ON THE EMPIRICAL AND THE LYRICAL: REVIEW OF *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY* (EDITED BY JEAN BRAUCHER, JOHN KIDWELL & WILLIAM C. WHITFORD)

REVIEW BY
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INTRODUCTION

On the occasion of Stewart Macaulay's official retirement from the University of Wisconsin Law School, where he has taught since 1957, his friends and colleagues organized a conference to revisit his early scholarship. Macaulay has been a prolific writer throughout his long career and, notwithstanding the fact of his retirement, he continues to write and teach at Wisconsin. More than a half-century of excellent scholarship is a lot from which to choose. The conference organizers' decision to focus on his early work was an excellent choice, allowing a degree of reflection and a tracing of Macaulay's influence that only time could allow. "Sixteen well-known contracts scholars from the UK and the USA were invited to present papers and all responded affirmatively."[1] All but one of those papers were collected, along with three of Macaulay's previously published articles, in a volume aptly titled *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical*. The result is a collection of breadth and depth, a splendid achievement for the conference organizers and volume editors Jean Braucher, John Kidwell, and William C. Whitford.

The three previously published articles by Macaulay include his most-cited *Non-Contractual Relations in Business: A Preliminary Study*

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1. Jean Braucher & William C. Whitford, *Preface*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL viii (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

(*Non-Contractual Relations*),[2] and excerpts from two other substantial articles, *Private Legislation and The Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards* (*Private Legislation*) and *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*.

The chapters following Macaulay's articles are written by thoughtful and informed scholars, including (in order of appearance) Robert Gordon, Edward Rubin, Robert Scott, Jay Feinman, David Campbell, Li-Wen Lin and John Whitford as co-authors, Claire Hill, Brian Bix, Ethan Leib, Carol Sanger, Charles Knapp, William Woodward, Jr., John Wightman, Deborah Waire Post, and D. Gordon Smith. From each contribution there is something (and sometimes, many things) to learn, not only about Macaulay's scholarship and contracts law, but also about social and economic organization, empiricism, theory, and scholarship—including teaching. I was glad to have read each chapter, which is not to say I agreed with everything I read. I take that as a good sign, and you might too. It is evidence that this is not an anodyne volume. The contributors largely avoided the easy conventions and platitudes that too often accompany celebratory collections. They paid Macaulay a higher tribute by critically engaging the scholarship of his life's work. The review below aims to follow their fine example.

I. PUBLIC AND PRIVATE ORDERS

It was an auspicious decision on the part of the editors to begin with Robert Gordon's chapter, *Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction*. The primary goal of the chapter is to situate Macaulay's scholarship within "old and recurring debates in political, social and legal theory about the relationship of the 'public' realm of law and the state to the 'private' realms of social life and markets . . . ."[3] Before locating Macaulay, however, Gordon briefly, and quite effectively, lays out the two sides of the principal debate. "One

2. Indeed, as Robert Scott notes, the article "is the most widely cited paper on contract law of the past 50 years." Robert Scott, *The Promise and the Peril of Relational Contract Theory*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 105, 105 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013) (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996)).

3. Robert W. Gordon, *Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 49, 49 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

side of this debate, which (correctly or not) we often associate with Adam Smith and FA Hayek, asserts the *priority of private ordering*."[4] Private ordering takes a number of forms here, from "thick" configurations—which rely on customs and behavioral norms based on kinship, communal, or repeated relational exchanges—to "thin" arrangements "in which self-interested people who don't know each other use price signals (the 'invisible hand') to co-ordinate their self-interested behaviour for mutual benefit."[5] Hayek called this the sphere of spontaneous order, which is not to suggest a lawless order.[6] Law and government have a place here, particularly when it comes to those "thinner" arrangements where "the threat of legal sanctions for breach may be needed to provide security for dealings across distances and cultural and national communities."[7] Even here, however, according to proponents of the priority of private ordering view, law and government should be limited, minimal, and largely formal.[8]

Opposing this view "are those who think that all social activity, including the most 'private' activity such as family life and market dealings between equals, is pervasively permeated and regulated, and often effectively produced, by state action, including legal action."[9] Government plays a central, if not necessary, role here as part of the Hobbesian bargain.[10] The priority of public ordering is grounded, maintains Gordon, in some version of the view that "social relationships are naturally rife with conflict."[11] He connects this view to contract enforcement (as one might expect in an essay on Stewart Macaulay) by observing that "in a society of plural communities and ideologies, where interpretations of agreements are likely to proliferate wildly, the state is

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4. *Id.*

5. *Id.* at 50.

6. *Id.* (citing [1 Rules and Order] F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 38–54 (1973)).

7. *Id.* For a review and rigorous treatment of this argument, see generally AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE (2004).

8. My summary of Gordon's brief review of the private order arguments runs the risk of flattening a complex and nuanced discussion. Gordon is attentive to the risk while nonetheless diligently moving through this introductory (yet too often forgotten or ignored) material. Gordon reminds the reader that "[w]ithin this school there are large differences of opinions on the need for and proper scope of government provision of public goods . . . ." Gordon, *supra* note 3, at 50. Even when there is agreement on outcomes, justifications often differ. Compare, for example, the arguments for formal laws offered by "classical thinkers" (based on liberty) to those offered by "modern neo-formalists" (based on efficiency). *Id.* at 51. Gordon also offers a nice caveat to the challenge in placing Adam Smith rightly in the debate. *Id.* at 52–53.

9. *Id.* at 51.

10. *Id.* at 52.

11. *Id.*

also the master definer and interpreter of disputes about the meanings of terms, both public and private."[12] Private ordering relies on the state to clarify and resolve disputes that arise across communities lacking shared norms of interpretation and enforcement. Calling on the state in these situations bears some surface resemblance to those "thin" contexts wherein the spontaneous order champions would also welcome the state. That's as close as the two sides get. Any greater apparent convergence is illusory.

Deep ideological differences about the role, power, and capacity of the state to clarify and—more controversially—to constitute meanings separate proponents on either side of the public-private divide. Their usual arguments follow one of two approaches: "(1) *theoretical arguments* over how much state power, bureaucratic capacity and legal legitimacy are *necessary* to development . . . ; and (2) *empirical-historical arguments* about how much states actually were and are active and important promoters – or impeders – of capitalist development."[13] The chapters in the volume by Jay Feinman and by Edward Rubin fall squarely in the theory category. Gordon's chapter falls in the other category. Gordon takes an empirical-historical approach, casting a historian's eye on the American private order proclamation that the economic success of the country is due to its legacy of free markets, private property, and *laissez-faire* policies.[14] In a few tightly organized paragraphs, Gordon demolishes this "imagined history," so often promoted by private-order boosters in developing and transitional economies.[15] Compelling as his historical review is, it is

12. *Id.*

13. *Id.* at 53 (emphasis added).

14. *Id.* at 53–55.

15. *Id.* at 53–54. As Gordon observes, this account of American private order success "is often used as a basis for promoting Rule of Law projects in transitional societies, which try to limit governance to courts that stick to enforcing property rights and contracts and restricting the sphere of further state action." *Id.* at 54. The counter-histories that Gordon briefly describes are well known and too long to repeat here, but a shortened selection may be useful. "With respect to the nineteenth century," the familiar account "leaves out: high tariff barriers promoting domestic manufacturing; a national bank promoting a stable currency; the constitutional protection of slavery[;]" the federal government's role "in acquiring and colonising territory, . . . and in evicting and then deploying military force to clear out Indian tribes;" as well as the government's offering of land grants to settlers, colleges, railroad companies, and a number of privileges and immunities to various other corporate categories. *Id.* at 54. "With respect to the twentieth century, it leaves out: highways, bridges, dams, irrigation projects, scientific research on basic science, technology, medicine, pharmaceuticals;" it skips over some domestic matters; and it turns to foreign occupation: "foreign policy and a far-flung network of navies and military bases promoting markets for products overseas and protecting direct foreign investment; . . . not to mention enormous subsidies . . . for favoured industries such as agribusiness, petroleum and housing construction." *Id.*

merely background for placing Macaulay's scholarship within the larger public-private debate.

Gordon begins his discussion of Macaulay in earnest by noting that "Macaulay's first major contribution to this debate – somewhat ironically as we shall see – is with an article that has become a poster child for the Smith-Hayek side of the great debate."[16] In that article, *Non-Contractual Relations in Business: A Preliminary Study*, Macaulay presented an empirical investigation tending to show non-reliance on formal contract law by businessmen engaged in commercial exchanges.[17] This article, of course, is Macaulay's best-known work—as previously mentioned, it is among the most cited articles in legal scholarship—and we shall consider it further below.[18] One great appeal of Gordon's chapter, however, is the attention he devotes to lesser-known works by Macaulay. For example, Gordon unpacks Macaulay's largely overlooked *Private Government*,[19] an essay demonstrating a complex interaction between state actors and private actors. Gordon effectively uses this essay to illustrate Macaulay's effective manner of scrambling the public-private distinction.[20] Gordon is pretty good at scrambling would-be distinctions too. After having so clearly laid out the dividing lines between the public and private ordering proponents, Gordon shows this simple division cannot accommodate Macaulay's scholarship. It does not fit comfortably on either side. Still, it is tempting to situate Macaulay on the public side and a number of the contributors to the volume attempt to do exactly that.

Rubin's thoughtful contribution to the volume, entitled *Empiricism's Crucial Question and the Transformation of the Legal System*, tries with some success to fit Macaulay's scholarship within a public ordering framework.[21] While I found Gordon's blurring of Macaulay's scholarship more convincing, there is much to recommend in Rubin's chapter. Particularly effective was his use of Niklas Luhmann's

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16. *Id.* at 59.

17. *See generally* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1, 55–67 (1963).

18. *See supra* note 2 and accompanying text; *infra* Part II; *see also* Gordon, *supra* note 3, at 59 (providing a citation count of more than a thousand).

19. Gordon notes: "So far as I've been able to find out, this brilliant article – which had the misfortune of appearing as an essay in an edited collection – has only been cited four times . . . ." Gordon, *supra* note 3, at 62–63. Compare that with the more than 1,500 citations for *Non-Contractual Relations in Business: A Preliminary Study*. Scott, *supra* note 2, at 108.

20. "Macaulay's intervention in this argument continues a post-Realist tradition of scrambling the public-private distinction." Gordon, *supra* note 3, at 68.

21. *See generally* Edward Rubin, *Empiricism's Crucial Question and the Transformation of the Legal System*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 74 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

synthesis of systems theory to both explicate the structure of Macaulay's work and illustrate the transformative potential of the contemporary legal empirical scholarship.[22] A brief review of Luhmann's discussion of autopoietic systems and their interpenetration is called for (Rubin offers a fuller treatment, on which the following is based). "An autopoietic system, according to Luhmann, is a system that is bounded by virtue of being self-referential – that is, it is an organised structure that constructs or defines its elements."[23] The system is self-contained or closed, in one regard, but importantly *not* "closed-off" or "isolated from its environment."[24] An autopoietic system reacts to its environment, but does so "by constructing elements within the system, not by directly absorbing external elements."[25] When two or more autopoietic systems react to each other, which Luhmann refers to as "interpenetration,"[26] a purely internal translation of practice in either system would be incomplete or inaccurate.

With this background, and regarding law as an autopoietic system, Rubin uses Luhmann's systems theory to reveal the limits of traditional legal scholarship and the promise of the new empiricism, initiated by Macaulay and others. "When traditional scholars argue that particular cases were wrongly decided, they phrase their arguments in terms of the legal system's internal norms . . . , such as precedent, dictum . . . , or in reference to specific concepts such as agreement, negligence and foreseeability."[27] Macaulay's empirical scholarship "was distinctly different. The behaviours that he explored in his Wisconsin business study were outside the legal system. That was the point of the study."[28] The businessmen whom Macaulay surveyed in his study "were certainly affected by [the legal] system," Rubin notes, "but it was the *social system* that was regulating them. . . . In autopoietic terms, the legal system

22. *Id.* at 81–82.

23. *Id.* at 81.

24. *Id.*

25. *Id.*

26. Rubin writes: "We speak of 'penetration', if a system makes its own complexity . . . available for constructing another system. Accordingly, interpenetration exists when this occurs reciprocally, that is, when both systems enable each other by introducing their already-constituted complexity into each other." *Id.* at 82 (quoting NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 116 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

27. *Id.* at 83. Even the ubiquitous policy considerations offered in traditional legal scholarship follow a strictly internal order rather than interpenetrating with another system. As Rubin notes, "[s]ocial policy is often taken into consideration, but it is translated into legal terms, such as the law's need to maintain consistency or address new issues presented by the cases." *Id.*

28. *Id.*

interpenetrated with this system, but the supposedly legal behaviours of the business people belong to the social system, not the legal one."[29]

This is an extremely interesting interpretation of Macaulay's scholarship. It can be illustrated, in another context, by considering the fine contribution to the volume by Charles Knapp.[30] The title of Knapp's chapter poses a simple question: *Is There a 'Duty to Read'?* His text provides a clear answer: there is no duty to read legally binding agreements. Like the duty to mitigate, the "duty to read" is not a duty at all.[31] Practitioners and officials know this, although they refuse to abandon the language of duty and obligation. "Often courts, instead of or in addition to phrasing the principle as a 'duty to read', will characterise it as a 'conclusive presumption'. '[A] party who signs a written contract is conclusively presumed to know its contents and assent to them.'"[32] But calling it a "conclusive presumption"—"in effect another name for 'legal fiction'"—is no better than calling it a "duty."[33] Still, Knapp does regard the rule as a kind of presumption, but not an irrefutable one: "[T]he presumption created by signing an agreement is not regarded as truly conclusive, nor is the duty absolute."[34]

The principle that people ought (in some sense of that word) to read and understand their written agreements operates differently in theory and in practice. In theory, parties read and understand their agreements. In practice, "[n]obody does that, and in fact nobody is expected to," says Knapp.[35] Moreover, law provides parties with a number of defenses and

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29. *Id.* at 83–84 (emphasis added).

30. *See* Charles L. Knapp, *Is There a 'Duty to Read'?*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 315 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

31. *Id.* at 316, 339. "The 'duty to read', although regarded as part of contract law, is not a 'duty' imposed *by* contract, but rather a statement about how parties *should* behave during the contract-making process." *Id.* at 316 (emphasis added). Knapp also compares the duty to read to the duty to bargain in good faith, but the connection is admittedly not as close as the duty to mitigate. *See generally id.* at 316–17.

32. *Id.* at 319 (quoting *Bibbs v. House of Blues New Orleans Rest. Corp.*, 2011 WL 1838783, *5–6 (E.D. La.).

33. *Id.*

34. *Id.* at 319–20.

35. *Id.* at 339. You might worry about consent if no one reads or is expected to read contracts, but Knapp reminds us that parties can consent to things they don't actually know.

> Even though both parties to an agreement may know that one of them has not read all or perhaps any of the document, nevertheless, by signing it, that party is manifesting her intention to be legally bound to the contents of the writing, whatever they may be.

Id. at 328–29.

> From Llewellyn to Barnett, commentators have suggested the possibility that one party in signing a writing with contents unknown to her may nevertheless

escape hatches to avoid harsh consequences that would follow from their failure to read. Knapp reviews these ameliorating strategies, allowing avoidance of strict enforcement through interpretation, failure of assent, fraud, misrepresentation, mistake, unconscionability, and the reasonable expectations doctrine.[36] A troubling question arises from this review: With so much seepage, what use is the doctrine?

Knapp locates the rule's rationale in "the law's desire to insulate a written contract from later claims that it does not truly represent the complete and final contract of the parties."[37] In this regard, the duty to read operates like the ever-elastic estoppel doctrine, protecting those who rely on the belief that the counterparty has read and assented to a written agreement,[38] or better, as "a more sweeping version of the parol evidence rule," a rule itself of dubious value.[39] Whatever questionable value one sees in these arguments, there is no doubt that they reflect conventional motivations (i.e., serving purposes of evidence, reliance, and consent) for preserving the non-obligatory "duty." Hence, the rule may be usefully maintained for familiar legal objectives, although (Knapp proposes) the terminology of "duty" and "conclusive presumption" should be abandoned.[40] He suggests replacing these Inapt terms with a "rebuttable 'presumption of knowing assent,'" which would have the effect of holding "[o]ne who knowingly and voluntarily assents to a contract whose terms are contained in a given writing . . . legally responsible for her actions by being held to those terms, in the absence of fraud, mistake, or the excusing cause."[41]

Rubin would place Knapp's contribution in the traditional legal scholarship category. Although contesting the terminology regarding "the duty to read" rule, Knapp enlists arguments and frameworks internal to the law. He challenges the rule by invoking systems of legal reason; for example, by observing that the "duty to read" creates no duty in the Hohfeldian sense, nor, he says, is it a conclusive presumption as some

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> be manifesting truly her *consent to be bound* to whatever may in fact be the contents of that writing, provided those do not exceed the bounds of what might be legitimately expected in light of what the signer *does* know.

Id. at 329 (citations omitted).

36. *Id.* at 327.

37. *Id.* at 324.

38. "[T]he estoppel justification seems to depend on a tacit assumption that the drafting party can necessarily rely in good faith on the signer's expression of apparent assent." *Id*. at 327.

39. *Id.* at 324. "Whether the American legal system really needs the [parol evidence rule] is certainly open to question. Other functioning legal systems appear to manage quite well without one. And ours is so full of exceptions and anomalies that . . . it is hard to see why we tolerate it." *Id.* at 340.

40. *See id.* at 340.

41. *Id.* at 340, 343.

judges wrongly call it.[42] He summons arguments grounded in the estoppel doctrine and the parol evidence rule.[43] He presents an extended discussion of contemporary "duty to read" cases across a number of transactional domains, involving insurance contracts, pre-injury releases, transactions in real property, sales of goods, credit card agreements, and attorney malpractice and misconduct.[44] None of this is meant as a criticism of Knapp's chapter. Far from it—the legal analysis is excellent. The point is rather one of placement: situating Knapp's work within a scholarly doctrinal tradition and by so doing highlighting Macaulay's distinctive approach.

Macaulay wrote expansively about "the duty to read" in his *Private Legislation* article, where from the start he exposed the legal canon to sharp critical appraisal.[45] A venerable doctrine is quickly reduced to a "grand slogan" and a "rallying cry." Macaulay exemplifies the absurdity of strict and literal application of the "duty," not with case law and other legal sources, but with a common and farcical vernacular fully accessible to those outside legal practice. He mocks that only "a judge, temporarily bereft of his common sense" would "apply the duty-to-read slogan" to a contract written in "invisible ink," or to "a contract written in lemon juice which could only be read over the heat of a candle," or to a contract, supplied by a gray paper manufacturer, written on company paper with "light gray ink that . . . can be seen only by holding the paper at an angle to the light."[46] His grammar is not just spirited, it is deliberately non-legal.

At the same time, Macaulay never dismisses the doctrine. Quite the opposite. He appreciated that the "duty to read" rule is consequential, but he was unwilling to take it at face value or rely only on what judges and treatise writers said it meant. As discussed in Feinman's chapter—the contribution most engaged with the *Private Legislation* article—Macaulay's empirical approach takes nothing for granted:

> In [his] 'Duty to Read' [analysis] Macaulay conducted an extensive examination of the liability of a credit card holder for its unauthorised use. Here he is in full form: exploring the

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42. *Id.* at 317.

43. *Id.* at 325–27, 340.

44. *See generally id.*

45. *See generally* Stewart Macaulay, *Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts and Credit Cards*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 20 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

46. *Id.* at 20–21. Actually, the last case, involving the paper manufacturer, appears to be an actual instance of a purchase order with hard-to-read terms on its back. *Id.* at 20 n.3.

> context of the growth of credit cards, examining credit card applications and the cards themselves for the presence or absence of limitations of liability, and surveying customers as they entered gas stations, as well as examining cases and statutes.[47]

With this, Rubin's claim about the distinctive approach of Macaulay and the New Legal Realist movement is apparent. "Rather than being content with the only answer that the internal structure of the legal system provides," empirical legal studies "answers the standard legal question . . . in sociological or non-legal terms."[48] But if that is what the contemporary legal empiricists are doing—a proposition of which I am not entirely convinced—then where does Rubin see the transformative promise of their approach?

The answer to this question lies in his vision of the state's role and capacity in modern economies. Rubin's chapter reflects a strong statist tendency, although not one primarily motivated by a Hobbesian concern for civil order. His public ordering priority is grounded not in the vision that "social relationships are naturally rife with conflict,"[49] but in the administrative demands of advanced contemporary states.[50] States no longer largely exist to rein in the "bad man," says Rubin, "the modern state is responsible for managing society and this responsibility requires it to assume its administrative form."[51] Law's principal modality in the modern state, according to Rubin, is concerned less with defining a

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47. Jay M. Feinman, *Ambition and Humility in Contract Law*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 140, 153 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

48. Rubin, *supra* note 21, at 84.

49. Gordon, *supra* note 3, at 52.

50. It is telling that even in framing the traditional claim, Rubin invokes James Madison (and not Hobbes) for the ancient justification of the state: "If men were angels," wrote Madison, "no government would be necessary." Rubin, *supra* note 21, at 76 (quoting THE FEDERALIST NO. 51, at 318–19 (James Madison) (Penguin ed., 1987)). But Rubin isn't concerned with law and order of the state. "For the most part," he notes, "civil order is generally not a problem for modern states, in part because people identify with the state and accept its control, in part because of well-established and effective police forces." *Id.* at 85. Madison, of course, was long committed to limited government and did much in his early presidency to reduce the federal bureaucracy. *See* GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 170 (2006). His actions, however, left him and the country without many administrative resources to fight the War of 1812. *See id.* As a consequence, it is argued, even Madison eventually conceded the value of the administrative state. *See, e.g.*, RON CHERNOW, ALEXANDER HAMILTON 647 (2004); *but see* WOOD, *supra* at 171 (observing that Madison "knowingly accepted the administrative confusion and inefficiencies and the military failures").

51. Rubin, *supra* note 21, at 85–86 (citing ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY (1990)).

normative system for those subject to its authority than it is in providing useful guidance to administrators (within the executive, judiciary, and legislative arms) of state policy.[52] Law's function in society has been transformed, he argues, which heralds a distinct and further transformative role for contemporary legal empiricists.

When "law is primarily an instrument of management, rather than a statement of norms," as Rubin sees it, the inputs the legal regime requires are not theories about norms, but data.[53] "The relevant data [are] empirical in the empirical legal studies sense; it consists of information about the effect that the judge's rule will have on those to whom it applies."[54] Yet, as Feinman emphasizes (quoting from Macaulay's credit card research), "'[t]he judiciary would seem to lack much of the essential inputs for a regulatory decision either favoring issuer or holder . . . I would not suppose that the legislative committee would have heard all that is reported here.'"[55] With so much complexity "inherent in a simple slogan"—like the "duty to read"—warned Macaulay, there is every reason to fear that legal decision makers are simply "shooting in the dark," which sometimes "is the only sensible course open; often it is not."[56] Rubin points to a different course, one that would take us beyond "the autopoietic isolation of the legal system."[57] Contemporary legal empiricists, he argues, are well-equipped guides, all "teched-up," as it were, in both legal and social scientific methodologies.[58] Accordingly, he argues that "[e]mpirical legal studies has the potential to transform law precisely because it can end this isolation by merging law and social science."[59]

Rubin concludes his strongly argued chapter with a comparatively weak discussion of the "statistical turn in empirical legal studies" based on a lengthy critique of Robert Putnam's *Bowling Alone: The Collapse and Revival of American Community*.[60] His choice of Putnam is puzzling

52. "Law serves as an instrument of this managerial mode of governance; it is a mechanism by which the legislature, executive and administrative agencies carry out many of their tasks. Its role in stating norms of conduct continues, but in much reduced form." *Id.* at 86.

53. *Id.* at 86.

54. *Id.* at 88.

55. Feinman, *supra* note 47, at 153 (quoting Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1118 (1966)).

56. Macaulay, *supra* note 45, at 34.

57. Rubin, *supra* note 21, at 94.

58. *Id.* at 94–95.

59. *Id.* at 94.

60. *Id.* at 95–99.

in a number of ways,[61] but the decision to focus on statistics is importantly revealing. Reading the chapter as a whole, one is reminded of the etymological origins of statistics as the science of facts concerning the state.[62] While acknowledging that statistical analyses can be conducted poorly (*à la* Putnam) or well (particularly if informed by the kinds of ethnographic and qualitative approaches that Macaulay employed), Rubin finds that its ultimate use in this context is to inform effective state planning and administration. But this sort of reasoning goes to the heart of the public-private debate.[63] Even when statistical analyses are done well, private-order proponents would still dispute the state's administrative capacity. "This is not a dispute about whether planning is to be done or not," as Hayek said in his essay on *The Use of Knowledge in Society*; rather, "[i]t is a dispute as to whether planning is to be done centrally, by one authority for the whole economic system, or is to be divided among many individuals."[64] This fundamental question is not raised, much less answered in the chapter. Rubin appears so committed to the public order paradigm (at least for modern economies) that the necessity of the large administrative state seems beyond question. Moreover, notwithstanding his efforts to enlist Macaulay in the public charge, Rubin makes no mention of the fact that Macaulay

61. Not the least of which being that Putnam's work falls within empirical legal studies only by stretching the category beyond its analytically useful bounds. Putnam is not a legal empiricist nor is his scholarship particularly focused on law. That said, I found Rubin's critique of Putnam's empiricism thoughtful and well argued; however, it is simply misplaced. Surely, he could have used some important contemporary empirical legal scholarship as a vehicle for this discussion. Over the past decade, there have been substantial legal-empirical debates concerning capital punishment, affirmative action, and guns, among other controversial issues. For examples of such work on capital punishment, see Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005). For examples on affirmative action, see David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). For examples on guns, see JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed. 2010); Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 ECON. J. WATCH 6.2, 218 (2009).

62. *Statistics Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com.ezproxy.library.wisc.edu/view/Entry/189322?redirectedFrom=statistics#eid (last visited Dec. 2, 2013).

63. "This is familiar stuff," as Feinman observes. Feinman, *supra* note 47, at 143–44.

64. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520–21 (1945).

remains among the more notable skeptics of the state's capacity to use contracts for social and economic planning. To be clear, Macaulay "is not a romantic about spontaneous order," he is merely pessimistic about the state, or, as Gordon somewhat clinically put it, "[h]e's a depressed liberal, not a libertarian."[65]

Macaulay's resignation to—if not depression about—the view that law, particularly contract law, best serves "market functioning" and not "state social or economic planning" is most clearly revealed in Jay Feinman's chapter, *Ambition and Humility in Contract Law*. Feinman begins by restating the theoretical framework in Macaulay's *Private Legislation* article and reproducing the two-by-two matrix[66] (below) that summarizes its organization.

	market goals	other than market goals
Generalising approach ('rules')	market functioning policy	social (or economic) planning policy
Particularistic approach ('case-by-case')	transactional policy	relief-of-hardship policy

The columns here depict competing substantive goals served by contract law (i.e., market and "other than market" goals) while the rows indicate how the law might approach these goals (i.e., using generalized rules or taking on matters in a case-by-case manner). The matrix yields four policy categories—market functioning, social (or economic) planning, transactional, and relief-of-hardship—against which the duty to read or any other legal doctrine may be evaluated. In his original article, Macaulay "explained in some detail"[67] the ambition of these policies and concluded that "[f]or contract law, the market is the primary social institution, so market goals predominate."[68]

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65. Gordon, *supra* note 3, at 60. Gordon elaborates in another part of his chapter: "I would venture that Macaulay on the whole has a more Hobbesian than Smithian view of social life as riven with conflicts and rivalries . . . [b]ut he lacks Hobbes's confidence in sovereign authority to resolve such conflicts." *Id.* at 65. The state is not irrelevant in Macaulay's framework; it is simply not central. "Macaulay's is a view that asserts a determining importance of government in the structuring of social relations – but of many governments, not necessarily of 'the state' or central 'legal system'. His is a picture of legal pluralism, not legal centrism." *Id.* at 63–64.

66. Feinman, *supra* note 47, at 142 (citing Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1057 (1966)).

67. Macaulay, *supra* note 45, at 23.

68. Feinman, *supra* note 47, at 150.

"Part of the power of Macaulay's organisation," Feinman notes, "is the way in which it makes clear the great defects of contract law's ambition."[69] It is at this point that Feinman says he departs from Macaulay's framework. "Macaulay's framing of market-promoting goals as primary and market-correcting goals as secondary correctly states the customary objectives of contract law," Feinman acknowledges.[70] "But these dichotomies are exaggerated. There is no institution of the market separate from and preexisting to non-market activity, just as there is no private law not constituted by public values."[71] Feinman returns us to the troubled public-private distinction, emphasized in Robert Gordon's historical chapter. Revealing the mess, they both suggest, may be the central contribution of Macaulay's scholarship.

Macaulay, I think would welcome the attribution. Calling to mind W.H. Auden's *Law Like Love*, Macaulay has observed, "Like life, law in action is messy."[72] He was not, of course, the first to make this observation.[73] He simply made it more effectively than anyone else. After reading Macaulay, it is hard to see clear lines between public and private. In no small part due to his scholarship, now "[w]e know that much of the work that we think of as legal is done by private governments, and that there is a messy overlap between private and public and formal and informal action."[74]

II. LAW, ECONOMICS, ORGANIZATION, AND SOCIETY

In *Non-Contractual Relations*, Macaulay famously framed his analysis around a pair of central questions that arose from his empirical observations of the contracting practices of business organizations. "Two

69. *Id.* at 152. "The organisation demonstrates that contract law is at best badly confused and at worst incoherent and largely ineffective. Nevertheless, because the mainstream story of contract law serves such a powerful ideological function for judges and law professors, it retains an extraordinary vitality." *Id.* at 155.

70. *Id.* at 150.

71. *Id.* at 151. Feinman continues, "[t]he exchange of goods may be a private activity, but the exchange of goods that the law has made the subject of property and which exchange is enforceable by law is an essentially public activity." *Id.* at 151–52. He rightly concludes with an observation that is at once obvious but nonetheless must be stated: "Law constitutes the market for reasons of the public good, so supporting the market through contract law is only another way of advancing the public good, and not a particularly distinct way at that." *Id.* at 152.

72. Stewart Macaulay, *A New Legal Realism: Elegant Models and the Messy Law in Action* 28 (Univ. of Wis. Law Sch., NLR Working Paper Series 1, 2008), *available at* http://www.newlegalrealism.org/readings/workingpapers.html.

73. "We have known that the law in action is messy for a long time," Macaulay recently wrote in reference to an 1894 quip by Anatole France regarding law in action. *Id.*

74. *Id.* at 27.

questions need to be answered," he observed, "(A) How can business successfully operate exchange relationships with relatively so little attention to detailed planning or legal sanctions, and (B) Why does business ever use contract in light of its success without it?"[75] There is, I think, a rather nice parallel here with Ronald Coase's first and arguably most important article, *The Nature of the Firm*.[76] As a young man, Coase—who just passed away this year at age 102—received a travel scholarship from the London School of Economics, which he used to visit the United States to study economic organization, particularly the burgeoning 1920s automotive manufacturing industry in Detroit.[77] Based on his empirical observations of business organizations, Coase framed his article around two central questions.[78] The context in which these questions occurred to Coase is worth recalling.

Summoning up Coase and *The Nature of the Firm* here is no mere coincidence. The pivotal pair of questions he posed in that article provided the key organizing principle around which the discussion of business organizations and their contractual choices has taken place for more than a half century. Importantly, Coase's questions did not arise out of thin air. They were not the product of pure imagination, if such a thing exists. The questions were revealed to him against a political backdrop wherein the public-private debate commanded broad attention. As Coase recalled his time studying contracts and organizational structure among car manufacturers in Detroit, bigger political and economic questions preoccupied much of the academy and the world. "The Russian Revolution had taken place only fourteen years earlier. We knew then very little about how planning would actually be carried out in a communist system."[79] This was the central matter of markets and organizations at the time.[80]

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75. Stewart Macaulay, *Non-Contractual Relations in Business*: *A Preliminary Study*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 12 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

76. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

77. Ronald H. Coase, The Institutional Structure of Production, Lecture to the Memory of Alfred Nobel (Dec. 9, 1991) (transcript available at http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1991/coase-lecture.html).

78. Coase himself was impressed by another pair of questions that encouraged him to challenge theoretical assumptions and explore them empirically: "Mrs. Robinson has said that 'the two questions to be asked of a set of assumptions in economics are: Are they tractable? and: Do they correspond with the real world?'" Coase, *supra* note 76, at 386 (quoting JOAN ROBINSON, ECONOMICS IS A SERIOUS SUBJECT 12 (1932).

79. Coase, *supra* note 77.

80. The debate is reflected in works such as LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH (1920), *reprinted in* COLLECTIVIST

Contemplating the nature of state organization of economic activity, Coase seized on the metaphor of the firm (or maybe it was the other way around).[81] Whatever the teleological order, these ideas led him to challenge the confidence economists held in the market as the ideal way to organize production and allocation of resources. He posed his first question: If markets are ideal, then why do firms and large organizations bypass the market and organize many of their transactions internally?[82] The answer, Coase said, lies in the transaction costs associated with using the market, such as the costs of negotiating, writing, and enforcing contracts.[83] These costs of market (or external) procurement can make firms relatively more efficient.[84] Yet, and here is the second question, if firms are more efficient than markets, then why aren't all transactions organized within a single giant firm?[85] The question was hardly facetious, as Coase observed: "Lenin had said that the economic system in Russia would be run as one big factory."[86] Transaction costs, again, proved to be the answer. Transaction costs associated with firm (or

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ECONOMIC PLANNING: CRITICAL STUDIES ON THE POSSIBILITIES OF SOCIALISM 87 (F.A. Hayek ed., S. Adler trans., 1935); F.A. von Hayek, *Economics and Knowledge*, 4 ECONOMICA 33 (1937); Oskar R. Lange, *On the Economic Theory of Socialism: Part One*, 4 REV. ECON. STUD. 53 (1936–37); A.P. Lerner, *Statistics and Dynamics in Socialist Economics*, 47 ECON. J. 253 (1937).

81. Coase, *supra* note 77.

82. "Yet, having regard to the fact that if production is regulated by price movements, production could be carried on without any organisation at all, well might we ask, why is there any organisation?" Coase, *supra* note 76, at 388. "The significant question would appear to be why the allocation of resources is not done directly by the price mechanism." *Id.* at 392–93.

83. "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism. The most obvious cost . . . is that of discovering what the relevant prices are. . . . The costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market must also be taken into account." Coase, *supra* note 76, at 390–91. *See also* Coase, *supra* note 77 ("I found the answer by the summer of 1932. . . . [T]here were costs of using the pricing mechanism. What the prices are has to be discovered.").

84. "There are negotiations to be undertaken, contracts have to be drawn up, inspections have to be made, arrangements have to be made to settle disputes, and so on. These costs have come to be known as transaction costs." Coase, *supra* note 77.

85. Coase, *supra* note 76, at 394. ("Why is not all production carried on by one big firm?").

86. Coase, *supra* note 77. Noting the skepticism expressed by economists about Lenin's plan, Coase continued:

> [T]his was an impossibility [to western economists]. And yet there were factories in the West and some of them were extremely large. How did one reconcile the views expressed by economists on the role of the pricing system and the impossibility of successful central economic planning with the existence of management and of these apparently planned societies, firms, operating within our own economy?

Id.

internal) procurement—such as bureaucracy, agency, and administrative costs—limit the effective scale of firms. His early article *The Nature of the Firm* not only introduced the idea of transaction costs (that would play an even greater role in his 1960 article, *The Problem of Social Costs*, which elaborated the Coase Theorem), it initiated—albeit slowly at first—a great wave of intellectual activity concerning organizations and institutions structuring economic and social activity.[87]

But if Coase's insight operated around a strict dichotomy between the market and the firm, then it was the work of scholars following him that filled in the details and developed models revealing additional modes of governance that operated somewhere between the extremes of the spot market and the wholly integrated firm. Here enters Macaulay's *Non-Contractual Relations*, which highlighted the salience and prevalence of long-term relational contracting among firms as a vital alternative to pure markets or full integration.[88] Oliver Williamson and other economists—including Armen Alchian, Robert Crawford, Victor Goldberg, Paul Joskow, and Benjamin Klein[89]—would expand on the Coasean insight while paying heed to the relational contract scholarship of Macaulay and, later and significantly, Ian Macneil.[90] Meanwhile, building on pioneering work by Peter Blau, Melville Dalton, Alvin Goulder, Richard Scott, and Philip Selznick among others, a new generation of organizational sociologists, particularly Mark Granovetter and Walter Powell, would enlist Macaulay's findings to contest the thinly socialized rational actors dominant in the models economists were developing.[91] Li-Wen Lin and Josh Whitford review some of the

87. *See* R.H. Coase, *The Problem of Social Costs*, 3 J.L. & ECON. 1 (1960).

88. Macaulay was not an isolated actor, of course. Robert Merton was a great influence on Macaulay's thinking. Other organizational sociologists were also unpacking and complicating, in important ways, the simple dichotomy of firms and markets. *See, e.g.*, PETER BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH (1962).

89. The key early works here are OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); Victor Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426 (1976); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978). In addition to Coase, Williamson in particular built on important works such as CHESTER BARNARD, THE FUNCTIONS OF THE EXECUTIVE (1938); JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); Herbert A. Simon, *A Formal Theory of the Employment Relationship*, 19 ECONOMETRICA 293 (1951).

90. *See, e.g.*, Ian R. Macneil, *Contracts: Adjustments of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

91. *See, e.g.*, Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985); Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, 12 RES. ORG. BEHAVIOR 295

sociological changes to Williamson in their chapter entitled *Conflict and Collaboration in Business Organisation: A Preliminary Study*.[92] I will return to that study shortly.[93]

While the debate carried on between institutional economists and organizational sociologists, a separate, more legally inflected divide erupted among their counterparts within the legal academy. Robert Scott's chapter in the volume thoughtfully explores this divide among relational contracts scholars.[94] Scott begins, naturally, with Macaulay's *Non-Contractual Relations* and continues fifty years to the present.[95] Over this period he fixes on big themes. Sidestepping the formula of chronicling the literature since 1963, he celebrates the field's early promise and warns of its present peril.[96]

Scott gives emphasis to themes both divergent and unifying. He begins with the divergence. "Relational contract scholarship has evolved in two separate, and often opposing, intellectual traditions," writes Scott, "[o]ne camp consists of scholars who are typically associated with the 'law and economics' movement; in the other camp are scholars who more readily identify with the 'law and society' tradition."[97] Scott, of course, is an intellectual force in the former camp; Macaulay more so in the latter. Neither is especially partisan, at least not like the "[f]undamentalist economic relationalists," as Scott styles them, who dismiss socio-legal scholarship as insufficiently rigorous, or the "[f]undamentalist socio-relationalists" who disdain the abstract formalism of law and economics.[98] Scott makes much of the

(1990). The work of the prior generation is well presented in BLAU & SCOTT, *supra* note 88; MELVILLE DALTON, MEN WHO MANAGE (1959); ALVIN W. GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1954); PHILIP SELZNICK, TVA AND THE GRASS ROOTS (1966). See Joel M. Podolny & Karen L. Page, *Network Forms of Organization*, 24 ANN. REV. SOC. 57 (1998) for a review of the sociological critique of the economic framing of markets and hierarchies.

92. Li-Wen Lin & Josh Whitford, *Conflict and Collaboration in Business Organisation: A Preliminary Study*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 191 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

93. *See infra* notes 169–87 and accompanying text.

94. *See generally* Scott, *supra* note 2.

95. *Id.* at 105, 135.

96. *Id.* at 105.

97. *Id.*

98. *Id.* at 106. "Fundamental economic relationalists scoff at the notion that [contract scholars] in the law and society tradition, including Ian Macneil – who coined the term relational contract theory – deserve to be called 'theorists,'" observes Scott. *Id.* "They accuse the 'socio-relationalists' of drawing unwarranted conclusions from casual empiricism that lacks rigor . . . ." On the other hand, Scott continues, "[f]undamentalist socio-relationalists, for their part, deny that economic relationalists have any right to call themselves 'relationalists'." *Id.*

fundamentalists from both camps. These hardliners are tools in his chapter, used to render a sharper divide between the camps than might otherwise be seen.[99] They clear the ground for unifying themes to follow.

By highlighting the greatest differences between the two camps, Scott reveals that much of what remains is an even greater commonality.[100] "The irony," he acknowledges, "is that these analysts have much more in common with each other than with the majority of contract scholars."[101] He does not go so far as to claim there is a common approach among relationalists from the "law and economics" and "law and society" camps.[102] Far from it, he argues that "law and economics" maintains a methodological commitment to ex-ante, incentive-based approaches that are attendant to interactions between formal and informal enforcement, particularly concerning the potential of the latter to crowd out the former; while "law and society" takes an ex-post, norms-based approach that is not particularly engaged with "the crowding out" debate.[103] Relationalists don't share a common method. They share a common purpose.

"Relationalists of all stripes believe that the institution of contract can only be understood by observing the law 'in action', and, in particular," Scott shrewdly pivots, "by exploring the interaction between the threat of legal coercion and the array of informal norms that also regulate the relationship in important ways."[104] This wonderful sentence reveals Scott's skill and purpose. He gives a nod to "the law in action" and in the next breath affirms a course fully capable of accommodating the economics of remedies and non-legal sanctions. Scott writes like an ambassador from the law and economics camp, seeking to separate and calm the bickering sides so they might focus on the existential threat he sees facing them all—namely, intellectual stagnation, irrelevance, then

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99. Undeniably, there has been some name-calling and pointed language, some of which is directed at Scott. See, for example, Scott's reference to Richard Speidel's taunt that "'Scott now states that "we are all relationalists" . . . Nonsense. Those arguing [sic] the virulent strain of the new formalists are neither realists nor relationalists and the sooner we say so the better.'" *Id.* at 106 n.6 (quoting Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 845 n.86 (2000)).

100. "To be sure, there are key points of contention that divide relationalists, but nevertheless both groups understand the world in much the same terms (albeit with somewhat different vocabularies)." *Id.* at 107.

101. *Id.*

102. "These two analytical traditions rest on fundamentally different conceptions of the role of law and the relative power of context versus theory." *Id.* at 117.

103. *Id.* at 123. For Scott's discussion of *The Relationalist Divide*, see generally *id.* at 117–23.

104. *Id.* at 107.

an inevitable demise from failure to recruit and reproduce.[105] If this seems a bit too dire, it might be. Economists, sociologists, and other academics, both in disciplinary departments and professional (i.e., business and law) schools, are carrying on research in the broad relationalists tradition.[106] None of this is news to Scott. He knows the literature better than anyone I know. His entreaties, I believe, are driven less by a felt necessity to revive the field than a desire to redirect it. There is no cause to quibble about that. It is better to watch him try to move the field forward than simply shake it awake.

Scott wants to take the field toward a new "unified relational contract theory."[107] Seeing no one-size-fits-all option for contract law,[108] Scott proposes a reconciliation (which seems a more accurate characterization than "unification," as Scott puts it) by tailoring contract law to different contexts. "All relationalists should be able to agree that a unitary contract law appropriate to all these environments is a hopeless fiction."[109] Scott would apply one set of rules for sophisticated commercial actors who enter contracts based on dickered terms and another set of rules for less informed actors who are often subject to contracts of adhesion. "[I]t is important to separate the question of how to regulate adhesion contracts – whether a particular contract is exploitive and, if so, what terms would be reasonable – from the regulation of commercial contracts between firms."[110] This separation,

105. "I fear that the relationalist revival . . . may be on the wane. The younger cohort of law and economics scholars, armed with impressive technical skills, have abandoned relational questions" as have "[m]any of the other bright stars in contract [who] are formally trained in analytical philosophy." *Id.*

106. Scott mentions the experimental research on reciprocity and trust, but there is also robust relational contracting research from economic theorists using a repeated games framework, multi-tasking, and other theoretical innovations. *See, e.g.*, DIXIT, *supra* note 7, at 59–83 (2004); George Baker, Robert Gibbons & Kevin J. Murphy, *Relational Contracts and the Theory of the Firm*, Q. J. ECON., Feb. 2002, at 39; Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. 24 (1991). An excellent sociological contribution based on network analysis is also found in the volume. *See* Lin & Whitford, *supra* note 92.

107. Scott, *supra* note 2, at 126.

108. "So long as the common law rules of contract are regarded as background rules that apply to all contractual domains, and so long as courts continue to demand that the judicial process that implements these rules must govern all contract disputes, the clash of perspectives between economic rationalists and socio-relationalists will continue unabated." *Id.*

109. *Id.* at 108.

110. *Id.* at 126. "Consumer transactions, and the equitable issues they present, are better resolved within a regime separate from the contract rules that govern commercial parties." *Id.* at 127.

Scott argues, would discourage arbitrary judicial resort to context in contractual disputes involving sophisticated commercial parties.[111]

Agreements between sophisticated actors, of course, often require interpretation of context. How could a court enforce a clause calling for "reasonable effort" or "best efforts" (or other common standards in commercial contracts) without considering context? Crucially, Scott does not argue for an elimination of judicial attention to context in agreements involving sophisticated parties. "The question is not whether a court can have recourse to context ex post, but *who decides* whether and when the court should have recourse to context."[112] There is every reason to believe that sophisticated parties will sometimes invite the court to consider context. Those occasions will tend to be characterized by a high degree of uncertainty, as Scott observes in describing his research with Ron Gilson and Charles Sabel on "braiding": in situations of high uncertainty, "combinations of both precise rules and general standards . . . offer[] sophisticated contracting parties the ability to braid the text with context evidence that is revealed over the course of contract performance."[113]

In such situations, Scott sees a useful role for judicial interpretation when sophisticated parties call for it. He is substantially less convinced that judicial interpretation would serve the interests of less sophisticated actors facing adhesive contracts. To be sure, Scott recognizes the need for some response to abusive contract terms, but he believes "that it is a category mistake to treat the problem of exploitation in adhesion contracts as a question of contract interpretation."[114] Rather than relying on courts to police consumer transactions through interpretation, a task Scott believes the "courts are . . . ill-equipped to" handle, he would favor a more administrative approach—similar, he suggests, to "[t]he emerging regulatory regime in the European Union."[115] Through directives, the European Union has targeted unfair practices, including "blacklisting" and "greylisting" questionable contract terms.[116] "To take account of the evolution of unfair practices, . . . terms used in particular contracts that are perceived as potentially unfair by a court may be referred to a standing body of experts," which would then decide if the

111. *Id.* at 127–28.

112. *Id.* at 127.

113. *Id.* at 132. High uncertainty, however, is not a sufficient condition for welcoming judicial interpretation of context. Sometimes, as Scott nicely puts it, "in the face of high and continuous uncertainty, context is too important to allocate to the courts: the parties create their own context through a contractually specified process." *Id.* at 135.

114. *Id.* at 128.

115. *Id.* at 129.

116. *Id.*

black-and-gray listed terms should be updated.[117] Courts could play a feeder role here, providing data to competent experts who are better equipped to police the fairness of consumer transactions. I don't know, because he didn't say so, but Scott may welcome the newly established federal Consumer Financial Protection Bureau (CFPB) as a vehicle to serve this administrative expertise function in the United States. But whatever his feelings regarding the CFPB, there is no doubt about his skepticism concerning the courts in this capacity. To him, the judicial route is a dead end—or worse, a cliff, over which both consumer and commercial transactions threaten to plunge under the weight of a single interpretive approach.

A more cautiously optimistic role for the court in policing consumer transactions is presented in Ethan Leib's chapter *What is the Relational Theory of Consumer Form Contract?*. Like Scott, Leib argues for a distinctive approach to contracts involving consumers subject to adhesive terms.[118] "Admittedly," concedes Leib, "it is possible that we don't need a specialised law of consumer form contracts for the courts to apply. Maybe there is no problem in need of a solution."[119] The point is dutifully raised and then quickly dismissed. Everyone agrees there is a problem. Only its solution escapes consensus. Leib's chapter sets out to describe what form he believes the solution should take.

Leib makes the case for a relational approach to consumer contracts based on insurance law's reasonable expectations doctrine.[120] A fine reward of reading his chapter is the review he presents of Macaulay's and Macneil's writings on consumer form contracts. He begins with Macaulay's *Private Legislation*, which Leib notes, "laid the groundwork for a relational law of consumer form contract."[121] In that article, as Leib recapitulates, Macaulay argued for a case-by-case approach wherein courts would "pay[] careful attention to the 'bargain-in-fact', implementing the 'sense of the transaction', and honouring the 'reasonable expectations' of the consumer."[122] Such an approach, for instance, would "prevent[] corporations from using a 'duty to read' strategically to force consumers to accept terms they could not

117. *Id.* at 130.

118. *See generally* Ethan J. Leib, *What is the Relational Theory of Consumer Form Contract?*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 259 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

119. *Id.* at 260.

120. *See generally id.*

121. *Id.* at 267.

122. *Id.* "[T]he most natural application of [Macaulay's] argument emphasises 'reasonable expectations' over letting 'a writing get in [the] way'." *Id.*

reasonably have read or understood."[123] But the relational approach does not simply reject the fallacy of consent to unread adhesive terms. It can provide a distinct logic and legitimacy to contracts of adhesion. To support this claim, Leib turns to the work of Macneil.

Macneil's scholarship, argues Leib, shows that a relational approach can offer an affirmative account of consumer form contracts. It does so by first recognizing the embeddedness of these transactions. Summarizing Macneil, Leib first observes that "consumers are woven into a *relationship* with the companies that furnish products and advertise to them."[124] It is a structured relationship, a kind of "bureaucratic organisation" based on manifold plans.[125] "Those plans take many forms[, which] taken together, become a mini-constitution – a *private* constitution – for how the bureaucracy is to be run."[126] Viewed this way, from an embedded relational perspective, the adhesive agreement (call it contract or mini-constitution) acquires a distinct legitimacy. "What legitimates the mini-constitution that accompanies the bureaucratic relation is not specific assent to precise terms or the content of the bureaucratic planning – but consensual entry into *already legitimate relations*."[127] By accepting her role in preexisting market relations, the consumer can effectively consent to transactions even when she does not read or understand the written terms of the contract. Compare this approach with the transactions cost efficiency logic Judge Frank Easterbrook proffered in *ProCD, Inc. v. Zeidenberg*[128] and *Hill v. Gateway 2000, Inc.*[129] or with Professor Randy Barnett's analogy to consumers legitimately agreeing to accept the terms of a sealed envelope.[130]

Whether one finds Easterbrook's or Barnett's argument more persuasive, Leib's discussion of a uniquely relational approach of adhesion contracts is worthy of note. Of course, Macaulay and, even more so, Macneil deserve credit (and Leib gives them their due) for developing a relational justification for the legitimacy of these contracts. But what about the terms of these contracts? If the relational approach rejects the idea of consumer consent to *specific* unread terms, then how is the content of the contract to be determined? No one thinks that the consumer should be taken as giving a "blanket assent" to every term in

123. *Id.*
124. *Id.* at 269.
125. *Id.*
126. *Id.*
127. *Id.*
128. 86 F.3d 1447 (7th Cir. 1996).
129. 105 F.3d 1147 (7th Cir. 1997).
130. *See* Leib, *supra* note 118, at 270 n.57.

the written contract; nor does anyone believe that the consumer is free to walk away from any or all terms in contract. Mutuality demands a greater commitment than that. Macaulay and Macneil do not provide much guidance here, argues Leib.[131] He aims to provide an answer to this puzzle in his chapter.

To start, Leib traces a seeming convergence among commentators. Macneil says the contract must retain only that which is reasonable; Easterbrook would exclude unconscionable terms; Professor Karl Llewellyn would remove "unreasonable or indecent" terms; Barnett would cut "radically unexpected" terms.[132] However, observes Leib, "behind this superficial consensus about reasonableness as a constraint on consumer form contracting is actually a diverse array of applications of reasonableness tests."[133] Unconscionable, unreasonable, not reasonable, indecent, and radically unexpected are identified through different doctrinal tests and it is through these tests that their dissimilarities are realized.[134]

For his part, Leib appeals to insurance law's "reasonable expectations" doctrine to suggest a relational approach capable of providing content to consumer form contracts. "The reasonable expectations principle extended to consumer form contracts would require courts to inquire in the first instance about what an average consumer could reasonably expect out of a transaction given all the surrounding circumstances."[135] Leib's relational approach prioritizes the consumer's view of "reasonableness," not the firm's or a third-party's perspectives (he offers a reason for the built-in bias, but it is really more a suggestion than a fully developed justification).[136] In the next step, after the court identifies what is reasonable to consumers, it "must then read out of the contract anything in the standard form document to the contrary, irrespective of whether it is 'decent' – or itself 'reasonable' using other metrics."[137] This is the essence of the approach Leib offers.

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131. *Id.* at 272–73.

132. *Id.* at 273.

133. *Id.*

134. *Id.*

135. *Id.* at 276.

136. "Macneil already furnished a ready-made explanation for why this asymmetry is appropriate: to do any relational analysis, one must 'pay[] attention to the power structure in which [consumer form] contracts are made'." *Id.* (quoting Symposium, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 696 (2005)). Given the asymmetry of power in the consumer form contract, one should "focus on the reasonable expectations of the consumer first and foremost." *Id.*

137. *Id.* Leib adds the following useful caveat:

> Although the doctrine has some affinity with late Llewellyn, it isn't coextensive with Llewellyn's proposed treatment of consumer form contracts. For Llewellyn, so long as a term is not unreasonable or indecent,

Leib is quick to admit that "[n]one of this is to suggest that the reasonable expectations approach – relationally conceived – as applied to consumer form contracting is a panacea."[138] The biggest challenge of the approach is an empirical one. Even if the court agrees, in theory, to adopt his approach, how exactly will it identify the content of reasonable? In response to this question, Leib strikes a note familiar to Rubin's chapter. He would invite relationalists to undertake serious empirical work: "Instead of merely conceding the institutional competence challenge," he implores, "relationalists should be producing reliable empirical evaluations of contractual context themselves, helping to alleviate the considerable difficulties courts will have in applying the doctrine."[139] Relationalists like Bob Scott (and probably Macaulay too) doubt that generalist courts could be effective users of this information, as opposed to, say, some other regulator with specific expertise. On his side, Leib could point to the experience of the insurance industry. But, unfortunately, he provides no empirical assessment of the doctrine's application and effect in insurance contracts. Moreover, as a highly regulated industry, it may be difficult to assess what is due to industry regulators or the courts.

* * *

Like Leib and Scott, David Campbell's chapter is more theoretical than empirical. His chapter *What Do We Mean by the Non-Use of Contract?*, is enjoyable to read, even if one doesn't agree with everything he has to say. And that may be just fine with him. Campbell himself strikes a tone of polite disagreement throughout his chapter. While the tendency in the other chapters displays a consistently sympathetic prose toward Macaulay's scholarship, Campbell's writing is more cross-grained. He contests Macaulay's basic terminology of "non-use" and "non-contractual,"[140] as well as the use of "relational."[141]

> the form's term prevails upon the consumer. The reasonable expectations doctrine in a relationalist rendering, by contrast, requires that a buyer's reasonable expectations cannot be defeated, even if that defeat would be reasonable or decent.

Id.

138. *Id.* at 280.

139. *Id.* at 284.

140. "I will argue that the basic concepts of non-use and non-contractual relations introduced in Macaulay's two great 1963 papers . . . poorly capture the relationship of economic exchange and legal contract that Macaulay has done so much to reveal to us." David Campbell, *What Do We Mean by the Non-Use of Contract?*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 159, 161 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013). It is perhaps useful to add the following from Campbell: "It is in an obvious sense

His admiration for Macaulay's scholarship (and it is clear that he admires both the work and the person) is peppered with qualifications. He sometimes hints at his reservation with expressions of the form "I very respectfully suggest . . . ."[142] Other times his language is more direct, such as when he begins "I must just say outright . . . ,"[143] and "I am obliged to say I disagree . . . ."[144] Beyond matters of style, Campbell's chapter presents a strong and unconventional law and economics response to relational contracting. It is a unique contribution to the volume and well worth digesting.

For Campbell, the "[e]conomic exchange is what is essential."[145] He applauds Macaulay's scholarship for placing "exchange" at the core of contract.[146] But, argues Campbell, by displacing the traditional formalist notion of contract, the literature (which developed from Macaulay's early work, if not Macaulay himself) has managed to elide the importance of the actual and supposedly unused contract.[147] This is the basic issue Campbell contends with, and he spends the bulk of the chapter attempting to assert the salience of the "unused contract" in the relational context.[148]

Enlisting Macaulay's study of the troubled contractual relationship between Frank Lloyd Wright and S.C. Johnson & Company, Campbell sees great value in the actual contract between the parties, even in this

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foolish to criticise the coining of terms which have given rise to such valuable discussion, but surely one cannot be surprised if these terms sanction effective disregard of the actual law." *Id.*

141. "I myself think 'complex' is a much less confusing term (in this context) than relational and a much more natural term than intertwined," which Macneil substituted for relational in his later writings. *Id.* at 179.

142. Here is a bit more context: "I very respectfully suggest that Macaulay's claim that 'much, if not most, [exchange is] untouched by contract norms or litigation' is only partially correct." *Id.* at 178 (quoting Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 523 (1977)).

143. "I must just say outright that I do not think Macaulay has always maintained this position, and . . . I criticised what I thought were some instances of an avoidably excessive strain of welfarism in Macaulay's work." *Id.* at 176.

144. "I am obliged to say I disagree with Macaulay here." *Id.* at 173.

145. *Id.* at 166. "For, as I have said, the legal contract is not what is essential. It is the exchange, and particularly the profit, that is essential." *Id.* at 167–68.

146. "In contrast to [the] entirely legal conception of contract as promise, Macaulay's definition of contract as 'devices for conducting exchanges' has an integral economic component, with the economic exchange being the object and the legal contract a means of achieving that object." *Id.* at 166.

147. "In this literature, the unused contract generally falls entirely out of consideration and attention shifts entirely to non-contractual relations. This analysis turns to what is now usually called the 'embeddedness' of exchange in social relations . . . ." *Id.* at 164.

148. *See generally id.*

canonical case of "non-use" and "non-contractual" relations.[149] First, he reminds us that the "contract was needed to get the ball rolling . . . ."[150] Second, the threat of litigation based on the contract was always there as a last resort.[151] If this resort was too remote, that was only because the remedies stemming from litigation were wholly inappropriate. But that could have been fixed by the contract itself. Hence, in this case, Campbell suggests, the problem was not a failure of contract so much as a failure of the contractors.[152] "The question becomes why did two competent commercial parties agree [to] a contract which stipulated inappropriate remedies?"[153]

Campbell suggests four answers to this question. First, the most ideal remedies are sometimes prohibited. Courts will not enforce all liquidated clauses, particularly those related to services (and of course penalties).[154] Second, even sophisticated parties face bounded rationality and transaction costs in specifying clauses.[155] Third, and (Campbell claims) a central issue in the Frank Lloyd Wright and S.C. Johnson & Company context, parties are often needlessly ensnared by a limited conception of contract.[156] Though these parties are often sophisticated about contract law, they are often too committed, suggests Campbell, to the dictates of *pacta sunt servanda*.[157] Fourth, stipulation of specific remedies is frequently not needed because parties can cover or otherwise resolve trouble cooperatively.[158] Covering may appear as "a perfect case of non-use," states Campbell, "but it is not. It is a case where the contract remedies so align the interests of the parties that they make recourse to the law in the classical sense of threat of legal action redundant."[159]

I found this aspect of Campbell's lively chapter most provocative. He no doubt meant it to be. Here he advocates boldly for a position that seems absurd. By his sights, unilateral breach is a cooperative exercise. He illustrates the point with the cover remedy and further develops it through an efficient breach argument based not on the usual optimal

149. *Id.* at 168–69.

150. *Id.* at 169.

151. *Id.*

152. "[I]n my opinion, it is not the institution of contract as such that is at fault but the parties' failure to use contract's resources to help, rather than hinder, them in the attempt to conduct their exchange." *Id.* at 171.

153. *Id.* at 170.

154. *Id.*

155. *Id.*

156. *Id.* at 170–71.

157. *Id.* at 171. *Pacta sunt servanda* means "agreements must be kept." BLACK'S LAW DICTIONARY (9th ed. 2009).

158. Campbell, *supra* note 140, at 177–79.

159. *Id.* at 180.

allocation criterion, but on "the minimisation of the costs of breach."[160] It seems to me that the most effective way to minimize the costs of breach is not to breach. This is not meant to be an entirely banal observation. It is offered to highlight the importance of considering the opportunity costs of performance (among other normative considerations) when evaluating the costs of breach. Such consideration appears absent in Campbell's "efficient breach" argument. Yes, conditional on the occurrence of breach, one would hope that the law would minimize the costs and difficulties faced by the parties in dealing with the matter. This is not, however, an efficient breach claim so much as a claim that the law should operate efficiently given breach.

But Campbell wants to claim more: "a major function of the law of contracts is to allow breach," he says, "*but on the right occasions and on the right terms*."[161] What are the "right occasions," what are the "right terms"? He does not fully elaborate the claim here and instead points the reader to previously published work.[162] But, if the right occasions are those where the promisor finds breach individually rational, if not efficient—which is to say the cost of breach in terms of the remedy is less than the cost of performance—then this is essentially the conventional argument about opportunistic breach (or efficient breach, assuming perfectly estimated expectation damages). This first step of law "allowing" breach (though it's hard to imagine how law could prevent breach), is presupposed in Campbell's argument regarding the efficiency of minimizing the costs of breach. Taken together, then, Campbell's efficiency argument is not at all absurd or even unconventional. It may simply be a new path to an old point—a path that perhaps provides fresh perspective. I am unsure, so forgive my prevarication. Yet however reasonable the argument may appear, it does seem a bit of a stretch to call unilateral breach followed by unilateral cover "fundamentally cooperative."

A more cooperative response to the expectancy of a promisor preferring non-performance in some contingencies would be to modify the initial agreement at some interim stage, or to leave gaps (intentionally) in the initial agreement that the parties would fill in together later as relevant circumstances reveal themselves. This is the proposed tactic, for example, in the work on "braiding" by Robert Scott and his collaborators. Campbell passes over these more cooperative

160. *Id.* at 181.

161. *Id.* at 180 (emphasis added and removed).

162. Regarding the right terms, Campbell suggests, "'terms which encourage claimants to cover in the knowledge that the defendant will compensate lost net expectation.'" *Id.* at 180–81 (quoting David Campbell, *The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455, 468 (2005)).

exercises in his consideration of "the relational," or as he would prefer, "the complex" contract setting. Whether this is an oversight or simply something he would consider beside the point is unclear. Perhaps these matters are addressed in his prior articles, which following this interesting chapter I am quite inclined to read. Campbell mentioned that Macaulay once called his novel "efficient breach" argument "most unorthodox" yet possessing "great plausibility."[163] Based on the chapter's abbreviated rendition of the argument, I can appreciate Macaulay's sentiment.

* * *

Law and economics is a wide-ranging field, as Brian Bix's chapter, *The Role of Contract: Stewart Macaulay's Lessons from Practice*, reminds us. Bix usefully connects the social norms subfield in law and economics to Macaulay's scholarship. Robert Ellickson's cattlemen in Shasta County and Lisa Berstein's cotton merchants are placed in context with Macaulay's businessmen.[164] In addition to the shared emphasis on informal norms in these works, Bix draws attention to the fact that they are all informed by careful empirical observations.[165] This is the central point for Bix.

His chapter is primarily concerned with the divergence between social practices involving contracts and "the content of most contract law courses and much of mainstream contract law scholarship."[166] For Bix, it is not just a matter of misaligned theory to fact. There is more at stake than that. Implicating legal academics, Bix warns, that "when we teach the legal fictions we offer in the name of contract law, we leave law students – and the general population they will later represent and educate – with the belief that law . . . is fair, legitimate, and even efficient."[167] He concludes, "that is rarely the case."[168] This is an extraordinary conclusion. Does he actually believe that law is rarely fair, legitimate, and efficient? Maybe he means it is rarely all three at once, but even if it is meant as a disjunctive claim, then it is by far the most pessimistic statement in the volume. More troubling is that it is also a positive statement, but little empirical support is provided.

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163. *Id.* at 181 (quoting Macaulay, *supra* note 72).

164. Brian H. Bix, *The Role of Contract: Stewart Macaulay's Lessons from Practice*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 241, 246 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

165. *Id.* at 246–47.

166. *Id.* at 241.

167. *Id.* at 253.

168. *Id.*

In contrast, Lin and Whitford's chapter is the most empirically thoroughgoing contribution the book. As alluded to above, they provide a nice review of the sociological response to the law and economics of relational contracts, particularly Oliver Williamson's "transaction-cost economics" approach to contracting and organizations.[169] But the real contribution of the chapter is its discussion of their own empirical analysis on conflicts and collaboration among a relatively small worldwide network of computer companies. Building on network analysis of alliance and conflict among nation-states, Lin and Whitford deploy this methodology to study inter-firm relations.[170] Specifically, they report preliminary results from quantitative network analysis of alliances and litigation among 231 "internationally important semi-conductor companies" during the years 2000 to 2010.[171] They collected data on collaboration among these firms—primarily measured by strategic alliances and joint ventures—and conflict, as measured by litigation among the firms.[172] Lin and Whitford got their litigation data from LexisNexis and Lex Machina.[173] There is reason to worry about selection bias in the conflict data.

For various reasons, firms are happy to report news of business alliances; for many of the same reasons, they are also hesitant to disclose conflict—and especially litigation—among present and former partners. Additionally, firms increasingly select arbitration over litigation to settle disputes (especially in international transactions).[174] A commonly reported benefit of arbitration is its ability to preserve the confidentiality of the disputants as well as the dispute itself. Hence, one might expect conflict to be underrepresented by litigation. The data seems to bear out this expectation, although it is impossible to know for sure. Lin and Whitford observe "671 alliance relations" and "206 litigation relations."[175] While acknowledging the skewed data, Lin and Whitford, do not see it as a data problem so much as a predictable theoretical result. "These finding[s] are easily squared with extant theory," they say.[176] They suggest that alliances are frequently entered into by competitors, which make them "unstable" and subject to "high failure rates."[177] In other words, their theory predicts more alliances (of a short-term nature):

169. Lin & Whitford, *supra* note 92.

170. *Id.* at 191.

171. *Id.* at 198.

172. *Id.* at 201.

173. "The strategic alliance data are collected from SDC Platinum Database." *Id.* at 198.

174. *See generally id.* at 197 n.23.

175. *Id.* at 201.

176. *Id.*

177. *Id.*

"In such competitive collaboration, alliance partners would pursue short-term self-interests over long-term collaborative goals."[178] I am not quite sure why this is not a recipe for conflict, but in any case, I think the selection issue deserves more attention.[179]

Be that as it may, the study is preliminary and the investigators provide some very interesting findings.[180] Their k-core analysis offers stark results. A k-core analysis measures connectedness among nodes in a network, where nodes in their study correspond to firms.[181] Their analysis revealed an extraordinary degree of connectedness among a large number of Japanese semi-conductor makers.[182] An informed insider may have surmised as much from casual observation, but the formal analysis allows for broader comparisons. As they conclude, "[t]he regional analysis implies that there may be different normative spaces in an industry, with firms embedded in different normative spaces following different sets of norms to govern their behaviour."[183]

Additionally, looking beyond dyads, Lin and Whitford present compelling results and theory related to triads, which they perceptively apply to Macaulay's early work. "Our study suggests there may be a 'structural' explanatory factor concerning the use or nonuse of business litigation," they argue.[184] Their analysis of triads, for instance, "indicates that the use or non-use of litigation can be affected by a firm's relation with a third party."[185] This is a terrific insight. In their final write-up of their analysis, I hope they consider the sociological work on numbers by Georg Simmel. His observations on dyads, triads, and larger groupings foreshadow key organizational concepts, like integration and bilateral monopoly.[186] Simmel's writings will, I suspect, usefully inform their empirical project. The semi-conductor industry did not exist when Simmel wrote, but that hardly matters. His insights that are relevant to their project did not derive from any particular business form or from business in general. Indeed, even more than the business partnership,

178. *Id.* at 201, 204.

179. The authors are not blind to the litigation selection issue: "We are, of course, well aware that most conflict in the relations that interest us and other sociologists does not culminate in litigation." *Id.* at 217–18.

180. There were other small concerns with the chapter. For example, Figure 2 graphs B and G, as well as graphs C and I, seem redundant, while some graphs with distinct edges are not shown. But these quibbles are overshadowed by the approach and interesting findings of the chapter.

181. *Id.* at 210–11.

182. *Id.*

183. *Id.* at 218.

184. *Id.*

185. *Id.*

186. THE SOCIOLOGY OF GEORG SIMMEL 118–44 (Kurt H. Wolff ed., trans., 1950).

Simmel relied on the organizational form of the monogamous marriage to develop his arguments about the dyad.[187] Adding a child revealed the triad. The family organization, of course, is not simply a metaphor for the business organization; it is an important context of relational contracting in its own right, which brings me to the last chapter in this section.

Carol Sanger's superb chapter touches on a little known, at least in contracts circles, article written in 1978 by Jacqueline and Stewart Macaulay entitled *Adoption for Black Children: A Case Study of Expert Discretion*. As Sanger observes, "[t]he article seeks to understand the structural, ideological, and particularly the *institutional* reasons, why and how in the early 1970s trans-racial adoption became a disfavoured mode of family formation."[188] The article provides a perfect *entre* for Sanger's chapter, which concerns "the use of contract in family formation."[189] One could hardly imagine a more relational or socially embedded venue of contracting.

In some ways contract is a very familiar form of family building. Take, for instance, the unromantic prearranged marriage, as well as the more serendipitous marriage. The mutual bonds of contract and marriage cut across cultures and millennia. However, Sanger's chapter "focuses on the use of contract not to acquire a spouse, but in the process of obtaining a child. As with wives," she writes, "children were certainly acquired contractually in the past."[190] Historically, contracts were commonly used for acquiring custody of children under slavery, indentured servitude, and apprenticeship.[191] These contractual exchanges, however, were no more relational than contracting for adult labor. Sanger is concerned with the more personal, more relational, modern use of contracts to create parent-child relationships (not the historical master-slave, master-servant, or master-apprentice relationships).[192]

No doubt the historical practices of slavery in America contribute to the continuing, but waning, opposition (particularly within the black community) of transracial adoption. Sanger's chapter, however, is neither primarily historical in nature nor geared toward contemporary racial relations, which is not to suggest she turns a blind eye to either history or race. Quite the contrary, Sanger gives thoughtful attention to

187. *Id.* at 128–32.

188. Carol Sanger, *Acquiring Children Contractually: Relational Contracts at Work at Home*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 289, 291–92 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

189. *Id.* at 289.

190. *Id.* at 290.

191. *Id.*

192. *Id.* at 291.

these issues and in various places evokes consideration of both history and race to great effect. For example, in a section on the transformation of adoption law and practices, she astutely connects changes in parental termination and adoption agreements, beginning in the 1970s, to the "uncanny cultural phenomenon" of Alex Haley's *Roots* and the subsequent growing cultural awareness and interest in genealogy and family histories.[193] These factors altered the balance of the "secrecy interest" of transacting birth mothers and adoptive parents as weighed against the interests in knowing one's birth origins.[194] The demand for secrecy was also altered, as well as the supply of cases. In elaborating the historical context, Sanger recalls the development of "the pill" in the 1960s and decriminalization of abortion in 1973.[195] All of this history, however, is mainly a backdrop to her primary focus: modern statutes and doctrine concerning post-adoption agreement, particularly termination and acquisition of parental and visitation rights.[196]

Her early reference to the article by Jacqueline and Stewart Macaulay does not provide the organizing frame for the chapter. Theoretically, Sanger is more dedicated to the relational contract scholarship of Macaulay, applying it in what she calls "relational contracts at work at home."[197] In developing her analysis, she reviews case law and statutes[198] as well as empirical analyses of parental termination cases.[199] Contract doctrine runs through the whole subject, from formation to remedy, with emphasis on specific performance and rescission. Contract surfaces even in cases of involuntary termination of parental rights, or the threat of it. Consider the following case, one of the many accounts that Sanger effectively relates.

The account comes from a 2009 Texas case, *In the Interest of DEH*,[200] which involved a six-month-old child, DEH, who "was removed from her unmarried parents on grounds of abuse: the baby had been beaten by her father and suffered two fractures . . . , a liver contusion, and a spleen laceration."[201] The child was subsequently placed in foster care and the father's parental rights were involuntarily terminated.[202] The

193. *Id.* at 293.

194. *Id.* at 292–94.

195. *Id.* at 294.

196. *Id.* at 298, 302.

197. *Id.* at 291.

198. Among other considerations, Sanger highlights interracial adoption of Native American children and meaningfully connects that discussion to the jointly authored work of the Macaulays. *Id.* at 297.

199. *Id.* at 292, 296–99.

200. 301 S.W.3d 825 (Tex. App. 2009).

201. Sanger, *supra* note 188, at 304.

202. *Id.*

biological mother, EL, voluntarily terminated her parental rights "following a mediation with her attorney and the baby's pre-adoptive foster parents."[203] The foster parents and EL also entered a post-termination contract, but subsequently "EL sought to have her consent withdrawn on the grounds of fraud, duress and coercion."[204] She was told, her complaint reported, that if the pending involuntary "termination case against her went to trial, 'the likely outcome was that she would never see [her child] again' and that her only other option was to sign the affidavit of relinquishment and enter into an agreement for limited visitation."[205]

Beyond the poignancy of these characteristically tragic accounts and the instructive applications of familiar contract doctrine to what is, for most, an unfamiliar context, Sanger's chapter offers subtle and meaningful insight into Macaulay's relational contracts scholarship. As mentioned before, issues of embeddedness could not be made more apparent than in this contracting context. Only slightly less obvious—and just as central—are issues of power, which are suggested in a number of other chapters in the volume,[206] but best explored by Sanger. In moving away from an earlier analogizing of post-adoption/post-termination visitation agreements with prenuptial agreements, Sanger raises plea bargains as an apt analogy.[207] These are contexts where power and status are so apparent they cannot be denied.

Perhaps an even more apt analogy, which Sanger knows better than most but did not discuss, would be the postnuptial agreement. Consider, for instance, *Pacelli v. Pacelli*,[208] involving a wife who entered an agreement restricting her property distribution in the eventuality of divorce in return for the husband's promise not to immediately file for divorce.[209] As the court observed, Mrs. Pacelli

> faced a more difficult choice than the bride who is presented with a demand for a pre-nuptial agreement. The cost to [her] would have been the destruction of a family and the stigma of a failed marriage. She testified on several occasions that she signed the agreement to preserve the family and to make sure that her sons were raised in an intact family.[210]

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203. *Id.*
204. *Id.*
205. *Id.* (quoting *In the Interest of DEH*, 301 S.W.3d at 830).
206. *See, e.g.*, Leib, *supra* note 118, at 261, 276, 282.
207. Sanger, *supra* note 188, at 308–09.
208. 725 A.2d 56 (N.J. Super. Ct. App. Div. 1999).
209. *Id.* at 57–58.
210. *Id.* at 59.

A number of other can be easily summoned. In a way, that may be the key contribution of this chapter, namely encouraging broad consideration of power and embeddedness across various domains of relational contracting. Once these dynamics are made accessible, as they are so visible in the context Sanger develops, it is easy to see them everywhere. Yet in drawing on analogies, as she cautions, one must also bear in mind that "there are important differences in how postadoption visitation agreements are used and regarded . . . ."[211] The social meaning of contracts and exchanges resists easy translation when its subject matter involves children.[212]

III. DOCTRINE, LAWYERS, AND JUDGES

In a chapter entitled, *Restitution without Context: An Examination of the Losing Contract Problem in the* Restatement (Third) of Restitution, William Woodward, Jr. brings us back to *Restitution in Context*, Macaulay's first academic publication.[213] The losing contract problem and its remedies are best illustrated by example, and Woodward provides a workable one. Imagine that "Contractor contracts to build Owner a house for the price of $150,000."[214] Before work begins, Contractor expects her cost will be $100,000 (implying an expected profit of $50,000), but with the work 80 percent complete she realizes that she has already outlaid $160,000 in costs and that it will take another $40,000 to finish the project as promised.[215] In other words, Contractor realizes that she is in a losing contract: the cost of keeping the contract (i.e., $200,000) is greater than its value to her (i.e., the price of $150,000).[216] Before she goes to Owner to seek an adjustment to the

211. *See* Sanger, *supra* note 188, at 313.

212. *See, e.g.*, Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, *in* BABY MARKETS: MONEY, MORALS, AND THE NEW POLITICS OF CREATING FAMILIES (Michele Bratcher Goodwin ed., 2010); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

213. William J. Woodward, Jr., *Restitution without Context: An Examination of the Losing Contract Problem in the* Restatement (Third) of Restitution, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 347, 347 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

214. *Id.* at 350.

215. *See id.* Assume Contractor is competitive; that is, $160,000 is the reasonable value of Contractor's work (it would cost any decent contractor $200,000 to build the house and $160,000 to construct the 80 percent of it completed). If Contractor in the example is deficient in any way, it was in estimating or predicting the costs. But even here, we need not assume deficiency. Market fluctuations around input factor prices could bring about such losing circumstances even for business parties who are not "dimwitted," "overly optimistic," "desperate for work," or "just plain stupid," as Woodward seems to view the unfortunate contractor in his example. *Id.*

216. *See id.*

original contract terms, some good luck, it seems, comes her way when "Owner refuses to pay anything at all and ejects" Contractor, effectively breaching the contract.[217] Assuming she has a remedy, "[h]ow should we measure the contractor's recovery?"[218]

It is this question—which "has puzzled courts and commentators for more than a century"[219]—that animates the losing contract problem and is the focus of Woodward's essay. There are four common answers to the measurement problem. First, the recovery could be determined by the ordinary measure of *expectation damages*, which would award the contractor the contract price ($150,000) minus the loss avoided by not having to complete the remainder of the work ($40,000 or $110,000 net).[220] Second, the contractor could be awarded the *reasonable value* of her services provided ($160,000) which is the approach "adopted by most courts . . . [and is] enshrined in the *Restatement (Second) of Contracts*."[221] Third, some courts would limit any reasonable value recovery using a *contract price cap rule*, so the contractor in this example would receive no more than the contract price of $150,000.[222] Fourth, because she did 80 percent of the work, a court might allow her to recover 80 percent of the contract price ($120,000 i.e., 80% * $150,000), which is a form of price apportionment (here called a *contract rate rule*) followed in many civil law jurisdictions, in Article 2 of the *Uniform Commercial Code*, and in the recently completed *Restatement (Third) of Restitution and Unjust Enrichment* (R3RUE).[223]

Woodward takes the R3RUE to task for rejecting the conventional judicial solution, *reasonable value rule*, and replacing it with its favored *contract rate rule*. He first challenges the instrumental analysis that led the R3RUE reporter, Andrew Kull, to dismiss the common approach. "[T]he 'reasonable value rule', it is said, encourages . . . strategic behaviour [i.e., calculated attempts to induce the other side to breach] and is inefficient because the parties will expend resources trying to

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 350–51.

221. *Id.* at 352.

222. This is the second choice rule of the *Restatement (Third) of Restitution and Unjust Enrichment*, allowing a losing-contract claimant "the market value of the plaintiff's uncompensated contractual performance, not exceeding the price of such performance as determined by reference to the parties' agreement." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38(2)(b) (2011).

223. *See* Woodward, *supra* note 213, at 352. *See also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. d (2011) (describing the contract rate rule as a minority rule among U.S. jurisdictions); U.C.C. § 2-607(1) (2013) (stating that "[t]he buyer must pay at the contract rate for any goods accepted").

enhance their litigation position . . . ."[224] Rational parties, Professor Andrew Kull has observed in earlier academic writings, would not choose a rule that leads to such perversity, making the *reasonable value rule* a poor candidate for the default.[225] *Reasonable value* would be a bad default rule, Woodward summarizes, "because it would require the parties to negotiate a change in this inefficient rule, or be stuck with it, in their contracts."[226] It is little wonder then, that reporter Kull would disfavor this rule in the R3RUE.

The claim that rational parties would reject the *reasonable value rule*, however, is far from obvious. An instrumental efficiency analysis could support the *reasonable value rule*.[227] Woodward attempts to provide an example by "denominat[ing] the losing contract rule a 'penalty default rule.'"[228] His attempt, however, is unclear and ultimately falls short of securing his point. First, he doesn't define the "losing contract rule" that he would treat as the penalty default *à la* Ayers and Gertner—nor was I able to locate its meaning in the context. Perhaps he means the "predictable" strategic and inefficient behavior that often accompanies losing contracts, but these are better described as consequences or corollaries rather than a rule that could operate as a legal default; or perhaps he merely means some rule—any rule—for dealing with the losing contract problem.

Whatever his meaning, the application of the penalty default analysis to the "losing-contract rule" seems misplaced. Penalty default rules are useful in the context of asymmetric information, where the penalty allows the parties to effectively harness private information held by one side. Nothing in the information structure described by Woodward suggests that a penalty default would be useful here, so it is no surprise that the parties would have to waste resources to contract around this presumptively inefficient rule, which, by the way, is exactly the logic of Kull's argument against the *reasonable value rule*.[229] Problematic though it seems, Woodward's penalty default analysis is not particularly central to his thesis, and it would be pointless to make too much of it here, beyond observing that it does ironically undermine his aim to demonstrate that "this kind of instrumental analysis is so easily manipulated, it is ultimately indeterminate as a normative matter."[230]

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224. Woodward, *supra* note 213, at 354.

225. *See* Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465, 1472 (1994).

226. Woodward, *supra* note 213, at 354.

227. *See, e.g.*, Richard R.W. Brooks & Alexander Stremitzer, *Remedies on and off Contract*, 120 YALE L.J. 690, 725 (2011).

228. Woodward, *supra* note 213, at 354.

229. *See* Kull, *supra* note 225, at 1477–78.

230. Woodward, *supra* note 213, at 355.

The chapter finds its footing when it comes out of the weeds of instrumental analyses and takes broader views. "[E]ven if it were less indeterminate, abstract instrumental analysis," observes Woodward, does not clearly "offer much guidance at all in this complex setting."[231] He quite effectively argues that the "noise" of the situation (a good characterization) and the competing incentive effects—which are in any event, according to Woodward, non-existent or extremely small in thick relational contexts—render this approach altogether arbitrary.[232] An instrumental analysis based on investment considerations of the cooperative or selfish sort would recommend a different default than analyses concerned with promoting optimal search, efficient performance, or some other objective.[233] For Woodward's clear, if unacknowledged objective—which I take to be encouraging contractual adjustment in order to preserve the relationship, or what John Commons called the "going concern"[234]—theoretical economic analyses offer no useful counsel. He turns instead to behavioral economics, focusing on experimental findings around the reciprocity norm, which "'holds that individuals in collective action settings behave not like rational wealth maximizers but rather like moral and emotional reciprocators.'"[235] Behavioral economics, however, with its hodgepodge of competing biases and anomalies, hardly seems better able to provide a unique answer to the losing-contract problem. A reciprocity norm analysis points in one direction while analyses informed by status quo bias, endowment effects, or—perhaps especially—Prospect Theory's loss aversion may steer the analyst elsewhere.[236] Woodward appreciates the indeterminacy and he leaves the behavioral approach on a skeptical note.

It is at this point, however, that the essay takes its most interesting turn. Shifting away from abstract theoretical and behavioral analyses, Woodward isolates ideology as the best way to understand both the

231. *Id.*

232. *See id.* at 355–56.

233. Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

234. John R. Commons, *Law and Economics*, 34 YALE L.J. 371, 375 (1925).

235. Woodward, *supra* note 213, at 361 (quoting Dan M. Kahan, *Signaling or Reciprocating: A Response to Eric Posner's* Law and Social Norms, 36 U. RICH. L. REV. 367, 368 (2002)).

236. The central tenant of Prospect Theory is that losses loom larger than gains, which is to say, individuals weigh losses more than equivalent gains. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979). The incentive and behavioral effects to avoid losses in the "realized" losing-contracts setting should, according to the loss aversion logic, provoke stronger responses than in settings with an economically equivalent transaction where the prospect of loss is less salient. One can only speculate here, but if we are to speculate about the reciprocity norm then why not about loss aversion?

traditional rule and the R3RUE departure from it. He observes that R3RUE's ideological commitments place "contract" prior to "restitution" (at least for the purposes of organizing voluntary exchange), and he takes the losing-contract problem as fundamentally a contract enforcement problem.[237] "Once the problem is defined as having an enforceable contractual underpinning, then liability should not go beyond the 'promise' made . . . [and] giving the loser-plaintiff a remedy that exceeds the value one calculates based on the breacher's promise would, it is said, 'unjustly enrich' the plaintiff . . . ."[238] Strong ideological commitments to individual autonomy are reflected in this vision; here parties are free—free both to contract and to avoid contract, that is to avoid "liability not voluntarily assumed."[239]

In opposition to the autonomy view stated above, where obligation goes no further than what is explicitly assumed through promise and consent, Woodward offers an alternative where he says:

> [O]nce a contract is made, the contracting parties owe one another 'more' than the quantifiable measure of their respective promises. One can express that 'more' in a number of ways: the trust formed in the relationship, the sense of mutual reliance the contract represents, 'organic solidarity', 'morality', or . . . the obligation inferred from the 'reciprocity norm'.[240]

Now completing the picture with ever broader brush strokes, Woodward layers his argument by asserting that it is not just the R3RUE that has abandoned this something "more" that Macaulay, Macneil, and others made central decades ago.[241] The R3RUE move is simply an extension of the promotion of the rational individual over the relational individual that over the past several decades has been espoused in "the free market economic theories championed . . . by . . . Milton Freedman[], the related political rhetoric of Margaret Thatcher and Ronald Reagan, and the relentless outpouring of judicial opinions and academic writing by Richard Posner . . . ."[242] I might add that this is not a new contest. The battle for the rational individual as the normatively correct unit of analysis over the transactional relationship goes back at least as far as

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237. *See* Woodward, *supra* note 213, at 364 (analyzing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c (2011)).

238. *Id.* at 364. The unjust enrichment results "presumably by giving the loser plaintiff more than he bargained for, or exposing the promisor to more liability than she assumed." *Id.* (citation omitted).

239. *Id.* at 365.

240. *Id.* (citations omitted).

241. *Id.* at 368.

242. *Id.* at 369.

Jeremy Bentham's attacks on Blackstone's commentaries.[243] Woodward is merely witnessing, from the rearview mirror at that, a more recent flare up: "To even the casual observer, the context against which we think about contract law has changed dramatically during the last 25 years and it would be surprising if *this* context did not affect how contract law is perceived."[244]

Woodward's excellent essay draws our attention to contract's jurisprudential cadence, lifting and lowering doctrine like flotsam on swells with ideological and political undercurrents. To make the point perfectly clear he recalls a wonderful passage from Gilmore's *Death of Contract*:

> "We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods . . . everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim . . . But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstacy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic – as well as, frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation – and so the rhythms continue."[245]

Having so convincingly developed his argument, I was a bit struck by Woodward's hedge near the end of his chapter: "It may not be easy," he says, "to form an apolitical normative judgment about the losing contract rule when that judgment is inevitably . . . affected by our ideological beliefs about what contract law . . . should do."[246] It may not be easy? It would seem impossible were we to grant his thesis credence.

A short chapter by D. Gordon Smith returns us to the topic of restitution and associated doctrines. Smith's entry is entitled *Doctrines of Last Resort*, a term he uses in reference to a vast collection of doctrines that include good faith, fair dealing, fiduciary duties, restitution, and

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243. *See* Commons, *supra* note 234, at 371 (citing Jeremy Bentham, *Fragment on Government*, *in* 1 WORKS OF JEREMY BENTHAM 221 (John Bowring ed., Edinburgh, 1843)).

244. Woodward, *supra* note 213, at 369.

245. *Id.* at 373 (quoting GRANT GILMORE, DEATH OF CONTRACT 102 (1974)).

246. *Id.* at 370.

unjust enrichment. He calls this motley collection "doctrines of last resort," he says, "because they are activated only when all other potentially applicable commands from constitutions, statutes, regulations, ordinances, common law decisions and contracts have been exhausted."[247] Strictly speaking, that can't be right. These so-called "doctrines of last resort" are not backups that kick in only when first-line commands are exhausted. These doctrines often operate simultaneously and in the alternative with other expressed orders. Moreover, his doctrines of last resort are not neatly separable from the commands and orders of courts, legislators, regulators, and contracting parties. In trying to make sense of his assertion, it becomes quickly apparent that this chapter ought not to be read strictly, but rather loosely and sympathetically. From that perspective, one can see a hint of something interesting in Smith's thesis, although it is not worked out in any suitable fashion.

Smith is concerned with situations wherein the expressed language of agreements (including the terms supplied by constitutions, statutes, regulations, ordinances, and common law decisions) leaves room for strategic behavior and advantage taking by one or both parties to the agreement. In the common parlance of economists, the context is one of "incomplete contracts," and the consequence of concern is "opportunism."[248] Smith provides a brief and useful elaboration of these terms, nicely relating incomplete contracts to a more recent article by Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*.[249] He then traces the etymology of opportunism from nineteenth-century continental usage through the early twentieth-century writings of Justice Benjamin Cardozo and ultimately to its current interpretation (i.e., "self-interest seeking with guile") coined by the economics Nobel Laureate Oliver Williamson.[250]

Opportunism has captured the attention of economists because it is thought to be a significant source of inefficiencies in allocation and

247. *See* D. Gordon Smith, *Doctrines of Last Resort*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 426, 427 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

248. *See id.* at 427–41. Smith provides a brief and useful elaboration of these terms in his chapter, nicely connecting Macaulay's article, *The Real and the Paper Deal*, with incomplete contracts and tracing the etymology of opportunism (in English) from the nineteenth-century through early twentieth-century writings by Justice Benjamin Cardozo to its current usage popularized by Oliver Williamson. *See id.* at 430–33.

249. Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MODERN L. REV. 44 (2003).

250. *See* Smith, *supra* note 247, at 427–32.

investment.[251] It is to this concern that the doctrines of last resort, Smith argues, may usefully respond. By constraining opportunism when contract and command are silent, these doctrines establish "boundaries on self-interested behavior to mitigate opportunism."[252] This is an insightful and noteworthy claim; however, it is one that has been significantly developed by Henry E. Smith and his collaborators.[253] No doubt D. Gordon Smith was unaware of this work since he does not cite it, while his citations to other works are generous.[254] In any event, his chapter is too short to offer a competing or alternative analysis to the other Smith. There is, however, the hint of something distinctive in the chapter, as mentioned above, to which we now turn.

Early in his discussion, D. Gordon Smith observes that in those "circumstances – where positive law and private ordering are otherwise incomplete – contracting parties rely heavily on informal social sanctions to protect against opportunism, but the doctrines of last resort reinforce these social sanctions."[255] The observation suggests not only that parties may look to non-legal over legal enforcement (the key observation of Macaulay's Non-Contractual Relations) and that there may be exploitable trade-offs or interactions between contract law (or law) and doctrines of last resort (very loosely equity); but D. Gordon Smith also suggests that these more equitable (for lack of a better term) last-resort doctrines also bolster social norms. Questions arise from this final suggestion. How exactly do last-resort doctrines reinforce social sanctions? Why would last-resort doctrines be more effective in shaping and supporting norms than expressed and manifest legal commands? Does the logic of acoustic separation not imply otherwise?[256]

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251. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 43–67 (1985).

252. Smith, *supra* note 247, at 430.

253. *See generally* Henry E. Smith, *An Economic Analysis of Law versus Equity* (Nw. Law Sch., Law & Econ. Colloquium Paper, 2011), *available at* http://www.law.northwestern.edu/faculty/programs/colloquium/law_economics/documents/2011_SmithLawVersusEquity.pdf; Kenneth Ayotte, Ezra Friedman & Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism* (Nw. Law Sch., Law & Econ. Research Paper No. 13-15, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245098##; Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321315.

254. In all fairness to D. Gordon Smith, it should be noted that the work by Henry E. Smith and collaborators has been circulating in draft form and not as final publications.

255. Smith, *supra* note 247, at 427 (citation omitted).

256. *See, e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

No answers are provided; the questions are not even raised in the piece, which is unfortunate because the study of how law enforces norms is a compelling line of inquiry. I have come across it in my own research on racial restrictive covenants, which are agreements among property owners to restrict sales, rentals, and occupancy to persons of designated ethnicities, races, religions, or nationalities. Studying these agreements and the institutions that promoted them, one is struck by the extensive role legal doctrine played in shaping norms and social sanctions in neighborhoods throughout the country during the twentieth century.[257] Through covenants and the other practices that supported them, neighbors learned how to behave and what to expect of others. Particularly in loosely knit neighborhoods lacking shared neighborly conventions, homeowners learned how and against whom to discriminate. Legal doctrine provided scaffolding around which norms of exclusion were constructed.

By the mid-twentieth century, when the Supreme Court ruled judicial enforcement of racially restrictive covenants unconstitutional,[258] the scaffolding was dispensable because the norms had hardened. Moreover, courts were but a single and occasional venue for enforcing racial covenants; the ordinary and everyday functioning of those agreements operated to support norms among real estate professionals and homeowners selling and renting residential property with little need or desire to resort to courts. As Macaulay long ago told us, parties secure their agreements relying less on courtroom enforcement than community enforcement when the relevant community is properly identified. Covenants, contracts, and other enforceable agreements are not prepared primarily for judges. Their primary purpose is to establish shared expectations among the parties concerning the exchanges and interactions that are subject to the agreement. Though it is not all that they do, to a significant extent contracts construct norms.

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Sometimes contracts miss the mark of the parties' intentions and expectations. Such mistakes, particularly in complex business agreements, are the topic of Claire Hill's contribution to the volume.[259]

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257. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013).

258. *See Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

259. Claire A. Hill, *What Mistakes Do Lawyers Make in Complex Business Contracts, and What Can and Should Be Done about Them? Some Preliminary Thoughts*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 223 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

Her chapter is less concerned with legal doctrine applicable to mistakes than with mistakes in practice. Based on practitioner interviews, Hill develops a taxonomy of four nonexclusive types of mistakes. "One type of mistake is a 'mechanical' mistake – a term is not defined, for instance, or is defined in two different ways."[260] She would place typographical errors in this category too.[261] Summing up the other categories, Hill observes: "A second is a technical mistake – a formula does not work. A third is inconsistency. For instance, two different provisions purport to govern the same event, but yield different results. . . . A fourth type is lack of clarity . . . ."[262] One could debate whether these "types" actually represent more or fewer than four categories. Aspects of her categorization call to mind Melvin Eisenberg's *Mistake in Contract Law*, where he introduced mental or "intellectual blunders" among other useful distinctions.[263] It might have been useful for Hill to contrast Eisenberg's categories with her own, but her concern is less devoted to typologies than to exploring mistakes generally from a relational perspective.

At various places, Hill's chapter hints that she might attempt to identify the causal effects of mistakes in contract relationships that endure and those that end in litigation or some other breakdown. The identification problem is daunting. Do parties use mistakes as escape routes from failed contractual relationships, or do documents lacking accuracy and clarity lead to failed relationships? "Which conclusion is correct is not important for my account," says Hill, "so long as there are appreciable, even if fewer, mistakes in documents where the parties do not move toward litigation."[264] But not moving toward litigation is not the same as continuing a relational arrangement. The same selection issues that troubled Lin and Whitford's empirical study surface here. Hill's account, however, is more descriptive than causal.

She describes factors for locating contexts where mistakes are likely to occur: "More transaction complexity and less tractability, less review by knowledgeable lawyers, longer document length, and more haste would seem unambiguously to yield more mistake-ridden documents, . . . [b]ut *other factors' effects* are harder to predict."[265] Hill acknowledges that "[e]mpirical work would be needed to determine which factors

260. *Id*. at 225.

261. *Id.*

262. *Id.* at 225–26. The fourth category, lack of clarity, occurs "where there is more than one reasonable way to read a provision and no straightforward interpretive convention or other rule that dictates which meaning should prevail." *Id.* at 226.

263. *See* Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CALIF. L. REV. 1573, 1584 (2003).

264. Hill, *supra* note 259, at 229.

265. *Id.* at 231 (emphasis added).

contributed more to mistakes;"[266] but this is not her project. In fact, while stating that "such work should be helpful to efforts to minimise mistakes,"[267] Hill also reveals that she finds that project entirely dubious. Regarding efforts to minimize mistakes, she does not believe that "much (more) can be done about them."[268] Furthermore, she argues that "a good case can be made that not much *should* be done about [them] . . . . Many drafting defects might simply go unnoticed – and do no harm."[269] Finally, she observes mistakes "may even do some good," relationally speaking, "if they constrain litigation and solidify the community through its common acceptance of (litigation-constraining) norms."[270] What then is Hill's project?

The aspect of her chapter that I found most compelling was not how mistakes are handled between business parties *per se*, but rather the role of lawyers and law firms in the mistake-making mess. It is in this context that Hill makes her empirical contribution, and it is an excellent one. She produces a revealing continuum of mistakes "reflecting the lawyer's state and extent of knowledge and awareness."[271] She touches on the salience of legalese, junior lawyers, and law firm reputation. By highlighting lawyers and legal practice as prime sources of mistakes (not just the subcontractor hastily submitting a bid or the mutually mistaken traders from foreign lands), Hill's analysis offers insight that is otherwise obscured when imagining that mistakes originate largely outside of legal practice.

Beyond the external errors that lawyers are enlisted to fix, legal practice also introduces problems. Indeed, the adversarial, reputational, and self-promotional features of the American legal profession may be a very good reason for business parties to rely less on litigation and the like and turn to more trustworthy norms of business practice. Hill observes that business parties often choose to avoid exploiting mistakes for the sake of a relationship; the nonuse of contractual mistakes can foster trust and other relational bonds among these parties.[272] However, for the law firm that sees itself as an aggressive advocate for the client (and not the relational arrangement between the client and its counterparty), "nonuse" is nonsense.

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266. *Id.* at 232.
267. *Id.*
268. *Id.* at 224.
269. *Id.* at 224–25.
270. *Id.* at 239.
271. *Id.* at 233.
272. *Id.* at 236–37.

The problem is illustrated (loosely) in the recent case *Sumerel v. Goodyear Tire & Rubber Co.*,[273] where, in the context of negotiating a settlement, Goodyear's lawyer emailed opposing counsel an offer containing errors favorable to Sumerel and other plaintiffs.[274] Counsel accepted the mistaken offer, which Goodyear later discovered and sought to invalidate.[275] The parties in this case were not business contractors, so the analogy is less than ideal. However, the agency problem of lawyers in generating and responding to mistakes is apparent. The claim is not that lawyers are more prone to making mistakes; I would imagine just the opposite. The claim is that when it comes to complex contracting among business parties, lawyers are usually the ones writing and responding to the contracts. If we are to understand mistakes in this context, then, as Hill makes clear, we must turn our gaze to the lawyer's role.

The judge's role, or rather the role of particular judges, is taken up in two other chapters. The first is John Wightman's *Contract in a Pre-Realist World: Professor Macaulay, Lord Hoffmann and the Rise of Context in the English Law of Contract*, which focuses on what he calls the "contextual 'turn' in English law."[276] While identifying the roots of contextualism in American law in academic and other extrajudicial venues,[277] Wightman notes that in English law, contextualism has emanated largely from the bench and "[t]he principle judicial author of this development is Lord Hoffmann."[278] This is certainly a compelling topic for contracts scholars. Hoffmann's distinct interpretive approach has shaken up—if not overturned—settled doctrines like the familiar chestnut, *Hadley v. Baxendale*.[279] The spotlight on Hoffmann, particularly his approach to context and interpretation, is reminiscent of an early article by Macaulay on Justice Roger Traynor.[280] One senses a lost opportunity in Wightman not using the occasion to place his chapter in conversation with the Macaulay article, which he cites in a footnote mentioning that the article presents "an approach to interpretation with

273. 232 P.3d 128 (Colo. App. 2009).

274. *Id.* at 131.

275. *Id.* at 132.

276. John Wightman, *Contract in a Pre-Realist World: Professor Macaulay, Lord Hoffmann and the Rise of Context in the English Law of Contract*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 377, 379 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

277. These extrajudicial sources are "of the kind exemplified by the *Restatement* (*Second*) *of Contracts*, or the *Uniform Commercial Code*." *Id.* at 378.

278. *Id.*

279. (1854) 156 Eng. Rep. 145 (Ex. Div.).

280. Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

some resemblances to that discussed [in the chapter]."[281] Surely more could be said, if only to say why nothing more ought to be, in a book on the scholarship of Macaulay. Alas, this is not a chapter about Macaulay and his scholarship.

The same may be said of the chapter that follows Wightman's, by Deborah Waire Post on *The Deregulatory Effects of Seventh Circuit Jurisprudence*.[282] Post's title suggests a broader analysis of the Seventh Circuit jurisprudence, but it is really a concentrated critique of several opinions by Judges Richard Posner and Frank Easterbrook with only tangential reference to other judges on the circuit and to Macaulay's scholarship.[283] Wightman's and Post's chapters cover remarkably similar grounds. Together they might be placed under the heading "judicial interpretation of context and consequential damages." From distinct but related legal traditions—English and American common law of contracts—Post and Wightman scrutinize parallel themes navigated by influential contemporary judges. Regrettably, the chapters are not expressly in conversation with each other, yet they read well together and I will review them as such.

Consider first Wightman's discussion of the rise of context in English contract law. The principle case considered is *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,[284] "where Lord Hoffmann's judgment has become the classic statement of the modern approach to construction."[285] I won't bother reciting the facts, but the key issue in the case "concerned an express term which only had one 'literal' meaning, in that the syntax of the relevant clause could not [be] made to mean what one of the litigants – ultimately successfully – contended that it meant."[286] How did this litigant come to prevail under Hoffmann's approach to construction? The initial step involves acknowledging that when the literal meaning of a written contract fails to make sense (or cannot be reconciled with the views of the parties and the background context), it may indicate that "something had clearly 'gone wrong'" in the contract drafting.[287] The subsequent step in Hoffmann's approach requires "assessing the commercial sense of the alternative meanings by examining them against the background of

281. Wightman, *supra* note 276, at 378 n.5.

282. Deborah Waire Post, *The Deregulatory Effects of Seventh Circuit Jurisprudence*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 402 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

283. *See generally id.*

284. [1998] 1 W.L.R. 896 (H.L.) (Eng.).

285. Wightman, *supra* note 276, at 384.

286. *Id.* at 384–85.

287. *Id.* at 385.

the contract."[288] This approach is elsewhere referred to as "committed contextualism" by Hugh Collins and as an "extended objective approach" by Wightman.[289]

The essence of the extended objective approach "is that the meaning of terms is to be found in how a reasonable person would understand them, having in mind the background of the transaction."[290] This approach differs from the conventional objective approach, Wightman notes, "because it depersonalises the parties and sees them possessing the characteristic of a reasonable person – the reasonable seller, buyer and so on."[291] Commercial actors under this approach are presumed to be "reasonable," but less in the sense of being willing to make reasonable accommodations and compromises than in the sense of being rational—or at least not irrational. Commercial actors here do things that make sense commercially. They do not enter into nonsensical transactions so judges need not enforce "commercial nonsense." Hoffmann's approach, then, offers a way to read through contractual gibberish. When the literal meanings of written contracts imply nonsense, judges may take liberty to render those transactions commercially sensible. They may do so, as Wightman approvingly describes the approach, with notable detachment from the claimed intentions of actual parties.[292] Turning away from actual parties averts the hazard of being "drenched in subjectivity."[293] Context, however, still matters. Commercial context—"the background of the transaction"—is focal, but it is to be seen and evaluated through the eyes of the reasonable actor, rightly understood.[294]

Consider now Post's less reverential discussion of Posner's approach. Beginning where Woodward's chapter left off, Post recalls the "ideological divide between those who wish to limit the liability of the breaching party in contract and those who believe that a major shortcoming in contract law is the failure to completely compensate the party injured by the breach of contract."[295] Macaulay is her representative agent of the latter category, while Posner and Easterbrook are the ideal type of the former.[296] Post charges that starting "[a]lmost 30

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288. *Id.*

289. Wightman, *supra* note 276, at 387 (citing Hugh Collins, *Objectivity and Committed Contextualism in Interpretation*, *in* COMMERCIAL LAW AND COMMERCIAL PRACTICE 189, 190 (Sarah Worthington ed., 2003) (describing committed contextualism in practice)).

290. *Id.* at 387.

291. *Id.*

292. *Id.*

293. *Id.* at 388.

294. *Id.* at 387–89.

295. Post, *supra* note 282, at 406.

296. *See id.* at 406–07.

years ago, Judge Posner was at work critiquing, and sometimes rewriting through a process of interpretation,"[297] the expectation remedial ideal, "at least as expressed in Article 2 of the *Uniform Commercial Code* (UCC) [which aims] to put the 'aggrieved party [. . .] in as good a position as if the other party had fully performed'."[298] The vehicle case for the charge is *Western Industries, Inc. v. Newcor Canada Ltd.*,[299] a battle of the forms case where the parties' conflicting terms on consequential damages were knocked out under a UCC section 2-207 analysis.[300] With the relevant terms jettisoned, Post notes that the "UCC section 2-715 would fill the gap and the buyer would be entitled to consequential damages if the seller 'had reason to know of the buyer's general or particular requirements at the time contracting'."[301] However, the breaching seller in the case, Newcor, claimed that a trade usage limiting consequential damages should have supplied the missing term, preempting any need for the UCC section 2-715 gap-filler.[302] At trial, the district judge refused to admit Newcor's evidence of the claimed trade usage.[303] On appeal, Newcor argued the refusal was improper.[304] Posner agreed and reversed the lower court.[305]

In her reading of Posner's opinion, Post observes clear bias and faulty methodology. "After a recitation of the facts, . . . [i]t soon becomes clear to the reader that [Posner's] real concern was the risk that consequential damages pose to a seller."[306] She continues, "[e]ven though the issue before Posner was not the sufficiency of the evidence on the issue of trade usage, but its admissibility, he took it upon himself to

297. *Id.* at 407.

298. *Id.* at 406 (quoting U.C.C. § 1-305(a) (2013)).

299. 739 F.2d 1198 (7th Cir. 1984).

300. *Id.* at 1205–06.

301. Post, *supra* note 282, at 407–08 (quoting *W. Indus.*, *Inc.*, 739 F.2d at 1206). Judge Richard Cudahy also reached this conclusion in his concurring opinion to that case:

> I would also depart from the majority in its formulation of a critical issue in this case—that is, in supplying terms for such a silent contract, the question is which Code provision should govern: §§ 1–205 and 2–202 invoking trade usage to explain or supplement contract terms or § 2–719 providing only that the *agreement* may exclude consequential damages. Comment 3 to § 2–715 states that: "In the absence of excuse under the section on merchant's excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting."

W. Indus., *Inc.*, 739 F.2d at 1207 (Cudahy, J., concurring).

302. *W. Indus.*, *Inc.*, 739 F.2d at 1201.

303. *Id.* at 1201–02.

304. *Id.* at 1201.

305. *Id.* at 1203–05.

306. Post, *supra* note 282, at 408.

construct an argument that would support a finding that the evidence was sufficient."[307] My own reading of the opinion suggests a different conclusion, but judge for yourself. In any event, it is the approach—not its conclusions—to which I wish to call to your attention. On this, Post observes that "[t]he methodology Posner used to 'prove' the existence of a trade usage in the case was consistent with a law and economic analysis, involving theoretical speculation about the relationship between risk allocation, efficiency and presumptive choices by rational economic actors."[308]

Posner's methodology was certainly consistent with a law and economics approach, but that's hardly saying anything. It is almost tautological to say Posner follows a law and economics approach. More striking here (particularly after reading Wightman) is how closely Posner's approach aligns with that attributed to Hoffmann. Posner resolved the admissibility issue by attempting to make sense of the transaction.[309] Although the district judge barred testimony by the seller's experts on a number of grounds,[310] Posner was simply not satisfied that a jury necessarily ought not hear these experts.[311] Posner did not "prove" or establish the sufficiency of evidence on the claimed trade usage.[312] Rather, he sought to gauge the sensibility of a trade usage that would limit consequential damages given "the background of the transaction."[313] He almost certainly would have barred the evidence if it amounted to commercial nonsense "by analogy to the principle that excludes testimony in contradiction of the laws of nature."[314]

Post might concede this point and still challenge the ruling by observing that simply because a practice makes theoretical sense that is not enough to establish it as a custom. That's true. "Whether a custom exists is an empirical question," Post rightly observes, "and as such it requires rigorous attention to the 'situated practices' of '*actual people* in actual settings.'"[315] Posner (and perhaps Hoffmann too) is too quick to

307. *Id.*

308. *Id.*

309. *W. Indus., Inc.*, 739 F.2d at 1203–04.

310. *Id.* at 1201–02.

311. *See id.* at 1203–05. Cudahy also concurred on the exclusion question: "I agree with the majority that a limitation of remedy might have been accomplished by trade custom or usage and that the evidence of trade custom should probably have been admitted." *Id.* at 1207 (Cudahy, J., concurring).

312. *See* Post, *supra* note 282, at 408.

313. Wightman, *supra* note 276, at 387.

314. *W. Indus., Inc.* 739 F.2d at 1203. It is worth noting the subtle equating, albeit by analogy, of commercial sensibility (or rationality) with "the laws of nature."

315. Post, *supra* note 282, at 409 (emphasis added) (quoting Baudouin Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification*, 1 EUR. J. LEGAL STUD. (2007)). Yet one might argue

dispense with actual people for Post. The substitution of reasonable and rational parties for real and relational ones risks eliding the central dynamics of power and inequality that underscore, if somewhat obscurely, Post's progressive defiance of Posner's approach.[316]

Wightman is more conventional. He introduces the recent commotion over the traditional *Hadley v. Baxendale* rule—a commotion that followed from another Hoffmann opinion[317]—with a hypothetical, a "classic classroom illustration."[318] The hypothetical involves a negligent taxi firm that causes a client to miss a flight, who "as a result fails to clinch a highly lucrative deal – and the taxi firm was fully aware of the likely loss when the taxi was booked."[319] Wightman notes that before Hoffmann's recent ruling, "English law struggled to explain why the [taxi firm] was not liable, since the resulting loss appears to meet the requirement that it was foreseeable, at the time of entering the contract, as a probable result of the breach."[320] The change in English case law, as Wightman notes, now implies that foreseeability at the time of contracting is, by itself, insufficient for recovery. The English doctrine now resembles the tacit agreement test that Justice Oliver Wendell Holmes articulated 110 years ago,[321] which itself had English origins.[322] What goes around comes around.

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that's not the point. Posner wasn't seeking to show the existence of a custom, only its nontrivial possibility, which would allow the question of its plausible existence to go to the jury. *See W. Indus., Inc.*, 739 F.2d at 1205–06.

316. Invoking Henry Maine's famous proposition, Post writes, "[i]t is received wisdom that progress entails a movement from status to contract. Not true. Status is everywhere present in contract." Post, *supra* note 282, at 414. The presence of status is not entirely troubling, as Post observes: "Courts have separated out the least well off, members of vulnerable populations, and protected them." *Id.* But for the most part, at least as far as the Seventh Circuit under the influence of Posner and Easterbrook are concerned, Post argues that courts have failed in their progressive regulatory function to protect the least well-off and vulnerable. *Id.* at 412, 414.

317. *See Transfield Shipping Inc v. Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 A.C. 61 (appeal taken from Eng.). For a comprehensive and insightful account of the opinion that stirred up the commotion and an analysis of the subtle—but important—"last voyage problem" that gave rise to the particular case, see Victor P. Goldberg, The Achilleas*: Forsaking Foreseeability*, 66 CURRENT LEGAL PROBS. 107 (2013).

318. Wightman, *supra* note 276, at 389–90.

319. *Id.*

320. *Id.* at 390.

321. *See Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

322. For instance, in his *Western Industries, Inc.* opinion, Posner observed that "the traditional rule of the [American] common law, announced in *Hadley v. Baxendale*, was that consequential damages were not recoverable in contract cases unless specifically negotiated for. See *Globe Refining Co. v. Landa Cotton Oil Co*., 190 U.S. 540, 543, 23 S.Ct [sic] 754, 755, 47 L.Ed [sic] 1171 (1903)." *W. Indus., Inc. v. Newcor Can. Ltd.*, 739 F.2d 1198, 1203 (7th Cir. 1984). Actually that was not the traditional rule, but rather the

The new English development provides a second opportunity to consider Hoffmann's and Posner's analyses of context and consequential damages, and Wightman's and Post's treatments of these jurists. Lord Hoffmann's opinion in *Transfield Shipping Inc v. Mercator Shipping Inc* (*The Achilleas*)[323] changed *Hadley*'s ancient doctrine,[324] but as Wightman notes,[325] Hoffmann built on an earlier case, *South Australian Asset Management Corp. v. York Montague Ltd.* (*SAAMCO*),[326] to reach that result. "The plaintiff in *SAAMCO* lent money to a purchaser on the security of an office building after receiving a valuation report from the defendant valuer."[327] The borrower defaulted, at which point the plaintiff realized that the office building's value actually was substantially less than the loan.[328] "This was partly because the valuer had negligently overvalued the security, but partly because the value of commercial property generally had dropped between the time of the valuation and the borrower's default."[329] The defendant argued that it should not be held liable for the general loss due to the drop in the market even if it was accountable for the loss due to its own negligence.[330] An intermediate court ruled otherwise, holding that the plaintiff would not have suffered any market loss but for defendant's negligent valuation.[331] The plaintiff, the court concluded, would not have made the loan in the first place if the valuation was conducted properly; moreover, loss resulting from a market fall was foreseeable at the time of contracting, so the defendant was liable under *Hadley*.[332] "The House of Lords allowed the appeal and held that the defendant was not liable for the element of loss attributable to the market fall."[333] Lord Hoffmann wrote the substantive judgment, but before turning to the basis of that judgment, consider a similar case that Post highlights in her chapter.

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so-called "tacit agreement" rule promoted by Justice Holmes, which has since been largely abandoned in the United States. As Posner observed, "[t]he [tacit agreement] rule has been relaxed and today most courts would say that it was enough if the consequences were foreseeable, whether or not there was evidence that the promisor had undertaken to insure the promisee against them."

323. (2009) 1 A.C. 61 at 11, 79 (H.L.) (Eng.).
324. *Id.*
325. Wightman, *supra* note 276, at 390.
326. [1997] A.C. 191 (H.L.) (Eng.).
327. Wightman, *supra* note 276, at 390.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*

In *Movitz v. First National Bank of Chicago*,[334] the plaintiff invested in commercial real estate based on the negligent advice of the defendant bank.[335] Shortly thereafter a general collapse in the real estate market resulted in substantial losses for the plaintiff.[336] After finding the bank liable for breach of contract and of its fiduciary duty, a lower court awarded the plaintiff $3.3 million in damages, which included losses suffered as a consequence of the general market downturn.[337] The logic was the same as above.[338] "Had the bank been more careful at the outset and discovered then that the building was less profitable than it appeared to be and that it required significant repairs, the deal might never have gone through . . . had it not been for the bank's negligence in evaluating the property,"[339] the plaintiff would not have suffered a loss, foreseeable at contracting, due to a market downfall.[340] The Seventh Circuit reversed the lower court on appeal, holding the defendant bank not liable for the loss attributable to the market fall.[341] Posner wrote the substantive judgment.[342]

Compare Wightman's and Post's treatments of the distinctive approaches by Hoffmann and Posner, respectively, to reach the same conclusion. Wightman, for his part, again emphasizes Hoffmann's inventive contextualist approach. "On this view, the extent of the defendant's responsibility is defined by the scope of the duty as an implied term of the contract, the content of which is obtained by construing the agreement in its overall commercial setting."[343] Apparently, this was a novel application of the scope of duty rule;[344] it was used to limit recovery for foreseeable consequential damages that the parties "should, in the context, be treated as having assumed."[345]

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334. 148 F.3d 760 (7th Cir. 1998).

335. *Id.* at 761–62.

336. *Id.* at 761, 763.

337. *Id.* at 761.

338. *Id.* at 762.

339. *Id.*

340. *Id.*

341. *Id.* at 765.

342. *Id.* at 761.

343. Wightman, *supra* note 276, at 391.

344. "Invoking the scope of duty in a breach of contract case seems to have been novel: the usage to which Lord Hoffmann referred [in his opinion] was in the scope of the duty of care for economic loss in the tort of negligence." *Id.* at 391–92.

345. *Id.* at 392. "What is striking about this approach is that the court has inserted the additional concept of scope of duty, thereby sidestepping the liability for foreseeable loss that would have been the result of applying the traditional remoteness rule." *Id.* at 391.

Hoffmann is celebrated in the chapter for resolving a problem with which "English law [has long] struggled."[346]

Posner addressed the same problem in *Movitz*, talking more in terms of but-for causation than scope of duty, but he ultimately rests on a scope or *kind* of duty analysis like Hoffmann's.[347] Posner also appealed to doctrine from another area of law—here securities law—to support his argument: "The distinction between 'but for' causation and actual legal responsibility for a plaintiff's loss is particularly well developed in securities cases, where it is known as the distinction between 'transaction causation' and 'loss causation.'"[348] Post refers to this distinction in her chapter but doesn't say why it might be useful to understanding Posner's opinion.[349] She takes it, along with his often provocative language, to suggest a "sardonic," disconnected judicial approach, more concerned

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346. *Id.* at 390.

347. Posner, revealingly, turns to old English case law to illustrate his argument. I quote his opinion at length here:

> The principle that but-for causation is not enough to establish civil liability for carelessness or other wrongdoing is pertinently illustrated by the famous old English case of *Gorris v. Scott*, 9 L.R.-Exchequer 125 (1874). The plaintiff's sheep were being transported on a ship owned by the defendant. A storm arose and the sheep were swept overboard to a watery death. The defendant had failed to equip the ship with pens for the sheep, as he was required to do in order to prevent the spread of disease among the animals. Had he complied with his duty the sheep would have been saved. And so the violation of the duty was a "but for" cause of their loss. Yet the plaintiff was not allowed to recover any damages. The loss of the sheep was a consequence, but not a foreseeable consequence, of the violation of a legal duty, because the duty was to take precautions against a different kind of loss from the one that materialized . . . . It is the same here. The bank had no contractual or other legal duty to build pens that would prevent the Houston real estate market from diving overboard. The care that the bank was contractually required to take in advising [the plaintiff was to] make sure that the building was a sound purchase under current market conditions.

Movitz, 148 F.3d. at 762–63.

348. *Id.* at 763.

349. Post, *supra* note 282, at 416. The securities analogy provides a useful illustration of the broader distinction of legal and general causation:

> Suppose that an issuer of common stock misrepresents the qualifications or background of its principals, and if it had been truthful the plaintiff would not have bought any of the stock. The price of the stock then plummets, not because the truth is discovered but because of a collapse of the market for the issuer's product wholly beyond the issuer's control. There is "transaction causation," because the plaintiff would not have bought the stock, and so would not have sustained the loss, had the defendant been truthful, but there is no "loss causation," because the kind of loss that occurred was not the kind that the disclosure requirement that the defendant violated was intended to prevent.

Movitz, 148 F.3d. at 763.

with promoting economic efficiency than "veracity, responsibility and the integrity of the market."[350]

The difference between Wightman's and Post's chapters isn't simply a matter of deference to the judges they consider. Wightman's chapter is largely a doctrinal discussion. Post does not pay very close attention to Posner's doctrinal analysis. She is, ultimately, relatively unconcerned with his contract law doctrine as compared to his law and economics dicta. This is the focus of her chapter: "a particular brand of law and economics theory," which she also identifies with Easterbrook, that has degraded contract law and principles so much so that it contributed to the latest housing bubble and economic crisis.[351]

Wightman suggests that English law is insulated from such academic theory (and certainly law and economics has not taken root in the United Kingdom as it has in the United States and a number of other European countries).[352] Yet many of the same troubling contractual practices associated with the recent global crisis pervaded both the United States and the United Kingdom.[353] This raises a challenge to Post's basic hypothesis—one which is not insurmountable—but goes ultimately unaddressed. Here again, another opportunity is missed. Had these two chapters been in closer dialogue, given the great similarities of their topics and subjects, they might have supplied a compelling comparative analysis.

CONCLUSION

On the whole, *Revisiting the Contracts Scholarship of Stewart Macaulay* is a highly recommendable text. The essays commenting on Macaulay's work go beyond simple reviews. They often present novel, insightful, and sometimes challenging perspectives on the subject that, fifty years ago, Macaulay began unpacking. Together these essays capture the arc of not only Macaulay's scholarship, but also the

350. Post, *supra* note 282, at 416.

351. Post, *supra* note 282, at 405. "If the current crisis was caused by reckless behaviour, a compulsion or insatiable desire for ever greater profits, the law of contracts and contract theory must have played some part in the excesses that occurred. If Washington DC is the epicentre of the deregulatory impulse that caused capitalism to fail, the Seventh Circuit and a particular brand of law and economic theory has to be the epicentre of the deregulatory impulse in contract theory." *Id.*

352. Wightman argues that English law evolved within "a legal tradition in which judicial decisions have been regarded as self-sufficient and relatively uninfluenced by academic commentary . . . ." Wightman, *supra* note 276, at 380.

353. *See, e.g.*, Andrew Ackerman, Scott Patterson & Robin Sidel, *J.P. Morgan to Agree to 'London Whale' Fines Bank to Admit Wrongdoing as Part of SEC Settlement*, WALL ST. J., Sept. 16, 2013, http://online.wsj.com/news/articles/SB10001424127887323527004579079411558707586.

intellectual tradition that preceded his work and advances that have been built upon it. And as good as the collected essays on his scholarship are, Macaulay's three reproduced articles remain the most essential readings in the volume. For readers who have not read these works, who have read only some of them, or who read them some time ago, the volume presents a great opportunity. The collected chapters engage Macaulay's three articles along with many of his other writings, as well as work by Macneil among others. Reading Macaulay's early scholarship not in isolation, but rather in the critical context fostered by these reflective authors, including the editors, offers a rare vista.