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In her pathbreaking article, "Restatement and Reform: A New Perspective on the Origins of the American Law Institute,"[1] Professor N.E.H. Hull rejects the conventional wisdom about the conservative, even reactionary, character of the First Restatements. The truth, she argues, is more subtle. The Restatements, and the larger ALI project of which they were a part, reflect the "'progressive-pragmatic'" worldview of the law professors most responsible for their creation.[2] These professors–men like William Draper Lewis, Arthur Corbin, and Wesley Hohfeld–were reformers. They rejected the formalism of earlier generations; for them, law was not a conceptual system but a practical tool for promoting beneficial social goals. They tempered their zeal for change, however, with an appreciation of political realities. For example, they understood the need to include older scholars like Joseph Beale and Samuel Williston in the Restatement project in order to give the work credibility with the established bar. Their strategic compromises help explain the "unsteady equilibrium" between conservatism and reform that characterizes their ultimate product.[3]

Professor Hull unfortunately leaves one element of the received wisdom unchallenged. She accepts the conventional notion of Williston, the Reporter on the Restatement of Contracts, as an anti-reform conceptualist whom progressives had to mollify in order to advance their agenda.[4] In fact, Williston shared the progressives' distaste for conceptual rigidity and championed the Restatement's greatest doctrinal innovation. He favored formalism for its practical advantages, but he did not object to gradual reforms that could make commercial law more just and predictable. He distrusted some of the progressives' scholarship, but he did not entirely discount it; for example, he asked Corbin to keep an eye out for Hohfeldian issues in drafting the Restatement.[5] In Hull's terms, Williston was a "conservative-pragmatist."

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1. N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990).
2. *Id.* at 56.
3. *Id.* at 81.
4. *See id.* (contrasting Williston's "conservatism" with the "progressivism" of Lewis).
5. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 397 n.31 (1973).

Far from opposing the reformers, he actually helped them to achieve some of their goals.

I discuss Williston's jurisprudence–his beliefs that law must be justified in terms of real-world effect, that rules can have only presumptive force, and that one can best understand judicial restraint as a matter of institutional competence–at length elsewhere.[6] Time does not permit me to go into details here. Instead, I will focus my comments on Williston's role in establishing the Restatement's greatest doctrinal innovation, the doctrine of promissory estoppel.[7]

Promissory estoppel is the great exception to the consideration, or bargain, requirement in American contract law. As a general matter, courts enforce only those promises that are the products of bargains. They do not enforce gratuitous promises–promises to confer a gift, for example. Classical contract theory explained this as a matter of formal logic: gifts do not result from bargains, and, therefore, gift promises cannot be enforced. Under the doctrine of promissory estoppel, however, courts do enforce gratuitous promises that have caused foreseeable and detrimental reliance on the part of promisees. According to the version of the doctrine contained in section 90 of the Restatement, "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[8]

Contracts scholars know well the standard account of promissory estoppel's appearance in the Restatement. In this account, popularized by Grant Gilmore in *The Death of Contract*, Williston reluctantly agreed to section 90 only after Corbin embarrassed him by pointing out several cases that had relied on promissory estoppel.[9] Not to put too fine a point on it, this account is flatly wrong. Nobody had to shame Williston into accepting promissory estoppel. On the contrary, he repeatedly claimed credit for inventing the doctrine and for making it a success. He defended the doctrine against its detractors in the ALI.

Williston endorsed promissory estoppel only gradually. He toyed with the concept in his 1920 contracts treatise, but ultimately concluded that the weight of case law opposed it.[10] By the time he became Reporter, though, he enthusiastically embraced the doctrine. Williston came to believe that real

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6. Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).
7. *See id.* at 247–53 (discussing this pont in more detail).
8. RESTATEMENT OF CONTRACTS § 90 (1932).
9. GRANT GILMORE, THE DEATH OF CONTRACT 61–65 (1974).
10. *See* 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139 (1920).

world concerns about rough justice and business convenience required the exception to the bargain requirement. As he explained during the ALI debate on section 90,

> As someone expressed it, in regard to this section, if you bind up too closely, with definite mathematical rules the law of consideration, the boiler will burst. You have got to leave the court a certain leeway outside of those mathematical and exact rules. This section is, so to speak, the safety valve for the subject of consideration.[11]

Williston did not advocate abolishing the consideration requirement, of course. Section 90 was fairly narrow; only foreseeable, "definite and substantial" reliance, not reliance alone, could make a promise binding. And he insisted that the full expectation measure of damages should be available as a remedy for breach, a position that many–including, famously, Fuller and Perdue–have seen as excessively rigid.[12] These facts should not distract us from the larger point, though. Williston did not oppose the central reform of the Restatement. He championed it.

My observations here do not detract from Professor Hull's ultimate point about the reform agenda of many of the scholars who engineered the creation of the ALI. I do hope, though, that I have provided a helpful qualification to her work. At least with respect to the contracts Restatement, the reformers did not need to work around a recalcitrant Reporter. Notwithstanding the myth that later Realists like Gilmore created, Williston was, in fact, the progressives' ally.

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11. Movsesian, *supra* note 6, at 249 (quoting *Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. APP. 86 (1926) (discussing section 88, the predecessor of section 90)).

12. *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages:* pts. 1 & 2, 46 YALE L.J. 52, 64–65 (1936), 46 YALE L.J. 373, 401, 405–06, 413 (1937).