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ON COLLABORATION, ORGANIZATIONS, AND CONCILIATION IN THE
GENERAL THEORY OF CONTRACT

*Ethan J. Leib**

Daniel Markovits's *Contract and Collaboration*¹ is a thought-provoking and ground-breaking inquiry into the ethics of contract. It argues that the philosophical foundation of contract may be found in what Markovits calls the collaborative view: a principle of forming respectful communities of collaboration where contractors treat each other as ends in themselves and refrain from treating each other as mere instrumentalities. This is indeed a new way to think about contract, and a way to give it ethical underpinnings. It also helps explain a number of puzzles in the doctrine of contract; in particular, Markovits explores (with varying degrees of success) how his theory can explain the requirement of consideration and the primacy of expectation damages as the standard remedy for contractual breaches.² Markovits presents what he takes to be both a positive and normative account of contract that appears to achieve a remarkably good fit with the philosophy of promise-making and promise-keeping, as well as the common law doctrines and provisions of the Uniform Commercial Code that constitute the law of contract. Markovits's achievement also puts contract in its best light, rendering it an especially attractive building block of a liberal community.

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1. Daniel Markovits, *Contract and Collaboration*, 113 *YALE L.J.* 1417 (2004).

2. I should note that the argument for why the collaborative ideal produces a preference for expectation damages over reliance damages is less than convincing. While I won't be able to focus upon this suggestion in what follows, it suffices to note that my impression that reliance damages may be better for establishing respectful communities than expectation damages comes from those who regularly argue for a greater role for the reliance remedy in service of establishing deeper communal bonds among citizens. See P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 9 (1981) (“[T]he French jurist François de Connan (1508-51) . . . argued that a promise, by itself, created no ‘natural’ obligation unless it was relied upon”); Peter Gabel & Jay Feinman, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 497, 508-09 (David Kairys ed., 3d ed. 1998); Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW* 641, 652 (David Kairys ed., 3d ed. 1998).

Still, in the effort to see normative benefits in the collaborative view, there is a tunnel vision of sorts, occluding a more complete positive theory of contract. That complete theory could not, as Markovits's does, fail to explain two out of the three prototypical cases of the contractual relation. Markovits acknowledges that there are three prototypical forms of contracts: (1) person-to-person; (2) person-to-organization; and (3) organization-to-organization.³ A person for these purposes is a natural person; an organization is a group of natural persons who come together in some association that may or may not have legal personhood.⁴

He is refreshingly honest in arguing that his theory of contract only addresses Type (1) contracts.⁵ Indeed, in a moment that evidences exceptional integrity, he goes even further to show why the simple ways of reducing Type (2) and Type (3) contracts to the first Type should be considered unavailing.⁶ I wish to argue here that this feature of

3. Markovits, *supra* note 1, at 1464. I shall call these Type (1), Type (2), and Type (3) contracts, respectively. The latter two Types are grouped as "organizational contracts" insofar as they involve organizations. The typology, of course, has roots in Meir Dan-Cohen's book, *MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* 82-84 (1986), and is a quite standard way of classifying contracts. Some subdivide Type (2) contracts based upon who is the promisor and who is the promisee. But for my purposes here, the three main Types will do just fine. In some ways, a careful reading of the few cited pages of Dan-Cohen's book makes my ultimate point perfectly well: The three contract Types may have different underlying values, and it is dangerous to try and isolate a singular theory to explain them all, especially if one only focuses upon one Type as the "core" of contract. Indeed, Dan-Cohen very helpfully begins the task of building a theory of contract to accommodate all three Types. *See id.* at 96-102 (arguing that different contract remedies should be used depending upon (1) whether a breach is effected by an individual or an organization and (2) whether the breach is committed against an individual or an organization). However, Dan-Cohen does call contract a "paradigmatically individualistic legal field." *Id.* at 84. I challenge that assumption here.

4. To be sure, a natural person can incorporate herself—and it isn't immediately clear how such a person should be treated for purposes of the typology. But let us leave the marginal cases for another time.

5. Markovits, *supra* note 1, at 1464-65. For an argument that non-economic theories of contracts routinely and unnecessarily denigrate contracts involving organizations, *see* Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria* (March 8, 2005) (unpublished working paper, at <http://ssrn.com/abstract=681728>).

6. Markovits, *supra* note 1, at 1464-74. Instead of rehearsing his whole argument on this score, I shall simply quote a representative paragraph where Markovits explains why organizations are not just conglomerations of people with the same moral entitlements that individuals have:

The collaborative view describes the distinctive forms of respect and community that contracts engender, but these broader notions do not directly apply to organizations at all. Individual persons have reasons to respect and seek community with each other because

Markovits's account, while not fatal to using the collaborative view as a window into something potentially true and interesting about Type (1) contracts, severely curtails the possibility of treating the collaborative view as a general theory of contract as such. Although Markovits remains content to suggest that a "natural . . . division of labor"⁷ allows him to focus only on the Type (1) contract, there is great reason to doubt that we can say of today's contract law, as Markovits does, that contracts with and between organizations lay outside the "conceptual core"⁸ of contract. Indeed, the very fact that organizational contracts form part of the conceptual core of contract will present difficulties for the theory of liberal institutions that Markovits promises us in the future.

The short challenge to Markovits's theory I shall offer here has the potential to illuminate a methodological argument that has been going on in contract theory for some time. The long-standing debate between the philosophical "autonomy theorists"⁹ and the "efficiency theorists"¹⁰ has never quite settled down. What we may learn if we focus on the possible Types of contractual relations generally and the role each Type can play in contract theory is that the autonomy and efficiency theorists tend to focus their views on only one Type of contract: the autonomy theorists focus on Type (1) and the efficiency theorists focus on Type (3). Markovits is a good example of the fixation on Type (1), and Alan Schwartz and Robert Scott's recent contribution to contract theory in the

individual persons' moral status commands that they be treated never merely as means but always as ends in themselves. Organizations, by contrast, have no comparable moral status, even when they are treated, artificially, as persons at law. Quite to the contrary, organizations should be treated precisely as mere means, and someone who treats an organization as an end in itself makes, at least presumptively, a moral error. Organizations are simply not the kinds of creatures to which the broader moral framework that supports the collaborative ideal directly applies, so that relations involving organizations—that is, between organizations or between organizations and individual persons—cannot directly participate in the value of contractual collaboration.

Id. at 1465. Thanks to the readers of prawnsblawg.blogs.com for encouraging me to give voice to Markovits's reasoning on this issue early in the paper. See http://prawnsblawg.blogs.com/prawnsblawg/2005/07/on_collaboratio.html (last visited on Sept. 6, 2005).

7. Markovits, *supra* note 1, at 1465.

8. *Id.* at 1470.

9. The classic example of the philosophical "autonomy" approach to the theory of contract is CHARLES FRIED, *CONTRACT AS PROMISE* (1982).

10. Examples of "efficiency" theories of contract include: Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541 (2003); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489 (1989); and Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261 (1980).

Yale Law Journal is a good example of an efficiency theory committed to holding only Type (3) contracts to be at the core of contract.¹¹ In the final analysis, none can claim to have achieved a comprehensive theory of contract precisely because of each one's inability to account for all Types of contracts; indeed, Schwartz and Scott acknowledge that their work is fundamentally normative rather than descriptive,¹² and they clearly compartmentalize Type (1) and Type (2) contracts as laying outside the core of contract law.¹³ Each side in the debate, however, may ultimately have a place within a general pluralistic theory of contract law. But theorists must stop boxing out entire Types of contracts if they wish to offer us a general theory of contract.

Part I of this Essay summarizes the portion of Markovits's collaborative view upon which I shall focus. Part II argues, *pace* Markovits, that Type (2) and Type (3) contracts are part of the "conceptual core" of contract for which a general theory of contract must account. And Part III offers some concluding thoughts about conciliation in contract theory.

I. A SLIVER OF MARKOVITS'S THEORY

There is, to be sure, something unseemly about critiquing an incredibly rich work that produces acute insights into the philosophy of promising and the law and theory of contract by narrowly focusing on a short section of a substantially grander project. Even worse, the piece of Markovits's Article I shall discuss here is one Markovits acknowledges as "inevitably incomplete," one that yields a conclusion "not yet earned, and whose final justification must abide future work connecting collaboration to the mainstays of liberal political authority."¹⁴ Nevertheless, I believe it useful to meditate upon this incompleteness briefly because it will not only highlight what the collaborative theory of contract cannot be said to have accomplished but also because it shall produce helpful directions of inquiry for Markovits as he undertakes his more ambitious work of the future: connecting the collaborative ideal to the market and other "liberal" institutions. Moreover, ruminating upon the incompleteness of Markovits's account facilitates a more general lesson about the inattention theorists pay to the role of Types in contract

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

12. *Id.* at 544 (noting that their perspective is normative).

13. *Id.* at 544-45.

14. Markovits, *supra* note 1, at 1465.

theory formation.

Let me recap the section of Markovits's Article that I wish to pursue here. Early in his Article, Markovits establishes that contracts partake in the "morphology"¹⁵ of promise-making and promise-keeping despite a contract's somewhat more impersonal nature. In a subsection entitled "Who Can Collaborate," Markovits considers another way that a mode of impersonality in contract narrows "the scope of the collaborative view's application [but] not the view's persuasiveness *tout court*."¹⁶ He observes that the collaborative theory of contract is developed with contracts between individuals as the core cases. He argues that "[t]his is a natural emphasis given the theory's origins and ambitions: Both the Kantian ideals of respect out of which the theory has grown and the liberal ideals of political legitimacy to which the theory aspires focus attention on individuals and away from organizations."¹⁷ Because he believes that contracts involving corporate entities present different ethical and conceptual problems from contracts between individuals,¹⁸ Markovits generally feels comfortable keeping the collaborative view's ambit somewhat circumscribed. He specifically reserves the questions of "whether there should be one law of contract or two, and if there should be only one, whether considerations relevant to individuals or to organizations should dominate."¹⁹ Nevertheless, he does finally take a stand: "[C]ontracts involving individuals properly occupy the center our intuitive conception of contract."²⁰

15. *Id.* at 1473. Markovits uses the felicitous phrase to describe how organizational contract relates to the core case of the person-to-person contract; I adapt this phrase for my purposes here.

16. *Id.* at 1464.

17. *Id.*

18. The careful reader will notice that I speak of "ethics" and the "ethical," whereas Markovits prefers "morality" and the "moral." My preference is rooted in Bernard Williams's understanding of the different connotations of the words, something that need not detain us here. See generally BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985). In short, the "moral" involves a more judgmental perspective than that of the "ethical," which is far more culturally-dependant, contingent, subjective, and rooted in lived lives. My sense is that, given his philosophical sensibilities, Markovits would be perfectly comfortable with using the language of ethics over the language of morality in this context.

19. Markovits, *supra* note 1, at 1465. Indeed, as I suggest *infra*, we may need three laws of contract to correspond to the three Types.

20. *Id.* It isn't made clear whether one needs to be a "collaborationist" to be included in the account of "our" intuitions. I shall assume not, but it is possible that Markovits is merely making an observation about the collective intuitions of those who already agree with him. This is unlikely, however, because Markovits's idea is so new that there probably aren't many adherents to his view.

Still, Markovits makes a few observations about the two other Types of contracts that involve more impersonal relations: those between individuals and corporate entities and those between corporate entities. He notes that organizations cannot directly participate “in the [ethical] ideals by whose terms the collaborative view explains contractual obligations.”²¹ Despite the treatment of corporations as legal persons at law, corporate entities cannot command treatment as ends in themselves as real people can demand; indeed, it would be a category mistake to treat corporations and organizations as ends in themselves. Accordingly, organizations cannot participate in the sort of community Markovits sees in contractual collaboration. Markovits, to his credit, goes on to reject some other ways we might tenuously try to tie organizational contracts to the collaborative ideal. He concludes that “[t]he collaborative account of contract therefore seems not to apply, either directly or indirectly, to contracts that involves organizations.”²²

So what does Markovits have to say about the exclusion of contracts involving organizations, which he is sure is not a “theoretical failure”?²³ First, he claims that many other philosophical theories of contract proceed by investigating individual wills to find the root of contractual obligation; and those theories also have a “similarly restricted scope,” excluding organizations.²⁴ Moreover, a quick scan of the “efficiency” or economic theory of contract, which generally treats the purpose of contract as welfare or wealth-maximization, produces a similar, obverse conclusion: theories that treat the firm as the core of contract have virtually nothing interesting to say about the case of the person-to-person contract. Finally, he argues that theories of contract that account for organizations “succeed only on terms that reveal such agreements to be far removed from contract’s conceptual core.”²⁵ Markovits believes that a more careful consideration of the efficiency theory of contract between firms reveals that the “distinctive essence of contract” lies in person-to-person contracts even though the economic view “succeeds at analyzing organizational practices upon which the collaborative view has no immediate purchase.”²⁶

21. *Id.* at 1465.

22. *Id.* at 1467.

23. Markovits, *supra* note 1, at 1465.

24. *Id.* This parry really is beside the point: just because other theories are limited in scope doesn’t mean being limited in scope isn’t a difficulty that requires more than the excuse that others are doing it. If everyone were jumping off of a bridge . . .

25. *Id.* at 1467.

26. *Id.* at 1468.

This final piece of Markovits's argument deserves elaboration because it ultimately is the only way to save the collaborative theory of contract from some "theoretical failure," assuming its aspiration is to describe—positively, and, in an important way, exhaustively—our experience and law of contract. The gist of Markovits's argument is that Schwartz and Scott's "efficiency" theory of contract rests on the idea that "firms' broad-ranging contractual engagements generally cause them to occupy both sides of contractual relationships."²⁷ This fact about firm contracting enables Schwartz and Scott's theory of contract to exclude considerations of corrective justice and distributive justice, which will "come out in the wash"²⁸ because firms are always on both sides of the bargaining table. But, more importantly and more generally, Markovits wants us to conclude that firm contracting and the efficiency theory of contract lie outside the conceptual core of contract. This results because the parties to organizational contracts are not treated with any distinctness or separateness: firms "are mere instrumentalities that interact with each other on behalf of [a] common owner, who has a perfectly balanced share in both sides of every transaction."²⁹ This presumed diversification of every firm owner's portfolio supports the efficiency theory, and it ultimately renders contracts to be about a single person, not about bilateral relationships among parties. Whatever else contract may be at its core, Markovits argues, it is about more than one party: "Contract, in its essence, involves *two* distinct, independent parties, but the transactions that Schwartz and Scott describe countenance just *one*."³⁰ Accordingly, the economic theory of contract reveals itself not to be about contract at all.

Thus, despite Markovits's introductory remarks about the subject, which reserved some questions about organizational contracts and their role in the theory and practice of contract, Markovits insists that the conceptual core of contract is in Type (1) contracts and that theories which focus upon organizational contracts reveal themselves not to be about contract after all. This allows him more comfortably to conclude that the collaborative view's inability to account for organizational contracts should not "count against" the collaborative view's explanation that Type (1) person-to-person transactions are the only components of

27. Markovits, *supra* note 1, at 1469 (citing Schwartz & Scott, *supra* note 10, at 555-56).

28. *Id.*

29. *Id.* at 1470.

30. *Id.*

contract that can be said to form contract's core.³¹

Markovitz urges that efficiency theorists are misguided, *inter alia*, when they argue that contract law should principally serve firms' economic needs. Schwartz and Scott, for example, have argued that person-to-person contracts should be and are governed by different legal regimes such as family law, property law, consumer protection law, and employment law; contract law proper, they argue, should be and is left with the role of regulating contracts between firms, a sub-species of Type (3) contracts.³² By contrast, Markovits argues:

[A]s a descriptive matter, contracts among individual persons—governed by the doctrines of traditional contract law—play a fairly prominent role in many individual persons' [ethical] and legal lives. Individual persons . . . commonly make contracts involving the purchase and sale of personal property (including, increasingly, over the Internet) and of services in many forms.³³

Markovits thus focuses our attention on the disservice to these transactions that a fixation on firm efficiency in contract law might engender. Because he generally wishes to see collaborative ideals underlying our liberal institutions and our most basic market transactions, Markovits would reject any account of contract that sought solely to service firm efficiency or that is dominated by efficiency considerations. And he goes further: any contract law of firms must pay its respects to the collaborative view. To the extent that a contract law for organizations is inconsistent with collaborative norms, it has the potential to erode the very foundation of contract because its conceptual core is located within Type (1) contracts.³⁴

Enough summary. Markovits's conclusion is by now clear: "[T]he importance of the collaborative approach to contract is not undermined by the fact that it does not immediately encompass" Type (2) and Type (3) contracts.³⁵ For the reasons explored below, I respectfully dissent from that conclusion to the extent that the collaborative view aspires to

31. Markovits, *supra* note 1, at 1471.

32. Schwartz & Scott, *supra* note 10, at 544, 550. Firms, for Schwartz and Scott, are particularly sophisticated parties; accordingly, the principal goal of wealth-maximization seems fair to impute to them.

33. Markovits, *supra* note 1, at 1471-72 (footnote omitted).

34. *See id.* at 1467 ("there may be good reason to assimilate contracts including organizations to the collaborative view in order to protect collaboration among individuals.").

35. *Id.* at 1473.

be a general theory of contract.

II. TYPE (2) AND TYPE (3) CONTRACTS ARE PART OF THE CONCEPTUAL CORE OF CONTRACT FOR WHICH A GENERAL THEORY OF CONTRACT MUST ACCOUNT

At the center of this intervention into the “collaborative theory of contract” is a simple point: it is misleading and inadequate to treat Type (2) and Type (3) contracts as outside the “conceptual core” of contract. Markovits too easily reaches his conclusion because of his method of getting there. By giving primacy to his philosophical approach, he divorces himself from commonsensical, empirical, historical, and genealogical accounts of contract that would surely put Type (2) and Type (3) contracts within the core of the concept. It is simply impossible to present a coherent general account of contract without attending to all three Types of contracts. Markovits ultimately excludes Type (2) and Type (3) contracts because of a particular reading of the efficiency theory of contract offered by Schwartz and Scott (and his sense that no one else has done any better than producing circumscribed theories). Surely, there are other ways to imagine a general theory of contract sensitive to Type (2) and Type (3) contracts that do not fall prey to Markovits’s very interesting characterization of Schwartz and Scott’s efficiency theory of firms, thin and hybrid though they may be. This doesn’t mean, however, that the collaborative view is useless. It only means that Markovits’s theory does not exhaust the general theory of contract as he might have hoped. It also means that further refinement of the view is required; or, Markovits must concede that he has achieved only a partial theory of contract, even if it is one that helps explain Type (1) contracts especially well, furnishing tools of understanding to those who enter into Type (1) contracts and to those charged with judging them.

I begin with a simple commonsensical observation in service of a more sociologically-sensitive philosophical inquiry into the core of contract:³⁶ Although Type (1) contracts surely “play a fairly prominent role in many individual persons’ [ethical] and legal lives,”³⁷ as Markovits argues, it is likely that Type (2) contracts are far more

36. Inspiration here is taken from P.S. ATIYAH, *supra* note 2, at 138 (encouraging “sociological inquiry into the institution of promising [and contracting] as it currently exists in a modern Western society”).

37. Markovits, *supra* note 1, at 1471-72.

common in citizens' daily lives. The very example Markovits employs makes the point just fine: he cites E-bay as proof that we have regular contract-based transactions with one another *qua* individuals. But he fails to acknowledge that, if more carefully analyzed, those transactions are mediated through an organization—and indeed are better considered as two Type (2) contracts rather than one Type (1) contract. We must contract with E-bay to get a username before we can buy from and sell to each other. More generally, if we classify each of the basic contracts into which most of us enter, I suspect we will find the vast majority of them to be of the Type (2) variety. From our bank accounts to our car financing; from our home financing or leases to our book purchases; from our employment contracts to our credit cards; and from the food that we eat to the entertainment we enjoy, a vast majority of the contracts we enter are of the Type (2) variety.³⁸ No doubt, Type (1) and Type (3) contracts also account for many contracts as well; I don't care to undertake a full empirical study of which Type of contract predominates as a matter of fact. Yet the point I wish to make is by now clear: calling Type (1) contracts the conceptual core of contract does not cohere very well with our ordinary usage or intuitions.³⁹

38. As would no doubt interest Markovits, *see id.* at 1465 (suggesting that the collaborative view will be connected with a story about “liberal political authority”), many standard stories about the legitimacy of liberal political authority can be classified as Type (2) contracts, with individuals making a contract with the state, a corporate entity. The “social contract” theory of legitimacy is the most obvious one to draw upon a Type (2) contract. But “popular sovereignty” and constitutionalist theories also trade on a form of the Type (2) contract. This could get more complicated too: the “social contract” of Hobbes's invention was with a singular sovereign, so it might better be considered a Type (1) contract after all; and “popular sovereignty” and constitutionalist theories also have Type (3) valences because “the people” can sometimes be considered a corporate entity in these theories—and they have corporate bodies to represent them (whether they be states or cameral entities). I'm sure Markovits will treat this very interesting subject in due course.

39. It is also worth noting that just as Markovits tries to dismiss Type (2) and Type (3) contracts, Schwartz and Scott, *supra* note 10, at 544-45, make an effort to dismiss Type (1) and Type (2) contracts. Schwartz and Scott believe that Type (1) contracts are controlled by family and property law and that Type (2) contracts are controlled by employment law (when an organization is the “buyer” from an individual), consumer protection, securities, and leases law (when the buyer is the individual and the seller is an organization). Like Markovits, Schwartz and Scott try too hard to narrow contract's scope: the UCC (and particularly Article 2)—what Schwartz & Scott see as the conceptual core of contract law—applies to many Type (1) and Type (2) contracts. It doesn't take too much imagination to think of cases where an individual consumer's contract with an organization is controlled by the UCC (think 2-302's unconscionability provision). Furthermore, organizations buy goods from individuals all the time in transactions controlled by the UCC. Moreover, merchants also come within the UCC, even when they are doing business as individuals. In the final analysis, however, Schwartz and Scott needn't worry too much about whether they are right to focus solely on Type (3)

For fun, I performed an empirical test on two major contracts casebooks traditionally used to teach the basic contracts course: John P. Dawson's and Stewart Macaulay's.⁴⁰ I wanted to see if, quite apart from our sense of our everyday lives, our contracts courses in the law schools teach students about a predominant contract Type. My inadequate methodology consisted of surveying the principal cases (you know, the ones in **bold** or *italics* in the table of cases) and classifying them by Type on the basis of the named parties. Although this test is not fool-proof because the names of cases do not necessarily tell us the actual parties to the contracts at issue in the case, it is a reasonable proxy for these purposes. I treated governmental units as corporate entities.⁴¹

I report the results here to solidify my claim that Type (1) contracts do not dominate contract law. In the Dawson casebook, Type (1) contracts do seem to account for the highest number of principal cases: 66 of 148. But the tallies of Type (2) and Type (3) contracts total 63 and 14, respectively, combining to form the majority of the main cases in the book. In the Macaulay casebook, a product of the University of Wisconsin's "Law in Action" movement, Type (1) cases account for the fewest in the list of principal cases: 25 of 103. Again, Type (2) contracts, totaling 38, and Type (3) contracts, totaling 40, combine to dominate the casebook.

That Markovits is able to show Schwartz and Scott's account of Type (3) contracts to be far removed from Type (1) contracts should not deter one from trying to achieve a unified general theory of contract that can explain more than Type (1) instantiations of contractual transaction and obligation. Thus, Markovits's refusal to answer whether there should be one or two laws of contract effectively avoids a central challenge to his theory: If there are to be two laws of contract, and the second law of contract will control the Type (2) and Type (3) varieties to the exclusion of Type (1), won't any general theory of contract need to attend to both laws of contract? And even if there is to be a "second" law of contract for Type (2) and Type (3) contracts, won't it partake of the general concept of contract? Is it really a category mistake to call all three Types of contract "contracts"? Must not the collaborative view be

contracts because they do not aspire to a positive theory of contract. They are satisfied to offer a normative account of contract for a sub-class of Type (3) contracts, those between sophisticated firms.

40. See JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* (7th ed. 1998); 1 & 2 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (1995).

41. This is consistent with the treatment of governmental units as organizations in DAN-COHEN, *supra* note 3, at 164-65, 186, 191.

considered a “theoretical failure,” assuming its aspiration is to get at the conceptual core of contract and to provide a positive general theory of contract?

Finally, why doesn’t Markovits consider that there may need to be three laws of contract? It seems reasonable that firm-to-firm contracts can be presumed to pursue profit, and it seems plausible that person-to-person contracts can perhaps be presumed to be controlled by a different ethic.⁴² But what to do about that most interesting and extremely common case of the Type (2) contract which must partake of some hybrid or *sui generis* ethic that has yet to be adequately theorized?⁴³ Indeed, the Type (2) contract may – more than any other type – offer some insight into the social contract.⁴⁴

There is an even more preliminary question that must be asked about the philosophical method Markovits employs—a question that must generally be asked of most theorists employing philosophical (and even economic) methodologies: To what extent does the philosophical method make an effort to cohere with the historical development of the common law relevant to the very concept under philosophical scrutiny? Of course, as with most philosophical expositors of contract, Markovits “tests” his theory by looking at particular doctrines in the law of contract to see if the values he discovers in his view fit the doctrine. That is a good approach as far as it goes.⁴⁵ But by the time we arrive at the “testing” phase, the view itself has already been developed. Thus, there is almost no inquiry into the historical development of contract to see if the collaborative view is of a piece with contract’s history.

As I just argued, today’s practice of contract must be said to be constituted by all three Types of contract. Perhaps, then, Markovits can

42. This presumption, however, must remain rebuttable: organizations form for many reasons, not only for profit. And plenty of Type (1) contracts are profit-seeking. This reality – and some consequences that flow therefrom – is nicely pursued in Oman, *supra* note 5. Accordingly, although we must remain sensitive to Type in contract theory formation, it is dangerous to speak of wholly separate laws of contract to govern each Type precisely because the contracts within a Type may share the same shape but can’t be presumed to always share the same underlying motive or theory of obligation.

43. I thank Jeffrey Gordon for pushing me on this point.

44. For more on social contract theories and their relation to the common law of contracts, see DAVID J. IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 215-19 (1999). I discuss these issues *supra* note 38.

45. As I suggested in note 2, the “testing” phase produced more mixed results for me than it did for Markovits because I believe more can be said for the desirability of reliance damages, even if the collaborative view is “right.” But I’ll reserve this interesting topic for another time. See ATIYAH, *supra* note 2, at 9; Gabel & Feinman, *supra* note 2, at 497, 508-09; Gordon, *supra* note 2, at 641, 652.

be vindicated if it can be shown that Type (1) contracts were the first sort of contracts—and that makes them form the conceptual core. As awkward (and downright fallacious) as it might be to define conceptual priority with reference to chronological priority, that strategy might help us understand why Type (1) contracts should be the benchmark for the analysis of contract. Otherwise, we risk the result that, under Markovits's theory, the philosophical core of contract (and its exclusion of Type (2) and Type (3) contracts) can only be delineated if we grant the very individual-centered collaborative view for which his Article is poised to argue in the first instance. I pursue this line of inquiry despite Markovits's admission that he is involved in "high abstraction" and despite his forthrightness that he abandons "history," rendering his view "limited . . . in this regard."⁴⁶

Although it would be inappropriate here to survey the history of contract law (not the least because I am no historian), a quick glance at Oliver Wendell Holmes, Jr.'s lecture on the history of contract law in his magisterial *The Common Law*⁴⁷ suggests that there is, after all, nothing present in the early history of contract that circumscribes its conceptual application to Type (2) or Type (3) contracts. As he writes, "the earliest appearance of law was as a substitute for the private feuds between families or clans."⁴⁸ Thus, at its core, law seems to have application to corporate entities and is not reserved for individuals *qua* individuals. Even contract law's earliest appearances fail to resonate with the narrow scope of the collaborative view: "[C]ontract . . . was simply a solemn admission of liability in the presence of the officer authorized to take it."⁴⁹ Accordingly, contract involved a party and an officer of an organization more than it involved a promisee with whom a promisor collaborates.

Moreover, contract law has its historical roots in the action of the debt, which was "simply the general form in which any money claim

46. Markovits, *supra* note 1, at 1475.

47. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 247-88 (Dover Publications, Inc. 1991) (1881). I made efforts to confirm relevant details of the common law with authoritative histories, most especially IBBETSON, *supra* note 44.

48. HOLMES, *supra* note 47 at 248. Cf. MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 5 (1990) ("[I]t is not individuals but collectivities that impose obligations of exchange and contract upon each other. The contracting parties are legal entities: clans, tribes, and families who confront and oppose one another either in groups who meet face to face in one spot, or through their chiefs, or in both these ways at once.").

49. HOLMES, *supra* note 47, at 250. Understanding promises themselves as admissions is a central thesis of ATIYAH, *supra* note 2, at 184-215.

was collected.”⁵⁰ Thus, if the core of the historical concept of contract was about the collection of money, it is hard to see why the philosophical concept should be delimited by the Type (1) contract, unless we are already so enamored with the normative benefits of the narrow scope of the philosophical concept produced by the collaborative view that we ignore many features of the historical development of contract law. At the very least, the historical development of the common law of contract should inform the philosophical concept more than it has in Markovits’s argument. Marshalling a fitness test at the conclusion of the presentation of the deracinated philosophical theory is too little too late, especially because two out of three categories of contract are out of frame under the collaborative view.

There is an even more radical claim that Holmes’s history of contract might support, and it severely undermines the collaborative view because of its basis in the philosophy of promising. It may be the case that the core of contract is not about promises at all but that contract actions were merely extended to promises “by strict analogy.”⁵¹ As Holmes maintains, the old action of debts, from which contract arose, “were not conceived of as raised by a promise. They were a ‘duty’ springing from the plaintiff’s receipt of property, a fact which could be seen and sworn to.”⁵² Or consider Grant Gilmore’s hypothesis:

Without giving much thought to the matter, we have tended to assume that “Contract” came first, and then, in time, the various specialties—negotiable instruments, sales, insurance and so on—split off from the main trunk. The truth seems to be the other way around. The specialties were fully developed . . . long before the need for a general theory of contract had occurred to anyone.⁵³

Thus, perhaps a more careful historical look at contract’s subdivisions would reveal that promises are not at the root of many of them, and that it is a bit misleading to focus on the promise as the

50. HOLMES, *supra* note 47, at 251.

51. *Id.* at 264.

52. *Id.* Should one wish to impeach Holmes’s credibility as a historian, Atiyah may be consulted to confirm these details. See ATIYAH, *supra* note 2, at 119; see also P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

53. GRANT GILMORE, *THE DEATH OF CONTRACT* 12-13 (1974). To be sure, Gilmore is not perfectly reliable on the point. See James R. Gordley, Review, 89 HARV. L. REV. 452 (1975) (reviewing Gilmore and suggesting that the theory of contract was better developed than Gilmore suggests).

core of contract. Historian David Ibbetson provides many reasons to think about the earliest contracts actions as being rooted in agreement and assent rather than promise.⁵⁴

This argument, however, should not be pressed too far. Whatever we may say about the debt actions from which contract actions arose, promises were soon seen as central to the contract action. Indeed, when the contract-specific debt fully morphed into the action of *assumpsit*, it eventually became tied to promises.⁵⁵

Nevertheless, even supposing that contractual obligation has roots in the normative force of promise-keeping, we must then ask if there is something about promises at *their* conceptual core that excludes corporate entities from their purview, thereby excluding Type (2) and Type (3) transactions from contract's core? As Atiyah has written, "Philosophers nearly always assume that promises are only made by individual human beings. But this is not true. Promises are made by people acting collectively in all manner of [social] groups[:] . . . companies, associations, schools, hospitals, universities, Governments, and many other institutions."⁵⁶ Yet perhaps this obvious fact about our current practice of organizations making promises happened by mere analogy and was not part of promise's "core."

History of a sort may be a guide here as well. Although it may be fair to put promise at the center of contract, there is still a real historical-philosophical-genealogical question about the emergence of the promise in the first place. In turn, that question may shed light on the issue of the day: whether the conceptual core of contract must be thought to exclude Type (2) and Type (3) contracts. To be sure, Holmes himself thought that

[t]he question does not seem to be of great philosophical significance. For to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense. The nature of the particular promise which was first enforced in a given system can hardly lead to any truth of general importance.⁵⁷

Holmes is a bit quick to dismiss the "metaphysical" inquiry, at least too

54. IBBETSON, *supra* note 44, at 71, 73, 135, 146, 222.

55. On the historical development of the *assumpsit* action, see *id.* at 126-51 ("The Rise of the Action of *Assumpsit*").

56. ATIYAH, *supra* note 2, at 151-52.

57. HOLMES, *supra* note 47, at 251.

quick for those who purport to present a philosophical, rather than pragmatic, account of contract.

So where did the promise come from? In *On the Genealogy of Morals*, Friedrich Nietzsche⁵⁸ has an interesting answer, though his genealogical method might be criticized for producing a history too speculative to take seriously. Still, the extraordinary Second Essay of that work is devoted to the question of how humankind first came to have the right to make promises.⁵⁹ This question is particularly urgent because Nietzsche thinks its opposite, forgetfulness, is the root of “happiness, . . . cheerfulness, . . . hope, . . . pride, . . . [and the] present.”⁶⁰ How people developed the right to make promises and take responsibility for themselves and their futures demands explanation. Still, Nietzsche has the greatest of respect for the individuals that have achieved the right to make promises because they are truly free: They can stand as guarantors for themselves, and, in so doing, show themselves to be truly sovereign over their own wills.

But, Nietzsche argues, just how man achieved sovereignty over his will is a somewhat sordid affair. In short, the development of the promise was only possible by creating a memory, and “only that which never ceases to *hurt* stays in the memory.”⁶¹ In Nietzsche’s view, memory was created with harsh physical punishment that acculturated people to recognize that they can be responsible for their wills. He is sure that “blood and cruelty lie at the bottom of all ‘good things,’” including having the right to make promises.⁶² But most important for my purposes, Nietzsche argues that the blood and cruelty behind the

58. FRIEDRICH NIETZSCHE, *On the Genealogy of Morals: A Polemic*, in BASIC WRITINGS OF NIETZSCHE 449 (Walter Kaufman trans. & ed., 1992). The uses and disadvantages of Nietzsche’s work for the theory of contract are understudied (unlike the application of Nietzsche’s work to the theory of punishment).

59. *Id.* at 493.

60. *Id.* at 494. Lest anyone think this is merely an idiosyncratic view, the sober E. Allan Farnsworth has most recently focused our attention on the humanness of changing one’s mind. Indeed, he writes that “[m]uch of contract law is devoted to identifying the reasons that . . . excuse renegeing.” E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 20 (1998). As Macneil has written, “beneath the covers we are firmly committed to the desirability of promises being broken, not just occasionally but quite regularly.” Ian Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 729 (1974). Farnsworth also notes that there is a trend in favor of letting people out of their obligations. Perhaps the focus of contract law then, after all, is the delineation of when and why we may properly forget, not the delineation of when and why our promises should be enforced. Indeed, classical contract theory seems to be based on the ideal that “no one should be liable to anyone for anything.” GILMORE, *supra* note 53, at 15.

61. NIETZSCHE, *supra* note 58, at 497.

62. *Id.* at 498.

genesis of promising was exacted first and foremost by corporate entities—states, clans, tribes—against the individual. Indeed, the organization is the only entity that could have the awesome power to engrain memory in individuals and furnish them with the very possibility for commitment that serves as the source of their promises and responsibility.

At first, these promises and responsibilities were directed to the corporate entity before they were extended to individuals. Nietzsche argues that particular cultures have particular forms of the promise which can be traced to their societies' punishment regimes. Thus, embedded in Nietzsche's view of the promise is actually an acknowledgement that, *mutatis mutandis*, the Type (2) promise lies at the core of the concept: the community (a corporate entity or organization) "stands to its members [as] creditor to his debtors."⁶³ And, even focusing upon what Nietzsche has to say in the Second Essay about Type (1)'s etiology in buying and selling, promises between individuals seem to have their origins in "[s]etting prices, determining values, contriving equivalences, [and] exchanging."⁶⁴ This is hardly the sort of fulcrum for contract that would exclude consideration of the Type (2) and Type (3) varieties because there is nothing particular about these activities (unlike the more Kantian collaborative community) that would exclude organizations.⁶⁵

We return to our inquiry: Can the "philosophical" concept of contract be divorced from an account of the development of promising?

63. *Id.* at 507. This is, in a different way, what I am getting at *supra* note 38. Nietzsche finds this creditor-debtor relationship in all political authority, not just authority of the liberal form. Indeed, Nietzsche writes, "sentimentalism which would have [the state] begin with a 'contract' has been disposed of." *Id.* at 522. Nietzsche even finds theological authority to rest on the creditor-debtor relationship. NIETZSCHE, *supra* note 58, at 526.

64. *Id.* at 506.

65. There is, of course, much more that can be said about Nietzsche and contracts. For example, Nietzsche traces in contractual relations and the relationship of creditors and debtors the very foundation of all public law—and punishment in particular. To understand this argument, we would need to acknowledge that breaches of contract once entitled promisees to take body parts from the live body or the grave of the promisor-breacher as compensation.

In "punishing" the debtor, the creditor participates in a *right of the masters*: at last he, too, may experience for once the exalted sensation of being allowed to despise and mistreat someone as "beneath him"—or at least, if the actual power and administration of punishment has already been passed to the "authorities," to see him despised and mistreated.

Id. at 501. As should be obvious, reconciling the collaborative view with Nietzsche's vision of contract would be quite a challenge indeed. On the other hand, the collaborative view partakes of the Kantian morality; and Nietzsche writes that "the categorical imperative smells of cruelty." *Id.* at 501.

More precisely—and more relevantly—if promises themselves have their roots in Type (2) transactions, does it make sense that Type (2) contracts should be excluded from the philosophical concept of contract, which Markovits assumes has its roots in the philosophy of promising? I don't mean to be a slave to history here: no one knew as well as Nietzsche that “the cause of the origin of a thing and its eventual utility, its actual employment and place in a system of purposes, lie worlds apart; whatever exists having somehow come into being, is again and again reinterpreted to new ends, taken over, transformed.”⁶⁶ Still, a positive general theory of contract must remain in greater touch with commonsensical, empirical, historical, and genealogical perspectives on contract and promise to command our support.

In summary, then, Markovits's philosophical “core” of contract—one that includes only Type (1) transactions—fails to address commonsensical intuitions about the sort of contracts we all enter; most people's experience of contract in society; the likely empirical reality that Type (1) contracts do not dominate the marketplace or the classroom; and a more general sense that there is something improbable about devising a positive theory of contract while emphasizing only one of the three categories of contract. Moreover, Markovits's “core” neither connects with the history of the common law nor a particular (if idiosyncratic) genealogy of promising. Accordingly, there is substantial reason to doubt that it is fair to exclude Type (2) and Type (3) contracts from the core of the concept.⁶⁷ In the final analysis, I think we must conclude that the collaborative view is simply an incomplete theory of contract, addressing only one out of the three Types of contracts, all of which should presumptively be located at contract's conceptual core.

Despite Schwartz and Scott's efficiency theory of contract that, under Markovits's fascinating spin, seems to do away with a basic feature of contract (specifically, that contract's structure should involve bilateral relations), other accounts of contract do not need to have this characteristic.⁶⁸ We cannot even use the collaborative view to dispense

66. NIETZSCHE, *supra* note 58, at 513.

67. Consider also LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* 20 (1965): “[T]he ‘pure’ law of contract is an area of what we can call abstract relationships. ‘Pure’ contract doctrine is blind to details of subject matter and person.” Indeed, it is blind to Type. More about Friedman *infra* note 72.

68. *E.g.*, ATIYAH, *supra* note 2, at 9. Markovits's failure to engage Atiyah directly is curious given that both are more generally interested in social cooperation and utilize a thin moral theory to justify their accounts of contract. Notably, Atiyah does not limit his approach to Type (1) contracts, but neither does he think that promising is necessary for social

with “efficiency” theory altogether. This is so for two independent reasons. First, Schwartz and Scott’s particular misstep may be avoided by other efficiency theorists who are not focused, as they are, on firms. Second, Schwartz and Scott easily save themselves because their perspective is self-consciously normative, not descriptive.⁶⁹

The collaborative view has, accordingly, failed to satisfy its ambition of being a general theory of contract. Nevertheless, it should be admitted to be a fascinating window into Type (1) contracts. A unified positive general theory of contract, like a unified field theory (to use Gilmore’s penchant for physics analogies),⁷⁰ remains yet to be achieved.

A final word about what the inclusion of organizational contracts into the core of the concept will mean for the collaborative view’s future ambitions. Although we only have an elliptical account of where Markovits is headed in the next phase of developing the view, we know that he intends to suggest that the economic institution of the market, which has contract at *its* core, has a civilizing effect in getting participants to overcome egocentrism. Because contract, and, in turn, the market foster collaborative interactions that establish respectful community but avoid the intimacy and jingoism of the clan, liberal societies may ultimately rely upon contract to solve the coordination problems associated with overcoming egocentrism.⁷¹ My focus here on organizational contracts and their likely centrality in the theory and practice of contract requires Markovits to tackle a further question when he turns to his next project: whether the collaborative view can, after all, be said to have purchase on the capitalist economic order.

Although I have little doubt that a market economy has contract at its core, I have argued here that the core of contract must be thought to include organizational contracts. Yet, Type (2) and Type (3) contracts, outside the ambit of the collaborative view, seem to facilitate a particular form of economic order: capitalism. What I think this means for the sentimental education that our economic institutions can offer is that it cannot focus solely on what individual-to-individual contracts do to hone our sensibilities of respectfulness.⁷² A narrow focus on the

cooperation (as Markovits seems to). *See id.* at 135.

69. *See* Schwartz & Scott, *supra* note 10, at 544 (noting that their perspective is normative).

70. GILMORE, *supra* note 53, at 68 (calling the consideration doctrine “anti-Contract” by analogy to anti-matter in physics) (explained by Markovits, *supra* note 1, at 1488 n.168).

71. I am paraphrasing Markovits, *supra* note 1, at 1515-18.

72. Markovits will need to confront Lawrence Friedman’s description of classical

collaborative view's achievements in describing Type (1) contracts will, I think, bias Markovits's inquiry to come. I would thus urge Markovits not to forget that the collaborative view (as yet unmodified) has only accomplished a partial theory of contract; and only a partial theory of the market can follow in its wake. Indeed, our economic order, once organizational contracts are accounted for, may be best described as a capitalist one, and capitalism may have something other than Type (1) contracts as its conceptual core. I'll stop here for now; we'll see where Markovits takes us. I look forward to the further development of the collaborative view and will no doubt have more to say about it as it is refined, expanded, and subjected to other criticisms.

III. CONCLUDING THOUGHTS ABOUT THE CONCILIATION OF CONTRACT THEORY

In conclusion, some general ruminations about contract theory seem in order. Jody Kraus has argued that most philosophical theories of contract cannot be squared with most economic theories of contract because of a simple methodological impasse. The philosophers tend to offer normative theories that focus on doctrine, ignoring stubborn cases that do not conform to the proffered philosophical account, while the economic theorists tend to be descriptive and deduce their economic accounts from actual case outcomes rather than idealized doctrinal

contract doctrine (which includes both consideration and expectation damages, features of contract law that the collaborative view endorses) as bearing a close resemblance to "liberal" economic theory (of the nineteenth century). In both, "parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision." FRIEDMAN, *supra* note 67, at 21. Friedman sees classical contract theory as of a piece with laissez-faire economics in particular. See generally GILMORE, *supra* note 53, at 103-04. I doubt this is the sort of "liberal" economic order Markovits wishes the collaborative view to underwrite. And, in the future, it will be useful if Markovits clarifies just what sort of economic order he has in mind as being supported by the collaborative view. If it is the welfare state, perhaps § 90 of the RESTATEMENT OF CONTRACTS is far more relevant to reconcile with the collaborative view (and, with it, the reliance theory of contractual obligation) than the doctrine of consideration (and its bargain-based theory of obligation). See generally GILMORE, *supra* note 53, at 61-93, 104. Only the latter reconciliation was undertaken in Markovits's Article.

Moreover, to make his argument work that contractual collaboration facilitates liberal political authority, Markovits will also have to explain why so many illiberal societies are contract-filled. Didn't England have monarchy and contract side-by-side? Doesn't China have contract with a moderate authoritarian regime? And, my favorite, the classic *ad Hitlerium*: Didn't the Nazis have contracts? Of course, Markovits can emphasize that collaboration is a necessary but not a sufficient condition for liberal political authority. That, however, is hardly a very radical thesis.

statements.⁷³ Markovits's collaborative view, while philosophical, presents itself as a normatively attractive *descriptive* theory of contract. In a sense, it is exactly the sort of hybrid that should be welcomed into the family of contract theories, usually polarized, Kraus argues, on the normative-descriptive dimension.

But there are two other ways in which the collaborative view, to its detriment, refuses to be a hybrid. First, it is "monistic" rather than "pluralistic:" "Pluralistic contract theories advert to autonomy, efficiency, morality, social norms, policy, experience, and other values to explain and justify contract doctrines," whereas "monistic" theories "purport to explain and justify contract law by rendering it coherent under a single explanatory/justificatory principle."⁷⁴ By emphasizing a single principle, that of collaboration, Markovits remains within a landscape principally populated by monistic theories of contract. Ironically, while offering one more monistic normative theory (though a normative *efficiency* theory, flouting Kraus), Schwartz and Scott diagnose that "theories that are grounded in a single norm—such as autonomy or efficiency— . . . have foundered over the heterogeneity of contractual contexts to which the theory is to apply."⁷⁵ Just as Schwartz and Scott's monism self-consciously cabins all Type (1) and Type (2) contracts (as well as some Type (3) contracts)⁷⁶ outside the ambit of their efficiency principle, Markovits's monism results in a failure to account for Type (2) and Type (3) contracts, contracts central to our experience and law of contract. As Schwartz and Scott instruct: "Pluralist theories attempt to respond to the difficulty that unitary normative theories pose by urging courts to pursue efficiency, fairness,

73. See Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 689 (Jules Coleman & Scott Shapiro eds., 2002). To be sure, Kraus doesn't mean to suggest that economic theories are never normative and that philosophical theories are never descriptive; the methodological divergence is "over the relative priority between explanation and justification." *Id.* at 696. It is worth repeating here that Schwartz & Scott, *supra* note 10, at 544, offer their efficiency theory as a purely normative one. The same strategy is utilized by noted Harvard legal economists, Lewis Kaplow and Steven Shavell. See Lewis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

74. Kraus, *supra* note 73, at 688 n.1 (citing MICHAEL TREBILOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993)). Recent attempts at pluralistic theories include: Melvin A. Eisenberg, *The Theory of Contracts*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS 206 (Peter Benson ed., 2001).

75. Schwartz & Scott, *supra* note 10, at 543.

76. *Id.* at 544. Remember that Schwartz and Scott offer a theory of firm-to-firm contracting, where firms are particular sub-types of organizations that are especially sophisticated.

good faith, and the protection of individual autonomy. Such theories need, but so far lack, a meta-principle that tells which of these goals should be decisive when they conflict.”⁷⁷ It is pluralism that requires more attention within contract theory, and Markovits’s monism is frustrating precisely because contract’s heterogeneity likely demands a pluralistic theory.

The second way in which Markovits refuses to hybridize his theory is also methodological. By remaining purely philosophical and not admitting the commonsensical, empirical, historical, and genealogical perspectives I have offered here, he tries, however unsuccessfully, to dismiss Type (2) and Type (3) contracts as outside the core of the concept. I have argued that the collaborative view’s fixation on the Type (1) contract makes it inadmissible as a general descriptive theory of contract. As I have argued, any theory of contract that purports to be general must find some way to accommodate all three Types of contract—or simply admit that it is a partial account. There is, of course, no shame in producing a partial theory of contract. Indeed, Markovits may be able to offer one of the “meta-principles” that pluralistic theories need: The collaborative view might be modified to direct courts and parties in Type (1) contracts. But that is not what the collaborative view set out to do. Its ambition is to achieve a general positive and normative theory of contract. To achieve the general descriptive theory, it abandons Type (2) and Type (3) contracts altogether. I have argued that this strategy severely limits its claim to success. The same argument, of course, *mutatis mutandis*, would condemn any efficiency theory that similarly sought to box out Type (1) and/or Type (2) transactions as not properly belonging to the law of contract.

In the final analysis, “[t]here is never any point in arguing with a successful revolution.”⁷⁸ So if the collaborative view, in an effort to revolutionize contract theory, ultimately wins adherents for its very attractive normative perspective on contracts, I’ll stop nit-picking with its failure to be an accurate general positive theory; indeed, it may yet be prophetic. But until then, I think it is worth making the effort to help modify the collaborative view and to encourage others to continue the search for the Holy Grail: a unified general theory of contract that can apply to all Types of contracts. The grail may not be neat and pretty; it will likely be a sprawling, hybrid mess. But it is the task of a general

77. *Id.* at 543.

78. GILMORE, *supra* note 53, at 23.

theory of contract to accommodate all the Types of contract central to our experience and law. There is still another option, of course, which is to give up on the search for a unified theory of contract altogether. That path, however, will require a justification that cannot be bracketed.

Focusing on Types of contracts and their relevance for building a general theory of contract helps put a pervasive problem in contract theory construction into a new light. Theorists—of both the autonomy and efficiency variety—try to bite off only so much as they can chew, usually limiting their inquiry to a particular Type. In the case of the efficiency theorists, Type (3) contracts are paradigmatic. For autonomy theorists of various stripes, Type (1) contracts are at the core. What I hope this intervention accomplishes is to inspire renewed attention to the multifarious Types of contracts, all of which must be located at the core in order to have a fully persuasive general descriptive theory of contract.

