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A replication of Macaulay's 1963 study of Wisconsin manufacturers shows that manufacturers are using a new type of contract to govern changed transactions and to establish new forms of industrial organization. This article seeks to specify these changes and to demonstrate their theoretical significance by constructing an empirically and theoretically informed analytical framework. This framework establishes relations of meaning between discrete contracts, job shop production, and classical contract law; between open-term contracts, mass production, and neoclassical contract law; and between long-term agreements, flexible production, and a "shadow" relational contract law. It demonstrates that long-term agreements constitute a new device for governing exchange, that they are part of a broader change from mass production to flexible production, and that their distinctive features are not recognized by neoclassical contract law.

Since the late 18th century, thinkers have asserted that the modern economy and its legal system was and should be contractual.[1] That is, economic obligations were or should be explicitly planned and consented to ahead of time by the obligated parties rather than arising implicitly from the social status of, or ongoing relationships between, the obligated parties. The

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1. Adam Smith, *The Wealth of Nations* (New York: Penguin, 1979 [1776]); Henry Sumner Maine, *Ancient Law* (New York: Dorset Press, 1986 [1861]); Herbert Spencer, *The Principles of Sociology* (New York: D. Appleton, 1898).

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legal system did or should enforce only those agreements which were contractual in nature—that is, fully planned and freely consented to.

Until relatively recently, the question of contract was mainly debated as a question of degree. Legal scholars debated the degree to which commercial law was or should be contractual or noncontractual.[2] Social scientists debated the degree to which economic transactions were or should be contractual or noncontractual.[3] Law and society scholars debated the degree to which economic transactions actually conformed to and were enforced through contract law and its enforcement mechanisms.[4]

One oft-cited example of this tradition is Stewart Macaulay's 1963 article "Non-contractual Relations in Business."[5] Macaulay asked: What good is contract law? Who uses it? When and how? Using existing contract law as a standard, Macaulay defined a "contract" as a device for conducting exchanges. Two characteristics made an exchange device contractual: "(a) Rational planning of the transaction with careful provision for as many future contingencies as can be foreseen, and (b) the existence or use of actual or potential legal sanctions to induce performance of the exchange or to compensate for non-performance."[6] He conducted interviews with more than 40 representatives of Wisconsin manufacturers to assess empirically the degree to which they used contract (so defined) to conduct their exchanges.

Macaulay determined that manufacturers only partially relied on contract law in establishing their exchanges and rarely relied on contract law to adjust or enforce their exchanges. In practice, manufacturers left gaps in the rational planning of their exchanges. These gaps were filled in later during the performance of the exchange. Disputes were avoided through various "non-contractual relations," including (1) reference to general business norms of good faith and fair dealing, to industry customs, to understandings between the parties that had developed implicitly over a long history of past exchanges, and to personal relations between the parties; or (2) fear of losing personal reputation, professional reputation, or future business. He explained that contractual relations were often more dysfunctional than noncontractual relations for the conduct of ongoing business.[7]

How have things changed since then? In conducting their exchanges, do Wisconsin manufacturers use contract to a greater or lesser degree than they did 30 years ago? What good is contract law *today?* Who uses it? When

2. Compare Samuel Williston, *Contracts* (3d ed. St. Paul, Minn.: West Publishing Co., 1957), and Arthur Corbin, *Corbin on Contracts* (St. Paul, Minn.: West Publishing Co., 1952).

3. See Richard Swedberg, *Economics and Sociology* 3–19 (Princeton, N.J.: Princeton University Press, 1990).

4. See "Symposium: Law, Private Governance and Continuing Relations," 1985 *Wis. L. Rev.* 461.

5. Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study," 28 *Am. Soc. Rev.* 55 (1963).

6. *Id.* at 56.

7. *Id.*

and how? To answer these questions, I conducted a replication of Macaulay's interviews. Originally, Macaulay conducted 57 interviews with representatives of 48 companies of which 43 were manufacturers. While these included manufacturers of such diverse products as guns, office furniture, children's books, and pens, 17 were concentrated in three broad product lines of machinery: motorized vehicles (e.g., farm machinery and motorcycles), paper producing or processing machinery (e.g., paper mills and labeling equipment), and machinery installed in commercial construction (e.g., air conditioning and industrial pumps). An additional 13 companies were either parts suppliers or purchasers of this machinery. I identified 40 of the same companies and/or establishments ("factories") making roughly the same product today. I was granted interviews with purchasing and/or sales managers in 36 of these companies and/or establishments.

Questions were designed to assess who the companies' suppliers and customers were; the organization of their production processes; the types of contracts they used; the type of transactions that these contracts governed; the extent to which they relied on the contracts and the legal system to establish, adjust, and enforce these contracts; and what other types of relations they relied on to plan, adjust, and enforce their exchanges. I then compared these with the responses that Macaulay collected 30 years ago.[8]

Three findings indicate that changes are underway in Wisconsin manufacturing.

First, Wisconsin manufacturers understand their dealings to be in the midst of profound change. Of the 37 manufacturers interviewed, 10 are using a new type of agreement (the long-term agreement) to establish a new type of governance relation (long-term exclusive relations) for governing a changed exchange of goods (the continuous delivery of higher-quality parts, subject to frequent changes in quantity and design).[9] Indeed, the purchasing manager for one producer of farming machinery opened our conversation by saying, "I'm sure you are here about our new partner relation with our suppliers." As for those companies not party to a long-term agreement, they know of these innovations and are watching them closely. The words of a manufacturer of industrial pumps was typical: "While we have yet to enter such an arrangement, we are aware that this type of agreement is out there, and we are watching how they turn out." *Are these long-term agreements a "new" device for governing exchange, or are they merely a variation on the model of contract that Macaulay found in contract law and used to assess exchange practices 30 years ago?*

Second, Wisconsin manufacturers suggest that these transformations in exchange are related to a host of other changes in their business, including changes in market conditions, marketing strategy, the machines used, the

8. Macaulay graciously granted me access to the notes from his original interviews.
9. *Infra* at 620–23 and appendix, Contract 3.

organization of the shop floor, and/or the organizational structure of the entire industry. When I asked agents involved in long-term agreements why they were using them, they would jump into a discussion of "niche marketing," "dedicated production," "new plant-floor layouts," "just-in-time inventory," "quality control systems," "new materials handling systems," or the like. Indeed, even the respondents not involved in long-term agreements saw their industry to be in the midst of important changes involving a package of similar innovations. *Are these new long-term agreements part and parcel of a wholesale change in the structure of industrial organization?*

Third, shortly after Macaulay conducted his research, there was a major reform of contract law as it applies to the sale of goods (including exchanges between manufacturers). Between 1957 and 1967, all the states (except Louisiana) replaced their existing statute and common law of sales with the Uniform Commercial Code (UCC). Drafted by Karl Llewellyn, the UCC is specifically designed to give greater legal recognition and enforcement to sales contracts with extensive gaps in the "rational planning of the transaction" and in the "careful provision for as many future contingencies," as well as greater legal recognition and enforcement of the noncontractual relations used to fill in these gaps. The UCC is an effort in legal realism—an attempt to bring to the "law-on-the-books" a more realistic depiction of the "law-in-practice." *Does this change in sales law from a "classical" to a "neoclassical" model of contracting give legal form and enforcement to the new long-term agreements being used by Wisconsin manufacturers?*

These findings suggest changes in the "contractual" nature of Wisconsin manufacturers' exchange practices that are less a question of *degree* than a question of *kind*. The question of contract should not be: Are business practices more or less contractual by the standard of contract law? Rather, the question should be: What types of business practices are more or less contractual by what standard of contract law?

This article will answer this last question by constructing an empirically and theoretically informed analytic framework. Such a framework must do several things. First, it must distinguish between various types of *transactions and the contracts used to govern them*, various *structures of organization in industry*, and various *structures of knowledge in contract law*. Second, it must identify and explain the internal logic that makes a given exchange compatible with a given industrial organization and a given structure of contract law. Finally, this framework should specify the progression of these structures of exchange, industrial organization, and contract law in history.

Through the construction and application of such a framework, I will demonstrate that the long-term contracts and industrial organization emerging in Wisconsin industry are qualitatively new and theoretically significant. Further, I will demonstrate that these forms of business dealings are

not consistent with the model of contracting implicit in neoclassical contract law.

I. THE LITERATURE

Legal scholars recognize that the structure of contract law has changed over time.[10] They understand the history of contract law as a progression of "theories of contract" that use different images of the practice of market exchange, including (1) the classical theory of contract and (2) the neoclassical theory of contract. Further, they question whether a third theory of contract is emerging through legal scholarship and through the occasional novel common law decision. Some refer to this "shadow theory" as (3) the relational theory of contract. Legal scholars are aware that the law of contract has changed as the needs and practices of the commercial world have changed. However, they rarely go far beyond such general assertions to characterize what the organizational structure of the commercial world is or to specify how it has changed.

Not surprisingly, industrial organization and American business history go much further in characterizing and specifying the organizational structure of industry.[11] They tend to specify the history of industrial organization as a progression of industrial strategies and structures, including chiefly job shop production and mass production. Further, several have asked whether a third form of industrial organization—flexible production—is emerging in the present economy. Such scholars are aware that industrial production is serviced by contract law and its enforcement mechanisms. However, they rarely go far beyond such general assertions to characterize just what the structure of legal knowledge is or to specify how it has changed.

Three recent traditions *do* attempt to explain the connections between qualitative differences in industry structure and contract law: transaction cost economics (TCE), strategy and structure theory (SST), and the sociology of institutionalization (SofI).

Transaction cost economists recognize the importance of characterizing and explaining differences in the structure of exchanges, including both the unit transactions and the contract devices used to govern them. TCE theorizes three generic types of contractual governance relations:

1. Discrete contracts

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10. See especially Ian Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, NeoClassical, and Relational Contract Law," 72 *Nw. U.L. Rev.* 854 (1978). See also Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974) ("Gilmore, *Death of Contract*"); *id.*, *The Ages of American Law* (New Haven, Conn.: Yale University Press, 1977) ("Gilmore, *Ages of American Law*").

11. See, e.g., Alfred Chandler, *The Visible Hand* (Cambridge: Harvard University Press, 1977) ("Chandler, *Visible Hand*"); Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide* (New York: Basic Books, 1984) ("Piore & Sabel, *Second Industrial Divide*").

2. Long-term incomplete contracts[12]
3. Hierarchical fiat

The affinity of different contract devices for different types of transactions is explained to be a consequence of transaction-cost economizing. In establishing economic exchanges, businesses seek to economize not only on production costs but also on transaction costs—that is, on the costs of establishing, adjusting, and enforcing their transactions in the face of opportunistic behavior. Some types of contractual or "governance" relations are more transaction-cost efficient than others in governing the various types of transactions. Transactions differ in their frequency, in their uncertainty, and in their asset specificity. Asset specificity is especially determinative. Discrete contracts are the most efficient means for governing transactions which involve low asset specificity. Long-term incomplete contracts are the most efficient means for governing transactions with moderate asset specificity. Hierarchies are the most efficient means for governing transactions with high asset specificity.[13]

TCE relates various types of contractual exchanges, industrial organization, and contract law using a "bottom-up" approach. The transaction is TCE's independent variable. The organization of an industry is the aggregation of its bimodal governance relations as determined by the characteristics of its transactions. Discrete contracts aggregate to form markets, long-term incomplete contracts aggregate to form "hybrids." Hierarchies aggregate to form firms. Various types of contract law give form and enforcement to various types of governance relations. Classical contract law defines and enforces discrete contracts. Neoclassical contract law defines and enforces long-term incomplete contracts. Forbearance law officially declines to define and enforce hierarchical commands.[14]

TCE establishes and explains the link between types of transactions, governance devices, industrial organization, and contract law. Hence I will incorporate the insights of transaction cost economics into my analysis below. However, TCE raises two problems that force me to move beyond it.

First, because it takes the transaction as its basic unit of analysis, TCE takes the characteristics of the transaction as independent variables and uses them to explain the organization of the industry (its dependent variable). In my study of Wisconsin manufacturing, I observed changes in the characteristics of transactions. Why have these changes occurred? My re-

12. In sec. V.B below, I refer to these as "open term contracts"; for an example, see appendix, Contract 2. I distinguish these contracts from the "long-term agreements"; for an example, see appendix, Contract 3.

13. Oliver Williamson, "Comparative Economic Organization: The Analysis of Discrete Structural Alternatives," 36 *Admin. Sci. Q.* 269 (1991); *id.*, *The Economic Institutions of Capitalism* esp. at 72–80 (New York: Free Press, 1985) ("Williamson, *Economic Institutions*"); William Ouchi, "Markets, Bureaucracies, and Clans," 25 *Admin. Sci. Q.* 129 (1980); Ronald H. Coase, "The Nature of the Firm," 4 *Economica* N.S. 386 (1937).

14. Williamson, 36 *Admin. Sci. Q.* at 271–77.

spondents suggested that the nature of their exchanges changed because of broader changes in the strategy and structure of their industry. Because TCE does not provide a theory of why the characteristics of transactions change, I must move outside TCE theory to explain this change.

Second, because TCE uses the various types of contract law as a source for its varying models of governance of relations, it has difficulty recognizing new forms of contractual relations not yet recognized by the various types of contract law. Ronald Coase, writing in the 1940s before the full implementation of neoclassical contract law, saw only markets and firms, even though long-term incomplete contracts were already in use.[15] Oliver Williamson, writing in the 1980s after the full implementation of neoclassical contract law, saw markets, firms, *and* hybrids. Now, the new long-term agreements being written by Wisconsin manufacturers may merely be a new variation of Williamson's hybrid form. But if they constitute a new, fourth form of governance relation already in business use but not yet represented in contract law, TCE might fail to "see" it.

The sociology of institutionalization (SofI), like TCE, explains qualitative differences between and internal connections between contracts, industrial organization, and contract law.[16] However, SofI presents different reasons for these internal connections and, in presenting a causal analysis, tends to favor more of a "top-down" approach.

SofI takes the institutional environment within which organizations operate as its independent variable. In perceiving their economic situation, evaluating their alternatives, and selecting a type of governance relation and industrial organization, businesses deploy values, norms, concepts, models, and cognitive processes learned from their broader social context. Whether they believe in these cultural forms or not, their decision-making process and the governance and organizational forms they adopt will be evaluated in these terms by other organizations within their institutional environment. Thus, the type of governance relation selected to establish, adjust, and enforce a given transaction, and the organization of a broader segment of the production stream into a firm, market, network, or whatever, are chosen in part because they are seen as "normal," "appropriate," "legitimate," "efficient," or "legally enforceable" by the broader business community and, perhaps, by the parties themselves. Hence, for a given type of governance relation or industry structure to become predominant and stable across an industry and over time, it must be institutionalized in the cultural

15. Coase, 4 *Economica*.

16. Sharon Zukin & Paul DiMaggio, *Structures of Capital: The Social Organization of the Economy* (New York: Cambridge University Press, 1990); Paul DiMaggio & Walter Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," 48 *Am. Soc. Rev.* 147 (1983); Mary Douglas, *How Institutions Think* (Syracuse, N.Y.: Syracuse University Press, 1980); John Meyer & Bryan Rowan, "Institutionalized Organizations: Formal Structure as Myth and Ceremony," 83 *Am. J. Soc.* 340 (1977).

forms of academic knowledge, accepted business practice, law, and other elements of the institutional environment.

SofI explains why a meaningful link exists between the different types of contract law and the different types of contracts used to govern business transactions. It also explains why contract law must change when governance practices change and vice versa. It is difficult for business practices to stabilize around a new form of governance relation unless this new form is institutionalized in the legal, cultural, and political environment of business. Among other things, this means that a description of the type of contract manufacturers use to govern their transactions must be represented in the concepts of contract law. The concepts of contract law give businesses the models they follow in constructing their contractual relations, either passively ("this is how one writes proper contracts") or actively ("this is how we must write our contract for it to be legally enforceable"). Thus, a change in business contracting practices will only stabilize and prevail as a predominant form of doing business if (among other things) it is institutionalized in the body of contract law.

I will incorporate the insights of the SofI into my analysis below. However, SofI raises several problems that force me to supplement its insights. First, SofI tends to underemphasize the constraints the technology, geography, and organization of production impose on the range of industrial strategies that are viable. Second, SofI tends to focus on the impact that established institutional environments have on organizations. In my case, I will anticipate the type of legal environment that needs to be instituted in order to stabilize already-existing business exchange practices.

Strategy and structure theory (SST) provides a nice corrective to the shortcomings of both TCE and SofI because it focuses on the "middle level" of industrial organization.[17] It takes the industry as its unit of analysis and the source of its independent variables. Changes in market demand, competition, sources of supply, economic conditions, and technology can offer new strategies of marketing and producing a competitive advantage over old ways of doing business. The pursuit of new marketing and production strategies require knitting together the total resources of an industry in new ways to pursue different courses of action. This includes new ways of selling products; new ways of organizing plants; new types of machinery; new ways of organizing workers and their skills; new ways of conducting research and design; new ways of handling materials. This requires a change in the struc-

17. Alfred Chandler, *Strategy and Structure: Chapters in the History of the American Industrial Enterprise* 13–14 (Cambridge, Mass.: MIT Press, 1962) ("Chandler, *Strategy & Structure*"); *id.*, *Visible Hand* (cited in note 11); *id.*, "Historical Determinants of Managerial Hierarchies," *in* Andrew Van de Ven *et al.*, eds., *Perspectives on Organizational Design and Behavior* 391–402 (New York: Wiley, 1981); Paul R. Lawrence & Jay W. Lorsch, *Organization and Environment* (Cambridge: Harvard University Press, 1967); James D. Thompson, *Organizations in Action* (New York: McGraw Hill, 1967).

ture of the organization/s through which the industry is governed. For example, Alfred Chandler argues that strategies to expand volume and disperse geographically led to the replacement of markets by vertically integrated firms with a multidepartmental structure. In short, the organizational and technological structure of an industry expresses the industrial strategy it pursues.

SST demonstrates that to explain why changes occur in the characteristic flow of goods through an industry, one needs to look to changes in the marketing and production strategy being pursued at the level of the industry. When, for example, a concatenation of changes in market demand, technology, or production technology opens up the opportunity for new industrial strategies, the characteristic flow of materials through the industry may change. This constitutes a change in TCE's characteristic features of the unit transaction, with all its transaction cost implications for bimodal governance relations.

While transaction cost economics, the sociology of institutionalization, and strategy and structure theory all seek to explain the structure of economic organization, their theories are incompatible in that each points to a different independent variable on a different social level. Fortunately, I do not need a causal analysis to answer my questions. I want to determine whether the long-term contracts and industrial organization emerging in Wisconsin industry are qualitatively new and theoretically significant and to determine whether these new forms of business dealings are inconsistent with existing neoclassical contract law. To answer these questions, I do not need a causal analysis; I only need an analysis of meaning.

A *causal analysis* establishes relations of cause and effect—that is, the strength and direction of influence which one institution has on another. A *meaning analysis* establishes that several institutions rest on similar premises, assumptions, norms, and values. A relationship of meaning exists when different institutions express a common set of purposes and orient the action of individuals accordingly. The demonstration of a meaningful relationship can be illuminating even where the causal connection between the institutions in question remains obscure and indeterminate.[18]

Once transaction cost economics, the sociology of institutionalization, and strategy and structure theory are stripped of their causal claims, their conceptualizations and insights can be profitably pooled. In the following pages, I will use their pooled insights to establish relations of meaning between specific contractual forms of bimodal exchanges, specific strategies and structures of industrial organization, and specific doctrines of contract law. Following SST, I show that the pursuit of a given industrial strategy requires a particular structure of industrial organization including a distinc-

18. This discussion draws heavily from Anthony Kronman, *Max Weber* (Stanford, Cal.: Stanford University Press, 1983), esp. 34–36 and 118–19.

tive flow of goods. Following TCE, I show that the distinctive characteristics of this flow of goods, as manifest in the characteristics of particular transactions, selects a particular governance relation. Following SofI, I show that the particular practice of market exchange is institutionalized as the image of contracting presumed by a given theory of contract law. Hence industrial strategy, industrial structure, transaction type, governance relation, and contract law all share the same presuppositions about what social interaction is and should be.

I remain agnostic on the causal mechanisms through which such a correspondence of meaning between exchanges, industrial organization, and contract law develops and the causal mechanisms through which each element helps secure the others' permanence over competing structures of knowledge and organization.

II. ANALYTIC STRATEGY

In establishing relations of meaning between economic exchanges, industrial strategy and structure, and contract law, it is analytically effective to begin with industrial strategy and move in turn from the industrial organization of the commodity stream, to the governance organization of the individual transactions within that commodity stream, and finally to the institutional environment of contract law. This analytic strategy is expressed in the structure of Figure 1, reading the categories in the left-hand column from top to bottom.

Economic Exchange & Industrial Organization

Following TCE, I understand an economic exchange to include, first, an underlying transaction of goods across technologically distinct production processes and, second, a governance relation used to plan, conduct, evaluate, adjust that transaction.[19] Economic exchanges are situated within an overall production and distribution stream. In general, industrial production involves a stream of economic exchanges that moves raw materials through a number of production processes until the final product is delivered to the consumer. In the industrial manufacture of goods, this typically involves exchanges between raw materials producers, intermediate product producers, major assemblers, distributors, retailers, and consumers. My main

19. I am using the terminology of transaction cost economics. See Williamson, *Economic Institutions* 15–42; Ouchi, 25 *Admin. Sci. Q.* 129–41. This is in contrast to Ian Macneil's terminology, who makes a distinction between discrete "transactions" and relational "contracts." In my terms, a given transaction may be conducted through either a "discrete contractual relation" or a "relational contractual relation." See Ian Macneil, *The New Social Contract* (New Haven, Conn.: Yale University Press, 1980) ("Macneil, *New Social Contract*").

THE ORGANIZATION OF INDUSTRY			
Organization	Job shop production (1840–1890)	Mass production (1890–1975)	Flexible production (1975–present)
Marketing strategy	Rapid market response	Low price & standard quality	Unique quality, service, or technology
Production strategy	Functional plant layout	Product-flow plant layout	Group plant layout
	using Process-specific machinery	*using* Product-specific machinery	*using* Process-specific machinery
	to produce Small volumes	*to produce* Large volumes	*to produce* Medium volumes
	of Specialized products	*of* Standardized products	*of* Specialized products
THE EXCHANGE			
Transaction	Irregular (when ordered) deliveries of small batches	Regular (monthly) deliveries of large batches	Continuous (daily) deliveries of small batches
	with Frequent product changes on short notice	*with* Infrequent product changes on long notice	*with* Frequent product changes on short notice
	redeploying Nonspecific physical assets	*redeploying* Specific physical assets	*redeploying* Nonspecific physical assets
Contract	Discrete contract	Open-term contract	Long-term agreement
	with Exchange terms	*with* Exchange & adjustment terms	*with* Adjustment & constitutional terms
	covering A single transaction	*covering* A set of transactions	*covering* Continuous transactions
	over A week/month	*over* 1–3 years	*over* 3–5 years
	requiring Communication regarding exchange	*requiring* Communication regarding exchange & adjustment	*requiring* Communication regarding exchange, adjustment, product design, mfg. design, finances, etc.
CONTRACT LAW			
Type	Classical contract law (1840–1905)	Neoclassical contract law (1905–1975)	Relational contract law (1975–present)
Image	Offer, acceptance, consideration	The business agreement-in-fact	Continuing relations
Recognized source of obligations	Contractual sources privileged	Contractual sources emphasized	Contractual & noncontractual sources equally recognized

FIGURE 1
Three production regimes

focus is on "intermediate" exchanges within the production stream between manufacturers, especially between intermediate product producers and major assemblers. As SST demonstrates, an overall production stream can be organized in various ways to pursue varying industrial strategies.[20] Changes in industrial strategy involve changes in the organization of the production stream, including changes in the attributes of the transactions through which materials flow.

Different *market conditions* are better exploited by some types of marketing strategies over others. A given *marketing strategy* is only feasible given a certain *production strategy*, which includes a given type of *production plan*. When industrial production is organized to pursue a given industrial (marketing and production) strategy, it presumes a certain type of *economic transaction* to operate efficiently. To plan, evaluate, and adjust a given type of economic transaction, manufacturers innovate particular types of *governance relations* generally, including (in our case) a different type of *contractual relation* specifically. These types of contractual relations can be characterized by the type of *written instrument* used to memorialize the relation.

Contract Law

"Contract law" is a bit of a misnomer. It suggests a body of legal principles enforcing obligations explicitly consented to by the parties to an agreement, in contrast to other bodies of law (torts, criminal law) enforcing obligations implicitly imposed on individuals by virtue of their membership in a community or some other noncontractual source. Yet contract law does not completely deliver on these promises.

First, contract law's ruling image of "*the* market exchange," and hence its understanding of "*the* contractual relation," has changed over time. Certainly, contract law always advances a model of a market exchange involving planning for the future and for legal enforcement. But contract law's understanding of the source for the terms of this exchange have also changed. At times these terms are derived from social customs of equitability, at other times from mutual consent to an exchange of promises, at yet other times from business agreements-in-fact, and at still other times from the long-term continuing relation between the parties.[21]

Second, even as contract lawyers strive to operationalize this (changing) image of the contractual relation as the source of legal obligations, they inevitably make implicit and explicit reference to noncontractual relations as the source of "contractual" obligations. While they may seek to privilege,

20. Chandler, *Strategy & Structure* 13–14.

21. For more specific concepts used for distinguishing various contract types, see *infra* at 608.

for example, the express terms of the parties' agreement as the source of the parties' legal obligations, they find themselves referring to and drawing on other noncontractual sources, including, for example:

The parties' course of dealing

The parties' course of performance

The industries' usages of trade

The power relation between the parties

General social norms of good faith and fair dealing

Just as contract law's ruling image of "*the* contractual relation" has changed over time, so, too, has its relative deployment of this entire range of social relationships.

Third, as contract lawyers strive to operationalize this (changing) image of the contractual relation and its (changing) sources of legal obligations, they legally recognize or fail to recognize various types of contract provisions. These include, for example, definitions of price, quality, quantity, and delivery, as well as rules to be followed should certain foreseeable contingencies arise.

Hence the structure of contract law as a body of legal knowledge can be characterized in terms of (1) *the modal image of market exchange* which contract law deploys, (2) its relative use of the entire array of possible *sources of social obligation* in its construction of explicit legal principles, and (3) *the types of contract terms* it recognizes as legally enforceable.

When lawmakers (including lawyers, judges, legislators, and legal academics) formulate specific principles of contract law, they presume a modal image of economic exchange. Following the insights of SofI, I will demonstrate that, at least over the past 150 years, this modal image of economic exchange has been drawn from intermediate product market exchanges in industrial production streams. As market conditions change, and hence prevailing industrial strategies change, the prevailing structure of these intermediate product market exchanges has changed. *Over the long run*, the modal image of market exchange held by lawmakers has changed accordingly. This, in turn, has led these lawmakers to revise legal principles of contract law to conform to the new image of the model market exchange. In the terms of legal academics, this constitutes a change in the theoretical perspective of existing contract doctrine.

III. THE EMPIRICAL STRATEGY

Empirical observations of exchange practices are drawn from Stewart Macaulay's interviews conducted around 1960 and my own interviews con-

ducted around 1990 with 36 Wisconsin manufacturing firms.[22] Both sets of interviews focused particularly on the type of intermediate transactions in goods each company conducted and the type of instrument used to govern those transactions.

Empirical observations of industrial organization were drawn from these interviews and from "histories" of these firms that I developed from business reference sources.[23] To flesh out the data, I relied on secondary sources in America business history, in industrial organization, and in the emerging literature on flexible specialization.[24]

For specifying the prevailing structure of contract law, I analyze contrasting doctrines in the common law, the Uniform Sales Act (1905), and the Restatement of Contract (1932); in the Uniform Commercial Code (1956) and the Restatement (Second) of Contract (1976); and in emerging cases and commentaries on relational contract (since 1973).[25] I also rely on secondary sources in contract law, especially the "relational contracting" literature associated with Karl Llewellyn, Grant Gilmore, Ian Macneil, and Stewart Macaulay.[26] I am especially interested in the image of market exchange invested in the concept of contract and the relative extent to which this image of market exchange relies on contractual relations and noncontractual relations.

IV. JOB SHOP PRODUCTION AND CLASSICAL CONTRACT LAW

A. Job Shop Production

During the mid- to late 19th century, industrial production became a significant presence in the American economy in the form of job shop or simple factory production.[27] This form of production developed at a time

22. Macaulay, 28 *Am. Soc. Rev.* 55 (cited in note 5); Stewart Macaulay, unpublished research materials.

23. *Moody's Industrial Manual*, 1914–91; numerous clippings regarding specific companies interviewed from a variety of newspapers and business periodicals.

24. See sources cited at notes 27, 37, and 41.

25. *Infra* notes 45 and 46.

26. Karl Llewellyn, "Across Sales on Horseback," 52 *Harv. L. Rev.* 725 (1939); *id.*, "The First Struggle to Unhorse Sales," 52 *Harv. L. Rev.* 873 (1939); *id.*, "What Price Contract? An Essay In Perspective," 40 *Yale L.J.* 704 (1939); Gilmore, *Death of Contract* and *Ages of American Law* (both cited in note 10); MacNeil, *New Social Contract*; MacNeil, 72 *Nw. U. L. Rev.* (cited in note 10); Macaulay, 28 *Am. Soc. Rev.*

27. Classical sources for this discussion include Karl Marx, *Capital: A Critique of Political Economy* (Harmondsworth: Penguin Books, 1976); Karl Bucher, *Industrial Evolution* (New York: Henry Holt & Co., 1912); Max Weber, *General Economic History* (Glencoe, Ill.: Free Press, 1927). Modern sources for this discussion include Willard Hurst, *Law and the Conditions of Freedom* (Madison: University of Wisconsin Press, 1956); Chandler, *Visible Hand* (cited in note 11); Piore & Sabel, *Second Industrial Divide* (cited in note 11). See also sources cited at notes 37 and 41.

when the U.S. economy was fragmented into a number of local "island" markets, and flourished as the canal, the railroad, and the telegraph permitted the development of a national market.

Factory owners sought market advantage through an ability to respond quickly and flexibly to the short-term signals of competitive markets, including product demand, price, quality, and delivery. This short-term flexibility was achieved through a production strategy that used general process machinery in a functional plant layout to produce small volumes. When a bid developed for a specific type of product, such a factory could commit itself to producing just the quantity required by retooling its general process machinery to produce the specific product requested. Production planning was limited to a short-range plan oriented to filling market orders as they came in. In part, this was because, as a matter of historical fact, long-range production planning had not yet been developed as an industrial skill. But job shop strategy provided no entrepreneurial incentive to develop such skills since, as a matter of industrial strategy, it was not useful.

Relative to later forms of industrial organization, job shop production had low production throughput, had high inventories, had high direct labor costs, and produced expensive goods with inconsistent quality. Yet it could provide small batches of specialized products at short notice because it had a short manufacturing lead time and comparatively low investment costs.

B. Job Shop Exchanges

Because planning was oriented to the short-range adjustments of relatively small competitive markets, the movement of goods through its production stream involved deliveries of small and changing batch sizes of goods at irregular intervals, and whose makeup changed regularly and unpredictably as the product demands of the market changed. In TCE terms, these transactions had an occasional frequency, a relative certainty, and a nonspecificity of assets.

To govern this transaction, manufacturers developed *the discrete contract*. The discrete contractual relation governed a single discrete transaction in the near-term future (a few days, a week, a month). Such a contract facilitated rapid response to fluctuations in market demand by allowing the redrafting of contract terms between each discrete transaction. Consequently, the terms of a discrete contract were rather simple.

This is evident in its written memorial. Consider an example of a discrete contract from the 1860s: Contract 1 (see appendix). Notice that the terms of this contract cover a single transaction to be executed in the near future. Its terms are limited to defining an exchange of commodities, specifically to defining the price of the commodity, the commodity's quality, the

quantity to be purchased, and the timing, location, and means of delivery. I henceforth refer to these as "exchange terms" (fig. 2).

	Discrete Contract	Open-Term Contract	Long-Term Agreement
Exchange terms	Specified	Some open	All open
Adjustment terms	--	Specified	Some open
Constitutional terms	--	--	Specified

FIGURE 2
The terms of the contracting instrument

C. Excursus on the Characteristics of Discrete Contracts

We can draw on the concepts of Ian Macneil to characterize this form of contractual relation. In Macneil's terms, this type of contract can be characterized as discrete, as impersonal, as presentiational, as involving a bargain between instrumentally oriented parties, and as requiring the mutual consent of the two parties (fig. 3).[28]

It is *discrete*, in that the contract plans a single transaction separated from all other transactions—be they prior, contemporaneous, or subsequent, or whether they involve both of the immediate parties or other parties. It is *impersonal*, in that it defines the relation in terms of a single commodity exchange, namely, the description of the good, the price of the good, the quantity of the good ordered, and the date and terms of delivery. It is *presentiational*, in that it attempts to plan in the immediate present all the performances to be conducted in the future. It involves *instrumental bargaining*, in that it presumes a relation between two parties who dicker the terms of the exchange to achieve their own, individual, economic interests. Finally, it involves *mutual consent*, in that it presumes that the terms of trade which result from this instrumental bargaining are freely assented to by both parties before performance begins.[29]

28. Macneil, *New Social Contract* (cited in note 19).
29. Adapted from Macneil, *New Social Contract*, and *id.*, 72 *Nw. U.L. Rev.* (cited in note 10).

D. Classical Contract Law I: The Image of Contracting

It is this type of contractual exchange that 19th-century lawyers, judges, and legal academics had in mind when they developed those legal principles we refer to today as classical contract law.[30]

Consider Christopher Columbus Langdell, the innovator of modern legal academics, defining "contract" during the 1870s:

> A contract is one of the means by which two persons make a mutual exchange of something which the other has. . . . In most cases, . . . it is not convenient [or impossible] to make the exchange on each side at the same moment. . . . Whenever the exchange is made on one side before it is made on the other side, a contract becomes necessary for the security of the party who performs his part of the exchange first; for it is only by means of a contract that he can compel performance by the other party. For the same reason, also, the contract must be made not later than the moment when the exchange is made by the party who performs first. . . . When, therefore, the making of an exchange is preceded in whole or in part by a contract to make it, the contract must be made either before the exchange is made on either side, or at the moment that it is made on one side and before it is made on the other side.[31]

This modal image helped define the formal requirements for a business agreement to be recognized as a legally enforceable contract. Consider the first Restatement of Contract, drafted by Langdell's student Samuel Williston 60 years later when the classical conception of contract was on the decline:

> A *contract* is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
>
> —Restatement of Contracts sec. 1 (1932)

> The requirements of the law for the formation of an informal contract are:
>
> (a) A promisor and a promisee each of whom has legal capacity to act as such in the proposed contract;
>
> (b) A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration of his promise . . .

30. Sources for this discussion include Llewellyn sources cited in note 26; Gilmore, *Death of Contract* and *Ages of American Law* (both cited in note 10); Thomas C. Grey, "Langdell's Orthodoxy," 45 *U. Pitt. L. Rev.* 1 (1983).

31. Christopher Columbus Langdell, *A Summary of the Law of Contracts* 248–49 (Boston: Little, Brown, & Co., 1880).

(c) A sufficient consideration . . .
(d) The transaction . . . is not void by statute or by special rules of the common law.

—Restatement of Contracts sec. 19 (1932)

(1) Consideration for a promise is:
(a) an act other than a promise, or
(b) a forbearance, or
(c) the creation, modification, or destruction of a legal relation, or
(d) a return promise.

—Restatement of Contracts Sec. 75 (1932)

In these definitions, we can see an application of an image of discrete contracting with its characteristics of discreteness, impersonality, presentiation, instrumental bargaining, and mutual consent. A contract is an exchange of promises (*mutual consent*) to perform a single mutual exchange (*discreteness, impersonality*). A contractual promise is distinguished from other promises (such as a promise to give a gift) by the fact that it is given in exchange for a consideration (that is, it is a product of an *instrumental barter*). The promise of future performance must occur prior to, or no later than, that point in time when actual performance begins (*presentiation*) (fig. 3).

E. Classical Contract Law II: Some Formation Rules

This modal image of the discrete contract guided judges as they developed legal principles to dispense with various problematic exchanges brought to their courts for decision. These principles were fashioned to operationalize the values of discreteness, impersonality, presentiation, instrumental bargaining, and mutual consent implicit in classical law's image of discrete contracting. Consider the following examples of majority rules from the classical period of contract law. As we shall see, these legal rules had later consequences as industrial practices changed.[32]

Open Terms. What if the parties to the contract failed to specify one of the discrete terms of the contract? What if they failed to specify the quality of the product, its price, its quantity, or the term of its delivery? Courts often ruled such contracts "void for indefiniteness." If the content of an agreement is unduly uncertain, no contract is formed.[33] This principle applied the value of presentiation.

32. Sources for this and the following section include Arthur Corbin, *Corbin on Contracts* (St. Paul, Minn.: West Publishing Co., 1952); E. Allan Farnsworth, *Farnsworth on Contracts* (Boston: Little, Brown & Co., 1990); *Restatement of Contracts* (1932); Uniform Sales Act (1905).

33. Restatement of Contracts sec. 32 (1932).

Modifications. Suppose after an imperfect tender the seller agreed to let the buyer keep the shipment for half the price. Later he refused to honor this modification of the agreement. Under classical common law, a modification of an agreement was like a new contract: to be enforceable, it required "fresh" consideration by both parties. This principle applied the value of instrumental bargaining as the mark of a contract.

The Battle of the Forms. What if a seller sent an offer, and the buyer sent an "acceptance" which added new qualifications or conditions? Classical contract law did not treat such a response as an acceptance at all. Since the response did not perfectly conform to the offer made, it was treated as a rejection of the initial offer and as a counteroffer. "Acceptance of an offer," wrote one court, "must be positive, unconditional, unequivocable, and unambiguous, and must not change, add to, or qualify the terms of the offer."[34] This principle applied the value of mutual consent.

The Firm Offer. What if a seller made an offer "good for 30 days." Was she bound to honor it for 30 days, or could she revoke it at any time? Courts regarded such "firm offers" as revocable at will unless the offeror accepted a consideration in exchange for his promise to keep the offer open.[35] This principle applied the value that instrumental bargaining was the mark of a contract.

The Installment Contract. What if a seller agrees to sell 1,200 widgets for $1,200. The seller agrees to ship the widgets in 12 installments of 100 widgets at the beginning of every month. The buyer agrees to pay $100 on delivery of each installment. Suppose the buyer found that the fourth shipment did not perfectly conform to the contract. Could he breach the remainder of the contract and purchase from a new seller? Under common law, many courts would treat each installment as a separate contract. Consequently, the court would resolve the dispute around the fourth shipment as a discrete contract, and free the buyer from any obligation for future installments.[36] This principle enhanced discreteness.

F. Classical Contract Law III: Some Rules of Interpretation

Classical contract law was the greatest attempt to prescribe contract as the proper relation for governing modern market exchanges. It was the greatest attempt to restrict the source of social obligations to those terms explicitly stated and consented to by the parties bound. Yet even this greatest ideal statement of contract made reference to other types of economic relations as sources of obligation in the governance of economic transac-

34. Wagner v. Rainier Mfg. Co., 230 Or. 531, 371 P.2d. 74 (1962).
35. Restatement of Contracts sec. 46 (1932).
36. Restatement of Contracts sec. 266 (1932); 6 Williston sec. 860.

tions. This is most easily seen in the rules classical contract law developed for a court to identify and interpret the terms of a contract.

Ever since an act of Parliament in 1677, contracts involving a given minimum value or length of duration have required a written memorandum to be legally enforceable. Lawyers refer to this requirement of writing as the "Statute of Frauds." In determining the terms of a contract, if this final writing is seen to be a final and complete "integration" of the parties' agreement, it may not be supplemented or contradicted by reference to other writings or oral statements by the parties. Lawyers refer to this principle as the "parole evidence rule." Indeed, many courts argued that if the written agreement was final and complete, courts were to interpret the terms of this writing, and hence the terms of the contract, in terms of the plain meaning of the words. Lawyers refer to this as the "plain meaning rule." More sophisticated authorities argued that the meaning of these terms could also be interpreted in terms of "operative usages" (local customs) and the "circumstances prior to and contemporaneous with the making of" the written document. However, these could not be used as a source of the terms themselves unless the written integration had gaps:

> The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all *operative usages* and knowing all *the circumstances prior to and contemporaneous with the making of the integration*, other than *oral statements by the parties* of what they intended it to mean."
>
> —Restatement of Contracts sec. 75

Yet, in either case, the express terms of agreement between the parties—that is, the agreed-upon market exchange—are the privileged source of obligations governing an economic transaction. Where these express terms are complete and their meaning self-evident, the terms become the sole source of obligation governing an economic transaction and cannot be supplemented by other sources. In such a case, other sources, such as the recent history of personal interactions between the parties and industry custom, cannot be considered as a source of contract terms themselves. Indeed, the plain meaning rule says they cannot even be considered as a source of meaning for those terms. In short, classical contract law recognizes other noncontractual governance relations, but makes reference to them only as gap fillers when the privileged source—the express terms of the agreement—are found wanting.

V. MASS PRODUCTION AND NEOCLASSICAL CONTRACT LAW

A. Mass Production

At the turn of the century, the existence of a national market and the introduction of new production technologies provided market opportunities for a new form of industrial strategy.[37]

Mass production companies sought market advantage through an ability to offer mass quantities of standardized goods at low prices on national markets and to discourage new entry into these markets through economies of scale and barriers to entry. This was made possible through a production strategy that invested in a number of high-volume product-specific machines integrated into a production line producing mass quantities of standardized goods at reduced cost. Unfortunately, mass producers had to ensure the full employment of these production lines over long periods in order to recoup the costs of this product-specific machinery. Because the design and quantity of the goods produced was fixed in the plant layout, in labor skills, and in product-specific machinery, planning came to be oriented not to implementing changes in market demand but rather to maintaining the full utilization of plant capacity. This long-term production planning was oriented to maintaining plant capacity by ensuring a constant flow of materials and parts into the plant and a constant flow of finished goods out of the plant and into the hands of paying customers. Typically, this planning involved techniques for stabilizing supply and product markets at levels that ensured full utilization of the production line.

Relative to job shop production, mass production enjoyed a higher production rate, increased productivity, low work-in-progress, and improved product consistency, but at the cost of much longer lead time and much higher investment costs.

B. Mass Production Exchanges

In order to ensure full utilization of production capacity, the movement of goods through the production stream involved regular deliveries of large batches at extended intervals, whose makeup did not change because the product did not change. In TCE terms, the shift from job shop to mass

37. See discussion of empirical strategy above pp. 605–6. Primary sources include Macaulay, 28 *Am. Soc. Rev.* (cited in note 5); Macaulay, unpublished research materials; *Moody's Industrial Manual*, 1914–51. Secondary sources include Chandler, *Visible Hand* (cited in note 11); Chandler, *Strategy & Structure* 13–14 (cited in note 17); Charles Sabel and Jonathan Zeitlin, "Historical Alternatives to Mass Production," 108 *Past & Present* 133–76 (1985). See also sources cited in note 41.

production gave transactions a more recurrent frequency, an increased uncertainty, and a high asset specificity.

To govern this transaction, manufacturers developed *the open-term contract*. In contrast to the discrete contract, which tended to govern a single discrete transaction in the near-term future, the open-term contract covered a series of discrete transactions extending over a period of a year or more. Such a contract facilitated the planning for and certainty of the regular deliveries of large batches over the long term required to ensure the capacity utilization of expensive mass production plants. But it did so at the cost of the flexibility of adjustment that occurred between discrete contracts governing individual discrete transactions. Consequently, open-term contracting required more extensive communications between buyers and sellers, materials handlers, and accountants regarding the transactions. Such interparty communication was no longer limited to the negotiation of exchange terms during the planning of the agreement but covered more expansive topics and extended into the performance of the agreement.

Consequently, the terms of an open-term contract came to differ from those of the discrete contract in two ways (see fig. 2). First, one or more of the *exchange terms* stipulated in the discrete contract (price, quantity, quality, delivery) were left open in the open-term contract to be filled in during the course of performance. Second, the open-term contract included a new type of provision not found in the discrete contract which stipulated what adjustments would be made should certain reasonably foreseeable events occur. I refer to these as "adjustment terms."

Consider an example of an open-term contract: Contract 2 (see appendix). In this example, the quantity term is left open, to be filled in later by the buyer, given certain minimum requirements (item 3). In contrast, the price, quality, and delivery terms are fully specified (items 2, 4, 5, and 6).[38] In this case, the adjustment terms concern liability for consequential damages (item 8), the means for adjusting prices (item 10), liability for taxes (item 12), and what should happen should either party experience a devastating disaster (appropriately, item 13).

Note how the open-term contract relaxes many of the characteristics of the discrete contract (see fig. 3). It is less discrete, in that it governs a series of discrete transactions between the parties. It is less impersonal, in that it defines a set of terms which go beyond the basic definition of an exchange of commodities. It is less presentiational, in that some of the terms are left open at the moment of consent to be filled in during the

38. Different types of open-term contract can be distinguished by the term which is left open and/or by who has the right to fill it in. In some cases, the quantity term is left open, to be filled in later by the seller. An "output" contract is an example. In other cases, the quantity term is left open, to be filled in later by the buyer. A "requirements" contract is an example. In some cases, the price term is left open to be filled in later by the seller based on her costs and an agreed-upon profit margin. This is called a "cost-plus" contract.

course of performance. It is less "dickered" and involves less "consent," in that one party is given the power to determine the specifics of the open terms (subject to certain limitations).

C. Neoclassical Contract Law I: The Image of Contracting

It is this type of contractual exchange that 20th-century neoclassical lawyers, judges, and legal academics had in mind when they developed principles to reform classical contract law.[39]

Noting the decline in the use of courts to resolve contract disputes, reform-minded lawyers were concerned that innovations in the law had not kept pace with innovations in business practices. Using the drafting of a uniform commercial code as a vehicle, Karl Llewellyn sought to reform the contract law of sales. In his eyes, existing contract law tended to impose legal principles implementing a discrete model of contracting on business agreements which tended to use open-term contracts. To implement this reform, he took the focus of the law off the exchange of promises and consideration between the parties and refocused it on the "business agreement-in-fact." This is most evident in his Uniform Commercial Code's definition of contract:

> "*Contract*" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law.
>
> —Uniform Commercial Code sec. 1-201(11).

> "*Agreement*" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. . . . Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts.
>
> —Uniform Commercial Code sec. 1-201(3).

39. Sources for this and the following two sections include Eugene F. Mooney, "Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law," 11 *Villanova L. Rev.* 213 (1966); William J. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicolson, 1973); Zipporah Batshaw Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules," 100 *Harv. L. Rev.* 465; David Charnay, "Hypothetical Bargains: The Normative Structure of Contract Interpretation," 89 *Mich. L. Rev.* 1815 (1991); Walter F. Pratt, "American Contract Law at the Turn of the Century," 39 *S. Cal. L. Rev.* 415 (1988); The Uniform Commercial Code (1956); The Restatement (Second) of Contracts (1976).

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

—Uniform Commercial Code sec. 2-204.

In these definitions, we can see the application of an image of contracting that relaxes the discrete contract's characteristics of discreteness, impersonality, presentiation, instrumental bargaining, and mutual consent. A contract is a total legal obligation that results from the parties' bargain-in-fact. This bargain-in-fact need not be evidenced by an explicit exchange of promises but may be evidenced through conduct (an alleviation of *instrumental barter* and *mutual consent*). The timing of the agreement need not be identifiable to a magic moment preceding the beginning of performance (an alleviation of *presentiation*). The bargain-in-fact need not be evidenced by explicit consent to a specification of all the terms (an alleviation of *mutual consent*). Rather, the bargain-in-fact may be evidenced by reference to the relation that exists between the specific parties to this contract (an alleviation of *impersonality* and, perhaps, *discreteness*) (see fig. 3).

D. Neoclassical Contract Law II: Some Formation Rules

The image of open-term contracts guided 20th-century reform-minded judges in common law decisions relaxing classical contract principles, and later guided Llewellyn in a systematic restatement of commercial contract law. Recall the exemplary classical principles I discussed earlier. Now consider how these legal principles violate the characteristics of the open-term contract, how Llewellyn's Article 2 of the Uniform Commercial Code rephrases these principles with the open-term contract in mind, and how Llewellyn's rephrasing loosens the values of discreteness, impersonality, presentiation, instrumental bargaining, and mutual consent so rigorously enforced by classical principles (see fig. 3).

Open Terms. What if the parties to the contract fail to specify one of the exchange terms of the contract? What if they fail to specify the quality of the product, its price, its quantity, or the term of its delivery? Under classical law, courts often ruled such open-term contracts "void for indefiniteness." Clearly, this became a problem once manufacturers started using a mass production strategy and open-term contracts. Consequently, neoclassical contract law changed this rule. Under UCC sec. 2-204(3):

	Discrete Contract	Open-Term Contract	Long-Term Agreement
Discreteness	High	Medium	Low
Presentiation	High	Medium	Low
Impersonality	High	Medium	Low
Instrumental bargaining	High	Medium	Low
Explicit mutual consent	High	Medium	Low

FIGURE 3
The characteristics of the Contracting Instrument

> Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Note that this relaxes the law's implementation of the value of presentiation.

Modifications. Suppose a seller makes an imperfect tender. After this tender, the seller agrees to let the buyer keep the shipment for half the price. Later he refuses to honor this modification of the agreement. Under classical common law, a modification of an agreement was like a new contract: to be enforceable, it required "fresh" consideration by both parties. This rule was problematic once manufacturers started signing requirements and output contracts covering a number of transactions over a year or more. Such open-term contracts will quite likely require some modifications during the duration of the agreement. In the course of business, manufacturers will rarely be concerned with "exchanging fresh consideration." Consequently, neoclassical law changed this principle. Under UCC sec. 2-209(2):

> An agreement modifying a contract within this Article needs no consideration to be binding.

Note that this relaxes the law's implementation of the values of presentiation, discreteness, and instrumental bargaining.

The Battle of the Forms. What if a seller sent an offer, and the buyer sent an acceptance which added new qualifications or conditions? Since the acceptance did not perfectly conform to the offer made, under classical contract law the "acceptance" was treated as a rejection of the initial offer and as a counteroffer. As the volume of industrial production grew to mass proportions, transactions between manufacturers became numerous and uniform. Since more likely than not the "offer" and "acceptance" of an

contract were made through an exchange of standardized forms, it became increasingly unlikely that the terms of these forms would match precisely. Hence the provisions of classical contract law made it likely that most business agreements would not conform to the legal requirements of a contract. Consequently, neoclassical contract law changed this principle. Under UCC sec. 2-207:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon. . . .
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> (a) the offer expressly limits acceptance to the terms of the offer;
> (b) they materially alter it;
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Note that this relaxes the law's implementation of the value of mutual consent.

The Firm Offer. What if a seller makes an offer "good for 30 days." Is she bound to honor it for 30 days, or can she revoke it at any time? Classical contract law regarded such "firm offers" as revocable at will unless the offeror accepted a consideration in exchange for his promise to keep the offer open. As manufacturing moved to mass production, and manufacturers involved themselves in planning one- to three-year installment contracts, they needed more time to consider offers. If, after taking the time to consider such offers, these offers were suddenly withdrawn by the seller, the planning process would be disrupted. Consequently, neoclassical contract law changed this principle. Under UCC sec. 2-205:

> An offer by a merchant to buy and sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration. . . .

Note that this relaxes the law's implementation of the value of instrumental bargaining.

The Installment Contract. If a seller fails to perform an installment in an installment contract, can a buyer repudiate the remaining installments and purchase from a new seller? Under common law, many courts would say yes, treating each installment as a separate contract. Obviously, in a mass production system that relies on installment contracts, such a rule deprived

businesspersons of the security that their contracts were enforceable. Consequently, neoclassical contract law changed this principle:

> (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
> (2) The buyer may reject any *installment* which is non-conforming if the non-conformity substantially impairs the value of that installment. . . .
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of *the whole contract* there is a breach of the whole. . . .
>
> —Uniform Commercial Code sec. 2-612

Note that this relaxes the law's implementation of the value of discreteness.

In sum, just as the change in business practices from the use of discrete contracts to the use of open-term contracts relaxes the discrete characteristics of actual market exchanges between merchants, so, too, the change in contract law from classical principles to neoclassical principles relaxes the discrete characteristics of the image of the market exchange inscripted in contract law.

E. Neoclassical Contract Law III: Some Rules of Interpretation

If we refer once again to the Uniform Commercial Code's definition of contract, we see that the neoclassical image of contract also relaxes classical law's privileging of the express writing or words of agreement between the parties as the source of legal obligations. Granted, an agreement is "the bargain of the parties as found in their language." But the terms of the agreement can also be found in "other circumstances," including the parties' "course of dealing," their "course of performance," or the "usages of trade" in their industry. This new emphasis on noncontractual governance relations is also evident in Llewellyn's rules for a court's interpretation of contract terms.

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
>
> —Uniform Commercial Code sec. 1-205(4)[40]

40. See also UCC sec. 2-208(2)).

Granted, the express terms of the parties (the "market exchange") remains the privileged source of terms and the privileged source for the meaning of those terms. But other nonmarket relations can be used as more than mere gap fillers. They can now be used to supplement the definition of the terms and meaning of the agreement even when the express terms have no apparent gaps.

In short, we see a change in the rules contract law uses in applying various types of economic relations to the governance of economic transactions (see fig. 4).

	Classical Contract Law	Neoclassical Contract Law	Relational Contract Law
Express terms	Privileged	Emphasized	Equal?
Course of dealing	Gap filler only	Supplement	Equal?
Course of performance	Gap filler only	Supplement	Equal?
Usages of trade	Gap filler only	Supplement	Equal?
Good faith/fair dealing	Gap filler only	Supplement	Equal?

FIGURE 4
Law's privileging of the sources of contract content

VI. FLEXIBLE PRODUCTION—AND A RELATIONAL CONTRACT LAW?

A. Flexible Production

Since the mid-1970s, the internationalization of product markets, the saturation of those markets, the introduction of new production and information technologies, the introduction of new methods of management, and changes in consumer demand have all created the opportunity for a new industrial strategy.[41]

41. See discussion of empirical strategy at pp. 605–6. Primary sources include my interviews with 37 manufacturing companies and ancillary materials; *Moody's Industrial Manual*, 1914–51; and numerous clippings regarding specific companies interviewed from a variety of newspapers and business periodicals. Secondary sources include Charles F. Sabel, "Learning by Monitoring: The Institutions of Economic Development," *in* Neil Smelser & Richard Swedberg, eds., *Handbook of Economic Sociology* 137–65 (Princeton, N.J.: Princeton-Sage, 1994); Bennett Harrison, *Lean and Mean: The Changing Landscape of Power in the Age of Flexibility* (New York: Basic Books, 1994); Andrew Sayer & Richard Walker, *The New Social Economy: Reworking the Division of Labor* (Cambridge, Mass.: Basil Blackwell, 1992); Egan Matzner & Wolfgang Streeck, *Beyond Keynesianism* (Brookfield, Vt.: Edward Elgar, 1991); David Harvey, *The Condition of Postmodernity* (Cambridge, Mass.: Basil Blackwell, 1989); Scott Lash & John Urry, *The End of Organized Capitalism* (Madison: University of Wisconsin Press, 1987); Piore & Sabel, *The Second Industrial Divide* (cited in note 11).

This new flexible production strategy seeks market advantage by offering a product that has a unique technology, a unique quality, or is supported by unique service. If one can offer a product that is unique, then one has the opportunity to occupy exclusively one's own market niche and to charge premium prices. However, this strategy requires the constant change of product design. If you cannot quickly change your product, then you can neither take advantage of new market demands as they open up nor keep a monopoly position in your niche over time.

This short-term flexibility is achieved through a production strategy that uses general process machinery in a group plant layout to produce medium volumes of specialized products. By using general purpose machines that permit retooling to be done automatically off-line, flexible production can offer specialized products with reduced setup time and costs over traditional job shop production. By organizing these machines by group rather than by function, the plant gains the ability to dedicate portions of its production to different products or different customers, in contrast to mass production.

On the one hand, flexible production, like mass production, seeks to maintain full use of production capacity by developing a long-range production plan. On the other hand, flexible production, like job shop production, seeks to respond to or create (through product innovation) frequent changes in market demand by constantly revising its production plan. Flexible production achieves both of these objectives by developing a long-range plan that is revised daily. Because its long-range production plan is not fixed in plant layout, labor skills, or production machinery, it can respond to new orders by immediately revising its production plan to schedule the use of its machinery, its flow of materials, and the delivery of supplies to maximize production flow and minimize lead time. This is facilitated by new information technologies.

Relative to earlier forms of industrial organization, flexible production offers reduced work-in-progress, reduced manufacturing lead times, reduced direct labor, and high-quality consistency. On the one hand, the costs of new automated distribution, information, and production machines requires production in a total volume higher than that in traditional shop production. On the other hand, the flexibility of this new machinery permits the composition of the total volume to be specialized into medium batches of a variety of products, in contrast to the standardized composition of mass production's total volume.

B. Flexible Production Exchanges

Because flexible production's production plan is continually changing, yet is capable of adjustment on a day-to-day basis, the movement of goods

through its production stream involves continuous transactions of small batches of goods, whose makeup changes regularly on short notice as the product demands of the market change. Further, since the basis of competition is innovation, continuous communications are required not only between buyers and sellers and between materials handlers and accountants regarding the exchange of commodities but also between product engineers and operations engineers regarding product and production innovations. In TCE terms, the shift from mass to flexible production means transactions have a much higher frequency and an increased uncertainty but with a decreased physical asset specificity.

To govern this transaction, manufacturers are using a new type of contract called *a long-term agreement.*[42] The long-term agreement facilitates the planning for and certainty of the regular deliveries of parts to ensure capacity utilization of relatively expensive flexible production plants, as well as the planning for and certainty of the innovations in parts design and quality required to maintain a distinctive product. In contrast to the discrete contract, which tended to govern a single discrete transaction in the near-term future, the long-term agreement governs numerous discrete transactions over a three- to five-year period. In contrast to the open-term contract, which tended to cover a set of discrete transactions in large batches at extended intervals (e.g., a month), the long-term agreement covers constant transactions in small batches at extremely short intervals (e.g., a day).

Consequently, the terms of the long-term agreement differ from those of both the discrete contract and the open-term contract (see fig. 2). First, because discrete transactions occur constantly, it is impossible and impractical to specify the exchange terms we saw in the discrete contract (price, quantity, quality, delivery). Second, because there are so many changes in both product design and production design over the course of the agreement, it is impossible to foresee all the contingencies of the future, and hence to specify all the terms of adjustment in the present. Consequently, many adjustment terms are left open. Third, in place of specific exchange and adjustment terms, the long-term agreement includes constitutional terms that set up institutional processes through which exchange terms and adjustments will be specified during the course of performance.

Consider an example of a long-term agreement: Contract 3 (see appendix). Note that the long-term agreement does more than govern the exchange of commodities and their adjustment. The long-term agreement also establishes processes for interorganizational cooperative in product, production, and management design (e.g., items 3, b & e). Consequently, the most

42. Manufacturers also refer to this contract as a "partnership agreement." I have opted for the term "long-term agreement" to avoid confusion with a document outlining the terms of a business partnership. I will demonstrate that these long-term agreements differ significantly from what Williamson calls "long-term incomplete contracts" (which I refer to as "open-term contracts").

sacrosanct prerogatives of the traditional instrumental business enterprise become subject to negotiation. Details from the company books regarding costs and savings are shared with the trading partner (items 3, f & g). The internal organization of the firm is subject to interparty negotiation (items 3, b & e). The setting of prices and the sharing of profits is subject to interfirm negotiation during the course of performance (item 6).

Note how the long-term agreement completes the decay of the characteristics of the discrete contract (see fig. 3). It is not discrete, in that it governs continuous transactions between the parties. It is not impersonal, in that it defines a set of relations between the parties that goes beyond the basic definition of an exchange of commodities. It is minimally presentiational, in that the exchange terms are left entirely open at the moment of consent, and the adjustment terms are left partially open at the moment of consent, to be filled in during the course of performance. Only the constitutional terms specifying the processes to be used in the future are designed in the present, and even these are sketchy. It is less instrumental, in that the agreement presumes that setting prices and dividing profits will be less a product of "dickering" between two separate and self-interested parties and more a product of mutual cooperation in a spirit of community.

C. A Relational Contract Law?

If exchange practices in intermediate product markets continue to be a source for the image of market exchange that lawyers, judges, and legal academics have in mind when they developed legal principles, then we might anticipate that the present change in industrial exchange practices from open-term agreements to long-term agreements will lead to changes in the principles of contract law.

At present, there is no serious challenge to the orthodoxy of neoclassical principles. Indeed, there is not, as yet, any well-developed "shadow law" waiting in the wings. However, there is evidence that, at present, the field of contract law is in a period of intellectual uncertainty.

First, there is a new burst of theorizing by contract scholars. Recent reviews of the field of contract law scholarship identify the development of a number of theoretical perspectives independent from and critical of the presumptions of neoclassical contract law. These include death of contract theory, law and economics theory, relational contract theory, empirical contract theory, and critical contract theory.[43]

43. See, e.g., Robert A. Hillman, "The Crisis in Modern Contract Theory," 67 *Tex. L. Rev.* 103-36 (1988); Jay M. Feinman, "The Significance of Contract Theory," 58 *U. Cin. L. Rev.* 1283 (1990).

Second, the American Law Institute and the National Conference of Commissioners on Uniform State Laws are undertaking a reevaluation and redrafting of key sections of the Uniform Commercial Code.[44]

At least two approaches developing out of this disintegration and reintegration of perspectives on contract are a move away from the clear distinction between contractual relations and noncontractual relations and a movement toward the view of contractual relations as long-term continuing relations.

Consider first the work of Grant Gilmore.[45] Gilmore argues that the classical distinction between contract law (where civil liability arose from the exchange of promises of the parties based on bargained consideration) and tort law (where civil liability arose from the negligence of one party toward another in fulfilling a general civil duty) is decaying. On the contracts side, we see the application of negligence standards in contract cases regarding both the sale of professional services and the warranty of products. On the tort side, we see the application of strict liability standards in tort cases regarding the sale of "dangerous" products. The consequence is the development of a general theory of civil liability he calls "contorts." Gilmore is citing an image of social exchange in certain recent case decisions which no longer distinguishes between contractual relations and tort relations in terms of whether the civil liability arose out of the explicit agreement between the parties to a given transaction or out of a general obligation of one party toward another arising out of their ongoing social relationship. In short, it presumes an image of social exchange which is closer to a long-term agreement than to a discrete or open-term contract.

Consider, second, the work of Ian Macneil.[46] Macneil argues that existing contract law omits legal recognition of certain types of exchange relations actually used in society. Specifically, it fails to recognize the use of ongoing relations to govern economic transactions. The functioning of such relations requires role integrity, preservation of the relationship, harmonization of the norms within the relationship to the social norms outside the relationship, and the support of certain "supracontract norms." Macneil argues that existing norms of neoclassical contract law undermine these elements of ongoing relations, thereby undermining a type of nondiscrete contractual relationship which is useful in the modern world. To remedy this situation, Macneil seeks to develop new norms for contract law which recognize and enforce a broader array of contractual relations. This is evident in his definition of contract as "the relations among parties to the

44. See Richard E. Speidel, "Revising Article 2: Some Emerging Problems," *Commercial Law Annual* 51-58 (1991).

45. See Gilmore, *Death of Contract* (cited in note 10).

46. Macneil, *New Social Contract* (cited in note 19); *id.*, 72 *Nw. U.L. Rev.* (cited in note 10).

process of projecting exchange into the future."[47] Macneil's definition of contract presumes an image of social exchange that is closer to a long-term agreement than to a discrete or open-term contract.

In short, while I cannot say that contemporary legal scholarship and contract doctrine are dropping an image of market exchange based on the open-term agreement and deploying an image of market exchange based on the long-term agreement, there are indications that this is one direction in which contract scholarship and doctrine may move in the future.

VII. CONCLUSIONS

Long-term agreements constitute a new device for governing exchange. Long-term agreements do share some characteristics with open-term contracts. Like open-term contracts, they establish and govern a long-term relationship involving multiple transactions between the parties. They leave gaps in planning the quality, quantity, delivery, and price of the goods transacted. They include adjustment terms specifying what to do should certain foreseeable contingencies occur, such as strikes, law suits, and the like.

However, unlike open-term contracts, long-term agreements include constitutional terms that establish processes of interorganizational cooperation in product, production, and management design and monitoring. Indeed, while the main focus of open-term contracts remains the exchange terms which plan specific transactions as supported by adjustment terms, the raison d'être for long-term agreements is the constitutional terms establishing interorganizational cooperative processes in which exchange terms will be negotiated at a later date.

Further, as TCE would anticipate, this change in the contractual governance relation accompanies a change in the characteristics of the transactions governed.

Long-term agreements are part and parcel of a wholesale change in the structure of industrial organization. The transactions of Wisconsin manufacturers have become more frequent, have more uncertainty, and have less asset specificity because there has been a change in the firms' production and marketing strategies. Rather than compete on price, they now must compete on the uniqueness of their quality, service, technology, or product. This new strategy is made possible because of changes, for example, in the technology of their production machines, in the layout of their plants, in the contours of their final markets. It is achieved through a redeployment of their plants, machines, personnel, etc., as an entirely new form of industrial organization.

47. Macneil, *New Social Contract* 5–7.

Neoclassical contract law does not recognize the distinctive features of long-term agreements. Changes in the law tend to lag behind changes in society.[48] The neoclassical revisions of the UCC did help contract law to recognize the practice of open-term contracting associated with the mass production strategies of mid-century. However, as shown above, the new long-term agreements differ from open-term contracts in many theoretically significant respects because they are associated with a total reorganization of industry. Some legal scholars sense that there is a new disjuncture between the "law-on-the-books" and "the-law-in-practice." There are areas of contract law which could serve as useful sources of law-by-analogy. But the law of long-term agreements remains to be written when a few of these new "partnerships" go sour and end up in the appellate courts. When this occurs, will judges recognize that they are judging something new?

48. I mean this to be a descriptive, not an explanatory, statement. On the "lag" theory of law and social change, see Lawrence M. Friedman & Jack Ladinsky, "Social Change and the Law of Industrial Accidents," 67 *Colum. L. Rev.* 50 (1967).

APPENDIX

Contract 1: A Discrete Contract

This Agreement, &c.

Witnesseth, that the said John Doe agrees to sell to the said Richard Roe one thousand cords of wood, all of it to be well seasoned, and to be of beach and maple only, and to deliver the same, securely corded, at the factory of the said Richard Roe, in the town aforesaid, for the price of two dollars per cord, on the first day of June next.

And the said Richard Roe, in consideration thereof, agrees to pay to the said John Doe, for the said wood, at the rate of two dollars for each cord of wood, immediately upon the completion of the delivery thereof.

In witness whereof, &c.

Contract 2: An Open-Term Contract

Agreement made this fifth day of January, 1966, between XYZ Company, Inc., a Delaware corporation (hereinafter called "seller") and Alpha Corporation, a Massachusetts corporation (hereinafter called "buyer").

Witnesseth:

Seller hereby agrees to sell and deliver to buyer, and buyer agrees to purchase and receive from seller, the material hereinafter described for use in buyer's manufacturing operations upon the following terms and conditions:

1. Term

This agreement shall continue in effect for a period of five (5) years commencing July 1, 1966, and from year to year thereafter, subject to cancellation by either party as of the expiration of said five (5) year period or any contract year thereafter, on six (6) months' prior written notice.

2. Description of Materials

[Fill In Details]

3. Quantity

Seller agrees to sell to buyer and buyer agrees to buy from seller not less than fifty per cent (50%) of buyer's annual requirements of said material for use at buyer's plant located at _____; provided, however, that buyer shall be obligated to purchase not less than _____ pounds of said material, and seller be obligated to sell to buyer hereunder not more than _____ pounds of said material in any contract year.

4. Shipment

Shipments shall be made as required and ordered by buyer in as nearly equal monthly installments as may be practicable.

5. Price

The price to be paid by buyer for the material shall be $_____ per pound, subject to increase as provided below.

[Herein set forth basis for future increases in price.]

6. Deliveries

All deliveries shall be FOB buyer's plant in _____, by tank cars or tank trucks, freight prepaid, via route of seller's choice. Shipper's weights shall govern.

7. Term of Payment

Net thirty (30) days.

8. Claims

Seller shall not be liable for any loss or damage resulting from the use of the material herein sold in Buyer's manufacturing processes or in combination with other substances. Claims on account of weight, quality, loss of or damage to material shall be made in writing as promptly as possible and in no event more than thirty (30) days after delivery. Seller's liability for damages in respect of such claims shall in no event exceed

the purchase price of the material for which such damages are claimed. Seller's standard specifications for quality shall govern.

9. Exclusion of Warranties

EXCEPT AS SPECIFICALLY SET FORTH HEREIN, ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING MERCHANTABILITY, ARE EXCLUDED.

10. Lower Competitive Price

If at any time during the term of this contract buyer can purchase from a manufacturer within the United States material of equal quality, in like quantity as the shipment involved at a lower price than is then in effect hereunder, and buyer furnishes seller satisfactory proof thereof, then if seller shall not reduce the price hereunder to such lower price for such quantity, nor notify buyer in writing that it will make such reduction, buyer may purchase such quantity from such other manufacturer.

11. Favored Nation Clause

If seller shall at any time during the term of this contract sell material equal to the quality herein provided to any private domestic consumer at a price lower than that then in effect under this contract, seller will accord such lower price to buyer on a like quantity while such lower price is in effect.

12. Taxes

If any tax or other governmental charge (federal, state, or local) or increase therein hereafter becoming effective shall increase the cost to seller of producing or selling the material covered by this contract, seller, at its option, may add the amount thereof to the price then in effect, provided however, that if seller shall elect to add any such tax or charge or increase to the purchase price, buyer shall have the right to terminate this contract.

13. Force Majeure

In the event either party is prevented from performing this contract by circumstances beyond its control, including without limitation strikes, lockouts, fire, explosion, flood, acts of God, war or other hostilities, civil commotion, breakdown of machinery, governmental acts, orders, or regulations, and inability or difficulty in obtaining shipping facilities or supplies, the obligation of seller to deliver and the obligation of buyer to accept delivery of material hereunder during the period of such disability shall be suspended and the quantities so effected shall be eliminated from this contract without liability to either party.

14. Indemnity

Seller agrees to defend and hold buyer harmless from any claims for patent infringement, provided buyer gives seller prompt written notice of the assertion against buyer of any such claims.

15. Freight Rates

Any increase in freight rates on shipments becoming effective after the date hereof, may, at seller's option, be added to the price of the material covered by this contract.

16. Compliance and Applicable Laws

Seller warrants that all material sold hereunder will have been manufactured in accordance with the requirements of the Fair Labor Standards Act, as amended, and all other applicable laws, rules, and regulations.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed as of the day and year first above written.

XYZ COMPANY, INC.

By

_____ Seller

ALPHA CORPORATION

By

_____ Buyer

Contract 3: A Long-Term Purchasing Agreement

1. This agreement represents an understanding between "purchaser" and "supplier" to participate in a 3 year supply program where both parties can experience steady improvement in areas such as process flow, paperwork flow, and inventory reduction. Quantity can reach a level where supplier's final inspection and purchaser's receiving inspection of parts is no longer necessary. All of this will result in higher quality products, reduced supplier costs with resulting reduced pricing on [purchaser's] parts, increased volume of business and higher profits for both supplier and purchaser.
2. Purchaser commits to:
   a. Purchase all requirements from supplier.
   b. Stabilize parts requirements and institute time-phased supplier schedule.
   c. Share with supplier concepts of Statistical Operator Control and Quality Circles.
   d. Give timely notification of quality criteria changes.
   e. Will not competitively bid Supplier's parts for price comparison.
3. Supplier commits to:
   a. Deliver consistent quality parts which comply with Purchaser's specifications.
   b. Work with purchaser to implement a just-in-time delivery program.
   c. Work with purchaser on future development of prototype designs.
   d. Actively pursue cost reductions.
   e. Establish Statistical Operator Control Programs, Reduction of Inventory, Improvement of Delivery Performance, and Dedication of Capacity to Purchaser.
   f. Hold pricing firm for the term of agreement except for metal market changes.
   g. Absorb setup costs.
   h. Provide Cost Breakdown Information.
4. Purchaser pledges to uphold and fortify supplier's desire for dedicating a work cell to purchaser's production.
5. The parties agree to work together to develop efficient packaging and transportation.
6. At specified times throughout each year supplier and purchaser will meet to review performance against stated objectives. Objectives will be revised or reconfirmed throughout the term of the agreement. The parties will openly share information about costs and savings incurred under this agreement and develop means for equitably sharing those savings.
7. Should supplier fail to maintain its obligations under this agreement, purchaser may terminate purchase agreement by providing 3 months written notice. If, however, prior to that date supplier becomes competitive, the termination will be suspended. Exception to this agreement would include supplier's inability to meet purchaser's production requirements, engineering specifications, or cost constraint on new designs.
8. Supplier realizes that review of supplier's performance against objectives will be an important factor in any decision by purchaser to award future long-term agreements.
9. Force Majeure Clause
10. Terms and Conditions