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Contract, Property, and the Role of Metaphor in Corporations Law

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ABSTRACT

Cognitive scientists have described the role of metaphor as the attempt to understand one domain of knowledge (the "target") in terms of another (the "source"). Corporations law scholarship is currently dominated by a metaphor which attempts to explain corporations in terms of contracts. This "contractarian" metaphor derives from the economic model of the "firm" as a set of "contracts." The legal version of the metaphor exhibits confusion about both its target and its source. The economic concept of the "firm" is not equivalent to the legal concept of the "corporation." Nor is the economic "contract," a voluntary reciprocal relationship, equivalent to the legal "contract," a legally enforceable relationship that is partly, but not entirely, based on voluntary consent. Contractarian discourse uses the term "contract" loosely, however, and conflates voluntariness and enforceability.

The contractarian metaphor helps show that the firm is not a black box whose characteristics are immune from market forces. But it wrongly suggests that individual choice is the basis for the legitimacy of all legally enforceable corporate relationships. The metaphor masks the fact that the rules of corporate law are often based on social welfare judgments of judges, lawmakers and regulators rather than on parties' bargains in the marketplace. It misleadingly suggests that the law imposes no value judgments but merely rubber-stamps freely made individual decisions. Thus the model lulls us into thinking we can avoid the hard questions of how the law makes its value judgments. Because the concept of "property" includes rights and duties not based on assent, a property-based metaphor for corporations can help put the "law" back into this branch of "private law."

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"Nothing is the same as anything else."[1]

Introduction

"The essence of metaphor," according to two leading theorists on the subject, "is understanding and experiencing one kind of thing in terms of another."[2] Corporations law scholarship is currently dominated by the "nexus of contracts" or "contractarian" model, a metaphor that attempts to understand corporations in terms of "contracts." This model is derived from economic theory, and like law and economics analysis generally, it has transformed from a controversial insurgent approach to near-orthodoxy in academic corporations law.[3] This is clear from the fact that those who deviate from the model typically feel obliged to explain themselves.[4]

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[1] RICHARD POWERS, GALATEA 2.2, at 70 (1995).

[2] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980).

[3] For a history of the model's rise to prominence, see William W. Bratton, Jr., The New Economic Theory of the Firm: Perspectives from History, 41 Stan. L. Rev. 1471 (1989).

[4] This article, of course, is itself an example. Other examples abound in the 1995 anthology PROGRESSIVE CORPORATE LAW (Lawrence Mitchell, ed.), which presented diverse views that were unified primarily in their opposition to contractarianism. The titles of the following essays from the anthology are instructive: Lynn Dallas, Working Toward a New Paradigm, Douglas Branson, The Death of Contractarianism and the Vindication of Structure and Authority in Corporate Governance and Corporate Law; Marleen A. O'Connor, Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements. See also Klein & Gulati, Connected Contracts, UCLA Law Rev. (2000) (explaining how the "connected contracts" model improves upon the contractarian

This Article uses this influential metaphor to examine three related phenomena: the role of metaphors in legal theory; the rhetorical power of the concept of "contract" in legal discourse. Part I borrows some cognitive science approaches to metaphor. Many cognitive scientists view metaphor as a phenomenon related to analogical reasoning. Under this view, metaphor is a mapping (in the mathematical sense) from one conceptual domain (in this case, contract) to another (in this case, corporations). The most logically rigorous metaphors are built on correspondences between the relational structures among the elements of one domain and parallel structures in the other domain. Part II applies the cognitive science approach to the contractarian metaphor and critiques its lack of analogical structure. The concept of "contract" in the metaphor often vacillates between the economist's definition of "contract," which is based on consent, and the lawyer's definition, which is based on legal enforceability. Part III argues that a metaphor based on "property" expresses features of corporations law that the "contract" metaphor fails to account for. The contract metaphor emphasizes the important role of markets and individual choice, but it obscures the powerful role of law in shaping corporations. A property metaphor acknowledges that corporations law, like "private law" generally, does not simply reflect the desires of consenting parties, but shapes "private" relationships by imposing normatively significant choices about social welfare.

I. A Cognitive Science Approach to Metaphor

a. Metaphor as Mapping

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approach); Blair & Stout, Team Production (arguing that although the "team production" model seems to resemble "other constituencies" models, it is in fact consistent with contractarianism).

Traditional linguistic theories viewed metaphor as a deviant use of language because it does not mean what it says. For example, in Shakespeare's *As You Like It*, Jaques proclaims that "All the world's a stage."[5] This statement is literally false. Nonetheless, it is understood as a meaningful statement and not as a lie or an error. The classic approach to this conundrum attempted to translate metaphors into true "literal" statements. Aristotle argued that every metaphor has a literal equivalent: a comparison statement.[6] According to this approach, Shakespeare did not of course mean that the world "*is*" a wooden platform on which plays are performed. What he really meant was, "The world is *like* a stage in certain respects." The Legal Realists also viewed metaphors as a deviant use of language, but gave up on trying to translate them. Instead, they characterized legal metaphors as hocus-pocus used to obscure the actual reasoning (or lack thereof) behind the law. [7]

Many cognitive scientists today see metaphor not as a deviant use of language, but as an essential feature of language and of cognition itself.[8] A metaphor is far too complex to be

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[5] William Shakespeare, As You Like It, Act II, Sc. VII.

[6] For example, if Romeo says "Juliet is the sun," this is literally false, but his statement has a literal, true equivalent, such as "Juliet is like the sun because she is beautiful."

[7] See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935). Cf. Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev 1053 (1989). Professor Ross characterizes legal metaphors as paradoxical uses of language. However, he views metaphors' paradoxical nature as appropriate in light of the inherent paradoxes of the law.

[8] See Andrew Ortony, Metaphor, Language, and Thought, in METAPHOR AND THOUGHT 1 (Ortony, ed., 2d ed. 1993). Ortony distinguishes between the traditional belief that reality is an objective truth that literal language can precisely describe and the belief that cognition is the mental construction of what we call "reality." Id. at 1-2. Some cognitive scientists, linguists, and others still hold the traditional view, under which metaphor is a deviation from the proper role of language and not an important aspect of cognition. Under the latter view, however, all language is "an essentially creative activity," and thus metaphor is not essentially different from literal language, but simply involves a bit more creativity. Id. at 2. See also George Lakoff, *The Contemporary Theory of Metaphor*, in METAPHOR AND THOUGHT, supra, 202, 205. Lakoff disdains the common definition of metaphors as "nonliteral" comparisons, because he questions the distinction between "literal" and "nonliteral" language. According to Lakoff, much of everyday language and conceptualization normally thought of as "literal" is in fact infused with metaphor.

reduced to a "literal" equivalent. The world is *not* "like" a stage in any literal sense. It is not located in a theater; it is not used for plays; it is not covered by a curtain. In cognitive science and linguistics, metaphor is typically understood as related to analogical reasoning.[9] Both metaphor and analogy have been described as mappings (in the mathematical sense of the term) from one domain of knowledge (the source, or base, domain) to another (the target domain).[10] Based on the mapping, the analogist can abstract a more generalized domain, or schema, that accommodates both the source and the target phenomenon.[11]

For example, an elementary scientific analogy maps characteristics of waves in water to corresponding characteristics of sound. Professors Holyoak and Thagard use this example to explain how analogical thinking works:

> The first person who noticed that sound behaves something like water waves presumably did not already conceive of *wave* as a category so general as to include both water and sound waves. But seeing the analogy may have paved the way for forming such a category. We will refer to the representations of

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[9] See, e.g., Gentner, Falkenheiner & Skorstad, *Viewing Metaphor as Analogy*, in ANALOGICAL REASONING: PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY 171 (David Helman, ed.,1988); Holyoak & Thagard, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT (1995). But see, e.g., Glucksberg & Keysar, *How Metaphors Work*, in METAPHOR AND THOUGHT 401(arguing that metaphor is simply a process of categorization).

[10] See, e.g., Lakoff; Gentner, Falkenheiner & Skorstad, *supra*; Holyoak & Thagard, supra. This modern approach was presaged by Professor Richards' description of a metaphor as positing a relationship between a "tenor" (target) and a "vehicle" (source). The basis for the relationship, which he called the "ground," is akin to the mapping of correspondences. I.A. RICHARDS, THE PHILOSOPHY OF RHETORIC (1936). Another pioneer of metaphor theory, Max Black, further contributed to the modern approach by modeling metaphor as consisting of a principal subject (cf. the "target domain") and a subsidiary subject (cf. the "source domain"). A metaphorical statement works by "projecting upon" the principal subject a set of "associated implications" that can be attributed to the subsidiary subject (the "projection," of course, relates to the later idea of a mapping from source to target). See MAX BLACK, *Metaphor*, in BLACK, MODELS AND METAPHORS (1962).

[11] This use of the term "schema" comes from Holyoak & Thagard. Some theorists have argued that metaphor and analogy are simply forms of categorization. See Glucksberg & Keysar. That approach, however, does not explain where categories come from, or how to determine what to put into which category. The theory described in the text suggests that categorization is a product of analogical thinking.

As the following discussion develops, the irony should become clear; the cognitive science model is itself a kind of metaphor—an attempt to understand metaphor in terms of mappings.

> complex concepts such as *wave*, which convey patterns among constituent elements, as *schemas*…. [12]

For convenience, I will adopt the convention of naming mappings in the form TARGET DOMAIN AS SOURCE DOMAIN.[13] Thus the analogy above can be called SOUND AS WATER WAVE. The example shows that the analogy is not just a comparison of SOUND to WATER WAVES but the use of such a comparison to construct a "complex concept"—the schema ***wave***, a superordinate category that embraces, at a high level of abstraction, both sound waves and water waves.[14]

It is tempting to think of the analogical process as a sequence of discrete, independent steps: the identification of a target problem (how does sound behave?); the identification of a source analog (the behavior of waves in water); the drawing of correspondences between the domains; and finally the construction of a generalized schema (***wave***). But analogical thinking is not nearly so simple. Rather than successive steps, these tasks are overlapping and interdependent. For example, the target and source domains do not exist in a vacuum. Unlike a "source domain" and a "target domain," any two subjects are more complex than two pithy lists of characteristics that can be compared to one another. Thus the analogist must create an

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[12] Holyoak & Thagard at 24. Max Black developed the idea of "interaction" between the target and source domains. See MAX BLACK, *Metaphor*, in BLACK, MODELS AND METAPHORS (1962); Max Black, More About Metaphor, in Metaphor and Thought 19, 27-28. I discuss interaction *infra* at ---.

[13] This convention comes from LAKOFF & JOHNSON, METAPHORS WE LIVE BY (1980).

[14] It should be apparent that some version of this process is a part of language itself. Conceptualizing categories of things and naming those categories follows the analogical reasoning process. For example, a category like "dog" comes from analogizing among a group of creatures and constructing a general schema that explains all the members of the group. See Mary Hesse, *Theories, Family Resemblances and Analogy*, in ANALOGICAL REASONING 317, 319.

abstract, simplified portrait to serve as each domain.[15] The analogist does so with the ultimate purpose of constructing a schema that will shed light on the problem at hand.[16] Thus she will emphasize the aspects of each subject that contribute to this goal and ignore aspects others that she finds irrelevant.[17] For example, in SOUND AS WATER WAVE, the analogist's portrait of water waves emphasizes the fact that they can compress and refract, but ignores the fact that they are cool, blue-green and wet. The latter properties are just as relevant as the former to water-waveness. As they have no apparent analogs in sound, however, they are not helpful in solving the problem of how sound behaves, and thus they are discarded.

Schema formation can change the way we think about both the target *and* the source.[18] Prior to the analogy to sound and the resultant schema formation, waves were a phenomenon associated only with water. But the analogy and schema give "wave" a different meaning. It becomes an abstraction that lacks many of the specific attributes of real water waves, such as

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[15] The target domain, then, is but a metaphor for the "real" target problem, and the source domain is a metaphor for a source phenomenon or thing. When a domain is itself an abstract concept, like "contract" or "corporation," it can be thought of as itself a schema constructed by analogizing among individual instances. For example, drawing correspondences between ARRANGEMENT TO EMPLOY FACTORY WORKER and PROMISE TO BUY ROSE THE COW can be seen as yielding the schema "*contract*," which can later be used as a source domain for targets like CORPORATION or TRUST, which can in turn yield a new, broader, more abstract schema (rather confusingly also called "*contract*").

[16] According to Holyoak and Thagard, "symbiotic interaction" takes place between specific analogies (such as that between water waves and sound) and schemas (such as *wave*). That is, while analogies lead to the construction of a schema, the schema simultaneously influences the drawing of analogies.

[17] Holyoak and Thagard refer to this property of analogical reasoning as the "purpose constraint."

Professor Hunter argues that the purpose constraint explains why a lawyer arguing from precedents cites the cases that support her client's case and ignores those that do not. *See* Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law* (SSRN Working Paper Series, October 3, 2000) (available at http://papers2.ssrn.com/paper.taf?ABSTRACT_ID=239739). I think this defines the purpose constraint more broadly than Holyoak and Thagard intended. Holyoak and Thagard use the concept to mean that the analogist looks only at the correspondences that will help solve the problem at hand, while Hunter means that the analogist will look only at the correspondences that will support her desired solution. But the two alternatives are rather difficult to distinguish, and Hunter's extension of the concept thus illustrates how fine the line is between analogical reasoning and conclusory thinking.

coolness and wetness, and is instead defined by features that might not have been thought essential to "waveness" before, such as periodicity and amplitude.

An analogy can serve as a heuristic to generate hypotheses about the target. For example, a salient property of water waves is that they bend, or diffract, as they pass the edge of an obstacle. The SOUND AS WAVE analogy is structured around the correspondences between spatial relationships among pressure areas in the air and points on the surface of the water. Diffraction of water waves is a phenomenon involving the relationships between points on the surface of the water. Thus, in the early days of studying sound, the structure of the analogy suggested the hypothesis that sound diffracts as it passes the edge of an obstacle. Of course we now know this to be accurate, but note that the analogy and schema only suggested the hypothesis; they did not *prove* it. Proof of an hypothesis depends on empirical verification.

This explanation of analogical reasoning contrasts with the classic Formalist view of common law analogy as syllogism. Under this view, analogical reasoning from case precedent begins by finding a *rule* behind a case or group of cases. The rule is then applied mechanically to the case at hand to yield an inevitable result. This approach suggests that we can understand the case at hand (the target) by discovering and applying a "rule" *immanent* in the source domain (i.e., the precedent). [19] Unlike the Formalist "rule," the cognitive scientist's "schema" is not discovered, but *constructed* through the process of drawing correspondences between the source and the target.

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[18] See Holyoak & Thagard at 222.

[19] See Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, working paper posted October 3, 2000, available at http://www.ssrn.com. Professor Hunter argues that Professor Brewer's recent work on analogical reasoning fits the Formalist mold in that it draws more from classical logic than from

b. "Analogical" and "Figurative" Metaphors

If metaphor is defined broadly to include *all* attempts to understand one thing in terms of another, then analogy is one type of metaphor. But not all metaphors are analogies. Theorists have characterized analogical reasoning as based on a tight, highly structured mapping of correspondences between the source and target domain. Professor Gentner describes "structural consistency" in which members of each domain are arranged in one-to-one correspondence with members of the other domain, and "parallel connectivity in predicates is maintained."[20]

For example, the great seventeenth-century chemist Robert Boyle drew analogies between ants moving their eggs and fire heating a metal knife blade. Each ant is very small in relation to the "heap of eggs," yet each ant can penetrate the heap and move a single egg; as each ant does this, the small ants can move the large heap. Similarly, "igneous particles" (particles which Boyle believed to make up fire) penetrate the metal and "agitate" the "corpuscles" of metal until the entire blade is hot. These two phenomena are examples of Boyle's abstract schema of "local motion": significant changes caused by the combined effects of the motion of many miniscule particles, each of which is inconsequential by itself.[21] The object correspondences are one-to-one: ant-igneous particle; egg-metal corpuscle; egg heap-knife blade. Each object has a correspondent, and no object has more than one. The parallel

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cognitive theory. *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. (1996).

[20] Gentner & Jeziorski, *The Shift from Metaphor to Analogy in Western Science*, in METAPHOR AND THOUGHT 447.

connectivity in predicates is maintained in that *ant moves egg and thereby relocates heap* is parallel to *igneous particle agitates metal corpuscle and thereby heats blade*. If, for example the metal corpuscle were said to agitate the igneous particle, the analogy would be structurally inconsistent and thus deficient.

Gentner and Jeziorski further maintain that analogical reasoning avoids "extraneous associations." That is, "[o]nly commonalities strengthen an analogy."[22] Other kinds of connections between source and targe, such as thematic commonalities, are irrelevant. For example, an atom is often analogized to the solar system, based on their common structure. The nucleus, as the relatively fixed center, corresponds to the sun, and the electrons correspond to the orbiting planets. But other kinds of correspondences between the base and target do not add to the analogy. For example, the fact that the sun produces energy by the fission of atoms, or that both the sun and atoms are necessary elements of life, do not strengthen this structural analogy between SOLAR SYSTEM and ATOM.

Gentner and her coauthors define "metaphor" broadly, and divide metaphors into three classes.[23] The first class consists of mappings based on similarities in the *relational structures* of different domains. Boyle's analogy between the ants and the flame is an example of the first type of metaphor. Boyle's point is not that igneous particles resemble ants, but rather that the *relationship* of igneous particles to a knife blade is like the relationship of ants to a heap of eggs: each is an example of small agents creating large changes. Gentner's second class consists of mappings of attributes rather than relationships, such as mappings based on

[21] Gentner & Jeziorski, *The Shift from Metaphor to Analogy in Western Science*, in METAPHOR AND THOUGHT 447, 459.

appearance. This class is less sophisticated that the first, as the attribute or attributes mapped can be "isolated predicates" and need not take into account the relationships among attributes of a domain. Like metaphors of the first class, however, metaphors in this class are made up of one-to-one correspondences between predicates of each domain. Referring to two extremely tall basketball teammates as the "Twin Towers" is an example of this kind of mapping. The height and strength of each player is mapped to the height and strength of one tower.

These first two classes obey Gentner's rule of structural consistency and her prohibition against extraneous associations. Gentner's third class does not. This class includes the literary device we commonly refer to as "metaphor." Members of this class do not consist of precise one-to-one mappings between source and target.[24] Rather they also incorporate "cross-weaving connections" and lack a structure for placing members of the source domain in correspondence with members of the target domain.[25] Furthermore, a single metaphor may involve multiple sources, and may make use of extraneous associations, such as thematic and metonymic connections.[26]

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[22] Gentner & Jeziorski at 450.

[23] See Gentner & Jeziorski; Gentner, Falkenhainer, & Skorstad.

[24] Mapping is never structurally perfect; thus the difference between analogy and metaphor, and indeed the difference between "figurative" and "literal" language, is one of degree rather than of kind.

"The pragmatic effects of numerous figures of speech are on the way to becoming part of the conventional content of the expressions that are used to convey them. But this process occurs by stages so that in most cases the communicative value of an expression that began life as a metaphor or some other trope is partially conventional and partially not. This fact makes untenable one of the most cherished assumptions of modern formal linguistics, namely the assumption that conventional content and linguistic form are connected by a discrete function."

Jerrold M. Sadock, *Figurative Speech and Linguistics,* in METAPHOR AND THOUGHT 42, 57.

[25] Gentner, Falkenheiner & Skorstad at 173.

[26] Id. Cf. Holyoak & Thagard at 223 (although based on analogy, "metaphor is often extended by an associative aura created by metonymy and other figurative devices").

"Metonymy" is a figure of speech using the word for one thing X to refer to another thing Y, which X is an attribute of or is associated with. For example, city government may be referred to as "city hall." There are numerous types of metonymy, some of which are also referred to by the term "synecdoche": for

From here on, I will refer to Gentner's third class of metaphors as "figurative," and her first class as "analogical."[27] The difference is one of degree rather than of kind. That is, tightly structured mappings are more "analogical," while "attempts to understand one thing in terms of another" that depend on metonymy and other kinds of loose connections are more "figurative." Gentner's second class, which is a one-to-one mapping but lacks the structure of the first class, lies somewhere in between the two poles.

Gentner views figurative metaphor as a device used for "expressive-affective purposes" in literature, but not one used in scientific problem-solving. Gentner and Jeziorski argue that a key aspect of the evolution of "modern" scientific thinking was the shift from loose associations and toward systematic comparisons based on higher-order abstract relationships—that is, the shift from figurative metaphor to analogy. While scientific metaphors have certainly become more analogically rigorous, I doubt that scientific hypothesizing has left figurative metaphor completely behind. In any event, I am sure that legal theory has not.

Ernest Hemingway's famous quote about F. Scott Fitzgerald provides an example of an analogy that is "extended" into a figurative metaphor:

> His talent was as natural as the pattern that was made by the dust on a butterfly's wings. At one time he understood it no more than the butterfly did and he did not know when it was brushed or marred. Later he became conscious of his damaged wings and of their construction and he learned to

example, using a word for the part to mean the whole (for example, "wheels" to mean car) or vice versa, a member of a category to mean the whole category or vice versa ("creature" to mean "person"), or the container to mean the thing contained ("the bottle" to mean alcohol).

[27] I use Gentner's analysis, but modify her terminology. Gentner calls all three classes "metaphor," reserves the term "analogy" for the first type of metaphor, and has no special term for the second or third class. Holyoak and Thagard's terminology has the reverse structure: they call all mappings analogies, and define metaphor as a special case of analogy.

> think and could not fly anymore because the love of flight was gone and he could only remember when it had been effortless.[28]

The first sentence explicitly analogizes Fitzgerald's talent to the pattern on a butterfly's wings, based on a shared characteristic: both are natural. But Hemingway abandons structural consistency. Rather than hewing to the one-to-one correspondence between talent and pattern, he also maps talent to the wings, and to the capacity for flight. According to Holyoak and Thagard, the structural inconsistency results from "a metonymy—because strong associations link the concepts of pattern, wings and flight, these can be interchanged quite freely." Hemingway's metaphor is also structurally inconsistent in that it violates what Gentner calls the parallel connectivity of predicates. Hemingway's ultimate point is that Fitzgerald's awareness of his talent prevented him from using it. But a butterfly's consciousness of its pattern does not affect its ability to fly. We understand his point because we know that self-consciousness makes it difficult to perform skills, but this has nothing to do with the butterfly analogy.

Structure is a key aspect of analogical reasoning. As a descriptive matter, highly structured mappings make for more convincing arguments than mappings that lack structure.[29] Highly "figurative" literary metaphors like Hemingway's may succeed in affecting the reader with their beauty or emotional impact, but they are not "convincing" on the logical level. According to Gentner, "people prefer to map systems of predicates that contain higher-order relations with

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[28] ERNEST HEMINGWAY, A MOVEABLE FEAST, quoted in Holyoak & Thagard at 223. My deconstruction of this metaphor borrows somewhat from Holyoak and Thagard's, but differs in several respects. *Cf.* Holyoak & Thagard at 223-25.

[29] See Holyoak & Thagard at 141-45, 174 (arguing that structured mappings contribute to the coherence of decisionmaking and of the defense of hypotheses).

inferential import, rather than to map isolated predicates."[30] Gentner argues that this preference for "systematicity" is "a structural expression of our tacit preference for coherence and deductive power in interpreting analogy."[31] A structured analogy can be a useful heuristic. It can generate hypotheses in an orderly fashion: a number of structured correspondences suggest a structured schema from which we can extrapolate further correspondences. Figurative metaphors, however, lack a structure to guide the process of schema formation and extrapolation.

II. Contractarianism as Metaphor

a. Contracts, Ks and Rs

Contractarianism is a highly figurative metaphor. CORPORATION AS CONTRACT is not based on a set of clear structural correspondences between corporations and contracts. Although the metaphor lacks analogical structure, it derives power from multiple, "cross-weaving" layers of associated concepts that simultaneously make descriptive and normative arguments about corporations, as well as about "contracts." The lack of structure should make us question the reliability of the metaphor as a heuristic.

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[30] Gentner, Falkenheiner & Skorstad, in ANALOGICAL REASONING at 172. Research on children suggesting that very young children lack the ability to draw structured mappings, but the facility develops as children mature. See Gentner, *Metaphor as Structure Mapping: The Relational Shift,* 59 Child Development 47 (1988); HALFORD, CHILDREN'S UNDERSTANDING: THE DEVELOPMENT OF MENTAL MODELS (1993), cited in Holyoak & Thagard at 98-99. Gentner believes that the facility develops as children gain knowledge, but Halford believes that it is tied to the development of increased memory capacity as children mature.

[31] Gentner, Falkenheiner & Skorstad, in ANALOGICAL REASONING at 172.

Economists developed the "nexus of contracts" model to analyze the "firm." In other words, economists attempted to explain the target FIRM in terms of the source NEXUS OF CONTRACTS. This concept has been imported into legal academia. The legal version of the metaphor attempts to explain CORPORATION in terms of NEXUS OF CONTRACTS. Surprisingly, however, the legal translation of the metaphor plays fast and loose with the legal concept of "contract." To a lawyer, a "contract" is a legally enforceable promise.[32] Sometimes lawyers use the term more narrowly to refer to promises whose enforceability is based on a bargained-for exchange of value.[33] To the economists who developed the nexus concept, however, "contract" means something very different. The essence of the economic concept of "contract" is voluntariness, not enforceability. Although not very clearly defined, a contract is typically a voluntary "relationship[] characterized by reciprocal expectations and behavior."[34] This of course includes relationships that are not legally enforceable.

For the sake of clarity, I will refer to the lawyer's "contract" as "K" (following the convention of the law school classroom) and to the economist's "contract" as "R" for "relationship."[35] The legal version of contractarianism ignores the distinction and uses economic arguments involving R as if they refer to K. It is important to note that R and K are two

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[32] See, e.g., Restatement of Contracts 2d §1.

[33] This definition excludes promises enforceable despite a lack of bargaining, such as those enforced on the basis of the promisee's reasonable detrimental reliance on the promise (the doctrine of promissory estoppel).

[34] See Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 Colum. L. Rev. 1757,1764 n. 30 (1989); Melvin Eisenberg, *The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm*, 24 J. Corp. L. 819, 822-23 (1999).

[35] "Relationship" is meant to reflect the fact that the economist's "contract" is consensual but not necessarily enforceable. Cf. William A. Klein, The Modern Business Organization: Bargaining Under Constraints, 91 Yale L.J. 1521 (1982). In this early legal version of the economic nexus-of-contracts model,

different concepts, and not simply different aspects of the same phenomenon. As a matter of positive law, not every R is a K. Voluntary reciprocal relationships may be legally unenforceable for a variety of reasons, such as conflict with public policy, indefiniteness, or noncompliance with the statute of frauds. Nor, moreover, is every K an R. Under the "objective theory" of contractual assent, I may be bound to a promise I never intended to make, if a reasonable person would have understood me to have so intended.[36]

Confusion arises because some *normative* theories of contract hold that only Rs should be enforceable.[37] Put simply, these theories hold that a person's legal obligations should be limited to those she voluntarily undertakes. These theories come in at least two main varieties. The first theory is categorical and "libertarian." According to this theory, individual self-determination is an end in itself, and respect for that end justifies limiting K to include only Rs. The second view is consequentialist and "utilitarian." According this view, we should enforce only Rs because Rs maximize social welfare. This is of course the invisible hand thesis central to neoclassical economics: that if each individual is left to transact freely in the market, he will rationally maximize his own wealth, leading to the most efficient allocation of resources in individual transactions and in the economy as a whole.

Professor Klein conspicuously avoids the confusing term "contract" and refers to a business enterprise as a "series of bargains." Id. at 1521.

[36] Judge Hand stated (or perhaps overstated) this principle as follows: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (SDNY 1911). See also Lucy v. Zehmer, 196 Va. 493 (1954) ("If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.").

[37] Professor Barnett is one of the leading contemporary proponents of this view. *See, e.g.*, Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent,* 78 Va. L. Rev. 821 (1992);…*And Contractual Consent*, 3 S. Cal. Interdisc. L. Rev. 421 (1993). As we shall see, the normative position that only Rs *should* be Ks is sometimes mistaken for a descriptively accurate theory—that only Rs *are* Ks. This

The implication of the contractarian metaphor is that there is an abstract schema to which both firms and contracts (i.e., voluntary reciprocal relationships) belong. As in the example of SOUND AS (WATER) WAVE, this schema has the same name as the source domain, in this case "**contract**," but actually represents a superordinate schema that is broader and more abstract than the concept used as source domain.

b. Structural inconsistency in the metaphor

As large public corporations first came to dominate the U.S. and world economy, many theorists focused on the special characteristics of the corporate form. In 1932, for example, Berle and Means first drew attention to the "separation of ownership and control"—the divergence of interests between shareholders and professional management.[38] Professor Coase asked why production is sometimes organized in firms rather than through market transactions.[39] The answer, according to his famous 1937 article, was that market transactions entail costs, which can be reduced or avoided through organization as a firm.

Neoclassical economists developed the nexus of contracts model to refute this distinction between the firm and the market. They maintained that interactions within a firm are themselves market transactions. As Alchian and Demsetz put it:

> It is common to see the firm characterized by the power to settle issues by fiat by authority, or by disciplinary action superior to that available in the common market. This is delusion….What then is the content of the presumed power to

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leads to the conclusion that all Ks are Rs, that is, if the law enforces a person's obligation under the rubric of "contract," she must have incurred it voluntarily.

[38] See Adolf Berle and Gardiner Means, The Modern Corporation and Private Property (1932).

[39] *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937)

> manage and assign workers to various tasks? Exactly the same as one little consumer's power to manage and assign his grocer to various tasks.[40]

Alchian and Demsetz posit a relational correspondence between relationships in a firm and market transactions that may be represented as *manager:worker :: consumer:grocer*. Both these relationships fit into the general schema of R in which freely acting party A enters into a reciprocal relationship with freely acting party B. But while this correspondence is a tight mapping, the claim is that *all* corporate relationships correspond to *consumer:grocer*. Early contractarian models like Alchian and Demsetz's attempted only to explain the vertical integration of production narrowly defined. Thus their models focused on employers and workers. But legal scholars of corporations at least since Berle and Means have focused on the shareholder-manager relationship. How does the *consumer:grocer* model help to explain the shareholder's place in the firm? What is *x* such that *x:shareholder* (or *shareholder:x*) corresponds to *manager:worker* and *consumer:grocer*? It is often suggested that manager: shareholder corresponds to consumer:grocer. There is a similarity, in the sense that managers cannot force shareholders to invest in the firm any more than the consumer can force the grocer to carry a certain brand of canned soup. But the lack of force does not by itself make an R. The characterization of the manager-worker relationship or the customer-grocer relationship as an R is supported by other attributes of the relationship, such as actual bargaining between the parties or their representatives and mutual, voluntary exchange of value.

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[40] Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am. Econ. Rev. 777 (1972).

The shareholder-manager relationship is not a product of the same kind of process. These parties can be said to be on each end of corporate governance terms, but they do not stand in the same relation to each other as A and B do in an R. They do not bargain with one another, they do not reach agreement with one another, and they do not exchange. Shareholders come into association with the firm by dealing with intermediaries, such as brokers, who do not represent the management. Thus "parallel connectivity in predicates" breaks down. Does the shareholder contract with the firm? This mapping is structurally unsound, for if the firm is analogous to a set of Rs, the firm cannot correspond to a *party* to the Rs.[41] With respect to corporate governance terms, the shareholder corresponds to a contracting party in the sense that, assuming a highly efficient market, the price a shareholder pays for shares approximates the price the shareholder would have paid if corporate governance terms were bargained for. But there is no structured pattern of correspondences between contracting parties and shareholders.

The metaphor of corporate governance terms as contracts between management and shareholders evokes the notion that the terms of corporate governance are *literally* created by agreements between management and shareholders. While this kind of bargaining is possible in very small corporations, nothing of the sort happens in a large publicly traded corporation. Under the corporate law regime, a corporation's governance terms are set before any shareholders come into the picture. The basic choices about corporate governance terms, such as the choice of default regime (i.e., the decision to incorporate, and the state of incorporation),

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[41] Cf. Eisenberg, *The Dual Nature of the Firm*, 24 J. Corp. L. at 830. Professor Eisenberg refers to

whether corporation's charter will vary from the defaults, and if so, how, are made are made prior to the initial public offering.[42] The choices are made by the firm's managers and their lawyers, investment bankers, and other advisers, as well as other interested parties such as underwriters and venture capitalists.

Do shareholders assent to these terms when they purchase shares? In the same passage about contracts of adhesion quoted above, Easterbrook and Fischel present the classic law-and-economics reply: "The terms in rental contracts, warranties, and the like are real contracts because their value (or detriment) is reflected in price."[43] But price does not establish voluntariness any more than enforceability does. Even if markets efficiently priced all terms, this would only mean that the buyer got fair value for her money. This may be a good argument for the fairness of enforcing the term against her, but it does not mean she actually *consented* to the term.[44] Even if markets are perfectly efficient and all information is reflected in price, the investor knows only the price of the package and the fact that the market has priced it. She does not know the contents of the package. Thus the investor has not literally consented to the contents of the package.

In any event, it is of course unlikely that markets are so efficient that all explicit, implicit, and background law terms are priced.[45] Easterbrook and Fischel reply that "[t]he long run will

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this structural inconsistency with the less charitable term "intellectual incoherence."

[42] See John C. Coates IV, Explaining Variation in Takeover Defenses: Failure in the Corporate Law Market (SSRN working paper 2000) (http://papers.ssrn.com/paper.taf?abstract_id=237020).

[43] Easterbrook & Fischel, The Economic Structure of Corporate Law 16.

[44] This kind of "fairness" justification is of course alien to libertarian contract theory, which focuses on the voluntariness of exchange and not on the adequacy of consideration. In a truly libertarian view of contract, it would matter only whether a party consented, and whether she got a fair price would be irrelevant.

[45] Indeed, one study suggests that even significant changes in corporate law may not be reflected in stock price. See Weiss & White, *Of Econometrics and Indeterminacy: A Study of Investors' Reactions to*

arrive *eventually*, and terms that are not beneficial for investors will stand revealed; the firm will lose out in competition for investors' money. We therefore treat even hard-to-value terms as contractual."[46] This approach adds another level of abstraction. Under this analysis the term is efficiently priced not with respect to any particular investor, but in a very abstract sense: it is efficient with respect to all investors as an undifferentiated class that stretches across time. Such a "contract" can only be metaphorical, not actual.

Easterbrook and Fischel, among others, have argued that underwriters bargain for corporate governance terms on behalf of shareholders. But this argument merely adds another layer of metaphor. Of course underwriters literally bargain when they purchase shares. But they cannot bargain on behalf of public shareholders: when underwriters bargain with issuers, public shareholders do not exist yet.[47] We might say that underwriters have economic incentives that align their interests with those of shareholders. But even if this is true, it makes underwriters "representatives" only in a metaphorical sense. The underwriters cannot be representative the way that an individual employee represents herself in contract negotiations with her boss, or the way union leaders represent the interests of workers, or the way a lawyer represents his client. Underwriters cannot have real accountability to nonexistent shareholders.

The argument is that the *result* that underwriters achieve (that is, the stock price and governance terms) resembles that which would have obtained *if* they had been bargaining for shareholders who appointed them and held them accountable. In other words, because

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"Changes" in Corporate Law, 75 Cal. L. Rev. 551 (1987) (finding that certain major changes in Delaware corporate law had no significant effect on stock prices in the twenty days following the announcement of the changes).

[46] Easterbrook & Fischel at 21.

[47] Note that the managers of the public corporation have not been elected yet either.

underwriters theoretically represent the interests of theoretical future shareholders, they theoretically act the way actual shareholder representatives would act if shareholders existed and were able to appoint such representatives. But in the absence of real input from actual shareholders about their preferences, the "interests of shareholders" can only be an imaginary construct. This is not to say that the terms of corporate governance should not be legally enforceable Ks. But it does show that their enforceability cannot be based on the actual mutual assent that is the essence of R.

c. Metonymic associations in the metaphor

As noted above, "corporation" and "firm" are distinct but related concepts, and the term "contract" is used to refer to the distinct but overlapping concepts of R and K. Because CORPORATION AS CONTRACT does not clearly depict either its source domain or its target domain, the metaphor cannot produce a tight analogical structure. The mapping, such as it is, is extremely loose. Furthermore, the correspondence between corporation and contract depends on metonymic and thematic associations as much as structured analogical mapping.

Contractarians acknowledge that the nexus of contracts model uses the term "contract" to mean R rather than K. In elaborating upon the model, however, they often slip back and forth between the two meanings of "contract," exploiting the ambiguity of the term and the metonymic and thematic associations between R and K created by the shared name "contract." Judge Easterbrook and Professor Fischel, for example, adopt the R definition: "[c]ontract

means voluntary and unanimous agreement among affected parties."[48] "Social contracts" are only metaphorically Rs, as they do not involve actual consent. A corporation, in contrast, involves many "real contracts" according to Easterbrook and Fischel:

> Sometimes terms are not negotiated directly but are simply promulgated, in the way auto rental companies promulgate the terms of their rental contracts. The entrepreneurs or managers may adopt a set of rules and say 'take them or leave them.' This is contracting nonetheless. We *enforce* the terms in auto rental contracts, as we enforce the terms of a trust although the beneficiaries had no say in their framing.[49]

This passage scores rhetorical points by using the ambiguous term "contract" to conflate K and R. Contracts are Rs, they say. Contracts of adhesion are Ks. Corporations, as contracts of adhesion, are Ks. Therefore they are Rs (which, implicitly provides further normative justification for treating them as Ks). But the mere fact that the terms of corporate governance or of car rental forms are *enforceable* Ks does not by itself strengthen the analogy to Rs.

Here the R metaphor violates Gentner's rule against "extraneous associations." An analogy between firm and R would be built solely on structured correspondences between the two domains. But CORPORATION AS CONTRACT is strengthened by "cross-weaving" thematic and metonymic associations. Corporations law is associated with the firm, and K law is associated with R through the shared name "contract" and the libertarian normative view that Rs should be enforced and that "R-ness" is the only proper basis for enforceability.[50] In circular

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[48] EASTERBROOK & FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (1991).

[49] Id. at 16-17.

[50] Unlike most current contractarians, Professor Klein insists that his "series-of-bargains" model is only a positive description of how firms operate, and *not* a normative prescription for corporate law. Rather

fashion, the enforceability of form contracts is used to suggest that corporate governance terms are Rs, and the R-ness of corporate governance terms is used to suggest that corporate governance terms are enforceable. This does not follow from analogy, but grows out of the metaphor.

The enforceability of Ks (including both form and non-form contracts) does not always derive from actual consent. Indeed, under the "objective theory" of contractual assent, the law routinely enforces Ks even in the absence of a party's intent to be bound. In Judge Hand's famous formulation, "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which *ordinarily* accompany and represent a known intent."[51] The modern law-and-economics version of the objective theory is the notion of "hypothetical consent." In cases where a contract does not address a given set of circumstances, a judge "constructs a 'hypothetical bargain': he determines how the parties would have bargained to treat the situation that has arisen had it been directly presented to them at the time they were forming the contract."[52] As in the objective theory, a hypothetical "bargain" does not involve consent as normally understood: the content of the obligation is not based on the parties' actual bargain (which is nonexistent or unknowable), but on the judge's

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than tacitly presume a libertarian set of values, he recognizes the definition of values as a separate inquiry. See Klein, 91 Yale L. J. at 1526.

[51] Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (SDNY 1911). For a classic critique of the enforceability of form contracts in the absence of assent, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983).

[52] David Charny, *Hypothetical Bargains: The Normative Structure of Contract Law*, 81 MICH. L. REV. 1815, 1815-16 (1991).

determination of what the parties would have bargained for.[53] This is of course colored by his own views of reasonable behavior and a socially desirable outcome, or at least by what he believes the to be the law's position on these matters.[54]

The terms of the corporate "contract" between, for example, management and shareholders, are not literally bargained for or consented to but are *hypothetical* bargains: they are terms that the parties (supposedly) *would have* bargained to in the absence of transaction costs.[55] The terms are enforceable but not actually bargained for: that is, the corporate "contract" is a K, but not an R. That they are putatively socially optimal is irrelevant to whether they are Rs. Orthodox economics assumes that people are rational wealth maximizers. If this assumption is true, then there is no need to distinguish between the actual and the hypothetical bargain, since they will always be the same. But the very meaning of the assumption is unclear, because wealth maximization can have different meanings for different shareholders, based on such factors as investment horizon, risk preference and portfolio mix.[56] Even if assumptions

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[53] Cf. John C. Coffee, *The Mandatory/Enabling Balance in Corporations Law: An Essay on the Judicial Role*, 89 Colum. L. Rev. 1618, 1619 (1989) ("what is most mandatory in corporate law is not the specific substantive content of any rule, but rather the institution of judicial oversight").

[54] See Charny, supra, at 1878-79. See also Coffee, 89 Colum L . Rev at 1623:

> Under [the hypothetical bargaining] approach, the parties will be deemed ex post to have consented ex ante to the term that would have been most rational for them to specify; in short, rationality implies consent.

[55] Cf. Richard A. Booth, Stockholders, Stakeholders, and Bagholders, 53 Bus. Lawy. 436, 477 (1998) ("In the case of fiduciary duty, the courts engage, in effect, in a search for the terms of the contract which the parties would have agreed to if they had addressed the issue in question. Clearly, the court in a fiduciary duty case is not called on to find the actual agreement between the parties. There is no such agreement except an agreement to abide by what the court says it is.")

[56] See, e.g., *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273 (1991).~~By contrast, the members of a political organization "can be said to have delegated to the organization their expressive interests in a certain area." Dan-Cohen, 79 Cal. L. Rev. at 1249; cf. Austin, 494 U.S. at 663. For example, the Supreme Court held that the National Association for the Advancement of Colored People (NAACP) is "every practical sense identical" with its members. "The Association, which provides in its constitution that '(a)ny person who is in accordance with~~

about shareholder preferences could be uniformly and clearly set out, real individuals are too complex and diverse to allow accurate generalizations about their preferences.[57] Of course we know from our personal experience that actual people are less than rational. Experimental psychology supports this observation, and "behavioral" law and economics is trying to incorporate this insight.[58] Furthermore, the efficiency principle that animates the corporate contract is indifferent to the distribution of gains, and this hardly a reasonable assumption about most individuals.[59]

The terms that hypothetical rational wealth maximizers would have assented to in the hypothetical absence of transaction costs may be terms that real, complex individuals facing transaction costs would have assented to—and they may not be. Hypothetical terms may maximize aggregate welfare. They may be more efficient than the terms that real persons will

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~~(its) principles and policies * * *' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views." NAACP v Alabama, 357 US 449, 459. Similarly, in *NCPAC*, the Court overturned restrictions on independent expenditures by a political action committee in on the ground that it was "designed expressly to participate in political debate" and therefore its speech is the individual speech of its members. FEC v NCPAC, 470 US 480 (1985). Most shareholders of a business corporation cannot realistically be said to have delegated their political voice to management. Members of a political nonprofit organization can easily express their agreement or disagreement with the political positions of the organization's leadership by contributing or withholding their contributions. The organization's very existence, then, depends on receiving membership approval of the political positions taken by its leadership. In a business corporation, however, there is neither similar market pressure nor a legal mandate of disclosure (see supra, discussions of divestment and disclosure). Thus shareholders are deprived of the opportunity to express either approval or disapproval of management's political positions.~~

[57] See, e.g., Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Managers Trustees Revisited*, 69 S.Cal. L. Rev. 1021 (1996).

[58] See, e.g., Symposium, The Legal Implications of Psychology; Human Behavior, Behavioral Economics, and the Law, 51 Vand. L. Rev. 1495ff. (1998).

[59] See Coffee, The Mandatory/Enabling Balance in Corporate Law, 89 Colum. L. Rev, at 1624; Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Legal Stud. 227, 240 (1980). As Professor Coffee explains,

> Proponents of hypothetical bargaining assume that rational parties would agree ex ante on whatever provision maximized value, even if the resulting gains were to be unequally distributed. Indeed, carried to its logical extreme, this perspective would justify a term that actually reduced value for one side if it increased value for the other side by a more than offsetting amount.

Coffee, 89 Colum L. Rev. 1624.

tend to prefer, encumbered as they are by bounded rationality, transaction costs, and a host of other ills. But hypothetical bargains are by their very nature not the terms that any real person has actually bargained for, and thus, whatever their merits, they are not Rs.

In other words, generalizations about "shareholder welfare" add yet another layer of metaphor. The generalizations reward the shareholders who happen to conform to them, and punish those who do not.[60] That is, a court interpreting the corporate "contract" does not ask what the parties *would have* consented to; it tells them what they *should* have consented to.[61] Hypothetical bargain methodology is thus inconsistent with both the libertarian[62] and utilitarian views. In decreeing what the parties "would have done," the lawmaker's job is not to simulate the subjective wishes of the parties, but rather to ignore the parties' idiosyncrasies and predict the socially desirable (that is, efficient) outcome. In contrast to libertarian philosophy, hypothetical bargain methodology posits that legal duties may be based on social welfare rather than on individual will. In contrast to neoclassical laissez faire economics, it suggests that

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[60] Cf. Booth, Stockholders, Stakeholders, and Bagholders. Professor Booth argues that limits on shareholders' ability to sue are proper in that they reflect the hypothetical preferences of diversified shareholders. Booth argues that the same limits should apply even when shareholders are known to be undiversified, because such shareholders are irrational and "contributorily negligent."

[61] Cf. John C. Coffee, The Mandatory/Enabling Balance in Corporate Law, 89 Colum. L. Rev. 1618 (1989) ("courts will not seek simply to enforce the contract as written, but will to some uncertain extent serve as arbiter to determine how the powers granted to management by the corporate charter may be exercised under unforeseen circumstances.")

[62] Professor Dagan divides hypothetical contracts into two types. Dagan, In Defense of the Good Samaritan, 97 Mich. L. Rev. 1152 (1999). First, there are "weak" hypothetical contracts, which comport with principles of individual autonomy because they are based on "reasonable" and uncontroverted assumptions about the hypothetical promisor. Second, there are "strong" hypothetical contracts, which violate autonomy in that they are enforced despite the fact that they are known to be counterfactual. For example, an obligation to repay a "Good Samaritan" for saving your property from a flood is a weak hypothetical contract. Id. at 1163. As noted in the text, however, the corporate contract, however, is a counterfactual, strong hypothetical contract because of its indifference to distribution. In any event, even the weak hypothetical contract, even if it respects autonomy as Dagan argues, is not based on the notion of *consent*.

lawmakers can predict efficient outcomes without the use of market mechanisms. I do not mean to argue that reasonable form contracts and gap-filling terms should not be enforced, but rather that the normative case for their enforceability must be based on social welfare determinations of policy makers. It cannot realistically be said to derive from the consent of the parties.

d. Essentialized Portrayal of the Domains CONTRACT *and* CORPORATION

Contractarianism, like any other metaphor, uses an essentialized portrait as its source domain. A detailed, "thick" portrayal of any complex concept, especially a legal concept, will suffer from internal contradictions. But a domain full of internal contradictions is not a viable one for the purpose of drawing correspondences. Interaction of a messy, real source phenomenon with an idealized schema produces a distilled, essentialized concept.[63] It is this essentialized construct, not any real phenomenon, that serves as the source. Even when the source is a physical thing, a metaphorist must abstract it to a concept.[64] This is all the more true when the source is more of a concept than a "thing" to begin with. In metaphor, deciding which source characteristics to ignore is no less important than deciding which characteristics to highlight and draw correspondences to. In reality, nothing is the same as anything else. Mapping can be done only between abstractions, not between messy realities. Because analogy and metaphor use abstracted portraits to stand in for more complex real phenomena, they always make use of a kind of metonymy. For both the source and the target, the name of a thing or concept is used

[63] See the discussion of schema formation, supra (in Part I.a.)

to refer to something less than the whole, and that essentialized part is taken to stand for the whole.

Furthermore, a given concept used as a domain has any number of potential portraits that differ based on the characteristics the metaphorist wishes to emphasize. The meaning of a metaphor depends on the meaning of the source and target domains as conventionally understood by the metaphorist and her audience. Suppose you say "Richard is a gorilla" to express your view that Richard is fierce and violent. I, however, believe Richard to be a kind soul. Will it get me anywhere to point out the established fact that gorillas are for the most part shy and gentle animals? No. The term "gorilla," whatever its real meaning, is commonly taken to connote ferocity. Your statement is not intended as an accurate statement about gorillas, it is a statement about Richard.[65]

Similarly, CORPORATION AS CONTRACT is a statement about corporations, by reference to an idealized, laissez-faire vision of Contract. In this vision, economic relationships are the product of individual free will and rational deliberation, and the law respects them for this reason. "Real" contract law, however, cannot be neatly summed up. Rather, like all areas of law, it is full of uncertainties and internal contradictions. Observers cannot even agree on what

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[64] See, for example, the discussion of waves, supra.

[65] See John R. Searle, *Metaphor*, in METAPHOR AND THOUGHT at 92. I borrow this example from Searle with some queasiness. Imagine what the metaphor might be taken to mean if Richard is African-American. Cf. Jennifer M. Russell, *On Being a Gorilla in Your Midst, Or, the Life of One Blackwoman in the Legal Academy*, 28 Harv. C.R.-C.L. L. Rev. 259, 260 (1993). This disturbing possibility should serve to underscore how the meanings of source domains are fluid and dependent on context. Using a painful personal story, Professor Russell drives home the point in the text: that the meaning of a metaphor lies in the socially understood meaning of the source, and is independent of its "true" meaning. Professor Russell, an African-American, was the target of a racist who compared her to a gorilla. Although Russell was aware that the gorilla is a "gentle…creature," this did not blunt the metaphor's force as "a time-worn message communicated to persons who are not white": that their racial identity renders them less than human.

real contract law is. It sometimes respects individual choice, but it also has aspects that favor wealth and privilege, as well as a contradictory regulatory streak that sometimes attempts to correct unequal bargaining power or redistribute wealth. Such an unruly and internally contradictory "domain" does not lend itself to being mapped.

As noted above, however, the process of mapping requires simplified conceptions of the source and target domains. As the gorilla example should make clear, it does not matter whether the metaphorist is working from an empirically accurate depiction of the source domain, as long as her audience can understand what she means by the source domain.[66] Professors Braucher and Coffee[67] dispute the accuracy of the contractarians' depiction of the source domain, but they understand perfectly well what contractarians mean by their CONTRACT and what the metaphor CORPORATION AS CONTRACT means. This idealized CONTRACT is based on a well-known and widely held normative idea of what the law's relationship to the market should be. Even opponents of this view readily grasp the implications of the metaphor; even primatologists understand that "Richard is a gorilla" connotes ferocity.

It is easy to think of a metaphor as the use of a familiar domain to explain an unfamiliar one. Thus we might believe that CORPORATION AS CONTRACT takes the settled principles of contract and uses them to make sense of the less settled area of corporations. Of course nothing of the sort occurs. Both "corporation" and "contract" are equally fluid conceptions.

Professor Russell's story also dramatizes the point that the essentialization of the *target* domain (here, Russell herself) is another crucial aspect of metaphor building.

[66] For example, I might try calling Richard a "gorilla," in order to compliment him on his gentle nature. Even if he is aware of the gentleness of gorillas (as Professor Russell was, see note – *supra*), he will probably feel insulted, and all my friends will also understand me to have insulted him. I can try to explain that I used the source domain GORILLA to mean "gentle creature," but my metaphor is nonetheless ineffective because of the understood meaning of the term.

Even though a metaphor is normally intended to make statements about its target, it also alters our perception of its source domain. Professor Black referred to this effect as "interaction" between target and source.[68] RICHARD AS GORILLA is meant primarily as a statement about Richard, but in making that statement it remakes our notion of "gorilla." If we knew nothing of gorillas, we might learn from the context in which the metaphor is used that RICHARD AS GORILLA means Richard is fierce, and thus we also learn that GORILLAS are fierce. Even if we know better about actual gorillas, we learn that the conventional meaning of GORILLA is ferocity. This circles back to reinforce the notion that Richard is fierce, which reinforces the notion that gorillas are fierce, and so on. Professor Ross gives an excellent legal example of this phenomenon in his discussion of the metaphor of property as a "bundle of sticks." To most people, "bundle of sticks" means a very specific kind of physical thing—pieces of wood tied together. To lawyers with prolonged exposure to the metaphor, however, "bundle of sticks" is inseparable from the idea of related but divisible rights. As Ross points out, the constant use of the metaphor in legal discourse changes our understanding of both the target and the source:

> Imagining as best we can the pre-metaphor notions, the distinctions between the ideas of a 'bundle of sticks' and 'property' seem to overpower any coincidental attributes….The mystery is how two ideas which do not seem to coincide pre-metaphor somehow do coincide post-metaphor. *Part of the answer is that the 'bundle' and 'property' of our post-metaphor cognitive world are somehow different from their pre-metaphor counterparts.*[69]

In CORPORATION AS CONTRACT, the same kind of interaction effect takes place. Regardless of what we know of contract law, we learn from the use of the metaphor in laissez-

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[67] See supra, n. ----

[68] See MAX BLACK, *Metaphor,* in BLACK, MODELS AND METAPHORS (1962); Max Black, More About Metaphor, in Metaphor and Thought 19, 27-28.

[69] Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. at 1058-59 (emphasis added).

faire contexts that CONTRACT connotes the idea that voluntary relations are enforceable, and enforceable relations are voluntary. This supports the idea that corporate governance terms are both enforceable and voluntary, which supports the idea that contracts are voluntary and enforceable, and so on. [70]

Thus far, I have focused on the slipperiness of the CONTRACT concept in CORPORATION AS CONTRACT. Recall, however, that the genesis of the metaphor was in the economic description of *firms* as Rs. This reveals more slipperiness in the target domain CORPORATION. The economic concept of "firm," a method of organizing production by vertical integration, is not the same as the legal concept of "corporation," a legal form for organizing firms. While the distinction may seem excessively fine to the layperson, its importance should be obvious to the lawyer. Unlike "corporation," "firm" is an economic concept and *not* a legal one. A firm may have an unincorporated legal form, such as sole proprietorship, partnership, or limited liability company. Such a firm differs from an incorporated firm in many significant respects, such as governance structure, capital structure, tax liability, and investors' liability for the firm's debts. The proposition that the vertical integration of production that we call a firm is

[70] As the contractarian model cemented its hold on corporate law scholarship a decade ago, Professor Braucher saw how contractarianism was remaking the source domain of contract and attempted to reclaim the term. Real contract law, she argued, plays an important regulatory role in deciding which promises to enforce. So if corporations are "contractual," corporate law is, and should be, regulatory law. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 Wash. & Lee L. Rev. 697 (1990). Cf. John C. Coffee, *The Mandatory/Enabling Balance in Corporate Law*, 89 Colum. L. Rev. 1618 (1989) (arguing that in corporate governance, as in long-term contracts, "judicial involvement is not an aberration but an integral part of such contracting"). In this argument, we see the same metonymic process seen in Easterbrook and Fischel's argument about form contracts. Both the form contract argument and the regulatory argument are based on an analogy between the contract and K. But if contractarianism is tightly analogous to R, K law should be irrelevant to the model, whether as support or as critique.

accomplished through a series of Rs is not equivalent to the proposition that the rules of corporation law are accomplished through a series of Rs.

Contractarians are by no means the only commentators who confuse "corporation" and "firm." "Corporation" is, of course, used in common parlance to refer to large business firms, the vast majority of which are incorporated. This use of "corporation" to mean "firm" is a metonym—the use of one term to mean another with which it is closely related, but not synonymous. The economic model of the firm as R was based on a hypothetical small intimate firm, not a giant, complex incorporated firm. The ubiquity of this metonym obscures what should be a clear distinction between "corporation" and "firm." This makes FIRM AS NEXUS OF CONTRACTS seem synonymous with CORPORATION AS NEXUS OF CONTRACTS when in fact they are different concepts. While corporations, by definition, cannot exist without law, firms can. The metonymic connection between "firm" and "corporation" thus disguises the fact that the distribution of legal entitlements, and not a hypothetical market independent of law, determines the characteristics of the corporate form.

e. From heuristic to proof...and back again?

Metaphor and analogy can be useful as heuristics—that is, as tools to generate hypotheses. They cannot prove anything. A set of demonstrated correspondences may be used to hypothesize further correspondences, but it does not prove any further correspondences. Nonetheless, metaphor and analogy are used as if demonstrated correspondences *prove* further correspondences. This is particularly powerful in law for at least two reasons. First, metaphor and analogy alone can only get you so far in science; the

scientific method requires empirical proof of hypotheses. Legal reasoning traditionally does not. In any event, many legal hypotheses, both descriptive and normative, are impossible to prove empirically. They are supported by the tools of argument, including rhetorical devices that do not follow the rules of the scientific method or formal logic. Second, the formalist strain of legal reasoning holds that the common law method of arguing by analogy to precedent is a rule-based syllogistic process.[71] This suggests that an analogy is a kind of formal proof. If I create a tight analogy between the case at hand and a favorable precedent, this shows that I have located the one "correct" case analogy, which contains the one "correct" rule, which yields the one "correct" answer. For example, it might be argued that downloading copyrighted music using the Napster online service is analogous to shoplifting CDs from a store. On the other hand, it might be argued that using Napster is analogous to sharing your CD collection with a friend. The formalist view of analogical legal reasoning suggests that one of these analogies is the correct one, and establishing which analogy is correct will dictate the correct disposition of the case. But in fact both analogies are "correct," and both are "incorrect." The first highlights aspects of Napster that generate the hypothesis that Napster is illegal; the second highlights aspects that generate the hypothesis of illegality. But neither *proves* whether Napster is legal or illegal.

Metaphor theorists warn against mistaking metaphors for "propositional statements." That is, the mapping TARGET AS SOURCE is not logically equivalent to the statement "TARGET *is*

[71] See supra p. ----.

SOURCE."[72] But metaphors are often misinterpreted in just that way. Many contractarians use the metaphor as evidence that corporate relationships *are* Rs, rather than as a heuristic that generates the hypothesis that corporate relationships should be treated like Rs.[73] The contractarian metaphor builds on correspondences and other connections to suggest that there is a superordinate schema that sums up the correspondences between CORPORATION and R. This schema is not the same as either CORPORATION or R, but contains the correspondences between them. The proposition, "a corporation is composed of contracts," is accurate only in the sense that target-source interaction has redefined "contract" to mean something other than our typical understanding of R or K. Or put another way, they are accurate to the extent that CORPORATION (and CONTRACT) can be said to fit into a superordinate schema (which, for want of a better name we might call **contract**) the way that sound waves and water waves fit into the schema **wave**. SOUND AS WAVE does not mean that sound waves *are* water waves, but rather that SOUND fits into an abstract schema **wave** (distinct from water waves). Similarly, CORPORATION AS CONTRACT does not mean that corporations are contracts, but that both corporations and contracts fit into a new schema, "**contract."** A schema can be a useful heuristic: we build part of the schema based on correspondences we construct, and then make hypotheses—that is, educated guesses—about the rest of the schema. As discussed above, however, CORPORATION AS CONTRACT vacillates between the K and R meanings of "contract," and thus the contours of the resulting schema are unclear.

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[72] See, e.g., Lakoff, *Contemporary Theory,* at 207.

[73] See, e.g., Easterbrook & Fischel (form contract metaphor, discussed *supra*); Butler and Ribstein: The Contract Clause and the Corporation, 55 Brook. L. Rev. 767 (1989).

Scientists, like lawyers, rely on the "unscientific" heuristics of metaphor and analogy in order to generate hypotheses. But the work does not end with the generation of the hypothesis. Ideally, scientists test their hypotheses by the "scientific method."[74] Similarly, legal hypotheses should be tested by empirical means or normative argument. Moreover, even if hypotheses later find support, the use of any given metaphor as heuristic inevitably injects bias into the inquiry. It generates only those hypotheses that fit with the prevailing metaphor, and thus we fail to even consider alternative hypotheses that may be equally consistent with the data.[75] Thus it is important to have multiple paradigms that generate competing, unconventional hypotheses. Indeed, this was the original role of the contractarian metaphor. It generated arguments that are inconsistent with the standard fiduciary model of the corporation.[76] But the contractarian metaphor has become the new orthodoxy—a monopolist in the marketplace of hypotheses. Furthermore, it is often mistaken for a proof of laissez-faire theories rather than a generator of educated guesses consistent with laissez-faire policy. A competitive marketplace of heuristics

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[74] See, e.g., Mary Hesse, *Family Resemblances*; Hesse, The Explanatory Function of Metaphor in Hesse, Revolutions and Reconstructions in the Philosophy of Science (1980); Darden & Rada, *Hypothesis Formation Using Part-Whole Interrelations*, in ANALOGICAL REASONING.

[75] "Prevailing paradigms are metaphorical or analogical abstractions that guide scientific inquiry. Because paradigms or theories are products of the human mind, they are constrained by attitudes, beliefs, and historical conditions. Current theories are taken to be "true," the way the world is believed to be, according to the scientific thinking of the day. These beliefs focus attention in certain directions and determine what scientists choose to observe. Observations are interpreted to fit the prevailing model. Those that obviously do not fit are ignored until another theory is developed that can incorporate them."

American Association for the Advancement of Science (AAAS), The Liberal Art of Science: Agenda for Action, The Report of the Project on Liberal Education and the Sciences 121 (1990).

Racial profiling in law enforcement is an egregious example of a hypothesis that skews results. "Put simply, there is a connection between where police look for contraband and where they find it." David Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 301 (1999).

[76] Examples include the modern view that shareholders can authorize managers' conflicts of interest, see, e.g., Del. Gen. Corp. L. § 144, and that the corporate charter can shield directors ex ante from monetary liability for breaches of the duty of care, see, e.g., Del. Gen. Corp. L. § 102(b)(7).

requires the production of hypotheses that contractarianism would not produce. This should help return contractarianism to its heuristic roots and revitalize theoretical discourse about corporations generally.

III. PROPERTY LAW as an Alternative Source Domain

a. Property as Anti-Contract

The economic conception of contract (R) helps show that the firm is not a black box whose characteristics are immune from market forces. But it wrongly suggests that individual choice is the basis for the legitimacy of all legally enforceable corporate relationships. The R metaphor masks the fact that the rules of corporate law are often based on social welfare judgments of judges, lawmakers and regulators rather than on parties' bargains in the marketplace. It misleadingly suggests that the law imposes no value judgments but merely rubber-stamps freely made individual decisions. Thus the model lulls us into thinking we can avoid the hard questions of how the law reaches its value judgments.

Some might argue that the distorting effects of the contract metaphor should teach us to abandon metaphors altogether. But it is difficult, if not impossible, to explain a complex concept without resorting to other concepts. According to one prominent theorist, "as soon as one gets away from concrete physical experience and starts talking about abstractions… metaphorical understanding is the norm."[77] If we are stuck with metaphor, a CORPORATION AS CONTRACT metaphor could reflect the statist aspects of corporate law if it were to define the source domain

[77] Lakoff, supra, at 205.

CONTRACT in the K sense. As discussed above, although R is based on actual bargaining, K reflects the normatively intrusive aspect of corporate law. K law refuses to enforce some Rs, and imposes some duties that do not arise from Rs. But redefining CONTRACT is far easier said than done.[78] In corporations theory (though not in contract theory), the battle over the terrain of "contract" is essentially over. The free-market, anti-statist connotations of CONTRACT are already deeply ingrained in the economics discourse and have taken firm root in corporations law discourse. It is pointless to revisit the terminological and taxonomic debate. Although contract law has regulatory content, a revisionist version of CORPORATION AS CONTRACT, in which CONTRACT stands for "regulatory" law, would be unclear because it could not escape the settled meaning of CONTRACT. It would likely be as effective as insisting that from this day forth, when I say GORILLA, I mean "gentle." Richard would probably still be insulted. At best, he would be confused.

Moreover, the concept of K is too broad and internally contradictory to have much punch as a metaphor. The enforceability of K derives from *both* individual choice and statist social welfare determinations, in varying and uncertain proportions. Corporations law is based on both market forces and statist social welfare determinations, but disaggregating these polar aspects is more enlightening than lumping them together. As argued above, metaphors should operate as heuristics, and the use of multiple heuristics will generate a wider range of plausible

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[78] Over a decade ago, Professor Braucher critiqued contractarianism for ignoring the regulatory aspects of contract, and Professor Coffee pointed out that neither corporations law nor contracts are entirely shaped by the parties, because both are ultimately subject to judicial interpretation in their enforcement. But neither of these insights had much effect on the basic anti-statist bent of the contractarian model. See Braucher, *Contract and Contractarianism*, *supra*; John C. Coffee, *The Mandatory/Enabling Balance in Corporations Law: An Essay on the Judicial Role,* 89 Colum. L. Rev. 1618 (1989).

hypotheses. Thus I suggest introducing a second metaphor that will highlight the statist aspect of corporate law. Using two metaphors may help limit the contract metaphor and disaggregate enforceability from R.

A second metaphor requires a source domain that focuses on state allocation, in contrast to CONTRACT, which focuses on individual choice. Emphasizing the role of the state underscores the fact that the normative evaluation of business association law should be based on pragmatic policy concerns and not solely on whether it satisfies the indeterminate standard of "what the parties would have wanted." Law and economics discourse already has a concept that can serve as this source domain: property. While the economic analysis of "contract" (R) discounts the importance of the state in the interpretation and enforcement of agreements, economic analysis of "property" openly acknowledges the fact that the state determines the nature and extent of property rights. Professor Demsetz, one of the founding fathers of modern contractarianism, highlighted this aspect of property:

> the *government or courts must help decide* which individuals possess what property rights…property rights so assigned must be *protected by the police power of the state* or the owners must be *allowed* to protect property rights themselves.[79]

In economics, Professor Hart and his coauthors have developed a "property rights" theory of the firm.[80] Contractarianism argues that the party who values an entitlement more highly will get it through bargaining. In contrast, the property rights theory predicts, unsurprisingly perhaps, that the party who ex ante "owns" productive assets will determine how the assets are used.

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[79] Demsetz, *Some Aspects of Property Rights,* 9 J. L.& Econ. 61, 62 (1966) (emphasis added).

"Ownership" of an asset is defined as the right to exclude others from using that asset.[81] To the extent that this ex ante right is allocated by the state (which the property rights model seems to assume) and not by the consent of the parties, this model is consistent with the property metaphor sketched here.

In short, law-and-economics often defines "property" as the opposite of "contract" (R). Professor Rudden, for example, defines "property interests" as "entitlements good against people with whom we have no contract."[82] CONTRACT opens infinite channels for parties to define their relationships with one another by mutual consent. PROPERTY does the things CONTRACT does not do: it opens only certain channels, and closes others. Moreover, while the CONTRACT rights of A are binding only on parties with whom A has contracted, A's PROPERTY rights are binding on nonparties.[83]

I do not mean to say that "corporations *are* property," but rather that corporations law and property law have corresponding effects on so-called "private" ordering. Corporations law is to private ordering of firms as property law is to private ordering of rights in items of property. Through PROPERTY LAW, the state provides a limited set of forms that set the terms for internal governance involving the owners of an asset and for external relations between the owners and

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[80] See Hart and Moore, *Property Rights and the Nature of the Firm*, 98 J. Pol. Econ 1119 (1990); see also Grossman and Hart, *The Costs and Benefits of Ownership*, 94 J. Pol. Econ. 691 (1986); Hart, *An Economist's Perspective on the Theory of the Firm*, 89 Colum. L. Rev. 1757 (1989).

[81] This model explains why, Alchian & Demsetz notwithstanding, a worker is more responsive to his employer than a grocer is to her customer—the employer can prevent the worker from working by refusing to employ the worker, but the customer cannot prevent the grocer from doing business by refusing to buy from the grocer. See Hart, 89 Colum. L. Rev. at 1771.

[82] Bernard Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem* 239, in OXFORD ESSAYS ON JURISPRUDENCE (1987).

[83] Thus it could be said that criminal law and tort law are PROPERTY law, in that they give me rights against others regardless of whether they consent. Or it might be said that there are two kinds of law: CONTRACT and everything else.

nonowners or people who claim to be owners. I readily admit that this sketch is oversimplified, but as we have seen, a simplified portrait of the source domain is an essential characteristic of metaphor. Of course, some, if not all, the effects of property law can at least in principle be simulated by contract, and thus contract-oriented reductionists believe most, if not all, property law can be subsumed into contract law. I will return to this crucial point shortly.

The typical essentialized view of contract holds that contract law sets only procedural rules for creating private relationships, while the content of the relationship is left entirely to the wishes of the parties. As long as the parties follow the proper procedures for enforceability, the law will recognize and enforce the duties and rights they agree to.[84]

In contrast, the law of property "lays down a restricted list of entitlements which it will permit to count as property interests."[85] This restricted list is sometimes referred to as the *numerus clausus* ("closed category"), a term borrowed from the civil law. Property law prescribes a fixed number of standard forms both for internal relations—the ordering of rights and duties among the owners of an asset—and for external relations—the ordering of rights and duties between owners on the one hand and third parties (nonowners or would-be owners) on the other. The principle that property law recognizes only in fixed number of forms of property rights is reflected, for example, in the restrictive "catalog of estates" that applies to present and

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[84] See Merrill & Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Problem*, 110 Yale L.J. 1, 3 (2000). Of course this is a vast oversimplification. As Professors Merrill and Smith concede, contractual freedom is not absolute: contracts with illegal subject matter are prohibited, and there are some formal requirements to enforceability. *Id.* Contract of course has a strong regulatory streak of its own. See e.g., Braucher, *Contract and Contractarianism*, *supra*; David Charny, *Hypothetical Bargains: The Normative Structure of Contract Law*, 81 Mich. L. Rev. 1815 (1991). But its regulation takes a very different form. Contract has a basically open-ended structure, but it has ad hoc regulatory aspects; in property, the restraints are built into the very structure of cognizable property rights.

[85] Rudden at 239.

future property interests.[86] The law will not normally recognize new types of property interests, sometimes referred to as "fancies," that do not conform to the recognized estates. As Justice Holmes wrote, "even if…the covenant was valid as a contract between the parties, [the court still must determine whether] it is of a kind that the law permits to be attached to land…"[87] The law prohibits "incidents of a novel kind" from being "devised and attached to property at the fancy or caprice of the owner."[88]

Internal ordering accomplishes things often associated with contract. Where property has multiple owners, PROPERTY LAW provides rules for ordering their rights and duties with respect to one another under the rules for concurrent estates.[89] Theoretically, co-owners could also accomplish such ordering through Rs. Through PROPERTY LAW, however, the state provides forms for these rules. Furthermore, in accordance with the numerus clausus rule, the state recognizes only a limited number of concurrent estates (joint tenancy, tenancy in common, and tenancy by the entireties). Similarly, corporations law, and business associations law generally, provides a fixed number of forms of business association. Again, while parties could

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[86]The principle also applies in other areas of law that are placed under the rubric of property, such as landlord-tenant law, easements and servitudes, and intellectual property. See Merrill & Smith at 3.

[87] Norcross v. James, 2 N.E. 946, 948 (Mass. 1885) (Holmes, J.).

[88] Keppell v. Bailey, 39 Eng. Rep. 1042, 1029 (Ch. 1834), quoted in Merill & Smith at 3.

Property is of course more complex than this simple model would suggest. The catalog of estates has evolved over time; for example, the fee tail has been eliminated, and condominiums have been recognized (indeed, the innovation of the limited liability company in business associations law can be analogized to that of the condominium in property law). The *numerus clausus* is not set in stone, but it is a constraint at any given point in time.

[89] Professor Lewis explores the role of property law in managing the relations among cotenants in *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wisc. L. Rev. 331. Similarly, Professors Dagan and Heller include the (close) corporation as one type of institution for managing commonly owned property in *The Liberal Commons*, 110 Yale L.J. 549 (2001).

arrange their relationships through contract, the state provides a set number of business association forms (corporation, partnership, etc.)

Property law's impact on third parties is often identified as the factor that distinguishes it from contract. CONTRACT involves only *in personam* rights, that is, rights good against particular persons, namely counter parties to the contract. PROPERTY, however, involves *in rem* rights, or rights good against the world.[90] The justification for giving me such *in rem* rights varies. Locke maintained that I obtain a moral right to land by adding my labor to it, while modern theorists typically argue that society recognizes property rights in order to achieve the most socially desirable use of resources.[91] In any event, the justification is not mutual consent between myself and others.[92]

"My" property is defined in large part in relation to third parties, so property law, by defining what is mine, gives nonconsenting parties duties to me. For example, if I have purchased land in fee simple absolute from A, his duty to stay off the land can be explained as contractual. But B's duty to stay off the land cannot. B never agreed to stay off my land.

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[90] See Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII (1980). For definitions of in personam and in rem, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. Blackstone famously called property "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion *of the right of any other individual in the universe*." Although this definition lacks many of the modern ideas about property, Professor Schroeder points out that it captures the *in rem* nature of property rights. See Jeanne Schroeder, *Chix Nix Bundle-o-Sticks: A Feminist Critique of the Disaggregation of Property*, 93 Mich. L. Rev. 239 (1994).

In some instances, the duty corresponding to my in rem property right applies only to persons with notice, but notice without compensation is not equivalent to consent.

[91] See, e.g., Posner, Economic Analysis of Law § 3.1 (4th ed 1992); Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. Pap. & Proc. 347 (1967).

[92] "Social contract" theories are, of course, based on the most attenuated kind of "hypothetical bargain" and not on individual consent.

Furthermore, my *in rem* right against trespass, or the world's duty not to trespass, could not be simulated by contract; the transaction costs would be too great.[93]

One way that the definition of "my" property affects third parties is that it defines what is available to my creditors if I default. "When we say that assets are someone's property, we generally mean (among other things) that those assets are presumed available to satisfy claims of that person's creditors. More particularly, we mean that that person can pledge those assets as security for his contractual commitments, and indeed will generally be presumed to have done so unless he specifies otherwise."[94]

Like property, and unlike contract, business associations law governs more than the relationships among parties who enter into a business association. It also has binding effects on third parties. By recognizing firms as "legal entities" that can own assets, business associations law designates certain assets as property of "the firm," as distinct from the property of the people—shareholders, workers, and managers—who, in varying degrees, control the assets.[95]

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[93] See, e.g., Merrill & Smith at 55: "One can perhaps use contracts to bind successors in interest to paint a house beige, but it is not practical to use contracts to bind the whole world not to commit trespasses or nuisances on the property. In rem rights provide protection against in personam harms, but it is not practical to create an in rem right by bundling together myriad in personam rights that have been individually negotiated with every potential wrongdoer. Thus, in many contexts transaction costs will prevent contracts from serving as an effective substitute for property rights."

[94] Hansmann & Mattei, *The Functions of Trust Law*, 73 N.Y.U. L. Rev. 434, 469-70 (1998). "If A owes B a pure contract debt—say to repay an unsecured loan—A…[has] an obligation, for satisfaction of which all his things are liable, but only while they are his." Rudden at 240.

[95] See Hansmann & Kraakman, *The Essential Role of Organizational Law*, 110 Yale L. J. 387 (2000). See also Paul Mahoney, *Contract of Concession?* 34 Ga. L. Rev. 873, 876 (2000):

"Consider a business (ignoring the organizational form) with a few owners. The owners will have personal creditors and the business will have business creditors. Each class of creditors needs to know which assets are available to satisfy which debts. Can the personal creditors seize business assets such as machines and inventory if the owner's personal debts are unpaid? Can the business creditors seize an owner's house or car if the business's debts are unpaid? It is critically important to a well-functioning system of organizational law that the answers to these two questions be clear, and extremely useful that the law offer multiple organizational forms that provide a varied menu of answers to them."

The most obvious way that corporations law creates *in rem* rights is through limited liability. If an enterprise is organized as a corporation or other limited liability entity, its creditors cannot reach the assets of the owners to satisfy the debts of the owners.[96] Professors Hansmann and Kraakman have recently analyzed another, related type of *in rem* right created by business associations law. [97] They refer to this as "affirmative asset partitioning." Affirmative asset partitioning limits the owners' personal creditors ability to reach the assets of the firm.[98] The law achieves this result by recognizing the firm as a "legal entity" and declaring that certain assets used in the enterprise "belong" to the firm and do not belong to the firm's owners.[99] Thus

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[96] Professor Mahoney rightly warns us against presuming that there is something "natural" about unlimited liability and "unnatural" about limited liability. Unlimited liability seems natural only in light of our modern ideas about respondeat superior and tort liability generally. See Mahoney, *Contract of Concession? supra*. While there is indeed nothing inevitable about the existing baseline rules of liability, they *are* the baseline rules that apply today in the absence of organizational law.

[97] Hansmann & Kraakman, *The Essential Role of Organizational Law, supra*. Hansmann & Kraakman actually speak in even broader terms of "organizational law" rather than just business associations law. They include other "organizations," such as nonprofit corporations, municipal corporations, and spendthrift trusts. They even suggest that marriages fall into this category. They build on Hansmann & Mattei's earlier argument that trust law is better analogized to property law than contract law. See Hansmann & Mattei, *The Functions of Trust Law, supra.*

[98] Affirmative asset partitioning, unlike limited liability, extends to general partnerships: "The rules of creditors' rights and bankruptcy applied in partnership provide that creditors of the partnership have a claim on [assets held in partnership name], in the case of the partnership's insolvency, that is prior to the claims of the partners' personal creditors.

[99] It might be argued that the theory turns on the assumption that the shareholders are the owners of the firm. If shareholders own the firm, then absent organizational law, the shareholders' personal creditors should be able to seize and liquidate the firm. But, it will be argued, shareholders are not the firm's owners, and thus there is nothing odd about their creditors' inability to seize the firm.

In response, I would argue that it does not matter whether shareholders are the owners of the firm. In the absence of business associations law, *some* natural person (whether shareholders, managers, or someone else) would have to be the owner of the firm's assets. This natural person's creditors could seize and liquidate the productive assets in satisfaction of her debts. Business associations law replaces this regime with a regime in which *no* natural person "owns" the productive assets; instead, it allows the creation of a fictitious "persons who owns the assets.

the "firm's" assets are presumed to have been pledged to the creditors of the enterprise. They are presumed not to have been pledged to the creditors of the firm's owners.[100]

b. PROPERTY cannot be reduced to CONTRACT

1. Standard forms generally

The expected objection to the property metaphor is that it is no different from a contract metaphor because all, or almost all, of the property-like roles of corporations law can be achieved by contract. As discussed above, contractarians often refer to the packages of rules provided by forms of business associations as "form contracts." This metaphor expresses how the forms allow parties to pick from among the forms and *choose* the relationship they want, ready-made. Professor Fuller argued that legal formalities are useful in that they "offer[] channels for the legally effective expression of intention."[101] The form contract metaphor is useful insofar as it captures the way that the fixed forms of business associations provide channels for persons to express their intent to enter into a certain type of legal relation.

But the "form contract" metaphor tends to focus on the "contract" (which metonymically evokes R) and discount the importance of the "form." The metaphor of forms as "channels" should also remind us that the law influences the direction of transactions when it offers a channel where none previously existed, or offers a smoother channel than previously existed. Furthermore, when formalities open certain channels, they indirectly close other possible

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[100] 110 Yale L.J. at 394. Partnership law does not provide limited liability or the "liquidation protection" aspect of affirmative asset partitioning that corporation law provides. But partnership law does play a property-law like role in that it gives a firm's creditors a priority claim on the partnership assets.

[101] Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941)

channels. Forms and formalities *limit* the results individuals may realize, and the methods by which they may realize them. Forms shape choice even if there is no prohibition against deviating from the forms. The form contract metaphor captures the "channel opening" function of reducing transaction costs for standard forms, but does not reflect this "channel closing" function.[102] This channel closing function is in tension with the idea that corporations law should be based on Rs. Channel closing can be expressed metaphorically by reference to property law's numerus clausus principle.

It might be argued that corporations law does not close channels because most rules are defaults rather than "mandatory" rules. Although the law provides certain forms, it does not prohibit other arrangements. It might be said that in the absence of absolute prohibitions, no *numerus*—in property or corporations—is ever really *clausus*. Parties can simply bargain around the terms to reach their desired result, and thus corporations law plays no important role.

The recent literature on path dependency, however, calls this assertion into question. Parties may acquiesce in the state-provided default rule even if they would prefer a different rule. A number of factors contribute to this phenomenon, including transaction costs, network effects and endowment effects.[103]

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[102] Of course real form contracts have a negative channeling effect, but the understood meaning of the form contract metaphor includes only positive channeling. Our fierce friend Richard is still a GORILLA, whether or not real gorillas are fierce.

Although Fuller celebrated the "facilitating" work of forms, he acknowledged that "forms have at times been allowed to crystallize to the point where needed innovation has been impeded."

[103] See Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stan. L. Rev. 127, 139-42 (1999).

The Coase Theorem posits that *in the absence of transaction costs*, the initial allocation of entitlements is a matter of indifference: parties will arrive at an efficient reallocation of entitlements through Rs. Because there are transaction costs in real life, of course, the initial allocation of entitlements makes a world of difference.[104] Even if an initial allocation of an entitlement is inefficient, transaction costs can inhibit or prevent the transfer of the entitlement. Thus, as transaction ~~transaction~~ costs~~s~~ rise and make ~~explicit~~ contracting around a default rule more difficult, the rule becomes more and more like a mandatory rule. ~~Tacit adoption of~~ Simply adopting state-provided default rules ~~is the path of least resistance, which~~ avoids the transaction costs of drafting terms, such as corporate governance terms.[105]

With sufficient legal creativity, co-owners can simulate nonstandard property interests or nonstandard co-tenancy relationships,[106] just as unusual business forms can be created by fancy lawyering. But parties choosing to do so would incur immense transaction costs if they were to negotiate and draft desired novel terms of their relationship from scratch. The *numerus clausus*

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[104] "The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave." R.H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988).

See also Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 Va. L. Rev. 397 (1997) "Far from attempting to extend reductionist economic theories to law, Coase essentially advocated a pragmatist perspective on liability law - and offered what became known as the Coase Theorem almost as a kind of parody of reductionist theory. His overall body of work shows that Coase never believed the Theorem applied to the real world, and in this respect he considered it all too typical of contemporary economics."

[105] *See* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 826 (1995). ~~Professor Klausner further argues that the bias toward default rules is further enhanced by the fact that they can generate "network benefits" to the extent that a "contractual network" forms around a default rule or rules. *See id.* at 828 ("Default terms…are prime candidates as focal points because they are well known, and they uniquely have the imprimatur of the legislature or court that created them.")~~

[106] For example, at least some of the restrictions on forms of future interests can be defeated through the use of common-law trusts. See Michael Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163, 1178 (1999).

does not entirely prevent the creation of unusual property interests, but it may discourage parties who are unsophisticated or cannot afford good legal advice.[107] Similarly, even if the founders of a business corporation wish to deviate from certain default terms of the corporate form, the transaction costs of contracting may prevent them from doing so.[108]

Contractarians sometimes argue that the transaction costs of deviating from default terms of corporate governance are de minimis. The only cost, they argue, is that of typing in a paragraph in the corporate charter. If it is true that defaults are easily escaped, then the state's monopoly over defaults makes no difference. But even if the immediate transaction costs of avoiding default rules are low, opting for nonstandard rules can mean forgoing "network benefits."[109] There are benefits to following standard rules simply by virtue of the fact that they are the standard. For example:

> More judicial precedents can be expected, on average, to enhance the clarity of the term. Common business practices implementing the term may become established, further reducing uncertainty. Legal advice, opinion letters and related documentation will be more readily available, more timely, less costly, and more certain. Finally, firms may find it easier to market their securities.[110]

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[107] Rudden 240 (in property law, despite the numerus clausus, "the well-advised citizen can, *at some cost*, almost always obtain results denied to him by one legal device by using another")

[108] See, e.g., O'Kelley, *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 Nw. U. L. Rev. 216, 247 (1992) .

A good explanation of this argument for the importance of state-provided forms appears in the most unlikely location: Easterbrook and Fischel's book, *The Economic Structure of Corporate Law*. Despite their faith in markets, they use transaction costs to argue that the state's monopoly over forms (and over ex post judging) is normatively desirable because the market will *not* provide them. They argue that transaction costs will discourage private parties from developing comprehensive ex ante solutions. Private parties cannot capture all the gains of developing such solutions because of free rider problems: "other firms could copy the answers without paying the creator." Easterbrook & Fischel at 35. The state, however, will take on this task because the state, unlike private parties, is willing to supply "public goods" even if its costs exceed the economic gains it can capture. Note how far this statist explanation deviates from the libertarian view of the corporation as R. It assumes that the state can determine an efficient allocation of entitlements when the market cannot.

[109] *See* Klausner, 81 Va. L Rev. at 828.

[110] Klausner, 81 Va. L. Rev. at 761.

Thus, even if parties might otherwise prefer a different rule, and even where the transaction costs of doing so would be low, they might nonetheless adopt the standard rule *because* it is the standard and thereby confers special benefits. The network benefits of standardization, of course, translate into costs on those who opt for nonstandard forms. The existence of a jurisprudence of established forms increases the costs even further. Parties wishing to avoid default rules must learn those rules (including judge-made rules) and craft their contracts carefully to counter presumptions that the default rules apply to their relationship.

Even in the absence of transaction costs, parties may be slow to bargain around standard forms. Experimental psychology has brought the Coase Theorem into question. Entitlement allocations may indeed affect preferences. Experiments suggest that people simply prefer *existing* entitlement allocations (such as default rules) over reallocations.[111] Thus alienable legal entitlements may resist being traded even when transaction costs are low.[112]

Professor Korobkin argues, based on preliminary experimental evidence, that contracting parties will prefer default law over negotiated terms. He further argues that if parties use a form contract as a basis for negotiations, the parties will be biased in favor of the form terms.[113] Network effects can explain some of this preference, but Korobkin interprets his data to suggest that network effects are not the whole story. His explanation, which he calls the "inertia theory," is that parties will prefer inaction over action. This explanation is consistent with

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[111] See Jack Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves,* 79 Am. Econ. Rev. 1277 (1989); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms,* 51 VAND. L. REV. 1583 (1998).

[112] Korobkin at 1584.

a large body of experimental psychology literature. "Regret theory" holds that the preference for inaction is based on an emotional reaction rather than a strict cost-benefit calculation. When people must make decisions, they fear later regretting decisions that lead to undesirable results.[114] Furthermore, people tend to believe that they will regret taking an action that has bad results more than they will regret *inaction* that leads to the same undesirable result.[115]

The "inertia theory" suggests that the state's provision of standard forms does not just offer options; it also affects outcomes. If people follow the path of least resistance in designing business associations, they will tend to adopt the prevailing standard forms. Once they opt for the standard forms, inertia theory further suggests that they will tend not to vary the default terms.

For purposes of this Article, my point is not that the allocation of entitlements under existing corporations law rules is normatively wrong. My point, rather, is that the metaphor of CORPORATION AS R is incomplete. The descriptive argument that the rules of corporations law are based on consent is simply incorrect. Corporations law is, rather, based on a social welfare norm imposed from the top down; that society is best served if we favor the relationships that rational actors would have chosen. This norm is immensely powerful and appealing, and a view reflected in the law of K (for example, in the objective theory of consent, and in the theory of quasi-contract). But it is not a view based on R—it is not based on the actual known preferences of the parties.

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[113] Korobkin at 1606.

[114] Korobkin at 1610 & n.84 (citing sources).

[115] Korobkin at 1613 (describing experimental support for this hypothesis). The law reflects this distinction between action and inaction in that it typically treats sins of commission more harshly than sins of omission with similar results.

The normative argument that relations within a firm should be based on Rs is inconsistent with the existence of many default terms of corporations law. Standard forms of business associations are consistent with Rs only to the extent that their provisions can be easily avoided by contract. The Coase Theorem suggests that transaction costs make this difficult. Furthermore, the network and inertia theories suggest forces that will make standard forms resistant to contractual alteration even in the absence of transaction costs.

2. In rem rights

The rule of limited liability as against tort creditors may (or may not) be beneficial in terms of social welfare. But it obviously has no grounding in consent. Tort creditors do not choose their tortfeasors, and thus cannot choose to "transact" only with unlimited liability tortfeasors. Furthermore, the transaction costs of arranging limited liability in tort by contract would be infinite. A corporation cannot identify in advance the parties against whom it may commit torts. Thus limited liability could theoretically be established by contract only if the owners of an enterprise were to seek releases from every one of the enterprise's potential tort victims, namely every person and entity in the world.

Limited liability with respect to contract creditors could theoretically be arranged by contract. Indeed, it might be argued that limited liability for contract debts *is* bargained for, since parties who contract with a corporation are (or should be) aware that they have no right to seek satisfaction from the enterprise's individual owners and seek compensation for this in the contract's terms. Even if this is so, the path dependence arguments come into play again. The

law opens channels for the realization of limited liability arrangements, but closes channels to other arrangements.

Like limited liability in contract, affirmative asset partitioning[116] could theoretically be accomplished through contracting. But the transaction costs would be greater; for a large publicly traded firm, it would be several orders of magnitude greater. Contracting for limited liability would require the alteration of all the firm's contracts with all of its creditors. Contracting for affirmative partitioning would require the alteration of all of the personal contracts of *each* owner of the firm. For large firms like publicly held corporations, the number of such contracts would be astronomical.[117]

The contractarian model suggests that corporations law plays no important role if its effects *could have been* simulated by contract. Professors Hansmann and Kraakman argue that affirmative asset partitioning is the "essential" role of business associations law because the transaction costs of achieving it by contract would be so great as to make it practically impossible. Limited liability for contract obligations could realistically be achieved by contracting. Thus, they argue, the legal rule of limited liability is secondary in importance. But while legal rule of affirmative partitioning avoids more transaction costs than limited liability rules do, this does not make the latter meaningless. Assume that legal rules provide for limited liability, which is exactly what parties wanted, and save parties the cost of contracting. If so, the law has achieved something that parties could not do by contract—to achieve limited liability

[116] See Hansmann & Kraakman, 110 Yale L.J., discussed supra at ---.
[117] Hansmann & Kraakman, 110 Yale L.J. at 429.

while avoiding much of the associated transaction costs.[118] In some cases, such as affirmative asset partitioning, transaction costs of contracting would be so high that X can occur only through state intervention. In some cases, such as contractual limited liability, contracting costs might not be so high as to make contracting a practical impossibility. But the relevant question for an R-based theory is not whether limited liability *could have been* simulated by contract in the absence of corporations law. Rather, the question is whether it *would have been*. Corporations law significantly reduces the cost of obtaining limited liability. It thereby increases the chances that a given firm will choose to organize as a limited liability entity. Furthermore, because limited liability is the default rule for corporations, path dependency factors may make it resistant to contractual alteration even in cases where it would otherwise be efficient to contract around it.

From the property metaphor sketched above, we might abstract a broader schema which, for want of a better term, we might refer to as ***property***. This schema would reflect the common characteristics of corporations law and conventional property law mentioned here, such as channeling via standard forms and the enforcement of *in rem* rights. But in order to accommodate both corporations and conventional property, this ***property*** schema would necessarily sacrifice some important characteristics of each.[119] The schema would not be equivalent to "property" as we think of it now. A similar schema revision occurred a generation ago (though it may have since reversed itself) when the Supreme Court treated recipients of

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[118] See. e.g., Easterbrook & Fischel at 35, discussed supra at ---.

[119] The similarity between schemas and "literal" categories suggests that metaphor and categorization are closely related. Some theorists argue that they are one and the same. See Glucksberg & Keysar, *How Metaphors Work*, in METAPHOR AND THOUGHT 401.

government benefits as holders of "property rights."[120] A different revision of the property schema has assimilated "intellectual property" and conventional property into a broader schema. In our era, it is difficult to think of "property" without including intellectual property. Something of a similar nature has happened with "contract"—although some contractarians insist that corporations are "literally" Rs, in fact the use of the CORPORATION AS CONTRACT metaphor (and other contract-based metaphors) has helped to establish a schema of ***contract*** that is more abstract and commodious than any conception of contract that preceded it. The way in which the metaphor has remade our idea of "contract" is as important as, and perhaps inseparable from, the way it has remade our thinking of "corporation."

Conclusion

The contractarian metaphor is especially effective as a rhetorical device to advance a laissez faire political agenda with respect to large firms. This is of course one reason why adherents of the model are hostile to alternative approaches. I do not pretend that my "propertarian" model is politically neutral. I think it should be clear however, that both "contract" and "property" are sufficiently contested concepts such that both CORPORATION AS CONTRACT and CORPORATION AS PROPERTY, like all metaphors, are highly indeterminate until the metaphorist spells out his conception of the source domain. John Dewey famously argued that the normative implications of models of the corporation are infinitely plastic.[121] This is

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[120] See Goldberg v. Kelly, 357 U.S. 254 (1970).

[121] See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L. J. 655 (1926); cf. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 Stan. L. Rev. 1471(1989); David Millon, *Theories of the Corporation*, 1990 Duke L.J. 201 (1990).

literally correct: no description of the corporation has inevitable normative consequences. Moreover, the standard theories have sometimes been used for contradictory normative ends. But as Professor Horwitz has argued, a given theory in a specific historical and social context cannot be separated from the "legal and intellectual baggage" it carries.[122] It is the baggage attending the source domain, and not some objective reality about the source domain, that determines its political meaning.

I suggest the use of a property metaphor knowing full well that the term is just as politically contested and ideologically loaded as the term "contract." Just as we distinguished between R and K, we can draw the distinction between the competing libertarian-natural law vision, in which "property rights" exist independently of law, and the Benthamite-realist vision espoused here,[123] in which "property rights" are creations of law. A property metaphor is of course a useful foil to the contractarian heuristic only to the extent that it portrays its source after the Benthamite-realist ideal. The meaning of the metaphor, and thus its usefulness as an alternative heuristic, will ultimately depend on the fortunes of the political contest between the two visions of property, just as the meaning of the contract metaphor turned on the contested meaning of "contract."[124]

Laissez-faire commentators tend to insist not only that a minimal state role is normatively desirable, but also that as a *descriptive* matter, the state is unimportant because the market will always find a way around its dictates. Similarly, commentators who favor regulation argue both

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[122] MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 at 106.

[123] According to Bentham, "Before laws were made, there was no property; take away laws, and property ceases." Following the R and K labels, we might call the two visions of property N (for natural law) and B (for Benthamite).

that the state *does* play an important regulatory role and that it *should*. The descriptive and normative, of course, need not go hand in hand; one can deplore state involvement while acknowledging the fact that in the real world the state indeed plays a role.[125] Then why does there seem to be so much at stake in the description of the state involvement in corporations? I believe this shows the far-reaching influence of the antiquated "concession" theory of the corporation.[126] The descriptive aspect of this theory holds that the state grants special powers to the corporation that an enterprise could not otherwise obtain. The normative conclusion is that this state "concession" gives the right to regulate corporations as a quid pro quo. This idea remains influential: thus pro-regulatory commentators try to prove the descriptive thesis, with the tacit implication that it will establish the normative one. Anti-regulatory commentators try to disprove the descriptive thesis, with the implication that it will disprove the normative one. For example, Professor Mahoney writes,

> Justices Brandeis and Marshall, then, were both wrong to claim that regulatory scrutiny of businesses organized as corporations is a quid pro quo for governmental favors those businesses receive by incorporating. They are, instead, part and parcel of the governmental unease with unfettered enterprise that led to the fiction that government "creates" or "licenses" the corporation.[127]

I agree entirely with Professor Mahoney. Decisions about the wisdom of regulation cannot be answered by "proving" that the corporation is a "state concession." But he seems to suggest that disproving concession theory will prove that government may not regulate

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[124] See supra, n.----(discussing Jean Braucher and John Coffee).

[125] Some commentators take just this position: Professor Mahoney, for example, agrees with Hansmann and Kraakman that business associations law plays an important role in asset partitioning. See Mahoney, *Contract of Concession? supra.* But he also argues that there are historical examples of successful "private" asset partitioning arrangements, which states have unnecessarily outlawed and supplanted with business associations law.

[126] This theory is also known as the "grant" or "artificial entity" theory.

corporations. It is taken for granted that the description of the role of the state will determine the normative desirability of corporate regulation. But it won't. The normative conclusion of the concession "theory" does not follow from its descriptive thesis, *and* the opposite conclusion will not follow from disproving that descriptive thesis.[128] Even if the state "creates" corporations, this does not mean it should regulate them. And even if the state does not create corporations, this does not mean it should not regulate them.

Using the property metaphor, which highlights the role of the state, does not tell us whether or not the state should regulate corporations. Rather, it tells us that the state should weigh practical social welfare considerations rather than using the "hypothetical bargain" construct. Of course, "social welfare" is not a legal or economic standard, but a contested political concept. But it is preferable to be candid about this rather than to suggest that the "what the parties would have done" approach is determined entirely by the parties' intent.[129] Both intent and statist social welfare determinations are intimately involved whenever the law makes decisions about corporations (or any other "private law" matter).[130] In short, the question is whether in a given regulatory context, the government is or is not justified in its "unease with unfettered enterprise." The property metaphor does not purport to answer this question, but it hopefully reminds us that this is the right question to ask.

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[127] Mahoney, *Contract of Concession? supra.*

[128] Moreover, the "descriptive" part of the thesis is a conjecture that could never really be "proved" or disproved—indeed, it is not even really descriptive.

[129] Cf. Gulati, Klein, and Zolt, Connected Contracts, 47 UCLA L. Rev. 887, 944 (2000) (listing "Exposure of Hidden Embedded Value Judgments" as an important characteristic of a good model: "A model that hides value judgments is unlikely to gain widespread acceptance.").

[130] Thus it might be said that corporations are both property and contract in the way that light is said to be both particle and wave (Professor Frank Gevurtz suggested this metaphor to me).