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Relational Contract Theory and Democratic Citizenship

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INTRODUCTION

Relational contract theory has done much to re-center our understanding of contract and contract law. Most contracts casebooks now include materials on long-term contracting and the variations in "standard" contract law necessitated by these relations.[1] As Professor Robert Scott recently said, "[w]e are all relationalists now."[2] Yet even with the improved understanding of contract behavior and contract law fostered by relational contract theory, the many versions of the theory have not provided an adequate normative understanding of the state's role in contract law. While relational contract theorists discuss the possible legal changes suggested by relational contract issues, each approach – whether based on Ian Macneil's foundational relational contract theory or on a law-and-economics or communitarian variant – contains at best a thin theory of the state and its connections to contract law. These theorists have difficulty discussing and explaining state impositions on contract law and contract relations, such as those based on the prevention of gender and racial discrimination and those which view work and employment as a non-

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[1] *See, e.g.*, E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 604-63 (6th ed. 2001) (discussing filling "gaps" in contracts, good faith and best efforts principles, and trade usage and course of performance issues); *id.* at 253 (discussing Charles Goetz and Robert Scott's study of relational contracts); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 494-509 (4th ed. 1999) (explaining trade usage and course of performance in long-term contracts); *id.* at 520-28 (addressing supplier contracts and reasonable notice for termination); *id.* at 541-56 (examining good faith in output/requirements contracts); *id.* at 255 (discussing Stewart Macaulay's studies of business relationships); *id.* at 1083-84 (discussing Ian Macneil's work).

[2] Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000).

contractual aspect of citizenship and self-actualization, even when the theorists might be sympathetic to these principles.

This Article explores the role of the state from the view of relational contract theory. In particular, I argue that one can understand the democratic state as itself a relation, but one outside of, and parallel to, the relations understood by relational contract theory. The state is a super-relation which mediates among other relations, using law as a mediating instrument. Ultimately, I argue that while relational contract theory helps us understand contract and also helps us focus on the relational aspect of democratic citizenship, democratic theory and not contract theory, even of the broadly relational kind, is necessary to provide the basis for state legal activity in many of the most important areas of contract relations and disputes.

In addition to providing a theoretical framework for understanding the connections between actions of the state and relational contract theory, it is my hope that this Article can reinvigorate an often neglected aspect of contract law: the role of contract law in a democratic society. As George Priest observed several years ago, Friedrich Kessler once taught contracts as a course in law, capitalism, and democracy: "Kessler saw the reform of contract law as essential to the preservation of capitalism and democracy, to the control of industrial empires, and to the protection of the citizen-consumer."[3] Such concerns with democracy were once more common in contracts scholarship, particularly in the halcyon days of consumer law and political liberalism.[4] By contrast, contemporary contracts courses and contracts scholarship focus on how courts can improve risk allocation, provide effective default rules, and otherwise assist the efficient regulation of private transactions.[5] While these are valuable topics and goals, the absence of significant discussion, in classes and law journals, of the relationship between the democratic state and its contract law leaves us without the full depth of discourse available for contract law. This result is especially unfortunate since contract law and contract ideology were so critical in the framing of the early modern political conception of the United States and its law during the Reconstruction Era of the 1860s and 1870s. It is an underlying assumption of this Article that contract and democracy in fact have a lot to say to

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[3] George L. Priest, *Contracts Then and Now: An Appreciation of Friedrich Kessler*, 104 YALE L.J. 2145, 2150-51 (1995).

[4] *See, e.g.*, W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) (discussing the intersection between consumer law and contracts); *see infra* Part IV.B.

[5] *See* Priest, *supra* note 3, at 2145.

each other, and that the complexity of the connections between American democratic ideals and American contract ideology can provide rich soil for thinking about contract law.

This Article begins in Part I with a description of relational contract theory and its variants. While I discuss several versions of relational contract theory, I focus predominantly on Ian Macneil's theory since he is the most widely recognized theoretician, as well as the "founder," of relational contract theory as a distinct study. Part I then critiques relational contract theory for being overly descriptive in its approach and for not providing a sufficient normative basis for being able to analyze the actions of the democratic state. This Part ends with the suggestion that if one takes the basic idea of relational theory and recognizes the democratic state as itself a relation, one can begin to reassemble the connections between contract and democracy.

In Part II, I begin exploring these connections with a brief look at one of the formative eras for the study of contract and democracy. The authors of American Reconstruction were steeped in a contract ideology and faith in contract; they were also determined to create a new, post-slavery, democratic state. This episode provides some clues about the possible interrelations between contract and democratic citizenship, and how this connection can break down. Part III sets forth the theory of democratic citizenship as applied to relational contract theory. Here I locate the connection between Michael Walzer's theory of a plurality of values in a democracy and Ian Macneil's relational contract theory. I then flesh out some of the connections with an analysis of a few areas of law (anti-discrimination, labor) for which democratic citizenship theories can provide superior normative principles. In Part IV, I suggest ways in which the two theories overlap and assist each other, paying particular attention to problems of consumer form contracting. This Article concludes by noting the caution necessary for this project, a caution based in part on Ian Macneil's important concerns about bureaucracy and jurisprudential idealism.

I. RELATIONAL CONTRACT THEORY

A. What Is Relational Contract Theory?

Like so much of legal theory, there are almost as many definitions of relational contract theory as there are scholars discussing

it. There is law-and-economics based relational contract theory,[6] Ian Macneil's foundational relational contract theory[7] and its

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[6] *See, e.g.*, Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992); Robert A. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990) [hereinafter *Default Rules for Commercial Contracts*]. It is a bit misleading to characterize all relational contracts scholarship that is based at least in part on economic analysis as part of law and economics. Much of this scholarship in fact challenges some assumptions of the more traditional, or first generation, law-and-economics approach; some of this scholarship, such as the work of Robert Scott (including the seminal article he coauthored with Charles Goetz, above), may be better described as part of the transaction-cost school of law and economics. *See, e.g.*, Oliver E. Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979). Some of this work can also be described as within the related area of social norms scholarship. *See, e.g.*, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Diamond Industry*]; Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998). However, as I am categorizing in broad swaths, these approaches do have an important family resemblance.

[7] *See* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980) [hereinafter MACNEIL, NEW SOCIAL CONTRACT]; Ian R. Macneil, *Reflections on Relational Contract Theory After a Neo-classical Seminar*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 207 (David Campbell et al. eds., 2003) [hereinafter Macneil, *Reflections*]; Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000) [hereinafter Macneil, *Challenges and Queries*]; Ian R. Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOC. & LEGAL STUD. 431 (2000) [hereinafter Macneil, *Contracting Worlds*]; Ian R. Macneil, *Political Exchange as Relational Contract*, *in* GENERALIZED POLITICAL EXCHANGE: ANTAGONISTIC COOPERATION AND INTEGRATED POLICY CIRCUITS 151 (Bernd Marin ed., 1990) [hereinafter Macneil, POLITICAL EXCHANGE]; Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 J. INSTITUTIONAL & THEORETICAL ECON. 272 (1987) [hereinafter Macneil, *Relational Contract Theory as Sociology*]; Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567 (1986) [hereinafter Macneil, *Exchange Revisited*]; Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 [hereinafter Macneil, *Relational Contract*]; Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5 (1984) [hereinafter Macneil, *Contracts of Adhesion*]; Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983) [hereinafter Macneil, *Values in Contract*]; Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018 (1981) [hereinafter Macneil, *Economic Analysis of Contractual Relations*]; Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) [hereinafter Macneil, *Adjustments of Long-Term Economic Relations*]; Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L REV. 691 (1974) [hereinafter Macneil, *Many Futures*]. For a full bibliography of Macneil's work through 2001, see THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 387, 387-90 (David Campbell ed., 2001) [hereinafter SELECTED WORKS].

For other work on relational contract theory influenced by Macneil, see SELECTED WORKS, *supra*, at 3-4; Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763 (1998); Matthew Lees, *Contract, Conscience, Communitarian Conspiracies and Confucius: Normativism Through the Looking Glass of Relational Contract Theory*, 25 MELB. U. L. REV. 83 (2001). Richard Speidel has also done extensive work developing the particular connections between relational contract theories and contract doctrine, especially

cousin law-and-society relational contract theory,[8] libertarian relational contract theory,[9] and liberal communitarian relational contract theory.[10] Despite their diversity, these approaches to contract law share at least one important characteristic: they emphasize the social and interpersonal relationships between the parties to the contract and not simply the contractual agreement of those parties.

In particular, relational contract theories present important revisions to the standard perspective on contract law as studied in most first-year contracts courses for much of the last two generations. "Taught" contract law has been based on some variant of what contracts scholars call neoclassical contract law. Neoclassical contract law, as embodied in the Second Restatement of Contracts, in the main treatises on contracts,[11] and to some degree in Article 2 of the Uniform Commercial Code, takes as its model transaction the isolated, or discrete, event between two relatively equally situated, arms-length bargainers, engaged with each other for the sole purpose of the contractual exchange and expressing their complete contractual obligations in their mutual promises. Thus the "contract" is defined through the offer and acceptance rubric, where all the parties' obligations are objectified in the stated agreement.[12] This model has its roots in classical contract law, most commonly associated with the grand treatises and schol-

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regarding Article 2 of the Uniform Commercial Code. *See* Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254 (1995); Richard Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789 (1993) [hereinafter Speidel, *Relational Sales Contracts*]; Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823 (2000) [hereinafter Speidel, *Characteristics and Challenges*]; Richard Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981).

[8] *See* Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977) [hereinafter Macaulay, *Elegant Models*]; Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter Macaulay, *Non-Contractual Relations*]; Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000) [hereinafter Macaulay, *Floating*]; Elizabeth Mertz, *An Afterward: Tapping the Promise of Relational Contract Theory – "Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909 (2000).

[9] *See, e.g.*, Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1179-80 (1992).

[10] *See* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990) [hereinafter Braucher, *Regulatory Role*]; Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43 (1993) [hereinafter Feinman, *Default Rules*]; Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000) [hereinafter Feinman, *Theory in Context*].

[11] *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS (4th ed. 1998); E. ALLEN FARNSWORTH, CONTRACTS (3d ed. 1999); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS (4th ed. 2001).

[12] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 17-70 (1979); FARNSWORTH, *supra* note 11, at 109-222.

arship of Samuel Williston,[13] which sought to objectify and formalize contract law through a series of universally applicable legal rules.[14] Modern contract law is called *neo*classical, however, for several reasons: First, although it retains the fundamental structure of classical contract law, it incorporates some non-classic elements, such as the doctrine of unconscionability, the duty of good faith, trade usage, and the increased use of reliance as a basis for liability.[15] Second, where classical contract law was rule-based, neoclassical contract law is more willing to adopt standards.[16] Third, neoclassical contract law disclaims the broad scope of classical law by carving out areas of complex contract relations, such as labor law.[17] In its attention to standard-based legal analysis and contextual doctrines of good faith and unconscionability, neoclassical contract law, as developed by legal realists such as Arthur Corbin and Karl Llewellyn, shifted the focus of some contract law beyond the discrete bargain to include the pre-contractual and post-contractual interactions, as well as the trade and custom contexts of commercial contracts.

Despite this expansion of classical contract law to include these broader concepts, relationalists still argue that neoclassical contract law persists in defining contract primarily as the discrete bargain centered on an exchange of promises. According to the common view, contract law is about promises and their enforcement.[18] Good faith and unconscionability exist mainly on the periphery, to be brought in when the more classical doctrines fail.[19]

Relational contract theorists often view the classical approach as other-worldly and its neoclassical offspring as a form of extra-terrestrial visitation.[20] Beginning in the 1960s, scholars, influenced by the realists, began exploring what in fact was going on in the world of contracting, or contracts-in-action. The answer, based

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[13] *See generally* SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (4th ed. West Group 2001) (1920).

[14] *See* Feinman, *Theory in Context*, *supra* note 10, at 738-39.

[15] Macneil, *Relational Contract*, *supra* note 7, at 496-98.

[16] Jay Feinman points to the difference between the First and Second Restatements of Contracts in how they approach the determination of the materiality of a breach to make this point. *See* Feinman, *Theory in Context*, *supra* note 10, at 739.

[17] *Id.* at 738-39.

[18] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

[19] Macneil highlights the comments to U.C.C. § 2-302 on unconscionability to make this point: "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 86 (quoting U.C.C. § 2-302, cmt. 1).

[20] For Macneil's critique of neoclassical contract law, see, e.g., Macneil, *Adjustments of Long-Term Economic Relations*, *supra* note 7, at 883-86.

on empirical work such as that done by Stewart Macaulay[21] and the theoretical work of the "creator" of relational contract theory, Ian Macneil,[22] was that contract law – classical and neoclassical – bears little relationship to what people actually do. Relationalists argued that many contracts are part of a longer term and deeper interpersonal relationship than contract law could imagine.[23] For example, the franchise relationship and the manufacturer-distributor relationship, while clearly contractual, cannot be reduced to the initial written or oral contract. Even the terms of those contracts often require an open-endedness that accounts for flexibility over time in fundamental terms, such as price and quantity. These relationships also produce their own "rules" which are independent of, and often contradictory to, contract law.[24] For instance, Macaulay discovered that suppliers would consider the buyers' canceling of an order not as a breach (even though a breach it was according to contract doctrine), but just something that the buyer often had to do – if done in good faith – and to which the supplier would adjust without contract dispute.[25] Relationalists such as Macneil also began emphasizing how contracts were embedded social practices existing in a context of norms independent of the parties' promises and agreements.[26]

Here we come to the beginnings of the differentiations among relational contract theories. Relational contract can be understood

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[21] *See, e.g.*, Macaulay, *Non-Contractual Relations*, *supra* note 8; *see also* Gidon Gottlieb, *Relationalism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567 (1983) (describing the law from the relational perspective).

[22] See sources cited *supra* note 7. Macneil now prefers that his theory be called "essential contract theory" in part to distinguish it from other less expansive (and often economics-based) relational contract theories that do not focus on the essentials of exchange relations. Macneil, *Contracting Worlds*, *supra* note 7, at 432.

[23] "Neoclassical contract law is founded in theory and organization on the discrete transaction, but with many a relational concession. It can often deal adequately with the more discrete issues in contractual relations. But when discrete and relational principles conflict, neoclassical law lacks any overriding relational foundation, and thus lacks a resource often needed in relational law." Macneil, *New Social Contract*, *supra* note 7, at 72. Paul Gudel describes neoclassical doctrines such as good faith as simply an "attempt to force relational wine into discrete bottles . . . ." Gudel, *supra* note 7, at 770; *see also* Gottlieb, *supra* note 21.

[24] Long-term contracting arrangements are the focus of relational contracts scholars of all camps. *See, e.g.*, STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966) (focusing on an empirical approach); Goetz & Scott, *supra* note 6 (discussing economics-based theory, focusing on the manufacturer-distributor model).

[25] Macaulay, *Non-Contractual Relations*, *supra* note 8, at 61.

[26] *See* Gudel, *supra* note 7, at 769-70 (comparing a neoclassical, promise-centered view of contract with Macneil's more contextual and norm-based approach); *see also* Braucher, *Regulatory Role*, *supra* note 10, at 702 (arguing that, under relational theory, "contractual relations . . . are embedded in and defined by social context"); *id.* at 711 ("In a relational approach to contract, interpretation and supplying terms both require investigation of the norms of the relationship and of the social context.").

in both a narrow and a broad sense. Narrowly it encompasses those contracts in which the parties plan a long-term relationship: requirement and output contracts, franchise agreements, some employment contracts, and marriage.[27] This narrow approach considers aspects of the longer term relations that affect how the parties contract, what the terms of contract are and can be, how they are interpreted, and what other "norms" govern the relationship outside of the legally recognized contract.[28] To this extent, the legal principles of the realists, particularly those implemented in the U.C.C. such as good faith,[29] open-price terms,[30] the flexibility accorded output and requirements contracts,[31] and the attempt to find a contract where the parties' expressions of offer and acceptance contradicted each other but their actions show an agreement to proceed,[32] are the focus of scholarly attention and the model for further expansion of "relational" principles to non-sales long-term contracts.[33] This narrow understanding of relational contracts remains relatively consistent with neoclassical contract principles,

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[27] *See, e.g.*, Goetz & Scott, *supra* note 6; Schwartz, *supra* note 6; Scott & Scott, *supra* note 6.

[28] The relational approach that I describe as "narrow" comes close to what Alan Schwartz described as "internal." In Schwartz's terminology, internal relational approaches focus on the norms internal to the particular relationship. Schwartz, *supra* note 6, at 275; *see also* Gillian Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990); Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1. My category of "narrow" would include such approaches, but I mean to emphasize the frequent limitation of such analysis to particular types of transactions and relations; some versions of what I call "narrow" relational approaches will take into account norms from trade practices and the like. I do not adopt Schwartz's contrasting category of "external" relational approaches, which Schwartz describes as focusing on societal norms of fairness, justice, etc. (although my own approach might fit into this category). Schwartz, *supra* note 6, at 275. Schwartz himself recognizes the limits of such a category because he sees Ian Macneil, who is after all the main proponent of a broader relational theory, as advocating analysis of both "internal" and "external" relational norms. *Id.* I view the category of "broad" relational theory as accounting for more broadly social and political norms although not always to norms of fairness or similar general principles. Furthermore, I contend that one cannot really talk about a single, internal relationship; so-called "external" norms arise from overlapping relationships and cannot easily be reduced to a single category. One could even ask the Macneilian question of whether "internal" norms are ever created in isolation from "external" norms and social constructs. Schwartz is somewhat sensitive to these problems, and his article provides an excellent analysis of how "internal" approaches to contract relations often "collapse" into either external or law-and-economics approaches. *Id.* at 275-78.

[29] U.C.C. § 1-203 (1977).

[30] U.C.C. § 2-305 (1977).

[31] U.C.C. § 2-306 (1977).

[32] U.C.C. § 2-207 (1977).

[33] *E.g.*, Goetz & Scott, *supra* note 6. Much of this work focuses on how courts can fill the gaps in incomplete contracts. *E.g.*, Schwartz, *supra* note 6. As Jay Feinman points out, the more narrow view of relational contract tends to dominate American contracts scholarship. Jay Feinman, *The Reception of Ian Macneil's Work on Contract in the USA*, *in* SELECTED WORKS, *supra* note 7, at 59, 60-61, 64. For a relational analysis of Article 2 of the U.C.C., see Speidel, *Relational Sales Contracts*, *supra* note 7.

although it seeks to center relational principles that are often peripheral. It is an approach most commonly associated with the transaction-cost school of law and economics[34] and with social norms scholarship.[35]

But the deeper challenge of relational contract theory, and the primary insight of its main theorist Ian Macneil, is that *all* contracts are relational.[36] Contract is always a social act involving multiple layers of relationships. As Paul Gudel has observed, this insight is based on an assumption about human nature profoundly different than the utility-maximizing, individualist assumptions of many contract theorists, especially those schooled in law and economics.[37] Contract, according to Macneil, highlights the fundamental contradiction in human existence: "Man is both an entirely selfish and an entirely social creature, in that man puts the interests of his fellow ahead of his own interests *at the same time* that he puts his own interests first."[38] For Macneil, contract can only be understood as a complex interaction between self-interest and so-

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[34] For a brief description of this school and its connection with relational contracts theory, see Gudel, *supra* note 7, at 775-76. Gudel cites as a representative work from this school Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983). For other related works by Robert Scott, see also Scott, *Default Rules for Commercial Contracts*, *supra* note 6, at 600 (discussing the proper choice for default rules under a relational theory); Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 903 (1986) (analyzing aspects of secured financing under relational theory).

[35] Lisa Bernstein's work is one of the foremost examples of social norms scholarship applied to contract law. *See, e.g.*, Bernstein, *Merchant Law*, *supra* note 6. More generally applicable social norms scholarship is far too rich to cite adequately here. For a few representative works encompassing a range of approaches, see, e.g., ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); W. Bradley Wendel, *Mixed Signals: Rational Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1 (2002). The seminal work for legal scholars is ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). See also the articles in two excellent symposia: Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *The Legal Construction of Social Norms*, 86 VA. L. REV. 1577 (2000).

[36] Macneil, *Values in Contract*, *supra* note 7, at 344; SELECTED WORKS, *supra* note 7, at 5. Macneil defines "contract" as "exchange relations." Macneil, *Challenges and Queries*, *supra* note 7, at 878. Because I view Macneil's theory as presenting the greatest challenge, and because I see it as the one most closely addressing the questions of the role of the state, I concentrate much of my analysis on his approach.

[37] Gudel, *supra* note 7, at 776.

[38] Macneil, *Values in Contract*, *supra* note 7, at 348. For a more extensive discussion of Macneil's recognition of this inherent human contradiction, see SELECTED WORKS, *supra* note 7, at 46-58. Macneil also makes the important point that in the real world of people who are both selfish and social, there are no utility maximizers, as neoclassical economists might suppose, but rather utility *enhancers* "immersed in relations creating countless countermotives." Macneil, *Exchange Revisited*, *supra* note 7, at 577.

cial solidarity.[39] Moreover, according to Macneil, this duality exists in all contracts.[40] The most discrete contract, such as the purchase of gas on the turnpike (to use Macneil's famous example),[41] assumes social customs and rules (money, language) and depends on each person's connections to third parties (suppliers of gas, governmental regulators). Thus Macneil-influenced scholars argue for a much broader approach to the study of contract, one often based on sociology, social psychology, and other social sciences.[42]

Of course this broad definition needs more precision to avoid being over-inclusive to the point of meaninglessness. We still want to be able to talk productively about distinctions among different types of contracts or contractual relationships. Macneil therefore argues that even if all contracts involve human relations, they exist in a spectrum of contract wherein some contracts can be understood as more "relational" and others as more "discrete."[43] Macneil identifies the range of concepts or norms that he believes apply to contracts generally, and then he determines which of these norms are strongest in the discrete transactions and which are stronger as a contract relation becomes more "intertwined."[44] It is not so much that Macneil wholly disagrees with the narrow view, but rather that he does not want us to forget that even contracts that seem primarily discrete operate in a context of human relations and norms, and that state created legal rules will affect his more generalized contract norms which exist in all contracting situations.

Macneil's architecture of contract norms is complex and a brief summary cannot do it full justice. Nevertheless we can set out some of the basic principles. Because of his broad focus on all contract behavior, Macneil developed a broad typology of norms

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[39] *See, e.g.*, MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 96-98 (discussing this relationship).

[40] Macneil, *Values in Contract*, *supra* note 7, at 344-45.

[41] Macneil, *Many Futures*, *supra* note 7, at 720-21.

[42] *See, e.g.*, William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545 (discussing Macneil's work as a general theory of "social order" which must extend beyond law and economics). Macneil appreciates the transaction-cost economic approach of Goetz and Scott, but finds it still "far too unrelational a starting point in analyzing relational contracts," largely because of its affinities with neoclassical economics. Macneil, *Relational Contract*, *supra* note 7, at 495 n.45.

[43] Macneil has recently emphasized that it is better to describe "discrete" transactions with the term "as-if-discrete," because it is only the study of the transaction that creates the discreteness – even the supposedly discrete transaction is deeply embedded. Macneil, *Challenges and Queries*, *supra* note 7, at 894-95.

[44] Macneil prefers the term "intertwined" to describe highly relational contracts because it emphasizes that all contracts are relational and that some are "more" relational in the sense that the parties are more interconnected. He also recognizes that this is not a generally accepted term. *See id.* at 895; Macneil, *Relational Contract Theory as Sociology*, *supra* note 7, at 276.

that apply in all contract relations. The general norms that he identified as essential to all contract behavior are:

1. Role Integrity
2. Reciprocity (a.k.a. Mutuality)
3. Implementation of Planning
4. Effectuation of Consent
5. Flexibility
6. Contract Solidarity
7. Linking Norms (restitution, reliance, expectation)
8. Creation and Restraint of Power
9. Propriety of Means
10. Harmonization with the Social Matrix.[45]

According to Macneil, these norms affect all contracting behavior, whether such contracts are more discrete or more relational. Macneil next identifies a subset of norms or values which are associated with the two ends of the contract spectrum, discrete and relational contracts. Relational contracts exhibit norms of Role Integrity, Preservation of the Relation, Harmonization of Relational Conflict, and Supra-Contract Norms.[46] Discrete contracts, on the other hand, emphasize two of the general norms, Implementation of Planning and Effectuation of Consent,[47] and produce a subset of additional norms or values particular to discrete contracts, including precision and efficiency.[48] Part of Macneil's project is to explore how these various norms interrelate, and how this interrelation can support or impede contractual relations and social solidarity more generally.[49]

Some others have taken the basic themes of Macneil's theory and, while not necessarily adopting the theory in its full complexity, have similarly advocated that the law approach contract with far more attention to the norms and structures of the multiple overlapping relationships evidenced in many contract relations. Jay Feinman, for instance, has argued in favor of a relational contract methodology by which courts would investigate the embeddedness of the relationship as part of an intensive factual adjudication.[50]

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[45] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 40; Macneil, *Values in Contract*, *supra* note 7, at 347.

[46] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 66-70. These norms are derived from his general contract norms, but their particular manifestation in relational contracts apparently alters them. *See id.* at 65.

[47] *Id.* at 59-60.

[48] Macneil, *Values in Contract*, *supra* note 7, at 358-60.

[49] For other summaries of Macneil's basic theory, see Gudel, *supra* note 7, at 776-80; Lees, *supra* note 7, at 87-93.

[50] *See generally* Feinman, *Theory in Context*, *supra* note 10 (noting that many diverse transactions, including labor and family relations, give rise to "factual differences" that should

And Jean Braucher has applied a relational perspective to critique contractarianism as being unrealistic and a distortion of contract law.[51] For the purposes of this Article, however, I will concentrate my discussion of relational contract theory primarily on Macneil's theory, both because it is the most developed of any relational theory and because he addresses some of the issues I raise.

B. Relational Contract Theories and Norm Description

Despite their significant differences, both the narrow and broad relational contract theories force us to look outside doctrine and toward the world of contract actually practiced; they ask us to think very seriously about the world of human relations surrounding what we tend to think of as the legal contract. Relational contract theory teaches us about the need for law to provide greater room for industry-created customary norms and dispute resolution mechanisms, and to explore how law can best promote such norm development. Relational theory also helps us become more comfortable with relational "warps" in contract doctrine. If one accepts the proposition that the differing relational contexts of different contracts can produce their own variations of contracting norms, one can more readily understand and accept the alterations one encounters in particular contracting relations; the unusual warps of standard contract law created in insurance law[52] become far less problematic than under a more classically based understanding of contract law as a consistent and uniform whole.

Yet, despite their great advantages, relational contract theories tend to view contract law and contractual norms descriptively. To a certain extent, the relational theorists write about norms as simply existing. Goetz and Scott, for example, emphasized contract terms and relationships that already exist in the market.[53] These and other economically-oriented theorists discuss social norms more as social facts than as normative or foundational.

Elizabeth and Robert Scott approach norms slightly differently in the context of marriage, but to a similar effect. They ad-

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be examined initially when analyzing contracts); Feinman, *Default Rules*, *supra* note 10. Gillian Hadfield has suggested an even stricter relational analysis which focuses entirely on the norms developed within a relationship and expressly excludes court enforcement of norms external to the relationship. Hadfield, *supra* note 28, at 930.

[51] Braucher, *Regulatory Role*, *supra* note 10.

[52] *See, e.g.*, Feinman, *Theory in Context*, *supra* note 10, at 744-45 (discussing how insurance law has seceded from contract law).

[53] Goetz & Scott, *supra* note 6, at 1052. As they describe their work, they address "core provisions of relational contracts" (such as best efforts and termination clauses) and how they "represent an optimizing response to peculiar environmental constraints of complexity and uncertainty" and set standards to which courts should be more open. *Id.* at 1091.

vocate viewing marriage as a relational contract in which the norms of fidelity, intimacy, love, altruism, honesty, among others, govern the relationship (at least the healthy relationship).[54] Although Scott and Scott recognize that these norms are complex and involve both internalized and externally imposed "societal" aspects,[55] they are not explicitly judging the norms or giving a theoretical foundation for them.[56] They focus more on the functions and roles of these norms than on their meanings or values.[57] As they describe their project, it is "essentially positive,"[58] and to the extent they adopt normative positions, those positions are not particularly marital-specific and are not explicitly founded on a moral theory about the values of love, intimacy, etc. Indeed, their normative claims are either generalized interpersonal values ("mutual commitment and relational stability")[59] or normative claims more

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[54] Scott & Scott, *supra* note 6, at 1289-90 (describing social norms of marriage); *id.* at 1268 (describing the "core of marital relationship"). The authors also describe these "norms" as "assets." *Id.* at 1270.

[55] *Id.* at 1284 (discussing endogenous and exogenous norms).

[56] Elizabeth Scott, in a separate, more recent article, discusses the deep complexity of norms in marriage. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000). She provides an excellent analysis of the tensions between commitment norms, commonly associated with traditional ideas of marriage, and egalitarian gender norms, associated with more modern conceptions, and observes just how hard it is to "unbundle" these norms so as to retain commitment norms while enabling egalitarian norms. *Id.* at 1946-70. Her article presents a more developed analysis of norms, but even though the author is sympathetic with both gender equality and interpersonal commitment, she generally avoids developing a basis for making normative choices among these norms. For instance, Scott makes an initial assumption that commitment norms are, or should be, ungendered. *Id.* at 1908. She also writes as if it were historical accident that commitment norms became associated with gender inequity, imposing greater obligations on wives than husbands. *Id.* at 1914; *see also id.* at 1916 n.33 (contending that there was a "'contamination' of commitment norms by gender norms"). It is not at all clear, however, that the development of gender inequality is separable historically from marital commitment norms; what Scott sees as contamination may well be an essential historical relationship. (Citation on this point is potentially voluminous, but for one example, see Catherine MacKinnon's discussion in CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 13-36 (1989)). The modern or liberal choice to privilege gender equality above commitment is an affirmative normative choice that must be implemented broadly, including by state action and law, to overcome the historic "bundling." Scott herself seems to emphasize efficiency principles less in her own article than in her work with Robert Scott, and instead adverts to a Rawlsian original position methodology for divining the egalitarian principle. Scott, *supra*, at 1915. My point is mainly to argue for increased attention to the basis for the state's pro-equality choices and the importance of the relationship between the state and marital "contracting."

[57] *E.g.*, Scott & Scott, *supra* note 6, at 1270 ("Love, friendship, intimacy, mutual support, and the fulfillment of raising children are indivisible and incommensurable assets."); *id.* at 1290 ("Norms of trustworthiness, solidarity, openness, honesty, harmony, and fulfillment of obligation between spouses and toward children are widely accepted and frequently serve both bonding and monitoring functions.").

[58] *Id.* at 1233.

[59] *Id.* at 1231. Elizabeth Scott has more recently developed her analysis of these marital norms, but continues to focus on a more descriptive analysis of them. *See generally* Scott, *supra* note 56.

commonly associated with law and economics.[60] These economics and social norms-influenced relational approaches are often founded on a normative adherence to utility-maximizing efficiency and rational actor methodologies, and these normative positions generally underlie the choice of norms from particular relationships.[61] Even so, the discussion of particular norms by these scholars remains primarily descriptive.

Ian Macneil presents a more complex (and perhaps ambiguous) approach to contract norms. On the one hand, Macneil divines his contract norms through his own observation of contract behavior, and he takes a strong position against any normative moral principle behind his theory: "I wish to disclaim any idea that [my] theory of relational contract . . . is a comprehensive 'system' of values based on utilitarianism, natural law, or any other dogma."[62] Rather, Macneil identifies two levels of "values": internal values of contract and external values of society responding to contract.[63] The internal values consist of Macneil's general contracting norms summarized above. Macneil identifies them primarily through his own personal analysis, or, as he notes, through a process that "social scientists scornfully call casual empiricism."[64] On the other hand, Macneil admits that these norms operate prescriptively in the sense that they are not just what people actually do when contracting but are also what people *ought* to do in order to contract.[65] Nevertheless, Macneil asserts that he is bas-

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[60] *E.g.*, Scott & Scott, *supra* note 6, at 1301 ("A central normative implication of our analysis is that important default rules governing divorce fail adequately to protect marital investments."). Scott and Scott also adopt a law-and-economics normative position, without quite explicitly calling it such, by asserting that "contract theory posits" that law should set rules of marriage and divorce based on an analysis of what "informed, rational actors in the premarital context" would contract for. *Id.* at 1306. In fact it is primarily law-and-economics influenced contract theory that posits such; Macneilian relational contract theory expressly critiques such a view and would, I think, find fault with Scott and Scott's use of rational actor assumptions to address what they also realize are issues of reciprocity and solidarity.

[61] *E.g.*, Schwartz, *supra* note 6, at 275 (identifying the difficulties facing courts in determining norms supplied as gap-fillers to a contract).

[62] Macneil, *Values in Contract*, *supra* note 7, at 343 n.5; *see also* Macneil, *Reflections*, *supra* note 7, at 214. Macneil's claim that his theory is not meant to be comprehensive must be read in light of his assertions (1) that all human activity should be understood as relational, and (2) that his theory of exchange relations can profitably be applied to nonmaterial exchange relations, such as politics. *See generally* Macneil, POLITICAL EXCHANGE, *supra* note 7. It may be more accurate to say that while Macneil would apply his theory to almost all forms of human relations (since he sees exchange as central to all interpersonal relations), the theory itself does not attempt to encompass all aspects of these relations or of human existence more broadly.

[63] Macneil, *Values in Contract*, *supra* note 7, at 342-43.

[64] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 38.

[65] *Id.* at 37-38. This is in part why Macneil now prefers that the normative aspect of his theory be called "essential contract theory." Macneil, *Challenges and Queries*, *supra* note 7, at 892-93. I chose here to follow the far more commonly used reference to Macneil's theory as relational contract theory; I fear that in this case one participant in the discourse, even one so

ing these norms on his observation and analysis of how contract relations in fact work, not on some overarching normative system: "the oughts of [relational contract] theory are the product of what appears actually to work in social interaction, rather than the result of formulations derived from more theoretical notions."[66] His approach is properly seen, then, as inductively based on his own observations rather than deductively based on moral or political theory.[67] Macneil asserts a rather ambiguous status for his normative claims as being both normative and descriptive (or positive).[68] The concept of "norms," for Macneil, "connote[s] both actual behavior and principles of right action" divined from that behavior, because "behavior leads logically to convention and convention leads logically to norms."[69]

Moreover, for Macneil the internal values generally found in contract relations have "by far the greatest impact upon the lives of the participants [in contracts] and everyone affected by their activities," and they are, in their aggregate effect, "the most important [norms] in determining the value patterns of the overall society . . . ."[70] Thus, Macneil claims that the internal contract norms form the foundation for broader social norms and values.

Yet Macneil recognizes that there are also external values arising from the social context surrounding contract relations which themselves influence contract values. His typology allows for these norms in the general contract category of harmonization

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central as Macneil, cannot change the established linguistic norm.

[66] Macneil, *Values in Contract*, *supra* note 7, at 408; *see also* Speidel, *Characteristics and Challenges*, *supra* note 7, at 827.

[67] Macneil describes how he began developing his theory: "[I]t did not occur to me consciously that I might be developing a theory. Rather, I was simply exploring and trying to make sense of reality, the reality of what people are actually *doing* in the real-life world of exchange." Macneil, *Challenges and Queries*, *supra* note 7, at 879. One can certainly still call this a normative approach, as Macneil himself insists, because the descriptive work unearths prescriptive norms, but it is a normativity based on observation. *See* Macneil, POLITICAL EXCHANGE, *supra* note 7, at 154. One could aptly label Macneil's theory as being both empirical and intuitionist. One could also connect these to T. K. Seung's distinction between transcendent and immanent intuition: "Immanent intuition is the intuition of positive or prevailing normative standards in any given society; transcendent intuition is the intuition of normative standards that transcend all particular societies." T. K. SEUNG, INTUITION AND CONSTRUCTION: THE FOUNDATION OF NORMATIVE THEORY xi (1993). Macneil's theory employs both types of intuition.

[68] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 37-38; *see also* Speidel, *Characteristics and Challenges*, *supra* note 7, at 827 (stating that Macneil's is a "complex descriptive theory" which derives normative claims from the norms internal to contract relations, and that "[t]he 'is' of actual behavior becomes the 'ought' by which the relationship is governed").

[69] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 38 (citing theories of the reasoning process developed in DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969) and EDNA ULLMAN-MARGALIT, THE EMERGENCE OF NORMS (1977)).

[70] Macneil, *Values in Contract*, *supra* note 7, at 351. Similarly, "[contract norms] and their interplay permit the widest possible range of 'successful' human activity and interaction." *Id.*

with the social matrix, and within the relational category of supracontract norms. These external values emanate from the sovereign in the form of law, from private associations in the form of trade rules and regulations, from religious organizations in the form of moral guidance to individuals and families, and from a vast array of other social forces and organizations not encompassed within a particular contract relation.[71] In particular, Macneil has argued that the law expresses the underlying values of a society which can provide a basis for social solidarity: "[law functions] as a relatively precise expression – an index if you will – of the great underlying and diffuse sea of custom and social practices in which human affairs are conducted. This function of law is to tell society what is most important among its customs and practices."[72]

Macneil does not, however, have a normative theory for the proper content of these external values. He views them more sociologically. He identifies a potential source of morality in law as arising from the joining of individual self-interests in a cooperative project, thus creating a combination of self-interest and solidarity.[73] He then cites his own common contract norms as some of the underlying norms of solidarity which give moral force to the law, or at least to contract and other exchange-based law.[74]

C. Relational Contract Theory, Normativity, and the State

This proclivity of relational theories to view social norms as social facts makes it very hard for the theories to evaluate the

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[71] *Id.* at 367-68. Macneil views all these "external" relations as themselves interconnected through exchange relations and therefore in some sense not truly external, but admits also the analytic usefulness of the external/internal distinction. *Id.*

[72] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 94. Macneil was a bit ahead of his time on this point. Legal scholars have more recently explored the expressive value of law in great detail and from diverse viewpoints. For instance, Richard McAdams has set forth an interesting version of the role of law in expressing social norms. *See, e.g.*, Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); *see also* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (arguing that the expressive theory of law is not persuasive); Matthew D. Adler, *Linguistic Meaning, Nonlinguistic "Expression" and the Multiple Variants of Expressivism: A Reply Response to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577 (2000) (rebutting Professor Anderson's arguments against the expressive theory of law); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (exploring the expressive dimensions of constitutional law); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (arguing that expressive functions of law make the most sense in connection with efforts to change social norms).

[73] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 97. Interestingly Scott and Scott also recognize the importance of both self-interest and solidarity, at least in marriage. They tend, however, to emphasize the former in their methodology. *See generally* Scott & Scott, *supra* note 6.

[74] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 98.

norms and rules actually being studied.[75] While relational theory may improve our understanding of the customs and norms internal to contract or particular contractual contexts, it becomes very hard to evaluate the norms. When, if ever, could a trade practice itself be deemed unfair or unconscionable?[76] Why would the law want to protect a consumer, or be sensitive to claims of abuse by women in contractual aspects of marital relations,[77] or to support workers in their relations with employers? Or, more significantly, can relational contract theory fully credit, let alone support, societal norms such as anti-discrimination on the basis of race or gender and their imposition on particular contract relations?

This Article suggests that a focus on contract relations cannot answer fundamental questions about which norms to support. As

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[75] I certainly do not mean to deny the great value of this type of work. The focus on social norms gives a needed depth to legal and law-and-economics analysis, and, as in the case of Scott and Scott's approach to marriage, makes possible a rich understanding of law and its context that can greatly improve law and society. But any approach (including mine) is incomplete. I mean only to address what I see as one particular omission of the literature. An example of how the failure to account for normative democratic principles leads to a weakness in social norms literature can be seen in the tendency of social norms scholars to refer to political activists promoting democratic principles as "norm entrepreneurs." *See, e.g.*, Scott, *supra* note 56, at 1925 ("Acts of domestic violence have been the subject of increasing social censure, as advocacy groups acting as 'norm entrepreneurs,' have publicized information about the harms to women."); *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 394-95 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909-10 (1996). It would, I am sure, be quite a surprise to the political advocates who press for egalitarian and gender justice on issues such as police responses to domestic violence to learn that they are entrepreneurs of any sort. The danger with this descriptive term is that it papers over the fundamentalness of the underlying principle (by calling it a "norm" and equating it, for analytic purposes, with norms such as leashing a canine), and that it views the democratic actor in terms more related to economics than political and social justice. While this may not be the meaning these scholars intend to convey, the rhetoric remains flawed.

[76] The narrower the relational perspective, the more suspicion is aroused by concepts of unconscionability. *See, e.g.*, Goetz & Scott, *supra* note 6, at 1136-38 & n.111 (arguing in favor of limiting unconscionability to procedural infirmities). On unconscionability, see *infra* p. 55.

[77] The problem of gender discrimination within the context of marriage is particularly under-developed in Scott and Scott's excellent article on marriage as a relational contract. This may stem from a deficiency in method. The authors assert that their hypothetical thought experiment of rational pre-marital bargainers will discount or exclude gender biases and differences. Scott & Scott, *supra* note 6, at 1307. This is problematic on several levels, perhaps most importantly because their hypothesized bargainer seems to follow the *male* rational actor model. As Scott and Scott mention, feminists sometimes describe women as "less effective" bargainers because they value the welfare of others more than do men. *Id.* (In fact it would be better to describe this characteristic as different, not "less effective"; it is perhaps less effective in producing the results that neoclassical economic theories value, but it is also likely to be superior in producing results that such women would value.) Scott and Scott then say that this gender difference is "excluded" from their model. *Id.* at 1252. This exclusion clearly means that the other-regarding characteristics are suspended, since in their hypothetical model they posit "two rational utility maximizers." *Id.* Other-regarding characteristics then reappear only after these utility maximizers have (rationally) determined that they are embarking on a joint venture which requires that they account for each others' interests. *Id.* at 1266. It is essential to note, however, that one of the authors has a far more developed analysis of gender discrimination in the context of the marital "contract" in a subsequent article. *See generally* Scott, *supra* note 56.

discussed above, relationalists tend to overemphasize the descriptive aspect of the study of norms. Beyond this tendency, to the extent relationalists invoke normative claims, they are either too limited in scope (as in the case of the efficiency-based normative claims of economic relationalists)[78] or too general (as in the case of communitarian claims) to help formulate a theory of the state's role.[79] Indeed, relationalists tend to say relatively little about why society, and in particular the state, should make the choices that scholars advocate.[80] For instance, Scott and Scott, in their excellent article analyzing marriage as a relational contract, only come to the role of the state briefly in their conclusion: "Arguably, the state has an independent interest in promoting marital cooperation. Stable families fulfill many functions that the state would otherwise be required to provide at greater cost . . . ."[81] The normative justification here for state action, and ultimately for marital law, is efficiency. Perhaps this is *a* plausible normative reason for state action, but it certainly is not the *only* one; the state makes a choice to promote marriage values, not just fulfill functions, and we need a more developed normative theory of why such choices are better for the state to make.

This question is more complicated under Macneil's theory because Macneil has a more intricate explanation of the state's imposition of norms on contract relations. Macneil argues that discrimination and other forms of oppression are properly viewed through his eighth contract norm, the creation and restraint of power: "Above all else what we are witnessing is a massive power

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[78] The question of whether efficiency can supply an adequate normative basis for law is far too large and has been engaged by far too many excellent minds for me to address here. However, I do agree with Macneil that efficiency claims are based on too constrained a view of human nature and social interaction to be particularly helpful for these purposes. *See, e.g.*, Macneil, *Challenges and Queries*, *supra* note 7, at 889 n.46; *see generally* Ian R. Macneil, *Efficient Breach of Contract: Circles in the* Sky, 68 VA. L. REV. 947 (1982) (examining the fallacies of efficient breach analysis); Macneil, *Economic Analysis of Contractual Relations*, *supra* note 7 (discussing the interplay of neoclassical microeconomics, transactional cost analysis, and contractual relations, and analyzing the problems relations pose for neoclassical microeconomic analysis).

[79] *Cf.* Braucher, *Regulatory Role*, *supra* note 10, at 721-22 (identifying freedom as a principle with which to limit contractual analysis). In this article Braucher addresses some of the questions that I raise, although my analysis centers more on political and democratic theory.

[80] This tendency for relationalists to overlook the state perhaps explains why, in a recent symposium on Macneil and relational contract theory, there was almost no discussion of legislation, even among scholars who agree with Macneil. Macneil himself frequently points toward legislative law as a source of relational contract law, but other contracts scholars seem fixated on contract doctrine, courts, and private law. *See, e.g.*, Feinman, *Theory in Context*, *supra* note 10, at 744-45; Mertz, *supra* note 8, at 913-14; *see generally* Speidel, *Characteristics and Challenges*, *supra* note 7 (reviewing the characteristics that typify relational contracts and discussing the challenges posed by those contracts to the administration of contract law by the courts).

[81] Scott & Scott, *supra* note 6, at 1332-33.

game, and it is being won by the 'private' institutions."[82] Macneil's norms of solidarity and reciprocity are also implicated by discrimination as discriminatory actions arguably deny solidarity and reduce reciprocity between the parties to a bare minimum.

This concern with the power balance in contract relations in fact characterizes several of the long-practicing relational contract theorists, including Macneil. Stewart Macaulay, for instance, suggests that the non-relationalist, formalist approach to contract law, which privileges the written contract, "reinforces the power of those who draft those documents, usually the lawyers who represent those with superior bargaining power."[83] The problem for relational contract theory, however, is its justification for resolving this imbalance. Macneil does not believe that the state can provide any adequate check on this "power game." He has argued that the modern state is incapable of promoting values because it is so deeply bureaucratic: "[W]hile we like to think we are a democracy, and while some people think we are a plutocracy, the fact is that America is a bureaucracy."[84] For Macneil, the state is not capable of promoting democratic values or other values beyond those inherent in bureaucratic organization. Furthermore, he deemphasizes the potential impact his theory could or should have on activities of the sovereign: "Those who read relational contract theory as necessarily or presumptively supporting great sovereign intervention are mistaken."[85] More recently Macneil has argued that the remnants of the democratic state that remain in a world increasingly dominated by private, international financial powers are inadequate for the task of balancing power in exchange relations. The idea of a democratic state promoting democratic values

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[82] Macneil, *Contracting Worlds*, *supra* note 7, at 436. For Macneil's ten contracting norms, see *supra* text accompanying note 45. Jay Feinman has recently argued that certain areas of law have already adopted a version of relational analysis, and that this has happened in particular in areas where there is a clear inequality between bargaining or exchanging parties: insurance, landlord-tenant, and products liability. *See* Feinman, *Theory in Context*, *supra* note 10, at 744-46.

[83] Macaulay, *Floating*, *supra* note 8, at 800.

[84] Ian R. Macneil, *Bureaucracy, Liberalism, and Community – American Style*, 79 NW. U. L. REV. 900, 903 (1984) [hereinafter Macneil, *Bureaucracy*]; *see also* MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 108-17 (critiquing modern bureaucracies, including the centralized state, and presenting his own Utopian alternative); Macneil, *Values in Contract*, *supra* note 7, at 352 n.36 ("Although I believe the state has a role respecting the common conscience . . . I consider the modern bureaucratic state a relatively poor provider on that score."); *see generally* Macneil, *Contracts of Adhesion*, *supra* note 7 (analyzing certain aspects of modern bureaucracy and exploring their relationship to contracts of adhesion and liberal theory).

[85] Macneil, *Values in Contract*, *supra* note 7, at 410; *see also id.* at 410 n.217 ("[W]e have far too much sovereign law imposing norms of various kinds on contracts.").

and norms seems, under Macneil's approach, at best quaint and hopelessly utopian.[86]

While Macneil does in this way address the problem of state implementation of values, the values he identifies are primarily those internal to his own relational contract theory. The state is one of the many human institutions which can affect these contract norms, but there is no particular justification for these norms as being themselves supported by a political or moral theory. This is, of course, consistent with Macneil's rejection of a normative basis for his theory more generally. Ultimately, though, Macneil's theory is deeply pessimistic; he leaves little room for the effectuation of normative goals, whether they be his contract norms or other norms developed outside his exchange relationships.

Indeed, the closest Macneil comes to acknowledging a proper role for extra-contract norms is in his "contract" norms of supracontract norms and the harmonization of contract with the social matrix. This, however, seems a rather thin account of potentially significant norms. Unlike his other norm categories, supracontract is an empty vessel with no substance of its own. It serves more or less as a catchall category, a bin of miscellany which allows his theory to account for norm-influences external to the contract relation without ever developing or adopting a theory for those norms. Indeed, unlike his position with respect to his other contract norms, Macneil never really credits supracontract norms with anything other than a sociological, descriptive existence.[87] Contract norms are for him essential, other norms are simply there. This is especially problematic with respect to the norms which can govern actions by the state, since that is the most critical source for imposition of norms on contract *through law.*

Macneil's failure to address fully the role and norms of the state stems both from his general pessimism about state actions and from his insistence on seeing the contract relation as the center of relations.[88] When describing the role of the other social rela-

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[86] Macneil, *Contracting Worlds*, *supra* note 7, at 436.

[87] Macneil asserts that it is "incorrect" to assume that "norms *not* included in the common contract norms are not highly valued in relational contact [sic] theory." Macneil, *Values in Contract*, *supra* note 7, at 411. I embrace this mistake. I do so because Macneil allows as non-contract norms mainly those norms existing in particular historical-social contexts. *Id.* Thus Macneil views such norms far more descriptively and atheoretically than his own contract norms. It is a bit hard to see how such non-contract norms are "highly valued" when they receive little analytic attention or development in Macneil's theory, although it is probably adequate to note that Macneil is focusing on one particular theory – relational contract – and that he leaves non-contract norms to other theorists.

[88] *See id.* at 410. Macneil claims:

> In terms of policies for positive law of sovereign states, [relational contract] theory itself offers direct guidance only when imposition of norms on con-

tions which affect contracts, and which Macneil strongly insists need to be studied in order to understand contract, he nonetheless describes them as "enveloping" relations.[89] It is as if contract is the center of an onion and Macneil is trying to study all the surrounding layers but always with the assumption that contract lies at the core.[90] Or, put slightly differently, Macneil sees politics (and its product, the state) as largely exchange-based and therefore subject to his relational contract norms.[91] Considering that Macneil and other relationalists begin with the study of contract and contract law, this "enveloping" schematic makes sense. It does, however, make it difficult for someone even as broadly focused on all social interaction as is Macneil to appreciate the non-contractual aspects of significant human relations.[92] If we think of the state as something enveloping contract, it will make sense to see contract norms as paradigmatic and non-contract norms imposed by the state as problematic.[93]

> tracts within the state either erodes norms within them beyond viable limits or is essential in order to preserve contract norms at the minimum levels necessary for the contractual relations to continue.

Id. at 410.

[89] Macneil, *Challenges and Queries*, *supra* note 7, at 884.

[90] Macneil himself prefers the culinary and culturally specific metaphor of the Scotch Egg wrapped in Haggis (he also mentions metaphors of a web and DNA). *See* Macneil, *Reflections*, *supra* note 7, at 208-12. Macneil's metaphors emphasize the interconnectedness of the multiple relations. The basic idea, however, that contract and exchange are at the core of his analysis remains in both his and my metaphors.

[91] *See* Macneil, POLITICAL EXCHANGE, *supra* note 7, at 161.

[92] The contract-centric approach of relationalists also produces a fear that if contract law looks outside contract norms, contract will become tort. *Cf.* Gudel, *supra* note 7, at 773 (suggesting that Macneil's relational contract theory avoids the problem of contract law devolving into a tort-like approach of applying "a general social standard of acceptable behavior"). The ghost of Grant Gilmore's prophecy of the death of contracts haunts contract theorists. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974) (contending that contract law is dissolving back into tort law); Symposium, *Reconsidering Grant Gilmore's* THE DEATH OF CONTRACT, 90 NW. U. L. REV. 1 (1995) (reflecting upon and exploring underlying themes of Gilmore's seminal piece). I suggest that the external norms of behavior can be based, at least in part, on norms of democratic citizenship rather than the more encompassing norms of general social conduct.

[93] It is worth noting that Macneil's focus on contract norms and relations rests in part on an underlying belief that these norms reflect Durkheimian ideas of organic solidarity. MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 91. Macneil argues that organic solidarity is the solidarity of different persons based on particular needs for exchange. Organic solidarity "consists of a common belief in effective future interdependence . . . [and] applies to the close interdependence of marriage, to the purchase of a television set on time, to employment with a law firm . . . right on up to the nation-state . . . ." *Id.* Organic solidarity is thus the Ur-force on which Macneil's theory of contract norms rests. *See* Macaulay, *Floating*, *supra* note 8, at 777; Mertz, *supra* note 8, at 913 n.23; Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 568-70 (reviewing the social and cooperative aspects of Macneil's and Macaulay's contract theories). For Durkheim's theory, see generally EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (George Simpson trans., The Free Press 1949) (1933). Ultimately, so long as people feel this sense of solidarity in their relations – relations at any level – then exchange can continue to be an exchange of goods,

If, on the other hand, we think of the democratic state as a parallel relationship with its own core of norms (norms as "valuable" as contract norms), it may be possible to understand and value more fully the impositions of law on the contract relationship. By shifting our theoretical apparatus to imagine the state as a separate sphere of relational activity, of the state as representing relations of people as citizens, we may be more willing to see norms of citizenship as co-equal, yet not co-extensive, with contracting norms.[94] Macneil has shown some signs of moving toward such a view of the state as properly mediating contract norms and other essential but non-contractual norms,[95] and it is the point of this article to work through one possible theory which does this.

In order to flesh out this alternative conception of the relationship between the democratic state and contract relations, it may help to explore some of the historical connections between contract and democratic citizenship. Relational contract theory focuses primarily on the contractual and exchange relations among people, but people have other relations. Most significantly for the purpose of law in a democratic society, people relate to each other as citizens through the state. The political relationship of people as embodied in the state supplies the enforceability of contract law and can significantly alter contract law by implementing societal

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an exchange that benefits each party. If, however, people begin to believe that those with social power are getting too much out of the exchange relation, they come to see the relation shift from an exchange of goods to an exchange of harms, and solidarity will collapse. MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 103. It is in part based on this foundation for Macneil's theory, and in part because Macneil repeatedly emphasizes the importance of his contract norms for social solidarity, that I believe his theory as he applies it is far more comprehensive than he is willing to assume. Macneil, however, disagrees. *See, e.g.*, Macneil, *Relational Contract Theory as Sociology*, *supra* note 7, at 277 ("Relational contract theory is not intended . . . to be a complete theory of human relations, an impossibility in any event."). While Macneil's theory may not be *complete*, given the breadth of his definition of contract and relational contract (which includes the "world socioeconomy") and the centrality (or, as Macneil now prefers, "essential" nature) of his norms to contract, it is hard not to view his theory as encompassing most human behavior. *See* Macneil, *Contracting Worlds*, *supra* note 7, at 432.

[94] Randy Barnett has also argued that relational contract theory needs to be placed in a larger context. His approach is to consider relational contract theory in connection with his own consent theory of contract, which "explicitly places contract theory within a larger theory of entitlements or property." Barnett, *supra* note 9, at 1181. My approach differs in at least a couple of significant respects. First, while I seek to situate relational contract theory in a context of democratic theory, I do not claim that relational contract theory is a subset of democratic or political theory. They are related, and can inform each other, but at most they are overlapping theories. Second, as a political theory, democratic citizenship theory focuses far more on the relationships in which people are engaged and on both the communal and the individual aspects of these relations than does Barnett. A fuller discussion of Barnett's theory is beyond the scope of this Article, but is certainly deserved.

[95] *See* Macneil, *Contracting Worlds*, *supra* note 7, at 435 (discussing the possibility of "sovereign law" accounting for a range of "social subsystems," including the subsystems of race, class, and gender at work in an employment relation).

norms and principles.[96] Indeed, it is precisely this interaction between democratic principles and contract relations that was so critical during one of the periods of significant state involvement in contract relations: Reconstruction. It is to this example we now turn.

II. DEMOCRATIC VALUES AND CONTRACT RELATIONS: RECONSTRUCTION AND THE RIGHT CONTRACT

Reconstruction represents the period during which American law first engaged the interrelation of democracy, race, and contract. The contractual relations and norms existing at the time confronted the citizenship relations and democratic ideals at the heart of the progressive movement for racial justice. This historical moment therefore serves as a potential source for better understanding and developing a theory of the connections between relational contract theory and ideas of democratic citizenship. This section will briefly review the historical issues; the next section will develop the theoretical claims.

A. Reconstruction

The Civil Rights Act of 1866 established the right to contract as a foundation of American citizenship. The Act declared that all citizens of the United States

> shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none

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[96] My emphasis on the connections of the state to relational contracts and the importance of contract law differs markedly from some relationalists, who view the state and the sovereign's law as at best peripheral. In particular, Gidon Gottlieb has argued that "the idea that law is necessarily derived from the State through its legislative and judicial organs and that it depends upon the State for its efficacy is warranted neither by a historical perspective nor by the experience of relational societies." Gottlieb, *supra* note 21, at 568. Gottlieb's points are well taken. The fact that much behavior is governed by social norms and private agreements does not mean, however, that the norms developed and enforced by the state are not essential. Moreover, if one accepts Gottlieb's definition of private norms as "law" themselves, one still will need to talk about the distinct concept of the "law of the State." I find it more helpful to follow a traditional definition of law as excluding private norms (though the outer limits of law may include enforceable contract terms). Gottlieb's article is probably now more accurately associated with social norms scholarship, much of which developed after his work was published.

> other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[97]

While one can debate whether this Act guaranteed a minimal level of substantive contract rights or instead promised merely equality of contract rights, the right to contract is central to the Act's implementation of citizenship under either view.[98]

The freedom of African-Americans to contract had been greatly impeded, socially and legally, throughout the country before the Civil War.[99] Reconstruction Republicans saw this right as central to their ideal of a free labor society in which each (male) citizen had the capacity to sell his labor freely and make a living: "The laws of contract are the foundation of civilization."[100] Reconstruction ideals of freedom of contract rested on the antebellum, abolitionist ideology of free labor in which "[f]reedom meant economic independence, ownership of productive property – not as an end in itself primarily, but because such independence was essential to participating freely in the public realm."[101] The connections between ideas of free labor and the principles of liberty of contract constituted one of the essential principles of abolition jurisprudence and were central to the freedom and citizenship created by the Reconstruction amendments.[102]

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[97] Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

[98] I have recently argued that the Act should be read to guaranty a minimal baseline of rights. Others disagree. *See* James W. Fox Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 97-99 & n.113 (2002).

[99] *See, e.g.*, LEON F. LITWACK, NORTH OF SLAVERY, THE NEGRO IN THE FREE STATES, 1790-1860, at 157-58 (1961).

[100] ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 164 (Henry Steele Commager & Richard B. Morris eds., 1988) (quoting letter of George W. Welch to Benjamin F. Butler, May 19, 1874, Benjamin F. Butler Papers, Library of Congress). Foner sees this ideology as "hopelessly unrealistic" in light of the actual conditions and lack of free will involved in labor contracts in the South. *Id*; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1151-52 (1866) (Representative Thayer supporting the Civil Rights Bill and identifying the right of contract as one of the "fundamental rights of citizenship" and one "of those great natural rights to which every man is entitled by nature"); *id.* at 475 (Senator Trumbull describing the rights in the Civil Rights Bill as the "rights of citizens" and "the great fundamental right").

[101] William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 774-75; *see generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970) (discussing ideologies that led to the Civil War, including the North's view that free labor was a fundamental right).

[102] Forbath, *supra* note 101, at 786. Forbath importantly observes that there were at least two strands of abolitionist free labor ideology affecting Reconstruction Era legal discourse: one focused on free labor as an expression of citizenship participation in the republic, and the other focused on the moral justifications for a liberty of contract regime. *Id.* at 772-86. On the tensions inherent in applying free labor principles in the postwar South, see generally WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR

Supported in part by this ideological commitment to freedom of contract and free labor, and in part by the postwar rejection of providing decent land to former slaves,[103] enforcement of the labor contract constituted a dominant activity of the Freedmen's Bureau. The Bureau wrote or rewrote labor contracts which local officials had the plantation owners and freedmen sign, in part to ensure some level of uniformity in basic contractual rights.[104] Some Bureau officials even seem to have relied on free labor ideology to enforce their own versions of the more modern contract doctrines of unconscionability and public policy: "One Bureau official lectured a North Carolina planter who desired [contractually] to bar blacks from leaving the plantation without his permission: 'Contracts of this nature when the landowner undertakes to control the personal liberty of the laborers, are utterly foreign to free institutions.'"[105] It was believed, even if naively, that establishing a written contract with terms consistent with free labor would preserve the basic rights of a laborer to the fruits of his labor, and that such labor and contract rights were an integral aspect of American democratic citizenship. State-enforced contract labor was liberated labor.

Even in the more contested arena of women's citizenship, this period saw significant implementation of contract rights for women. The law of *femme covert* was gradually coming to an end with the passage of the Married Women's Property Acts in the mid-nineteenth century.[106] While rights of married women to contract lagged behind their rights to property, the importance of contract rights for women was being recognized, especially as those contract rights related to property.[107] The fact that contract rights

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RACIAL CONTROL, 1861-1915 (1991).

[103] FONER, *supra* note 100, at 161-67.

[104] COHEN, *supra* note 102, at 72-74; FONER, *supra* note 100, at 165.

[105] FONER, *supra* note 100, at 165.

[106] For a review of this history and its historiography, see generally Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (stating that while the statutes enacted during the nineteenth century gave wives greater legal authority, they still were not on equal ground with their husbands); *see also* ELIZABETH BOWLES WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861, at 57-247 (1987) (reprinting a dissertation written in 1960 and arguing that by the middle of the 1840s the liberalization of women's legal status had begun); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983) (commenting that the passing of the Married Women's Property Acts reflected the increasing responsibility women were assuming over family affairs).

[107] *See* WARBASSE, *supra* note 106, at 282-87; Siegel, *supra* note 106, at 2141-43 (describing the postwar legislation which gave married women rights to their earnings and a capacity to contract and sue as a "second wave of reform legislation"); *see also* Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988) (critiquing the disjunction between postwar ideas of wage freedom for men and the limited amount of wage freedom enacted for women).

preceded voting rights for African-Americans and women indicates the fundamental nature of contracting for the foundation of democratic citizenship.[108]

B. Lessons from Reconstruction

The definition of citizenship implemented by the laws and policies of Reconstruction evidence an expansive understanding of democratic citizenship as being the mediating point for a variety of relationships. With respect to the labor relationship, formal written contracts, enforced with the consistency of contract law, were a recognized way in which the state could try to guaranty former slaves the basic rights and liberties denied them under slavery. The formal contract served as the focal point for mediating the citizen-relation and labor-relation, with the goal of allowing the individual to develop his citizenship through his labor.

Moreover, it was evident that freedom of contract required supervision, by the state, of contract terms. While many officers of the Bureau allowed plantation owners to include and enforce oppressive contract terms which limited the right of workers to leave plantations and enabled planters to withhold the onetime payment at the end of the year, others in the Bureau supervised the terms closely, striking such contract terms and even imposing a minimum wage when the market rate fell below a living wage.[109] State enforcement of free contract thus required some protections associated with modern contract and labor law – doctrines of unconscionability, illegality of terms, and wage rate restrictions – in order to create a real chance at freedom through contract.

Similarly, by protecting the right of African-Americans to marry, Reconstruction Era legal changes enabled the development of the family relationship. Slavery oppressed in part by the denial of the rights of marriage and family; democratic citizenship required the state to protect the right to, and space for, family relationships. One of the most important immediate results of freedom for former slaves was the chance to reunite with their families.[110] As Peggy Cooper Davis has observed, "African-Americans con-

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[108] But contract rights, by themselves, cannot secure equal democratic citizenship. *See infra* Part IV.

[109] FONER, *supra* note 100, at 165.

[110] FONER, *supra* note 100, at 82-85. Charles Sumner, supporting the Civil Rights Bill in 1865, cited favorably how the 1861 Russian emancipation of the serfs guarantied the "rights of family and the right of contract" as central components of freedom from bondage. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865). Amy Dru Stanley notes, however, that for women there was no right to contract and that Sumner's twin rights were largely male rights. Stanley, *supra* note 107, at 471.

sciously claimed the status and responsibilities of spouse, of parent, *and* of citizen. The formation of legally recognized marriage bonds signified treatment as a human being rather than as a chattel – acceptance as people and as members of the political community."[111] At the very least, the state was seen as the proper vehicle for the protection of the sphere of family as an aspect of full citizenship.

Education was also recognized as a fundamental aspect of democratic citizenship, for without education, African-Americans could not achieve within the economic and political spheres. One of the moderate successes of Reconstruction was the effort to establish education for former slaves who had for generations been denied basic literacy and opportunities for primary education.[112] Reconstruction Republicans understood the central role of education in any system of free citizenship; indeed, the right to contract could prove meaningless without the capacity to contract and make informed choices.

We can also learn from Reconstruction how these principles can fail. By implementing contract ideology as a discrete ideology unsupported by other structures of citizenship such as voting and property, contract produces oppression, not freedom. Early in Reconstruction, President Johnson blocked attempts to provide land to the freedmen; the land they had worked in slavery was returned to the plantation owners, and labor contracts were used to once again bind black laborers to the land and white landowners. Without property rights and property ownership, labor contracts oppressed.[113] And when the Freedmen's Bureau and state and local officials enforced labor contracts against the workers with the threat of arrest for not laboring, the "contract" oppressed absolutely. This coercive contract enforcement regime was imposed on

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[111] PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 35 (1997).

[112] *See* James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 531 (1999) (noting that the Bureau coordinated the efforts of benevolent societies to educate hundreds of thousands of African-American children); *see also* Paul A. Cimbala, *Making Good Yankees: The Freedmen's Bureau and Education in Reconstruction Georgia*, 1865-1870, 29 ATLANTA HIST. J. 5 (1985), *reprinted in* THE FREEDMEN'S BUREAU AND BLACK FREEDOM 57 (Donald G. Nieman, ed., 1994) [hereinafter THE FREEDMEN'S BUREAU]; JACQUELINE JONES, SOLDIERS OF LIGHT AND LOVE: NORTHERN TEACHERS AND GEORGIA BLACKS, 1865-1873 (1980) (describing the eagerness of teachers to help educate the freed people).

[113] On the importance of property for the former slaves, see generally Paul A. Cimbala, *The Freedmen's Bureau, the Freedmen, and Sherman's Grant in Reconstruction Georgia, 1865-1867*, 55 J. S. HIST. 597 (1989), *reprinted in* THE FREEDMEN'S BUREAU, *supra* note 112, at 62; CLAUDE F. OUBRE, FORTY ACRES AND A MULE (1978). In essence the freedmen saw labor contracts in the absence of property ownership as a return to slavery. *See* FONER, *supra* note 100, at 160-61.

blacks exclusively, emphasizing that oppressive contracting was reserved for blacks, not whites.[114] Add to this the difficulty of seeking redress in cases of contract disputes because of the complex combination of the unavailability of legal representation, the lack of fair tribunals, and the absence of education sufficient to know one's rights, and there was little even a fair contract arrangement could do to prevent social and economic oppression.[115] Ultimately, the failure of Reconstruction to create significant freedom of labor indicates as strongly as any other episode in our history that it is essential for contract to exist in an environment of legal, political, and social citizenship protection.[116] The contract relation, in and of itself, means little in a vacuum.

This point is also evident from the citizenship status of women during and after Reconstruction. The increased capacity for women to contract during the nineteenth century probably improved women's position, at least economically.[117] Absent suffrage, however, it did not guaranty women an improved status as democratic citizens. This is perhaps one of the reasons that the Seneca Falls Declaration of Sentiments declared "the elective franchise" to be the "first right of a citizen" and stated that all other legal disabilities, including the rights to property and wages (and implicitly the contract rights which flow from these), depended on the denial of the vote.[118]

Reconstruction therefore cannot be the ultimate source for identifying the full range of democratic citizenship. Its impact was limited. It failed to produce significant changes economically; its political advances were rescinded in the last decades of the nineteenth century; its very foundation and implementation was ambiguous and contested; and it failed to address the extension of

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[114] FONER, *supra* note 100, at 166.

[115] *See generally* FONER, *supra* note 100, at 165-67.

[116] W.E.B. DuBois expressed this point about the need for a full panoply of supports for freedom when he argued that a full federal commitment to

> a national system of Negro schools; a carefully supervised employment and labor office; a system of impartial protection before the regular courts; and such institutions for social betterment as a savings-bank, land and building associations, and social settlements . . . [could have] formed a great school of prospective citizenship, and solved in a way we have not yet solved the most perplexing and persistent of the Negro problems.

W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 39 (Dover 1994) (1903).

[117] *See generally* Siegel, *supra* note 106.

[118] *See* THE SENECA FALLS DECLARATION OF SENTIMENTS, 1848, *reprinted in* AMERICAN LEGAL HISTORY: CASES AND MATERIALS 264-66 (Kermit L. Hall et al. eds., 2d ed. 1996). On the importance of the Nineteenth Amendment's guaranty of women's right to suffrage as an important step to establishing women's equal citizenship, see generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

basic rights to women and members of other racial minorities. Nonetheless, Reconstruction does help us focus our attention on the potential connections between contract and citizenship relations in ways that may clarify the social-political context for relational contract theory.

III. RECONSTRUCTING RELATIONAL CONTRACT: THE CITIZENSHIP RELATION

The question then is what sort of political theory do we want to use to evaluate contract law as understood by relational contract theory? This Article suggests that the most sensible way, one which respects the contextualizing spirit of relational contract theory yet also advances a more developed role for the state, is a theory that centers on the democratic citizen but which accounts for the plurality of social interactions in which people engage and which constitute the larger community. This theory, which has its roots in the work of Michael Walzer and others,[119] views democratic society as comprised of a host of relational spheres with overlapping value systems emanating from each sphere. Reconstruction thus serves both as a source of ideas about contract and citizenship, and as a negative example to illustrate the need for a broader, more plural approach to democratic citizenship.

A. Situating the Theory

Before exploring this theory in more detail, however, let me first situate it in the context of the approaches of Ian Macneil and Michael Walzer. Walzer sets forth a theory of justice which expressly focuses on goods themselves. He disclaims a theory of distributive justice which focuses on distribution because he believes that it omits the essential aspect of the goods – that they have meanings upon being produced or created, that their meaning is prior to their distribution. In this sense "one might almost say that goods distribute themselves among people,"[120] and Walzer studies the meaning of particular goods that produce the distributive meanings and structures. But Walzer's theory is more than merely a study of diverse norms; for him, when these spheres and meanings of goods interact in a positive way, they produce what he

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[119] *See generally* MICHAEL WALZER, SPHERES OF JUSTICE (1983) (setting forth the theory of complex equality). My own approach is heavily influenced by the many wonderful essays about Walzer's theory in PLURALISM, JUSTICE, AND EQUALITY (David Miller & Michael Walzer eds., 1995).

[120] WALZER, *supra* note 119, at 7.

terms complex equality.[121] Under complex equality, the inequalities within each sphere are legitimate so long as people disadvantaged in one sphere can engage in other spheres where they are advantaged, or at least not disadvantaged.

Macneil focuses on exchange. But his idea of exchange would encompass all relations among people involving Walzer's goods. Where Walzer uses "distribute" to mean "give, allocate, [and] exchange,"[122] Macneil appears to use "exchange" to encompass Walzer's distribution concept. Following Macneil's basic argument about the ubiquity of exchange, one can argue that allocation is in fact a form of exchange.[123] The concept of allocation focuses on the one-sided power of the entity which controls a (often scarce) good to distribute the good, whereas exchange commonly refers to two parties trading. But when a party allocates, someone is receiving and usually exchanges something for the allocation, though perhaps indirectly. The state may allocate welfare expenditures, but this is done in the broader exchange relationship of the citizen's obligations to the state. Thus Macneil, in discussing the importance of viewing political power from an exchange perspective, argues that "the distinction between unilateral power and reciprocal power, is, to an important degree, a false one."[124] When people focus on allocation, then, they are, from a Macneilian perspective, simply focusing on one aspect of the political exchange relation.

These two theories overlap to the extent that both focus on social relations and the norms, meanings, and values arising from those relations. One of Macneil's primary points is that there is a network of social relations involved in all exchanges. Similarly, Walzer observes that the goods at issue in his theory are social goods.[125] Despite Walzer's initial rhetorical emphasis on goods distributing themselves, he readily admits that social meanings arise out of the "social" aspect of social goods and not the "good-in-itself."[126] The two theories differ, however, in how they view the structure of norm creation. Whereas Walzer is looking for the

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[121] *Id.* at 19; David Miller, *Complex Equality*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 197-204; David Miller, *Introduction* to PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 1, 12-13. *But see* Amy Gutmann, *Justice Across the Spheres*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 99 (criticizing Walzer's version of a spherical complex equality).

[122] WALZER, *supra* note 119, at 6.

[123] *Cf.* SELECTED WORKS, *supra* note 7, at 47-48 (discussing the breadth of Macneil's concept of exchange).

[124] Macneil, POLITICAL EXCHANGE, *supra* note 7, at 154.

[125] WALZER, *supra* note 119, at 7.

[126] *Id.* at 8-9.

variety of norms arising out of the diversity of social goods, Macneil concentrates on the norms underlying exchange itself. Walzer's theory thus studies a greater plurality of norms than does Macneil's. MacNeil and Walzer also differ in their approach to the state. Whereas for Macneil the state is a dangerous Leviathan,[127] for Walzer the state can be (note: can, not is) a positive source guarding the spheres to promote complex equality.[128]

The theory I postulate seeks to merge these two approaches somewhat. One of my primary critiques of Macneil is his failure to credit different sets of norms from non-contractual relations. In this sense, I adopt the pluralism of Walzer's approach. Walzer, however, tends to downplay the relationships and relational contexts themselves in favor of a focus on the particular good. Consequently, Macneil provides guidance by concentrating on the interpersonal and collective relationships. Macneil is ultimately concerned with the root of social meaning itself, which he defines as organic solidarity. Walzer might well agree with this concept, but it plays a lesser role in his theory of spheres of justice. The theory adopted here focuses on relational contexts rather than goods.[129] I do not, however, believe that Macneil's concept of exchange can be extended nearly as far as he supposes.[130] While things are in fact exchanged in the citizen relationship, exchange does not explain the foundational norms of democracy. For these we need to look at the nature of the democratic relationship itself.

B. What Is the Theory?

Relational contract theory focuses on exchange relations. What I want to do is consider the fundamental relation for the purpose of *law* as being that of democratic citizenship. Democratic citizenship is crucial for law because it is the primary manner in which the state relates to its citizens and which ultimately gives the law its authority. This "relationship" has its own norms –

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[127] Macneil, particularly in his writings of the 1980s, often referred to the state this way. *See, e.g.*, Macneil, *Bureaucracy*, *supra* note 84, at 944.

[128] I agree with David Miller's reading of Walzer's SPHERES OF JUSTICE, *supra* note 119, to advance a concept of equal citizenship. Miller, *Introduction*, *supra* note 121, at 3, 12-13. Miller believes equal citizenship is not, however, a fundamental principle for Walzer's theory; in contrast it is fundamental in my approach.

[129] Jon Elster has distinguished between theories of justice that focus on contexts (families, friends, professions) and theories, such as Walzer's, that focus on the good to be allocated (grapefruits or avocados). Jon Elster, *The Empirical Study of Justice*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 81, 86-88 (also identifying four other types of theories). My approach leans more towards the former by focusing on relational contexts.

[130] This difference marks perhaps my clearest break with Macneil's theory. As my discussion below tries to make clear, I do not think an exchange theory of all human relations is either workable or accurate.

those of democratic citizenship – which are the foundation of legitimate state action. This theory is explicitly normative to the extent that it takes positions based on a belief that those positions are correct, are theoretically justifiable, and ought to be implemented, and it makes judgments about what people are and should be as democratic citizens.[131]

The relational emphasis of democratic citizenship makes it a natural counterpart to relational contract theory. In one sense, the political community is itself seen as a form of ongoing long-term contract. There is no moment of "discrete" contracting or agreement between a citizen and the polity. Consent is an ongoing process, and the state is constantly seeking the re-consent of its members. Indeed, where discrete consent is sufficient there is no longer democracy; Hitler came to power by consent. One of the things that marks off the democratic state from other states is the need for repeat or ongoing consent.[132]

It is not sufficient, however, simply to consider citizenship another instantiation of relational contract. Because relational contract theories focus on exchange, they carry with them some critical limitations. To the extent that exchange implies economic transactions and material exchanges, it is inappropriate as a model

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[131] The normativity I propose for a theory of democratic citizenship accounts for both inductive reasoning of what democracy is and has been – the norms that rise up from below in democratic society – *and* deductive reasoning of the nature of democracy from political theoretical. Ultimately I believe some version of reflective equilibrium is necessary through which evidence of democratic norms arising from practice is compared with more deontological theories about what democracy should be. I find particularly helpful on this score T. K. Seung's discussion of Rawlsian reflective equilibrium, where Seung sets forth his own theory of dual consideration. SEUNG, *supra* note 67, at 46-70; *see also id.* at 61 (emphasizing "the need to be sensitive to the empirical dimension of the normative world, and . . . the need to be faithful to the transcendent ideals"). Rawls' own idea of reflective equilibrium does not address empirical evidence; rather, for Rawls the dynamic of reflective equilibrium compares his deontological principles of justice with considered moral judgments which are primarily intuitive. *See* JOHN RAWLS, A THEORY OF JUSTICE 42-45 (Belknap Press 1999) (1971). It is other theorists, such as Seung, who propose the comparison of empirical understandings with the theoretical principles. *Cf.* Elster, *supra* note 129 (discussing Walzer's analysis by examining the descriptive, explanatory, and normative approaches to distributive justice); DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 42-92 (1999) (assessing the significance of considering empirical evidence regarding how norms of justice are applied in social contexts, in regards to developing an adequate theory of justice).

[132] Walzer makes this point in the context of the treatment of guest workers. Guest workers (resident aliens) are often treated tyrannically in the sense that the society obtains their labor but offers them no membership benefits (welfare protections and basic rights) in return. Some might contend that the workers consent to this upon their initial entry as guest workers. Walzer replies that "this kind of consent, given at a single moment in time, while sufficient to legitimize market transactions, is not sufficient for democratic politics. Political power is precisely the ability to make decisions over periods of time, to change the rules, to cope with emergencies; it can't be exercised democratically without the ongoing consent of its subjects." WALZER, *supra* note 119, at 58. Relational contract theory would point out that such onetime consent is often *not* sufficient for market transactions either, at least of the long-term type.

for citizenship relations. This is a clear defect with narrow relational theories, which focus on long-term contracts in business relations and emphasize economic exchanges as well as economic analysis and norms. While such theories account for nonmaterial aspects of contract relations, such nonmaterial aspects exist in the theories primarily in the effect they have on economic exchanges.

By contrast, in democratic citizenship the goods being exchanged are not the stuff of contract exchange. Democratic politics is not the market, and democratic political power is not economic power. Citizens exchange nonmarketable, nonmaterial goods.[133] Membership in democratic society is not for sale, and while its meaning may be under constant negotiation, one does not barter in citizenship. This is particularly true of American citizenship after the Civil War when the Fourteenth Amendment created birthright citizenship.[134] The basic rights of citizenship, and the equality of those rights, are a baseline of democratic citizenship.[135] The content of these rights will be a constant negotiation (it is democracy, after all), but the rights are negotiated through democratic politics, not economic exchanges. Disabled citizens should not have to purchase the right to be free of discrimination; they should instead be able to engage in political discourse with politicians and other citizens, demonstrating how their claims to employment and access rights are coextensive with the rhetoric of rights already developed.

One might counter that this theory is wishful; in fact, democratic politics is purchased and bartered. After all, legislation is passed in the world of monied politics, and lobbying is big business. True, but when this happens, democratic politics is corrupted. The need for campaign finance reform arises, and the claim for reform resonates so loudly, because democratic politics

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[133] *Cf.* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that inalienabilities need to be analyzed under a concept of human flourishing); Judith Andre, *Blocked Exchanges: A Taxonomy*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 171 (discussing an approach where grounds for blocking exchanges are not found in a list or single principle, but rather in a set of related considerations).

[134] There is also some support for this point in the structure of the original Naturalization Acts, which focused on length of residence, not labor. *See, e.g.*, Naturalization Act of 1802, 2 Stat. 153; Naturalization Act of 1798, 1 Stat. 566; Naturalization Act of 1790, 1 Stat. 103. Naturalization under this view is a process of learning the norms of democracy, not an exchange of citizenship for labor. Of course residence restrictions also had negative meanings designed to exclude people whose political views were undesirable, such as pro-Jeffersonian "Jacobins" from the 1790s and socialists in the late-nineteenth century. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 153, 370-71 (1997).

[135] *See* James W. Fox Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103, 123-49 (1996) (presenting a positive defense of welfare from a theory of liberal citizenship).

is corrupted when it is bartered. Thus the exchange relations of the market dominate the citizenship relations of democratic politics.

Alternatively, one might follow Macneil and reply that politics is itself an exchange and can best be analyzed from a broad relational theory of exchange. Under this view, democratic "negotiation" or "discourse" represents an exchange of power, rights, and recognitions, even if the exchange is not economic.[136] Yet, to the extent that the concept of exchange operates more broadly than economic exchange, as it does in Macneil's capacious theory,[137] it remains an inadequate rubric to account for the non-exchange aspects of the citizenship relation for several reasons. First, Macneil's use of the terms "contract" and "exchange" carry with them the unwanted (for Macneil) refuse of economic meanings even when re-configured in Macneil's theory as non-economic terms. As he does with many terms,[138] Macneil attempts to restate exchange and contract in ways that explicate his broad, Durkheimian social theory. But one cannot cleanse language of its origins or communal meanings. By asking us to think about exchange as a focus of human relations, Macneil's theory turns us in the direction of economic relations even if Macneil would rather we look elsewhere. It also inherently limits our attention to situations in which the non-exchange aspects of human relations dominate, and in which the norms governing the relations derive from non-exchange social constructs.

To illustrate this point, allow me two banal examples of "exchanges." Two people can exchange goods, perhaps a shirt and a pair of shoes. Two others exchange pleasantries. The former exchange may be predominately economic or material, the latter entirely social. It might be possible to understand the first relationship reasonably well by focusing on the relation as an exchange, but the second requires discussion of the non-exchange relations. Were the parties friends? Neighbors? Classmates? Strangers recognizing each other's equal status as citizens? The exchange tells little about what they are, and certainly little about how they should behave. What may be a pleasantry between friends might

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[136] *See, e.g.*, Macneil, POLITICAL EXCHANGE, *supra* note 7.

[137] *See, e.g.*, Macneil, *Relational Contract*, *supra* note 7, at 485; Macneil, *Many Futures*, *supra* note 7, at 700. I thank Ian Macneil for getting me to think more carefully about this aspect of his theory, even if I ultimately disagree with him on some of the substantive consequences.

[138] "[Macneil's] normative schema is rather elaborate and expressed in terms to which Macneil typically gives rather unconventional meanings . . . ." SELECTED WORKS, *supra* note 7, at 15.

be offensive over-familiarity between neighbors or strangers. The norms of the interaction are not those inherent in the exchange. Indeed, the same can be said of the former example. As Macneil's theory rightly suggests, we need to look at the "transaction" (transaction here standing for material exchange) in context. What if the exchange was one of gifts between cousins? If so, the norms for evaluating whether this is a good exchange will depend primarily on non-exchange values of family and social custom.[139] While the exchange may be a particular instance in those relations, it does not produce the norms of the relations. We do not understand the relationship or the norms governing the relationship without understanding their socially constituted roles and how those roles relate to each other.

The problem, then, is one of focus. By concentrating on exchange as the source of norms for human relations, Macneil's theory underplays, sometimes dramatically, the non-exchange norms (or what he sometimes calls supracontract norms).[140] Moreover, given the cultural associations of materiality and economics with terms such as contract and exchange, Macneil's theory, as applied by others, may well have a tendency to return to the material exchange norms, as happens with the more narrow relational theories.

This problem of focus and undervaluing of non-exchange norms is particularly critical for questions of democratic citizenship. First, we still need distinctions between exchanges of power in the political realm and exchanges of money. Without such distinctions, there is less of a basis for objecting to the domination of one by the other, and the norms particular to political relations easily devolve into the norms of the market. Following Walzer, we should recognize that money and material exchange can easily colonize politics and democracy.[141] As suggested above, the rhetorical or social meanings of terms such as contract and exchange

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[139] It should be noted that Macneil would likely argue that family and other social relations have very significant exchange-based norms, and that some norms I would identify as founded in non-exchange principles Macneil would view as exchange-based.

[140] *Cf.* Amy H. Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW. U. L. REV. 132, 145-57 (1995). Kastely presents a related sympathetic critique of relational contract theory, arguing that it "is not helpful . . . in addressing the practices of exploitation, powerlessness, and marginalization . . . ." *Id.* at 153. My argument is that democratic citizenship theory does provide a means of addressing these concerns, in part by promoting the preconditions for effective choice, such as options for role differentiation, which Kastely cites favorably. *Id.* at 180.

[141] WALZER, *supra* note 119, at 282 (discussing colonization of state power); *id.* at 295-303 (discussing the illegitimacy of property and money overtaking the state and democracy).

do not allow us to separate political and market norms, and may even tend to press political norms towards market ideals.

Second, just as exchange norms cannot comprehend friendship or family norms in the examples above, they also cannot account for the norms of democratic citizenship. The basic liberal idea of fundamental rights, wherein each citizen has some baseline level of rights that are inalienable and unmarketable even if that person gives her fully competent and informed consent,[142] cannot be explained from a theory of exchange. So too with the ideals of equal respect, equal treatment, and inherent human dignity. Martin Luther King, Jr., was not seeking exchange on the steps of the Lincoln Memorial; he was asserting a citizenship right and making claims for respect and dignity, socially, politically, and legally.[143] While one *could* analyze King's claims and those of the civil rights movement generally from an exchange perspective, this would be to miss the more central normative claims and aspirations.[144] The norms of democratic citizenship cannot be understood from a wholly exchange-based theory, even one as open as Macneil's.

Indeed, it is precisely the point of a Walzerian democratic theory to foster the proliferation of multiple norm structures and communities. As discussed above, this type of pluralistic democratic citizenship theory recognizes that norms arise through different types of human interrelations. Some of these may be based predominantly on material exchanges, some based mostly on non-material exchange, and others based mostly on non-exchange relations. Moreover, exchange relations may have an important, although lesser, role to play in non-exchange relations, such as the family; a plurality of norms within spheres of human relations is certainly possible. The variety of norms and norm communities is itself valued under this democratic citizenship theory.

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[142] The necessity of presuming some baseline of liberal democratic rights and principles, even in a theory as communal or cultural as Walzer's, is discussed in Joseph H. Carens, *Complex Justice, Cultural Difference, and Political Community*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, 45, 58-59.

[143] It may also help to illustrate this point to consider the different approaches to claims of black democratic citizenship made by Booker T. Washington and W.E.B. DuBois. Washington's approach was that of exchange: he was willing to sacrifice political and social rights in order to gain some basic economic rights. DuBois on the other hand asserted recognition and baseline rights of membership, in particular voting and education rights, not as an exchange but as a basic aspect of citizenship. For DuBois's views on this distinction, see DUBOIS, *supra* note 116, at 25-35.

[144] Note that this is *not* to say that all of the norms identified by Macneil as contract or exchange norms are irrelevant. Restraint of power, solidarity, reciprocity, and others will be relevant in other spheres as well, including politics. But these norms have a different context, and other norms, like dignity and recognition, will be more central.

Here we come to the central point of a relational conception of democratic citizenship: citizenship is a sphere or relationship separate and distinct from (though not uninfluenced by) other spheres or relations, and it has its own guiding principles.[145] Citizens relate to the state *qua* citizens, and the democratic state owes its existence, and is justified by its relationship, to the citizenry. While the state can certainly act in ways distinct from its relation to citizens and its role as a democratic state, its most important and necessary function is to relate to its citizens, to protect them and ensure their prosperity, and to provide security and general welfare.

Democratic citizenship has as its core values of equality and human dignity.[146] These are the values which the state should promote and protect, both within its own relationship with citizens, and, more importantly for our purposes, as fundamental principles across other relational spheres. Thus, if equal citizenship is threatened by market distributions of money and power – for instance by establishing the price of labor below a minimum threshold necessary for survival, or by allowing health and safety conditions to deteriorate to the point of threatening worker well-being – the state has a role in interfering with market norms or employment norms to secure worker security and well-being. Indeed, the connection between citizenship and labor reveals particularly important aspects of democratic citizenship, as I shall explore more below.

The theory of democratic citizenship that I advocate also asserts an affirmative concept of the self, albeit one that is both somewhat thin and does not claim to be comprehensive. The democratic citizen, under this approach, is not merely a political being. She exists as a richly textured modern who is most fully developed and free when she has the realistic option of exploring several spheres of social activity, when her self exists in multiple sub-communities.[147] This theory recognizes both the capacity of individuals to choose these relations and the social constructions

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[145] This conception owes much to Michael Walzer's SPHERES OF JUSTICE, *supra* note 119. Walzer uses the metaphor of spheres to describe the different types of distributive principles he locates in different types of human activity. My emphasis is on the relationships that constitute what Walzer might see as distributive spheres, and on the norms governing those relations. This may sometimes overlap with Walzer's spheres and with his ideas about just distributions of goods, but it is meant to be a somewhat different concept.

[146] *See* Fox, *supra* note 135, at 123-49, and sources cited therein at nn.95-96.

[147] For a statement of the importance of social differentiation to freedom, autonomy, and the role of the State, see DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 165-75 (1989) (applying individual differentiation principles to government institutions and other authority figures, and differentiating autonomy from freedom).

of the self which bound and otherwise influence these choices.[148] The attractiveness of such a theory, it seems to me, is precisely this view of people as multifaceted, as existing in multiple sub-communities with multiple sets of norms, yet as also having core values in their basic political relations.[149] This type of democratic citizenship theory therefore posits a conception of the self somewhat similar to Macneil's conception of the self which is simultaneously selfish and social.[150]

Indeed, the perspective of democratic citizenship contains the potential to bridge a chasm in Macneil's theories of contract relations and bureaucracy. We have already seen that Macneil views the self as both wholly individual and wholly communal. For Macneil, the former has been overly emphasized in the United States, to the point of an excessive reliance on principles such as individual equality before the law, leading to an over-rationalization resulting in excess law and excess bureaucracy.[151] Macneil advocates a shift in emphasis toward communities which, in his view, can instill values more important than equality – values such as communal duties, reciprocity, and a sense of belonging.[152] While this may at first blush appear anti-liberal, Macneil seems sympathetic to the concept of citizenship to the extent it encompasses community rather than individual rights.[153] Democratic citizenship bridges these two polls because it emphasizes the individual's membership in communities, including, but not limited to, the political-juridical community. Democratic citizenship advocates a rich civil society where no single bureaucracy dominates, and where space for multiple small social networks or communities can flourish.[154] Macneil's value of "belonging" is precisely what equal democratic citizenship seeks.[155]

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[148] This is why the democratic citizenship theory advanced here is properly seen as relationalist. Macneil shows some sympathy with a different variation of democratic theory, what he labels liberal pragmatism. Liberal pragmatism, according to Macneil, is a theory about the proper role and actions of the modern democratic state and has influenced Arthur Corbin, Karl Llewellyn, and Lawrence Tribe, among others, including legislatures and lawyers. Macneil observes, however, that such an approach is at bottom based on individualistic, market ideas of the self. Macneil, *Challenges and Queries*, *supra* note 7, at 882-83 & n.28.

[149] Another attraction is the vision of equality. One of Walzer's greatest contributions was to emphasize the importance of complex equality, an equality across spheres that accounts for different inequalities within each sphere but then also seeks to balance inequalities so that each citizen has some spheres where she can have status and perhaps power. *See supra* text accompanying notes 121 and 128 (discussing complex equality).

[150] *See supra* text accompanying notes 38-41.

[151] Macneil, *Bureaucracy*, *supra* note 84, at 912.

[152] *Id.* at 935-36.

[153] *See id.* at 941 n.160 (citing favorably Karl Marx's critique of the French Revolution as insufficiently attentive to communal man-as-citizen and overly attentive to man-as-individual).

[154] *See, e.g.*, Michael Walzer, *The Civil Society Argument*, *in* DIMENSIONS OF RADICAL

To illustrate, consider that people engage in multiple social relationship networks: family, school, political, employment, consumer.[156] Each of these calls for a different social role. Each of these social roles is embedded in and created by a sub-community with norms and practices and understandings unique to that sub-community. A theory of democratic personhood in a pluralistic democracy should enable people to engage in these spheres of relations, and to achieve differing levels of values in each sphere. Thus, democratic citizenship theory recognizes precisely the sort of multiplicity of social interactions that relational contract theory often emphasizes. The work that relational contract theory has done in trying to shift contract law toward recognition of relational norms fits rather nicely with at least some versions of plural democratic theory.

Democratic citizenship theory, however, asks more of us than merely identifying the norms or values inherent in spheres of social interaction. Where relational contract theories stop, democratic citizenship theories march on. Most importantly democratic citizenship theory asks us to view the citizenship relationship as to some degree centralizing, and to see the state as guarding and regulating the borders of other spheres.[157] Where relational contract theories are often immersed in particular relations, or, in Macneil's case, in concentric circles of exchange relations, democratic citizenship theory is meta-relational; it seeks to understand the relations of relations, with the effect on individual citizens being a connecting point for this study.

The basic problem, therefore, from the point of view of democratic citizenship, is what David Miller calls "dominance":[158] that power in one sphere, while perhaps legitimated under the

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DEMOCRACY 89 (Chantal Mouffe ed., 1992) (using 'civil society' to describe a society of uncoerced human interactions and a network of relationships); Michael Walzer, *A Better Vision: The Idea of Civil Society: A Path to Social Reconstruction*, 38 DISSENT 293 (1991) (discussing modern civil society in the context of state and national governments and the economy). For an interesting discussion of the possible importance of civil society to democratic freedom in the context of contract law and adhesion contracts, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1238-43 (1983).

[155] *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA (1989) (discussing nationhood and the concept of equal citizenship as a unifying ideal); Miller, *Complex Equality*, *supra* note 121, at 206-07 (discussing the importance of equality of status and citizenship).

[156] Macneil recognizes this multiplicity, though to a different effect. *See* Macneil, POLITICAL EXCHANGE, *supra* note 7, at 164-65 (recognizing the electorate as functioning in "multiple capacities as citizens, workers, taxpayers, and beneficiaries of government programs").

[157] *See, e.g.*, Michael Walzer, *Exclusion, Injustice, and the Democratic State*, 40 DISSENT 55, 63 (1993) [hereinafter Walzer, *Exclusion*] (discussing the role of the state in limiting market or religious dominance outside their spheres).

[158] Miller, *Complex Equality*, *supra* note 121, at 203.

norms of that sphere, may produce power across other spheres, and so reduce the general capacity for citizens to enjoy a range of goods and statuses. Equality across spheres requires a complex view of equality, where people who have less power or status within one sphere can balance this by having greater power or status in other spheres. The line workers at a factory assembly plant can enjoy an equality status within her family and perhaps a leadership role in local politics. As Walzer emphasizes, "[w]hat a larger conception of justice requires is not that citizens rule and are ruled in turn, but that they rule in one sphere and are ruled in another – where 'rule' means not that they exercise power but that they enjoy a greater share than other people of whatever good is being distributed."[159]

If, however, a person's power and status within one sphere – the market being the most likely – grants that person power in politics, in education, and in other areas, there is little chance that citizens can benefit from a plurality of relational spheres. Furthermore, if the citizen is subjected to overriding inequality – such as gender discrimination – her capacity to experience complex equality, even where the discrimination is absent in some spheres, will be greatly diminished.[160] The state plays a critical role in preventing such domination and ensuring the existence of complex equality. The democratic state can properly do this not just because it has power or democratic legitimacy, but because it is the one relational sphere where the values and norms of equality and human dignity govern. There is only one citizenship: equal citizenship.[161] Because the democratic state has a particular normative concern with equal citizenship, it is the best source for preventing domination across spheres by a party who gains success in a particular sphere. This concern is most relevant for the domination possible in the market by concentrated wealth, which can translate easily into domination in politics, in education, and in other social relations.[162]

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[159] WALZER, *supra* note 119, at 321.

[160] Walzer has recognized the importance of state action to prevent exclusion and discrimination and so foster complex equality: "given the continued existence of excluded groups, the state must play a larger role in advancing the cause of complex equality than I envisaged for it when I wrote [SPHERES OF JUSTICE]." Walzer, *Exclusion*, *supra* note 157, at 56.

[161] *See* KARST, *supra* note 155, at 3; Miller, *Complex Equality*, *supra* note 121, at 204-09; Miller, *Introduction*, *supra* note 121, at 12-13; Michael Rustin, *Equality in Post-Modern Times*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 17, 41 ("If structures of political decision-making are democratic, and based on equal citizenship, there is some likelihood that other forms of power will be kept within bounds."). I have previously argued that the establishment of equal citizenship and elimination of a tradition of tiered ideas of citizenship was one of the (not fully realized) goals of Reconstruction. *See* Fox, *supra* note 112.

[162] *See* WALZER, *supra* note 119, at 106, 295-303; Miller, *Complex Equality*, *supra* note

By seeing the state and the citizenship relation as a source for policing domination across other relational spheres, we can more fully address some of the key problems raised in relational contract theory. In particular, Macneil repeatedly emphasizes his contract norms of power relations and mutuality and the problems inherent in the imbalances caused to these norms by modern society and law. Yet he fails to credit actions of the state (both legislative and judicial) which seek to balance power relations and support greater mutuality.[163] An examination of a few areas of law may help to illustrate how democratic citizenship theory can both frame and supplement relational contract theory.

C. Examples

1. Anti-Discrimination Law

Relational contract theories have difficulty discussing anti-discrimination laws. The tendency is to identify the general social norm against discrimination, often expressed through statute, and, taking it as a social fact, explore its effect on contract law, contract behavior, and contract norms.[164] But non-discrimination principles are at least as deep and important as the norms of contract and should clearly sometimes trump and alter contract relational norms. The employment norms of pre-1964 America *should* have been shaken up and revised. Prior to the civil rights revolution, employment was understood within its own sphere as properly dis-

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121, at 212-13; Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 321-22 (1984) (discussing how market success can cause inequalities of wealth that create coerciveness; organized market powers can generate command and obedience similar to a government; and wealth and ownership easily convert into government power). For a sensitive analysis of the complexities of the values of "money" for Walzer's theory, see Jeremy Waldron, *Money and Complex Equality*, *in* PLURALISM, JUSTICE, AND EQUALITY, *supra* note 119, at 143.

[163] As I have indicated, Macneil's failure to credit the role of the democratic state is based in large part on his view of the state as incapable. Most recently he has argued that the power and willingness of democratic states to control private institutions, especially on the international level, has been greatly diminished. Macneil, *Contracting Worlds*, *supra* note 7, at 436. Obviously I am far more sanguine about the potential of the democratic state than is Macneil.

[164] *See, e.g.*, Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 337, 399 (1986) (viewing anti-discrimination laws as an external force affecting the employment contract relationship). Macneil mentions anti-discrimination law as being itself relational contract law, but the implication is that it implements relational contract norms. *See* Macneil, *Challenges and Queries*, *supra* note 7, at 897. Under his theory, such laws can be seen both as addressing the power and reciprocity norms of contract, and as representing the social norms external to contract. To the extent anti-discrimination principles are understood as based in contract norms, Macneil fails to capture their central role in democratic citizenship; to the extent they are understood as external, Macneil treats them as do other relational theorists – as external social facts understood primarily for their empirical value. *Cf.* Macneil, *Relational Contract*, *supra* note 7, at 506-07 (suggesting that discrimination law presents one of many complexities in contract relations which promise-oriented theories of contract cannot adequately address).

criminatory – a norm that applied to employers and employees alike (witness the strong support for racist employment polices among white unions). Discrimination was the custom of the relationship. Similarly, it was consistent with the norms of both legal employment and legal education to prohibit women from attending law school or practicing with major law firms.

So long as our focus is on norms internal to particular relations, or even Macneil's broader contractual norms, it is not clear that there is any justification for state imposition of anti-discrimination law. Indeed, one could argue that anti-discrimination law injures contract norms because it forces the parties – the white male employer and the white male employees – to violate their own norms, including consent. There may even be a tendency to focus more on lost solidarity and other relational norms than on the benefits of gender or racial equality.[165] The Macneilian relationalist would probably respond, with Paul Gudel, that anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, implement the norms of reciprocity and power-structuring and so support contract-as-it-should-be.[166] But these norms seem indeterminate if understood only as contract norms. Hiring or promoting a woman or minority just as surely destroys the reciprocity norms enabled by historic discrimination – the reciprocity within the white male culture – as it does promote a societal "reciprocity" or balancing of power across genders and classes. The norm of power restraint, which would suggest limitations on unilateral power, also fails to explain these laws, since this norm cannot adequately distinguish among legitimate power differences and those that should be prohibited. Why, for instance, should the state play a greater role in preventing gender discrimination than in regulating employment more generally?

Ultimately, there is something odd about viewing the civil rights legislation as involving primarily norms of contract power relations rather than as implementing norms of democratic citizenship. The racial and gendered discriminatory norms of employment and other contract relations should change not because the

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[165] As Eric Posner has noted, there is a coercive side to solidarity: when the state promotes a solidarity relationship it also necessarily permits more abuse within the relationship than it would permit among strangers; yet when the state intervenes to prevent abuse it disturbs the solidarity of healthy relations as well. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 190 (1996). The question therefore is when the state's intervention is justified. From the view of democratic citizenship it is almost certainly justified to disturb the solidarity of families in order to prevent systemic abuses of women and children. My point is that this answer must come from a normative perspective outside the relationship.

[166] Gudel, *supra* note 7, at 785.

solidarity of contract exchange was threatened, but because democratic citizens should not suffer racial and gender discrimination. The foundational statement of the twentieth century opposing the norm of racial segregation, *Brown v. Board of Education*, was a statement about equal citizenship based on the Fourteenth Amendment.[167] It is the state's particular place in society as the implementing agency for democratic citizenship that not only allows, but requires it to address inequalities across other spheres. The principles of non-discrimination which motivated the civil rights era do not arise out of some deep-rooted norm of contract exchange or from some generalized social norm identifiable through careful sociological observation; rather they exist at the foundation of democratic citizenship and are part of the very basis of law and government in a democratic society.[168] Democratic theory, with its emphasis on broadly based conceptions of equal opportunity, equal treatment, and the basic equality of human dignity, provides contract theory with the basis for these principles. While state enforcement of equal citizenship may increase social solidarity, equality nevertheless trumps general solidarity; it is not a sufficient argument against anti-discrimination laws to argue that such laws would produce a loss in social solidarity (even if one could define and measure such a concept). Furthermore, when the state speaks and enforces the language of equal worth and dignity, it helps create equal dignity in society, and so can change the norms of other areas, such as discriminatory employment.[169] State

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[167] 347 U.S. 483 (1954). Jack Balkin has observed that there are two related, but distinct, visions of the principle animating *Brown*: anti-subordination (also called equal citizenship) and anti-classification (also called color-blindness). Jack K. Balkin, *Brown v. Board of Education: A Critical Introduction*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 1, 11 (Jack K. Balkin, ed.) (2001); *see also id.* at 55-57. I adopt the anti-subordination reading. On the importance of *Brown* for establishing a modern American cultural ideal and norm of equal democratic citizenship, see KARST, *supra* note 155, at 15-27; Balkin, *"Revised Opinion,"* *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra*, at 77-91; Jack K. Balkin & Sanford Levison, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1099-1100 (2001) (discussing equal citizenship as a foundational constitutional and political principle).

[168] In the context of Macneil's contract norms the problem may be that he seeks to locate reciprocity and power-structuring as contract norms, whereas they may be better understood as norms of democratic citizenship.

[169] In this way democratic citizenship can overcome a learned or socialized perception of inequality. For instance, a lower-income consumer may "feel" inferior and so be more willing to accept onerous contract terms. Indeed, the fact that contract law often enforces onerous bargains itself creates this self-perception. If the state speaks, however, in ways that reinforce the consumer's self-worth, the consumer may be more willing to assert his or her interests. *See, e.g.*, Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY. L. REV. 445, 482-84 (1994) ("[A] belief that individuals are of equal moral worth may lead one to believe that he need not take a smaller share of the surplus created by exchanges."). On the role of democratic citizenship and law in creating a society of equal dignity and worth, see Fox, *supra* note 135, at 137, and sources cited therein at notes 152-53. This point is related

creation of equal citizenship may in this way also create a better structure of solidarity than the one it replaces. By adding a relational theory of democratic citizenship to relational contract theory, we can better account for the important role for democratically based principles such as non-discrimination in contract relations and contract law.[170]

2. Labor

As mentioned above, labor is a critical intersection for contract and democracy. The labor relation is both contractual and essential to citizenship. The area of labor thus provides a key point to explore how a democratic citizenship theory can advance relational contract theory. Macneil posits that labor law in the twentieth century shifted from viewing the labor relation in discrete terms, focusing on the basics of consent (essentially the *Lochner* Era), to addressing the mutuality and power imbalances within the labor relation through modern labor legislation and regulation.[171] He sees this as a shift in favor of relational contract norms, although he views the move with suspicion because labor laws have also had the effect of creating a new protected class of union managers[172] and the employed generally.[173]

Macneil's understanding of labor law as a species of contract law highlights one of the most important insights of relational contract theory: neoclassical contract law has improperly carved out large sections of contract law which are inconveniently relational and now treats them as distinct areas of law. This has happened with labor law, insurance, corporate law, family law, and many other areas.[174] According to Paul Gudel, this division occurs

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to the study of the expressive functions of law. *See supra* note 72.

[170] Paul Gudel contends that Macneil's theory provides an essential advantage over "liberal" theories of contract which focus on the overly vague concept of "fairness," because relational contract theory requires a particularization of fairness within the context of the exchange and also balances fairness with other contract norms. Gudel, *supra* note 7, at 782-83 (citing Charles Fried as the main proponent of the liberal theory). To the extent Gudel means to critique Rawlsian views, he undervalues the extent to which liberal theories in fact have very developed conceptions of fairness-in-action. *See id.* at 781. It is very hard to argue that Rawls' theory is insufficiently developed in its conception of fairness, even when it remains rather abstract. If one then combines the later Rawlsian idea of liberalism as primarily *political* with a Walzerian interest in placing the political within the context of other spheres of social relations, one can, I think, overcome the problem Gudel addresses.

[171] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 87.

[172] *Id.* at 89-90.

[173] *Id.* at 139 n.29 (suggesting that minimum wage laws increase the "gap in wealth" between the employed and the unemployed).

[174] *See* Gudel, *supra* note 7, at 778 (pointing out that classical contract law has tended to "spin off" specialty areas such as labor/management relations); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 617 (1983) (discussing the division of

"partly because we think of contract law as implementing and enforcing the world of private agreements, while labor law and family law are statutorily based public law, permeated and informed by public policies imposed on these relations by the body politic acting through its representatives."[175] Relational contract theory suggests that this split can be harmonized by understanding such areas of public law not as primarily imposing external norms, but as seeking to "facilitate reciprocity, solidarity and the other contract norms."[176]

As with anti-discrimination law, it is also rather odd to view labor legislation as operating primarily within Macneil's contract norms. William Forbath has shown that the labor movement was a movement about membership in the democratic society,[177] and the brief discussion above about Reconstruction suggests that labor has played a crucial role in defining modern American democratic citizenship. The state regulation of the employment relationship exists not simply because of a power imbalance or the need to foster contract norms of reciprocity, but because of a power imbalance in an area critical for citizenship. Control over one's labor (free labor), and protections against having one's labor relation itself become controlling or life-threatening (wage, hour, and safety regulation), are critical to a democratic citizen's being able to *be* a citizen in the first place. As Judith Shklar so rightly observed:

> The opportunity to work and to be paid an earned reward for one's labor was a social right, because it was a primary source of public respect. It was seen as such, however, not only because it was a defiant cultural and moral departure from the corrupt European past, but also because paid labor separated the free man from the slave.[178]

Work constitutes our identity as democratic citizens, our membership in our national and local community, and our sense of independence and self-worth.[179] There can be a dramatic differ-

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traditional contract law into many disparate segments); *see also supra* note 17 and accompanying text (discussing "carving out" of contract law areas).

[175] Gudel, *supra* note 7, at 780.

[176] *Id.*

[177] *See* William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1793-1804 (1994) [hereinafter Forbath, *Rights Talk*] (reviewing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993)).

[178] JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1-2 (1991).

[179] *See* Vicki Schulz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000) (discussing the importance of work to the individual's citizenship, community, and identity); *see also* Ken-

ence between protection of citizen labor and protection of contractual reciprocity and power relations more generally. When the state acts to protect labor, through broadly applicable labor and workplace laws, it acts in favor of citizenship; different – and lesser – concerns are present when the state acts to protect car dealers in their dealer-manufacturer relations. Absent some theory about the proper role of the state, relational contract theory cannot adequately explain such differences.

To understand how thinking in terms of the democratic citizenship relation can help us understand the state's role in contract law, it may help to consider two labor and employment cases used by relationalists Gudel and Macneil to illustrate their approach. In *Foley v. Interactive Data Corp.*, the plaintiff, a fired employee, argued for applying the tort of bad faith breach of contract to the employment contract.[180] The California courts had an established tort of bad faith breach of contract in insurance law,[181] but they had not expanded it beyond the insurance contract relation. The court in *Foley* decided, 4-3, not to do so. Paul Gudel contrasts the majority and dissenting opinions and suggests that the dissent gets the case right because it applies a relational analysis:

> [T]he majority regards employment as a relation that only has value in the separable economic 'products' that the employee gets out of it, while the dissenters think about employment as a relation that has an inherent, non-commercial value for the employee. The dissenters suggest that employees find value in the activity of the job itself, thus making the relation seem, at least partly, more like the non-commercial insurance contract.[182]

Gudel keenly analyzes this case as important for understanding the relational perspective. The dispute between the majority and minority, however, can also be considered a dispute about the proper role of the court in a democracy. The majority distinguishes employment from insurance on the basis that insurance is "quasi-public" and provides a "public service."[183] The courts can properly regulate insurance, according to the majority, *because*

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neth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530-53 (1997) (asserting that work is a source of identity and self-worth).

[180] 765 P.2d 373 (Cal. 1988).

[181] *See* Crisci v. Sec. Ins. Co. of New Haven, 426 P.2d 173 (Cal. 1967); *see generally* ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 25G (3d ed. 2002) (discussing "Insurers' Liability for Bad Faith").

[182] Gudel, *supra* note 7, at 791.

[183] *Foley*, 765 P.2d at 396.

insurance serves a particular function for the state. This view of insurance ultimately sees consumers of insurance as more than just consumers: they are consumers of a public good and their character as democratic citizens is implicated by the insurance contract in a way not true of the consumption of widgets or a contract for yard services. The "public" role of insurance in fact justifies both the extensive regulation of the field by the legislatures *and* the independent, overlapping regulation of the insurance contract relation by the courts. For the majority in *Foley*, however, such public functions do not exist for employment.

The dissent counters, as Gudel observes, with an eloquent statement of the importance to the employee of the employment relationship, of how employment is not like other market transactions.[184] The dissent's description of the value of employment is particularly intriguing: "One's work obviously involves more than just earning a living. It defines for many people their identity, their sense of self-worth, their sense of belonging."[185] For the dissent, this justifies the court's implementation of the bad faith tort as an effort to remedy a serious harm: "The wrongful and malicious destruction of one's employment is far more certain to result in serious emotional distress than any wrongful denial of an insurance claim."[186]

It is important here to see how the majority and dissent are talking past one another. The majority is looking to justify court action in the "publicness" of the activity; the dissent is looking for a significant, tort-like harm to invoke the court's power to remedy private harms. Ultimately, the relational contract theorist cannot bridge these two discourses. Gudel seems to favor the dissent's approach because it focuses on the nature of the relationship between the parties. It is hard, however, to see how this avoids the Gilmorian problem that Gudel earlier raised of having contract devolve into tort. If one legitimizes a court's interference with contract on the basis of a court's general authority to remedy torts, then Gilmore may have been right.

Democratic citizenship can resolve this problem. It provides a means of connecting the harm to the employee to the publicness of an activity. The state has a particular concern with employment precisely because employment is so central to the citizen's sense of self-worth as a citizen and belonging in the democratic community. Injury to the employee is in fact not like harms in other con-

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[184] *Id.* at 415 (Kaufman, J., concurring and dissenting).

[185] *Id.* This section is highlighted by Gudel. Gudel, *supra* note 7, at 790-91.

[186] *Foley*, 765 P.2d at 415.

tract breaches because those harms may not implicate the party's citizen-status. Employment is a candidate for application of doctrines of good faith in ways that other contract relations are not. The employer serves a public function. The dissent focuses too much on the individual or private effects of employment; the relationalist focuses too much on the relationship between the employee and the employer. Democratic citizenship theory expands these perspectives to capture the publicness of private employment and so can connect employment and insurance more effectively.[187]

We can also see the potential of a relational approach which accounts for democratic citizenship in providing an alternative understanding of a rather old case highlighted by Ian Macneil, *Edward G. Budd Manufacturing Co. v. NLRB*.[188] In this case the National Labor Relations Board (NLRB) reinstated an employee who had been fired for working for a union, and the Court of Appeals enforced the NLRB's reinstatement order.[189] First let us look at the portion of the appellate opinion quoted by Macneil:

> The case of Walter Weigand is extraordinary. If ever a workman deserved summary discharge it was he. He was under the influence of liquor while on duty. He came to work when he chose and he left the plant and his shift as he pleased. In fact, a foreman on one occasion was agreeably surprised to find Weigand at work and commented upon it. Weigand amiably stated that he was enjoying it. He brought a woman (apparently generally known as "Duchess") to the rear of the plant yard and introduced some of the employees to her. He took another employee to visit her and when this man got too drunk to be able to go home, punched his time-card for him and put him on the table in the representatives' meeting room in the plant in order to sleep off his intoxication. Weigand's immediate superiors demanded again and again that he be discharged, but each time officials inter-

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[187] Some readers may recoil at the idea of a court-imposed good faith obligation in an employment contract as being an ex post attempt to implement democratic values, whereas legislative regulation of contract terms, which happens prior to contracting, would be less offensive and more consistent with principles of individual contractual consent (the latter simply being a way of setting the field of play prior to the game, rather than changing the rules during or after the game). In response I would observe, first, that I view court and jury determinations as potentially important expressions of democratic principles and do not necessarily assume priority for individual consent, and, second, that the contextualized view of contract that relational theories adopt would reject as artificial the characterization of court-imposed good faith duties as being ex post – the duty exists before and during the transaction; the court simply enforces it. I thank my "formalist" colleague, Jack Graves, for raising this point.

[188] 138 F.2d 86 (3d Cir. 1943). Macneil discusses this case in Macneil, *Values in Contract*, *supra* note 7, at 370-72.

[189] *Edward G. Budd Manuf.*, 138 F.2d at 86-90.

> vened on Weigand's behalf because as was naively stated he was "a representative" [of a company union]. In return for not working at the job for which he was hired, the petitioner gave him full pay and on five separate occasions raised his wages. [Only one of these was a general pay increase given to other employees.][190]

Now let us look at Macneil's discussion:

> In spite of the foregoing description of Weigand, the Court of Appeals enforced the NLRB's order of reinstatement. One may either be outraged at the imposition of such an employee on a business, or think the order served the employer right, or both. But it is clear that the NLRB's and the court's imposition on the employer of Weigand as an employee reflects very different values from the employer's original retention of him. The upper management originally viewed him as supplying services sufficiently valuable to warrant his retention, thereby satisfying the norm of reciprocity as they saw it. Once Weigand "joined the other side" and hence no longer served his theretofore useful function for management, they, entirely correctly, no longer believed that any individual reciprocity would be achieved. While the voluntary retention of Weigand reflected the reciprocity norm as applied to a single employee, the sovereign imposition of Weigand as an employee reflected at least three, and perhaps four, norms. These were the reciprocity norm applied collectively, the contractual solidarity norm, the restraint to power norm, and perhaps some unidentified supracontract norms. The result, however, unless Weigand mended his ways or was successfully fired for not doing so, was not a contractual relation between the employer and Weigand as an individual. Rather, it was a private welfare scheme imposed on the employer as a means of policing the National Labor Relations Act.[191]

Macneil's purpose is to illustrate how the state's imposition of norms on the contract relation transforms the norms of contract. This is important, and represents a significant and necessary methodology for thinking about how the state can affect contract relations and implement non-contractual norms and principles. The problem, however, is that Macneil analyzes the state's action as the imposition of *contract* norms on the relationship; the externality is that of the actor, not the norm-type. He contrasts the internal

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[190] Macneil, *Values in Contract*, *supra* note 7, at 371 (quoting *Edward G. Budd Manuf.*, 138 F.2d at 90 (original footnotes omitted by Macneil, bracketed additions by Macneil)).

[191] *Id.* at 371-72 (footnotes omitted).

creation of these norms within the employment relation with the external implementation of contract norms from without the relation. Notice that the closest he comes to acknowledging a truly external norm in this context is his reference to supracontract norms, and even then he minimizes that acknowledgment by stating that the court is imposing "*perhaps* some unidentified supracontract norms."[192]

Recall our discussion above of how Macneil's category of "supracontract norms" really operates as a bin of miscellany for norms arising outside of the contract relation. Given Macneil's proclivity to view non-contract norms with suspicion and to see contract or exchange norms as central, it is natural for him to view the government's action in the *Budd* case as both effecting and affecting contract norms. Yet, by forcing the case into his theoretical structure, Macneil misses what may be the more important normative aspect of the government's (government consisting of, in this case, the court, legislature, and administrative agency) action: the importance of labor, employment, and union activity to democratic citizenship.

Consider that the court's opinion, and ultimately the case itself, was not primarily about employee Weigand's reinstatement; it was about company unions. The discussion of Weigand comes at the end of an opinion in which the court spends most of its discussion reviewing the creation of the company union and addressing the NLRB's order disestablishing the company union.[193] The court was predominantly concerned with the employer's favorable treatment of, and support for, the company union, which operated to disadvantage the competing unions, including the CIO. In fact, the court emphasized Weigand's case primarily to point out how the company union representatives were treated favorably, and, as the court stated, "[w]e can scarcely believe that the petitioner [employer] would have displayed such an attitude toward officers of

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[192] *Id.* at 372 (emphasis added). It is odd for Macneil to describe the *supra*contract norm as "unidentified." After all, his contract norms of reciprocity, solidarity, and restraint of power are not actually identified by the court – it is Macneil who identifies them. Moreover, the main norms identified by the court were the legal norm of the National Labor Relations Act prohibiting discharge of employees engaging in union activity, and the related labor law norm critiquing the employer who had, as the court describes the complaint, "foisted a labor organization . . . upon its employees . . . and dominated its activities." *Edward G. Budd Manuf.*, 138 F.2d at 86, 90-91; *see also id.* at 90 (affirming the NLRB's decision that the company union was dominated and controlled by the employer). While these norms may be an example of Macneil's contract norms, they may also be seen as implementations of the broader democratic norms favoring employee control over union activity. To the extent that such *supra*contract norms remain unidentified, it is mainly Macneil who is not identifying them.

[193] *Edward G. Budd Manuf.*, 138 F.2d at 86-91.

an undominated 'adversary' labor organization."[194] Macneil downplays this aspect of the case, which becomes, in Macneil's analysis, an imposition of collective reciprocity, solidarity, and power restraint, albeit one he probably condones.

What Macneil views as collective reciprocity, solidarity, and power restraint, however, can also be seen as a more specific protection of the employment relationship for the purpose of preserving the social and political status and capacity of all employees. This was a case, after all, enforcing the National Labor Relations Act.[195] Under this Act, the nation had determined, after enormous democratic struggle, that the preservation of *collective* reciprocity and balancing of power in *this* type of relationship is proper action for the democratic government. Indeed, the problem with company unions is, in part, that they interfere with the workers' democratic participation in the union. "Equal citizenship requires . . . [that citizens] enjoy a measure of democracy at work and in their economic lives."[196] It was because private ordering of the employment relation did not protect the employees' basic necessities that the federal government had to begin acting in the first place. Employment in which the employee is capable of protecting his or her own security is central because of the special role of labor in our democratic society. Much of the New Deal was about labor as an expression of citizenship, and about the role of the state in preserving and fostering citizenship through labor. As William Forbath has shown:

> the politicians, lawyers, scholars, and labor leaders who shaped the New Deal understood reform to entail not merely economic recovery, but redeeming workers' rights and identities as citizens. Thus, the Legal Realist Robert Hale told the Senate Committee on Education and Labor in 1934 that the situation of an employee at a nonunion steel plant was akin to that of a "non-voting member of a society." And at the same hearing, Senator Robert Wagner attacked the existing legal order for "perpetuating in modern industry . . . aspects of a [feudal] master-servant relationship." As

[194] *Id.* at 90.

[195] Macneil describes this as "policing the National Labor Relations Act." Macneil, *Values in Contract*, *supra* note 7, at 372. I think this description greatly underplays the role and purpose of the Act as protecting, preserving, and creating norms of democratic citizenship.

[196] Forbath, *Rights Talk*, *supra* note 177, at 1792. *Cf.* WALZER, *supra* note 119, at 295-303 (discussing importance of principles of industrial democracy). By highlighting the historic development of labor as a potential citizenship right, I do not mean to suggest that the contemporary context is no different; problems of globalization, the service and information economy, etc., raise a host of complex issues not encountered by New Dealers. I do believe, however, that such topics should not be addressed without due consideration of work as a means of self-fulfillment and citizenship. I thank Marleen O'Conner for pointing this out.

> citizens, workers deserved "real opportunities to participate in the determination of economic issues." Echoing labor's half-century-old refrain, Wagner concluded that "industrial tyranny" was "incompatible with a republican form of government."[197]

The reasons for the state's interference with the labor relationship at Edward G. Budd's shop are found in the political and social justifications and norms for enacting the spate of labor legislation of the New Deal – norms of equal, democratic citizenship. They justify particular state action in particular fields of social and economic activity. They are a critical component of the context of the case and may explain the case better than Macneil's contract norms.[198]

This is not to say that the interaction of these more general democratic norms, which justify government action with the internal contract relational norms that Macneil identifies as essential to contract, is not far more complex; indeed, a study of how the New Deal labor legislation interacted with norms of contract would be fascinating. But the action of the state cannot properly be weighed in this analysis without seeing it as based on something more particular, and more normatively significant, than vague "supracontract" norms. Ultimately, Macneil's relational contract theory stumbles when it fails to credit fully the non-contract norms pertaining specifically to the democratic state.

Macneil might respond that in fact the state's entry into labor relations has been far from successful in creating "democratic citizenship." For instance, Macneil correctly notes that "labor unionism supported by legal backing of various kinds almost surely creates a new kind of inequality in society, that between the organized and the unorganized."[199] This is a powerful point. I would reply, however, that even the tensions and distortions present in the legal protection of labor can be better understood and addressed by ac-

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[197] Forbath, *Rights Talk*, *supra* note 177, at 1802 (footnotes omitted); *see also* William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139, 143-57 (1998) (discussing New Deal and post-World War II ideas of work, citizenship, and the state).

[198] My argument here amounts to a claim that Macneil's analysis takes insufficient account of the context of the case. This is ironic, of course, since Macneil's theory is itself the basis for theories which contextualize our understandings of cases. This highlights my general point that democratic citizenship is an important omitted context for relational contract analysis.

[199] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 90. For a recent critical exploration of unionism and inequality, particularly inequalities of race and gender, see Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1567-1600 (1999) (discussing the disadvantages faced by women and non-whites in working-class labor markets).

counting for democratic citizenship theory. Under a theory of equal citizenship, legal protection of one class or type of worker, at the expense of other workers or even of non-workers, is a violation of citizenship principles. When unionism adopted racist policies, it was the democratic principle of anti-discrimination that challenged this inequality.[200] Democratic citizenship theory would not disagree with Macneil that labor law implemented by the government has had modest success and unintended adverse consequences, but neither would it deny the importance of the efforts to protect labor and the need to address resulting inequalities, to the extent they affect other democratic citizens. Moreover, a theory of democratic citizenship would also focus on the extent to which *privatized* labor law – the collective bargain agreement – itself contributed to the failures of labor law. It may well be the case that the over-reliance of post-World War II labor on the private contract to the exclusion of a fully integrated relationship among the state and labor and management caused the problems identified by Macneil.[201]

IV. INTERSECTIONS: HOW RELATIONAL CONTRACT THEORY AND DEMOCRATIC CITIZENSHIP THEORY CAN HELP EACH OTHER

One of the problems with relational contract theory identified above was that it views norms too descriptively and lacks theoretical support for the norms that drive state activity in a democracy. Perhaps the most significant benefit provided by an understanding of democratic citizenship is that it gives us a means of identifying and talking about how particular types of contract relations are more important to citizenship than others and are appropriately subject to higher state monitoring and regulation. In particular, employment and education, each of which is to a significant degree contractual, are important for the development and maintenance of the "self" conceived of in citizenship theories, as the discussion of Reconstruction above demonstrates. State regulation of these relations can be based not on a general acceptance of social

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[200] *See* Cynthia L. Estlund, *The Changing Workplace as Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 348 (discussing the use of Title VII of the Civil Rights Act of 1964 to fight discrimination).

[201] *See, e.g.* Forbath, *Rights Talk*, *supra* note 177. For instance, Forbath asserts

> [T]he New Deal's institutional legacy fell far short of this panoply of social and economic rights [outlined in President Roosevelt's Bill of Rights], and FDR's broad rights rhetoric fell into disuse as, after World War II, the labor movement came to depend on the 'private welfare state' that unions constructed for workers in core sectors of the economy through collective bargaining.

Id. at 1803.

norms for these activities, which is how contract relationalists seem to conceive of extra-contractual norms, but rather from a developed normative understanding of the role of the state in promoting equal citizenship.[202] In this section I will explore a few points where relational and democratic theory overlap and can support each other.

A. Consent

Democratic citizenship presumes a priority for the liberal idea of individual rationality and choice. Consent is obviously important to democratic principles, since it justifies the use of state power, including the power to constrain basic freedoms. This basic idea is consistent with the commonly accepted consent norm of contract, which is a norm of classical contract law as well as one of Macneil's norms. It means, however, that democratic principles will recognize the importance of private ordering in contract, not just public consent to state action. One of the reasons that democratic citizenship theory should foster spheres of contractual relations is that because, as a theory, it values individual choice and powers of consent. When people fully consent to contract terms, they have in a sense made law democratically: the "law" of their relationship has been made by the consent of the governed.[203] Thus democratic citizenship, by recognizing the value of people consenting to relations and relational spheres, and by valuing the multiplicity of spheres, supports a fundamental norm of contract – that of consent.

However, as a *political* theory democratic citizenship also legitimizes state action to effectuate political principles based on consent. When the state interferes with contract rights, there are *two* consents at issue: the consent of the private parties in the transaction, *and* the political consent of the citizens. In this sense, contractual consent is contextualized in a broader world of political consent.[204] State "interference" with contractual consent, by imposing, for instance, wage regulations, actually implements the consent of the citizenry for the state to promote the general welfare.

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[202] For an example of this type of analysis in education, see AMY GUTMANN, DEMOCRATIC EDUCATION (1987).

[203] *See, e.g.*, Slawson, *supra* note 4, at 530 ("Private law which is made by contract in the traditional sense is democratic because a traditional contract must be the agreement of both parties.").

[204] *Cf.* Barnett, *supra* note 9 (setting out a different consent-based context for relational contract theory).

Macneil is well aware of this dual consent concept of what he defines as liberal theories.[205] He argues that it is very difficult to justify contracts of adhesion under liberal consent theory, since the consumer does not herself consent to terms.[206] As Macneil observes, only the more abstract political consent of legislative, administrative, or judicial controls, including gap-filling of terms and invalidation under unconscionability rules, remains plausible.[207] Macneil also adds to this the more relational idea of abstract consent in that people collectively consent to the general structure of the consumer economy and the law that facilitates it.[208]

By expanding our ways of thinking about consent in these relational and democratic modes, we can recognize some of the ways collective consent affects contracting. First, there are particular contracting relations in which the legislative or administrative bodies *do* write terms: insurance law is the most obvious example, where insurance commissioners have the authority to review and approve standardized terms.[209] If the legislature determines that the particular relation is significant enough to its citizens, it will regulate the adhesion contract. The question then becomes what other types of contracts *should* the legislature and administrative agencies regulate. Once we admit that consent is implicated in such regulation, it becomes easier to address this question openly, without fear that consent is being undermined at every regulatory step. As this article suggests, democratic theories might well emphasize particular contract relations as more important for public regulation. The point here, however, is that such determinations can be made with reference to principles of democratic citizenship without undermining the other democratic and contract principle of consent.

Second, courts can serve a democratic function in contract enforcement. Consider the doctrine of unconscionability. By thinking about collective consent wherein consumers consent to a reasonable consumer economy, the unconscionability doctrine is one means of enforcing consumer consent to reasonable terms and recognizing the lack of consent to unreasonable terms.[210] In addition,

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[205] Macneil, *Contracts of Adhesion, supra* note 7, at 5, 7-8.

[206] *Id.* at 7-8.

[207] *Id.* at 8.

[208] *Id.* at 18-22.

[209] JERRY, *supra* note 181, at 119-23. As Jerry notes, states are particularly active in regulating fire insurance terms: "each state mandates the exact wording for the standard fire insurance contract." *Id.* at 121; *see also* Friedrich Kessler, *Contract of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943) (discussing courts' policy of favoring insurance policyholders when interpreting insurance contracts).

[210] *See* discussion of unconscionability *infra* pp. 56-63.

the court is often implementing the legislature's will. In the area of consumer contracts, it is doing so when it applies the U.C.C.'s unconscionability provisions, since the legislatures enacted the language and the court applies it. Yet even outside of statutory unconscionability law, it is not too much of a stretch to argue that one of the court's roles in democracy is to police terms of contracts for public policy concerns, including unconscionable terms. One could even go so far as to argue that judicial supervision of adhesion contracts, and perhaps form contracts more generally, is essential to provide such contracts (which often lack the "consent" central to the democratic character of traditional contracts) with democratic legitimacy.[211]

Like relational contract theory, democratic citizenship theory also confronts the problems of capacity and basic entitlements. While it emphasizes the consent power of citizens, it also emphasizes the need for people to attain a level where that consent is meaningful. People need a certain minimum of education and other goods to be able to participate (since citizenship theories are, after all, participatory theories) in the society, both as a political actor and as one capable of acting meaningfully across the range of spheres of social interaction. From the perspective of contract law, democratic theory will emphasize the minimum capacities that people need to contract and to make contract obligations enforceable. Thus it would view the doctrines that constitute the fringes of neoclassical law – duress, unconscionability, mistake – as fundamental to the validity of state enforcement of the contract obligations. The state would have a higher obligation to police bargains to ensure that consent was given. Democratic citizenship theory would also emphasize the need to *combine* these contract law principles with affirmative support for education and welfare programs. If Reconstruction teaches us anything, it teaches that contract alone is a desert and that we need social welfare for people to flourish as citizens and as contracting parties.

B. Consumer Adhesion Contracts

To illustrate these democratic concepts of consent and capacity, consider the consumer form contract, a.k.a. the adhesion contract.[212] Democratic theory would seek to ensure that the consumer

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[211] David Slawson made this significant point over three decades ago. Slawson, *supra* note 4, at 533-36.

[212] A distinction can usefully be drawn between consumer form contracts generally and a subset of such contracts which constitute adhesion contracts. The standard form contract may lack consent to all of its terms, yet not be adhesive, if the consumer has a reasonable opportunity

has the capacity to consent, and so would police such agreements from some version – probably a strong one – of the unconscionability doctrine.[213] However, as Macneil and others have observed, the standard form agreement is essential to the functioning of the modern, bureaucratized economy.[214] Thus, the law needs to account for the enforceability of such agreements in some way. I think relational contract theory is less capable of answering this problem than democratic theory, because democratic theory provides the external context for interpreting the form contracts. Relational theory enables us to see that the consumer is likely consenting to something, albeit not the predrafted forms. Relational contract theory begs for a relational standard to apply, yet consumer transactions cannot legitimately rely on trade customs or other sources of commercial relational norms, since the consumer is not within this community, at least not in a way to have any influence on, or tacit agreement with, the norms. What the consumer has agreed to, in fact, is a broader concept of reasonable terms, the type of analysis applied in the reasonable expectations doctrine of the Ur-law of form contracting, insurance.[215] Indeed, the importance of this question has been magnified recently in the debates over revision of Article 2 of the U.C.C., where drafters engaged in a battle royale over consumer protection issues, including the ap-

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to know about and choose other sellers with different contract terms. Under this view adhesion contracts are those for which the consumer has no choice of contracting with other sellers under different terms. For instance, all automobile manufacturers might use the same warranty disclaimer. *See generally* Slawson, *supra* note 4, at 539-61. I use adhesion in a broader sense to include contract terms which the seller cannot reasonably expect the buyer to review, since in such cases it matters not at all if there are other term options in the market. *See* Rakoff, *supra* note 154, at 1226-29 (arguing that consumers do not, and cannot be expected to, read form terms). For Rakoff's far more extensive typology of contracts of adhesion, see *id.* at 1177.

[213] *See infra* pp. 56-63 for discussion of unconscionability.

[214] "[N]o one can honestly say that consumers *ought* to read [long standard form contracts because] . . . if consumers actually did such a foolish thing the modern economy would come to a screeching halt." Macneil, *Contracts of Adhesion*, *supra* note 7, at 5-6; *see also* Kessler, *supra* note 209, at 631-32; Slawson, *supra* note 4, at 530. *But see* Rakoff, *supra* note 154, at 1197-1245 (arguing, *inter alia*, that contracts of adhesion are not essential to the economy and that the standardization they achieve can be obtained just as well, and more fairly, through regulation).

[215] On the reasonable expectations doctrine, see generally Roger C. Henderson, *The Formulation of the Doctrine of Reasonable Expectations and the Influence of Forces Outside Insurance Law*, 5 CONN. INS. L.J. 69 (1998). Professor Henderson's article is part of an excellent symposium issue on the reasonable expectations doctrine. On how enforcing the reasonable expectations of the consumer supplies democratic legitimacy to the form contract, see Slawson, *supra* note 4, at 539-44; *cf.* Braucher, *Regulatory Role*, *supra* note 10, at 726 (advocating preference for contract interpretations that implement reasonable consumer standards, at least in the absence of clearly expressed contract terms to the contrary). *But cf.* Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 65 (1995) [hereinafter Braucher, *Afterlife*] (emphasizing the weakness of case-by-case reasonableness determinations in policing unconscionable terms in consumer contracts and favoring legislative and administrative blanket restrictions on terms).

plication of a reasonable expectations doctrine to consumer form contracts.[216]

The basic idea that the consumer's "consent" might encompass reasonable terms itself is entirely consistent with relational approaches; the current U.C.C.'s unconscionability provision[217] was arguably created to provide such a test.[218] The problem with the traditional unconscionability approach, however, lies precisely in its failure to credit the law as an instrument of democratic citizenship. This point is most apparent in the assumption that courts, not juries, decide the question of unconscionability. The U.C.C. itself expressly directs questions of unconscionability to the court.[219] This is so despite the recognition by the drafters that questions of unconscionability often require factual analysis of context.[220] This desire to view unconscionability as a question of law may stem in part from the historic origins of unconscionability in equity, where courts applied a "shock the conscience" test appealing to the court's conscience.[221] Being an equitable doctrine, the jury played no role. Yet unconscionability is also closely connected to a standard of reasonableness, and it is this reasonableness standard which Robert Hillman, for instance, has recently emphasized in advocating unconscionability as an important safeguard in the law of consumer form contracts.[222] If one pushes unconscionability toward the reasonableness test, however, it becomes far from clear that juries should not be involved in a wide

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[216] *See* Henderson, *supra* note 215, at 80-106. On the demise of provisions protecting consumers in form contracting situations in the Article 2 revision process, see Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS. L.J. 607, 614-17 (2001). Current and prior drafts of revisions of Article 2 can be obtained at the official website for The National Conference of Commissioners on Uniform State Laws, Drafts of Uniform and Model Acts *at* http://www.law.upenn.edu/bll/ulc/ulc.htm (last modified Aug. 22, 2003).

[217] U.C.C. § 2-302 (2002).

[218] *See* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 748 (2002) (exploring how the reasonableness test was part of the vision of Karl Llewellyn, who drafted the U.C.C. provision). For an example of Llewellyn's view, see KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (Aspen Publishers 1960). For a critique of Llewellyn's approach, see Rakoff, *supra* note 154, at 1198-1206.

[219] "If the court *as a matter of law* finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . ." U.C.C. § 2-302(1) (2002) (emphasis supplied).

[220] "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." U.C.C. § 2-302(2) (2002).

[221] *See* FARNSWORTH, CONTRACTS, *supra* note 11, at 303-08.

[222] Hillman, *supra* note 218, at 750 (arguing against Todd Rakoff's anti-form contract position and in favor of Llewellyn's idea that a consumer or others can exercise a blanket assent to form terms, primarily because courts, applying unconscionability, will enforce only terms that are "not unreasonable").

range of determinations of the validity of particular terms.[223] Traditional understandings of reasonableness, both in tort and contract, place it in the province of juries.[224] Indeed, reasonableness is often seen as the means by which the jury constructs a communal judgment: the reasonable person is "a personification of a community ideal of reasonable behavior, determined by the jury's social judgment."[225]

This point is most obviously relevant to procedural unconscionability issues, where the claim is a defect in the process of contracting.[226] Such disputes are often ones of fact particular to the transaction, such as whether the seller hid relevant terms or shaded the legal meaning or effect of written terms. To the extent the jury is viewed in its role as factfinder, this approach makes sense.[227]

The stronger claim, however, is that even in cases of substantive unconscionability there is a significant role for the jury, and it is here that democratic citizenship can have some impact. Questions of substantive unconscionability involve the validity of particular contract terms, whether they are oppressive, overly one-sided, or otherwise serve the interests of the drafter so greatly that the other party could not have meant to agree to them. Democratic citizenship might well support a greater role for the jury in sifting through the facts of a case to determine if the particular term – e.g., an arbitration clause – is substantively unconscionable. Thus, pre-dispute contractual arbitration agreements where the arbitration fee is $4000 might well be unconscionable to an average consumer but not for an investment banker.[228]

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[223] David Slawson recognized this problem in 1971 and noted that it could lead to a "highly artificial" division of facts and law to try to parse out the province of the judge and jury in unconscionability claims. *See* Slawson, *supra* note 4, at 564-65. Oddly Slawson, who in this article constructed a democratic legitimacy theory for adhesion contracts, did not address the question I posit below: Isn't the jury the proper *democratic* body for deciding unconscionability?

[224] In contract, for instance, the reasonableness of an interpretation of the contract language is a question of fact for the jury, unless of course the judge decides that no reasonable jury could interpret it as one of the parties suggests. *See* MURRAY, *supra* note 11, at 462.

[225] PROSSER & KEETON ON THE LAW OF TORTS 175 (W. Page Keeton et al. eds., West 1984).

[226] The classic exposition of the two-pronged view of unconscionability (procedural and substantive) was by Arthur Leff. *See* Arthur A. Leff, *Unconscionability and the Code – The Emperor's New Clause,* 115 U. PA. L. REV. 485 (1967). The classic case read by almost all law students is Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[227] The fact/law distinction often devolves into a particular/general distinction for the purpose of determining jury questions. *See* William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 932-33.

[228] *See, e.g.*, Brower v. Gateway 2000, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (finding an arbitration clause in a consumer form contract to be unconscionable to the extent it required

More importantly, the jury can also be viewed as the best *democratic* body to express social norms about contract.[229] Unconscionability is nothing if not a claim that a contract or contract term violates accepted social norms, either the norms of a particular trade or broader social norms. Indeed, one can think of the citizen jury as analogous to the merchant jury for the purpose of implementing consumer trade norms. From a democratic perspective it makes more sense to ask a jury for an expression of social norms than to ask a court, at least where the norm is more broadly based, such as in consumer transactions.

Substantive unconscionability doctrine – whether implemented by juries or the courts – also has the potential to promote democratic citizenship in a way that changes the norms and self-images of citizens themselves. As mentioned above in the discussion of anti-discrimination laws, when the state speaks law it also constitutes community.[230] Jeffrey Harrison has argued that a broadly applied unconscionability doctrine may in fact inform consumers that they need not accept oppressive terms simply because they feel powerless.[231] Knowing that oppressive terms are unenforceable may lead consumers to value themselves more, and to take seriously their status as equal citizens. This point should be made cautiously, however, because the particular theory of democratic citizenship put forth here also credits the norms of the market within their own sphere of market relations. The key question,

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costly arbitration proceedings). *Brower* presents exactly the type of case which should cause one to question the necessity of having the judge decide substantive unconscionability. In that case, the appellate court determined that a term requiring arbitration costing the consumer approximately $2000 would be unconscionable but one costing $500 might not, *as a matter of law*. *Id.* at 574-75. This is absurd. If the consumer has a low income and minimal assets, the fee for arbitration could be $500 or $50,000 – it's prohibitive either way. Either the unconscionability of the cost of arbitration is unreasonable under the particular embedded facts of the case and is best determined by a jury, or there needs to be a fee limitation structure for consumer dispute resolution, which is best done by legislatures or agencies.

[229] On the connections between juries and democracy, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (discussing various forms of jury selection discrimination and their troubling affect on American democracy); Lisa Kern Griffin, *"The Image We See Is Our Own": Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332 (1996) (book review) (arguing that although the jury system lies at the heart of our democratic system, it has lost much of its moral authority in the popular legal culture). For a fascinating analysis of the importance of jury service to democratic citizenship in the context of gender discrimination, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 128-220 (1998).

[230] *See supra* text accompanying notes 164-70.

[231] Harrison, *supra* note 169, at 493-500. The opposite may also be true: The unconscionability doctrine, to the extent it emphasizes the lower education and bargaining capacity of the consumer, encourages consumers and (perhaps more troublingly) their attorneys to characterize the consumer-plaintiff as deficient and powerless. It is hard to know which signal – empowerment or powerlessness – dominates.

therefore, is not simply whether any contract term is unconscionable, but (1) whether the term itself impinges on other democratically significant spheres, such as the right to public dispute resolution and juries, or the vindication of important statutory rights, and (2) whether the contract relationship itself involves issues of democratic citizenship, as would employment relations.

One might respond that parties, and in particular sellers of mass consumer products, need more certainty regarding the enforceability of contract terms than is possible if juries decide many of the substantive unconscionability claims. Gateway would rather know that its arbitration provision is invalid as a matter of law than have 40% of juries say it is valid; they need reliability and accurate cost estimates. Furthermore, consumers benefit from reduced costs of decisions made as a matter of law, even if those decisions go against the consumer.

While this may be accurate, it is also true that in a jury-based regime the court still retains the controlling ability to determine that no reasonable jury could decide that the particular clause is or is not conscionable. Yet, even if we concede that the decision about substantive unconscionability should lie with the court, the court should still be expected to rely on democratically based means of determining substantive unconscionability: statute and administrative regulation. Where the particular term is made unlawful by the legislature or administrative agency, the court has an obvious statement of unconscionability to follow. But the court can also rely on analogous situations to aid its legal review of a contract term, conducting what is essentially a public policy analysis of the terms based on legislative and administrative actions in related areas of law. On the question of arbitration, for instance, the court would ultimately want to balance the democratically expressed interests in favor of arbitration under the Federal Arbitration Act with the democratically expressed interests in having disputes decided by public bodies, particularly if the dispute involves an issue deemed by the legislature as important for public values and for citizenship itself.[232]

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[232] Thus the court's determination of the "conscionability" of an arbitration agreement (or its decision to send the issue to the jury) should properly be influenced by whether the issues subject to arbitration are of public or citizenship import, such as violations of the civil rights laws. There is a very strong democratic citizenship claim for holding that disputes regarding racial and gender discrimination should not be subject to pre-dispute arbitration. *See, e.g.*, Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 780 (2002) (arguing that there is a "clear public interest" in seeing federal rights such as anti-discrimination adjudicated in a public forum and not being subject to pre-dispute arbitration). As Knapp notes, the Supreme Court seems unmoved by this observation. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that a

Democratic citizenship theory would also be sympathetic to arguments made by some scholars that consumer adhesion contracts amount to a form of "private legislation."[233] The seller uses sophisticated informational techniques and complex drafting processes, involving marketing departments, law departments, etc., to create a set of legal rules beneficial to it in a wide range of transactions; the seller legislates, often furtively.[234] Moreover, as Todd Rakoff has observed, the form contract terms often reflect the legal gamesmanship of the drafting firm's law department, and not a business analysis of the underlying transaction-type; "[t]here is no basis for presuming that the form incorporates any relevant social wisdom."[235] The consensual relation for such private legislation is not between the seller and buyer, since the buyer plays no role in drafting and is often oblivious to the term at issue, but between the seller and some party acting as proxy for the buyer. Yet because contract law usually enforces the form terms, the "proxy" for the buyer is by default the seller itself. As Friederich Kessler stated, "[f]reedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms."[236] Democratic citizenship suggests that in the face of this privatized authoritarianism sanctioned by contract law, the state is in fact in the most legitimate position to act as the buyer's proxy and engage in this private legislation, at least to the extent disputes arise and the state is asked to enforce the contract.[237] Because ad-

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claim arising under the Age Discrimination in Employment Act can be subject to pre-dispute arbitration agreement).

[233] Slawson, *supra* note 4, at 538; Macaulay, *Floating*, *supra* note 8, at 780. Stewart Macaulay's more extensive views on how rules, codes, and norms of non-state organizations function as private legislation can be found in Stewart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCES 445 (Leon Lipson & Stanton Wheeler eds., 1987). Some aspects of this latter work of Macaulay overlap with my theory presented here. In particular Macaulay notes the need to study the full range of interaction among the state, private associations and relational networks, and the individual. *Id.* at 503. He also understands citizenship as having meaning because of its interaction with (and realization through) networks of social relations such as friends, families, fellow workers, etc., which is similar to my idea that democratic citizenship need be understood through the multiple spheres of relations. *Id.* at 478. In this piece, however, Macaulay sees the state as one of many "governments" or social structures which legislate behavior. *Id.* at 446-54. By contrast, I emphasize the unique role of government in implementing and fostering democratic citizenship.

[234] Firms use market research to determine how a contract term adverse to the consumer can be included in materials sent to consumers in a way most likely to evade the consumer's attention while still complying with the law of contract formation and modification. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1133-34 (9th Cir. 2003) (describing AT&T's market studies used to determine what disclaimer language would be most likely to discourage consumers from reading other terms which eliminated class action rights and required arbitration).

[235] Rakoff, *supra* note 154, at 1205-06.

[236] Kessler, *supra* note 209, at 640.

[237] I do not deny that the consumer's consent is also reflected in the market, which the

hesion contracts are fundamentally authoritarian, they do not promote a plural, civic freedom envisioned by democratic citizenship.[238] Rather than privileging private legislation, the court can privilege public legislation, and, in its absence, public regulation through the court and jury.

Relational contract theory would likely also support much of the above critique.[239] It could not, however, explain why the state should have such an affirmative rule, nor would it be able to guide courts as effectively. Democratic citizenship theory addresses the omission while also relying on a relational method. The consumer, under this view, is acting in a dual capacity as economic actor and citizen. The consumer may consent in a general sense to certain notice provisions for timely asserting warranty claims. There are accepted norms of the seller-consumer relation that should be supported. But the consumer neither has the capacity to, nor actually does, consent to arbitration in a distant forum and the relinquishment of basic rights. The consumer lacks capacity because nobody can understand such provisions without a lawyer – they are drafted and marketed to be hidden – and the consumer in fact does not believe that she has given up such rights. Democratic theory would, I believe, support this reasonableness interpretation of the contract that would effectuate a societal consumer norm.[240] It would privilege consumer legislation and administrative regulation as a means of policing such bargains,[241] and it would also support having the democratic dispute resolution body, the jury, decide these disputes in a public forum.

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seller presumably takes into account in framing and implementing its terms. This can justify the use of the terms in the market, and democratic citizenship theory would permit this power *in its own sphere*. However, when the seller seeks to use state authority to enforce its term (rather than just relying on the force of the market and the good will or consumerist obedience of the buyer), the seller must subject itself to the state's role as representative of the public norms and as proxy for the consumer consent. Ultimately this view would allow for some space for market-only regulation of terms that lie between terms which are regulatorily prohibited and the mere use of which by a firm could result in sanction, and terms that courts would refuse to enforce.

[238] Rakoff, *supra* note 154, at 1240-41.

[239] *See, e.g., id.* (setting forth Rakoff's analysis of contracts of adhesion). Rakoff's approach is relational to the extent he analyzes the function of contracts of adhesion in mediating the relationship among individuals, firms, and institutions. *See id.* at 1215-16, 1220-29.

[240] *Cf.* Braucher, *Regulatory Role*, *supra* note 10, at 732-38 (supporting goals of both efficiency and decency supplemented by community standards).

[241] *See* Braucher, *Afterlife*, *supra* note 215, at 65 ("[T]he ultimate normative judgment about reasonableness – in view of the facts – may be most appropriately legislative. Given the many burdens on Congress, however, administrative regulation is more feasible.").

CONCLUDING SUGGESTIONS

I want to conclude by also mentioning some ways in which relational contract theory can improve and support the democratic citizenship principles I have discussed.[242] First, the insight and work of relational theorists supports the particular type of social pluralism of democratic theory advocated by Michael Walzer and others. The possibility of private cooperation and the capacity for contracting parties to develop, with some frequency, cooperative norms indicates that Walzer was probably right to champion the private (non-state) creation of spheres of good valuation and to attempt to expand the focus of political theory beyond the realm of politics. More fundamentally, to the extent that Macneil is correct that there are essential norms of contract, and that the act of contracting and the ensuing contractual relations are themselves essential for organic solidarity, it becomes vital that theories of the democratic state themselves include space for such contract norms.

Second, the knowledge of the norms internal to each sphere will often provide essential guidance to the implementation of any democratic norms. While at times there will be irreconcilable tensions between democratic principles and norms internal to particular non-political relations, such as in my discriminatory employment example, frequently the tension between the internal norms and democratic norms will reveal the more effective means of implementation. Internalizing affirmative action programs and anti-harassment programs in ways consistent with a particular employer's management styles and with the customs of the particular business or trade is more likely to be effective than heavy-handed and long-term state enforcement. The democratic crusader who refuses to account for the overlapping subcultural norms of particular embedded social relations will find himself beset with hostility and avoidance.

Third, relational contract theory may also provide a methodology for implementing some democratic values through contract law. An example of such methodology can be seen in David Slaw-

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[242] In addition to the points made in the text, relational contract theory could also refocus how we think of the Constitution and constitutional law. Gidon Gottlieb has suggested that the Constitution is itself relational, and that constitutional law is often dependant on the acts and practices of constitutional actors and their relations. Gottlieb, *supra* note 21, at 589-91. The implications of such an approach are too broad to address here. One possibility is that such a theory would support the movement away from juricentric constitutionalism. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17-30 (2003) (noticing that the Court has resisted congressional enforcement of civil rights in an effort to maintain the Court's role as the "ultimate expositor" at the expense of Congress's political interpretations of the Constitution).

son's now classic treatment of standard form contracting.[243] Slawson recognized both the necessity of form contracting[244] (although he was reluctant to describe the interaction as contracting)[245] and the need to regulate it.[246] Slawson's solution is particularly significant for our purposes: he advocated that courts evaluate form contracts according to "nonauthoritative" standards, including standards particular to the transactional context.[247] On one level, his approach seems eminently relational, since he argued that the "[s]tandards appropriate for reviewing the terms under which the products or services of an industry are sold would of course have to be developed from consideration of the purposes of the industry and its products or services."[248] The norms inherent in a particular industry *should* influence a court; a court's evaluation of a suicide exclusion in a life insurance policy should account for the purpose of life insurance and the risk analysis of suicide coverage.[249] On another level, however, Slawson's approach pushes relational contract theory beyond itself and towards democratic theory, for in analyzing the purposes served by an industry standard, Slawson would have the court consider the industry standard's relationship to the public interest.[250] The court's overriding standard in evaluating form contract terms is the public interest, not the norms emanating from the particular industry or contract relation. The key point, then, is that relational contract theory provides guidance for determining the inherent values or norms of particular industries or relationships, and that those values themselves can be tested against ideas of democratic citizenship and connections to "public interest."

Macneil's attention to the norms essential to contracting also suggests that the state needs to consider how its own imposition of non-contractual norms, even democratic norms as critical as nondiscrimination, may have unintended effects on the underlying solidarity and reciprocity of the relationship being regulated. Will

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[243] Slawson, *supra* note 4.

[244] *Id.* at 532.

[245] "[P]ractically no standard forms, at least as they are customarily used in consumer transactions, are contracts." *Id.* at 544.

[246] *Id.* at 539-61.

[247] *See, e.g., id.* at 544 ("Reasonable expectations are determined not by what the form recites but by the actual context in which the transaction is conducted.").

[248] *Id.* at 559; *see also* Kessler, *supra* note 209, at 637 ("In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling', and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.").

[249] Slawson, *supra* note 4, at 559; *see also id.* at 560 (arguing that business history provides important evidence of relevant standards which the court should use).

[250] *Id.* at 534.

the imposition of norms central to democratic citizenship ultimately impede the other valuable norms of the employment relation? How can the state promote employment in a way that retains the benefits of the employment relation for development of the democratic self, yet also insures the implementation of democratic norms and values within the relationship?[251] These questions remain ever-present for any theory that tries to implement democratic principles through contract law.

Finally, relational contract theorists provide a note of caution in any theoretical project to improve contract or other social relations. Although much of Macneil's work has focused on developing the general contractual norms of relational contracting, a significant yet under-appreciated aspect of his scholarship involves the analysis of bureaucratic law. Macneil displays both the conviction that bureaucracy is inevitable in the modern world and the deep fear of the dehumanizing power of bureaucracy.[252] Thus, when he contemplates the use of state power to enforce noble ends, such as anti-discrimination programs, he believes that the necessary bureaucratization resulting from such imposition by the Leviathan-state will destroy the relational aspects of the enterprise being regulated. According to Macneil, bureaucratization produces procedural regularity but also potentially destroys trust and good faith.[253] A relationship mediated by bureaucracy is not a relationship of solidarity, and "bureaucracy in the service of equality is a paradox," since bureaucracy necessarily implies unequal power.[254] This is a critical concern. Bureaucratically controlled and imposed democratic norms may well cease to be democratic and may well not lead to the development of the democratic citizen and self. Macneil therefore reminds us that no social policy can be implemented without loss. He also cautions against any perfectionist social theory, and to the extent that

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[251] The fact that this theory of democratic citizenship concerns itself with the interaction between the state and contract norms makes it at least plausibly consistent with Macneil's relational contract theory, since he only rejects theories (or "dogmas") which "insist on effectuating supracontract norms, like equality and choice, to such a degree that essential common contract norms are eroded too much . . . ." Macneil, *Values in Contract*, *supra* note 7, at 414.

[252] *See, e.g.*, Macneil, *Bureaucracy*, *supra* note 84; Macneil, *Contracts of Adhesion*, *supra* note 7. While Macneil's analysis of bureaucracy is much more important than contract scholars generally credit, his definition of bureaucracy, like his definition of contract and exchange relations, is overly broad. He defines modern bureaucracy as encompassing all activity; all people are bureaucrats almost all the time. Macneil, *Bureaucracy*, *supra* note 84, at 905 n.20. We ultimately will need a more precise definition and finer distinctions for such an analysis to be helpful.

[253] MACNEIL, NEW SOCIAL CONTRACT, *supra* note 7, at 68.

[254] Macneil, *Bureaucracy*, *supra* note 84, at 921. Macneil's vision of equality in this passage appears to be that of a simple equality rather than the complex equality advanced by Walzer and advocated here.

democratic citizenship bends toward perfectionism, Macneil's caution should be raised.

One may still hope, however, that a theory of democratic citizenship can partially address these concerns as well, and that by being grounded in a theory of pluralism among social value constructs, such a theory may have the potential for minimizing these adverse effects. A theory of the state sufficiently open to other values may foster the flexibility to address Macneil's concerns. Moreover, the fear of bureaucratization may be greatest in the case of extensive state regulatory and administrative control; one can hope that one of the roles of the courts in a democracy is to implement democratic norms without creating vast bureaucracies. A theory of democratic citizenship which appreciates the role of court-centered contract law and even more importantly the role of private contract relations beyond law might be able to avoid the liberal impulse to become a bureaucratic Midas, turning everything it touches into bureaucracy. Whether such an approach can succeed is another story, but given the already highly bureaucratized nature of much of the contractual relations people engage in every day, often bureaucratized by the private entities rather than the state,[255] it is probably worth the effort.

[255] Employment with a large corporation, for instance, is far more likely to be bureaucratic than an expression of solidarity, as Macneil has long recognized. Macneil, *Bureaucracy*, *supra* note 84, at 917-18. Given the choice between private bureaucracy designed to maximize one party's profits and public bureaucracy designed to maximize democratic values, the latter may be justified.