REVIEW

Economics as Context for Contract Law

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Framing Contract Law: An Economic Perspective
Victor Goldberg. Harvard, 2006. Pp vii, 411.

Of the many legends echoing across the generations at The University of Chicago Law School, one of the more famous involves a course in antitrust taught in the early 1950s. The story is usually told the same way: Dean Edward Levi had decided to spice up his class by collaborating with an economist from across the quad. From Monday to Thursday, Levi would go through a collection of antitrust cases to synthesize disparate holdings and celebrate the collective wisdom of lawmakers. Then, every Friday, Aaron Director would walk into the classroom and use economics to rip apart everything taught over the past week.[1] Levi would promptly engage Director in debate, to the general amusement of most students. More than fifty years later, I think we can safely say that Director usually held the upper hand—by the end of class, even the great orator Levi reportedly had to resort to poking fun at Director's mustache in the face of the economist's inexorable logic.[2] In any case, substantive antitrust law has never been the same since.[3]

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1 See R.H. Coase, *Law and Economics at Chicago*, 36 J L & Econ 239, 247 (1993) ("Robert Bork has commented: 'One of the pleasures of that course was to watch Ed agonizing as these cases he had always believed in and worked on were systematically turned into incoherent statements. Ed fought brilliantly for years before he finally gave way.'"); Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741, 747 n 25 (1993) (describing the classes taught by Levi and Director and challenging "[t]he supposed moral of the story [ ] that legal reasoning, even by its most able practitioners, is inferior to economics"); Edmund W. Kitch, ed, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–70*, 26 J L & Econ 163, 183–84 (1983) (describing the character, structure, and impact of the classes taught by Levi and Director).

2 See Bernard D. Meltzer, *The University of Chicago Law School: Ruminations and Reminiscences*, 70 U Chi L Rev 233, 248 (2003).

3 For more on the difference between the traditional and Chicago approaches to antitrust law, see generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U Pa L Rev 925 (1979) (discussing the difference, but arguing that "although there was a time when the 'Chi-

Victor Goldberg, a leading figure in the economic analysis of contract law, seeks to spark a similar revolution with his latest book, *Framing Contract Law*. Just as Director punched holes in mid-twentieth-century antitrust law, Goldberg puts on his economic brass knuckles to argue that judges and litigators are often missing what is really going on in many contractual relationships. His primary theme is that lawmakers need to pull the focus back from the narrow doctrinal cubbyholes of contract law and use a broader lens of economic analysis to develop a holistic picture of contractual relationships (pp 160, 308). Legal rules and decisions should then be crafted that empower private parties to make value-enhancing deals, while avoiding unnecessary distortions or unintended consequences.

This stimulating book should be placed on the top of the reading stack for everyone who studies contract law—along with those who structure or litigate deals for a living. Goldberg is an adept legal archeologist who has done a wonderful job unearthing old court documents, obscure business relationships, and forgotten family histories. He is a master storyteller—many of the chapters flow more like a Booker Prize novel than dry legal commentary. And he is, of course, a sharp-minded economist who cuts through rhetoric and partial analysis to provide (often counterintuitive) explanations for the tricks that parties use to order their contractual affairs. These, in turn, convincingly demonstrate how courts, and occasionally the litigating parties themselves, blunder the microlevel analysis underlying a sensible resolution of individual cases.

But Goldberg offers up a less than complete theory of what it means for economics to frame contract law. Once we understand what is really happening in these individual transactions, then what? How exactly should this translate into the enduring policy choices that must be made by commercial lawmakers? Goldberg's reluctance to advance broad-sweeping legal prescriptions is not an unintentional oversight, as he explicitly acknowledges his desire to eschew grand theories (p 381) (although some tentative normative principles do creep through the book's narrative). Nor is his caution necessarily a bad thing; incrementalism has its benefits. Furthermore, contract law is extraordinarily complex and can be laden with conflicting aims—or with many plausible paths to the same destination. Thus, any economic theory of contract law may ultimately suffer from a lack of granularity in a way that antitrust law, with its arguably narrower scope and objec-

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cago' school stood for a distinctive approach to antitrust policy, especially in regard to economic questions . . . the distinction between these schools has greatly diminished").

tives, does not. Nevertheless, I still wish that Goldberg had turned the zoom lens back a few clicks and gone after an even wider shot.

Part I of this Review offers a basic overview of Goldberg's analysis, along with several detailed illustrations of his methodological approach. Part II then devotes sustained attention to one of the book's core themes—the relationship of option theory to contract law—to consider how a better understanding of economic incentives can improve legal decisions. Part III refocuses the discussion by raising some thorny design questions that must be addressed before the contract law canvas can be comfortably mounted on an economic frame.

I. A Sketch of Goldberg's Analysis

A. Organizing Principles and Topics

Framing Contract Law loosely follows the three-act script that is used to organize most scholarly inquiry into contract law: (1) Has a binding contract been formed? (2) Have both parties successfully performed their obligations? (3) What remedial rights accrue to a breached-against party? The format is familiar and effective, although Goldberg does deviate in several important ways.

For example, before launching into this holy trinity of contract law, Goldberg treats us to a terrific introductory chapter on Hollywood movie contracts. The general idea here is that a film's profits can be sliced up just like a firm's and that various owners (actors, producers, writers, financiers, and so on) often rely on nuanced contractual methods to divide the pie. The importance of understanding this economic arrangement is motivated by a string of lawsuits brought by actors and screenwriters attacking their "net profits" contracts as unconscionable. The cases seem plausible because the movies were often financial blockbusters (examples include *Coming to America*, *Batman*, and *JFK*) that nevertheless failed to earn net profits for the plaintiffs. Did the studios pull a fast one by using a convoluted definition of profits? If so, should the deal be unwound via unconscionability?

The key to this riddle, according to Goldberg, is to analogize a film to a firm and to view different contractual claims as different types of "security" interests in, or options on, the film's ultimate profitability. Considered this way, it is less insidious that in Hollywood, "net profits" are not defined under generally accepted accounting principles;[4] rather, they are a term of art granting holders of these con-

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[4] Indeed, there are all sorts of hardwired adjustments, such as fixed percentage overhead costs and distribution costs, which might allow a film to generate real profits for a studio while still falling short of earning calculated net profits for actors or screenwriters (pp 15–19). See also

tingent rights a subordinated claim to any "gross profit" participants who may sign onto the project in the future. Further, the book demonstrates why everyone might prefer contingent compensation[5]—and why net profit participants might logically seek to use this structure ex ante, even if they disparage it ex post.[6] At the end of the chapter, it is hard to see the studio contracts as overreaching.

Starting the book with a discussion of Hollywood movie deals is effective on a variety of levels. This is a fun industry to study—and telling stories about Art Buchwald's endless battles with Paramount is a better way to lure readers into the action than parsing obscure clauses from industrial resale contracts (p 12). More to the point, Goldberg's careful examination of the various financial rights and economic incentives provides a nice introduction to several pervasive problems in contract design, including moral hazard, adverse selection, and the impact of changing circumstances over time. Finally, the willingness of some courts to entertain an unconscionability claim under these circumstances demonstrates the book's central theme: judges, lawmakers, and even litigators just don't get the subplots of some contractual transactions.

Armed with this foundation, the second part of the book turns to a string of chapters on consideration. Goldberg does not take on every issue; rather, he focuses on the "band-aids" that are used to patch together the legality of a contract notwithstanding the apparent absence of real consideration (pp 37–38). These include the automatic imposition of best-efforts-with-sole-distribution rights (exemplified by the case of *Wood v Lucy, Lady Duff-Gordon*[7]), the law's understanding of open-quantity output and requirements contracts, and the good faith overlay on satisfaction clauses (p 38–41). The discussion of each concept is nuanced, but if I had to draw a general theme from this part, it would probably be that courts are straining to add too much content to these deals via good faith.

The third and fourth parts of *Framing Contract Law* look at the performance and remedy questions, respectively. The former contin-

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Harold L. Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis* 175–91 (Cambridge 7th ed 2007) (providing a financial overview in terms of profit-and-loss statements for typical production, distribution, and exhibition contracts for individual theatrical motion pictures).

5 The primary reason for this is that a variable compensation structure helps to mitigate agency cost distortions between the studio (principal) and the talent (agents) (pp 28–31).

6 Simplifying the analysis a little, lesser-name actors joining a film project early may be willing, indeed eager, to subsequently water down their equity claims in order to land famous actors. This will significantly reduce the likelihood of ever receiving net profits from the project, but it will also increase the chances of overall success—which can then lead, in turn, to a better reputation and future financial gains (pp 25–28).

7 118 NE 214 (NY 1917).

ues to be preoccupied with problems relating to best efforts, industry custom, and good faith—this time in the context of interpreting a valid contract. The latter chapters on remedies comprise some of the book's more insightful commentary.[8] In particular, Chapter 10 offers an intriguing justification for enforcing the difference between contract and market price, which Goldberg terms the protection of "property in the price" (p 219). In a nutshell, he uses information economics[9] to argue that parties should be entitled to replicate economic risk by recovering the contract–market price differential at the time of breach—even in the absence of contractual reliance. After establishing and applying this concept, the fourth part of the book examines cases related to a host of remedial topics, including specific performance, consequential damages, and the lost volume seller problem.

The book concludes with two additional parts. The last one (part six) analyzes the defenses of impossibility, impracticability, and frustration of purpose. These chapters might easily have been combined with those examining the performance question—and I am not sure why Goldberg chose to end the book with these subjects. Likewise, part five of the book might have been shoved into the earlier discussion on remedial issues—but I am glad that it was not. Instead, Goldberg sets apart a separate section to deal with links between option theory and contract law. Understanding the existence and effect of embedded options in contract law is becoming a hot topic in the legal literature.[10] As I will discuss in Part II, the book's eagerness to em-

8 In Goldberg's view, the remedy for breach is just an additional term to be interpreted under the contract, and the relevant question is "[w]hat remedies would reasonable people have included in their contract" under the circumstances (p 203). An unconsidered bias toward expectation damages should be jettisoned (p 204), and lawmakers should uphold explicit remedial instructions in the contract (such as liquidated damages) or "interpret" a remedy that comports with likely intentions—just as they might interpret a reasonable time or place of delivery (p 203).

9 In this context, information economics refers to the observation that information is valuable because it allows parties to make choices that will yield a higher payoff than those made under a veil of ignorance. Of course, information can also be costly to obtain, and parties will need to weigh the tradeoffs of information-gathering investments. For a classic treatment of these issues, see generally George J. Stigler, *The Economics of Information*, 69 J Pol Econ 213 (1961) (explaining that market participants address problems in the relationship between information dispersion and efficient pricing of goods by using techniques, such as advertising, to reduce the cost of gathering additional information).

10 See, for example, George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 Minn L Rev 1664, 1669 (2006) (showing how "an imprecise contract term—combined with judicial willingness to fill gaps—can generate an embedded option"); Ian Ayres, *Optional Law: The Structure of Legal Entitlements* 1–10 (Chicago 2005) (using option theory to illuminate the structure of legal rights); Avery Wiener Katz, *The Option Element in Contracting*, 90 Va L Rev 2187, 2190 (2004) (discussing how option contracts can benefit users without necessarily improving the efficiency of the transaction); Robert E. Scott and George G. Triantis, *Embedded Options and the Case against Compensation in Contract Law*, 104 Colum L Rev 1428, 1431–32 (2004) (explaining a variety of contracting patterns in terms of embedded options as a form of risk manage-

brace option theory—explicitly in this part, and implicitly everywhere else—is one of its great successes.

Some customary topics are ignored. For instance, there is very little discussion of offer and acceptance.[11] Alternative grounds for enforcing promises, such as quasi-contract and promissory estoppel, are hardly mentioned. And a wide range of defenses to contract formation—including mistake, duress, fraud, illegality, and so on—are left untreated. One possible explanation for these gaps is that Goldberg uses his prior law review articles as the foundation for some of the book's chapters. As with other projects of this nature, the seams sometimes show, and one or two chapters seem to come out of left field.[12] But, then again, contract law encompasses a vast universe, and Goldberg did not wish to write a nine-hundred-page tome (pp 7, 379). There is enough here to get his general point across.

B. The Lessons of Kewpie Dolls, Shirley MacLaine, and Aluminum Wires

The real fun in *Framing Contract Law* comes from Goldberg's ability to convincingly argue counterintuitive positions—which he often supports by mounting a Holmesian (Sherlock, not Oliver Wendell, Jr.[13]) investigation to unearth previously unknown facts about landmark cases. Some of the plot twists have leaked out in his earlier scholarship,[14] but Goldberg has saved enough gems for this book. And it is striking to see all the judicial "failures" assembled in one place.

This approach is difficult to discuss in the abstract—as are the primary elements of my Review—so let me present three examples to illustrate the book's general methodology of setting up the case facts, digging deeper with primary research to flesh out additional details,

ment); Paul G. Mahoney, *Contract Remedies and Options Pricing*, 24 J Legal Stud 139, 141 (1995) ("The option approach . . . provides a plausible explanation for the common law's choice of money damages as the usual remedy, as well as for some of the significant exceptions to that rule.").

11 There is some relation of unilateral offers to requirements contracts in Chapter 3 (pp 86–88). And Goldberg has included an extended chapter on UCC § 2-207's "battle of the forms" (p 189). Even here, however, the analysis deals mostly with what term should govern the agreement—and not with whether a valid agreement was struck.

12 One example of the discontinuity is Chapter 14, which examines the liability of careless public commodity inspectors and other trade surveyors in tort and contract law. Goldberg relates this discussion to the consequential damages problem in contract law (p 244), but the issues do not seem to have a very close connection.

13 The book also channels Oliver Wendell Holmes at times by advocating the imposition of objective standards to understand contractual context (pp 161, 378–79).

14 Some examples include Victor P. Goldberg, *The Net Profits Puzzle*, 97 Colum L Rev 524 (1997) (Chapter 1); Victor P. Goldberg, *An Economic Analysis of the Lost-volume Retail Seller*, 57 S Cal L Rev 283 (1984) (Chapter 12); Victor P. Goldberg, *Bloomer Girl Revisited or How to Frame an Unmade Picture*, 1998 Wis L Rev 1051 (Chapter 15).

employing an economic framework to take apart and reconstruct the contractual relationship, and demonstrating how legal outcomes often miss their marks.

1. Best efforts and contracts for exclusive dealing.

In the innovative case of *Wood*, Judge Cardozo famously establishes the rule that an agreement for exclusive dealing imposes an implicit requirement to use best efforts.[15] The plaintiff, Otis Wood, could not contract for sole rights to promote Lucy's name for use on blouses or bedspreads and then lounge around doing nothing. This rule is important because it resuscitates a contract that otherwise lacks consideration (by exposing Wood to a sufficient legal detriment). Thus, when Lucy went around Wood to personally license her name to Sears, Roebuck & Co, she was found to have breached a legally binding agreement. But did Cardozo really understand the likely contractual intentions of Wood and Lucy? Goldberg suggests that the case was probably wrong for two separate reasons.

Before Goldberg launches into this analysis, however, we are treated to some salacious gossip on the parties, their family histories, and their business affairs. Most scholars will probably have heard about Lucy's rise to fame as a "creator of fashions," along with her dishonorable behavior on the Titanic (Lucy and her husband allegedly bribed sailors for preferential access to lifeboats) (p 45). But they may be less aware that Otis Wood's father was a notorious mayor of New York City who secured a judicial appointment for Benjamin Cardozo's father (who, in turn, acquitted Wood Sr. in a controversial bribery case) (pp 45–46). Nor may they be aware that Otis Wood had an eccentric and wealthy aunt, the "Recluse of Herald Square," who died with an estate worth roughly $35 million today,[16] along with a massive collection of packaged hotel soaps and fifty ancient $10,000 bills sewn into the lining of her jacket (pp 47–48).

But the best find in this story is that Otis Wood had entered into an almost identical promotion contract with a prominent illustrator named Rose O'Neill for the rights to market her Kewpie dolls—whose cherubic image would appear on everything from buttons to jewelry to toy furniture, earning O'Neill more than a $1 million in royalties (p 49). This contract is important because it was executed prior

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15 118 NE at 214. Article 2 of the UCC codifies this default rule. See UCC § 2-306(2) (ALI 2004) ("A lawful agreement . . . for exclusive dealing . . . imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.").

16 I estimate this figure by growing her 1932 estate of $877,500 at 5 percent for seventy-five years.

to the Lucy deal and because it governed the same sort of relationship. Yet this earlier transaction differed from the Lucy contract by explicitly obligating Wood to use "best efforts" in his promotion of Kewpie dolls (p 53). The Kewpie contract thus disproves Goldberg's initial hypothesis: that "best efforts" clauses had not yet emerged as a strategy for mitigating the agency cost problem inherent in a promotional contract of this nature (p 63).[17] Instead, the lack of a written "best efforts" clause in the Lucy contract raises an inference that Otis Wood purposefully chose not to obligate himself in this manner[18]—although Cardozo's later willingness to imply such an obligation ironically saved Wood's eventual case.

The existence of the Kewpie doll contract also raises a second reason why Cardozo may have gotten the *Lucy* case wrong: the "exclusive" right to promote is more ambiguous than it initially seems. The contract between Wood and O'Neill was also "exclusive," but it provided a bifurcated payment schedule where Wood would get 40 percent of the revenue for promotional deals that he generated, but only 20 percent of the proceeds for marketing deals struck by O'Neill without Wood's help. The clear implication of this is that "exclusive" means that Wood was the only agent authorized to promote Kewpie dolls—but that O'Neill was free to pursue side deals on her own as long as she paid Wood his cut (p 53).

Thus, it is not at all obvious that Lucy even breached her exclusive deal with Wood. Like with the O'Neill deal, it depends on what they meant by "exclusive." Lucy may have been free to license naming rights to Sears or anyone else on her own (perhaps needing to still pay Wood his commission) without ever violating the contract (pp 63–67). It turns on whether "exclusive" means "exclusive third-party promoter" (allowing Lucy to freely contract on her own behalf) or whether it means "exclusive promoter no matter what" (precluding her from doing so under the agreement).[19]

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17 The agency problem arises here, as it does in many other contractual transactions, because Wood controls the use of Lucy's name while Lucy is the residual owner of the proceeds. See Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J Fin Econ 305, 308–10 (1976) (defining and exploring the agency cost problem that arises with the separation of economic ownership and managerial control). This problem is mitigated, of course, by the variable nature of Wood's compensation (they agreed to split revenues fifty-fifty) but Wood might nevertheless have incentives to forgo some worthwhile efforts.

18 This inference is strengthened by the fact that Wood was in contemporaneous litigation with O'Neill and may have feared some legal exposure under the explicit "best efforts" clause in that contract (p 63).

19 And even if exclusivity is interpreted in this stringent manner, Lucy might still have pursued the side deals and paid Wood damages for breach (assuming Wood was ineligible for an injunction or other form of equitable relief) (pp 64–65).

The upshot of all this is that Cardozo's logic withers in the face of Goldberg's investigation. The opinion's primary basis for inferring a best efforts obligation—that failure to impose such a duty would place Lucy at the mercy of Wood—falls apart if exclusivity is defined in the liberal manner suggested by the Kewpie doll contract. Lucy is at no one's mercy because she can simply license her name directly (as she did with Sears). And it is harder to believe that the parties were unaware of "best efforts" clauses when Wood had just used one in a prior contract. If all of these facts had been known at the time of litigation, it is likely that even Cardozo, the great Houdini of consideration,[20] would have rejected the contract for lack of mutual obligation (p 44).

Goldberg then goes on to suggest that the subsequent kudzuization of implied best efforts requirements does more mischief than good. He argues that the *Lucy* rule, nurtured by drafters of the UCC and the Restatement, has grown far beyond the context of the original decision and now pops up frequently as an implicit term—even in some contracts with separate, clearly defined sources of consideration (pp 68–70). Further, there is judicial confusion over whether "best efforts" merely means "reasonable efforts," or whether promisors *really* have to try their hardest (p 69). Goldberg concludes that the regrettable legacy of this misguided decision is that it "imposes an ill-defined standard on an ill-defined set of promisors" (p 44).

This is where the chapter really starts to get interesting, and the stage has been set for some exciting future discussion. For there will indeed be some harm arising from the legal ambiguity and embedded options imposed via implicit best efforts clauses.[21] But might there also be some economic benefits from cleaning up after messy or lazy contractors to save a bona fide deal or to resurrect the intended meaning of the relationship? It is hard to know how to weigh the imposition of some errors against the correction of others; perhaps the net effect is indeterminate. Here, then, is one example of the many tradeoffs inherent in contract law, a theme to which I will return in Part III.

20 See, for example, *Allegheny College v National Chautauqua County Bank of Jamestown*, 159 NE 173, 176–77 (NY 1927) (holding, famously, that when Allegheny College accepted a donation, it assumed an implied obligation to "couple [the announcement of the scholarship with] the name of the donor," which was sufficient consideration).

21 For example, a promisee might ignore the implicit best efforts requirement in good times, while suing to annul the deal for a lack of best efforts if future conditions (beyond the control of both parties) render the deal unprofitable. Like any other loophole, this sort of strategy (if unrecognized, ignored, or mispriced by the promisor) can undermine the effectiveness of contract law.

2. The irrelevance of mitigation in pay-or-play contracts.

One of the book's more amusing chapters reconstructs the famous legal dispute between the actor Shirley MacLaine and Twentieth Century-Fox.[22] As contract law scholars will recall, MacLaine sued the studio for her guaranteed compensation ($750,000) after it cancelled the film project *Bloomer Girl*, a story exploring "issues of black and female equality and war and peace with the vicissitudes of courtship and pre–Civil War politics" (p 281). Some canny lawyers at Fox offered MacLaine a substitute project: *Big Country, Big Man*. This movie replaced the progressive show tunes of *Bloomer Girl* with a "'Western Type' story taking place [and being filmed] in an opal mine in Australia" (p 290). When she refused to take the new part, Fox argued that its damages should be reduced because MacLaine was unwilling to mitigate the breach (p 284). The role of the case in most textbooks, then, is to tee up a comic discussion of reasonable mitigation in employment contracts: Is MacLaine legally compelled to ride a mule in Australia? Would she have to costar in a NASCAR film with Will Ferrell? And so on.

Yet, after undertaking his usual sleuthing, Goldberg shows how this case, too, vastly misunderstands the contractual relationship. Instead of asking whether *Big Country* was a different or inferior project, the book uses option theory to argue that there was no breach at all under the terms of the contract between MacLaine and Fox. Instead, Fox had simply bought an (expensive) call option on the actor's time. Thus the studio still owed her the $750,000 option purchase price when it chose not to make the film—regardless of her decision on *Big Country* (p 280). MacLaine eventually got her money—because riding a mule and roping cattle are not the same as singing in a hoop skirt about Southern equality. But the mitigation argument, according to Goldberg, was a massive red herring.

To support this interpretation, the book takes us back into the world of Hollywood contracting. It is apparently common to use pay-or-play provisions to reserve a leading actor's block of time. But importantly, the studios are not promising to make the movie; they are simply promising to pay the guarantee whether they film or not. This makes some sense, because there is often great uncertainty when a contract is signed about whether the movie will actually be completed (pp 298–99). Can the screenplay be tweaked to everyone's satisfaction? Can other leading actors be lined up? Will another studio preempt the general topic? And so on. Thus there is significant option value from having the right to abandon the project, and leading actors

22 *Parker v Twentieth Century-Fox Film Corp*, 474 P2d 689 (Cal 1970).

can often capture some of this value by selling a call option on their time to the studios. Usually, actors would rather do the movie—assuming it is a good one—because they will typically get additional participation rights (such as a net or gross share of the profits). But if the studio does decide to pull the plug on a movie, an actor should still receive her guarantee.[23] If you buy an option on Google stock, and it expires out of the money, you're still out the initial purchase price.

MacLaine's contract had this sort of pay-or-play provision, and she may have thought that it would be easy to recover her $750,000 guarantee from Fox. Yet even though there was some (confused) precedent for this type of case, the California Supreme Court seems to have bungled the analysis by wandering into a jungle of mitigation. Fortunately for MacLaine, the movies were different enough that the court ruled in her favor. For Goldberg's purposes, of course, the case serves as another nice example of a judiciary looking to pigeonhole an issue into its doctrinal slot, while blind to the transaction's real economic context.

This is a fun story, but the even more interesting issue for contracts scholars relates to the use of pay-or-play options as a strategy for skirting legal limits on liquidated damages. To the distress of many commentators,[24] courts continue to strike down liquidated damage provisions that they deem excessive and punitive. Even worse, the law will sometimes disallow the use of such terms if the harm from breach can be reasonably estimated at the time of contracting.[25] But might a discrete and separately priced option to abandon the project serve as a clever drafting ploy to mount an end run around the penalty clause ban (p 308)? If so, the prohibition becomes meaningless because all

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23 This is subject, of course, to a negotiated offset for replacement projects—which is sometimes, but not always, included in these contracts (pp 306–07). High-profile sporting contracts, such as those involving football coaches, can also contain these offsets. See Robert H. Lattinville and Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review*, 17 Marq Sports L Rev 109, 158 (2006) (describing the use of offset clauses in collegiate and professional football coaching contracts to reduce damage awards by the amount of post-termination earnings).

24 See, for example, Aaron S. Edlin and Alan Schwartz, *Optimal Penalties in Contracts*, 78 Chi Kent L Rev 33, 36 (2003) (summarizing the theoretical arguments for and against the penalty bar on liquidated damages and arguing that the UCC prohibition of liquidated damages should be repealed); Charles J. Goetz and Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum L Rev 554, 556 (1977) (arguing that the "uncritical application" of the assumption that penalty clauses overcompensate "induces a costly reexamination of the initial allocation of risks and may also deny the nonbreaching party either adequate compensation for the harm caused by the breach or the opportunity to insure optimally against such harm").

25 See, for example, *Southwest Engineering Co v United States*, 341 F2d 998, 1001 (8th Cir 1965) ("[T]he harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation.").

contracts can be reconceptualized under our current remedial structure as options to perform or pay damages for breach.[26] If not, then why won't we allow parties to sell value-enhancing options where one side's need for flexibility is traded for another's willingness to cope with uncertainty? Indeed, this would seem quite strange in a world where financial alchemists in Chicago sit around all day concocting obscure products to list on their derivatives exchanges.[27]

3. Reforming prices under impracticability.

The third example that I will discuss relates to the use of the impracticability doctrine to reform a contract's price term, as seen in the radical decision of *Aluminum Co of America v Essex Group, Inc*[28] ("*Alcoa*") Students of this case will recall that Essex had determined to enter the aluminum wiring business, and it sought to purchase the needed aluminum from the giant producer Aluminum Company of America (Alcoa) under a long-term supply contract.[29] The parties struck a very complicated deal at the end of 1969; the gist of it was that Alcoa would make Essex a fixed quantity of aluminum (subject to some adjustment by mutual consent) at a price that was partially indexed to several benchmarks (a construction index, a labor index, and the wholesale price index for industrial commodities).[30] Essentially, the parties were trying to mimic the costs, including the cost of capital, that Essex would incur if it ran its own production plant. The easier way to do this, of course, would have been to write a cost-plus contract tied to Alcoa's actual expenses. But confidentiality concerns apparently left Alcoa unwilling to disclose this information (p 351),[31] and the parties chose an alternative route.

To Alcoa's horror, however, the rising oil prices and rampant inflation of the early 1970s were not fully reflected in the indexed price (p 355). The firm soon found itself in a situation where it was obligated to deliver aluminum to Essex at a price far below market—and

26 See Scott and Triantis, 104 Colum L Rev at 1429–32 (cited in note 10) ("Rather than conceiving of damages as compensation, the right to breach and pay damages is better understood as a valuable option sold by the promisee to the promisor.").

27 See Aaron Lucchetti and Alistair MacDonald, *Trading Up: Inside the Exchanges' Race to Invent New Bets*, Wall St J A1 (July 6, 2007) (describing the expansion of the number and variety of derivatives available on the Chicago Mercantile Exchange and noting that global derivatives trading has grown on average by 30 percent per year since 2001).

28 499 F Supp 53 (WD Pa 1980).

29 Id at 55–56.

30 Id at 56.

31 The parties were also (justifiably) worried about the incentive problems arising in cost-plus transactions: as all lawyers billing at an hourly rate know, Alcoa would have less reason to economize on inputs when it earned a guaranteed markup.

less than its actual cost.[32] Alcoa claimed that this disparity would result in a $60 to $75 million loss over the life of the contract,[33] although this valuation was extremely dubious.[34] When Essex refused to renegotiate, Alcoa sued to reform—or, better yet, cancel—the contract by arguing mutual mistake (the index failed to track production costs), impracticability (the oil shock rendered the deal imprudent), and frustration of purpose (same).[35] Accepting these arguments, the court decided to modify the contract by rewriting the price term to ensure that Alcoa would receive, at a minimum, its actual cost plus one cent per pound (p 357). This is the decision's ticket to most casebooks: electing to reform a key term under impracticability, rather than just striking down the deal, was a revolutionary step—albeit one that would have no future value as precedent (pp 348–49, 357–58).

To assess the merits of this case, Goldberg again resorts to a bit of legal archeology coupled with economic common sense. This time, he argues that blame for the unfortunate situation lies mostly with the inept transactional lawyers who engineered this deal (p 363), although he also (justifiably) questions the expansive judicial use of mistake and impracticability (pp 358–59). The most obvious flaw with the contract—and the one seized upon by the court—was that the erection of a production cost index, always a tricky endeavor over the long term,[36] served as a lousy approximation of the project's likely cost to Alcoa. Part of the disparity was caused by the 1973 oil shock, which triggered a rise in carbon-based prices far beyond that of the wholesale price index for industrial commodities. But there were other problems as well. For example, under the price formula, the parties shockingly "forgot" to put in an inflation adjustment for 60 percent of the ultimate price, a dangerous oversight in 1973 (p 365). The fundamental

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32 By 1979, the contract entitled Essex to buy an ingot of aluminum for twenty-five cents; the market price was roughly seventy-three cents, and Alcoa's costs were around thirty-five cents (p 355).

33 *Alcoa*, 499 F Supp at 66.

34 In an effort to emphasize Alcoa's misfortune and support an impracticability claim, the litigators apparently forgot their basic finance. For example, Alcoa failed to discount its ten years of future projected losses (p 359). Correcting this error could chop the loss in half under some assumptions: a 5 percent discount rate drops the $75 million loss to $59 million; a 10 percent rate drops it to $46 million; and a 15 percent rate drops it to $38 million (also assuming constant annual losses). Moreover, Alcoa projected its peak loss during the first six months of 1979 through the entire ten-year period—instead of taking an average loss figure over the past decade or calculating the projections on some other, more reasonable basis (pp 359–60).

35 See *Alcoa*, 499 F Supp at 56–57.

36 The biggest difficulty here is that technology, globalization, and other developments are likely to alter the optimal balance of input factors over time. For example, new manufacturing processes, or cheaper offshore labor, may make it worthwhile to substitute capital for labor (or vice versa). Thus even if the indices used to benchmark input costs perfectly track actual costs (unlike *Alcoa*), a disparity between contract and market price may nevertheless arise over time as the various input proportions shift.

issue, however, was structural: the parties attempted a convoluted strategy to mimic plant ownership by Essex—instead of simply writing a requirements contract linked to the external market price for aluminum (pp 365–68).

So what is to be made of all this? Should the court reform the contract under the almost certainly correct assumption that the parties really meant to write a deal that tracked Alcoa's actual costs more closely? Should it just annul the deal? Or should it grunt "tough luck" to Alcoa and enforce the text of the agreement, notwithstanding the windfall to Essex that probably does not accord with the parties' ex ante expectations. Goldberg tentatively suggests that the latter is perhaps the soundest course, as a sort of bitter medicine that will force future parties to think through their deal structures even more carefully (p 349).[37] If a judge cannot live with that (harsh?) outcome, then Goldberg believes that the actual decision was better than annulling the entire contract—because Essex likely needed more protection for its reliance (pp 350–51).[38] But discussion of these tantalizing issues is sparse, and we are left wondering exactly why the benefits of taking a strict textual approach outweigh the harms of ignoring the parties' "true" intentions—if such a thing can ever really be divined.

C. Evaluating a Case-based Approach

The other chapters continue on in pretty much this same manner. In each of his stories, Goldberg's analysis is compelling—and most likely correct. But he still relies on probabilistic inferences to solve the puzzles. Sure, it is likely that Otis Wood mindfully left out a best efforts clause in his contract with Lucy because he feared imposition of additional duties in the wake of his Kewpie doll litigation. But it is also possible that they just used a different lawyer with a different set of drafting priorities (p 63). Sure, it is highly probable that Alcoa and Essex meant to set up an accurate cost-plus index, justifying judicial reformation of the price term. But someone at Essex may also have realized that the deal's partial lack of adjustment for inflation had

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37 Judge Posner agrees with this assessment, arguing that reformation of the Essex contract inefficiently externalized the costs of contract formation from the private parties to the public (via the judicial process). See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex L Rev 1581, 1602 (2005) ("Because the probability of experiencing significant cost increases during the life of the contract was significant and the potential consequences substantial, Alcoa could reasonably have been adjudged to have failed to invest sufficiently in making the contract clear at the outset.").

38 Goldberg argues that this is true because the quantity of aluminum in the contract constituted all of Essex's needed supply—but less than 1 percent of Alcoa's annual production. Furthermore, Essex had built its manufacturing plant close to Alcoa's smelter in order to minimize transportation costs and eliminate the need to remelt the aluminum ingots (pp 350–51).

some implicit option value—and used this boon to offset another concession. Unless another trove of empirical data is uncovered, we will probably never know.

Putting these inferential ambiguities aside, the undeniable benefit of this case-based approach is that Goldberg's arguments are both carefully documented and salient. It is hard to quarrel with the book's archeological efforts. And we certainly remember discussions involving Kewpie dolls and Australian westerns.

The drawback is that readers are forced to question the extent to which the book's conclusions can be extended beyond the specific facts of the cases selected for analysis. To be sure, some of the chapters only use a case to make the storytelling easier.[39] For example, Chapter 4 argues that courts should not uphold contracts with buyer satisfaction clauses by understanding satisfaction to be bounded by good faith (the typical judicial jujitsu for avoiding a consideration problem). Instead, these promises should count as consideration because they are valuable to sellers as a way of inducing buyers to produce information that may result in an enhanced sales price (p 95–96). In other words, there are two deals: the buyer pays for an option to abandon in bad future states, and the seller pays the buyer to develop information about the commercial prospects of the asset.[40] It doesn't really matter, then, that this chapter focuses on *Mattei v Hopper*[41] (a casebook favorite involving a land purchase contract under the condition that the developer receive "satisfactory" third-party shopping center leases); any one of a hundred similar cases might have been used as the vehicle to deliver Goldberg's thesis.

But other chapters seem to pick out some specific case anomaly to argue for judicial error (or, alternatively, that a court reached the right outcome for the wrong reason). The *Wood* and *Alcoa* discussions are two examples of this.[42] So is Chapter 6, which argues that a court's effort to interpret what "best efforts" meant in *Bloor v Falstaff Brewing Co*[43] (involving the sale of beer) was misguided because the trans-

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39 Indeed, one of the book's great successes is its ability to convey economic arguments without getting bogged down in the jargon that prevents some ideas from influencing as much as they should.

40 The deal simply takes this form to prevent buyers from discounting the price due to asymmetrical information—and to protect a buyer from becoming trapped by a seller's subsequent opportunism in the event that the asset is discovered to be especially valuable (pp 93–98).

41 330 P2d 625 (Cal 1958).

42 These cases are certainly famous and influential enough to merit detailed scholarly assessment; my point here is simply that Goldberg relies on the peculiar facts surrounding these transactions as the basis for his criticism.

43 454 F Supp 258 (SDNY 1978).

action was an acquisition instead of a distribution agreement.[44] It is not immediately obvious how analysis of this specific problem—even if it is spot on—should extend into normative prescriptions for contract law.[45]

Goldberg is quite convincing, however, in his insistence that courts have historically neglected some fundamental economic concepts in their adjudication of contract disputes—and that this has caused some warts to grow on our common law. Perhaps the most striking area of neglect relates to option theory: the book often claims that ignorance of the explicit or embedded options woven through a transaction is responsible for shoddy legal reasoning (pp 277–78, 376–78). It is helpful, then, to devote sustained attention to this aspect of the book—in order to show how a careful understanding of economic incentives might indeed improve the results of individual decisions in contract law.

II. Contracts and Options: Incorporating Nuanced Economic Incentives into Microlevel Decisions

A. Contracts as Embedded Options

An option is created whenever a person is entitled, but not obligated, to take a future action relating to an uncertain event. This right may be explicit and come with a separate price tag—such as the purchase of a put option on Apple stock. Or it may be implicit in a business investment or legal entitlement.

Importantly, freedom to act in this manner does not necessarily have economic value. By walking into a Las Vegas casino I am permitted, but not obliged, to put my money on lucky number seven—yet there is no option value here. A meaningful option is only created when new information might emerge to shed some light on key uncer-

44 According to Goldberg's research, the promise to use best efforts was really tied to a seller "earnout" requirement designed to prevent the buyer from misdirecting beer sales away from the transaction. More specifically, Investors Funding Corporation (the seller; Bloor was the bankruptcy trustee) was to receive $4 million plus fifty cents per barrel of Ballantine beer sold by Falstaff (the buyer) over the next six years. Goldberg argues that this was part of an earnout designed to protect Falstaff from a rapidly falling market share for Ballantine (pp 152–57). The best efforts promise was, in turn, an inelegant way to prevent Falstaff from cheating on the earnout by diverting sales of Ballantine to its other brands.

45 Goldberg seems to admit as much, describing this as a one-off transaction (pp 142–43). Even if the result of this analysis does not generalize, however, the framing question might. In other words, it is worth asking why a seller would impose a condition on the subsequent use of an asset when, all other things being equal, this should result in a lower sales price. Such an inquiry might suggest that this condition could generate subtle economic incentives designed to increase the overall proceeds from the sale.

tainties before the decision must be made.[46] I enjoy no new information prior to spinning the roulette wheel and cannot adjust my decision accordingly. But a staged business investment, for example, usually creates embedded options because the firm can decide whether to branch into other markets (or scuttle the project) after new data arises over time. The purchase price of this embedded option is buried, of course, in the initial investment.[47]

Nonbinding freedom to act under uncertainty is a far-reaching concept, and legal commentators are starting to recognize that many of the entitlements created by law may also convey embedded options.[48] For instance, the simple right to initiate and invest in a drawn-out lawsuit can be rich with options.[49] A plaintiff might spend more on discovery if new information renders the case promising—or abandon the endeavor if the reverse proves true.

Embedded options are especially important for contract law because they are our primary legal framework for the private transfer of intertemporal rights and obligations. Indeed, every contingency in a contract might be viewed as an abandonment option—to be exercised or waived by the protected party according to future circumstances. Further, all contracts might be reconceived as embedded options by considering what happens when one side chooses not to perform as promised. Under current law, this breaching party will typically have to pay expectation damages, unless some other valid provisions have been written into the deal. Yet, as Robert Scott and George Triantis have shown, we might view this amount not as damages for breach, but rather as the price of exercising an option not to perform.[50] There

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46 See generally Timothy A. Luehrman, *Strategy as a Portfolio of Real Options*, 76 Harv Bus Rev 89 (1998) (arguing that business strategy should be conceived of as a series of options, and implying that options are inherently related to managing uncertainty and risk).

47 This notion of strategic embedded options has become quite important in business decisions, and managers now routinely adjust their net present value calculations to incorporate any additional option value that potential investments might enjoy. See Richard A. Brealey, Stewart C. Myers, and Franklin Allen, *Principles of Corporate Finance* 597–615 (McGraw-Hill Irwin 8th ed 2006) (describing the value of options in the theory and practice of corporate finance). See also generally Avinash K. Dixit and Robert S. Pindyck, *Investment under Uncertainty* (Princeton 1994) (articulating an approach to investments that involves considering the options embedded in those investments).

48 See, for example, Ayres, *Optional Law* at 1–5 (cited in note 10) (pointing out that net present value analysis typically ignores "the option values that are almost always embedded in real investments"); Lee Anne Fennell, *Revealing Options*, 118 Harv L Rev 1399, 1405 (2005) (suggesting that embedded options are important in understanding and structuring entitlements because "[o]ption making offers a middle ground between property rules and liability rules").

49 See Bradford Cornell, *The Incentive to Sue: An Option-pricing Approach*, 19 J Legal Stud 173, 174 (1990) ("Filing a suit is analogous to purchasing an option, because it gives the plaintiff the right to proceed toward trial without having the obligation to try the case.").

50 Scott and Triantis, 104 Colum L Rev at 1429–32 (cited in note 10).

is measurable value to this right of abandonment (though it is not obvious that the entitlement should belong to the breaching party[51]) because new information may change the resulting costs and benefits of performance before it is due.

Viewing contract law in this manner is only worthwhile, of course, if it can generate additional insights. And here is where *Framing Contract Law* comes in. By emphasizing how courts repeatedly fail to understand the embedded—and sometimes even explicit—options in a contract, Goldberg offers a compelling argument that our legal system might be improved with common law that is more sensitive to these economic effects. Let me try to generalize from the book's discussion by considering a few ways that a robust understanding of option theory might improve the adjudication of individual contract disputes.

One obvious problem arises when a judge is willing to award a party something that she did not bargain for in the first place. The flip side of this mistake—cutting out an element of the initial bargain—can be equally harmful. Either type of judicial error distorts precisely crafted bargains and facilitates social inefficiencies. If these sorts of things happen with any frequency, they also provide incentives to engage in mendacious litigation.

Yet this is exactly what occurs when courts misread a contractual relationship by overlooking explicit or implicit option rights. The more egregious cases, such as Shirley MacLaine's lawsuit against Twentieth Century-Fox, ignore plainly purchased options (p 280). Recall that in that dispute, the studio had promised MacLaine a guarantee regardless of whether it made the movie—along with additional financial rights if the project went forward. When Fox chose to abandon the film (most likely after receiving discouraging information on its prospects), it simply elected not to exercise an out-of-the-money call option on MacLaine's time. But importantly, Fox still owed the actor the initial purchase price of the option—and failure to immediately conclude the case on these grounds is problematic.

I suspect that fewer courts would overlook explicit options today, and that the more common error involves judicial failure to recognize embedded options (as these are not separately delineated and priced in an agreement). Consider, for example, the famous output contract between Feld and Levy & Sons,[52] where Feld struck a deal to buy Levy's full production of breadcrumbs (a byproduct of its primary baking business) for six cents per pound. Levy did not promise Feld a minimum quantity of crumbs (though it could have easily done so),

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51 See Part III.C.

52 *Feld v Henry S. Levy & Sons, Inc*, 335 NE2d 320 (NY 1975).

yet Feld nevertheless sued for breach when Levy dismantled its bread-crumb toasters and used the deformed loaves for dog food instead. Practically, Levy might be seen to have retained an embedded option to stop making breadcrumbs if this endeavor later proved unprofitable. But when Levy tried to exercise this option, the court stepped in to say no (forcing Levy to sell some minimum output of crumbs under a nebulous good faith standard).[53] The end result was a likely misreading of the ex ante relationship between these parties[54]—along with a confusing strain of case law on the role of good faith as an additional constraint on discretion in output and requirements contracts.[55]

Still other cases may be clouding the common law with crude compromise solutions that attempt to account for embedded option features in contracts. One example of this, also discussed by Goldberg, is found in the line of cases on frustration of purpose. The situation in the well-known dispute of *Krell v Henry*[56] is representative: recall that Henry was excused from paying Krell a sky-high rent when King Edward's coronation was delayed. Krell was able to retain the down payment, however, after Henry dropped his claim for the return of this money (p 339). Other contemporary cases came to this same result—loss of deposit but excuse from future payment—through direct court order. This is an unusual outcome, given that the frustration of purpose doctrine usually expunges all contractual obligations. Yet Goldberg, always the contrarian, argues that these cases actually got it right. His position is that the courts recognized an embedded option running from landlord to renter: the deposit bought a call right to occupy the apartment by paying the balance of the contract price (p 339–42). Goldberg is surely right that there is an option feature here, though, without more, it is not at all obvious that the parties intended the down payment to be the purchase price of that option.[57] Indeed, you can enjoy the same option for free today with most hotel reservations as long as you cancel more than twenty-four hours before

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53 As Goldberg nicely puts it, the court "glosses over the question of why Levy's termination of an operation that does not cover variable costs would be in bad faith" (p 118). See *Feld*, 335 NE2d at 323.

54 This is only true, of course, if the parties understood that their economic relationship would end when Levy no longer made crumbs. Alternatively, it is possible that they understood the contract to foreclose reduction of output to zero—or that they had inconsistent beliefs on this term.

55 See UCC § 2-306(1) (ALI 2005) (defining output, requirements, and exclusive dealings contracts as involving such outputs and requirements as generally occur in good faith).

56 2 Eng Rep 740 (KB 1903).

57 Goldberg seems to admit as much, claiming that it "would have been a fruitless exercise for the court to search for the 'true' option price" (p 341). But I am not sure why a rule that leaves the spoils where they fall is better than attempting to value the option, or using a default rule of expectation damages to price abandonment, or annulling the deal entirely.

your event. In any case, the unusual angle taken on the frustration of purpose doctrine by these decisions is probably a well-intentioned compromise—but somewhat troubling as precedent.

It is important, then, for courts to recognize the existence of options in individual transactions. At best, a court missing these economic effects may perpetrate a zero-sum transfer of value from one party to the other. At worst, the muddy analysis can sour relationship-specific investments or nurture irrelevant doctrinal tangents, such as the inquiry into reasonable mitigation standards triggered by Shirley MacLaine's pay-or-play litigation.

Furthermore, as other parts of Goldberg's book demonstrate, ignoring optional effects is just one way that a court might misunderstand a deal's economic incentives. This prompts a much more general question: why can't more courts get this stuff right?

B. Scalpels and Cudgels: Why Can't More Courts Get It Right?

Taken in its entirety, *Framing Contract Law* presents a complex puzzle: why don't courts show greater sensitivity to the economic substratum beneath individual transactions? Part of the explanation may rest with the age of some disputes dissected in the book. Ignorance about real options, for instance, is understandable in 1970—when these effects were hardly understood. But Goldberg does not confine his claims to prior eras; he argues that contemporary lawmakers continue to keep their eyes closed. This is more problematic, especially since recent academic commentary has focused heavily on the use of economic tools and models to understand, shape, and inform contract law. Yet the book's claim sounds right: apart from a few prominent jurists, many courts do seem to ignore the law and economics literature. Part of the blame surely lies with the muddy jargon and hard-to-access mathematics that permeate some of the research. But more and more judges and lawmakers are gaining fluency in these matters; surely comprehension has not stopped economics from having great influence in, say, antitrust doctrine.

Goldberg has another intriguing explanation, however, for the more general failure of economics to affect contract law: he believes that there is a major gulf between the transactional lawyer's scalpel and the litigator's cudgel. In his words, "it has become clear to me that there is a significant disjunction between the intellectual frameworks of the transactional lawyer structuring deals and the litigator interpreting those transactional structures after problems have arisen" (p 1).

Why might this be true? The book hints that failure to appreciate many nuanced incentives in a given transaction comes about because litigators are forced to cram issues into "contract law's analytic boxes," while transactional lawyers are more focused on "practical concerns"

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(p 308). Goldberg is surely onto something here (although litigators might also be said to be focusing on the "practical concern" of winning a case under current rules). Litigators do need to hammer home discrete arguments—the deal was void for mistake, for example, lacked consideration, or amounted to unconscionability. Transactional lawyers, on the other hand, do not care about doctrinal cubbyholes (beyond ensuring that obvious problems will not ruin their labors). Instead, they typically work with the principals to carve subtle, and sometimes sophisticated, motivations throughout an entire deal. When everyone performs as expected, the incentives work as best as they can.

Yet it is impossible to specify upfront how parties should handle every eventual contingency, and when a transaction breaks down litigators and courts must step in to pick up the pieces. Here, then, is the problem according to Goldberg: an ex post failure to recognize nuanced ex ante incentives can lead to poor adjudication decisions. Indeed, it may even be worse than this if the "cubbyhole" structure of contract law gives litigators and lawmakers less of a reason to search for obscure economic effects.

Of course, there is an alternative explanation for the failure of economics to have more influence: it is difficult to translate an understanding of individual transactions into full-fledged rules for governing contract law. In other words, even if lawmakers have perfect insight into the effects of historically executed contracts, what should happen next? Or, to stick with the book's title metaphor, how exactly should a comprehensive understanding of economics be used as a frame for contract law?

III. FOUR QUESTIONS ABOUT FRAMES

Suppose we could wave a magic wand and transform all judges, state and federal, into economic super-jurists—a sort of Posner, Easterbrook, and Calabresi rolled into one. Furthermore, let's give them an unlimited budget for hiring the world's best special masters to help unlock a contract's hidden incentives: Nobel-winning options traders and hedge fund managers, famous Wall Street investment bankers and lawyers, maybe even Alan Greenspan.[58] Armed with this formidable armada of intelligentsia, could we now trust courts to understand the complex economic incentives underlying a given contractual dispute *and then* craft legal rules that leverage these effects to maximize social welfare?

58 We will ignore, for now, Greenspan's alleged role in designing the faulty price index in the *Alcoa* transaction (p 361).

I have high confidence that this group would do the former. But I contend that even in this fantasy world it would be exceptionally difficult to distill an optimal array of legal rules from individual disputes. In other words, even if we accept economics as the appropriate frame for contract law (and while I do, many others do not), there are still some intricate problems to resolve (or at least finesse) before using this frame to generate concrete normative recommendations. In this Part, I briefly pose four of the thorniest questions: the timing question, the precision question, the multiple-equilibria question, and the intent question.

A. The Timing Question

When exactly should economics act to frame contract law? In other words, should lawmakers try to work out most rules (whether mandatory or default[59]) in advance, or should judges retain ample discretion to fine-tune these rules later in the context of an individual dispute? To take the former route, we would use stricter language—whether in a statute, such as the UCC, or through common law pronouncements—to bind future discretion. For example, an acceptance takes effect when placed in the mailbox.[60] To take the latter route, we would adopt looser language, replete with Goldberg's dreaded "band-aids" of reasonableness and good faith. Continuing the example, a mailed acceptance might instantly form the contract only when reasonable.

Striking a good balance here is just a variant of the classic rules versus standards problem, of course, and the usual benefits of certainty from ex ante rules must be weighed against a loss of customization from additional context.[61] In other words, with strict upfront rules,

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59 The choice of whether to use a default or mandatory rule to govern any given issue is another thicket that I will not explore in this Review. For some discussion of these issues, see generally Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L J 541 (2003) (arguing that most rules in contract law should be default rules—except for those governing market failures or seeking to avoid externalities); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va L Rev 821 (1992) (illustrating how default rules reveal the operation of consent and discussing the implications this has for contract law); Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87 (1989) (proposing a theory of how courts should choose between competing default rules).

60 Restatement (Second) of Contracts §§ 63, 66 (1981).

61 For helpful discussions here, see Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 Colum L Rev 496, 496–501 (2004) (providing "a basic taxonomy of economic considerations that can serve as an organizing framework for parties choosing between form and substance when designing contracts"); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557, 619–20 (1992) (analyzing rules and standards from an economic perspective and concluding, among other things, that "the calculus determining whether rules or standards are preferable would emphasize ex ante promulgation costs and ex post enforcement costs, giving less attention to costs of advice by contracting parties because they often would not choose to acquire advice about such matters"); Colin S. Diver, *The Optimal*

parties will know exactly what to expect, but courts will sometimes be forced into outcomes that seem incorrect, or at least unduly harsh. With flexible standards there is more upfront ambiguity, but judges have room to tighten or loosen the noose. The tradeoffs here are especially tricky in contract law because parties will often be able to override an ex ante rule with an ex post standard (or vice versa), assuming they are willing to bear these transaction costs.[62]

As should be apparent by now, Goldberg seems to dislike the use of legal standards. He views terms like good faith and reasonableness with suspicion because they open the door to many of the judicial errors that he has observed over the years (p 38). Furthermore, the haziness (and sometimes immutability—you can't disclaim good faith[63]) of these standards makes it harder for private parties to write clear, upfront terms and introduces a risk that private language will be displaced by legal fiat.

Yet either approach can be compatible with an acceptance of economics as the primary frame for contract law. The twin goals of efficient trade and efficient investment are not exclusively attained through ex ante rules. Indeed an adept judge might use her understanding of economics, along with flexible governance standards, to properly distinguish between two very similar disputes.[64] Some other basis is needed to decide when contract laws should take effect, and it seems to me that the really important factors underlying the timing question relate to one's beliefs about promulgation and adjudication costs, the willingness of private parties to review and amend contract rules, and the relative competencies of the judiciary.[65]

Precision of Administrative Rules, 93 Yale L J 65, 65–66 (1983) (discussing rules and standards in the administrative law context).

62 See Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S Cal Interdiscipl L J 1, 9–10 (1993) ("[A]lthough default analysis is often couched in terms of substituting one rule for another, parties could contract around a default standard for a more precise rule (or contract around a precise default rule for a less precise standard).").

63 See E. Allan Farnsworth, *Contracts* § 7.17 at 489 (Aspen 4th ed 2004). See also UCC § 1-304 (ALI 2005) ("Every contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement."); UCC § 1-102(3) (ALI 2000) (making good faith effectively immutable by specifying that good faith cannot be disclaimed by agreement); UCC § 1-302(b) (ALI 2005) (retaining the immutability of good faith in the most recent articulation of the UCC). Parties can, however, set a reasonable definition of good faith under the circumstances of a given transaction. UCC § 1-102(3) ("[T]he parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.").

64 It strikes me that this is the sort of approach often taken in antitrust law—where there are relatively vague upfront laws, providing courts with the flexibility to consider situational context when deciding whether an action has been taken with desirable or nefarious motives and consequences.

65 See Ayres, 3 S Cal Interdiscipl L J at 1–17 (cited in note 62) (discussing the costs of rules as opposed to standards and the willingness of parties to substitute their own standards or rules

Related to this, it may be quite difficult to abandon contextual customization in some circumstances. Consider, for example, a contract governed by a satisfaction clause—such as a farmer's promise to sell a fixed quantity of potatoes to a distributor, so long as the tubers meet with the buyer's satisfaction.[66] It is possible, of course, to view this relationship as a nonbinding option: the distributor can take the potatoes or annul the deal as he sees fit. But lawmakers have sought to avoid this outcome (and the resulting consideration problem) by incorporating a notion of good faith into satisfaction. In other words, the distributor cannot use the satisfaction clause as a pretext for refusing the potatoes; he must really have received lousy crops. Yet it is unlikely to be worth the effort to write laws setting out the conditions for acceptable potatoes in advance. The pragmatic options, then, are to strike down these deals (exposing the parties to opportunism or forcing them to contract with detail on conditions of quality), or to have courts hash out the meaning of good faith satisfaction if a dispute does materialize. There may indeed be good reasons to compel parties to internalize the costs of writing their contracts. Yet one can go too far here as well,[67] and contextual discretion is not easily abandoned.

Even if Goldberg's call for a greater sensitivity to economics does not resolve the timing question, however, let us assume that we can adopt a workable approach (as I suppose we have all along in contract law). Some issues are governed by ex ante rules to constrain judicial discretion; others will be decided later with standards when more facts are available.[68] This takes us to a second challenge: how complex should these rules or standards be?

B. The Precision Question

What is the optimal precision, or granularity, of an economic frame on contract law? Should we prefer simple rules that apply equally to all parties, or should we consider adopting more complex rules to offer customized treatment to various segments of the econ-

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for default rules in contracts); Kaplow, 42 Duke L J at 579–84 (cited in note 61) (analyzing the costs and benefits involved in rule creation at various stages, including law promulgation, the choices of individuals, and law enforcement).

66 These facts are taken from *Neumiller Farms Inc v Cornett*, 368 So2d 272 (Ala 1979).

67 See Posner, 83 Tex L Rev at 1582–84 (cited in note 37) (noting that "[d]eliberate ambiguity may be a necessary condition of making the contract" and that "it would be a mistake for courts to take the position that any ambiguity in a contract must be the product of a culpable mistake by one or both of the parties").

68 There may also be some hybrid approaches blending ex ante and ex post adjudication. See Ayres, 3 S Cal Interdiscipl L J at 1–17 (cited in note 62) (discussing the characteristics and benefits of many permutations of rules and standards in contract law, including complex/simple, ex ante/ex post, and tailored/untailored rules and standards).

omy? This choice presents an additional overlay on the previous timing question: we might have simple or complex rules, and simple or complex standards. And while many economic commentators seem to prefer a simple approach,[69] either framework is theoretically compatible with a greater sensitivity to economic incentives in contract law.

The conceivable benefit of more complex laws is that they can offer contracting parties customized legal treatment, finely tailored to the circumstances of their deal. In a sense, this relates back to Goldberg's intuition that judges are missing economic nuances because litigators are forced to cram issues into doctrinal boxes, while transactional lawyers have a more precise set of tools to use while engineering their deals. One way to solve this concern, then, might be to increase the resolution of doctrinal cubbyholes in an attempt to better match ex post litigation with ex ante dealmaking. In other words, lawmakers would set different default rules for different groups of contracting parties in order to cut their contracting costs and provide customized legal treatment. This sort of approach is, after all, exactly what sophisticated firms do with their customers in an attempt to better serve their needs.

Unfortunately, selecting a level of granularity in contract law is a byzantine problem. Into how many groups should we splinter our society? The UCC, for example, famously enacts different rules for consumers and merchants.[70] Similarly, common law default rules occasionally differ from those of the UCC. But it is not self-evident that bifurcating contract law between consumer and merchant—or between goods and services—presents an optimal segmentation. Why not three different groups? Why not ten?[71]

Furthermore, implementing complex laws is cumbersome. As demonstrated by the federal tax code (one of our more granular approaches to lawmaking), writing and administering intricate rules is replete with challenges. Will a contracting party even be aware of her default legal treatment? Will this lead to greater judicial error when

69 See, for example, Schwartz and Scott, 113 Yale L J at 598–99 (cited in note 59) ("Default rules would be too expensive to create if efficient solutions were party-specific. Then there would need to be as many legal rules as there are sets of contracting parties.").

70 UCC § 2-104(1) (ALI 2005) defines a merchant, and several other sections of the Code offer customized default rules for merchants. See, for example, UCC § 2-205 (ALI 2005) (allowing merchants, and only merchants, to write firm offers); UCC § 2-314 (ALI 2005) (imposing higher warranty standards on merchants).

71 Richard Craswell puts the problem this way: "If different rules would be efficient for different contracting pairs, the law must also to decide the extent to which its default rules should be 'tailored', or customized to match the rule that would be most efficient for each individual contracting pair." Richard Craswell, *Contract Law: General Theories*, in Boudewijn Bouckaert & Gerrit De Geest, eds, 3 *Encyclopedia of Law and Economics: The Regulation of Contracts* 1, 5 (Edward Elgar 2000).

courts pick the wrong law to govern a dispute? Will parties just opt out of the muddle and incur unnecessary transaction costs to write their preferred terms explicitly? The price of complexity is conceivably worth it under the right circumstances,[72] but some commentators have seized upon these tough questions to advocate very simple rules. The best answer is hardly obvious.

C. The Multiple-equilibria Question

The Nash equilibrium, named after Nobel laureate John Forbes Nash, is one of the more important concepts in game theory. It is used to describe a situation where all parties to a given economic game have nothing to gain by changing their strategy—assuming that the other players will also keep theirs unchanged.[73] In other words, Ann and Bob are in Nash equilibrium if Ann is making the best decision she can, taking account of Bob's decision, and Bob is making the best decision he can, taking account of Ann's decision.

Yet, as any game theoretician knows, there can often be more than one Nash equilibrium for a given state of affairs.[74] This may lead to coordination problems, where the players will need to second guess which decision will generate the best outcome. To take a simple example, consider a game where two players must decide whether to drive on the right or left side of a road. If they both choose the same side, then they get to their destination safely (a payoff of zero); otherwise they crash (a negative payoff). There are two Nash equilibria here (left-left and right-right), but the parties may still collide if they have no basis for preferring one side over the other. Here, then, is where the law can conceivably play a valuable role by mandating the rules of the road. But how should a lawmaker decide which side to select? Either is efficient.

Extending this analogy to contract law, recent research suggests that there may be several different ways to govern some fundamental issues—each of which can theoretically provide sound economic results. Even assuming, then, that lawmakers are able and willing to

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72 I have explored some of these tradeoffs elsewhere. See generally George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 Tulane L Rev 1109 (2006) (discussing the costs and benefits associated with complex rules and reporting on an empirical experiment designed to investigate the optimal precision of legal default rules).

73 See Avanish Dixit and Susan Skeath, *Games of Strategy* 86–89 (W.W. Norton 2d ed 2004). See also Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law* 19–20 (Harvard 1994) (applying the concept of Nash equilibrium to negligence regimes).

74 See, for example, Baird, Gertner, and Picker, *Game Theory* at 35 (cited in note 73) (explaining the potential problem of multiple Nash equilibria using an example involving riparian landowners who only have an interest in building and maintaining levees if their neighbors also do so).

place an economic frame on contract law, it may still be difficult to know which of several equally good rules to adopt.

For example, recall the long-running (and still-lively) debate about the best remedy for breach of contract. As I have discussed earlier in this Review, a contract might be reconceived as granting every promisor an option to perform or pay damages.[75] Under our current legal bias for expectation damages, returning the nonbreaching party to postcontractual parity (subject to the usual limitations of certainty, foreseeability, and so on) will, by default, be the price of exercising that cancellation option on the contract. Of course the parties might change the "exercise price" by insisting on (reasonable) liquidated damages or some other sanction for breach. The point is that ownership of the embedded option, the entitlement to force nonperformance, is enjoyed by the promisor.

When viewed this way, there is no obvious reason why we should use expectation damages as the exercise price of an option to abandon,[76] but this rule may nevertheless do a pretty good job of promoting efficient trade and investment. Efficient trade is encouraged because the breaching party will internalize the value of performance to the nonbreaching party when deciding whether to cancel the deal. Efficient reliance (or investment) is encouraged because the nonbreaching party can behave as if performance will take place.[77] So our current remedial system, while not perfect, may serve as a decent default.[78]

But might there be another way to structure remedial entitlements that can also midwife efficient outcomes? Richard Brooks, for example, has recently argued that a mirror image regime could do the trick.[79] Under his approach, an alternative default rule would be estab-

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75 See note 50 and accompanying text.

76 Scott and Triantis, 104 Colum L Rev at 1432–34 (cited in note 10) (arguing that "[t]he buyer may be prepared to pay a premium to be able to shift both the risk in the value of performance and the risk in the seller's costs" by agreeing to pay liquidated damages, but the current penalty rule will not allow this).

77 There is, however, a good argument that this might lead to over-reliance in some circumstances. See Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 Yale L J 829, 835–36 (2003):

> A person who invests money . . . will invest more if the outcome is certain than if the outcome is uncertain. Because expectation damages provide a return to the promisee whether or not breach is efficient, the promisee will invest as though the yield of the investment would occur with probability of 1 rather than with the probability (< 1) that performance occurs. The promisee thus invests an amount greater than would be efficient.

78 More freedom to set the option price via liquidated damages is one obvious improvement. See Scott and Triantis, 104 Colum L Rev at 1453–56 (cited in note 10) (suggesting that allowing liquidated damages could encourage "contracting for efficient termination rights").

79 See Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 Yale L J 568, 573 (2006) (developing "an efficient performance hypothesis, structured to give the promisee the right to compel performance and capture all or some of the profits when nonperformance is elected").

lished where the promisee could either demand specific performance or compel breach and receive the promisor's cost of performance. Thus the famous Holmesian (Oliver Wendell, Jr., not Sherlock) statement that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else"[80] might be modified to "the duty to keep a contract is absolute unless the other party wants your opportunity cost of performance instead." Brooks goes on to show how this should promote efficient outcomes because the promisee will now internalize the costs and benefits of performance. The only difference is that the underlying entitlement shifts from promisor to promisee.

Facing this fork in the road, lawmakers need some other basis for deciding whether to grant an abandonment option to the promisor, to grant it to the promisee, or to do something in between.[81] One solution would be to use morality and ethics as a sort of tie breaker: it is wrong to break our promises, so, everything else being equal, the default entitlement should be given to the promisee.[82]

Another possible way to resolve this stalemate is to subject the theoretical efficiency of alternative remedial regimes to empirical testing. This might take the form of gathering data on the social meaning of contractual intentions—do most parties understand when they sign a contract that promisors are allowed to breach if willing to pay the price?[83] Such an inquiry is possible to conduct, I suppose, although I am aware of few efforts to do so.

A second worthwhile area of empirical inquiry might examine the relative administrative burdens of operationalizing alternative rules. For example, in a lively follow-up discussion to Brooks's essay, Jody Kraus argues that the information necessary to implement the

80 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv L Rev 457, 462 (1897).

81 Lee Anne Fennell has recently explored the possibility of using options embedded within other options to elicit private information. See Fennell, 118 Harv L Rev at 1402–07 (cited in note 48) (discussing "entitlements that require the entitlement holder to craft an option to which other parties can respond"). While her work focuses primarily on property law, there may be some intriguing extensions of this idea into contract default rules.

82 See Brooks, 116 Yale L J at 586–95 (cited in note 79) (suggesting that granting the nonperformance option to the promisee is more consistent with "broadly held moral intuitions about promises and contracts"). It is worth asking, however, whether a rule allowing promisees to bar promisors from keeping their word in order to take their money has any moral superiority. See generally Jody S. Kraus, *A Critique of the Efficient Performance Hypothesis*, 116 Yale L J Pocket Part 423 (2007), online at http://yalelawjournal.org/content/view/576/14/kraus.html (visited Jan 12, 2008) (disagreeing with Brooks by arguing, among other things, that "the moral objection motivating [the] new remedy is itself unmotivated").

83 See Brooks, 116 Yale L J at 588 (cited in note 79) (noting that "scholars have made relatively little effort to identify empirically the social meaning of contractual promises").

mirror image regime would be harder for private parties to obtain.[84] Along these lines, we might also study which rule would be easier for courts to implement. In the same exchange, Eric Posner makes the point that empiricism might eventually "trump" morality as a basis for breaking the tie,[85] and even Brooks admits that for rules seeking allocative efficiency, empirical analysis is the only way forward.[86]

Multiple solutions may exist for other areas of contract law as well. Eric Posner has made this sort of argument before, hypothesizing that contract law may indeed be analogous to the rules of the road, with many equally good ways to drive, as long as we all follow the same system.[87] Or, said more bluntly, an economic framework for contract law is indeterminate. I am more optimistic that some rules can be demonstrated as empirically better than others—though this will not be easy. Yet there is something appealing about Posner's claim, and many issues in contract law may actually have several equally good solutions that resist empirical tie breakers.

D. The Intent Question

Finally, suppose that despite the difficulties of timing, complexity, and multiple equilibria we are nevertheless able to assemble a pretty good collection of rules to govern our contracts. These laws may not be perfect, but, as Goldberg shows, there is probably ample room to design rules that take greater account of the economic incentives underlying individual transactions. Unfortunately, this improved regime would lead to yet another prickly question: how should we understand the power of private intent to override contract law?

This is no trivial matter, as a great virtue of contract law lies in its flexibility and in the freedom of parties to make their own private

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84 Kraus, 116 Yale L J Pocket Part at 433 (cited in note 82) (criticizing the new remedy proposed by Brooks on the basis that "[s]imple information economics suggests that it will cost more for the promisee to prove the value of the breach to the promisor than to prove the value of her own expectancy").

85 See Eric A. Posner, *What the Efficient Performance Hypothesis Means for Contracts Scholarship*, 116 Yale L J Pocket Part 438, 439–40 (2007), online at http://yalelawjournal.org/2007/07/23/posner.html (visited Jan 12, 2008) ("[I]f the empirical puzzle is ever resolved, then an efficiency-oriented court will not have the flexibility to choose a remedy that is sensitive to non-efficiency ethical considerations.").

86 See Richard R.W. Brooks, *What Efficiency Demands: The Efficient Performance Hypothesis Defended*, 116 Yale L J Pocket Part 14, 19–20 (2007), online at http://yalelawjournal.org/2007/07/24/brooks.html (visited Jan 12, 2008) ("Any tie-breaker [rooted in efficiency considerations] must be an empirical one. I am deeply skeptical of our capacity and willingness to search out that empirical answer.").

87 Posner, 112 Yale L J at 865 (cited in note 77) ("Individual contract doctrines, then, could be like rules of the road: sufficient as long as, within limits, everyone obeys them, and thus not susceptible to prediction on the basis of fine-grained theories of optimal interaction.").

laws.[88] This customization is also thought to be economically efficient—since the parties can write value-enhancing provisions whenever the benefits of individualization exceed their collective transaction costs. And while I'm no expert here, I also understand intent to be fundamental to most philosophical arguments for upholding promises.[89]

But how should intent practically manifest itself in contract law? Should we understand intent objectively or subjectively? How much work should our courts undertake in order to decipher and effectuate this intent? And where should we draw the line on the power of intent to overwrite law?

There are some obvious limits. Parties lacking *real* intent—through flaws from incapacity, fraud, duress, mistake, and so on—should not be able to draw upon the power of the law to back their bargains. And even parties with perfectly clear intentions and desires should not be able to change some rules or enter into some deals—such as those resulting in harmful externalities or dysfunctional markets. But what about the vast middle ground between these boundaries? What lessons can economics provide for a proper understanding of intent?

Goldberg does not take on these questions directly—and to do so would probably double the length of his book. But he does set the stage for further discussion with his analysis of the *Alcoa* dispute. After showing how the parties did a lousy job drafting their contract (recall that, among other things, they largely overlooked inflation in the price index), Goldberg asks whether a court should step in to fix the whole mess by mandating a better pricing formula (p 349). It is tempting to conclude (as the court ultimately did) that this is what preserving original intent demands; certainly it is the approach most likely to comport with the parties' initial goals. But, then again, can we ever know ex ante intentions with certainty? And how far should courts go in these efforts? Once we wade into the hazardous (and expensive) waters of reforming contracts to preserve true intent, it becomes quite tricky to place boundaries on judicial action[90]—even with a "great metaphysical solvent" like the objective test.[91]

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88 See Harry W. Jones, *The Jurisprudence of Contracts*, 44 U Cin L Rev 43, 50–54 (1975) (arguing that freedom of contract allows decisions of great social importance to be "made not by government or any department of government but by private individuals and organizations").

89 See generally, for example, Randy Barnett, *A Consent Theory of Contract Law*, 86 Colum L Rev 269 (1986) (arguing that "[p]roperly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent").

90 For example, why did the *Alcoa* court decide to use a 1 percent markup instead of 5 percent? Why did it select a dual pricing structure (the higher of the actual price formula or a 1 percent cost markup)? And so on.

91 See Grant Gilmore, *The Death of Contract* 42–43 (Ohio State 1974).

All of this is simply to say that contractual intent invokes epistemological concerns and competing objectives that are difficult to reconcile, even under an economic frame. At the macro level, we can say that contract law should indeed seek to facilitate the voluntarily transfer of resources to their highest-value users with a minimum of transaction costs (broadly defined).[92] At the micro level, we can say that the law should certainly work harder to understand and preserve (or at least not distort) the careful balance of economic incentives in a given transaction. But how we get from here to there—that is, what rules will best translate micro intentions into macro efficiency—remains an elusive will-o'-the-wisp.

CONCLUSION

Economics has permeated the study of contract law for the past few decades, and it is fair to ask whether *Framing Contract Law* really offers up anything new. The answer is an unqualified yes: by insisting that lawmakers pay more attention to the economic context of disputed transactions—and by showing how time after time they are getting it wrong—Goldberg exposes a longstanding divide between legal scholarship and everyday adjudication. In an era in which commentators are beginning to question whether the economic analysis of contract law has slammed into a dead end,[93] this underscores the need for a reconciliation between theory and practice.

Yet if Goldberg has identified the gulf between classroom and courtroom, much more work is now required to determine how any sort of bridge might be erected. Should we prefer certain, but inflexible, rules over ambiguous, yet forgiving, standards? How granular should our laws be? What should we do when the same issue has several plausible solutions? And how should we understand transactional intent to alter any rules that we do adopt? I don't suggest that any of these questions are easy; maybe they render economic theories of contract law indeterminate beyond a few lofty tenets. But asking lawmakers to try harder on the economics, without providing additional guidance on the underlying design principles that they should follow, may not get us very far.

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92 Posner, 83 Tex L Rev at 1583 (cited in note 37) ("The goal of a system, methodology, or doctrine of contract interpretation is to minimize transaction costs, broadly understood as obstacles to efforts voluntarily to shift resources to their most valuable use.").

93 See, for example, Posner, 112 Yale L J at 879–80 (cited in note 77) (recognizing the important impact that economics has had and is likely to continue to have on contract law scholarship but suggesting that "economics fails to explain contract law" and "economics provides little normative guidance for reforming contract law").

This is not to say, however, that we should throw up our hands and abandon the effort. In an age of ubiquitous information and powerful supercomputing, some of the empirical problems may eventually prove tractable, even if others remain harder to pin down. And a robust understanding of behavioral incentives can still yield insights into the partial effects of alternative legal regimes.[94] In other words, it is still helpful to point out mistakes even if the systemic solutions are not yet known. Economics may indeed influence substantive contract law over the next fifty years as much as it has altered antitrust law during the past fifty. This book, though not the last word on the subject, should help that project along its way.

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94 On the benefits of partial economic analysis for contract law, see generally Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 Yale L J 903 (2003) (addressing Eric Posner's claim that economic analysis has failed as a descriptive theory and as a normative theory).