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Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria

CORPORATIONS AND AUTONOMY THEORIES OF CONTRACT: A CRITIQUE OF THE NEW *LEX MERCATORIA*

NATHAN OMAN[†]

ABSTRACT

One of the central problems of contracts jurisprudence is the conflict between autonomy theories of contract and efficiency theories of contract. One approach to solving this conflict is to argue that in the realm of contracts between corporations, autonomy theories have nothing to say because corporations are not real people with whose autonomy we need to be concerned. While apparently powerful, this argument ultimately fails because it implicitly assumes theories of the corporation at odds with economic theories of law. Economics, in turn, offers a vision of the firm that is quite hospitable to autonomy theories of contract. The failure of this argument suggests that a more fruitful avenue for reconciling these competing approaches is to find a principled way of integrating them into a single theory.

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INTRODUCTION

Many contracts scholars have long had an intuition that corporations present a special problem for autonomy theories of contract law.¹ Most of these theories implicitly or explicitly assume that contracting parties are human beings rather than institutions. Hence, there seems something suspect about applying such theories to corporations. Recently, scholars have tried to use this intuition to solve some basic problems in the philosophy of contract law. In this paper, I hope to demonstrate that this approach will not work. First, I articulate the hitherto inchoate arguments on which the intuition rests. Second, I demonstrate that despite their initial plausibility, these arguments are flawed. Ultimately, the injection of corporations into contract law theory throws up new versions of some old problems, but corporations do not pose a unique or fundamental challenge to autonomy theories of contract.

The most recent use of corporations in the debate over contract theory comes at a time when that theory is deeply divided. Contracts scholarship suffers from an embarrassment of theoretical riches.² Philosophers,³ historians,⁴ and economists⁵ have all entered the conversation. A few generations ago, discussion centered on questions of the extent to

1. For example, in discussing form contracts, Todd D. Rakoff has written:

Refusal to enforce a contract of adhesion, the courts say, trenches on freedom of contract. Implicit in the argument is an equating of the drafting organization with a live individual. For what gives value to uncoerced choice – the type of freedom that the courts have in mind – is its connection to the human being, to his growth and development, his individuation, his fulfillment by doing To see a contract of adhesion as the extension and fulfillment of the will of an individual entrepreneur, entitled to do business as he sees fit, is incongruous.

Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1236 (1983). See also MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR THE BUREAUCRATIC SOCIETY 61 (1986) (arguing that corporations do not have “original autonomy rights”); Karl Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L.J. 704, 733 n.63 (1931) (noting the “pernicious heritage” in contract law scholarship of treating organizations as though they were people); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1464–71 (2004) (arguing that his promissory theory of contract cannot be applied to contracts between corporations).

2. See generally ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997) (discussing contemporary theories of contract law); STEPHEN A. SMITH, *CONTRACT THEORY* (2004) (same); MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993) (same).

3. See, e.g., *THE THEORY OF CONTRACT LAW: NEW ESSAYS* (Peter Benson ed., 2001).

4. See, e.g., JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991); DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* (1999).

5. See, e.g., *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley ed., 1999) (collecting essays on contract from an economic perspective).

which contracts reflected the will of the parties or the rules of society⁶ and the relative merits of achieving fairness or freedom.⁷ The debates had the advantage of occurring in essentially the same language.⁸ In contrast, the contracts theorists of today find that it is difficult to talk with each other even when discussing the same issues that exercised their predecessors. While each approach operates with its own criteria for successful theories, contracts scholars have not found a powerful and widely accepted meta-theory that would allow them to adjudicate between the competing approaches. The search for such a meta-theory is one of the major tasks of contemporary contracts scholarship.

One of the difficulties confronting a contracts theorist is the sprawling nature of contract law itself. Contracts have the potential to govern everything from the sale of a cow by an individual farmer to disputes over the acquisition of a multi-billion dollar oil company.⁹ One strategy for dealing with the theoretical pluralism is to narrow the field of inquiry to purely commercial transactions.¹⁰ The claim is that whatever its limitations elsewhere, in the realm of firm-to-firm contracts, economic analysis should reign supreme.¹¹ Thus, even if a unified theory of all contracts is difficult, a unified theory of some significant subset of contracts may be possible.

The success of this latest move—which I shall call the new *lex mercatoria* (law merchant)—rests on its ability to dismiss outright non-economic theories as inapplicable. The claim is that autonomy theories are not useful in understanding contracts by corporations because such theories assume that contracting parties are human beings. Ultimately, this argument necessarily invokes a particular theory—or set of theories—about the nature of corporations. These theories, however, have been largely repudiated by contemporary economic analysis. Ironically, contemporary law and economics explicitly assumes a model of the corporation that is particularly hospitable to the very theories that the proponents of the new *lex mercatoria* hope to dismiss once and for all.

6. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

7. See, e.g., Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1942).

8. For an idiosyncratic but influential account of this earlier discussion see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (arguing that the discussion of contract law represented a competition between individualistic and altruistic visions of the law).

9. See, e.g., *Sherwood v. Walker*, 33 N.W. 919, 920 (Mich. 1887) (discussing a contract to sell a cow named Rose); *Texaco Inc. v. Penzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987) (discussing a contract to sell the Getty Oil Company).

10. See Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54 (Jody S. Kraus & Steven D. Walt eds., 2000); Alan Schwartz & Robert E. Scott, *Contracts Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

11. Schwartz & Scott, *supra* note 10, at 544.

The failure to banish autonomy theories from the new *lex mercatoria* illustrates the difficulty of reconciling autonomy and welfare theories by dismissing one approach all together. Scholars interested in a coherent theory of contracts would be better served by finding ways of integrating the two approaches in some principled fashion.¹² Hence, any advantage of the new *lex mercatoria* must lie in its ability to make the integration of autonomy and welfare theories into a single approach more tractable.

This article proceeds as follows. Part I provides some theoretical background on the conflict between autonomy and efficiency theories of contract and the attempts to reconcile them. In Part II, I provide a fully developed version of the argument for dismissing autonomy theories from the discussion of contracts between corporations. Part III examines the various theories of the corporation inherent in that argument. In Part IV, I argue that these theories of the corporation are inconsistent with efficiency theories of contract and that the preferred conception of the corporation among law and economics scholars—the nexus of contracts theory—can be reconciled with autonomy theories. In Part V, I illustrate the application of the nexus of contracts theory of the corporation to autonomy-based arguments about contracts between corporations using the example of contract interpretation. This article concludes with some observations on attempts to reconcile autonomy and efficiency drawn from the arguments over corporations and contracts.

I. THE PREDICAMENT OF CONTEMPORARY CONTRACT THEORY AND THE NEW *LEX MERCATORIA*

A. Reconciling Autonomy and Efficiency

Contemporary legal philosophy is essentially divided about the basis of contractual obligation. On one side are autonomy theorists who claim that contracts represent a form of self-determination and ought to be enforced as a way of respecting and increasing human freedom. On the other side are efficiency theorists who argue that voluntary transactions increase aggregate levels of social welfare and ought to be enforced as a way of increasing wealth and utility.¹³ The autonomy theories are

12. For my own attempt to offer such an approach see Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005).

13. There are of course theorists who seek to avoid this conflict by adopting a largely contextual, atheoretical, and ad hoc approach to contract law. These theorists deny that contract law can or should be understood to embody a consistent theory. It is enough that it provides pragmatic solutions to the concrete problems that it finds itself faced with. See also Robert Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988) (arguing that a pragmatic model of contract law displays the complexity of the theory). See generally HILLMAN, *supra* note 2. For example, Jean Braucher has written, "I remain a skeptic about the need for and the wisdom of a unified field theory of contract, particularly a one-dimensional one; a good gray compromise statement of competing concerns will probably do." Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 701 n.14 (1990). For a discussion of the conflict between theory and pragmatism in contract law scholarship see Oman, *supra* note 12, at

deontological, while the efficiency theories are consequentialist, and therein lies the problem. As one philosopher has observed:

As normative theories, economic contract theories would seem to be logically incompatible with autonomy contract theories for the same reason that consequentialist moral theories are logically incompatible with deontological moral theories: The former claim that moral justification is solely a function of consequences, while the latter claim that moral justification is logically independent of consequences.¹⁴

Without some way of reconciling or adjudicating between these competing approaches, contract theory is deeply incoherent. So long as the theories converge on the same conclusions, this is a logical but not a practical problem. However, when the theories diverge¹⁵ or when one theory fails to generate any concrete answers to particular questions,¹⁶ the absence of a unified approach presents real problems.¹⁷ We are unable to specify or confidently justify the rules of contract law.¹⁸

There are two potential strategies for reconciling these differing theories of contract law. The first approach is the "horizontal independ-

1483–84. In addition, James Gordley and others have argued for a neo-scholastic vision of contract based on the idea of equality in exchange. James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547 (1995). See also James Bernard Murphy, *Equality in Exchange*, 47 AM. J. JURIS. 85 (2002).

14. Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, in SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 420, 420 (Ernest Sosa & Enrique Villanueva eds. 2001).

15. Compare, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 130–32 (4th ed. 1992) (arguing against specific performance on economic grounds), with Randy Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986) (arguing in favor of a default rule of specific performance based on an autonomy theory of contract). See generally TREBILCOCK, *supra* note 2, at 242 ("On the various central normative issues pertaining to the concept of freedom of contract, I have concluded that the claim of convergence between autonomy and welfare values is much more tenuous than proponents of the private ordering paradigm have conventionally been prepared to acknowledge.").

16. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989) (arguing that autonomy theories produce no determinate answer to the question of what sorts of default rules the law of contract should include).

17. Peter Benson has observed:

Contemporary scholars often assume that the juxtaposition of a plurality of different moral conceptions in an account of law is unproblematic. Indeed, they frequently judge it to be desirable, because they think that the deployment of a multiplicity of conceptions enables a theory to accommodate the richness and the complexity of the subject matter under investigation. If, however, the invocation of different moral conceptions is to provide a coherent and stable account of the basis of contract, it is essential that these diverse conceptions function as integrated parts of an articulated and therefore intelligible whole. Otherwise, the plurality of conceptions will constitute only an unresolved chaos which cannot explain anything, whether simple or complex.

Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1085–86 (1989).

18. See Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW 118, 118 (Peter Benson ed., 2001) ("In common law jurisdictions at least, there is at present no generally accepted theory or even family of theories of contract."); cf. Schwartz & Scott, *supra* note 10, at 543 ("Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be.").

ence" strategy.¹⁹ We can claim that autonomy approaches and efficiency approaches are actually theories about different things. Since both purport to be theories of contract law, this claim is puzzling. There are, however, several different sorts of legal theories. A theory could *justify* legal rules²⁰ or provide an *explanation* of a field of law.²¹ Alternatively, a theory could aim simply at *predicting* actual case outcomes.²² For example, Jody Kraus claims that autonomy theories seek to explain the doctrinal arguments of judges.²³ In contrast, he argues, efficiency theories seek to explain the outcomes of particular cases irrespective of the stated reasons of the judges.²⁴ Hence the different theories are in fact explaining different things.

The second approach is the "vertical integration" strategy.²⁵ This strategy "contemplate[s] . . . that both approaches may be combined as logically distinct components of a unified theory."²⁶ They are reconciled by arranging the two approaches hierarchically. There are two ways that this can be done. First, one can show that autonomy is lexically superior to efficiency or vice versa, so that the normative criteria are logically distinct but one of them "trumps" the other. For example, I have argued elsewhere that one should pursue efficiency so long as it does not conflict with autonomy.²⁷ When such conflicts arise, the demands of efficiency must give way to the demands of autonomy.²⁸ Alternatively,

19. See Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, 1 SOC. POL. & L. PHIL. 385, 390-422 (2002) ("Part II: Horizontal Independence"). I borrow the terminology "horizontal independence" and "vertical integration" in this section from Kraus. See also Kraus, *Reconciling Efficiency and Autonomy*, *supra* note 14.

20. Kraus, *Legal Theory and Contract Law*, *supra* note 19, at 400-02.

21. *Id.* at 395-99. For the most elaborate attempt to date to provide such an internal interpretation of contract law, see generally SMITH, *supra* note 2.

22. Kraus, *Legal Theory and Contract Law*, *supra* note 19, at 400. By prediction, Kraus seems to mean something like a theory that generates accurate forecasts of case outcomes without necessarily providing a phenomenologically accurate account of legal reasoning or legal justifications. There are obvious parallels between this conception of explanation and Milton Friedman's defense of unrealistic assumptions in economics. According to Friedman, the inaccuracy of the assumptions is irrelevant so long as the predictions were empirically correct. See Ernest Nagel, *Assumptions in Economic Theory*, in THE PHILOSOPHY OF SOCIAL EXPLANATION 130, 130-38 (Alan Ryan ed., 1973) (discussing Friedman's argument that unrealistic assumptions are valid in economic theories if they produce accurate predictions). See generally ALEXANDER ROSENBERG, PHILOSOPHY OF SOCIAL SCIENCE 74-79 (1988) (discussing instrumentalism in economics). Analogously, Kraus envisions theories that provide inaccurate descriptions of legal doctrine but correctly predict who wins or loses the case.

23. See Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 689-90 (Jules Coleman & Scott Shapiro eds., 2002).

24. *Id.*

25. See Kraus, *supra* note 14, at 422.

26. *Id.*

27. Oman, *supra* note 14, at 1499.

28. *Id.* at 1499-1506 (arguing for the lexical priority of liberty in contract law). Kraus suggests that under a lexical ordering of competing theories the lexically prior theory can be thought of as authorizing but not requiring the lexically subordinate theory. See Kraus, *supra* note 14, at 420-22. As an example of this approach, he cites Thomas Scanlon, *Promises and Contracts*, in THE THEORY OF CONTRACT LAW 86 (Peter Benson ed., 2001). See *id.* at 437 n.6.

Louis Kaplow and Steven Shavell take the opposite position, claiming that “parties need to be induced to perform their contracts when performance would be beneficial, but should not be encouraged to perform when doing so would reduce their well-being.”²⁹ The second “vertical integration” strategy is to argue that one approach is foundational while the other is derivative. For example, Frank Buckley has argued that autonomy theories can actually be reduced to consequentialist theories.³⁰ According to Buckley, autonomy theories necessarily invoke the convention of promising.³¹ Yet the desirability of the convention must be based on consequentialist reasoning, because we cannot invoke a promise to abide by the convention of promising without falling into circularity.³² Hence, autonomy is really an implication of consequentialism. As we shall see shortly, one can also argue that efficiency is an implication of autonomy.

B. *The New Lex Mercatoria*

Recently, some commercial law scholars have sought to reconcile the conflict by narrowing their focus from contracts in general to purely commercial transactions. The idea that the law should make a distinction between business obligations and other obligations has a long history. Roman law created a special class of “innominate contracts” that allowed certain kinds of business transactions, such as sales (*emptio venditio*) and partnerships (*societas*), to be concluded without the formalities required for other contracts.³³ During the eleventh and twelfth centuries, long-distance trade began to reemerge in western Europe, and with it came the rise of the *lex mercatoria* to govern issues of sale, carriage, and insurance.³⁴ Nineteenth-century jurists sought to unite all voluntary obligations under a single rubric of contract,³⁵ but today the law still makes subtle and not-so-subtle distinctions between business contracts and other contracts. In the United States, the entire law of sales has been cut off from the common law and codified in Article 2 of the Uniform Commercial Code. The U.C.C. also has a set of special rules that apply

29. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 156 (2002). See also Richard Fallon, Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979, 980–81 (2002) (discussing Kaplow and Shavell’s Fairness Versus Welfare).

30. F.H. Buckley, *Introduction to THE FALL AND RISE OF FREEDOM OF CONTRACT 2* (F.H. Buckley, ed. 1999).

31. *Id.* at 4–5.

32. See *id.* at 5–6. Buckley’s assertion that all autonomy theories of contract – what he calls “right to contract” theories – can be dismissed by this kind of argument is a bit premature, since there are autonomy theories of contract that do not invoke the convention of promising. Buckley’s failure to address non-promissory autonomy theories of contract is odd given the fact that Randy Barnett had offered a more or less fully articulated version of such a theory long before Buckley’s essay appeared. See Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

33. See BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 171, 185 (1962).

34. See HAROLD J. BERMAN, LAW AND REVOLUTION 333–34 (1983).

35. See generally GRANT GILMORE, THE DEATH OF CONTRACT (1974). Gilmore’s thesis has been famously controversial on many fronts, not the least of which are his historical claims. See James Gordley, *Book Review*, 89 HARV. L. REV. 452 (1975) (attacking some of Gilmore’s more extreme historical claims about the innovations of nineteenth-century theorists).

only "between merchants."³⁶ According to some commercial law scholars, the idea of a *lex mercatoria* can be used to attack the predicament of contemporary contract theory.

Daniel Farber, for example, has implicitly built on this idea to offer a vertical integration strategy, arguing that in the context of commercial law an efficiency norm can be derived from a commitment to autonomy.³⁷ He invokes John Rawls's argument that the principles of justice can be derived from what the parties in a hypothetical original position would choose behind a veil of ignorance that keeps them from knowing how they will personally fare under any particular set of principles.³⁸ According to Farber, in the original position the parties would choose a norm under which judges decided commercial law cases using efficiency.³⁹ Unlike earlier, more ambitious—and less persuasive—consent arguments for efficiency, Farber limits his defense to the realm of commercial law.⁴⁰ In this limited context, he argues that risk aversion, distributive justice, and catastrophic reallocations of wealth are of limited concern and are thus unlikely to upset consensus in the original position.⁴¹

Farber's argument seems to demonstrate that the task of reconciling competing approaches to contract law becomes more tractable when the discussion is narrowed to the context of commercial law. This turn toward a new *lex mercatoria* can also be used to construct arguments showing that autonomy and efficiency are "horizontally independent." This approach offers a more radical solution to the problem of reconciling the competing approaches by suggesting that rather than being mistaken or derivative, autonomy theories are simply irrelevant for the vast majority of contracts.

36. See, e.g., U.C.C. §§ 2-104(3) (defining "between merchants"); 2-201(2) (relaxing slightly the requirements of the statute of frauds between merchants); 2-207(2) (stating that additional terms accompanying an acceptance become part of the contract between merchants); 2-209(2) (stating that limitations on oral alterations of written contracts between merchants must be countersigned if the writing is a form); 2-605(1)(b) (specifying special repudiation rules for contracts between merchants); 2-609(2) (stating that the reasonableness of the grounds for insecurity in contracts between merchants is determined by commercial practice).

37. Farber, *supra* note 10, at 55–57.

38. JOHN RAWLS, A THEORY OF JUSTICE 118–30 (rev. ed. 1999) (setting forth the basic argument for "justice as fairness" based on the original position).

39. Farber, *supra* note 10, at 56–57.

40. *Id.* Compare RICHARD POSNER, THE ECONOMICS OF JUSTICE 92–115 (1981) (offering a consent based justification for the "wealth maximization" norm) with JULES COLEMAN, MARKETS, MORALS, AND THE LAW 115–22 (1988) (criticizing Posner's argument) and RONALD DWORKIN, A MATTER OF PRINCIPLE 237, 251–66 (1985) (offering a slightly different critique of Posner's argument). Posner himself has largely conceded defeat in this debate. See RICHARD POSNER, THE PROBLEMATICS OF LEGAL AND MORAL THEORY (1999).

41. Farber, *supra* note 10, at 73. He also argues that the efficiency norm should only be pursued in commercial law when the lexically prior demands of justice generated by Rawls' theory are satisfied. *Id.* at 74–75.

II. THE ARTIFICIAL PERSONALITY ARGUMENT

A. Horizontal Independence and the New Lex Mercatoria

In a recent article, Alan Schwartz and Robert Scott offer a "horizontal independence" approach to the conflict between autonomy and efficiency by combining the idea of the *lex mercatoria* and economics to offer a new theory of contract law.⁴² Their core claim is that contract law should pursue no other goal than to maximize the joint gains from transactions.⁴³ All other considerations should be ignored.⁴⁴ The hope that economics can provide a master norm for contracts is not new.⁴⁵ Indeed, law and economics has had other approaches "on the run" for at least fifteen years, if not longer.⁴⁶ What is new is the basic strategy that Schwartz and Scott adopt. Following Farber, they seek to strengthen the case for the primacy of economic analysis by limiting it. Thus, they claim their theory applies only to contracts between firms.⁴⁷ In so doing they explicitly hark back to the *lex mercatoria*.⁴⁸

Limiting the theory to inter-firm contracts provides a unified theory of contract law by summarily dismissing autonomy theories.⁴⁹ Because

42. Schwartz & Scott, *supra* note 10. Much of the rest of this paper focuses on the claim put forward by Schwartz and Scott that autonomy theories of the corporation are inapplicable to contracts between corporations, and the arguments implicit in that claim. In fairness to them, and their fine article, I hasten to point out that the bulk of their piece is not directed at the issue of theoretical pluralism, but rather at working out the implications of a single-minded allegiance to the efficiency norm. Because my primary interest here is the issue of theoretical pluralism, rather than the specific elaborations of autonomy and efficiency theories, I focus mainly on those parts of their article that address the issue of pluralism. I am in no way claiming that that this piece is a response to the subtle economic arguments that make up the bulk of their article.

43. *Id.* at 544.

44. *See id.*

45. *See, e.g.,* Buckley, *supra* note 30, at 2 ("Not merely does law-and-economics scholarship offer a compelling normative explanation for free contracting, but rival theories are unpersuasive."). *See also* KAPLOW & SHAVELL, *supra* note 29, at 52–58 (arguing that welfare based theories of contract are superior to alternatives based on promising or personal autonomy).

46. *See* Kraus, *supra* note 23, at 687 ("As in private law scholarship generally, economic analysis is the dominant paradigm in contemporary contracts scholarship."). Although, dating such things is always subjective, I would point to Richard Craswell's article attacking the inability of autonomy theories to account for the default rules of contract law as the decisive turning point in favor of economic analysis. *See* Craswell, *supra* note 16.

47. Schwartz & Scott, *supra* note 10, at 544. They do not foreclose the possibility, however, that it may apply to other contracts as well. *Id.* For purpose of their theory, Schwartz and Scott define a firm as: "(1)[A]n entity that is organized in corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm." *Id.* at 545.

48. They write, "[F]or centuries [commercial law] has drawn a distinction between mercantile contracts and others. Modern scholars have not systematically pursued the normative implications of this ancient distinction, however. We attempt to cure this neglect by setting out the theoretical foundations of a law merchant for our time." *Id.* at 550 (citation omitted).

49. Limiting the theory to contracts between firms also makes the positive economic analysis of contracting relationships more tractable. Many non-economists doubt that the rational actor model of modern law and economics can provide an adequate epistemological framework for legal theory. Behavioralists object to simple theories of utility maximization, pointing to evidence of systematic cognitive biases that seem to falsify the basic assumptions of the rational actor model. *See, e.g.,* Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); and Jennifer Arlen, Matthew Spitzer & Eric Talley, *Endow-*

all of the agents in this realm are corporations, autonomy theories based on a commitment to individual freedom are inapplicable.⁵⁰ "These answers are ruled out . . . because business firms that make commercial contracts are artificial persons whose autonomy the state need not respect on moral grounds, and whose morality is ordinarily required by positive law."⁵¹ If this move is justified, then Schwartz and Scott may have found the holy grail of contemporary contracts scholarship: A unified theory of contract law. As they point out, most interpersonal agreements and firm-to-person agreements are not governed by the law of contracts.⁵² While human beings may make contracts, most of their voluntary relations are governed by employment law, real estate law, family law, or consumer protection law.⁵³ Thus, even if a theory of firm-to-firm contracts is not a complete account of contract law, it would cover the lion's share of contracts in the real world.

B. Autonomy Theories and the Corporation

Unfortunately, Schwartz and Scott do not provide any more details about why the artificial nature of the corporate person vitiates autonomy theories of firm-to-firm contracts. In the remainder of this section, I will flesh out this argument, explicitly articulating the case for banishing autonomy theories from the discussion of the new *lex mercatoria*. I shall call this line of reasoning the Artificial Personality Argument. Because they refer to this argument rather than explicitly developing it, what follows is not exposition but original analysis. Nevertheless, the Artificial Personality Argument lies at the bottom of the common intuition that autonomy theories cannot apply to contracts by corporations. While I ultimately conclude that the Artificial Personality Argument is a failure, in laying it out I try to make the strongest case possible for it, and in the end I believe that it stands as a real challenge to autonomy theories rather than as a straw man that can easily be brushed aside.

The Artificial Personality Argument is based on the philosophical assumptions of contemporary autonomy theories.⁵⁴ The works of Charles Fried and Randy Barnett provide two of the more widely discussed examples of autonomy approaches and briefly sketching their

ment Effects Within Corporate Agency Relationships, 31 J. LEGAL STUD. 1 (2002). Because firms, however, are profit maximizing institutions rather than actual persons, one can argue that in the limited context of corporate behavior, the critiques of the rational actor model, whatever their force elsewhere, are quite weak. Schwartz & Scott, *supra* note 10, at 550–51. Schwartz and Scott acknowledge that agency costs and cognitive biases may also distort firm behavior, causing them to deviate from the predictions of a pure rational actor model. However, they are optimistic that competition and corporate mortality largely weed out these problems. See *id.* at 551 & n.18 (responding to behavioral law and economics literature on corporate behavior).

50. See Schwartz & Scott, *supra* note 10, at 556.

51. *Id.*

52. *Id.* at 544.

53. See *id.*

54. See *id.* at 556 n.25.

theories will illuminate the Artificial Personality Argument.⁵⁵ Both of these theorists justify and explain contract law by arguing that it represents a commitment to the value of individual liberty.⁵⁶ According to Fried, the basis of contract is the enforcement of promises.⁵⁷ He goes on to argue that "[t]he obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust."⁵⁸ Individual autonomy, in turn, rests on what he calls the "liberal ideal."⁵⁹ According to Fried this is the principle that "whatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours."⁶⁰ Fried's "liberal principle" essentially restates the traditional distinction between the right and the good. In liberal political philosophy, the right defines the sphere in which people are free to pursue their own ends free of coercion. The good represents the ideals and ends that people use their freedom to pursue.⁶¹ According to Fried, promising provides us with a way of enlisting the help of others in the pursuit of our vision of the good without violating their rights.⁶² At the same time, breaking a promise violates the "liberal principle," treating the disappointed promisee as a mere means to the promisor's ends.⁶³ For Fried, contract law is simply the legal instantiation of this set of moral principles.

Fried's theory is open to a number of objections. Its focus on the will of the promisor seems to commit it to subjective theories of contract formation and interpretation, both of which have been rejected by the common law and present practical problems.⁶⁴ In addition, contract as promise commits the law to enforcing principles of personal morality,

55. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Barnett, *supra* note 32. Other examples are summarized in Peter Benson, *Contracts*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 24 (Dennis Patterson ed., 1996).

56. FRIED, *supra* note 55, at 2, and Barnett, *supra* note 32, at 306.

57. FRIED, *supra* note 55, at 2-4.

58. *Id.* at 16.

59. *Id.* at 7.

60. FRIED, *supra* note 55, at 7.

61. "[L]iberals . . . draw a distinction between the 'right' and the 'good' - between a framework of basic rights and liberties, and the conceptions of the good that people may choose to pursue within the framework." Michael Sandel, *Introduction to LIBERALISM AND ITS CRITICS* 1, 3 (Michael Sandel, ed. 1984). For further discussions of the distinction, see JOHN RAWLS, *A THEORY OF JUSTICE* §§ 5-6, 48, 68, 84 (rev. ed. Oxford University Press 1999) and BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 8-19 (1980).

62. FRIED, *supra* note 55, at 8.

63. See FRIED, *supra* note 55, at 16-17 ("By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then break it.").

64. See, e.g., *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) (Easterbrook, J.) ("You can't escape contractual obligation by signing with your fingers crossed behind your back, even if that clearly shows your intent not to be bound."), *Billmyre v. Sacred Heart Hosp. of Sisters of Charity*, 331 A.2d 313, 316 (Md. 1975) ("When language of a contract is clear, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."). See generally E. ALLAN FARNSWORTH, *CONTRACTS* 118-127, 137-139, 148-152, 503-505 (2d ed. 1990) (discussing the role of the objective theory in the contemporary law of contracts).

which apparently conflicts with the liberal principles that Fried invokes.⁶⁵ In response, Barnett has proposed an autonomy theory based on the alienation of rights rather than the sanctity of promising.⁶⁶ Barnett begins his argument by invoking a version of Fried's "liberal principle":

The function of . . . [a] theory based on individual rights is to define the boundaries within which individuals may live, act, and pursue happiness free of the forcible interference of others.⁶⁷

Barnett dispenses with Fried's complex gyrations around promising and its autonomy-extending powers.⁶⁸ Rather, he looks to how rights are acquired and transferred.⁶⁹ While arguing that certain rights are inalienable,⁷⁰ Barnett claims that most rights can be transferred by their holders to others.⁷¹ Within the liberal framework, consent becomes the touchstone for the transfer of rights precisely because rights are meant to define the sphere within which an individual is entitled to live her life free of coercion.⁷² Contract law thus becomes the legal mechanism that facilitates and polices the consensual transfer of rights. Most contracts involve a commitment to some future action. This temporal aspect poses a potential embarrassment to Barnett's consent theory, which seems to reduce contracting to conveyancing. It is also part of what makes the promissory theory attractive. Promises are by definition commitments to some future action. A consent theory of contract, however, has the same advantage so long as one can conceptualize future performance as a kind of alienable present entitlement.⁷³

65. See SMITH, *supra* note 2, at 69. Furthermore, Smith writes:

The reason it is said to be illegitimate for the state to enforce promises qua promises is that doing so is inconsistent with the 'harm principle.' This foundational principle of modern liberalism . . . holds that it is illegitimate for the state to interfere with an individual's liberty unless that individual has harmed . . . another individual.

Id.; Randy Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1025 (1991) ("[A] moral theory of promising, standing alone, would have courts enforcing purely moral commitments, which is tantamount to legislating virtue."). Schwartz and Scott seem to be implicitly alluding to this point when they note that the morality of corporate behavior is already required by the non-contract law. Schwartz & Scott, *supra* note 10, at 556. But see Thomas Scanlon, *Promises and Contracts*, in THE THEORY OF CONTRACT LAW 86 (Peter Benson, ed. 2001) (rejecting the argument that enforcing promises is an illegitimate exercise morality enforcement).

66. See Barnett, *supra* note 32, at 271-74 (criticizing will theories of contract and promissory theories of contract).

67. Barnett, *supra* note 32, at 291.

68. See generally *id.*

69. See generally *id.*

70. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, in PERSPECTIVES ON CONTRACT LAW 70 (Randy E. Barnett, ed., 2d ed. 2001).

71. Barnett, *supra* note 32, at 293 ("The subjects of most rights transfer agreements are entitlements that are indisputably alienable.").

72. See *id.* at 296-300 (discussing consent as the moral basis for the transfer of rights).

73. See, e.g., RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 73 (1995). The possibility of conceptualizing promises of future action as transfer of a presently existing entitlement is perhaps the chief internal weakness of transfer theories like Barnett's. Stephen Smith has trenchantly summarized the argument, writing:

Despite their important differences, these theories are both grounded in the moral assumptions of liberal individualism.⁷⁴ Liberalism takes the individual human being as the basic unit of moral calculus, and then deduces moral theories from this basic assumption.⁷⁵ Both promise and consent theories see the autonomy of individuals as providing a normative justification for the law of contracts. With these individualistic assumptions clearly in view, we can understand the nature of the Artificial Personality Argument and the dismissal of autonomy theories from the new *lex mercatoria*.

According to the Artificial Personality Argument, applying autonomy theories to corporate contracts is a category mistake. In justifying respect for the autonomy of others, Immanuel Kant wrote:

Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. He must in all his actions, whether directed to himself or to other rational beings, always be regarded at the same time as an end.⁷⁶

Kant's formulation makes explicit that respect for autonomy is tied to the humanity of the rights-bearer.⁷⁷ Liberals do not respect the autonomy of rocks precisely because rocks are not human beings. According to the Artificial Personality Argument corporations are like rocks rather

The conceptual objection to transfer theories is that it is not possible for contracting parties to do what such theories suppose they are doing when they make a contract. More specifically, the objection is that the rights that transfer theories suppose are transferred by contracts do not exist prior to the making of contracts . . . I have the right to give or not give you my watch next Thursday. But a contract in which I agree to deliver my watch to you next Thursday cannot be regarded as transferring that liberty right to you.

SMITH, *supra* note 2, at 101.

74. The link between autonomy-based arguments for freedom of contract and liberalism has, however, been questioned by some self-proclaimed liberal theorists. See, e.g., Dori Kimel, *Neutrality, Autonomy, and Freedom of Contract*, 21 OXFORD J. OF L. STUD. 473 (2001) (arguing that the version of perfectionist liberalism articulated by Joseph Raz justifies significant restrictions on contractual freedom). See also DORI KIMEL, *FROM PROMISE TO CONTRACT* (2003). Stephen Smith, for example, links what he calls "rights-based theories" (autonomy theories in this article) with liberal individualism, writing:

Rights-based theories of contract typically understand rights in the traditional 'Kantian' sense. Rights, in this view, reflect the classically individualistic values. . . . [I]t is expressed in the idea that the foundation of rights is individualist. These foundations are typically regarded as either the protection of specifically individual interests (say an interest in owning property or achieving personal autonomy), or, following Kant again, as flowing from a particular conception of human agency. It would be inappropriate, in this view, to explain our rights as grounded in, say, utilitarian considerations of general welfare.

SMITH, *supra* note 2, at 141.

75. See, e.g., STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* 14 (1992) ("The idea that society, and particularly its political arrangements, can be understood as . . . a contract between individuals has been a major theme in the history of liberal thought.").

76. IMMANUEL KANT, *THE GROUNDING FOR THE METAPHYSICS OF MORALS* 35 (James W. Ellington, trans. 1981) (1785).

77. *Id.*

than people.⁷⁸ Autonomy theories of contract cannot justify the contract law applying to corporations precisely because such theories are deeply grounded in respect for human beings as free definers of their own lives.⁷⁹ Corporations are not human beings and are not entitled to be treated as ends rather than means. Morality does not require "leaving them free to make their lives as we are left free to make ours."⁸⁰ To paraphrase Chief Justice Rehnquist, the claim of the Artificial Personality Argument is that autonomy theories are concerned with "the liberty of natural, not artificial persons."⁸¹ Seen in these terms, the Artificial Personality Argument is a "horizontal independence" strategy that purports to demonstrate that firm-to-firm contracts are a separate phenomenon about which autonomy theories have nothing to say.

Once we explicitly state the Artificial Personality Argument, it becomes clear that it stands or falls based on one's theory of the corporation. If corporations really are fundamentally different than natural persons, then concern for human autonomy tells us nothing about the law governing their contracts. On the other hand, if the distinction between natural persons and corporations can be collapsed, then autonomy theories can be used to understand firm-to-firm contract law and the basic problem of theoretical pluralism remains. If the Artificial Personality Argument fails, we must look elsewhere for a reconciliation. In the next section, I turn to theories of the corporation that could support the Artificial Personality Argument.

III. ARTIFICIAL PERSONALITY THEORIES OF THE CORPORATION

The Artificial Personality Argument rests on the assumption that corporations are not human beings. We must be wary of metaphors. It is easy to speak of "soulless corporations" or "impersonal" firms, but if one looks at the functioning of any corporation, what one sees are actual human beings.⁸² Even shell corporations that exist only as file folders and tax shelters have their documents handled by digits attached to human hands. *The Wall Street Journal* regularly reports on the contracts that corporations have "signed" with one another, but it also mentions the human beings that actually put pen to paper.⁸³ Thus, the Artificial Personality Argument cannot literally rely on the claim that corporate contracts are not the acts of human beings. Rather, it must rest on some

78. See Schwartz & Scott, *supra* note 10, at 556.

79. Cf. Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1236 (1983).

80. Cf. FRIED, *supra* note 55, at 7.

81. Cf. First National Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J. dissenting) (quoting Northwestern National Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906)).

82. Cf. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 194 (2d ed. 1985).

83. See, e.g., James Bandler, *Losing Focus: As Kodak Eyes Digital Future, A Big Partner Starts to Fade*, WALL ST. J., Jan. 23, 2004 at A1 (discussing contracts signed by Walgreens, Kodak, and Fujii), *Healthcare Brief*, WALL ST. J., Jan. 23, 2004 at A10 (discussing contracts signed by RiteAid, Corp.).

concept of the corporation that explains why the activity of corporate agents signing contracts is morally different than the activity of two neighbors clinching a deal at a yard sale. The Artificial Personality Argument contends that autonomy theories of contract cannot apply to corporate contracts because to do so would be nonsensical *from the point of view of the autonomy theories themselves*. Thus in order to make the Artificial Personality Argument coherent, we need some concept of the corporation that renders the human activity of the corporation unworthy of the kind of moral respect demanded by autonomy theories.

There are three basic theories about the nature of corporations: the real theory, the concession theory, and the fiction theory. The real theory claims that corporations are the legal expression of organic groups or other supra-individual entities and should be understood as having a will and an existence that cannot be reduced to the sum of their collective parts.⁸⁴ The concession theory claims that the corporation is a creation of the state that exercises delegated authority to serve the purposes of the government, even when that purpose is "private" business.⁸⁵ The fiction theory claims that the corporation is nothing more than a collection of individuals and that the language of corporations is little more than a useful shorthand referring to a complex set of individual rights and obligations.⁸⁶ None of these theories has ever completely dominated the law of corporations, and one can find traces of each theory in the reported cases. Hence, it is difficult, if not impossible, to match particular theories with different jurisdictions or different periods. Throughout history, they have existed side by side in the law, taking on different names and different nuances of meaning.⁸⁷ They have been combined and confused with one another in various ways, but the basic claims demonstrate a remarkable continuity.

In the remainder of this section, I shall argue that the Artificial Personality Argument can employ both the real and the concession theory. In the next section, I will argue that the Artificial Personality Argument cannot use the fiction theory, and that such a theory can be employed by autonomy theories to understand the nature of corporate contracts.

A. The Real Theory of Corporations

Although the real theory of the corporation has almost disappeared from discussions of corporate law, at one time it was an important posi-

84. See Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068 (1994).

85. *Id.* at 1069.

86. *Id.* at 1064.

87. See *id.* at 1064-65.

tion in corporate jurisprudence.⁸⁸ Writing at the end of the nineteenth century, Ernst Freund summarized the position, stating:

Above the existence of the individual there is the existence of the species, and the corporation is nothing but the legal expression of this fact, which appears as a reality in the physical person, so the higher will of the species is embodied in numerous and various forms of association, and as a result we find, beside the individual, entities of a higher order endowed with volition and acting capacity. And where the law recognizes such embodied will as a person, we have a juristic person or a corporation.⁸⁹

There are two key ideas in this theory. The first is that the legal form of the corporation recognizes an already existing community. One way in which this concept manifests itself legally is through the doctrine of "corporation by prescription."⁹⁰ At common law, a community—such as a town—which operated as an entity for a long period of time could become a legal person without a formal charter of incorporation.⁹¹ The second key idea is that corporate bodies are possessed of a collective will that cannot be reduced to the individual wills of the members of the corporation.

The real theory of the corporation received its most forceful statement in German legal thought. Nineteenth-century German jurists were eager to find authentically German legal traditions in contrast to the foreign influences of the Roman law.⁹² Otto Gierke became the proponent of this approach in the context of corporate law.⁹³ According to Gierke, the indigenous, pre-Roman German law had a thick notion of corporate existence, what Gierke called *Genossenschaft*.⁹⁴ In contrast to the thin,

88. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 67 (2001) ("For almost forty years after 1890 American jurists, like their German French, and English counterparts, were preoccupied with the theory of legal personality.").

89. ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* 13 (Chicago, The Univ. of Chicago Press, 1897).

90. One of the earliest recorded cases dealing with this doctrine was Lord Coke's opinion in *The Case of Sutton's Hospital*, where he wrote that if "before time of memory foundation was made . . . foundation is taken for incorporation." 10 Coke's Rep. 23a, 33a (Kings Bench, 1612) *reprinted in* 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE* 347, 372 (Steve Sheppard ed., 2003).

91. See, e.g., *Town of Juliaetta v. Smith*, 85 P. 923, 924 (Idaho 1906) (municipal corporation may exist by prescription from long use even if the formalities of incorporation were not complied with); *Worley v. Harris*, 82 Ind. 493, 496 (1882) ("The exercise of corporate powers over a place for twenty years, with knowledge on the part of the public, is conclusive evidence . . . of a corporation by prescription."); *Bassett v. Porter*, 58 Mass. 487, 492-93 (1849) (stating that an entity of long standing may be presumed to have a legal existence even if no record of incorporation exists). As these cases – especially *Bassett* – show, corporations by prescription were frequently created by recourse to the legal fiction that a charter had been granted at some point in the past but inadvertently lost.

92. See J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 320-25 (1992) (discussing the work of nineteenth-century German jurists of the so-called "Historical School").

93. See OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (Frederick William Maitland trans., 1900) (Beacon Press 1958).

94. See *id.* at 37 ("It is a distinctive trait of medieval doctrine that within every human group it decisively recognizes an aboriginal and active Right of the group taken as a Whole.").

Roman theory that a corporation was nothing more than a legal fiction, Gierke argued that historically German law recognized the organic existence of the group.⁹⁵ Corporations, he argued, are the legal manifestation of communities possessed of a collective spirit.⁹⁶ Hence, the acts of a corporation are not the mere aggregation of the individual acts of its members, but rather should be understood as being qualitatively different. Gierke's treatise became influential in common law countries by virtue of a translation by Frederick Maitland.⁹⁷ Maitland and others argued that in numerous instances the common law acknowledged the real existence of collectives and treated their actions as what they were—the choices of organic groups, even when the groups were not formally incorporated. They took this as evidence that in practice the common law, whatever the rhetoric of its judges and lawyers, contained elements of the real theory.⁹⁸

The real theory of the corporation is largely forgotten today, but Meir Dan-Cohen has adopted a position very similar to it, albeit one shorn of Gierke's Hegelianism.⁹⁹ Dan-Cohen presents his theory through a hypothetical.¹⁰⁰ Imagine a regular company with human managers and employees who make widgets.¹⁰¹ One day the managers decide to mechanize the company's production completely.¹⁰² All of the employees are fired and replaced with widget-making machines.¹⁰³ This move to automation proves so productive that the shareholders vote to replace management with computers.¹⁰⁴ The computers then decide to alter the firm's capital structure, and the corporation purchases all of its outstanding shares of stock in a buy back, leaving a fully functioning corporation bereft of any human beings at all.¹⁰⁵ According to

95. *See id.*

96. *Id.*

97. *See* HORWITZ, *supra* note 88, at 71–72 (discussing Maitland's influence on the debates over corporate theory).

98. *See* Frederick William Maitland, *Introduction to OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES* vii (Frederick William Maitland trans., 1900) (Beacon Press 1958); Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 L.Q. REV. 219 (1911). The sorts of acknowledgments of organic group life pointed out by Maitland continue to exist in American law. *Id.* Thus, American law routinely treats unincorporated associations as persons, implicitly acknowledging according to Maitland's argument, the "real" status of these groups. *See, e.g.*, 5 U.S.C. § 8471(4) (2005) (defining "person" under the Federal Retirement Thrift Investment Management System to include "unincorporated association"); 11 U.S.C. § 101(9)(iv) (2005) (defining "corporation" under the bankruptcy laws to include an "unincorporated company or association"); 12 U.S.C. § 375b(9)(A)(i) (2005) (noting that an "association" or "unincorporated organization" can violate Federal Reserve Board regulations); 15 U.S.C. § 17 (2005) (noting that "unincorporated associations" can be sued by major league baseball players for anti-trust violations).

99. *See generally* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR THE BUREAUCRATIC SOCIETY 47–51 (1986).

100. *Id.* at 46.

101. *Id.*

102. *Id.* at 47.

103. *Id.*

104. *Id.*

105. *Id.*

Dan-Cohen, "[t]he displacement of human management by computers would . . . have little effect on both the actual operations and the legal status of [the corporation]."¹⁰⁶ The only thing that makes the hypothetical implausible is the demands it places on computer technology not on legal theory.¹⁰⁷ The ease with which we can imagine fitting such a personless corporation into our existing laws suggests that corporations should be treated as *sui generis*.

Regardless of whether one conceptualizes the real theory in the terms of Gierke or Dan-Cohen, it fits the needs of the Artificial Personality Argument. Gierke's *Genossenschaft* may be entitled to some kind of respect and autonomy, but such requirements cannot be specified using contemporary autonomy theories. The liberalism upon which the autonomy theories rely is essentially individualistic. To borrow the words of Gierke, in liberal thought there is "a drift, which makes for a theoretical concentration of right and power in the highest and widest group on the one hand and the individual man on the other, at the cost of all intermediate groups."¹⁰⁸ *Genossenschaft* is thus outside the categories of liberal theory. Dan-Cohen, as a contemporary of Barnett and Fried, is even more explicit:

The negative answer to the question . . . [of] whether or not organizations can have original autonomy rights of their own . . . follows simply and straightforwardly from combining the ethical individualism of the paradigm of autonomy with our description of organizations [in the computerized company hypothetical].¹⁰⁹

Because corporations *qua* corporations can exist independent of any human members they cannot be endowed with rights based on notions of human dignity. It does not follow from this that corporations are entitled to no rights. Such rights, however, including presumably the right to contract,¹¹⁰ must be based on some sort of consequentialism.¹¹¹

106. *Id.* at 48.

107. *See id.* Indeed, Dan-Cohen does not even believe that his hypothetical places unrealistic demands on computer technology. *Id.*

108. GIERKE, *supra* note 93, at 87.

109. DAN-COHEN, *supra* note 99, at 61.

110. *See id.* at 98-102 (discussing contract remedies within the context of Dan-Cohen's theory).

111. *Id.* at 80 ("[I]t is clear that as far as derivative rights are concerned the utilitarian is indifferent whether the right bearing unit is an individual human being or a Personless Corporation."). Not surprisingly, Dan-Cohen's version of the "real theory" is particularly hospitable to the Artificial Personality Argument when it is employed by economic partisans like Schwartz and Scott. *Id.* Indeed, he anticipates the basic approach of Schwartz and Scott, if not the details of their particular economic arguments. *Id.* He mirrors the individual-individual, individual-organization, organization-organization typology presented by Schwartz and Scott, and like them argues that in organization-organization transactions in particular considerations of utility should dominate. *See id.* at 191.

B. The Concession Theory of Corporations

In contrast to the marginal place of the real theory in English-speaking jurisprudence,¹¹² the concession theory flows naturally from the history of Anglo-American corporate law and is a prominent feature of much of the doctrinal discussion of that law.¹¹³ Stated succinctly, it claims that corporations are institutions that exercise authority delegated to them by the state.¹¹⁴

Some of the very first business corporations were the royal charter companies of Elizabethan England.¹¹⁵ These corporations were created by a special charter from the crown that gave them not only corporate existence but also a monopoly over some aspect of commerce.¹¹⁶ The Royal East India Company neatly illustrates the state-like functions of these companies.¹¹⁷ This corporation was responsible for the entire English conquest of the Indian subcontinent.¹¹⁸ At the zenith of its power it ruled the entire country and administered a “private” army of 260,000 troops, more than twice the size of the British Army of the time.¹¹⁹ Indeed, India—or some portion of it—was formally ruled by the East India Company for over a century until 1858, when it turned the government of the subcontinent over to the Crown.¹²⁰

Although less dramatic, the early history of America also illustrates the quasi-public status of early corporations. The earliest corporations operating in America were some of the colonies themselves. For example, both Massachusetts and Virginia were self-governing corporations created by the grant of a charter.¹²¹ During the colonial period, there were only a tiny handful of business corporations created by the colonial legislatures,¹²² and municipal corporations were only slightly more

112. See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1490–91 (1989) (describing the short life of the “real theory” in American jurisprudence).

113. *Id.*

114. *Id.* (“Like government authorities, managers exercise their power by means of a rationalized system of control and administration like the government, the ‘public’ firm was a ‘political’ entity.”).

115. See generally W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382 (1921) (discussing corporations law during the Elizabethan period).

116. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 21 (2003).

117. But see Ron Harris, *The Formation of the East India Company as a Deal Between Entrepreneurs and Outside Investors*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=567941 (last visited Sept. 30, 2005) (offering a contractual account of the formation of the East India company).

118. *Id.*

119. *Id.*

120. *Id.* at 28.

121. 1 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2 n.3 (1999 & Supp. 2005) (noting that Virginia was incorporated in 1606 and Massachusetts in 1629).

122. Simeon Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 449, 450 (1903) (listing the six corporate charters granted by colonies for businesses before the Revolution).

common.¹²³ With independence, however, states began granting more corporate charters, but they did so mainly to further quasi-public goals such as the construction of bridges or canals and the charters frequently granted monopolies.¹²⁴ The bulk of businesses continued to operate as sole proprietorships, partnerships, or unincorporated joint-stock companies.¹²⁵ Although the first general incorporation statute was passed by North Carolina in 1795,¹²⁶ most corporations continued to be formed by special acts of the legislature that gave to individual corporations specific powers and rights.¹²⁷

Although there was agitation to open up the corporate form during the Jacksonian period,¹²⁸ it wasn't until after the Civil War that the corporation became the dominant form of business organization in America.¹²⁹ The change came with general incorporation statutes that issued charters to corporations for "any lawful purpose."¹³⁰ Even those corporations, however, continued to be conceptualized as concessions from the state. For example, in his first inaugural address as governor of New Jersey, Woodrow Wilson reaffirmed that "[a] corporation exists, not of natural right, but only by license of law, and the law . . . is responsible for what it creates."¹³¹ Today, the language of delegated power continues to pervade the legal language surrounding corporations.¹³² For ex-

123. Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1096 (1980) ("Prior to the Revolution there were only about twenty incorporated cities in America.").

124. FRIEDMAN, *supra* note 82, at 188-89. "[P]eople in 1800 identified corporations with franchise monopolies." *Id.* at 194.

125. See FRIEDMAN, *supra* note 82, at 190 ("Until . . . the middle of the [nineteenth] century, the corporation was by no means the dominant form of business organization."); Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 886-90 (2000) (chronicling the use of unincorporated joint-stock companies prior to the passage of general incorporation statutes). See also FLETCHER, *supra* note 121, § 2 ("[M]ost of the business of the period [early American history] being transacted by unincorporated joint stock companies more in the nature of limited partnerships.").

126. See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 295-96 (1998) ("In 1795, North Carolina adopted perhaps the first incorporation statute in the United States, granting canal builders the right of eminent domain under certain conditions and the power to 'sue and be sued, plead and be impleaded, under the denomination of the canal company.'").

127. See FRIEDMAN, *supra* note 82, at 188 ("In the early 19th century . . . the legislature granted charters by statute, one by one."). In addition, Congress incorporated some businesses by special statutes, perhaps most notably in the nineteenth century, the Union Pacific Railroad Company. See Act of July 1, 1862, 37 Cong. Ch. 120, July 1, 1862, 12 Stat. 489 (incorporating Union Pacific).

128. See FRIEDMAN, *supra* note 82, at 194-95 (discussing Jacksonian agitation over corporations).

129. *Id.* at 511 ("By 1870 corporations had a commanding position in the economy.").

130. New York seems to have been the first state to adopt such a law in 1866. See 1866 N.Y. Laws 1896.

131. *Quoted in* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 559 n.37 (1932) (Brandeis, J., dissenting).

132. See, e.g., *Allen v. Malvern Country Club*, 746 S.W.2d 546, 549 (Ark. 1988) ("Corporations organized under the laws of this state are but creatures of the legislature"); *Sahara Grotto & Styx, Inc. v. State Bd. of Tax Comm'rs*, 261 N.E.2d 873, 874 (Ind. Ct. App. 1970) (stating that corporations possess powers delegated to them by the statutes of their incorporation). The extent to which this delegation language continues to have meaning in an age of general incorporation statutes is illustrated by the fact that seemingly core aspects of government can be delegated to private cor-

ample, the Supreme Court has argued that corporations are creations of the state designed to confer special benefits on shareholders:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximizing the return on their shareholders' investments.¹³³

For liberal theory, the freedom of individuals is taken as a *prima facie* good, while the freedom of the state is viewed with great suspicion.¹³⁴ This suspicion is such that a libertarian theorist like Robert Nozick can claim, "The fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all."¹³⁵ One can think of social contract theories and other liberal justifications for the state as secular theodicies in which the primal evil of social coercion must be justified.¹³⁶ Such coercion is the antithesis of individual autonomy and something requiring special explanation.¹³⁷ As I have already noted, autonomy theories of contract rest implicitly or explicitly on some version of the liberal distinction between the right and the good. Individuals have rights, including the right to contract, so that they can pursue their own visions of the good.¹³⁸ In contrast, the state is not supposed to pursue a particular vision of the good.¹³⁹ Rather, respect for individuals requires that the state remain neutral as to their particular ideals, confining itself to the protection of their rights, or pursuit of a limited conception of the good constrained by the superior demands of individual rights.¹⁴⁰

porations. See *Owens v. Tri-County Turkey Creek Conservancy Dist.* No. 21, 418 P.2d 674, 678 (Okla. 1966) (taxing power); *Ins. Co. of N. Am. v. Kueckelhan*, 425 P.2d 669, 679 (Wash. 1967) (law enforcement); *Valero Eastex Pipeline Co. v. Jarvis*, 926 S.W.2d 789, 792 (Tex. App. 1996) (eminent domain).

133. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1990).

134. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* ix (1974).

135. *Id.* at 4.

136. Cf. JOHN MILTON, *PARADISE LOST* Bk. I. ll. 23–26 (1667), available at <http://darkwing.uoregon.edu/~rbear/lost/pl1.html> ("what is low raise and support; [t]hat to the highth of this great [a]rgument I may assert Eternal Providence, and justifie the wayes of God to men").

137. For a modern, and in some ways extreme, approach to the problem of justifying the "evil" of collective coercion see NOZICK, *supra* note 134, at chs. 5–6 (presenting arguments in favor of a state monopoly on most forms of protective violence).

138. See Joyce E. Taber, *An Unanswered Question About Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude The EEOC From Seeking Monetary Relief On An Employee's Behalf In a Title VII Case?*, 50 AM. U. L. REV. 281, 291 n.58 (2000).

139. Michael Mello, *Adhering To Our Views: Justices Brennan and Marshall And The Dissent Towards Death As a Punishment*, 22 FLA. ST. U. L. REV. 592, 683 n.624 (1995).

140. It should be noted that while the language of "rights" has a minimalist and libertarian flavor to it some left-of-center theorists find off-putting. See, e.g., Braucher, *supra* note 13, at 706 (referring to liberal theory's obsession with "dreaded 'crossings' of our 'boundaries'"). There are liberal theories that justify a fairly expansive vision of wealth redistribution and the provision of social services by the government. See, e.g., RAWLS, *supra* note 38, at 266 (arguing that social inequalities should be arranged so as to benefit those who are least well off).

We can now see why the concession theory of the corporation meets the conceptual needs of the Artificial Personality Argument. If a corporation is an institution that exercises power delegated to it by the state, then it does not make sense to justify the law governing its contracts with the same theories that justify the contracts of individuals. On this view, the actual human beings who sign the corporation's contracts and carry out its affairs are analogous to government bureaucrats. They are human beings, but their official actions are of a fundamentally different nature—from the point of view of liberal political theory—from those engaged in by private individuals. "Whether the corporate privilege shall be granted or withheld is always a matter of state policy[.]"¹⁴¹ Justice Brandeis wrote. "If granted, the privilege is conferred in order to achieve an end which the state deems desirable."¹⁴² Under the concession theory it is this link between corporations and the desires of the state that makes autonomy theories inapplicable to firm-to-firm contracts.

IV. THE FICTION THEORY, THE NEXUS OF CONTRACTS, AND AUTONOMY

One of the striking things about the theories sketched in the preceding section is how foreign they seem to most of contemporary corporate law scholarship. For example, one scholar contends, "It has been over a half-a-century since corporate legal theory, of any political or economic stripe, took the concession theory seriously."¹⁴³ While this is a bit of an exaggeration,¹⁴⁴ it is safe to say that neither the real nor the concession theory represents a dominant approach in law and economics scholarship. Rather the dominant approach has been a modern version of the ancient fiction theory of the corporation.¹⁴⁵ Building on an individualistic framework for understanding legal entities that goes back at least to the eleventh century, if not earlier, modern economists have conceptualized the corporation as a "nexus of contracts."¹⁴⁶ As I shall argue, this concept of the firm cannot be used by the Artificial Personality Argument and is actually quite consistent with autonomy theories of contract.

A. *The Fiction Theory of Corporations*

The fiction theory of the corporation is one the oldest approaches to corporate jurisprudence. It asserts that corporations are nothing more

141. *Liggett*, 288 U.S. at 545 (Brandeis, J, dissenting).

142. *Id.*

143. STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 141 (2002).

144. See, e.g., MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 151 (8th ed. 2000) ("[C]orporate law is constitutional law; that is, its dominant function is to regulate the manner in which the corporate institution is constituted, to define the relative rights and duties of those participating in the institution, and to delimit the powers of the institution vis-a-vis the external world.").

145. See BAINBRIDGE, *supra* note 143, at 199 ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory.").

146. See Michael J. Phillips, *supra* note 84, at 1071-72.

than useful conceptual devices for understanding the relationships between individuals.¹⁴⁷ Under Roman law, the dominant form of business organization, the *societas*, was conceptualized as a contract and lacked most of the incidents of "corporateness."¹⁴⁸ During the eleventh century, the jurisprudence of corporations took on a new urgency as the Catholic Church came to be conceptualized legally as a set of interlocking corporations.¹⁴⁹ The medieval canonists, in turn, drew on the nominalist strand of scholastic thought to define the corporation. As one fourteenth-century jurist succinctly summarized the prevailing orthodoxy, "All philosophers and canonists [believe] that the whole does not differ really . . . from its parts."¹⁵⁰ The medieval formulation of corporations as "artificial persons" was to exert a powerful influence on corporate theory, and centuries later the Supreme Court would use the same label.¹⁵¹

The medieval period also saw the rise of contractually created business organizations that served many of the same functions as modern business corporations. One of the primary functions of legal personality and limited liability is what economists call "asset partitioning." For example:

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.¹⁵²

Medieval lawyers solved these problems through a variety of contractual mechanisms. Merchants could band together for a voyage, and purchase a ship using a so-called "bottomary loan" (essentially a maritime mortgage). The ship would then become solely liable for the venture's liabilities.¹⁵³ Italian traders created a contractual entity for business purposes—known as a *commenda*—that partitioned assets along similar

147. See *id.* at 1064–65.

148. NICHOLAS, *supra* note 33, at 185 ("Since Roman law had no concept of a corporation, every joint commercial venture necessarily took the form of a *societas* . . .").

149. See BERMAN, *supra* note 34, at 215–20 (discussing the constitutional role of corporate law in the Papal Revolution of the eleventh century).

150. *Id.* at 607–08 n.48 (quoting the jurist Bartolus).

151. See Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 605 (1819) (referring to corporations as "artificial persons").

152. Mahoney, *supra* note 125, at 876.

153. See *id.* at 882–83 (discussing bottomary loans).

lines.¹⁵⁴ During the Elizabethan period there were numerous joint stock companies that lacked any formal charter. These companies were entirely contractual and allowed investors to limit their liability to the initial investment and reap some *pro rata* share of the returns of the venture.¹⁵⁵ In the wake of the South Sea Bubble, parliament passed laws against unchartered joint stock companies, but such companies continued to operate despite the law until the middle of the nineteenth century.¹⁵⁶ Thus, even as the concession theory of the corporation was rising to the position of legal orthodoxy in the mid-nineteenth century, there was a commercial reality in which most of the indicia of corporateness were being created almost entirely by contract.¹⁵⁷ Less than a century later, this earlier contractual account of the business corporation would be re-discovered by economists.¹⁵⁸

B. *The Nexus of Contracts Theory*

The modern nexus of contract theory of the corporation traces its origin to a 1937 article by Ronald Coase.¹⁵⁹ Coase was interested in understanding how the existence of the firm could be reconciled with what he called "the main achievement of economic science,"¹⁶⁰ namely the insight that when resources are allocated using the decentralized process of the market what results is not chaos but an orderly movement of goods and services according to the price mechanism. If decentralized market processes could effectively organize resources, why do "we find 'islands of conscious power in this ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk?'"¹⁶¹ Coase's answer to this question was transaction costs.¹⁶² Finding goods and services and negotiating terms to spot contracts for every single business transaction is expensive. These costs can be avoided through a single contract that gives a central authority the right of direction. "The contract," according to Coase, "is one whereby the factor, for a certain remuneration (which may be fixed or fluctuating), agrees to obey the directions of an entrepreneur *within certain limits*."¹⁶³

154. *Id.* at 880–81. See also MICKLETHWAIT & WOOLDRIDGE, *supra* note 116, at 7–8 (discussing the Italian commenda).

155. Mahoney, *supra* note 125, at 883–84.

156. *Id.* at 887–89. See also MICKLETHWAIT & WOOLDRIDGE, *supra* note 116, at 40 (discussing the Bubble Act of 1720).

157. Mahoney, *supra* note 125, at 886–92 (The Triumph of the Concession Theory).

158. See generally Bratton, *supra* note 112, 1513–17 (arguing that the nexus of contract theory restates the older fiction theory of the corporation).

159. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386 (1937) available at http://people.bu.edu/vaguirre/courses/bu332/nature_firm.pdf.

160. See *id.* at 394.

161. *Id.* at 387 (quoting D.H. ROBERTSON, *THE CONTROL OF INDUSTRY* 85 (reprtd. & rev. 1948)).

162. *Id.* at 390.

163. *Id.*

Later economists refined this model of the firm by pushing for an even more individualistic, contractual approach. In 1972, Alchian and Demsetz famously argued that Coase was mistaken to see managers as exercising even circumscribed control, since employees' willingness to follow direction was in every instance a matter of contractual choice.¹⁶⁴ Four years later, Jensen and Meckling summarized what was to become the conventional wisdom, writing that "[t]he private corporation or firm is simply one form of legal fiction which serves as a nexus of contracting relationships."¹⁶⁵ More recently, even the nexus of contracts approach has come under attack as insufficiently contractual.¹⁶⁶ The hyper-contractual approach in effect completes the deconstruction of "control" and "ownership" that Coase began. In this theory, all the participants are "investors" contributing intellectual and reputational capital (employees) or cash and other resources (equity and debt).¹⁶⁷ Each set of participants then "controls" the other participants through monitoring and sanctions. For example:

Employers often . . . evaluate and reward or penalize the employee's behavior Less obviously, employees often exercise similar control. They grant the employer the power to set certain conditions of employment, to evaluate their performance, and to decide on bonuses and promotions, but then they evaluate the employer's performance and penalize or reward the employer (for example, by quitting or exerting less or more effort in the future).¹⁶⁸

In effect, these theorists simply dispense with the "nexus" in nexus of contracts theory, leaving only a web of interlocking connected contracts.¹⁶⁹

For our purposes, particular solutions to the economic mystery of the firm's existence are less important than the paradigm that these theories create for understanding the nature of corporations. Coase and his progeny provide a way of conceptualizing the corporation as "a complex set of explicit and implicit contracts."¹⁷⁰ There are two aspects of this approach that make it more hospitable to autonomy theories of contract than either the real or concession theories. First, the contractual approach to the firm is essentially individualistic. Unlike the real theory, it

164. See Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

165. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structures*, 3 J. FIN. ECON. 305, 311 (1976).

166. See G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887 (2000).

167. See *id.* at 922–29.

168. See *id.* at 921.

169. See Stephen M. Bainbridge, *The Board of Directors as a Nexus of Contracts*, 88 IOWA L. REV. 1, 7–8 (2002) ("Although their [Gulati, Klien, and Zolt] new model remains contractarian in nature, it lacks a critical feature of the standard contractarian account – namely, a nexus.").

170. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989).

does not rely on any communitarian notion of collective determination or reified idea of the corporation independent of human constituents.¹⁷¹ Indeed, it denies that a corporation is fundamentally different from any other contractual endeavor.¹⁷² Second, the contractual vision of the firm conceptualizes it as arising out of private rather than government choices. To be sure, nexus of contracts theorists acknowledge the existence of state promulgated corporate law, but they see these rules as providing contractual defaults in order to reduce transaction costs, rather than as concessions of government power designed to serve the purposes of the state.¹⁷³ Provisions of state corporate law that cannot be bargained around are analyzed as mandatory contractual provisions analogous to mandatory rules in contract law.¹⁷⁴

The nexus of contracts theory's insistence on the fictitious nature of the corporation also explains how liberal autonomy theorists could analyze firm-to-firm contracts. A contract between two firms appears to be a contract between two separate, non-human entities, but in reality inter-firm contracts incompletely describe the underlying agreements of actual human beings. The full terms of the agreement must be specified using not only the explicit terms of the contract and the regular rules of contract law, but also by the contracts—including the “contract” represented by corporate charters and management structures—which make up the corporations that signed the agreement. Ultimately contracts between corporations are agreements between actual human beings. The scope of the power of these human beings to “bind” other participants in the corporate enterprise will be limited by the background rules of corporate law. However, the nexus-of-contracts theory teaches us that ultimately these rules can be thought of in largely consensual terms. Corporate agents exercising their discretion become essentially analogous to any other individual whose discretion and ability to bind others is limited by pre-existing contracts. The presence of the corporation form works no decisive shift in moral status. Thus, from the point of view of the nexus of contract theory, the Artificial Personality Argument is untenable. It mistakes a useful shorthand—the corporation—for a decisive difference where no such decisive difference exists.¹⁷⁵

171. See *id.* at 1418–20.

172. *Id.*

173. Rutheford B. Campbell, Jr., *Corporate Fiduciary Principals For The Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 565 (1996).

174. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (setting forth general requirements of contractual capacity); *Id.* § 14 (limitations on the enforceability of contracts by infants); *Id.* § 15 (limitations on the enforceability of contracts by those with mental illnesses or defects); *Id.* § 110 (listing of contracts covered by the Statute of Frauds); *Id.* § 178 (unenforceability of agreements on public policy grounds); *Id.* § 189 (contracts in restraint of marriage); *Id.* § 356 (prohibition on penalty clauses).

175. One arguably decisive difference is the limited liability provided by the corporate form. However, there is no reason that limited contractual liability cannot be created entirely by agreement. Indeed limiting the pool of assets available to answer for a particular contract is routinely

The nexus of contracts theory, thus, turns the table on efficiency theorists who would invoke the Artificial Personality Argument. Just as the Artificial Personality Argument claims one has nothing to say when viewing firm-to-firm contracts through the lens of autonomy theories, when one views the Artificial Personality Argument through the lens of economics one finds that the conception of the corporation that the argument requires is not the one endorsed by contemporary law and economics scholarship.

One might object that the nexus of contracts response to the Artificial Personality Argument rests on an equivocation. The term "contract" in the nexus of contract theory¹⁷⁶ does not mean the same thing that "contract" means in contract law and therefore the argument is fallacious.¹⁷⁷ This criticism can be met in the following way. Economics and law clearly do not use the term "contract" in precisely the same way. When economists speak of contracts they are generally using the term broadly to include all voluntary transactions.¹⁷⁸ It can encompass everything from simultaneous exchanges and informal deals to highly formalized long-term written agreements. The important point is that the transactions are consensual rather than required by government regulations or some other external source of coercion.¹⁷⁹ In contrast, lawyers use the term contract in a much more limited way. Thus, the *Restatement (Second) Contracts* defines a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹⁸⁰ Generally, a contract requires the formalities of offer, acceptance, and consideration.¹⁸¹ The juristic

done through devices such as non-recourse secured lending. Likewise, the liability shield provided by the corporate form is routinely waived – at least for some businesses – through personal guarantees offered for corporate debts. Tort liability, of course, presents a different case, but there is no obvious reason why autonomy theories of contractual liability should be dramatically influenced by the scope of tort liability.

176. Braucher, *supra* note 13, at 698–99.

177. Cf. Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1764 n.30 (1980) ("Economists tend to view contracts as relationships characterized by reciprocal expectations and behavior . . .").

178. *Id.* ("Economists tend to view contracts as relationships characterized by reciprocal expectations and behavior.").

179. Melvin Eisenberg summed up this point, writing:

In ordinary language, the term contract means an agreement. In law, the term means a legally enforceable promise. Pretty clearly, however, the nexus-of-contracts conception does not mean either that the corporation is a nexus of agreements or that it is a nexus of legally enforceable promises. Instead, the conception means that the corporation is a nexus of reciprocal arrangements.

Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 822 (1999).

180. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). See generally 1 E. ALLAN FARNSWORTH, CONTRACTS §1.1 (3d ed. 2003) (discussing the legal definition of "contract").

181. See, e.g., *Davis v. Dykman*, 938 P.2d 1002, 1006 (Alaska 1997) ("The formation of a valid contract requires an offer encompassing all essential terms, unequivocal acceptance by the offeree, consideration, and an intent to be bound."). The law of contract, of course, abounds with exceptions to these requirements and will enforce many agreements and promises that do not meet them. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 82(1) (1981) (promise to pay a debt

and economic definitions of contract thus look quite different, and the charge of equivocation seems correct. The problem with this line of reasoning is that the Artificial Personality Argument itself is an attack on juristic categories. Insofar as the law is concerned, there is no difference between the contracts entered into by a corporation and those entered into by a natural person.¹⁸² This is precisely the position that the Artificial Personality Argument rejects. Rather it insists that one must import non-juristic distinctions between persons and corporations—namely the distinction that says they are entitled to different sorts of moral respect—into contract theory in order to understand the discontinuous nature of contract.

Contracts between human beings and contracts between firms require differing theoretical approaches not because of any juristic distinction but because—all juristic categories aside—firms simply are not real people. The argument thus stands or falls based on the non-juristic distinctions that it is making. If, however, the nexus of contracts approach is accepted, then the activity of a firm can be understood in voluntaristic and individualistic terms. This is precisely what the Artificial Personality Argument denies. In the end, the equivocation response rests on a category mistake. It wrongly assumes that the Artificial Personality Argument is directed against a full-fledged set of juristic categories rather than against the more primitive concepts of person, choice, and autonomy employed by philosophical defenders of contract.

C. *The Failure of the Artificial Personality Argument*

The ultimate validity of the Artificial Personality Argument rests on which of the three competing theories of the corporation is “true.” Cast in these terms, evaluating the argument is a daunting task. From at least the eleventh century to the present, debates have raged about the “true nature” of corporations, and it seems unlikely that a definitive answer to the question is going to emerge. However, it is important to remember that the Artificial Personality Argument need not be thought of as a free-standing claim about the nature of contracts and corporations. Rather it is part of a larger attempt to understand the relationship between autonomy and efficiency theories of contract. Seen in this context, the Artificial Personality Argument fails. Recall that the Artificial Per-

unrecoverable because of statute of limitations); *Id.* § 83 (promise to pay a debt discharged in bankruptcy); *Id.* § 84(1) (a promise to perform a duty conditioned on an event that did not occur); *Id.* § 85 (promise to perform a voidable duty); *Id.* § 86 (promise for past or moral consideration); *Id.* § 87 (a written option contract reciting consideration); *Id.* § 88 (a written guaranty reciting consideration); *Id.* § 89 (fair and equitable modification of an existing contract); *Id.* § 90 (promissory estoppel) (1982); U.C.C. § 2-205 (2003) (firm offer rule).

182. See, e.g., U.C.C. § 1-201(b)(26) (2003) (“‘Party’, as distinct from third-party, means a person who has engaged in a transaction or made an agreement within the code.”); *Id.* § 1-201(b)(27) (“‘Person’ includes an individual or organization”); *Id.* § 2-204(1) (“A contract for the sale of good may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”).

sonality Argument was offered as a horizontal independence strategy as an attempt to reconcile autonomy and efficiency theories of contract by showing that they apply to different sorts of things. Hence, the Artificial Personality Argument can only demonstrate the horizontal independence of these theories if it is consistent with the economic approach that it seeks to defend. It is not. In assessing the Artificial Personality Argument we can thus move from daunting and loaded questions about the "true" nature of things to more tractable questions about the consistency of different pieces of a larger argument.

Modern economics of the sort invoked by efficiency theories of contract is firmly committed to methodological individualism.¹⁸³ What this means is that the individual is taken as the basic unit of social explanation.¹⁸⁴ This methodological individualism, coupled with an assumption of rationality and scarcity is what marks economics off from other social sciences such as sociology or anthropology. The insistence on rational individualism is more than a simple matter of policing disciplinary boundaries, however. It provides the basis for two important ambitions of modern economics. The first ambition is that social scientific theories be falsifiable. Most economists in theory aspire to the Popperian model of science in which theories generate predications that can then be falsified through observation.¹⁸⁵ The gradual accretion of theories that withstand repeated attempts at falsification, as well as the rejection of theories that fail this test, is supposed to lead to increased scientific knowledge of human activity. The insistence on individual rationality allows economists to produce theories from which predictions can be rigorously and logically deduced. This deductive character makes the theories potentially falsifiable and hence, on Popper's view, scientific. The second ambition is theoretical unity. The rational actor model holds out the promise that a single mode of explanation can account for all interesting or important social phenomena.¹⁸⁶ Whatever the merits of

183. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 59 (3d ed. 1995) (describing the basic assumptions of the rational actor model).

184. Some economists, particularly those who place their hopes in sociobiology or neuroscience reject the individualistic reductionism of mainstream economics, arguing that the basic units of social explanation are sub-individual, e.g., neuropathways, etc. See, e.g., Terrence R. Chorvat et al., *Law & Neuroeconomics*, (George Mason Law & Econ., Working Paper Series, Paper No. 04-07, 2004), available at <http://ssrn.com/abstract=501063>.

185. See Daniel M. Hausman, *Philosophy of Economics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 4.1 (Edward N. Zalta ed., Winter ed. 2003), available at <http://plato.stanford.edu/entries/economics/> ("Karl Popper's philosophy of science has been influential among economists."). Compare MAX BLAUG, *THE METHODOLOGY OF ECONOMICS: OR HOW ECONOMISTS EXPLAIN* (1992) with TERRENCE HUTCHISON, *ON THE METHODOLOGY OF ECONOMICS AND THE FORMALIST REVOLUTION* (2000) (prominent defenses of a Popperian approach to economics); KARL POPPER, *The Logic of the Social Sciences*, in *THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY* 87 (Teodor W. Adorno et al., eds. Glyn Adey & David Frisby trans., Harper & Row Publishers 1976) (setting forth his own theory of social science).

186. See LIONEL ROBBINS, *AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE* 15-16 (1932) (defining economics as the science which studies human behavior as a relationship between ends and scarce means that have alternative uses). Robbins was an early and

these ambitions, they demonstrate that methodological individualism is not some secondary part of modern economics but rather is central to the entire intellectual enterprise.

The rational actor of economics and the autonomous individual of liberalism are slightly different people. One can be an economist without being a liberal, and one can be a liberal without subscribing to the shibboleths of microeconomic theory. Both positions, however, share a hostility to the collectivism of the real theory of corporations. For example, the gravamen of liberal social contract theory is that the individual is prior to the community, which must be justified in individualistic terms. Likewise, economists have insisted that collective action must be understood by reference to individual choices and incentives.¹⁸⁷ Neither theory is hospitable to Gierke's claims about collective wills and *Grossenshaft*. The concession theory is less overtly inconsistent with economic theory, but from an economic point of view it is ultimately question begging. Even if one accepted it as a historical account of the rise of the corporation's legal personality, Coase and his progeny point out that one is still left with the question of why economic activity is carried out by firms at all. Answering that question in the individualistic terms of modern economics leads inevitably toward the nexus of contract theory. In short, efficiency theorists cannot invoke the Artificial Personality Argument to side step the competing claims of autonomy theorists without simultaneously endorsing (if only implicitly) theories of the corporation that are at odds with the basic assumptions of economics.

V. APPLYING AUTONOMY THEORIES TO THE NEXUS OF CONTRACTS: THE EXAMPLE OF INTERPRETATION

The arguments presented above show that one cannot dismiss autonomy theories from firm-to-firm contracts on the basis of an a priori claim about the nature of the corporation. The fiction theory—and in particular the nexus-of-contracts theory—demonstrates that one needn't assume that firm-to-firm contracts somehow belong to a different metaphysical class from contracts between individuals that renders them unamenable to autonomy theories. However, the a priori failure of the Artificial Personality Argument does not necessarily mean that autonomy theories have anything to offer to our understanding of firm-to-firm contracts. Unless autonomy theories suggest results that differ from those generated by the economic theories offered in their place, the failure of

influence advocate for an expansive view of economics. A more recent writer taking a similar position is Richard Posner, who claims:

[E]conomics is the science of rational choice in a world – our world – in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his 'self-interest.'

POSNER, *supra* note 15, at 3–4.

187. See, e.g., MACUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

the Artificial Personality Argument remains an essentially scholastic point. The issue of contract interpretation offers an example of how autonomy and efficiency theories sharply diverge when applied to firm-to-firm contracts.

A. Hyper-Formalism and the Efficiency Norm

One must first understand the striking results that a consistent application of the efficiency norm to contractual interpretation yields. According to the ingenious argument put forward by Schwartz and Scott, if one's only goal is to maximize the joint gains from contracting, then one ought to adopt a very hard version of the plain meaning rule.¹⁸⁸ Rather than looking to all of the circumstances surrounding a transaction and evidence of the intention of the parties, one should interpret the words of the contract as literally as possible. Going hand in hand with this position is an equally hard-edged version of the parol evidence rule.¹⁸⁹ In short, contractual interpretation should be simplified to a literal reading of the language within the four corners of a written contract *and nothing more*. This hyper-formalist approach rests on three inter-related concepts: cost, risk, and diversification.

All things being equal, the efficiency norm suggests that low-cost dispute resolution is to be preferred to high-cost dispute resolution. Hyper-formalism has the obvious advantage of cheap dispute resolution. One can dispense with expensive and time-consuming fact-finding, with the attendant army of disputes and arguments over the reliability and interpretation of evidence. One simply reads the contract without reference to any divergence between that reading and the actual intent of the parties.

The obvious objection to such an approach is that sometimes it will produce "wrong" interpretations that vary significantly from anything envisioned by the parties. One of the insights provided by Schwartz and Scott is that stopping the analysis at this point is a mistake.¹⁹⁰ The next question should be whether the "mistakes" produced by hyper-formalism are systematic. Do they consistently favor one group in a way that can be predicted in advance? Schwartz and Scott conclude that they do not.¹⁹¹ Accordingly, they argue that we should not care about the "mis-

188. Schwartz & Scott, *supra* note 10, at 569 ("Typical firms prefer courts to make interpretations on a narrow evidentiary base whose most significant component is the written contract.").

189. "Under [the parol evidence rule] when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement" BLACK'S LAW DICTIONARY 1117 (6th ed. 1990).

190. Schwartz & Scott, *supra* note 10, at 575-76.

191. *Id.* at 575-76. Schwartz and Scott are careful not to overstate their case, acknowledging that under some circumstances profit maximizing firms would not be indifferent to contract "misinterpretation." *Id.* at 576-77.

takes" in the context of corporate contracts.¹⁹² A corporation is going to have lots of contracts. Hence, it can expect to "win" about as often as it "loses" under a regime of hyper-formalist contract interpretation. A firm's contracts thus become analogous to a diversified stock portfolio.¹⁹³ The investor in such a stock portfolio should be risk-neutral as to any particular stock, since diversification allows one to balance declining stocks with advancing stocks. The only thing that matters is the aggregate performance of the portfolio. Similarly, if our sole goal is to maximize the value of a firm, we should be indifferent to the "performance" of any particular contract under a hyper-formalist interpretation regime. So long as "winning" interpretations are as frequent as "losing" interpretations, the risk of judicial "mistakes" is diversified away and the firm realizes the full benefits of the cheaper resolution of contractual disputes.

The analogy to a stock portfolio also illustrates the stockholder centric nature of the efficiency argument for hyper-formalism. It ultimately privileges the position of a diversified investor whose only goal is to maximize the return on her investment. Such an investor would clearly prefer the hyper-formalist interpretation regime. On the other hand, managers and employees, for whom the corporation is not simply an income stream, but also, a place where they spend much of their time and lavish much of their energy,¹⁹⁴ quite possibly might prefer that their plans and arrangements be carried out according to their intentions, rather than falling victim to random—albeit evenly distributed—misinterpretation by the courts. The question thus becomes why we should adopt the perspective of such an investor. Schwartz and Scott offer essentially two reasons for taking this position. The first is that stockholders "own" the corporation and are entitled by that "ownership" to have the firm's contracts interpreted to maximize the value of their investment.¹⁹⁵ The second is that employees of a corporation are required by law to maximize shareholder value.¹⁹⁶ Upon closer examination, however, the argument from ownership turns out to be circular and the argument from the legal requirements of employees rests on an oversimplification of corporate law.

As a legal matter, it is not true that shareholders "own" a corporation, and once the claim is unpacked it seems to be little more than a restatement of a conclusion. Legally speaking, shareholders are the residual claimants on the assets of a corporation and have the ability to exer-

192. See *id.* at 550–54.

193. This analogy is mine rather than Schwartz and Scott's.

194. MICKLETHWAIT & WOOLDRIDGE, *supra* note 116 (noting that people live much of their lives and work out much of their identity within the context of corporations).

195. Schwartz & Scott, *supra* note 10, at 550–51 ("A firm is direct by its owners, who often are shareholders. Shareholders prefer their firms to maximize profits . . .").

196. *Id.* at 551 ("[T]he legal rules that attempt to deter bad manager behavior fall into the domains of the criminal, corporate, and securities laws. Contract law should exploit this specialization by assuming that the agreements it regulates reflect the parties' maximizing choices.").

cise some power through their voting over its management. Shareholders, however, lack many of the other crucial indicia of property owners. For example, they do not have day-to-day control over a corporation or its assets.¹⁹⁷ They do not have the right to exclude others from a corporation's property. By virtue of owning stock in the General Electric Company ("GE"), I do not have the power to throw someone out of a GE factory. Indeed, not only do stockholders lack the ability to exclude others from corporate property, they themselves can be excluded from it. Were I to trespass on GE's property, my ownership of GE stock would not constitute a valid defense to a tort action against me.¹⁹⁸ One might still assert that shareholders are the owners of the company in some important normative sense. Whatever this sense, it is not one that we usually associate with property. No one, to my knowledge, argues that shareholders should be given all the incidents of control that would flow from treating a corporation as their property. No one, for example, argues that GE stockholders should be exempt from the law of trespass as it applies to GE property. In short, the claim that stockholders own the corporation amounts neither to the claim that they exercise full legal property rights in a corporation nor to the claim that they should exercise such legal rights in the corporation. Ultimately, it amounts to the claim that corporations ought to be run for the benefit of shareholders. Yet this is precisely the conclusion that that concept of ownership was invoked to support. Hence, introducing the concept of property into the discussion of the shareholder's status neither accurately states the law nor materially advances the normative discussion. In this context, it amounts to little more than a restatement of the conclusion being argued for.¹⁹⁹

It is far from clear that employees of a corporation are required by law to run a corporation so as to maximize shareholder value. For starters, dozens of states have passed laws explicitly allowing corporate managers to consider the interests of corporate constituencies other than shareholders, e.g., employees or members of the community in which a

197. *Amdur v. Meyer*, 224 N.Y.S.2d 440, 433 (App. Div. 1962) (holding that shareholders cannot require management to follow particular business policies); *Associated Grocers of Ala., Inc. v. Willingham*, 77 F. Supp. 990, 966 (N.D. Ala. 1948) (same), *Continental Sec. Co. v. Belmont*, 99 N.E. 138, 141 (N.Y. 1912) (same), *Automatic Self-Cleaning Filter Syndicate Co. v. Cunningham*, 1906 2 Ch. 34 (U.K.) (same).

198. My status as a stockholder, however, would guarantee me access to corporate property for the purposes of inspecting the books. See DEL. CODE ANN. tit. 8 § 220 (2005). See also Susan B. Hoffnagle & Jolyan A. Butler, *Shareholders' Right to Inspection of Corporate Stock Ledger*, 4 CONN. L. REV. 707 (1972) (discussing the scope of shareholder's inspection rights).

199. William W. Bratton summarizes this point thus:

"Ownership" becomes as irrelevant a concept as "firm entity" [under the nexus of contracts theory]. The "firm" is only a series of contracts covering inputs being joined so as to become output. "Capital," and thus the traditional legal situs of ownership, devolves into one of the many types of inputs.

Bratton, *supra* note 112, at 1499. Cf. Alchian & Demsetz, *supra* note 164, at 781-83, 789 n.14 (owners contract for rights to anticipated residual rewards).

corporation is located.²⁰⁰ The practical effect of these statutes has been fairly minimal.²⁰¹ However, their limited significance does not come from a powerful, countervailing legal requirement that employees manage a corporation in the interests of the shareholders. Rather, it comes from the fact that corporate managers are granted broad discretion in how they manage corporations.

The courts have frequently declared that corporate managers are fiduciaries of the corporation.²⁰² In practice, however, this fiduciary status places few limits on managerial decision-making. It does create substantial legal requirements with regard to the theft of corporate assets or opportunities,²⁰³ but the business judgment rule provides a virtually impenetrable shield from legal oversight of ordinary business decisions.²⁰⁴ So long as a manager complies with the proper formalities and exercises some basic modicum of care she is immune from legal attack and the courts will not second guess her decisions.²⁰⁵ Furthermore, although the corporation may sue a manager for breach of fiduciary duty and a shareholder may bring a derivative suit on behalf of the corporation, a shareholder himself generally cannot sue misbehaving corporate managers for most kinds of misbehavior.²⁰⁶

200. See ARIZ. REV. STAT. ANN. § 10-1202 (2004); CONN. GEN. STAT. ANN. § 33-313(e), repealed by CONN. GEN. STAT. § 33-756 (2004); FLA. STAT. § 607.0830(3) (2005); GA. CODE ANN. § 14-2-202(b)(5) (2005); IDAHO CODE ANN. §§ 30-1602, -1702 (2005); 805 ILL. COMP. STAT. 5/8.85 (2005); IND. CODE ANN. § 23-1-35-1(d), (f), (g) (West 2005); IOWA CODE ANN. § 491.101B (West 2005); KY. REV. STAT. ANN. § 271B.12- 210(4) (West 2004); LA. REV. STAT. ANN. § 12:92(G)(2) (2004); MASS. GEN. LAWS ANN. ch. 156B § 65 (West 2005); MINN. STAT. § 302A.251(5) (2004); MISS. CODE ANN. § 79-4-8.30(d) (2005); MO. REV. STAT. § 351.347 (2005); NEB. REV. STAT. § 21-2035(c) (2005); N.J. STAT. ANN. §§ 14-A:6-1(2), 6-14(4) (West 2005); N.M. STAT. ANN. § 53-11-35(D) (LexisNexis 2005); N.Y. BUS. CORP. LAW § 717(b) (Consol. 2005); OHIO REV. CODE ANN. § 1701.59(E) (LexisNexis 2005); OR. REV. STAT. § 60.357(5) (2005); PA. CONS. STAT. §§ 515- 16 (2005); R.I. GEN. LAWS § 7-5.2-8 (2004); S.D. CODIFIED LAWS § 47-33-4 (2005); WIS. STAT. § 180.0827 (2005); WYO. STAT. ANN. § 17-16-830(e) (2005) (enacted 1989).

201. See Robert Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156 (1993); Lawrence Mitchell, *A Theoretical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

202. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *Pueblo Bancorp v. Lindoe, Inc.*, 37 P.3d 492, 499 (Colo. App. 2001), *In re Toys "R" Us, Inc. Shareholder Litigation*, 878 A.2d 975, 999-1000 (2005).

203. See, e.g., *Klinicki v. Lundgren*, 695 P.2d 906 (Or. 1985), *Miller v. Miller*, 222 N.W.2d 71 (Minn. 1974), *Litwin v. Allen*, 25 N.Y.S.2d 667 (1940), *Guth v. Loft*, 5 A.2d 503 (Del. 1939). See also Victor Brudney & Robert Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997 (1981).

204. The business judgment rule "immunizes management from liability in corporate transaction[s] undertaken within both power of corporation and authority of management where there is reasonable basis to indicate that transaction was made with due care and in good faith." BLACK'S LAW DICTIONARY 200 (6th ed. 1990).

205. See, e.g., *Aronson*, 473 A.2d 805 (holding that Delaware law presumes that managers act in good faith and in the best interests of the firm). Under Delaware law, even an explicit showing of bad-faith or incompetence is not sufficient for legal interference with the business decisions so long as a defendant can prove the "entire fairness" of the transaction. See *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del. 1995).

206. As the Delaware Chancery Court has explained:

A bill filed by stockholders in their derivative right . . . has two phases – one is the equivalent of a suit to compel the corporation to sue, and the other is the suit by the cor-

To be sure, one can find precatory language in judicial opinions to the effect that corporations should be run in the interest of the shareholders, but the business judgment rule insures that such language has little if any real impact on managerial decision making. In any case, there is reason to believe that such language was never meant to enshrine the shareholder primacy norm. The *locus classicus* for the shareholder primacy norm is *Dodge v. Ford Motor Co.*,²⁰⁷ where the Michigan Supreme Court stated:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.²⁰⁸

When this dicta is viewed in context, however, it is clear that what is involved is not a generalized duty by managers to maximize shareholder value, but rather, a prohibition on the oppression of minority shareholders in the case of a closely held corporation. The case arose out a dispute between Henry Ford and the Dodge brothers, who owned ten percent of the stock in Ford Motor Company.²⁰⁹ The Dodge brothers opposed Henry Ford's management style and wished to set up their own car company to compete with Ford.²¹⁰ Henry Ford wanted to forestall this by denying capital to the Dodge brothers and forcing them out of the company.²¹¹ Accordingly, Henry Ford had the board of directors cease the payment of stock dividends and then he himself resigned, went to California, and announced that he would be setting up a new car company to compete with Ford.²¹² All of these antics were ploys to depress the value of the Dodge brother's Ford Motor Company stock and force them out.²¹³ Ultimately, the Michigan Supreme Court ruled for the Dodge brothers not because of some generalized duty to maximize share value, but rather, because of the right of dissenting minority shareholders to be free

poration, asserted by the stockholders on its behalf, against those liable to it. The former belongs to the complaining shareholders; the latter to the corporation. The complaining stockholders are allowed in derivative bills to bring forward those two causes of action in one suit.

Cantor v. Sachs, 162 A. 73, 76 (Del. Ch. 1939). *Accord* Brown v. Tenney, 532 N.E.2d 230, 232 (Ill. 1988) ("The derivative action really consists of two causes of action; one against the directors for failing to sue; and the second based upon the right belonging to the corporation.").

207. 170 N.W. 668 (Mich. 1919).

208. *Dodge*, 170 N.W. at 684.

209. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 316 (1997).

210. *See id.*

211. *See id.* at 317-18.

212. *See id.*

213. *See id.*

from unreasonable oppression.²¹⁴ The court pointedly did not issue an injunction against plant expansions that the Dodge brothers believed would be unprofitable, citing the business judgment rule.²¹⁵

B. Autonomy Theories and Interpretation

By and large, autonomy theories prescribe a different method of interpreting contracts. If contract law is a matter of enforcing a particular set of commitments that individuals make as a way of expanding their liberty, then it follows that we must know what the individuals themselves committed to. Indeed, to the extent the "misinterpretation" of a contract—that is an interpretation that varies from the intent of the parties—leads to legal coercion, we are faced with the primal question of liberal political theory, namely the justification of collective violence. Autonomy theories of contract purport to answer this question in the limited case of self-imposed or consensual legal obligations.²¹⁶ Once contractual liability goes beyond such self-imposed obligations, however, it can no longer be justified by autonomy theories. These considerations mean that autonomy theories of contract must take a broader approach to contractual interpretation than the hyper-formalism suggested by a single-minded devotion to the efficiency norm. This does not mean that autonomy theories are committed to a wholly subjective theory of interpretation. As Charles Fried has written:

It is a truism in the philosophy of language that in interpreting a person's words we are not guessing at the hidden but determined content of some list of meanings in the speaker's head. Rather our concerns particularize render concrete, inchoate meanings.²¹⁷

Such an approach, however, does require an attention to context and intention that would be foreclosed by a rule limiting inquiry into a contract's meaning to a literal interpretation of the plain meaning of a signed document.

Just as the nature and law of corporations does not provide any reason for adopting the shareholder primacy norm implicit in the argument of the new *lex mercatoria*, it also provides no reason for rejecting auton-

214. See *Dodge*, 170 N.W. at 684 ("There should be no confusion . . . of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders.").

215. *Id.* (confessing that "judges are not business experts."). *Dodge* can be profitably contrasted with the well-known *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968) in which a disgruntled shareholder argued that the refusal of the Chicago Cubs' management to install night stadium lighting decreased profits. The court held that the board was not obligated to make profits their sole goal and could appropriately consider factors such as the impact of their decisions on the community and on the game of baseball as a whole. *Id.* at 180-82. See also ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 19 (1999) (distinguishing *Dodge* from *Shlensky* on the grounds that *Dodge* involved oppression of minority shareholders).

216. FRIED, *supra* note 55, at 16.

217. *Id.* at 60.

omy theories. Armed with an understanding of the corporation as a nexus of contracts, one can apply the broader notion of interpretation inherent in autonomy theories to contracts between corporations. The easiest way of illustrating this is through a thought experiment. Imagine an entrepreneur who has a new idea around which he builds his business. In order to advance his goals he enters into various contracts with individuals and companies. His decision to make these contracts is an exercise of his liberty. To be sure, part of his motivation is profit. However, this is by no means his sole motivation. People start businesses for many reasons—such as the desire for independence or to be one's own boss—that are not easily reducible to simple profits.²¹⁸ Furthermore, liberal philosophy's indifference to ends means that, properly speaking, our entrepreneur's motives are irrelevant. What matters is whether his actions violate the liberal principle. Provided that they do not, the law should further his autonomous choices by enforcing his contracts. Or, so say the autonomy theories.²¹⁹

As our entrepreneur's business grows, his contracts will become more complex. He will develop relationships with employees, suppliers, and creditors that will be governed by long-term agreements. No doubt, these contracts will present knotty issues of interpretation. Language may be vague and many assumptions will be left implicit. Nevertheless, autonomy theories have a reasonably clear set of implications. We ought to be willing to expend judicial resources and require that parties incur costlier litigation in order to see to it that each contract, insofar as it is possible to do so, is enforced to accord with the original intent of the parties. In many cases, the ultimate purpose of the parties to these contracts will be to maximize their wealth. According to autonomy theories, however, this is not the primary concern of contract law.²²⁰ The reason is that the law of contract represents state action compelling one party to a lawsuit against his or her will. As such, it must stand the test of the liberal principle, which requires that the state be indifferent to its citizens' ends, focusing instead upon the protection and advancement of their liberty. Hence, autonomy theories require that we inquire into the actual intent and meaning of our entrepreneur's contracts.

Thus far, there is nothing in the nature of our entrepreneur's contracts that would lead us to believe that they ought to be analyzed using

218. This point is hardly confined to the case of entrepreneurs. Most people make professional and career decisions on the basis of a complex set of factors, of which monetary profit is but a single – and often not the most important – part. Consider, for example, the fact that such talented lawyers as Robert Scott and Alan Schwartz could surely make more money working on Wall Street or K Street than they currently do at Yale Law School and the University of Virginia.

219. FRIED, *supra* note 55, at 7 (“But whatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours. This is the liberal ideal.”).

220. See Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 206, 224 (Peter Benson ed. 2001).

some new set of theories. Now suppose that he faces the problem of asset partitioning.²²¹ He wants to specify that certain assets under his control will be available to answer for the debts of his business but other assets should not be available to answer such debts. As we have seen there are a variety of ways in which he might accomplish this. For example, he could structure his debts as non-recourse loans secured by his widget-making machine. As is common in such transactions, he might enter into covenants that would limit his control over the widget-making machine, agreeing, for example, that he will maintain it in good working order and not sell it without first paying the debt.

Over time, the accretion of such contracts would do two things for our entrepreneur. First, it would significantly limit his personal liability for payment of "business" debts.²²² Second, it would significantly limit his former freedom to control "business" property without subjecting himself to the risk of significant personal liability.²²³ Neither of these changes, however, represents any fundamental change in the nature of the contracts of the entrepreneur from the point of view of autonomy theories. The limitations on personal liability are simply terms in particular contracts, representing the choices of autonomous individuals pursuing their chosen ends. Likewise, the entrepreneur's loss of control over particular assets does not mean that his liberty is no longer the structuring normative principle of contract enforcement. It simply means respect for that liberty requires honoring his choice to give up certain freedoms and that he be subjected to liability for the violation of certain self-imposed duties and obligations to others. Under autonomy theories, however, both of these propositions are true of any contract.²²⁴

Now suppose that our entrepreneur decides to get around the asset-partitioning problem in a different way. Rather than doing so by using secured lending and other explicitly contractual devices, he chooses to incorporate his business. This action will do three things. First, it will limit his personal liability. Those assets that he assigns to the new corporation will now be answerable exclusively for corporate debts, and in the absence of some further contract, his personal assets will be immune from attachment by corporate creditors. Second, it will limit his control over business assets. How much this control is limited will depend on essentially two things. The first is the corporate law of the state in which he incorporates the business.²²⁵ Second, the terms of the corporate char-

221. See text accompanying notes 146 & 158.

222. See Lynn LoPucki, *The End of Liability*, 106 YALE L. J. 1, 14-19 (1997) (arguing that secured lending allows debtors effectively to avoid or limit most of their liability).

223. For example, the non-recourse loan in the preceding paragraph might contain a covenant not to sell the widget-making machine, the violation of which would subject our entrepreneur to full personal liability for the loan.

224. FRIED, *supra* note 55, at 14, 16-17.

225. PINTO & BRANSON, *supra* note 215, at 2 ("Every state has a corporate law statute that provides the rules for the corporations incorporated in that state . . .").

ter and bylaws will place further limits on his power.²²⁶ The third thing that incorporation will allow our entrepreneur to do is raise money by offering stock to others. Offering stock may further limit his control over the business by subjecting him to obligations in addition to those contained in the state law and the corporate charter, most notably federal securities regulations.

By now, our entrepreneur will be hedged in by a variety of legal obligations. He is no longer the solo operator more or less free from legal constraints that he was when he first began his business. However, all of these new obligations are the result of voluntary actions by him and those to whom he becomes obligated. Furthermore, there is a well-developed body of law that defines the scope and meaning of those obligations, and as we have seen, there is nothing in that body of law suggesting that he has consented to a fundamental shift in how his business contracts should be interpreted. To be sure, the laws of corporate governance and agency now impact the legal effect of his contracts on behalf of the corporation, but none of these bodies of law suggests that some new kind of contract law applies to the contracts he enters into as part of his business. Nor do they require that profit be the goal of his contracts.

One might object that even if autonomy theories can be applied to relatively small and autocratically run corporations where contracts represent the will of a single manager with merely bounded power, they cannot be applied to the contracts of more complex corporations. The "decisions" of these larger corporations cannot be thought of as those of a single individual. As Jensen and Meckling put it:

[T]he "behavior" of the firm is like the behavior of a market; i.e., the outcome of a complex equilibrium process. We seldom fall into the trap of characterizing the wheat or stock market as an individual, but we often make this error by thinking about organizations as if they were persons with motivations and intentions.²²⁷

One could argue that the idealized story of the entrepreneur presented above obscures this fact. When we recognize that corporate behavior is being dictated by complex market forces rather than individual decisions, then autonomy theories ought to be jettisoned.

The problem with this objection is that ultimately it proves too much. Every time a corporation makes a contract, it does so because some actual individual has come to some decision as to how he or she will exercise the discretion that belongs to her. Despite Dan-Cohen's hypothetical, in our world it remains an irreducible fact that contracts by corporations are always made by human beings. The legal scope of a

226. *Id.* at 11 ("The articles [of incorporation] may also contain other significant discretionary provisions authorized by statute.").

227. Jensen & Meckling, *supra* note 165, at 311.

corporate agent's discretion will be set by the law of corporations, which as we have seen, does not commit her to an a priori duty to maximize stockholder value. Nevertheless, as Jensen and Meckling rightly point out, she will be subject to pressures created by the market-like forces within the firm that will ultimately dictate many contractual terms.²²⁸ The question thus becomes whether the fact that the terms of the contract are, in some sense, the outcome of a complex "market" renders the resulting contract fundamentally different than other contracts in the way posited by the Artificial Personality Argument. Once the question is seen in these terms, its answer becomes straightforward. Virtually every contract will contain terms that are determined by complex market transactions. The most obvious example is the price term in a sales contract.²²⁹ If one neighbor sells a used lawnmower to another neighbor, the market in lawnmowers will largely control the price term. Absent extraordinary circumstances, the seller cannot charge \$10,000 for the lawnmower because the buyer can easily purchase a new lawnmower at Home Depot for considerably less money. A host of factors ranging from the demand for lawnmowers in the local area to the price of steel on international commodity markets, in turn, will determine the price at Home Depot. If the mere fact that an implicit or explicit term in a contract resulted from complex market transactions was sufficient to dismiss autonomy theories of contract, virtually every contract would be beyond the reach of such theories. Such a claim would be controversial to say the least and is clearly beyond the scope of the Artificial Personality Argument.

The idealized story of our entrepreneur illustrates an important point, namely that we ought not to be seduced by the language of entity that surrounds our discussion of corporations. To be sure, it is extremely useful to talk and think about corporations as separate entities in many contexts. However,

The "personhood" of a corporation is a matter of convenience rather than reality There are many actors, from production employees to managers to equity investors to debt investors to holders of warranty and tort claims against the firm. The arrangements among these persons usually depend on contracts and on positive law, not on corporate law or the status of the corporation as an entity. More of-

228. *Id.*

229. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 19 (5th ed. 2001) ("What [the] price and quantity [of goods] will be depends on the particular characteristics of supply and demand. Variations of price and quantity over time depend on the ways in which supply and demand respond to other economic variables, such as aggregate economic activity and labor costs, which are themselves changing.").

ten than not a reference to the corporation as an entity will hide the essence of the transaction.²³⁰

This is certainly true when corporate personality is invoked to explain what corporate contracts are “really” about.

The actors involved in the idealized story of our entrepreneur—customers, creditors, employees, stockholders and the entrepreneur himself—will all have different motives and goals in participating in the business. From the point of view of the liberal philosophy embedded in autonomy theories of contract, the point of the exercise is not to maximize the returns for a single group—stockholders—or even for all groups, but rather, to facilitate the peaceful co-operation of individuals pursuing disparate ends. Jules Coleman has written that the market can be thought of as an essentially political institution that allows those with widely differing conceptions of the good to nevertheless cooperate peacefully with one another.²³¹ The nexus-of-contracts theory teaches us that the corporation is simply the market in another guise.²³² In this sense, the nexus-of-contracts theory makes the corporation into a much weaker concept than is assumed by the Artificial Personality Argument. As two of the nexus-of-contracts theory’s most prominent proponents have argued:

An approach that emphasizes the contractual nature of the corporation removes from the field of interesting questions one that has plagued many writers: What is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? Is there anything wrong with corporate charity? Should corporations try to maximize profit over the long run or the short run? Our response to such questions is: Who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation’s tempered commitment to a profit objective.²³³

If corporations are enterprises defined by the emergent pattern of individual agreements rather than some master norm of economic efficiency, it does not mean that entrepreneurs and others should not be free

230. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991).

231. See JULES COLEMAN, *RISKS AND WRONGS* 5 (1992) (“Markets are most attractive where individuals have broadly divergent conceptions of the good . . .”). According to Coleman, “The market is a particularly appropriate form of rational organization under certain sets of empirical circumstances, including heterogeneity of values, cultural diversity, geographic dispersion and the like. In such communities markets contribute to social stability. That is their attraction to liberal political theory.” *Id.*

232. *But cf.* EASTERBROOK & FISCHEL, *supra* note 230, at 14 (“Just as there is no right amount of paint in a car, there is no right relation among managers, investors, and other corporate participants. The relation must be worked out one firm at a time.”).

233. *Id.* at 35–36.

to opt into the regime of hyper-formalism advocated by Schwartz and Scott. Nothing in the arguments offered above suggest that their basic insight that hyperformalism increases the value of contracts taken together is incorrect. No doubt, the sole goal of some parties (perhaps most parties) is to maximize the value of their contracts as a portfolio. Autonomy theories have no objection to parties choosing such a hyper-formalist regime either through integration clauses or—more effectively—through arbitration agreements that move litigation over contracts into private, hyperformalist forums. Indeed, there is empirical evidence suggesting that parties who have a bundle of largely fungible commodity contracts prefer precisely the kind of hyper-formalism advocated by Schwartz and Scott and have created private forums accordingly.²³⁴

All of this is unobjectionable to autonomy theories so long as it represents the actual intent of the parties, rather than a one-size fits all norm imposed by law. This stance necessarily commits autonomy theories to an inescapable first question when interpreting contracts: What is the intent of the parties? Even when the intent is that other intentions be ignored and that a written agreement be woodenly interpreted, autonomy theories require that we first identify this intention. Such an inquiry will inevitably impose costs that could be avoided by adopting the regime envisioned by Schwartz and Scott. Although I have argued elsewhere for the priority of liberty to welfare in contract law,²³⁵ I freely admit that such increased costs may be a valid objection to autonomy theories. It must be noted, however, that *such objections have nothing whatsoever to do with the nature of corporations*. The argument applies equally well to contracts between individuals, and as we have seen incorporation works no legal or metaphysical transformation on the contracts negotiated between firms. Ultimately, the question must be fought out on the merits of the respective theories themselves.

VI. A LESSON FOR CONTRACT THEORY

The demise of the Artificial Personality Argument illustrates one of the key problems facing the “horizontal independence” strategy. Recall that the horizontal independence strategy seeks to resolve the conflict between autonomy theories and efficiency theories by demonstrating that they are actually theories of different things. The Artificial Personality Argument ultimately flounders on the fact that both the economics relied on by the welfare theorists and the liberal political philosophy relied on by the autonomy theorists are essentially individualistic. This commit-

234. See generally Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (discussing contract interpretation in merchant courts set up by commodity traders).

235. See Oman, *supra* note 12, at 1499–1503 (arguing for the priority, but not the exclusivity, of autonomy theories on the basis of the philosophy of John Rawls).

ment to individualism means that neither approach can consistently invoke some non-individualistic concept such as the corporation to side-step any conflicts. To be sure, they use individualism in different ways, but in the end, they are talking about the same things: actual human beings. This convergence is precisely what the horizontal independence strategy seeks to deny.

The ultimate convergence of both welfare and autonomy theories on the individual comes from two forms of reductionism that are key to contemporary economics. First, economics in its positive form is reductionist, focusing on the individual rational actor as the primary unit of social explanation. Second, economics is normatively reductionist in that it once again uses individuals as the primary unit of measurement. When economists speak of efficiency or wealth maximization they are talking in terms of social aggregates. What economists are aggregating, however, are the satisfactions of individuals. Hence, there is no sense in which society is deemed to have or experience satisfaction independent of the individuals who make it up. These two forms of reductionism are what make economics such an attractive tool for policy analysis. The rational actor model allows a policy analyst to predict the effects of particular policies by deducing how agents bent on satisfaction of their preferences would behave in response. The same deductive model allows us to make comparative judgments about the extent to which differing policies satisfy preferences. Both the positive and the normative judgments focus our attention relentlessly on the individual, and it is at this point that the conflict with autonomy theories becomes inevitable.

The vast majority of law and economics literature on contracts is implicitly or explicitly normative.²³⁶ Economic theorists of contract law do not regard efficiency as simply one potentially interesting equilibrium point predicted by their positive model of contracting behavior.²³⁷ Rather, they use it as criteria for judging the desirability of differing rules of law.²³⁸ When coupled with the methodological individualism of eco-

236. See Kraus, *supra* note 23, at 694 ("Legal theory is both a normative and explanatory enterprise. Most contemporary contract theories at least implicitly pursue both enterprises simultaneously.").

237. A. Mitchell Polinsky provides a representative example of the ease with which economic theorists use the concept of efficiency as a normative criteria, invoking it as both a welfare maximizing principle and as an indicator of hypothetical consent:

Contract law can be viewed as filling in [the] "gaps" in the contract – attempting to reproduce what the parties would have agreed to if they could have costlessly planned for the event initially. Since the parties would have included contract terms that maximize their joint benefits net their joint costs – both parties can thereby be made better off – this approach is equivalent to designing contract law according to the efficiency criterion.

A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 29 (3d ed. 2003).

238. See, e.g., Janet Kiholm Smith & Richard L. Smith, *Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information*, 19 J. LEGAL STUD. 467 (1990); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Thomas S. Ulen, *The Efficiency of Specific Performance*, 83 MICH. L. REV. 341 (1984); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J. L. & ECON. 691 (1983);

nomics, efficiency theories of contract will necessarily discuss the same things as autonomy theories because while each theory conceptualizes human individuality differently, both approaches are ultimately directed at actual people. The conflict can only be resolved using the horizontal independence strategy if one of the theories abandons its claim to being normative.²³⁹ This happy solution is unlikely to work. Although autonomy theories might be conceptualized purely as interpretations of existing legal doctrines, the fact of the matter is that those who adopt autonomy theories almost universally tend to do so because they find the theories normatively attractive on the merits.²⁴⁰ Likewise, the convergence of positive and normative individualism in economics means that few law and economics scholars are going to give up their role as prescriptive policy analysts. So long as efficiency theorists and autonomy theorists both offer arguments for how contract law should be, a conflict remains to be solved. The idea of a new *lex mercatoria* may play a role in such a resolution, but if it does it will likely employ a vertical integration strategy such as that put forth by Farber,²⁴¹ rather than the horizontal independence approach of the Artificial Personality Argument.

CONCLUSION

Despite the criticisms that I have made of attempts to establish efficiency as a master norm for contract law, this article is not an exercise in econophobia. I believe that economics offers important insights into the law²⁴² and that ultimately no theory of contract can afford not to incorporate the insights of law and economics.²⁴³ Nor, despite the fact that I have spent much of this article defending them, am I ultimately persuaded by autonomy theories of contract. Rather, I believe that contract theory must find some principled integration of the two approaches.

Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980); Charles J. Goetz & Robert Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); John H. Barton, *The Economic Basis for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972).

239. This, of course, is exactly the position that Jody Kraus tries to defend, arguing that law and economic theory is a kind of behavioralist explanation of contract case outcomes. See Kraus, *supra* note 23, at 689.

240. Stephen Smith has pointed out that:

Although the best known answers to the analytic question are *prima facie* open to both utilitarian and rights-based justifications, in practice scholars who defend particular answers to the analytic question also hold that, in the end, there is only one good justification (the justification they defend) for the obligation they have identified.

SMITH, *supra* note 2, at 49.

241. See generally Farber, *supra* note 10 (arguing that in the context of commercial law an efficiency standard can be derived from an autonomy norm).

242. Indeed, elsewhere I have offered a traditional law-and-economics analysis in defense of the use of legislative history to construe statutes. See Nathan Oman, *Statutory Interpretation in Econotopia*, 25 PACE L. REV. 49, 72-83 (2005).

243. See Oman, *supra* note 12, at 1504-06 (arguing that an adequate theory of contract must incorporate economic arguments).

Unfortunately, the Artificial Personality Argument cannot harmonize the discordant voices of autonomy and welfare theories of contract. While it appears superficially appealing to efficiency theorists, on closer examination the theories of the corporation that it requires in order to be coherent cannot be reconciled with the methodological individualism of economics. Armed with the nexus-of-contracts theory of the corporation, autonomy theorists can deploy arguments developed in other contexts to account for firm-to-firm contracts. Obviously, the autonomy arguments that I have discussed are deeply controversial and not without their weaknesses. However, one need not be a partisan of such approaches to appreciate the key insight of this paper: While the injection of the corporation into contract theory throws up new examples of old problems, it does not pose any fundamentally new or unique issues for autonomy theories. A new *lex mercatoria* may indeed hold the promise of reconciling the competing approaches to contract, but the promise does not lie in the fact that autonomy theories can be summarily banished from its domain. Rather, the meta-theoretical advantage of a new *lex mercatoria* must lie in its ability to make the principled integration of autonomy and welfare theories into a single approach more tractable.

