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American Contract Law at the Turn of the Century

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AMERICAN CONTRACT LAW AT THE TURN OF THE CENTURY

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I. INTRODUCTION

During the past century, contract law, along with most of American society, has undergone a "major transformation."[1] While courts of a hundred or more years ago would have declared an agreement not to be enforceable, courts today would routinely consider the same agreement to be a contract. Underlying the transformation in contract law is a fundamental displacement of one image of contract by another. The consequence of that displacement is a greater involvement by courts in policing the performance of contracts.

The result of this transformation in contract law is documented and much discussed.[2] Little, however, has been written

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1. Donald, *Foreword* to R. WIEBE, THE SEARCH FOR ORDER, 1877-1920, at vii (1967); *see also* H. ADAMS, THE EDUCATION OF HENRY ADAMS 457 (E. Samuels ed. 1974); H. COMMAGER, THE AMERICAN MIND at viii (1950) ("[T]he mid-[1880s] and the nineties constituted something of a watershed in American history and thought and . . . the period since that time has a certain unity."); *id.* at 41 ("The decade of the nineties is the watershed of American history."); C. S. LEWIS, DE DESCRIPTIONE TEMPORUM (1955); H. MAY, THE END OF AMERICAN INNOCENCE at vii (1959); W. NUGENT, FROM CENTENNIAL TO WORLD WAR: AMERICAN SOCIETY, 1876-1917, at xiv (1977); Bradbury & McFarlane, *The Name and Nature of Modernism*, in MODERNISM: 1890-1930, at 49 (M. Bradbury & J. McFarlane eds. 1978); Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555 (1978-79).

2. The seminal work on the shift in doctrine is Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936-37); *see also* Konefsky, Mensch & Schlegel, *In Memoriam: The Intellectual Legacy of Lon Fuller*, 30 BUFFALO L. REV. 263 (1981). For more recent discussions, see, *e.g.*, P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); J. DAWSON, GIFTS AND PROMISES (1980); C. FRIED, CONTRACT AS PROMISE (1981); G. GILMORE, THE DEATH OF CONTRACT (1974); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); J. LIEBERMAN, THE LITIGIOUS SOCIETY 20-21, 29 (1981) (movement described as one from contract to fiduciary); I. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); Fleming, *The Sanctity of Contracts in Eclipse?*, 24 AUSTL. L.J. 306 (1950); Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U. L. REV. 751, 777 (1965); Metzger & Phillips, *Promissory Estoppel and the Evolution of Contract*

to account for the origins of the change. Those accounts that do exist tend toward a generalized explanation that the change was merely one part of a reaction against a style of reasoning known as "formalism."[3] That conventional explanation has taken on an almost legendary character according to which late-nineteenth-century judges had settled into a style of reasoning deductively from a priori rules. Not long thereafter, lore has it, judges of the early twentieth century developed a preference for "scientific" evidence that conclusions worked in practice. As with most legends, there is some truth to this account. But the truth is limited to a description of styles of reasoning. It does little to identify the sources of the reaction against formal rules; and it does even less to explain why courts reached particular results. Specifically, the legend does not account for the courts' transformation of contract law.

Beyond the incomplete portrayal of the development of doctrine is a mischaracterization of the judges who participated in the development. A stock figure in the legend is a late-nineteenth-century judge who is little more than a pertinacious atavist, out of touch with the times, who sought only to obstruct progress. However accurate that caricature might be in public law, in private law it comes perilously close to exceeding the proper bounds of literary license. The actual judges, atavistic though they may have been, proved to be quite pliant in responding to the changes at the turn of the century. Moreover, in their own way, the judges were remarkably in touch with the spirit of the final years of the nineteenth century.

The thesis of this article is that the critical origins of the transformation of contract doctrine lie in the period between 1870 and 1920. In that half century, roughly between the end of Reconstruction and the end of the First World War, the United States came to recognize itself as having changed from a traditional society, characterized by localism and face-to-face communications, to a modern, urban society, characterized by its

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Law, 18 AM. BUS. L.J. 139 (1980); Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163 (1983).

3. *See* M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949); *see also* M. HORWITZ, *supra* note 2, at 253-66. For critical discussions of "formalism," see Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979); Comment, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 WIS. L. REV. 997.

cosmopolitan nature and by an economy which reached well beyond the village.[4] Intangibly the society had changed from one in which "[p]resent, past, and future [were] essentially the same"[5] to one in which change and uncertainty were dominant and in which links to the past were weakening.[6]

The alterations in contract law matched those in society. The judges of the Reconstruction period viewed contracts as part of a market dominated by small, discrete transactions, as the market had been in the past. But markets were changing, reflecting the acceleration and fruition of many of the developments that had begun in the decades before the Civil War. Instead of being discrete and localized, transactions were now regularly more complex and regional as well as national.[7] In an effort to cope with the newer transactions in an unsettled economy, manufacturers developed new marketing techniques, most often described in terms of vertical and horizontal integration.[8] But the same factors that fueled the movement toward bigger enterprises also produced new contracting practices, character-

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4. *See* R. BROWN, MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE, 1600-1865, at 9-13 (1976); W. NUGENT, *supra* note 1, at xvi; J. QUANDT, FROM THE SMALL TOWN TO THE GREAT COMMUNITY: THE SOCIAL THOUGHT OF PROGRESSIVE INTELLECTUALS 3-5, 15 *passim* (1970); D. RUSSO, FAMILIES AND COMMUNITIES: A NEW VIEW OF AMERICAN HISTORY 4 (1974). For a critique of "breakdown theories" of history, see T. BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA (1978).

5. R. BROWN, *supra* note 4, at 9.

6. *Id.* at 12-13; *cf.* H. COMMAGER, *supra* note 1, at 407 ("In a general way it could be said that the two generations after 1890 witnessed a transition from certainty to uncertainty . . . ."); W. NUGENT, *supra* note 1, at 30 ("[T]he decade of the 1870s was in important respects the last of that older America that was so homogeneous in its rural-centered culture, and the first of a newer kind of society whose thrust and whose problems centered around cities, industry, different types of people, and unfamiliar ideas."); R. WATSON, JR., THE DEVELOPMENT OF NATIONAL POWER, 1900-1919, at 50-52 (1976) ("change was fundamental" influence of William James, Peirce, Dewey); R. WIEBE, *supra* note 1, at 145 (fluidity of values); R. WILSON, IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860-1920, at 21 (1968) (period had a "singular air of constant change and uncertainty").

7. For a discussion of the iron industry's rapid growth from a regional to a national business, see G. PORTER & H. LIVESAY, MERCHANTS AND MANUFACTURERS: STUDIES IN THE CHANGING STRUCTURE OF NINETEENTH CENTURY MARKETING 55-59 (1971).

8. *See, e.g.*, S. BRUCHEY, GROWTH OF THE MODERN AMERICAN ECONOMY 102-03 (1975); G. PORTER & H. LIVESAY, *supra* note 7, at 54-61; Chandler, *The Coming of Big Business*, in THE COMPARATIVE APPROACH TO AMERICAN HISTORY 220, 225-29 (C. Vann Woodward ed. 1968), *reprinted in* THE CHANGING ECONOMIC ORDER: READINGS IN AMERICAN BUSINESS AND ECONOMIC HISTORY 268, 272-74 (A. Chandler, S. Bruchey, & L. Galambos eds. 1968) [hereinafter THE CHANGING ECONOMIC ORDER]; Chandler, *The Beginnings of "Big Business" in American Industry*, 33 BUS. HIST. REV. 1 (1959).

ized by reduced specificity in the terms of agreements. The public debate about the ever larger corporate forms overshadowed all other discussion of economic change.[9] Thus eclipsed, the new contract practices were usually discussed only within judicial opinions. Nevertheless, those opinions reveal concerns about the future of the country akin to the sentiments that dominated the more public debate about large corporations.

Judges at first rejected these new practices by declaring the agreements not to be enforceable as contracts. The new forms failed to fit the existing image of contract; but they had become too popular in the market for the courts long to resist. Recognizing that the doctrines of the past were no longer adequate for the needs of a changing commercial world, the judges modified the doctrines to embrace the greater uncertainty that characterized the new agreements. The judicial adaptations allowed the enforcement of agreements that previously would not have been enforced. But the change produced new difficulties for the judges, who until then had faced only the binary decision of whether or not to enforce an agreement. They now had to attend to the performance of the contract and to the much more complex questions arising from the uncertainties in the agreements themselves. The judicial response to those new difficulties was couched in terms familiar to the emerging communitarian theories of the era.[10] In the language of the courts, the central concept for both enforcement and performance came to be that of "good faith."[11] Through the use of that concept courts strove to

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9. For discussions of the response of the law to this overshadowing debate, see, *e.g.*, G. KOLKO, RAILROADS AND REGULATION, 1877-1916 (1965); G. MILLER, RAILROADS AND THE GRANGER LAWS (1971); A. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA (1910); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956); McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631 (1978).

10. *Compare* L. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 112-13 (1965) (early twentieth-century courts' "increased awareness of the economic and social interdependence of the community") *and id.* at 156 *with* J. QUANDT, *supra* note 4, at 27 ("applied to society, this theory posited increasing division of labor and interdependance of parts") *and* R. WILSON, JR., *supra* note 6, at 30 ("urgent demand for concepts of man that gave him protective membership in a social community that stood as a buffer between the individual and the harsh uncertainties of both the evolutionary and the industrial world").

11. A number of recent articles have discussed the current importance of the doctrine of good faith. *See, e.g.*, Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Gillette, *Limitations on the Obliga-*

preserve some of the moral decency of the rural past while allowing the development of commercial practices for the urban future, with as yet undefined morals. The result was an altered image of contract, one in which the relationship between the parties was closer to a fiducial one than to that of unrelated individuals in a free market.[12]

This article, then, looks to the emergence of the doctrine of "good faith" as the key to understanding the major transformation in contract law during the past century. As is true with most areas of private law, the path of this doctrinal development is neither straight nor smooth. Rather, because it depends upon the separate courts of many jurisdictions, the path is tortuous and uneven. In an effort to smooth the path and to focus the historical account, this article returns regularly to discussion of a single case, *Wood v. Lucy, Lady Duff-Gordon*,[13] which epitomizes the law's developing response to the uncertainty of the late nineteenth century. What may seem, in the 1980s, to be an easy decision was far from easy early in the century, as is apparent from the divisions within the New York courts. Those divisions, along with the facts of the case, make *Wood* an especially useful lens through which to examine the changes in contract law at the turn of the century.[14]

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tion of Good Faith, 1981 DUKE L.J. 619; Newman, *The Renaissance of Good Faith in Contracting in Anglo-American Law*, 54 CORNELL L. REV. 553 (1969); Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982); Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

12. This combining of images is reminiscent of Thomas Bender's argument in *Community and Social Change in America*. In his terms, the new image of contract was one that sought to preserve some values of "gemeinschaft" within the "gesellschaft" of the market economy. T. BENDER, *supra* note 4, at 13 and *passim*.

13. 222 N.Y. 88, 118 N.E. 214 (1917).

14. I am not the first to see in *Wood* a significant change in the law. Karl Llewellyn, for example, used it to illustrate "a whole new way of reading commercial documents." K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 34 n.25 (1960). I must also admit that the case makes the historical account much more fun. No other case has links to so much that was symbolic of the modern America—ranging from the Ziegfield Follies (for which Lucy designed costumes) to the Titanic, that tragically sinkable manifestation of confidence in technology (Lucy and her husband survived the sinking). Other links include the Kewpie doll (Wood was an advertising agent for the creator of the doll, *see infra* note 64), the modern Olympic movement (Lucy's husband, Cosmo Duff-Gordon was a fencer on the British Olympic team), Queen Victoria (Lucy designed dresses for women attending her funeral, *see infra* note 57), and Sears, Roebuck's catalogue sales (Lucy agreed to design dresses to be sold by Sears, *see infra* notes 87-88). For

II. *Wood v. Lucy, Lady Duff-Gordon*—BACKGROUND

A. The Facts

The case began as a suit by Otis F. Wood against Lucy, Lady Duff-Gordon for breach of an agreement signed in 1915. According to Wood, the agreement gave him the exclusive right to place Lucy's endorsements on products. Thus, when Lucy herself placed endorsements, Wood contended that he should have a share of the profits from those endorsements. Lucy demurred, arguing that for an agreement to be enforceable it must impose obligations on both parties. This agreement was unenforceable, she contended, because it imposed no duties on Wood. The trial judge overruled the demurrer; he interpreted the agreement as requiring Wood to exercise his "bona fide judgment"—a requirement which the judge thought sufficient to give content to Wood's obligation and thus to make the agreement enforceable.[15] The appellate division unanimously reversed, concluding that the contract was "void for lack of mutuality."[16] The court found nothing in the agreement that required Wood to place any endorsements. Viewed in that light, there was no obligation in the agreement that could be enforced against Wood. There was therefore no contract that Wood could enforce against Lucy. The court of appeals, by a 4-3 vote, agreed with the trial judge. Judge Cardozo's opinion for the majority used the phrase "reasonable efforts" to describe Wood's obligation.[17]

B. The Social Milieu

Although obviously important to the case, Wood and Cardozo were actually little more than supporting characters to the role played by the defendant, Lucy, Lady Duff-Gordon, who was one of the most vibrant symbols of the changing standards of her era. Lucy herself described the change in fashion as one

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a biography of Lucy and her sister, the novelist Elinor Glyn, see M. ETHERINGTON-SMITH & J. PILCHER, THE "IT" GIRLS (1986).

15. Wood v. Lucy, Lady Duff-Gordon (N.Y. Sup. Ct. Jan. 6, 1917), *reprinted in* Papers on Appeal at 13, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

16. 177 A.D. 624, 627, 164 N.Y.S. 576, 578 (1917).

17. 222 N.Y. at 92, 118 N.E. at 215. There was no dissenting opinion.

away from individualism. In the years before the death of Queen Victoria in 1901, according to Lucy, "every woman wanted to look individual and unlike everyone else." But as the early years of the twentieth century passed, women's fashion became "almost communal in its tendencies."[18]

Lucy's description of changes in women's fashion was but a cameo portrait of the changes in American society in the years around the turn of the century. There was no overnight transformation into an industrial, urban economy; the changes had begun decades before.[19] In the years after the Civil War, however, the rate and the nature of change so accelerated that it is accurate to describe the economy of the late nineteenth century as significantly different from the economy of mid-century.[20] Perhaps more importantly, many in the United States began to *perceive*[21] the changes as moving significantly and finally away from a nation which was primarily a collection of discrete, small communities or neighborhoods.[22] As the novelist Sherwood Anderson

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18. L. DUFF-GORDON, DISCRETIONS AND INDISCRETIONS 80 (1932); *cf.* F. KESSLER & G. GILMORE, CONTRACTS 1118 (2d ed. 1970) ("In our own century we have witnessed what it does not seem too fanciful to describe as a socialization of our theory of contract."). Henry May described similar changes across much of American society between the end of the nineteenth century and the end of the First World War. H. MAY, *supra* note 1. For a study of May's thesis and additional autobiographical evidence of changes, see Bourke, *The Social Critics and the End of American Innocence: 1907-1912*, 3 J. AM. STUD. 57, 58-65 (1969).

19. S. BRUCHEY, *supra* note 8, at 29-32; S. BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH, 1607-1861: AN ESSAY IN SOCIAL CAUSATION 91 (1965); C. NETTLES, THE EMERGENCE OF A NATIONAL ECONOMY, 1775-1815 (1961); D. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES, 1790-1860 (1962).

20. S. BRUCHEY, *supra* note 8, at 83-84 (discussion of the "crucial differences between" the antebellum economy and that of the last decades of the century); G. PORTER & H. LIVESAY, *supra* note 7, at 3 (causes of structural change in the marketing of goods not "widely operative . . . until the closing decades of the nineteenth century"); THE CHANGING ECONOMIC ORDER, *supra* note 8, at 2-3.

21. T. BENDER, *supra* note 4, at 109; *cf.* C. GLAAB & A. BROWN, A HISTORY OF URBAN AMERICA 136 (1967) (increasing attention to urbanization in years after Civil War); Berle, *Preface* to A. BERLE, JR. & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY at vii (1932) ("It is of the essence of revolutions of the more silent sort that they are unrecognized until they are far advanced.").

22. T. BENDER, *supra* note 4, at 108-17. The nation was very much the Midwest, "a farming section of separated villages whose isolation had hardened belief into certain knowledge. The residents knew that Protestantism was the true religion, . . . and that the farmers were the backbone of the country." L. ZIFF, THE AMERICAN 1890S, at 74 (1966). On the Midwest, see R. JENSEN, THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888-1896 (1971); P. KLEPPNER, THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900 (1970); *see also* H. COMMAGER, *supra* note

wrote, before the change each town had

> a character of its own, and the people who lived in the towns were to each other like members of a great family. . . . [E]very one knew his neighbor and was known to him. Strangers did not come and go swiftly and mysteriously and there was no constant and confusing roar of machinery and of new projects afoot.[23]

The economy rested on those communities. The essence of production remained the craft; most workers shared the opportunity to put their hands on a product and to identify with it.[24] Likewise, the basis for sales was personal knowledge and trust of those with whom one dealt, even when the transaction extended into a regional market.[25] This personal involvement with production and sales meant that buyers and sellers alike could share the same values. In the words of the historian Henry F.

1, at 34 (rural basis for nineteenth century American values); A. TRACHTENBERG, THE INCORPORATION OF AMERICA 20-22 (1982) (changing image of West from agrarian to source of value for markets); G. WHITE, THE EASTERN ESTABLISHMENT AND THE WESTERN EXPERIENCE 11 (1968); R. WIEBE, *supra* note 1, at 12 ("American institutions were still oriented toward a community life where family and church, education and press, professions and government, all largely found their meaning by the way they fit one with another inside a town or a detached portion of a city.").

23. S. ANDERSON, POOR WHITE 46-47 (Mod. Lib. ed. 1926) (1st ed. 1920).

24. The story of the harnessmaker in Sherwood Anderson's novel *Poor White* provides an evocative portrayal of the effect of the loss of this ability. *Id.* at 53-54, 134-35, 208-11; *see* A. TRACHTENBERG, *supra* note 22, at 68-69, 149-50; *see also* I. LIPPINCOTT, ECONOMIC DEVELOPMENT OF THE UNITED STATES 286, 462 (1921); W. NUGENT, *supra* note 1, at 34, 44. Nugent also relates that the "average number of workers per manufacturing establishment was still only six people in 1880, which basically fits the picture of an agrarian and small-firm economy." *Id.* at 34; *cf.* D. DUNCAN & C. PHILLIPS, RETAILING: PRINCIPLES AND METHODS 10 (1946). The loss of this connection between worker and product became one of the laments of the Populists. *See, e.g.*, W. Peffer, THE FARMER'S SIDE: HIS TROUBLES AND THEIR REMEDY 51 (1891); J. QUANDT, *supra* note 4, at 88-89 (as production and workers' tasks became more specialized, individuals found themselves isolated from the community).

25. G. PORTER & H. LIVESAY, *supra* note 7, at 121 ("In a commercial world where communications and banking facilities were primitive, reliance on a few trusted individuals became a fundamental element of the merchant's creed."). For a similar account of the importance of personal trust in earlier years, see S. BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH, *supra* note 19, at 50; T. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 8, 13 (1979); Madison, *The Evolution of Commercial Credit Reporting Agencies in Nineteenth Century America*, 48 BUS. HIST. REV. 164, 165-66 (1974); Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 106-07 (R. Beeman, S. Botein, & E. Carter II eds. 1987).

May, "The first and central article of faith in the national credo was, as it always had been, the reality, certainty, and eternity of moral values."[26] This implicit sharing of values extended throughout American society, including even literature, whose authors could assume a stable relationship between writer and reader—a relationship that included "a community of attitudes, a shared sense of reality."[27]

The United States of 1870 was not yet ready to acknowledge being an urban, industrial nation. According to the census, rural places outnumbered urban places by a ratio of almost five to one.[28] The rural population was almost three times that of the urban population.[29] Not until the census of 1920 would the urban population exceed the rural.[30] Statistics for production and income reflect similar characteristics for the nation. For example, in the decade 1879-1888 the nonfarm component of gross private domestic product exceeded the farm component for the first time.[31] Before then, no sector of the economy had equaled the percentage of national income provided by agriculture. In that decade, however, both manufacturing and trade exceeded the agricultural income.[32] Thereafter, manufacturing regularly exceeded agriculture, though trade fell behind until the first decade after World War I.[33]

Thus, by the first decades of the twentieth century, much had changed. "[M]any people living in 1900 could remember when neither railroads nor telegraphs nor telephones existed. In a sense, such people were older than the American economy, a phrase that had seldom been used at the time they were born because it lacked content when economies were local and re-

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26. H. MAY, *supra* note 1, at 9.

27. P. FAULKNER, MODERNISM 1 (1977); *see also* W. NUGENT, *supra* note 1, at 11-12 (in spite of differences among Americans, "there did exist, in the [1870s] a degree of unity in such areas as cultural assumptions, ethnicity, distribution of wealth, occupational experience, religious and moral outlook"); *cf.* H. MAY, *supra* note 1, at 6-8 (dinner in 1912 for William Dean Howells celebrated "the unity, excellence, and continuity of American nineteenth-century civilization").

28. BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 11 (1975).

29. *Id.* at 12.

30. *Id.*

31. *Id.* at 232.

32. *Id.* at 238.

33. *Id.*; *see also* S. LEE & P. PASSELL, A NEW ECONOMIC VIEW OF AMERICAN HISTORY 272 (1979) (shift in economy in years after Civil War).

gional in nature."[34] Two symbols of this new American economy were the city, with its discordant diversity,[35] and the railroad, which provided an impersonal link, often over great distances, between buyers and sellers.[36]

Although not all towns grew to be large cities, the rail lines insured that few would remain isolated.[37] The same lines that

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34. S. RATNER, J. SOLTOW, & R. SYLLA, THE EVOLUTION OF THE AMERICAN ECONOMY 320 (1979). As Professor Stuart Bruchey explained, it is during the period 1870-1900 "that we can first speak of the mass demand of a national urban market." S. BRUCHEY, *supra* note 8, at 85; *see also id.* at 99-100 ("widening markets" characterize the era between 1870 and 1914). The first transcontinental railroad was not completed until 1869; the telephone was invented in 1876. In 1850 there were not 10,000 miles of track in the country; in 1870 there were just over 50,000 miles. By 1890, however, the total mileage had more than tripled, to 167,000 miles. W. NUGENT, *supra* note 1, at 5, 8, 33; *cf.* H. COMMAGER, *supra* note 1, at 41 (contrasts between agricultural nation of years before 1890s and urban nation of years after that decade); R. HOFSTADTER, THE AGE OF REFORM 7 (1955) (similar dates for transition from agrarian society to modern urban life); *id.* at 23 ("The United States was born in the country and has moved to the city."); H. MAY, *supra* note 1, at 95 ("In 1912, as everybody knew, village traditions were breaking down as village isolation decreased. Village storekeepers were complaining that the mail-order house, rural free delivery, and inter-urban trolleys were taking business to the towns."); W. NUGENT, *supra* note 1, at 5 (The 1870s were "a time with a visual, historical, and social character which would soon be lost beneath the steaming accretion of future industrial-urban history."). *See generally* R. HOWER, HISTORY OF MACY'S OF NEW YORK 1858-1919, at 146 (1946). For a discussion of the development of a national culture, see chapter 38 of LITERARY HISTORY OF THE UNITED STATES: HISTORY 639-51 (R. Spiller, W. Thorp, T. Johnson, H. Canby, R. Ludwig, & W. Gibson eds. rev. 4th ed. 1974).

35. *See generally* H. COMMAGER, *supra* note 1, at 46; *id.* at 61 ("The city came to dominate literature as it dominated economy and society."); G. BARTH, CITY PEOPLE 60-61 (1980); B. TARKINGTON, THE TURMOIL 321 (1915) (contrast between "pioneer stock" and city people). Michael Frisch has argued that the city came to be an impersonal abstraction to which its residents attached loyalty in place of the close associations of the town. M. FRISCH, TOWN INTO CITY: SPRINGFIELD, MASSACHUSETTS, AND THE MEANING OF COMMUNITY, 1840-1880 (1972).

36. The great advances in transportation were a major factor in the growth of the economy. Of similar importance, though not so visible and therefore not so productive of concern, was the expansion of the industries that supplied raw materials. I. LIPPINCOTT, *supra* note 24, at 277-78. Transportation, communication, and the availability of coal were more directly related to the timing of increased output than was market demand. A. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 208 (1977); *see* R. GINGER, THE AGE OF EXCESS 45-46 (2d ed. 1975) (railroads aided growth of large plants and expanded markets); *cf.* H. ADAMS, *supra* note 1, at 240 (generation between 1865 and 1895 "mortgaged to the railways").

37. J. QUANDT, *supra* note 4, at 52. Also consider the following explanation from Professor Kirkland:

> [The development of retail institutions in the period between the Civil War and the First World War was the result of] strong economic forces pushing marketing of merchandise into a new prominence and into new forms. On the production side, these forces were epitomized by the larger quantity of com-

brought new products also brought new ideas. The intellectual challenge to existing values matched the economic challenge to existing markets. Many, no doubt, would have agreed with the philosopher James H. Tufts who observed that his " 'generation ha[d] seen the passing of systems of thought which had reigned since Augustus. . . . Principles and standards which had stood for nearly two thousand years [were being] questioned.' "[38]

The cities and the railroads could offer no consolation; they only reinforced impressions of rapid change and of an increasingly large number of value choices.[39] In the words of one student of the period, "a moral unity corresponding to [the] economic web had not yet emerged."[40] As another author said, "The abstract and translocal market increasingly challenged the

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modities flowing from a dynamic industrialized economic order. The virtual completion of a national transportation system, furthermore, enabled manufacturers and traders to break down autonomous and limited marketing areas and to distribute products on a national scale. On the consumption side, growth of trade reflected the increase in national income and its diffusion on such equalitarian terms that mass rather than elite markets emerged.

E. KIRKLAND, INDUSTRY COMES OF AGE 264 (1961); *see* W. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 147 (1983).

38. *Quoted in* H. COMMAGER, *supra* note 1, at 106; *see also* S. ANDERSON, *supra* note 23, at 64 (fathers who had discussed same values as of past; sons looked to new values); Moore, *Individualism in Architecture*, 15 ARCHITECTURAL REC. 55, 55 (1904) ("We are living in a period of transition such as never before has occurred in the history of mankind.").

39. H. COMMAGER, *supra* note 1, at 42-43, 48-53; P. FAULKNER, *supra* note 27, at 14 (discusses "complexity" of first decade of twentieth century); E. HAYTER, THE TROUBLED FARMER, 1850-1900, at 9-10 (1968) (farmers confronted with challenges to beliefs by industrial capitalism; result was "a disquieting uncertainty"); R. HOFSTADTER, *supra* note 34, at 176 (1955) ("The whole cast of American thinking in this period was deeply affected by the experience of the rural mind confronted with the phenomena of urban life, its crowding, poverty, crime, corruption, impersonality, and ethnic chaos."); *id.* at 187 (those who migrated from rural to urban area moved from "a life based on primary human contacts—the family, the church, the neighborhood" to "a more impersonal environment, in which they experienced a much larger number of more superficial human relationships."); W. NUGENT, *supra* note 1, at 66 (during the 1870s changes began which rendered "the old value system obsolete"); G. WHITE, *supra* note 22, at 19; R. WILSON, *supra* note 6, at 89 (biography of sociologist Edward Ross mirrors obsolescence of rural values for urban America). For a poignant recreation of the effect of the changes in physics on a traditional mind, see R. MCCORMMACH, NIGHT THOUGHTS OF A CLASSICAL PHYSICIST (1982). *Cf.* LITERARY HISTORY OF THE UNITED STATES: HISTORY, *supra* note 34, at 729 (American humor began to concentrate on "the progressive industrialization and urbanization of our society, and the increasing complexities of modern living"); *id.* at 790 (change in attitudes from those based on an "uncentralized agrarian social pattern" to those "relevant to an integrated society dominated by huge metropolitan centers").

40. J. QUANDT, *supra* note 4, at 17.

family and community as a foundation for social order."[41] To replace the values of the community, the best that the city and the railroad could offer were the values of commerce.[42] The result was, in the hyperbole of Henry James, that the United States became "the only great people that is exclusively commercial."[43] Possibly the most abrupt statement of those values came from the Wizard of Oz, who rejected Dorothy's plea that he must help her because he was strong and she was weak. Responding to Dorothy's plea for justice, Oz said, "In this country everyone must pay for everything he gets. . . . Help me and I will help you."[44]

The new values, unlike the old, could not readily be shared; indeed, because they would exact payment for every exchange, they were the antithesis of sharing. More often than not, they contravened the values of the community, or they were so disparate as to be incoherent.[45] One could therefore sympathize with the reaction of a character in a novel portraying rural life in New England who complained about recent intrusions by strangers coming into her village: "I see so many of these new folks nowadays, that seem to have neither past nor future. Conversation's got to have some root in the past, or else you've got to explain every remark you make, an' it wears a person out."[46]

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41. T. BENDER, *supra* note 4, at 113.

42. L. ZIFF, *supra* note 22, at 348; *cf.* W. CHURCHILL, MR. CREW'S CAREER 53 (1908) (new values marked "the springing of a generation of ideals from a generation of commerce"); H. COMMAGER, *supra* note 1, at 56-57 (discussion of developing criticism of commercial values); *id.* at 247-76 (discussion of "literature of revolt"). For a novel which deals with the inability of new values to replace the old ones, see H. FREDERIC, THE DAMNATION OF THERON WARE (John Harvard Library ed. 1960) (1st ed. 1896). The book is discussed in L. ZIFF, *supra* note 22, at 214-17.

43. James, *Americans Abroad*, 27 THE NATION 208 (1878). *See generally* W. HOWELLS, A TRAVELER FROM ALTRURIA (1st ed. 1894), *reprinted in* THE ALTRURIAN ROMANCES (C. Kirk & R. Kirk eds. 1968) (note especially pages 115-20, 122-23; lamenting the decline of farm life); B. TARKINGTON, *supra* note 35, at 211.

44. L. BAUM, THE WONDERFUL WIZARD OF OZ (1st ed. 1900), *reprinted in* M. HEARN, THE ANNOTATED WIZARD OF OZ 208 (1973).

45. R. WIEBE, *supra* note 1, at 42-43 ("As the network of relations affecting men's lives each year became more tangled and more distended, Americans in a basic sense no longer knew who or where they were. The setting had altered beyond their power to understand it, and within an alien context they had lost themselves.").

46. S. JEWETT, THE COUNTRY OF THE POINTED FIRS 97 (1896); *see also* G. BARTH, *supra* note 35, at 4 (people in cities had to develop new responses to the problems of urban life "and these accommodations created new patterns of getting along with each other").

One could just as readily have said "trade" or "bargaining" instead of "conversation."

The reaction to and against the new commercial values was but part of the increasingly prominent belief that the end of the nineteenth century marked a turning point in human history, much like Lucy's designs marked the end of the Victorian era in fashion. The belief found expression in the popular phrase "fin-de-siecle," which literally means "end of the century."[47] To many Americans of the late nineteenth century, however, the expression meant more than the announcement of a change in the calendar. They thought that with the end of the century came an end to the relevance of history.[48] In art and literature, for example, that belief found voice through arguments for new "forms" of expression; the old forms were considered inadequate for the new conditions of the twentieth century.[49]

This turmoil, both physical and intellectual, had a profound impact upon the law, possibly the aspect of culture that most

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47. *See* H. ADAMS, *supra* note 1, at 331; P. FAULKNER, *supra* note 27, at 5-6, 14-15; F. KERMODE, THE SENSE OF AN ENDING 96-97 (1967); M. NORDAU, DEGENERATION (1895); L. ZIFF, *supra* note 22, at 133, 136, 214-15; *see also* W. HOWELLS, *supra* note 43, at 121 (country in a transition period when the "struggle for life has changed from a free fight to an encounter of disciplined forces, and the free fighters that are left get ground to pieces between organized labor and organized capital"); Flower, *Some of Civilization's Silent Currents*, 6 THE ARENA 765, 765 (1892) ("The present is so pre-eminently a transition period, a day of such striking contrasts and startling antitheses, that it is difficult" for anyone to perceive the true status of civilization).

48. *See* G. BARTH, *supra* note 35, at 3 ("The widening gap between past and present. . . ."); H. COMMAGER, *supra* note 1, at 58 (the younger literary figures of 1890-1905 were "rebels" who "had no past"; the older figures "were indifferent to the future"); P. FAULKNER, *supra* note 27, at 1 ("Modernism is part of the historical process by which the arts have dissociated themselves from nineteenth-century assumptions, which had come in the course of time to seem like dead conventions."); H. MAY, *supra* note 1, at 31; P. SPRAGUE, GUIDE TO FRANK LLOYD WRIGHT AND PRAIRIE SCHOOL ARCHITECTURE IN OAK PARK 7 (1976); L. ZIFF, *supra* note 22, at 102 (quoting Hamlin Garland on impact of evolution); Bradbury & McFarlane, *supra* note 1, at 22.

49. As early as 1863 the brilliant Charles Peirce had asserted that the age was at an end and called "for a new kind of culture whose fundamental sentiments and faiths would be not merely different from but opposed to the faiths and sentiments of the Age." R. WILSON, *supra* note 6, at 33; *see* E. ROSS, SIN AND SOCIETY (1907) (argues that new conditions of life demand a new code of morality) (Hofstadter describes *Sin and Society* as "a very popular book." R. HOFSTADTER, *supra* note 34, at 203 n. 8); *cf.* H. ADAMS, *supra* note 1, at 26, 53; H. MAY, *supra* note 1, at 7 (after 1917 the one-time dean of American letters, William Dean Howells, became a symbol of "a rejected past"); B. TARKINGTON, *supra* note 35, at 321 (relics of the "old period" could still be found occasionally in cities); Carter, *Introduction* to H. FREDERIC, *supra* note 42, at vii; Moore, *supra* note 38, at 68.

prides itself in being influenced by the past, by precedent. Despite that pride, as Cardozo would later write, "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[50] The value choices inherent in the spreading tracks of economic transactions and the multifarious bustle of the city threatened to overwhelm citizens and judges alike. But lawyers and judges lacked the freedom of artists to declare openly their break with precedent or their disassociation with the forms of the past.[51] Nevertheless, the law underwent a change similar to that in the arts and the rest of American society.

In no area of law was this turbulence of more significance than in contract law, the area of law that arose to establish settled rules to facilitate planning for the future.[52] The turmoil of the late nineteenth century threatened to put an end to any hope for stability. Contracting, like conversation, had in earlier times been rooted in the past. People who knew one another and who knew the local market, insulated as it was from dramatic shifts in the economy, faced little likelihood of changes in circumstances that would require elaborate agreements or provoke complex disputes.[53] Railroads and cities, however, seemed to disrupt that past by bringing economic uncertainty into the local markets. Parties thus faced the tiring prospect of writing detail upon detail into each agreement if they were to account for

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50. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 178 (M. Hall ed. 1967).

51. *Cf.* White, *Scholarly Books: What, to Whom and Why*, 81 MICH. L. REV. 723 (1983):

> In contrast to medicine and many other endeavors, the law neither welcomes nor graciously accepts change. Rather, in the interest of preserving certainty in the regulation of men's affairs, the law resists all appearance of change. Thus courts often disguise their modifications of judicial doctrines and sometimes even go so far as to deny that any change has occurred.

Id. at 724; Williston, *Freedom of Contract*, 6 CORNELL L. Q. 365, 369 (1921) (reasons for slow change in law); *see also* W. NUGENT, *supra* note 1, at 37-65 (argues that American "ideas and institutions" reacted conservatively to the economic crises of the late nineteenth century). Professor Morton Horwitz has argued that the same description should be applied to legal historians. *See* Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

52. *See* M. HORWITZ, *supra* note 2, at 173-74.

53. *See* Haskins, *Planter and Cotton Factor in the Old South: Some Areas of Friction*, 29 AGRIC. HIST. 1, 10 (1955), *reprinted in* THE CHANGING ECONOMIC ORDER, *supra* note 8, at 92, 105-06.

every potential event.

As was true of other areas of society, contract law adapted to the changing circumstances. The contours of the developing new consensus were apparent in the 1917 opinion of the New York Court of Appeals in *Wood v. Lucy, Lady Duff-Gordon.* Although the forms often remained the same, the content underwent substantial change. Much like poets who would argue whether free verse retained the form of poetry, so legal scholars would later argue whether the changes which emerged in contract law at the turn of the century retained the form of contract.[54]

III. *Wood v. Lucy, Lady Duff-Gordon*—THE ECONOMY

A. The Contract Between Lucy and Wood

As she did with the general development of the period, Lucy personified the particular changes in the economy and in contract practice. Very much independent, Lucy renounced the traditions of her generation when she began her own business, designing women's clothing.[55] Like many of the entrepreneurs of the period, Lucy started with little capital.[56] Nevertheless, after overcoming early difficulties, she established herself by 1900 as one of the pre-eminent designers of fashion for women. In a manner typical of the personal style of the American economy during the Reconstruction era, Lucy at first designed only for individual women for specific grand occasions such as coronations and state funerals.[57] Because her designs were created for one woman to wear on a particular occasion, they became known as "personality" dresses.[58]

As the times changed, so did Lucy. First, she became a com-

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54. This is in essence the dispute sparked by Professor Gilmore's lectures published under the title *The Death of Contract*, *supra* note 2.

55. L. DUFF-GORDON, *supra* note 18, at 59.

56. *Id.* at 54-56.

57. *Id.* at 46. Possibly the most spectacular of Lucy's accomplishments was designing different mourning dresses for one hundred women in Queen Victoria's funeral and then promptly producing different designs for two hundred women for the coronation of King Edward VII. *See* SAT. EVENING POST, Jan. 29, 1927, at 12, 13, 91; The Times (London), Apr. 23, 1935, at 12, col. 3.

58. L. DUFF-GORDON, *supra* note 18, at 38.

pany, with the name "Lucile."[59] Later, in 1910, she opened a branch office in New York City where she continued to embody the economic changes by depersonalizing her services. In common with much of the production in the United States, Lucy no longer personally designed each dress for each customer. Instead, she hired others to design and sew; she even began to produce more than one dress of each design. With the change in style and the concentration of population in urban areas, Lucy could now profit from marketing multiple copies of the same design. In addition, Lucy hired a manager for her branch office, further increasing the distance between herself and her customers; she would no longer be able to devote personal attention to each client for each occasion.

Lucy also came to appreciate that something as ephemeral as her name could be of value in the emerging consumer society of the United States.[60] As seller after seller saw production overtake demand in the last years of the nineteenth century,[61] adver-

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59. N.Y. Times, Apr. 22, 1935, at 17, col. 1; *cf.* A. TRACHTENBERG, *supra* note 22, at 82 (on the increasing number of incorporations). Lucy's company had a short-lived financial success and went bankrupt in 1922. N.Y. Times, Mar. 21, 1922, at 10, col. 3. In 1924 her London firm failed. The Times (London), Apr. 19, 1923, at 5, col. a. During the proceedings following that bankruptcy, the Recorder of Bankruptcy asked her whether she could tell him about her shareholders. Lucy responded, "It's all Greek to me. I don't know what a share is." N.Y. Times, Apr. 22, 1935, at 17, col. 1. Lucy's admission showed how much she remained a creature of the nineteenth century, much like the harnessmaker of Sherwood Anderson who, when told how he might make more profit, responded, "Business . . . what do I know about business? I'm a harnessmaker, I am." S. ANDERSON, *supra* note 23, at 208.

60. *See* D. POPE, THE MAKING OF MODERN ADVERTISING (1983); T. VEBLEN, THE THEORY OF THE LEISURE CLASS (1899). The consumer came to replace the producer as the perceived fundamental entity in the economy. W. NUGENT, *supra* note 1, at 135-37.

61. Truman E. Moore well captured the spirit of the years at the end of the nineteenth century when he wrote that there was

> a madness that seemed to have seized men who ran the factories. If so many products could be produced, then so many products should be produced, and therefore would have to be sold. The study of commercial history leaves one with the impression that great factories grew not because they were needed, but because they were possible.

T. MOORE, THE TRAVELING MAN: THE STORY OF THE AMERICAN TRAVELING SALESMAN 66 (1972). Moore also noted that the problem of overproduction was primarily one of consumer goods; the distribution of capital goods did not become a problem until the Depression. *Id.* at 81-82, 105; *see also* A. CHANDLER, *supra* note 36, at 208 (market demand was only partly responsible for increased production; the improvements in transportation, communication, and the production of raw materials were major causes); R. GINGER, *supra* note 36, at 36, 55 (the frontier encouraged increased mechanization; industrial capacity in general increased); R. HOWER, THE HISTORY OF AN ADVERTISING AGENCY 7

tising became increasingly important both to inform buyers of products and to persuade customers to buy.[62] To take advantage of that new demand, Lucy turned to an advertising agent, yet another intermediary between herself and her clients.[63]

The agreement with the agent provided that because Wood "possesse[d] a business organization adapted to the placing of such endorsements as the said Lucy, Lady Duff-Gordon, has approved," Lucy agreed to grant Wood "the exclusive right to place such endorsements on such terms and conditions as may in his judgment, and also in the judgment of said Lucy, Lady Duff-Gordon, or A. Merritt, her personal business adviser, be most advantageous" to Lucy and Wood.[64] The agreement was to last for a year and to renew itself automatically unless either party gave ninety days notice of termination.

One aspect of the agreement with Wood is especially important because it represents the most significant change in contract practice and, consequently, the critical challenge to contract doctrine at the turn of the century: The agreement did not

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(rev. ed. 1949); J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY 43 (1982) ("From the 1880s on, but especially in the twentieth century, headlong developments in the technology of production and distribution and in entrepreneurial and managerial skill have generated outputs on a scale which only markets of sectional and national scope could accommodate."); S. LEE & P. PASSELL, *supra* note 33, at 269; S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 34, at 286-87 (investment in capital goods not easily transferred; so manufacturers tended to continue production even though not profitable in hope that others would go out of business first); D. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920, at 27-28 (2d ed. 1978) ("By the 1880s many businessmen had begun to worry that there were too many factories for the economy to absorb.").

62. L. ATHERTON, MAIN STREET ON THE MIDDLE BORDER 222-24 (1954); R. HOWER, *supra* note 61, at 9, 116; *see also* T. MOORE, *supra* note 61, at 82; G. PORTER & H. LIVESAY, *supra* note 7, at 224-25 (statement by soap manufacturer about change toward brand names).

63. *See* R. GINGER, *supra* note 36, at 49-50; *cf.* G. BARTH, *supra* note 35, at 78 ("advertising agent was another variety of intermediary in economic affairs"); MANAGERIAL HIERARCHIES: COMPARATIVE PERSPECTIVES ON THE RISE OF THE MODERN INDUSTRIAL ENTERPRISE 1 (A. Chandler & H. Daems eds. 1980); R. WIEBE, *supra* note 1, at 19-21 (change from marketing directly under control of a single person to agents in the field).

64. Amended Complaint of Plaintiff, *included in* Papers on Appeal at 5, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917). The nature of Wood's business organization is not clear. His obituary in the New York Times reported that he had been a journalist, not an advertising agent. N.Y. Times, May 2, 1939, at 23, col. 4. Even so, in the years before advertising agents were common, it may have been his ability to write that attracted Lucy to him. *See* R. HOWER, *supra* note 61, at 95. Whatever his talents, Wood was at least willing to sue to enforce what he saw as his rights under agreements similar to that with Lucy. *See* Papers on Appeal, Wood v. Wilson (N.Y. Sup. Ct. App. Div. 1916) (suit against the creator of the Kewpie doll).

fully define Wood's obligation; he was to do whatever his judgment directed, with the consent of Lucy's manager. In the field of advertising it was known as an "open contract."[65] The agreement also contained a second type of contract provision developed in response to the economic uncertainty of the late nineteenth century—Wood's right was *exclusive*.[66] Both aspects of the agreement were consequences of Lucy's and Wood's inability to know in advance what opportunities might exist for placing her endorsements. Like other producers who sought to develop new markets, Lucy benefited from the agreement by being freed from having to make decisions about advertising. She could concentrate on her special skill, designing, while Wood concentrated on his presumptive specialty, advertising. From Wood's perspective the agreement was beneficial because it assured him that he would have no competition in his efforts to place Lucy's endorsements. Thus, there would be one less uncertainty in the undeveloped market for her designs.

B. The Economic Milieu

Prior to the Civil War, there had been little need to resort to contract to deal with uncertainty. The localized transactions in standardized goods for a primarily agrarian market had insulated commerce from most swings of the economy.[67] What litigation there was in the antebellum years tended to deal with the system of money itself and not with attempts by the parties to

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65. *See* R. HOWER, *supra* note 61, at 71-72; *id.* at 239 (the "advertiser was to place through N.W. Ayer & Son all the newspaper advertising that he required during a year or more; in return for this promise Ayer pledged the best resources of his firm in the selection of media and purchase of space"); *id.* at 243 (sample of contract for 1891); Carlton Illustrators v. American Locomotive Co., 168 A.D. 289, 153 N.Y.S. 1018 (1915) (contract to supply all the illustrations "required" for advertisements).

66. For discussion and examples of contracts for exclusive dealings, see L. ASHER & E. HEAL, SEND NO MONEY 61 (1942); L. ATHERTON, *supra* note 62, at 224-25 (by the mid-1880s exclusive agencies were quite common for style or for durable goods, especially when manufacturers wanted to "invade[ ] new territory"); T. BECKMAN, WHOLESALING 147-153 (1926) (including tacit understanding that exclusive agency included exclusive source of supply); R. HOWER, *supra* note 34, at 164 (brand name gloves to be sold exclusively at Macy's); G. LEBHAR, CHAIN STORES IN AMERICA, 1859-1950, at 103 (1952); R. TWYMAN, HISTORY OF MARSHALL FIELD & CO., 1852-1906, at 97-98 (1954); *see also* Fowle v. Park, 131 U.S. 88 (1889) (upholds contract for exclusive geographical sales area for Wistar's Balsam of Wild Cherry).

67. G. PORTER & H. LIVESAY, *supra* note 7, at 9; Chandler, *supra* note 8, at 4.

deal with uncertainty in the market.[68] That was true partially because a stable monetary system is basic to any economy which is to advance beyond bartering in a localized market.[69] In part, though, it was true because few national markets existed before the Civil War and the small scale of transactions required less planning to avoid uncertainty.[70]

After the war, however, a relatively stable system of money aided the emerging national market for an ever greater variety of products.[71] The development of new markets for new products and increased output required additional planning because uncertainties increased as transactions extended over both longer times and greater distances. New markets also meant more contact with strangers.[72] To complicate matters further, a

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68. Uncertainty about the monetary system is possibly the most basic type of economic uncertainty. If the parties could not be certain that a particular medium of exchange would be in effect at the time for performance and payment, then they had to choose a satisfactory replacement. The creation of a national legal tender by 1871 meant that the parties to a contract were no longer subject to serious uncertainty about the continuance of a particular medium of exchange. The first act creating a legal tender was the Act of Feb. 25, 1862, ch. 33, 12 Stat. 345. Congress subsequently authorized additional issues of legal tender. *See* Act of July 11, 1862, ch. 142, 12 Stat. 532; Act of Mar. 3, 1863, ch. 73, 12 Stat. 709. The Supreme Court first held the acts to be unconstitutional, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), then reversed itself and held the acts to be constitutional, Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). For a discussion of those cases, see Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367.

69. *See* J. HURST, *supra* note 61, at 40-42, 57. For an account of the financing practices of merchants see G. PORTER & H. LIVESAY, *supra* note 7, at 16, 62-78; *id.* at 109 (example of barter by manufacturer of railroad wheels faced with increasing costs).

70. *See* R. BROWN, *supra* note 4, at 117-18, 122; E. DOUGLASS, THE COMING OF AGE OF AMERICAN BUSINESS 290-91 (1971) (combination and integration the dominant postwar trends in response to national market); S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, at 188-93 (1957); S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 34, at 123, 183-84, 224, 235; *see also* THE CHANGING ECONOMIC ORDER, *supra* note 8, at 2-3 ("small-scale production for local or regional markets" was "fundamental characteristic" of the market prior to Civil War); *id.* at 13, 17.

71. On the greater availability of cash, both from retained earnings and from a newly developed national capital market, see G. PORTER & H. LIVESAY, *supra* note 7, at 116. On national and urban markets, see A. CHANDLER, STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE 23 (1962); R. GINGER, *supra* note 36, at 22 (crucial developments between 1877 and 1893); R. WATSON, JR., *supra* note 6, at 4 ("development of the country as a huge, free trade area"). On the growth of non-standard products, see G. PORTER & H. LIVESAY, *supra* note 7.

72. Lippincott points to those reasons for the development of corporations: "Railways had opened vast markets for merchants and manufacturers; enterprises were growing in size and much larger amounts of capital were required. At the same time the risks of enterprise were much greater. Producers were selling to large numbers of consumers they did not know and had never seen." I. LIPPINCOTT, *supra* note 24, at 471; Madison,

steady decline of prices and almost periodic panics, or depressions, unsettled the country in the last decades of the nineteenth century.[73] To compensate for the new problems and to reduce uncertainty, parties turned to new forms of contractual arrangements with increasing frequency.[74]

The agreement between Wood and Lucy typified the responses to uncertainty about markets. Like Lucy and Wood, many parties were unable to define the future with precision. They therefore preferred to leave parts of any agreement "open" to await future developments.[75] The techniques of production

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supra note 25, at 164, 166.

73. There were panics in 1873, 1878, and 1893. *See* R. FELS, AMERICAN BUSINESS CYCLES, 1865-1897 (1959); S. REZNECK, BUSINESS DEPRESSIONS AND FINANCIAL PANICS (1968).

74. *Cf.* THE CHANGING ECONOMIC ORDER, *supra* note 8, at 206 (In the 1860s "railroad men and manufacturers were still searching for a legal and administrative structure that would give them some control over the uncertainties created by a rapidly industrializing economy").

75. The output and requirements contracts discussed in the text had little history before the Civil War. Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1, 1 n.1 (1932) ("The only case found in this country prior to the middle of the nineteenth century involving a contract of the type considered in this article without a fixed quantity term is Mason v. Cowan's Administrator [40 Ky. (1 B. Mon.) 7 (1840)]." The contract, dated November 1836, provided that the buyer would purchase all the hogs the seller "may have for market, next fall." The agreement stated that there would be "about one hundred" hogs. When the seller was unable to produce the estimated hogs he purchased hogs from another person and tendered them to the buyer, who refused to take them. The court held that the buyer was within his rights since the contract envisioned that the hogs would come from the particular seller. There was no discussion of the "output" aspect of the contract.) At least one other case, however, involved a similar contract. *See* Cherry v. Smith, 22 Tenn. (3 Hum.) 19 (1842) (enforcing agreement to ship up to 150 barrels of salt "when called on"). For another early discussion of requirements contracts, see Note, *The Construction of Requirement Contracts and the Effect of Estimate Provisions Therein*, 28 COLUM. L. REV. 223 (1928). A more recent examination of similar issues is found in Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

Obviously the use of reported judicial decisions is an imperfect basis for a history of economic practice. It is possible that the contracts were used earlier but did not provoke litigation. The general absence of reference to these contracts in the literature of economic history suggests that the possibility is slight. The secondary sources, however, may themselves be inadequate—the economic historians may have been exclusively concerned about marketing practices rather than about the contracts that underlay the practices. Nevertheless, the appearance of the cases in the 1870s does suggest that a change occurred. If the contracts were used previously, the lack of dispute about them reinforces the argument for a community of values and a stability of economy in those earlier years. The appearance of disputes, therefore, is but one more reflection of the changes occurring in the period. Moreover, this article is an account of the changes in legal doctrine—changes that could occur only after the contracts became the subject of dispute.

that emerged during the years of rapid economic expansion after the Civil War left the new industries with uncertainties about their productive capacity.[76] Those industries, therefore, preferred buyers who were willing to leave the quantity term open, agreeing to buy whatever the industry could produce.[77] The resulting agreement came to be known as an "output" contract. Similarly, a buyer who was uncertain about the supply of goods or of the market for the finished product might want a seller to agree to sell only what the buyer would order—a "requirements" contract.[78] Requirements contracts were especially useful when new markets were opened through advertising or traveling salesmen.[79] The requirements contract permitted an agent or retail outlet to order only the quantity it could actually sell.[80] A com-

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76. *See supra* note 61.

77. In some instances the new means of production required a certain source of raw materials to ensure that the production would be profitable. One instance involved a new cannery; for the cannery to be profitable, there had to be a guaranteed source of supply for the vegetables. The court explained that a contract under which a farmer promised to deliver his crop of corn was to the mutual benefit of both parties. The cannery gained assurance of its supply; the farmer gained assurance of a market. As the court explained, there was evidence that

> corn fit for this purpose [canning] could not be obtained in the open market in sufficient quantities to authorize the necessary expense in building, machinery and preparations required to carry on this business, but that to make it a prudent and safe business resort must be had to contracts like the one under consideration.

J. Winslow Jones & Co. v. Binford, 74 Me. 439, 444 (1883); *cf.* Fontaine v. Baxley, Boles & Co., 90 Ga. 416, 426, 17 S.E. 1015, 1018 (1892) (requirements contract for railroad ties beneficial to both parties); Garden City Sand Co. v. Southern Fire Brick & Clay Co., 124 Ill. App. 599, 606 (output contract provided "sure and steady market"), *aff'd*, 223 Ill. 616, 79 N.E. 313 (1906).

78. *See, e.g.*, Rozier v. St. Louis & S.F. R.R., 147 Mo. App. 290, 126 S.W. 532 (1910) (quarry owner did not want to open new quarry unless certain of market for output).

79. *E.g.*, A. Santaella & Co. v. Otto F. Lange Co., 155 F. 719, 720, 722-23, 725 (8th Cir. 1907) ("Optimo" cigars); National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, 431 (1884) (pig iron); Spencer v. Taylor, 69 Kan. 493, 496-97, 77 P. 276, 277 (1904) (mineral waters); Scott v. T.W. Stevenson Co., 130 Minn. 151, 153 N.W. 316 (1915) (clothing). For a discussion of the efforts of local, traditional businessmen to secure statutory restrictions on traveling salesmen, see Hollander, *Nineteenth Century Anti-Drummer Legislation in the United States*, 38 BUS. HIST. REV. 479 (1964). For a case study of the efforts of the Singer Sewing Machine Company to resort to the courts to protect its salesmen from local restrictions, see McCurdy, *supra* note 9, at 631, 637-42.

80. Rehm-Zeiher Co. v. F.G. Walker Co., 156 Ky. 6, 160 S.W. 777 (1913) (whisky); Cullinan v. Standard Light & Power Co., 65 S.W. 689, 690 (Tex. Civ. App. 1901) (oil); S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 34, at 375-78 (developments of wholesalers, etc.); *cf.* Havighurst & Berman, *supra* note 75, at 1 (uncertainties led to new types of

mon addition to both the output contract and the requirements contract was a provision allowing one party to have an exclusive right to deal with the other, just as Wood and Lucy ostensibly had done.[81] Buyers would agree to sell only the products of particular sellers; or sellers would agree to sell only to particular buyers, usually in a defined geographical area. That type of contract was especially attractive for sellers like Lucy who sought to introduce products into new markets.[82]

One other version of the output contract, and another significant response to uncertainty in the late nineteenth century, arose in the context of developing a specialized market which traded in uncertainty itself and through which risks could be

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contracts). The court in Bloomington Canning Co. v. Union Can Co., 94 Ill. App. 62, 66 (1901), explained that a requirements contract benefited both parties. The buyer was able to secure a source for his needs without having to fix the quantity; the seller was able to estimate his needs for raw materials. *See also* Golden Cycle Mining Co. v. Rapson Coal Mining Co., 188 F. 179 (8th Cir. 1911) (new ore industries works needed continuous supply of coal in 1906); Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 127, 76 N.E. 294, 295 (1905) (McFarlan could sell as many carriages as it could manufacture; it needed a certain supply of wheels, yet all wheel manufacturers were operating at full capacity).

81. The following is but a partial list of the many cases involving an exclusive right to sell particular products: Weil v. Chicago Pneumatic Tool Co., 138 Ark. 534, 212 S.W. 313 (1919) (motor trucks and parts); Lowery Lock Co. v. Wright, 154 Ga. 867, 115 S.E. 801 (1922) (transmission lock for Ford cars); Phares v. Stover, 136 Ga. 843, 72 S.E. 344 (1911) (miscellaneous parts); Carterville Coal Co. v. Covey-Durham Coal Co., 186 Ill. App. 163 (1914) (coal); Olson v. Whiffen, 175 Ill. App. 182 (1912) (bottles and bottling equipment); Bendix v. Staver Carriage Co., 174 Ill. App. 589 (1912) (Staver automobiles); Kaufman Bros. & Co. v. Farley Mfg. Co., 78 Iowa 679, 43 N.W. 612 (1889) (cigars); Elkhorn Consol. Coal & Coke Co. v. Eaton, Rhodes & Co., 163 Ky. 306, 312, 173 S.W. 798, 800 (1915) (coke); Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N.W. 319 (1891) (mineral water); Lewis v. Atlas Mut. Life Ins. Co., 61 Mo. 534 (1876) (insurance); Paragon Distrib. Corp. v. Paragon Laboratories, Inc., 99 N.J. Eq. 224, 129 A. 404 (1925) (hair dye); Hadden v. Dimick, 31 How. Pr. 196 (N.Y. 1866) (blankets); Ash v. Charles F. Noble Oil & Gas Co., 96 Okla. 211, 223 P. 175 (1923) (petroleum products); Leisy Brewing Co. v. Schafer, 91 Okla. 105, 216 P. 109 (1923) (product of brewery); Mowbray Pearson Co. v. E.H. Stanton Co., 109 Wash. 601, 187 P. 370 (1920) (ice).

82. Both exclusive dealing contracts and the more familiar vertical integration were common practices of new industries as well as of other industries faced with marketing difficulties. *See* G. PORTER & H. LIVESAY, *supra* note 7, at 132. A producer that integrated forward gained control of the retail or wholesale outlet for its products. The same producer had only slightly less control over an independent outlet that was, on the one hand, obligated to buy its requirements from the producer, and, on the other hand, privileged to be the exclusive dealer for the product. For discussions that link output and requirements contracts with vertical integration, see, *e.g.*, Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 727 (1931); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959).

shared among a larger number of individuals. The most significant market of that kind was the farm commodities exchange—the futures market. This market had no direct bearing on the terms of the agreement between Wood and Lucy; but the market did result from factors similar to those which produced the output and requirements contracts. Furthermore, the futures market spawned frequent litigation, much of which served to move courts away from the doctrines of the past, toward a greater acceptance of uncertainty and, therefore, toward acceptance of requirements and output contracts.

The futures market developed in the context of the three-decade-long downward trend in the prices of farm products. But even the trend was not dependable; farmers also faced unpredictable seasonal fluctuations in prices for their crops.[83] The fluctuations seemed all the more damaging because they resulted from the new, wider national market for farm produce. By the end of Reconstruction, farming too had ceased to be a regional activity. Instead, crops from one area of the country rapidly traveled the rails to other areas.[84]

Efforts to stabilize the price fluctuations and to spread the risks of other price movements concentrated upon the futures market.[85] The formal structure of the arrangement was that a

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83. B. BAILYN, D. DAVIS, D. DONALD, J. THOMAS, R. WIEBE, & G. WOOD, THE GREAT REPUBLIC 792-94, 849-56 (1977) (discussion of effect of lower prices on farmers); R. WATSON, JR., *supra* note 6, at 21 (mechanization helped produce oversupply of farm products and, in turn, lower prices). *But see* S. LEE & P. PASSELL, *supra* note 33, at 294-97 (data shows all prices declined during period 1870-1900; ratio of farm prices to other prices did not vary significantly during period); S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 34, at 268. For a contemporaneous account of the plight of the farmers, see W. PEFFER, *supra* note 24; Welch, *The Farmer's Changed Condition*, 10 THE FORUM 689, 689, 692 (1891) (change from time when most trade was by barter to time when farmers produce supplies for the market).

84. The American farmer also became part of an international market. R. HOFSTADTER, *supra* note 34, at 50-52.

85. J. ARONI, FUTURES (1882) (account of history and rules of New Orleans Cotton Exchange); J. BAER & O. SAXEN, COMMODITY EXCHANGES & FUTURES TRADING (1949); A. CHANDLER, *supra* note 36, at 209-15; MANAGERIAL HIERARCHIES, *supra* note 63, at 19 ("In the 1850s, commodity dealers who bought directly from farmers and sold directly to processors quickly replaced factors and other types of commission merchants in marketing agricultural crops."); C. COWING, POPULISTS, PLUNGERS, AND PROGRESSIVES 3-74 (1965); E. DOUGLASS, *supra* note 70, at 403-04, 416 (futures contracts protect against price fluctuations and help maintain stable prices); G. HOFFMAN, FUTURE TRADING 8, 13-57 (1932) ("In the United States, future trading had its origin just prior to the Civil War in grain and pork products. Cotton followed in the latter part of the sixties, coffee in

farmer would contract in advance of harvest to sell a particular crop—in effect an output contract. Known as a "forward contract," this type of agreement permitted farmers to protect themselves against downturns in price. The buyer could then choose to bear the risk of a fall in price (accepting, of course, the benefits of an increase in price). Alternatively, the buyer could sell the contract in the futures market, thereby shifting some or all of the risk to others.

IV. *Wood v. Lucy Lady Duff-Gordon*—THE LAW

A. The Litigation Between Lucy and Wood

No doubt most of the parties who adopted the new contracting practices never had occasion to test them in court. The first of those who did find themselves involved in litigation, however, had little reason to be confident of the outcome. The very fact of litigation usually meant that the contract had not protected the parties from fluctuation of the market, as they had hoped. Furthermore, once the contract failed, the nature of the transaction meant that the open term would be the very one seized upon by the party seeking to benefit from the change in the economy. With the dispute thereby focused on the open term, the parties presented a direct challenge to the fundamental doctrine that there had to be sufficient certainty for an agreement to be enforced as a contract.[86]

1882, cottonseed oil in 1904 and raw sugar in 1914."); H. IRWIN, EVOLUTION OF FUTURES TRADING (1954); J. LURIE, THE CHICAGO BOARD OF TRADE, 1859-1905 (1979); S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 34, at 256; R. WIEBE, *supra* note 1, at 73 (cotton exchange viewed as "alien" enemy invading the small communities; threat of outsiders to take away local control); Bakken, *Historical Evaluation, Theory, and Legal Status of Futures Trading in American Agricultural Commodities*, in 1 FUTURES TRADING SEMINAR 3 (1960); Chapman & Knoop, *Dealings in Futures on the Cotton Market*, 69 J. ROYAL STATISTICAL SOC. (ser. A.) 321 (1906); Dumbell, *The Origin of Cotton Futures*, 1 ECON. HIST. 259 (1927); Stevens, *"Futures" in the Wheat Market*, 2 Q.J. ECON. 37 (1887). For early cases, see Porter v. Viets, 19 F. Cas. 1077 (C.C.N.D. Ill. 1857) (No. 11,291); Low v. Forbes, 18 Ill. 568 (1857). For a fictional treatment of futures trading, see F. NORRIS, THE PIT (1903).

86. As A.W.B. Simpson has found, the doctrine is an old one, dating from as early as the seventeenth century; the rule is as much one of evidence as it is of contract law:

> The rule that the promise must be clear and certain is intimately associated with the whole system of pleading to an issue, and, as Stephen explains, to "the nature of the original constitution of the trial by jury," which led to the

At this juncture, Lucy departed from her role as model. There was no disruption in the market for her endorsements. Instead, she brought Wood's lawsuit upon herself when, in one of the more innovative decisions of her career, she arranged with Sears, Roebuck and Company to sell her dresses through its catalogues.[87] Sears published the first catalogue (which it called a "portfolio") of Lucy's designs for the fall and winter of 1916-1917.[88] That Lucy was once again at the forefront of commercial practice was evident from a comment in the trade journal *Printer's Ink*, which reported that the announcement of the agreement threw "a bomb into the camp of rival mail-order houses." The announcement, the journal further explained, was "by far the most spectacular bid for prestige which this daring advertiser [Sears] has made since it first announced the new handy edition of the Encyclopedia Britannica."[89]

The primary consequence of the arrangement with Sears, however, was to provoke Wood to sue for breach of his agree-

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insistence upon certainty in the issue. If in the action of assumpsit this certainty in the issue was to be achieved, the promise must itself be averred with certainty, and numerous cases illustrate this. The principle applied both to the promise sued upon and to a promise averred as a consideration, for the latter was not a good consideration unless itself actionable, and to be actionable it must be certain.

A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 532 (1975) (footnote omitted). By the late nineteenth century the doctrine was well-established as part of American contract law. *See, e.g.*, 1 C. BEACH, A TREATISE ON THE MODERN LAW OF CONTRACTS 94 (1896).

87. Lucy's decision to work with Sears recalled but another example of the intrusion of urban life into rural communities, in this instance through mail-order catalogues. *Cf.* H. MAY, *supra* note 1, at 95 (village retailers complain of mail-order houses taking business to towns); J. QUANDT, *supra* note 4, at 17 (quoting Frederick Allan White's editorial complaint about mail order houses:

"The mail order house unrestricted will kill our smaller towns, creating great cities with their . . . inevitable caste feeling that comes from the presence of strangers who are rich and poor living side by side. Friendship, neighborliness, fraternity or whatever you may call that spirit of comradery that comes when men know one another well, is the cement that holds together this union of states.").

88. *Portfolio of Lady Duff-Gordon's Original Designs* 4 (Sears, Roebuck and Co., Fall & Winter 1916-1917). For advertisements of the portfolio, see HARPER'S BAZAAR, Oct. 1916, at 100-01; MCCALL'S MAG., Nov. 1916, at 92-93.

89. *Sears-Roebuck's Latest Advertising Coup*, PRINTER'S INK, Sept. 21, 1916, at 28; *see also* G. WEIL, SEARS, ROEBUCK, U.S.A. 68 (1977); THE ADVERTISING NEWS, Sept. 29, 1916, at 10-11. Despite the excitement created by the announcement, the scheme was a failure. Sears lost more than a quarter of a million dollars on the two portfolios that it published. B. EMMET & J. JEUCK, CATALOGUES AND COUNTERS 225 (1950).

ment with Lucy.[90] As noted previously, Lucy relied upon the traditional response that the agreement lacked mutuality. She lost the first round of the suit when the trial judge denied her motion for judgment on the pleadings. He interpreted the agreement as requiring Wood to exercise his "bona fide judgment"—a requirement which the judge thought sufficient to prevent the agreement from being unenforceable.[91] The appellate division unanimously reversed, concluding that the contract was "void for lack of mutuality."[92] The court held that the agreement did not require Wood to place any endorsements. Viewed in that light, nothing in the agreement could be enforced against Wood.

The disagreement between the two lower New York courts precisely reflected the fluid state of contract doctrine at the turn of the century. Poised between the traditional rule of the appellate division and the modern rule of the trial court, judges throughout the country strove to articulate values in response to the new contractual devices. The "open" nature of the contract between Lucy and Wood challenged the venerated rule of contract law that there could be no contract unless the obligations of the parties were mutual.[93] A late-nineteenth-century American editor of a respected English treatise on contracts phrased the rule this way: "When the only consideration to sustain the contract is that arising out of mutual promises, the mutuality must be absolute so that each party may have an action in case

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90. In his complaint Wood mentioned one other endorsement by Lucy—one for the Chalmers Motor Car Company. Amended Complaint of Plaintiff, *included in* Papers on Appeal at 10, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917). For an advertisement by Chalmers featuring Lucy's design of the interior of an automobile, see VOGUE, Oct. 15, 1916, at 17. For another advertisement featuring Lucy, see N.Y. Times, Oct. 21, 1916, at 4, col. 7 (Oliver Typewriter Co. offered free pattern of Lucy's "The Ideal Office Gown.").

91. Wood v. Lucy, Lady Duff-Gordon (N.Y. Sup. Ct. Jan. 6, 1917), *reprinted in* Papers on Appeal at 13, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

92. 177 A.D. 624, 627, 164 N.Y.S. 576, 578 (1917).

93. *See, e.g.*, Nichols v. Raynbred, Hob. 88, 80 Eng. Rep. 238 (K.B. 1614); 2 W. BLACKSTONE, COMMENTARIES *445; J. POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS *360 ("Mutual promises . . . must be both made at the same time, or else they will be both *nuda pacta*."). For a statement of the rule, see, *e.g.*, C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 103 (2d ed. 1880). For a discussion of the requirement of mutuality in terms of exclusive agency contracts like that in *Wood*, see Sears, *Mutuality of Contracts; Promise for a Promise; Unilateral Contracts; Consideration*, 32 AM. L. REV. 409 (1898).

of breach or neither is bound."[94] The rule could be satisfied only if there were obligations to be imposed on both sides; if an obligation was not fully described, it was not enforceable.

The traditional doctrine formally barred enforcement of the new contracts which left portions of obligations to be defined after the moment of agreement. For example, under an output contract the buyer promised to purchase whatever the seller produced; but, some reasoned, there was no obligation on the part of the seller to produce anything. Similarly, under a requirements contract the seller agreed to sell whatever quantity the buyer ordered; but the buyer had no obligation to order anything.[95] The objection to these new contracts was neither new nor unusual. It could present an aristocratic lineage from a classic such as Pothier's century-old *Treatise on Obligations*:

> It is of the essence of agreements which consist in promising something, that they produce in the person who made the promise an obligation that binds him to perform it. Hence it follows that as there is nothing more contrary to the obligation than the absolute freedom which might be left to him, to do or not to do what he promised, the agreement which would leave this entire freedom, would be absolutely void, on account of the want of obligation. If then, for example, I were to agree with you to give you a certain thing, if I please, the agreement

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94. W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT 93 n.2 (J. Knowlton 2d Amer. ed. 1887). For other statements of the same rule, often in virtually identical language, see C. ADDISON, A TREATISE ON THE LAW OF CONTRACTS *22 (E. Ingersoll 2d Amer. ed. 1857); 1 C. BEACH, *supra* note 86, at 214; J. BISHOP, THE DOCTRINES OF THE LAW OF CONTRACTS 152 (1878); W. CLARK, HANDBOOK OF THE LAW OF CONTRACTS 165-66 (1894); J. LAWSON, PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS 108 (1893). As if to demonstrate its antiquity, the rule had a Latin version, *ex nudo pacto, non oritur actio. See* H. BROOM, A SELECTION OF LEGAL MAXIMS 509-10 (R. Kersley 10th ed. 1939); J. SMITH, THE LAW OF CONTRACTS: A COURSE OF LECTURES *86 (W. Rawls 3d Amer. ed. 1853).

95. *See, e.g.*, Fallon v. Chronicle Publishing Co., 8 D.C. (1 MacArth.) 485 (1874); Savannah Ice-Delivery Co. v. American Refrigerator Transit Co., 110 Ga. 142, 145, 35 S.E. 280, 281 (1900) (dictum); Campbell v. A. Lambert & Co., 36 La. Ann. 35, 37 (1884) (contract to deliver requirements of coal in 1879); *see also* American Cotton Oil Co. v. Kirk, 68 F. 791, 793 (7th Cir. 1895); Kenan, McKay & Spier v. Home Fertilizer & Cotton Oil Co., 202 Ala. 29, 31, 79 So. 367, 369 (1918); American Refrigerator Transit Co. v. Chilton, 94 Ill. App. 6, 9 (1901). Not all of the early cases held that the requirements contract was unenforceable. S.B. Smith & Co. v. R.S. Morse & Co., 20 La. Ann. 220, 222 (1868)(enforcing contract to supply all the ice required for use in hotel for five years); Cherry v. Smith, 22 Tenn. (3 Hum.) 19, 24 (1842) (enforcing contract to ship up to 150 barrels of salt "when called on").

would be absolutely void.[96]

As a result, the very reasons that made the new types of agreements attractive proved to be the basis for denying enforcement.

The evidence of widespread use of the contracts created a dilemma for the courts, a dilemma that emphasized to the judges the weakening power of the past. If they adhered to precedent they would impede what appeared to be a needed contractual practice; if they were to enforce the new agreements, they had to develop a new rationale. They chose to enforce the agreements, but to explain the conclusion in terms of the adage *id certum est quod certum reddi potest* (that is certain which can be made certain).[97] By doing so, the courts were able to change outcomes while appearing to adhere to the old form which required mutuality of obligation. In reality the courts put a markedly different content into that old form. The new content was the result of questions about the nature of obligations that arose once courts decided to enforce the agreements. Could, for example, a buyer seek to profit from a change in the economy and substantially increase its orders from a seller who had agreed to furnish the buyer's requirements? The courts might well have declared the agreements enforceable to the full extent of whatever requirements (or output) a party had. It would not have been implausible to expect that the market and contracting practice would adapt to those circumstances.[98]

But the courts chose not to take that course. Instead of

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96. 1 R. POTHIER, A TREATISE ON OBLIGATIONS CONSIDERED IN A MORAL AND LEGAL VIEW 33 (Eng. trans. Newbern, N.C. 1802).

97. *See, e.g.*, Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 F. 77, 79 (8th Cir. 1902); Parker v. Pettit, 43 N.J.L. 512, 515 (1881); H. BROOM, *supra* note 94, at 422-25; W. CLARK, *supra* note 94, at 63-65; 1 W. BLACKSTONE, COMMENTARIES *78; 2 *id.* at *143.

98. The possible adaptations are many, both formal and informal. An example of a formal adaptation would be to place limits on the obligation of a party to buy or to sell. *See, e.g.*, Staver Carriage Co. v. Park Steel Co., 104 F. 200 (7th Cir. 1900) (minimum quantity fixed for requirements contract); Bloomington Canning Co. v. United Can Co., 94 Ill. App. 62 (1901) (maximum quantity in requirements contracts); Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N.E. 294 (1905) (minimum and maximum quantity); East v. Cayuga Lake Ice Line, 21 N.Y.S. 887 (Sup. Ct. 1893) (maximum quantity in requirements contract); Walsh v. Myers, 92 Wis. 397, 66 N.W. 250 (1896) (minimum quantity in exclusive dealing contract). An example of an informal adaptation would be for the other parties in the market to refuse to deal with a party who had "taken advantage" of an open-term contract by having "excessive" output or requirements.

bowing fully to the values of the market,[99] the judges sought to preserve some of the values of the past by requiring that the contracts be performed in good faith, the "bona fide judgment" required by the trial judge in *Wood*. The key characteristic of the new content for the old form was that the courts, not the parties or the market, would have the primary role in determining what was good faith. Consequently, the courts had both a new focus for their deliberations—performance rather than obligation—and a new standard for judgment—good faith. Together the new focus and the new standard would make the courts much more involved in supervising the performance of contracts.

B. The Changing Economic Milieu—Output and Requirements Contracts

No pair of cases better illustrates the competing doctrine and the conflict between values of the traditional community and those of the modern commercial nation than *Bailey v. Austrian*[100] and *Wells v. Alexandre*.[101] *Bailey* arose in the farming state of Minnesota; yet the product involved, pig iron, indicates that industry had begun to intrude. In dispute was an agreement made in 1871 for the supply of all the Lake Superior pig iron that the plaintiff would "want" for its foundry in St. Paul during a specified period. Without inquiring into the needs of commerce, the Supreme Court of Minnesota recited the refrain that there could be no mutuality of obligation unless " 'each party has the right at once to hold the other to a positive agreement.' "[102] The contract lacked mutuality, the court reasoned,

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99. For an argument that the judges sided with mercantile interests, see Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Gabel & Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172 (D. Kairys ed. 1982).

100. 19 Minn. 535 (1873). Cases following *Bailey* include A. Santaella & Co. v. Otto F. Lange Co., 155 F. 719, 723 (8th Cir. 1907); McCaw Mfg. Co. v. Felder & Rountree, 115 Ga. 408, 413, 41 S.E. 664, 666 (1902); Wickham & Burton Coal Co. v. Farmers Lumber Co., 189 Iowa 1183, 1190, 179 N.W. 417, 420 (1920); Tarbox v. Gotzian, 20 Minn. 139, 141 (1873). *See generally* Lavery, *The Doctrine of* Bailey v. Austrian, 10 MINN. L. REV. 584 (1926) (historical analysis of the *Bailey* doctrine).

101. 130 N.Y. 642, 29 N.E. 142 (1891). Almost half a century later *Wells* would be described as "[p]erhaps the leading case in support of the validity of" requirements contracts. Note, *Contracts—"Requirements" Contracts—Mutuality of Obligation*, 11 NOTRE DAME LAW. 227, 227 (1936).

102. 19 Minn. at 537 (quoting 1 T. PARSON, THE LAW OF CONTRACTS 449 (6th ed.

because the plaintiff had not promised to "want" any pig iron; the plaintiff had not even obligated itself to stay in business.[103] There was, therefore, no contract on which the plaintiff could recover. The court's reasoning reflected the image of a traditional economy in which a single transaction held no promise of continued dealings between the parties.

The image of a quite different economy, the more complex "modern" economy, revealed itself in the New York decision in *Wells*. The dispute in that case arose out of an agreement in which the plaintiff promised to furnish the defendant's steamers " 'with strictly free-burning pea [coal] . . . for the year 1888.' "[104] The defendants bought coal from the plaintiff for six months before selling their steamships to another company. The defendants then argued that they had no further requirements for coal. The Court of Appeals of New York readily recognized the nature of the commerce involved: the defendant's steamships, which ran between New York and Cuba or Mexico, required large, but uncertain, quantities of coal. "It is very clear," the court wrote, "that the language employed by plaintiff in the light of surrounding circumstances was intended to make as definite as possible, the quantity of coal which the defendants would be required to take."[105]

Two aspects of the *Wells* opinion illustrate the very different assumptions that the two courts held about the nature of the economy and of contract. First, unlike the Minnesota court, the New York court perceived that uncertainty was implicit in commercial practices. To the New York court the indefiniteness of the agreement was a reflection of the market, not of the parties' failure to agree. The court, therefore, did not allow the defendant to use the uncertainty to avoid the obligation which the court found implicit in the agreement. Second, the two courts differed in their views of the relationship between the parties. For the Minnesota court the relationship was discrete and based on a single transaction. The court's conclusion that the defend-

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1873)). For other cases in which the word "want" proved fatal to the enforceability of an agreement, see Higbie v. Rust, 211 Ill. 333, 71 N.E. 1010 (1904); Drake v. Vorse, 52 Iowa 417, 3 N.W. 465 (1879).

103. 19 Minn. at 537.

104. 56 N.Y. Super. Ct. Rep. (24 J. & S.) 542, 544 (1889).

105. 130 N.Y. at 644, 29 N.E. at 143.

ant had no obligation to stay in business was, therefore, internally consistent. For the New York court, by contrast, the relationship was continuing. It therefore made no sense for the steamship company to avoid its obligations by selling its assets to another company.[106]

A third difference between the two courts arose as a consequence of the New York court's decision to enforce the agreement. The Minnesota court was not troubled by questions of performance; it simply found no obligation to perform. The New York court, however, had to consider performance—in particular, whether the defendant was obligated to order the coal. The court resolved that question by turning to notions of reasonableness and fairness—a preview of the development of "good faith." The court thought it clear that the agreement required the defendant to give notice of its needs. "[A]ny other construction," the court announced as it implicitly gave content to the notion of good faith, "would make the contract unreasonable, and place one of the parties entirely at the mercy of the other."[107] Quite plainly, the court was not prepared to approve a contract in which something approaching commercial Darwinism would prevail. The court was willing to entertain the new contract prac-

106. Although other courts would later be troubled over whether a party was obligated to stay in business, The *Wells* court had no difficulty. Its penultimate sentence simply declared that "the provisions of the agreement do not admit of a construction that it was to terminate in the event of a sale or other disposition of [the steamships] by the defendants." *Id.* at 646, 29 N.E. at 143. The Minnesota court had been equally didactic in reaching the opposite conclusion. 19 Minn. at 537. For later discussions of whether a party had to stay in business, see, *e.g.*, *In re* United Cigar Stores Co., 8 F. Supp. 243, 244 (S.D.N.Y.) (buyer not obligated to stay in business), *aff'd*, 72 F.2d 673 (2d Cir.), *cert. denied sub nom.* Consolidated Dairy Products Co. v. Irving Trust Co., 293 U.S. 617 (1934); Chalmers & Williams v. Walter Bledsoe & Co., 218 Ill. App. 363, 367-72 (1920) (contract for requirements of coal; buyer changes from steam power to electricity thereby reducing need for coal); C.A. Andrews Coal Co. v. Directors of Pub. Schools, 151 La. 695, 92 So. 303 (1922) (seller not obligated to sell more coal if buyer changes to a type of furnace requiring more coal); Hickey v. O'Brien, 123 Mich. 611, 82 N.W. 241 (1900) (contract to supply requirements of ice for established business for five years "presupposed" that business would exist for those five years); Wigand v. Bachmann-Bechtel Brewing Co., 222 N.Y. 272, 118 N.E. 618 (1918) (expenditures by one party on plant for second party may require second party to stay in business for term of output contract or until minimum quantity is produced); Asahel Wheeler Co. v. Mendleson, 180 A.D. 9, 167 N.Y.S. 435 (1917) (implied obligation of good faith and fair dealing means that buyer cannot order for speculative purposes); McKeever, Cook & Co. v. Canonsburg Iron Co., 138 Pa. 184, 20 A. 938 (1890) (contract for requirements of coal does not preclude buyer from drilling gas well which reduces need for coal).

107. 130 N.Y. at 645, 29 N.E. at 143.

tices, but it was not so willing to embrace the commercial values of the emerging modern society.

For the final quarter of the nineteenth century courts struggled with the new contractual practices. By the early years of the twentieth century, however, the reasoning that appeared in *Wells* began to emerge as dominant. Even the Supreme Court of Minnesota eventually relented. In 1901 it effectively overruled *Bailey* in *Ames-Brooks Co. v. Aetna Insurance Co.*[108] The dispute in *Ames-Brooks* arose over the provision of insurance on grain shipments on the Great Lakes for the shipping season of 1899. Aetna had provided insurance in the past and agreed that it would do so for that year. When the market rates subsequently increased, however, the Aetna syndicate sought to escape any obligation by arguing that the agreement lacked mutuality because Ames-Brooks had not agreed to have any shipments during the year. Reflecting traditional doctrine (and, of course, the precedent of *Bailey*), the trial court agreed with Aetna. But the supreme court disagreed, explaining that it must "interpret the contract from the standpoint of the practical business men who made it."[109]

Loath to abandon the old forms and precedents, the court attempted to distinguish earlier decisions such as *Bailey* by pointing out that those agreements had lacked mutuality. Echoing *Wells*, the court portrayed *Ames-Brooks* as factually different because its plaintiff had an established business which required insurance on its cargoes. The court reasoned that the plaintiff intended to remain in business for another year and had promised to buy its insurance from Aetna, a promise which

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108. 83 Minn. 346, 350, 86 N.W. 344, 346 (1901). *See* City of Marshall v. Kalman, 153 Minn. 320, 324-25, 190 N.W. 597, 599 (1922); Minneapolis Mill Co. v. Goodnow, 40 Minn. 497, 498, 42 N.W. 356, 356-57 (1889); 9 CYCLOPEDIA OF LAW AND PROCEDURE, *Contracts*, 213, 330 n.24 (W. Mack & H. Nash eds. 1903).

109. Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346, 349, 86 N.W. 344, 345 (1901); *cf.* The Kronprinzessin Cecilie, 244 U.S. 12, 24 (1917) ("Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs."); T.B. Walker Mfg. Co. v. Swift & Co., 200 F. 529, 531-32 (5th Cir. 1912) (contract to fulfill buyer's needs obligates seller to supply sufficient quantities of beef in accordance with buyer's customary business operation); Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 93, 43 N.E. 774, 777 (1895) (court presumed parties placed a reasonable construction on the term "requirements"); Warden Coal Washing Co. v. Meyer, 98 Ill. App. 640, 643 (1901) (parties' agreement to deliver coal in amount needed by buyer was not void for lack of mutuality because it was reasonable to assume they were *practical* businessmen).

included a promise not to buy from anyone else.[110]

The court's attempt to distinguish the earlier cases amounted to little more than the jurist's version of the poet's search for new forms. Whereas the poet had the luxury of eschewing rhyme and meter in favor of free verse, the judge felt no such freedom. Judges who preferred the new doctrine had to enclose it in old forms. The plaintiff in *Ames-Brooks* had no more of an explicit obligation to buy insurance than the plaintiff in *Bailey* had an obligation to buy pig iron. Both plaintiffs had ongoing businesses which depended upon the subject of the contract for operation. If each business was to continue, it would require some quantity of the product, either iron or insurance. The cases, therefore, were not different in fact. The only distinction lay in the different assumptions held by the courts about the market. For the *Bailey* court the market comprised distinct, one-time transactions; for the *Ames-Brooks* court the market comprised transactions of a continuing nature. To the *Bailey* court it was utterly unreasonable to think that a party might promise to stay in business; to the *Ames-Brooks* court the thought was both reasonable and probable.

Over time, more and more courts reflected their recognition of the new commercial market as they began to enforce agreements with open terms. The economic development of the country seemed to crush the doctrinal formalism that had resisted the development of new contractual devices.[111] Slowly, the

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110. 83 Minn. at 350, 86 N.W. at 346; *see also* National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, 434 (1884) (manufacturer only bound to buy supplies needed in upcoming year from supplier; contract was enforceable because manufacturer was obligated to buy or else close business); Hickey v. O'Brien, 123 Mich. 611, 614-15, 82 N.W. 241, 242-43 (1900) (court traces process of distinguishing Bailey v. Austrian, 19 Minn. 535 (1873)).

111. *See* Scott v. T.W. Stevenson Co., 130 Minn. 151, 159-60, 153 N.W. 316, 319 (1915). A Delaware court made the same point five years later:

> A very strict rule was declared in Bailey v. Austrian and other early cases, respecting mutuality and certainty in contracts involving all of the buyer's requirements or consumption of goods purchased. But this rule has been somewhat modified on account of the growth and exigencies of business, and the later cases are rather uniform in holding that such contracts are not void for lack of mutuality and certainty, if in the light of surrounding circumstances the quantity contracted for can reasonably be ascertained or is capable of being approximately ascertained at the time of making the agreement.

American Trading Co. v. National Fibre & Insulation Co., 31 Del. 65, 84, 111 A. 290, 298 (Super. Ct. 1920) (citation omitted); *see also* American Publishing & Engraving Co. v.

courts came to realize the futility of attempting to deter shipments of products such as iron and bolts,[112] wheels,[113] fertilizers,[114] and the ubiquitous railroad ties.[115]

The realization came from courts throughout the nation, seemingly reflecting the nationalization of the economy that had contributed to the problem in the first place. Significant state-

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Walker, 87 Mo. App. 503, 506-07 (1901) (contract binding on both parties when formal acceptance made and performance begun); Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 555-56, 93 N.W. 459, 461 (1903)(recognizing the trend of decisions finding mutuality in contracts in which established businesses intend to be bound by requirments contract).

One court effectively stood the principle of mutuality on its head. After concluding that one party was bound by the contract the court noted that "the principle of mutuality, which is an essential element of every contract, compels a ruling that the other party shall also be bound by the terms of the contract, in order to make it a binding agreement." Dawson Cotton Oil Co. v. Kenan, McKay & Speir, 21 Ga. App. 688, 695, 94 S.E. 1037, 1040 (1918); *see also* Lewis v. Atlas Mut. Life Ins. Co., 61 Mo. 534, 538 (1876) (if one party was bound "it necessarily follows that [the other party] must also have been bound"). Professor Friedrich Kessler and Professor Grant Gilmore had the following to say about the developments:

> It is surely one of the more discreditable episodes in our history that for a generation or more the argument could be seriously made that there was no contract because the buyer's promise to buy his requirements was "illusory" and therefore, no consideration for the seller's promise to sell. The eventual good sense represents, chronologically, one of the earliest instances in which obvious commercial needs and pressures forced the reversal of a position initially based on apparently logical deductions from nineteenth century consideration theory.

F. KESSLER & G. GILMORE, TEACHER'S MANUAL CONTRACTS: CASES AND MATERIALS 26 (1972).

112. *Cf.* Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 F. 77, 81 (8th Cir. 1902) (contract unenforceable but court recognized validity of contract if quantity was ascertainable with reasonable certainty).

113. Staver Carriage Co. v. Park Steel Co., 220 Ill. 412, 77 N.E. 174 (1906); *see* Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N.E. 294 (1905); Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N.W. 39 (1892).

114. *See* Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 F. 298 (6th Cir. 1903); Aetna Explosives Co. v. Diamond Alkali Co., 277 Pa. 392, 121 A. 201 (1923) (contract for 1916). *Contra* American Agric. Chem. Co. v. Kennedy & Crawford, 103 Va. 171, 48 S.E. 868 (1904) (contract dated 1902).

115. *See* McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 51 So. 767 (1910); Fontaine v. Baxley, Boles & Co., 90 Ga. 416, 17 S.E. 1015 (1892); Laclede Constr. Co. v. T.J. Moss Tie Co., 185 Mo. 25, 84 S.W. 76 (1904). *Contra* Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co., 166 F. 191 (C.C.W.D. Mo. 1908); Bagnell Timber Co. v. Spann, 102 Ark. 621, 145 S.W. 546 (1912); Hudson v. Browning, 264 Mo. 58, 174 S.W. 393 (1915). For a review of the current state of the law, see Speidel, Restatement Second: *Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785 (1982).

ments of the new doctrine came from New York,[116] which by 1920 had become the commercial center for the nation. The less commercially developed states had a less consistent pattern of approving the new contracts, but they approved them nonetheless. One of the earliest decisions to uphold a requirements contract came from the Supreme Court of Louisiana in 1868.[117] The agreement at issue called for furnishing "all the ice [a hotel] may require." The court held that the contract was not void for want of mutuality, and noted that the hotel would breach the contract if it bought ice elsewhere.[118] The supreme courts of both Illinois and Ohio followed that Louisiana decision.[119] Farther west, courts from Missouri to Utah approved the contracts,[120] with the Missouri Court of Appeals responding tersely that the argument that an output contract lacked mutuality was "more specious than sound."[121]

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116. As already discussed, Wells v. Alexandre, 130 N.Y. 642, 29 N.E. 142 (1891), was one of the major cases of the period. *See supra* text accompanying notes 101-110; *see also, e.g.*, Wigand v. Bachmann-Bechtel Brewing Co., 222 N.Y. 272, 118 N.E. 618 (1918) (output contract enforceable); New York Cent. Iron Works Co. v. United States Radiator Co., 174 N.Y. 331, 66 N.E. 967 (1903) (requirements contract enforceable); Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co., 1 A.D. 507, 37 N.Y.S. 276 (1896) (output contract enforceable); Moore v. American Molasses Co., 106 Misc. 263, 174 N.Y.S. 440 (1919) (requirements contract enforceable). For cases from other of the more urban states, see *e.g.*, Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671, 117 P. 934 (1911) (requirements contract enforceable); Staver Carriage Co. v. Park Steel Co., 220 Ill. 412, 77 N.E. 174 (1906) (requirements contract enforceable); National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427 (1884) (requirements contract enforceable); Russell, Burdsall & Ward, Inc. v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23 (1905) (requirements contract enforceable).

117. S.B. Smith & Co. v. R.S. Morse & Co., 20 La. Ann. 220, 222 (1868).

118. *Id.* at 222. *But cf.* Campbell v. A. Lambert & Co., 36 La. Ann. 35 (1884) (agreement to deliver coal "as may be required" lacks mutuality). For other decisions from predominantly rural states, see, *e.g.*, McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 51 So. 767 (1910) (output contract is binding); El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S.W. 460 (1910) (output contract enforceable); Thomas-Huycke-Martin Co. v. T. M. Gray & Sons, 94 Ark. 9, 125 S.W. 659 (1910) (output contract binding); Ayer & Lord Tie Co. v. O. T. O'Bannon & Co., 164 Ky. 34, 174 S.W. 783 (1915) (output contract enforced).

119. National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427 (1884); Cincinnati, S. & C. R.R. v. Consolidated Coal & Mining Co., 8 Ohio Dec. Reprint 365 (Cincinnati Super. Ct. 1882), *rev'd*, 9 Ohio Dec. Reprint 15 (Hamilton Dist. Ct. 1883), *aff'd*, *id.* at 15 n. † (1887).

120. *See* Western Macaroni Mfg. Co. v. Fiore, 47 Utah 108, 151 P. 984 (1915) (requirements contract binding).

121. Rozier v. St. Louis & S.F. R.R., 147 Mo. App. 290, 297, 126 S.W. 532, 534 (1910); *see also* Spencer v. Taylor, 69 Kan. 493, 77 P. 276 (1904) (requirements contract

To be sure, part of the development in contract doctrine may be attributed to the development of business itself. With more businesses and with a wider spread for the market, courts had more examples against which they could measure the conduct of the parties before them.[122] Courts were, therefore, better able to fill an open term in an agreement by looking to the conduct of other, similar parties. But the decisons reflect more than simply a greater ease of dealing with the facts. The opinions reveal both an important intellectual development—the acceptance of uncertainty—and the beginning of a critical doctrinal development—the policing of standards of performance. As early as 1882, an Ohio court illustrated the intellectual development when it concluded:

> It is difficult to see how parties could make contracts for the supply of quantities uncertain at the time of the contract, but entirely capable of being made perfectly certain during the time it is to run, in any other way than that adopted here. The party proposing merely contracts for the benefit of the probability or possibility that more or less will be needed by the other. The party accepting fully secures this to the other because he is bound not to buy elsewhere.[123]

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binding).

122. For examples of cases dealing with established businesses, see T.B. Walker Mfg. Co. v. Swift & Co., 200 F. 529, 530-31 (5th Cir. 1912); Lima Locomotive & Mach. Co. v. National Steel Castings Co., 155 F. 77 (6th Cir. 1907); A. Klipstein & Co. v. Allen, 123 F. 992 (N.D. Ga. 1903); Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 F. 77, 79-80 (8th Cir. 1902); Manhattan Oil Co. v. Richardson Lubricating Co., 113 F. 923, 925 (2d Cir. 1902) (buyer must observe good faith in limiting to legitimate requirements of business); T. W. Jenkins & Co. v. Anaheim Sugar Co., 237 F. 278, 279-80, 281-82 (S.D. Cal. 1916), *rev'd*, 247 F. 958 (9th Cir. 1918), *cert. denied*, 257 U.S. 659 (1922); American Trading Co. v. National Fibre & Insulation Co., 31 Del. 65, 84, 111 A. 290, 298 (Super. Ct. 1920) (output contract for vulcanized fiber and insulation paper enforceable); Nelson v. Barber, 143 La. 783, 79 So. 403, (1918) (requirements contract enforceable in general but not on facts of this case); S.B. Smith & Co. v. R.S. Morse & Co., 20 La. Ann. 220, 222 (1868) (ice for hotel); E. Richard Meinig Co. v. United States Fastener Co., 200 A.D. 522, 531, 193 N.Y.S. 106, 113 (1922) (self-piercing glove clasps); McCall Co. v. Icks, 107 Wis. 232, 239, 83 N.W. 300, 302 (1900) (McCall patterns).

123. Cincinnati, S. & C. R.R. v. Consolidated Coal & Mining Co., 8 Ohio Dec. Reprint 365, 367-68 (Cincinnati Super. Ct. 1882), *rev'd*, 9 Ohio Dec. Reprint 15 (Hamilton Dist. Ct. 1883), *aff'd*, *id.* at 15 n.† (1887).

C. *The Changing Legal Milieu—The Futures Market*

This critical shift toward acceptance of greater uncertainty did not occur in just one area of contract law. Rather, much of the developing contract law at the turn of the century was in response to the efforts of the contracting parties to deal with uncertainty. The farm commodities market, in particular, provides another prime example of the efforts of courts to reconcile traditional values with the uncertainties of the modern economy.

For requirements and output contracts the competing traditional doctrine had been mutuality. For the futures market the conflict came from the early established doctrine that gambling contracts were immoral and therefore illegal.[124] The resilient doctrine that linked morality and law was a trace of the traditional community with its shared, stable values. The morals of the community condemned futures contracts because they served only to tempt the unsuspecting to invest beyond their means.[125] Moreover, traditional economic values rejected futures

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124. The sale of stock provides one early example of opposition to the sale of items not owned at the time of contracting. *See, e.g.*, Barrett v. Hyde, 73 Mass. (7 Gray) 160, 161 (1856) (reference to 1836 law voiding sale of stock not owned at time of contract); Thompson v. Alger, 53 Mass. (12 Met.) 428 (1847) (applying N.Y. law); Stanton v. Small, 3 Sand. 230, 238, 240 (N.Y. Super. Ct. 1849) (act proscribing stock jobbing not applicable to sale of flour for future delivery; seller said to have acted according to law and "according to good morals"); Frost v. Clarkson, 7 Cow. 24 (N.Y. Sup. Ct. 1827) (citing New York statute); Brua's Appeal, 55 Pa. 294, 298 (1867). *But see* Gilchreest v. Pollock, 2 Yeates 18, 21 (Pa. 1795) (contract to pay $24,500 in specie for future delivery of $20,000 of stock not violative of statute and not immoral) ("The sale of stock is neither unlawful nor immoral. It is confessed, that an inordinate spirit of speculation approaches to gaming, and tends to corrupt the morals of the people. When the public mind is thus affected, it becomes the legislature to interpose. But we have no such law at present."). *See generally* T. DEWEY, LEGISLATION AGAINST SPECULATION AND GAMBLING IN THE FORMS OF TRADE (1905); E. DOUGLASS, *supra* note 70, at 526-27; Parker, *Government Regulation of Speculation*, 38 ANNALS 444 (1911). Judge Thomas N. Cooley explained some of the problems that arose when a transaction took the form of a prohibited gambling deal even though the transaction was not in substance a gamble. Shaw v. Clark, 49 Mich. 384, 388, 13 N.W. 786, 787-88 (1882); *cf.* H. FULLER, WITH THE PROCESSION 327 (1895) (character opposes speculation even though its gains would mean financial salvation).

125. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814, 820-21 (1879); Cleage v. Laidley, 149 F. 346, 350 (8th Cir. 1906) (testimony about attempt to corner market; result was bankruptcy); Bailey & Graham v. Phillips, 159 F. 535, 537 (C.C.S.D. Ga. 1907) (charge to jury); Medlin Milling Co. v. Moffatt Comm'n Co., 218 F. 686, 689 (W.D. Mo. 1915) (dealings in futures led to financial embarrassment of company); Bartlett v. Smith, 13 F. 263, 266 (C.C.D. Minn. 1882) (gambling contract in wheat said to be "pernicious"); *Ex parte* Young, 30 F. Cas. 828, 832-33 (N.D. Ill. 1874) (No. 18,145) (attempt to corner Chicago market for oats in 1872); *In re* Chandler, 13 Am. L. Reg. 310 (1874) (attempt to corner

contracts because those who profited by the contracts had only a "fierce greed for gain without labor";[126] they produced no goods and, therefore, added nothing to the country's wealth.[127] The traditional view was well-explained in an issue of the *Political Science Quarterly* for 1895. From the standpoint of those opposed to futures, the author explained, "the law of supply and

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oats market in June 1872); Heard v. Russell & Potter, 59 Ga. 25, 38-39 (1877) (jury charge condemning speculation); J.B. Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33, 38-39 (1876) (danger from market corners); Ohlendorf v. Bennett, 241 Ill. App. 537 (1926) (bank cashier's embezzlement of money over two years to finance speculation forced bank to close); Beveridge v. Hewitt, 8 Ill. App. 467 (1881) (description of financial ruin of particular individual); Webster v. Sturges, 7 Ill. App. 560, 564 (1880) (option trading is "baleful and poisonous influence"); Nave v. Wilson, 12 Ind. App. 38, 45, 38 N.E. 876, 878 (1894) (futures trading described as "vicious and demoralizing"); Brua's Appeal, 55 Pa. 294, 299 (1867) (gambling causes failures and embezzlements); *see also* F. NORRIS, *supra* note 85, at 129-31 (wheat futures set artificial prices and entice young men to gamble); *Futures*, 33 AM. L. REG. (n.s.) 436 (1894); 13 *id.* 317, 318 (1874) (In a note, commentator stated that trading in futures, like trading in stock differences, is a "demoralizing and degrading species of wagering or gambling, [and] is no doubt, generally reprobated by the lovers of morality and decency throughout the country.").

That speculation and financial embarrassment was not limited to clerks and those perceived as being in the lower classes is evident from Justh v. Holliday, 13 D.C. (2 Mackey) 346 (1883), which related losses suffered by General George Custer while dealing in the market in 1875 and 1876, shortly before his death in the battle of the Little Big Horn in June 1876. The court in *Justh* wrote that the "extent of this form of speculation [in stock] now rife in our country is unprecedented, unless perhaps by the almost universal gambling transactions that distinguished the era of the famous South Sea Bubble." *Id.* at 349. In a note following the report of a case, Francis Wharton discussed the conflicting tendencies of courts in dealing with these issues. *See* Melchert v. American Union Tel. Co., 11 F. 193, 201 (C.C.D. Iowa 1882); *see also Fictitious Dealing in Agricultural Products: Hearings on Bills Nos. 392, 2699, and 3870 Before the House Comm. on Agriculture*, 52d Cong., 1st Sess. (1892). In spite of the complaints, it was not until the early 1920s that Congress passed legislation regulating futures trading. C. COWING, *supra* note 85, at 261; 1 T. RUSSO, REGULATION OF THE COMMODITIES FUTURES AND OPTIONS MARKETS ¶¶ 9.03-.07, at 9-5 to 9-14 (1893).

126. Justh v. Holliday, 13 D.C. (2 Mackey) 346, 349 (1883).

127. Sawyer, Wallace & Co. v. Taggart, 77 Ky. (14 Bush) 727 (1879):

> The objection to commercial gambling is that men enter into fictitious contracts, and buy and sell upon contracts never intended to be performed by themselves or any one else, but the character of their transactions being unknown to the public, they are regarded as real, and so affect prices and trade without having any legitimate connection in fact with either.

Id. at 735. Williams v. Tiedemann, 6 Mo. App. 269, 275 (1878) (a settlement without actual delivery adds nothing to the "commercial prosperity" of the country); Kirkpatrick v. Bonsall, 72 Pa. 155, 158 (1872) (speculation on price of petroleum "destructive of good morals and fair dealing, and of the best interests of the community"); J. LURIE, *supra* note 85, at 63; *see also* L. FRIEDMAN, *supra* note 10, at 60 (speculation viewed as "a crime against the economy"); W. NUGENT, *supra* note 1, at 43-44 (the perceived "moral superiority" of producers).

demand is a moral law. [They hold] that prices ought to be determined by supply and demand and that it is wicked to determine them in any other way." What the opponents of futures failed to recognize, according to the author's modern, pragmatic perspective, was "that the 'law of supply and demand,' like any economic law, is merely a statement of facts." Reflecting the change from a stable, traditional economy to an uncertain one, the author went on to accuse the opponents of taking "the mediaeval view of price as an objective something, springing full-fledged from a physical supply and a definite demand."[128] The accuracy of the accusation is exemplified by statements such as one in a Georgia case involving dealings in cotton futures. The judge instructed the jury that a person who speculated in futures "interfere[d] with the natural laws of trade."[129] With futures contracts thus doubly condemned, by traditional morals and by traditional economic values, many rural areas not surprisingly perceived futures trading as no more than another urban intrusion into the locally controlled community.[130] They "longed for the antebellum days when economic control had been more local and therefore more personal."[131]

For so long as courts did not recognize a commercial value to futures contracts, they displayed their continuing belief in the predictability of the economy. In a stable economy there was little need to spread the risks of fluctuating prices. Likewise, in an

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128. Emery, *Legislation Against Futures*, 10 POL. SCI. Q. 62, 80 (1895). The following year Emery published a book, *Speculation on the Stock and Produce Exchanges*, which one author termed the "most authoritative work on speculation." C. COWING, *supra* note 85, at 47.

129. Heard v. Russell & Potter, 59 Ga. 25, 38 (1877).

130. As early as 1874 the Grange of Illinois "which had never been in sympathy with the Board of Trade or its methods, favored the passage of a law declaring all transactions in 'futures' to be gambling operations." 1 C. TAYLOR, HISTORY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO 501 (1917). For a discussion of the Illinois statute and the related judicial decisions, see J. LURIE, *supra* note 85, at 52-74. Julius Aroni provided evidence of a similar feeling when he bemoaned a jury's decision to invalidate a futures contract:

> The masses do not seem yet to be sufficiently educated to the high standard of progressive commerce; they have not yet learned that in this age of steam and electricity, time and distance having been almost swept away, large and important commercial transactions are no longer carried out in the style of the last century; so that it was not very difficult to persuade a jury of the immorality of "future" contracts.

J. ARONI, supra note 85, at 75; *see also* W. PEFFER, *supra* note 24, at 123; R. WIEBE, *supra* note 1, at 73.

131. C. COWING, *supra* note 85, at 4.

economy dominated by local, discrete sales there was no wider market through which to spread risks. But as had happened with output and requirements contracts, first the farmers and then the courts came to recognize that the futures market was only one aspect of the increasingly advantageous national market. The transactions on the various boards of trade became too large a part of the nation's economic structure for courts to continue declaring the agreements void, even in the rural states which so strongly opposed the intrusion from urban America.[132] The Supreme Court of Kentucky epitomized the courts' realization when it wrote in 1879:

> so large a portion of the real business in the great cities is done on 'change [exchange] as to wholly forbid the conclusion that all contracts made on them are unlawful, and unless such conclusion could be reached, the contracts involved here must be held to have been valid and lawful.[133]

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132. *See* sources cited *supra* note 85; *see also* S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 34, at 376.

133. Sawyer, Wallace & Co. v. Taggart, 77 Ky. (14 Bush) 727, 739-40 (1879); *see also* Clarke v. Foss, 5 F. Cas. 955 (W.D. Wis. 1878) (No. 2,852):

> In the main, commercial transactions must be left to be regulated by the higher and more inexorable laws which govern the trading world. If the transactions disclosed by this case are illegal, then, undoubtedly, a great part of the banking and clearing-house transactions in our great commercial centres are illegal also.

Id. at 960; Pixley v. Boynton, 79 Ill. 351, 353 (1875) (Contract for future delivery of wheat was "nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions."); Wolcott v. Heath, 78 Ill. 433, 437 (1875) (time contracts made in good faith not prohibited); Sanborn v. Benedict, 78 Ill. 309, 315 (1875) (if futures contracts were declared illegal, much American trade and commerce would halt); Bigelow v. Benedict, 70 N.Y. 202, 205 (1877) (contract for future delivery of gold) ("That there was an element of hazard in the contract is plain. But the same hazard is incurred in every optional contract for the sale of any marketable commodity, when, for a consideration paid, one of the parties binds himself to sell or receive the property at a future time, at a specified price, at the election of the other."). *But see* Beadles, Wood & Co. v. McElrath & Co., 85 Ky. 230, 243, 3 S.W. 152, 156 (1887) (that much legitimate trading is done on Cotton Exchange does not mean that gambling is also accomplished through the exchange).

One court even suggested that contracts made over "the great public exchanges of the country" were presumed to be valid. Gettys v. Newburger, 272 F. 209, 216 (8th Cir.), *cert. denied*, 257 U.S. 649 (1921). For other instances of the application of a similar rule, see, *e.g.*, Cleage v. Laidley, 149 F. 346, 352 (8th Cir. 1906) (contracts for purchase and sale of grain or other personal property to be delivered in the future are lawful and valid); *cf.* Clarke v. Foss, 5 F. Cas. 955, 957-58 (W.D. Wis. 1878) (No. 2,852) (testimony

Equally important, though, was the growing recognition that uncertainty and the means to deal with it were a vital part of the nation's economy. As early as 1876, a judge of the Supreme Court of Illinois had expressed that view, though in dissent.[134] Two points in his opinion illustrate especially well the growing recognition that the new conditions required new values. He argued, first, that there was nothing immoral about betting on risks; it was to be expected in the modern society.[135] Second, the requirement of margins was quite sensible for those transactions on exchanges, especially in large cities where the parties could not be expected to know one another or to take the time required to investigate the financial position of the other.[136] In short, rather than continue to treat the new characteristics of the modern economy as though they were aberrations, he urged that they be accepted as the norm.

The most important recognition of speculation as both legitimate and beneficial came in 1905 in an opinion by Justice Holmes. The case, *Board of Trade v. Christie Grain & Stock Co.*,[137] arose from the Board's efforts to prevent others from using and distributing quotations of prices from sales of grains and futures. The Board argued that Christie operated an illegal

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about practices of board of trade); Fox v. Steever, 55 Ill. App. 255, 257-60, 262 (1894) (testimony about operation of board of trade; court concludes that it is not unusual that commodities change hands many times before actual delivery), *aff'd*, 156 Ill. 622, 40 N.E. 942 (1895); Sawyer, Wallace & Co. v. Taggert, 77 Ky. (14 Bush) 727 (1879) (similar point about trades). *But see* Huff v. State, 164 Ark. 211, 219, 261 S.W. 654, 657 (1924) (prosecution for violation of statute prohibiting certain dealings in futures, no defense that board of trade rules require delivery).

134. J.B. Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33, 53 (1876) (Dickey, J., dissenting).

135. *Id.* at 54.

136. *Id.* at 33, 53-54; *see also* Irwin v. Williar, 110 U.S. 499 (1883); Mullinix v. Hubbard, 6 F.2d 109, 110 (8th Cir. 1925) (deals in accord with rules of exchange provide "legitimate aid and not obstruction to commerce"); Bigelow v. Benedict, 70 N.Y. 202, 205 (1877) (no vice in contract just because it involves risk). *See generally* H. BRACE, THE VALUE OF ORGANIZED SPECULATION (1913); H. EMERY, SPECULATION ON THE STOCK AND PRODUCE EXCHANGES OF THE UNITED STATES (1896); Clews, *Transactions on Margin and for Future Delivery*, 12 BENCH & BAR 54, 55 (1908) ("speculation is a motive power of the first importance"); Emery, *supra* note 128 (semble); Stevens, *The Utility of Speculation in Modern Commerce*, 7 POL. SCI. Q. 419 (1892) (speculation is beneficial); Note, *Dealings in Futures*, 40 HARV. L. REV. 638, 640 (1927) (speculation beneficial because it smooths swings of prices).

137. 198 U.S. 236 (1905). *See* Bakken, *supra* note 85, at 23; Schonberg, *Historical Evaluation, Theory, and Legal Status of Futures Trading in American Agricultural Commodities*, in 1 FUTURES TRADING SEMINAR 29, 38 (1960).

"bucket shop"[138] and had no right to use the quotations. Christie responded that the Board operated the biggest bucket shop of all and was, therefore, so tainted with illegality that its quotations should not be protected.[139] The Supreme Court sided with the Board. Writing for the Court, Justice Holmes explained:

> [I]n a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want.[140]

Complete acceptance of uncertainty was evident in a subsequent opinion by a federal district judge. The judge explained his approval of a contract which left open a term setting the mixture of sizes in a large quantity of prunes:

> In construing contracts in which persons seek to cover the contingencies and uncertainties of crops that are yet to mature, provisions reasonably adapted to that end should not be made futile and meaningless because they may contain some element of the "will, wish, or want" of one of the parties. Into each such stipulation the law will inject the requirement of good faith and fair dealing. Better is it that there should be some indefiniteness and uncertainty in contracts such as these than that the growers of commodities, and the merchants who deal in them, should be told that, unless they are able accurately to foretell what nature holds in store, they cannot safely make contracts which will in some degree be dependent upon future events.[141]

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138. The origins of the term "bucket shop" are unclear. The phrase is a pejorative which usually refers to a "brokerage house . . . whose operators would secretly 'bucket'—*i.e.*, hold out—rather than execute a customer's orders, in the hope that the house would later be able to buy or sell the stock or commodity at more favourable prices." 2 THE NEW ENCYCLOPEDIA BRITANNICA: MICROPAEDIA 338 (1982); *see also* BREWER'S DICTIONARY OF PHRASE AND FABLE 166 (I. Evans. centenary ed. rev. 1981).

139. For Christie's own account of the dispute, see Christie, *Bucket Shop vs. The Board of Trade*, 15 EVERYBODY'S MAG. 707 (1906).

140. 198 U.S. at 247.

141. California Prune & Apricot Growers, Inc. v. Wood & Selick, Inc., 2 F.2d 88, 90 (S.D.N.Y. 1924); *cf.* Ayer & Lord Tie Co. v. O.T. O'Bannon & Co., 164 Ky. 34, 36, 174 S.W. 783, 784 (1915) (use of "would" in an oral contract deemed an inadvertence which did not render agreement unenforceable); Excelsior Wrapper Co. v. Messinger, 116 Wis.

That opinion confirmed the shift in doctrine that had been anticipated in *Wells*, with an equal lack of concern for the parties' choice of verb, whether it be "will" or "want." The opinion also confirmed that the doctrine of good faith would be used to deal with the uncertainties inherent in the newly approved contracts.[142]

V. *Wood v. Lucy Lady Duff-Gordon-Gordon*—THE AFTERMATH

In the process of dealing with uncertainty, many judges came to realize the inadequacy of particular precedents, the old forms of the law. Those judges, like many of their contemporaries, sensed the accuracy of what Cardozo had so brashly said as a student in 1889. The time had come, he observed, "when the old forms seem[ed] ready to decay, and the old rules of action [had] lost their binding force."[143] The judiciary responded through efforts to reconcile the old forms of the law with the new forms of commercial agreement. Once the judges accepted the existence of a new market, however, they confronted a conflict between traditional and modern values. In the disputes about performance of the new agreements, the judges saw not the traditional, accommodating values of the small community, but the new, harsh values of commerce. They saw a market to which, in the words of a character in Henry Fuller's novel *With the Procession*, everyone had "come for the one common, avowed object of making money."[144] The result of that object was that "every man cultivates his own little bed and his neighbor his; but who looks after the paths between? They have become a kind of No Man's Land, and the weeds of a rank iniquity are fast choking them up."[145] Many judges held similar views about the consequences of a single-minded search for profit, though they ex-

549, 555, 93 N.W. 459, 461 (1903) (no lack of mutuality "when the discretion, wants, or needs of a party are referred to an existing" business).

142. *Cf.* Moore v. American Molasses Co., 106 Misc. 263, 278, 174 N.Y.S. 440, 448 (1919) ("In an executory contract, indefinite as to the quantity of goods to be furnished, there is implied good faith and fair dealing on the part of each toward the other . . . .").

143. B. CARDOZO, *The Altruist in Politics*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 47, 47 (M. Hall ed. 1967) (Columbia College Commencement Oration 1889).

144. H. FULLER, *supra* note 124, at 248.

145. *Id.*

pressed them in a different manner; and in a muted way, they set about policing the "paths between."

Almost without exception, courts that enforced output and requirements contracts encountered these agreements after a change in the market presented one party with an opportunity to make substantial profits. To accept the profit-based morality of commerce and enforce the open-term contract without limit did not present the courts with catastrophic choices—it would neither drive anyone out of business nor reward overbearing conduct during negotiations. It would, however, deny one party a share of the bounty newly available to its contractual counterpart. This imbalance was a cause for concern only to those who would not accept the morality of profit as the teleology of the era. Judges expressed that concern with the pejorative observation that to enforce an open-term contract without limit would place one party "at the mercy of the other."[146]

Apprehension that one party was potentially "at the mercy of the other" made it natural for judges to turn to the analogy of the fiduciary and of equity when confronted with disputes about the new contracts.[147] A prime example of that reasoning can be found in *Wigand v. Bachmann-Bechtel Brewing Co.*,[148] the first case in which the highest court of a state held that an obligation of good faith extended to all contracts.[149] This decision of the New York Court of Appeals involved an output contract which

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146. *See, e.g.*, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917); Wells v. Alexandre, 130 N.Y. 642, 645, 29 N.E. 142, 143 (1891). Some courts used the same language to explain a conclusion that a contract was unenforceable. *E.g.*, Schimmel v. Martin, 190 Cal. 429, 432, 213 P. 33, 34 (1923) (contract to supply water; court concluded that it would be unreasonable to construe contract to promise to supply water indefinitely at single price in agreement); Campbell v. American Handle Co., 117 Mo. App. 19, 24, 94 S.W. 815, 816 (1906) (party had complete freedom to act for own profit).

147. *Cf.* Union Pac. Ry. v. Chicago, R.I. & P. Ry., 163 U.S. 564, 600-01 (1896) ("It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them."); J. LIEBERMAN, *supra* note 2; R. WIEBE, *supra* note 1, at 133, 146 (on the adoption of new communal values, the growing impossibility of distinguishing the individual from the community around him; the recognition of the fluidity of values).

148. 222 N.Y. 272, 118 N.E. 618 (1915).

149. *See id.* at 277, 118 N.E. at 619. In this conclusion I disagree with Professor Burton's conclusion that "the standard doctrinal formulation of the good faith performance duty was first articulated" in Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163 (1933). Burton, *supra* note 11, at 379.

obligated the buyer to purchase a waste product from a brewery for five years. The buyer invested a considerable amount of money in preparing to process the waste product. Then, after two years, the brewery sold its facility to another company and attempted to avoid any obligation under the contract by arguing that it no longer had any output. The court of appeals rejected the brewery's position with the observation that to accept the argument would produce an agreement that was too "one-sided."[150] The court further explained its conclusion with the general observation that "[e]very contract implies good faith and fair dealing between the parties to it."[151] The court took its language and principle from cases in which one party had complete control over whether the other party received any benefit at all from the contract.[152] In cases of that sort the courts had routinely concluded that the party with discretion had to act in good faith. For example, in *Simon v. Etgen*, from which the *Wigand* court took its language, the court held that, in the absence of a stated time for performance, a reasonable time would be implied.[153] Similarly, both of the other two precedents cited by the court in *Wigand* involved an established legal principle that one party owed a fiduciary duty to the other. One of those cases, *Industrial & General Trust v. Tod*, involved the obligation of a railroad reorganization committee toward the bondholders.[154] The other case, *Brassil v. Maryland Casualty Co.*, involved the obligation of an insurance company toward its insured in settling and litigating a claim.[155] Thus neither the

150. 222 N.Y. at 278, 118 N.E. at 619.

151. *Id.*

152. *See, e.g.*, Simon v. Etgen, 213 N.Y. 589, 107 N.E. 1066 (1915); Brassil v. Maryland Casualty Co., 210 N.Y. 235, 104 N.E. 622 (1914); Industrial & Gen. Trust, Ltd. v. Tod, 180 N.Y. 215, 73 N.E. 7 (1905).

153. 213 N.Y. at 589, 107 N.E. at 1066. The decision was itself another early instance of a court formulating a broad duty of good faith. The court relied solely upon *Industrial & Gen. Trust* and *Brassil* to support its statement that "[e]very contract implies good faith and fair dealing between the parties to it." 213 N.Y. at 595, 107 N.E. at 1067.

154. 180 N.Y. at 225-26, 73 N.E. at 9-10. The court relied upon three precedents, each involving similar facts, to support its conclusion that the reorganization committee owed a special duty of good faith to the railroad's bondholders: Shaw v. Railroad Co., 100 U.S. 605 (1880); Hollister v. Stewart, 111 N.Y. 644, 19 N.E. 782 (1899); White v. Wood, 129 N.Y. 527, 29 N.E. 835 (1892).

155. 210 N.Y. at 235, 104 N.E. at 622. The court cited no cases to support its statement that "there is a contractual obligation of universal force which underlies all written

principle nor even the language of the *Wigand* court was singular. What was portentous was the application of the principle to a contract at the heart of mercantile practice. In a society so dominated by commercial values, it bordered on the heretical for a court even to imply that any part of the relationship between buyer and seller in an output contract resembled that of the fiduciary. Yet that is precisely what the New York courts did at the time of *Wigand* and *Wood.*

In two other roughly contemporaneous decisions, lower New York courts reached similar conclusions. Each case involved buyers under requirements contracts who wanted to order substantial quantities of goods after the market price increased. The first of the two cases, *Asahel Wheeler Co. v. Mendleson,*[156] concerned a contract made in 1914 to supply caustic soda for the year 1915. The buyer placed no orders until the end of November 1915. By that time the market price for the soda had more than doubled. Even though the contract fixed the maximum amount of soda that could be ordered, the court held that the buyer could order only what it needed in its regular business. The court directly linked the notion of good faith with opposition to conduct with the sole object of making money:

> [A]s to an executory contract which is indefinite as to the quantity of goods to be furnished, the obligation of good faith and fair dealing toward each other is implied, and a party to a contract has no right to use it for a purpose not within the contemplation of the parties, as for speculative, as distinguished from regular and ordinary business, purposes.[157]

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agreements. It is the obligation of good faith in carrying out what is written." *Id.* at 241, 104 N.E. at 624.

156. 180 A.D. 9, 167 N.Y.S. 435 (1917).

157. *Id.* at 12, 167 N.Y.S. at 437. To support that conclusion the court relied upon an earlier decision of the court of appeals, New York Cent. Iron Works Co. v. United States Radiator Co., 174 N.Y. 331, 66 N.E. 967 (1903). In *Iron Works* the court allowed a buyer to order more than twice the amount of pipe required by the buyer in the previous year. Foreshadowing the emergence of a general obligation of good faith, the court explained that there were limits "in such a contract." *Id.* at 335, 66 N.E. at 968. "The obligation of good faith and fair dealing towards each other is implied in every contract of this character. The [buyer] could not use the contract for the purpose of speculation in a rising market since that would be a plain abuse of the rights conferred, and something like a fraud upon the seller." *Id.* The only other case cited was an early stage of Moore v. American Molasses Co., 106 Misc. 263, 174 N.Y.S. 440 (Sup. Ct. 1919). *See infra* text accompanying notes 158-59.

The second of the two cases, *Moore v. American Molasses Co.*,[158] involved a dispute over a contract to supply Moore's "full requirements" of molasses for a year. As the market price approached twice the contract price and Moore ordered fifteen percent more than in any previous year, the company refused to meet further orders. The company especially objected to Moore's use of postcards advertising molasses for sale at below the prevailing market price. The court, like the other New York courts, castigated the buyer for such purely pecuniary motives.[159]

That castigation represented the final step toward imposing a general duty of good faith on contracting parties. The judicial reaction was comparable to siding with Dorothy in her confrontation with the Wizard of Oz. The judges offered protection solely because the parties were perceived as being weak, without requiring that the parties pay for the protection.[160] The courts had come to realize that the essence of the new contractual practices was sharing. As the nineteenth century struggled to a close, the courts had recognized that mercantile agreements could be no more certain than the uncertain economy itself. The typical relationship between the contracting parties was no longer a discrete transaction based on a particular performance, promised for an assured future. Instead, the parties left open a term in the agreement, binding themselves to move together into the uncertain future.[161] In recognition of that relationship, the courts had

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158. 106 Misc. at 263, 174 N.Y.S. at 440.

159. *Id.* at 278, 174 N.Y.S. at 448 (citing Asahal Wheeler Co. v. Mendleson, 180 A.D. at 9, 167 N.Y.S. at 435).

160. *Cf.* Hilleary v. Skookum Root Hair Grower Co., 4 Misc. 127, 131, 23 N.Y.S. 1016, 1018 (N.Y.C.C.P. Ct. 1893) (good faith required when uncertainty and doubt might place one party at the mercy of the other).

161. More recently, Professor Ian Macneil has been a prime proponent of the theory that many contracts are "relational"—they involve more than single, discrete encounters between the parties. *See, e.g.*, I. MACNEIL, *supra* note 2; Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627 (1975); Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). In a similar vein, Professor Speidel has written of the obligations arising from long-term contracts:

> In short, the long-term supply contract is a bit more complex than the "one-shot" sale of Dobbin or Blackacre. Beyond its obvious economic importance, it complicates, and perhaps prevents, complete risk planning at the time of contracting. Complete consent is a mirage. Over time, "gaps" in the initial agree-

taken a first step toward enforcing the contracts by reasoning that sellers in output contracts could not sell to anyone else, and buyers in requirements contracts could not buy from anyone else.

This new reasoning did more than respond to the formal requirements for mutuality by providing one party with an obligation which could match the obligation of the other party.[162] Binding the fates of the parties so firmly together made it easier for the courts to determine whether there would be limits to the obligation. The close ties between the parties prompted the realization that the relationship between them was akin to one of sharing. Thereafter, courts were able to view parties to the new contracts as being more like partners or co-adventurers than like atomistic elements of a larger economy. The courts were then able to invoke, in the language of both *Woods* and *Wells*, the proscription that no agreement would be allowed to place one party "at the mercy of the other." The phrase referred only to what was perceived as an unseemly rush for profits. Those who sought only profits were branded with the same disparaging label as those who dealt in grain futures. They all were "speculators," immoral because they sought profit without production.[163] One who attempted to speculate was said to have not acted in

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ment will undoubtedly emerge. At the same time, specialized uses of the contract will increase both the cost of terminating the relationship and the likelihood that the market will be unable to provide an adequate substitute for either party.

Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369, 375 (1981); *see also* Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. REV. 241 (1980). For a study of how businessmen actually work out their disputes see Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Both Professor Macauly and Professor Macneil contributed to a symposium published by the *Wisconsin Law Review*. *See* Macauly, *An Empirical View of Contract*, 1985 WIS. L. REV. 465; Macneil, *Relational Contracts: What We Do and Do Not Know*, *id.* at 483.

162. *See e.g.*,, National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, 433-34 (1884); Semon Bache & Co. v. Coppes, Zook & Mutschler Co., 35 Ind. App. 351, 355-56, 74 N.E. 41, 42-43 (1905); Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346, 350, 86 N.W. 344, 346 (1901); Cincinnati, S. & C. R.R. v. Consolidated Coal & Mining Co., 8 Ohio Dec. Reprint 365, 367-82 (Cincinnati Super Ct. 1882), *rev'd*, 9 Ohio Dec. Reprint 15 (Hamilton Dist. Ct. 1883), *aff'd*, *id.* at 15 n. † (1887).

163. For a case in which the court distinguished a requirements contract from the speculation involved in a grain deal, see Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N.E. 774 (1895).

good faith and therefore could not enforce the contract.[164] The moral opprobrium attached to a pure seeker of profit (who produced nothing) manifested itself in holdings that restricted requirements to actual needs for business.[165] The effect of that limitation was that neither party would be allowed to reap substantial profits without sharing them with the other party.

By so restricting parties to open-term contracts, the courts effected a compromise between traditional and modern values. The courts allowed commercial practice to develop according to the needs of the market; but they insisted that the development be mediated by values other than those of commerce. In the end, then, both society and its law adapted to uncertainty by turning to embrace it. Sarah Orne Jewett's well-read sea captain was correct in his observation: "Certainty, not conjecture is what we all desire[d]." But, as he noted, the desire had long been unful-

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164. *See, e.g.*, Laclede Constr. Co. v. T.J. Moss Tie Co., 185 Mo. 25, 84 S.W. 76 (1904); New York Cent. Iron Works Co. v. United States Radiator Co., 174 N.Y. 331, 66 N.E. 967 (1903); Asahel Wheeler Co. v. Mendleson, 180 A.D. 9, 167 N.Y.S. 435 (1917); Moore v. American Molasses Co., 106 Misc. 263, 174 N.Y.S. 440 (Sup. Ct. 1919). For similar reasoning about the conduct of the seller in an output contract, see Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 F. 298, 303 (6th Cir. 1903).

165. *See, e.g.*, Manhattan Oil Co. v. Richardson Lubricating Co., 113 F. 923, 925 (2d Cir. 1902); American Trading Co. v. National Fibre & Insulation Co., 31 Del. 65, 84-85, 111 A. 290, 298 (Super. Ct. 1920); Scott v. T.W. Stevenson Co., 130 Minn. 151, 153 N.W. 316 (1915). For a discussion of the diverse conclusions reached by the courts, see Havighurst & Berman, *supra* note 75. The moral sense also revealed itself in the many cases dealing with jobbers, who had no established business but served only as middlemen, able to increase or decrease their requirements according to the market. *See, e.g.*, Crane v. C. Crane & Co., 105 F. 869, 872 (7th Cir. 1901) (contract with retail merchant lacks mutuality); Higbie v. Rust, 211 Ill. 333, 337, 71 N.E. 1010, 1011 (1904) (contract lacks mutuality); Saginaw Medicine Co. v. Dykes, 210 Mo. App. 399, 405, 238 S.W. 556, 557 (1922) (contract with door-to-door salesman lacks mutuality); Jackson v. Alpha Portland Cement Co., 122 A.D. 345, 348-49, 106 N.Y.S. 1052, 1054-55 (1907) (contract with retail dealer lacks mutuality). *But see* T.W. Jenkins & Co. v. Anaheim Sugar Co., 237 F. 278 (S.D. Cal. 1916), *rev'd*, 247 F. 958 (9th Cir. 1918), *cert. denied*, 257 U.S. 659 (1922) (district court held agreement lacking in mutuality because buyer was a wholesale dealer who could alter requirements; court of appeals reversed, holding that there was a presumption of integrity of conduct); Fontaine v. Baxley, Boles & Co., 90 Ga. 416, 426, 17 S.E. 1015, 1018 (1892) (contract in which manufacturer agreed to supply all railroad ties that middleman might sell enforced because of past performance and middleman's reliance); Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory, 189 A.D. 843, 847-48, 179 N.Y.S. 271, 273 (1919), *rev'd*, 231 N.Y. 459, 132 N.E. 148 (1921). Not all decisions were alike. When a requirements contract stated both minimum and maximum quantities, one court permitted the buyer to order both for resale and for its own needs, so long as the orders were within the limits set by the contract. Aetna Explosives Co. v. Diamond Alkali Co., 277 Pa. 392, 121 A. 201 (1923).

filled because people had "not looked for truth in the right direction."[166]

166. S. JEWETT, *supra* note 46, at 23; *cf.* 3 A. CORBIN, CORBIN ON CONTRACTS § 609, at 689 (1960) ("[C]ertainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it."); F. KERMODE, *supra* note 47, at 97 ("The very locus of human uncertainty, henceforth to be thought of not as an imperfection of the human apparatus but part of the nature of things, a condition of what we may know."); Bradbury & McFarlane, *supra* note 1, at 48 (characteristic of modernism is "to see . . . uncertainty as the only certain thing"); Gilmore, *supra* note 3, at 442 ("change is our only constant"); Peters, *Grant Gilmore and the Illusion of Certainty*, 92 YALE L.J. 8 (1982).