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Formalism in American Contract Law: Classical and Contemporary

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It is a truth universally acknowledged, that we live in a formalist era.¹ At least when it comes to American contract law.² Much more than the jurisprudence of a generation ago, today's cutting-edge work in American contract scholarship values the formalist virtues of bright-line rules, objective interpretation, and party autonomy. Policing bargains for substantive fairness seems more and more an outdated notion. Courts, it is thought, should refrain from interfering with market exchanges. Private arbitration has displaced courts in the context of many traditional contract disputes. Even adhesion contracts find their defenders, much to the chagrin of communitarian

¹ Substantial excerpts of this talk, presented at the 2005 EACLE Symposium on "Agreements" at Ghent University, are taken from my previously published work on American contracts scholar Samuel Williston. Mark L. Movsesian, *Rediscovering Williston*, 63 WASH. & LEE L. REV. 207 (2005). I thank John McGinnis and Brian Tamanaha for careful readings of earlier drafts and the participants in the EACLE Symposium and a workshop at St. John's University School of Law for helpful comments.

² See, e.g., David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842 (1999); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133 (1995).

scholars.

This is not the first formalist era in American contract law. For about 60 years after 1870, the American academy was dominated by what has come to be known as classical jurisprudence.³ The classicists were formalists, too. They argued in favor of objectivity and predictability and relatively free markets. Indeed, the story of their overthrow by the Progressives and Realists in the middle part of the twentieth century, a story told memorably by Grant Gilmore in *The Death of Contract* and *The Ages of American Law*, is in many ways the grand narrative of American contract jurisprudence.⁴ It would be entirely understandable for contemporary formalists to view themselves as a kind of Restoration.

Yet New Formalists--the designation became popular in the 1990s--don't really see things that way. New Formalists reject classical contract jurisprudence as outmoded. They dismiss the essentialism of the classicists, preferring arguments about efficiency and pragmatism to conceptual analysis. They reject the classical belief in the ineluctability of legal rules; for New Formalists, legal rules have only presumptive force. Their commitment to the free market is less

³Recent years have seen a surge of interest in classical jurisprudence. For good examples, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-64 (1995); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 497-507 (2003).

⁴See Mark L. Movsesian, Book Review, *Two Cheers For Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1529-31 (2002).

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conceptual. Finally, New Formalists denigrate the under-theorized nature of classical jurisprudence. New Formalist scholarship does not focus on doctrine and does not rely on the intuitive justifications of lawyers and judges. Rather, it seeks to explain contract law with the tools of social science: economics and statistics.

In reality, the differences between classical and contemporary formalism are less pronounced than New Formalists believe. Some versions of classical jurisprudence might fit the image New Formalists have of it; the work of Langdell, perhaps, comes close to the caricature. But some classical jurisprudence does not. Using the work of an important classical contract scholar, Samuel Williston, I will show that at least one influential version of classical formalism also valued pragmatism. Williston was not an essentialist. He held that legal rules were presumptive, to be disregarded where important real-world values counseled a different result. Moreover, Williston did not support freedom of contract with the ideological fervor we sometimes attribute to him.

Nonetheless, there is an important way in which classical formalism did differ from the contemporary version. Compared to New Formalism, classical scholarship was unfortunately under-theorized. Classicists like Williston did indeed rely on the sort of commonsense explanations that lawyers and judges use in their daily work. Given what they were at-

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tempting to do, their lack of interest in theory is understandable. Unlike today's legal academics, classicists did not see themselves primarily as members of the university world. They thought of themselves primarily as lawyers and they directed their scholarship primarily towards the profession. More than anything else, the difference between classical and contemporary formalism can be explained by the changing self-image of the American legal academy.

Before explaining the unappreciated similarities between classical and contemporary formalism, it is necessary to consider the purported differences. In the conventional account, New Formalism differs from the classical version in four important and related ways. First, New Formalism rejects the essentialism of classical contract law. Classicism maintained that "contract" was a concept with an essence, an irreducible descriptive and normative core.⁵ Contract law was a set of axioms that followed from a true understanding of that essence, and a set of rules that followed from the axioms.⁶ Classical contract law drew its justification from its supposed conformity with a proper understanding of contract *as a concept*, without regard to the practical effect con-

⁵See, e.g., Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 48-49 (1983); cf. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THE STRUGGLE OF OUR AGE* chs. 3, 4 (forthcoming 2006) (manuscript on file with author) (discussing "conceptual formalism" and distinguishing it from "rule formalism").

⁶See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1751 (2000).

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tract law had in terms of efficiency or other values.⁷

To make this discussion more concrete, consider the famous example (at least to Americans) of Langdell's treatment of the "mailbox rule." Under the mailbox rule, acceptance of an offer made by correspondence is effective immediately upon dispatch--at the moment the offeree puts the acceptance out of his or her control--even if the offeror has not yet received it.⁸ The rule is one of the foundational principles of American contract law, learned by thousands of first-year law students in the United States every year.

Christopher C. Langdell, one of the most prominent classicists (and dean of the Harvard Law School) rejected this rule.⁹ To him, the essence of contract lay in the concept of promise, and the essence of promise lay in communication to the promisee. A promise that the promisee had not received was, by definition, not a promise at all; thus, acceptance could take effect only upon receipt by the offeror.¹⁰ Langdell recognized that there might be practical arguments for the mailbox rule. He noted that judges had "claimed that purposes of substantial justice, and the interests of contracting parties as understood by themselves,

⁷See *id.* at 1750 (explaining that classical contract law maintained that fundamental doctrines were self-evident and allowed "no room" for "justifying doctrinal propositions on the basis of moral and policy propositions").

⁸See E. ALLAN FARNSWORTH, *CONTRACTS* § 3.22 (3d ed. 1999).

⁹See C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 15 (2d ed. 1880).

¹⁰See Grey, *supra* note 5, at 4 (discussing Langdell's views regarding the mailbox rule).

[would] be best served by holding that the contract is complete the moment the letter of acceptance is mailed,” and that some had posed cases showing that Langdell’s approach “would produce not only unjust but absurd results.”¹¹ For an essentialist like Langdell, though, these practical arguments were “irrelevant.”¹² Once one understood the true nature of a promise, nothing else could matter.

New Formalists disdain this sort of essentialism. They advocate formalism, not because it coheres with abstract concepts like “contract” and “promise,” but because it advances important pragmatic values like certainty, stability, and efficiency.¹³ For example, Lisa Bernstein writes that formalist adjudication by private arbitral regimes benefits contracting parties by promoting clarity and predictability.¹⁴ A comprehensive set of bright-line rules, she argues, reduces transaction costs and makes misunderstandings less likely. Moreover, if disputes do arise, a formalist approach improves the chances of settlement “by making arbitral outcomes relatively predictable.”¹⁵ Simi-

¹¹LANGDELL, *supra* note 9, at 20-21.

¹²*Id.* at 21. Langdell did go on to demonstrate that, assuming practical arguments were relevant, he could muster some in favor of his own position. *Id.*

¹³See Thomas C. Grey, *The New Formalism* 4, 28-29, at http://papers.ssrn.com/paper.taf?abstract_id=200732 (Sept. 6, 1999) (discussing the pragmatic nature of the new formalism).

¹⁴See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1735-44 (2001) (describing and discussing advantages of formalist approach of cotton industry arbitration tribunals).

¹⁵*Id.* at 1742.

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larly, Schwartz and Scott advocate formalist interpretation of certain business contracts, at least as a default position, as a means of promoting efficiency.¹⁶ They believe that a plain-meaning approach, coupled with a “hard” version of the parol evidence rule and strict enforcement of merger clauses, best suits the presumed goals of contracting parties--maximizing the joint gains from transactions.

The second difference relates to the classicists’ belief in the ineluctability of legal rules. Classicism taught that judges should apply common law doctrines with relentless logic, without allowing for exceptions based upon new social propositions or the harshness of particular results.¹⁷ For example, classical contract law held that promises lacking consideration were unenforceable.¹⁸ Gift promises lacked consideration; as a result, a court should not enforce a gift promise, even in circumstances where the promisee reasonably had relied on the promise to his or her detriment. People might recoil at the idea of a promisee bearing the loss in these circumstances, but a court could not ignore the rule about gift promises simply because the rule led to a harsh or unfair result in a particular case. Just as classicists denied the role of real-world concerns in the formulation of legal rules, they denied the role of real-world concerns in

¹⁶ Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 547 (2003).

¹⁷ Eisenberg, *supra* note 6, at 1752-53 (criticizing this aspect of classical legal reasoning).

¹⁸ I draw this example from Eisenberg. *See id.*

the application of rules as well.

By contrast, New Formalists believe that legal rules have merely presumptive force.¹⁹ When pragmatic or ethical considerations counsel strongly against the application of a rule in a particular case, a court should not insist on applying the rule. For example, Frederick Schauer endorses a “new” version of formalism that he calls “presumptive positivism.”²⁰ Under this approach, legal rules create “presumptive rather than absolute” constraints for courts, “thereby... allowing for the possibility of override in particularly exigent circumstances.”²¹ Similarly, Randy Barnett’s “consent theory” of contract relies heavily on presumptions in explaining the proper limits of objective interpretation and the role of contract defenses. While the parties’ consent makes out a prima facie case of contractual obligation, Barnett argues, the case may be rebutted by a showing of circumstances, generally coterminous with traditional contract defenses, that deprive that consent “of its normal moral, and therefore legal, significance.”²²

Third, the classicists’ defense of freedom of con-

¹⁹See Grey, *supra* note 3, at 499 (discussing “presumptive” nature of contemporary formalism).

²⁰FREDERICK SCHAUER, PLAYING BY THE RULES 197, 203 (1991). See also Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 546-48 (1988) (discussing “presumptive formalism” and suggesting it be called “presumptive positivism”).

²¹SCHAUER, *supra* note 20, at 196.

²²Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318 (1986).

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tract allegedly sets them apart from New Formalists. Here again, the conventional wisdom draws a distinction between the essentialism of classical contract law and the pragmatism of contemporary scholarship. According to the conventional wisdom, classicists held that freedom of contract was a conceptual imperative, a principle that followed necessarily from a true understanding of contract's nature.²³ This essentialism supposedly led classicists to reject all limits on party autonomy, even limits based on health and safety grounds--to endorse the Supreme Court's holding, in the landmark case of *Lochner v. New York*,²⁴ that the Constitution prohibits legislation that interferes with parties' right to contract on terms they see fit.²⁵ The association with *Lochner* casts a reactionary taint on the classicists, and in fact some scholars have suggested that their essentialism masked an anti-egalitarian bias. For example, Morton Horwitz writes that Williston's objectivism acted to "disguise gross disparities of bargaining power under a façade of neutral and formal rules."²⁶

By contrast, contemporary defenses of freedom of contract tend to rely on functional arguments. Most of these defenses come from the law and economics per-

²³See, e.g., Mooney, *supra* note 2, at 1133 (discussing the "classical, conceptualist ethic emphasizing... 'freedom of contract' and marketplace economics").

²⁴*Lochner v. New York*, 198 U.S. 45 (1905).

²⁵See Grey, *supra* note 3, at 494-96 (discussing the "canonical" connection between Langdellism and *Lochnerism*).

²⁶MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 201 (1977).

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spective and stress the efficiency gains that result from honoring party autonomy.²⁷ Contracts increase efficiency by allowing parties to trade goods and services to other parties who value them more highly. As a result, society generally should refrain from interfering with parties' contractual choices; society can better address distributional concerns through tax and transfer measures. Law and economics scholarship does accept regulations that weed out contracts that do not reflect real choice (contracts based on deception or threats, for example) as well as contracts that involve some market failure, such as the presence of externalities. Generally speaking, though, most law and economics scholars hold that the efficiency losses that result from broader limitations on party autonomy outweigh the benefits.

One important strand of law and economics scholarship addresses freedom of contract from the point of view of institutional competence. This scholarship also relies on pragmatic arguments. For example, Michael Trebilcock, a Canadian whose work has been influential in the United States, dismisses abstract inquiries into the proper scope of party autonomy.²⁸ Such inquiries involve the balancing of a multitude of conflicting social values and are thus likely to be unsuccessful. Rather, scholars should focus on a more

²⁷See F. H. Buckley, *Introduction*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 1, 7 (F. H. Buckley ed., 1999) (“[T]he intellectual revival of freedom of contract has been led by scholars in the law-and-economics tradition.”).

²⁸MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 248 (1993).

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practical question: determining which government actor seems most likely to reach an appropriate balance among these many social values. For example, Trebilcock writes, courts typically lack the information and expertise necessary to engage in a sensitive evaluation of social conditions. As a result, courts typically should refrain from invalidating private transactions on the basis of wider social values. Regulators, by contrast, are more likely to have “an appropriately systemic perspective.”²⁹ They are thus better equipped than courts to identify those market failures, such as information asymmetries and collective-action problems, that may justify invalidating certain private agreements.

Finally, in today’s terms, classical scholarship seems strikingly under-theorized. A good example is the work of Williston. Like other classical scholars, Williston devoted himself primarily to doctrinal analysis--to the identification and development of the principles that underlie judicial decisions and, to a lesser extent, commercial statutes.³⁰ Williston’s work was not merely descriptive; he sought connections among doctrines, criticized incoherence, and suggested ways to harmonize apparently inconsistent precedents. But apart from occasional references to common sense and other intuitive notions, policy arguments did not interest him. Williston largely ig-

²⁹*Id.* at 251.

³⁰*Cf.* Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2002) (describing traditional legal scholarship).

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nored big-picture questions about the political and economic goals of contract law; he did not look to other disciplines to gain a deeper understanding of the legal system. Moreover, he showed little inclination to do empirical work on the complex ways in which legal rules might interact with commercial practice. “[F]rom the standpoint of legal or social thought,” Lawrence Friedman laments, Williston’s work amounted to “volume after volume of a heavy void.”³¹

By contrast, contemporary formalism seeks a stronger theoretical foundation. Straightforward doctrinal analysis does not appeal to New Formalists; they care much more about explaining the legal regime in terms of functional utility. Moreover, when they make claims about formalism’s practical benefits, New Formalists do not rely on commonsense intuitions. Rather, they back their assertions with sophisticated economic models and empirical studies. For example, in defending objective contract interpretation, Schwartz and Scott rely on microeconomics.³² Bernstein, for her part, has conducted a number of empirical studies of private arbitral regimes that show how a combination of formalist adjudication and informal reputational sanctions can serve the needs of contracting parties.³³

³¹LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 543 (1973).

³²See Schwartz & Scott, *supra* note 16, at 548.

³³See, e.g., Bernstein, *supra* note 14, at 1735-45 (discussing cotton arbitrators); Lisa Bernstein, *Merchant Law In a Merchant Court: Rethinking the Code's Search For Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769-71

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Some classical scholarship no doubt fits the image that New Formalists have of it.³⁴ But some does not. For example, Samuel Williston's work has more nuance and balance, and shows more continuity with contemporary scholarship, than commonly supposed. Williston taught at Harvard for about 60 years, starting in 1890. Over the course of his career, he wrote more than 50 articles and several treatises on commercial law, including an influential contracts treatise, *Williston on Contracts*, which appeared in 1920.³⁵ He drafted several important commercial statutes and served as Reporter on the *Restatement of Contracts*, a monumental project, sponsored by the American Law Institute, which synthesized American contract law in 1932.³⁶ His impact on American contract law has been enormous and enduring.

Williston's work thus represents an influential strand of classical contract jurisprudence.³⁷ Yet his

(1996) (discussing feed and grain arbitrators).

³⁴I should point out that some new scholarship rejects the idea that classicists were reductive. See, e.g., David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQUIRIES IN LAW 541, 541-42, 546 (2003).

³⁵SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920). This treatise is currently in its fourth edition. RICHARD A. LORD, *WILLISTON ON CONTRACTS* (4th ed. 1990).

³⁶RESTATEMENT OF CONTRACTS (1932).

³⁷Some might argue that the differences between Williston and other classicists suggest that Williston should not be considered a classical formalist at all. But the differences are not so pronounced as to exclude Williston from the classical camp. While Williston did not share the conceptualism of the Langdellians, he did agree on other central tenets of classicism, for example, the desirability of abstract rules and the importance of logic in legal reasoning. His scholarship,

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work does not wholly fit the image of tiresome scribbling that ignores all social concerns. When one actually takes the time to read Williston, one sees that the conventional image presents an incomplete picture. While much of his scholarship can strike a contemporary reader as arid and conceptual, there are strong elements of pragmatism as well. Williston tempered an emphasis on formal logic with a concern for the real-world effects of legal rules, an advocacy of economic individualism with a recognition of the need for some market regulation.

I have studied Williston's work in detail elsewhere.³⁸ Here, I will briefly discuss three important ways in which Williston's jurisprudence shows more subtlety than we typically appreciate. First, Williston's formalism was not essentialist. True, he favored the use of abstract principles in legal reasoning. But he did not favor abstract principles because of their coherence with a "correct" conceptual understanding of contract. Law, he wrote, "is a pragmatic science," one that must be judged by its real-world application.³⁹ Williston favored formal legal reasoning because he believed that it had important practical advantages.

like other classical scholarship, was systematic and doctrinal. These points of agreement demonstrate that, despite his rejection of essentialism, Williston is best seen as part of the classical tradition in contract law.

³⁸Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

³⁹SAMUEL WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 127 (photo reprint 1986) (1929).

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For example, Williston argued that general legal concepts promote predictability in commercial relationships.⁴⁰ If law were merely a collection of particularized rules without unifying principles, lawyers could not accurately advise clients.⁴¹ Parties could not feel secure about their contractual rights and duties and might be less likely to enter into mutually beneficial agreements. Moreover, uncertainty would promote costly litigation that would drain the resources of the parties and the public at large. Williston frequently pointed out that the success of a legal system depended not only on its capacity to reach acceptable results at trial, but also its capacity to delineate rights and duties without the need for litigation.⁴²

Williston recognized that there was a potential practical downside to the use of general concepts in law. Categorical principles could lead to harsh results in particular cases.⁴³ But he believed that this danger was exaggerated.⁴⁴ Legal complexity also could cause hardship, for example, by creating traps for the unwary or opportunities for sharp practice. By adhering

⁴⁰Samuel Williston, *Change in the Law*, 69 U.S. L. REV. 237, 239 (1935) (discussing "systematic jurisprudence").

⁴¹SAMUEL WILLISTON, *LIFE AND LAW* 213 (1941) (discussing difficulty of learning and applying a body of law that lacks "connecting threads of principle").

⁴²See, e.g., Samuel Williston, *Repudiation of Contracts (Part II)*, 14 HARV. L. REV. 421, 438 (1901).

⁴³See, e.g., WILLISTON, *supra* note 39, at 2-3.

⁴⁴*Id.* at 97.

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to general concepts, judges could reduce these potential dangers. Moreover, categorical principles could help rein in willful judges who might be inclined to decide a matter on the basis of personal whim rather than “the general justice of the case.”⁴⁵ In any event, as discussed below, Williston believed that legal rules should have only presumptive effect; in particularly exigent circumstances, judges should refrain from applying them.

Williston’s pragmatism was also evident in the way he derived the general principles themselves. Williston did not often describe his methodology, but one can piece it together from his occasional jurisprudential writings and from the corpus of his work. Williston did not attempt to derive the principles of contract law from metaphysical philosophy. Such an approach would be a waste of time, he thought--“an excursion into cloud-land.”⁴⁶ Rather, he looked to case law. Judicial decisions provided the raw materials for his systematic jurisprudence.

Williston believed that a scholar must study a body of case law and identify “the principles, whether clearly formulated or not... which underlie the decisions.”⁴⁷ In a largely inductive process, the scholar must observe the data--that is, read the cases--and,

⁴⁵*Id.* at 59.

⁴⁶WILLISTON, *supra* note 41, at 203.

⁴⁷Samuel Williston, *The Necessity of Idealism in Teaching Law*, 2 AM. L. SCHOOL REV. 201, 202 (1908).

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reasoning upward, discover the general principles that the data reflected.⁴⁸ Once identified, the principles served as a kind of canon by which one could judge the correctness of the cases themselves. Sound cases conformed to the principles; unsound cases did not. Williston captured this idea in a phrase he often repeated: “*stare principiiis*.”⁴⁹ Although courts should generally follow precedent in the interests of stability, wrong decisions ultimately should not stand in the way of sound principles.

Nonetheless, Williston did not believe that a scholar could identify legal concepts solely through induction. Various “principled” accounts of doctrine could exist. The scholar had to develop the best account: the one that relied on concepts that were general, uniform, consistent with the body of law as a whole, and, crucially, in tune with real-world needs. Williston made this point repeatedly. The ideal rule, he wrote in 1908, should not “violate sound views of political economy;” it should “conform to the usages or requirements of business.”⁵⁰ Similarly, in a 1935 article entitled *Change in the Law*, Williston insisted that a legal principle should not only be general and coherent, but “should also conform to social needs

⁴⁸See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387; 1434 (1997) (explaining that classicists believed that the “axiomatic principles of the common law... were to be initially discovered by reasoning inductively upward from the cases”).

⁴⁹See, e.g., Williston, *supra* note 40, at 239.

⁵⁰Williston, *supra* note 47, at 202.

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and not violate what may be called the mores of the community.”⁵¹ Indeed, because “social needs” and “mores” change over time, legal principles must themselves evolve. “To the extent that social needs and mores change, legal principles should change” too.⁵²

In this embrace of pragmatism, Williston resembled today’s New Formalists. Of course, one should not overstate the similarities. Williston focused primarily on doctrinal system-building; he did not give policy arguments nearly the same degree of attention as black-letter analysis. Moreover, compared to New Formalists, Williston was noticeably under-theorized. Williston did not attempt to support his assertions about practical benefits with empirical data or sophisticated economic models. Even his concept of *stare principiiis* was more or less intuitive. Williston never attempted to develop a theory that would explain when, precisely, a court should abandon precedent in favor of correct principle.⁵³ Nonetheless, both in defending an axiomatic jurisprudence and in deriving the axioms themselves, Williston emphasized real-world benefits, not conformity to abstract philosophy or adherence to judicial fiat.

Second, like New Formalists, Williston understood that a rule should not control in circumstances where

⁵¹Williston, *supra* note 40, at 239.

⁵²*Id.*

⁵³See Grey, *supra* note 5, at 26.

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its application would lead to seriously bad social consequences. In explaining this belief, Williston drew a distinction between geometric logic and legal logic, a distinction that will surprise people who hold the conventional view of him. Geometric logic, Williston wrote, is conclusive; its “arguments aim at demonstrative certainty.”⁵⁴ Legal logic, by contrast, is a matter of “[p]resumptions and probabilities;”⁵⁵ it indicates the likely result, at least in the absence of serious practical difficulties. So, for example, when one Realist scholar quipped that formal logic was so indeterminate that it could not even definitively resolve a dispute whether “Socrates is mortal,”⁵⁶ Williston answered him thus:

If we can say, almost all men are mortal, though occasionally one may be found who is not, the judicial conclusion in a particular case is likely to be that Socrates is mortal unless it can be shown that there are some peculiar circumstances in the facts of his case rendering the rule that applies to most men inapplicable to him. A great deal of legal and judicial reasoning is like that.⁵⁷

Thus, like New Formalists, Williston maintained

⁵⁴See WILLISTON, *supra* note 39, at 157 n.2 (internal reference omitted).

⁵⁵*Id.* at 157.

⁵⁶*Id.* at 153-54.

⁵⁷*Id.* at 156-57.

that rules should have merely presumptive force: in an appropriate case, logic should take a back seat to “practical convenience” and rough justice.⁵⁸ “No one will dispute,” Williston wrote, “that logic should be the servant not the master of practical convenience, and that where logic and convenience are clearly at war, logic must yield.”⁵⁹ Of course, deciding precisely when logic and convenience are clearly at war is a matter of judgment; given the advantages that he believed logic created for a legal system, Williston thought that courts should depart from logic only on the strongest arguments from social policy.⁶⁰ But in the end, social welfare, not logic, must control: “law is made for man, and not man for the law.”⁶¹

Third, Williston distrusted conceptual defenses of laissez-faire capitalism.⁶² As a pragmatist, Williston understood that freedom of contract could not be the only public value, that law had to strike a balance between party autonomy and other social concerns like public health and safety. To be sure, Williston did not think that courts should attempt to strike this

⁵⁸WILLISTON, *supra* note 41, at 311; *see* Williston, *supra* note 42, at 438 (“It may be conceded that practical convenience is of more importance than logical exactness . . .”). I discuss several examples of Williston’s preference for presumptive rules, including his embrace of the doctrine of promissory estoppel, in Movsesian, *supra* note 38, at 245-53.

⁵⁹Samuel Williston, Book Review, 35 HARV. L. REV. 220, 221 (1921).

⁶⁰*See* Williston, *supra* note 41, at 438 (arguing that “considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts”).

⁶¹1 WILLISTON, *supra* note 35, § 119, at 256.

⁶²*See* Grey, *supra* note 3, at 502 (stating that “Williston gave no support to constitutional liberty of contract”) (internal quotations omitted).

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balance; he did not think judges should have discretion to settle broad social questions in the context of particular cases.⁶³ Yet he did not object to legislative attempts to ameliorate the harshness of the free market. Indeed, he occasionally drafted such legislation himself.

Williston's thoughts on the matter appear most clearly in his remarkable article, *Freedom of Contract*, which he wrote in 1921.⁶⁴ Given the conventional wisdom about classicism, one might expect a full-throated defense of libertarianism in contract law. In fact, Williston devoted much of the piece to debunking the notion of absolute liberty of contract. During the late eighteenth and early nineteenth century, he explained, "metaphysical and political philosophers" had preached "a gospel of freedom" and laissez-faire economics.⁶⁵ This "theorizing" had made a strong impact on American contract law, which had adopted extremely individualistic doctrines about parties' capacity to make agreements free from state regulation.⁶⁶

By the twentieth century, however, the "tide" had turned against freedom of contract, and Williston

⁶³See WILLISTON, *supra* note 41, at 215 (discussing judicial temptation to make exceptions "to avoid a harsh application of a general rule").

⁶⁴Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

⁶⁵*Id.* at 366.

⁶⁶See *id.* at 367 (describing the effect of laissez-faire philosophy on the development of contract law).

plainly favored the direction of the change.⁶⁷ Experience had shown, he wrote, “that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare.”⁶⁸ Legislatures must balance the legitimate claims of party autonomy against other social interests like public health and safety. Once legislatures had done so, courts should stay out of the way. Williston denounced the *Lochner* Court’s willingness to obstruct “reasonable social experiment[s]”⁶⁹ and gave a list of salutary laws that might once have offended notions of liberty of contract, but fortunately did so no longer: rate regulations for common carriers, statutes providing standard terms in insurance contracts, limitations on interest rates that creditors could charge “the necessitous poor,”⁷⁰ and even minimum wage laws.⁷¹

As *Freedom of Contract* demonstrates, Williston’s approach to the concept was both pragmatic and institutional: pragmatic in its recognition that freedom of contract must be balanced against other social interests and institutional in its focus on assigning the balancing to the correct governmental actor. This approach resonates with at least some of the current law-and-economics literature on party autonomy,

⁶⁷See *id.* at 374–75 (discussing situations where unlimited freedom of contract does not serve the public interest).

⁶⁸*Id.*

⁶⁹*Id.* at 376.

⁷⁰*Id.* at 375.

⁷¹For discussion of these examples and others, see *id.* at 374–75, 377–78.

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most notably Trebilcock's work, discussed earlier. To be sure, Williston's argument is not as theoretically rich as Trebilcock's. Unlike Trebilcock, Williston did not offer a careful comparison of the perspectives of judges and legislators; he did not explain public regulation in terms of information asymmetries and other market failures. Nonetheless, his approach is quite close in spirit to Trebilcock's, and the affinities should make us wary of dismissing Williston's arguments as excessively conceptual.

Williston's moderation appears, not only in jurisprudential articles like *Freedom of Contract*, but also in his work as a statutory drafter. No concept so typifies freedom of contract as *caveat emptor*, the doctrine that holds that courts will not intervene to rescue buyers who have not taken reasonable steps to protect themselves. Given the conventional wisdom about classicism, one would expect Williston to have enshrined the doctrine in the statutes he drafted. But his statutory work demonstrates uneasiness with *caveat emptor*. One important example involves the provision he wrote for the American Uniform Sales Act on a buyer's remedies for a seller's breach of warranty.

Suppose that a buyer has purchased defective goods from a seller who had warranted their quality. Established law at the time Williston drafted the Sales Act provided that the buyer could keep the goods and sue the seller for damages, measured as the difference in value between the goods as warranted and the goods

as delivered.⁷² If the seller had known about the defects, established law also gave the buyer the option to rescind the sale, return the goods, and recover the purchase price.⁷³ But what if the seller had not known about the defects? The English Sale of Goods Act, which served as Williston's principal model, did not allow the buyer to rescind the contract in those circumstances. American jurisdictions were divided on the question,⁷⁴ though the weight of authority apparently favored the English rule.⁷⁵

A drafter who favored an unmitigated right to contract easily could have adopted the English rule for the American statute. But Williston did not adopt the English rule. Instead, he drafted a provision for the Sales Act that allowed rescission even where the seller's misrepresentation had been innocent.⁷⁶ He argued that a buyer's right to rescind in these circumstances would create practical advantages. For example, allowing rescission for honest as well as fraudulent misrepresentation would save litigation costs by obviating the need for difficult and time consuming inquiries about the seller's state of mind when he gave the warranty.⁷⁷

⁷²SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 608, at 1009 (1909).

⁷³*Id.* at 1010; *see also* WILLISTON, *supra* note 41, at 260–61 (discussing this hypothetical).

⁷⁴WILLISTON, *supra* note 72, § 608, at 1011.

⁷⁵Samuel Williston, *Rescission for Breach of Warranty*, 4 COLUM. L. REV. 195, 211 (1904).

⁷⁶Unif. Sales Act § 69(1)(d), 1 U.L.A. 295 (1950).

⁷⁷WILLISTON, *supra* note 72, § 608, at 1010–11.

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More importantly, Williston believed that the rescission remedy promoted commercial good faith. Williston did not feel comfortable leaving parties entirely to fend for themselves in the marketplace. He thought that law should step in when one party sought to take unfair advantage of the other. Williston explained his reasoning thus:

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

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about the sale.⁷⁸

In the end, Williston wrote, the English rule represented nothing more than “the principle of *caveat emptor*.”⁷⁹ As a result, the English rule “may well be swept away, as the more obviously barbarous applications of the doctrine have already been.”⁸⁰

In his rejection of essentialism, his embrace of presumptive formalism, and his pragmatic approach to freedom of contract, Williston stands much closer to contemporary formalism than we commonly assume. There is, however, one sense in which Williston’s work does fit the conventional picture of classical jurisprudence. Compared to New Formalists, Williston was dramatically under-theorized. Where New Formalists rely on empirical data and sophisticated economic models to support their doctrinal prescriptions, Williston made only shorthand references to concerns about rough justice and “practical convenience.”⁸¹ The under-theorized character of Williston’s scholarship comes through in two examples I have already discussed here: his rather vague concept of *stare principis*, and his rejection of *caveat emptor* as a violation of roughly defined norms of commercial good faith. There are many others that I have dis-

⁷⁸*Id.* at 1010.

⁷⁹Samuel Williston, *Rescission for Breach of Warranty*, 16 HARV. L. REV. 465, 475 (1903).

⁸⁰*Id.*

⁸¹*See, e.g.,* Williston, *supra* note 42, at 438.

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cussed elsewhere.⁸²

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

One should not be too quick to dismiss Williston and other classicists on this basis, however. Success or failure depends on what a scholar is trying to achieve. Before one can judge a body of scholarship, one needs to understand the scholar's goals and intended audience. The goals of classical scholars differed greatly from those of contemporary scholars. Today, American law professors think of themselves as writing primarily for other academics. Their task, as they perceive it, is to formulate new accounts of law and law's social impact and to defend those ac-

⁸²Movsesian, *supra* note 38, at 262-67. Williston's more or less intuitive defense of the parol evidence rule offers a particularly interesting example. See *id.* at 266-67.

counts within the scholarly community.⁸³ Rather than as adjuncts to the bar, they see themselves principally as members of the broader university world; indeed, they increasingly attempt to map law in terms of other disciplines like economics and political science.⁸⁴ They write in an academic idiom, one that prizes theoretical novelty and rigor and argumentative subtlety.

Williston and other classicists understood the enterprise of legal scholarship quite differently. They did not direct their work primarily toward other law professors (given the relatively small number of American law schools at the time, that would have been a narrow readership indeed) but toward practicing professionals.⁸⁵ They believed that their most important task as scholars consisted of creating a doctrinal system that attorneys and businesspeople could use on an everyday basis, one that simplified law and made it more comprehensible.⁸⁶ They saw them-

⁸³See Posner, *supra* note 30, at 1321; Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1217 (2002).

⁸⁴See Posner, *supra* note 30, at 1321–22 (discussing law-and-economics and contemporary constitutional law scholarship); Sullivan, *supra* note 83, at 1217 (discussing the "law-and" phenomenon); see also TAMANAHA, *supra* note 5, ch. 8 (discussing increasingly academic, as opposed to practical, orientation of law professors).

⁸⁵See Posner, *supra* note 30, at 1320 (discussing traditional legal scholarship's emphasis on writing for the legal profession); see also Sullivan, *supra* note 83, at 1217 (discussing changes in legal scholarship).

⁸⁶See, e.g., WILLISTON, *supra* note 41, at 108 ("It is also part of a teacher's work to a greater or less extent to systematize the law..."); Samuel Williston, *Fashions in Law with Illustrations from the Law of Contracts*, 21 TEX. L. REV. 119, 133 (1942) (discussing classical legal scholarship); Williston, *supra* note 40, at 238-39 (discussing classical legal pedagogy).

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selves, not so much as participants in the university world, but as members of the bar.⁸⁷ Late in his career, remembering his early Harvard colleagues, Williston gave a description that could apply to him as well. His colleagues, he recalled, “did not conceive of themselves as jurists, but as lawyers.... They felt themselves engaged in a practical profession, and in the training of young men for that profession. As such, they were pragmatists.”⁸⁸

Given their goals and intended audience, the classicists’ reliance on intuitive justifications seems more plausible. Lawyers rely on rough judgments about fairness and practicality all the time. So do their clients. Even if “business people” do not carefully reason out legal problems, Williston maintained, “they do have an instinct” about their proper resolution.⁸⁹ Lawyers and their clients work with law on an operational level, and they typically have little interest in rich theoretical accounts.⁹⁰ Particularly in the commercial context, complex and controversial normative accounts of law can have a negative payoff. As Richard Posner has argued, everyday commerce depends on the ability of parties to displace debates about “deep issues” that can “disrupt and even poison

⁸⁷ As Richard Posner notes, legal scholars traditionally “identified with the legal profession rather than with their colleagues in other departments of their university. They even dressed like lawyers rather than like professors.” Posner, *supra* note 30, at 1315.

⁸⁸ WILLISTON, *supra* note 39, at 119.

⁸⁹ SAMUEL WILLISTON, *PROBLEMS IN THE MODERN LAW OF CONTRACTS* 22 (1933).

⁹⁰ RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 11-12 (2003).

commercial relations among strangers.”⁹¹

In the end, the differences between classical and contemporary formalism do not relate so much to essentialism, or pragmatism, or moderation with respect to freedom of contract. As Williston’s work shows, some influential classicists actually agreed with New Formalists on these matters--or, at least, agreed to a greater extent than we typically realize. The differences relate more to the changing self-image of American law professors, who increasingly define themselves as university scholars first and lawyers second, often a far second. People who view themselves as social scientists are not likely to spend their careers parsing judicial decisions and building doctrinal superstructures; they are not likely to value the intuitive judgments of practitioners.

The new orientation of American legal scholarship presents both promise and threat. Much of the new scholarship is rich and suggestive. Very few of us, I suspect, would like to return to the days of classical jurisprudence, when law reviews were filled with articles endlessly distinguishing and reconciling cases. Nonetheless, there is a danger that, in attempting to employ the tools of other disciplines, we will come to disregard our own comparative advantage as experts trained in law and legal institutions and our obligation to help prepare our students for the world of the professional lawyer. Whether the potential promise of

⁹¹*Id.* at 12.

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the new scholarship outweighs the potential threat, however, is a matter for another symposium.

