IAN MACNEIL'S CONTRIBUTION TO CONTRACTS SCHOLARSHIP

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According to Professor Whitford, most contracts scholars have been ambivalent towards Ian's Macneil's messages. Macneil's thesis that contracting takes place not at a single moment but over a period of time has been generally accepted. But Macneil's second theme — that parties involved in long-term relations seek goals in addition to wealth maximization—has gone largely unrecognized. After reviewing the possible reasons for Macneil's limited influence, Professor Whitford concludes that political preference for wealth maximization values is the most likely explanation.

Macneil has been both prolific and distinctive. He has devoted a career to developing and marketing his relational contract theory. Although I hope and expect that Macneil will have many additional productive years in which to further develop and market his theory, his work is now rich and unique enough to justify an attempt at overall assessment of its impact.[1] In this comment I will discuss the impact of Macneil's writings on the work of other academics writing about contract law.

The reader should be aware that Macneil himself conceives of his work as much broader than anything most other contract scholars recognize as contract law. His relational contract theory encompasses all exchange, and because Macneil sees exchange occurring almost everywhere, his theory becomes in effect a general theory of the social order. It is a provocative theory at that level of generality and deserves to be

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1. The most complete statement of the theory is in I. MACNEIL, THE NEW SOCIAL CONTRACT (1980). *See also* Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978) [hereinafter cited as Macneil, *Adjustment*]; Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and The Need for a "Rich Classificatory Apparatus"*, 75 NW. U.L. REV. 1018 (1981) [hereinafter cited as Macneil, *Economic Analysis*]; Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) [hereinafter cited as Macneil, *Efficient Breach*]; Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974) [hereinafter cited as Macneil, *Many Futures*]; Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974) [hereinafter cited as Macneil, *Presentiation*]; Macneil, *Values in Contract: Internal and External*, 78 NW. U.L. REV. 340 (1983) [hereinafter cited as Macneil, *Values*].

evaluated on those terms.[2] Nonetheless I limit my review, as indicated, to the impact of his work on contracts scholarship.

I. The Relevance of Macneil's Relational Contract Theory to Contracts Scholarship

Macneil's work has two great messages for contracts scholarship. Although one of the messages has been incorporated into the work of quite a few other contracts scholars, the other message has been largely ignored. In part I, I will describe these messages and their significance in light of the traditions of contracts scholarship. In Part II, I will speculate about the reasons for the differential impact of Macneil's two messages.

Both of Macneil's messages concern what he calls relational contracts. Briefly, relational contracts emerge in the context of ongoing relationships. They are to be contrasted with what Macneil calls discrete contracts. Although all contracts have relational elements, contracts occurring between parties who have little interaction other than the contract itself tend to fall on the discrete end of the relational-discrete continuum. Macneil gives as an example of a mostly discrete transaction the purchase of gasoline at a service station along a superhighway.[3]

The more generally accepted of Macneil's messages is that relational contracts differ from discrete contracts in that typically there is no single moment at which the parties confirm a meeting of the minds respecting the important terms of the contract. Rather, to quote Macneil:

> The exercise of choice [about contract content] is . . . an incremental process in which parties gather increasing information and gradually agree to more and more as they proceed. Indeed, the very process of exercising choice in such circumstances, such as through engineering studies, may entail major parts of the total costs of the whole project as finally agreed.[4]

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2. *See* Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. Chi. L. Rev. 567 (1983). Though Professor Gottlieb does not purport to evaluate Macneil's work extensively, his perspectives on the legal and social order resemble Macneil's.

3. Macneil, *Many Futures, supra* note 1, at 720-21.

4. Macneil, *Economic Analysis, supra* note 1, at 1041. Of course, not all credit for the acceptance of this perspective should go to Macneil. Macaulay's famous article, so cited in this symposium, has been quite influential in defining and winning support for this perspective as well. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963). Support for this perspective can be found in the writings of some of the legal realists as well, especially Llewellyn. Certainly Macneil has been among the most persistent and prolific of the relational contracts zealots, however, and as social acceptance comes, he must be given a good deal of the recognition.

Both economists and lawyers have come to acknowledge this behavioral reality. There is a growing body of economics literature explaining that in relational contracting it is commonly more in the parties' perceived self-interest to reach agreement gradually rather than all at one time, allowing much performance to occur while important terms remain to be negotiated. This economics literature speculates about what kinds of contracting strategies might be expected in these circumstances. Victor Goldberg's contribution to this symposium is an excellent example of such literature.[5]

Lawyers have had a more difficult task than the economists. Both lawyers and economists need to develop new perceptions about how people behave in relational contract situations. In addition, lawyers must develop a new normative structure to accommodate and regulate that behavior. Classical contract law of the type refined so superbly by Williston presupposed a single moment at which the parties reached agreement on all important terms. Before this grand meeting of minds, there was no contractual liability. And after this point, all important decisions—particularly the determination of the terms governing the relationship and the measurement of expectation damages[6] —could be reached only by referring to that all encompassing agreement. Classical contract law can be coherently applied to situations in which there is no grand meeting of the minds, even though the parties act as though there is a contract only by denying that a contract exists at all. Courts sometimes reach that result,[7] but it often seems harsh because it fails to protect obvious reliance on what the parties believed to be a valid contract. Partly for this reason, this approach is not generally favored today.

If relational contracts lacking a grand meeting of the minds are to be enforced, there is no way to explain the results reached within the structure of classical contract law because that body of law provides only the parties' agreement as a reference point for determining contractual content. If the results of cases purporting to enforce such contracts are not to appear unpredictable and ad hoc, some basis outside the framework of classical contract law must be established for determining when liability begins, defining the terms of relationship, and set-

5. Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 Wis. L. Rev. 527. *See also* Goldberg, *Relational Exchange: Economic and Complex Contracts*, 23 Am. Behavioral Scientist 337 (1980); Williamson, *Transition-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 223 (1978).

6. *See generally* Macneil, *Presentiation*, *supra* note 1.

7. *E.g.*, U.C.C. § 2-204 (1978) (which leaves open the possibility that apart from the intent of the parties, a contract can be held too indefinite to be enforced).

ting the remedy upon breach.[8] Much progress has been made. The *Restatement (Second) of Contracts* reflects a modern attempt to summarize judicial solutions to these relational contract problems.[9] And law review articles proposing "doctrines" for a new relational contract law are now legion.[10] These developments reflect the degree to which legal academics have accepted Macneil's observations about the nature of agreement in most relational contracts. In this sense, relational contract theory is now mainstream contract theory.[11]

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8. It is at this point that I take issue with my colleague, John Kidwell. He seems to presume that classical contract law can be applied to relational contracts in a way that will lead to predictability in judicial decision-making. Kidwell, *A Caveat*, 1985 WIS. L. REV. 615.

9. Macneil discusses the new *Restatement* and argues that while it is more relational than its predecessor it is nonetheless inadequately relational. *See* Macneil, *Adjustment, supra* note 1; Maeneil, *Presentiation, supra* note 1.

10. *E.g.*, Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 1011-18 (1983); Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Speidel, *Court-imposed Price Adjustments Under Long-Term, Supply Contracts*, 76 NW. U.L. Rev. 369 (1981).

11. While Macneil correctly describes the difficulty of applying classical contract law to relational contracts, he refrains from arguing that classical contract law cannot be applied in a strictly logical manner even to discrete contracts. I agree with the argument advanced by others that, even assuming no difficulty in determining historical fact, the rules of classical contract law cannot resolve disputes to which they apply because they fail adequately to mediate between the contradictory principles they embrace. While there are a number of sets of conflicting principles in classical contract law, probably the most important conflict is between protecting reasonable expectations based on promise while simultaneously preserving a more subjectively conceived freedom of choice. The latter concern has yielded doctrines concerned with mistake, incapacity, fraud, duress, and, more recently, unconscionability. The critique to which I refer contends that in any given case one can make logical arguments for either result, relying first on rules premised on subjective freedom principles and then on the expectation-protecting, objective contract rules. Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981). Even if there is not such a conflict in a particular case, there is likely to be an unresolved conflict between other conflicting principles embraced by classieal contract law, sueh as consideration and promissory estoppel or restitution and expectation ideals.

Macneil seems to believe that the rules of classical contract law provide a greater restraint on a court's discretion in settling a lawsuit than the foregoing critique implies. One of his criticisms of classical contract law as applied to relational contracts is that it does not provide a court with enough flexibility to adapt its decision to the special circumstances before it. Macneil, *Adjustment, supra* note 1, at 859, 860.

The critique to whieh I adhere does not say that the results of all cases governed by classical contract law are unpredictable, but only that whatever predictability exists is not derived from logical application of established rules. Predictability can come from a widely shared perception of which of two conflicting principles should govern in a particular situation. A good example comes from the history of the application of the *Hadley v. Baxendale* principle. The *Hadley* rule mediates between concern for protecting the reasonable expectations of the non-breaching party and concern for not exposing the breaching party to greater risks than he/she subjectively anticipated. Over the years there have been great differences in the way that the *Hadley* rule has been applied as society and the courts have tended to give greater sway to one principle or another. Those well informed about the praetices of courts have often been able to predict the application of *Hadley* to particular fact situations with considerable accuracy. Today, for example, unlike 50 years ago, a wholesaler of widgets can be reasonably confident that a court will not bar a elaim for normal

Macneil's second great message for contracts scholarship bears on how, as opposed to whether, relational contracts lacking a grand meeting of the minds should be enforced. Articles and court opinions which accept Macneil's first message and seek to enforce such relational contracts sometimes suggest that the decision about the content of the contracts should be taken in light of all the facts and circumstances.[12] While undoubtedly some kind of balancing approach is often needed, without some specification of the factors to be balanced and the approximate weights to be accorded to each, these suggestions provide no real guide to decision-making. Another common approach is to assume that the parties to the relation are primarily and perhaps solely motivated by a desire to maximize wealth. With this assumption it is often possible to infer, from the perspective of hindsight, what terms the parties would have agreed to had it been practicable to reach agreement prior to the breakdown of the relationship and resulting litigation. Advocates of this approach[13] overlook what I consider the second great message of Macneil's work on relational contracts for contracts schol-

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resale profits on *Hadley* grounds when the manufacturer-supplier of the widgets breaches the contract.

Some might characterize these presumptions as to how particular rules will be applied as essentially rules in themselves, with the result that contract law becomes partly determinate. I prefer to characterize them as simply shifting conceptions of what damages "arise naturally" from a breach or are "in the special contemplation of the parties," which is certainly the way courts describe what they are doing. By adhering to the very general statement of the "rule" of *Hadley v. Baxendale*, courts leave open the possibility that future courts can reach opposite results consistently with stare decisis. Hence the usual barriers to change in rules—e.g., the obedience owed by a lower court to the decisions of a higher one—do not so effectively prevent changes in the pattern of applying a rule like *Hadley*'s.

The critique of classical contract law advanced here is also not inconsistent with an assumption that societal needs for predictability in case decisions are sometimes met by adopting specific rules that largely control the outcome of cases. In contract law, such needs have been met by adopting rules specific to one type of contract. Indeed, this has happened so often that there are now many specialized areas of applied contract law that are considered separate doctrinal areas (e.g., securities law). Contract law remains residual, applied when there is not an applicable specialized body of law or when the rules constituting such an area do not cover the point in dispute. *See* L. FRIEDMAN, CONTRACT LAW IN AMERICA viii (1965). Perhaps beeause contract law applies to such a wide diversity of factual situations, even classical contract law has retained its characteristic of a collection of vague provisions that fail to resolve basic conflicts between competing principles.

12. Richard Speidel, in his usual lucid manner, has discussed this approach at some length. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785 (1982).

13. The Goetz & Scott articles, *supra* note 10, are the best examples. This is an appropriate place to note the distinction between efficiency and wealth maximization. Classical analysis presumes that in a condition of freedom the parties to a contract can be expected to favor whatever preferences they have, and that given enough information they can be expected to do so in the most efficient way possible (that is, to maximize). We have no way of knowing, however, what preferences people have. In the absence of such information, when it is necessary to fill in gaps in a contract, analysts in our culture commonly assume that parties wish to maximize material wealth, which is what I mean by wealth maximization.

arship. That message, which has had a lesser impact in the world of contracts scholarship, is that parties in relational contracts frequently temper wealth maximization goals with other objectives.

Consider, for example, Macneil's recurrent assertion that parties to relational contracts desire to preserve their relationship.[14] Preservation of the relationship can be a means to wealth maximization. As parties establish regular ways of conducting their business, and as they commit what the economists call idiosyncratic investments to the relationship,[15] the transaction costs of finding a substitute for an existing relationship can become great. A manufacturer with a regular supplier will have worked out many understandings over the years that make particular exchanges more efficient. Rarely will a switch to a new supplier not involve extra costs as similar understandings are developed anew. Hence, making extensive efforts to preserve relationships, the behavior pattern that Macneil observes, is frequently the course indicated by wealth maximization goals.

Yet wealth maximization concerns are not the only reason parties desire to preserve relations. Humans are social animals and their identities (that is, self-concepts relating to their character and place in society) are partly constituted by their relationships. Not all relationships are enjoyable, and at times the parties will prefer separation to a continued relationship. But if the relationship is an important one, termination will inevitably entail a partial change in identity. Perhaps franchise termination provides the best example. For the franchisee, termination often means the end of a career, and therefore is an event often carrying emotional costs well beyond the wealth costs of establishing a new career. Even in the manufacturer-supplier hypothetical discussed above, termination will frequently entail the end of friendships between employees of the two corporations.[16]

In my opinion, recognition of the values parties express in their relational contract behavior should affect the way in which academics evaluate judicial decisions and legislation seeking to protect interests in preserving relationships, such as limiting the termination rights of franchisors or restricting an employer's right to dismiss an employee at

14. I. MACNEIL, *supra* note 1, at 66-67.

15. *See* Williamson, *supra* note 5.

16. That the parties to a relational contract are frequently corporations does not undercut the point. As Macneil would surely agree, each corporation is itself just a set of relational contracts between different constituent elements of the corporation. *See* Klein, *Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521 (1982). As a corporation terminates a relational contract with another corporation, there will be personal relationships between employees of each corporation that will be compromised.

will.[17] Many articles demonstrate that wealth maximization considerations alone frequently support granting the franchisor or employer a unilateral power to terminate these long standing relationships. More efficient substitutes may be available for an existing franchisee or employee. Replacement will enhance the wealth not only of the franchisor or employer but of other franchisees and employees as well.[18] Recognizing that preserving relationships may serve values other than wealth maximization, however, complicates the analysis. If the parties had truly negotiated all the terms of their relationship at the origin of the contract, a rare occurrence in relational contract situations,[19] they might have included termination restrictions similar to those imposed by recent judicial and legislative decision in order to satisfy goals other than wealth maximization. Even if they would not have, the goals of the parties may have changed over the life of the relationship, and there may be no reason not to reflect the new goals in the adjudicated decision.[20]

In suggesting that Macneil's work has these implications, I need to make clear that Macneil himself rarely states his specific views about the desirable content of positive law. Certainly Macneil believes the legal system needs to take radically different approaches to relational contracts than it traditionally has. In dealing with disputes, he favors greater reliance on procedures oriented towards mediation and less emphasis on adversary processes looking towards adjudication. In regulating contracts, he 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.[21] Absent such big changes, however, Macneil rarely indicates how courts should de-

17. Macneil discusses franchise termination legislation. I. MACNEIL, *supra* note 1, at 377-78. For examples of decisions restricting employers' termination rights, see Tameny v. Atlantic Richfield, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); Fortune v. Nat'l Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977).

18. *E.g.*, Jordan, *Unconscionability at the Gas Station*, 62 MINN. L. REV. 813 (1978); Smith, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J.L. & ECON. 125 (1982); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

19. To be sure, in franchise and employment situations, there is commonly a standard form contract purporting to represent the parties' agreement to all essential terms. Very often this form is signed close to the beginning of the relationship. I assume that frequently these forms do not represent a true meeting of the minds any more than any other standard form contract does. *See generally* Leff, *Contract As Thing*, 19 AM. U.L. REV. 131 (1970).

20. *See* Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786-797 (1983).

21. *See* I. MACNEIL, *supra* note 1, at 71-117; Macneil, *Adjustment*, *supra* note 1, at 886-901. Macneil's most specific discussion of the implications of the preservation of relations norm for positive law can be found in Macneil, *Efficient Breach*, *supra* note 1.

cide particular cases before them or expresses support for reasonably particularistic legislation. No doubt influenced by Macaulay and others in the law and sociology school, he seems deeply aware of the problematic correlation between the intent of legislation or a judicial decision and its actual impact on the parties.[22] Macneil may be justifiably cautious. Judicial decisions limiting the termination of franchises or employment may do little in the end to serve the values other than wealth maximization that are sought in those relationships. Macaulay found that federal legislation designed to protect automobile dealers actually did little to aid dealers who tried to resist a manufacturer's attempt to terminate a franchise.[23] Macneil's caution, however, hardly justifies the work of other scholars who analyze franchise and employment termination problems as though wealth maximization concerns were the only values at stake.

Participation is another value commonly reflected in the behavior of parties to relational contracts. Participation, as I use the term, means that the parties seek influence in formulating the substantive content of a transaction. It is the opposite of alienation. In discrete transactions, take-it-or-leave-it bargains seem quite satisfactory because the party not drafting the terms can exercise effective control over its own well-being and, indirectly, over the terms of the standard form contract simply by deelining to enter the transaction or refusing to enter another one. As transactions become relational, however, withdrawal becomes a less viable means of control, and the parties seek direct participation in the formulation of the rules of the relationship. Though often partieipation serves the wealth maximization objectives of the parties seeking it, it can be and often is an objective independent of its wealth maximizing effects. People want some control over their own destiny, even if sheer obedience to the dictates of another would be more efficient.

Macneil does not explicitly identify participation as a relational contract norm. Perhaps he considers it an aspect of "consent," "power," or "propriety of means," which he does identify as contract norms.[24] In any event, the importance of what I have called participation in relational contracting is implicit in his observations. Macneil continually refers to the modern collective bargaining relationship as a

22. For a discussion of the transformation of norms when imposed, see Macneil, *Values, supra* note 1, at 370-73. At times Macneil seems to eschew almost any implications of relational contract theory for the substantive content of contract law. *Id.* at 410.

23. S. MACAULAY, LAW & THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966).

24. Macneil, *Values, supra* note 1, at 347. In Macneil's terminology, unilateral power means that the parties have control over the lives of others. Those others resist attempts at that unilateral power, frequently by negotiating agreements. It is successful resistance that I call "participation."

situation in which society recognizes the distinctive character of relational contracts and has provided a reasonably mature relational contract law to support them.[25] The central tenet of modern labor law is that employees, acting through representatives, should have input in formulating employment conditions. Take-it-or-leave-it employment contracts are not generally favored, even if from a wealth perspective alone they provide terms as favorable to employees as a negotiated contract.[26]

Though there are a number of possible applications of a participation value in contract law, none are so obvious as regulation of standard form contracts (SFK) used in real estate leases and various other relational contracts involving consumers. It is now generally recognized that true consent to all aspects of the SFK is usually lacking. From a wealth maximization perspective, this is as it should be. Individual negotiation of every contractual detail would take too much time.[27] Because of the absence of true consent, a majority of commentators no longer regard agreement to a SFK as sufficient to validate its content. Rather, judicial and legislative oversight of some terms is deemed both appropriate and desirable.[28] In suggesting ways to exercise that oversight, however, commentators very often look just to wealth maximization values. The question they frame is what terms the parties would have agreed to if they had negotiated the contract, were well informed, and were concerned solely with wealth maximization.[29]

Once again, I believe that the law, and legal academics, should more fully recognize the place of other values, especially participation, where a SFK is used in a relational contract setting.[30] While individual

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25. *E.g.*, I. MACNEIL, *supra* note 1, at 84-90.

26. *See, e.g.*, NLRB v. Gen. Elec. Co., 418 F.2d 736 (2d Cir.), *cert. denied* 397 U.S. 965 (1970) (disapproving of take-it-or-leave-it bargaining in the collective bargaining setting). Macneil's concern with alienation as a major social problem is clearly brought out in his attack on large bureaucracy. Macneil, *Values, supra* note 1, at 416-18. Participation is, of course, a possible antidote to alienation.

27. *See* Leff, *supra* note 19; Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. (1984).

28. *See* Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

29. I have used this basic approach in my own work. Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of The Wisconsin Consumer Act*, 1975 WIS. L. REV. 607, 615-28.

30. Many SFKs involving consumers are used in transactions that are not highly relational. Consider, for example, the contract with a moving company. As Macneil always reminds us, all contracts have their relational elements. Most consumers, however, do not contract with a particular moving company more than once, and the performance of the contract occurs over a reasonably short period of time. Where a contract touches on a person's life in this rather limited way, it is more reasonable to assume that wealth maximization motives predominate. Regulation

negotiation of each contract may be just too inefficient, there may be other ways to provide adhering parties a sense of participation in framing the contents of their agreements. In Germany, there has recently emerged a tradition of bargaining between SFK drafters, typically trade associations of manufacturers or sellers, and organizations representing the adhering parties, often consumers. This tradition has been supported by the establishment of legal institutions to encourage such bargaining. In Germany, both consumer organizations and a state agency are authorized to sue to enjoin the use of any term in a SFK that is "unfair". Reaching collective agreement about the content of a SFK with a consumer organization induces that organization not to exercise its authority, of course, and as a matter of practice, the state agency typically refrains from exercising its power if the content of the SFK is a product of a collective agreement.[31]

Collective negotiation of SFK terms may serve wealth maximization objectives. The bargaining parties will often have better information about the likely practical consequences of different possible terms than will the legislative or judicial bodies that are otherwise likely to regulate SFK content. Quite apart from such effects, however, collective negotiation traditions might effectively provide consumers a greater sense of participation than results solely from participation in electoral processes through which citizens participate in some marginal fashion in the setting of legislative and judicial responses to SFKs. The extent to which collective negotiation can fulfill a participation value will depend in part on our ability to establish negotiating consumer organizations to which consumers feel an allegiance or identity. If the goal of participation were taken seriously by legal scholars, we should

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of the boiler plate of a SFK is still needed, of course, but regulation from an exclusively wealth maximization perspective may be appropriate.

An outstanding example of the use of a SFK in a relational setting is the real estate lease. The contract for a new car is also quite relational. The parties are committed to a long term relationship because of the extensive warranties in use today, particularly since it usually is not practical for the buyer to simply sell the car and buy another when confronted with a problem. In these contexts, I believe that concern for participation and other values different from wealth maximization should be reflected in the content of regulation.

31. *See* Micklitz & Bohle, *Five-and-a-half year German Standard Terms Act: An Interim Survey From The Point Of View Of Consumer Protection*, in UNFAIR CONTRACT TERMS IN CONSUMER CONTRACTS 111 (T. Bourgorgnie ed. 1983); Micklitz, *Three Instances of Negotiation Procedures in the Federal Republic of Germany*, 7 J. CONSUMER POL'Y 211, 220-27 (1984). Similar practices have been proposed in France. Calais-Auloy, *Collectively Negotiated Agreements: Proposed Reforms in France*, 7 J. CONSUMER POL'Y 115 (1984).

have many articles on these issues. Unfortunately, we have virtually none.[32]

I have discussed here only two values other than wealth maximization that I believe parties pursue in relational contract situations and that ought therefore be reflected in the law pertaining to relational contracts. There are certainly others. The basic point is, of course, that materialism is not the only value people exhibit in relational contract behavior. Therefore, we should not structure the law or our legal commentary as if it were.

II. The Reasons for Macneil's Limited Impact

In this Part, I will discuss possible reasons why contracts scholars have generally accepted only one of the two major implications of Macneil's work for contracts scholarship that I have identified. The most evident explanation is the current popularity of the wealth maximization value. Macneil's thesis about the nature of the agreement process in relational contract situations can be accepted without departing from an analytic framework based on wealth maximization, though it does require considerable revision of classical contract doctrine. Macneil's hypothesis about the multiplicity of goals pursued in relational contracts, however, suggests that parties compromise wealth maximization objectives to accommodate other concerns. If such a pluralism of objectives were to be reflected in effective legal rules, it might often operate against the perceived self-interest of dominant groups in society. More to the point of this commentary, however, it would render less valuable the very considerable intellectual capital so many legal academics now have invested in an analytic framework premised on the primacy of wealth maximization values.

A critique asserting that a large part of the legal academic community have ideological blinders is a harsh one. It should be reached only after considering other possible explanations for the differential impact of the two major implications Macneil's work has for contract law.

One possible alternative explanation may be found in the many conversations among contracts teachers concerning the difficulty of reading Macneil's articles. There is a widespread impression, I believe, that this difficulty has limited the impact of Macneil's work in the legal academic world. While I find Macneil's work difficult to read as well, I think it is important to recognize that this difficulty is not simply a mat-

32. A practical program to further the value of participation could start with the formation of organizations that could legitimately claim to speak for groups of consumers entering particular types of SFKs, such as tenant unions.

ter of style. To a great extent it is an inevitable concomitant of Macneil's challenge to basic conceptions embedded in traditional contract theory.

A good example is Macneil's invention of new terminology to explain his concepts. Throughout his work, words such as "solidarity" or "power" (in both unilateral and bilateral varieties) are used in very distinctive ways which Macneil is careful to define.[33] Using language in unconventional ways always makes an article more difficult to read, and hence should be avoided when possible. Macneil's relational contract theory, however, challenges the conception that promise is both the beginning and source of all norms of a contract. Since that conception underlies both traditional contract law and most contract scholarship, it should not be surprising that Macneil finds the usual vocabulary of contracts scholarship inadequate to describe the categories he considers important to the analysis of relational contracts. Traditional vocabulary has been so long used to describe the concepts underlying a promise-based conception of contract that the very words, like offer and acceptance, are likely to conjure traditional concepts in a reader's mind. Macneil could nevertheless describe his analytical categories in ordinary language, taking care to qualify that language where appropriate. If such qualifications would be lengthy, however, his decision to coin new terminology may make his articles more readable than they otherwise would be. The only real question is whether Macneil has invented more new terminology than is needed to explain efficiently his new ways of looking at things. And on that question perhaps some artistic license is appropriate.

A second objection to Macneil's work, sometimes deemed stylistic, is that his work is too complex, in the sense that he describes more different characteristics of relational contracts than we can easily master. His work has been implicitly criticized for its "rich classificatory apparatus."[34] A little reflection will indicate that this is not stylistic criticism. The question is whether Macneil's numerous categories for describing features of relational contracts are useful or needed in terms of some end in view. If they are, the messenger (Macneil) should not be blamed for the bad news.

Even though Macneil's work, perhaps necessarily, is difficult to read, that alone cannot explain the differential impact on contracts scholarship of the two great implications of his work. Another possible explanation for this differential impact is Macneil's own reticence to discuss the implications of his relational contract theory for contract

33. *E.g.*, Macneil, *Economic Analysis*, *supra* note 1, at 1032-34, 1036-39.

34. Williamson, *supra* note 5, at 236.

law.[35] As Robert Gordon observes in his contribution to this symposium, Macneil (along with Macaulay) often appears to assert the marginality of law.[36] Moreover, when Macneil does discuss the implications of his observations for the law, he has until recently given much greater emphasis to what I have called the first implication. In a recent article Macneil even asserted the "relative social neutrality" of relational contract theory, implying that the theory was not inconsistent with what he called the "dogma of 'growth-at-all-costs,'"[37] what I would call an exclusive concern with wealth maximization. I disagree with this conclusion, of course,[38] but it would not be surprising if Macneil's own ambivalence about the implications of his work for the values that should be reflected in positive law were partly responsible for the kind of impact the scholarship has had.

Another reason so much contracts scholarship has not accepted Macneil's multiplicity of goals thesis may be that most scholars simply do not believe it. Put into question here is Macneil's method. He asserts that values other than wealth maximization are expressed in the behavior of parties to relational contracts. His evidence comes from years of study based on a methodology that, in his contribution for this sympo-

35. *See supra* text accompanying notes 21-22. The reticence may help explain the difficulty many have in reading Macneil. Because of the lack of discussion about the implications for positive law of Macneil's findings, his articles often appear to be lengthy descriptions of distinctions—for example, between "effectuation of consent" and "creation and restraint of power"—that do not appear to be helpful in evaluating some problems, such as how to resolve disputes in relational contracts. Very often Macneil's justification for his many analytic categories seems to be simply that relational contracts are a very important part of the world about us and that he is describing interesting similarities and differences between them. But there is simply no end to the similarities and differences one could observe about relational contracts (or any category of objects or behaviors, for that matter). One could observe how many relational contracts involve a person named Mitchell or distinguish those contracts concerning families with ancestors on the Mayflower from others. Normally we assume that such distinctions need not be drawn because they would not be useful to us in dealing with any questions we want to ask about relational contracts. If Macneil devoted more effort to explaining the utility of his many categories for solving some acknowledged social problem, I suspect that complaints about the accessibility of his work would lessen.

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

37. Macneil, *Values*, *supra* note 1, at 414. *Compare* Macneil, *Adjustment*, *supra* note 1, where he discusses the implications of the first thesis quite concretely.

38. In the very same article in which Macneil asserts the "relative social neutrality" of his work, he identifies as one implication of relational contract theory that the fundamental nature of man places limits on the kinds of contractual relationships that can be sustained. The idea that there are nature-based limits on the viability of human institutions is in turn described as inconsistent with "what seems to be the prevailing ideology throughout the Western world, the growth-at-all-costs school." Macneil, *Values*, *supra* 412-14 (1983). This passage comes closer to my own views.

sium, he calls casual empiricism.[39] But Macneil is a participant as well as an observer in this society. How can we know that with his casual empiricism Macneil sees what exists as distinct from what he wants to exist?

There is no complete answer to this objection.[40] Perhaps in all scholarship about the social world, but certainly in scholarship seeking to establish propositions as general as Macneil's, the biases and presuppositions of the observer will influence the findings. We could, as some apparently have,[41] abandon all hope for partial objectivity in such scholarship. In that case we would have nothing to go on in forming our individual beliefs about the nature of the social world except our personal politics, however they are formed. Suppose, however, that we proceed on the assumption that a partial objectivity is possible in accounts of the social world about us by accepting that in evaluating any particular account we must keep in mind the inevitable subjectivity of the reporter. Such an epistemological position is most consistent with my experience as I perceive it. Certainly I have had the experience of realizing that my perceptions of the world about me are influenced by what I expect or hope to see. But I also believe that I have had the experience of changing my ideas about how society works because of what I have observed or read about other people's observations.

On this assumption that through study it is possible to learn things about the social order, it seems to me that Macneil's account of relational contracting deserves considerable credence. He has devoted the better part of a career to observing, thinking about, and writing about the subject. In his writing he continually gives examples of his hypotheses from widely ranging areas of life—the product of his casual empiricism. His views should be taken seriously. It is appropriate to suspect Macneil's subjectivity and to look for ways in which that subjectivity may have influenced his observations. There is, however, no study of a depth comparable to Macneil's work that rejects his multiplicity of goals thesis (presumably in favor of a hypothesis that wealth maximization is a predominant motive for most parties to relational contracts).[42]

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39. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

40. Macneil discusses this point. Macneil, *Values*, *supra* note 1, at 408. His conclusion is similar to the one I come to below.

41. *See* Leff, *Law and* . . ., 87 YALE L.J. 989 (1978).

42. It is sometimes argued in comparable circumstances that if the parties truly sought things other than wealth maximization, it would be reflected in their marketplace behavior. Of course, it is the implication of Macneil's work that such preferences are reflected in contracting behavior. They may not be reflected in the written contracts used in franchise or consumer situations. One of the basic and generally aecepted premises of relational contract theory, however, is that often written contracts are not true representations of some grand meeting of the parties'

In the absence of such a study, it seems likely that persons who reject the multiplicity of goals thesis do so because, perhaps unconsciously, they presume that people behave predominantly in accordance with wealth maximization objectives, and they are willing to abandon their presumption only when confronted with evidence much more rigorously empirical than Macneil's. However, rigorous empirical studies at the level of generality of Macneil's work are extraordinarily difficult, if not impossible. If a wealth maximization hypothesis is generally accorded a presumption of validity in these circumstances, it is evidence of that thesis' popularity. That, of course, is the explanation for the limited acceptance of Macneil's work that I first suggested.

A person could accept Macneil's description of the values parties reflect in relational contracting and yet disagree that all those values should be reflected in the law. It is generally assumed that a primary purpose of contract law is to reflect the collective will of the parties. This assumption is based on the liberal idea that there is no basis for determining what is good other than the preferences of the citizenry. On this basis I have argued here that both the law and legal scholarship should better reflect the implications of Macneil's multiplicity of goals thesis, since it is a thesis about the preferences of parties to relational contracts as revealed by their behavior. In fact, however, I believe that individual preferences are in part socially formed. Contract law, and even contracts legal scholarship, is part of the social structure that influences the content of individual preferences. In that event, it cannot be a complete justification for a proposition of contract law that it best maximizes the very preferences of the citizenry that it helped form.

It is very difficult on this vision of preference formation to determine what non-arbitrary bases exist for evaluating the content of contract law. It is too big a topic for me to explore further in this comment. Suffice it to say that if this view of preference formation is the reason so much of legal scholarship ignores Macneil's multiplicity of goals thesis in favor of law favoring wealth maximization, I believe that the only basis for adopting the latter stance can be a political vision of what is good. In other words, I am back to the explanation I first proffered—the current popularity of the wealth maximization value.

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minds, since that grand meeting of minds rarely occurs. If a relationship does not begin with any general agreement to all important terms of the relationship, many would argue that in settling disputes courts will be establishing terms for the parties, and that in doing so they need not follow the terms of a written contract. *See supra* note 19. In filling in missing terms, it is my argument that courts will be observing, rather than ignoring, the likely preferences of the parties if they direct attention to values other than wealth maximization.

III. Conclusion

In this comment I have described what I believe to be the two great implications of Macneil's work for contract scholarship. The first implication, now widely accepted, concerns the nature of the agreement process in most relational contracts. Because there is typically no single moment in which parties reach agreement on all important terms of the contract, dispute resolution cannot proceed on the assumption that only such an agreement can provide the "law of the transaction." The second implication concerns the goals of parties to relational contracts. I believe that Macneil's many descriptions of relational contracting illustrate that parties to such contracts commonly pursue a number of objectives, only one of which is wealth maximization. This conclusion has important implications for the content of positive law, yet much legal scholarship, including the scholarship accepting the first implication of Macneil's work, presumes that wealth maximization is the parties' sole or very predominant concern.

I hope that in the future Macneil's work, as well as the work of others, will help convince much of contracts academia that the privileged position many accord to the wealth maximization value has no basis other than political preference. If that occurs, perhaps it will lead to cultural change and to a more pluralistic vision of the values that should be reflected in our law.