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THE ANATOMY OF A LEADING CASE: *LAWRENCE V. FOX* IN THE COURTS, THE CASEBOOKS, AND THE COMMENTARIES

M.H. Hoefflich* and E. Perelmuter**

I. THE ORIGIN OF THE "LEADING CASE"

In spite of the wide diversity of training, practice, and location of lawyers throughout the United States, virtually all share one experience: the standard core curriculum of the first year of law school taught by the case method. The extent to which that experience in parsing cases in contracts, torts, and property shapes the American legal mentality is open to debate, but it undeniably has an impact. The first-year experience socializes law students in the culture of the law. During this period, students learn the language of the law and the ways that lawyers think. During this period, too, students absorb certain basic notions about legal analysis and the shape of the legal system, and begin to view the world as common lawyers. Included among these basic notions, the "conventional wisdom" of basic law training, is the concept of the "leading case." This Article explores the notion of the leading case, and places the concept in an historical and jurisprudential framework.

Jurisprudentially, the idea of a leading case derives from a fundamental tenet of the Langdellian approach to the science of

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law.¹ The Langdellian approach viewed cases as reasoned essays in deductive logic. On this model, a judge is faced by a set of facts that gave rise to a dispute requiring resolution. The judge's role is to analyze those facts, order them so that he may apply underlying "principles of law," and deduce the proper resolution according to those principles.

The learning process is but a mirror image of this formalistic view of judicial action. Theoretically, the law student confronts a reasoned, deductive opinion encompassing both law and fact. The student must separate out relevant facts and order them in an approximation of historical accuracy. The student must then isolate the facts upon which the decision has turned and derive the more general underlying principle from the facts and the statement of the specific rule applied. The student of law is thus like the student of physical science. Both gather the data of reality, detect a pattern therein, and discover the fundamental principles upon which those patterns are constructed.

Of course, many cases involve the same underlying principles with only minor variations. In order to choose those cases that will be included in Langdellian teaching materials, like casebooks, criteria beyond the simple provision of facts and rules of law must be developed.² The principal criterion is clarity of thought and exposition. Generally, authors will choose cases that are sufficiently well-written so that students can understand them. A second criterion is simplicity. A case with exceptional or complex facts that confound the "pure" principles will

1. C.C. Langdell was born in New Hampshire on May 22, 1826. He attended Phillips Exeter, Harvard College, and Harvard Law School, where he was an assistant to Theophilus Parsons during the period in which Parsons was writing his *Law of Contracts* (published 1853-55). Langdell moved to New York City in 1854 and began to practice law. He was not a good trial lawyer but was known as a superb researcher. In 1870, Charles Eliot, then President of Harvard, at the urging of several leading members of the Bar, appointed Langdell to be Dane Professor and Dean at the Harvard Law School. In 1871, Langdell published his *A Selection of Cases on the Law of Contracts*, the first American casebook. As a result of Langdell's efforts, and those of his protégé, James Barr Ames, the case method of legal education came to predominate first at Harvard and, eventually, throughout the United States. Among the many biographical sketches of Langdell, see especially that by James Barr Ames in 8 W. LEWIS, *GREAT AMERICAN LAWYERS* (1909).

2. One of the great puzzles in relation to Langdell himself is how he chose cases for his casebooks. He seems to have used certain basic rules. For example, Langdell always chose an English case to illustrate a point, if possible. If there was no English case in point, he chose a case from Massachusetts or New York. Since Langdell's time, the preference for English cases has disappeared; cases from the United States have become the norm. Perhaps the greatest change in Langdellian casebooks was initiated by Karl Llewellyn in his casebook on sales. The inclusion of nondecisional materials, a fact perhaps explained by Llewellyn's interest in statutory as well as case materials, came to be accepted as the norm.

be undesirable. Ideally, a case chosen for a casebook presents only a few simple rules, easily discovered. Finally, tradition is significant.³ Casebook authors choose cases based upon their own education and practice and upon what earlier writers have done. The origin of the "leading case" derives from these criteria. A "leading case" is essentially a case that has become traditional. It is a case that most casebooks in a field utilize, often in extenso. As such, a leading case may have enormous impact on the shape of the law, because most lawyers learn the law through such cases.

The Langdellian method and the concept of a leading case are, in many respects, merely practical manifestations of legal formalism. The formalistic movement, as it developed in law during the nineteenth century, was characterized by a tendency to view legal development and decision-making processes exclusively in terms of abstract principles and ancillary rules. Legal reasoning involved only reasoning from established principles. Empirical data, nonlegal motivations, and nondeductive reasoning were all excluded from the legal process.⁴ The casebook method of teaching was consistent with this approach to law. A leading case in this formalistic context was a case wherein a judge clearly expounded a legal principle or set of principles as applied to a particular fact pattern. In short, the leading case was an opinion that utilized a logical process to reduce abstract principles to concrete decisions.

Although legal formalism and the Langdellian method have both encountered substantial and continuing challenge,⁵ the casebook continues to be a mainstay of legal training. Law professors, law students, and lawyers continue to speak of leading cases and "black letter" law. An examination, however, of particular leading cases and their distribution in both casebooks and judicial opinions can provide some salutary, if surprising, revelations. One case that provides a valuable insight into both the Langdellian method and legal formalism is *Lawrence v. Fox*,⁶ the leading case on the right of a third party to sue on a promise in a commercial context.

3. See Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1438 (1987).

4. See Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 119-21 (1986).

5. From the beginning, there were holdouts against Langdellianism; see R. STEVENS, LAW SCHOOL 73-91 (1983).

6. 20 N.Y. 268 (1859).

II. *LAWRENCE V. FOX* AS A LEADING CASE

The facts in *Lawrence v. Fox* are almost paradigmatic.⁷ The majority opinion is a model of extreme formalism tempered by a sense of justice. The dissent carries formalism to its logical extreme. Thus, superficially at least, *Lawrence v. Fox* is a perfect leading case.

The facts of *Lawrence v. Fox* are simple. Fox borrowed \$300 from Holly, who, in turn, owed \$300 to Lawrence. At the time Holly loaned the money to Fox, Fox promised to pay Lawrence in the same amount on the following day. On that day, however, Fox did not repay Lawrence. Holly, meanwhile, disappeared from the annals of legal history.

Lawrence brought suit against Fox in the Superior Court of the City of Buffalo. The case was tried to a jury, which returned a verdict for the plaintiff. Fox appealed the jury's decision to the New York Court of Appeals, which rendered its verdict in 1859. Justice Gray, writing for the majority, composed his opinion in formalistic style. Essentially, the question at issue was whether Lawrence had a cause of action against Fox for the amount owed him by Holly, an amount that Fox had promised Holly he would pay. Outwardly, the opinion is a model of deductive reasoning. After disposing of several minor evidentiary issues, Justice Gray turned his attention to two of the basic tenets of nineteenth-century contract law. First, was there adequate consideration supporting Fox's promise to Holly? Second, did adequate privity exist to create an enforceable contract?

As to the issue of the adequacy of consideration to support a valid contract, Justice Gray accepted the principle sacred to nineteenth-century legists that no action could be maintained without consideration. Gray, however, found that under *Farley v. Cleveland*,⁸ a New York case decided a quarter century before, there was consideration in the transaction. Gray recited the facts of *Farley v. Cleveland* in an effort to demonstrate their similarity to the facts of *Lawrence v. Fox*, and then stated simply that "a promise in all material respects like the one under consideration was valid" under the doctrine of *Farley*.⁹ Interest-

7. For an interesting discussion of the background of the third-party beneficiary doctrine and the history of the case of *Lawrence v. Fox*, see Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1111, 1116-39 (1985).

8. 4 Cow. 432 (N.Y. 1825).

9. *Lawrence v. Fox*, 20 N.Y. at 270.

ingly, Gray's opinion does not mention two crucial points about *Farley*. First, in *Farley* the Court assumed but did not decide that a cause of action would lie on the facts, because the case concerned a separate issue regarding the applicability of the New York Statute of Frauds. Second, in *Lawrence v. Fox*, as in *Farley*, there was no evidence of any bargained-for exchange between the parties to the suit, the traditional concept of consideration in Anglo-American law.¹⁰

It was precisely during the nineteenth century that the doctrine of consideration came to play an overweening role in Anglo-American contracts law. During this period, the full notion of an exchange relationship with interparty bargaining came to be seen as a prerequisite for a valid contract. Justice Gray's statements as to the consideration requirement in *Lawrence v. Fox* are a model of judicial obfuscation. There is no attempt to fit the fact pattern within the abstract principle. Rather, Gray has recourse to the expedient of citing precedent. Gray simply states that on similar facts consideration was held to be present in *Farley*, and that this had been the "settled" law of New York for a quarter century. In fact, Gray pulled a hat trick—he acknowledged the general principle and found it satisfied, without analysis or reasoning or basis in the facts. Gray, of course, never mentioned that the precedent did not, in fact, establish the point.

On the issue of privity, the other cornerstone of classical nineteenth-century contracts theory, Justice Gray again resorted to the expedient of simply citing a prior case as precedent. Indeed, Gray's citation of *Schermerhorn v. Vanderheyden*¹¹ was, in many ways, even more disingenuous than his citation to *Farley*. Gray stated:

As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it."¹²

10. On the history of consideration, see ASS'N AM. LAW SCHOOLS, SELECTED READINGS ON THE LAW OF CONTRACTS 320-597 (1931).

11. 1 Johns. 139 (N.Y. 1806).

12. *Lawrence v. Fox*, 20 N.Y. 268, 271 (1859) (quoting *Schermerhorn*, 1 Johns. at 140).

The difficulty with this citation, however, is that both *Dutton v. Poole*,¹³ the English case alluded to, and *Schermerhorn v. Vanderheyden* involved promises among close relatives and were thus considered to be exceptions to the general requirement of privity among the parties.

In fact, *Lawrence v. Fox* departed significantly from nineteenth-century contract doctrine. The case represented the first time an American court permitted a third-party beneficiary to recover in a commercial context.¹⁴ Regardless of the wisdom of the result, the majority opinion written by Gray provides a fascinating example of how a judge, bowing to the institutional pressures favoring formalism, could construct a seemingly reasoned opinion that actually was not reasoned at all. Gray hid behind the forms and manipulated the formalistic style so as to give the appearance of a principled, doctrinal analysis.

If this evaluation of Gray's opinion seems rather harsh, it is nevertheless justified in light of both Judge Comstock's dissent and the final lines of Gray's opinion that respond to this dissent. Comstock, a judge who otherwise appears to have left no mark, wrote a dissent that is a model of close doctrinal analysis and extreme formalism. His arguments were simple. He, like Gray, began with the premise that an action in contract requires privity and consideration. Unlike Gray, however, he found neither present in the facts of *Lawrence v. Fox*: "The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject."¹⁵

Justice Comstock delivered a devastating attack on Gray's opinion. The dissent began with general principles, and then analyzed their application in the precedents. Comstock recounted the facts of *Farley* and *Schermerhorn* and properly distinguished them from the facts in *Lawrence*. He concluded his argument by demonstrating that cases permitting a third party to sue on a contract absent the general requirements of privity and consideration "belonged to exceptional classes."¹⁶ Because the facts of *Lawrence v. Fox* did not fit within any of these recognized exceptions, no action should lie. As an essay in deductive

13. 83 Eng. Rep. 523 (1677).

14. See *Waters*, *supra* note 7, at 1111-12.

15. 20 N.Y. at 275 (Comstock, J., dissenting).

16. *Id.* at 281.

logic and formal case analysis, Comstock's dissent is irreproachable.

Gray's response to Comstock's dissent is, in many respects, one of the most interesting judicial pronouncements of the nineteenth century. Gray's appeal to precedent and tradition and his less than wholly satisfactory analysis could not withstand Comstock's attack. Thus, at the very end of his majority opinion Gray allowed the veil of formalism to fall away and appealed to justice: "[I]f . . . it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), *the effort should not be made in the face of manifest justice.*"¹⁷ In these final lines Gray abandoned formalism for the "grand style" of reasoning and discourse loved by Llewellyn.¹⁸ When the choice came down to one of critical application of the rules versus "manifest justice," Gray (and the other members of the New York Court of Appeals, with the exception of Comstock) chose justice.

III. LAWRENCE V. FOX IN THE CASEBOOKS

Lawrence v. Fox highlights two conflicting approaches: formalism and the "grand style." The case shows formalism at both its worst and best, illustrating the degree to which a judge will bow to institutional pressures to conform, even in the "face of manifest justice." Substantively, *Lawrence v. Fox* is also a landmark case in that it established for the first time the right of a third party to sue on a contract in a commercial context. Doctrinally, however, the case is rather difficult. Because of Gray's difficulties in reaching what he considered the right result, the majority opinion is muddled and does not exemplify clarity of thought or felicity of language. Indeed, Gray's opinion is far more interesting jurisprudentially than precedentially. *Lawrence v. Fox* is, in fact, a difficult precedent because the case is built on a foundation of misconstruction and false interpretation. Thus the extent to which *Lawrence v. Fox* has become a leading case in the development of third-party beneficiary theory is quite remarkable.

17. *Id.* at 275 (emphasis added).

18. On Llewellyn and the "grand style," see K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); see also W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

This Part of the Article presents an analysis of the use of *Lawrence v. Fox*¹⁹ in contracts casebooks from Langdell's classic *Cases on Contracts*²⁰ to Fessler and Loiseaux's *Contracts: Morality, Economics and the Marketplace*.²¹ In presenting this analysis of casebooks published during a 103-year period, I will examine why *Lawrence v. Fox* was used to illustrate third-party beneficiary theory at the expense of other seemingly more worthy cases. I will further contend that these casebooks played a prominent if not principal role in the ultimate triumph of the third-party beneficiary doctrine.²²

Langdell's *Cases on Contracts* includes no American cases regarding third-party rights. Langdell cites, without comment, the major English cases extending from *Dutton v. Poole*²³ and *Bourne v. Mason*²⁴ to *Tweddle v. Atkinson*.²⁵ *Lawrence v. Fox* made its first casebook appearance in Samuel Williston's 1894 *Cases on Contracts*.²⁶ In the first edition of Williston's casebook, it is one of seven cases on third-party rights, none of which is English. These seven cases include a decision of the U.S. Supreme Court,²⁷ two Massachusetts decisions,²⁸ and one Wisconsin decision.²⁹

Why did Williston choose to include *Lawrence v. Fox* in his casebook? The structure of the chapter suggests an answer. Massachusetts law followed English law on the question of third-party rights. Thus, after the decision in *Tweddle v. Atkinson*,³⁰ Massachusetts courts adopted the general rule that third parties could not enforce promises.³¹ In contrast, New York, fol-

19. See *supra* note 14 and accompanying text.

20. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879). Langdell did not use *Lawrence v. Fox* in his casebook. It first appeared in 1894. See *infra* note 26 and accompanying text.

21. D. FESSLER & P. LOISEAUX, CONTRACTS: MORALITY, ECONOMICS AND THE MARKETPLACE (1982).

22. This conclusion differs from Professor Waters's views on the development of third party beneficiary doctrine. Professor Waters ignores the influence of casebooks and argues that Arthur Corbin was principally responsible for the widespread adoption of the doctrine. See Waters, *supra* note 7, at 1172.

23. C. LANGDELL, *supra* note 20, at 170 (citing 2 Levinz 210 (1677)).

24. *Id.* (citing 1 Ventris 6 (Q.B. 1669)).

25. *Id.* at 174 (citing 1 Best & Smith 393 (Q.B. 1861)).

26. S. WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS 342 (1894).

27. National Bank v. Grand Lodge, 98 U.S. 123 (1878).

28. Borden v. Boardman, 157 Mass. 410, 32 N.E. 469 (1892); Exchange Bank v. Rice, 107 Mass. 37 (1871).

29. Bassett v. Hughes, 43 Wis. 319 (1877).

30. 1 Best & Smith 393 (1861).

31. See Williston, *Contracts for the Benefit of a Third Person*, 15 HARV. L. REV. 767, 778-79 (1902).

lowing *Lawrence v. Fox*, generally permitted such suits. Thus, by publishing Massachusetts and New York cases, Williston showed the two primary legal trends in U.S. jurisdictions. Williston also included *Bassett v. Hughes*,³² decided by the Wisconsin Supreme Court in 1877, in order to demonstrate how "frontier" jurisdictions decided such cases. Significantly, Williston appended lists of cases in other jurisdictions on this same point. Obviously, Williston made the decision to feature the two opposing trends from New York and Massachusetts. As a result, he was compelled to cite *Lawrence v. Fox* because later New York cases depended upon it.

In this context, it is interesting to note how succeeding casebooks cited *Lawrence v. Fox*. During the period of 1879 to 1900, eight casebooks on contracts spanning a wide geographic area were published. After the appearance of Williston's casebook, Huffcut and Woodruff was published in 1894,³³ Hopkins in 1896,³⁴ Pattee in 1896,³⁵ Keener in 1898,³⁶ Ashley in 1899,³⁷ the second edition of Huffcut and Woodruff in 1900.³⁸ Huffcut taught at Cornell, Pattee at Minnesota, Hopkins was an employee of West Publishing, Keener taught at Columbia, Ashley at New York University, and Woodruff first at Stanford and then at Cornell. Huffcut and Woodruff attended Cornell, Pattee attended Iowa, Keener attended Harvard, and Ashley attended Columbia.

Of the six casebooks published between 1894 and 1900 all but one printed *Lawrence v. Fox*.³⁹ Even more interesting is the general structure of each of the chapters containing the case in succeeding books. Huffcut and Woodruff included five cases: *Lehow v. Simonton*,⁴⁰ a Colorado case; *Lawrence v. Fox*,⁴¹ *Bassett v. Hughes*,⁴² *Borden v. Boardman*,⁴³ and *Wood v. Moriarty*,⁴⁴ a Rhode Island case. Thus, Huffcut's casebook utilized three of the five cases printed by Williston, but added cases from Colorado and Rhode Island. Hopkins included only two cases, *Law-*

32. 43 Wis. 319 (1877).

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

34. E. HOPKINS, HOPKINS' SELECTED CASES ON THE LAW OF CONTRACTS (1896).

35. W. PATTEE, ILLUSTRATIVE CASES IN CONTRACTS (2d ed. 1896).

36. W. KEENER, CASES ON CONTRACTS (1898).

37. C. ASHLEY, CASES ON CONTRACT (2d ed. 1899).

38. E. HUFFCUT & E. WOODRUFF, AMERICAN CASES ON CONTRACT (2d ed. 1900).

39. The sole exception was W. PATTEE, *supra* note 35.

40. 3 Colo. 346 (1877).

41. 20 N.Y. 268 (1859).

42. 43 Wis. 319 (1877).

43. 157 Mass. 410, 32 N.E. 469 (1892).

44. 15 R.I. 518, 9 A. 427 (1887).

rence v. Fox and *Exchange Bank of St. Louis v. Rice*,⁴⁵ both also in Williston. Keener, in his 1898 casebook, included a far greater selection, twenty-three cases in all, of which three were English,⁴⁶ nine were from New York,⁴⁷ two were from Pennsylvania,⁴⁸ one was from Iowa,⁴⁹ four were from Massachusetts,⁵⁰ one was from Illinois,⁵¹ one was from Rhode Island,⁵² one was from Minnesota,⁵³ and one was from the U.S. Supreme Court.⁵⁴ Ashley included only five third-party cases in his 1898 casebook: two from England,⁵⁵ one from Massachusetts,⁵⁶ from New York,⁵⁷ and one from Illinois.⁵⁸ The second edition of Huffcut and Woodruff included twelve cases: one from Colorado,⁵⁹ from New York, including *Lawrence v. Fox*,⁶⁰ one from Wisconsin,⁶¹ two from Rhode Island,⁶² one from North Carolina,⁶³ two from New Jersey,⁶⁴ one from Massachusetts,⁶⁵ and one case from a federal court.⁶⁶

45. 107 Mass. 37 (1871).

46. *Tweddle v. Atkinson*, 1 Best & Smith 393 (1861); *Price v. Easton*, 4 Barnewell & Adolphus 433 (1833); *Dutton v. Poole*, 83 Eng. Rep. 523 (1677).

47. *Durnherr v. Rau*, 135 N.Y. 219, 32 N.E. 49 (1892); *Gifford v. Corrigan*, 117 N.Y. 257, 22 N.E. 756 (1889); *Wheat v. Rice*, 97 N.Y. 296 (1884); *Todd v. Weber*, 95 N.Y. 181 (1884); *Little v. Banks*, 85 N.Y. 258 (1881); *Vrooman v. Turner*, 69 N.Y. 280 (1877); *Devlin v. Mayor of New York*, 63 N.Y. 8 (1875); *Kelley v. Roberts*, 40 N.Y. 432 (1869); *Lawrence v. Fox*, 20 N.Y. 268 (1859).

48. *Adams v. Kuehn*, 119 Pa. 76, 13 A. 184 (1888); *Campbell v. Lacock*, 40 Pa. 448 (1861).

49. *Davis v. Clinton Water Works Co.*, 54 Iowa 59, 6 N.W. 126 (1880).

50. *Borden v. Boardman*, 157 Mass. 410, 32 N.E. 469 (1892); *Saunders v. Saunders*, 154 Mass. 337, 28 N.E. 270 (1891); *Marston v. Bigelow*, 150 Mass. 45, 22 N.E. 71 (1889); *Mellen v. Whipple*, 67 Mass. (1 Gray) 317 (1854).

51. *Bay v. Williams*, 112 Ill. 91 (1884).

52. *Wood v. Moriarty*, 15 R.I. 518, 9 A. 427 (1887).

53. *Barnes v. Helka Fire Ins.*, 56 Minn. 38, 57 N.W. 314 (1893).

54. *National Bank v. Grand Lodge*, 98 U.S. 123 (1878).

55. *Tweddle v. Atkinson*, 1 Best & Smith 393 (Q.B. 1861); *Dutton v. Poole*, 83 Eng. Rep. 523 (1677).

56. *Marston v. Bigelow*, 150 Mass. 45, 22 N.E. 71 (1889).

57. *Buchanan v. Tilden*, 158 N.Y. 109, 52 N.E. 724 (1899); *Lawrence v. Fox*, 20 N.Y. 268 (1859).

58. *Bay v. Williams*, 112 Ill. 91 (1884).

59. *Lehow v. Simonton*, 3 Colo. 346 (1877).

60. In addition to *Lawrence v. Fox*, the authors included *Buchanan v. Tilden*, 158 N.Y. 109, 52 N.E. 724 (1899), and *Sullivan v. Sullivan*, 161 N.Y. 554, 56 N.E. 116 (1900).

61. *Bassett v. Hughes*, 43 Wis. 319 (1877).

62. *Adams v. Union R.R.*, 21 R.I. 134, 42 A. 515 (1899); *Wood v. Moriarty*, 15 R.I. 518, 9 A. 427 (1887).

63. *Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 234, 32 S.E. 720 (1899).

64. *Economy Bldg. & Loan Ass'n v. West Jersey Title & Guarantee Co.*, 64 N.J.L. 27, 44 A. 854 (1899); *Whitehead v. Burgess*, 61 N.J.L. 75, 38 A. 802 (1897).

65. *Borden v. Boardman*, 157 Mass. 410, 32 N.E. 469 (1892).

66. *Boston Safe-Deposit & Trust Co. v. Salem Water Co.*, 94 F. 238 (1899).

An examination of the casebooks published between 1895 and 1900 reveals several interesting points. First, *Lawrence v. Fox* was clearly a "leading case" by 1900, having been cited in six out of eight books, and six out of seven that included a section on third-party rights. After Williston, every casebook with a section on third-party beneficiaries included this case. No other case approached this frequency of printing. Several, including *Dutton v. Poole*⁶⁷ and *Borden v. Boardman*,⁶⁸ appear in three casebooks, but not more.

Equally interesting is the fact that, while the citation of *Lawrence v. Fox* by Williston made sense structurally as the beginning of one of the two trends in American case law, there is no such structural justification for the case's appearance in later books. Furthermore, it is difficult to see the logic behind the choice of other cases. For example, Huffcut and Woodruff, both trained and teaching at Cornell, included few New York cases in their sections on third-party rights. Similarly Keener, trained at Harvard and teaching at Columbia, though including a significant number of New York cases, also included a large number of cases from other, nontraditional jurisdictions.

Overall, it appears that in the period prior to 1900 only *Lawrence v. Fox* became preeminent in the third-party beneficiary area. Other cases cited by Williston failed to achieve the popularity of *Lawrence v. Fox* among casebook authors. Considering the difficulty of the case and the conflict between the majority and the dissent in terms of approach, this popularity is rather remarkable. It should be noted, however, that several of the authors disapproved of the majority opinion in *Lawrence v. Fox*. Ashley, in particular, applauded Comstock's dissent as the proper result.⁶⁹

Lawrence v. Fox remained a leading case in succeeding decades as well.⁷⁰ *Lawrence v. Fox* appeared in all six casebooks published between 1913 and 1925.⁷¹ *Borden v. Boardman*,⁷² the

67. 83 Eng. Rep. 523 (1677).

68. 157 Mass. 410, 32 N.E. 469 (1892).

69. See C. ASHLEY, *supra* note 37, at 133.

70. For a general discussion of the status of contracts scholarship during the period 1870-1930, see Farnsworth, *supra* note 3, at 1406-26.

71. These six casebooks are: A. CORBIN, *CASES ON THE LAW OF CONTRACTS* (1921); G. COSTIGAN, *CASES ON THE LAW OF CONTRACTS* (1921); E. HUFFCUT & E. WOODRUFF, *SELECTED CASES ON THE LAW OF CONTRACTS* (2d ed. 1925); W. KEENER, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1914); A. THROCKMORTON, *ILLUSTRATIVE CASES ON CONTRACTS* (1913); and S. WILLISTON, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1922).

72. 157 Mass. 410, 32 N.E. 469 (1892).

Massachusetts case first cited by Williston, also became a leading case at this time, appearing in five of the six books.⁷³ During this period, too, more books began to appear from outside the elite eastern circle. Throckmorton, educated at Washington and Lee and teaching at Indiana, published his *Illustrative Cases on Contracts* in 1913.⁷⁴ It included only *Lawrence v. Fox* and *Borden v. Boardman*. Costigan, educated at Nebraska and teaching at Northwestern, published his *Cases on the Law of Contracts* in 1921.⁷⁵ Aside from *Lawrence v. Fox* and *Borden v. Boardman*, Costigan included three English cases,⁷⁶ one other Massachusetts case,⁷⁷ four other New York cases,⁷⁸ a Wisconsin case,⁷⁹ a West Virginia case,⁸⁰ a Missouri case,⁸¹ a New Jersey case,⁸² a Rhode Island case,⁸³ a case from North Carolina,⁸⁴ one from Louisiana,⁸⁵ and one from South Dakota,⁸⁶ as well as a Supreme Court case.⁸⁷ Also during this period, Arthur Corbin of Yale published the first edition of his *Cases on the Law of Contracts*.⁸⁸ Corbin, too, printed *Lawrence v. Fox*, along with twenty other cases. Of these, five were English,⁸⁹ three from New York,⁹⁰ one from Massachusetts,⁹¹ one from Connecticut,⁹² one from Michigan,⁹³ one from Oregon,⁹⁴ two from Wisconsin,⁹⁵ one

73. Only W. KEENER, *supra* note 71, omitted this case.

74. A. THROCKMORTON, *supra* note 71.

75. G. COSTIGAN, *supra* note 71.

76. *Dutton v. Poole*, 83 Eng. Rep. 523 (1677); *Bourne v. Mason*, 1 Ventris, 6 (Q.B. 1669); *Rookwood's Case*, [1590] Croke

77. *Flynn v. North Am. Life Ins. Co.*, 115 Mass. 449 (1874).

78. *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Case v. Case*, 203 N.Y. 263, 96 N.E. 440 (1911); *Gifford v. Corrigan*, 117 N.Y. 257, 22 N.E. 756 (1889); and *Staff v. Bemis Realty Co.*, 111 Misc. 635, 183 N.Y.S. 886 (N.Y. Spec. Term 1920).

79. *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440 (1903).

80. *Jenkins v. Chesapeake & Ohio Ry.*, 61 W. Va. 597, 57 S.E. 48 (1907).

81. *School Dist. v. Livers*, 147 Mo. 580, 49 S.W. 507 (1899).

82. *Whitehead v. Burgess*, 61 N.J.L. 75, 38 A. 802 (1897).

83. *Wood v. Moriarty*, 15 R.I. 518, 9 A. 427 (1887).

84. *Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 234, 32 S.E. 720 (1899).

85. *N.O. St. Joseph's Ass'n v. Magnier*, 16 La. Ann. 338 (1861).

86. *Fry v. Ausman*, 29 S.D. 30, 135 N.W. 708 (1912).

87. *National Bank v. Grand Lodge*, 98 U.S. 123 (1878).

88. A. CORBIN, *supra* note 71.

89. *Tweddle v. Atkinson*, 1 Best & Smith 393 (Q.B. 1861); *Dutton v. Poole*, 83 Eng. Rep. 523 (1677); Anonymous, [1646] Style 6; *Lever v. Heys*, Moore, 550 (K.B. 1599); *Rookwood's Case* [1590] Croke Eliz. 164.

90. *Fosmire v. National Sur. Co.*, 229 N.Y. 44, 127 N.E. 472 (1920); *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Vrooman v. Turner*, 69 N.Y. 280 (1877).

91. *Gardner v. Denison*, 217 Mass. 492, 105 N.E. 359 (1914).

92. *Meech v. Ensign*, 49 Conn. 191 (1881).

93. *Knights of the Modern Maccabees v. Sharp*, 163 Mich. 449, 128 N.W. 786 (1910).

94. *The Home v. Selling*, 91 Or. 428, 179 P. 261 (1919).

95. *Sedgwick v. Blanchard*, 170 Wis. 121, 174 N.W. 459 (1919); *Bassett v. Hughes*, 43 Wis. 319 (1877).

each from South Dakota,⁹⁶ Nebraska,⁹⁷ and Washington,⁹⁸ two from Pennsylvania,⁹⁹ and one from the Supreme Court.¹⁰⁰

By 1925, a number of changes had taken place in both legal academe and the style of casebooks. While *Lawrence v. Fox* continued as the leading case in third-party beneficiary law, law schools spread West and South. Consequently, casebooks became more national and less influenced by the authors' jurisdictions. Nevertheless, of the eleven cases most often cited in casebooks published between 1913 and 1925, four were New York cases,¹⁰¹ three were English decisions,¹⁰² one was a United States Supreme Court decision,¹⁰³ and the others were from Massachusetts,¹⁰⁴ Rhode Island,¹⁰⁵ and South Dakota.¹⁰⁶

The change in the structure of casebook sections on third-party beneficiary theory coupled with the maintenance of *Lawrence v. Fox* as a leading case had significant doctrinal impact. First, the decline in the use of Massachusetts cases is crucial because Massachusetts was the major U.S. jurisdiction that generally prohibited third-party contract actions at common law.¹⁰⁷ Thus, as the casebooks cited Massachusetts cases less frequently and often in connection with English cases, students came to see the New York tradition, begun by *Lawrence v. Fox*, as the "majority view" in the United States. Second, the broadening of the geographical base for cases made the casebooks of the 1913-1925 period more "national" in scope and, as a result, may have diminished attacks on the "Harvard" case study method as irrelevant to lawyers in the Midwest and West.¹⁰⁸

96. *Fry v. Ausman*, 29 S.D. 30, 135 N.W. 708 (1912).

97. *Forburger Stone Co. v. Lion Bonding & Sur. Co.*, 103 Neb. 202, 170 N.W. 897 (1919).

98. *John Horstmann Co. v. Waterman*, 103 Wash. 18, 173 P. 733 (1918).

99. *In re Edmundson's Estate*, 259 Pa. 429, 103 A. 277 (1918); *Jones v. Commonwealth Casualty Co.*, 255 Pa. 566, 100 A. 450 (1917).

100. *National Bank v. Grand Lodge*, 98 U.S. 123 (1878).

101. *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Gifford v. Corrigan*, 117 N.Y. 257, 22 N.E. 756 (1889); *Vrooman v. Turner*, 69 N.Y. 280 (1877); and *Lawrence v. Fox*, 20 N.Y. 268 (1859).

102. *Dutton v. Poole*, 83 Eng. Rep. 523 (1677); *Bourne v. Mason*, 1 Ventris 6 (Q.B. 1669); *Tweddle v. Atkinson*, 1 Best & Smith 393 (Q.B. 1861).

103. *National Bank v. Grand Lodge*, 98 U.S. 123 (1878).

104. *Borden v. Boardman*, 157 Mass. 410, 32 N.E. 469 (1892).

105. *Wood v. Moriarty*, 15 R.I. 518, 9 A. 427 (1887).

106. *Fry v. Ausman*, 29 S.D. 30, 135 N.W. 708 (1912).

107. See A. CORBIN, *CASES ON THE LAW OF CONTRACTS* 991, n.12 (2d ed. 1933).

108. For a further discussion of this point, see *infra* notes 148-50 and accompanying text.

The trends begun before 1925 continued thereafter. Between 1930 and 1939 a number of new editions of existing casebooks as well as entirely new texts appeared.¹⁰⁹ Second editions of Costigan and Corbin were published in 1932 and 1933, respectively,¹¹⁰ and a third edition of Williston was published in 1930.¹¹¹ The Midwest was again well-represented. George Goble, a graduate of Yale and a professor at the University of Illinois, published his *Cases and Materials on Contracts* in 1937.¹¹² George Gardner, a graduate of the University of Illinois teaching at Harvard, published *A Selection of Cases and Materials on the Law of Contracts* in 1939.¹¹³ All of these casebooks included *Lawrence v. Fox*. Of the twelve cases most frequently cited in the five casebooks, four were New York cases,¹¹⁴ three were English cases,¹¹⁵ and one each were from Connecticut,¹¹⁶ Alabama,¹¹⁷ Oregon,¹¹⁸ Minnesota,¹¹⁹ Massachusetts,¹²⁰ and the United States Supreme Court.¹²¹

During the periods 1946-1959 and 1961-1983, the simultaneous trends towards maintenance of *Lawrence v. Fox* as a leading case and the gradual "nationalization" of casebooks continued. During the 1960's and 1970's, *Lawrence v. Fox* truly became a "leading case" in the full sense of that phrase. In Lon Fuller's casebooks, *Lawrence v. Fox* became the first case in the third-party section.¹²² The same was true in Kessler and Gilmore's book,¹²³ in Dawson and Harvey,¹²⁴ and in Farnsworth and Young's casebook.¹²⁵ In fact, by 1980, not only was *Lawrence v.*

109. Farnsworth, *supra* note 3, at 1426-29.

110. A. CORBIN, *supra* note 107; G. COSTIGAN, *CASES ON THE LAW OF CONTRACTS* (2d ed. 1932).

111. S. WILLISTON, *A SELECTION OF CASES ON THE LAWS OF CONTRACTS* (3d ed. 1930).

112. G. GOBLE, *CASES AND MATERIALS ON CONTRACTS* (1937).

113. G. GARDNER, *A SELECTION OF CASES AND MATERIALS ON THE LAW OF CONTRACTS* (1939).

114. *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Gifford v. Corrigan*, 117 N.Y. 257, 22 N.E. 756 (1889); *Vrooman v. Turner*, 69 N.Y. 280 (1877); *Lawrence v. Fox*, 20 N.Y. 268 (1859).

115. *Tweddle v. Atkinson*, 1 Best & Smith 393 (Q.B. 1861); *Dutton v. Poole*, 83 Eng. Rep. 523 (1677); and *Bourne v. Mason*, 1 Ventris 6 (Q.B. 1669).

116. *Schneider v. Ferrigno*, 110 Conn. 86, 147 A. 303 (1929).

117. *Copeland v. Beard*, 217 Ala. 216, 115 So. 389 (1928).

118. *The Home v. Selling*, 91 Or. 428, 179 P. 261 (1919).

119. *Heins v. Byers*, 174 Minn. 350, 219 N.W. 287 (1928).

120. *Gardner v. Denison*, 217 Mass. 492, 105 N.E. 359 (1914).

121. *National Bank v. Grand Lodge*, 98 U.S. 123 (1878).

122. L. FULLER, *BASIC CONTRACT LAW* 531 (1947).

123. F. KESSLER & G. GILMORE, *CONTRACTS, CASES AND MATERIALS* 1119 (2d ed. 1970).

124. J. DAWSON & W. HARVEY, *CONTRACT AND CONTRACT REMEDIES* 1081 (1959).

125. A. FARNSWORTH & W. YOUNG, *CONTRACTS, CASES AND MATERIALS* 1018 (3d ed. 1982).

Fox the only case on third-party beneficiary theory printed or noted in virtually every published contracts casebook, regardless of the author's training or location, it was generally the case used to introduce students to the third-party idea.

Indeed, within the past several decades the doctrine of *Lawrence v. Fox* has won a complete triumph. There are no longer two views on third-party rights. Comstock's dissent has fallen by the wayside in a number of books. By 1930, Williston had dropped the dissent entirely.¹²⁶ All that remained of *Lawrence v. Fox* was an abridged, "cleaned-up" version of Gray's majority opinion. Although Farnsworth and Young included the dissent, they abridged it considerably, omitting the challenge to the logic of Gray's majority opinion.¹²⁷ In short, in the past fifty years, not only has *Lawrence v. Fox* emerged as the leading case on third-party rights in the world of contracts casebooks, it has also been reduced to Gray's opinion, rather than the two opposing opinions of Gray and Comstock.

The century between 1894 and 1984, therefore, witnessed an evolution of contracts casebook treatment of third-party rights. Williston's two-theory approach has disappeared; *Lawrence v. Fox* has become a hoary leading case; and contemporary law students are presented with a view of third-party theory drawn from a host of cases from jurisdictions throughout the United States.¹²⁸ Students learning third-party beneficiary theory quickly come to believe that *Lawrence v. Fox* is and has been the leading case on third-party beneficiary theory since it was decided, and will undoubtedly assume that the case's settled doctrine can be traced in the courts and commentaries as easily as it can be derived from the casebooks. In that they are misled.

IV. LAWRENCE V. FOX IN THE COURTS

If the preeminence of *Lawrence v. Fox* encountered no serious challenge in the casebooks, its fate in the courts and in commen-

126. S. WILLISTON, *supra* note 111, at 354-56.

127. See A. FARNSWORTH & W. YOUNG, *supra* note 125, at 1021-22.

128. For example, in *J. DAWSON & W. HARVEY, supra* note 124, the authors include cases from Minnesota (Jefferson v. Asch, 53 Minn. 446, 55 N.W. 604 (1893)), Washington (Vikingstad v. Baggot, 46 Wash. 2d 494, 282 P.2d 824 (1955)), South Dakota (Fry v. Ausman, 29 S.D. 30, 135 N.W. 708 (1912)), Alabama (Copeland v. Beard, 217 Ala. 216, 115 So. 389 (1928)), New Jersey (Joseph W. North & Son v. North, 91 N.J. Eq. 390, 110 A. 581 (1920)), and various federal courts (Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 F.2d 645 (2d Cir. 1955); Rouse v. United States, 215 F.2d 872 (D.C. Cir. 1954); McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534 (D. Minn. 1943)).

taries was rather different. A survey of contracts cases decided in state courts in New York, Illinois, California, Virginia, and Massachusetts reveals a fascinating tale. Only New York courts cited *Lawrence v. Fox* frequently. In Illinois, California, and Virginia a substantial body of case law grew up around third-party rights. In each jurisdiction one can find leading precedents that adopt the doctrines of *Lawrence v. Fox*. None, however, specifically relies upon the New York case.¹²⁹ the body of case law, while paralleling New York law to some extent, does not look to *Lawrence v. Fox* for specific guidance or authority.

In New York itself, the doctrine of *Lawrence v. Fox* went through periods of expansion and contraction. By 1877, the New York courts had begun to retreat from the then accepted interpretation of *Lawrence v. Fox* that, as a general rule, a third-party beneficiary could sue to enforce a promise. In *Vrooman v. Turner*,¹³⁰ a mortgage case, the Court of Appeals specifically limited the applicability of *Lawrence v. Fox*:

The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. . . . [T]here must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.¹³¹

Ironically, in 1859 the precedents for third-party actions, such as *Dutton v. Poole*, were all noncommercial. The innovation made by *Lawrence v. Fox* was to extend such third-party rights to the commercial context. By 1877, New York courts viewed *Lawrence v. Fox* as authorizing a third-party contract right *only* in the commercial context where there was a preexisting debt at issue. Within eighteen years, *Lawrence v. Fox* changed from a precedent to be reckoned with in New York, to a disfavored case.

129. This conclusion is based upon a Lexis survey of cases in those jurisdictions combined with a survey of cases not on Lexis contained in hard-copy reports.

130. 69 N.Y. 280 (1877).

131. *Id.* at 284-85.

By 1918, however, the pendulum had swung back. In *Seaver v. Ransom*,¹³² the New York Court of Appeals, faced with a third-party suit in the noncommercial context, established a clear division of the law of third-party beneficiary rights. According to the majority opinion in *Seaver*, New York courts recognized third-party contract rights in three contexts: (1) where a debt existed between the promisee and the third-party beneficiary; (2) where the contract was made for the benefit of a close relation; and (3) in certain public-contract cases. The court cited *Lawrence v. Fox*, along with *Farley v. Cleveland* and *Vrooman v. Turner* among others, as examples of cases falling within the first class.¹³³ Thus, by 1918 the New York courts identified *Lawrence v. Fox* as one of a number of cases establishing the principle of third-party contract rights. *Lawrence v. Fox*, however, was once again revered by the Court of Appeals. It was referred to as "the great case of *Lawrence v. Fox*."¹³⁴

Lawrence v. Fox obviously was not an easy case to deal with as precedent. By distorting the concept of privity and consideration, the case established a broad general rule that a third-party claimant could sue on a contract. Yet, the doctrine it laid down was, after a period of some doubt, hailed as progressive. After 1915, the right of third parties to sue in New York was firmly established and strong citations of authority for that proposition nearly always included *Lawrence v. Fox*.

In the courts, therefore, *Lawrence v. Fox* enjoyed a decidedly mixed reception. Virtually no court outside of New York ever cited *Lawrence v. Fox*. Even in New York, *Lawrence v. Fox* was in disfavor until about 1915. Between 1894 and 1918, however, *Lawrence v. Fox* became firmly established as the leading case on third-party contract rights in virtually every published casebook.

V. LAWRENCE V. FOX IN LAW REVIEWS AND TREATISES

Before we can fully assess the significance of *Lawrence v. Fox* in order to discuss the nature of a leading case generally, it is useful to explore one other area of legal literature—the law reviews and the law treatises. Third-party beneficiary theory was the subject of an under-appreciated exchange between Samuel

132. 224 N.Y. 233, 120 N.E. 639 (1918).

133. *Id.* at 237-38, 120 N.E. at 640.

134. *Id.* at 236, 120 N.E. at 640 (emphasis added).

Williston and Arthur Corbin. Not surprisingly, *Lawrence v. Fox* figured prominently in that debate.

In 1902, Samuel Williston published *Contracts for the Benefit of a Third Person* in the *Harvard Law Review*.¹³⁵ In that article, he attempted to set forth the current doctrine regarding third-party contract rights in the United States. Williston, foreshadowing *Seaver v. Ransom*¹³⁶ and the first *Restatement*,¹³⁷ divided the subject into commercial and noncommercial situations. Of the latter he said:

It is in regard to contracts to discharge a debt of the promisee that the greatest confusion prevails. In the first place the intrinsic difficulty of the case is greater than where the third person is the sole beneficiary of the contract. . . . [I]t is in this class of cases that the reasoning of the courts is most artificial. New York by the decision of *Lawrence v. Fox* has done more than any other jurisdictions [sic] to spread and strengthen the theory that a third person can sue on such a contract.¹³⁸

This statement reveals that, to Williston, *Lawrence v. Fox* represented the first in a line of cases expressing a progressive view that granted third-party beneficiaries the right to sue on a contract. He noted in this same article that, by 1902, only a few jurisdictions did not allow such a right.¹³⁹ New York, however, was in the lead. Interestingly, Williston seems to have been undisturbed by Gray's opinion. Williston, the master of the formalistic, technical approach, stated:

Promises for the benefit of a third party must also be distinguished from promises to one who has not given the consideration for the promise. It is laid down in the books that consideration must move from the promisee, and it is sometimes supposed that infringement of this rule is the basis of the objection to allowing an action by a third person upon a promise made for his benefit. Such is not the case. In such promises the consideration does move from the promisee, but the beneficiary who seeks to maintain an action on the promise is not the promisee.

135. Williston, *supra* note 31.

136. 224 N.Y. 233, 120 N.E. 639 (1918).

137. RESTATEMENT (FIRST) OF CONTRACTS §§ 133-47 (1928).

138. Williston, *supra* note 31, at 785 (citation omitted).

139. *Id.* at 780.

The rule that consideration must move from the promisee is somewhat technical, and in a developed system of contract law there seems no good reason why A should not be able for a consideration received from B to make an effective promise to C. Unquestionably he may in the form of a promissory note and the same result is generally reached in this country in the case of an ordinary simple contract.¹⁴⁰

Williston's explanation of the importance of *Lawrence v. Fox* helps explain why it became a leading case during this period. Because Gray refused to be bogged down in a formalistic approach leading to an unfair result, and because he was willing to go further than his contemporaries at an earlier date, the New York cases following *Lawrence v. Fox* came to stand for progressive legal thought. Even with the narrowing of the doctrine during the latter part of the nineteenth century (a contraction illustrated by *Vrooman v. Turner*), the New York cases, at least to Williston, were exemplary. Indeed, Williston's 1902 article may reveal the hidden agendas of the casebook chapters on third-party rights—the attempt to formulate a clear doctrine allowing suits by third-party contract beneficiaries. Williston appended three notes to his article.¹⁴¹ The first lists cases jurisdiction by jurisdiction that allow recoveries by sole beneficiaries. The second lists cases allowing recoveries by beneficiaries owed a debt by a promisee. The third lists cases where mortgagees can sue grantees of mortgagors. Clearly, the purpose of these notes was to indicate that the doctrine of *Lawrence v. Fox* was the majority rule.

Sixteen years after the publication of Williston's article, Arthur Corbin published *Contracts For the Benefit of Third Persons* in the *Yale Law Journal*.¹⁴² Corbin, the antiformalist, also found much of value in *Lawrence v. Fox*, and strongly supported its doctrine:

For a good many years this decision was severely criticised, the critics being obsessed with the idea that privity was logically necessary. Fine distinctions were often drawn so as to avoid following this decision, but in

140. *Id.* at 771 (citations omitted).

141. *Id.* at 804-09.

142. Corbin, *Contracts for the Benefit of Third Persons*, 27 *YALE L.J.* 1008 (1918). For an in-depth discussion of Corbin's lifelong efforts on behalf of the third-party beneficiary rule, see *Waters, supra* note 7, at 1148-72.

spite of some confusion thus caused, the great weight of authority is in harmony with it and a creditor-beneficiary can maintain suit.¹⁴³

Though Corbin and Williston disagreed on many points of contract law, both agreed not only that third-party contract beneficiaries should recover where there was a preexisting debt between promisee and beneficiary, but also that *Lawrence v. Fox* was the leading case on the point. What is fascinating about this view, of course, is that *Lawrence v. Fox* as a leading case was, in fact, virtually a creation of law professors, not judges, except in New York. Moreover, even in New York the status of *Lawrence v. Fox* was not firmly established until the 1918 decision in *Seaver v. Ransom*. Who then, in Corbin's words, "regarded" *Lawrence v. Fox* "as the leading authority"?¹⁴⁴ it was the contracts professors.

In light of the foregoing analysis, it is not surprising that *Lawrence v. Fox* found its way into that quintessential law professors' document, the *Restatement of Contracts*.¹⁴⁵ The concept of "creditor beneficiary" developed in section 133 of the first *Restatement* is a codification of the doctrine of *Lawrence v. Fox* as developed judicially prior to 1933.¹⁴⁶

VI. THE SIGNIFICANCE OF THE LEADING CASE: THE LESSON OF *LAWRENCE V. FOX*

The history given above illustrates how *Lawrence v. Fox* became a leading case and shows what it means to be a leading case. The leading case is, above all, an academic concept that is firmly rooted in the Langdellian legal universe. As such, the concept is of great import jurisprudentially. To understand its significance fully, it is useful to turn to the debate about the nature of casebooks that emerged during the late nineteenth and early twentieth centuries. In this regard, one must turn to an article by Albert Martin Kales, a professor at the University of Chicago. The article was published in the *Harvard Law Review* in

143. Corbin, *supra* note 142, at 1013 (citation omitted).

144. *Id.*

145. RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 137, at § 133.

146. *See id.*

1907 and was entitled *The Next Step in the Evolution of the Case-book*.¹⁴⁷

Kales' article is an attack not on the casebook method but on what he calls the "Harvard method." The Harvard method was, in reality, little more than the emphasis in casebooks on leading cases drawn from "older and more important jurisdictions," rather than upon case law of particular jurisdictions in which law schools were situated.¹⁴⁸ In effect, Kales complained that the casebooks then in use did not prepare law students for practice adequately, for they taught law as doctrine and principle and not as actually practiced. Kales summarized his argument in the following words:

The charge against the present Harvard Law School case-book is that in the older and more important jurisdictions the work of checking up its results with the local law has become an impossibility. It does not merely take time. It can't be done. Life is too short. I venture to assert that to obtain a good working knowledge of the law in such jurisdictions on topics studied in the Harvard Law School case-book, it is necessary carefully to note the actual departures by statute and by decision from the law as taught by the case-book, to supply new topics closely related to the subject-matter of the case-book, to learn the well-settled rules taught by the case-book, or the solution of controverted questions, in terms of the cases of the particular jurisdiction. I do not hesitate to affirm that these steps involve so much labor that the individual student who has mastered the subject-matter of the case-books can no longer do it for the courses or even the majority of those which he studies during three years in a law school.¹⁴⁹

Kales's challenge has been reiterated over the years. His argument illustrates the fundamental division between those who favor "national" law schools and those who believe that law schools ought to cater exclusively to the jurisdictions within which they are located. The Harvard method of casebook writing obviously favors the national approach.

147. Kales, *The Next Step in the Evolution of the Case-book*, 21 HARV. L. REV. 92 (1907).

148. *Id.* at 92.

149. *Id.* at 95.

Eugene Wambaugh, then of the Harvard Law School, enunciated the traditional response to the attack on the "Harvard method" in a postscript to Kales's article. Wambaugh remarked:

It ought to be enough to point out that the lawyers of this country are really not inefficient, and that all of them, whether educated with Harvard case-books or other case-books or treatises, have been trained according to *the theory that American law is essentially one science and that the peculiarities of local decisions are not to be emphasized for students.*¹⁵⁰

Here lies the essential point of difference between Wambaugh and Kales. Kales was convinced, as were the Realists twenty years later, that the peculiarities of local decisions represented the law in action, while to Wambaugh, they were but trivial aberrations. Whether Kales or Wambaugh was correct in his view of law is irrelevant. Rather, an issue raised by their debate and illustrated by the history of *Lawrence v. Fox* is jurisprudentially crucial. The point is that casebooks purport to present a normative view of the law, *not* what law is but what law ought to be. It is here that the hidden agenda of the casebook method and the influence of the concept of the leading case is most important.

Lawrence v. Fox was not a typical mid-nineteenth-century contracts case. It distorted the accepted doctrines of privity and consideration, it misused precedent, and it appealed to a hermetic method beyond literal formalism. At the time it was decided, *Lawrence v. Fox* headed forcefully down a new path. It was a path that courts in other jurisdictions would eventually follow, albeit with different turnings, byways, sideroads, and, perhaps, at a different pace.

The great danger of the Harvard method challenged by Professor Kales was not that it was inefficient pedagogically because it did not teach students the law they needed to practice. The purpose of law school education, as most legal educators agree, is first to teach students to think like lawyers. Substantive education is a goal secondary to that primary purpose. Kales, however, could have leveled a different challenge against the Harvard style casebook—namely that it is really part and parcel of the same movement that led ultimately to the *Restatements*—the belief expressed by Professor Wambaugh that "American law is

150. *Id.* at 118 (emphasis added).

essentially *one science*" and that when students learn that science they learn law as it is. The process by which *Lawrence v. Fox* became a leading case illustrates the power of the casebook. The casebook author who selects cases in a very real sense shapes the future of legal development. Although *Lawrence v. Fox* does not appear frequently in third-party cases decided outside of New York, its ubiquity in both the casebooks and the commentaries ensured that its underlying principles of law would be discovered by generation after generation of law students, and thus would have enormous impact. The career of *Lawrence v. Fox* in the casebooks and the commentaries cannot be ignored, because the eventual triumph of the third-party contract right was due, in some measure, to the inculcation of the *Lawrence v. Fox* doctrine in the law schools.

Lawrence v. Fox is the perfect case to illustrate the full significance of the "leading case" concept because it broke with tradition. Indeed, the judge writing for the majority felt compelled to admit that a more technical reading of the law might yield a different result. Moreover, *Lawrence v. Fox* was neither logically necessary nor problem-free. On the contrary, it was difficult and muddled. That *Lawrence v. Fox* became a leading case despite these factors testifies, one may argue, to the strong desire of Williston, Corbin, and other law professors that its doctrine be established and spread. That courts did not cite *Lawrence v. Fox* by name tells little. That jurisdiction after jurisdiction, as well as the *Restatements*, adopted its doctrine suggests much.

One might object that it is obvious that a casebook betrays the bias of its author. That argument, however, was not made in support of the casebook method of teaching. The casebook in Langdellian theory is but a small laboratory in which a student may discover the underlying doctrines of the science of law. To discover those doctrines as they truly exist, if in fact they exist at all, requires that the casebook reflect the law as it exists and not as the authors believe it ought to be. *Lawrence v. Fox* simply did not represent the law as it existed in 1894 or in 1921. Rather, *Lawrence v. Fox* represented a vision of what the law should be. By becoming a leading case, *Lawrence v. Fox* became a self-fulfilling prophecy and, as such, a silent tool of reform.

CONCLUSION

This Article has argued that there may be much more significance to a leading case than simple educational value. A leading

case is one of legal academe's most effective tools for legal change. The inclusion of a such a case in a casebook and thus in the educational program of novice lawyers creates a precedent stronger than any court can hope to achieve. The establishment of *Lawrence v. Fox* as a leading case in the casebooks and the commentaries and the gradual acceptance of its doctrine over that same period illustrates this process well. The leading case provides an example of the significance of the hidden agendas in law teaching¹⁵¹ and the extent to which legal academe affects the development of the law.

151. Here, of course, one enters the rather murky waters now being explored by members of the Conference on Critical Legal Studies who argue that there are hidden *political* agendas contained in most traditional doctrinal legal scholarship.