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RELATIONAL CONTRACT THEORY IN CONTEXT

Jay M. Feinman[*]

> When one struggles against ancient concepts—and their labels—it seems almost impossible to avoid being misunderstood, even by very perceptive people.[1]
>
> Ian R. Macneil

INTRODUCTION

This Symposium, commemorating Ian Macneil's four decades as a contract law teacher and scholar, is filled with irony. All of the participants recognize the immense contribution Macneil has made to contracts scholarship, but only a few of us could be considered enthusiastic devotees of relational contract theory as articulated by Macneil. Even more ironically, while Macneil's work is widely cited, the level of engagement with its details has not been commensurate with its contribution, and the work is frequently misread by scholars. Moreover, Macneil's theory has had a limited direct impact on contract law as determined by the courts and legislatures. Finally—and this is an irony I would like to highlight in this Article—despite the limited engagement with Macneil's work, there have been significant developments in the law itself that are roughly parallel to the approaches he has suggested.

In this Article, I want to situate Macneil's relational contract theory within the story of the development of contract law, to describe the parallel developments in the law, and to draw out some of the implications of the theory and the developments. Macneil's scholarship inhabits the broader realm of social theory as well as the narrower realm of contract law, but it is only the narrower realm that I consider here. At each stage of the story I will consider three issues about the version of contract law under discussion. First, what is the scope or structure of the field? What does it contain, and how is its subject matter defined in relation to related fields? Second, what method does the field use? What tools of analysis does it employ to decide cases? Third, what is the field's substance? What are its core principles and purposes?

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[*] Distinguished Professor of Law, Rutgers School of Law, Camden. This Article is a version of a paper presented at *Relational Contract Theory: Unanswered Questions*, a symposium held at Northwestern University School of Law on January 29, 1999.

[1] Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 341 n.1 (1983) [hereinafter *Values in Contract*].

I. CLASSICAL AND NEOCLASSICAL CONTRACT LAW

Relational contract is one of the latest steps in the scholarly project of responding to the inadequacies of classical contract law, so the appropriate starting point is the familiar story of classical law,[2] along the three dimensions of scope, method, and substance. The scope of contract law as conceived by classical scholars and judges was very broad. Classical contract law was the realm of consensual relations, as distinguished from the nonconsensual relations governed by tort law. All consensual relations of any kind were within the realm of contract. A single body of law could govern such a wide range of transactions because of its method. The classical method involved the application of relatively clear rules of legal doctrine, typically framed at a high level of generality and presenting dichotomous choices. The scope and method served the substance; as the realm of consensual relations, contract law simply set ground rules for self-maximizing private ordering.

By the time of its enshrinement in Williston's treatise[3] and the original Restatement of Contracts, classical contract law already was under attack. The essence of the criticism of classical law and its reconstruction through succeeding scholarly generations was contextualization; the more classical contract law was placed in context, the less sense it made. The contextualization took two forms, one internal and the other external to the body of law itself.[4] The internal criticism compared the ostensible rules with the results in the cases, finding that the rules did not explain the cases and that no formal, general rules ever could. The external criticism situated the rules in the world of actual contracting practice, arguing that the law's approach needed to be changed to serve the objectives of contract law.

Neoclassical contract law—the law of the Uniform Commercial Code, the Restatement (Second) of Contracts, and today—is the product of this criticism. It is "neoclassical" because it addresses the shortcomings of classical law rather than offering a wholly different conception of the law.[5] The scope of neoclassical law is residual and fragmented. There is still a unitary body of contract principles (the rules of formation, validation, performance, and remedies), but the law is residual in that it no longer attempts to encompass all consensual transactions. Labor law and corporate law, for ex-

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[2] *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9-31 (1992) (providing background on late nineteenth-century classical legal thought); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 102-05 (1998) (providing information on the emergence of legal classicism in contract law).

[3] *See* SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920).

[4] *See* Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565.

[5] *See* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 173-90 (1997); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1287-89 (1990).

ample, are no longer within the scope of contract. The law also is fragmented, in that the unitary principles are not necessarily applied in the same way in all types of cases. We have seen the recognition of transaction types—for example, the law of sales is part of the general law of contract but marked off for separate treatment.[6]

Neoclassical method is a mix of rules and standards. This is still doctrine, by and large, but it is doctrine of a much softer sort than in classical law. This softening is best captured in the preference for rules in the original Restatement as compared to the preference for standards in the Restatement (Second).[7] The substantive core of neoclassical law is based on the assumption that parties act out of self-interest set within a context of trade custom and balanced by social values. Contract is still fundamentally about achieving one's own ends, but those ends are understood largely in terms of the context out of which they arise. In some cases, moreover, these ends may be subordinated to external social policies.

II. THE NEOCLASSICAL ACCOUNT OF RELATIONAL CONTRACT

As the mainstream conception of modern contract law, neoclassical law has a tremendous capacity to deal with new theories and developments. New approaches or insights can be redescribed, absorbed, or marginalized as necessary in order to maintain the integrity of the subject. This is what has happened to relational contract theory. Rather than being viewed as a fundamental challenge to neoclassical law, relational contract has been described in terms of scope, method, and substance that allow it to be comfortably accommodated within the mainstream.

In the neoclassical conception, relational contract theory adds a theoretical insight about the unity underlying various types of exchange transactions. This insight buttresses contract law's claim to a general scope, but this is largely of scholarly interest. A much more important contribution that relational contract theory has made is its description of the relational-discrete continuum. Macneil's work brought to light the importance of considering relational contracts—extensive, long-term relationships—as a distinctive form of contracting. Relational contracts, like sales contracts,

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[6] The fragmenting tendency continues with the adoption of Article 2A on Leases and the proposal for an Article 2B on Licenses, now the Uniform Consumer Information Transactions Act, as independent statutes rather than elements of the rejected "hub-and-spoke" concept for a new Uniform Commercial Code (U.C.C.). *See* Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1686-87 (1999). The proposed statutes are available from the National Conference of Commissioners on Uniform State Laws (visited April 12, 2000) <http://www.law.upenn.edu/library/ulc/ulc.htm>.

[7] *Compare* RESTATEMENT OF CONTRACTS § 276 (1932) (providing rules for determining materiality) *with* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981) (outlining circumstances significant in determining materiality).

can be governed by the core principles of contracts, as long as the courts applying the principles are sensitive to the factual differences in context.[8]

Relational method has also been seen as consistent with neoclassical method. Macneil's structure of contract norms is an elegant if unnecessarily detailed account of the need to contextualize, and of the desirability of using vague standards that make it easy for the courts to accomplish such contextualization. Similarly, the substance of relational contract theory has been seen as a refinement of neoclassical contract law. In relational contracts, greater attention needs to be paid to the desirability of fairness and cooperation; in relational contracts, short-term self-interest sometimes needs to be subordinated to long-term self-interest.

From the neoclassical perspective, then, relational contract theory has one central insight: there exists a class of relational contracts that deserve treatment as a special subcategory of the general contract law.[9] This is an important, previously unrecognized insight, but it is also one that easily can be absorbed into the scope, method, and substance of neoclassical law. This insight is seen as accounting for most of the contribution that relational contract theory has to make to the law. Beyond that contribution, relational contract is seen as an interesting, if perhaps excessively detailed sociological theory that is not particularly useful to the project of formulating and applying contract doctrine.[10]

III. A DIFFERENT VIEW OF RELATIONAL CONTRACT

The neoclassical account of relational contract theory is, I believe, widely held. It also is too limited. Relational contract is much more complex, and presents a much greater challenge to neoclassical contract law, than this account suggests. It would take more of an intellectual history of modern legal scholarship than I am prepared to give here to account for the neoclassical treatment of relational contract. As Macneil has said, "[A]ll conceptualizing is a political act."[11] This Article is not, however, the place to explore the politics of contract theory.[12] I will say that it is not unusual for adherents of a mainstream theory to respond in this way to a challenger; a frequent accommodation technique is to redescribe the challenge as arising for particular circumstances that can be treated as a special case (the

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[8] *See* HILLMAN, *supra* note 5, at 255-66.

[9] *See* Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 894 n.63 (2000) [hereinafter *Challenges and Queries*]; William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 546-48.

[10] *See* Whitford, *supra* note 9, at 555-57.

[11] *Values in Contract*, *supra* note 1, at 389.

[12] *See* Feinman, *supra* note 5, at 1313-18.

relational contract) within a general category (all of contract), rather than as relevant across a broad range of inquiry.[13]

Here is a different account of relational contract theory and of what a truly relational contract law would look like. This account of the theory, and the subsequent account of its implications, is in most respects faithful to Macneil's theory. But every description is also an interpretation, so therefore it is possible that others—including the author of the theory—may not agree with all of my presentation.

Begin with the scope of relational contract. Relational contract simultaneously dramatically broadens and dramatically fragments the scope of contract law as compared to neoclassical law. Macneil begins with the "primal roots of contract,"[14] and this beginning leads him to broad definitions of "contract" and "exchange": "[C]ontract encompasses all human activities in which economic exchange is a significant factor."[15] "Exchange," in turn, is not limited to defined monetizable exchange, but also includes other interactions in which reciprocity is a dominant element. Accordingly, the scope of relational contract is very general, in some respects even more general than was classical contract law. It brings back within the field of contract law some of the topics that were spun off in the development of neoclassical law; labor relations is a prominent example.[16] It breaks down doctrinal boundaries further by potentially bringing tort and property law topics within the definition of contract. And it brings within the scope of contract relations those activities that have economic aspects but that are not primarily economic, such as family relations.[17] Relational contract, therefore, is willing to treat an astonishingly wide range of transactions as subject to the same body of theory.

At the same time, however, relational contract is aimed at fragmenting in a more earnest way than neoclassical law. Neoclassical law recognizes that there are contexts in which the same rules will be applied differently because of factual differences—differences between contracts for sales of goods as compared to construction contracts, for example. Relational contract almost begins by looking through the other end of the telescope. The contract norms are stated at a high degree of generality, but they direct our attention to features particular to the contract at issue and to the relational context out of which it arises. These elements of relational analysis argue for much more developed contextualization. This contextualization results

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[13] *See* David Campbell, *The Undeath of Contract: A Study in the Degeneration of a Research Programme*, 22 H.K. L.J. 20 (1992).

[14] IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 1 (1980) [hereinafter NEW SOCIAL CONTRACT].

[15] *Challenges and Queries*, *supra* note 9, at n.2.

[16] *See* IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 210-53 (1978) [hereinafter EXCHANGE TRANSACTIONS AND RELATIONS]; *see also* Macneil, *Challenges and Queries*, *supra* note 9, at 897.

[17] *See* STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 202-318 (1995).

not only in locating relations along the relational-discrete continuum, but also in distinguishing contracts according to more familiar categories, such as standardized consumer transactions and long-term relationships involving sophisticated commercial parties. The result is a relational contract law that contains much more generalization across different settings at the same time as it accentuates the differences between settings.

It is much harder to describe briefly the method of relational contract law. The insight about the fragmentation of contract law is a beginning. Relational analysis is contextual with a vengeance, immersing itself in the facts of the particular contract and of the contexts from which it arises.[18] But here is a crucial and often misunderstood point: context is not enough. Facts are essential, but facts do not dictate solutions. It is not possible to immerse oneself in the facts of a situation and come to the correct solution that is immanent in those facts.

Instead, facts are filtered through the structure of the relational method. The key to this structure is the concept of contract norms. The normative structure begins with ten common contract norms, such as role integrity, reciprocity, and implementation of planning.[19] Macneil identifies these norms as arising out of study of all types of contracting behavior, employing the broad definition of contract noted earlier.[20] These norms can be used in the analysis of any contract. However, different norms are of different value depending on the nature of the contract. For example, implementation of planning and effectuation of consent are especially important in contracts with strong discrete elements, while role integrity, preservation of the relation, and harmonization of relational conflict are particularly important in contracts with especially relational characteristics.[21]

The relevant normative structure also includes external norms. These obviously include values of the society defined by law that may or may not be reflected in the particular relation. In addition to positive law, relevant external norms include customs of an industry or other relevant group, rules of a trade association or professional organization, and norms generated by any group intersecting with the relation at issue.[22]

It is crucial to understand the multiple levels of this normative structure, because misunderstanding it leads to misunderstanding all of relational contract theory. The normative structure includes what we ordinarily think of as norms relevant to the understanding of a contract under neoclassical law. In a sales case involving a particular trade, for example, there may be norms internal to the contract and norms of a trade, relevant to such issues as interpretation or waiver under principles of course of performance,

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[18] *See Challenges and Queries, supra* note 9, at nn.27-45.

[19] *See* NEW SOCIAL CONTRACT, *supra* note 14, at 36-70; *Values in Contract, supra* note 1, at 346-66.

[20] *See Challenges and Queries, supra* note 9, at nn.5-12.

[21] *See Values in Contract, supra* note 1, at 349-51.

[22] *See* NEW SOCIAL CONTRACT, *supra* note 14, at 37-40; *Values in Contract,* supra note 1, at 367-68.

course of dealing, or trade usage.[23] These types of norms are, of course, included in a relational analysis. But the contract norms also embody norms developed through the observation of many different contract settings unrelated to the context at issue; the results of this observation, and the theorizing about these results, are the sources of the contract norms. And the use of external norms makes clear that social values beyond the relation at issue also must be considered relevant.[24]

The use of this normative structure in analyzing contracts leads substantially, if not totally, to a rejection of doctrinal method as it is ordinarily practiced, in favor of a method that looks much more like policy analysis. From this perspective, doctrine consists of rules and standards taking a deductive form about legal consequences (*e.g.*, "substantial performance satisfies a constructive condition") while policy consists of arguments in a consequential form (*e.g.*, "contract terms should be interpreted to avoid forfeiture").[25] In analyzing a relation, we find facts that, when seen through the structure of norms internal and external to the relation, suggest that the law ought to reach a certain result. This analysis is aimed at determining the benefits of acting in a certain way, however, not at formulating rules or principles that dictate results independent of the norms.

The substantive core of relational contract theory proceeds from two propositions: that contract is fundamentally about cooperative social behavior, and that contracts containing significant relational elements are the predominant form of contracting. This suggests that there is a baseline of obligation in contracting, one that arises out of the contract norms. This position is distinguished from the classical position that there is a baseline of no obligation, or the neoclassical position that there is a core of self-interest affected at the periphery by custom and regulation. The precise content of the obligation is determined by the application of relational method.

This is not to suggest that relational contract necessarily dictates cooperation or communitarianism. (Certainly not for Macneil.) If we think of relational contract as a reaction to neoclassical contract, the emphasis on cooperation is a corrective to neoclassical law's retention of the core classical position of self-interest. More generally, the recognition that different contracts have different contexts and values—in particular, that contracts can have strongly discrete or strongly relational elements—gives balance to the concepts of cooperation and competition, or, in Macneil's terms, of reciprocity and the restraint of power.

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[23] *See* U.C.C. § 1-205 (1995).

[24] *See Values in Contract*, *supra* note 1, at 367-69.

[25] DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 133-56 (1997).

IV. PARALLEL DEVELOPMENTS IN THE LAW

In my view, therefore, relational contract theory presents a substantial alternative to neoclassical contract law, and the limited effort by neoclassical scholars to grapple with it in detail constitutes, in the words of this Symposium's title, an "unanswered question" about relational contract. Interestingly, while the mainstream of contract law and contract law scholarship has been proceeding without the benefit of relational contract theory, developments in particular kinds of cases have suggested its relevance. Following the three dimensions of scope, method, and substance, in this Part I will bring those developments to light.

Relational contract is both more general and more fragmented than neoclassical law, as discussed above. The generalizing tendency has not been pursued in the law, but the fragmenting tendency has. For at least the past forty years (coincidentally, the span of Macneil's career), the traditional doctrinal structure in private law has been in decline. There are many reasons for this, and some of them relate to the shift away from classical law discussed previously. A particular element of the decline has been the spinning off of subfields that have become relatively independent of their parent subject. This has both diminished the scope of the traditional fields and established a new structure that makes the traditional trivium of contract-tort-property increasingly tenuous.[26] We can see this in three examples, one from each traditional field: insurance law, which has seceded from contract; landlord-tenant law, which has seceded from property; and products liability, which has seceded from tort.

Woodruff's 1924 casebook asked, "What do they of the law of insurance who only the law of contract know?"[27] When the question was asked, the answer was, only part. Today, the answer is, practically nothing. Insurance is a contractual relationship, but courts and legislatures have developed a body of insurance law that is distinct from the mainstream of contract. For example, the doctrine of reasonable expectations has bled over somewhat from insurance contracts to standard form contracts generally,[28] but it still creates a rule of interpretation and construction in insurance cases that is profoundly different from the rule applied in run-of-the-mill contract cases. The obligation of good faith applies in every contract, but it generally gives rise to a tort cause of action and extracontractual remedies only in insurance cases.[29] Waiver and estoppel are applied more generously against insurance companies than against other contracting par-

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[26] *See* Jay M. Feinman, *Doctrinal Classification and Economic Negligence*, 33 SAN DIEGO L. REV. 137 (1996); Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989) [hereinafter *Jurisprudence of Classification*].

[27] EDWIN H. WOODRUFF, SELECTION OF CASES ON THE LAW OF INSURANCE v (2d ed. 1924).

[28] *See, e.g.*, Elliott Leases Cars, Inc. v. Quigley, 373 A.2d 810 (R.I. 1977).

[29] *See, e.g.*, Story v. City of Bozeman, 791 P.2d 767 (Mont. 1990).

ties,[30] while misrepresentations by the insured are often treated more leniently.[31] And so on.

Landlord-tenant law presents a different picture. It originated, of course, in the law of property. Here, part of the story is the use of contract principles as the field was carved out of property law. The tenant's inability to avoid a lease when ousted from quiet enjoyment of the premises was cured by supplementing the conveyance concept of the lease with the concept of conditions from contract law.[32] But the law of contract regarding tenancies is very different from the general law of contract. As in contract law, there are implied warranties, but the implied warranty of habitability is broader than any contract law warranty, essentially nondisclaimable, and protected by unique remedies.[33]

Products liability law is still more different, having mixed contract and tort origins. Over time, the doctrinal origins in contract have mostly disappeared, but the basis in expectations has not. Yet the area has not been absorbed by tort. Instead, it has become an independent field, deserving of its own Restatement,[34] with principles that developed and then influenced both its parent fields.

The method of analysis used in developing these fields and then applying the law in them is to a considerable degree nondoctrinal, in the same sense that relational analysis is nondoctrinal. The fields are defined without reference to doctrinal categories. Instead, the key to definition is contextualization. The areas are defined by factual similarities among the cases that fall within them.[35] (There is even a link to Northwestern University Law School here; this move can be linked with functional analysis of the type favored by Leon Green,[36] as well as with relational analysis.) Once the field is defined, principles are developed and cases decided through a normative analysis not dissimilar to the analysis of contract norms. The type-situation, when thought of as a relation, is redescribed as exhibiting a normative structure. External social values are brought to bear as well. The analysis by the courts in well-known cases such as *Comunale v. Traders & General Insurance Co.*,[37] a leading insurance bad faith case; *Javins v. First National Realty Corp.*,[38] the leading case on implied warranty of habitability; and Justice Traynor's germinal dissent on products liability in

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[30] *See* ROGER C. HENDERSON & ROBERT H. JERRY, II, INSURANCE LAW: CASES AND MATERIALS 934-38 (2d ed. 1996).

[31] *See* LEE K. RUSS, COUCH ON INSURANCE § 82.35 (3d ed. 1997).

[32] *See* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 6.32 (2d ed. 1993).

[33] *See id.* §§ 6.38-.45.

[34] RESTATEMENT OF THE LAW (THIRD), TORTS: PRODUCTS LIABILITY (1998).

[35] *See Jurisprudence of Classification*, *supra* note 26, at 696-700.

[36] *See, e.g.*, LEON GREEN, ADVANCED TORTS: INJURIES TO BUSINESS, POLITICAL AND FAMILY INTERESTS (1977); LEON GREEN, CASES ON THE LAW OF TORTS (1968).

[37] 328 P.2d 198 (Cal. 1958).

[38] 428 F.2d 1071 (D.C. Cir. 1970).

Escola v. Coca Cola Bottling Co.[39] all speak of reciprocity, propriety of means, restraint of power, and the like within the relation and within relations of the type, and they all apply supracontract norms to reshape the law. Even after these areas have matured, judicial opinions often have a strikingly relational cast.

Developments in these areas have been to a considerable extent pro-consumer, but by no means uniformly so. This suggests the substance of these developments. Although they all are contractual settings, they all involve settings in which there are characteristically (though not always) relations of inequality. Accordingly, the law of contract, built around a paradigm of relative equality, is not particularly well suited to deal with them. As such, they demonstrate a baseline of obligation independent of the terms of the contract. But like the substance of relational contract, the law in these areas does not run only in one direction.

V. IMPLICATIONS

The development of these subfields provides some evidence of the power of relational contract theory. But what are the implications of these developments for where relational theory might go next?

First, I think it is clear that if any progress is to be made, it will be made in the direction of further fragmenting analysis rather than extending Macneil's project of creating a more general theory of contract. Therefore, we can identify and develop additional subfields that can operate as independent relational contexts, as do insurance, landlord-tenant, and products liability law. It would be particularly interesting to develop subfields in which there are not the obvious levels of inequality. The Macneil and Wisconsin casebooks suggest some possibilities.[40]

One possibility is family economic relations. The Wisconsin casebook leads the way here in treating contract law cases arising out of family settings as part of the mainstream of contract yet deserving of special treatment as a class of contracts representative of continuing relations, like franchises or employment.[41] Old chestnuts like *Hamer v. Sidway*[42] and *Kirksey v. Kirksey*[43] and newer classics like *Marvin v. Marvin*[44] are brought together to consider how contracts and contract law are used in family settings and how we should think about contracting in the context of intimate relations.

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[39] 150 P.2d 436 (Cal. 1944).

[40] See notes 16, 17. Stewart Macaulay discusses these casebooks and the relationship between them at greater length in his contribution to this Symposium. *See* Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 775-79 (2000).

[41] *See* MACAULAY ET AL., *supra* note 17, at 202-63.

[42] 27 N.E. 256 (N.Y. 1891).

[43] 8 Ala. 131 (1845).

[44] 557 P.2d 106 (Cal. 1976).

Another possibility is commercial construction contracting. Here we have a setting in which contracts, including form contracts, are widely used by a mix of repeat players and occasional players of different size and sophistication, in which interactions take place over time in a variety of settings, and in which problems always arise. This possibility is dealt with in the Macneil casebook,[45] but other than Justin Sweet of Berkeley[46] and Tom Stipanowich of Kentucky,[47] there has been no sustained scholarly attention to the fields.

A quite different possibility concerns long-term, extensive relationships between large economic entities. There was a moment when there seemed to be a prospect of extending relational analysis to these situations, which many people think of as the paradigm of a relational contract. The Westinghouse uranium cases[48] and *Aluminum Co. of America v. Essex Group*[49] produced a flurry of literature about the desirability of judicially mandated adjustments in long-term contracts. Given this literature, including especially that by Macneil[50] and Speidel,[51] one would think that this would be a natural area for the application of relational theory, but it has not turned out that way. The likely reason for this is that the scholarly literature outweighs the volume of litigated disputes. The cases were sparked in some part by unusual events, including the unusual inflation of the time, and as the economic circumstances that gave rise to them passed, so did litigation of this type. There also may be a tendency to avoid litigating these problems, or at least to avoid bringing the litigation to conclusion, because of all that is stake.

Second, is it possible that relational contract theory can reshape the core of contract doctrine—the traditional doctrinal structure of rules and principles of formation, performance, etc.? One of Macneil's original propositions for this Symposium was that "[t]he intermediate contract norms—general, relational, and discrete—provide more effective tools of social and legal analysis of contractual relations than . . . such less specific, but more familiar, concepts such as good faith, substantive unconscionability, fairness, etc."[52] While this may be true, and I was once optimistic about

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[45] *See* EXCHANGE TRANSACTIONS AND RELATIONS, *supra* note 16, at 809-11, 814-27, 939-62, 1250-78.

[46] *See* JUSTIN SWEET, SWEET ON CONSTRUCTION LAW (1997).

[47] *See* Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463.

[48] *See* MACAULAY ET AL., *supra* note 17, at 742-70.

[49] 499 F. Supp. 53 (W.D. Pa. 1980).

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

[51] *See, e.g.*, Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981).

[52] Letter from Ian R. Macneil to *Northwestern University Law Review* (Apr. 30, 1998) (on file with *Northwestern University Law Review*) (concerning the structuring of a contracts symposium).

the project, I now believe that the relational norms will not supplant the more familiar doctrines anytime soon, much less replace the even more fundamental doctrines such as indefiniteness, conditions, or parol evidence.

I believe, however, that a version of relational contract theory can have real influence as a counterweight to the still-powerful discrete, maximizing tendencies of neoclassical contract law. If we think of doctrine as a structure of argument rather than a set of rules, then it becomes clear that neoclassical contract and relational contract generate competing general accounts of the sources and nature of obligation in contract law. I have suggested elsewhere how these argument structures might be developed in relation to particular doctrines, such as promissory estoppel,[53] or particular classes of cases, such as construction litigation.[54] I will simply conclude by summarizing the competing accounts, emphasizing the differences.[55] Neoclassical contract emphasizes the autonomy of individuals and the limited liability that autonomy necessitates. It focuses, therefore, on the agreement process as an exercise of autonomy to create liability, and tries to construct the expectations of the parties from their agreement and the context that gives their agreement meaning. In contrast, relational contract emphasizes the interdependence of individuals in social and economic relationships. Because its paradigmatic unit of inquiry is the extensive relation rather than the discrete transaction, relational contract focuses on the necessity and desirability of trust, mutual responsibility, and connection. Not all of these bonds should be legally enforceable, but beginning analysis by recognizing them is likely to produce a broader set of obligations.

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[53] *See* Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992).

[54] *See* Jay M. Feinman, *Attorney Liability to Nonclients*, 31 TORT & INS. L.J. 735 (1996); Jay M. Feinman, *Economic Negligence in Construction Litigation*, 15 CONSTRUCTION LAW. 34 (1995); Jay M. Feinman, PROFESSIONAL LIABILITY TO THIRD PARTIES (2000).

[55] *See Values in Contract*, *supra* note 1, at 355-56.