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LANGDELL AND THE FOUNDATION OF CLASSICAL CONTRACT LAW

DANIEL P. O'GORMAN*

ABSTRACT

In the late nineteenth and early twentieth centuries, scholars seeking to bring order to the common law developed what has since become known as classical contract law. Its leading architects were Christopher Columbus Langdell, Oliver Wendell Holmes, Jr., and Samuel Williston, and their efforts involved seeking to provide an objective foundation for contract law. Any idea, however, that these three worked in coordination to create classical contract law would be mistaken. Holmes is considered a relentless critic of Langdell, and even Williston distanced himself from Langdell. This Article identifies in what ways Holmes and Williston differed from Langdell in their approach to contract law and, to do so, focuses on the doctrine of consideration, the foundation upon which classical contract law was built. This Article concludes that, as a result of these differences, classical contracts scholars' quest to create an objective foundation for contract law that could withstand erosion was doomed to fail. First, the leading architects did not agree on a fundamental concept—a theory of law. The disagreement between Langdell and Holmes about the nature of law (logic versus experience) virtually ensured they would be unable to agree on something like the meaning of consideration and would thus be unable to agree on a foundational theory of contract law. Second, even when the architects sought to construct principles upon the same foundation (logic), the foundation proved unable to provide a clear answer to the meaning of consideration.

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I. INTRODUCTION

The late nineteenth and early twentieth centuries was a time of significant scholarly interest in the law of contracts,¹ and for good reason. Not only had the Industrial

¹ Much of their work can be found in *Selected Readings on the Law of Contracts from American and English Legal Periodicals*, published in 1931, which is over one thousand three hundred pages and is a collection of essays from this period. See ASS'N OF AM. L. SCHOOLS, *SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS* (1931). One commentator calls it "the single most important collection of essays ever published on the common law of contract." Peter Benson, *Introduction to THE THEORY OF CONTRACT LAW: NEW ESSAYS* 2 n.3 (Peter Benson ed., 2001).

Revolution increased the practical importance of contracts,² but the end of the old forms of action³ and the rise of reported cases⁴ created a felt necessity to bring order to a common law that seemed nothing more than a “ragbag” or “thick fog” of details.⁵ Embracing the scientific method, which was very much in the air at the time,⁶ and

² See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 45 (1977) (noting that with the Industrial Revolution contract law became more important than it had been in preindustrial society); E. ALLAN FARNSWORTH, *CONTRACTS* 19 (4th ed. 2004) (noting that “[i]t was not until the nineteenth century that economic conditions led contract law to its apogee, as the legal underpinning of a dynamic and expanding free enterprise system.”).

³ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 404 (3d ed. 2005) (noting that old technicalities in the law of contracts were abandoned long before mid-century, and “[w]hat remained was more or less to tidy up doctrine and to express its principles as general rules.”); Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 *RATIO JURIS* 26, 27 (2002) (noting that “[t]he traditional way of categorizing and thinking about the common law—the forms of action—broke down” and that “[t]his proceeded rapidly throughout the first half of the nineteenth century in both England and the United States, culminating in the procedural reforms abolishing the forms of action around the middle of the nineteenth century in the New York Field Code and the English Procedural Reform Acts.”); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 58 (1994) (noting that Langdell’s principles of contract law would be “rules of substantive law whose formulation and organization will create a substitute for the structure once given by the forms of action, the absence of which Langdell experienced as a practitioner of New York law under the reforms of the Field Code of Procedure.”); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 825 (1989) (noting that “[t]he legal thinkers of Holmes’ generation confronted a practical historical situation that impressed upon them the need for a new and perspicuous categorical arrangement of the common law” and that “[w]ith the demise of the writ system, the organization of cases around the traditional forms of action was breaking down.”).

⁴ See GILMORE, *supra* note 2, at 60 (noting that the increased reporting of cases called for the simplification of doctrine).

⁵ See OLIVER WENDELL HOLMES, *Introduction to the General Survey by European Authors in the Continental Legal Historical Series* (1913), in OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 298, 301–02 (1920) (noting that “[w]hen I began, the law presented itself as a ragbag of details.”); OLIVER WENDELL HOLMES, *Brown University—Commencement Speech 1897*, in *COLLECTED LEGAL PAPERS*, *supra* note 5, at 164, 164 (noting that when he began practicing law “[o]ne found oneself plunged in a thick fog of details”). Throughout this Article, Holmes will be referred to without “Jr.” as he dropped the “junior” in 1894 after his father died, except when citing in footnotes to articles before 1894. Richard A. Posner, *Introduction to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 1, n.1 (Richard A. Posner ed., 1992).

⁶ See KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 218–19 (1990) (noting that “[t]he common law as a science was reinforced by the intellectual influences in vogue of Savigny’s emphasis on the law as a legal science and of Darwin’s evolutionary theory.”).

rejecting natural law as an ordering principle,⁷ scholars embarked on a quest to identify a new objective foundation for jurisprudence, including contract law.⁸

Their efforts with contract law started in earnest with Christopher Columbus Langdell's *A Summary of the Law of Contracts*,⁹ published first as an appendix to his casebook in 1879¹⁰ and then separately in 1880.¹¹ They continued with Oliver Wendell Holmes's contracts lectures in 1880, which were published in 1881 in his celebrated book *The Common Law*.¹² And they concluded in the early twentieth century with the work of Samuel Williston, reflected in his monumental four-volume

⁷ See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 28 n.99 (1983) (noting that "[t]he classical legal scientists unanimously rejected natural law jurisprudence . . ."); Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HISTORY REV. 215, 253 (1995) (noting that "Langdell and his followers were progressive scholars: they were among the first Western jurists to adopt a wholly secular approach to law."). "Natural law theories maintain that there is an essential (conceptual, logical, necessary) connection between law and morality [A]ccording to natural law theory, it is part of the very meaning of 'law' that it passes a moral test." JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 11 (Revised ed. 1990); see Siegel, *supra* note 7, at 253–54 (discussing the prolific treatise writer Joel Prentiss Bishop, and his theistic strand of classical legal theory); Mathias W. Reimann, *Holmes's Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72, 80 (Robert W. Gordon ed., 1992) (noting that "the conviction was widespread that the civil law provided the best guidance.").

⁸ Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1446 (1997).

⁹ C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 5 (2d ed. 2004) (1880).

¹⁰ BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906, at 100 (2009).

¹¹ *Id.* at 102.

¹² OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Belknap Press 1963) (1881).

treatise on the law of contracts in 1920,¹³ and then in the American Law Institute's *Restatement of Contracts* in 1932, for which Williston was the Reporter.¹⁴

These three—Langdell, Holmes, and Williston—are, at least according to Grant Gilmore, the primary architects of what came to be known as classical contract law.¹⁵ Holmes sought to make the “bargain theory” of contract law its substantive foundation,¹⁶ and Langdell and Williston sought to make formalism its methodology.¹⁷ Any idea, however, that these three worked in coordination to create the great edifice, which started to crumble under the blows of Arthur Corbin even before it was finished,¹⁸ would be mistaken. Holmes is considered a relentless critic of Langdell,¹⁹ and even Williston distanced himself from Langdell.²⁰

This Article seeks to identify in what ways Holmes and Williston differed from Langdell in their approach to contract law and, to do so, focuses on the doctrine of consideration. The doctrine of consideration will be the focus because, during this period, Anglo-American jurists, including our architects of U.S. classical contract law,

¹³ SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920) (four volumes); *see also* Allen D. Boyer, *Samuel Williston's Struggle with Depression*, 42 *BUFF. L. REV.* 1, 37 (1994) (noting that “Williston’s treatise on contracts was immediately recognized as a classic text.”); Benson, *supra* note 1, at 2 (noting that Williston’s treatise “represents the most systemically and carefully worked-out presentation of the legal point of view that culminates several decades of intensive and highly sophisticated efforts by such masters of the common law as Pollock, Holmes, Langdell, Ames, Holdsworth, Salmond, and Leake, to bring order and internal consistency to the law of contract.”). E. Allan Farnsworth, however, has argued that the years from 1881 (after Holmes published *The Common Law*) to the First World War (just before Williston published his treatise) were in fact lean ones for contracts scholarship. *See* E. Allan Farnsworth, *Contracts Scholarship in the Age of Anthology*, 85 *MICH. L. REV.* 1406, 1407 (1987) (“[F]rom 1881 to the time of World War I, there was a significant decline in contracts scholarship and . . . 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.”).

¹⁴ *See* Wm. Draper Lewis, *Introduction to AM. LAW INST., RESTATEMENT OF CONTRACTS IX* (1932) (noting Williston was the Reporter for Contracts).

¹⁵ GRANT GILMORE, *THE DEATH OF CONTRACT* 13–14 (1974); *see also* William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes’s Early Legal Scholarship*, 90 *COLUM. L. REV.* 809, 827 n. 99 (1990) (noting that “[t]he link between Holmes and Langdell was most clearly made by Grant Gilmore.”). Gilmore called the results of their efforts the “Holmes-Williston construct,” GILMORE, *supra* note 15, at 14 and by others as the “Williston-Langdell approach.” ANDREW L. KAUFMAN, *CARDOZO* 314 (1998).

¹⁶ GILMORE, *supra* note 15, at 18–21.

¹⁷ *Id.* at 13–14.

¹⁸ *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 49–51 (1992) (discussing Corbin’s attack on classical contract law in the early twentieth century).

¹⁹ Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of the Historiography, 1906-2005*, 22 *LAW & HIST. REV.* 277, 307 (2004).

²⁰ Mark L. Movsesian, *Rediscovering Williston*, 62 *WASH. & LEE L. REV.* 207, 240 (2005).

were preoccupied with the meaning of consideration,²¹ and it was the project's crucial element.²² The old forms of action having gone away, scholars sought a single test of enforcement for a promise.²³ But Langdell, Holmes, and Williston simply could not agree on what consideration was, and this, as much as anything, revealed that the foundation of the great edifice was weak.

And it did not take long for that to become apparent. Shortly after Langdell published the *Summary*, Holmes attacked not only Langdell's general approach to constructing a theory of contract law, but he also attacked his view of consideration. Williston, in the early twentieth century, flip-flopped on the meaning of consideration, but rather than signaling that the quest to create a new foundation had finally succeeded, this showed that it had failed.

This Article maintains that there were two reasons classical contracts scholars' quest to create an objective foundation for contract law was doomed to fail. First, the leading architects did not agree on a fundamental concept—a theory of law. The disagreement between Langdell and Holmes about the nature of law (logic versus experience) virtually ensured they would be unable to agree on something like the meaning of consideration and would thus be unable to agree on a foundational theory of contract law. Second, even when the architects sought to construct principles upon the same foundation (logic), the foundation proved unable to provide a clear answer to the meaning of consideration. In the end, all that was left was for Arthur Corbin to point out the obvious.

This Article focuses on Langdell and his theory of consideration, and how Holmes and Williston's views differed from his, as he was arguably the first theorist of U.S. classical contract law. Part II provides a brief biographical sketch of Langdell. Part III discusses Langdell's theory of law as a science and includes discussions of how Holmes and Williston's theories of law differed from Langdell's. Part IV provides a background of the law of consideration up to the late nineteenth century, the time the architects of classical contract law sought to give it definition. Part V summarizes Langdell's discussion of consideration in his *Summary of the Law of Contracts*. Part VI analyzes the specific areas regarding consideration upon which Langdell and the other leading architects of classical contract law (Holmes and Williston) disagreed (thus dooming the project's foundation). Part VII is a brief conclusion.

II. CHRISTOPHER COLUMBUS LANGDELL: A BRIEF BIOGRAPHICAL BACKGROUND

Langdell's rise started "from an impoverished and traumatic childhood on a hardscrabble farm" in New Boston, New Hampshire.²⁴ He attended Phillips Exeter Academy in Exeter, New Hampshire, from 1845 to 1848,²⁵ and entered Harvard

²¹ JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF THE MODERN DOCTRINE OF CONTRACT* 171 (1991).

²² LAPIANA, *supra* note 3, at 60.

²³ TEEVEN, *supra* note 6, at 225–26.

²⁴ Bruce A. Kimball, *Young Christopher Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 191 (2002).

²⁵ KIMBALL, *supra* note 10, at 16–20.

College in 1848, but left fifteen months later due to a lack of funds.²⁶ As an undergraduate student, he took a natural history course where he learned botany and zoology, the latter being taught by Louis Agassiz, the Swiss scientist who was the field's leading figure.²⁷ After leaving Harvard College, Langdell spent eighteen months clerking in a prominent law office in New Hampshire.²⁸ He then entered Harvard Law School in 1851, graduated in 1853, and thereafter spent a year at the law school on postgraduate study.²⁹ In law school, Langdell assisted Theophilus Parsons with research for his *Law of Contracts* (published in 1853), identifying the cases and drafting notes discussing them.³⁰ He became Parsons's principal assistant on the project, and Parsons directed his other assistants to provide their work to Langdell for review and revision.³¹ In fact, Langdell's work on the book might have been more valuable than Parsons's.³² At law school, Langdell was known for his incessant conversations with classmates about the law, including presiding over mealtime discussions of cases.³³

Langdell left Harvard Law School in 1854 and practiced law on Wall Street in New York City from 1855 to 1870.³⁴ He was greatly respected by the leaders of the bar,³⁵ and in 1869, fellow lawyers referred to him as "[t]he highest legal ability in the nation."³⁶ But the corruption of Tammany Hall in the 1860s, which extended to judges and lawyers, alienated him and in early 1870 he accepted a position as a professor at

²⁶ Bruce A. Kimball, *Langdell, Christopher Columbus*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 323 (Roger K. Newman ed., 2009).

²⁷ KIMBALL, *supra* note 10, at 24–25.

²⁸ Kimball, *supra* note 24, at 222–23.

²⁹ Kimball, *supra* note 26, at 323.

³⁰ Kimball, *supra* note 24, at 224; ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*, at 165 (1967). Parsons's treatise focused more on particular types of contracts than on a unifying theme. LAPIANA, *supra* note 3, at 59. Prior to Parsons's treatise, William Wetmore Story had published *A Treatise on the Law of Contracts Not under Seal*, but it too focused on different types of contracts. *Id.* Francis Hilliard and Joel Bishop published contracts treatises in 1872 and 1878, respectively, but they too focused on particular types of contracts. *Id.*; see also Mark P. Gergen, *Negligent Misrepresentation as Contract*, 101 CALIF. L. REV. 953, 974 n.80 (2013) (noting, with respect to Hilliard's treatise, that "[t]he working part of the treatise is in the analysis of specific types of contracts.").

³¹ Kimball, *supra* note 24, at 225; see also KIMBALL, *supra* note 10, at 87 (noting that Langdell was Parsons's chief research assistant).

³² Kimball, *supra* note 24, at 225.

³³ KIMBALL, *supra* note 10, at 34.

³⁴ Kimball, *supra* note 26, at 323; Bruce A. Kimball & R. Blake Brown, "The Highest Legal Ability in the Nation": *Langdell on Wall Street, 1855–1870*, 29 *LAW & SOC. INQUIRY* 39, 39 (2004).

³⁵ SUTHERLAND, *supra* note 30, at 166.

³⁶ Kimball, *supra* note 26, at 323.

Harvard Law School.³⁷ As a result of his experience with the corruption of the New York legal system, Langdell came to believe in an apolitical, scientific nature of law.³⁸

In January 1870, Langdell was named Dane Professor, and in the spring semester he taught courses in negotiable paper and partnerships, apparently by the traditional lecture method.³⁹ In September he was elected the law school's first dean,⁴⁰ and at the same time he introduced the case method of teaching law along with the first casebook, *A Selection of Cases on the Law of Contracts*.⁴¹ The first half of the casebook was published in time for the start of classes in October 1870⁴² and the completed first edition was published by Little, Brown, and Co. in October 1871,⁴³ the latter edition including a preface and a thirteen-page index.⁴⁴ Langdell's case method and his casebook went hand in hand. The case method involved the use of the Socratic method in class, an inductive method of teaching through which Langdell questioned students about the cases, leading them to formulate and then refine principles of law derived from the assigned cases.⁴⁵ For the casebook's title page, Langdell fittingly chose Sir Edward Coke's maxims, "many times *compendia sunt dispēdia*" ("shortcuts are a waste of time"), and "*melius est petere fontes quam sectari rivulos*" ("it is better to seek the sources than to follow the tributaries" or, stated somewhat differently, "it is better to go up to the wellsprings than to follow rivulets downhill").⁴⁶

Langdell's biographer, Bruce Kimball, has identified a host of factors that might have contributed to Langdell's decision to adopt the case method of instruction. First, while at Exeter, Langdell read John Locke's *Some Thoughts Concerning Education*,⁴⁷ which recommended that students be presented with original sources and learn by going from the particular to the general.⁴⁸ Second, in his natural history course at Harvard, Langdell had been exposed to specimens, which perhaps influenced him to

³⁷ *Id.*

³⁸ *Id.*

³⁹ 2 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 359, 363 (1908).

⁴⁰ *Id.* at 370–71; SUTHERLAND, *supra* note 30, at 167.

⁴¹ Kimball, *supra* note 26, at 323.

⁴² KIMBALL, *supra* note 10, at 88, 97.

⁴³ C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871); KIMBALL, *supra* note 10, at 91, 97.

⁴⁴ KIMBALL, *supra* note 10, at 90.

⁴⁵ Kimball, *supra* note 26, at 323.

⁴⁶ LANGDELL, *supra* note 43, at iii; KIMBALL, *supra* note 10, at 89 n.28; Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 11 (1980).

⁴⁷ KIMBALL, *supra* note 10, at 18.

⁴⁸ *Id.* at 19.

later view cases as legal specimens, so to speak.⁴⁹ Third, scientific taxonomy was emphasized during the mid-nineteenth century,⁵⁰ and the induction of principles from cases can be seen as a form of legal taxonomy. Fourth, as previously noted, in law school Langdell had intense discussions with classmates about cases and it can thus be assumed he had a great interest in caselaw.⁵¹ Fifth, he had a tremendous knowledge of the cases stemming from his work for Parsons on his contracts treatise.⁵² Sixth, New York's shift to code pleading in 1848 involved a new emphasis on caselaw precedent and, as noted, Langdell practiced in New York from 1855 to 1870.⁵³ Seventh, Langdell's law practice primarily involved cases in equity,⁵⁴ which presumably emphasized the specific facts of cases. And eighth, there was an increase in the reporting of cases,⁵⁵ and thus court opinions were becoming readily available.

By the late 1870s, Langdell's casebook was selling out and the publisher wanted a new edition.⁵⁶ Langdell complied, and the second edition was published in the fall of 1879.⁵⁷ Although the organization and the selection of cases changed little, he expanded the index to nineteen pages and, more importantly, added a 131-page "summary of topics covered by the casebook."⁵⁸ The summary's addition (ironically, as will be seen) was in response to Holmes's review of the first edition, where Holmes had stated that students would find Langdell's casebook "a pretty tough pièce de resistance without a text-book or the assistance of an instructor."⁵⁹ Importantly, in 1880, the summary was also published separately from the casebook under the title, *A Summary of the Law of Contracts*.⁶⁰

The *Summary* was significant in that it treated contract law as a general body of law, rather than as a collection of separate areas of law based on different types of contracts, such as insurance, shipping, or employment contracts, which had been the

⁴⁹ *Id.* at 87.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 87–88.

⁵⁶ *Id.* at 100.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Book Note, 6 AM. L. REV. 353, 354 (1872) (Oliver Wendell Holmes, Jr. reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871)); see also Speziale, *supra* note 46, at 34 ("Christopher Langdell's *Summary of Contracts* may have been . . . a giving-in to students (and scholarly critics) who yearned for a statement of 'the law'—a response to the uncharitable reviews of his first edition and his first year of teaching.").

⁶⁰ KIMBALL, *supra* note 10, at 102.

way contract law had been previously treated.⁶¹ The *Summary* has thus been described as Langdell's "most significant scholarly contribution," and "[i]ts essence lies less in substantive doctrine than in [Langdell's] originality in seeking to develop an abstract, systematic theory of law . . ."⁶² Langdell's writings in the last several decades of the nineteenth century thus placed him as one of the age's leading theorists of contract law.⁶³ He is considered by some to be "the first theoretician of contract law in the United States,"⁶⁴ and the first person to recognize that there was such a thing as a general theory of contract law.⁶⁵

The *Summary* had, as noted, originally been intended as a reference guide for students using his casebook,⁶⁶ and Langdell, in the preface, implied that he only agreed to it being published separately because the publisher saw a separate market for it and had urged for its separate publication.⁶⁷ Langdell might, therefore, have in a sense inadvertently become the first U.S. theorist of a general theory of contract law (thanks to Holmes and Little, Brown, and Co.), beating Holmes to the punch, whose *The Common Law* was published in 1881. It is perhaps in this sense that Gilmore said that Langdell stumbled across the idea of a general law of contract, almost inadvertently discovering it.⁶⁸

Around 1883, Langdell, his eyesight having started to deteriorate, and having married for the first time in 1880, entered a period during which he published almost

⁶¹ GILMORE, *supra* note 15, at 6–7.

⁶² Kimball, *supra* note 26, at 323–24. It has been noted that it "was more theoretically sophisticated and insightful than any contemporary work in torts." Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1697 (2000).

⁶³ Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HISTORY REV. 345, 345 (2007); *see also* KIMBALL, *supra* note 10, at 84 (noting that "Langdell's scholarship during the 1870s . . . on contracts and sales . . . exercised seminal influence jurisprudentially" and that he was a "leading theorist of contracts during its 'golden age' in Anglo-American law.").

⁶⁴ LAPIANA, *supra* note 3, at 188 n.19.

⁶⁵ GILMORE, *supra* note 15, at 6; *see also* Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 551 (2010) (noting that Langdell "initiated and inspired the effort to formulate classical contract theory . . ."). In fact, he "has long been taken as a symbol of the new age," GILMORE, *supra* note 2, at 42, though it has been argued that "Langdell had nothing to do with creating the new age or with shaping the new approach," but was "the first to give a conscious, theoretical expression to the new order of things—which is why he became the symbol of his time." *Id.* at 62.

⁶⁶ KIMBALL, *supra* note 10, at 111; *see also* Farnsworth, *supra* note 13, at 1410 (noting that "the *Summary* was written mainly for students.").

⁶⁷ LANGDELL, *supra* note 9, at v; *see also* KIMBALL, *supra* note 10, at 111 n.145 ("The preface of the *Summary* implies that Langdell did not want to issue it separately and did so only at the urging of the publisher, which envisioned a separate market for it.") (citation omitted).

⁶⁸ GILMORE, *supra* note 15, at 6, 12.

nothing.⁶⁹ He returned to writing in the late 1880s and early 1890s, before becoming nearly blind and again ceasing to write.⁷⁰ He retired as dean in 1895, wrote another group of articles starting in 1897, retired as Dane Professor in 1900, and died in 1906.⁷¹

III. LANGDELL'S THEORY OF LAW: LAW AS A SCIENCE

Langdell is famous for considering law as a science, and his view led to an approach to law that has been referred to as classical orthodoxy.⁷² But exactly what he meant by “law as a science” and why he adopted such an approach has been the matter of debate.⁷³ A variety of views have emerged, many of them related and thus not necessarily inconsistent with all of the others. One view is that Langdell meant law should be treated as “an intellectual discipline worthy of a place in the university” rather than to be learned through an apprenticeship,⁷⁴ and that it was meant to be a pedagogical tool focusing on primary sources (cases) rather than secondary sources (treatises) (recall Coke’s maxims that Langdell included at the beginning of his casebook).⁷⁵ A second, related view, is that he hoped treating law as a science would

⁶⁹ Kimball, *supra* note 26, at 324.

⁷⁰ *Id.*

⁷¹ *Id.*; Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOCIAL INQUIRY 691, 691 n.1 (1995).

⁷² Grey, *supra* note 7, at 2; *see also* SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 199 (1940) (“Any generally expressed belief in England or America that the everyday law of the courts is a science, that should be studied in its completeness like other sciences, may be fairly dated from Langdell’s appointment in 1870 as Dane Professor of Law at Cambridge.”). The idea of law as a science was not, however, new, though Langdell can be credited with popularizing the idea in the United States. *See* M. H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 J. AM. LEGIS. HISTORY 95, 121 (1986) (“[O]ne should praise Langdell only for his popularization efforts, not for his innovativeness or originality.”); Juan Javier del Granado & M. C. Mirow, *The Future of Economic Analysis in Latin America: A Proposal for Model Codes*, 83 CHI.-KENT L. REV. 293, 296 (2008) (“In North America, until the last quarter of the nineteenth century, law had not been considered a science, but an art, ‘the art of the lawyer and the art of the judge,’ until a German-inspired brand of systematic legal science was successfully transplanted into the case method of the common law by scholars, such as Dean Christopher Columbus Langdell . . .”) (quoting Jerome Frank, *Why not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 923 (1933)).

⁷³ *See generally* Kimball, *The Langdell Problem*, *supra* note 19 (providing an excellent review of the differing views); LAPIANA, *supra* note 3, at 55 (“What that idea [Langdell’s idea of legal science] was has been a source of scholarly debate for some time.”).

⁷⁴ Speziale, *supra* note 46, at 25, 37.

⁷⁵ *See* Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in the Law*, 5 NOVA L.J. 323, 333 (1981) (“Langdell was as committed as [Harvard President Charles William] Eliot to the construction of university-based, professional legal education. If the practice of law was not a handicraft, and systematic professional education could not be secured through apprenticeship, then it would become necessary to regard law as a university science.”); *id.* at 358 (“Langdell’s [sic] principal commitment was to the construction of a first-class professional law school which would contribute to the standardized and centralized production of upper echelon lawyers. He seemed

elevate law and the legal profession through such training, and that law could thereby be saved “from the politics that he believed had invaded the bar” (recall his experience with Tammany Hall when he practiced law in New York).⁷⁶ A third (related to the second) is that Langdell’s approach, combining a scientific aspiration with recognition that there were no “great universal principles,” was designed to identify narrower principles of law; rules of substantive law to fill the void left by the abandonment of the old forms of action.⁷⁷ This view also maintains his approach was organic and Darwinian, rejecting immutable absolutes, and recognizing that the law developed.⁷⁸ This view asserts that Langdell’s approach, rather than advancing a formalist approach to law, can perhaps be viewed as the beginning of the end to formalism.⁷⁹ A fourth (inconsistent with the third) is that Langdell viewed law as a natural science in that

willing to recruit the language of science . . . and impose them upon the ensemble of immediate circumstances and options which Harvard confronted, always with his goals clearly in view.”); WILLISTON, *supra* note 72, at 199 (“[H]e sought simply to apply to the systemic study of law the methods habitually used by lawyers in the preparation of particular cases—namely, to study chronologically the previous decisions that seemed applicable to the question at issue, and to extract from the a guiding thread of principle. What was an appropriate method for a trained lawyer, Langdell thought would be appropriate also for young students who were given such aid as they required from an instructor.”).

⁷⁶ W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 136–38 (1997); *see also* KIMBALL, *supra* note 10, at 129 (“In 1870, upon leaving New York to return to HLS as a professor, Langdell understood that success in legal practice, even among elite lawyers, did not necessarily depend on legal expertise and that, absent such dependence, the legal system and the entire polity were at risk. He therefore adopted the view that the justice and legitimacy of the legal system depend on the quality and legitimacy of the legal profession, which require, in turn, that lawyers acquire strong legal knowledge through a demanding legal education. This novel view [likely] spurred . . . his commitment to legal science . . .”).

⁷⁷ LAPIANA, *supra* note 3, at 58.

⁷⁸ LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 10–11 (1986); *see also* KIMBALL, *supra* note 10, at 90 n.38 (noting that Langdell’s evolutionary language in the preface of his casebook reflected the change in outlook prompted by the publication of Darwin’s *The Origin of Species* in 1859); KALMAN, *supra* note 78, at 13 (noting that the case method’s “scientific nature was consistent with the passion for science of the Darwinian and positivistic late nineteenth century.”); Speziale, *supra* note 46, at 35 (“Langdell’s return to original sources, his dynamic classroom style, and his references to the ‘growth’ of doctrine, when seen in their late-nineteenth-century context, suggest organicism rather than unitary conceptualism.”).

⁷⁹ Speziale, *supra* note 46, at 3–4 & 4 n.10; *see also* LAPIANA, *supra* note 3, at 188 n.11 (“[T]he case method teachers espoused a theory of law based on the belief that law came from power and were opposed by thinkers who believed that law was discovered, not made, and that its substance consisted of timeless principles I believe that the ‘formalist’ label, at least in its most pejorative meaning, belongs not to Langdell and the other case method teachers, but to their opponents”). Grey, however, has argued that Langdell can be considered both a conceptualist in that he sought to structure “law into a system of classification made up of relatively abstract principles and categories,” and a formalist in that he sought to make “law certain by making legal reasoning deductive.” Grey, *supra* note 3, at 822. Grey further argues, “[f]or Langdell, the two were integrated; formality was to be achieved through the conceptualist enterprise itself. The general principles must serve as axioms constituting a deductive system that would make legal reasoning exact and scientific.” *Id.*

empirical analysis (of cases) could lead to the discovery of immutable legal truths.⁸⁰ In the following Subparts, an analysis of Langdell's specific approach to law as a science will be considered.

A. *Evolution (Organicism)*

For Langdell, legal principles develop over time, just like living things develop over time. In the preface to his 1871 casebook, Langdell, echoing scientific evolutionary theory, wrote that "[l]aw, considered as a science, consists of certain principles or doctrines," and "[e]ach of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries."⁸¹ This, of course, is one of the principal features of the common law in contrast with civil law.⁸²

Langdell's casebook shows that the historical development of the rules of contract law were important to him. For each topic, he arranged the cases geographically and chronologically,⁸³ and he added to each case the court and the year of decision.⁸⁴ Sir Frederick Pollock (an English jurist) recognized Langdell's appreciation for the

⁸⁰ GILMORE, *supra* note 2, at 42. This led Grant Gilmore to conclude that Langdell was "an essentially stupid man," whose belief that law is a science was "absurd," yet "mischievous," and it only became popular because it "corresponded to the felt necessities of the time." *Id.*; see also John Henry Schlegel, *Langdell's Auto-da-fé*, 17 LAW & HIST. REV. 149, 153 (1999) ("Langdell is unlikely to have understood what he was doing . . ."). However, "[t]he idea that anyone of note ever really held such an extreme view is a myth that has now thankfully been largely debunked by more careful thinkers." Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1450 (2008). The "felt necessities of the time" referred to be Gilmore were perhaps "the elite bar's desire for uniform laws among the states, its image of apolitical decision making, and its accentuation of competence and learning." Siegel, *supra* note 7, at 255; see also Reimann, *supra* note 7, at 255 n.93 (discussing the various theories explaining the rise of formalism in the United States).

⁸¹ LANGDELL, *supra* note 43, at vi; see also Reimann, *supra* note 7, at 108 ("Langdell's principles grow. Their change over time can be observed by reading the relevant cases in chronological order. In fact, their organic nature can be understood only by tracing their development. That is why Langdell organized his casebooks chronologically and taught cases accordingly.") (footnote omitted).

⁸² See Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 75 (2001) ("The common law is a law defined in terms of past judicial decisions. The resulting methodology is such that the common law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation. The common law evolves with the ongoing derivation of legal standards from prior judicial decisions, but it is defined by continuous motion. This means that the common law is that which cannot be crystallized, frozen, or ever entirely captured. It is fluid, with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the lived experiences which formed the basis of the litigation that led to the prior relevant court adjudications.") (footnotes omitted).

⁸³ KIMBALL, *supra* note 10, at 91.

⁸⁴ *Id.* at 88.

growth of legal doctrine, observing that “[d]ecisions are made; principles live and grow. This conviction is at the root of all of Mr. Langdell’s work.”⁸⁵ Langdell’s view that legal doctrines develop can perhaps be viewed in the context of Charles Darwin’s *The Origin of Species*, in that “[t]he idea that a species can originate by evolution parallels the notion that laws are not immutable, but alterable and contingent.”⁸⁶ Although Langdell’s *Summary* sought to extract principles of law from the cases, this too can be seen as “the outgrowth of an organic approach to law: Langdell could have been trying to group cases and formulate the patterns of principles without any judgment about their immutability.”⁸⁷

B. *Original Investigation (Empiricism)*

For Langdell, if law was a science, then the reported cases were the specimens to be studied. In his annual report of the law school for 1873–74, he wrote: “The work done in the Library is what the scientific men call original investigation. The Library is to us what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist.”⁸⁸ In his 1886 address at the inaugural meeting of the Harvard Law School Association, he said:

[It] was indispensable [for me] to establish at least two things [when I became dean]; first that law is a science; secondly, that all the available materials of that science are contained in printed books. . . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.⁸⁹

⁸⁵ *Id.* (quoting Frederick Pollack, *Vocation of the Common Law*, in HARVARD L. SCH. ASS’N, REPORT OF THE NINTH ANNUAL MEETING AT CAMBRIDGE 17 (1895)).

⁸⁶ David S. Clark, *Tracing the Roots of the American Legal Education—A Nineteenth-Century German Connection*, in I THE HISTORY OF LEGAL EDUCATION 502 (Steve Sheppard ed., 1999); see also Kunal M. Parker, *Representing Interdisciplinarity*, 60 VILL. L. REV. 561, 568 (2015) (“Indeed, ‘Langdell’s legal science’ . . . was not ahistorical in its own day. Instead, it was quite historical and intended explicitly to reveal the evolution of legal doctrine on the lines of the dominant Darwinian-Spencerian historical temporalities of the day. This is quite clear from the structure of Langdell’s famous casebooks, which included ‘correctly’ and ‘incorrectly’ decided cases in order for the student to see the unfolding of legal doctrine over time.”).

⁸⁷ Speziale, *supra* note 46, at 34.

⁸⁸ CHRISTOPHER C. LANGDELL, *Annual Report of the Dean of the Law School, 1873-74*, in HARVARD UNIVERSITY, ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE (1870-95), quoted in KIMBALL, *supra* note 10, at 349.

⁸⁹ *Professor Langdell’s Address*, in HARVARD LAW SCH. ASS’N, REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING AT CAMBRIDGE, NOVEMBER 5, 1886, at 48, 49–51 (1887), reprinted in 3 LAW Q. REV. 124 (1887), as reprinted in 21 AM. L. REV. 123–24 (1887), quoted in SUTHERLAND, *supra* note 30, at 175. The event was the inaugural meeting of the Harvard Law School (Alumni) Association commemorating the 250th anniversary of Harvard Law School. The keynote speaker was Holmes. KIMBALL, *supra* note 10, at 231.

Langdell's approach was thus scientific in that it was "methodological in nature."⁹⁰ Cases—the specimens—are studied and principles (conclusions) are made from careful investigation. President Charles William Eliot of Harvard, who had hired Langdell, said at the same event:

He [Langdell] told me that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.⁹¹

The cases would be studied to trace the evolution of a legal principle and then identify it in its current form. If law was "thought to be based on a natural and fixed evolutionary principle not unlike what Darwin observed in his evolutionary studies of the animal kingdom," then "legal principles could be discovered like an empirical fact."⁹²

Langdell, however, wrote that he believed that "the cases [the specimens] which are useful and necessary for this purpose [identifying general principles] at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study."⁹³ Coupled with his belief that "the number of fundamental legal doctrines is much less than commonly supposed,"⁹⁴ he thought it was "possible to take such a branch of the law as Contracts . . . and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines . . ."⁹⁵ In other words, some specimens yielded no important information, as their characteristics were the same as their ancestor's. But others had characteristics different from those of their ancestors, a characteristic that continued in later specimens, and these were the ones that were important to study.

Langdell's choice of specimens is controversial. He has been criticized for focusing solely on caselaw, and thus considering judge-made law to be the only "law." But for much of U.S. history the principal law *was* judge-made law. As Grant Gilmore has noted, during early U.S. history "[t]he federal Congress did little; the state legislatures did less. The judges became our preferred problem-solvers."⁹⁶ He has also

⁹⁰ Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196, 200 (1995).

⁹¹ *President Eliot's Address*, in REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING AT CAMBRIDGE, November 5, 1886, *supra* note 89, at 60–62.

⁹² Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 359 (1994) (footnotes omitted).

⁹³ LANGDELL, *supra* note 43, at vi.

⁹⁴ *Id.*

⁹⁵ *Id.* at vii.

⁹⁶ GILMORE, *supra* note 2, at 36.

been criticized for focusing too much on English cases, but, as noted by Samuel Williston, “a thorough study of any fundamental legal principle in American law necessarily must go back to the English cases because they were the one great common factor in the basic law of all the states.”⁹⁷ If Langdell sought to show the historical development of present rules, it would be difficult to avoid English cases, as the English common law had exerted a considerable influence on U.S. law.⁹⁸

Langdell’s use of cases as the specimens to be studied was notable in its rejection of natural law, and is consistent with legal positivism and separating what is “law” from what is “moral.”⁹⁹ As has been observed, “the case method teachers espoused a theory of law based on the belief that law came from power and were opposed by thinkers who believed that law was discovered, not made, and that its substance consisted of timeless principles.”¹⁰⁰ Langdell’s role as a former lawyer and as a current law professor was a key ingredient in his legal positivism. As he explained in a letter:

The chief business of a lawyer is and must be to learn and administer the law as it is; while I suppose the great object in studying jurisprudence should be to ascertain what the law ought to be; and although these two pursuits may seem to be of a very kindred nature, I think experience shows that devotion to one is apt to give more or less distaste for the other.¹⁰¹

⁹⁷ WILLISTON, *supra* note 72, at 200; *see also* TEEVEN, *supra* note 6, at 218 (arguing that Langdell used English cases because they had “an advanced commercial law and the advantage of a single common law jurisdiction”).

⁹⁸ *See* FRIEDMAN, *supra* note 3, at 65–71 (discussing influence of English law). *But see* Carrington, *supra* note 71, at 709 (arguing that the fact “[t]hat American public law, the structure of American legal institutions, and the openness of the legal profession were all (at least in part) conscious rejections of English traditions tended to escape the notice of Bostonians.”).

⁹⁹ “Those who wish to emphasize the separability of law from morality are generally called ‘legal positivists.’” NIGEL E. SIMMONDS, *CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS* 5 (3d ed. 2008). Legal positivism, which was given its first systematic statement by John Austin in the nineteenth century, repudiates natural-law theory, and maintains a distinction between analytical jurisprudence and normative jurisprudence, the former concerned with what the law is and the latter with what it ought to be. MURPHY & COLEMAN, *supra* note 7, at 19. Siegel has argued that Langdell’s desires to separate law from morals “was an oddity in Gilded Age America [and that] [m]ost Gilded Age lawyers, judges, and scholars, even Langdell’s colleagues at the Harvard Law School, believed law was deeply embedded in moral considerations and the moral predilections of the society it governed.” Stephen A. Siegel, *The Revision Thickens*, 20 *LAW & HIST. REV.* 631, 636 (2002).

¹⁰⁰ LAPIANA, *supra* note 3, at 188 n.11.

¹⁰¹ *Id.* at 77 (quoting Letter from C.C. Langdell to T.D. Woolsey (Feb. 6, 1871) (on file at Yale University Library)); *see also* Speziale, *supra* note 46, at 3 (“Nothing that [Langdell] did or said was inconsistent with the positivist approach to law that sees rules as constructs of cases and predictions of future decisions.”); Heidi Margaret Hurd, Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 *S. CAL. L. REV.* 1417, 1426 (1988) (“Langdell’s reluctance to admit moral argument into legal decisionmaking is . . . plausibly explained as a symptom of skepticism about the ontology of morals. Failure to reach an agreement concerning

Not only was this a rejection of natural law,¹⁰² it was also a rejection of the idea that fundamental legal principles could be knowable simply through reason.¹⁰³ Thus, it was more akin to positivism and empiricism than to rationalism,¹⁰⁴ though, as will be seen, it did have a rational aspect to it.

This legal positivism was consistent with Langdell's view of law as akin to a natural science, rather than to moral philosophy. As Robert Gordon describes it:

Through the generations, advocates of a scientific approach to law agreed that the science should be a positive science based on discoverable, observable facts—facts of nature and society, facts of history, and facts of prior decisions. In part this commitment to facts expressed an attitude—a ‘masculine’ readiness to look brute reality unblinkingly in the face, to throw off the crutches of religion, moral sentiment, and the stale formulae of conventional professional wisdom, and to embark upon the strenuous, tough-minded, intellectual path.¹⁰⁵

In this sense, Langdell's strain of classical legal theory was different from that of, say, Joel Bishop, the great U.S. treatise writer of the nineteenth century, whose “jurisprudence began with his belief in a transcendent Christian God who created the universe and endowed it with a physical and moral law.”¹⁰⁶ Classical writers such as Langdell “viewed traditional natural law theories that lacked this positive basis as philosophical speculation rather than legal science.”¹⁰⁷ For example, the natural

moral issues seemingly indicated to Langdell that there was nothing about which to agree. Morals, unlike legal rules, neither could be deduced from more general self-evident principles, nor inductively derived from the daily transactions among persons. Thus, there could be no science of morals.”); Kelley, *supra* note 62, at 1705 (noting that Langdell, in the quoted letter, “expressed his understanding of a distinct line between the study of law as it is and the study of law as it ought to be. He concluded that lawyers and law professors ought only to study the law as it is. Based on the views expressed in this letter, Langdell's notion of law as a science probably included Austin's rigid distinction between law and morality.”); Feldman, *supra* note 8, at 1426 (“Although Langdell did not often explicitly discuss positivism as a theory, Langdellians clearly were committed positivists.”).

¹⁰² See Grey, *supra* note 7, at 53 n.99 (“The classical legal scientists unanimously rejected natural law jurisprudence . . .”); Feldman, *supra* note 8, at 1434 (noting that “the Langdellians repudiated natural law.”).

¹⁰³ See Hoeflich, *supra* note 72, at 120 (“Langdell's major contribution to the notion of law as science was his emphasis on the empirical dimension by his insistence that the first principles to which deductive method must be applied could be attained not by reason or logic alone but through empirical research in the decided cases . . .”).

¹⁰⁴ Rationalism is “[a]ny philosophy magnifying the role played by unaided reason, in the acquisition and justification of knowledge.” SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 308 (2d ed. 2005).

¹⁰⁵ Robert W. Gordon, *The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231, 1240 (1995) (reviewing LAPIANA, *supra* note 3).

¹⁰⁶ Siegel, *supra* note 7, at 233.

¹⁰⁷ Grey, *supra* note 7, at 30.

lawyers asked when a promise was *morally* binding; to common-law positivists the question was when it was *legally* binding.¹⁰⁸

It has been argued, however, that Langdell, in an effort to make contract law entirely consistent, selected those cases he believed represented good law, and reconciled cases in a way the judges would not have intended.¹⁰⁹ But this might have been hard to avoid if one is writing a casebook or (as the separately published *Summary* could be considered) a treatise. As even Gilmore recognized (though disparagingly):

The function of the legal scholar, whether he is writing a treatise or compiling a casebook, is 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 truth. That is to say, the doctrine—the one true rule of law—does not in any sense emerge from the study of real cases decided in the real world. The doctrine tests the cases, not the other way around.¹¹⁰

Gilmore argued that Langdell relied primarily on English cases, and often mischaracterized those cases, to develop his ideal concept of contract law.¹¹¹ It has similarly been argued that while Langdell claimed his work was “scientific,” it did not follow “the rigorously positivist tradition in which [for example] Holmes was working.”¹¹² Gilmore derisively argued that Langdell’s *Summary* explained “which cases are ‘right’ and which are ‘wrong.’”¹¹³ And Langdell’s belief that contract law could be reduced to just a few principles meant that the system would have to make sense logically, and thus cases that did not fit the logical structure would have to be rejected as incorrectly decided. As one critic has written:

Langdell did not include in his base for induction all the decided cases on a particular topic. The subsequent induction of the true rule or the true meaning of a legal doctrine was not a scientific induction at all. It just reflected Langdell’s preconceived notions, which led him to include some cases in the base and to exclude others. Moreover, Langdell on some questions, such as the effective date of acceptance by mail, included cases reaching

¹⁰⁸ P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 9 (1981).

¹⁰⁹ GILMORE, *supra* note 2, at 47–48; *see also* Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Apr. 10, 1881), *reprinted in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 17 (Mark DeWolfe Howe ed., 1941) (“[H]is explanations and reconciliations of the cases would have astonished the judges who decided them.”).

¹¹⁰ GILMORE, *supra* note 2, at 47.

¹¹¹ *Id.* at 47–48.

¹¹² Kelley, *supra* note 62, at 1697. Gilmore has argued that it was Holmes, not Langdell, who, more than anyone else, gave classical contract law its content. GILMORE, *supra* note 2, at 48.

¹¹³ GILMORE, *supra* note 2, at 125 n.3.

diametrically different results. One cannot scientifically derive by induction a single rule from diametrically opposed cases.¹¹⁴

It appears here that Langdell is damned if he does, and damned if he doesn't. He is accused of cherry-picking cases to support his theory of contract law, and then accused of including inconsistent results despite arguing that law is a science based on a few fundamental principles.¹¹⁵ This all shows, however, that Langdell's argument that "law is a science" cannot be taken too seriously, and that Langdell himself understood it was not to be taken as something akin to a natural science.

While rejecting some cases as incorrectly decided is inconsistent with a thoroughgoing positivism, it is a necessary byproduct of a program designed to bring order to an area of law. The architects of classical contract law in a sense stood somewhere between legal positivism and natural-law theory, in that they divorced what is law from what is moral, yet they also sought to bring rational order to the confused state of the common law, the latter goal meaning some caselaw had to be rejected. Similarly, if one believed that there were in fact just a few general principles of law, then inconsistent cases would also have to be rejected as incorrectly decided. The point was to make the law more certain and predictable, and "Langdell's version of scientific naturalism enabled legal analysts like Langdell to believe that they could, if they employed the correct method and perspective, discover 'right answers' for the legal problem at hand."¹¹⁶ For example, Professor Dennis Patterson argues that under a "geometric model" of law identified by Professor Thomas Grey:

it is the task of legal theory to identify principles basic to the subject under scrutiny. But here normativity and rationality converge. Principles are identified through the use of scientific method; but once identified, those principles must be internally coherent. Formal derivability—the hallmark of the geometric method—is not possible if there are contradictions among first principles.¹¹⁷

As has been recognized, "the legal scientists themselves, if asked what they were doing, would surely have emphasized their generalizing ambitions to produce what Holmes called a 'philosophically arranged' body of law, a rational scheme or system of abstract categories for organizing legal knowledge to replace the old forms of action."¹¹⁸ Thus, while the project had more positivism and empiricism in it than rationalism, creating a rational scheme was one of the goals.

And Langdell's belief that there were in fact just a *few* general principles of law necessarily gives it a certain unempirical flavor. For example, it has been argued that "[a]n article could be written about the contrast between the classical jurists' rhetoric of rigorous scientific inquiry and the casualness of their empiricism—their

¹¹⁴ Kelley, *supra* note 3, at 39.

¹¹⁵ *Id.*

¹¹⁶ Minda, *supra* note 92, at 359 (footnotes omitted).

¹¹⁷ Patterson, *supra* note 90, at 199.

¹¹⁸ Gordon, *supra* note 105, at 1236 (footnote omitted).

ruthlessness in squeezing and suppressing data that did not fit”¹¹⁹ But the same commentator recognizes why, in his belief, this was so: “[T]heir justification was surely that the generalizing feature of their project was far more important and urgent business than the empirical or factual side.”¹²⁰ Simply put, generalizing and empiricism are, at a certain point, in tension.¹²¹

The more serious charge is that Langdell cherry-picked cases to support the identification of axioms he wanted. Obviously, if this was the case, there is nothing scientific about his approach.¹²² For example, it has been asserted that “[i]n Langdell’s system, cases are carefully selected to serve as the building blocks of concepts that will thereafter operate as axioms”¹²³ It has been further argued that “[c]orrect legal principles are discovered not in the plethora of decided cases, but in the realm of (ideal) theory. Cases are illustrative, not instructive. Cases stand in need of explanation. Doctrine—explanatory principles—is the (hidden) true legal order.”¹²⁴ We will return to this idea later.

C. Taxonomy (Classification)

For Langdell, law as a science did not stop at simply reading cases and identifying the evolution of legal principles over the past several hundred years. Langdell’s reference to law’s “essential doctrines” hints at his belief that law as a science also involves taxonomy (the classification of things according to their presumed natural relationships). In fact, he made this explicit when he wrote that these essential doctrines should be “classified and arranged that each should be found in its proper

¹¹⁹ *Id.* at 1238 n.16; *see also* Patterson, *supra* note 90, at 198 (“If the cases were to be properly explained, the principles of law identified by Langdell would, of necessity, have to account for all of the ‘data.’ It is at this point that the identification of ‘science’ with ‘scientific method’ founders.”).

¹²⁰ Gordon, *supra* note 105, at 1238 n.16; *see also* Patterson, *supra* note 90, at 198 (“If the cases were to be properly explained, the principles of law identified by Langdell would, of necessity, have to account for all of the ‘data.’ It is at this point that the identification of ‘science’ with ‘scientific method’ founders.”).

¹²¹ This led John Chipman Gray to write privately in 1883 that “[i]n law the opinions of judges and lawyers as to what the law is, *are* the law, and it is in any true sense of the word as unscientific to turn from them, as Mr. Langdell does . . . as for a scientific man to decline to take cognizance of oxygen or gravitation [A] school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil.” Letter from John Chipman Gray to Charles William Elliot, President, Harvard Univ. (Jan. 8, 1883) (on file with Harvard Archives), *quoted in* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 158 (1963).

¹²² *See* Patterson, *supra* note 90, at 200 (“It turns out . . . that there is very little that is ‘empirical’ in Langdell’s approach to law In science, validity (e.g., of a hypothesis) is a function of confirmation (by the data). A confirmed hypothesis is one that has survived the experimental tribunal. But for Langdell, validity was a function of verisimilitude—the correspondence of case with principle. As principle (doctrine) enjoyed pre-testing validity, it was the case that was always under scrutiny.”).

¹²³ Gordon, *supra* note 105, at 1237.

¹²⁴ Patterson, *supra* note 90, at 201.

place, and nowhere else.”¹²⁵ The rationale behind scientific taxonomy “is that the human mind craves order, and taxonomy (describing species, naming species, classifying them within a system of sets and subsets) is what gives comprehensible order to the dizzying multiplicity of living creatures.”¹²⁶ And, remember once again, that classical legal theory sought to bring order to the common law in the wake of the abandoning of the old forms of action, and the dizzying multiplicity of legal details. It was as if the legal scientists had decided that the old classifications were all wrong and new ones—better ones, more accurate and logical ones—were now needed.¹²⁷ It has thus been stated that “Langdell . . . was an amateur botanist, who classified law much as he did plants.”¹²⁸

D. Axioms (Conceptualization)

This taxonomy, however, was not simply designed to classify; the classifications would result in principles that could be used by judges to properly decide exactly what they were observing when a new set of facts came before them (for example, “Oh, you’re an unenforceable promise” or “Oh, you’re an enforceable promise”). To Langdell, the proper study of the law, like the study of nature, “consisted in the careful observation and recording of many specific instances, and then from these instances derivation of general conclusions that the qualities of the phenomena or specimens would hold constant for other instances of the same classes.”¹²⁹ While Langdell’s *Summary* is not presented in a pyramid of concepts like the work of say, the German legal theorists,¹³⁰ and “there is no sense of a strictly descending order of generality,”¹³¹ Langdell did argue that there were a limited number of principles, and, as will be seen later, there was a pyramid of sorts lurking in the *Summary*.

Williston, for example, wrote that “Langdell was not much interested in the historical development of the law except as it led to the discovery of legal principles.”¹³² Thus, Langdell’s most significant contribution for jurisprudence was, perhaps, his attempt to reduce the law of contracts to these top-level principles, i.e., a few guiding principles, such as abstracting contract formation into offer, acceptance,

¹²⁵ LANGDELL, *supra* note 43, at vii (noting that “[i]f these [fundamental legal] doctrines could be so classified and arranged that each could be found in its proper place, and nowhere else, they would cease to be formidable in their number.”).

¹²⁶ DAVID QUAMMEN, *THE RELUCTANT MR. DARWIN: AN INTIMATE PORTRAIT OF CHARLES DARWIN AND THE MAKING OF HIS THEORY OF EVOLUTION* 97 (2006).

¹²⁷ See Boyer, *supra* note 13, at 19 (“Another facet of formalism was its belief in fine lines and neat categories, distinctions which were purportedly cognizable on logical grounds.”).

¹²⁸ KALMAN, *supra* note 78, at 11. To the extent Langdell was an “amateur botanist,” the only apparent evidence of his practicing botany was as a college student in his Natural History class. See Kimball, *supra* note 24, at 210–15 (discussing the botanical influence on Langdell).

¹²⁹ SUTHERLAND, *supra* note 30, at 176.

¹³⁰ Reimann, *supra* note 7, at 107.

¹³¹ *Id.* at 262 n.150.

¹³² WILLISTON, *supra* note 72, at 199.

and consideration.¹³³ And importantly, recall that he believed that “the number of fundamental legal doctrines is much less than is commonly supposed.”¹³⁴ As Grant Gilmore noted, “it is with Langdell that, for the first time, we see Contract as . . . an ‘abstraction’”¹³⁵ The theory aspired to have a legal system based on a “few basic top-level categories and principles [that] formed a conceptually ordered system above a large number of bottom-level rules.”¹³⁶ The scientific nature of law meant that a few fundamental rules and principles could be identified.¹³⁷ Gary Minda has written:

[Langdell’s idea of law as a science] expresses one of the great unfulfilled promises of legal modernism: the belief that the deep structure of law is knowable, that fundamental principles can be discovered from an examination of complex phenomena, and that the secrets of the law are intellectually and rationally discoverable through the application of the correct scientific-like methodology. These ideas are characteristic of the scientific naturalism associated with Darwinian thought of the early nineteenth century.¹³⁸

Langdell’s scientific approach to law thus involved both induction and deduction or, stated more colloquially, it went both up and down. It started at the bottom, with the search for bottom-level rules. These bottom-level rules would be discovered from an analysis of the reported cases (the specimens that had been collected in the laboratory, so to speak).¹³⁹ Once these bottom-level rules had been identified, it was then time to derive top-level principles (axioms, fundamental principles of law) from the collection of bottom-level rules.¹⁴⁰ If it had been done today, one can imagine a mass of sticky notes all over a large table, each one having a rule extracted from a case. The sticky notes are then put into separate sections, such as “mutual assent” or “consideration.” Taxonomy would continue, as the bottom-level rules put in each category would then be organized into just a few top-level principles.

¹³³ KIMBALL, *supra* note 10, at 93–94.

¹³⁴ LANGDELL, *supra* note 43, at vi.

¹³⁵ GILMORE, *supra* note 15, at 14.

¹³⁶ Grey, *supra* note 7, at 11.

¹³⁷ KALMAN, *supra* note 78, at 11.

¹³⁸ Minda, *supra* note 92, at 359 (footnotes omitted).

¹³⁹ Grey, *supra* note 7, at 20. Grey has argued that simple observation and recording of the results was not, however, the way it worked. He argues that these bottom-level rules would be stated in a way that led to uncontroversial results when applied to facts—objective tests that avoided determining the parties’ subjective intentions and bright-line rules rather than standards. *Id.* at 11. In other words, an agenda might have been at work, which, if true, would distinguish Langdell’s approach from typical scientific inquiry.

¹⁴⁰ *Id.* at 19; *see also* KIMBALL, *supra* note 10, at 111 (discussing the inductive nature of Langdell’s mode of legal reasoning).

These top-level principles could be viewed as axioms, in the sense of “an established rule or principle” rather than a “self-evident truth.”¹⁴¹ If they were derived through induction they could not be self-evident, though critics have argued they were more like the latter than the former in that the “correct” specimens were identified normatively.¹⁴² Langdell definitely had a few “top-level principle” sticky notes that did not seem to have any sticky notes underneath them except for ones labeled “Hugo Grotius” or “Robert Joseph Pothier,” who were neither English nor cases, but instead civil-law jurists (but more on this later).¹⁴³ If the approach was in fact scientific and positivist, and not normative, the resulting axioms were not based on considerations of social policy by Langdell. For example, Douglas Baird has argued that social policy had no place in Langdell’s theory of contracts:

Langdell had a faith that the common law had an inner logic, one that rested upon principles, as did the physical universe. These principles were like Newton’s laws, and they had an independent existence that could be discovered through careful study. Whether such things as the doctrine of consideration was good or bad was not a meaningful question. It was like asking whether gravity was good or bad.¹⁴⁴

Holmes believed Langdell’s approach was unscientific because the attempt to reduce a body of law to the consequences of a few fundamental principles was inconsistent with way the legal system really worked:

As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequences of simple postulates is

¹⁴¹ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 87 (11th ed. 2003).

¹⁴² See, e.g., Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS*, *supra* note 1, at 206, 208 (arguing that classical contract law’s axioms were of the “self-evident” kind, and “[a]mong the axioms of this school were that only bargain promises have consideration, that bargains are formed by offer and acceptance, that the measure of damages for breach of contract is expectation damages, and that contracts must be interpreted objectively.”); *id.* at 210 (arguing that classical contract law “conceived of contract law as a set of fundamental legal principles that were justified on the ground that they were self-evident”); Eric A. Posner, *The Decline of Formality in Contract Law*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 61, 64–65 (F. H. Buckley ed., 1999) (“Holmes’s commitment to an axiomatic system of contract law comes perilously close to Langdell’s ‘geometric’ approach to contract law, but should not be confused with it. A formal theory like Holmes’s must be internally consistent, or else it will produce indeterminate results. However, Holmes does not purport to derive his theory from self-evident premises. Instead, he tried to present it as a unification of existing cases, which themselves emerged from a long history of common law development in response to social needs.”).

¹⁴³ LAURA R. FORD, *THE INTELLECTUAL PROPERTY OF NATIONS: SOCIOLOGICAL AND HISTORICAL PERSPECTIVES ON A MODERN LEGAL INSTITUTION* 346 (2021).

¹⁴⁴ Douglas G. Baird, *Reconstructing Contracts: Hamer v. Sidway*, in *CONTRACTS STORIES* 160, 165 (Douglas G. Baird ed., 2007); see also Reimann, *supra* note 7, at 107 (“[T]he abstract nature of legal concepts also makes them more or less independent of policy or convenience for . . . Langdell . . .”).

always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.¹⁴⁵

Just as the critics of formalism viewed the empiricists as not empirical enough,¹⁴⁶ Holmes viewed Langdell's resulting axioms and the conclusions they dictated as not empirical enough.

It has similarly been argued that trying to distill just a few governing principles leaves no room for exceptions to those doctrines:

Langdell included in the domain of cases for his scientific analysis only those illustrating or developing a particular legal doctrine; he excluded cases that recognize that the doctrine is defeasible when an overriding normative principle applicable to the facts suggests that the ordinary application of the legal concept would be unjust. Langdell thus set up a non-normative conceptual system of law radically at odds with the underlying phenomena. This points to the most fundamental problem with Langdell's methodology. It was inconsistent with the way common law judges decided cases, then and now.¹⁴⁷

A reduction of exceptions based on perceived overriding normative principles was, however, perhaps the point. Recall that Langdell, likely as a result of his Tammany Hall experience, was seeking to make the law more predictable, and exceptions (and the discretion to create exceptions) makes the law less predictable.

Note here that if Langdell was truly extracting top-level principles from the cases, then he can be attacked as a legal positivist who is unconcerned with social policy and the morality of the rules. And if he is selecting cases to fit into a logical structure designed to bring order to the common law, he can be attacked as ignoring social policy and the morality of the rules in favor of rational order. And if he is selecting cases to fit a vision of the law he prefers, he can be attacked as adopting a version of law that is immoral.

Langdell's legal positivism did not, however, necessarily mean that policies did not underlie the axioms he discovered through scientific inquiry. The approach would result in axioms that were themselves based on the policies embedded in the court

¹⁴⁵ [Oliver Wendell Holmes, Jr.], Book Review, 14 AM. L. REV. 233, 234 (1880) (unsigned review of C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (2d ed. 1879)).

¹⁴⁶ MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLUTION AGAINST FORMALISM 24 (Beacon Press 1957) (1949).

¹⁴⁷ Kelley, *supra* note 3, at 39.

decisions generating the axioms,¹⁴⁸ but at the same time the approach sought to provide courts with a nonpolitical way of resolving future disputes.¹⁴⁹

Later criticism was that the classical theorists sought top-level principles based on the economic policy of *laissez-faire*.¹⁵⁰ But this misunderstands the classicists' commitment to law as a science. The classicists viewed their work as scientific, in that they would review the raw material—the cases—and extract legal principles through reason.¹⁵¹ In fact, “[m]ost . . . were perfectly happy to see the regulatory-protective sphere expand, so long as its actions were properly classified on the public side of the public-private ledger.”¹⁵² *Laissez-faire* was more a world-view of the courts during the era of classical contract law than an academic world-view.¹⁵³

¹⁴⁸ Movsesian, *supra* note 20, at 233 (“[A] jurisprudence that adheres closely to case law is unlikely to ignore social propositions. The judges who wrote the opinions . . . were members of American society, and one can safely assume that over the course of years on the bench they developed a working knowledge of American commercial practice. Even discounting for occasional bias and incompetence, one cannot assume that these judges routinely rendered decisions at odds with that practice. A jurisprudence that builds on case law is thus at least as likely to reflect actual social propositions as one that looks to metaphysical systems for its justification. As Williston writes, sticking to decided decisions can protect against an academic tendency ‘to get too far from the earth.’”) (footnotes omitted) (quoting Samuel Williston, *The Necessity of Idealism in Teaching Law*, 2 AM. L. SCH. REV. 201, 203 (1908)).

¹⁴⁹ See Gordon, *supra* note 105, at 1250 (“The most ambitious claim for legal science, of course, was that even though these issues might be socially important—perhaps even the subject of epic social struggles—common law principles, the ordinary tools of lawyers and judges, offered techniques for resolving such issues in the courts that did not require taking positions on any of the political, economic, and moral questions implicated in them. In view of the issues’ importance, legislators and social scientists—who unlike lawyers and legal scientists may properly take economic, political, and moral factors into account—may wish to regulate these activities, but that is entirely their business. The legal scientist must ignore all those considerations. He just calls the law the way it is.”).

¹⁵⁰ See GILMORE, *supra* note 2, at 13 (noting that some link “nineteenth-century legal formalism with nineteenth-century *laissez-faire* economics.”); *id.* at 66 (“In recent years it has become a truism to point out that *laissez-faire* economics and late nineteenth-century legal theories are blood brothers.”); Movsesian, *supra* note 20, at 226 (quoting Richard A. Epstein, *Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT*, *supra* note 142, at 25–26) (“According to the conventional wisdom, Williston shares the classical belief that freedom of contract is a conceptual imperative, a principle that follows necessarily from an understanding of contracts’ true nature. This essentialism supposedly leads Williston to reject all limits on party autonomy, even limits based on health and safety grounds—to endorse, along with other classicists, the *Lochner* Court’s holding that the Constitution prohibits legislation that interferes with parties’ right to contract on terms they see fit.”); *id.* at 253 (noting that “liberal critics posit an ‘intimate connection between the formal doctrines’ of classical contract law—the consideration requirement, the objective theory of interpretation, and so on—and ‘the political philosophy of *laissez-faire*.’”).

¹⁵¹ Grey, *supra* note 7, at 30.

¹⁵² Gordon, *supra* note 105, at 1249.

¹⁵³ NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 25 (1995).

But the Langdellian law-as-a-science approach had obvious appeal to business interests.¹⁵⁴ First, the system was built for predictability, and businesses, rising in power during the Gilded Age, benefitted from legal predictability.¹⁵⁵ Second, classical theorists' resulting theory of law, which involved limited liability, was consistent with nineteenth-century individualism and laissez-faire economic theory.¹⁵⁶ Recall Grant Gilmore's argument that Langdell's theory of law was consistent with the felt necessities of the time.¹⁵⁷ Their legal theories thus came to be viewed as a form of conservative ideology, and Langdellian legal science was even confused with the laissez-faire constitutional doctrines of the *Lochner* era.¹⁵⁸

Another criticism of Langdell's approach is that identifying a few top-level principles to which all bottom-level rules must be derived would make the law static. Grant Gilmore, for example, argued that "[t]he jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever."¹⁵⁹ A view of the law based on a "few relatively fixed and fundamental principles, was not readily adapted to a period of rapid social change."¹⁶⁰ Judges were to apply common-law doctrines "without allowing for any exceptions based upon new social propositions or the harshness of particular results"¹⁶¹

¹⁵⁴ See Schlegel, *supra* note 80, at 153–54 (“I do not mean to suggest that Langdell was a conscious conspirator with the Gilded Age elites, a running dog of capitalism, as it were. He was an essentially stupid man who felt quite honestly that he was working to elevate the profession by educating counselors, where others merely strove to educate lawyers. But his creation fit well with the existing ideology of the bar that maintained that it exercised neutrally placed, professional judgment capable of mediating between capital and labor, industry and agriculture, this at a time when there was need for such professional judgment on the part of the capitalist industrial elites. Thus, Langdell was no heretic. Heretics do not have buildings named for them at Harvard; heretics usually burn at the stake.”).

¹⁵⁵ Grey, *supra* note 7, at 32.

¹⁵⁶ GILMORE, *supra* note 15, at 95; see also KALMAN, *supra* note 78, at 13 (“[T]he conceptualism behind the case method bolstered the laissez-faire economics of the age.”).

¹⁵⁷ GILMORE, *supra* note 2, at 42.

¹⁵⁸ Grey, *supra* note 7, at 39; see also Siegel, *supra* note 7, at 254 (“Beginning in the 1970s, scholars expanded classicism's scope by arguing that late-nineteenth-century laissez-faire constitutionalism was the public law expression of the same jurisprudential persuasion. These claims proved problematic because, as was subsequently observed, the private law scholars most identified with classical thought generally advocated deferential review of legislation and opposed the activism required to void economic and social regulatory enactments.”).

¹⁵⁹ GILMORE, *supra* note 2, at 43.

¹⁶⁰ Grey, *supra* note 7, at 39.

¹⁶¹ Movsesian, *supra* note 20, at 224–25.

It has been argued, therefore, that Langdell's enduring image is as an "amoral natural lawyer,"¹⁶² in the sense he believed there existed "a rationally connected scheme of preexisting and *unchanging*, true, rules of law that are discoverable by judges."¹⁶³ Thanks to Holmes:

it became commonplace to call Langdell a "legal theologian" who believed that legal principles were eternally inscribed in some "heaven of concepts." This conclusion, in effect, turns Langdell into some sort of "amoral" natural lawyer [S]uch a theory apparently would picture law as having an existence independent and prior to legal practice, but its content would not even be based on morality but instead on something else—often referred to by the critics of formalism as mere or pure logic.¹⁶⁴

It has thus been argued that Langdell's approach was remarkably similar to the approach of Robert Joseph Pothier (a French jurist),¹⁶⁵ who worked in the natural-law tradition.¹⁶⁶ By seeking to organize the law according to rational principles, the approach of classical legal scholars in effect continued the natural-law tradition.¹⁶⁷

The notion that Langdell was in fact an amoral natural lawyer is based on several things. First, Langdell's comparison of law to natural science suggested that there were "true" rules of law, a priori legal truths, much like there were true rules of physics, from which subsidiary truths could then be deduced. Remember what he said in his 1886 speech to alumni:

We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all what the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.¹⁶⁸

¹⁶² Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2080 & 2081 n.112 (1995).

¹⁶³ Speziale, *supra* note 46, at 1 n.1 (emphasis added).

¹⁶⁴ Sebok, *supra* note 162, at 2080–81 (footnote omitted); *see also id.* at 2081–82 ("The equation of formalism with natural law . . . had its origins in Holmes's early antiformalist critique of Langdell By emphasizing the role of deduction in formalism, Holmes linked Langdell to the idea that there were a priori legal truths, and so connected Langdell—and formalism—to natural law.").

¹⁶⁵ Clark A. Remington, *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29, 51–52 (1998).

¹⁶⁶ Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 288 (2005).

¹⁶⁷ *See* A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW Q. REV. 247, 257 (1975) (noting that, with respect to English scholars in the nineteenth century, "they curiously continue to present the law as consisting of rational principles which are merely illustrated by the cases; to this extent they maintained the natural law tradition.").

¹⁶⁸ Langdell, *supra* note 89, at 50–51.

Langdell's approach has thus been likened to that of Joel Bishop and antebellum science:

[A]ntebellum science was based on the idea of natural theology—that the truth of the Bible, in the form of scriptural principles, was to be found in nature and that the study of nature would demonstrate the truth of these principles. The formal structure of Langdell's science is much the same; the truth of doctrine, in the form of principles, was to be found in cases and the study of cases would demonstrate the truth of legal principles—that were then used to trim the cases themselves.¹⁶⁹

And if there were “true” rules of law, this in turn suggested that those rules were not subject to change, any more than the rules of physics are subject to change.¹⁷⁰ Grant Gilmore, for example, argued that Langdell's proposition that law was a science meant that:

legal truth is a species of scientific truth. The quality of scientific truth, as most nineteenth-century minds understood it, is that once such a truth has been demonstrated, it endures. It is not subject to change without notice. It does not capriciously turn into its own opposite. It is, like the mountain, there. The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever. This strange idea colored, explicitly or implicitly, all the vast literature which the Langdellians produced.¹⁷¹

It has similarly been argued that Langdell's scientific approach to law was incoherent because although based on the historical development of the law, it would then “freeze the law at that stage in its development.”¹⁷²

Louis Menand has argued that Langdell's view of law as a science was in fact pre-Darwinian: “He thought that behind the variety of actual judicial opinions there was an ideal order, just as Agassiz had taught that there was an ideal order behind the variety of actual living organisms.”¹⁷³ Edward Rubin concurs:

Agassiz was an empiricist; he believed that nature's secrets were unlocked by scrupulous examination of physical evidence. . . . But Agassiz could not accept the idea that the empirical evidence he valued so highly would reveal a stochastic, malleable world of the sort that Darwin has depicted, and indeed, he remained a vociferous opponent of Darwin's theory until his death in 1873. Instead, he insisted that the biological world was composed of fixed,

¹⁶⁹ Schlegel, *supra* note 80, at 152 (footnote omitted).

¹⁷⁰ See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 13 (1973) (“There is perhaps even a hint that the common law may be nearing the end of the process of historical growth, culminating in a final, logically complete system. However, this is not a necessary implication of Langdell's statement.”).

¹⁷¹ GILMORE, *supra* note 2, at 43.

¹⁷² Kelley, *supra* note 3, at 39.

¹⁷³ LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 341 (2001).

unchanging forms that had been specially created, and he believed that empirical examination of particular plants and animals would reveal the essential features of those forms. Langdell's conception of science reiterated this ancient and outmoded concept. By examining cases, he believed, the student would come to perceive the *enduring principles* of Anglo-American law that lay behind them.¹⁷⁴

There is insufficient evidence, however, to conclude that Langdell believed in a priori, enduring legal truths, and that he was some sort of "amoral natural lawyer." Langdell's emphasis on the development of legal doctrine shows that this charge goes too far. As noted, Langdell wrote that "[l]aw, considered as a science, consists of certain principles or doctrines," and "[e]ach of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries."¹⁷⁵

Langdell, in his annual report for 1876–77, in defending his approach to teaching law as a science, acknowledged that arguments had been made that it could not be taught as a science, and he acknowledged that that position "may be supported by plausible arguments."¹⁷⁶ He conceded that "[l]aw has not the demonstrative certainty of mathematics . . . nor does it acknowledge truth as its ultimate test and standard, like natural science . . ."¹⁷⁷ He also opposed a bar examination, and in doing so, while arguing that it was indispensable for an effective system of legal education to have "a scientific course of study,"¹⁷⁸ downplayed the identity between law and science to argue against having to pass a "scientific" examination for bar admission.¹⁷⁹ Langdell was also apparently willing to reconsider the conclusions he had drawn from case analysis, something that would be inconsistent with an "amoral natural lawyer."¹⁸⁰

¹⁷⁴ Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 633–34 (2007) (emphasis added). Recall that Langdell was taught zoology by Agassiz, KIMBALL, *supra* note 10, at 25, though he was taught botany by Asa Gray, *id.* at 24, who welcomed Darwinism (which came after Langdell graduated, however). Kimball, *supra* note 24, at 213.

¹⁷⁵ LANGDELL, *supra* note 43, at vi; *see also* Grey, *supra* note 7, at 28–29 (noting that the classical theorists "accepted the nineteenth-century evolutionary idea that law, even in its fundamentals, was not unchanging but progressively evolving . . .").

¹⁷⁶ HARVARD UNIV., ANNUAL REPORTS OF THE PRESIDENTS AND TREASURER OF HARVARD COLLEGE, 1876–77, at 96–97, *reprinted in* LAPIANA, *supra* note 3, at 56–57.

¹⁷⁷ *Id.*; *see also* William Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 721 (1894) (acknowledging that Langdell's case method is an applied science, not an exact science).

¹⁷⁸ HARVARD UNIVERSITY, *supra* note 176, at 95.

¹⁷⁹ Chase, *supra* note 75, at 359.

¹⁸⁰ *See* WARREN, *supra* note 39, at 457 ("Professor Langdell was always willing to reconsider a conclusion in the light of new suggestions A student recently informed me of a course in which Professor Langdell changed his opinion in regard to a case three times in the course of one week, each time advancing with positiveness a new doctrine. That he could do this without losing the respect or confidence of his students shows the esteem in which he was held To

This suggests that Langdell saw perceived axioms as questionable, open to debate as to whether they were supported by the cases.¹⁸¹ The axioms could not be tested against some external standard and thus conclusively proven to be true or false.¹⁸² When Holmes criticized an attempt “to deduce the *corpus* from *a priori* postulates,” he was aiming at the German Pandectist legal scientists and their neo-Kantianism, not Langdell.¹⁸³ A dedication to the case method is simply inconsistent with a belief in self-evident principles of law.¹⁸⁴ As Anthony Sebok has written:

Langdell was acutely aware of the fact that legal principle, unsupported by the actual law found in the judgments of courts, was unlikely to be a correct statement of the law. That some might think otherwise is a bit of a mystery. Langdell treated the decisions of courts as results from a “laboratory” from which all reliable conclusions about the principles of law were drawn.¹⁸⁵

Mathias Reimann notes that a key difference between Langdell and the German legal scientists was that whereas the latter found principles from “speculation about human

lose confidence in him for changing his position upon a legal proposition would be as absurd as to lose confidence in Charles Darwin if he withdrew a tentative conclusion found to be false after more extended investigation. Professor Langdell studied the law as contained in the reports in the same spirit in which the great scientists study the phenomena of nature.”) *But see* Schlegel, *supra* note 80, at 152 (“That Langdell changed his mind in class does not make him less of the formalist that Gilmore objected to.”).

¹⁸¹ *See* Speziale, *supra* note 46, at 20 (“For legal theory, the implication seems to have been that law is not a superstructure of rules from which to deduce the proper results of particular cases, but rather that law consists of sets of cases out of which multiple theories constantly spring forth.”); Chase, *supra* note 75, at 359 (“Christopher Langdell would appear to be (on the basis of the statement above) an anti-Langdellian, crypto-Legal Realist. The one idea to which Gilmore leads us to believe Langdell will cling tenaciously, the Harvard Dean hurls to the winds.”).

¹⁸² *See* LAPIANA, *supra* note 3, at 57 (“Langdell did not see legal science consisting of propositions that can be easily tested like the grammatical rules of the classical languages. Finally, and most important, it was impossible to test legal propositions against some external standard of truth, a role that nature performs for the natural sciences.”).

¹⁸³ Grey, *supra* note 3, at 818; *see also* WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937*, at 92 (1998) (“American legal science differed radically from continental, for the ‘data’ of common law legal science were to be found in the reports of cases, whereas judicial decisions were of little significance to the pandectist.”).

¹⁸⁴ *See* Hoeflich, *supra* note 72, at 121 (“The need for first principles was always a part of the deductive model of law, but the means of deriving these first principles was also always variable. Leibniz, Wolff, Thibaut, and the Pandectists looked to natural law and natural law in its best mundane manifestation, Roman law, for these principles. Savigny looked to the history and society of each nation, as did Legaré. Langdell looked to cases.”).

¹⁸⁵ Sebok, *supra* note 162, at 2080; *see also* TWINING, *supra* note 170, at 12 (noting that Langdell’s “law as science” approach has as one of its roots nineteenth-century positivist thought).

nature, the rules of reason, or *a priori* notions about the universe,” and were rooted in Immanuel Kant’s philosophy, Langdell “finds them in the traditional common-law manner, namely through induction in the actual cases (though he selects his cases), and that cases are what gives them birth.”¹⁸⁶ Thus, despite what some have argued,¹⁸⁷ Langdell’s approach did not maintain there were *a priori*, self-evident legal principles.

But this does not mean that Langdell’s theory of contract law lacked any resemblance to natural law. For example, it has been argued that under Langdell’s approach “[e]xisting rules were *elevated* into the category of self-evident verities.”¹⁸⁸ In other words, although derived from cases, the resulting axioms were then given a status *equivalent* to “self-evident verities.”

This criticism has some validity. Langdell’s approach—wittingly or unwittingly—seems to discourage innovation and exceptions. As has been argued, if “[e]xisting rules were elevated into the category of self-evident verities . . . this meant that the law turned a blind eye to social and economic concerns—thereby setting itself, deliberately or unwittingly, against social change.”¹⁸⁹ Langdellian legal science was marked with “the intense respect for *stare decisis*,”¹⁹⁰ and he had written that each of law’s principles and doctrines had “arrived at its present state by slow degrees.”¹⁹¹ One commentator has observed:

For the Harvard professors, binding precedents functioned as an analog to the facts of physical science: they were observable phenomena, which theory, principle, and laws were developed to explain and systematize. The Harvard school’s reliance on *stare decisis* for the ultimate grounding of the legal system had a cost. It turned jurisprudence from a study of what ought to be into a study of what is (or what used to be). It turned legal science into an inquiry in which fidelity to precedent and legal principle outweighed concern for achieving the socially defined just result in any given case. In short order, law became a study that its detractors easily lampooned for fashioning a “heaven of jurisprudential concepts,” which any contact with earthly air would destroy.¹⁹²

Positivism and predictability had their costs.

And even if a top-level principle was derived inductively from the cases (legal positivism), once that top-level principle was identified and distilled into a general statement (as was necessary for it to be a top-level principle), that principle could reveal that certain bottom-level rules were incorrect, as not flowing from the top-level principle. The desire for order trumped legal positivism, since the law was currently

¹⁸⁶ Reimann, *supra* note 7, at 108.

¹⁸⁷ *See supra* note 142.

¹⁸⁸ Boyer, *supra* note 13, at 20 (emphasis added).

¹⁸⁹ *Id.*

¹⁹⁰ DUXBURY, *supra* note 153, at 15.

¹⁹¹ LANGDELL, *supra* note 43, at vi.

¹⁹² Siegel, *supra* note 7, at 256.

in a state of disorder and the project's goal was to bring order to it. This required giving meaning to the top-level principle, and it could not simply be given meaning inductively from existing cases, as the conclusions in them were often not well-reasoned and would twist the meaning of the top-level principle beyond what it could bear.

As will be seen, this happened with the meaning of promise. Langdell's desire for an orderly, logical structure to contract law would require giving meaning to *promise*, and if the caselaw was inconsistent with that meaning, the cases should be considered incorrectly decided. After all, courts were not using the word *promise* to simply designate something that was consideration; they were identifying consideration as including a promise, the latter being a concept that was taken from outside of the law and which pre-dated contract law. This did not mean, however, Langdell believed there were a priori legal truths; it meant that if courts used the concept of promise, then the concept had to be given meaning, and that meaning was often found outside of, and prior to, the law, something not all courts remembered. And this led to the common law lacking order, which in turn meant that in certain situations positivism and conceptualism would be in tension.

E. Back Down (Formalism)

Having reached the top, it was now time to go back down. Additional bottom-level rules would now be determined deductively from the top-level principles, and these bottom-level rules could then be used to decide future cases.¹⁹³ And what about any existing specimens that included strange bottom-level rules, ones that did not fit logically under any of the inductively derived axioms? What was to be done with these illogical leftovers on the table? As noted, Langdell believed that cases inconsistent with a top-level principle should be disregarded as incorrectly decided, essentially an aberration who would not survive in the wild and who should be written off.¹⁹⁴

Again, recall that classical legal theory sought to bring order to the common law, an order desired in the wake of the end of the old forms of action and the proliferation of reported cases. It was impossible to create a comprehensive, orderly system of contract law if every decision had to be accounted for. Failing to do this would leave the common law in no better state than its current state, except for perhaps having a better index. "By analogizing the law library to the chemistry lab, Langdell treated judicial decisions as experiments,"¹⁹⁵ and if they were experiments, some of them might have gone wrong or be mutations that would disappear. "They were experiments that had failed to apply correct logic; good law was good metaphysics."¹⁹⁶

Langdell's approach was thus empirical in its approach to discovering fundamental principles, and then rational in its approach to deducing rules of law from those principles.¹⁹⁷ It was thus both descriptive and normative, normative in the sense that

¹⁹³ Grey, *supra* note 7, at 19.

¹⁹⁴ *See id.* at 21.

¹⁹⁵ Carrington, *supra* note 71, at 708.

¹⁹⁶ *Id.* at 709.

¹⁹⁷ Hoeflich, *supra* note 72, at 119–20. This approach was followed by Williston. Movsesian, *supra* note 20, at 233–34.

Langdell was arguing that what ought to be done was reject the precedential value of cases whose reasoning was inconsistent with a top-level principle. The normative aspect did not derive from any ethical theory such as Kantianism or utilitarianism, but from a desire for order. But as Mathias Reimann observes, this approach makes Langdell's "notion of science highly problematical."¹⁹⁸ He explains:

On the one hand, the organic seemed to believe that law is a science like the natural sciences, i.e., essentially an empirical, inductive method with the goal of finding and classifying the true rules of the game. On the other hand, the formalist was ready to engage in a good deal of logical speculation in deductive form, reasoning from abstract principles, and thus regressing from nineteenth-century positivism to eighteenth-century continental idealism . . . Langdell needed a rather ill-defined concept of science to unite these divergent ideas under its name, and it is never really clear whether his rules are descriptive of what actually happens or prescriptive of what should happen or both.¹⁹⁹

Thus, as Reimann concludes, "we find Langdell's approach at the borderline between two conflicting views of law, a hybrid with parents from different ages."²⁰⁰

It appears that Langdell was seeking, in a sense, to take the benefits of legal science and its idea of a rationally-ordered complete system of law, and adapt it to the common-law system.²⁰¹ As Michael Hoeflich notes: "Langdell's major contribution to the notion of law as science was his emphasis on the empirical dimension by his insistence that the first principles to which deductive method must be applied could be attained not by reason or logic alone but through empirical research in the decided cases."²⁰² Whereas the Pandectists had looked to natural law and Roman law for first principles, and Friedrich Carl von Savigny (a German jurist) and Hugh Swinton Legaré (a leading American scholar of Roman law) had looked to a nation's history and society, Langdell looked to cases.²⁰³ Two commentators have noted:

[The Langdellians] were able to transplant legal ideas of systematic legal science from a civil-law mould into a common-law mould. Thus, at the end of the nineteenth century, a bright young generation of technocrats in the United States who were well-connected and well-educated were able to pass off the systematization (that is, the logical ordering together) of all laws—a characteristic of the civil-law tradition—as a scientific ordering together of

¹⁹⁸ Reimann, *supra* note 7, at 263 n.164.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 109.

²⁰¹ See, e.g., Granado & Mirow, *supra* note 72, at 301 ("[L]angdell ripped apart civil-law legal science and continental attempts to rationalize whole systems of law by codification and refashioned a common-law legal science based on the case method.").

²⁰² Hoeflich, *supra* note 72, at 120.

²⁰³ *Id.*

case law, embodied in currently reported opinions of North American courts.²⁰⁴

But how were the axioms to be changed over time if law was, as Langdell believed, organic? Once the top-level principles had been identified and they took over, the scientific deductive approach seemingly left no room for direct appeal to “acceptability” (i.e., justice and policy, or in the language of the nineteenth century, fairness and convenience, respectively) in formulating bottom-level rules.²⁰⁵ The deductive approach from top-level principles did not seem to leave much (if any) room for moral and policy considerations when identifying new bottom-level doctrinal propositions.²⁰⁶ If the top-level principles treated the parties as an abstraction, say as party *A* and party *B*, rather than as, say, “big business” and “consumer,” there was little room for the bottom-level principles to take account of the parties’ unequal bargaining power. A ragbag of details was better fitted for direct appeals to acceptability than an orderly structure.

The criticism can perhaps be overstated, as throughout his work Langdell appealed to policy considerations,²⁰⁷ but Langdell’s few discussions of policy do appear like “casual make-weights and after-the-fact justifications that lend support but rarely, if ever, explicitly determine the existence, shape, or scope of a legal principle, let alone a bottom-level rule or case decision.”²⁰⁸ Further:

[c]onsiderations of justice and convenience were relevant . . . only insofar as they were embodied in *principles*—abstract yet precise norms that were consistent with the other fundamental principles of the system. To let considerations of acceptability directly justify a bottom-level rule or individual decision would violate the requirement of conceptual order, on which the universal formality and completeness of the system depended. In

²⁰⁴ Granado & Mirow, *supra* note 72, at 299; *see also* Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMP. L. 609, 654–55 (2017) (“The problem was that German legal science at the time was dominated by the natural reason model, which was alien to common lawyers’ thinking and to the dominant role they gave to cases. Instead of the rationalistic inquiry, *more geometrico demonstrata*, that was the staple of the German legal science, the common law version of legal science favored an inductive study that started with the cases and tried to identify underlying doctrines and principles implicit in them. This is the version of legal science championed by Langdell at Harvard at the time The scientific analogy was less deductive geometry, more inductive botanical classification.”) (footnotes omitted).

²⁰⁵ Grey, *supra* note 7, at 40–41; *see also* KIMBALL, *supra* note 10, at 111 (describing Grey’s concept of “acceptability”).

²⁰⁶ *See* Eisenberg, *supra* note 142, at 208 (“In the strictest version of axiomatic theories, like the school of classical contract law, no room is allowed for justifying doctrinal propositions on the basis of moral or policy propositions.”).

²⁰⁷ Grey, *supra* note 7, at 13.

²⁰⁸ Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1526 (2001).

classical orthodox thought, acceptability was to influence decision only subject to the constraint of universally formal conceptual order.²⁰⁹

Again, there was a price for predictability and an apolitical body of law.

F. *Predicting the Future: The Ever-Tangled Skein of Human Affairs*

With the axioms and bottom-level rules in place, and the leftovers (the incorrectly decided cases and incorrect bottom-level principles) discarded, future specimens could be more confidently predicted, provided the courts chose to play the game. In sum, then, axioms (fundamental principles of law) would be determined inductively by reviewing caselaw, and then theorems (rules of law) would be deduced from the axioms, and then cases would be decided deductively from the rules.²¹⁰

Perhaps counterintuitively, Langdell's case method therefore had a certain pragmatic spirit to it, akin to Holmes's famous prediction theory of law, something that is often overlooked. Langdell wrote that "[t]o have such a mastery of these [fundamental legal doctrines] is as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs [and] is what constitutes a true lawyer"²¹¹ Writing in the 1940s, the historian Daniel J. Boorstin argued that in the last seventy-five years the spirit of the American law school (which was the spirit of Langdell's case method) had been predominantly pragmatic:

The expression of the pragmatic spirit has had two phases. The first phase was the origin, development and diffusion of the "case-method" and of the prediction concept of law in its simplest form. "Law, considered as a science," Langdell explained in the preface to his influential case-book on contracts in 1871, "consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer" It has often been noted that the elaboration of the case-method of legal instruction occurred simultaneously with the development of pragmatism as an explicit philosophy. Despite the fact that Langdell himself was not a pragmatist, the appeal of the case-method in the United States in the late 19th and early 20th century was due in large measure to its compatibility with the prediction concept of law.²¹²

G. *Holmes's Legal Science: Experience over Logic and Battling the Powers of Darkness*

Holmes, like Langdell, viewed law as a science, at least in a sense. Holmes himself maintained that at the bottom of his legal philosophy was the progress of mid-nineteenth century science, and "the influence of the scientific way of looking at the

²⁰⁹ Grey, *supra* note 7, at 15.

²¹⁰ *Id.* at 19.

²¹¹ LANGDELL, *supra* note 43, at vi.

²¹² Daniel J. Boorstin, *The Humane Study of Law*, 57 YALE L.J. 960, 961 (1948).

world.”²¹³ Darwin’s *The Origin of Species* was published while Holmes was in college (1859), and although he had not read it, he acknowledged that the difference in science was “in the air.”²¹⁴

Holmes shared Langdell’s notion of law as a science in several ways. First, he shared Langdell’s view of the law as evolving.²¹⁵ For example, Holmes, writing an anonymous review of the 1870 edition of Langdell’s casebook, praised the book’s historical ordering of the cases, stating: “Tracing the growth of a doctrine in this way not only fixes it in the mind, but shows its meaning, extent, and limits as nothing else can.”²¹⁶ In 1886, in his oration before the Harvard Law School Association, he said (referring to Langdell’s case method and its focus on “embryology and lines of its growth”) that “there is no way to be compared to Mr. Langdell’s way.”²¹⁷ And Holmes’s famous view of law as experience (rather than logic) showed a sympathy to the historical school of jurisprudence.²¹⁸

Second, Holmes, like Langdell, believed in the *slow* growth of legal doctrines. After almost twenty years on the Massachusetts Supreme Judicial Court, he wrote that:

the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain.²¹⁹

²¹³ Letter from Holmes to Morris R. Cohen (Feb. 5, 1919), *quoted in Felix Cohen, The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 14 (1948); *see also* Grey, *supra* note 3, at 795 (“Much of Holmes’ legal thought can be explained in terms of this Victorian scientific positivism—what Holmes himself called ‘the scientific way of looking at the world.’ From this outlook followed his legal positivism and a version of utilitarianism tempered by skepticism about the practical possibilities of measuring utility.”) (citation omitted).

²¹⁴ Letter from Holmes to Morris R. Cohen, *supra* note 213, at 14; *see also* Reimann, *supra* note 7, at 109 (noting that “Holmes and Langdell were both under the spell of the new ideas of science and evolution.”).

²¹⁵ *See* PHILIP P. WEINER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 182 (1949) (noting that one thing that made Holmes’s work “‘scientific’ was his evolutionary approach to law . . .”).

²¹⁶ Book Note, *A Selection of Cases on the Law of Contracts*, 5 AM. L. REV. 539, 540 (1871) (Oliver Wendell Holmes, Jr. reviewing C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1870)).

²¹⁷ Oliver Wendell Holmes, *The Use of Law Schools*, in *COLLECTED LEGAL PAPERS*, *supra* note 5, at 35, 44.

²¹⁸ Grey, *supra* note 3, at 805–06 & n.70.

²¹⁹ *Stack v. N.Y., New Haven & Hartford R.R.*, 58 N.E. 686, 687 (Mass. 1900). On Holmes’s tenure at the Massachusetts Supreme Judicial Court, *see generally* Patrick J. Kelley, *Holmes on the Supreme Judicial Court: The Theorist as Judge*, in *THE HISTORY OF LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, at 275 (R. Osgood ed., 1992);

And while Holmes the scholar might have tried to bring order to the common law,²²⁰ Holmes the jurist was not so ambitious,²²¹ believing the common law should not get ahead of society.²²² While he recognized that courts can and must make law, adapting the law to changes in society, he also recognized that courts should do so slowly, writing:

I recognize without hesitation that judges do and must legislate but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, "I think the doctrine of consideration is a bit of historical nonsense and shall not enforce it in my court."²²³

Thus, while he recognized that courts can and do make law, he was an advocate of judicial restraint.²²⁴ Holmes was himself skeptical of his ability to identify which rules were best for society, which made him reluctant to depart from precedent.²²⁵

Third, and similar to his belief that the common law should develop slowly, Holmes, perhaps more so than Langdell, was a legal positivist.²²⁶ Holmes is of course

Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1005 (1977).

²²⁰ See Douglas G. Baird, *The Young Astronomers*, 74 U. CHI. L. REV. 1641, 1641 (2007) (noting that Holmes, as a scholar, "started as a pragmatist who made his mark by producing a single volume that tried to make sense of the common law," and that his "task was accounting for the outcome of discrete cases.").

²²¹ See THOMAS HEALY, *THE GREAT DISSENT* 10 (2013) (Holmes, as his critics had long said, was more of an aphorist than a system builder. He believed that legal decisions, like art, should include only what is essential.); Kelley, *supra* note 219, at 276 ("Holmes on the Supreme Judicial Court did not turn out to be a bomb-throwing dissenter. Instead, he seemed to be a regular judge, hardly ever dissenting, writing for a unanimous court craftsmanlike opinions remarkable only for the grace and clarity of their expression.").

²²² Kelley, *supra* note 3, at 44. There might have been additional factors that contributed to his lack of judicial ambition on the Massachusetts Supreme Judicial Court, including the workload, the role of creatively addressing legal issues being transferred to bodies outside the court, and a tradition of unanimity for court opinions coupled with colleagues who disfavored theory in the opinions. Kelley, *supra* note 219, at 276; Tushnet, *supra* note 219, at 978.

²²³ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

²²⁴ TWINING, *supra* note 170, at 16.

²²⁵ Grey, *supra* note 3, at 812.

²²⁶ See Feldman, *supra* note 8, at 1442 ("[I]n many ways, the early Holmes was strongly aligned with his Langdellian contemporaries. Most important, perhaps, Holmes was a committed positivist. He declared that natural law jurists were 'naïve,' and as early as 1872, when explicitly discussing Austin's positivist jurisprudence, Holmes wrote that 'sovereignty is a form of power, and the will of the sovereign is law, because he has power to compel obedience or to punish disobedience, and for no other reason.'").

famous for defending the so-called separability thesis, under which a determination of existing law is separate from a determination of what is morally right.²²⁷

Fourth, Holmes praised Langdell's effort at taxonomy and conceptual analysis.²²⁸ In Holmes's anonymous review of the completed 1871 first edition of Langdell's casebook, Holmes wrote: "There is nothing of . . . the 'manual method.' A contract concerning coal is not indexed under the head Coal, nor even under the popular name of the contract, as Charter-party or Insurance. The cases are referred to under the general principle of the law of contracts."²²⁹ Holmes himself, early in his career, had focused on dividing law into proper categories,²³⁰ and in the late 1870s, while shifting course somewhat, had merely shifted "from analytical classification to philosophical synthesis."²³¹ Holmes, for example, believed that students must be aware of principles, and that the student should have "more than a rag-bag of details" so that they may see "how it hangs together."²³² He wrote:

The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time. . . .

. . . .

Even if every decision required the sanction of an emperor with despotic power and whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found.²³³

²²⁷ See BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 198 (2004) (explaining that the separability thesis is a "tenet or dogma of legal positivism, that law and morality are 'separate'"); Catherine Wells, *The Positivist*, in *THE PRAGMATISM AND PREJUDICE OF OLIVER WENDELL HOLMES JR.* 117 (Seth Vannatta ed., 2019) (discussing Holmes's legal positivism).

²²⁸ KIMBALL, *supra* note 10, at 92 ("Holmes extolled Langdell's abstraction of general dimensions of contract . . .").

²²⁹ Book Note, *supra* note 59, at 353–54.

²³⁰ Note, *Holmes, Peirce and Legal Pragmatism*, 84 *YALE L.J.* 1123, 1123 n.7 (1975); see also Thomas C. Grey, *Holmes on the Logic of Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 133, 145 (Steven J. Burton ed., 2000) ("[Holmes] devoted his early legal career to a reclassification of the common law into subjective categories designed to replace the rough-and-ready practical pigeonholes of the vanishing writ system and the loose taxonomy of law into personal and property rights used by Blackstone and Kent.").

²³¹ G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 *HOFSTRA L. REV.* 633, 637 (1982).

²³² Book Review, *supra* note 145, at 234.

²³³ Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 458, 464–65 (1897).

Holmes, discussing the *Summary* in a letter to Sir Frederick Pollock, even wrote that Langdell “is a noble old swell whose knowledge and ability and idealist devotion to his work I revere and love.”²³⁴

Holmes’s approach in his celebrated book *The Common Law* was similar to what Langdell did in his *Summary*.²³⁵ In fact, his goal was to reform the common law by identifying its “basic principles and their rational arrangement.”²³⁶ Holmes even claimed to identify the foundation for all common-law civil liability in an objective standard of reasonableness.²³⁷ Thus, much of his work was similar to Langdell’s, in that he was seeking to organize the common law into a coherent system based on abstract and conceptual ordering.²³⁸ Even after Holmes had concluded that logic alone could not be used to bring order to the common law, he believed that bringing order to it remained an important goal.²³⁹ Holmes, like Langdell, sought to conceptualize the common law to make the law more intelligible and hence more predictable.²⁴⁰ He believed that an important value was that “men should know the rules by which the

²³⁴ Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 10, 1881), *reprinted in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, *supra* note 109, at 17. The phrase “great swell” was one of Holmes’s favorite phrases. EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 787 (2d prtg. 1963). A “swell” is “a person of high social position or outstanding competence.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1263 (11th ed. 2003). Wilson notes that when Holmes referred to someone as a “great swell” he never “meant he is socially brilliant but always that he is preeminent intellectually—a top expert in some department or a profound or original thinker.” WILSON, *supra* note 234, at 787. Holmes might not have considered Langdell a “great swell,” but he at least considered him a “swell.”

²³⁵ See Grey, *supra* note 3, at 817 (“This [*The Common Law*] is not a project obviously different from the one Langdell stated in his much-quoted manifesto of classical legal science: ‘Law, considered as a science, consists of certain principles or doctrines If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.’”).

²³⁶ Reimann, *supra* note 7, at 111.

²³⁷ Feldman, *supra* note 8, at 1442–43; see also Edward A. Purcell Jr., *On the Complexity of “Ideas in America”*: Origins and Achievements of the Classical Age of Pragmatism, 27 LAW & SOC. INQUIRY 967, 989 (2002) (reviewing MENAND, *supra* note 173) (noting that Holmes was “a rather ‘high’ prescriptive theorist” who, in *The Common Law*, “referred easily and confidently to such things as ‘the true theory of contract’ and ‘the true limits of tort’”).

²³⁸ See Grey, *supra* note 3, at 816 (noting that “much of Holmes’ actual work was devoted to the abstract and conceptual ordering of doctrine into a structured and coherent system—in other words, the kind of doctrinal legal ‘logic’ that Langdell specialized in”) (footnote omitted).

²³⁹ See Reimann, *supra* note 7, at 111 (noting that Holmes “remained convinced that without well-defined principles and a rational arrangement of the law we must forever wander aimlessly.”).

²⁴⁰ Kelley, *supra* note 3, at 45–46.

game will be played.”²⁴¹ In fact, taxonomy and the creation of a general law of contract would help the law evolve.²⁴²

Like Langdell, as part of an effort to reconceptualize the system of the common law, Holmes was left no choice but to express skepticism about certain judicial opinions.²⁴³ In his review of Langdell’s casebook, Holmes even suggested that “some contradictory and unreasoned” decisions could have been omitted.²⁴⁴ And Holmes, like Langdell, has been accused of tampering with the data.²⁴⁵ Further, his unusual reading of the celebrated case of *Raffles v. Wichelhaus* (involving two ships named *Peerless*) arguably “shows how far he was willing to go to support his own premises.”²⁴⁶

With all of the similarities, why then did Holmes, after having initially praised Langdell’s casebook, come to believe that Langdell, despite being a “noble old swell,”

²⁴¹ Oliver Wendell Holmes, Jr., *Holdsworth’s English Law*, 25 LAW Q. REV. 412, 414 (1909).

²⁴² Grey, *supra* note 230, at 146. Morton Horwitz has argued that Holmes’s legal philosophy changed between the publication of *The Common Law* in 1881 and the publication of *The Path of the Law* in 1897. Horwitz argues that the early Holmes believed that shared customary norms and common-law categories could determine judicial solutions to specific legal questions and provide neutral constraints on judicial decision making, whereas the late Holmes believed judicial decision making could never be anything more than direct policy analysis. Under this theory, the source of “experience” in Holmes’s famous aphorism shifted from custom to policy. Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR., *supra* note 7, at 31, 51, 66–68. Horwitz’s thesis has its critics. See, e.g., Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019 (1993).

²⁴³ Feldman, *supra* note 8, at 1442.

²⁴⁴ Book Note, *supra* note 216, at 540.

²⁴⁵ See Carrington, *supra* note 71, at 732 (“He [Holmes] revealed a propensity to use history in the service of policy arguments, causing Albert Dicey to compare Holmes himself to theologians. Edward White accurately describes Holmes’s method as equally ‘breathtaking’ and ‘presentist’ as that of Langdell.”); Reimann, *supra* note 7, at 105 (“Holmes [in *The Common Law*] proceeds in a way contrary to what he claims to do: he does not, first, gather data, then observe, and finally draw conclusions in a truly scientific way. Instead, he starts with the result and then produces only the information suitable to support it, quietly omitting the rest.”); Mark DeWolfe Howe, *Introduction to HOLMES*, *supra* note 12, at vii, xx (asserting that Holmes’s *Common Law* was “not primarily a work of legal history. It is an endeavor in philosophy—a speculative undertaking in which the author sought to find the materials of legal history data which would support a new interpretation of the legal order.”); GILMORE, *supra* note 2, at 128 n.19 (asserting that “*The Common Law* was a work of theoretical speculation, not of history.”); *id.* at 53 (“On the face of things [Holmes] purports to be making a purely descriptive statement about what the law is here and now—Massachusetts in 1880—together with an account of how, historically, it came to be that way. But most of the time he is in fact making prescriptive statements about what the law ought to be—at all times and in all places.”).

²⁴⁶ Reimann, *supra* note 7, at 253 n.75. Holmes argued that when two parties agreed to the sale of cotton to be delivered on the ship *Peerless*, but each intended a different ship (with the same name), “[t]he true ground of the decision was not that each party meant a different thing from the other, . . . but that each said a different thing. The plaintiff offered one thing, the defendant expressed assent to another.” HOLMES, *supra* note 12, at 309.

represented the “powers of darkness”?²⁴⁷ Holmes’s change in attitude likely stemmed from the fact that, by the late 1870s, he had come to believe that the common law’s doctrines could not be made logically consistent.²⁴⁸ Although Holmes admired Langdell’s effort to bring order to contract law, and while he did not wish to banish logic and deduction from the law,²⁴⁹ by that point he had come to believe that an effort to bring order based primarily on a system of logic—such as has been attempted by John Austin with his analytical method—was a mistake and was unachievable.²⁵⁰ The law had developed historically through struggle and not by following the dictates of logic.²⁵¹ Simply put, “[h]e did not want to see experience squeezed out by logic.”²⁵²

Holmes’s purpose in *The Common Law* was to discredit a particular form of legal science, a type prevalent in nineteenth century Germany and based on Roman law, and which had achieved fame not only among civil-law jurisdictions, but among common-law jurisdictions as well.²⁵³ The seeds of this nineteenth century German legal science had been Immanuel Kant’s philosophy, which had rejected natural law and maintained that only pure reason could determine truth.²⁵⁴ Holmes had a few problems with Kant’s moral philosophy, particularly as a legal philosophy. First, Kant concluded that pure reason dictated that the morally correct action was to always treat persons as an end, and never as a means only, and the philosophy cherished “the human ability to make free choices” and the protection and respect of freedom of the will.²⁵⁵ Holmes rejected such a moral philosophy as a legal philosophy because he believed it was inconsistent with the reality of how societies act and the reality of human nature (recall Holmes’s view that law should not get ahead of society), arguing

²⁴⁷ Holmes is in fact considered Langdell’s “first great critic.” Feldman, *supra* note 8, at 1442.

²⁴⁸ KIMBALL, *supra* note 10, at 102.

²⁴⁹ See GILMORE, *supra* note 2, at 50 (“Holmes by no means rejected the ‘law is a science’ idea”); Grey, *supra* note 230, at 133 (“Holmes was by no means generally ‘anti-logic’ in legal theory. He thought that logic, in its various related senses, was a significant (but not the only) force in shaping the law, and also that it supplied important (but again not the only) criteria for evaluating legal inquiry”) (footnotes omitted); TWINING, *supra* note 170, at 390 n.17 (“One may infer from the context of [his famous] quotation that Holmes did not intend to deny any place to logic in the law.”); WHITE, *supra* note 146, at 63 (“Holmes was not an opponent of generalization, or of the deductive method, or of system. He was not motivated by any irrational contempt for logical inference. The law, like any other empirical science, deserves and needs the machinery of deduction and valid inference, and Holmes fully recognized this fact.”); Reimann, *supra* note 7, at 113 (noting that Holmes’s critical attitude toward logic “is not at all a condemnation of logic in general.”).

²⁵⁰ Howe, *supra* note 245, at xxii.

²⁵¹ Reimann, *supra* note 7, at 79.

²⁵² Speziale, *supra* note 46, at 33.

²⁵³ Reimann, *supra* note 7, at 80, 85.

²⁵⁴ *Id.* at 81.

²⁵⁵ *Id.* at 81–82.

that “[n]o society has ever admitted that it could not sacrifice individual welfare to its own existence.”²⁵⁶ For Holmes, social reality was the ultimate standard for law.²⁵⁷ He also believed a Kantian approach was inconsistent with the “general welfare,” and he thus opposed it on utilitarian grounds.²⁵⁸

While Kant’s philosophy had (like Holmes’s view) maintained a strict separation of law and morality,²⁵⁹ Holmes was concerned that Kant’s moral philosophy had colored German scholars’ interpretation of Roman law and that this interpretation would find its way into efforts to bring order to the common law.²⁶⁰ For example, with respect to contract law, German legal science was premised on Friedrich Carl von Savigny’s concept that a contract required a meeting of the minds, which flowed from Kantian moral philosophy, a requirement Holmes believed was inconsistent with the common law’s objective approach to contract formation.²⁶¹ Flowing from his rigorous positivism, this was enough to make it unsuitable as a common-law doctrine.

Second, and similarly, Holmes opposed a Kantian, formal approach to bringing order to the law solely through “pure reason,” an approach which left no room for considering external factors.²⁶² Prevailing German legal science downplayed historical development and focused on system-building and conceptualization, and while it resembled the old natural-law approach, it was not based on moral concepts, but was based on classical Roman law, “which seemed to [the Germans] to contain timeless truth needing only to be detected and explicated” (and German legal scholars tended to interpret Roman law as resting on abstract notions such as individual freedom).²⁶³ The approach also sought to create a comprehensive and entirely logical

²⁵⁶ HOLMES, *supra* note 12, at 41.

²⁵⁷ Reimann, *supra* note 7, at 109. Holmes believed that law’s substance was drawn largely from “[t]he felt necessities of the time.” HOLMES, *supra* note 12, at xxiv.

²⁵⁸ Reimann, *supra* note 7, at 99. Politically, Holmes was a preference utilitarian, Grey, *supra* note 230, at 136, who conceived of “law as a utilitarian instrument for the satisfaction of human desires,” Grey, *supra* note 3, at 788. Thus, “[p]rescriptively, legal principles are to be derived from ‘accurately measured social desires,’ with these to be approximated, in the absence of a better measuring stick, by ‘conformity to the wishes of the dominant power’ in the community.” *Id.* at 793 (quoting Oliver Wendell Holmes, *Law in Science and Science in Law* (1899), in COLLECTED LEGAL PAPERS, *supra* note 5, at 226, and Oliver Wendell Holmes, *Montesquieu* (1900), in COLLECTED LEGAL PAPERS, *supra* note 5, at 250, 258). He therefore believed that the Kantian metaphysics of morality incorrectly maintained that “no man may be looked upon as a means to an end,” Howe, *supra* note 245, at xvi, and that it was justifiable for persons to have a self-preference. HOLMES, *supra* note 12, at 38. Grey argues that Holmes desired to synthesize the precepts of the historical school with Benthamite utilitarian positivism. Grey, *supra* note 3, at 806 n.70.

²⁵⁹ Reimann, *supra* note 7, at 99.

²⁶⁰ *Id.* at 84.

²⁶¹ *Id.* at 87–88.

²⁶² *Id.* at 84.

²⁶³ *Id.* at 83–84, 89.

system of law,²⁶⁴ conflicting with Holmes's pragmatism, which viewed law as a means to achieving socially desirable ends.²⁶⁵ A comprehensive system based on logic would also be a static system based on pre-industrial views of society, and would be inappropriate for the industrial United States.²⁶⁶

When Langdell published the *Summary*, Holmes came to view Langdell as the primary domestic proponent of German legal science, though really only in the second sense (the formal approach to law), rather than in the first sense (Kantian metaphysics).²⁶⁷ Referring to the second sense, Holmes wrote that “[t]he danger of which I speak is . . . the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”²⁶⁸ In other words, he opposed the belief that logic alone could provide answers to every question of law.²⁶⁹ He did not oppose an effort to bring order to the common law by identifying “fundamental notions and principles of our substantial law, putting them in an order which is a part of or results from the fundamental conceptions,”²⁷⁰ and organizing the law “logically, arranging and distributing it, in order, from its summa genus to its infima species.”²⁷¹ But he opposed an excessive indulgence in logic.²⁷² As Mathias Reimann notes, “[o]ne might say that Holmes's arrangement was supposed to be conceptual but not formal,”²⁷³ whereas Langdell's arrangement was both conceptual and formal.²⁷⁴

When Holmes reviewed the *Summary* in an anonymous review of Langdell's casebook in 1880, he wrote that the *Summary* revealed:

²⁶⁴ *Id.* at 85.

²⁶⁵ Grey, *supra* note 3, at 805.

²⁶⁶ Reimann, *supra* note 7, at 104.

²⁶⁷ *Id.* at 92–93.

²⁶⁸ Holmes, *supra* note 233, at 465.

²⁶⁹ Grey, *supra* note 230, at 134 (“Holmes disapproved of legal logic only in its most extreme and exclusive sense, what he called ‘the merely logical point of view’ (*Common Law* 32), which is to say a jurisprudence committed above all else to the systematically deductive decision of every question of law.”).

²⁷⁰ Letter from Oliver Wendell Holmes to James Bryce (Aug. 1879) *quoted in* HOWE, *supra* note 121, at 25.

²⁷¹ HOLMES, *supra* note 12, at 198.

²⁷² Grey, *supra* note 3, at 815.

²⁷³ Reimann, *supra* note 7, at 265 n.175.

²⁷⁴ “Conceptual analysis” has been defined as “seek[ing] the truth about aspects of our world through breaking down the logical structure, or the necessary and essential attributes, of ideas and categories.” BIX, *supra* note 227, at 37. “Formalism” has been defined as “analysis . . . that moves mechanically or automatically from category or concept to conclusion, without consideration of policy, morality, or practice.” *Id.* at 69.

the weak point in Mr. Langdell's habit of mind. Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is, perhaps, the greatest living theologian If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things.²⁷⁵

Holmes, referring to the *Summary* in a letter to Sir Frederick Pollock in April 1881 (the same letter in which he wrote that Langdell "is a noble old swell whose knowledge and ability and idealist devotion to his work I revere and love"), wrote:

A more misspent piece of marvelous ingenuity I never read, yet it is most suggestive and instructive. I have referred to Langdell several times in dealing with contracts because to my mind he represents the powers of darkness. He is all for logic and hates any reference to anything outside of it, and his explanations and reconciliations of the cases would have astonished the judges who decided them.²⁷⁶

These complaints can also be seen in Holmes's *The Common Law*, published in 1881:

What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates [German legal science], or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part [German legal science and Langdell]. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.²⁷⁷

As he later wrote in *The Path of the Law*:

Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our

²⁷⁵ Book Review, *supra* note 145, at 234. Holmes defined *elegantia juris* as "logical cohesion of part with part." Oliver Wendell Holmes, *Science of the Common Law*, 9 CURRENT LEGAL THOUGHT 387, 388 (1943) (quoting Oliver Wendell Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 631 (1879)). With respect to referring to Langdell as a "Hegelian in disguise," Holmes "always presented Hegel simply as the ultimate logician For Holmes, Hegel was a label for 'logic,' and he used it at his convenience." Reimann, *supra* note 7, at 251 n.50.

²⁷⁶ Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 10, 1881), *reprinted in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, *supra* note 109, at 17.

²⁷⁷ HOLMES, *supra* note 12, at 32; *see also id.* at xxiv ("The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.").

friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.²⁷⁸

In other words, a portrayal of the common law as based on axioms and deciding cases with deductive reasoning from those axioms provided an inaccurate picture of what the courts were doing in fact.

Holmes, by providing his prediction theory of law in contrast to a system of law based on logic, thus argued that Langdell and his followers were giving a misleading account of the law to law students and practitioners.²⁷⁹ In private, Holmes “ridiculed the claim that the law is empirical science, and compared Langdell’s teaching to that of a biology teacher who ‘would give one of his pupils a sea urchin and tell him to find all about it he could.’”²⁸⁰ Holmes the legal positivist thus believed that Langdell’s effort to construct a logical system of law necessarily led to an unrealistic account of the law. Holmes was empirical in his approach to law, but he thought dissecting the sea urchin could not reveal everything one needed to know about the specimen. For Holmes, more than the library was needed to predict what the courts would say the law was.

And, similarly, any argument that the library was all the court needed to decide a case was a mistake. For example, Holmes “kept his own theories open-ended by his reiterated insistence that law basically reflects social and economic conditions and must change as they change.”²⁸¹ Thus, while Holmes supported Langdell’s generalizing aim, he believed that the resulting generalizations were only guidelines and useful tools; they could not be used to provide correct answers to future cases.²⁸² Axioms and deductive logic should not prevail over experience and policy judgments, and empiricism in the sense of using real-world experience should be preminent.²⁸³

²⁷⁸ Holmes, *supra* note 233, at 460–61. In 1908, Holmes, after reading Langdell’s *Equity Jurisprudence*, wrote in a letter to his friend Sir Frederick Pollock about that book that “[i]t has his acumen and patient discussion of detail, but I think brings out the narrow side of his mind, his feebleness in philosophising, and hints at his rudimentary historical knowledge. I think he was somewhat wanting in horse sense” Letter from Oliver Wendell Holmes to Frederick Pollock (July 6, 1908), *reprinted in* HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, *supra* note 109, at 140.

²⁷⁹ TWINING, *supra* note 170, at 18.

²⁸⁰ Paul D. Carrington, *Law as the “Common Thoughts of Men”*: *The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 519 (1997) (quoting LIVA BAKER, *THE JUSTICE FROM BEACON HILL* 208 (1991)).

²⁸¹ GILMORE, *supra* note 15, at 165 n.256.

²⁸² Gordon, *supra* note 105, at 1237–38, 1250.

²⁸³ Feldman, *supra* note 8, at 1444–46 (footnotes omitted). Thus, while Holmes was a legal positivist, he can at the same time be viewed as urging “an *introduction* of moral concepts into the law.” WHITE, *supra* note 146, at 69.

“[I]t was this elevation of logic over practicality that aroused his ire more than anything else.”²⁸⁴ As one commentator has described Holmes’s view:

[J]udges who realize that all common law rules are based on social policy may consciously improve the law by adopting rules that more effectively implement current policies or that implement a new policy preferable to the one underlying the old rules. These decisions can be made scientifically, however, only after scientific studies showing the consequences of particular rules and comparing the social advantages of different consequences.²⁸⁵

For example, it has been argued his goal in *The Common Law* “was to produce a doctrinal restatement of the common law that was guided by the demands of contemporary policy, using historical research primarily to identify anachronistic survivals.”²⁸⁶ Thus, the rules that should be discarded were the ones that were anachronistic, not the ones that failed to follow deductively from an axiom.

While Holmes shared Langdell’s belief in *stare decisis*, believing that most cases could and should be decided based on the application of established rules,²⁸⁷ he also believed that all rules had an area of doubtful application.²⁸⁸ Thus, there were gaps in existing law, a point at which the rules ran out and deduction could not provide an answer. While general principles could be useful, they alone could not decide particular cases.²⁸⁹ To believe otherwise was a logical fallacy. Holmes thus took issue with Langdell’s apparent strong positivist belief that there was existing law to decide every case, and that the judge could thus simply declare existing law and apply it to the facts.²⁹⁰ As Thomas Grey has argued, “[p]ragmatists [like Holmes] thus tend to be theoreticians armed with a presumptive suspicion of neat theories; this is not because they despise neatness, but because they know how obsessively those drawn to theorizing love it.”²⁹¹

As Holmes wrote, “[l]aw is not a science, but is essentially empirical. Hence, although the general arrangement should be philosophical, even at the expense of

²⁸⁴ Reimann, *supra* note 7, at 107.

²⁸⁵ Kelley, *supra* note 3, at 45 (citation omitted).

²⁸⁶ Grey, *supra* note 3, at 813.

²⁸⁷ Grey, *supra* note 230, at 140.

²⁸⁸ *Id.* at 137.

²⁸⁹ See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”); see also Grey, *supra* note 230, at 139 (“[H]e believed that although high-level generalizations could be very useful as presumptions and classificatory devices, they were invariably too vague to dictate particular legal conclusions.”); see also *id.* at 146 (“Holmes did not believe that principles generally dictate results in cases, but he did give them normative force, as presumptions or guidelines that could properly incline a judge toward one side of a case.”).

²⁹⁰ Grey, *supra* note 230, at 137.

²⁹¹ Grey, *supra* note 3, at 815.

disturbing prejudices, compromises with practical convenience are highly proper.”²⁹² As previously noted, he wrote that “the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.”²⁹³ For Holmes, creating a general law of contract would help identify idiosyncrasies and help determine whether policy grounds justified the differences or whether there was no good reason for them.²⁹⁴ He thus believed that Langdell was using taxonomy and a general law of contracts improperly. Langdell was using it to provide answers to all cases, and it was appealing to Langdell and his followers because of the human desire for “certainty and repose.”²⁹⁵

As noted, to Holmes the general principles should be viewed as merely guidelines,²⁹⁶ and he also believed the law was a mixture of precedent and policy.²⁹⁷ Because the existence of general principles meant that there would be difficult and borderline cases, in those situations the judge would have to exercise “the sovereign prerogative of choice,”²⁹⁸ taking into account “views of public policy”²⁹⁹ and “considerations of social advantage.”³⁰⁰ As he wrote, “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining how men should be governed.”³⁰¹ When Holmes wrote that law was experience, not logic, he meant that law should be “policy coupled with tradition.”³⁰² When Holmes wrote that “continuity with the past is no duty but only a necessity,”³⁰³ he combined a positivist strain of believing that the law at present was where you currently found yourself, and that

²⁹² *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 4 (1870).

²⁹³ Book Review, *supra* note 145, at 234.

²⁹⁴ Grey, *supra* note 230, at 146.

²⁹⁵ Holmes, *supra* note 233, at 466; *see also* Grey, *supra* note 230, at 146 (noting that Holmes believed “the generalizing impulse only served the psychological and aesthetic needs of lawyers and jurists . . .”).

²⁹⁶ Grey, *supra* note 3, at 819.

²⁹⁷ Reimann, *supra* note 7, at 267 n.182.

²⁹⁸ OLIVER WENDELL HOLMES, *Law in Science and Science in Law* (1899), in COLLECTED LEGAL PAPERS, *supra* note 5, at 239.

²⁹⁹ HOLMES, *supra* note 12, at xvi.

³⁰⁰ Holmes, *supra* note 233, at 467.

³⁰¹ HOLMES, *supra* note 12, at xxiv.

³⁰² Grey, *supra* note 3, at 807.

³⁰³ OLIVER WENDELL HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS, *supra* note 5, at 139.

“[t]he tree has grown as we know it,” yet recognizing at the same time that “[t]he practical question is what is to be the next organic step.”³⁰⁴

To Holmes, when a case involved a doubtful application of an existing rule of law, the interest in predictability was weak and the existing rule did not provide strong evidence of collective preferences.³⁰⁵ At this point, the court should engage in what was in effect legislating.³⁰⁶ Holmes believed that there could be no “exact, consistent, and complete” system of law, whether it was based on German neo-Kantian jurisprudence or legal positivism.³⁰⁷ And there was a danger in Langdellian legal science—“its power to delude judges into thinking that their rulings on politically charged subjects were derived by pure conceptual logic,”³⁰⁸ which is of course what Langdell seemed to be seeking (neutral decision making, not delusion).

Bruce Kimball has narrowed down Holmes’s issues with Langdell to the following:

At its core, the Holmesian critique . . . [of Langdell was] that he neglected what Holmes called “the forces outside of” the law. Those forces have conventionally been considered under the two categories of “justice” and “policy”—often called “fairness” and “convenience,” respectively, in nineteenth century writings. Taken together, justice and policy have been labeled concerns of “acceptability.” Holmes fundamentally charged that Langdell dismissed acceptability in determining doctrine and analyzing decisions in cases.³⁰⁹

Holmes believed that logic became the master under Langdell’s version of law as a science, and this was why Langdell represented the “powers of darkness.” Langdell shared Holmes’s belief in the evolution of law, his belief in legal positivism, and his belief in conceptualism, but Langdell also shared German formalism’s desire for logical order and a self-contained structure, which Holmes rejected. In effect, Holmes was a combination of legal historicism, legal positivism, nineteenth-century German legal science (its conceptualist part), and the future (American legal realism), whereas Langdell was a combination of legal historicism, legal positivism, and nineteenth-century German legal science (its conceptualist part and its logical ordering part, and its formalism), but he had none of the future in him. Langdell was part German (so to speak), and the wrong type, and it was this part with which Holmes took issue. And he only took issue with this part if it was meant to be an approach to jurisprudence, rather than (or in addition to) a mere teaching tool, which we will never know for

³⁰⁴ Holmes, Jr., *supra* note 241, at 414.

³⁰⁵ Grey, *supra* note 230, at 137.

³⁰⁶ *Id.*; see also Grey, *supra* note 3, at 800 (noting that for pragmatists, “[t]he task of inquiry is not the impossible one of building a purified structure of truths from the ground up, but rather the practical one of making such modifications in the existing body of knowledge as will solve the difficulty at hand.”).

³⁰⁷ Grey, *supra* note 230, at 138.

³⁰⁸ *Id.* at 140.

³⁰⁹ KIMBALL, *supra* note 10, at 111.

sure.³¹⁰ And for what it is worth, let's not forget that it was Holmes who encouraged Langdell to write his *Summary*.

H. *Williston's Legal Science: The Uneasy Formalist*

Enter Samuel Williston, another Harvard professor, who E. Allan Farnsworth argued did not share Langdell's conception of law as a science,³¹¹ but who, Mark Movsesian argues, did view "contract law as a kind of 'science'—a system of fundamental axioms, relatively few in number, that can provide the basis for deductive reasoning."³¹² In terms of logic versus experience, Williston falls somewhere between Langdell and Holmes (closer to Langdell), and was—in Allen Boyer's description—an "uneasy formalist."³¹³

Williston in fact expressly said "[l]aw is a science,"³¹⁴ and wrote that:

[i]t is the mark of a great scientist that he can correlate [scientific] facts and deduce a general law. In the same way he is not a great lawyer who knows the rule that is applicable to a large number of special situations. It is the capacity to generalize and to see relations between the rules governing particular states of fact, which mark the great lawyer. As a great lawyer has said: "The mark of a master is, that facts which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit."³¹⁵

Consider also what Williston said in an address to the American Bar Association's Section on Legal Education:

[The professor] must keep his own mind and that of his students constantly addressed to the general rule, free from arbitrary exceptions, and must use the particular cases to bring the rule out, rather than emphasize the importance of inconsistencies and peculiarities. For the ideal of the law is towards a few general principles, while in practice, with the increasing complexity of human affairs, the number of minor rules and applications is always increasing.³¹⁶

³¹⁰ Reimann, *supra* note 7, at 110.

³¹¹ E. Allan Farnsworth, *Samuel Williston*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW*, *supra* note 26, at 594.

³¹² Movsesian, *supra* note 20, at 230.

³¹³ Boyer, *supra* note 13, at 22.

³¹⁴ WILLISTON, *supra* note 72, at 202.

³¹⁵ SAMUEL WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 123–24 (1929). The "great lawyer" was Holmes. *See* Holmes, *supra* note 217, at 37.

³¹⁶ Samuel Williston, *The Necessity of Idealism in Teaching Law*, in *TRANSACTIONS OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT SEATTLE, WASHINGTON* 780–81 (1908).

And in the preface to his 1920 contracts treatise, he complained that “[t]he law of contracts . . . tends from its very size to fall apart,” and that the focus should be on “fundamental principles.”³¹⁷ The law should not be a “wilderness of single instances.”³¹⁸ And it has been argued that the Restatement of Law project (Williston was the Reporter for the *Restatement of Contracts*) “may well have represented the final effort to realize Langdell’s ideal of a science of law. By restating the law in a clear and simple fashion, the institute hoped to illuminate its correct principles.”³¹⁹ Williston acknowledged that identifying general principles could lead to injustice in particular cases, but he was skeptical of how often this happened, and (presumably like Langdell) believed that general rules helped curb judicial discretion and decisions based on personal whim.³²⁰

Williston, like both Langdell and Holmes, had a desire for “form and structure,” and he had “a vision of law as an organizing and stabilizing system.”³²¹ As Boyer has written:

To follow principle, as Williston used the term, meant to seek “logical coherence” and “logical coordination” across the law. It meant to draw useful analogies. It meant to achieve harmony and congruence where feasible, rather than maintain differences based on the traditional division between law and equity or the medieval forms of actions. In its purest form, it was insight.³²²

To Williston, all other things being equal, simplicity and predictability in law is a good thing.³²³ Farnsworth has concluded that Williston “was committed to rationally uncontroversial value-free reasoning with certainty and predictability as goals. Logic was paramount and the intrusion of moral, social, or economic notions was to be resisted.”³²⁴ Williston (like Holmes) believed in judicial restraint, and he believed that courts should not use the common law to decide broad social questions.³²⁵ Learned Hand, who had been a student of Williston’s in the 1890s, wrote of him:

³¹⁷ SAMUEL WILLISTON, 1 *THE LAW OF CONTRACTS* iii (1920).

³¹⁸ Samuel Williston, *Change in the Law*, 69 U.S. L. REV. 237, 240 (1935).

³¹⁹ KALMAN, *supra* note 78, at 14.

³²⁰ Movsesian, *supra* note 20, at 232.

³²¹ Boyer, *supra* note 13, at 23.

³²² *Id.* at 32.

³²³ *Id.* at 23.

³²⁴ Farnsworth, *supra* note 311, at 594.

³²⁵ Movsesian, *supra* note 20, at 258; *see also id.* at 232 (“Like other classical scholars, Williston takes a positivist view of law.”); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 129 (2000) (describing Williston as “a Holmesian positivist”).

[H]e was so secure in his thinking, so prepared to encounter dissidence and gently dispose of it, that one wondered what was the perfect mechanism that his skull enclosed. He seemed to be indifferent as to the effect of law, measured by human values, so long as it was consistent and clear.³²⁶

But Williston, while expressly maintaining that “[l]aw is a science,” believed it was a “pragmatic science”³²⁷ (though his view might have been an accommodation to the legal realists’ arguments of the early twentieth century).³²⁸ He explained as follows, in language reminiscent of Holmes’s view: “It can rarely deal with the absolute. Questions of how far and how much constantly intrude, and the questions of degree thus introduced require for their solution determination of doubtful facts and comparative valuing of interests, which have no mathematical equivalents.”³²⁹ Williston, like Langdell, thus did not believe contract law’s fundamental principles were based on self-evident truths.³³⁰ And sounding like Holmes, he acknowledged that it was “[o]bvious” that “contractual liability, like all other liability,” is ultimately “based on policy.”³³¹ As Movsesian notes:

Williston does not perceive contract as a Platonic entity; for him, there is no brooding omnipresence in the sky. Nor does Williston think of himself as discovering, in Aristotelian fashion, contract’s immanent structure Williston views law as a social construct that one must justify in terms of real-world benefits Williston favors formalism precisely because of its practical advantages.³³²

Thus, like Holmes, he believed that general rules should have only presumptive effect and should not apply in exceptional circumstances.³³³ And also like Holmes, he believed that rules must be consistent with the “mores of the community,” and

³²⁶ Letter from Learned Hand to A. James Casner (Nov. 10, 1959), *quoted in* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 49 (1994). Hand publicly provided a more flattering portrait of Williston. *See* Learned Hand, *Foreword to WILLISTON, supra* note 72, at vii-ix.

³²⁷ WILLISTON, *supra* note 72, at 202; *see also* Boyer, *supra* note 13, at 23 (“He believes law is a science, but not an exact science.”).

³²⁸ Kimball, *supra* note 19, at 304 n.98.

³²⁹ WILLISTON, *supra* note 72, at 202.

³³⁰ *See* Movsesian, *supra* note 20, at 231 (“Williston’s endorsement of ‘ideal rules’ does not stem from an essentialist understanding.”).

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 232; Boyer, *supra* note 13, at 31.

therefore must evolve.³³⁴ In other words, for Williston, legal principles were justified based on their practical benefits.³³⁵

Williston believed that Langdell had adopted his approach as a method for training lawyers, writing that Langdell:

sought simply to apply to the systematic study of law the methods habitually used by lawyers in the preparation of particular cases—namely, to study chronologically the previous decisions that seemed applicable to the question at issue, and to extract from them a guiding principle. What was an appropriate method for a trained lawyer, Langdell thought would be appropriate also for young students who were given such aid as they required from an instructor.³³⁶

But Williston also believed Langdell had carried things too far, and was critical of what he perceived as an overuse of logical deduction:

When these principles were discovered he would trace their consequences with as relentless logic as that employed by the sternest Calvinist. Decisions inconsistent with them, he said, were wrong. He has been called in consequence a legal theologian. How purely analytical, as distinguished from historical, his reasoning was may be seen from reading his writings.³³⁷

Williston was also critical of the usefulness of Langdell's approach to the prediction theory of law, echoing the concern that Langdell painted a picture of the law that was too static:

In one respect, and a very important one, law [as a science] differs from physical law. In physical law what has happened in the past will, under similar circumstances, happen in the future. Accurate observations of the past and present enable the scientist within the range of that observation to make absolute prophecies as to the future. This is not so in regard to law made by courts and legislatures. Uniform decisions of 300 years on a particular question may be, and sometimes have been overthrown in a day, and the single decision at the end of the series may establish a rule of law at variance with all that has gone before. But it will not always do so. It is never quite certain that the last decision justifies a prophecy of uniformity in the future. Therefore, statements of rules of law are no more than prophecies of results, never absolutely certain for the immediate future, still less for centuries to come. It is rarely possible to go further than to say that it is highly probable that for some time in the future courts will apply a stated rule to facts within its scope.³³⁸

³³⁴ Movsesian, *supra* note 20, at 234.

³³⁵ *Id.*

³³⁶ WILLISTON, *supra* note 72, at 199.

³³⁷ *Id.* at 200.

³³⁸ *Id.* at 201.

Williston appeared concerned that Langdell's approach, if applied in practice, would inhibit change:

The impulse that Langdell gave to legal thinking and teaching was primarily towards the discovery from decided cases of the principles that apparently had controlled them, and to apply to every variety of facts these principles, on the assumption that they would continue to be controlling for the immediate future. One who follows this impulse will tentatively, at least, accept as valid the principles that he finds have been operative in the past.³³⁹

Williston, like Holmes, was also critical of Langdell's approach to the extent fundamental principles would lead to the overthrowing of inconsistent decisions: "[T]he current thought during the Deanship of Langdell . . . ran not merely towards study of original sources. *Stare decisis*, or follow the precedents, was the old legal maxim. For this in effect Langdell's followers substituted *stare principii*, follow the principles, even if they overthrow some decisions."³⁴⁰ Williston was perhaps, as Learned Hand described him publicly, one who neither worshiped for the past nor who had "a heart open to each new-comer."³⁴¹ He was an "uneasy formalist."³⁴²

IV. A BRIEF HISTORY OF CONSIDERATION TO THE LATE NINETEENTH CENTURY

In the Middle Ages, England's common-law courts (the royal courts) saw little interest in enforcing private agreements.³⁴³ But private agreements were being enforced in other places, most notably in the merchant courts at the medieval fairs (developing the so-called law merchant, the body of law applied in those courts), church courts (for example, promises to marry and sworn promises), and by the Chancellor (who exercised so-called equitable jurisdiction).³⁴⁴ Common-law courts took notice and, more from a desire to expand their jurisdiction than to enforce private agreements, decided to get into the game.³⁴⁵

³³⁹ *Id.* at 204.

³⁴⁰ *Id.* at 205.

³⁴¹ Hand, *supra* note 326, at vii.

³⁴² Boyer, *supra* note 13, at 22. Bruce Kimball describes Langdell similarly, portraying him as a reluctant formalist, one who "evidently wanted to be, or felt he should be, a purely logical formalist," but who also considered the fairness of legal rules. KIMBALL, *supra* note 10, at 125.

³⁴³ JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 6 (5th ed. 2011); FARNSWORTH, *supra* note 2, at 11–12.

³⁴⁴ MURRAY, *supra* note 343, at 6; FARNSWORTH, *supra* note 2, at 12.

³⁴⁵ MURRAY, *supra* note 343, at 6. A.W. Brian Simpson has argued that the common-law courts were not primarily seeking to provide a remedy where none currently existed but were seeking to assume jurisdiction over cases that was currently within the Chancery's province. A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 4–5, 377 (1975).

Having decided to play, the common-law courts needed a way to distinguish promises that would be legally binding from those that would not.³⁴⁶ After all, “[n]o legal system has attempted to enforce all promises.”³⁴⁷ At this point in history, the English legal system and the common lawyers did not think in terms of, say, “contract” or “tort.”³⁴⁸ Rather, there were writs, and a cause of action if the facts fit within a writ, which was needed to get into the royal courts.³⁴⁹ If the facts did not fit within a writ, there was no cause of action, at least in the royal courts.³⁵⁰ The writ system therefore presented a challenge to the common-law courts if they were going to develop a general basis for enforcing promises.³⁵¹ The writ system also meant that common-law courts would have to start from the premise that a promise was unenforceable unless there was a reason to enforce it, rather than vice versa.³⁵²

At the time, there was not much on the menu to choose from. There were three writs available that could make a promise legally binding—covenant, detinue, and debt³⁵³—but each was narrow, and even taking the three together they did not provide much help. Covenant (birthed near the end of the twelfth century)³⁵⁴ was limited to written promises under seal, and was similar to the Roman *stipulatio*, in that enforceability was dictated solely by the promise’s form.³⁵⁵ This writ had potential, but only if the requirement of the wax seal was ignored, but this did not happen.³⁵⁶

Detinue was limited to recovering specific goods that had been transferred to the defendant under a bailment contract,³⁵⁷ plus the writ came with baggage (so to speak). The defendant could choose to pay for the goods rather than surrender them, and, additionally, under the so-called wager of law, if the defendant could produce twelve persons to swear they believed him then he prevailed (there was no trial by jury at this time).³⁵⁸

³⁴⁶ MURRAY, *supra* note 343, at 6.

³⁴⁷ *Id.* at 4; *see also* FARNSWORTH, *supra* note 2, at 11 (“No legal system has ever been reckless enough to make all promises enforceable.”).

³⁴⁸ MURRAY, *supra* note 343, at 6.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ FARNSWORTH, *supra* note 2, at 12.

³⁵² *Id.* at 11.

³⁵³ MURRAY, *supra* note 343, at 6–7.

³⁵⁴ FARNSWORTH, *supra* note 2, at 13.

³⁵⁵ MURRAY, *supra* note 343, at 7.

³⁵⁶ FARNSWORTH, *supra* note 2, at 13.

³⁵⁷ MURRAY, *supra* note 343, at 7.

³⁵⁸ *Id.*

Debt (like covenant, on the scene by the end of the twelfth century) was the most useful of the three (and the most commonly used for breach of contract), applying when a proposed exchange (a *quid pro quo*) had been performed by one side (something actually given or done) and the other side owed a sum certain.³⁵⁹ In other words, “this” had been given, but “that” had not, and “that” was a sum certain, the sum being the amount that the defendant promised to pay.³⁶⁰ An action for debt was like the modern action for the price, where the duty to pay the promised sum arises from accepting the goods, with the remedy more in the nature of specific performance than damages.³⁶¹ Debt could be seen as involving a misfeasance by the debtor, rather than a mere nonfeasance, in that the debtor had accepted performance,³⁶² and was based on unjust enrichment rather than a promise.³⁶³ Further, wager of law applied to debt as well.³⁶⁴

The most glaring limitation of these three writs, with respect to the enforcement of promises, was that they did not make informal (i.e., not under seal) promises legally binding absent prior performance by the promisee. An executory exchange of informal promises was not legally binding. And it turned out that modern contract law’s ancestor would not be any of these three writs, but the law of torts (as then conceived),³⁶⁵ and a writ called trespass on the case (developed in the thirteenth century).³⁶⁶ This writ covered injuries caused without force or violence, such as slander (the action of trespass covered injuries caused with force or violence, such as battery).³⁶⁷

The Court of King’s Bench (one of the royal courts) started using this writ to cover a situation in which a defendant had promised to perform a service and had then performed it badly.³⁶⁸ For example, if a blacksmith had promised to shoe a horse and did a bad job, the owner of the horse had an action under the writ of trespass on the case, and the specific type of action came to be known as special assumpsit (he undertook or he promised).³⁶⁹ The claim’s essence was a misfeasance causing harm

³⁵⁹ *Id.* at 8.

³⁶⁰ *Id.* The action of debt had originally been available to recover specific goods as well, but detinue took over that part and debt became relegated to recovering a sum certain. *Id.* at 7–8.

³⁶¹ U.C.C. § 2-709(1)(a) (AM. L. INST. & UNIF. L. COMM’N 1998).

³⁶² FARNSWORTH, *supra* note 2, at 13.

³⁶³ *Id.* at 13 n.8.

³⁶⁴ *Id.* at 14.

³⁶⁵ *Id.*

³⁶⁶ Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 43 YALE L.J. 1142, 1143 (1937).

³⁶⁷ MURRAY, *supra* note 343, at 8.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

(detriment) to the promisee,³⁷⁰ and in this sense did not, therefore, in general make an informal promise legally binding.

The significant move was not made until the 1530s and 1540s when the common law courts began to extend special assumpsit to cover a promise to perform, even if the promisor had not started performance.³⁷¹ And it was not a difficult move from the misfeasance cases to ones where the promisee had in fact detrimentally relied on the promise.³⁷² But by the end of the sixteenth century, the common-law courts were allowing such claims in assumpsit on purely executory exchanges of promises without the promisee in fact detrimentally relying,³⁷³ and with it necessarily came the measure of damages we now call expectation damages.³⁷⁴ Another benefit was that assumpsit was not subject to debt's and detinue's wager of law, assumpsit having been developed after the trial by jury arose.³⁷⁵

The basis for enforceability was achieved through a circularity of reasoning, a problem in reasoning that would be ignored until the late nineteenth century (stay tuned). The reasoning was that "a party who had made a promise in exchange for the promise of the other party had suffered a detriment since he was bound by his own promise."³⁷⁶ By considering a return promise to be a detriment to the promisee, courts were able to justify enforcing exchanges involving purely executory promises.³⁷⁷ By the end of the sixteenth century, common-law courts thus provided the primary mechanism by which to enforce a promise.³⁷⁸ And although assumpsit was initially unavailable when there was available an action of debt (something difficult on creditors, with debt's wager of law), in *Slade's Case* in 1602 the court held that assumpsit could be used in actions where previously only debt was available.³⁷⁹ The common-law courts and the writ of assumpsit thereby became the principal forum and the principal vehicle, respectively, by which to enforce a promise. As A.W.B. Simpson has noted, "[w]hat seems remarkable to a modern lawyer is the way in which the doctrine that a promise can count as good consideration comes into the law in this

³⁷⁰ *Id.* at 9.

³⁷¹ JOHN P. DAWSON, GIFTS AND PROMISES 199 (1980); MURRAY, *supra* note 343, at 8.

³⁷² FARNSWORTH, *supra* note 2, at 15.

³⁷³ *Id.* at 15–16.

³⁷⁴ *Id.* at 16.

³⁷⁵ MURRAY, *supra* note 343, at 8.

³⁷⁶ *Id.* at 9; *see also* FARNSWORTH, *supra* note 2, at 16 ("It was held that even if one had given only a promise in exchange for the other's promise, one had nonetheless suffered a detriment by having one's freedom of action fettered: one was in turn bound by one's own promise The reasoning is, of course, circular, since the conclusion that there was a detriment to the promisee . . . assumed that the promisee was in turn bound by a promise, even though nothing but a promise had been given for it.").

³⁷⁷ MURRAY, *supra* note 343, at 9.

³⁷⁸ FARNSWORTH, *supra* note 2, at 12.

³⁷⁹ MURRAY, *supra* note 343, at 8–9, 237; FARNSWORTH, *supra* note 2, at 17–18.

quiet and unobtrusive way; contemporaries clearly did not think that *this* required much explanation of justification.”³⁸⁰

But it did require *some* explanation and some boundaries, and during this time the word “consideration” could be found in many of the lawyer’s arguments, and it “was used to express vaguely the concept that there had to be some reason for enforcing a promise.”³⁸¹ The doctrine of consideration arose in the sixteenth century as a way to set the boundaries for when a promise would be legally binding,³⁸² and it focused on the promisor’s motive for making the promise.³⁸³ This meant, of course, that a promise, in and of itself, was not legally binding.³⁸⁴ The theory was that “a promise which lacks any adequate motive cannot have been serious, and therefore ought not to be taken seriously.”³⁸⁵ The doctrine became “the dominant validation device for the overwhelming majority of contracts.”³⁸⁶

But what was a good reason for enforcing a promise? To give some type of meaning to the doctrine of consideration, the common lawyers looked back to “their old friends, the forms of action,”³⁸⁷ and the vaguer meanings of consideration “were stripped away and ‘consideration’ was made over, from an amorphous word drawn from common speech, into a technical requirement for contract formation.”³⁸⁸ By the late 1500s the word “consideration” had become a term of art.³⁸⁹ They took from the action of debt the idea of a quid pro quo, with the defendant having received a benefit,³⁹⁰ and from the assumpsit cases involving detrimental reliance, the idea of a detriment to the plaintiff.³⁹¹ The idea of exchange was, however, the central device

³⁸⁰ SIMPSON, *supra* note 345, at 461.

³⁸¹ MURRAY, *supra* note 343, at 12; *see also* DAWSON, *supra* note 371, at 201 (“As time went on, the something ‘for’ which the promise was made was described increasingly as ‘the consideration,’ though the word still carried a load of vaguer meanings, suggesting other motives for promising that might or might not be good enough.”).

³⁸² SIMPSON, *supra* note 345, at 316, 318.

³⁸³ *Id.* at 321.

³⁸⁴ *Id.* at 321–22.

³⁸⁵ *Id.* at 322.

³⁸⁶ MURRAY, *supra* note 343, at 236.

³⁸⁷ *Id.* at 12.

³⁸⁸ DAWSON, *supra* note 371, at 202.

³⁸⁹ *Id.* at 208; FARNSWORTH, *supra* note 2, at 18.

³⁹⁰ FARNSWORTH, *supra* note 2, at 18; MURRAY, *supra* note 343, at 236; *see also* DAWSON, *supra* note 371, at 200 (“The requirement of the much older action of debt that something must have been given ‘for’ something else, a quid pro quo, made extremely familiar the notion of exchange, half completed.”).

³⁹¹ MURRAY, *supra* note 343, at 238; FARNSWORTH, *supra* note 2, at 18.

for determining enforceability, even from as early as the sixteenth century.³⁹² As John Dawson noted:

It became abundantly clear as the sixteenth century progressed that common-law courts had created the means for enforcing, and were prepared to enforce, a great variety of exchange transactions. In the transactions that were enforced there was one recurring element which provided the reason why they were enforced: each party had in fact desired some act or abstention of the other in return for which he had agreed to perform his own.³⁹³

Thus, “pleaders were at least following a well-beaten track when they urged as a good reason for enforcing a promise the existence of an agreement that this would be given ‘for’ that.”³⁹⁴ Also, stopping at exchange and not enforcing gratuitous promises was consistent with a country entering the commercial age.³⁹⁵

The result? “[I]f there was an *exchange* resulting in *either a benefit* to the promisor or a *detriment* to the promisee, there was a reason for enforcing the promise,” and this became the formula for consideration.³⁹⁶ Note that grafted upon the idea that an exchange of informal promises can constitute a legally-binding contract, was the requirement of either a benefit to the promisor or a detriment to the promisee as an additional requirement for the exchange to be legally binding. As Chancellor Murray noted, it was not “the product of a grand design,”³⁹⁷ and “it is clear that consideration was not a well-planned, rationally conceived device for deciding which promises are enforceable.”³⁹⁸

And the concept of the exchange also requiring a benefit or a detriment would cause problems down the road. It has been argued that “our rules of consideration are the vestigial survivals of procedural evolution—the product of the peculiar and unsystematic history of the writ of *assumpsit* in the King’s courts in England”³⁹⁹ In essence, a “historical accident,” “the tyranny exercised in English law by the medieval forms of action . . . just beginning to fade at the crucial time, the sixteenth century, when a law of contract was emerging from the shadows cast by the law of tort.”⁴⁰⁰ But it has also been stated that “it would be hard to find a better illustration

³⁹² MURRAY, *supra* note 343, at 238; *see also* DAWSON, *supra* note 371, at 198 (noting that “the concept of bargained-for exchange became an established feature of the English law of contract in the decades when English lawyers were first becoming aware that a law of contract existed.”).

³⁹³ DAWSON, *supra* note 371, at 203.

³⁹⁴ *Id.* at 200.

³⁹⁵ FARNSWORTH, *supra* note 2, at 18.

³⁹⁶ MURRAY, *supra* note 343, at 238.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ Malcom P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 785 (1941).

⁴⁰⁰ DAWSON, *supra* note 371, at 197.

of the flexibility and development of the Common Law.”⁴⁰¹ Or, as stated by E. Allan Farnsworth, “in view of the difficulty that other societies have had in developing a general basis for enforcing promises, it is perhaps less remarkable that the basis developed by the common law is logically flawed than that the common law succeeded in developing any basis at all.”⁴⁰²

Although the expansion of assumpsit had made more promises legally binding than under detinue, debt, and covenant, the doctrine of consideration was still “an exclusionary rule preventing enforcement of promises that did not comply [with its requirements].”⁴⁰³ For example, in *Hunt v. Bate*, decided in 1568 (a case included in Langdell’s casebook), the court held there was no consideration for a master’s promise to hold harmless a guarantor who had obtained the release of the master’s servant, so that the master’s business would not go undone, because the master had made the promise after the guarantor had secured the servant’s release.⁴⁰⁴

For the next hundred years, the concept of consideration was not given much thought. As Farnsworth noted, “the movement toward contract was a slow one for two centuries.”⁴⁰⁵ Consideration rested, left alone for a long time. One interesting development, however, which did not per se alter the definition of consideration, was Parliament’s conclusion in the late seventeenth century that the common-law courts had gone a bit too far in expanding the writ of assumpsit. In 1671, a jurist remarked that two men could no longer talk together without one of them claiming a promise had been made.⁴⁰⁶ As a result, in 1677 Parliament passed the Statute of Frauds, requiring certain classes of contracts to be in writing to be enforceable.⁴⁰⁷

Another interesting development, which did not have the same staying power as the Statute of Frauds, occurred in the middle of the eighteenth century. Despite the term *consideration* having been in use for a couple hundred years, it still did not have a precise meaning,⁴⁰⁸ and there was a brouhaha in 1765, when Lord Mansfield apparently went a bit too far in asserting that consideration should be unnecessary in transactions between merchants or if the promise was in writing.⁴⁰⁹ This view was

⁴⁰¹ James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 69 (1888).

⁴⁰² FARNSWORTH, *supra* note 2, at 18–19.

⁴⁰³ DAWSON, *supra* note 371, at 202.

⁴⁰⁴ *Hunt v. Bate* (1568) 73 Eng. Rep. 605 (CP).

⁴⁰⁵ FARNSWORTH, *supra* note 2, at 19.

⁴⁰⁶ SIMPSON, *supra* note 345, at 603.

⁴⁰⁷ See Val Ricks, *The Democratization of Contract Law: The Case of Mutual Promises*, 45 FLA. ST. U. L. REV. 947, 950 n.26 (2018) (“As actions on plebian mutual promises took root, the property-owning aristocracy became so bothered at being bound on their informal promises that Parliament passed the Statute of Frauds to cut back on their potential liability.”).

⁴⁰⁸ GILMORE, *supra* note 2, at 7.

⁴⁰⁹ *Pillans v. Van Mierop* (1765) 97 Eng. Rep. 1035, 1039 (KB); see also Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 364 (2002) (“Mansfield boldly declared that, past consideration or not, the usage of merchants did not require consideration for a binding contract, and further that consideration

promptly rejected in 1778 by the House of Lords.⁴¹⁰ The requirement of consideration had been given a bit of a scare by the towering Scot, but that disturbance had passed without harm.

Roughly one hundred years later, exactly what the benefit/detriment test for consideration meant remained unclear. For example, starting in the 1580s, conflicting opinions arose regarding whether part payment of a debt was consideration for complete discharge, and the issue was not resolved in England until 1884 in the case of *Foakes v. Beer* (it was held not to be sufficient consideration).⁴¹¹ The architects of classical contract law would have their work cut out for them. But this brings us to where we started this Article—the nineteenth century.

A significant development in the nineteenth century was superimposing the requirement of offer and acceptance on the requirement of consideration.⁴¹² This development occurred primarily because of the problem of contracts being formed by mail, and was imported from the civil law concept that a promise does not become a promise under law until it is accepted by the promisee, though the legal concept of “offer” replaced the Roman term *pollicitation* (a promise that has not been accepted).⁴¹³ In Langdell’s casebook, the first chapter is titled “Mutual Consent,” and it begins with the following quote from Ulpian, the Roman jurist: “*Est autem pactio duorum pluriumve in idem placitum consensus*” (“A pact is the consensus of two or more parties that a party shall do or not do some particular thing.”)⁴¹⁴

The requirement of an offer and acceptance did not, however, fit neatly over the requirement of consideration. In the sixteenth and seventeenth centuries, for promises to be consideration for each other they must have been made at the same time.⁴¹⁵ In *Cooke v. Oxley*, the court held that a contract did not form when an offeror gave an

was not required in an unsealed written contract subsequent to the passage of the Statute of Frauds in 1677.”).

⁴¹⁰ MURRAY, *supra* note 343, at 237; *see Rann v. Hughes* (1778) 2 Eng. Rep. 18, 32 (HL).

⁴¹¹ *Foakes v. Beer* (1884) 9 App. Cas. 605 (HL); *see also* DAWSON, *supra* note 371, at 208–09.

⁴¹² Alfred William Brian Simpson & Brian A. Simpson, *Legal Theory and Legal History* (1987) at 187. The case of *Payne v. Cave* (1789) 3 T.R. 148, 149 (KB), is often cited as introducing the requirement of offer and acceptance (“[T]he assent of both parties is necessary to make the contract binding[.]”).

⁴¹³ Simpson, *supra* note 167, at 260; *see also* Parviz Owsia, *The Notion and Function of Offer and Acceptance under French and English Law*, 66 TUL. L. REV. 871, 873 (1992) (“The modern doctrine of offer and acceptance is a rather late development in both the civil- and common-law systems. Roman law lacked a formulated mechanism of offer and acceptance. Under French law, it took shape in the eighteenth century at the hand of Pothier. Offer and acceptance then worked its way, apparently under Pothier’s influence, into the English law of contract around the close of the eighteenth and into the nineteenth centuries.”).

⁴¹⁴ LANGDELL, *supra* note 43, at 1. For the translation, *see* WILLIAM FREDERICK HARVEY, *A BRIEF DIGEST OF THE ROMAN LAW OF CONTRACTS* 77 (1878).

⁴¹⁵ Simpson, *supra* note 167, at 261.

offeree a certain time within which to accept the offer because the offeree did not allege that the offeror assented to the deal when the offeree sought to accept.⁴¹⁶

This idea ran into further difficulties when offers and acceptances started to be made by mail. The court in *Adams v. Lindsell* recognized the problem, believing that the requirement that the promises be made at the same time, if taken literally, would mean no contract could ever be formed by mail.⁴¹⁷ The court thus held that an offeror “must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by letter.”⁴¹⁸

This brings us to the late nineteenth century. In 1848, New York had adopted David Dudley Field’s Code of Civil Procedure, abolishing the forms of action, and, by 1870, twenty-seven states had followed New York’s lead.⁴¹⁹ As a result, in the place of the ancient formulary system there was now “a formless action based on the facts of the contractual transaction.”⁴²⁰ Although the abolition of the old forms of action was not meant to disturb existing substantive law, “the old classifications provided by the forms of action to save the law from chaos were gone, and judges had to fill in by continuing to develop general principles.”⁴²¹ Around the same time that the forms of action were disappearing, a reevaluation of consideration was undertaken, as its present state was one of fragmentation, and there was a desire to refine it more narrowly.⁴²² The result would be the gradual supplanting of the benefit/detriment test with a test that the consideration be “bargained for,”⁴²³ though the former test remained the measure of what could qualify as “consideration.”

The bargain theory appeared somewhat in Langdell’s *Summary*, in which he stated that “[e]very consideration is . . . the promisor’s sole inducement to make the

⁴¹⁶ *Cooke v. Oxley* (1790) 100 Eng. Rep. 785 (KB); see also Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 436 (2000) (“The case . . . meant that no offer is binding unless immediately accepted because there is no consideration to make it binding. It was so understood by the legal profession for the next two decades and the case itself was argued and decided on the basis of consideration.”).

⁴¹⁷ *Adams v. Lindsell* (1818) 106 Eng. Rep. 250, 251 (KB).

⁴¹⁸ *Id.* This idea might have been new to the English courts, see LANGDELL, *supra* note 9, at 18 (noting that this idea was a “new one”), but Pothier, in his *Treatise on the Contract of Sale*, had proposed the idea, see ROBERT JOSEPH POTHIER, *TREATISE ON THE CONTRACT OF SALE* 18 (L.S. Cushing trans., Boston, Charles C. Little & James Brown 1839) (1762) (“[I]n order that the consent of the parties may take place . . . it is necessary that the will of the party who makes a proposal in writing should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition. *The will is presumed to continue, if nothing appear to the contrary.*”), though the court in *Adams* did not cite to Pothier. Simpson, *supra* note 167, at 261.

⁴¹⁹ TEEVEN, *supra* note 6, at 198–99.

⁴²⁰ *Id.* at 200.

⁴²¹ *Id.*

⁴²² *Id.* at 223.

⁴²³ *Id.*

promise.”⁴²⁴ It was, however, Holmes’s statement of the bargain theory that is usually credited with its rise,⁴²⁵ when he wrote in *The Common Law* that “the root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.”⁴²⁶ Detriment to the promisee would suffice, but only if the parties had “dealt with it on that footing” (as consideration).⁴²⁷ Thus, under the bargained-for test, a benefit or a detriment had to be bargained for if it was to count as consideration.⁴²⁸ Also, according to Holmes, whether the benefit or detriment was considered bargained for was to be determined objectively, based on the parties’ overt acts.⁴²⁹ The bargain requirement as the test for consideration would be carried forward by Williston.⁴³⁰ As Allen Boyer has written: “Williston’s favorite principle, of course, was bargain consideration. The presence of consideration, as if it were a chemical tracer, was an infallible indicator of an enforceable agreement. The absence of consideration was so notable a failing that it precluded many reasonable arrangements.”⁴³¹

As John Dawson has shown, a recurring element in those transactions enforced by English common-law courts in the sixteenth century had been that “each party had in fact desired some act or abstention of the other in return for which he had agreed to perform his own.”⁴³² Thus, while bargain consideration was not a revolutionary invention by Holmes,⁴³³ what happened during the era of classical contract law was that the consideration requirement was imposed upon matters for which it was not originally designed, such as whether a discharge or modification of a contract duty was binding, or whether a promise to keep an offer open was binding.⁴³⁴ In Grant Gilmore’s words, it was “[t]he balance wheel of the great machine,” and was “put to

⁴²⁴ LANGDELL, *supra* note 9, at 78; *see also* Kimball, *supra* note 63, at 369 (arguing that “Langdell introduced the bargain theory of contract.”).

⁴²⁵ TEEVEN, *supra* note 6, at 224.

⁴²⁶ HOLMES, *supra* note 12, at 293–94.

⁴²⁷ *Id.* at 292.

⁴²⁸ TEEVEN, *supra* note 6, at 224.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ Boyer, *supra* note 13, at 24. Williston, however, did “not argue that the doctrine is essential to contract’s ‘true’ nature or that it is consistent with a ‘correct’ theory of the parties’ rights. Rather, he argues that consideration is a necessary evil, a concession to reality. Courts simply cannot enforce every promise, he reasons; the law needs some screening mechanism.” Movsesian, *supra* note 20, at 238.

⁴³² DAWSON, *supra* note 371, at 203.

⁴³³ *Id.*

⁴³⁴ *Id.* at 198, 207–21.

some hitherto unsuspected uses.”⁴³⁵ It was an axiom that would, through deductive reasoning, provide the correct answer to many questions.

V. AN OVERVIEW OF LANGDELL’S DISCUSSION OF CONSIDERATION IN THE SUMMARY

Interestingly, Langdell did not regard the doctrine of consideration as necessary for a rational system of contract law,⁴³⁶ and even thought that not requiring consideration might have been “the more rational course.”⁴³⁷ In fact, Langdell argued that the belief—among lawyers and some courts—that certain types of promises—including bills of exchange and policies of insurance—required consideration “is irreconcilable with the nature of these contracts, even when judged by our law, still more when judged by the custom of merchants, and that the decisions by which it is supported, if they cannot be pronounced erroneous, must at least be deemed anomalous.”⁴³⁸ He believed, however, that “whatever may have been the merits of the question originally, it was long since conclusively settled” in favor of the doctrine of consideration.⁴³⁹ Langdell the legal positivist conceded the issue.

Langdell was bothered more, however, by the doctrine of moral consideration, which he believed would involve “judicial legislation.”⁴⁴⁰ But Langdell thought there was an even more significant objection from a “scientific point of view, that it could only succeed at the expense of involving a fundamental legal doctrine in infinite confusion.”⁴⁴¹ Langdell, who sought to bring an apolitical order to the common law, could not advocate for such an amorphous concept.

Consistent with the bargain theory, he also rejected the argument that unbargained-for detrimental reliance on a promise could furnish the consideration for the promise, even when:

the promise was made with the expectation that the promisee would act or refrain from acting on the faith of it, and with the intention of inducing him to do so, and with the full knowledge that a failure to perform the promise might place the promisee in a worse position than if the promise had never been made.⁴⁴²

Langdell argued that it could not be consideration because the promisee’s detrimental reliance was not in fact a condition to the promise, the promise in fact being “absolute in its terms, and its only condition was the condition (implied by law) of its

⁴³⁵ GILMORE, *supra* note 15, at 18.

⁴³⁶ Grey, *supra* note 7, at 26.

⁴³⁷ LANGDELL, *supra* note 9, at 60.

⁴³⁸ *Id.* at 63.

⁴³⁹ *Id.* at 61.

⁴⁴⁰ *Id.* at 89.

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 98–99.

acceptance.”⁴⁴³ Thus, such a promise, if held legally binding, would really be binding based on the notion of moral obligation, the moral obligation not based on a prior legal duty but being created by the promise.⁴⁴⁴ Langdell wrote that:

[a]s to the moral obligation created by the promise, that is even more delusive as a ground of decision than an antecedent moral obligation; for every promise which excites in the promisee an expectation of performance creates such an obligation, and every binding promise is supposed to excite such an expectation, the only difference between one promise and another in this respect being one of degree.⁴⁴⁵

To Langdell, recognizing unbargained-for detrimental reliance as making a promise binding “would render a consideration unnecessary in any case, and thus destroy all distinction in that respect between our law and the civil law.”⁴⁴⁶

Thus, with respect to moral obligation and promises inducing unbargained-for detrimental reliance (the latter currently dealt with under the doctrine of promissory estoppel), Langdell, the positivist, sought to accurately identify the distinction between the common law and the civil law, and Langdell, the system builder, sought to avoid axioms that would make the law too unpredictable.

But what of mutual promises? Was a promise consideration? The law was clear that an exchange of promises were each consideration for the other—recall that *assumpsit* moved beyond debt’s requirement of the receipt of a tangible benefit. As Langdell noted:

when it had become established that anything of value given or done by the promisee might be made the consideration for a promise, the courts were not long in perceiving that the making of a binding promise was giving or doing something of value, and hence that such promises were entitled to be admitted into the category of sufficient “considerations.”⁴⁴⁷

Langdell, the positivist, followed well-established law, though the circularity of the reasoning (the making of a binding promise was consideration because it was binding, and it was consideration because it was binding) did not yet seem apparent to him.

But what promises or acts would be considered a *good or sufficient* consideration? Langdell gave a broad definition of such consideration, but he included an important parenthetical qualification: “If anything whatever (which the law can notice) be given or done in exchange for the promise, it is sufficient; and therefore, if one promise be given in exchange for another promise, there is sufficient consideration for each.”⁴⁴⁸ Thus, in an exchange of promises, each promise would be supported by consideration, assuming it was a promise “which the law can notice.”

⁴⁴³ *Id.* at 100.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* (footnote omitted).

⁴⁴⁷ *Id.* at 103.

⁴⁴⁸ *Id.* at 59.

The first issue was whether that which was exchanged had to be adequate in value. Langdell noted that there was no such requirement, and that the reason was because the objective theory “shut its eyes to the inequality between them”:

[T]he law has never in theory abandoned the principle that consideration must be commensurate with the obligation which is given in exchange for it; that, though the smallest consideration would in most cases support the largest promise, this is only because the law shuts its eyes to the inequality between them; and hence any inequality to which the law cannot shut its eyes is fatal to the validity of the promise.⁴⁴⁹

The reason the law typically shuts its eyes to the inequality between them is because:

[t]he value of most considerations, as well as of most promises, is a thing which the law cannot measure; it is not merely a matter of fact, but a matter of opinion. If, therefore, the promisor thinks the consideration is equal to the promise in value (*i.e.* if he is willing to give the promise for the sake of getting the consideration), the consideration will be equal to the promise in value for all the purposes of the contract. From this it is but an easy step to the conclusion that, whatever a promisor chooses to accept as the consideration of his promise, the law will regard as equal to the promise in value, provided the law can see that it has any value.⁴⁵⁰

Thus, typically the law considers there to be “in theory . . . a perfect equality in value between the consideration and the promise.”⁴⁵¹ The theory necessarily included a rejection of the concept of a mixed motive for making the promise—part bargain, part gift:

That such equality always exists in theory seems pretty clear. In other words, the promise is in legal contemplation given and received in exchange for the consideration, and for no other purpose. Therefore, a promise can never constitute a gift from the promisor to the promisee as to any part of it.⁴⁵²

One situation in which the law could not ignore the inequality, however, was an agreement to simultaneously exchange a larger sum of money for a smaller sum.⁴⁵³ No theory could view this as involving an exchange of equivalents.

From the theory that the law presumes an equal exchange, the law could also not consider the promisor’s actual motive for entering into the agreement, beyond simply deciding whether the promisor’s apparent motive was to obtain the consideration. Because the law presumed an equal exchange and presumed that the promisor’s sole motive was to receive what the other side provided, as long as the promisor’s apparent motive was to receive what the other side provided, it was irrelevant if the promisor

⁴⁴⁹ *Id.* at 70–71.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 71.

⁴⁵² *Id.*

⁴⁵³ *Id.* at 108.

might have had other motives for making his promise. Langdell thus emphasized the difference between consideration and the defendant's actual motive for making the promise, writing that "the consideration need not in fact constitute the whole, or even any part, of the motive for making the promise."⁴⁵⁴ He thus rejected the idea of nominal consideration not being consideration, and believed that the parties could set up a consideration for the purpose of making the promise binding. He wrote that "whatever a promisor chooses to accept as the consideration of his promise, the law will regard as equal to the promise in value, provided that the law can see that it has any value."⁴⁵⁵ As an example, he relied on *Thomas v. Thomas*, writing that:

the consideration for the defendant's promise was the plaintiff's promise, but a desire to comply with the will of the defendant's testator was clearly the defendant's inducement to make the promise. So a promise may be made for a nominal consideration, *i.e.* the consideration may be given and received for the mere purpose of making the promise binding; and in all such cases there must of course be some motive for the promise besides the consideration.⁴⁵⁶

He concluded:

It must not be supposed . . . that motive, as distinguished from consideration, can constitute any element of a contract, or that it is a thing of which the law can strictly take any notice. On the contrary, as every consideration is in theory equal to the promise in value, so it is in theory the promisor's sole inducement to make the promise. As the law cannot see any inequality in value between the consideration and the promise, so it cannot see any motive for the promise except the consideration.⁴⁵⁷

Langdell also discussed the difference between consideration and a condition. He argued that "[a]ny act of the promisee . . . which may constitute a consideration, may also constitute a condition only; and hence, whether it constitutes one or the other, in a particular case, depends upon the intention of the parties."⁴⁵⁸ In this respect (distinguishing consideration from a promise of a gift subject to a condition), the promisor's intention had to be taken into account. Langdell (like Holmes)⁴⁵⁹ believed the decision in *Shadwell v. Shadwell* was incorrect—that the uncle's promise was a

⁴⁵⁴ *Id.* at 77.

⁴⁵⁵ *Id.* at 71.

⁴⁵⁶ *Id.* at 78. Holmes agreed that nominal consideration could be sufficient consideration, *see* Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1112–13 (1984) (noting that Holmes embraced the doctrine of nominal consideration), but he disagreed with the holding in *Thomas v. Thomas*, though only because he believed the parties' agreement "expressly stated other matters as the consideration." HOLMES, *supra* note 12, at 292 & n.10.

⁴⁵⁷ LANGDELL, *supra* note 9, at 78.

⁴⁵⁸ *Id.* at 83.

⁴⁵⁹ HOLMES, *supra* note 12, at 492 (discussing why he believed *Shadwell v. Shadwell* was incorrectly decided).

gratuitous promise subject to the condition of marriage, rather than marriage being consideration for the promise.⁴⁶⁰

There might appear to be some tension between Langdell's view of nominal consideration and his view on conditions, but his views can be reconciled. To Langdell, the question is always whether there is consideration for a promise, and if there is, the promisor's actual motive for making the promise will not change that. And to have consideration, the promisor must have simply manifested an intention to treat the return promise as consideration, meaning that he manifested an intention to make his promise in exchange for what the other party was providing. Even if the promisor's motive was to obtain what the other was providing simply to make the promisor's promise legally binding, there was still an intention to receive what the other was giving. The motive for wanting to receive it was irrelevant. The question was whether the promisor had "in fact" made it consideration.⁴⁶¹ But if the promisor did not treat it as consideration—did not make his promise to receive what the other party was giving—then it was merely a condition, and not consideration. It was a fine line, but a line nonetheless.

Langdell, seeking to bring order to the common law, argued that for something to be consideration for a promise it need not benefit the promisor.⁴⁶² In fact, he argued that "benefit to the promisor is irrelevant to the question whether a given thing can be made the consideration of a promise, though it may be very material to the question whether it has been made so in fact."⁴⁶³ To demonstrate that benefit to the promisor was irrelevant, he argued that "[t]here may be a clear benefit to the promisor, and yet no consideration, *e.g.* where the benefit does not come from the promisee."⁴⁶⁴ Rather, the sole test was whether there was a detriment to the promisee: "[D]etriment to the promisee is a universal test of the sufficiency of consideration; *i.e.* every consideration must possess this quality, and, possessing this quality, it is immaterial whether it is a benefit to the promisor or not."⁴⁶⁵ The reason for this was that in debt the debtor had to receive the consideration before the debt became an obligation, *i.e.*, the debtor had to receive a benefit, but assumpsit was designed to provide a remedy where debt would not, and thus benefit to the promisor is unnecessary.⁴⁶⁶ In assumpsit, the defendant's

⁴⁶⁰ LANGDELL, *supra* note 9, at 86. Holmes too considered the parties' intentions relevant in distinguishing between consideration and a condition of gratuitous promise, but staying true to his emphasis on the objective theory, maintained that intent must be determined objectively. See Daniel P. O'Gorman, *Oliver Wendell Holmes's Theory of Contract Law at the Massachusetts Supreme Judicial Court*, 13 NE. L. REV. 73, 87—88 (2021) (discussing Holmes's approach).

⁴⁶¹ LANGDELL, *supra* note 9, at 82.

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

promise creates the obligation, not the receipt of a benefit.⁴⁶⁷ Langdell, the system builder, was seeking to scrub the common law of the residue of the old writs, something very Holmesian indeed. Consideration was being clarified, and as things became clearer, the bargain theory was emerging as the principal test for enforceability.

And consistent with the bargain theory, because the promise must be given in exchange for consideration, the consideration could not have already been provided at the time the promise is made.⁴⁶⁸ So-called past consideration was not consideration at all, and was nothing more than a form of moral consideration.

But Langdell's effort to formulate a principle for consideration ran into difficulty precisely because of the old legal benefit/detriment test, the former (detriment) presumably what he was referring to when he referred to consideration being sufficient as long as it is that "which the law can notice." And recall that while he sought to cleanse the doctrine of consideration of the benefit test, he had held on to the detriment test, as it seemed consistent with the bargain theory. Here, Langdell, the positivist, seemed unwilling to go so far as to get rid of both the benefit test and the detriment test so he was left with explaining when a detriment was sufficient consideration and when it was not.

Langdell recognized the problem, and he sought to explain it by historical development. For example, Langdell acknowledged that a promise to pay an existing debt was not treated as consideration. But why not, if any promise was typically sufficient consideration? Langdell traced the limitation to the purpose of assumpsit. Assumpsit arose to relax the requirements of debt, but despite *Slade's Case*, Langdell believed that the preexisting-duty rule was a holdover from the notion existing before *Slade's Case* that assumpsit was designed to provide a remedy where debt would not.⁴⁶⁹ Langdell was thus a supporter of the preexisting-duty rule, but apparently for historical reasons. Here Langdell was the positivist, not the conceptualist. Holmes would likely have disapproved of such an unquestioning devotion to the past.

Importantly, Langdell also concluded that a legal principle was that "a verbal surrender of a thing which is by law incapable of being surrendered (*e.g.* an estate at will) will not be a consideration."⁴⁷⁰ Thus, not all promises that were bargained for were sufficient consideration, like, for example, promises including something "which is by law incapable of being surrendered." If this was a top-level principle that had been derived from the caselaw, then it had to be thrown back down upon the cases (the specimens) and any inconsistent cases declared incorrectly decided (illogical aberrations). This of course required that it then be determined when the law says something is incapable of being surrendered. Langdell wrote that:

the doing of a thing which the promisee is already bound to the promisor to do is clearly no consideration. Thus, payment of a judgment by the judgment creditor is no consideration for a promise by the judgment creditor. And the same principle seems to apply when the promisee is under an obligation to a

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 87.

⁴⁶⁹ *Id.* at 61.

⁴⁷⁰ *Id.* at 68.

third person to do the thing in question; for there is then a conclusive presumption of law that he does it in discharge of his previous obligation, and not as a consideration of a new promise.⁴⁷¹

In essence, a person does not surrender a right when the person performs a preexisting duty owed to the promisor, and such performance is therefore not a detriment incurred for the promise. And even if the duty is owed to a third party, there is a conclusive presumption that when the person acts and discharges the duty, he is doing it solely to discharge the duty, and not as a consideration for the new promise. Contrary decisions were therefore incorrectly decided.⁴⁷² Again, while consideration should be distinguished from actual motive, presumed motive determined if there was consideration (a detriment).

Here we see Langdell, the logician (one is incapable of surrendering a right to a promisor when he performs a preexisting duty to the promisor), and then seeking to extend that logic to what is a different situation (the duty is owed to a third party), even to the extent of declaring contrary decisions incorrect. Langdell, the conceptualist/formalist, is fully on display here, and we will return to this important issue of law in more detail in the next Part.

In sum, we see Langdell, in his discussion of consideration in the *Summary*, as both the legal positivist and the conceptualist/formalist. The legal positivist recognizes that the doctrine of consideration is an established part of the common law even if there was a more rational course that could be taken, and should be retained if the common law is to remain distinct from the civil law. Langdell the positivist also recognized and accepted the historical reason for holding that the payment of a preexisting debt was not consideration. Langdell the conceptualist/formalist expressed concern about recognizing exceptions to the bargain test for consideration that would make it difficult to predict future cases, such as the doctrine of moral consideration and detrimental reliance. The conceptualist/formalist also believed that a person's performance of a preexisting duty could not be consideration for a promise by the right-holder because the former was not, in performing, surrendering any right, and extended this principle to performing a duty owed to a third party, through a legal presumption that the person is acting solely to discharge the duty.

VI. LANGDELL'S DIFFERENCES WITH HOLMES AND WILLISTON ON CONSIDERATION

Having shown how Langdell's view of consideration displayed both his positivist side and his conceptualist/formalist side, this Part now discusses three instances in which Holmes or Williston or both disagreed with Langdell on an issue regarding the doctrine of consideration. The first involves a promise that is conditional on a past event; the second involves the so-called mailbox rule; and the third involves the issue of whether a promise to perform a duty owed to a third party is consideration. As will be shown, these disagreements highlight how Langdell and the other leading architects of classical contract law could not agree on the nature of consideration because they had differing concepts of law and, even when they applied the same concept (logic), the concept proved unable to provide an answer.

⁴⁷¹ *Id.* at 69.

⁴⁷² *Id.*

A. *Promise Conditional on Past or Current Event: Communis Error Facit Jus and the “Theory of Contract” Itself*

If a fundamental principle of consideration was that a promise, in general, was sufficient consideration for a return promise (and it had been, since the late sixteenth century), the definition of *promise* would play a key role in any unified theory of consideration, even if everyone agreed on the bargain test for consideration. Langdell’s legal definition of *promise*, however, differed from, and was narrower than, that of Holmes and Williston, and in an important way. Langdell maintained that a promise to pay a sum of money conditional on the existence of some past or present fact was not truly a promise if the fact had not existed, or did not exist.⁴⁷³

In Langdell’s *Summary*, he provided a hypothetical in which two parties wager on the result of a race that has already taken place.⁴⁷⁴ He acknowledged that precedent held that each party’s promise was supported by consideration,⁴⁷⁵ but he considered this to perhaps be a situation of *communis error facit jus* (common error makes law).⁴⁷⁶ For example, he believed *March v. Pigot*⁴⁷⁷ was wrong on principle.⁴⁷⁸ In that case, the court upheld a wager between two sons as to whose father would live longer, even though unknown to the parties, one of the fathers had already died. Langdell, citing as support a 1761 treatise by the French jurist Robert Joseph Pothier, argued that “if a wager be made by mutual promises upon a race which has already taken place, but the result of which is unknown to the parties, it is the losing party alone who promises, and he really receives no consideration for his promise.”⁴⁷⁹ Langdell, unlike, say, Joel Bishop, arrived at this result through an application of the definition of *promise*, and not because wagers were in some sense immoral.⁴⁸⁰ Pothier, for example, had written:

For a condition to have the effect of suspending an obligation, it is necessary,
1. That it should be a condition of something future; an obligation contracted under the condition of anything that is past, or present, is not properly a

⁴⁷³ *Id.* at 31–32.

⁴⁷⁴ *Id.* at 111.

⁴⁷⁵ *Id.*; see also Val D. Ricks, *In Defense of Mutuality of Obligation: Why “Both Should Be Bound, or Neither,”* 78 NEB. L. REV. 491, 506–07 (1999) (“Courts decided conclusively at least by the mid-1600s that assumpsit based on mutual promises lay for wagers even though only one party could win and no mutual remedy could exist.”).

⁴⁷⁶ LANGDELL, *supra* note 9, at 111.

⁴⁷⁷ *March v. Pigot* (1771) 98 Eng. Rep. 471, 472 (KB).

⁴⁷⁸ LANGDELL, *supra* note 9, at 111.

⁴⁷⁹ *Id.*

⁴⁸⁰ See Siegel, *supra* note 7, at 258 (“Bishop . . . prefaces his elaboration of common law principle with a disquisition on the moral impropriety of wagers. For Bishop, then, the conclusion that wagering contracts fail for want of consideration illustrates the wondrous coincidence between an exacting understanding of common law principle and moral principle.”).

conditional obligation. For instance, if after the lottery has begun to be drawn, and before an account of it is received, I promise a person to give him a certain sum in case I have the first drawn ticket; or if I promise a certain sum in case the Pope is now living, these obligations are not conditional, but they have at first their full perfection, if it appears that I really have the first drawn ticket, or that the Pope is living; *or on the contrary no obligation is contracted if it appears that I have not the first drawn ticket, or that the Pope is dead.*⁴⁸¹

The idea was that if there had already been the nonoccurrence, then at the time of contract formation there was, in fact, no duty to perform and hence no detriment. If the condition was to occur or not occur in the future, there was at least a conditional promise, which Langdell considered a detriment because the promisor could *possibly* suffer a detriment, and the possibility of having to perform could be considered a detriment.⁴⁸²

This view had potentially broad-ranging implications for the doctrine of consideration. Anytime a party's promise was subject to a condition, and the condition already failed at the time of the promise, Langdell believed there was in fact no promise and thus there was no consideration for the other party's promise.⁴⁸³ This meant that the other party could not be held liable for breach because his promise was not supported by consideration. No contract ever formed. Thus, if the condition was a future event, a contract still formed and the other party was obligated to perform, but if it was a current or past event that did not exist or had not happened, then the other party was not obligated to perform.

The issue extended beyond wagers. For example, prospective heirs might agree to share in their bequests from the decedent's will, making the agreement before the contents of the will are known. Such an agreement is a form of insurance, designed to reduce risk. Under Langdell's theory, any heir who was in fact (but unknowingly) not giving up anything (such heir's share being smaller than the others' shares), had not made a promise. Hence, that heir could not enforce the other heirs' promises. Langdell in fact recognized that this doctrine would frequently make charter-party contracts unenforceable.⁴⁸⁴ Langdell's argument was significant in that it applied even when the parties understood there was doubt about whether the event had occurred, and were contracting on that understanding, a situation much different from when the parties had contracted based on a mistaken assumption.

Three things are notable about Langdell's position. The first is that he states this is perhaps an example of *communis error facit jus*, which is an acknowledgment that this is "law," reflecting his positivist side, though his conceptualist/formalist side feels compelled to point out that it appears inconsistent with a top-level principle, here that being the definition of *promise*.

⁴⁸¹ 1 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 199 (Philadelphia, William David Evans trans., 3d ed. 1853) (1761) (emphasis added).

⁴⁸² LANGDELL, *supra* note 9, at 104–05.

⁴⁸³ *Id.* at 105.

⁴⁸⁴ *Id.* at 33.

The second is that despite courts having rejected his position, he does not discuss whether his narrow definition of *promise* should be expanded to accommodate the results reached by the courts. If the courts are concluding that there are mutual promises in such cases, and hence consideration, presumably they believe there is no basis to treat them as unenforceable. Langdell does not express any interest in considering whether his definition of *promise* should, for policy reasons, be expanded to accommodate the decisions and any policy justifications for those decisions.

The third is that Langdell relied on Pothier, a French civil-law jurist, over the common-law precedent for the substance of his conceptualist (not positivist) definition of *promise*.⁴⁸⁵ Had there not been common-law precedent on the issue, his reliance on Pothier's treatise would not be particularly surprising.⁴⁸⁶ Pothier's treatise on the law of obligations was the most famous of the French jurist's many works,⁴⁸⁷ and it is considered his primary contribution to legal science.⁴⁸⁸ And it was the type of book that would appeal to someone like Langdell, who sought to bring order to the common law, while still respecting its historical development. As one commentator has written:

In Pothier we see a lawyer who saw that there were three aspects of law that must enter the legal mind: the great bases which he found in Roman law partly, but also largely in the Law of Nature; the great realm of practice; the great and varying systems of customary law. He laboured like a Titan to bring together into one perfect whole these aspects of law, and performed a task of inconceivable labour and difficulty when he produced what was practically a code of French substantive and procedural law.⁴⁸⁹

Further, Pothier, like Langdell (and Holmes), distinguished between moral obligations and legal obligations, in the tradition of the pre-modern civil law jurists.⁴⁹⁰ Thus, while Pothier strongly believed in the natural-law tradition,⁴⁹¹ he also "granted that

⁴⁸⁵ *Id.* at 1.

⁴⁸⁶ See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1235 (2001) ("American legal writers had long promoted the study of Roman and civil law on the ground that it supplied a more logical and elegant arrangement than the common-law writ system. So when in the mid-nineteenth century the abolition of the forms of action required a new arrangement based on substantive law categories, it was natural to look to the civil law . . .") (citation omitted).

⁴⁸⁷ J.E. de Montmorency, *Robert-Joseph Pothier and French Law*, 13 J. SOC. COMP. LEG. 265, 280 (1913).

⁴⁸⁸ *Id.* at 484.

⁴⁸⁹ *Id.* at 287.

⁴⁹⁰ See Perillo, *supra* note 166, at 283 ("Typically, these jurists examined both the morality and the legality of conduct, distinguishing the 'forum of conscience' from the 'exterior forum.' The former involves an examination of conduct through the lens of moral philosophy; the latter is an examination of how a court would rule on the conduct in question."). Perillo argues that "American scholars with some frequency mistake Pothier's philosophical comments for statements of law." *Id.* at 283 n.133.

⁴⁹¹ See Francesco Parisi, *Alterum Non Laedere: An Intellectual History of Civil Liability*, 39 AM. J. JURIS. 317, 348 (1994) (noting that Pothier "stressed the fact that natural law provides the conceptual foundation for every obligation. According to this view, if contracts or torts give

positive law could override the natural law, writing that ‘the civil law can restrict that which natural law only permits.’⁴⁹²

Pothier’s treatise had been translated into English in 1802 by a U.S. publisher (Martin and Ogden) and then in 1806 by an English publisher (William David Evans), and was well known in the United States by at least the 1830s.⁴⁹³ The translation came at an opportune time, for as we have seen, there was a belief at this time that the common law lacked a formal congruity, and its disorder was often contrasted with the order of the civil-law treatises.⁴⁹⁴ The French treatises, such as those by Pothier, “presented the example of an elaborate system of laws reduced to order and congruity and set forth clearly and intelligibly in scientific treatises.”⁴⁹⁵

The popularity of Pothier’s contracts treatise in the common-law world in the early and mid-nineteenth century is shown by the preface to the 1839 translation of his treatise on sales, wherein it was noted that his “treatise on obligations . . . has become a standard work without which even a moderately sized law-library would scarcely be considered complete.”⁴⁹⁶ Joseph Perillo observes that “[i]n America, Pothier was the Blackstone of Contract Law,” and that “[r]eading Pothier was part of the education of many apprentice lawyers.”⁴⁹⁷ Pothier was thus quite influential in England and the

rise to obligations, it is because natural law itself prescribes that people fulfill their promises and compensate others for the harm caused by their faulty activities.”).

⁴⁹² Perillo, *supra* note 166, at 288 (quoting *Geer v. Connecticut*, 161 U.S. 519, 524 (1896)).

⁴⁹³ Perillo, *supra* note 166, at 270; *see also* Roscoe Pound, *The French Civil Code and the Spirit of Nineteenth Century Law*, 35 B.U. L. REV. 77, 83 (1955) (“[The] reading of French treatises on the law of nature was part of the training of the well read American lawyer down to the time of the Civil War.”); Peter Stein, *The Attraction of Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 412–13 (1966) (discussing Pothier’s influence in the U.S.).

⁴⁹⁴ Roscoe Pound, *Influence of French Law in America*, 3 ILL. L. REV. 354, 360 (1908–1909); *see also* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 351 (1979) (noting, with respect to England, that “[w]hen Pothier’s *Law of Obligations* appeared in English translation in 1806 it was avidly seized upon by English lawyers and judges, partly . . . because, in this age of principles, lawyers were beginning to think in terms of general principles of jurisprudence.”).

⁴⁹⁵ Pound, *supra* note 494, at 362.

⁴⁹⁶ L.S. Cushing, *Preface to POTHIER*, *supra* note 418, at v, v–vi.

⁴⁹⁷ Perillo, *supra* note 166, at 268.

United States,⁴⁹⁸ and not only had Langdell studied Roman civil law at Harvard Law School,⁴⁹⁹ his fondness for Pothier has been recognized.⁵⁰⁰

In fact, a third edition of Evans's English edition was published in the United States in 1853,⁵⁰¹ just two years before Langdell started practicing law on Wall Street. Interestingly, Roscoe Pound commented that "[o]ne who reads the older American reports, particularly those of the State of New York, cannot fail to notice the unusual number of references to the writers and authorities of the civil law which they contain and the great deference which appears to be paid to such authorities."⁵⁰² Further, "counsel, so far as their arguments are reported, cite civilians (mostly French) repeatedly."⁵⁰³

This did not mean, however, that civil law was considered more persuasive than English law, and "[c]ases may be found in the reports in which Pothier and Domat

⁴⁹⁸ Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343, 355 (1984) (noting that Pothier's "writing on contract was influential in nineteenth century . . . America . . ."); M.H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36, 58 n.92 (1985) ("Robert Joseph Pothier was one of the most important civilian private law theorists of the eighteenth century. His works on contract laws were of immense importance in the development of Anglo-American contract doctrine."); Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 686–87 (1998) ("Other than the Roman law itself, however, by far the most prominent among civilian sources influencing early American and contemporary English authorities is Pothier. Robert Joseph Pothier published his *Treatise on the Law of Obligations or Contracts* in French in 1761. The work had a lasting influence on the common law in England and America. At one time a British commentator opined that Pothier's contract doctrine was 'law at Westminster as well as Orleans.'") (citation omitted).

⁴⁹⁹ KIMBALL, *supra* note 10, at 36.

⁵⁰⁰ See Samuel J. Stoljar, *The False Distinction Between Unilateral and Bilateral Contracts*, 64 YALE L.J. 515, 515 n.3 (1955) (noting "Langdell's fondness for Pothier whose continental ideas he drew on wherever possible.").

⁵⁰¹ Perillo, *supra* note 166, at 270 n.23. Evans's English edition had been published in Philadelphia in 1826, 1839, and 1853. Simpson, *supra* note 167, at 255 n.29.

⁵⁰² Pound, *supra* note 494, at 354; see also FRIEDMAN, *supra* note 3, at 66 (noting that "French civil law, . . . particularly after the French revolution, had a certain attraction for American liberals" that in the "[i]n the early nineteenth century, the Napoleonic Code was a model of clarity and order," and that the "[c]ommon law, to some jurists, seemed feudal, barbaric, uncouth, at least in comparison to the neatness of some features of civil law.").

⁵⁰³ Pound, *supra* note 494, at 354. Pound identified four possible reasons for the civil law influence in the United States during the first half of the nineteenth century: (1) The rise of the law merchant; (2) the hostility toward England and English institutions that prevailed in the latter part of the eighteenth century and the early part of the nineteenth century and the feelings of friendship for France on the part of a large portion of the country at the same time; (3) the great influence in the first half of the nineteenth century of Chancellor Kent and Judge Story, who were learned civilians and cited the civil law in their opinions and books very freely; and (4) the movement for reform in practice and pleading which created great dissatisfaction with the common law at a time when the effects of the other causes were making themselves felt. *Id.* at 355 (footnote omitted).

[another French jurist] were cited by counsel but the court took a different view upon the basis of English decisions.”⁵⁰⁴ In fact, the actual influence of Pothier in the United States is a matter of contention, and, whereas Joseph Perillo believed it was significant,⁵⁰⁵ Pound believed it was not:

If a matter came up in a common-law court to be settled for the first time, the court often cited the civil law to fortify its own conclusion,—which nevertheless amounted simply to declaring its own ideas of the law and fortifying them by showing that others had reached the same result. When the ideas of the judges on new points differed from those of the civilians, they did not hesitate to follow their own. This is enough to show that they were engaged in building up the common-law, not in receiving another system in its stead.⁵⁰⁶

Pound concludes: “Men admired and sometimes quoted the civilians, but they adhered to the common law.”⁵⁰⁷

In any event, whatever the extent of Pothier’s influence in the United States, it came to an abrupt halt in the mid-century, just as Langdell started to practice law.⁵⁰⁸ “The common law came to be taught in law schools, an educated profession came into existence, and soon it was seen to be a mistake to suppose the civil law in substance wiser than our own.”⁵⁰⁹ But Langdell seemed to hang on to Pothier, well after Pothier had gone out of vogue in the United States. And what is more surprising is that Langdell, in 1880, in the *Summary*, used Pothier as support for a position contrary to the position taken in the common law, something that U.S. courts avoided even when Pothier’s influence was at its height. To make matters more puzzling, this was a position of Pothier’s that seemed to run contrary to Pothier’s famous will theory of contract. As Roscoe Pound has observed, a feature of the will theory of contract was that “one could contract that a future event should come to pass over which he had only a limited or even no power.”⁵¹⁰

Langdell obviously believed Pothier’s concept of *promise* was correct, and the formalist in Langdell followed that conclusion down. Langdell asserted that even though the parties intended to be bound, it would be difficult to argue that there was

⁵⁰⁴ *Id.* at 356.

⁵⁰⁵ Perillo, *supra* note 166, at 267.

⁵⁰⁶ Pound, *supra* note 494, at 361–62; *see also* Franklin G. Snyder & Ann M. Mirabito, *The Death of Contracts*, 52 DUQ. L. REV. 345, 361 n.68 (2014) (arguing that Pothier’s works “were eagerly received, in our view, in the way that a man with a nail eagerly looks around for anything that might be used to hammer it in . . . [T]he treatise writers seem to be the carts, not the horses.”).

⁵⁰⁷ Pound, *supra* note 494, at 361.

⁵⁰⁸ *Id.* at 354; *see also* Stein, *supra* note 493, at 432 (noting that “by 1850, [civil law] had probably ceased to be a real force in the development of American law.”).

⁵⁰⁹ Pound, *supra* note 494, at 363.

⁵¹⁰ Pound, *supra* note 493, at 92.

consideration for the agreement.⁵¹¹ For Langdell, following Pothier, something could not be a promise if there was no chance the promisor would have to perform. Or, similarly (in the language of the common law), how could it be a detriment to the promisor to promise to perform when there was no chance they would have to perform? What was one giving up? A promise of nominal consideration might involve a very small amount of consideration, but it was at least a promise to do something, not a promise to do nothing.

Langdell seems to believe that it had not occurred to the common-law courts that their decisions were inconsistent with the proper meaning of *promise*, an error that had been avoided by Pothier. Langdell wrote that the question had not arisen in the cases,⁵¹² courts having “assumed” there were mutual promises, and that in *March v. Pigot* the court failed to notice the issue.⁵¹³ Here, Langdell displays a desire for logical cohesion based on first principles, here the first principle being a proper definition of *promise*, even if it is at odds with the prevailing common law. And for Langdell, there was nothing wrong with relying on Pothier to point that out, even if it was 1880 and civilian authority was no longer in vogue. Good logic was good logic, and, after all, the French were known for their logical minds.⁵¹⁴

This was a big issue for Holmes, one that he believed concerned the “theory of contract” itself.⁵¹⁵ In *The Common Law*, he expressed his disagreement with Langdell (and thus Pothier), and adopted a more expansive view of *promise* than in vogue at the time. In particular, he was critical of the definition of *promise* that had been included in the Indian Contract Act of 1872. The Act had defined a proposal as “[w]hen one person signifies to another his willingness to do or to abstain from doing anything”⁵¹⁶ Holmes took issue with this definition because it would mean that a person could not promise, in a legal sense, that an event outside of his control would occur. For example, under this definition, a person could not promise that it would not rain tomorrow.

Holmes saw this definition as unsound for two reasons. First, many promises of future action are subject to events outside of the promisor’s control. For example, a promise to pay a sum of money is subject to the promisor having the means to pay the money when the money is due. Some promisors have greater control over the occurrence of the promised event, but Holmes saw this simply as differences in degree.

⁵¹¹ LANGDELL, *supra* note 9, at 41.

⁵¹² *Id.*

⁵¹³ *Id.* at 111.

⁵¹⁴ See Guy Canivet, *French Civil Law Between Past and Revival*, 51 LOY. L. REV. 39, 45 (2005) (noting that the French Civil Code continues to be praised for “its internal logic, which is generally associated with the French logical mind”); Josef L. Kunz, Book Review, 105 U. PA. L. REV. 130, 130 (1956) (reviewing THE CODE NAPOLEON AND THE COMMON LAW WORLD (Bernard Schwartz ed., 1956)) (“In France not only was the influence of Roman law strong, but the French spirit and language had inherited from Rome the love for precision, clarity and logic.”).

⁵¹⁵ HOLMES, *supra* note 12, at 235.

⁵¹⁶ *Id.* at 233.

Once this was recognized, and it was recognized that the law did not concern itself with the degree of control (the general rule being strict liability in contract law), there was no reason to believe that a promisor could not promise an event wholly outside of their control, it simply being a difference in degree of control.⁵¹⁷ Holmes believed that “[a] promise, then, is simply an accepted assurance that a certain event or state of things shall come to pass.”⁵¹⁸ Holmes distinguished what should be included in the legal definition of *promise* from what might be the more restrictive meaning of *promise* in the “moral world,” acknowledging that “[i]n the moral world it may be that the obligation of a promise is confined to what lies within the reach of the promisor”⁵¹⁹ Holmes supported his view of the legal meaning of *promise* by pointing out that the general remedy for breach of contract was an award of damages, not an order of specific performance, and thus it was incorrect to consider a promise as somehow subjecting the promisor’s will (future action) to that of another.⁵²⁰

Second, and most importantly (and flowing from the first reason), a promise under law was simply a person agreeing to a risk, a risk that the promised event would not occur.⁵²¹ He thus viewed a contract, and the “true theory of contract under the common law”⁵²² as “the taking of a risk,”⁵²³ and having nothing to do with the morality of promising.

Having rejected the Indian Contract Act’s definition of *promise* (technically, the definition of “proposal”), and having identified the true nature of contract under the common law (an assumption of risk), Holmes’s rejection of Langdell’s (and Pothier’s) argument regarding past events was a foregone conclusion, and Holmes found Langdell’s (and Pothier’s) argument “unsound.” He did not see how a past nonoccurrence that was unknown to the parties could be meaningfully distinguished from a future nonoccurrence, as both were uncertain, and that a promise to pay in either situation was a detriment for purposes of consideration.⁵²⁴ If a promise that it would not rain tomorrow was a promise despite the promisor having no control over the event’s occurrence, there was no meaningful distinction between that type of promise and a promise to pay if a prior event had not occurred. And Holmes pointed out that Langdell of course acknowledged that “[i]t is no objection to a promise as a consideration for another promise, that it is conditional upon some future and uncertain event”⁵²⁵ Langdell’s argument seemed to be based on a distinction that,

⁵¹⁷ *Id.* at 234.

⁵¹⁸ *Id.* at 235.

⁵¹⁹ *Id.* at 234.

⁵²⁰ *Id.* at 235.

⁵²¹ *Id.*

⁵²² *Id.* at 238.

⁵²³ *Id.* at 236.

⁵²⁴ *Id.* at 239.

⁵²⁵ LANGDELL, *supra* note 9, at 111.

while having superficial logical appeal, could not be supported. Remember, Holmes did not wish to banish logic completely from the development of the law.

But Holmes also objected to Langdell's argument on practical grounds, relying on his theory that a contract was simply an agreement to assume risks.⁵²⁶ Holmes wrote that "[c]ontracts are dealings between men, by which they make arrangements for the future," and "[w]ere this view unsound, it is hard to see how wagers on any future event, except a miracle, could be sustained."⁵²⁷ Holmes saw no meaningful distinction between lack of knowledge about the past or present and lack of knowledge about the future. Take, for example, an insurance contract. If the parties agree that the insured will pay a specified amount if his house does not burn down, and in exchange the insurance company promises to pay a specified amount if it does, only one party will end up benefiting and only one will suffer a detriment. But if a contract was simply an agreement to assume risks, there should be no reason why parties could not agree to assume the risk of whether a present or past fact existed, and the legal definition of *promise* should be made to accommodate that.

Williston, in a 1914 article, agreed with Holmes, and like Holmes, emphasized that "law is made for man, not man made for the law," and criticized Langdell as seeking to construct the law based on "universal intelligence." He wrote:

Professor Langdell regards these decisions as inexplicable on principle and only to be accounted for by the maxim *communis error facit jus*; but when a decision is founded on common sense it seems better to seek an underlying reason than to ascribe the result to common error, and I think it evidence that the law looks at the matter not from the standpoint of universal intelligence but from the standpoint of the parties; and as the law is made for man, not man made for the law, this is the only proper attitude. From the standpoint of the parties in the cases referred to above, the risk is as real where the contingency has already happened, but is unknown, as is the case where the contingency has not yet happened. This is not saying that anything is detrimental which the parties think detrimental, but only that where on the facts known at the time of the bargain any reasonable person would think performance of the promise might require an act or forbearance, which the law (not the parties) regards as detrimental to the promisor or beneficial to the promisee, the promise is sufficient consideration.⁵²⁸

Williston agreed with Holmes that there was no logical distinction between a promise subject to a future condition (which might never occur) and a condition that was a past event. He thus proposed the following test:

[W]here on the facts known at the time of the bargain any reasonable person would think performance of the promise might require an act or forbearance,

⁵²⁶ HOLMES, *supra* note 12, at 236.

⁵²⁷ *Id.* at 239.

⁵²⁸ Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 527 (1914).

which the law (not the parties) regards as detrimental to the promisor or beneficial to the promisee, the promise is sufficient consideration.⁵²⁹

Williston in his 1920 treatise reiterated his position, writing that “these decisions are sound in principle.”⁵³⁰ The *Restatement of Contracts* (with Williston as its reporter), took the same position,⁵³¹ and provided the following illustration:

A promises B to pay him \$5000 if B’s ship now at sea has already been lost, the fact being, though unknown to the promisor, that the ship has not been lost. This is sufficient consideration for a return promise, since it reasonably seems to the promisor that keeping his promise may involve payment of \$5000.⁵³²

What we see, then, is that Langdell and Holmes had a fundamental disagreement about consideration, one that was not simply about the definition of *promise*, but one that went to the true theory of contract. Each took a position that they believed appropriate for their conceptual framework. Holmes’s principle was that contracts are simply assumptions of risk and, hence, the second-level principle that flowed from this was that parties could contract to assume the risk of the occurrence or nonoccurrence of a past event.⁵³³ Holmes, part logician, sought to demonstrate that Langdell’s position was illogical.

Holmes’s view was also pragmatic in that the true conception of the legal meaning of *promise* should be based on whether the conception was useful. Some of the things that the pragmatists of the time had in common was “[a] distaste for verbalism, and an approach to meaning in terms of ‘practical’ or ‘pragmatic’ consequences” and the “[i]dea that meaning shifts and changes, growing as our knowledge grows.”⁵³⁴ And recall that, to Holmes, a comprehensive system based solely on logic would be a static system built on pre-industrial views of society, which was inappropriate for the nineteenth-century industrial United States.⁵³⁵ To Holmes, the legal definition of *promise* should be made to accommodate the use to which contract law should be put (particularly in the industrial age), irrespective of how *promise* might be defined outside of law, including by moral philosophers. Hence, the appropriate legal definition of *promise* was “simply an accepted assurance that a certain event or state of things will come to pass,” or “that a certain event or state of things has come to pass.” This definition was driven by what he believed was the true theory of contract

⁵²⁹ *Id.*

⁵³⁰ WILLISTON, *supra* note 317; see also James Barr Ames, *Two Theories of Consideration*, 13 HARV. L. REV. 29, 34–35 (1899) (agreeing with Holmes and Williston, and noting Langdell’s disagreement).

⁵³¹ RESTATEMENT OF CONTRACTS § 84(f) (AM. LAW INST. 1932).

⁵³² *Id.* § 84 cmt. F, illus. 11.

⁵³³ HOLMES, *supra* note 12, at 235–39.

⁵³⁴ Susan Haack, *The Pragmatist*, in THE PRAGMATISM AND PREJUDICE OF OLIVER WENDELL HOLMES JR., *supra* note 227, at 169, 172.

⁵³⁵ Reimann, *supra* note 7, at 104.

under the common law. What Pothier, a civil jurist, believed, seemed irrelevant to Holmes, who did not even acknowledge his argument.

Langdell, in contrast, fell into the trap of trying to define *promise* outside of its purpose in contract law. For Langdell, contract law flowed from the true concept of *promise*, not the other way around. And his reliance on Pothier was instructive, as the French approach to law has been contrasted with the common-law approach as follows:

[A] contrast not between logic and the lack of it, but between an approach which treats principles as having an immutable meaning (or at least is unwilling to re-examine the established interpretation in the light of its consequences) [the French approach], and one which acknowledges that meanings and interpretations change with the circumstances [the common-law approach].⁵³⁶

Langdell's approach does, however, have a certain appeal when one remembers that he apparently hoped to make contract law apolitical. If that is to be done, a judge's discretion should be limited. One way to do this is to apply preexisting notions of whether a promise has been made, rather than let the definition be driven by the judge's concept of contract law's purpose. Langdell's desire for an apolitical, comprehensive, and logical structure to contract law made him feel compelled to call out those courts for failing to recognize the illogical nature of their decisions. He did not even feel compelled to consider the practical effects this would have on the enforceability of charter-party contracts, being seemingly unconcerned about the matter.⁵³⁷ There is no reason to believe that Langdell was taking the position he was on this issue because it fit within some general theory of contract law that he had, and was instead simply trying to make the second-tier rules consistent with the first-tier principles. The problem was that this first-tier principle was not derived from the common-law cases, but from civil law. Langdell, the conceptualist and formalist, prevailed over Langdell the positivist.

B. *The Mailbox Rule*

Langdell's definition of *promise* also left no room for the so-called mailbox rule (the rule that an acceptance is effective upon dispatch, not receipt), again being influenced by the civil law. Langdell, the positivist, acknowledged that it was "supposed to be pretty well settled" in the common law that an acceptance by mail formed a contract upon dispatch,⁵³⁸ but he went to lengths to show that the matter had

⁵³⁶ BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 21 (2d ed. 2005).

⁵³⁷ LANGDELL, *supra* note 9, at 40–41.

⁵³⁸ *Id.* at 15. But not completely settled. See Grey, *supra* note 7, at 3 ("When Langdell confronted it, the question had not yet been settled. The courts of England and New York had adopted the mailbox rule, but those of Massachusetts had rejected it."); Sebok, *supra* note 162, at 2078 ("[W]hen Langdell wrote his treatise on contracts, the 'mailbox rule' had not yet become settled law in American jurisdictions."); Note, *Limitations on the "Acceptance on Mailing" Theory*, 17 HARV. L. REV. 342, 342 (1904) ("All jurisdictions, except possibly Massachusetts, hold that a letter accepting an offer completes the contract when mailed.") (footnote omitted). The Massachusetts case was *M'Culloch v. The Eagle Insurance Co.*, 1 Pickering 278 (Mass. 1822), which was arguably overruled by *Brauer v. Shaw*, 46 N.E.

not been resolved conclusively (consistent with his positivism),⁵³⁹ and argued that the “nature of the question has been misunderstood” (consistent with his conceptualism/formalism).⁵⁴⁰

Langdell maintained that in law a promise did not become a promise until it was accepted by the promisee.⁵⁴¹ He thus argued that a promise was in effect an offer,⁵⁴² what Roman law had called a *pollicitation* (an offer that was not yet accepted).⁵⁴³ This was a civil-law concept that had been imported into English law in the eighteenth century,⁵⁴⁴ and Langdell in his *Summary* cited as support Hugo Grotius (the Dutch natural-law jurist) and Pothier.⁵⁴⁵ From there, Langdell pointed out that an acceptance of an offer for a bilateral contract necessarily included a counter-promise,⁵⁴⁶ and as a promise it was a mere offer until accepted by the promisee.⁵⁴⁷

This, however, did not itself warrant a rejection of the mailbox rule. According to Langdell, the requirement that a counter-promise be itself accepted by the offeror did not require the offeror to expressly accept the offeree’s counter-promise; his acceptance of the counter-promise was implied in his offer as long as his offer continued.⁵⁴⁸ In fact, Langdell seemingly believed that an acceptance of a promise required a mental act only.⁵⁴⁹

617 (Mass. 1897) (Holmes, J.); *see also* *Lennox v. Murphy*, 50 N.E. 644, 645–46 (Mass. 1898) (Holmes, J.) (“There is no universal doctrine of the common law, as understood in this commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract”); Ian R. Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947, 944 n.20 (1964) (arguing that *Brauer* rendered *M’Culloch* “dubious authority.”).

⁵³⁹ LANGDELL, *supra* note 9, at 16–20.

⁵⁴⁰ *Id.* at 16. Catherine Wells has argued that Langdell’s position on the mailbox rule “can be found nowhere in the cases” and “it must be regarded as solely his creation.” Wells, *supra* note 65, at 584.

⁵⁴¹ LANGDELL, *supra* note 9, at 4.

⁵⁴² *Id.*

⁵⁴³ Simpson, *supra* note 167, at 260.

⁵⁴⁴ *Id.*

⁵⁴⁵ LANGDELL, *supra* note 9, at 1. With respect to Grotius, it has been recognized that “[b]y some accounts, Grotius achieved similar feats in the law as Galileo had accomplished in natural science He believed that you could begin with fundamental, universal principles and reason outward.” John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1054 (2010).

⁵⁴⁶ LANGDELL, *supra* note 9, at 15.

⁵⁴⁷ *Id.* at 1.

⁵⁴⁸ *Id.* at 14.

⁵⁴⁹ *Id.* at 1.

But what was also required to make a promise effective, in addition to acceptance of it by the promisee, was communication of the promise to the promisee.⁵⁵⁰ The offeror's acceptance of the offeree's counter-promise might be a mental act only (effective in advance of the offeror's knowledge of the counter-promise), but when an acceptance included a counter-promise, the counter-promise itself could not be effective against the offeree unless and until the offeror obtained knowledge of it.⁵⁵¹ This flowed from the requirement that a promise, to be effective, had to come to the knowledge of the promisee.

Langdell derived this top-level axiom—a promise must come to the knowledge of the promisee before it can be effective as a promise—inductively from the caselaw that held that an offer cannot be accepted by the offeree unless the offeree is aware of it.⁵⁵² Langdell wrote: “[C]ommunication to the offeree is of the essence of every offer.”⁵⁵³ And “the letter of acceptance must come to the knowledge of the [offeror] for the same reason that the letter containing the original offer must come to the knowledge of the offeree.”⁵⁵⁴ Thus, “[t]he acceptance . . . must be communicated to the original [offeror], and until such communication the contract is not made.”⁵⁵⁵ In other words, if an offer must be known to the offeree for the offeree to have the power to accept it (an established rule at the time),⁵⁵⁶ it logically followed that an acceptance was ineffective until the offeror was aware of it as the acceptance included a counter-promise. This meant that “in contracts *inter absentes* the letter [of acceptance] must be received and read.”⁵⁵⁷

Langdell's belief that logic dictated this result is shown by reviewing the two arguments in its favor he seemed to consider the most persuasive—one by Merlin de Douai, who had been the procureur-général at the French Court of Cassation from 1801 to 1814, in the case of *S. v. F.* (included in Langdell's casebook), which Langdell called a “powerful argument;”⁵⁵⁸ and the other by the Scottish judge John Marshall,

⁵⁵⁰ *Id.* at 15.

⁵⁵¹ *Id.* at 14.

⁵⁵² *Id.* at 15.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* at 19.

⁵⁵⁵ *Id.* at 15.

⁵⁵⁶ See LANGDELL, *supra* note 43, at 1019 (noting that “[a]n offer has no efficacy until communicated to the offeree” and providing page citations to the cases in the casebook supporting the proposition).

⁵⁵⁷ LANGDELL, *supra* note 9, at 15; see also Wells, *supra* note 65, at 580 (explaining that according to Langdell, “the acceptance contains not just an explicit acceptance of the original offer, but also an implied counter-offer. The counter-offer proposes the same contract as the original offer and it is accepted by the acceptance that was implied in the original offer. Thus, each contract represents two sets of offer and acceptance: (1) the explicit offer made in the original offer with the explicit acceptance contained in the acceptance; and (2) the implied counter-offer made in the acceptance with the implied acceptance made in the original offer.”).

⁵⁵⁸ LANGDELL, *supra* note 9, at 18.

Lord Curriehill, dissenting in *Thomson v. James* (also included in his casebook).⁵⁵⁹ Langdell again turned to the civilians for good logic.

Merlin believed that the argument that an acceptance was effective upon dispatch was contrary to “good sense.”⁵⁶⁰ He argued that spoken words can only bind the speaker if the words are heard by the addressee before they are retracted, and it is the same with a written letter, a conclusion that flowed from the very definition of a letter missive, which until received and read by the promisee is nothing more than words fixed upon paper.⁵⁶¹ Merlin also argued that each party’s consent to a contract was of the same nature, and thus if an offer was ineffective until received, an acceptance cannot be effective until received:

[T]he consent of him who accepts the proposed bargain is of no other nature than the consent of him who makes the proposal; both consents are equally necessary for the completion of the contract. If, therefore, he who proposes is not bound by the proposition, when he retracts it before it has reached its address, he who accepts can no more be bound by his acceptance, when he retracts it before it has reached the author of the proposition.⁵⁶²

Merlin’s argument, however, went beyond a mere argument for symmetry between the effective time of an offer and the effective time of an acceptance. He pointed out that if an acceptance was effective upon dispatch, that would mean that an offeree could not retract the acceptance, even if the retraction was communicated to the offeror before the offeror received the acceptance,⁵⁶³ something he obviously believed did not make sense. To emphasize the point, he proposed a hypothetical involving an acceptance by means of an acoustic vault in a cabinet, one with winding tubes through which a communication takes five minutes to travel. In the hypothetical, the offeree says into the vault that he accepts the offer, but then changes his mind and runs to the offeror and rejects before the offeror heard the acceptance through the tubes. Would the offeree be bound? To his own question, Merlin replied, “No; emphatically no; a hundred times no.”⁵⁶⁴

Lord Curriehill’s argument was similar. He argued that:

The writer of the letter might have destroyed it so long as it remained in his own hands. After despatching it by his clerk or servant, or any person in his employment, he might have recalled it before it arrived at its destination, and have still destroyed it. Or after so despatching it, he might still have sent an express with a refusal of the offer, and if it had been first delivered, he would still have been free, and the treaty would have been at an end. In short, until the acceptance reached the offerer, there was not that *convention in idem*

⁵⁵⁹ *Id.*

⁵⁶⁰ LANGDELL, *supra* note 43, at 158.

⁵⁶¹ *Id.* at 159.

⁵⁶² *Id.* at 161.

⁵⁶³ *Id.* at 161–62.

⁵⁶⁴ *Id.* at 162.

placitum which is necessary to constitute a mutual contract. Until then the pursuers had not conferred upon the defendant that power of exacting performance of the counterpart of the offer, which was essentially necessary to constitute a binding obligation upon them, and to render their acceptance effectual; and their consent was merely a resolution, which has no such effect It remaineth, then, that the only act of the will which is efficacious, is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform.⁵⁶⁵

Until the promisee receives the promise, the promisee can have no “power of exaction” upon the promisor. And without a power of exaction, neither party is bound. Curriehill considered this a principle of the “law of mutual contracts.”⁵⁶⁶

In sum, logic dictated that a promise could not bind the promisor unless the promisee was aware of the promise, as the point of communicating something to someone was for them to be aware of the communication and understand it. This was shown by the rule that an offer was ineffective unless and until learned of by the offeree, something no one seemed to dispute. And to be clear, this meant not only that the promise must be delivered to the promisee, but that the promisee was in fact aware of it; thus a promise in a letter required not only that the letter be received, but that it be read by the promisee.⁵⁶⁷ If an acceptance included a counter-promise (which no one seemed to dispute if the offer was for a bilateral contract), logic further dictated that the acceptance could not bind the offeree until it was received by the offeror. And the logic that a promise could not bind the promisor until the promisee was aware of the promise was demonstrated by what would otherwise be the strange result that an offeree could not avoid the contract by notifying the offeror of a rejection prior to the offeror receiving a previously dispatched acceptance. And if the acceptance could not bind the offeree to the counter-promise until it was received by the offeror, no contract could arise until that point, as both parties must be bound before either is bound, a principle established in 1789 in *Payne v. Cave*.⁵⁶⁸ The consideration for a bilateral contract was the exchange of promises, and until each party had given a promise, there was no consideration and hence no contract.⁵⁶⁹

⁵⁶⁵ *Id.* at 143–44.

⁵⁶⁶ *Id.* at 144.

⁵⁶⁷ LANGDELL, *supra* note 9, at 15.

⁵⁶⁸ *Payne v. Cave* (1789) 100 Eng. Rep. 502 (KB).

⁵⁶⁹ See Grey, *supra* note 7, at 3–4 (“According to Langdell, the issue between the alternatives was not merely a practical one. In his view, fundamental principles dictated that the acceptance must be received before the contract could be formed. This followed from the doctrine that a promise could not be binding unless it was supported by consideration. The consideration for the offer was the offeree’s return promise. But a promise by its nature is not complete until communicated; a ‘promise’ into the air is no promise at all. Since there was no promise, there was no consideration and could be no contract, until the letter of acceptance was received and read. The mailbox rule could not be good law.”); Wells, *supra* note 65, at 581 (“[E]very acceptance contains an implied offer. It is this implied offer which, when accepted by the original offeror, creates a binding promise for the original offeree, and without this binding promise there is no consideration for the contract. Because the acceptance contains an implied counter-offer, it must be communicated to the original offeree before any contract is formed.”)

Various arguments had been advanced as to why an acceptance should be considered binding upon mailing, but Langdell rejected each of them.⁵⁷⁰ First, it had been argued that the receipt rule was based on the idea that the parties must manifest assent at the same time, and under this reasoning the offeree must in turn be aware of the offeror's acceptance of the counter-promise and ad infinitum.⁵⁷¹ Hence, no contract could ever be formed at a distance.⁵⁷² Langdell argued that it was untrue that each party must be aware of formation at the same time, as this was impossible for contracts formed *inter absentee*.⁵⁷³ Rather, the requirement that the offeror be aware of the acceptance was not because both parties must be aware of formation at the same time, but because a bilateral contract is made at the time the counter-promise is made, and it is not a promise until it comes to the promisee's knowledge.⁵⁷⁴

Second, it had been argued that the offeror, by making his offer through the mail, impliedly authorizes the offeree to use the mail as well.⁵⁷⁵ But, argued Langdell, this simply means the mail is a permissible medium of acceptance, and does not change the fact that a promise is ineffective until it is communicated to the promisee.⁵⁷⁶ Langdell even went as far to say that "[i]f . . . the offer should expressly declare that the contract should be complete immediately upon mailing a letter of acceptance, such a declaration would be wholly inoperative."⁵⁷⁷ A promise was ineffective until communicated to the promisee, and there was nothing the parties could do to change this fact (any more than they could change a scientific truth).

Third, it had been argued that the offeror, by making his offer by mail, makes the post office his servant or messenger to receive an answer, and thus providing it to the post office is delivering it to the offeror.⁵⁷⁸ (Note that such an argument assumes the correctness of the requirement that a promise be received to be effective, and simply

Thus, there is no contract until the acceptance that implicitly contains the counteroffer is received by the original offeror. This means that despite the fact that acceptances need not be communicated in order to be effective, the implicit counter-offer contained in the acceptance must be communicated.").

⁵⁷⁰ LANGDELL, *supra* note 9, at 17–20.

⁵⁷¹ *Id.* at 18.

⁵⁷² *Id.* at 19.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*; see also Wells, *supra* note 65, at 581 (noting that Langdell's formulation "avoids the inevitable regress noted in *Adams v. Lindsell*. Once there is an exchange of letters, the contract has been formed. The first party has made an offer and has received an acceptance. The second party has made an offer (implied in his acceptance) and received an acceptance from the first party (implied in his offer). Thus, at that point there are two promises, each supported by the consideration provided in the other. There is no need for further communication.").

⁵⁷⁵ LANGDELL, *supra* note 9, at 19.

⁵⁷⁶ *Id.* at 19–20.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.* at 20.

seeks to fiddle with defining “received.”) Langdell rejected this, arguing in effect that the agent was simply authorized to receive the acceptance letter, and it would not be considered received by the offeror (although it became the offeror’s property), though the result would be different if the agent had been given authority to receive a verbal acceptance on the offeror’s behalf.⁵⁷⁹

This brings us to the fourth argument and Langdell’s notorious response. Langdell noted that “[i]t has been claimed that the purposes of substantial justice, and the interests of the contracting parties as understood by themselves, will best be served by holding that the contract is complete the moment the letter of acceptance is mailed.”⁵⁸⁰ Langdell famously replied, “The true answer to this argument is, that it is irrelevant.”⁵⁸¹ Langdell has been taken to task for this statement, and it does reflect a line that Langdell decided could not be crossed, even if the substantial justice or the parties’ understanding was otherwise. Langdell was unwilling to budge on the concept that a promise, to be a promise, must be communicated to the promisee, just like he was unwilling to budge on his definition of *promise* with respect to conditions that did not exist at the time the promise was made.

And he argued that even if matters of justice were considered, either rule would cause harm to one of the parties, as making the acceptance effective upon dispatch makes the offeror subject to a contract of which he is unaware and making it effective upon receipt means the offeree is deprived of a contract he believes he has made.⁵⁸² Langdell argued that it was better to maintain the status quo (no contract) and deprive someone of an expected benefit, than to impose a possible unlimited liability on the offeror.⁵⁸³ Also, the offeree has a measure of control over whether the acceptance will reach its destination and reach it in timely fashion, more so than the recipient.⁵⁸⁴

Langdell, however, believed that any possible merit to these arguments was “irrelevant.”⁵⁸⁵ The definition of *promise* was a top-level principle, and if an offer and an acceptance each contained a promise (as they did in a bilateral contract), the meaning of *promise* could not differ based upon whether it was included within an offer or within an acceptance. If it was correct that an offer was ineffective until received by the offeree, that must be because a promise was ineffective until received. And if that was so, then a counter-promise in an acceptance was ineffective until received, and until then the consideration for the offeror’s promise had not been provided. The truth of this axiom could be shown by the absurd results that would arise if it was untrue.

Holmes took issue with Langdell’s argument, and their competing arguments are a study in contrasts (in addition to a study in contracts). Whereas Langdell had argued

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 21.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*

that substantial justice was irrelevant, Holmes wrote that “[i]f convenience preponderates in favor of either view, that is a sufficient reason for its adoption.”⁵⁸⁶ But Holmes was (once again) more than willing to show that Langdell’s argument, presumably based on logic, was “unsound.”⁵⁸⁷ First, he took issue with Langdell referring to an acceptance as a “counter-offer,” arguing that an initial offer includes within it an implied acceptance of the counter-promise in advance and thus at no point was the acceptance a counteroffer.⁵⁸⁸ But that was really just a semantic disagreement, as they agreed that the offer included an implied acceptance of the counter-promise, and it did not dispose of Langdell’s principal argument that a promise is ineffective until communicated to the promisee.

From there, Holmes again challenged Langdell’s top-tier principle and his concept of *promise*. Holmes the conceptualist was on display, and he was eager to show that Langdell’s top-tier principle was inconsistent with what was truly the top-tier principle. This was a particularly important top-tier principle for Holmes, as it involved the objective theory, which Holmes had asserted was the general principle of both civil and criminal law. Holmes saw Langdell’s approach as implementing a will theory of contract. Langdell rejected the will theory of contract,⁵⁸⁹ but his top-tier principle seemingly injected a subjective element that was inconsistent with Holmes’s notion of contract law.

Holmes set out to show that Langdell’s argument was unsound because it was premised on the notion that communication of a promise to the promisee required that it not only be put into possession of the promisee, but be “brought to the actual knowledge of the promisee.”⁵⁹⁰ Langdell did seem to take the position that the promisee must actually be aware of the promise, arguing that an offer was ineffective “until it comes to the knowledge of the person to whom it is made,”⁵⁹¹ and therefore “the letter of acceptance must come to the knowledge of the offeror,”⁵⁹² and “in contracts *inter absentes* the letter [of acceptance] must be received and read.”⁵⁹³

⁵⁸⁶ HOLMES, *supra* note 12, at 305.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 305–06.

⁵⁸⁹ See LANGDELL, *supra* note 9, at 244 (“As to the rule that the wills of the contracting parties must concur, it only means that they must concur in legal contemplation, and this they do whenever an existing offer is accepted, no matter how much the [offeror] has changed his mind since he made the offer. In truth, mental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable; and when the required physical act has been done, only a physical act can undo it. An offer is a physical and a mental act combined, the mental act being a legal intentment embodied in, and represented by, and inseparable from, the physical act.”).

⁵⁹⁰ HOLMES, *supra* note 12, at 306.

⁵⁹¹ LANGDELL, *supra* note 9, at 197.

⁵⁹² *Id.* at 19.

⁵⁹³ *Id.* at 22; see also Wells, *supra* note 65, at 580 (explaining that according to Langdell, “the acceptance contains not just an explicit acceptance of the original offer, but also an implied counter-offer. The counter-offer proposes the same contract as the original offer and it is

Holmes argued that Langdell's position was contrary to law, as, for example, "[a] covenant is binding when it is delivered and accepted, whether it is read or not."⁵⁹⁴ He argued that the counter-promise was effective as consideration as soon as the "tangible sign" of it was "sufficiently put into the power of the promisee."⁵⁹⁵ To support this, he wrote, "I cannot believe that, if the letter had been delivered to the promisee and was then snatched from his hands before he read it, there would be no contract."⁵⁹⁶ If it be conceded that the counter-promise would be effective if the letter was delivered to the promisee but snatched from his hands before he read it, then Langdell's major premise must be incorrect. The promise must be capable of being effective before it was actually known by the promisee, and Holmes believed it was when it was put into the "power of the promisee."⁵⁹⁷ And it could be considered within the power of the promisee when dispatched. Holmes explained:

The offeree, when he drops the letter containing the counter-promise into the letter-box, does an overt act, which by general understanding renounces control over the letter, and puts it into a third hand for the benefit of the [offeror], with liberty to the latter at any moment thereafter to take it [T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts. When the sign of the counter promise is a tangible object, the contract is completed when the dominion over that object changes.⁵⁹⁸

For Holmes, a contract was formed by the parties' overt acts, and if mere delivery of an acceptance could be considered an effective acceptance, it must be because the offeree was considered to have renounced control over his letter. From there, it could logically be concluded that dispatching the letter was an effective acceptance because by such an overt act the offeree also renounced control over the letter. Holmes believed that Langdell's belief that a promisee must be aware of the promise for it to be a promise was inconsistent with enlightened (objective) theory, writing in a letter in 1896 that (ironically) he never dispatched (it was found in his papers):

I think that in enlightened theory, which we now are ready for, all contracts are formal, and that a tacit assumption to the contrary sometimes has led Mr. Langdell astray. I had this definitely in view in what I said . . . in my Common Law There never was a more unfortunate expression used than "meeting

accepted by the acceptance that was implied in the original offer. Thus, each contract represents two sets of offer and acceptance: (1) the explicit offer made in the original offer with the explicit acceptance contained in the acceptance; and (2) the implied counter-offer made in the acceptance with the implied acceptance made in the original offer.").

⁵⁹⁴ HOLMES, *supra* note 12, at 306.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.* at 306–07.

of the minds.” It does not matter in the slightest degree whether minds meet or not⁵⁹⁹

Holmes did not, however, directly address Langdell’s argument that knowledge of the acceptance flowed from the requirement that an offeree have knowledge of the offer. But for Holmes the question was what the offeror was seeking as the consideration for his promise. Holmes believed that “[a]cceptance of an offer usually follows by mere implication from the furnishing of the consideration.”⁶⁰⁰ When the offeree gives the tangible sign, the consideration has been provided. Again, Holmes would not let the moral concept of a promise determine the appropriate legal rule, and he sought to show that Langdell’s concept of promise led to results inconsistent with an objective approach to contract law. Even more importantly, however, Holmes, unlike Langdell, remained flexible, writing about the mailbox rule that “[i]f convenience preponderates in favor of either view, that is a sufficient reason for its adoption.”⁶⁰¹

With respect to Williston, in his 1920 treatise he acknowledged the logical flaws in the mailbox rule, writing the original English decision adopting the mailbox rule “failed to consider that since the proposed contract was bilateral, as is almost invariably any contract made by mail, the so-called acceptance must also have become effective as a promise to the offeror in order to create a contract.”⁶⁰² Williston recognized that the “question is, when has the offeree made the promise requested in the offer?”⁶⁰³ Williston acknowledged that:

[i]t may be forcibly argued that making a promise is something which necessarily requires communication, and that sending a letter which never arrives is no more making a promise to the person addressed than talking into a telephone where there is no connection with the person addressed; and the rule that a bilateral contract is completed by mailing acceptance has been ably criticized, and contention made that actual communication should be required [citing Langdell].⁶⁰⁴

But Williston supported the mailbox rule, apparently because by that point it was so well-established.⁶⁰⁵ Like Holmes, Williston felt the need to also address the logical argument made by Langdell. Following Holmes’s lead, he noted that whether a promise had been made should be based on an “outward indication . . . rather than the

⁵⁹⁹ HOWE, *supra* note 121, at 233 (quoting unsent letter from Oliver Wendell Holmes to E.A. Harriman, 1896).

⁶⁰⁰ HOLMES, *supra* note 12, at 303.

⁶⁰¹ *Id.* at 305.

⁶⁰² WILLISTON, *supra* note 317, at 141.

⁶⁰³ *Id.* at 143.

⁶⁰⁴ *Id.* at 143–44.

⁶⁰⁵ *Id.* at 141–42.

actual communication which is necessary for mental assent.”⁶⁰⁶ For Williston, the question was—what is the best indication that a promise has been made? Williston believed receipt was a better indication than mailing that a promise had been made, but once Langdell’s top-level principle had been rejected, all that was left for Williston was a non-principled decision of which event was the better indication that a promise had been made, and not one based on any top-level principle. Williston thus seemed to view his criticism of the mailbox rule as little more than a quibble. The *Restatement of Contracts* adopted the mailbox rule, without comment.⁶⁰⁷

The mailbox rule debate highlighted the difference between Langdell’s and Holmes and Williston’s theories of consideration. For Langdell, the rules of consideration flowed from general principles, which were inflexible. For Holmes and Williston, even though the rules of consideration flowed from general principles (such as, particularly for Holmes, the objective theory), the second-tier rules should or could be adjusted based on matters of convenience, even if at odds with perceived general principles. Logic shouldn’t be everything.

But Holmes and Williston’s disagreements with Langdell on the issues of wagers and the mailbox rule did not seem to deal a fatal blow to the hope that logic could provide for a comprehensive set of rules for contract law. After all, Holmes argued that Langdell had misconceived the nature of a promise, the true theory of contract, and the nature of consideration. It would not be until the turn of the century that the fatal blow to using logic as a theory for contract law would be dealt.

C. *How Mutual Promises are Each Consideration for the Other: A Secret Paradox of the Common Law and a Case of “Jumping In”*

Twenty years would pass after the *Summary* before Langdell was woken from his contracts scholarship slumber. And when he was (around 1900), it was because it came to his attention that Williston, in a law review article six years earlier, had accused him of having made an illogical argument in the *Summary*. He chose to defend himself, but he would find he was entering a debate where logic would give out and his theory of consideration would crumble.⁶⁰⁸

The issue had been lurking for some time. It was whether a promise to perform a preexisting duty owed to a third party was a detriment to the promisor sufficient for it to be consideration for a return promise. The problem was that Langdell had considered the promise to be a detriment because it created a legal duty to perform, but of course it only created a legal duty to perform if it was considered a detriment, so the reasoning was circular. If “detriment” was the test to determine when a promise was legally binding, whether the promise was legally binding could not be the test to determine if there was a detriment. Something else had to be the test of “detriment.”

And the issue raised an even more fundamental question—why informal, mutual promises were ever binding, and it would come to test the usefulness of the benefit/detriment conception of consideration as a top-level principle. Ultimately, the question would be whether logic could provide an answer to the question, and the

⁶⁰⁶ *Id.* at 144.

⁶⁰⁷ RESTATEMENT (SECOND) OF CONTRACTS § 64 (AM. L. INST. 1932).

⁶⁰⁸ C.C. Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496, 497–98 (1901).

difficulty it presented led Sir Frederick Pollock to call it “one of the secret paradoxes of the Common Law.”⁶⁰⁹ If logic could not provide an answer, any model of contract law premised solely on logic could not be sustained. The stakes were high.

At the time Langdell wrote his *Summary*, the law in England was that a promise or its performance was sufficient consideration, even if the promisor was under a duty to a third party to perform.⁶¹⁰ The leading English authorities were *Shadwell v. Shadwell*, decided in 1860 by the Court of Common Pleas, and *Scotson v. Pegg*, decided in 1861 by the Court of Exchequer.⁶¹¹

In *Shadwell*, the testator, learning of his nephew’s engagement, promised his nephew £150 per year to assist him at “starting,” payments to continue during the testator’s life until the nephew’s annual income as a barrister reached a certain level.⁶¹² The nephew sued, alleging that the testator had not paid all that was promised.⁶¹³ The defendant argued, among other things, that “the consideration on which the testator’s promise was based [i.e., going through with the marriage], was a consideration that the plaintiff should do what he was already bound to do [i.e., he was already engaged]; and that is not sufficient.”⁶¹⁴ Two judges, without addressing the preexisting-duty issue, found that the consideration was sufficient.⁶¹⁵ A dissenting judge argued, among other things, that:

a promise, based on the consideration of doing that which a man is already bound to do, is invalid . . . and it is not necessary, in order to invalidate the consideration, that the plaintiff’s prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person [citations omitted]. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive.⁶¹⁶

In *Scotson v. Pegg*, the plaintiff alleged that the defendant breached its promise to unload the defendant’s goods (coal) from a ship within a certain time, if the plaintiff

⁶⁰⁹ Book Review, 30 LAW Q. REV. 128, 129 (1914) (Frederick Pollock reviewing J.G. PEASE & A.M. LUTTER, THE STUDENT’S SUMMARY OF THE LAW OF CONTRACT (2d ed. 1913)).

⁶¹⁰ WILLISTON, *supra* note 317, at 281.

⁶¹¹ *Shadwell v. Shadwell* (1860) 142 Eng. Rep. 62, *reprinted* in LANGDELL, *supra* note 43, at 229; *Scotson v. Pegg*, (1861) 158 Eng. Rep. 121, *reprinted* in Langdell, *supra* note 43, at 236.

⁶¹² LANGDELL, *supra* note 43, at 229.

⁶¹³ *Id.* at 230.

⁶¹⁴ *Id.* at 231.

⁶¹⁵ *Id.* at 233–34.

⁶¹⁶ *Id.* at 236 (Byles, J., dissenting) (citations omitted).

delivered the goods to the defendant.⁶¹⁷ The defendant argued that the plaintiff was under a legal obligation to the prior owner of the goods to deliver the goods to the defendant (the prior owner had sold the goods to the defendant and directed the plaintiff to deliver them to the defendant), and thus there was no consideration for the defendant's promise.⁶¹⁸ One judge wrote: "The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order."⁶¹⁹ Another judge wrote:

[T]o say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.⁶²⁰

Note that, at least in the above-quoted passage from *Scotson*, the judge focuses on the promisor's interest in obtaining the promisee's performance, whereas the dissenting judge in *Shadwell* focused on the promisee's motive in performing.

Langdell included both cases in his casebook, summarizing them in the index as follows:

But it is no objection to a consideration that it consists in doing something which a third person could have compelled the promisee to do; *e.g.*, marrying a woman to whom promisee is already engaged; or delivering a cargo of coals in the same manner that promisee is already under contract with another person to deliver them.⁶²¹

Langdell, the legal positivist, thus reported their holdings as the law.

But in his *Summary*, he took issue with the results, relying on reasoning from the meaning of "detriment." He argued that a promise to perform a preexisting duty owed

⁶¹⁷ *Id.* at 236–37.

⁶¹⁸ *Id.* at 237.

⁶¹⁹ *Id.* at 239.

⁶²⁰ *Id.* at 240.

⁶²¹ *Id.* at 1012.

to a third party was a detriment whereas performing the duty was not.⁶²² Langdell argued that a promise to perform the preexisting duty owed to a third party gave the promisee the right to compel him to do it or to recover damages for nonperformance, which was an additional detriment to the promisor, as now two parties rather than one had the right to the promisor's performance.⁶²³ In contrast, performing the preexisting duty was not a new detriment.⁶²⁴ Thus, according to Langdell, if the alleged contract was unilateral then the consideration was insufficient, whereas if it was bilateral it would be sufficient. Langdell noted that the contracts sued upon in *Shadwell* and *Scotson* were unilateral, and thus if the judges had borne this distinction in mind the decisions might have been different.⁶²⁵ Recall that Langdell rejected the benefit test for consideration and argued that the only question was whether the promisee suffered a detriment.⁶²⁶ Thus, whether the promisor benefitted from the promisee's performance of the preexisting duty owed to the third party was irrelevant.

Sir Frederick Pollock, in the first edition of his 1876 treatise, had adopted the same reasoning as Langdell.⁶²⁷ He wrote:

In a case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. *It creates a new and distinct right*, which must always be of some value in law, and may be of appreciable value in fact. There are many ways in which B may be very much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may well be worth his while to give something for being enabled to insist on his own right on the thing being done. This opinion has been expressed and acted on in the Court of Exchequer, [citing *Scotson v. Pegg*] and seems implied in the judgment of the majority of the Court of Common Pleas in a case [citing *Shadwell v. Shadwell*] decided some weeks earlier.⁶²⁸

The question was whether the promisee was giving up anything, which was necessary under the requirement of consideration. Langdell (and Pollock) did not see a promisee who performed a preexisting duty as giving up anything, including any "right to breach," but a promisee who promised to perform gave up the right not to be sued by the third-party promisor for nonperformance of the preexisting duty.

⁶²² LANGDELL, *supra* note 9, at 104–05.

⁶²³ *Id.* at 105.

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *Id.* at 82.

⁶²⁷ SIR FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 158–59 (1st ed. 1876).

⁶²⁸ *Id.* at 175 (emphasis added).

At this point, the strains on a logical structure of contract law caused by retaining an additional requirement (a detriment or perhaps either a benefit or a detriment) for purposes of determining what would count as bargained-for consideration were unapparent. An additional requirement on top of a mere bargain was necessary, as no one seemed to want a promise to perform (or the performance of) a preexisting duty owed to the other party to be consideration for a new promise by that party (even if simply for historical reasons, like Langdell). The problem, however, was that a conceptualist and formalist would then need to account for such a second-tier rule within the logical structure of contract law if the rule was not going to be discarded. And that required a first-tier principle of consideration from which the preexisting-duty rule could flow. The principle adopted by Langdell—consideration required a detriment to the promisee—seemed to work well enough, making a promise to perform (or performance of) a preexisting duty owed to the promisor insufficient (clearly not a new detriment). And when applied to a situation involving a preexisting duty owed to a third party, the top-tier principle meant performance of a duty owed to a third party was insufficient (no new detriment) but a promise to perform such a duty was sufficient (a new detriment, because the promisor was now subject to a claim by the promisee as well as the third party). If this was the second-tier rule that logically flowed from the top-tier principle, then whether it was a good rule from a policy standpoint was irrelevant. So far, so good.

But in 1879, Sir William Anson (an English jurist) pointed out a fallacy in Pollock's (and thus Langdell's) deductive reasoning from the first-tier principle that a detriment is sufficient consideration, writing:

[I]t has been said [citing to Pollock] that the promise [to perform a preexisting duty owed to a third party is consideration because it] is based on the creation "of a new and distinct right" for the promisor, in the performance of the contract between his promise and the third party. But this is in fact to assume that a right is created which would not be the case if the consideration for the promise were bad If we say that the consideration for it is the detriment to the promisee in exposing himself to two suits instead of one for the breach of his contract, we beg the question, for we assume that an action would lie for such a promise. If we say that the consideration is the promisor's desire to see the contract carried out, we run the risk of confounding motive and consideration.⁶²⁹

Both Pollock and Anson downplayed the promisor's interest in having the promisee perform (the chance of which was presumably increased if the promisor's promise was enforceable), seemingly following Langdell's lead that detriment to the promisee, not benefit to the promisor, was the relevant question, as otherwise motive would be incorrectly confounded with consideration. Of course, if everyone agreed that a promise to perform a preexisting duty owed to the promisor was not (or should not be) consideration, then relying on the promisor's interest in performance to make the promise enforceable when the duty was owed to a third party was problematic. The promisor had an interest in performance in the former situation too. So detriment to the promisee must be the test, but why was a mere promise a detriment? Why did it

⁶²⁹ SIR WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 80–81 (Oxford, 1879).

have value of which the law would take notice? At this point, the discussion was limited to promises to perform a preexisting duty, and the can of worms had not yet been opened.

In 1894, Williston opened the can of worms. In an article titled “Successive Promises of the Same Performance,” he discussed promises to perform a preexisting duty, including those when the duty was owed to the promisee and when it was owed to a third party.⁶³⁰ With respect to the former, Williston believed that a promise to do what one was already obligated to the promisee to do, or doing it, was neither a detriment to the promisee nor a benefit to the promisor (assuming a benefit would be sufficient consideration).⁶³¹ The lack of a detriment was perhaps obvious, but the lack of a benefit was not. Here, Williston distinguished between an actual benefit and a legal benefit, writing that “[g]ranting that a benefit or advantage moving from the promisee to the promisor is a good consideration, surely nothing can be regarded by the law as a benefit to the promisor unless it is something more than what he was already entitled to.”⁶³² Accordingly, it was not good consideration, even if a benefit to the promisor was sufficient consideration.

Turning to the latter situation (preexisting duty owed to third party), Williston started by agreeing with Langdell that “what the promisee gives—that is, the detriment suffered by him—[was now] the universal test for consideration”⁶³³ If doing (not promising) what one was already bound to do was not a good consideration, then, following this to its “logical conclusion,” a benefit to the promisor could not be sufficient for consideration.⁶³⁴ Williston then addressed Langdell’s argument that a promise to perform a preexisting duty owed to a third party was a detriment because the promisor became legally bound to an additional party, whereas performance of the duty was not.⁶³⁵ Williston asserted that “[i]t seems impossible to dispute Anson’s criticism of the theory advanced by Pollock and Professor Langdell”⁶³⁶ and it “must be deemed sound.”⁶³⁷ But Williston, opening the can of worms, pointed out that this objection brought into issue the very question of why any bilateral contract was binding.⁶³⁸ If there was no detriment unless the promise was binding, it begged the question to say that an exchange of promises was binding because each promisor was

⁶³⁰ Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 27 (1894).

⁶³¹ *Id.*

⁶³² *Id.* at 30.

⁶³³ *Id.* at 33–34.

⁶³⁴ *Id.* at 34.

⁶³⁵ *Id.*

⁶³⁶ *Id.* at 35.

⁶³⁷ *Id.* at 36.

⁶³⁸ *Id.* at 35.

bound.⁶³⁹ The first promise is binding because the counter-promise is binding, and the counter-promise is binding because the first promise is binding. For three hundred years an informal, mutual exchange of promises had been considered binding because each promise had been given in exchange for the other, without anyone questioning the reasoning. But once Williston asked the question, there was no turning back.

Williston, the conceptualist/formalist (even if an “uneasy” one), thus turned to defining consideration in a way that could be induced from the second-tier principles. Courts in the United States, unlike those in England, had held that a promise to perform a preexisting duty owed to a third party was not good consideration,⁶⁴⁰ and thus Williston the legal positivist wanted a definition of consideration that would account for those results. Williston saw the answer in “revis[ing] slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise, in the thing promised, and not in the promise itself.”⁶⁴¹ Williston wrote:

If the test of the sufficiency of consideration be made whether the promisee has incurred a detriment at the request of the promisor (which would constitute a unilateral contract), or has promised something the performance of which will be, or may be, a detriment (which would constitute a bilateral contract), a logical consistency is attained. Nor is it attained at the expense of disregarding the authorities.⁶⁴²

Looking to the act that was promised, the circular reasoning was avoided. Promises as such were not consideration. The act was the detriment, not the promise. Under this new definition, a promise to perform a preexisting duty owed to a third party was not sufficient consideration because the promised act was not a detriment to the promisee. This test also explained why a promise to accept a gift was not consideration (the act of accepting a gift was not a detriment to the promisor).⁶⁴³

Williston’s solution was very much a hybrid of Langdellian legal positivism and Langdellian conceptualism/formalism. Like Langdell, he was willing to alter the received definition of consideration, but Williston did it to account for the actual decisions, whereas Langdell was less concerned with tailoring first-tier principles to actual decisions. Like Langdell, Williston gave matters of policy no attention in providing a revised definition of consideration. By ignoring benefit to the promisor, whether the promisor would want the promise or the performance was not considered relevant.

Langdell was unaware of Williston’s article until around 1900, and the following year wrote a response titled “Mutual Promises as Consideration for Each Other,” which was published in the *Harvard Law Review*.⁶⁴⁴ While Williston’s solution was

⁶³⁹ *Id.*

⁶⁴⁰ *Id.* at 32–33.

⁶⁴¹ *Id.* at 35.

⁶⁴² *Id.* at 36.

⁶⁴³ *Id.* at 35.

⁶⁴⁴ *See generally* Langdell, *supra* note 608.

Langdellian, Langdell's ire was up, apparently because he was being accused of a logical error.⁶⁴⁵ Langdell's response correctly pointed out that a weakness in Williston's argument was that if consideration for a promise was what was given in exchange, the promisor in a bilateral contract seeks in exchange the return promise, not the promised performance.⁶⁴⁶ Because the promised performance is in the future, it cannot be the consideration, only the counter-promise itself can be the consideration.⁶⁴⁷ Langdell showed that Williston had, in fact, failed to demonstrate why the counter-promise itself was consideration, and Pollock called Langdell's response a "a masterly reply."⁶⁴⁸

Langdell, however, despite having a masterly reply to Williston's new definition of consideration, was unable to provide his own explanation of why the counter-promise itself was consideration. He simply argued that he had operated on the assumption each promise was legally binding,⁶⁴⁹ and "the decision [of whether the counter-promise is consideration] will depend upon the judgment of the court on that question."⁶⁵⁰ He asserted that *Shadwell v. Shadwell* and *Scotson v. Pegg* were both authorities for the latter proposition,⁶⁵¹ presumably meaning that the courts finding consideration in those cases was defensible as within the court's discretion.⁶⁵² As a conceptualist/formalist, Langdell should not have simply argued that it was for the court to decide in each case whether a particular counter-promise was consideration, particularly when the facts are the same in different cases (if that was his argument). Judicial discretion of this kind, on a fundamental issue of contract law, was inconsistent with bringing order and predictability to the common law of contracts and providing rules for apolitical decisions. He presumably wanted to prove that Williston's solution was illogical, but in doing so, he had no choice but to address the

⁶⁴⁵ Williston, in his autobiography, wrote that Langdell's attitude caused him regret, but that it resulted no friction between them. WILLISTON, *supra* note 72, at 138.

⁶⁴⁶ Langdell, *supra* note 608, at 506.

⁶⁴⁷ *Id.*

⁶⁴⁸ Frederick Pollock, *Afterthoughts on Consideration*, 17 LAW Q. REV. 415, 422 n.2 (1901).

⁶⁴⁹ Langdell, *supra* note 608, at 502.

⁶⁵⁰ *Id.* at 505.

⁶⁵¹ *Id.* at 505 & n.2.

⁶⁵² As the leading analyst of the debate notes, Langdell saw little to be done about the problem, and "Langdell's answer was, in the end, to say that consideration and detriment were legal questions to be decided by the courts." Richard Bronaugh, *A Secret Paradox of the Common Law*, 2 LAW & PHIL. 193, 204 & n.28 (1983); *see also* Howard Engelskirchen, *Consideration as the Commitment to Relinquish Autonomy*, 27 SETON HALL L. REV. 490, 516 n.79 (1997) ("[I]n the last analysis Langdell missed the point and thought it obvious that one promise given for another was binding unless a defendant could establish some defect in the promise such as incapacity or illegality."). If, as Williston believed, Langdell was arguing that "[i]f the obligation of a promise would be a detriment to the promisor (assuming that the promise creates a binding obligation) the promise is sufficient consideration" that did nothing to solve the paradox. Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 518 (1914).

problem of why mutual promises are binding, and in doing so, he was left to essentially concede that he could conceive of no logical answer to the question.

But one can only wonder if this really bothered Langdell. Recall that Langdell acknowledged that law did not have the “demonstrative certainty of mathematics . . . nor does it acknowledge truth as its ultimate test and standard, like natural science . . .”⁶⁵³ If so, surely Langdell understood that at some point logic would run out. Perhaps this was what Langdell was saying when he wrote that ultimately it would be up to the courts to decide whether a particular promise was legally binding.

The problem thereafter consumed the energies of other scholars.⁶⁵⁴ Holmes, who was appointed to the U.S. Supreme Court in 1902,⁶⁵⁵ watched the debate from afar. In a 1910 letter to Pollock (after Langdell’s death in 1906), he essentially conceded that there was no principled reason why an exchange of promises were binding, writing that “it is a case of jumping in—call one binding and both are,” and that “[i]t is more convenient to say both bind than that neither does, therefore *voilà vous êtes* [“here you are”].”⁶⁵⁶ Several months later, he wrote to Pollock after receiving Pollock’s eighth edition of his contracts treatise. In it, Pollock had now written:

In fact there is no conclusive reason, other than the convenience of so holding, for the rule that a promise and a counter-promise will make one another binding: for neither of them, before it is known to be binding in law, is in itself any benefit to the promisee or burden to the promisor.⁶⁵⁷

Holmes, in reply, wrote, “I see no answer to what you say as to mutual promises.”⁶⁵⁸ It was classic Holmes. If it is more convenient to say that both are binding than to say that neither is, so be it.

In 1914, Williston wrote an article titled “Consideration in Bilateral Contracts,” which was published in the *Harvard Law Review*,⁶⁵⁹ and which formed the basis for

⁶⁵³ ANNUAL REPORTS OF THE PRESIDENTS AND TREASURER OF HARVARD COLLEGE, 1876-77, *supra* note 174, at 96–97, *reprinted in* LAPIANA, *supra* note 3, at 56–57.

⁶⁵⁴ *See* Bronaugh, *supra* note 652 (providing an extensive analysis of the debate).

⁶⁵⁵ SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 243 (1989).

⁶⁵⁶ Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 18, 1910), *in* HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, *supra* note 109, at 172.

⁶⁵⁷ FREDERICK POLLOCK, PRINCIPLES OF CONTRACT: A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND 191 (8th ed. 1911). Pollock also wrote the following year, “What logical justification is there for holding mutual promises good consideration for each other? None, it is submitted.” Frederick Pollock, Book Note, *The Law of Contracts*, 28 LAW Q. REV. 100, 101 (1912) (reviewing CLARENCE D. ASHLEY, THE LAW OF CONTRACTS (1911)).

⁶⁵⁸ Letter from Oliver Wendell Holmes to Frederick Pollock (Mar. 12, 1911), *in* HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, *supra* note 109, at 177.

⁶⁵⁹ Williston, *supra* note 652.

the same discussion in his 1920 treatise.⁶⁶⁰ Williston wrote that he had changed his mind since writing his 1894 article, and that he now supported the English decisions that had held that a promise to perform a preexisting duty owed to a third party was sufficient consideration.⁶⁶¹ He wrote: “[N]ow on the ground of legal benefit to the promisor I support the English cases and such American decisions as follow them in upholding the second agreement, whether unilateral or bilateral.”⁶⁶² But Williston made no effort to explain why he believed the English cases and what was apparently the minority rule in the United States was better law. A policy justification was shouting for recognition, but Williston ignored the shouts.

And more importantly for our purposes, Williston still made no effort to explain why, logically, an exchange of promises makes each one binding. He attacked Langdell’s 1901 effort to defend his position, writing that “[t]he question is not here in regard to disputed facts; all the facts must be taken as known,”⁶⁶³ correctly recognizing that an effort to bring order to the common law of contract should not give courts discretion, on a case by case basis, to decide an issue of law. He also made some progress toward a rationale for explaining why mutual promises were binding, arguing that “it is the promise in fact which the offeror requests—not a legal obligation.”⁶⁶⁴

But rather than offer his own answer to the paradox, he simply continued to fiddle with a test for consideration, one that would fit what he believed were the correct results in the cases (abandoning his positivism, yet missing the opportunity to do so for policy reasons, and thus appearing like a conceptualist/formalist whose only goal was creating a neat structure). Williston even seemed to acknowledge that there was no logical answer for how mutual promises made each promise legally binding, simply accepting that courts since the late sixteenth century had so decided, writing: “When bilateral contracts were first recognized no elaborate discussion was had of the requirements of a promise in order that it might be sufficient consideration for another promise. It was simply decided that a promise was sufficient for another promise.”⁶⁶⁵

Williston did not even see it as a paradox, writing in response to Pollock’s assertion: “I see nothing paradoxical about it. All that is necessary is to understand and state that the rules governing consideration in unilateral contracts will not cover

⁶⁶⁰ WILLISTON, *supra* note 317, at 192–216.

⁶⁶¹ Williston, *supra* note 652, at 524.

⁶⁶² *Id.* The Restatement of Contracts, published in 1932 with Williston as the Reporter, provided that a promise or the performance of a duty owed to a third party was sufficient consideration. RESTATEMENT OF CONTRACTS § 84(d) (AM. L. INST. 1932).

⁶⁶³ Williston, *supra* note 652, at 509 n.17.

⁶⁶⁴ *Id.* at 506; *see also* George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1269 (1985) (“Williston approached the problem by conceptualizing the obligor’s second promise as a natural rather than legal event. Williston called the second promise to perform ‘consideration in fact,’ which could be sufficient to uphold the contract and thereby render the promise binding.”).

⁶⁶⁵ Williston, *supra* note 652, at 518. Farnsworth concluded that Langdell “seems to have been bested by Williston in [the] debate over Langdell’s attempt to apply the notion of legal detriment to the enforceability of mutual promises.” Farnsworth, *supra* note 13, at 1411.

the bilateral situation, and a special rule is required.”⁶⁶⁶ In other words, the paradox could be dispelled by simply creating a special rule that avoided any inconsistency: a promise to perform a preexisting duty owed to a third party is binding because the general rule is that a promise is binding, but performing the preexisting duty is not consideration because we have a special rule that says it is not. But Williston missed the point. The paradox was not that existing legal rules, as so framed, could not account for the different results, it was that there was no solely logical explanation why each promise in a bilateral contract was consideration. Williston’s flip-flopping on the definition of consideration was merely cosmetic and simply proved that logic could not provide the answer.

It was a remarkable article, one that exposed the inability of Langdellian conceptualism/formalism to use logic as a way to create a comprehensive body of contract-law doctrine. As Richard Bronaugh has argued:

The moral of the tale is that classical contract formation, especially of the bilateral kind (i.e., in which only promises are exchanged), cannot explain consideration merely from within the force of the contract itself and must—however little appreciated—depend upon independent notions of obligation derived from the idea of promising as a moral act.⁶⁶⁷

One need not agree with Bronaugh’s conclusion about the reason mutual promises are consideration for one another, to agree that Langdellian logic could not provide an answer. It also shows that the architects of classical contract law did “not think of consideration in the same way” and “[t]hat that should be the case in the heyday of classical contract theory is perhaps the real paradox of the common law.”⁶⁶⁸

Ultimately, it took Arthur Corbin to point out the obvious. Entering the debate in 1918, he wrote:

Mutual promises create a legal obligation because—in English-speaking countries, at least—the customary notions of honor and well-being cause men to perform as they have promised, and the lawmaking powers have decreed that in such cases promise-breakers shall make compensation. The prevailing credit system in business requires such a rule. The basis for the enforcement of bilateral contracts lies in mutual assent and fair dealing.

The fact is that “consideration” is an undefined and nebulous concept. Our efforts at definition have been inharmonious and unsuccessful for the reason that a great variety of facts must be included. This is an excellent illustration of the general truth that we do not have universal principles or mechanical rules of clean-cut definitions in the beginning. It is evident that we have such universal and mechanical tests so that we can predict societal action with greater certainty. Therefore, we continually construct exact definitions and

⁶⁶⁶ Williston, *supra* note 652, at 509 n.18.

⁶⁶⁷ Bronaugh, *supra* note 652, at 196.

⁶⁶⁸ *Id.* at 204.

general rules. Some thus “lay down the law” with dogmatic vigor, even asserting an *a priori* necessity, logical or divine.⁶⁶⁹

In other words, courts held a promise to be binding when it was given in exchange for another promise because there were good reasons to do so, whether those reasons were based on the morality of promising or because the needs of business were promoted, or both. As Holmes had written, “[i]t is more convenient to say both bind than that neither does, therefore *voilà vous êtes* [“here you are”].”⁶⁷⁰

VII. CONCLUSION

There were two reasons the efforts of Langdell, Holmes, and Williston to create a foundation for contract law were doomed to fail. First, Langdell and Holmes did not share the same theory of law.⁶⁷¹ Langdell emphasized logic, whereas Holmes emphasized experience. This was demonstrated in Langdell wanting a preexisting concept of promise to drive the formulation of bottom-level rules of consideration, whereas Holmes was willing to expand the concept of promise to serve what he viewed was contract law’s purpose. Second, although Langdell and Williston agreed on the primacy of logic, logic alone proved unable to give an answer to one of the most fundamental questions of all—why are mutual promises consideration for each other? By the early twentieth century, it was apparent neither Langdell nor Williston were able to show that logic alone could answer this question. By this point, it was clear that the architects had failed in their efforts to build a solid foundation for classical contract law.

⁶⁶⁹ Arthur L. Corbin, *Does a Pre-Existing Duty Defeat Consideration*, 27 YALE L.J. 362, 375–76 (1918).

⁶⁷⁰ Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 18, 1910), in HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, *supra* note 109, at 172.

⁶⁷¹ See discussion *supra* Part III.