of the American and many of the English cases in his anthology of 1921 while editing his 1919 American edition of *Anson*.¹⁷⁰ Williston published his 1894 volume just after his 1893 edition of *Parsons*, his 1903 edition not long before his 1906 American edition of *Pollock*,¹⁷¹ and his 1922 edition shortly after his treatise appeared in 1920. And Williston wrote that it was Langdell's work as a student research assistant for Parsons¹⁷² that enabled Langdell "to prepare and publish with little delay" his cases,¹⁷³ though Langdell seems to have made at least as much use of Story's cases as of Parsons'.¹⁷⁴

The anthologists often took cases from each other. The most extreme example, of course, is Keener's hurried 1891 borrowing from Finch.¹⁷⁵ Williston's subsequent editions borrowed openly from Langdell, and Shepherd later borrowed openly from Costigan. Other casebook editors, not formally connected with predecessors, acknowledged similar debts.¹⁷⁶ And whether acknowledged or not, such debts will be inevitable as long as future editors teach from existing anthologies. As Corbin admitted, "One cannot use a particular casebook in his law school courses for more than 15 years without being greatly influenced by both the choice of cases and the order of their arrangement."¹⁷⁷ It is surely more than mere coincidence that so many editors of subsequent casebooks undertook to review the works of their

170. Corbin also produced a flurry of law review articles prior to the publication of his casebook, including four on offer and acceptance [23 YALE L.J. 641 (1914); 26 YALE L.J. 169 (1917); 27 YALE L.J. 382 (1918); 29 YALE L.J. 767 (1920)], and one each on consideration [27 YALE L.J. 362 (1918)], conditions [28 YALE L.J. 739 (1919)], third-party beneficiaries [27 YALE L.J. 1008 (1918)], and discharge [22 YALE L.J. 513 (1913)]. The chapter on conditions that he added to *Anson* was, for example, based largely on his 1919 article on that subject.

171. Here, however, the edition of *Pollock* seems to have been the by-product. Williston later wrote that he was encouraged to do it because "I had just brought out for the use of my class in the Law School two volumes of selected cases on contracts, liberally annotated." S. WILLISTON, *supra* note 28, at 262.

172. *Id.* at 136; see also Danzig, *The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia*, 29 STAN. L. REV. 1125, 1130-31 (1977).

173. S. WILLISTON, *supra* note 28, at 136. Parsons acknowledged in his preface his debt to "Mr. C.C. Langdell, now, Librarian of our Law School." 1 T. PARSONS, *supra* note 11, at x. President Eliot of Harvard later recalled that while a student he "heard a young man who was making notes to *Parsons on Contracts* talk about law." Address by President Charles W. Eliot, Harvard Law School Association dinner (Nov. 5, 1886), *quoted in* 2 C. WARREN, *supra* note 1, at 360.

174. At least in the area picked by Danzig, *supra* note 172, Langdell's cases correlate better with Story's citations than with Parsons'.

175. W. KEENER, *supra* note 43.

176. See, e.g., G. GARDNER, *supra* note 131, at vii (acknowledging, among others, Corbin, Costigan, Patterson, and Goble, "whose case books have brought to my attention many of the cases printed here").

177. A. CORBIN, *supra* note 113, at x. But Amram, *supra* note 116, at 373, said only about a quarter of Corbin's cases came from old casebooks. Whittier, *supra* note 164, at 221, said about three-fourths are cases not found in other books.

predecessors.¹⁷⁸

The early anthologists' emphasis on English cases deserves special attention. Langdell's *Cases* was particularly noted for this. Of Langdell's 336 cases, 310 were English, only twenty-two were American, and the remaining four came from other, mostly civil law, jurisdictions. Of the American cases, two were from the Supreme Court of the United States, ten from Massachusetts, eight from New York, and one each from Connecticut and Pennsylvania.¹⁷⁹

Why did Langdell so skew his selection? Anglophilia, coupled with Eastern snobbery, was surely a factor. Langdell recalled his contracts professor, Parsons, exhorting new students to study English decisions diligently because "England governs us still; not by reason of force but by force of reason."¹⁸⁰ This view must have guided Langdell when he helped Parsons with his treatise and again when he compiled an anthology of cases under pressure of time.¹⁸¹ Since Langdell had forsaken a bookish practice in New York for an ivory tower in Massachusetts, it was not surprising that he preferred American cases from those states. He was, of course, not alone in this. Early casebooks by his Harvard colleagues in other fields showed much the same parochialism,¹⁸² and, as late as 1950, Wormser, one of *Keener's* revisors, confessed to an "old-fashioned fondness for the leading English, Massachusetts, and New York cases."¹⁸³

Langdell's emphasis on English cases also served another end. According to Gilmore, the "apparent unity of doctrine" was "immensely

178. Thus Dawson, whose casebook appeared in 1959, reviewed *Kessler & Sharp* in 6 J. LEGAL EDUC. 405 (1954); while Sharp, whose casebook appeared in 1953, reviewed *Fuller* in 15 U. CHI. L. REV. 795 (1948); and Shepherd, whose casebook appeared in a second edition in 1946, also reviewed *Fuller* in 1 J. LEGAL EDUC. 151 (1948). Gardner, whose casebook appeared in 1939, reviewed both *Goble* in 51 HARV. L. REV. 188 (1937) and Patterson's two volumes in 45 YALE L.J. 1153 (1936); while Goble, whose casebook appeared in 1937, reviewed Costigan's third edition in 27 ILL. L. REV. 592 (1933). Havighurst, whose casebook appeared in 1934, also reviewed Costigan's third edition along with Patterson's two volumes in 21 IOWA L. REV. 661 (1936); and Grismore, whose casebook appeared in 1931, reviewed both *Corbin* and *Costigan* in 20 MICH. L. REV. 373 (1922).

179. In Langdell's second edition he dropped the Pennsylvania case. Gilmore, however, was incorrect in asserting that aside from New York and Massachusetts "no other American jurisdictions [were] represented." G. GILMORE, *supra* note 4, at 13. According to Williston, Langdell's "methods of selection were such that his case books never had wide circulation away from Cambridge." S. WILLISTON, *supra* note 28, at 74. If this is so, Williston was himself responsible for the preparation of the materials first compiled by Langdell.

180. 2 C. WARREN, *supra* note 1, at 312.

181. Langdell's anglophilia may also have been due to failing eyesight. According to Williston, "Partly owing to an inability to use his eyes to any considerable extent, an infirmity which overtook him before he had been teaching in Cambridge many years, he had little interest or sympathy with any development of law later than 1850." S. WILLISTON, *supra* note 13, at 114.

182. The heavy emphasis on English cases was continued, in somewhat differing degrees, by Ames in his two volumes of cases on bills and notes in 1881, by Gray in his six volumes of cases on property in 1888-1892, and by Keener in his two volumes of cases on quasi-contracts in 1888-1889. All of these authors were more catholic than Langdell in their tastes for American cases.

183. Wormser, *supra* note 136, at 145.

facilitated by the custom, initiated by Langdell, of relying to an extraordinary degree on English cases as authoritative precedents."¹⁸⁴ Langdell's view of law "as a science,"¹⁸⁵ led him to assume that "the cases which are useful and necessary" to finding the fundamental principles that he sought "bear an exceedingly small proportion to all that have been reported."¹⁸⁶ As Gilmore wrote, "We need not accuse Langdell and his successors of an unbecoming Anglophilism; for the structure they wanted to build, the English cases were the best — indeed the only possible — building materials."¹⁸⁷ In 1823, Nathan Dane had written in the introduction to his *Abridgment* that the "evil to be feared in our country is, that so many sovereign legislatures, and so many Supreme courts, will produce too much law, and in too great a variety."¹⁸⁸ With profits from this enormously successful work, Dane endowed a professorship at the Harvard Law School that was occupied by Parsons and then by Langdell. Langdell was surely aware that his benefactor believed that, in Hurst's words, a "university law school should be a school in the Anglo-American legal tradition, and not the voice of a parochial sovereign." In this, Hurst conceded, "Langdell's approach set an ideal of generous sweep."¹⁸⁹

Langdell's approach was not unopposed. Huffcut and Woodruff offered an alternative with their all-American anthology. In 1907, Albert Martin Kales, of the Illinois bar and sometime of Northwestern, proposed a different alternative consisting of casebooks "composed as far as practicable of cases from [a] particular jurisdiction, with the end to present an accurate exposition of the law in force at the present day in that jurisdiction."¹⁹⁰ Neither of these proposed alternatives offered a serious challenge to Langdell's approach.

The real challenge to the dominance of English cases was to come from another quarter. The establishment in 1923 of the American

184. G. GILMORE, *supra* note 4, at 55.

185. C. LANGDELL, *CASES*, *supra* note 15, at vi. This was not a novel view in his time. See Simpson, *supra* note 35, at 671-74; see also G. WHITE, *supra* note 85, at 20-62. In 1826, Joseph Chitty wrote in the preface to what may be the world's most durable lawbook of "the high importance of extracting from the decisions . . . the true principles upon which they are founded." J. CHITTY, *A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL; AND UPON THE USUAL DEFENSES TO ACTIONS THEREON* vii (1827).

186. C. LANGDELL, *CASES*, *supra* note 15, at vi.

187. G. GILMORE, *supra* note 4, at 55-56.

188. 1 N. DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* xiv (1823). A ninth volume was added to the original eight in 1829.

189. J. HURST, *supra* note 15, at 265.

190. Kales, *The Next Step in the Evolution of the Casebook*, 21 HARV. L. REV. 92, 92 (1907). Kales complained that "the Harvard Law School case-book . . . does not purport to give an accurate and detailed picture of the law of any single American jurisdiction" and that "English law . . . is the only single system that is minutely examined." *Id.* at 93. Kales, who worked primarily in the field of real property, had already published a text on future interests in Illinois. He subsequently edited several casebooks, none of which followed the suggestion in his article. For a casebook emphasizing New York cases, see note 117 *supra*.

Law Institute marked the beginning of an ambitious attempt to formulate rules that would be representative of American common law. The resulting *Restatement of Contracts* proved a formidable competitor to the English cases so prized by the early anthologists. In his second edition in 1933, Corbin cautioned students that the *Restatement* "cannot be swallowed like an oyster," but explained his "constant references" to it as an "aid in the process of analysis and generalization."¹⁹¹ For Corbin, the *Restatement* must have served the end of giving some "apparent unity of doctrine," much as English cases had done for Langdell. The *Restatement* still does this today, and it may be in significant part responsible for the declining influence of English cases.

A few simple statistics show this decline. While more than 90% of Langdell's cases were English, just over 40% of the cases in Williston's companion volume of 1894 were English, a comparison that may be slightly misleading because nearly 30% of Langdell's space was devoted to consideration, a topic in which English cases have always been prominent. Keener's two volumes in 1898 had just over 50% of their cases from England; Williston's two volumes in 1903 had just under 50%. In Corbin's and Costigan's 1921 editions, only about 30% of the cases were English, but in Williston's 1922 edition, some 40% were English.¹⁹² After the appearance of the *Restatement*, the figure dropped to under 15% in Patterson and Goble's 1941 casebook, to 20% in Fuller's 1947 casebook, and to under 20% in Kessler and Sharp's 1953 casebook. Today's casebooks contain only a few old English cases from among the most durable: *Adams v. Lindsell*, *Carlill v. Carbolic Smoke Ball Co.*, *Dickinson v. Dodds*, *Hadley v. Baxendale*, *Hochster v. de la Tour*, *Kingston v. Preston*, *Raffles v. Wichelhaus*, and *Taylor v. Caldwell*.

With the increasing emphasis on American cases came greater use of recent cases. Of Langdell's small collection of American cases, fewer than 30% came from the twenty years prior to publication while the others came from the first half of the nineteenth century. Williston began in 1894 with a whopping 75% of his American cases from the previous twenty years, but this dropped to just below 55% in his 1903 edition and plummeted to a mere 25% in his 1922 edition. Although the increasing span of years from which to choose cases may have contributed to this dramatic decline, it is difficult not to conclude that Williston developed a fascination with the familiar at the expense of the new and did not add many recent cases in his revisions. Of Huffcut and Woodruff's American cases of 1894, over 50% came from the previous twenty years, and for the American cases in Keener's 1898 casebook the figure was about 60%. It was also 60%

191. A. CORBIN, *CASES ON THE LAW OF CONTRACTS* vi (2d ed. 1933).

192. See Book Review, *supra* note 121, at 316, noting that over two-thirds of Corbin's cases were American.

for Corbin's 1921 edition, though Costigan's edition in the same year had only 40%.¹⁹³ The proportion of American cases from the preceding twenty years was well over 50% in *Patterson & Goble*, whose debt to Corbin is also evident in other ways.¹⁹⁴ But it fell to less than 30% in *Kessler & Sharp*, and to well under 25% in *Fuller*, as editors had a longer span of time from which to choose their cases and looked with increasing interest to the historical development of American, as distinguished from English, law.

By comparing the selection of cases one can get some insights into the extent to which casebook editors have been influenced by their predecessors. Because early contracts casebooks varied considerably in their scope, the comparisons here are limited to mutual assent and consideration, since these were included with more or less the same contours in all the casebooks beginning with Langdell.¹⁹⁵

Which of the early anthologists exercised the greatest influence on their successors? And which of the modern casebooks was most influenced by the early anthologists? The following figures compare the three early anthologies of Langdell, Keener, and Huffcut and Woodruff, together with Corbin's and Williston's great anthologies of the twenties, against the three modern casebooks of Patterson and Goble, Fuller, and Kessler and Sharp.¹⁹⁶

Of Patterson and Goble's 142 cases on mutual assent and consideration, 79 were old enough to have been in at least one earlier casebook. Of the 79, 62 or 78% had already appeared in one of the five earlier casebooks, and 57 or 72% had been in either *Corbin* or *Williston*. Forty-nine of the cases had been in *Corbin*, 32 in *Williston*, 28 in *Keener*, 15 in *Langdell*, and 7 in *Huffcut & Woodruff*. Fuller had only 108 cases on these topics, but 85 were old enough to have been included in an earlier casebook. Of these, 63 or 74% had appeared; 60 cases or 70% had been in either *Corbin* or *Williston*, 51 in *Corbin*, 33 in *Williston*, 26 in *Keener*, 16 in *Langdell*, and 10 in *Huffcut & Wood-*

193. See Oliphant, *supra* note 121, at 645, noting that the "most striking feature" of Corbin's casebook, one "being talked about," was that over 40% of the cases were decided since 1900. See also Book Review, *supra* note 121, at 316, noting that over half of Corbin's cases were decided since 1900.

194. The 1941 edition was dedicated to Corbin.

195. Langdell's most lasting contribution in terms of cases, however, was probably the series on the development of constructive conditions of exchange, including *Pordage v. Cole* (1669), *Kingston v. Preston* (1773), *Morton v. Lamb* (1797), and *Boone v. Eyre* (1777).

196. The considerable influence of Langdell on Keener is suggested by the fact that of 112 cases in *Keener* on mutual assent and consideration that were old enough to have been in Langdell's second edition, 76 or 68% of these had appeared in Langdell. Huffcut and Woodruff's influence on Keener was far less. Of 69 American cases in *Keener* on these topics that were old enough to have been in *Huffcut & Woodruff*, only 16 or 23% had appeared in their anthology.

Both Williston and Corbin owed a considerable debt to their predecessors Langdell, Keener, and Huffcut and Woodruff. Of Williston's 103 cases on mutual assent and consideration that were old enough to have been in one of those earlier anthologies, 68 or 66% had already appeared in one of them. Of 122 such cases in Corbin, 76 or 62% had already been used.

ruff. Kessler and Sharp had only 66 cases on mutual assent and consideration. Only 36 were old enough, and of these only 23 or 64% had already appeared, with only 19 or 53% having been in either *Corbin* or *Williston*. Nineteen were in *Corbin*, 9 were in *Williston*, a surprising 12 were in *Keener*, 7 were in *Langdell*, and 3 were in *Huffcut & Woodruff*. As for the influence of the early anthologists, the enormous impact of the combined works of Corbin and Williston is evident. It is somewhat surprising that Corbin's influence on the selection of cases so exceeded Williston's, even taking into consideration the far greater number of cases in Corbin's anthology. This must have been due in part to the circumstance that Williston's 1922 anthology was to a great extent a revised version of his 1903 edition, while Corbin's 1921 anthology was a fresh new product. The considerable influence of Keener, when compared with Langdell and with Huffcut and Woodruff is also of interest. As for the extent to which the modern casebooks were influenced, it comes as no surprise that Patterson and Goble were the most influenced by their predecessors and Kessler and Sharp the least influenced.¹⁹⁷

Many of the cases that were reused in the early contracts casebooks are still well known today. Who first used those cases? Langdell is responsible for many of the English cases, including *Adams v. Lindsell*, *Kingston v. Preston*,¹⁹⁸ *Pillans v. Van Mierop*, *Thomas v. Thomas*, *Dickinson v. Dodds*, and *Raffles v. Wichelhaus*.¹⁹⁹ But he omitted *Hadley v. Baxendale*, *Hochster v. de la Tour*, and *Taylor v. Caldwell* because he did not deal with their subject matter. *Hochster* was added by Williston in 1894, *Taylor* first appeared in *Keener* in 1898, but *Hadley*, though included in Keener's 1891 borrowing from *Finch* and a staple in casebooks on damages, did not reappear in contracts casebooks until it was used by Grismore in 1931. Keener also added *Foakes v. Beer* and *Carlill v. Carbolic Smoke Ball Co.*

Langdell's responsibility for leading American cases is, of course, more limited, but he did include *Mills v. Wyman* and *Gray v. Gardner*. Huffcut and Woodruff added many still-familiar nineteenth-century American cases in 1894. These included *Aller v. Aller*, *Hamer v. Sidway*, *Hobbs v. Massasoit Whip Co.*, *Lingenfelder v. Wainwright Brewing Co.*, *Moulton v. Kershaw*, *Schnell v. Nell*, *Sherwood v. Walker*, and

197. Fuller seems not to have been greatly influenced by Patterson and Goble. Of his 107 cases on these topics that were early enough to have been included in *Patterson & Goble*, only 37 or 35% were. Nor were Kessler and Sharp much more influenced by either Patterson and Goble or by Fuller. Of their 56 cases on these topics that were early enough to have been in *Patterson & Goble*, only 22 or 39% were. Of 61 cases early enough to have been in *Fuller*, 23 or 38% were.

198. *Kingston v. Preston* was presented as part of the opinion in *Jones v. Barkley* and not a principal case.

199. *Dickinson* and *Raffles* did not appear until his second edition, belatedly in the case of *Raffles*, which had been decided in 1864.

Wood v. Boynton. Along with Williston's volume of the same year, they were also responsible for *Anderson v. May*, *Clark v. Marsiglia*, *Devocmon v. Shaw*, *Dingley v. Oler*, *Lawrence v. Fox*, *Nolan v. Whitney*, *Norrington v. Wright*, and *White v. Corlies & Tift*. Williston in 1894 also added *Butterfield v. Byron* and *Stees v. Leonard* and in 1903 *Ayer v. Western Union Telegraph Co.* and *Kirksey v. Kirksey*. Keener's American contributions were more modest but included *Bishop v. Eaton*, *Day v. Caton*, and *Strong v. Sheffield*.

By the time that Corbin and Costigan published their casebooks in 1921, nineteenth-century American cases had been thoroughly picked over by their predecessors, but Corbin introduced *Gill v. Johnstown Lumber* and Costigan introduced *Fairmount Glass Works v. Crunden Martin Woodenware* and *Ricketts v. Scothorn*.²⁰⁰ Other significant additions of early cases were largely the result of the inclusion of new topics such as restitution in the contracts course. Thus Patterson in 1935 was the first to use *Britton v. Turner*, and Gardner in 1938 added *Chase v. Corcoran*.

It is tempting to surmise that the early emphasis on English cases had a lasting effect on American law,²⁰¹ but it is not easy to document this. It is difficult to point to a single American case of note that, having been excluded by the early anthologists, was not found and used by a later anthologist. A possible candidate is *Brayton v. Chase*,²⁰² a Wisconsin case decided in 1854, the same year as *Hadley v. Baxendale*, and cited by Friedman as anticipating the rule of that celebrated English case.²⁰³ Keener, however, featured the English case and ignored the Wisconsin one.²⁰⁴

Are we to suppose that, but for the anglophilia of the early anthologists, generations of American lawyers would have spoken reverently of the "rule in *Brayton v. Chase*" rather than the "rule in *Hadley v. Baxendale*"? It seems unlikely. The opinion of the Wisconsin court is far less interesting than that of the English bench. The case grew out of an action by a farmer who had contracted to buy a reaper and who, when the reaper was not delivered in time, lost "large crops

200. Havighurst, who had included *Ricketts* in 1934, noted that the case had appeared in Costigan "before it had achieved respectability by action of the American Law Institute." Havighurst, Book Review, 21 IOWA L. REV. 661, 662 (1936).

201. Gilmore suggests this by explaining that Langdell thought that the legal scholar's function was "to winnow out from the chaff those very few cases which have ever been correctly decided and which, if we follow them, will lead us to the truth." G. GILMORE, *supra* note 23, at 47.

202. 3 Wis. 456 (1854).

203. See L. FRIEDMAN, *supra* note 68, at 536; L. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 125-26 (1965) [hereinafter L. FRIEDMAN, CONTRACT LAW IN AMERICA].

204. Langdell, to be sure, used neither case. See text accompanying notes 139-40 *supra*. *Hadley v. Baxendale* was also used, for example; in J. BEALE, A COLLECTION OF CASES ON THE MEASURE OF DAMAGES (1895), a collection that was distinctly less anglophilic than Langdell's.

of winter and spring grain.”²⁰⁵ The court quoted *Greenleaf on Evidence* for the proposition that “‘the damage to be recovered must always be the natural and proximate consequence of the act complained of.’”²⁰⁶ After the quotation, the court added only that the damages sought “were too remote” and resulted from the plaintiff’s “peculiar situation” — a conclusion that Friedman faults as looking only to “the deal itself, as an abstract mathematical occurrence, . . . not its consequences.”²⁰⁷ Huffcut and Woodruff did not include *Brayton v. Chase* in their all-American anthology, Corbin’s monumental treatises did not cite it, and Williston’s gave it only passing mention.²⁰⁸ It seems unlikely that more broad-minded anthologists would have used the Wisconsin case instead of the English one, or that had they done so the Wisconsin case would have achieved comparable celebrity.

D. On Doctrine

To what extent did the early anthologists use their anthologies to influence the development of doctrine? The authorial presence is undisguised by today’s interventionist casebook editors. They take it as given that it is proper overtly to question and to criticize the cases that they have included and sometimes to present the subject so as to reflect their own theories and idiosyncracies.²⁰⁹

The editors of the early casebooks, however, would have had none of this. Although legend has it that students were not spared professorial theories and idiosyncracies in the classroom, the anthologies themselves were barren of these. With the exception of Keener’s short-lived borrowing from Leake, they included only cases, usually reprinted in full, and with any omissions carefully noted.²¹⁰ Langdell, Keener, and Huffcut and Woodward contributed virtually nothing beyond the headings for chapters and sections. Although the “index” that accompanied Langdell’s first edition gave capsule holdings for many of his cases and the *Summary* that was published with his second edition contained dogmatic explanations of which of the cases were “right” and which were “wrong,”²¹¹ the pristine casebooks

205. 3 Wis. at 456.

206. 3 Wis. at 460 (quoting 2 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 256 (Philadelphia & London 1846)).

207. L. FRIEDMAN, CONTRACT LAW IN AMERICA, *supra* note 203, at 126.

208. It is in a string citation in 3 S. WILLISTON, *supra* note 107, § 1355 n.75.

209. See Klare, *supra* note 132, at 885 (observing that “cases are organized under broader moral, social and political [rather than doctrinal] themes”); F. KESSLER, G. GILMORE & A. KRONMAN, CONTRACTS: CASES AND MATERIALS 12 (3d ed. 1986) (“A profitable approach to the law of contract . . . is to view legal doctrine, rules, principles, and standards as reflecting the value system of the culture in which the legal system is embedded.”).

210. See text accompanying note 56 *supra*.

211. See G. GILMORE, *supra* note 4, at 13. Williston, in the preface to his 1903 edition, took a jab at his predecessor’s index by expressing the hope that the index to the 1903 edition would “make the contents of the book reasonably accessible without being open to the objection of

themselves had no notes, no questions, no problems — nothing to break the student's concentration on the cases. The title page of Langdell's casebook bore these words of Lord Coke: "The advised and orderly reading of the books at large, I absolutely determine to be the right way to enduring and perfect knowledge."²¹²

Even the chapter and section headings were restrained, for, as Williston noted in the preface to his 1903 edition, they "may easily be made a key to the results of the cases, and it is desirable for the student to work out this result for himself with the aid only of such suggestion as proves necessary in the classroom."²¹³ Corbin, however, departed from this tradition by using a much more detailed organization with more enlightening section captions, sometimes amplified by suggestive parentheses, for example, "Mutual Promises as Consideration for Each Other (Conditional and Illusory Promises — Mutuality of Legal Duty or Obligation)."²¹⁴

Williston instituted the practice of adding footnotes to many cases citing other cases on the same point. Thus, for example, in his second edition in 1922, *Kirksey v. Kirksey* had appended to it a long footnote quoting one case and citing seven others.²¹⁵ Corbin followed Williston's practice of adding footnotes and went beyond it by inserting several bits of introductory text of his own and by offering occasional opinions in his footnotes. Thus his chapter on consideration began with a page of text including quotations of several definitions of "consideration," and his cases on conditions were preceded by over two and a half pages of text on conditions and the dependency of promises — the former quoting from his then-recent article on consideration without indicating his authorship and the latter omitting to cite his then-recent article on conditions.²¹⁶

Even this restrained authorial presence evoked criticism from one reviewer, Clarke Butler Whittier of Stanford, who faulted Corbin for occasionally using his footnotes "to present the author's views or reasoning rather than as mirrors of the authorities. . . . This is leading the student and sometimes it will happen that he is led in a direction which the instructor will think erroneous."²¹⁷ Whittier's views were,

giving the student the answer before he has done the problem." 1 S. WILLISTON, *supra* note 55, at iii.

212. C. LANGDELL, *CASES*, *supra* note 15, at i.

213. 1 S. WILLISTON, *supra* note 55, at iii.

214. A. CORBIN, *supra* note 113, at 292; *see also* text at note 280 *infra*.

215. One "in accord" and six "but see."

216. Corbin, *Does a Pre-Existing Duty Defeat Consideration? — Recent Noteworthy Decisions*, 27 YALE L.J. 362, 376 (1918) [hereinafter Corbin, *Pre-existing Duty*]; Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 379 (1919).

217. Whittier, *supra* note 164, at 222. Whittier gave five examples. In a footnote on page 72, Corbin, addressing the power of offeror and offeree to renege when an offer seeks an act as acceptance, proposed a rule that "appears reasonable and just, although not supported as to the second part by any judicial decisions." A. CORBIN, *supra* note 113, at 72 n.45. In a footnote that

however, not shared by others who favored a more active role for the casebook editor. Thus Henry Ballantine of Minnesota, reviewing Corbin, wrote that it would be "helpful if more complete references were given to leading legal articles" and if "more problem material [were] included in our casebooks."²¹⁸ And Costigan's audacious use of footnotes that not only posed questions for the student but cited and even quoted secondary authorities prompted Oliphant to write that the book's "most striking feature" was its "abundance of references to the academic opinion to be found in law journals and text-books."²¹⁹

It fell to Patterson in 1935 and to Goble in 1937 to elevate the note material so that it was "not printed in forbidding fine print at the bottom of the page" but "after the cases . . . in only slightly smaller type."²²⁰ Patterson, the only legal realist to produce a contracts casebook,²²¹ favored the use of questions and problems so that discussion might be "less an impromptu dialectic between student and teacher, in which the latter triumphantly pulls the rabbit from the hat, and more a sustained exploration of implications which are fully sensed in advance."²²² He was the first to use the caption "cases and materials" on contracts — the "materials" consisting largely of digested cases and his notes containing questions and problems.²²³ It

took up most of page 76, Corbin noted that there are "many apparently conflicting cases as to whether a guarantor is bound in the absence of any notice by the creditor" and summarized the holding of these cases. *Id.* at 76 n.47. On page 85, a footnote asked the student to observe that in the four preceding cases the contract was "unilateral, the only legal duty created being on the offeree, with the correlative right in the offeror. Such transactions are often described, somewhat inaccurately, as an offer of an act for a promise." *Id.* at 85 n.52. A footnote on page 235 opined that if "a promise is made subject to an express condition, the fulfillment of which requires action or forbearance by the promisee, the fulfillment of the condition will usually be held to be sufficient consideration." *Id.* at 235 n.22. And a footnote on page 267 noted that in "some cases it has been held that mere forbearance cannot be a consideration and that there must be a promise to forebear, wholly overlooking the possibility of a unilateral contract." *Id.* at 267 n.40.

Whittier, who had presumably studied under Williston before his graduation from Harvard Law School in 1896, crossed swords with Corbin again in 1923. In an article on contract beneficiaries after citing Corbin's and Williston's articles along with others on that subject, Whittier noted, "Professor Williston's discussion is both the most detailed and the most enlightening." Whittier, *Contract Beneficiaries*, 32 YALE L.J. 790, 790 n.1 (1923). For a later exchange with Corbin, see note 118 *supra*. Both Fuller and Shepherd were students of Whittier at Stanford.

218. Ballantine, Book Review, 7 MINN. L. REV. 77, 78 (1922).

219. Oliphant, *supra* note 121, at 646. For the same reason, Goble called Costigan's second edition "the best case book ever published on the subject of contracts." Goble, *supra* note 124, at 592. A few of Costigan's chapters actually began with excerpts from secondary sources.

220. Woodbridge, Book Review, 24 VA. L. REV. 824, 825 (1938).

221. At least he is the only one on Llewellyn's famous "sample" of twenty legal realists, except for Corbin, whose inclusion would be questioned by many and who, in any case, was not a legal realist when he produced his casebook in 1921. See W. TWING, *supra* note 90, at 76; see also Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 775 (1941) ("The modern editor . . . has . . . in his annotations and his passages of text, provided material you had not previously seen at all.").

222. 1 E. PATTERSON, *supra* note 128, at vi. Curiously, as one reviewer lamented, *Patterson & Goble* did not use the term "contract of adhesion," though it had been Patterson who had introduced it into the United States. Levin, *supra* note 130, at 741.

223. Page, whose casebook also appeared in 1935, used the title "cases and readings," but the

was Fuller in 1947 who broke from tradition by weaving among the principal cases his own text, excerpts from secondary sources, and digests of cases — all in the same type as the principal cases themselves. As the Age of the Anthology came to an end, cases were no longer presented as a mere gathering of flowers, juxtaposed against each other, but rather set against a background of scholarly writing that more often than not accorded with the editor's own conceptions.

But were even the early anthologists as reluctant to insinuate their opinions as the pristine character of their anthologies suggests? Not according to Friedman, who argues that "these bare, spare books carried to its extreme a most striking characteristic of the style of teaching they reflected. This was the Socratic masquerade: the art of saying everything while appearing to say nothing at all."²²⁴ How much did the early anthologists insinuate their opinions, whether by design or not, simply by the inclusion, the omission, and the juxtaposition of cases?

Concessions were, of course, made to the level of the beginning law student. Thus Langdell's omission of *Slade's Case* has been explained on the ground that he concluded that "the entire early history of consideration as it developed over the century subsequent to *Slade's Case* around the action of assumpsit was far too chaotic and obscure for student consumption."²²⁵ Some of Langdell's contemporaries, however, felt that he included too much. Thus Holmes thought that the cases on forbearance as consideration were

collected with an over-scrupulous minuteness . . . as if the desire to give the whole history of the doctrine had led to putting in some contradictory and unreasoned determinations which could have been spared. Indeed, one surmises that a skeptical vein in the editor is sometimes answerable for the prominence given to the other side of what is now settled.²²⁶

The early anthologists were not, however, subject to the con-

book contained virtually no readings. Patterson's use of digests came just a few years after Llewellyn's extensive use of digests in his sales casebook in 1930. Ashley had used digests in his contracts casebook of 1891.

224. L. FRIEDMAN, *supra* note 68, at 632.

225. Barnes, *Introduction* to C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* at 16 (Legal Classics Library ed. 1983). Barnes singles out this omission of "a point of departure" in the law of contract as Langdell's "most apparent" and "most egregious" omission, but notes that he dealt with *Slade's Case* in the *Summary*. *Id.* at 15-16.

226. Holmes, Book Notice, 5 AM. L. REV. 539, 540 (1871), *reprinted in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, at 89-91 (H. Shriver ed. 1936); *see also* Book Review, 5 S. L. REV. 872, 872 (1880) ("he seems to have thought that if a few overruled cases could be thrown in, it would be in some way an advantage"). (Two reviews by Holmes of Langdell's casebooks are reprinted in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra*, at 89-94.) By 1881, however, Holmes seems to have had an even more critical view, for he wrote to Pollock of the *Summary* that "to my mind [Langdell] represents the powers of darkness" and that "his explanations and reconciliations of the cases [in the *Summary*] would have astonished the judges who decided them." HOLMES-POLLOCK LETTERS 17 (M. Howe ed. 1941).

straints of space that inhibit contemporary casebook editors. While representative modern casebooks give comprehensive coverage with a mere 150 to 250 principal cases, Langdell had the luxury of using nearly 340 cases to present a fragment of the subject; Williston used over 400 and Corbin nearly 600 to present the subject with such important exclusions as remedies. There can be no doubt that Langdell and the other early anthologists took advantage of this luxury to advance their pet ideas. It is easy, for example, to discern Langdell's interest in including his one French case, for it contained nearly six pages of argument by Merlin against the mailbox rule, an argument in which Langdell himself joined, though without notable consequences.²²⁷

In part III of this article I examine in more depth the extent to which the anthologies reflected the positions of the anthologists. I focus on two controversies that were prominent during the period in question, in which the anthologists themselves played a major role and which retain their interest today. These controversies involved reliance on a unilateral offer and reliance on a gratuitous promise.

III. EXAMPLES OF INTERVENTIONISM AMONG ANTHOLOGISTS

A. *Reliance on a Unilateral Offer*

Can an offeror who has sought a return performance revoke the offer once the offeror has relied by rendering part of the performance? The singularly impractical nature of the question is suggested by two classic hypotheticals. One involves the offeror who promises \$25 in return for the offeree's moving a heavy safe to an office in another building and who revokes when the offeree has carried the safe to the door of that building.²²⁸ The other involves the offeror who promises \$100 in return for the offeree's walking across the Brooklyn Bridge and who revokes when the offeree has gotten half way across.²²⁹ Is the revocation effective?

Langdell harbored no doubts concerning the answer. Since "the promise is made in legal intendment at the moment when the performance of the consideration is completed," it follows that the offer may be revoked up to that moment:

As this may cause great hardship and practical injustice, ingenious at-

227. See *S. v. F.* in C. LANGDELL, CASES, *supra* note 15, at 155. In § 14 of the *Summary* Langdell wrote, "The case of *S. v. F.* contains a powerful argument . . . in support of the view adopted by *McCulloch v. The Eagle Ins. Co.*, but the point was not decided." C. LANGDELL, SUMMARY, *supra* note 19, § 14 (italics deleted). The case was used by Keener in 1898 and an excerpt appeared in *Patterson & Goble* in 1941.

228. See Ashley, *Offers Calling for a Consideration Other than a Counter Promise*, 23 HARV. L. REV. 159, 160-61 (1910). Ashley's article was substantially reproduced in his text. C. ASHLEY, *supra* note 71, § 30.

229. See Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136-37 (1916).

tempts have been made to show that the offer becomes irrevocable as soon as performance of the consideration begins; but such a view seems to have no principle to rest upon. . . . The true protection for both parties is to have a binding contract made before performance begins . . . and if they neglect this precaution, any hardship that they may suffer should be laid at their own doors.²³⁰

Langdell's view did not go unnoticed, but less than sixty years later, following an extensive debate in the law reviews, the American Law Institute endorsed a contrary rule. Under *Restatement* section 45, once the offeree has rendered part of the performance, the offeror is bound by an option contract and is not free to revoke the offer. To what extent did the anthologies take sides in this controversy?

The only selection in Langdell's anthology that bears on the revocability of a unilateral offer is *Offord v. Davies*,²³¹ an English case decided by the Court of Common Pleas in 1862. The actual dispute involved a different question, the revocability of an offer looking to a series of unilateral contracts. But in the course of the argument, reproduced in Langdell's casebook, Williams, J., asked, "Suppose I guarantee the price of a carriage to be built by a third party who, before the carriage is finished and consequently before I am bound to pay for it, becomes insolvent, may I recall my guaranty?" As to this, Erle, C.J., remarked, "Before it ripens into a contract either party may withdraw and so put an end to the matter. But the moment the coach-builder has prepared the materials he would probably be found by the jury to have contracted." In his *Summary*, Langdell cited *Offord v. Davies* in support of his view, evidently referring to the first sentence of this remark. He also cited it as an illustration of the unprincipled but "ingenious attempts" to justify a view contrary to his, apparently alluding to the argument of counsel and the second sentence of the response.²³²

It is hard to fault Langdell for his choice of *Offord v. Davies* as a springboard for the discussion of the question. Subsequent scholars have not unearthed a suitable American case of that time that better calls Langdell's own view into question.²³³ *Offord v. Davies* was used as a principal case by Keener, Williston, and Corbin and figured prominently in scholarly debate over the question.²³⁴ It is at least plausible

230. C. LANGDELL, *SUMMARY*, *supra* note 19, § 4, at 3-4.

231. 12 C.B. (N.S.) 748, 142 Eng. Rep. 1336 (C.P. 1862).

232. C. LANGDELL, *SUMMARY*, *supra* note 19, § 4.

233. McGovney relied for support on the dissent of Justice Preston of the Supreme Court of Louisiana in *Cornelson v. Sun Mut. Ins. Co.*, 7 La. Ann. 345, 347 (1852). McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 655-56 (1914). Langdell's *Summary* noted that *Bradbury v. Morgan*, 1 H. & C. 249, 158 Eng. Rep. 877 (1862), cited during argument in *Offord v. Davies*, "is *contra*, but it must be deemed erroneous." C. LANGDELL, *SUMMARY* *supra* note 19, § 4, at 3 n.3.

234. *Offord v. Davies* is used to support Langdell's view in Wormser, *supra* note 229, at 140-41, the second sentence of the response of Earle, C.J., being put down as a surmise that "if the oral remarks were passed upon by a jury," the jury might find "in the usual loose fashion of

to conclude that its popularity as a vehicle in the classroom contributed in an important way to the attention paid to it in the literature of the time.²³⁵

In his two-volume edition of 1903, Williston included a second case that bore on the issue of reliance on a unilateral offer. In *Biggers v. Owen*,²³⁶ an 1887 Georgia case, the court held that an offer of a reward for delivery of a murderer with evidence to convict had been withdrawn. "An offer of reward is nothing more than a proposition . . . and until some one complies with the terms or conditions of that offer, it may be withdrawn."²³⁷ The inference that there is no acceptance of an offer until completion of the requested performance supported Langdell's view — which was presumably shared by Williston.

Williston made no use, however, of two other cases, both of which cast doubt on Langdell's view. *Plumb v. Campbell*²³⁸ was an 1888 Illinois case holding that the statute of limitations for written rather than oral contracts applied where, though the writing contained no promise by the plaintiff, the plaintiff alleged full performance. In the course of its opinion, the court seemed to say by way of dictum that an offer of a unilateral contract could be accepted not only by rendering the requested performance, but also by "engaging, within a reasonable time, to perform the contract" or "by beginning such performance in a way which would bind him to complete it."²³⁹ *Los Angeles Traction Co. v. Wilshire*²⁴⁰ was a 1902 California case holding that though an offer to pay \$2000 on the offeree's completion of its street railway was at its inception "unilateral," once the "promised [sic] consideration had . . . been partly performed, . . . the contract had taken on a bilateral character," and the offeror could no longer revoke the offer, since to do so "would be manifestly unjust."²⁴¹ Williston cited both cases in his 1906 edition of Wald's *Pollock*, observing, "The difficulty with

juries" a bilateral contract. It is used to support the opposing view in McGovney, *supra* note 233, at 658.

235. The case appeared in *Langdell, Keener, and Williston* before it was used in the articles cited in the preceding footnote. Wormser noted in a footnote to his article that it appeared in the edition of Keener that he edited. Wormser, *supra* note 229, at 140 n.4.

236. 79 Ga. 658, 5 S.E. 193 (1887).

237. 79 Ga. at 659-60, 5 S.E. at 193.

238. 129 Ill. 101, 18 N.E. 790 (1888).

239. 129 Ill. at 107, 18 N.E. at 792. Although the notion that an offer of a unilateral contract could be accepted by a mere engagement of any sort would have been an anathema to Langdell, the court found support in Langdell's own teacher, Parsons. For Parsons had attempted to refute the contention that unilateral contracts lacked mutuality of obligation by arguing that the "party making the promise is bound to nothing until the promisee . . . engages to do, or else does or begins to do, the thing which is the condition of the first promise." 129 Ill. at 106, 18 N.E. at 791 (quoting T. PARSONS, *supra* note 11, at 375).

240. 135 Cal. 654, 67 P. 1086 (1902). For an earlier case reaching a contrary result on similar facts, see *Gray v. Hinton*, 7 F. 81 (C.C.D. Neb. 1881), first used as a digested case by Fuller in 1947.

241. 135 Cal. at 658, 67 P. at 1088.

these solutions of the problem is that they fail to take into account the offerer's right to impose such conditions as he chooses in his offer."²⁴²

Just prior to American entry into World War I, the merits of Langdell's view were hotly debated in the law reviews. This was the first great debate on contract law to be conducted in this relatively new forum; it took place as the lean years were drawing to a close, with four articles appearing between 1910 and 1917. The first was by Ashley. He mentioned *Biggers v. Owen*, discussed the "singular" case of *Los Angeles Traction Co. v. Wilshire* and its "confusion of thought," and speculated that the quotation from Parsons in *Plumb v. Campbell* was intended to refer to bilateral contracts. Concluding that the "harsh results which are possible in this class of cases are revolting to a natural sense of justice," he suggested that the offeree's reliance might give rise to a "possible estoppel."²⁴³ Dudley Odell McGovney, of Tulane and later Missouri, Iowa, and Berkeley, followed with a 1914 article in which he cited the exchange during the argument of *Offord v. Davies* to show that "[i]n case of doubt the courts interpret an offer as contemplating a bilateral contract," but argued that this was not necessary to protect the offeree. Even if the offer were reported as one for a unilateral contract, the offeror should be regarded as making two offers, one "the principal offer" and "another, or collateral, offer to keep the principal offer open for a reasonable time if the offeree begins work at once." He thus went beyond Ashley's "tentative suggestion that an equitable estoppel might sometimes be invoked as a solution of the difficulty"²⁴⁴ and proposed a mechanism to reach the desired result.

Wormser defended Langdell's view in a 1916 article, condemning *Plumb v. Campbell* and *Los Angeles Traction Co. v. Wilshire* as "marked by [a] lack of clear thinking," applauding the recognition of "the conception of unilateral contracts" by Erle, C.J., in *Offord v. Davies*, and maintaining, like Langdell, that he could "see no injustice whatever in the operation of the doctrine of unilateral contract."²⁴⁵ Corbin in a 1917 article summarized his view of the debate in this way:

Where an offer has been made so that it can be accepted only by per-

242. F. POLLOCK, PRINCIPLES OF CONTRACT 34 n.39 (S. Williston & G. Wald 3d ed. 1906). These two cases differed from cases like *Martin v. Meles*, 179 Mass. 114, 60 N.E. 397 (1901), a favorite of anthologists added by Williston in 1903, in which Holmes had used traditional analysis to conclude that an offer to contribute to the defense of a lawsuit by a committee sought a promise by the committee and that the committee had impliedly given its promise. See text at note 276 *infra*.

243. Ashley, *supra* note 228, at 163-67. Pollock, however, took a position similar to that of Parsons, saying that "surely the acceptance is complete" on an "unequivocal beginning of the performance requested," and dismissed Ashley's argument as "a very ingenious exercise in legal sophistry." F. POLLOCK, PRINCIPLES OF CONTRACT 26 & n.(c) (8th ed. 1911). McGovney, in turn, wrote that Pollock "has taken the problem too lightly." McGovney, *supra* note 233, at 657.

244. McGovney, *supra* note 233, at 657-59.

245. Wormser, *supra* note 229, at 136, 140-41, 142.

forming a series of acts requiring an appreciable length of time and effort or expense, such offer shall be irrevocable after the offeree has begun the performance of the requested acts, unless the offeror expressly reserved the power of revocation.²⁴⁶

Corbin's 1921 anthology included three cases on the question of reliance on a unilateral offer: *Offord v. Davies*, *Los Angeles Traction Co. v. Wilshire*, and *Brackenbury v. Hodgkin*.²⁴⁷ The last had been decided by the Supreme Court of Maine in 1917, too recently to have figured in the law review debate. It held that a mother's promise to her daughter and son-in-law to leave them her farm if they would move from Missouri and care for her for her life was accepted by moving from Missouri and beginning performance. In a long footnote to *Los Angeles Traction*, Corbin cited cases, referred to the articles by McGovney and himself, and quoted Pollack's criticism of Ashley.²⁴⁸ While the existence of a controversy was clear, it nevertheless might not have been apparent to a student which side of the controversy Corbin was on. To a practiced eye, however, the prominence given to the question by the use of both *Los Angeles Traction* and *Brackenbury*, coupled with the extensive treatment in the footnote, leaves no doubts as to Corbin's sympathies.

Williston's second edition in 1922 also added *Brackenbury*, accompanied by a footnote on civil law rules as to revocability of offers and a citation to Ihering's work on *culpa in contrahendo*.²⁴⁹ Still no mention was made of *Los Angeles Traction* and nothing was added about the debate in the law reviews. Williston was not so warm to the offeree's position until several years later when, in 1925, he took McGovney's proposal as redrafted by Corbin and made it his own in *Restatement* section 45.²⁵⁰ In arguing for that rule, Williston admitted that it "seems difficult on theory successfully to question the power" to revoke, "but great injustice may arise" if the power continues.²⁵¹ (He had written five years earlier in his treatise that it "seems impossible on theory successfully to question the power . . . though obvious injustice may arise."²⁵²) "The difficulty," he went on, "may best be met and the

246. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 195 (1917). Corbin not only foreshadowed *Restatement* § 45 but also addressed the question of mitigation, which § 45 does not. *Id.* at 196. Yet another short article appeared a few years later. Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94 (1921).

247. 116 Me. 399, 102 A. 106 (1917).

248. A. CORBIN, *supra* note 113, at 190 n.2.

249. S. WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS 65 n.1 (2d ed. 1922).

250. Unaccountably, Williston failed to make use of Corbin's qualification based on the notion of mitigation. See note 246 *supra*.

251. AM. LAW INST., CONTRACTS TREATISE NO. 1 (A) SUPPORTING RESTATEMENT NO. 1 § 68, at 132 (1925) (S. Williston, Reporter).

252. 1 S. WILLISTON, *supra* note 107, § 60, at 100 (emphasis added).

hardship avoided" by implication of a "subordinate offer to keep the main offer open," an analysis that "finds some support" in English cases inferring a collateral contract from attendance at an auction.²⁵³ (He had described this analysis in his treatise as a "suggestion," which he rejected partly because it was "open to the criticism made of [the English auction] cases; namely, that the necessary assumptions of fact are artificial."²⁵⁴) Williston had finally given in and abandoned Langdell's position for that of the opposition represented by Ashley, McGovney, and Corbin.

Though the anthologies of Corbin and Williston reflected views on the controversy, they seem to have had little impact on its resolution. That battle was won in the pages of the law reviews and not in those of the anthologies. Indeed, McGovney was not an anthologist at all and Ashley was not notable as one. Were anthologies a more potent force when it came to the effect of reliance on a gratuitous promise?

B. *Reliance on a Gratuitous Promise*

Can a promisor who has made a gratuitous promise retract it once the promisee has relied on it? A hoary example is *Kirksey v. Kirksey*,²⁵⁵ handed down by the Supreme Court of Alabama in 1845. As Williston told it in his 1906 edition of *Pollock*:

[T]he defendant wrote to his brother's widow: "If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation and that of your family, I feel like I want you and the children to do well." The widow came as requested, but it was held that no contract was created thereby.²⁵⁶

Williston used the case to illustrate a distinction "not brought out by the English decisions and not referred to by [Pollock,] . . . that between consideration and condition."²⁵⁷ But should not the widow's reliance have made the promise binding even in the absence of consideration? It would do so under section 90 of the *Restatement of Contracts*, the influential "promissory estoppel" section.

This heresy did not occur to the antebellum mind, trained in the orthodoxy that a promise needed consideration or a seal to be binding. Nor did it occur to Langdell or other contracts scholars of his century. For minds that resisted the leap expressed in *Restatement* section 45, the leap expressed in section 90 was inconceivable. Keener's 1898 edition contained *Presbyterian Church of Albany v. Cooper*,²⁵⁸ a 1889

253. AM. LAW INST., *supra* note 251, § 68, at 134.

254. 1 S. WILLISTON, *supra* note 107, § 60, at 101.

255. 8 Ala. 131 (1845).

256. F. POLLOCK, *supra* note 242, at 215-16 n.24.

257. *Id.* at 215 n.24.

258. 112 N.Y. 517, 20 N.E. 352 (1889).

New York case holding a charitable subscription unenforceable for lack of consideration, but there was no suggestion that an alternative basis for enforceability had been overlooked.²⁵⁹

Gratuitous bailments were a notable exception. Langdell included four cases, all English, in a section on gratuitous bailment in his consideration chapter. Their message appeared in the index in a summary of *Wheatley v. Low*: "The delivery of 10£ by A to B is a good consideration for a promise by B to pay the same to C without delay, though B is to receive no compensation for so doing; the entrusting of the money to B being a detriment to A."²⁶⁰ He later explained in the *Summary* that absent evidence that the gratuitous bailee made "the delivery of the property to him the consideration for his promise . . . , there is but one reason for holding the bailment to be a consideration, namely, that there is no other way of sustaining the promise."²⁶¹ The characterization of such cases of gratuitous undertakings as contracts cases was questioned by Joseph Henry Beale in his 1891 article on gratuitous undertakings. After remarking on the accepted inadequacy of the "ordinary division of personal actions between torts and contracts," he went on to argue that a person might undertake a duty toward another "merely by voluntarily entering into a new relation towards" the other.²⁶² The examples he gave of such gratuitous undertakings ranged from cases of rescue to cases of bailment, but as to all of them he maintained that liability arose out of the relationship itself and not out of either contract or tort.²⁶³ The notion of reliance was not mentioned in Beale's analysis.

The law reviews produced no early discussions of the effect of reliance on a gratuitous promise comparable to the articles of Ashley, McGovney, Wormser, and Corbin on the effect of reliance on a unilateral offer.²⁶⁴ The preface to Ashley's short text of 1911 contained the

259. Keener coupled the Presbyterian Church case with *Sherwin v. Fletcher*, 168 Mass. 413, 47 N.E. 197 (1897), in which a noncharitable subscription was held to be enforceable because supported by consideration, suggesting that absent consideration a promise was unenforceable.

260. C. LANGDELL, CASES, *supra* note 15, at 1017. Langdell continued: "*Wheatley v. Low*, 407 [Cro. Jac. 668, 79 Eng. Rep. 578 (K.B. 1623)], overruling *Riches and Briggs*, and *Pickas v. Guile*, 406; and see 407, n.(1)." *Wheatley v. Low* rejected the defendant's contention that he was not liable because the plaintiff did not allege "that he delivered it to the defendant upon his request." *Id.* at 407. The index had a separate entry on the fourth case, *Hart v. Miles*.

261. C. LANGDELL, SUMMARY, *supra* note 19, § 68, at 86. He added that in the four cases in his *Cases* "the question arose upon the declaration, and the declaration stated expressly that the promise was made in consideration of the bailment." *Id.*

262. Beale, *Gratuitous Undertakings*, 5 HARV. L. REV. 222, 222 (1891). Parsons had written that if a person makes a mere gratuitous promise, and then enters upon the performance of it, he is held to a full execution of all he has undertaken. 1 T. PARSONS, *supra* note 11, at 372. But Williston later thought that this went too far. AM. LAW INST., COMMENTARIES ON CONTRACTS RESTATEMENT No. 2, at 18 (1926) (S. Williston, Reporter).

263. Beale, *supra* note 262, at 223.

264. The earliest article, after Beale's, is Billig, *The Problem of Consideration in Charitable Subscriptions*, 12 CORNELL L. REV. 467 (1927); see also Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908 (1937).

remarkable prediction that "[t]echnical requirements, such as the accidental and unnecessary doctrine of consideration, are likely to disappear, bringing the law in accord with the modern sense of justice."²⁶⁵ But Ashley never went on to develop this thought.

It was Williston who first produced a thorough analysis of the effect of reliance on a promise in his treatise in 1920. In dealing with gratuitous undertakings, he cited Beale, his Harvard College classmate, for the proposition that "a voluntary undertaking may render one liable for the consequences of negligent failure to carry out the undertaking," but, unlike Beale, he noted that the gist of the action of assumpsit on which recovery was based "consisted in undertaking to do something and injuring the plaintiff by inducing him to rely on this undertaking." Williston concluded, however, that it would have been better if the liability of such persons as gratuitous bailees "had been left to the law of torts, unless a real bargain was contemplated."²⁶⁶ The sense that there was an important difference between liability based on a gratuitous undertaking and liability based on a "real bargain" was to figure prominently in Williston's later thinking.

Williston was more supportive of reliance as a basis of contractual liability when he came to charitable subscriptions. As early as 1906, in his edition of *Pollock*, Williston had written that "[t]he most noticeable illustration of the tendency of the courts to treat as consideration a detriment which was intended merely as a condition is afforded by cases of charitable subscriptions."²⁶⁷ Although his 1920 treatise began with the caution that the law had not "generally accepted the principle that reliance on a gratuitous promise makes the promise binding," he concluded that "the enforcement of charitable subscriptions is only to be supported if a promissory estoppel be regarded as a sufficient substitute for consideration." In a remarkable bit of legal realism, he wrote, "In a few decisions the court has frankly admitted that estoppel and not consideration was the ground on which recovery was allowed," adding that the correctness of these decisions "must depend on the general allowance of such a promissory estoppel as an alternative for consideration."²⁶⁸ In Williston's thinking, liability based on reliance on a gratuitous promise was, like liability based on a gratuitous undertaking, entirely distinct from liability based on bargain. The important question was whether liability based on reliance could be extended beyond charitable subscriptions to other gratuitous promises.

As to this Williston had more to say in his treatise in a section on

265. C. ASHLEY, *supra* note 71, at vii.

266. 1 S. WILLISTON, *supra* note 107, § 138, at 305. In his commentary in support of section 88, however, Williston wrote that such liability "can be supported on the ground of tort but not always." AM. LAW INST., *supra* note 262, at 18.

267. F. POLLOCK, *supra* note 242, at 216 n.24.

268. 1 S. WILLISTON, *supra* note 107, § 116, at 249, 252-53.

"Estoppel as a substitute for consideration." While pointing out that there are "many . . . decisions which hold that a detriment incurred in reliance on a promise is not valid consideration unless the detriment was requested as consideration," he concluded in a more positive vein. If it were thought desirable "to enlarge the boundaries of enforceable promises . . . , it may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise — rather than the more modern notion of purchase of a promise for a price." But though this proposition was "by no means without intrinsic merit, . . . it is opposed to the great weight of authority."²⁶⁹ Williston seems never to have returned to the possibility that justifiable reliance might replace consideration as the general basis for the enforcement of all promises.

This liberality that Williston expressed in his treatise with respect to reliance stands in sharp contrast to the orthodoxy that has sometimes been attributed to him in this regard.²⁷⁰ In his anthology, however, orthodoxy prevailed — perhaps because Williston favored feeding students a diet of what courts had done and not what they might do, perhaps because Williston's fascination with the familiar at the expense of the new hindered him in adding new cases as his thinking developed.²⁷¹

Williston's 1903 edition featured four cases, none taken from Langdell, that bore on the question of reliance on a gratuitous promise, in addition to one of Langdell's cases on gratuitous bailees.²⁷² The four cases appeared in sequence. In *Devecmon v. Shaw & Devries*, an 1888 Maryland case, the court held that a jury might conclude that an uncle's promise to his nephew to reimburse his expenses if he took a trip to Europe, was supported by consideration, for the nephew might have been "induced by this promise to spend [his money] in this way, instead of some other mode."²⁷³ In *Kirksey v. Kirksey*, the 1845 Alabama case discussed earlier, the court refused to enforce the brother-in-law's promise, regarding it as a "mere gratuity," unsupported by consideration.²⁷⁴ In *Presbyterian Church of Albany*, the 1889 case used by Keener, the court refused to enforce the subscriber's promise to a church since, putting aside an ineffective recital of consideration, there was nothing more than "a naked promise of the subscribers."²⁷⁵

269. *Id.* § 139, at 307, 308, 313.

270. The lore according to Gilmore has it that Williston resisted Corbin's attempt to include in *Restatement* § 75 a "broad, vague and, essentially, meaningless" definition of consideration, but was unable to resist Corbin's continued arguments based on the "estoppel" cases and finally agreed to section 90. G. GILMORE, *supra* note 4, at 62-64.

271. See text at note 193 *supra*.

272. *Riches v. Briggs*, Yelv. 4, 80 Eng. Rep. 4 (K.B. 1601).

273. 69 Md. 199, 201, 14 A. 464, 465 (1888).

274. 8 Ala. 131, 133 (1845).

275. 112 N.Y. 517, 523, 20 N.E. 352, 354 (1889).

And in *Martin v. Meles*, a 1901 Massachusetts case with an opinion by Holmes, the court held that a subscriber's promise to contribute to the defense of a lawsuit was supported by consideration.²⁷⁶ The text of the message was clear: If, as in *Devecmon* and *Martin*, consideration could be found, the promise would be enforced; otherwise, as in *Kirksey* and *Presbyterian Church*, it would not be.²⁷⁷ There was, however, a subtext. A footnote quoted an Illinois court that enforced a charitable subscription where the charity had incurred liabilities, saying that "the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking."²⁷⁸ At least as to charitable subscriptions the alternative of what Williston had called in his treatise "promissory estoppel" was not to be ruled out.

In his 1922 edition, Williston made no changes in these cases and only insignificant changes in footnotes. Even in his 1930 edition, which appeared after section 90 had been put before the American Law Institute, the only change was to replace *Presbyterian Church*. In its stead he used Cardozo's notable 1927 opinion for the New York Court of Appeals in *Allegheny College v. National Chautauqua County Bank*, which held a charitable subscription enforceable because supported by consideration, reserving judgment on whether in New York the general law of consideration had been modified by acceptance of what Williston's treatise "styled 'a promissory estoppel,'" but containing powerful dictum "that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions."²⁷⁹ In Williston's mind, the question remained that reflected in Cardozo's opinion: was the doctrine styled "promissory estoppel" to be generalized so as to be a substitute for consideration in cases of gratuitous promises that were not charitable subscriptions?

Corbin saw the matter differently. In his 1921 anthology, Corbin reproduced nine opinions, as opposed to Williston's four, on the effect of reliance. Even taking into consideration the greater total of cases in Corbin's anthology, it is apparent that he thought reliance of more importance than did Williston. Lest the reader miss the point, his cases were prefaced by an extraordinarily suggestive section caption: "Reliance on a Promise as Consideration (Must Consideration be the

276. 179 Mass. 114, 60 N.E. 397 (1901); see note 242 *supra*.

277. In Williston's 1906 edition of *Pollock*, however, he cited *Devecmon* among decisions "where promises were enforced though it seemed pretty clear that the so-called consideration was not in fact requested in return for the promise." F. POLLOCK, *supra* note 242, at 216 n.24. This reading of *Devecmon* was not repeated in Williston's treatise in 1920 but reappeared in his commentary in support of section 90. See note 262 *supra*.

278. S. WILLISTON, *supra* note 55, at 195 n.1 (quoting *Beatty v. Western College*, 177 Ill. 280, 292-93, 52 N.E. 432, 436 (1898)).

279. 246 N.Y. 369, 374, 159 N.E. 173, 175 (1927).

Motive of the Promisor or the Inducing Cause of His Promise?).”²⁸⁰ To Corbin’s mind the question was not whether a new doctrine of promissory estoppel should be accepted as an alternative to the doctrine of consideration, but rather whether the doctrine of consideration itself should be modified to make at least some gratuitous promises enforceable.

Corbin’s first two cases presented the bargain theory of consideration. One was *Wisconsin & Michigan Railway v. Powers*, which featured Holmes’ notable dictum on reciprocal “conventional inducement.”²⁸¹ The third was a case holding a carrier liable in tort for negligence under a gratuitous undertaking.²⁸² Then came *Kirksey* and *Devecmon*. These were followed by two cases in which reliance was held to be a basis for enforcement. In one, *Underwood Typewriter Co. v. Century Realty Co.*,²⁸³ Corbin made sure the student did not miss his point by appending a footnote with the lower court’s explanation that if a promisee acts “relying upon the faith of the promise, the element of consideration and mutuality is thereby supplied.”²⁸⁴ In the other, *Young Men’s Christian Association v. Estill*, the court said that “if, on the faith of the promise, the promisee . . . expends money and incurs enforceable liabilities in furtherance of the enterprise the promisor intended to promote, the consideration is supplied and the promise is rendered valid and binding.”²⁸⁵ Corbin ended the section with *Presbyterian Church* and *Martin v. Meles*. The message suggested by the section’s title and confirmed by the cases just quoted was plain: the doctrine of consideration was itself sufficiently flexible so that at least some gratuitous promises should be regarded as supported by consideration even though the reliance on the promise was not “the motive of the promisor or the inducing cause of his promise.” How Corbin’s version of a *Restatement* rule would have looked can be gathered from his formulation in a footnote in his 1919 edition of *Anson*: “[C]onsideration may consist of acts in reliance upon a promise even though they were not specified as the agreed equivalent and inducement, provided the promisor ought to have foreseen that such action would take place and the promisee reasonably believes it to be

280. A. CORBIN, *supra* note 113, at 222. I have not counted the opening case in Corbin’s section, *Thomas v. Thomas*, 2 Q.B. Rep. 851, 114 Eng. Rep. 330 (1842), a case also used by Langdell and Keener as well as Williston and one that does not speak to reliance but that shows that the consideration need not be the only or even the principal inducement for the promise.

281. 191 U.S. 379, 386 (1903); see text at note 30 *supra*. The other case was *Brawn v. Lyford*, 103 Me. 362, 69 A. 544 (1907) (the detriment lacked “the element of inducement” because not at the promisor’s “solicitation”).

282. *Carr v. Maine Cent. R.R.*, 78 N.H. 502, 102 A. 532 (1917).

283. 220 Mo. 522, 119 S.W. 400 (1909).

284. *Underwriter Typewriter Co. v. Century Realty Co.*, 118 Mo. App. 197, 203-04, 94 S.W. 787, 788 (1906).

285. 140 Ga. 291, 295, 78 S.E. 1075, 1077 (1913).

desired.”²⁸⁶

Thus in the early twenties, three views on the effect of reliance on a gratuitous promise had been expressed. The most revolutionary was the hint in Williston's treatise — never pursued by him — that the law might abandon the doctrine of consideration and retreat to the historical requirement of reliance. Less startling, perhaps, was Corbin's view that the doctrine of consideration itself might be modified to accommodate reliance that had not been bargained for.²⁸⁷ Most cautious was the path suggested by Williston's question as to whether an alternative doctrine of promissory estoppel might be created by generalizing from the charitable subscription cases. How did the *Restatement* come to take this cautious path in section 90?

Although his casebook did not betray it, Williston's views on the proper role of reliance as a general basis for enforcement underwent a significant change between his 1903 edition and the drafting of section 90. From his early recognition of the possibility that reliance might support a charitable subscription, he came to accept reliance as a general basis for enforcement of promises. His attitude toward *Kirksey v. Kirksey* is indicative of this. A footnote to his 1903 edition quoted a later Alabama opinion in which the court spoke of the “great difficulty” in discerning “the line which separates promises creating legal obligations, from mere gratuitous agreements.”²⁸⁸ Williston evidently held out *Kirksey* as a case on the latter side of the line, to be compared with *Devecmon*, a case on the former side. There is no suggestion that a different decision might have been reached on the basis of reliance. No change in Williston's attitude toward *Kirksey* appeared in his 1906 edition of *Pollock*.²⁸⁹ *Devecmon* was there cited for the proposition that “[i]n case of doubt where the promisee has incurred a detriment on the faith of the promise, courts will naturally be loath to regard the promise as a mere gratuity, and the detriment incurred as merely a condition.”²⁹⁰

Although the 1922 edition of Williston's casebook showed no change in his attitude toward either *Kirksey* or *Devecmon*, his 1926 commentary for the *Restatement* showed a startling departure from his earlier views on both cases. After stating *Kirksey*, he added, “The

286. W. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 124 n.1 (A. Corbin ed. 1919) (emphasis deleted). In 1918 Corbin wrote, “We are looking for a sufficient *cause* or *reason* for the legal enforcement of a promise. This problem . . . must exist in all systems of law. With us it is called the problem of consideration.” Corbin, *Pre-Existing Duty*, *supra* note 216, at 376.

287. Recall, however, that Holmes wrote, “It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it.” *Commonwealth v. Scituate Sav. Bank*, 137 Mass. 301, 302 (1884).

288. 1 S. WILLISTON, *supra* note 55, at 190 n.1 (quoting *Bibb v. Freeman*, 59 Ala. 612, 616 (1877)).

289. See text at note 255-57 *supra*.

290. 1 S. WILLISTON, *supra* note 107, § 112, at 233.

injustice of the result is manifest.”²⁹¹ And of *Devecmon* he said,

It can hardly be supposed that this was anything other than the promise of a gift for a special purpose, yet the injustice of denying recovery after the promise had been relied upon, was of such compelling force that the court held the question should be submitted to the jury.²⁹²

Apparently under pressure from Corbin, Williston had ventured along the cautious path:

If the law is to be simplified and clarified, it can be done only by coordinating the decisions under general rules not by stating empirically a succession of specific cases without any binding thread of principle. In fact there is a binding thread in all the classes of cases [including charitable subscriptions and gratuitous bailments] which have been enumerated, namely, the justifiable reliance of the promisee.²⁹³

Williston's failure even to mention *Ricketts v. Scothorn*²⁹⁴ in his supporting commentary was consistent with his portrayal of section 90 as a cautious generalization from specific situations rather than a restatement of a broad principle already developed in the courts. Indeed, for “greater caution,” he inserted the words, “[i]f injustice can be avoided only by enforcement of the promise.”²⁹⁵

Corbin came gamely to accept his partial victory. Much later, he wrote that he generally “accepted and followed” the analysis that the American Law Institute had used in its *Restatement*, but that the requirement of a bargain that the Institute “has seen fit” to use in its definition “made it necessary” immediately to “construct a number of additional rules stating when an informal promise will be enforceable without any consideration at all.”²⁹⁶ Foremost among these additional rules was, of course, that of section 90.

Although Williston and Corbin, both notable for their anthologies, had played central roles in the development of section 90, the impact of their anthologies is questionable. It is not even clear to what extent Williston's casebook reflected his view at the time he drafted section 90, for the relevant part had not been significantly revised for two decades. Corbin's casebook, on the contrary, surely reflected his view,

291. AM. LAW INST., *supra* note 262, at 18.

292. *Id.* at 17.

293. *Id.* at 19-20.

294. 57 Neb. 51, 77 N.W. 365 (1898) (grandfather bound by gratuitous promise to pay granddaughter \$2000 so she would not have “to work any more,” when she relied by quitting work). Williston cited it in his treatise, 1 S. WILLISTON, *supra* note 107, § 139, at 307 n.22, but ignored it in his casebook, though Costigan had included it in 1921 (*see* note 200 *supra*), perhaps to spare students such heretical views. Corbin twisted *Ricketts* to suit his views, saying that if a promise is subject to a condition that the promisee can fulfill, “fulfillment” of the condition will usually be held to be sufficient consideration. A. CORBIN, *supra* note 113, at 235 n.22. In his 1919 edition of *Anson*, however, he explained that if the promisee in the charitable subscription case had begun work or incurred liabilities, this “sometimes becomes a kind of estoppel contract like that in *Ricketts v. Scothorn*.” W. ANSON, *supra* note 286, at 142 n.3 (emphasis deleted).

295. AM. LAW INST., *supra* note 262, at 20.

296. 1 A. CORBIN, CONTRACTS § 116, at 504 (1963); 1A *id.* § 193, at 189-90.

but it had had only a few years to gain influence. What role, if any, it played in Corbin's attempt to push Williston in the direction of recognizing reliance must be left to surmise. Neither the history of section 45 nor that of section 90 suggests that anthologies exerted an influence in the development of contract that was as significant as the influence they exerted in the development of precedents through the establishment of leading cases.

CONCLUSION

On balance, the impact of the casebook during the Age of the Anthology was less than beneficent. Casebooks surely helped to mark leading cases for immortality, but, at least in the instances examined, they seem to have had little effect on the development of doctrine. And they clearly had a chilling effect on scholarship by directing scholarly energies to a subject artificially confined by the curriculum and by encouraging its treatment in a manner suitable for a student audience.

But all that is behind us. The modern contracts casebook is a far cry from Langdell's primitive anthology. We who edit such casebooks can be certain that with the rich mixture of cases and materials that we provide, free of the tyranny of the curriculum, we have avoided the shortcomings of the Age of Anthology. We can be confident that the score of contracts casebooks that we offer will do more than identify important cases — that they will serve not only the ends of classroom instruction but of scholarship, while contributing to the development of doctrine. Or can we?