THE TRUTH WHEREVER IT MAY BE FOUND: THE WISCONSIN SCHOOL OF CONTRACTS (AN INTRODUCTION)

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Does Wisconsin have a "school" of contract theory or scholarship? If so, for what—and for whom—does it stand? What does it even mean to say that an academic institution has a "school" of anything?

These are not the sorts of polite questions one is supposed to ask in introducing the "Wisconsin School of Contracts," a panel held as part of the *Wisconsin Law Review*'s 100th Anniversary Symposium, *Wisconsin's Intellectual History and Impact*, and commemorated in this Symposium Issue.

There is, of course, no doubt that there is a "Wisconsin School" of contracts. It is (loosely) subsumed in several other "schools" of legal thought—"law in action," "law and society," "new legal realism"—and has a fairly well-known origin story: Stewart Macaulay's path-breaking 1963 article, *Non-Contractual Relations in Business* ("*Non-Contractual Relations*").[1] That article contributed to the rise of "relational contracting" as a critical way of thinking and talking about private ordering in law, economics, sociology, and anthropology, among other disciplines. Over thirty scholars at the University of Wisconsin played a role in the development of the Wisconsin School, including Lawrence Friedman, Mark Galanter, Kathryn Hendley, Robert Gordon, John Kidwell, Gordon Smith, Joe Thome, Bill Whitford, and Patricia Williams.[2] It is a direct offshoot of the University of Wisconsin's historic commitment to the

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1. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963) [hereinafter *Non-Contractual Relations*].

2. *See* Stewart Macaulay & William C. Whitford, *The Development of* Contracts: Law in Action, 87 TEMP. L. REV. 793, 796 n.17 (2015) (observing that "[t]hirty-five different faculty members have taught Contracts 1 or 2 since Stewart Macaulay first joined the faculty in 1957").

"sifting and winnowing" of knowledge in the pursuit of truth wherever it may be found.[3]

Wisconsin's is not the only "school" of relational contracting scholarship, and Stewart Macaulay is not its only recognized source.[4] Nor, for that matter, can Wisconsin claim to have special insight into "truth" or its pursuit. Nevertheless, the Wisconsin School has had a significant impact, due in part to the intellectual and methodological tradition of which it is a part. Macaulay's *Non-Contractual Relations* may be among the most widely cited contracts papers in history.[5] As Columbia Law Professor Robert Scott—one of scores of legal scholars who followed in Macaulay's footsteps—has observed, "[w]e are all relationalists now."[6]

But for what, and for whom, the Wisconsin School actually stands, and what it means to say that there is a "Wisconsin School" of contracts, are more difficult questions to answer. This Introduction argues that that is not an accident. As the contributions to this portion of the symposium show, the Wisconsin School has led to difficult questions about institutional, methodological, and ideological choices, while insisting on candor and humility in the study and teaching of the law of private ordering. Perhaps the Wisconsin School's chief contribution to private ordering scholarship has been to make it harder, not easier, to answer such questions, even as it also revealed why it was imperative to ask them. If recent events are any indication, it turns out that may be a good thing.

This brief Essay introduces the symposium papers that follow and situates them in the Wisconsin School. Part I describes the Contracts portion of the symposium. Part II maps the papers to the institutional, methodological, and political facets of the Wisconsin School. Because, as will be developed, pedagogy is a key feature of the Wisconsin School, Part III briefly discusses how and why it came into the classroom through *Contracts: Law in Action*, the so-called "Wisconsin Contracts" book.[7] Part IV connects these observations to Wisconsin's larger academic tradition and considers some current implications.

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3. *See* Käri Knutson, *Sifting and Winnowing Turns 125: The Tumultuous Story of Three Little Words*, UNIV. WIS.–MADISON NEWS (Sept. 17, 2019), https://news.wisc.edu/sifting-and-winnowing-turns-125/ [https://perma.cc/9QN3-TKB6].

4. As discussed below, Ian Macneil, of Northwestern Law School, has sometimes been viewed as "the" (or at least "a") "father" of relational contracting. *See* William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 545 (discussing Macneil's career).

5. Juliet Kostritsky reports that it has been cited over 1,200 times. Juliet P. Kostritsky, *A Paradigm Shift in Comparative Institutional Governance: The Role of Contract in Business Relationships and Cost/Benefit Analysis*, 2021 WIS. L. REV. 385, 388.

6. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000).

7. *See* STEWART MACAULAY, WILLIAM WHITFORD, KATHRYN HENDLEY & JONATHAN LIPSON, CONTRACTS: LAW IN ACTION (4th ed. 2016).

I. THE SYMPOSIUM

As befits an approach with such broad and deep impact, the Wisconsin School of Contracts has already been the subject of symposia, books, and Festschrifts.[8] Thus, one may wonder: What is left to say? In honor of the centennial of the *Law Review*, we gathered five scholars to help answer this question, two of whom have contributed papers to this issue of the *Law Review*,[9] and one of whom has contributed an essay to the *Law Review*'s online companion, *The Wisconsin Law Review Forward*.[10]

In alphabetical order, the participants were:

- Jay Feinman: Professor Feinman, of Rutgers Law School, "is an expert in insurance law, torts, and contract law. The recipient of numerous teaching awards, he's also written seven books and more than [sixty] scholarly articles. He is a member of the American Law Institute."[11]
- Mitu Gulati: Professor Gulati, of Duke Law School (soon to be at the University of Virginia School of Law), is a prolific scholar who writes in several fields, including contract law, sovereign debt, judicial behavior, law firm dynamics, and the study of race and gender disparities.[12]
- Juliet Kostritsky: Professor Kostritsky, of Case-Western Reserve Law School—a graduate of the University of

8. The 2001 Wisconsin Law Review Symposium, for example, was devoted to it. *See* Howard S. Erlanger, *Introduction*, 2001 WIS. L. REV. 525, 525. *See also* Elizabeth Mertz & Lawrence M. Friedman, *Law in Reality, Law in Context: On the Work and Influence of Stewart Macaulay*, *in* STEWART MACAULAY: SELECTED WORKS 15, 15 (David Campbell ed., 2020) (commenting on Macaulay's impact on contract scholarship within a larger collection assessing his work); Robert E. 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); Jonathan C. Lipson, *Foreword; Forward!*, 87 TEMP. L. REV. 693, 693–94 (2015) (offering a Festschrift honoring contracts and related scholarship of Bill Whitford).

9. Theresa Arnold, Amanda Dixon, Hadar Tanne, Madison Sherrill & Mitu Gulati, *"Lipstick on a Pig": Specific Performance Clauses in Action*, 2021 WIS. L. REV. 359; Kostritsky, *supra* note 5.

10. Jay M. Feinman, *The Political Significance of the Wisconsin School of Contracts*, 2021 WIS. L. REV. FORWARD 1.

11. *Jay M. Feinman*, RUTGERS L., https://law.rutgers.edu/directory/view/feinman [https://perma.cc/DXM4-274G] (last visited Mar. 13, 2021).

12. Eric Williamson, *10 New Recruits: Meet the Next Group of Exemplary Professors Joining UVA Law*, UNIV. VA. SCH. L.: UVA LAWYER, https://www.law.virginia.edu/uvalawyer/article/10-new-recruits [https://perma.cc/93PQ-43T3] (last visited Mar. 13, 2021).

Wisconsin Law School class of 1980—is an internationally recognized authority on contracts and commercial law.[13]

- Peter Linzer: Professor Linzer, of the University of Houston, was "[a] noted scholar on contract law, he has published two editions of his *A Contracts Anthology*. He served as the Editorial Reviser of the 'Restatement (Second) of Contracts' . . . [and] as the Chair of the Contracts Section of the Association of American Law Schools."[14] Sadly, Professor Linzer passed away following the Symposium.[15]
- Trang (Mae) Nguyen: Professor Nguyen (Nguyễn Thu Trang) is an Assistant Professor of Law at Temple University and has been a researcher at the New York University School of Law, U.S.-Asia Law Institute, and a visiting scholar at the University of California Berkeley School of Law. Her work compares U.S., Vietnamese, and Chinese legal systems, including on supply chain contracts among businesses in these nations.[16]

As required by the COVID-19 pandemic, the symposium was held via Zoom on October 23, 2020.[17]

II. SCHOLARSHIP

"It is not precise—or at least not especially helpful—to say that Stewart Macaulay has a 'theory of contract law,'" Brian Bix recently observed.[18] Rather, Macaulay, and by extension the Wisconsin School that he helped to generate, "operate[] orthogonally" to essentializing claims about what contract law is or normative claims about what it should do.[19] As the late (and much missed) Jean Braucher observed:

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13. *Juliet P. Kostritsky*, CASE W. RSRV. UNIV., https://case.edu/law/our-school/faculty-directory/juliet-p-kostritsky [https://perma.cc/4D8Z-E4TA] (last visited Mar. 13, 2021).

14. *Peter Linzer*, UNIV. HOUS. L. CTR., https://www.law.uh.edu/faculty/main.asp?PID=22 [https://perma.cc/J4GF-ST9D] (last visited Mar. 13, 2021).

15. *Id.*

16. *Trang (Mae) Nguyen*, TEMP. UNIV. BEASLEY SCH. L., https://www.law.temple.edu/contact/trang-mae-nguyen/ [https://perma.cc/V4V7-QZGN] (last accessed Mar. 13, 2021).

17. *See Wisconsin Law Review's 2020 Symposium*, UNIV. WIS.–MADISON, https://wlr.law.wisc.edu/symposium/ [https://perma.cc/UCV4-H6FD] (last visited Mar. 13, 2021).

18. Brian H. Bix, *Stewart Macaulay and the Law of Contract*, *in* STEWART MACAULAY: SELECTED WORKS, *supra* note 8, at 4.

19. *Id.*

> Looking at law from the bottom up can be a relatively neutral enterprise . . . giving us information about the functioning of legal systems and providing a better basis for legal education by increasing understanding of the roles lawyers actually play. Investigation of facts at ground level also can serve at times a muckraking function, when observation reveals that things are not as we supposed and furthermore not as we think they should be. Perhaps the only sorts of empirical researchers whom Macaulay is not particularly interested in having join in a New Legal Realism are those who ignore important parts of what they are studying or who go far beyond their data when discussing the implications of their research.[20]

This bespeaks the pluralism of the Wisconsin School. All are welcome, we might say, provided you are willing to go wherever the truth may lead you. While Wisconsin obviously has no special purchase on "truth," Macaulay advanced seven claims about law and society which loom over the Wisconsin School of Contracts, magnifying the complexity of the project:

1. Law is not free.
2. Law is delivered by actors with limited resources and interests of their own in settings where they have discretion.
3. Many of the functions usually thought of as legal are performed by alternative institutions, and there is a great deal of interpretation between what we call public and private sectors.
4. People, acting alone and in groups, cope with law and cannot be expected to comply passively.
5. Lawyers play many roles other than adversary in a courtroom.
6. Our society deals with conflict in many ways, but avoidance and evasion are important ones.
7. While law matters in American society, its influence tends to be indirect, subtle, and ambiguous.[21]

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20. Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 SUFFOLK U. L. REV. 667, 691 (2012).

21. Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 383 [hereinafter *New Versus Old Legal Realism*] (citing Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 L. & POL'Y 149, 152–55 (1984)).

These "seven deadly sins"[22] may seem obvious to us today, but they compete with more simplifying approaches to legal scholarship, especially law and economics, and especially as practiced at the University of Chicago. For the "freshwater" economists, claims like those of the Wisconsin School were subordinate to *a priori* axioms of economic behavior reflecting rational action and quantifiable outcomes.[23] "It takes a theory to beat a theory," the economically-minded sometimes say.[24]

Messy statements about the law in action are not (in this view) a theory. They are a set of anecdotal observations which may be true but are inferior to the clarifying force of simple truisms such as "people maximize, markets clear."[25] "The wonder of modern price theory," Douglas Baird declared in 1997, "is how much can be derived from propositions that are so simple."[26] While much has changed since then, and even some law-and-economics stars have had second thoughts,[27] it is not hard to see that the Wisconsin School was antithetical to almost all that its friendly competitors to the south stood for.[28]

Wisconsin and Macaulay also had allies. The most important was Ian Macneil, of the Northwestern University Law School, who shares with

22. So dubbed by Wisconsin Law School Professor Emeritus David Trubek. *Id.* Macaulay, with characteristic modesty, also noted that others had contributed to the list. For example, Professor Frank Munger "added several [propositions] that reflect the more current law and society culture." *Id.* at 384 n.90 (citing Frank Munger, *Mapping Law and Society*, *in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH 21, 40–52 (Austin Sarat, Marianne Constable, David Engel, Valerie Hans & Susan Lawrence eds., 1998)).

23. *See, e.g.*, Chris Starmer, *Developments in Non-Expected Utility Theory: The Hunt for a Descriptive Theory of Choice Under Risk*, 38 J. ECON. LITERATURE 332, 334 (2000) ("I will start from the presumption that evidence relating to actual behavior should not be discounted purely on the basis that it falls foul of conventional axioms of choice.").

24. *See, e.g.*, Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983).

25. Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1132 (1997).

26. *Id.* at 1131–32. "For example, once one accepts that, as a general matter, demand decreases as price increases, much else follows." *Id.* at 1132.

27. *See* Jonathan Lipson, *The Great Repression: The Crisis of Richard Posner*, HUFFPOST (July 13, 2010, 4:28 PM), https://www.huffpost.com/entry/the-great-repression-the_b_644925 [https://perma.cc/8PJA-GHQW].

28. In a related vein, Melvin Eisenberg has argued that "we do not have a body of meaningful and justified contract law rules, either in place or proposed, that apply to, and only to, relational contracts." Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000). A moment's reflection should reveal the weakness of Professor Eisenberg's critique: one could make the same claim against virtually any common type of contract or prominent theory of contract law. No "body of meaningful and justified contract law rules" applies "to, and only to," one-off, adhesion, standard-form, bespoke, oral or imagined contracts, or credible theories about them.

Macaulay the title of "inventor" of relational contracting.[29] They both focused on "the close inspection of the norms and practices of the commercial users of contract law, the contracting parties themselves."[30] They differed, however, in their diagnoses of the pathologies presented and, indeed, over whether a cure was possible at all.

The more pragmatic and gimlet-eyed of the two, Macaulay was skeptical of broad claims and easy solutions, a "depressed liberal," in Robert Gordon's words, resigned to the fact that contract was but part of a larger and ongoing political struggle.[31] Macneil, by contrast, seemed to have somewhat greater confidence that government could improve outcomes in the use and abuse of contract, in particular that regulatory and administrative systems could protect those most vulnerable to promissory predation.[32] Unlike Macaulay, Macneil worked hard to convince readers that relational contracting was a "theory" centered around disclaiming the fiction of the "discrete" (one-off) transaction.[33]

Regardless of the differences, leading contracts scholars recognized the power of these insights, including Victor Goldberg,[34] Richard

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29. As Macneil said:

> My students, for example, all know that I invented relational contract, and I daresay Stewart Macaulay's students all know that he invented relational contract. Charles Fried knows that relational contract was invented by the Devil. Any good classical neoclassical microeconomist knows there is no such thing as relational contract. All these 'wees' happen to be wrong. Or are they? Perhaps for their own purposes, each of these 'wees' is correct.

Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 483.

30. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity* and *Power in Contract Law*, 1985 WIS. L. REV. 565, 568.

31. Gordon, *supra* note 30, at 571.

32. Whitford, *supra* note 4, at 551 (observing that Macneil "counsels greater reliance on proactive administrative agencies that can take account of the many third-party interests at stake and less reliance on courts able to apply regulatory rules only when a disadvantaged party initiates a court procedure").

33. Ian R. Macneil, *Relational Contract Theory*: *Challenges and Queries*, 94 NW. L. REV. 735, 877–78 (2000) (describing "(1) an umbrella theory encompassing all relational contract theories, (2) what I am calling 'essential contract theory,' referring specifically to my own relational contract theory based on common contract behavior and norms, and (3) the 'relational/as-if-discrete' spectrum or axis" to evaluate contract terms and norms) (citations omitted).

34. *See, e.g.*, Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426, 439 (1976) (developing the "hold up" problem observed by Macaulay).

Speidel,[35] and Robert Hillman.[36] The Wisconsin School distinguished itself from competitors and collaborators in three dimensions, reflected in the three contributions by symposium panelists: (i) our understanding of institutional choice and governance; (ii) our methodological options; and (iii) our ideological commitments. While the Wisconsin School also has other elements—notably, an approach to pedagogy, discussed below—these three have shown themselves to be especially salient to our current thinking about the role and rule of law in private ordering.

A. Institutional Choice

The Wisconsin School assesses institutions. While it did not necessarily define the term "institution,"[37] *Non-Contractual Relations* recognized that private ordering is itself a kind of institutional choice: the parties have chosen to use a market mechanism rather than, for example, central government planning to produce and distribute goods and services.[38] When things go awry, the parties again confront an institutional choice: they can go to court or try to work it out. Macaulay's singular—and, in retrospect, obvious—contribution was to find, empirically, that persons in business may not make the institutional choice lawyers were trained to expect—litigation—but instead a more nuanced one, to adjust through further market-regarding compromise.[39]

The Wisconsin Contracts tradition is one of several ways that the Law School developed and advanced its distinctive claims about the relationship between law and other governance mechanisms. Although this tradition preceded *Non-Contractual Relations*,[40] that paper injected

35. *See, e.g.*, Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1173 (1975) ("These perceived excesses included the wasteful utilization and inefficient allocation by private parties of increasingly scarce resources, the accumulation and frequent abuse of strategic market power, and a growing disparity in wealth, capacity, and opportunity among those who used or, in some cases, were used by contract.").

36. *See, e.g.*, Robert W. Hillman, *Business Partners as Fiduciaries: Reflections on the Limits of Doctrine*, 22 CARDOZO L. REV. 51, 54–55 (2000) ("The moral mandate approach promotes virtuous conduct in business relationships . . . . [S]upport for the view is found in the potential for inequity when bargaining power is unequal.").

37. The Wisconsin School seems to embrace the foundational taxonomy developed by UW law professor Neil Komesar: "large-scale social decision-making processes," in particular markets, courts, and regulators. NEIL K. KOMESAR, LAW'S LIMITS 31 (2001). *See also* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 107 (1994).

38. *See Non-Contractual Relations*, *supra* note 1.

39. *Id.* at 61–63.

40. Macaulay notes that "[a] few law professors at the University of Wisconsin, rather than honoring common law doctrine, studied the law in action. Professor Oliver

this thinking directly into the study and teaching of contract law and, as Professor Juliet Kostritsky notes in her contribution to this symposium, also showed that contract was but one of many potential governance regimes:

> Macaulay's work on private governance not only explains why governance arises but also identifies the preconditions for its success. He emphasized a shared understanding of the parties' primary obligations and a standardized product. By identifying those core factors, Macaulay caused others to explore whether private governance could succeed under other conditions and, if so, whether the elements of private governance would be different. Would informal adjustment succeed in other settings or would alternative institutions—such as formal information sharing protocols or managerial provision[s]—work in new contexts of innovation in alliances? Macaulay's work on successful governance led others to systematically explore what factors make private governance possible, including repeat play, sanctioning capabilities, close knit groups, and information transmission.[41]

Contract was, Macaulay argued, a form of "private government," one that could not be understood without recognizing its capacities to influence ongoing behaviors of the parties or their capacities to recruit other institutional actors.[42] These insights have been central to the work of many leading scholars, including Lisa Bernstein,[43] Claire Hill,[44] Matt Jennejohn,[45] Ronald Gilson, Charles Sabel, Robert Scott,[46] Oliver Williamson,[47] and Josh Whitford,[48] among others.

Rundell studied delay in the criminal justice system as early as 1912." *New Versus Old Legal Realism*, *supra* note 20, at 367.

41. Kostritsky, *supra* note 4, at 399.

42. *See* Stewart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCES 445, 448, 483–84 (Leon Lipson & Stanton Wheeler eds., 1987).

43. Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 599 (2015).

44 Claire A. Hill, *The New Realism in Business Law and Economics: Introduction*, 2020 WIS. L. REV. 439, 440.

45. *See* Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281, 313 (2016).

46. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1386 (2010).

47. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 596–600 (2000).

48. JOSH WHITFORD, THE NEW OLD ECONOMY: NETWORKS, INSTITUTIONS AND THE ORGANIZATIONAL TRANSFORMATION OF AMERICAN MANUFACTURING 100 (2005).

B. Methods and Other Madness

The Wisconsin School also propelled changes in legal research methodology. Macaulay, Bill Whitford, Mark Galanter, and many others were early movers in the broader shift toward empirical legal research methods. Macaulay tells a story about how he "fell down the rabbit hole to the land of empiricism":[49]

> [M]y father-in-law was the retired former General Manager of S.C. Johnson & Sons in Racine. We went there to show off our daughter to her grandparents. He asked me about what I was teaching in [C]ontracts. I explained Fuller & Perdue's expectation, reliance and restitution interests. When I defined expectation as the law putting the aggrieved party where he would have been had the contract been performed, my father-in-[law] exploded. "If you even have to see a lawyer, you won't be where you would have been had the contract been performed." He then told me the story of the tin cans in which [S.C. Johnson] packaged wax. It could have had the three firms that made the cans bid against each other during the [D]epression of the mid to late 1930s to drive down the price. Instead, Johnson awarded the order to the firm that needed it the most to stay alive during those times. Then five or six years later, we were in World War II, and there were great shortages of all kinds of things made from steel. "But," he said, "we never wanted a can during [World War II]. They owed us one because of what we had done for the three suppliers during the depression." My first real encounter with long term continuing relationships. So having to slog through Fuller and Perdue, triggered my scholarly career when we took [my daughter] Monica to visit her grandfather.[50]

There is a great deal one could say about this. Perhaps one should not discuss work with one's father-in-law. Perhaps it is no accident that this type of interaction with this type of relative produced the work that led to . . . relational contracting. Much more important, however, was the fact that Macaulay undertook the difficult task of trying to find out whether his father-in-law was right: what did people in business relations really try to do with law, if anything, when problems arose?

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49. Mark P. Gergen, Victor Goldberg, Stewart Macaulay & Keith A. Rowley, *Transcript of Panel Discussion—Transactional Economics: Victor Goldberg's* Framing Contract Law, 49 S. TEX. L. REV. 469, 476 (2007).

50. Email from Stewart Macaulay, Professor Emeritus, Wis. L. Sch., to author (Jan. 11, 2021, 06:23) (on file with *Wisconsin Law Review*).

Legal doctrine—the "law of law professors"[51]—gave one answer: sue for a remedy. But lived experience gave another: try to work it out. The desire to gain an empirical handle on how the system actually operated was not new—the Realists of the first half of the twentieth century had tried something similar[52]—but it was largely alien to fields of private ordering because observation was so difficult. One could count published judicial opinions, but if published opinions reflect a vanishingly small subset of contract disputes, they would provide a severely distorted picture of the work that contract law actually does. Nor did modern information technologies then permit large-scale experiments or content analyses to understand what the real world had on offer.

This left Macaulay and others in the Wisconsin School with one vital tool: the interview. Macaulay, and later Whitford and others at Wisconsin, recognized that, if you wanted to know something about what happened behind closed doors, you couldn't "bug the jury,"[53] but you could ask those in a position to know what happened, how they reacted, what they observed, and so on. Macaulay and Whitford's interviews of participants in famous contracts cases such as *Hoffman v. Red Owl*[54] and *ProCD v. Zeidenberg*[55] are thus well-known and valuable contributions to our stock of knowledge about the background of major contracts cases.[56]

By current empirical standards, however, interviews are considered weak tea. Many modern empiricists might say that the output of interviews is closer to journalism than to social science because what matters is not

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51 Gordon, *supra* note 30, at 575.

52. *See* William Clark, William O. Douglas & Dorothy S. Thomas, *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013 (1930); William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); William O. Douglas & Dorothy S. Thomas, *The Business Failures Project—II. An Analysis of Methods of Investigation*, 40 YALE L.J. 1034 (1931); William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932). *Compare* Gordon, *supra* note 30, at 567 (1985) (discussing Realists' frustration with the "difficulty and inconclusiveness of empirical research").

53. The reference is to a controversial empirical legal research study which recorded an actual jury deliberating about a real case. *See New Versus Old Legal Realism supra* note 21, at 377–78 (discussing HARRY KALVEN JR & HANS ZEISEL, THE AMERICAN JURY (1966)).

54. 133 N.W.2d 267 (Wis. 1965).

55. 86 F.3d 1447 (7th Cir. 1996).

56. William C. Whitford & Stewart Macaulay, Hoffman v. Red Owl Stores*: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010); ProCD v. Zeidenberg *in Context*, 2004 WIS. L. REV. 821. You can hear the interview with Zeidenberg online through the University of Wisconsin-Madison. *See* Darryl Berney, *cd.v.zeidenberg*, UNIV. WIS. – MADISON (Sept. 9, 2015), https://mediaspace.wisc.edu/media/cd.v.zeidenberg/0_tyoqxki6 [https://perma.cc/H8ZF-J3AP].

what people *say* they do but observing closely what they *actually* do.[57] In other words, we should evaluate "revealed preferences," not "expressed" ones.

But it is important to remember that much of the work of the Wisconsin School has been quantitative and objective: *Non-Contractual Relations* describes the elaborate steps Macaulay took to count the things that needed to be counted in order to make claims about the contracting practices of Wisconsin businesspeople.[58] The real power of the Wisconsin School has thus been its embrace of mixed methods, the quantitative and the qualitative, in recognition that one can bolster the other.

Mitu Gulati and his coauthors carry on this tradition in their essay for this Symposium Issue, *"Lipstick on a Pig": Specific Performance Clauses in Action*.[59] They study a dataset of more than 1,000 merger and acquisition (M&A) contracts to compare the use of money damages versus specific performance.

Conventional wisdom in U.S. jurisprudence and legal scholarship holds that the default remedy of money damages is preferable to specific performance for the breach of contract. As the default option, money damages are thought to be efficient. Efficiency is "often the first explanation that casebooks and treatises give to first-year contracts students for why the specific performance remedy is generally disfavored," Gulati and his coauthors write.[60]

Like Macaulay, Whitford, Galanter, Hendley, and many others, Gulati and coauthors went into the world to assess this view. They found

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57. *See* Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810 (1999) ("[W]hen I speak of empirical legal scholarship I refer only to the subset of empirical legal scholarship that uses statistical techniques and analyses. By statistical techniques and analyses I mean studies that employ data (including systematically coded judicial opinions) that facilitate descriptions of or inferences to a larger sample or population as well as replication by other scholars."); Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and the Profession*, 30 WAKE FOREST L. REV. 347, 349 (1995); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 323 (1989) (defining empirical scholarship as "primarily . . . statistical studies").

58. *Non-Contractual Relations*, *supra* note 1, at 55 n.3. Bill Whitford, along with Lynn LoPucki (then a Wisconsin bankruptcy scholar; now at UCLA), created the Bankruptcy Research Database in the 1980s, which revolutionized the study of corporate reorganization by making possible case-level quantitative analysis of the Chapter 11 bankruptcy reorganization system. *See UCLA-LoPucki Bankruptcy Research Database*, https://lopucki.law.ucla.edu/ [https://perma.cc/2NSU-7YUK]. As a non-resident student of this School, my contributions in the mixed-methods vein include Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1 (2016) and Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1 (2010).

59. *See* Arnold, Dixon, Tanne, Sherrill & Gulati, *supra* note 9.

60. Arnold, Dixon, Tanne, Sherrill & Gulati, *supra* note 8, at 360.

that, in over eighty percent of transactions in their dataset, parties chose specific performance as their preferred remedy—not at all what conventional jurisprudence would predict.[61] Using interviews with senior lawyers who specialize in this practice area, they then developed explanations for why parties contract around the law's alleged distaste for specific performance and the default rule of money damages.

> At the end of the day, the most consistent explanation we received for why parties wanted specific performance as a remedy was that they did not think that judges would give them the appropriate amount of money damages their bargain demanded. It was not that they preferred the remedy of specific performance to money; it was that the former remedy gave them a better chance of negotiating to their desired amount of money.[62]

This is an important, but ultimately troubling, finding. It is important because it shows a disconnect between what the legal system says it does—cashes out breach pursuant to a particular formula—and what it actually does in at least some cases—stipulates performance in the hope of ex post negotiation to a price considered more accurate by the parties, including the breacher.

It is also troubling because it suggests little confidence in judges' ability to price remedy. Specific performance is not, on this account, a remedy in itself but a second-order option that allocates negotiating leverage after things have gotten bad enough to ask a court to intervene, but not so bad that we actually want the court to do what the court is usually expected to do, which is set damages.

It also raises more questions than it can answer. What is it about M&A that produces this result? Does or should the insight of the sophisticated M&A lawyers Gulati coauthors interview trickle down to other, less sophisticated and costly transactions? If so, how? If not, why not? Is there a connection between specific performance as a remedy and the decidedly "non-relational" nature of business acquisitions?

C. Every. Thing. Is. Political.

It is common to assume that the Wisconsin School is politically left-leaning. This may be due to the State's progressive past,[63] radicalism

61. *Id.* at 369.

62. *Id.* at 381.

63. *See* John Milton Cooper, Jr., *Why Wisconsin? The Badger State in the Progressive Era*, WIS. MAG. HIST., Spring 2004, at 14.

among some students and faculty,[64] or the association with the avowedly left-leaning Critical Legal Studies movement.[65] But it is perhaps more accurate to say that the Wisconsin School is politically open. As Professor Braucher has observed, Wisconsin "does not necessarily have any particular political orientation other than better aligning law with what a democratic process might produce."[66] Because it is more concerned with asking difficult questions and rejecting easy answers—like "the market is always right"—it is hard to pin down normatively, even as many assume it occupies a place to the left of the dogma dial.

This is not to say that the Wisconsin School is apolitical. Quite the contrary. It is deeply concerned with the power imbalances that generate normative distortions which, in turn, produce political conflict that democratic processes may or may not address. For Wisconsin, everything is *potentially* political.

Thirty-five years ago, Robert Gordon, a star contributor to the Wisconsin School,[67] observed that the Wisconsin response to the problem of power imbalance has been

> . . . to assimilate continuing contract relations to a general conception of political struggle. In Macaulay's view, contract parties—such as the automobile manufacturers and their suppliers or dealers, or the oil companies and gas-station franchisees—appear both as social groups locked into relations of hierarchy and as political interest-groups trying strategically to manipulate outside institutions (including courts) to improve their basic bargaining positions. On the whole, Macaulay is a depressed liberal; he wishes that the weaker parties to these relationships could transform them into more egalitarian ones, but is very pessimistic about their ability to do so, because he believes that most of the institutional structures through which the struggle is carried on tend to work to the advantage of wealth and power.[68]

64. *See, e.g.*, *Revisiting Sterling Hall*, WIS. MAG. HIST., Autumn 2006, at 52; Mari Jo Buhle & Paul Buhle, *Angry Badgers*, ACADEME, July–Aug. 2011, at 17.

65. *See, e.g.*, Linda S. Greene, *Critical Race Theory: Origins, Permutations, and Current Queries*, 2021 WIS. L. REV. 259, 262 (describing the development of the Critical Legal Studies movement at Wisconsin).

66. Braucher, *supra* note 19, at 691.

67. Now an emeritus professor at Yale, Gordon was at the University of Wisconsin from 1977–1983, where he taught Contracts, among other things. *Robert W. Gordon*, YALE L. SCH., https://law.yale.edu/robert-w-gordon [https://perma.cc/ZWX9-9A29] (last visited Mar. 10, 2021).

68. *See* Gordon, *supra* note 30, at 571.

As Jay Feinman explains in his symposium contribution, *The Political Significance of the Wisconsin School of Contracts*,[69] Wisconsin's focus on power imbalance begins with its challenge to the claim that contract law is "general." For the Wisconsin School,

> [P]roceeding from a posture of generality is the wrong way to think about contract law. To understand a single contract or all contracts and to formulate rules to govern contractual exchanges, we need to begin ground up, not top down. When we do that, we see that the generalized conception of contract law makes two errors: it uses the discrete exchange as the paradigmatic contract rather than the relation, and it fails to give proper emphasis to variations among relations in context.[70]

Contract jurisprudence and doctrine are deeply committed to a generalist, "top-down" approach, perhaps best reflected in dictates like the *Restatement (Second) of Contracts*.[71] The Wisconsin School, however, comes at it from the other perspective, close to, but still distinct from, two important claimants in debates about the nature and ideology of contract law, Harold Havighurst and Duncan Kennedy. Havighurst, an "old" Realist (and former dean of the Northwestern University Law School), argued that there was no general contract law. A lawyer could become "a specialist in construction contracts or insurance, but not in 'offer and acceptance' and 'third party beneficiaries.'"[72] The M&A lawyers Gulati and his coauthors interviewed would probably not think themselves "specific performance" or even "remedies" experts.[73] Duncan Kennedy, perhaps the best known member of the Critical Legal Studies movement, famously argued that contract doctrine's seeming neutrality masked a specific, center-right political agenda which legal scholars should deconstruct.[74]

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69. Feinman, *supra* note 10.

70. *Id.* at 5.

71. RESTATEMENT (SECOND) OF CONTS. (AM. L. INST. 1981).

72. Richard E. Speidel, *The Contract Scholarship of Harold C. Havighurst*, 77 NW. U. L. REV. 250, 250 (1982) (citing Harold C. Havighurst, *A Classification of Contract Cases for Teaching Purposes*, 7 AM. L. SCH. REV. 844, 847 (1933)).

73. Arnold, Dixon, Tanne, Sherrill, & Gulati, *supra* note 9, at 378.

74. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1722 (1976) (arguing that traditional contract doctrine is "the product of its ideological power as of the direct material dominance of particular economic or political interests"). Kennedy acknowledged at the outset of this landmark paper his debt to the Wisconsin School: "[M]uch of this article simply abstracts to the level of 'private law' the argument of an article by Stewart Macaulay on credit cards." *Id.* at 1686 (citing Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM*

The Wisconsin School is sympathetic to both Havighurst and Kennedy, but also more cautious, concerned that sweeping or simple slogans—"contract law oppresses"—may gloss over complexity which the legal system must manage. Like Havighurst, Wisconsin questions the claim that there is a unitary law of contract, but also grudgingly recognizes that lawyers in the real-world act as if there is such a thing and that there may be social and economic benefits to such a fiction.[75] While concerned about problems of oppression and externalization,[76] Wisconsin is also not willing to match Kennedy's argument that law and legal education ineluctably reproduce a problematic hierarchy.[77]

The Wisconsin School revealed not only the granularity of contract law, but also that the presumptive mechanism for solving contract problems—litigation—was itself politically loaded. This was perhaps best articulated by Marc Galanter, who famously observed that repeat players in the litigation system (the "haves") will tend to come out ahead for the same sorts of reasons that they can influence elections and the selection of judges.[78] They have resources, sophistication, and power, which they can mobilize to achieve their goals in many fora.

To take this seriously, one had to recognize the contingency of Macaulay's findings in *Non-Contractual Relations*. There is no strong reason to think that the collaborative impulses of a group of Wisconsin businessmen in the 1950s would be replicated by other market actors in other contexts. Thus, consistent with the findings of Gulati and his coauthors, parties to failed modern M&A transactions may be much more inclined to sue first and settle later than were those in long-term business relationships several generations ago.

The point has never been to say that "relationships" as such are good or bad, but to assess the work that law and legal systems can do in making, breaking and reforming them. Always, the project is to understand the deeper institutional and ideological patterns, and the underlying factors (including, but not limited to, law) which drive those patterns.

As a political matter, those patterns may be complex and multivalent. As I have observed elsewhere, market actors today appear increasingly to

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Machine, the Law of Contracts and Credit Cards, 19 VAND. L. REV. 1051, 1056–69 (1966)).

75. *See* Feinman, *supra* note 10, at 2.

76. *See* Gordon, *supra* note 30, at 571.

77. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591–92 (1982).

78. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 149 (1974); Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 619 n.127.

use to achieve their visions of "social responsibility."[79] These visions may involve things like better treatment for labor and the environment attained through supply chain agreement or other contract terms. These uses of contract are politically difficult because they seek to proxy for what may conventionally be considered public action—e.g., labor or environmental protection—but are decidedly removed from meaningful democratic accountability.

Still, the underlying political question for the Wisconsin School is about the role of power in private ordering, whether used for ends we consider agreeable or disagreeable. The goal is to understand the conditions that permit such imbalances and the tradeoffs we are willing to accept to change that balance of power.[80] As Feinman explains:

> Power is important in individual exchange relations and in shaping the law as a whole. Institutional factors and the form of law also matter. But to preserve hope, the fundamental Wisconsin lesson is worth stressing: contracting practices are messy, complicated, and contextual and one needs to exercise caution in theorizing about them.[81]

III. SCHOOLED IN WISCONSIN

And what better place to make a cautious mess than in the classroom? A law review symposium on a particular scholarly tradition may not seem the right venue to discuss pedagogy. But, in one sense, Macaulay's foundational claim was as much about what was wrong with legal education[82] as it was about what was wrong with contract law, itself. It was wrong to teach law students doctrine devoid of context. It was misleading, dishonest, possibly cruel and—worst of all—probably boring to act as if the legal world began and ended with the appellate opinion. It was not possible to produce a better legal system (whatever "better" might mean) unless one could produce better lawyers. While a legal education

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79. Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 2019 WIS. L. REV. 1109, 1110 (explaining that "contract social responsibility . . . . harnesses ostensibly enforceable contract terms to address social, economic, and environmental problems conventionally remitted to public law and agencies").

80. *See generally* STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966); William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018.

81. Feinman, *supra* note 10, at 16.

82. David Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 LEGAL STUD. 157, 170 (1984) ("The question [Macaulay pursued] was whether contract law as taught in the universities was actually used or not, and how it might be changed so as to make it more useful to businessmen.").

deeply disconnected from the realities of practice might serve certain ideological agendas, it was unlikely to produce a better world.

If Macaulay, Whitford, and their crew believed that the scholarly project should be bottom-up and not top-down, there could be no way to implement that vision without also considering what happened in the classroom. This, in turn, led to the creation of *Contracts: Law in Action* (*CLA*).[83]

Initially a set of interview transcripts that supplemented another casebook, *CLA* is, by Macaulay and Whitford's own admission, "eccentric."[84] It seeks fully to implement the Wisconsin School's vision of the law of private ordering and how that law interacts with larger human and institutional phenomena:

> Whatever you might want to say about our course, it is not oversimplified, and it deals with real and important problems. Moreover, it focuses on the inconsistent goals found in the modern contract law, considered broadly. This includes consumer protection legislation, Article 2 of the UCC, and legislation applicable to specific types of contracts—such as those involving deals between husbands and wives, franchisors and franchisees, and employers and employees. One is bound by the contracts she appears to make, except when she isn't.[85]

I am the rare person who studied from, has taught from, and now co-edits a particular contracts casebook, *CLA*. As such, I feel (a possibly exaggerated) sense that I have some insight into the work the book is doing in relation to the Wisconsin School of scholarship.

Like the Wisconsin School generally, the good news is also the bad news. *CLA* probably has more context about more contracts cases than other contracts casebooks, much of it generated through fieldwork by the authors. It is candid about the institutional uncertainties that infect all legal decision-making, especially private ordering. It invites (forces) students to consider competing theories and policies marshaled in aid of various normative claims about what contract (law) is or should be. It asks students many hard questions but often leaves them struggling to find the answers.

One could say this sort of struggle is endemic to the first semester of a standard U.S. legal education, a feature, not a bug. Having taught from other casebooks (and at other law schools), I think the difference lies in

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83. STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD & MARC GALANTER, CONTRACTS: LAW IN ACTION (1993).

84. Macaulay & Whitford, *supra* note 2, at 793–94, 793 n.2 (2015) (discussing "eccentricity" and the origins of the casebook).

85. *Id.* at 802.

the institutional, methodological, and political commitments developed by the symposium contributors discussed above. *CLA* is, for example, perhaps the only set of contracts materials to focus extensively on the institutional choices presented by franchise and consumer contracting, a sphere often controlled through regulation, legislation, or other extra-judicial mechanisms far removed from the appellate opinion. By providing granular, contextualizing background, *CLA* ups the ante in the Socratic shell-game. Students must not only "find" the "rule" and imagine various counterfactuals, but also consider real off-screen facts about the parties and the problems the court was asked to solve.

This can be good news because it has the virtue of realism, but it can be bad news because it is hard for law students who may not know what to make of these sorts of materials. What, for example, do Joe Hoffman's later thoughts on his litigation have to do with the "rule" of *Hoffman v. Red Owl Stores, Inc.*?[86] How does one use the transcript of an interview with a famous litigant on an exam? To say that it shows that there may not be a single and undisputed "rule" of *Hoffman* may be correct, but so what? That is cold comfort to 1Ls in the middle of their first semester of law school, when this is usually taught.

At the same time, *CLA* is careful in its ambitions, much as the Wisconsin School is in its theoretical pronouncements. While *CLA* devotes a significant amount of material to problems of power imbalance in contracting—from duress through misrepresentation and unconscionability—the materials are not seeking to create or convert Republicans or Democrats, but instead to compel students to think more deeply and carefully about the institutional choices that are possible and probable, given the sorts of power imbalances that do exist. What tradeoffs are we willing to make for more (or less) freedom of (or from) contract? *CLA* provides not a trail of breadcrumbs that leads students to a neatly packaged answer—an economic axiom, or geometric proof of the sort that Williston might have envisioned[87]—but instead a bespoke loaf, which students are encouraged to tear and scatter as their own search for truth requires.

IV. THE TRUTH WHEREVER IT MAY BE FOUND

In 1894, the University of Wisconsin Regents held a show trial of sorts.[88] Professor Richard Ely, the author of *Socialism: An Examination of Its Nature, Its Strength and Its Weakness, with Suggestions for Social*

86. 133 N.W.2d 267 (Wis. 1965).

87. *See, e.g.*, Horace E. Whiteside, *Williston on Contracts: A Review*, 23 CORNELL L.Q. 269 (1938).

88. Knutson, *supra* note 3.

Reform,[89] and the director of Wisconsin's School of Economics, Politics, and History, stood accused of encouraging radicalism and labor unions.[90] Oliver E. Wells, the Wisconsin Superintendent of Public Instruction and an ex-officio member of the Board of Regents, had complained about Ely's "diabolical practices and teachings" to the Regents and to University President Charles Kendall Adams.[91] From August 20 to 23, 1894, the Regents held a hearing on Wells's charges that Ely encouraged strikes and boycotts and "[taught] students socialism and other 'vicious theories.'"[92]

Hundreds came to Ely's defense, and the Regents unanimously cleared him.[93] After Ely's ordeal, President Adams wrote a report for the Regents defending the academic freedom that was at stake, which gave voice to Wisconsin's notion of "sifting and winnowing" and to the ethical and institutional commitments that it requires:

> In all lines of academic investigation it is of the utmost importance that the investigator should be absolutely free to follow the indications of truth wherever they may lead. Whatever may be the limitations which trammel inquiry elsewhere we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found.[94]

Wisconsin has no special insight into "truth"—how could it? But Adams's proclamation was more than an epistemic claim. It was also a call for the sorts of institutional, methodological, and political commitments ultimately reflected in many facets of the University of Wisconsin. Those commitments are expressed, in part, as questions explored in this symposium. Institutionally, the important question is not simply whether we have academic freedom, but also how to create durable, credible and responsive social, political, and legal structures. Methodologically, the question is how we assess the truth of claims about those structures and how we receive those claims of truth. Politically, the question is how to deal with plural values in a complex society with rapidly changing institutions and analytic methods.

Buried in our studies of contract law, theory, and practices, it is easy to imagine that our work, and that of the Wisconsin School, are far removed from truly serious social and political challenges. We now take

89. RICHARD T. ELY, SOCIALISM: AN EXAMINATION OF ITS NATURE, ITS STRENGTH AND ITS WEAKNESS, WITH SUGGESTIONS FOR SOCIAL REFORM (1894).

90. Knutson, *supra* note 3.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

for granted the academic freedom that Ely and Adams established at the end of the 19th century because we can; academic freedom gives us that freedom, too. The Wisconsin School of Contracts may simply be a happy and perhaps modest outgrowth of this, one of the many seeds sifted and winnowed into fruitful scholarship.

Yet, recent events in Washington, D.C.—the attempted takeover of the Capitol on January 6, 2021[95]—are a reminder that claims of easy and certain truth (like an election was "stolen") are rarely either of those things, much less both of them. Those who believe them may be as committed to their "truths" as the rest of us are to our doubts. And therein lies the rub: We want questions that are difficult *because* we think they reflect real-world challenges. We want careful and qualified answers because they are credible, durable, and perhaps contribute to some deeper sense of institutional legitimacy. But questions and answers of the latter sort require tradeoffs, too, and we have no meta-theory that can instruct us in how to make those decisions, for ourselves or for others.

Questions that the Wisconsin School asks, difficult though they may be, may seem distant from the dramatic events of January 6, 2021. We study private order, not public chaos. Nevertheless, the Wisconsin School seeks to persuade those with easy answers that they need to ask better questions and to accept the possibility of more complex responses. This it has done, and, if the contributions to this symposium are any indication, it will continue to do.

95. For readers in a distant future, on that day, armed insurgents stormed the United States Capitol seeking to disrupt the certification by Congress of the results of the 2020 presidential election. Philip Bump, *When Did the Jan. 6 Rally Become a March to the Capitol?*, WASH. POST (Feb. 10, 2021, 10:11 PM), https://www.washingtonpost.com/politics/2021/02/10/when-did-jan-6-rally-become-march-capitol/ [https://perma.cc/Z94M-2NAT].