

**Court of Appeals**  
*of the*  
**State of New York**

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ACE SECURITIES CORP., Home Equity Loan Trust, Series 2006-SL2,  
by HSBC Bank USA, National Association, solely in its capacity as Trustee  
pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006,

*Plaintiff-Appellant,*

- against -

DB STRUCTURED PRODUCTS, INC.,

*Defendant-Respondent.*

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**APPENDIX TO THE BRIEF OF NEW YORK LAW PROFESSORS  
AS AMICI CURIAE**

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ably, the section was designed to allow courts to yield to what Cardozo had called “urgent or affecting” appeals “ad misericordiam” without the necessity of turning “by indirection” to “manipulation of the rules” of contract law or to “interpretation of language and the like.” At least one court found “the conclusion . . . inescapable” that section 2-302 “simply codified the doctrine [of unconscionability], which was used by the common-law courts to invalidate contracts” that were “‘so monstrous and extravagant that it would be a reproach to the administration of justice to countenance or uphold’” them.<sup>57</sup>

Following its effective date in 1964, lower courts quickly began to rely on section 2-302 and made unconscionability the law of the state. Two cases that soon became leading ones—*Frostifresh Corp. v. Reynoso*<sup>58</sup> and *Jones v. Star Credit Corp.*<sup>59</sup>—held, for example, that excessively high prices were unconscionable. Other cases declared unconscionable contracts with consumers who had limited knowledge of English, contracts giving excessive rights to creditors, and contracts otherwise “placing one party at the mercy of the other.”<sup>60</sup>

The Court of Appeals reacted similarly, although without always mentioning unconscionability or the code. Thus it reiterated the doctrines that a contract could be avoided on the ground of “economic duress or business compulsion” when a party was “forced to agree to it by means of a wrongful threat precluding the exercise of his free will” and that “a drastic provision . . . plac[ing] one party at the mercy of another . . . [would be] against the general policy of the law.” In the end, the court declared that the law had “developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose . . . because of a significant disparity in bargaining power,” and it applied the principle to permit the estate of an eighty-five-year-old nursing home patient to recover property given to the home by the patient before her death and to test separation agreements between spouses “to see to it that they are arrived at fairly and equitably” and that they are not “manifestly unfair to a spouse because of the other’s overreaching.”<sup>61</sup>

#### CONTRACT AND THE BUSINESS COMMUNITY

Arguably the reform agenda had its greatest impact not on law dealing with laborers, consumers, and other underdogs but on contract doctrines affecting dealings among businesspeople. In connection with these doctrines, the conflict between conservatives and reformers focused marginally, if at all, around issues of class, religion, or ethnicity; the conflict was primarily a geographic one, between upstate communities that wanted a body of contract law suited

to face-to-face dealings between inhabitants of small, homogeneous towns, on the one hand, and an urban, downstate constituency that wanted the law to address the more impersonal dealings of the metropolitan and ultimately the global economy, on the other.

Classical contract law, as abstracted by Christopher Columbus Langdell, had been about citizens keeping their word to other fellow citizens who were part of the same homogeneous community. Those who did not keep their word or otherwise settle disputes would lose their trustworthiness, with the result that others in their community would not enter into future business dealings with them and jurors drawn from the community would not believe their testimony about the terms of existing deals. We must understand at the outset, however, that the moral precepts underlying classical contract required only that citizens keep their word toward their equals. The precepts did not require that citizens keep, or even give their word, to outsiders or to their social inferiors. In the classical model, outsiders and inferiors had no credibility with juries. While outsiders with wealth and eminence might protect themselves by resorting to special commercial courts, like those with admiralty or diversity jurisdiction, those who were not equal either did not make contracts or faced the prospect that they could not enforce them.

Within these enforcement parameters, classical contract granted “men of full age and competent understanding . . . the utmost liberty of contracting.” In “a free enterprise system,” in which parties could “protect their own rights and interests and avoid oppressive contracts by seeking bargains elsewhere,” every business entity was “entitled to carry on its affairs and adopt in connection therewith such means of encouraging its business as it . . . [saw] fit.” It was simply not the function of courts “to guarantee every businessman’s success in his enterprise, . . . or to relieve him from contracts freely negotiated, that prove to be onerous. . . . The vitality of our marketplace,” it was thought, was “derived to a great degree from the time-honored caveat that the individual must enjoy the right of ‘freedom of contract.’”<sup>62</sup>

These moralistic precepts underlying classical contract doctrine came under challenge, however, as early as the 1920s. First, as we have just seen, the judiciary developed the doctrine of unconscionability to prevent moneymaking through exploitation of the poor and ill-informed. Even more important, increasing numbers of outsiders and social inferiors began to enter the economic mainstream, to attain political influence, and in larger, urban counties to sit on juries. That made it clear that some juries no longer could be trusted to decide business disputes routinely according to the subjective intentions of a small clique of elite insiders. And once subjective intentions grounded in the shared

moral assumptions and prejudices of a small elite ceased to provide a standard by which businesspeople could predict the meaning that others would attach to their deals, a new paradigm of contract, grounded in more objective standards, became necessary.

With the help of leading legal luminaries, contract law was transformed to accommodate this widening of the economy and society. New York played an especially important role in this transformation. Two New Yorkers, in particular, stand out: Benjamin N. Cardozo, who as a judge of the Court of Appeals in the 1920s wrote a line of pathbreaking contract decisions, and Karl Llewellyn, who as a professor of law at Columbia University drafted Article 2 of the Uniform Commercial Code during the 1940s and early 1950s.<sup>63</sup> Both men were committed to modernizing contract law so as to enable large-scale, urban business and not just a few people who dealt with each other on a face-to-face basis to function efficiently.

Important doctrinal changes began occurring as early as the 1920s. The first change was legislative, in the form of a statute authorizing the remedy of arbitration. The New York courts had begun the 1920s with a strong, common-law-based hostility toward arbitration, which provided an alternative to dispute resolution by local juries.<sup>64</sup> In 1920, however, the legislature enacted the Arbitration Law, which “declare[d] a new public policy, and abrogate[d] an ancient rule,” by thereafter making agreements to arbitrate binding. In an opinion by Cardozo, the Court of Appeals not only sustained the law’s constitutionality but also applied it retroactively to contracts made before the law’s passage in regard to arbitration sought after its passage. Thereafter, arbitration became a routine part of New York contract law, as the courts recognized that to “permit an action at law after the parties have agreed to submit any dispute . . . would be to set at naught the underlying policy which has shaped the growth of arbitration law in this State.” One case several decades later even held an American business to its agreement with an agency of the Soviet government to have disputes arbitrated in Russia, while another invalidated a provision allowing one but not both parties the option of litigating rather than arbitrating disputes.<sup>65</sup>

Further doctrinal changes followed as urban influence on the Court of Appeals increased. Following the election of Cardozo as chief judge in 1926, four of the seven judges on the highest court—Cardozo, Crane, Lehman, and O’Brien—came from the New York City metropolitan region, and three happened to be either Catholic or Jewish. The religion, ethnicity, and geographic origins of the judges mattered: men who represented the city and its social outcasts could no longer accept nineteenth-century Langdellian con-

tract law, which left local juries free to interpret and enforce contracts on the basis of their prejudices against outsiders and those they deemed their social inferiors. Although Protestant, small-town, upstate New York in 1920 still resembled nineteenth-century America and could continue to do business under nineteenth-century Langdellian doctrine, New York City, with its immigrant masses and its national and even international commercial dealings, could not. The city needed a different body of contract law, and as its judges came to dominate the Court of Appeals, they began to give it that new law, including new rules for filling in essential contractual terms left open by the parties, the doctrine of substantial performance, the concept of promissory estoppel, and, finally, some miscellaneous rules dealing with parole evidence and contractual impossibility.

*Filling in Missing Terms.* An important set of rules derived from classic precepts of freedom of contract provided that, if the parties to a contract neglected to specify all the terms of their agreement, their contract would fail for indefiniteness. The classic concept was that judges could enforce only what the parties had stipulated and that, in the absence of key terms, there was nothing to enforce. Of course, parties typically could testify about the substance of apparently missing terms, and juries could fill in those terms on the basis of judgments about the trustworthiness of the parties.

As early as the 1920s, however, the New York courts were routinely declining to honor the classic doctrine. Thereafter, throughout the century, the courts took an approach, later codified in the Uniform Commercial Code, that filled in gaps in agreements by reference to business custom or other objective standards of reasonableness not dependent on ad hoc jury judgments. Requirements contracts, for example, were readily upheld. Other cases similarly determined that, when a contract failed to specify a time for performance, performance had to occur within a reasonable time; that, if a method of performance was unspecified, the method had to be reasonable; and that a failure to specify a rate of interest would result in interest payments at the legal rate. As Judge Cardozo declared in one early case construing a contract clause giving a buyer the “‘privilege . . . to confirm more of the above if’” the seller “‘can get more,’” the clause “was drawn by merchants,” who “reading it would not be doubtful of its meaning. It was meant to accomplish something. We find no such elements of vagueness as to justify the conclusion that in reality it accomplished nothing.” And as Cardozo added, invalidation of a contract for indefiniteness was “at best a last resort.” A half-century later, the Court of Appeals still agreed that “practical business people [could] not be expected to

govern their actions with reference to nice legal formalisms” and hence that “failure to articulate . . . [an] agreement in the precise language of a [Langdellian] lawyer . . . [would] not prevent formation of a contract.”<sup>66</sup>

Although some early cases refused to fix uncertain price terms by reference to outside market standards, others did anticipate the UCC and take even that step.<sup>67</sup> The New York courts also anticipated other important rules subsequently codified in the code reflective of the fact that in “transactions[s] between laymen,” people “used expressions as businessmen understand them,” not as lawyers. Thus as early as the 1920s, the courts, in order to give precise meaning to ambiguous contract provisions, were prepared to receive evidence concerning trade usage and custom, as well as the parties’ course of dealing, both of which were considered to reflect the parties’ practical understanding of the contract’s meaning. Finally, New York judges anticipated the UCC with the rule that all parties were under an obligation of good faith and fair dealing in their performance of their contracts.<sup>68</sup>

*Substantial Performance.* Another significant limitation on freedom of contract is the doctrine of substantial performance. At the outset of the 1920s, this doctrine was in a state of chaos.<sup>69</sup> But then, in 1921, the Court of Appeals took a key step forward when Cardozo wrote the now leading case of *Jacob & Youngs, Inc. v. Kent*. The contract for construction of a country residence called for use of pipe “of Reading manufacture,” but the plaintiff had used different pipe of equal quality. Unfortunately, the deviation was not discovered until the residence was nearly completed, so that replacement of the correct pipe would have “meant the demolition at great expense of substantial parts of the completed structure.”<sup>70</sup>

Reflecting his downstate biases, Cardozo wrote that the “margin of departure within the range of normal expectation upon a sale of common chattels,” such as typically occurred in rural, upstate New York, “will vary from the margin to be expected upon a contract for the construction of a mansion or a ‘skyscraper’ ” in New York City. He also recognized that “substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other.” All his distinctions led to the conclusion that use of the wrong pipe constituted an insubstantial deviation from the terms of the contract and hence that the measure of damages should be “not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing.”<sup>71</sup>

Three judges dissented on grounds of freedom of contract. In their view, the “defendant had a right to contract for what he wanted . . . [and] to get

what the contract called for.” It was no answer that some other kind of pipe, “according to the opinion of the contractor, or experts, would have been ‘just as good, better, or done just as well.’ He agreed to pay only upon condition that the pipe installed were made by that company and he ought not to be compelled to pay unless that condition be performed.”<sup>72</sup> Although Cardozo agreed that the parties were “free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery,” he also appreciated the difficulties that ordinary businesspeople would have functioning under a standard that permitted the favoritism of juries to compel precise performance of contracts. Hence he permitted business convenience to trump freedom of contract as long as the deficiencies of businesspeople were both “trivial and innocent.”<sup>73</sup>

Although the lower courts and, in one case even the Court of Appeals, sometimes took a more cautious attitude toward the doctrine of substantial performance during the 1920s and early 1930s, the trend of decision in cases in which contractual relationships had broken down before completion of performance was to allow those who had provided goods or labor to recover the rough value of what they had provided. Thus the lower courts began to apply a doctrine of substantial performance even in cases involving sales of goods and employment contracts. Ultimately, in sales of goods cases the Uniform Commercial Code made it clear that sellers who tendered less than perfect performance had to be given a reasonable opportunity to cure their imperfect tender. Only in cases involving “a complete failure to perform without either a valid reason for noncompliance or even an attempt to perform” or some other deliberate breach would the doctrine of substantial performance or the analogous UCC doctrine of cure be inapplicable by the second half of the century.<sup>74</sup>

*Promissory Estoppel.* A third doctrine limiting freedom of contract is promissory estoppel. Unlike doctrines dealing with unconscionability, indefinite contract terms, and substantial performance, however, which developed gradually before their codification in the UCC, promissory estoppel quickly came to as full a fruition as it ever would in New York in the leading case of *Allegheny College v. National Chautauqua County Bank*, authored by Cardozo in 1927.<sup>75</sup>

The case involved a written promise by Mary Yates Johnston to bequeath \$5,000 to Allegheny College to fund a scholarship in her name. After she had paid the first \$1,000, which the college set aside as it had promised, Johnston informed the college that she would not pay the remainder of her subscription. Following her death, the college sued for the remaining \$4,000. After both

the trial court and the Appellate Division had denied relief, the case came before the Court of Appeals, where Chief Judge Cardozo reversed and granted judgment for the college.

Much of Cardozo's opinion was devoted to establishing a factual basis for a finding that Johnston's promise was binding because the college had given consideration for it. But Cardozo's effort to fit the transaction "within the mould of consideration as established by tradition" was not especially successful, and he therefore turned to his alternative holding: that "there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel.'" Cardozo cited two recent cases as "signposts on the road," even if not full-fledged precedents.<sup>76</sup>

The earlier of the two cases, *DeCicco v. Schweizer*,<sup>77</sup> involved a promise by a father to pay an annuity to his daughter if she married the man to whom she was already affianced. Her marriage could not be consideration for the promise, however, because she was already under a duty to perform her contract to marry, and it was settled that performance of a preexisting duty could not constitute consideration. Writing for the court, Cardozo had circumvented this difficulty by holding that the consideration for the father's promise was not the daughter's act of marriage but the couple's act. The daughter and her husband-to-be were under no duty to her father to complete their marriage, and thus their act of completing it could constitute consideration for the father's promise to pay. In executing this tour de force, Cardozo did not mention promissory estoppel.

The second case cited in *Allegheny College—Siegel v. Spear & Co.*<sup>78</sup>—was at least slightly more on point. In *Siegel*, the defendant's agent had promised to store the plaintiff's goods without compensation and, in addition, to obtain insurance on the goods. The Court of Appeals found that the plaintiff's delivery of his goods to the defendant's warehouse, after the defendant's promise to obtain insurance, constituted the consideration for the promise and therefore made it binding. Promissory estoppel was again not mentioned, although the argument for the existence of consideration, unlike the argument in *DeCicco*, was so weak that promissory estoppel might have constituted a stronger ground of decision.

Cardozo failed in *Allegheny College* to cite a third recent case, one in which an estoppel had been found. The case, *Lieberman v. Templar Motor Co.*, involved an initial written contract to deliver automobile parts over a period in excess of one year. Later the parties orally modified the contract, which the Court of Appeals, in an opinion by Cardozo, found binding because the parts



in question had no market value and were to be delivered within less than a year from the date of the modification. Cardozo added, moreover, that “assent to new terms of performance, even if invalid as a contract, [would] serve as an estoppel” and, even more significantly, awarded damages for labor and material costs incurred in reliance on the modification.<sup>79</sup>

Directly in point was a fourth case decided before *Allegheny College—Russian Symphony Society v. Holstein*, where the defendant, desiring to help produce the plaintiff’s orchestral concerts, signed a subscription agreement promising to pay \$50 if the expenses of the concerts exceeded the profits. In holding the subscription enforceable, the Appellate Division declared that the “decisions relating to subscription agreements, which . . . become mutually binding when accepted and acted upon, govern in the disposition of this appeal, rather than decisions relating to . . . executory contracts for the sale or purchase of goods.”<sup>80</sup>

Cardozo, of course, did not cite the *Holstein* case in *Allegheny College*, even though he held precisely what *Holstein* had held. After declining to “attempt to say” whether the new doctrine of promissory estoppel had “made its way in this state to such an extent as to permit us to say that the general law of consideration ha[d] been modified accordingly,” Cardozo concluded, “Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions.”<sup>81</sup>

In the decades following *Allegheny College*, the New York courts routinely applied the doctrine of promissory estoppel in charitable subscription cases. There could be little doubt that the “doctrine of estoppel ha[d] been carried to its greatest length” in such cases, where judges had “been zealous to find a consideration,” and that “the trend of judicial decision . . . ha[d] been towards the enforcement of charitable pledges almost as a matter of public policy.” At the same time, however, most judges thought that *Allegheny College* had “extended the doctrine of promissory estoppel only to the law relating to charitable subscriptions” and took the view that they “should go no further.”<sup>82</sup>

Only a few judges took a more expansive view that the *Allegheny College* case “indicate[d] the growth of the judicial process wherein the law enforces the reasonable expectations arising out of conduct.” Meanwhile, the Court of Appeals remained reticent and, in the few cases in which it mentioned either *Allegheny College* or promissory estoppel, it offered conflicting clues about its position. In one case, for example, the court held that a plaintiff who worked as a marketing agent for an association’s products could recover promised sales commissions even though he had never exchanged any promise in return. The

court also cited *Allegheny College*, although on an issue totally unrelated to promissory estoppel. But it did not decide the case on promissory estoppel grounds, holding instead that the plaintiff's labors constituted performance of a unilateral contract in response to the association's offer to pay.<sup>83</sup>

Two decades later, in another case the court again declined an opportunity to apply promissory estoppel in the context of a commercial case. Although three dissenting members of the court cited the *Allegheny College* case, the majority was not prepared so to advance doctrine. In a situation in which an insurance agent, at the request of the defendants, had submitted a plan for insurance on their business, but no insurance had been placed or contract reached, the four-judge majority refused to apply promissory estoppel in a fashion that "would open the door to an entirely new field of liability" and subject parties to contracts to which they had never manifested any agreement.<sup>84</sup>

The court arguably took a small step forward in a 1977 case, where the issue was whether a written contract could be modified by a subsequent oral agreement. A unanimous court held that the state's controlling legislation permitted oral modification in appropriate circumstances and in the alternative declared that under "the principle of *equitable estoppel* . . . a party to a written agreement [who] has induced another's significant and substantial reliance upon an oral modification . . . may be estopped from invoking the statute to bar proof of that oral modification." In so holding, however, the court neither mentioned the doctrine of promissory estoppel nor cited the *Allegheny College* case. It also took the view in another case that "the doctrine of equitable estoppel . . . should be applied with great caution," especially when dealing with realty.<sup>85</sup>

*Allegheny College* thus brought the doctrine of promissory estoppel to the fullest fruition it would achieve in New York. Although occasional attempts were made to extend the doctrine to commercial litigation, both the Court of Appeals and most lower court judges, concerned to protect classical notions of freedom of contract, rejected those attempts. It also should be noted that Karl Llewellyn, as was typically his wont, followed New York law, included no reference to promissory estoppel in Article Two of the UCC, and thus left Cardozo's *Allegheny College* legacy incomplete.

*Miscellaneous Doctrines.* Two final developments, dealing with the parole evidence rule and the doctrine of impossibility, deserve mention. Both developments strengthened and enhanced weapons available to judges for interfering with contractual terms to which parties had agreed.

As early as the 1930s, judges in New York began to feel an "obvious . . . need"

for “liberalizing the rule excluding oral testimony” and to further values other than enforcement of contract terms spelled out by one party. “Particularly in the face of high-pressure salesmanship” and of “contracts of sale . . . furnished on printed forms,” it was all too easy for merchants to “safeguard” their rights “in the printed form” while consumers and others with whom they dealt were exploited because they relied on differing oral representations. Judges needed a device to facilitate modification of printed forms and the like, and hence they altered the parole evidence rule so as to permit nonmerchant parties to prove oral warranties not included in printed forms or to give testimony that they had understood a release complete on its face to be merely partial in its meaning.<sup>86</sup> As Judge Stanley H. Fuld ruled in the 1957 case of *Sabo v. Delman*, where a defendant sought to plead as a defense to a charge of fraud a provision in a written contract that nothing except what was contained in the writing would be binding on either party, enforcement of such clauses would put it in a defendant’s “power to perpetrate a fraud with immunity, depriving the victim of all redress,” simply by virtue of having the “foresight” and the bargaining power “to include a merger clause in the agreement.”

A later case, however, *Dannan Realty Corp. v. Harris*, held that a merger clause containing language that the seller had not made the specific representations on the basis of which the purchaser sued did bar suit, on the ground that any other result would make it “impossible for two businessmen dealing at arm’s length to agree that the buyer [was] not buying in reliance on any representations of the seller as to a particular fact.” With *Sabo v. Delman*, on the one hand, and *Dannan Realty*, on the other, the reform principle of good faith dealing and the classical principle of freedom of contract remained in tension with each other, as the lower courts had to decide whether to read particular merger clauses as fitting within the *Sabo* or the *Dannan Realty* principle.<sup>87</sup>

The final important change was in the doctrine of impossibility. Well before the Uniform Commercial Code provided in section 2-615 for “Excuse by Failure of Presupposed Conditions,” New York courts had also translated the traditional doctrine of impossibility of performance, which had allowed judges to void terms to which parties had agreed only in cases of “the destruction of the means of performance by an act of God, *vis major*, or by law,” into the more serviceable concept of frustration of purpose, which they defined as the occurrence of “a supervening event or circumstance which was not within the contemplation of the parties.”<sup>88</sup> The conceptual shift from impossibility to frustration gave judges a better tool with which to excuse parties from performance of contracts to which they had given their assent if performance became

unusually hard. It thereby undercut, though it surely did not destroy, classic, Langdellian concepts of freedom of contract and brought doctrine more into accord with businesspeople's practical expectations.

When we look back over the changes in contract law noted in the pages above, it seems clear that businesspeople were the beneficiaries of most of them. This is especially true of the changes in remedial law, such as the authorization of arbitration, which helped businesspeople obtain the value of the contracts that they had made with other businesspeople. But it was also true of other doctrinal changes. Rules permitting judges to fill in terms omitted from contracts usually furthered businesspeople's actual expectations, while relaxation of the parole evidence rule and the doctrine of impossibility enabled judges to adjust contract terms to altered practical realities. The doctrine of substantial performance was, of course, a boon to the construction industry, while promissory estoppel, if applied to commercial transactions, favored business litigants as much as anyone. Even as limited by the Court of Appeals to charitable subscriptions, promissory estoppel usually favored corporate charities at the expense of individual charitable givers.

New York, of course, is a leading industrial and business state, and hence it is not surprising that its courts modified contract doctrine to fit business needs. What is surprising is how early New York acted. According to the received wisdom, the Uniform Commercial Code, adopted by states in the third quarter of the twentieth century, was the principal vehicle that "simplif[ied], clarif[ied], and modernize[d] the law governing commercial transactions." It appears, however, that the changes transforming New York law from classic, Langdellian doctrine focusing on freedom of contract to modern, utilitarian "machinery for expansion of commercial practices" began to occur some three decades earlier.<sup>89</sup>

To appreciate the reasons underlying contract law's early shift in New York to a more pro-business orientation, it is necessary to focus once more on the values associated with freedom of contract that provided the foundation for the classic, Langdellian model. Essentially they were the values of small-town America, where populist localism reigned and men who had repetitive transactions with each other worked out long-term relationships on individualized, face-to-face bases. Performing one's promises was essential in such a context: men with reputations for breaking promises they had seriously undertaken, and hence for being untrustworthy, would find themselves subject to censure by their peers and unable either to enter into new contracts or to convince local juries that they had acted properly in carrying out old ones.

Small-town America was not the world of Cardozo or Llewellyn, however,

or of other New York judges who played a central role in the transformation of the state's law of contract. Their world was New York City. In the political metamorphosis following the 1922 elections, which elevated Alfred E. Smith to the governorship, progressives centered in the city seized control of the state from the small-town, conservative forces that had dominated it through most of the nineteenth century, and, for the next seventy-two years, New York, unlike most of the rest of the nation, was governed by urban reformers.

In the context of contract law, conservatism was represented by the classic, Langdellian, freedom-of-contract paradigm, which was adequately suited to the needs of the small-town, upstate economy. The reformers who opposed conservatism, we must remember, were not hostile to the idea of contract, to free enterprise, or to accumulating wealth; they could not possibly have been, given the presence in their coalition of men such as Franklin Roosevelt, the squire from Harvard and Hyde Park, and Herbert and Irving Lehman, the sons of one of the founders of the Lehman Brothers brokerage firm. What the reformers needed was contract law that would permit people who were not neighbors, who did not attend church together, and who could not engage in face-to-face dealings to enter into commercial transactions with each other. They needed a body of contract doctrine that would enable people who were separated from each other by long distances and cultural pluralism to interact through documents, the meaning of which was not dependent on interpretation by a potentially biased jury representing only one of the cultures. Ultimately, the Uniform Commercial Code would provide that doctrine, but until the legislature enacted the code into law in 1964, the New York judiciary set about to provide the needed doctrine by means of common-law, doctrinal reform.

In essence, then, the history of contract law in twentieth-century New York reflects the demise of classical, Langdellian doctrine suited to the values of small-town America. In its place, New York judges substituted the mores of an increasingly urban marketplace, where relationships were more routinized and disputes had to be resolved by recourse to objective commercial criteria rather than to jurors' knowledge of their neighbors' trustworthiness. This shift was essential for New York's economy to remain efficient and for all New Yorkers to participate in it. Both the fact of the shift and its occurrence in New York beginning in the 1920s make perfect sense—rural law was transformed by the judiciary into urban law at approximately the same time that a new, urban coalition took political control of the state from its traditional rural governors.

But the transformation was incomplete. As had been the case in regard to the rest of the reform agenda, the judges who established new law did not

entirely eradicate the old. Just as expansion of the police power did not destroy property rights and empowerment of labor unions did not redistribute all management wealth and power to workers, so too codification of new business conventions did not destroy freedom of contract. While judges such as Cardozo crafted opinions that moved regulatory, labor, and contract law in reform directions, the legal system's reliance on precedent and continuing commitment to a capitalist marketplace ensured that much established law would remain in place.