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BROADCAST CONTRACTING

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ABSTRACT—The law of third-party beneficiaries considers whether an outsider can sue for damages on a contract formed by others. Some might believe that external claims are never allowed in private contracting because privity is required to maintain a lawsuit. This is incorrect, though the mistake would be understandable because third-party interests are largely treated as a postscript on contract law. This disregard for third-party rights is surprising, however, because the legal treatment of beneficiaries is a major source of contention in contract law. Hundreds of cases are litigated annually—in part because the standard for perfecting rights in this area is so ambiguous. Moreover, careful reflection on third-party-beneficiary contracting uncovers a powerful, even foundational, tool that can be used to adjust legal relationships in diverse areas of activity. Simply put, third-party-beneficiary contracts are quite different from bilateral contracts because they allow a promisor to adjust her legal rights with many, many others in one fell swoop by interposing a willing counterparty and setting the desired terms—a practice I will call "broadcast contracting." This Article describes the phenomenon of broadcast contracting, analyzes the theoretical rationale for these arrangements, and proposes some normative principles for incorporating broadcast contracts into a sensible system of contract law. I make two primary claims. First, the law should continue to empower private counterparties to establish these agreements and thereby confer rights on outsiders. Second, legal treatment of third-party claims relies far too heavily on conjecture about a vague standard; in this context, at least, the goals of contract law would be better served by moving toward a rule that insists on explicit grants of third-party rights as a precondition to outside liability.

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INTRODUCTION

The air was thick in Iowa City on March 6, 1982. The beloved Iowa Hawkeye men's basketball team, under the leadership of Coach Lute Olson, was one game away from the Big Ten Championship. Only the Purdue Boilermakers, the final opponent of the regular season, stood in the way. It was a tight game, and as the final seconds ticked away, referee James Bain whistled a dubious foul on Iowa that sent a Purdue teammate to the free throw line. It was a lousy call, and fans were outraged when the shots fell and Purdue claimed the game, 66–65, in the final seconds.[1]

Over the next few days, a nearby novelty store, Hawkeye John's Trading Post, began to sell a T-shirt picturing a man with a noose around his neck. Captioned "James Bain Fan Club," the shirt immediately attracted the attention of frustrated Hawkeye fans. Bain soon learned of the T-shirt and filed a lawsuit seeking both injunctive relief and damages.[2] The owners of Hawkeye John's refused to go quietly, however, and they launched a counterclaim against Bain.[3] The theory sounded in contract law and insisted that Hawkeye John's was a third-party beneficiary of the employment contract between Bain and the Big Ten Athletic Conference.[4]

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1 THE LAFAYETTE JOURNAL AND COURIER PRESENTS: MOST MEMORABLE MOMENTS IN PURDUE BASKETBALL HISTORY 111–14 (Jim Lefko, ed., 1998) (detailing the facts of the game in a chapter entitled "1982: Purdue Upsets the Hawkeyes 66–65").

2 Bain v. Gillispie, 357 N.W.2d 47, 48 (Iowa Ct. App. 1984).

3 *Id.*

4 *Id.* at 50.

As the argument went, Bain's rotten refereeing breached his contract with the Big Ten. This, in turn, eliminated Iowa from the championship and cost Hawkeye John's nearly $200,000 in lost profits from forfeited sales of Big Ten Championship memorabilia.[5] Further, Hawkeye John's contended that it was protected legally as a beneficiary of Bain's employment contract and was therefore entitled to sue Bain directly for damages related to his "baneful and outrageous" officiating, conducted "with a heedless disregard for the rights" of the Trading Post.[6]

While suing a bad referee for malpractice should elicit a chuckle from every disappointed sports fan, the Iowa courts were unwilling to accept this theory.[7] As the trial judge (sensibly) reasoned, "Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling."[8]

But despite its loss, Hawkeye John's was throwing a legitimate legal half-courter, one that is attempted in numerous cases each year.[9] Contract law does indeed permit third-party beneficiaries to maintain direct claims against a breaching promisor and, under certain circumstances, recover damages despite a lack of privity.[10] This is surprising to some, probably because this topic receives so little attention in contract law scholarship. Few teach this material. Most treatises and casebooks save it for the end.[11] And while the topic was a favorite (some might say obsessive) scholarly pursuit for Arthur Corbin in the 1920s,[12] it now functions almost as an

[5] *Id.* at 48. The team did advance to the NCAA tournament, where it was eliminated in the second round by the University of Idaho. *See 1981–1982 Iowa Men's Basketball Schedule*, FANBASE, http://www.fanbase.com/Iowa-Hawkeyes-Mens-Basketball-1981-82/schedule (last visited Aug. 8, 2012).

[6] *Bain*, 357 N.W.2d at 48.

[7] *Id.* at 50.

[8] *Id.* at 49–50 (quoting the trial judge).

[9] A Westlaw key number search on 95k187, Agreement for Benefit of Third Person, results in more than one thousand distinct legal opinions for the ten-year period ending January 2012.

[10] *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981); 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.3 (3d. ed. 2004); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 130 (4th ed. 2001); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 17.4 (6th ed. 2009).

[11] *See, e.g.*, IAN AYRES & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 1168–91 (7th ed. 2008) (chapter nine of nine); JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 843–71 (9th ed. 2008) (chapter seven of seven); E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 880–914 (7th ed. 2008) (chapter ten of ten); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 1001–46 (4th ed. 2007) (chapter eleven of eleven).

[12] Corbin published at least six articles on the topic: Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 YALE L.J. 1008 (1918); Arthur L. Corbin, *Contracts for the Benefit of Third Persons in Connecticut*, 31 YALE L.J. 489 (1922); Arthur L. Corbin, *The Law of Third Party Beneficiaries in Pennsylvania*, 77 U. PA. L. REV. 1 (1928); Arthur L. Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds*, 38 YALE L.J. 1 (1928); Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 46 L.Q.R. 12 (1930); and Arthur L. Corbin, *Contracts for the Benefit of Third Persons in the Federal Courts*, 39 YALE L.J. 601 (1930).

obscure postscript to contract law, attracting very little academic commentary in recent years.[13]

But third-party-beneficiary contracting is hardly an afterthought. It is a powerful, even foundational, tool that can be used to adjust legal relationships across wide swaths of activity. Bond issuers adopt a third-party-beneficiary framework to limit investor strike suits and concentrate performance-monitoring efforts.[14] Employers use the arrangement to contract into heightened standards of legal duty, such as binding themselves not to discriminate against employees in a same-sex relationship.[15] Businesses use a third-party-beneficiary framework to weave nets of economic cooperation outside of a firm's formal borders.[16] Indeed, because many aspects of a corporation can be seen as a nexus of contracts,[17] economic actors might even establish private business statutes, essentially contracting for new varieties of corporate entities.

Unfortunately, the common law of third-party-beneficiary contracting provides a very crude scale with which to weigh the legitimate economic gains from what I will call "broadcast contracting" against the negative effects that can occur. Broadcast contracting is the adoption of private agreements to create a heightened legal commitment to a defined class of third parties. A promisor contracts with a willing counterparty, identifies the desired group of outside beneficiaries, and sets binding new rules en masse to govern her behavior.

As I will argue, the flexibility, reach, and precision of broadcast contracting can conceivably allow a promisor to make commitments that increase social welfare or cut transaction costs across many different economic settings. But the open-ended nature of the law, and the difficulty in distinguishing intended beneficiaries (who do have legal rights) from incidental beneficiaries (who do not), generates powerful incentives to pursue specious litigation. Hawkeye John's claim for referee malpractice is

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13 Notable exceptions include Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992), and Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

14 *See, e.g.*, WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS 241–42 (6th ed. 2008).

15 *See infra* notes 93–100 and accompanying text.

16 *See* George S. Geis, *An Empirical Examination of Business Outsourcing Transactions*, 96 VA. L. REV. 241, 263–64 (2010) (listing "third party monitoring" as a contractual variable used by clients and vendors in structuring their outsourcing relationships).

17 *See, e.g.*, Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organization Law*, 110 YALE L.J. 387, 391–93 (2000). *But see* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (disputing this conception of a corporation); Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515, 569 (2007) ("[A] corporation is more than a nexus of contracts or group of assets; it has the legal rights and obligations of a person.").

just one example. The lack of recent attention on this topic has also fostered numerous half-truths and inaccuracies in our judicial opinions.[18]

This Article describes and analyzes the phenomenon of broadcast contracting. It seeks to answer the following questions: How do broadcast contracts work? Why might a party wish to write a broadcast contract? And how should the law deal with an outsider's claim for damages in this context? In short, I set forth a framework for understanding broadcast contracting and offer normative principles for the legal treatment of these relationships.

I will make two primary claims. First, there are logical reasons why two contracting parties might wish their relationship to include third-party-beneficiary rights, and the law should continue to empower private counterparties to confer this authority on outsiders. Second, the legal treatment of third-party claims relies far too heavily on judicial conjecture about vague standards and ambiguous classification rubrics.[19] Our legal system would be better served, at least in this context, by moving towards a rule-based approach that insists on explicit grants of third-party rights as a precondition to outside liability. In other words, we should demand very clear evidence before determining that two parties have indeed sought to broadcast contract rights to outsiders.[20]

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[18] *See, e.g.*, Mahalsky v. Salem Tool Co., 461 F.2d 581, 584 (6th Cir. 1972) (refusing to recognize any action in contract or remedy for breach absent privity); Verosol B.V. v. Hunter Douglas, Inc., 806 F. Supp. 582, 586 (E.D. Va. 1992) ("Under well-settled principles of contract law, a stranger to a contract ordinarily has no rights under the contract and cannot sue to enforce it."); Twine v. Liberty Nat'l Life Ins. Co., 311 So. 2d 299, 305 (Ala. 1975) (holding that a stranger to the contract could not take advantage of its breach); Anderson v. First Northtown Nat'l Bank, 361 N.W.2d 116, 118 (Minn. Ct. App. 1985) ("Strangers to a contract acquire no rights under such a contract."); Grgic v. Cochran, 689 S.W.2d 687, 690 (Mo. Ct. App. 1985) (holding that subcontractors owe no duty to the owner of the project on which they work in the absence of privity of contract).

[19] *See infra* Part I.B.

[20] I should clarify at the outset a quick point related to the scope of analysis. A subset of third-party-beneficiary claims involves government contracts. A taxpayer, for example, grows angry when a vendor breaches its contract with the government—say to build a road or bridge that is safe—and the taxpayer sues the vendor as a third-party beneficiary of this contract. *See, e.g.*, Jennifer Sapp, *Aging Out of Foster Care: Enforcing the Independent Living Program Through Contract Liability*, 29 CARDOZO L. REV. 2861, 2884–94 (2008) (discussing the use of third-party-beneficiary law to impose liability in the foster care context); Waters, *supra* note 13, at 1173–1208 (discussing the use of third-party-beneficiary law to secure the protection of public programs enacted via statute). The *Restatement* establishes a different approach, under § 313, to evaluate third-party-beneficiary claims in the government-contracting context. *See* RESTATEMENT (SECOND) OF CONTRACTS § 313 (1981). The U.S. Supreme Court has recently addressed this issue in a case determining whether beneficiaries of a contract between the federal government and various drug manufacturers could sue for breach. *See* Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342, 1345 (2011) (denying the right to bring a contract action as a third-party beneficiary in this context). I will specifically exclude public government contracts from assessment, as these arrangements present different legal issues from private contracting and involve considerations more closely related to the determination of private rights of action in statutory interpretation. Rather, my focus in this Article is on private contracting, typically between sophisticated parties who understand the nature of their exchange.

The Article is organized as follows. Part I reviews the law of third-party beneficiaries and the ongoing struggle to categorize and adjudicate these claims. Part II presents an economic analysis of broadcast contracting, examining and illustrating the basic mechanism, breadth of applicability, and theoretical benefits of one-stop multilateral commitment. Part III finishes by evaluating the normative fit between current law and an optimal system for governing third-party rights in the broadcast contracting context. I conclude that our present approach to third-party beneficiaries is largely a function of excessive historical abstraction and the resulting adoption of a vague and difficult-to-apply standard. Ultimately, the development of law in this area would be better served by moving towards an approach that adopts clearer rules to govern the conveyance of third-party rights. A brief conclusion summarizes my claims.

I. THE LAW OF THIRD-PARTY BENEFICIARIES

A. Background

When can a third party collect damages on a contract formed by two other people? At first blush, it is tempting to answer "never"—that is, legal liability for broken contracts should extend only to a direct counterparty. If Abe promises to pay Beth $50 to mow Cam's lawn, then Abe, not Cam, should sue Beth when she fails to perform.[21] After all, how can an outsider, even one who might suffer greatly from breach, possibly bring a claim? He had no say in forming the contract; why should he have rights? The aggrieved third party might, of course, encourage the original promisee to pursue the claim, especially if the promisee clearly indicated a desire to benefit the third party (and therefore presumably maintains some interest in seeing the performance take place). But, historically, contract law would not sanction direct action by an independent third party against the breaching promisor.[22]

Agency law offered a partial workaround to this problem, as contracts made between an agent and a third party (under authority) bind the principal.[23] But this requires a heightened legal status—where the agent agrees to act for the benefit of the principal and subject to her control—that analytically links the principal and third party in privity.[24] Further, the

[21] Terminology is important here and worth clarifying: the *promisor* is the party making a promise that will benefit some third party, the *promisee* is the initial contractual counterparty to the promisor (who very likely made a reciprocal promise to the promisor in order to induce the bargain), and a third-party beneficiary is a party independent of the contract who will nevertheless benefit in some manner from the performance of the promisor. In the simple example above, Abe is the promisee, Beth is the promisor, and Cam is the third-party beneficiary.

[22] *See* Waters, *supra* note 13, at 1112–13.

[23] *See* RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006).

[24] *Id.* § 1.01.

ongoing legal responsibilities of the three parties differ greatly in the agency context, as the agent is typically excused from any contractual liability and therefore drops out of the picture.[25] This is simply a representative arrangement, and most adversely affected contractual bystanders—such as Cam in the example above—would not enjoy such a relationship and would therefore receive no help from agency law.

Over time, contract law began to change, in fits and starts, to permit third-party beneficiaries to recover damages directly, in certain contexts, for a promisor's breach. The historical development of this rule is debated in the literature. Anthony Waters argues that the now-famous case of *Lawrence v. Fox*[26] "defied the prevailing rules of contractual liability" and "gave us the initial formulation of the third party beneficiary rule."[27] Melvin Eisenberg describes the evolution of the rule as a more gradual affair, emphasizing both earlier cases in English and American law that paved the way for *Lawrence*[28] and the relative unimportance of *Lawrence* in comparison to the legal developments that followed.[29] Certainly the early 1900s were a time of great balkanization for third-party-beneficiary rights. Some jurisdictions resisted the rule entirely,[30] following the formalist logic of Langdell[31] and Justice Holmes.[32] Others allowed claims only in a limited

[25] *Id.* § 6.01. The exceptions here occur when an agent negotiates a contract with a third party for an unidentified or undisclosed principal. In these contexts, the agent may be liable for the contract by default. *Id.* §§ 1.04(2), 6.02–.03. An agent may also assume ongoing contractual liability by agreement with the third party.

[26] 20 N.Y. 268 (1859).

[27] Waters, *supra* note 13, at 1111, 1115. Waters traces the analytical backstory of this case in some detail, arguing that the judicial outcome was the result of an unusual factual situation (including potentially unenforceable gambling loans), a gap in several legal doctrines, creative lawyering, and an accommodating judiciary.

[28] *See* Eisenberg, *supra* note 13, at 1360–63 ("[I]n reality the case was not very remarkable for its time. . . . *Lawrence v. Fox* broke little or no new ground in New York.").

[29] *Id.* at 1363. Eisenberg attributes the modern popularity of *Lawrence* to its three different opinions, each staking out a clear position on the topic: the Comstock opinion rejects third-party enforcement due to lack of privity, the Johnson opinion permits third-party enforcement via an agency theory, and the Gray opinion permits third-party enforcement without articulating an exact theory beyond "manifest justice." *Id.* at 1364–65. Just eighteen years later, New York strictly limited the reach of *Lawrence* in *Vrooman v. Turner*, 69 N.Y. 280 (1877), though later cases zigged back the other way. *See* Eisenberg, *supra* note 13, at 1362–74.

[30] Massachusetts, for example, held out against the doctrine for decades before eventually yielding to the rule in 1979. *See, e.g.*, Kenneth J. Foster, *Public Housing Tenants as Third-Party Beneficiaries: Considering* Ayala v. Boston Housing Authority, 27 NEW ENG. L. REV. 85, 87–92 (1992) (describing the Massachusetts case law and its eventual adoption of a third-party-beneficiary rule).

[31] *See* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 79 (2d ed. 1880) ("[The principle] that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise . . . is so plain upon its face that it is difficult to make it plainer by argument.").

[32] *See* O.W. HOLMES, JR., THE COMMON LAW 340–41 (1881) ("The fact that a consideration was given yesterday by A to B, and a promise received in return, cannot be laid hold of by X, and transferred from A to himself. . . . How, in short, can a man sue or be sued on a promise in which he had no part?").

number of difficult-to-distinguish contexts.[33] And still others were more permissive.[34]

Given the lack of clarity in this area for the first few decades of the 20th century, the *Restatement (First) of Contracts*, completed in 1932, sought to synthesize the treatment of third-party beneficiaries into manageable distinctions.[35] Accordingly, it divided potential third-party claimants into three groups: creditor beneficiaries, donee beneficiaries, and incidental beneficiaries.[36] The first two groups had legally enforceable rights, while the latter group did not. The borders between each group eluded precise definition, and as we will see, the distinctions were ultimately abandoned.[37] But a creditor–beneficiary relationship was generally understood to arise when a promisee sought to elicit a vow from the promisor to repay an obligation that the promisee owed to the third party.[38] For example, if Abe happened to owe Cam $50 from prior dealings, then Abe might arrange for a "ring-around-the-rosie" form of repayment, instead of paying Cam directly, by entering into the lawn mowing transaction with Beth that is described above.

By contrast, a donee–beneficiary relationship arose when, in the words of *Restatement (First)*, "it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of . . . performance thereof is [(i)] to make a gift to the beneficiary or [(ii)] to confer upon him a right against the promisor."[39] In other words, Cam might be a donee–beneficiary under the initial deal between Abe and Beth, even without a prior debt from Abe to Cam, as long as the contract clearly spelled out an intention for Abe to convey a gift of the performance to Cam. Likewise, even if there were no explicit gift statement, Cam might enjoy legal standing if Abe's bargain with Beth could somehow be understood as conveying a right for Cam to sue in the event of breach.

It takes some work to distinguish between these two types of donee–beneficiaries, but analytically it should indeed be possible for a promisee to seek to confer enforcement rights to a third party, even apart from any

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33 Williston apparently supported contextual third-party rights, at least initially, but struggled to reconcile his belief that "justice requires some remedy to be given the beneficiary" with his formal view of contract law. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 357, at 683 (1st ed. 1920). He eventually staked out a position in his treatise that a third-party claimant should not be able to maintain a suit in a court of law but that such a claim could prevail in a court of equity. This distinction did not carry over, however, to Williston's work on the restatement of contract law. *See* Eisenberg, *supra* note 13, at 1366 & n.37.

34 *See* Eisenberg, *supra* note 13, at 1366–70.

35 RESTATEMENT (FIRST) OF CONTRACTS §§ 133, 135–136 (1932).

36 *Id.*

37 *See infra* notes 44–51 and accompanying text.

38 RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(b).

39 *Id.* § 133(1)(a).

desire to make a gift of the actual performance. For example, a promisee might wish to grant enforcement rights to an outsider, for various strategic reasons,[40] even when the subject of the contractual performance does not directly or primarily benefit that third party. The much harder question, of course, is whether this desire for outside enforcement rights actually accompanies any given exchange.

The third and final category, that of an incidental beneficiary, purportedly encompassed all other third parties.[41] For example, Cam's neighbor Dawn might also be adversely impacted by Beth's failure to mow Cam's lawn (because she has to look at the unsightly view or deal with weeds that blow over from Cam's yard). But Dawn would only be considered an incidental beneficiary of the deal between Abe and Beth, and she could not sue Beth for breach.[42] Even a party suffering more explicit pecuniary harm from the breach—such as the service station forfeiting the sale of gasoline that Beth would have purchased to perform the job—cannot recover if it is deemed an incidental beneficiary.[43]

These distinctions may have sounded good to the drafters of the *Restatement*, but courts struggled consistently over the next decades to classify individual plaintiffs under this rubric. It was easy enough when, say, a prior creditor relationship existed between the promisee and a third party—or when the promisee clearly manifested a gift intention. But distinguishing the second type of donee beneficiary—where enforcement rights were conferred without an explicit gift intention—from incidental beneficiaries proved especially tricky. Courts seemed to accept the possibility that a right to enforce the contract might be understood to have been conferred by implication, even without an explicit promise or statement to that effect. Accordingly, it became quite challenging for a judge to determine whether a promisee had actually sought enforcement rights for the third party or whether the claimant was merely a disappointed incidental beneficiary. Furthermore, this inquiry only took place, of course, when the financial stakes were significant enough to trigger litigation—so presumably the aggrieved third party could always point to some meaningful harm. Moreover, larger questions regarding intent remained. Why was the intent of the promisee controlling to begin with? Wouldn't it make more sense to look at the objectives of both contracting parties?[44]

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[40] *See infra* Part II.C.

[41] RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(c).

[42] *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 302 illus. 16 (1981) ("B contracts with A to erect an expensive building on A's land. C's adjoining land would be enhanced in value by the performance of the contract. C [cannot bring suit for breach under the contract].").

[43] *Id.* § 302 illus. 17 ("B contracts with A to buy a new car manufactured by C. C is an incidental beneficiary, even though the promise can only be performed if money is paid to C.").

[44] *See, e.g.*, Am. Fin. Corp. v. Computer Scis. Corp., 558 F. Supp. 1182, 1184–85 (D. Del. 1983) ("[B]oth parties must in some manner express an intent to benefit the third-party before third-party beneficiary status is found."); Manor Junior Coll. v. Kaller's Inc., 507 A.2d 1245, 1246–48 (Pa. Super.

Throughout this time, the influential Yale contracts scholar Arthur Corbin continued to press for fewer discrete categories of beneficiaries, arguing that it was senseless to parse the distinctions of *Restatement (First)*.[45] Instead, Corbin advocated a simple binary framework—that of "intended" versus "incidental" beneficiaries—which would be grounded in fundamental notions of contractual intent (rather than the murkier corners of property, trust, and quasi-contract that continued to exert influence in this area).[46] Corbin believed, in a nutshell, that third-party rights should be understood exactly like any other term in a contract, attaching through the express or implicit intentions of promisor and promisee.[47] This test is arguably not any easier to apply, but it has emerged as the modern touchstone of third-party-beneficiary law.[48] With continued prodding from Corbin,[49] the *Restatement (Second) of Contracts* reoriented the inquiry along these lines, dropping the creditor and donee labels and focusing on the intentions of both contracting parties.[50] According to § 302 of *Restatement (Second)*, "Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties. . . ."[51] Said differently, the *Restatement (Second)* explicitly transferred the third-party-beneficiary

Ct. 1986) ("[A] party does not become a third party beneficiary unless both parties to the contract express an intention to benefit the third party in the contract itself.").

45 *See* Waters, *supra* note 13, at 1169–72.

46 Waters charts the evolution of third-party-beneficiary doctrine from obscure legal origins in property, trust, and quasi-contract to that of direct contractual intention. *Id.* at 1165–73.

47 *See* 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 774, at 8 (1951).

48 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

49 Even into his eighties, Corbin seems to have sent detailed recommendations on the topic to Robert Braucher, the initial reporter of *Restatement (Second)*. *See* Waters, *supra* note 13, at 1170.

50 The authors of *Restatement (Second)* boasted that prior doctrinal categorization challenges

> have now been largely resolved . . . by recognition of the power of the promisor and promisee to create rights in a beneficiary by manifesting an intention to do so. . . . [T]he terms "donee" beneficiary and "creditor" beneficiary carry overtones of obsolete doctrinal difficulties . . . . Instead, the terms "intended" beneficiary and "incidental" beneficiary are used to distinguish beneficiaries who have rights from those who do not.

RESTATEMENT (SECOND) OF CONTRACTS § 302 intro. note. Any claims to resolve the complexities of classification were, however, undoubtedly premature.

51 *Id.* § 302(1). This section goes on to require that "*either* (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id.* (emphasis added). It is also worth noting that standard contract law defenses—such as duress, fraud, incapacity, illegality, mistake, unconscionability—will typically shield the promisor from third-party claims. *See id.* § 309(1) ("[I]f a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity."); Eisenberg, *supra* note 13, at 1413 ("The general rule . . . is that the promisor can raise against a recognized beneficiary any defense the promisor would have had against the promisee under the contract.").

problem into a direct matter of contract interpretation: what terms did the initial counterparties mean to adopt for this exchange?

But again, this merely frames the inquiry. It is easy enough to interpret a contract when the parties clearly spell out a desired term. Words can be opaque, however, and rational parties cannot take the time to include a written clause for every contingency.[52] Thus, much of contract law deals with interpreting ambiguous or unstated terms—often by selecting default rules to fill gaps in incomplete agreements.[53] And while this task is difficult enough for terms impacting a bilateral contractual relationship,[54] imagine how the complications can multiply when outsiders are brought into the mix. Contracts govern vast expanses of activity, and undoubtedly the affairs of two counterparties will affect others—sometimes profoundly so. Moreover, the typical interpretation problem is compounded in the third-party context because an outside party—conceivably many different outside parties—will be making arguments about contractual intentions for a deal that they did not personally negotiate.[55] The next subpart discusses how lawmakers go about this task of determining the intentions of the initial counterparties with respect to outsider enforcement rights.

B. Distinguishing Intended and Incidental Beneficiaries

At the outset, it is important to note that contracting parties do not need to name an individual third-party beneficiary with specificity in order to create an enforceable right.[56] While they are certainly free to do so, another

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[52] *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 292–94 (6th ed. 2012); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW chs. 13–16 (2004); Richard Craswell, *Contract Law: General Theories*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS § 4000 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 568–94 (2003). Moreover, parties will sometimes have incentives to preserve contractual ambiguity in order to argue for a preferred interpretation down the road. *See* George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664 (2006); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

[53] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87–89 (1989); George M. Cohen, *Implied Terms and Interpretation in Contract Law*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS, *supra* note 52, § 4400, at 78–99.

[54] *See, e.g.*, Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 161–63 (1994) (explaining the shortcomings of various approaches to contractual incompleteness, particularly the limits on judicial competence in gap filling); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 839–42 (2003) (describing the challenges and possible indeterminacy of the default rule project).

[55] The same is often true, of course, for organizational contracts where the corporate agent pursuing the firm's claim may not be the same agent who initially negotiated the agreement for the firm.

[56] *See* Sec. Fund Servs., Inc. v. Am. Nat'l Bank & Trust Co., 542 F. Supp. 323, 329 (N.D. Ill. 1982) ("[I]t is not necessary for the third party who is benefitted by the contract to be named therein if he is otherwise sufficiently described or designated."); Pappas v. Jack O. A. Nelsen Agency, Inc., 260 N.W.2d 721, 725–26 (Wis. 1978) ("[T]he precise identity of the third-party beneficiary need not be ascertainable at the time of the agreement so long as the agreement specifies or identifies a group or

viable approach is to identify an explicit group that should be imbued with third-party enforcement rights.[57] For example, I might designate "all students in my current contract law class" as intended beneficiaries of my employment contract with the university.[58] If so, a breach on my part, such as failure to show up for class one month, could presumably be litigated by any student in the course. I have not spelled out all sixty student names, but it is easy enough for a court to recognize who possesses outsider rights.

The identification task grows taxing, however, if I name a more general group or make no mention of third-party beneficiaries. Suppose I specify "my students" as the intended third-party beneficiaries of a contract. Does this mean that both current students and former students can press a claim?[59] How about my short course students at a different university? And what if the contract fails to state anything at all about students or third-party beneficiaries? Can a student still make out a claim when I stop coming to class? Part, but not all, of my academic duties include teaching; did the university and I intend to confer third-party enforcement rights to the students? Such concerns over unstated intentions are familiar to the task of contract interpretation. Yet, as we will see, the presence of many potential outside parties further complicates the analysis.

Let us assume for the sake of discussion, then, that a promisor and promisee fail to identify any protected third parties, such that a court needs to determine whether a given outsider is an intended or incidental beneficiary. This presents an immediate follow-up question: should lawmakers use the objective or subjective intent of the contracting parties? In other words, do we care about the actual inner intentions of the parties or only about an objectively reasonable interpretation of the words and actions that manifest their intentions? This is another familiar concern in contract law, arising whenever a standard invokes contractual intent as the determinative legal crucible.

For the most part, of course, contract law exhibits a clear preference for objective intent over subjective intent.[60] Grant Gilmore has famously

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class to whom the party must belong to benefit thereby."); RESTATEMENT (SECOND) OF CONTRACTS § 308 ("It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.").

[57] *Pappas*, 260 N.W.2d at 725–26.

[58] My students might take issue with the word "beneficiary."

[59] The example ignores damages.

[60] Judges over the years have developed especially colorful ways of expressing this concept. *See, e.g.*, Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814 (7th Cir. 1987) ("Walters stoutly maintains that he subjectively intended to be bound . . . . Yet 'intent' does not invite a tour through Walters's cranium, with Walters as the guide. . . . 'The intent of the parties [to be bound] must necessarily be derived from a consideration of their words, written and oral, and their actions.'" (alteration in original) (quoting Household Utils., Inc. v. Andrews Co., 236 N.W.2d 663, 669 (Wis. 1974))); Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of

narrated the historical development of this inclination,[61] and it can be seen throughout *Restatement (Second)*.[62] Offer and acceptance, for example, are famously governed by an objective test: we care about how reasonable people would interpret what someone says and does, not about their idiosyncratic inner musings. You cannot mentally reject an offer while simultaneously responding "OK, that sounds good."[63] There are undoubtedly legitimate questions about what objective intent means and whether this is something that courts can actually identify.[64] But for many, this objective approach to contractual intent is a critical logical leap, needed to render the adjudicatory task tractable.

Arguably, however, the identification of third-party-beneficiary rights presents even greater epistemological difficulties than the determination of contractual agreement. With offer and acceptance, there is typically a conversation, or some related interaction between the relevant parties, that can be used to inform an objective determination of agreement. How can judges unpack, in an objective manner, whether a contract that favors a given person or a group (directly or indirectly) manifests an intent to provide third-party recourse? Courts need to look beyond the mere fact of the benefit itself; otherwise anyone positively impacted by the contract could pursue a claim. But any recognition of a benefit with ambiguous intent to a third party is problematic. We are walking on very thin ice when we purport to objectively allow the claims of one group while insisting that other benefits or other groups are merely incidental and thus unenforceable.

Some have argued, therefore, that the intended-beneficiary test only makes sense if courts embrace a subjective standard of intent. As Eisenberg puts it, "If the intent-to-benefit test is satisfied by objective intent, it provides no guidance on the issue the test, as so formulated, makes critical."[65] According to this view, the very exercise of dividing intended and incidental beneficiaries requires a focus on the actual (subjective) mental state of the parties.

This is too strong of a statement, however, as the objective test might still be used to shed light on third-party rights. Some cases are not too difficult: many people would find an intent to benefit Cam in the initial lawn mowing example, regardless of the standard adopted. Likewise, few

law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.").

61 *See* GRANT GILMORE, THE DEATH OF CONTRACT 42–43 (2d ed. 1995).

62 *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981).

63 Many who have studied the doctrine in this context will recall the binding land-sale contract of two barroom negotiators who were "high as a Georgia pine." Lucy v. Zehmer, 84 S.E.2d 516, 519 (Va. 1954).

64 *See* GILMORE, *supra* note 61, at 47 (famously describing the objective test as "the great metaphysical solvent").

65 *See* Eisenberg, *supra* note 13, at 1379.

people could argue with a straight face that either the Big Ten Athletic Conference or the referee it contracted with had a subjective intent to benefit an unaffiliated retail store in Iowa City.[66] It is more difficult to articulate exactly why this is so—but this is the challenge whenever we seek to objectify something.[67] To the extent that objectivity means anything in contract law, it could play a role here as well.[68] Of course, intending to benefit third parties and intending to give them private rights to enforce a breach are not the same thing, and this distinction might matter when crafting an approach to third-party claims.[69]

Given this uncertainty, it should perhaps not be too surprising that while courts often claim to follow the binary approach of *Restatement (Second)*, it is common to see the use of finer grain tools, tests, and maxims for determining whether third-party rights attach. One approach is to insist on a heightened standard, requiring something like a "clear," "definite," or "express" intent to benefit a third party.[70] This may deter the filing of some tenuous claims, but it is unlikely that these extra words provide much guidance for close inquiries. Less commonly, judges may require that the intent to empower a third party is located in the actual words of agreement or text of the contract.[71] This approach has significant advantages, and I will argue later in this Article that greater use of formalism would be a welcome

[66] *See supra* notes 5–8 and accompanying text.

[67] A related problem involves the choice of contextual facts and circumstances to bring into the analysis. For example, the contracting parties might designate a fringe group (such as Hawkeye John's) as an intended beneficiary, and, if so, this fact should be brought into the objective analysis. A promisee who insists that, despite specific contractual language to the contrary, he subjectively did not intend to convey third-party rights would have a lot of explaining to do.

[68] Some room also remains under the *Restatement (Second)* conception of third-party rights for a subjective analysis of intention. The challenge of melding objective and subjective standards is not unique to third-party-beneficiary rights; other branches of contract law take a similar approach to intent. The meaning of a satisfaction condition, for example, will be interpreted under either an objective or a subjective standard depending on the contracting context. The law prefers to evaluate satisfaction clauses under an objective standard but will allow parties to insist on subjective satisfaction of performance with highly aesthetic features such as portrait paintings. *See* RESTATEMENT (SECOND) OF CONTRACTS § 228 & illus. 4 (1981). So contract law has some experience uncovering the meaning of subjective intent—though I would argue that efforts here are fraught with uncertainty. I challenge anyone, for example, to distinguish practically (not conceptually with the band-aid of good faith) between a subjective satisfaction condition (legally binding) and an agreement lacking mutuality of obligation (unenforceable).

[69] In other words, we might select a default that requires *more* than just an objective intent to benefit before awarding outside enforcement rights. *See infra* Part III.B.1.

[70] *See, e.g.*, Khabbaz v. Swartz, 319 N.W.2d 279, 285 (Iowa 1982) (requiring express intent); Snyder Plumbing & Heating Corp. v. Purcell, 195 N.Y.S.2d 780, 783 (App. Div. 1960) (requiring clear intent); *see also* Eisenberg, *supra* note 13, at 1379 & n.80.

[71] *See, e.g.*, Sec. Fund Servs., Inc. v. Am. Nat'l Bank & Trust Co., 542 F. Supp. 323, 329 (N.D. Ill. 1982); Carson Pirie Scott & Co. v. Parrett, 178 N.E. 498, 501 (Ill. 1931) ("[T]he right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed.").

development in the law of third-party beneficiaries.[72] A textual prerequisite is far from universal, however, and it is admittedly in tension with the tools used to interpret contracts in some other contexts.[73] Interpretive problems also persist when, as discussed above, a contract states that it intends to convey enforcement rights to a general group without specifically identifying the members of that group.[74]

Still another approach is to impose additional substantive hurdles. For example, in order for rights to attach, a judge may require that the third party directly receive some form of performance.[75] This obviously dovetails nicely with the creditor–beneficiary context, as a payment in money or kind is promised directly to the third party. Similarly, the requirement of third-party receipt of performance is typically satisfied in the direct-donee context, such as Abe and Beth's initial lawn mowing contract. But the direct-performance rule eliminates the possibility of recovery when performance is provided to the initial counterparty—presumably even if both counterparties wish to empower a third-party beneficiary to sue. As I discuss below,[76] this is not always a sensible or desirable outcome.

In summary, courts have experimented with a messy mix of strategies for giving content to the imprecise distinction between intended and incidental beneficiaries. These include a focus on the language of the promise, the intentions or purposes of the parties, vague notions of utility or fairness, and even less explicit assertions about the needs of various commercial settings. This chaotic attitude toward third-party rights is perhaps understandable in light of the ambiguous legal mandate, but it would be helpful to have a legal approach that provides private parties with more certainty at the time of contracting and judges with more guidance at the time of adjudication.

C. Modification of Third-Party Rights

Finally, what happens if the initial counterparties attempt to modify the rights of a third-party beneficiary? Does the modification stick, or are the rights somehow vested in the third party such that they cannot be clawed back by subsequent counterparty agreement? Presumably, no problems

[72] *See infra* Part III.B.1.

[73] Eisenberg seems to reject a formalist approach for this reason, arguing that "[t]he better-reasoned cases reject these formal requirements." Eisenberg, *supra* note 13, at 1379. The indefiniteness doctrine is, however, an important exception to this proclivity toward gap filling and might serve as a useful model for our understanding of third-party-beneficiary rights. *See infra* notes 185–94.

[74] Some courts requiring explicit textual support for third-party rights do allow these general statements of intent to satisfy the inquiry. *See, e.g.*, Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., 399 F.2d 289, 292–93 (2d Cir. 1968); Am. Fin. Corp. v. Computer Scis. Corp., 558 F. Supp. 1182, 1186 (D. Del. 1983).

[75] *E.g.*, *Carson Pirie Scott*, 178 N.E. at 503–04.

[76] *See infra* Parts II.A–C.

arise if two counterparties renegotiate a contract to phase in third-party enforcement rights to an individual or group that did not previously enjoy legal protection. We can analyze this modification just like an initial grant of third-party rights. But what happens if the promisor and promisee have a change of heart and seek to rescind rights that were previously granted to a third-party beneficiary?

Contract law has struggled with this question. Some early cases treated the situation like that of any other contractual renegotiation, holding that a valid modification did indeed impact third-party rights and could extinguish outside enforcement privileges.[77] Other courts spoke of "vested rights" and refused to allow the initial counterparties to take back outside enforcement power—even though these contracting parties were the ones who established those rights in the first place.[78] In the midst of this uncertainty, *Restatement (First)* took a controversial position, stating that the initial counterparties could modify away the rights of creditor beneficiaries but not those of donee beneficiaries.[79] Because many third-party-beneficiary cases fell into this latter category, *Restatement (First)* effectively established a default rule of irrevocability outside the creditor context. It was not at all clear, however, that this was an optimal or analytically consistent approach.[80]

Indeed, in the ensuing years many courts and commentators rejected *Restatement (First)*'s solution to the modification problem.[81] Accordingly, the drafters of *Restatement (Second)* decided to advance a very different proposition.[82] Section 311 of *Restatement (Second)* reversed the rule of irrevocability to a presumption of revocability subject to a few exceptions.[83] Specifically, the initial counterparties may not modify away third-party rights under three circumstances: (1) the counterparties state at the outset that these rights are not subject to alteration,[84] (2) the third-party beneficiary materially changes her position in justifiable reliance on the promise before

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[77] *See, e.g.*, Biddel v. Brizzolara, 30 P. 609, 612 (Cal. 1883); Gilbert v. Sanderson, 9 N.W. 293, 295 (Iowa 1881).

[78] *See, e.g.*, Filley v. Ill. Life Ins. Co., 137 P. 793, 794–95 (Kan. 1914); Marquet v. Aetna Life Ins. Co., 159 S.W. 733, 735 (Tenn. 1913).

[79] RESTATEMENT (FIRST) OF CONTRACTS §§ 142–143 (1932).

[80] *See* Eisenberg, *supra* note 13, at 1416–17 (criticizing the approach and analytical justification for irrevocability in the donee–beneficiary context as inconsistent with contract law's approach to other gift promises, which are freely revocable).

[81] *See, e.g.*, McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534, 545 (D. Minn. 1943); Wolosoff v. Gadsden Land & Bldg. Corp., 18 So. 2d 568, 571 (Ala. 1944); William H. Page, *The Power of the Contracting Parties to Alter a Contract for Rendering Performance to a Third Person*, 12 WIS. L. REV. 141 (1937).

[82] *See* RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981).

[83] *Id.* § 311(2).

[84] *Id.* § 311(1).

the attempt at modification,[85] or (3) the third-party beneficiary manifests assent to her rights at the behest of the promisor or promisee.[86] It is hardly clear why the assent of an outsider to third-party enforcement rights should have legal impact on the modification powers of the initial counterparties.[87] But I will argue in Part III of this Article that *Restatement (Second)* treats this issue correctly with respect to a default rule of revocability subject to an exception for rights that are clearly deemed irrevocable in the ex ante agreement.[88] This normative claim must wait, however, until I am able to develop a richer theory of third-party rights.

To quickly summarize, contract law permits third parties to recover private damages from a breaching promisor if they fall into a legally protected class of outsiders. Historically, two types of beneficiaries—creditor and donee beneficiaries—enjoyed this right. More recently, *Restatement (Second)* has replaced these terms with a direct inquiry into whether the initial counterparties intended to convey enforcement rights to a given outsider. Express contractual language stating that the third party is indeed an intended beneficiary is obviously a powerful way to establish intent. But courts will sometimes find intent through other contextual evidence. Finally, even if a third party does enjoy enforcement rights, that power is usually taken away (with a few exceptions where the rights are deemed to be "vested") if the initial counterparties decide to modify their contract to remove the third-party-beneficiary status. Armed with this overview of the law, it is time to explore how parties are using third-party-beneficiary provisions to write broadcast contracts and to think more generally about the costs and benefits of providing outside enforcement rights. Part II turns to an analysis of broadcast contracting.

II. BROADCAST CONTRACTING

Broadcast contracting involves the adoption of private agreements to establish a heightened legal commitment to a defined class of third parties. The promisor simply contracts with a willing counterparty, identifies the desired group of outside beneficiaries, and sets binding new rules to govern her behavior. This is a flexible tool, and the promisor might use this framework to broadcast private economic commitments to many different beneficiaries or even to write "new laws" in areas as diverse as tort, employment, property, and corporate law—really in any setting where she has the desire, for whatever reason, to bind her hands more tightly than the status quo mandates. I will begin by describing the basic mechanics of

85 *Id.* § 311(3).

86 *Id.*

87 *See* Eisenberg, *supra* note 13, at 1419–21. Nor is it clear why a promisor or promisee might seek third-party assent.

88 *See infra* Part III.B.3.

broadcast contracting, turn to some additional examples and applications, and offer a detailed theoretical account for why private parties might wish to broadcast a contractual commitment. The section concludes by examining some limits on the use of broadcast contracting to adjust legal rights en masse.

A. Basic Mechanics

It is easiest to illustrate the mechanics of broadcast contracting through an employment law example. Title VII of the Civil Rights Act of 1964 famously prohibits employment discrimination based on "race, color, religion, sex, or national origin."[89] This includes acts such as discriminatory hiring and firing, unequal compensation or job assignments, and various other terms and conditions of employment.[90] But Title VII does not extend to employees in a same-sex relationship. Roughly twenty states and many cities and counties have enacted laws that address employment discrimination on the basis of sexual orientation,[91] but there is no unified legal standard. A proposed bill to ban discrimination in this context (the Employment Non-Discrimination Act (ENDA)) has been introduced several times in Congress,[92] but the prospects for enactment remain unclear.

Several years ago, however, Professors Ian Ayres and Jennifer Gerarda Brown developed a private legal alternative.[93] They established and registered a "Fair Employment" certification mark comprised of a simple FE enclosed by a circle:

FE

[89] *See* 42 U.S.C. § 2000e-2 (2006).

[90] *Id.*

[91] *See* CAL. GOV'T CODE § 12940 (West Supp. 2012); CONN. GEN. STAT. ANN. § 46a-81c (West 2004); HAW. REV. STAT. ANN. § 378-2 (LexisNexis Supp. 2011); 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2011); ME. REV. STAT. ANN. tit. 5, § 4572 (Supp. 2011); MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis 2009); MASS. GEN. LAWS ch. 151B, § 4 (LexisNexis Supp. 2011); MINN. STAT. ANN. § 363A.08 (West 2004); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2006); N.H. REV. STAT. ANN. § 354-A:7 (LexisNexis 2008); N.J. STAT. ANN. § 10:5-12 (West 2002 & Supp. 2011); N.M. STAT. ANN. § 28-1-7 (LexisNexis Supp. 2011); N.Y. EXEC. LAW § 296 (McKinney Supp. 2012); OR. REV. STAT. § 659A.030 (2011); R.I. GEN. LAWS § 28-5-7 (2003); VT. STAT. ANN. tit. 21, § 495 (2009).

[92] *See, e.g.*, J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1535–36 (2000).

[93] Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006). This concept is also discussed in a book published by the same authors. IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS ch. 4 (2005).

Any employer is permitted to license use of this mark, without charge, but the licensee must execute an agreement with the licensors, under which they promise not to discriminate on the basis of sexual orientation.[94] Professors Ayres and Brown are busy people, however, and they will not be personally enforcing any future breach of this contract—indeed, they expressly waive all rights to do so in each agreement with a licensee.[95] Rather, Ayres and Brown empower several categories of third-party beneficiaries to bring an action for breach: "Licensee and Licensor agree to designate as express third-party beneficiaries . . . all persons and entities that would be entitled to sue if ENDA were in effect . . . including . . . all persons who are or have been employed by the Licensee or applied for employment with the Licensee . . . ."[96]

Consider the effects of this broadcast contract. First, the promise not to discriminate should be legally binding as a bargained-for contractual agreement: there is offer and acceptance and the employer exchanges a legal detriment (the promise not to discriminate) for a legal benefit (the FE mark). One might question the adequacy of consideration for the FE mark, but there is intangible value here, and a court is extremely unlikely to strike down the deal for inadequacy.[97]

One might also query whether this deal comprises bargained-for exchange as required under a consideration theory.[98] A judge may doubt that the employer really sought to trade for the FE mark, concluding instead that this is simply a pretense allowing the employer to make a unilateral gift promise not to discriminate.[99] If so, the entire deal unravels. The much more likely result, however, would be a judicial reluctance to wade into these waters. We can understand why an employer might really wish to obtain the FE trademark, and certainly Ayres and Brown would be unwilling to license the mark without receiving a reciprocal commitment from the employer not to discriminate.[100] The bargain seems genuine and not a sham transaction.

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94 Ayres & Brown, *supra* note 93, at 1644–45.

95 *Id.* at 1698.

96 *Id.* at 1645.

97 Indeed, some trademarks are understood to be highly valuable and it is entirely possible that displaying the FE mark could have real effects.

98 RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

99 *Cf. id.* § 71 illus. 5 ("A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay $1000.").

100 Professor Ayres has even admitted elsewhere to negotiating with a potential consulting client to have them license the FE mark in exchange for his expert witness services. *See* Ian Ayres, *Never Say No: The Law, Economics, and Psychology of Counteroffers*, 25 OHIO ST. J. ON DISP. RESOL. 603, 615–16 (2010).

Is this broadcast contract necessary? Conceivably, an employer who is committed to an antidiscrimination policy could write direct employment contracts with every new hire, under which it promises not to discriminate or promises to behave as if all aspects of ENDA were current law. These agreements would be valid, as bargained-for consideration is present in each contract (both the employer and employee exchange legal detriments), and any current employee facing such discrimination would be entitled to sue.[101] But this is not the only audience for an employer's promise.

The real innovation in a broadcast contract arises from an ability to commit to parties outside of contractual privity and to parties that may otherwise never enter into a contractual relationship—in this case, potential employees.[102] Prior to the execution of an employment contract, these applicants enjoy no direct contractual rights with the employer. They therefore lack an ability to enforce direct promises not to discriminate. The employer could conceivably sign a pre-employment contract, under which it promises not to discriminate in exchange for a promise to apply for employment. But that is exceedingly cumbersome and impractical. And even this may fall short of the true goal: an employer may seek to broadcast its commitment widely in order to attract potential employees or obtain some other anticipated benefit.[103]

When a promise is broadcast via the FE contract, the situation differs from the use of repeated bilateral contracts. Each applicant is not, of course, named personally as a third-party beneficiary. But by clearly defining the classes of third-party beneficiaries to include job applicants and anyone else entitled to sue under ENDA, Ayres and Brown have provided a legal framework where candidates facing discrimination will undoubtedly be entitled to maintain a lawsuit as intended beneficiaries.[104] This result would not be possible if the employer merely issued a unilateral promise or statement not to discriminate against future job applicants.[105]

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[101] As I will discuss *infra* Part III.A.2, the transaction costs of writing multiple employment contracts would undoubtedly be greater than using a broadcast contract—especially if incoming employees felt the need to read and understand (and maybe even renegotiate) these various provisions. This should be true even if the employer uses a standard form contract to reduce costs.

[102] It is also possible, of course, that this binding precommitment will impact relationships with other, more remote stakeholders such as customers, competitors, and suppliers. *See infra* Part II.C.

[103] Again, it is possible that the employer could announce broadly that it always signs employment contracts with new hires prohibiting discrimination. This might indeed help foster a reputation that benefits the firm's relationships with job applicants and other stakeholders. But the statement is still nonbinding and therefore exposed to discounting as "cheap talk" in a way that broadcast contracting is not.

[104] Ayres & Brown, *supra* note 93, at 1646.

[105] Barring a reliance theory, this unilateral promise would be understood by contract law as an unenforceable gift promise. *See, e.g.*, Robert A. Prentice, *"Law &" Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 882–83 ("Absent [a few minor] exceptions, a gratuitous promise will not be enforced, even if it is indisputable that its maker well considered and seriously intended it.").

In order to judge the effectiveness of broadcast contracting, we also need to ask how these contracts can be terminated. After an employer commits to this expanded legal regime, is the commitment irrevocable or can it be reversed if, say, the employer regrets its decision (perhaps because it begins to experience a rash of lawsuits that it suspects are illegitimate claims)? In the FE example, Ayres and Brown provide for trouble-free exit rights: an employer is free to cancel its contract at any time, though employees with legitimate claims prior to cancellation would still maintain their right to sue.[106] Most likely, this flexibility was adopted to convince more employers to license the mark.[107] But an easy exit obviously weakens the strength of commitment, as an applicant or other outsider might question whether the deal remains valid.[108] Other exit regimes could easily be established, however, such as an agreement that lasts several years with automatic annual renewal rights unless one side files notice of termination with the other. Conceivably, a party might also establish a very long-term agreement, though a subsequent modification eroding these rights, if effective in limiting third-party claims, might again throw the continued validity of the commitment into question.[109]

B. Some Other Applications

It should be easy to see how anyone who identifies the potential to gain from a binding multilateral commitment might seize upon a broadcast contracting strategy to handcuff himself to new laws or obligations. Contract law is a flexible tool, long celebrated for the authority that it confers on two parties to establish private legal duties by voluntary agreement.[110] The insight here, however, is that broadcast contracting provides parties with an easy way to go even further. Anyone can create what is essentially a private statutory regime, with very expansive enforcement rights (consider a deal designating the "world as my third-party beneficiary") or much narrower segments of beneficiaries ("everyone on my block is a third-party beneficiary"). This dual customization, relating to both substantive commitment and domain of applicability, is very powerful. Consider a few additional possibilities.

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[106] Ayres & Brown, *supra* note 93, at 1656.

[107] *Id.*

[108] Presumably, Ayres and Brown or a third party could play an information aggregation role here by posting a current list of participants. Alternatively, a potential applicant could investigate whether the employer still displays the FE mark.

[109] Of course the initial counterparty would need to agree to a modification annulling third-party rights, and it is possible that it would not. Indeed, I strongly suspect that Ayres and Brown would say "no way" if asked to modify a long-term agreement in a way that eliminated all third-party rights. Moreover, it is possible to make an irrevocable commitment that is not subject to erosion via modification. *See infra* Part III.B.3.

[110] *See* Harry W. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 50–54 (1975).

1. Tort.—Suppose that a manufacturer wants to convince a certain group of consumers that it produces a very high quality product. Tort law imposes certain obligations, of course, via strict product liability.[111] And contract law, through Article 2 of the Uniform Commercial Code, establishes certain warranties, such as the warranty of merchantability, unless the sales contract clearly disclaims these obligations.[112] But these legal rights are subject to numerous limitations and qualifications, and it is at least conceivable that a manufacturer would wish to go further in an effort to signal quality. One option might be to expand the warranty terms in every individual sales contract. But a direct privity requirement may, in some cases, limit the protection afforded by the purchase contract—especially if a manufacturer makes a component that will be incorporated into a more complicated product. A broadcast contract allows for greater flexibility.

Imagine, for instance, that a chain saw manufacturer has developed a new type of "laser blade" that can melt through tree limbs. The innovator is concerned, however, that consumers will shy away from the laser blade due to fear of injury—after all, the laser blade technology is new and not all of the kinks have been worked out. We might expect that strict product liability will assuage some concerns because users know that they can recover damages for defective products.[113]

Interestingly, however, North Carolina rejects strict liability for defective products.[114] How can the laser blade maker convince consumers that its products are safe? One option might be to write a sales contract promising to indemnify purchasers for all injuries from the blade. But it may not want to go this far (especially if it fears liability for careless chainsaw users). Perhaps the seller simply wishes to provide North Carolina consumers with recovery rights along the lines of strict liability tort regimes in other states.[115]

To accomplish this, the laser blade maker could write a broadcast contract with a willing counterparty under which it receives a certification mark ("safe" maker) in exchange for a promise that all North Carolina residents can recover for blade malfunctions as designated third-party

[111] *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

[112] *See, e.g.*, U.C.C. §§ 2-313, 2-314, 2-315 (2003) (describing express warranties, the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose).

[113] Of course the availability of strict liability for defective products might not fully eliminate concerns about the laser blade chain saw, as the laser could be working perfectly fine and still scare away potential consumers.

[114] N.C. GEN. STAT. § 99B-1.1 (2011) ("There shall be no strict liability in tort in product liability actions.").

[115] It may be difficult to believe that any manufacturer would opt into *greater* tort liability, but such a commitment might, for example, allow the manufacturer to charge more via a bundled product–service pricing strategy. Alternatively, it might allow the manufacturer to increase the overall quantity of products sold, even if the individual profits per product are diminished.

beneficiaries to the extent that each consumer would enjoy recovery rights under the laws of *South* Carolina, which provides for strict liability where consumers are injured by defective products.[116] Such an expanded legal obligation should be enforceable and binding on the manufacturer under the logic discussed above in the fair employment context.[117]

Moreover, the ability to tailor the domain of commitment is an important feature of broadcast contracting. If our laser blade maker wants to commit, but is especially worried about illegitimate lawsuits from consumers in a certain county of North Carolina, then citizens of that county could presumably be excluded from the class of intended beneficiaries such that they would only enjoy the baseline tort rights provided by state law.[118] Similarly, an employer interested in conferring ENDA protections on existing employees, but not on all job applicants, might limit the scope of their class of intended beneficiaries accordingly.[119] Because this framework is used to expand rights beyond existing laws, courts should not, without more,[120] object to offers of incremental obligations to certain limited groups.

2. Executive Compensation.—Consider an example related to corporate law. The topic of executive compensation has received a great deal of attention in recent years as the gap continues to grow between median employee salary and senior executive pay.[121] One complicating factor is the delay between the receipt of executive compensation and the eventual consequences of decisions made during this period. The obvious problem is that it takes time to determine whether investments will pay off or wither on the vine. Some analysts fear that this delay allows managers to make poor decisions while simultaneously reaping large paychecks. In response, companies have begun to use clawback provisions in their

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[116] *See* S.C. CODE ANN. § 15-73-10 (2005).

[117] An interesting wrinkle might arise if a court concluded that this attempt was inconsistent with the North Carolina statute, which says, after all, that "[t]here shall be *no* strict liability." N.C. GEN. STAT. § 99B-1.1 (emphasis added). If so, then the broadcast rights might be annulled under the logic described *infra* Part II.E. Arguably, however, the manufacturer itself should be entitled to opt into a higher liability standard if it so desires.

[118] To be sure, tailored legal rights could also be established in this context via direct warranty provisions in the purchasing contracts. Consumers in one county could receive an expansive warranty while consumers in another county receive a limited warranty. The effectiveness of broadcast contracting, then, may come down to a question of transaction cost minimization: Is it easier to write one broadcast contract that delineates the precise allocation of consumer protections, or is it easier to stuff the right warranty in the right box? The choice may also come down to questions about effective communication of the entitlements.

[119] This assumes that the employer does not operate in a state, county, or city that has enacted laws similar to ENDA. *See supra* note 91 and accompanying text.

[120] There are, of course, limits on the freedom to discriminate in contracting with respect to certain protected groups.

[121] *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004).

employment contracts, under which the firm can recoup an executive's salary or bonus payments if bad news emerges several years in the future. Some commentators have called for state or federal regulation in this area to break lingering agency-cost barriers to these contracting techniques or to standardize the way that clawback provisions operate.[122]

Interestingly, however, it would be fairly easy for private clawback legislation to be promulgated via a broadcast contract. Any firm wishing to commit to such a regime could write a contract with a willing counterparty designating the firm as a "Meritocratic Employer" (ME). The firm could again receive use of a certification mark and the terms of the contract could establish the specific rules that the firm agreed to follow to implement the clawbacks—how long, which employees, what triggers for recoupment, what percentage of pay, and so on. Most importantly, the contract could designate third-party enforcement rights for various segments of owners and stakeholders—shareholders, debt investors, certain employees, and potentially others—giving any of these parties enforcement rights for a subsequent breach.[123] Finally, the term of the broadcast contract could last for several years, committing the firm to clawbacks in advance of subsequent executive hires. It is this latter feature that might conceivably provide some advantages over a simple press release that all senior hires will be subject to clawback provisions in the future (which should be discounted as cheap talk).

3. *Corporate Social Responsibility.*—In order to broadcast a contract, a promisor needs to locate a willing counterparty—someone like Ayres and Brown in the Fair Employment example[124]—who is willing to establish the substance of the third-party commitment (whether directly or by external reference) and to provide the consideration necessary to seal the deal (such as use of a certification mark or some other benefit). It is not necessary for this counterparty to retain monitoring and enforcement rights as long as an aggrieved third party will find it in her self-interest to take action for noncompliance. It is certainly possible, however, for the direct counterparty to keep an enforcement role. The possibilities here can be illustrated with a second example from corporate law.

In recent years, the notion of corporate social responsibility (CSR) has generated attention as an alternative to a corporate directive of shareholder

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[122] *See, e.g.*, Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368 (2009) (describing and analyzing various clawback provisions).

[123] One complicating factor in the corporate context is the fact that any damage claims against the firm may ultimately be borne by the investors, including current shareholders and debt investors. Accordingly, it may be necessary to include other signatories to the initial broadcast contract—such as the board of directors, managers, or outside insurers—to provide the right incentives against breach. Such provisions could conceivably raise other corporate law and governance concerns.

[124] *See supra* notes 93–100 and accompanying text.

wealth maximization.[125] CSR, in a nutshell, strives to balance the impact of corporate activity by managing a firm for the benefit of the environment, employees, communities, or some other relevant stakeholder.[126] This can be a nebulous concept, but various groups have composed standards of CSR to spell out some general principles.[127] A few states are even beginning to establish statutory frameworks that provide firms seeking to pursue CSR with a new set of default rules for governing corporate activity.[128] Might broadcast contracting be another way for a firm to commit to these goals?

Given the widespread interest in this topic, it should be easy for a firm wishing to pursue a policy of CSR to find a party to countersign the broadcast contract. To take just one possibility, a nonprofit company named B Lab currently registers companies as a benefit corporation (B Corporations) if they are willing to complete a number of requirements related to the pursuit of CSR (and pay the appropriate fees to B Lab). Upon completion of this process, firms are allowed to display the following mark:

Certified B Corporation

Unlike Ayres and Brown, however, B Lab is not willing to relinquish all enforcement rights; rather, it seeks to directly monitor compliance with the terms of its license. One-fifth of all B Corporations, for example, are

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[125] *See, e.g.*, John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1 (2005); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523 (2011).

[126] *See, e.g.*, Geoffrey Heal, *Corporate Social Responsibility—An Economic and Financial Framework* 12–13 (Dec. 2004) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=642762 (defining CSR).

[127] *See, e.g.*, *ISO 26000—Social Responsibility*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/social_responsibility (last visited Aug. 8, 2012) (providing an overview of ISO 26000:2010, a guide on social responsibility aimed at international public and private organizations).

[128] Maryland, for example, has enacted legislation for "benefit corporations," which offer a "material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits." MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (LexisNexis Supp. 2011). It goes on to list seven possibilities for specific public benefits:

(1) Providing individuals or communities with beneficial products or services;

(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

(3) Preserving the environment;

(4) Improving human health;

(5) Promoting the arts, sciences, or advancement of knowledge;

(6) Increasing the flow of capital to entities with a public benefit purpose; or

(7) The accomplishment of any other particular benefit for society or the environment.

Id. § 5-6C-01(d).

subject to on-site audits by B Lab during the two-year term of the agreement.[129] But there is no reason why B Lab could not also extend third-party enforcement rights to outsiders to enhance this commitment as long as the obligations and beneficiaries are clearly defined. A firm could sign an agreement with B Lab, for example, committing to certain environmental standards (above legal minimums)—and designating that any adversely affected party (perhaps as defined by some objective criteria) within, say, twenty miles of their facility could sue for breach as a third-party beneficiary. B Lab might also retain enforcement rights. It remains debatable whether a firm is better off committing to a policy of CSR,[130] but the tools for a binding multilateral commitment are available.

4. Other Domains.—These examples only scratch the surface of potential broadcast contracting scenarios. Because contract law supports so many different types of human activity, the domain of applicability is extensive. In property law, for instance, residents might amend a homeowners'-association agreement or some other covenant that runs with the land to include broadcast contracting rights. A property owner could commit to limit some use of her land by signing an agreement with a conservation group under which nearby residents are named as third-party beneficiaries. A party might commit to heightened rules of civil procedure, to the extent permitted by public policy,[131] under a broadcast contract for an alternative system of procedure. Indeed, private parties might establish new commitments in any corner of activity that is supported by, or connected to, contract law.

Of course, broadcast contracting only works if a promisor finds it in her self-interest to accede to the heightened commitment. The firm that, despite all rhetoric to the contrary, loves writing unconditional seven-figure checks to executives in the corner office will never broadcast a clawback commitment. The chain saw maker who dreads tort claims will laugh at the strategist who counsels opting into a *stricter* regime of liability. The ultimate question, then, is how a party might derive incremental benefits

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[129] *See Become a B Corp*, B CORP., http://www.bcorporation.net/become-a-b-Corp (last visited Aug. 8, 2012).

[130] One risk might be the possibility that CSR standards are drafted broadly, exposing the firm to lawsuits from many disaffected members of a community. The firm might also be placed in a situation where any decision about where to deploy scarce resources triggers a complaint by a party with competing interests.

[131] Arbitration clauses represent the front lines of permissible contractual modification of civil procedure. Extreme clauses can be struck down under the unconscionability doctrine, though the possibility of federal statutory preemption complicates the analysis. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011); Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 788 (9th Cir. 2002) (striking down an arbitration clause). Recent scholarship in this area has focused on the broader implications of other types of procedural contracting. *See, e.g.*, Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011).

from an ability to commit broadly to future obligations or limits on behavior.[132] This is a vast topic for strategists, but it is worth spending some time on the theoretical benefits of multilateral commitment in order to illustrate why anyone would agree to a broadcast contract.

C. The Benefits of Multilateral Commitment

The conventional wisdom says that preserving your options is a good idea. Don't close doors prematurely. Defer decisions until absolutely necessary. And, indeed, there are indisputable benefits from maintaining the flexibility to take advantage of new information by altering malleable courses of action.[133] This is why many firms and individuals shun commitment and delay decisions as long as possible, seeking to preserve flexibility as a means of coping with an uncertain world.

But there can also be significant strategic advantage to reducing flexibility via commitment and the inexorable tying of one's hands. Limiting your freedom can change other people's expectations about your future behavior, and this, in turn, can accrue to your advantage. The intuition should be familiar; we have heard the stories about Odysseus lashed to the mast or the invading conqueror burning his ships upon landing.[134]

A stylized example, borrowed from the game theory literature on this topic,[135] should illustrate the benefits of broad-based, ex ante commitment. Imagine that you run Ford Motor Company and are locked in competition with your archrival, General Motors (GM). The latest issue relates to the length of your warranty. Each firm is considering a strategy that would extend the standard three-year warranty on every car to five years. GM has a better track record for automotive quality, however, so you fear that it would be able to implement such a change more easily than Ford.

[132] Ayres and Brown address this question of why parties might sign up for additional liability exposure in the employment context. *See* Ayres & Brown, *supra* note 93, at 1669–88.

[133] These benefits are discussed in the literature assessing real (or embedded) options. These are created implicitly when valuable opportunities—but, importantly, not obligations—to take action in the future arise from outcomes that are uncertain today. *See* JOHNATHAN MUN, REAL OPTIONS ANALYSIS: TOOLS AND TECHNIQUES FOR VALUING STRATEGIC INVESTMENTS AND DECISIONS (2d ed. 2006); Timothy A. Luehrman, *Strategy as a Portfolio of Real Options*, HARV. BUS. REV., Sept.–Oct. 1998, at 89. Many legal entitlements might be understood to contain real options. *See, e.g.*, Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173, 175 (1990) (modeling discovery as a real option); Scott & Triantis, *supra* note 52 (describing the right to breach a contract and pay damages as a real option).

[134] Some of the benefits of using binding constraints as a means of strategic advantage are famously pioneered by the Nobel Laureate Thomas Schelling. *See, e.g.*, Thomas C. Schelling, *Altruism, Meanness, and Other Potentially Strategic Behaviors*, 68 AM. ECON. REV. 229 (1978).

[135] *See, e.g.*, AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 120–24 (1991).

In the absence of a broadcast commitment, Ford and GM will simultaneously choose and announce their strategies—whether to offer the three- or five-year warranty. Each firm would like an outcome where it offers the five-year warranty and its competitor sticks with the three-year warranty, as this gives them a distinct advantage when marketing the cars to consumers.[136] The worst outcome, however, arises when both firms offer the five-year warranty; both companies incur the incremental costs of the warranty without securing a relative marketing advantage. We can model this as the simultaneous form game illustrated in Figure 1.[137]

FIGURE 1: SIMULTANEOUS WARRANTY DECISION (PAYOFFS TO FORD, GM)

	GENERAL MOTORS WARRANTY	
FORD WARRANTY	**3 YEARS**	**5 YEARS**
3 years	4, 3	2, 4
5 years	3, 2	1, 1

Note first that except for the worst outcome (5-year warranty, 5-year warranty) the payoffs are not symmetrical. In other words, this is not a prisoner's dilemma game where both players are pushed, against their collective interests, into the longer term warranty. Rather, Ford's ideal outcome (represented by the payoff of 4) arises when both competitors simply continue with the 3-year warranty. After that, Ford prefers the situation where it offers the longer warranty and GM does not (a payoff of 3). This is followed by the third-best outcome (a payoff of 2) when Ford keeps the 3-year warranty, but GM offers 5 years. GM, on the other hand, has its best outcome when it offers the longer warranty and Ford does not. As stated above, GM can benefit more than Ford from a change in the status quo—but only if Ford does not match the change. After that, GM prefers the following results (respective): dual 3-year warranties (a payoff of 3); Ford offers 5 years and GM offers 3 years (a payoff of 2); and dual 5-year warranties (a payoff of 1).

How will this game play out if we assume that each party has good information about the payoffs to both sides?[138] As mentioned above, Ford

[136] This strategy was famously used in the automotive industry in the late 1990s when Hyundai Motor Company launched an aggressive marketing campaign that extended the warranties on its cars from the industry standard of three years to a much longer period of ten years in an effort to signal quality and win market share.

[137] The example is adapted from DIXIT & NALEBUFF, *supra* note 135, at 121–22.

[138] Note that perfect information about the payoffs is not required; each party just needs to know the relative advantages of each outcome for its competitor.

prefers to maintain the status quo, but this will not occur with simultaneous decisionmaking. GM should see that no matter which alternative it chooses, Ford always does better by offering the 3-year warranty: Ford earns 4 > 3 when GM offers 3 years, and Ford earns 2 > 1 when GM offers 5. Accordingly, GM should conclude that Ford is going to maintain its 3-year warranty policy no matter what. This, in turn, concentrates GM's decision into a choice between offering the 5-year warranty for a payoff of 4 and offering the 3-year warranty for a payoff of 3. So GM will choose the former, and we should expect to see the outcome portrayed in the top right box of Figure 1: Ford announces 3 years for a payoff of 2, and GM announces 5 years for a payoff of 4.

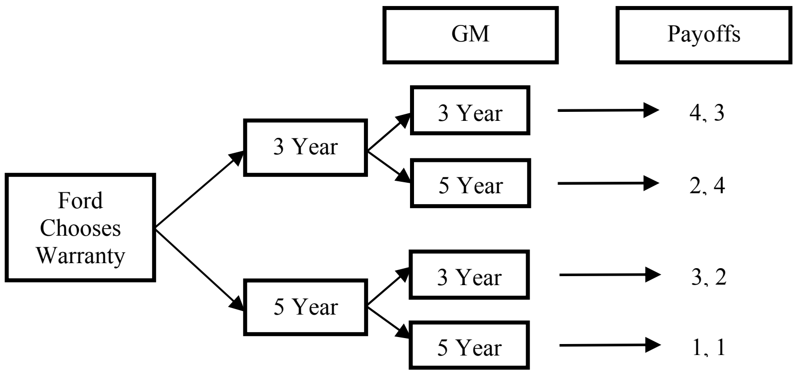
Now, consider how Ford can do better than this with a broadcast contracting strategy that commits it to offering the longer warranty. Suppose that Ford signs a contract with the consumer advocate Ralph Nader to license from Nader the right to display a "Ralph Nader Approved" (RNA) trademark on its advertising and marketing materials. In exchange for the use of this mark, Ford promises to offer a 5-year warranty on every car that it sells during the next 2 years. This agreement does not need to give Nader enforcement rights, but, like the FE contract described earlier,[139] it should specifically state that all Ford automobile purchasers in the United States during the term of the contract are designated as third-party beneficiaries, entitled to sue Ford for any breach of this agreement.

Ford has, in short, used a broadcast contract to commit to the longer term warranty, and this will transform the competition with GM into the sequential game illustrated in Figure 2. Now Ford gets to go first, deciding whether to move to the top half (by doing nothing) or the bottom half (through the broadcast contract) of this game board. It will make this choice by reasoning backward, expecting that if it offers the 3-year warranty, then GM will offer the 5-year warranty (GM receives a payoff of 4 > 3). If, on the other hand, Ford chooses the 5-year warranty, GM should stick with a 3-year warranty (2 > 1). Comparing the payoffs to Ford under either of these 2 options, Ford will decide to offer the 5-year warranty and receive a payoff of 3.

In a nutshell, then, a credible upfront commitment allows Ford to transform a simultaneous standoff into a sequential game, and thereby increase its ultimate payoff from 2 to 3. To be sure, Ford would love to find a way to obtain a payoff of 4, but such a result is not possible in this game.

[139] *See supra* notes 95–96 and accompanying text.

FIGURE 2: SEQUENTIAL WARRANTY DECISION (PAYOFFS TO FORD, GM)



Is broadcast contracting the best way for Ford to commit? Certainly it is not the only way. Ford might, for instance, seek to lock itself into the longer warranty simply by racing to announce a policy that all of its cars will be sold with 5-year warranties. This could indeed establish a degree of commitment, especially if everyone expects that backsliding on the announcement will cause significant harm to Ford's reputation. But the ploy might also be dismissed as cheap talk by GM and prospective car buyers because Ford is legally free to change its mind prior to selling the cars. GM might simply make its own matching announcement, expecting that Ford will buckle under the pressure and reverse its statement, thereby moving the outcome back to the top right box of Figure 1.

The advantage of a broadcast contract, then, is that Ford uses the power of the law to form an ironclad commitment. Just like a bilateral contract allows a given counterparty to rely on and invest in a promise, a broadcast contract allows potential customers and competitors to rest assured that the die has been cast. This changes the calculus by committing Ford to the longer warranty, and GM should be expected to adjust its own actions by maintaining the 3-year warranty in response to Ford's commitment.[140] Indeed, GM would love to beat Ford at its own game: if GM can broadcast its own contract for the 5-year warranty, then it gets to move first and can obtain GM's first-best outcome.[141] We can draw a nice analogy to a game of chicken where each side rushes to toss its steering wheel out the window first, thereby ensuring that its opponent will swerve.

[140] The key here is a credible commitment by Ford. If Ford has flexibility to switch back to the 3-year warranty, then it will seek to do so after GM announces its 3-year warranty in order to obtain Ford's maximum payoff of 4. But if GM sees that Ford's promised warranty is not credible, GM will anticipate a change of mind by Ford and offer the 5-year warranty.

[141] GM picks the 5-year warranty and Ford, facing the choice between a payoff of 2 and a payoff of 1, sticks with the 3-year warranty. This yields GM a payoff of 4.

D. Renegotiation

It is helpful, in this context, to return to the topic of renegotiation. To establish meaningful commitment, the relevant players must not believe that it will be easy for a promisor to reverse his pledge by modifying away the third-party rights through renegotiation with the promisee. Continuing the example above, if Ford broadcasts a five-year warranty contract with a wholly owned subsidiary (Ford Assurance Company) as the counterparty (rather than with Ralph Nader), GM and potential purchasers may again dismiss the entire ploy as cheap talk. Everyone should expect that control over both counterparties frees Ford to renegotiate away all third-party rights as it sees fit and therefore GM may not hesitate to announce its own five-year warranty.

This scenario is obviously not in Ford's interest, as it pressures Ford to return to the outcome portrayed by the top right quadrant of Figure 1. Ford would like to broadcast a commitment to third-party buyers that is *not* subject to erosion via renegotiation. There are at least two ways to seek this irrevocability. The first is to contract with a counterparty who will resist reversing the deal for reputational reasons. This is the role played by the hypothetical counterparty of Ralph Nader and the real-life example of Ayres and Brown. A promisor returning to these players to seek a renegotiation that undermines the third-party obligations would likely face a cool reception because each promisee is committed to supporting the protections granted to the third parties. But the commitment will only be as strong as outside expectations about a promisee's unwillingness to backslide.

A second possibility is to use the power of contract law to make such renegotiation impermissible (or at least subject to continuing damages for breach). As suggested earlier, courts have struggled over the years to determine whether third-party rights can be modified away.[142] This is an especially thorny issue because there are legitimate reasons why two parties might wish to annul third-party rights as time passes. This must be balanced, however, against an understanding that, at the time of contracting, a promisor may really wish to commit irrevocably for the reasons described above. Accordingly, as I will argue in Part III of this Article,[143] the initial presumption should be one of soft, or revocable, third-party rights in a broadcast contract. But the initial counterparties should also be entitled to change this default by manifesting a clear intention that the third-party rights are *irrevocable* for the term of the contract.[144] This will allow a promisor to establish the binding legal commitment necessary to erase the

142 *See supra* Part I.C.
143 *See infra* Part III.B.3.
144 Recall that this is also consistent with RESTATEMENT (SECOND) OF CONTRACTS § 311(2) (1981).

possibility that the specter of modification will damn the broadcast contract as cheap talk.[145]

E. Reducing Obligations with Broadcast Contracts

A final question that might arise is whether a motivated party can use a broadcast contract to *reduce* her legal obligations. Can a morally questionable firm whose motto is "do no good" write a broadcast contract that allows it to discriminate against any employee for any reason? Can a chain saw company broadcast an exculpatory agreement to the world, disclaiming all tort liability from defectively manufactured tools? The answer, of course, must be no. Most legal obligations are compulsory, and no amount of contracting should allow someone to wriggle out of these requirements.[146] As a result, broadcast contracting is mostly a one-way ratchet, allowing parties to expand, but not reduce, their legal obligations. Any attempt to disclaim immutable laws should be ineffective; presumably, a judge would just strike the deal down for illegality or as inimical to public policy.

But there is at least one caveat. In some cases, a party may be able to use third-party-beneficiary provisions to structurally limit the legal rights that third parties might otherwise enjoy in contract law. This is only true within certain limits, however, and the affected third parties must also accede to these structural limits when the relationship is formed. The easiest way to illustrate this idea is by examining bond offerings in the field of corporate finance.

When a company issues bonds, the deal is not always structured as you might expect. The simplest arrangement would be to write a contract between the firm and the various investors where the latter promises to lend and the former promises to pay interest, repay the loan, and take on other various obligations to protect this promise to repay.[147] But this is not how it often works in practice.[148] Rather, the issuer signs a direct contract—the bond indenture—with a bond trustee (often a large commercial bank) setting out most of the legal and economic terms that will govern the bonds. The primary investors are simply named as third-party beneficiaries to this bond indenture (though each investor may also sign a very short, direct contract with the issuer).[149] Similarly, all of the paperwork and funding is channeled through the trustee.[150]

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145 Such fears will also be tempered by the doctrine of reliance. *Id.* § 311(3).

146 *See, e.g.*, *id.* § 178.

147 This includes promises like maintaining insurance, not selling key assets, and so on.

148 *See* BRATTON, *supra* note 14, at 240–42. By contrast, private lending agreements are often structured as direct contracts between borrower and lenders. *Id.* at 245.

149 *Id.* at 241.

150 *Id.*

Why would the parties structure their relationship in such a counterintuitive manner? What possible purpose could be served by interposing a distinct legal entity between the very direct relationship of borrower and lender? Certainly this is not some recent innovation designed to promote securitization or another form of financial engineering; the practice dates back to railroad financings and the earliest large-scale bond issues.[151] Rather, the structure arose as a form of delegated monitoring: disparate bond investors were thought to lack resources and incentives to monitor the issuer's financial condition.[152] Instead, a trustee was appointed to watch the firm on the investor's behalf and bring suit against the issuer in the event of missed interest payments or some other breach.[153]

But this is hardly the whole story. Many bond indentures also contain provisions that channel lawsuits through the trustee. In some cases, a certain percentage of investors must object before the trustee is allowed to sue the issuer.[154] In other cases, significant discretion remains with the trustee.[155] For example, if the firm breaches a financial ratio covenant in a given quarter—such as the promise to maintain a certain earnings-to-interest ratio—then a single bond investor may not be entitled to sue the company to force acceleration of the loan. Rather, the indenture may insist that a given percentage of investors (perhaps 50% by dollar amount) object to the breach before the trustee may initiate a lawsuit. This is thought to serve as a screening device to shield the issuing firm from frivolous or abusive strike suits by an insignificant bond investor. Indeed, there are reasons why most of the bond holders might prefer to waive a given covenant breach, especially if the problem is viewed as a technical or temporary concern. If so, the majority of investors might object to a small investor triggering acceleration and thus prefer the structural solution described above.

Returning to our general question about the domain of broadcast contracting, we can see that the parties here have used a third-party-beneficiary structure to limit the contractual enforcement rights that might have otherwise been provided to objecting investors with a direct contract. But note that the initial investor has to accede to this structure when purchasing the bonds; she is always free to reject these limits on her right to enforce a breach by investing money elsewhere. And there is nothing illegal about placing some limits on the right to sue for breach of contract; this

[151] In the railroad context, this also allowed the investors to obtain security for their loans without receiving an individual fractional interest in the assets of the firm. Later, the contractual framework was extended to unsecured bond offerings.

[152] *See, e.g.*, Mitchell Berlin & Jan Loeys, *Bond Covenants and Delegated Monitoring*, 43 J. FIN. 397, 398 (1988) (noting that investors with diversified portfolios have limited incentives to monitor, even when these efforts are valuable for a collective group of investors).

[153] *Id.*

[154] *See* BRATTON, *supra* note 14, at 240–41.

[155] *Id.*

happens all the time with arbitration clauses or tiered dispute resolution procedures that give a party time to "cure" some technical breach before a lawsuit can be initiated. In other words, a party seeking to restrict its obligations with broadcast contracting must still operate within the confines of immutable laws. Further, lawmakers are nervous about the possibility that contract law's flexibility might be used to erode baseline legal rights, and they famously guard against this with doctrines such as unconscionability,[156] illegality,[157] and contracts that are deemed void for public policy reasons.[158] Even in the bond-financing context, lawmakers have limited by statute the degree to which parties can place structural limits on an individual investor's right to sue.[159]

As this example illustrates, broadcast contracting should be seen mostly as a vehicle for expanding obligations. The power to reduce legal obligations is quite modest, and such a reduction cannot be performed unless the adversely affected parties are willing to play along (throwing into question whether we should even call these broadcast contracts).

The final set of issues relates to the normative impact of broadcast contracting: the role that contract law should play in supporting multilateral commitment and third-party-beneficiary rights. The tradeoffs are complicated. The cynic might argue that expansive third-party rights will open the door to a new breed of wasteful strike suits, as the Hawkeye John's of the world muster their lawyers. The optimist will counter that this is no different than other types of private ordering and that contract law should foster the use of broadcast contracting to support private gains. How should we think about these competing claims? And might the answer depend on the legal requirements for identifying and protecting valid third-party commitments? Part III addresses these normative questions.

III. NORMATIVE IMPLICATIONS FOR CONTRACT LAW

Why should an outsider ever be permitted to sue on a contract that has been created by others? After all, a contract is conceived by two direct counterparties, even if it might impact the welfare of others, and the person who signs a deal is generally considered the proper party to bring an action for nonperformance. Indeed, very permissive third-party enforcement rights will distort the fundamental goals of contract law and undermine private

156 *See supra* note 131.

157 Contracts that violate an existing law are often struck down or reformed as impermissible.

158 Direct exculpatory agreements are a good example here: some agreements are permitted, but promises not to pursue tort claims can be struck down as unenforceable in extreme situations.

159 This discretion was thought to have been abused by bond trustees, leading to the enactment of the Trust Indenture Act (TIA) by Congress in 1939 and highly regulated bond indenture contracts with mandatory terms. For example, a bond contract subject to the TIA must allow investors to sue when principal payments are not made as promised. *See* Trust Indenture Act of 1939, Pub. L. No. 76-253, 53 Stat. 1149 (codified at 15 U.S.C. § 77aaa–bbbb (2006)).

ordering. I may be quite comfortable signing a contract with a single counterparty, for instance, knowing that I can stomach the risk of paying him expectation damages if I must breach. But I might not be willing to transact if my legal exposure expands to include the risk of incurring additional damage claims from many different outsiders. Unless I can charge a higher price or easily discard this heightened legal exposure, I may abandon positive surplus transactions. Given these risks of chilling valuable trade, can a legal rule permitting third-party rights ever be justified as promoting some other normative goal?

The only way to answer this question is to set out a normative theory of contract law and then consider how the treatment of third-party beneficiaries relates to these fundamental goals. I take an approach grounded in the economic analysis of law. At the macro level, contract law should promote the voluntary transfer of resources to their highest value users with a minimum of transaction costs (broadly defined).[160] More specifically, the law should seek to encourage both efficient trade (the transfer of goods and services from lower value to higher value users) and efficient reliance (customized investment that allows parties to increase the anticipated payoffs from trade).[161] At the micro level, this usually means that the law should attempt to understand and preserve (or at least not distort) the careful balance of economic incentives established in any given transaction.[162] In other words, we should also seek laws that minimize judicial error.

There are other lenses for evaluating contract law, of course, but law and economics scholars have drawn upon these guiding principles to develop numerous insights related to the proper (and improper) mechanics of contract law.[163] Most of the work here, however, analyzes direct exchange relationships between two contracting parties; much less has been said about how these goals relate to the legal treatment of outsiders. Thus, a comprehensive assessment of third-party rights requires inquiry into the sources of private gain from broadcast contracting, the transaction costs incurred in the pursuit of this gain, and the possibility of judicial error.

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[160] *See* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005).

[161] *See, e.g.*, COOTER & ULEN, *supra* note 52, at 290–91; Schwartz & Scott, *supra* note 52, at 544–45. For a more formal model exploring the efficient investment decision, see Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691 (1983).

[162] *See, e.g.*, VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE (2006) (describing the economic effects of selected contract provisions, along with some questionable legal outcomes altering these anticipated effects).

[163] To be sure, the task is not easy, and it is not always clear how the macro goals can be translated into legal rules that provide micro guidance to judges. *See* George S. Geis, *Economics as Context for Contract Law*, 75 U. CHI. L. REV. 569, 597–99 (2008) (discussing the challenges of translating between the macro and micro goals of contract law); Posner, *supra* note 54, at 864–65 (discussing indeterminacy concerns with the economic analysis of contract law).

I will divide the inquiry into two distinct questions. First, should contract law even allow parties to write broadcast contracts? If, as I will argue, the answer is yes, then we come to question two: how should judges determine whether a given third-party claim is valid? In other words, what default rule should be adopted for third-party enforcement rights, and what should it take for a promisor and promisee to modify this default?

A. *In Defense of Broadcast Contracting*

1. Maximizing Private Gains.—As a gateway issue we need to decide whether the ability to arm outsiders with a right to obtain damages for breach should even be permitted by contract law. We generally allow parties to contract about almost anything, under the mantra "freedom of contract," so the presumption here might be one of tolerance.[164] But some contexts are off limits. The law refuses to enforce contracts for illegal activity, for example, and some otherwise unobjectionable terms are struck down as violations of public policy.[165] Should we enact a similar ban on the conferral of third-party rights?

I would argue that contract law should continue to allow willing parties to broadcast rights to outside beneficiaries. As discussed above, there are legitimate reasons why the initial counterparties might wish these rights to attach. A promisor may seek to tie her hands to signal an incremental commitment broadly and thereby gain new customers, better employees, fewer competitors, or some other strategic benefit. Similarly, the promisee to a broadcast contract may realize private gains. In some cases, this may come in the form of intangible satisfaction, arising with the knowledge that the promisor has locked herself into a desired commitment with outsiders.[166] In other cases, the benefit to a promisee may be more direct. For example, a promisee licensing use of a certification mark as part of a broadcast contract[167] may seek a critical mass of users in order to boost the value and visibility of that certification. A blanket prohibition on third-party-beneficiary rights will smother these types of legitimate private gains.

Moreover, the ability to write binding broadcast contracts also supports relation-specific investment—potentially by both the initial counterparties and the third-party beneficiaries—to further increase the collective gains.[168] Using an example of buyer investment, Richard Craswell offers this helpful definition of relation-specific investment for bilateral contracts: "[I]t is any choice, be it action or inaction, which will (1) make [seller's] performance

[164] *See* Jones, *supra* note 110, at 49.

[165] RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

[166] The employer looking to provide expanded rights to employees or the manufacturer who feels good about standing behind a quality product might be examples of this.

[167] *See supra* notes 93–97 and accompanying text.

[168] On the topic of relation-specific investment, see sources cited *supra* note 161.

more valuable to [buyer] if [seller] does in fact perform, but (2) make [buyer] worse off than if he had not relied if [seller] fails to perform."[169] This same definition can easily be extended to broadcast contracts. Direct counterparties may seek to take some action (or inaction) in reliance on the enforcement rights of a third party to increase the gains from trade. Similarly, the third-party beneficiaries of a broadcast contract might profit by making a relation-specific investment on a broadcast contract. The future purchaser of a Ford car, for example, may be able to take certain actions or inactions in reliance on a promised five-year warranty to further increase the value she obtains from the upcoming trade. A consumer might buy an accessory that only works with Fords. A corporate purchaser may standardize its fleet of cars to reduce maintenance costs. Failure to enforce the outsider claims would undermine this investment, however, and thereby stymie the amplified economic gains.[170]

It is important to recognize, however, that these private gains can theoretically be obtained through the use of many repeated bilateral contracts. To a great extent, then, the availability of broadcast contracting should be understood as a device for minimizing the transaction costs of exchange—a fundamental goal of economic efficiency.

2. Minimizing Transaction Costs.—In a Coasean world of zero transaction costs,[171] the law of third-party-beneficiary contracting should not matter a jot. If lawmakers refused to allow a promisor to convey enforcement rights to third parties, then that promisor could theoretically write bilateral contracts with every affected person. Someone wishing to broadcast a commitment to a new employment policy, for example, would sign contracts with every employee, job applicant, and other conceivable beneficiary.[172]

Similarly, if we assume zero litigation costs—a form of transaction costs in the contracting context[173]—then it would be effortless for a promisee to enforce obligations that provide some benefit to a third party. Each promisee should be willing to sue on behalf of the injured third party because it would cost the promisee nothing. Accordingly, while we might

169 Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 490 (1996).

170 As with bilateral contracts, a lack of enforcement should chill relation-specific investment by the third parties out of a fear that the investment would be subject to holdup demands by the promisor. *See* Schwartz & Scott, *supra* note 52, at 559–62.

171 *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

172 This assumes that no consideration problems would arise because the individual counterparties would be able to offer some reciprocal promise, such as a willingness to apply for a job or purchase a product. Unilateral gift promises to many different third parties would, of course, be unenforceable under existing contract doctrine. *See* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 416–17 (1977).

173 In contract law, litigation over the meaning of a contract can be understood as a form of back-end transaction cost. *See* Posner, *supra* note 160, at 1583 (describing transaction costs in the contracting context as the sum of upfront drafting costs and back-end litigation costs).

still observe third-party beneficiaries in this hypothetical world, there would be little need for out-of-privity enforcement rights.

Reversing the legal rule would lead to identical results under these same Coasean assumptions. We might adopt a law, for instance, where any adversely affected person could, by default, successfully recover third-party damages for breach. But with zero drafting costs, the initial counterparties could easily scope their contract to exclude rights for remote outsiders and thereby narrow this default. Similarly, with zero litigation costs, each initial counterparty would not need to worry about defending against illegitimate claims (from, say, parties who did not actually incur damages under this expansive regime).

We do not live in this frictionless world, of course, and relaxing the Coasean perspective allows us to observe the role that third-party enforcement rights might play in driving down the costs of obtaining private gains from multilateral commitment. Commentators now recognize two types of transaction costs in the contracting context: ex ante drafting costs and ex post litigation costs over the meaning of a contractual commitment.[174] In a system with positive transaction costs, the choice between these two alternatives matters. Parties will not take the time to spell out every possible contingency in an initial contract, even though such efforts might allow them to avoid future litigation over differing interpretations of their agreement.[175] Drafting fees would eat up the gains from trade, and it is far cheaper, from an expected value point of view, to litigate the treatment of these low probability events if the unexpected occurs.

On the other hand, parties will typically include the most critical provision in the upfront agreement. They will not, for example, strike a bare-bones deal to "sell the company" while leaving the price, timing, and other key terms subject to judicial interpretation over how to best implement the commitment.[176] Accordingly, we should expect contracting parties to balance one type of transaction cost against the other, taking the time to draft provisions for fundamental terms but ignoring less important terms or remote contingencies in the initial agreement.[177]

We should consider the effects on both types of transaction costs, then, when weighing the merits of broadcast contracting. The savings related to upfront drafting and negotiation should be obvious. A legal system that

[174] *Id.*

[175] *See, e.g.*, Ayres & Gertner, *supra* note 53 (discussing the gap-filling problem with incomplete contracts); Cohen, *supra* note 53 (same).

[176] Indeed, in the extreme, such an effort would be fruitless. Courts are also only willing to go so far to adjudicate ambiguities for contracting parties, and a judge will toss out the contract entirely under the indefiniteness doctrine if the parties leave too much out. *See* sources cited *infra* note 185.

[177] Posner, *supra* note 160, at 1583. We might also predict the adoption of standard boilerplate terms in some contexts because the transaction costs of including these provisions should be lower.

permits broadcast contracting enables parties to write a single contract that confers rights to many. This replaces the need to negotiate and draft numerous bilateral contracts between a promisor and beneficiary. Even in an age of form contracting and take-it-or-leave-it negotiations,[178] it takes far less time to establish one commitment versus one thousand.[179]

Unlike the obvious efficiency gains, the impact of broadcast contracting on ex post litigation costs is not so clear. Forcing a promisor to write direct contracts with every beneficiary (by rejecting the doctrine of third-party-beneficiary rights) might indeed cut litigation expenses relating to the identification of intended beneficiaries. But some litigation will persist; we cannot expect the promisor and the beneficiary to reduce all performance obligations to writing. So a degree of ex post litigation over the substance of these rights would continue, even with many bilateral contracts.

By comparison, a regime that permits third-party claims in some circumstances will likely see a systemic increase in litigation costs because an additional gateway issue may now need to be litigated: whether a given plaintiff falls within the entitled class of beneficiaries. Conceivably, a promisor will be forced to defend against numerous borderline lawsuits, and this concern becomes especially important as we move from bilateral to multilateral contracting. Only one party will sue you in a bilateral contract dispute; with third-party rights, a flood of lawsuits might arise. Moreover, there is a feedback loop: the availability of third-party rights might drive ex ante transaction costs up further, as the initial counterparties are forced to spend resources defining and limiting the contours of third-party rights.

How should we weigh these tradeoffs? While the best approach is ultimately an empirical question, I would contend that denying third-party enforcement rights altogether is likely suboptimal. The transaction costs of requiring bilateral agreements with all beneficiaries will often be significant and frequently impracticable. For this reason, an insistence on bilateral contracting would likely eradicate some of the private gains from multilateral commitment.

If we accept this gateway premise—that outside enforcement rights are normatively desirable in a system of contract law—then we arrive at the second crucial question: what should be required to establish a valid third-

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[178] *See, e.g.*, Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327 (2010) (discussing contract standardization and proposing regulatory approaches to standardized contracts).

[179] Furthermore, it may not be practical for a party wishing the benefits of a broadcast contract to sign individual agreements with all potentially impacted parties, especially if they are not aware of the exact identity of a contingent class of beneficiaries. Imagine, for example, writing a contract that identifies by name and social security number all purchasers of Ford automobiles in the next two years as beneficiaries. The identity of these buyers is not knowable, and they must be described as a class, if at all, even though the ambiguity might lead to an interpretation dispute.

party claim? Or said differently, what default rule with respect to the broadcasting of third-party rights will minimize the cost function of ex ante drafting efforts, ex post litigation expenses, and judicial error? And what should it take for parties seeking alternative legal treatment to adjust this default?

B. Identifying Valid Third-Party Claims

The task of identifying whether outside claims should attach to any given contract can be seen as a problem of contract interpretation. Just as a court might be asked to determine whether two parties meant to trade a certain grade of chicken,[180] or whether delivery of this chicken should come in one lot or several lots, a court may need to work out whether an agreement should be understood to confer valid third-party claims. The law can impose default rules to help resolve some interpretative disputes.[181] But these can only go so far because contractual activity is varied and lawmakers cannot plan for every ambiguity in advance. Accordingly, a judge may need to fall back on various approaches and maxims, including textualism, an assessment of prior dealings, the determination of generally accepted trade customs, and, ultimately, evidence (and perhaps conjecture) about the contractual intent of the parties.[182]

From an interpretive point of view, there is nothing special about third-party-beneficiary rights; the presence of outside enforcement power in any given contract should simply be understood as an additional term that must be adjudicated. Does an agreement provide for third-party claims or not? As described in Part I, the typical approach to the identification of third-party rights is grounded in a very general default standard—that of intended versus incidental beneficiary. Importantly, an intended beneficiary has historically been found to exist without explicit textual acknowledgement of this right in the initial agreement.[183] In other words, outsiders may seize upon an agreement and argue that the initial counterparties sought to make them intended beneficiaries, even in the absence of formal statements to that effect.

This accommodating standard of intended beneficiary by implication has one clear advantage over a formal rule requiring explicit documentation

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[180] *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue is, what is chicken?").

[181] *E.g.*, U.C.C. § 2-307 (2003) (providing a default rule that goods "must be tendered in a single delivery").

[182] *See, e.g.*, Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 498 (2004) (noting, and ultimately rejecting, the "all-things-considered" approach to contract analysis); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1712–13 (1997) (outlining a hierarchy of factors that contribute to a contract gap-filling analysis).

[183] *See supra* Part I.B.

of third-party rights. A promisor and promisee will be able to reduce ex ante drafting costs by punting on the task of defining third-party rights and conscripting our legal system to backfill intent.

But there is a very high cost to pay for this draftsman's economy: the use of an abstract legal standard offers very little guidance to distinguish valid and invalid claims. Courts must shove plaintiffs into one box or another without help from the parties on how to sort the claimants. In short, legal treatment of this issue has been oversynthesized into a very general default standard that accepts the possibility of undocumented rights but provides little direction to parties and courts about when these rights will take effect. It should not be surprising that many potential plaintiffs recognize the option value, and perhaps the nuisance value, of initiating claims in this area.[184]

1. Towards a Formal Default Rule.—In the place of our prevalent approach to third-party rights, I would advocate an alternative default rule:

> *Third-party-beneficiary claims should be presumed invalid for indefiniteness unless the initial counterparties formally establish these rights in their agreement.*

In other words, the default rule for third-party rights should be off, not maybe. A promisor and promisee should be *required* to flip the switch on to legitimize outsider claims.

Analogizing to the indefiniteness doctrine is helpful to justify this default rule. While courts will often work diligently to preserve an incomplete agreement via interpretation, there is a limit. When an important term is missing from the deal, a judge may simply toss out the agreement entirely for indefiniteness instead of attempting to patch together the contract with an interpretive ruling.[185] This appears to be especially true when the parties could have easily spelled out the term, or at least a verifiable formula for giving content to the term, but fail to do so.[186]

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[184] *See supra* note 9.

[185] *See* 1 FARNSWORTH, *supra* note 10, § 3.27; MURRAY, *supra* note 10, § 38; PERILLO, *supra* note 10, § 2.9. The *Restatement (Second) of Contracts* adopts the indefiniteness doctrine as follows: "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981). The rule is justified as "reflect[ing] the fundamental policy that contracts should be made by the parties, not by the courts." *Id.* § 33 cmt. b.

[186] *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1653–55 (2003) (suggesting that courts might be "focus[ing] on whether the parties have fully exploited verifiable information in concluding their agreements" when deciding whether to annul for indefiniteness).

Some commentators[187] and lawmakers[188] deride the indefiniteness doctrine because it annuls what otherwise appears to be a legitimate contractual exchange. A ruling of indefiniteness may result in real hardship, especially if one party has relied heavily on what it thought was a binding commitment. An employee, for example, may expend extra effort in reliance on his boss's promise to pay him "a fair share of the profits," only to find that this agreement is unenforceable.[189]

But the indefiniteness doctrine is an important and legitimate escape valve for the interpretative task. Parties who leave fundamental terms unstated should not be able to externalize drafting costs on the judiciary.[190] Some gap filling must be tolerated in any effort to minimize systemic transaction costs.[191] But there should be limits. An employer and employee should not be able to strike a bonus plan offering "a fair share of [the] profits" and leave it to the courts to figure out what this means.[192] A TV producer promising to "take care of [a service provider] and remunerate [him] in a manner commensurate to the true value of [his services]" should not be understood as making a real legal commitment.[193] If you want a binding contract, hammer out the key terms now. So the ongoing use of the indefiniteness doctrine should not be seen as problematic.[194]

187 Support for active judicial gap filling takes root in both economic and philosophical approaches to contract law. The economic argument usually states that courts can save on transaction costs by filling gaps with commonly preferred terms. *See, e.g.*, Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 116–18 (1993) (citing much of the literature on gap filling); Craswell, *supra* note 52, at 1–2; Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1006 (1992). *But see* Ayres & Gertner, *supra* note 53, at 93 (arguing that majoritarian gap filling is not necessarily the optimal economic approach). The philosophical argument for judicial gap filling suggests that respect for parties' true intentions sometimes requires courts to resolve ambiguities. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 57–73 (1981).

188 *E.g.*, U.C.C. § 2-204(3) (2003) ("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.").

189 *See, e.g.*, Varney v. Ditmars, 111 N.E. 822, 823 (N.Y. 1916).

190 The concern that parties may inappropriately shift contracting costs to the judiciary dates back at least to Lon Fuller's work on formalities in contract law. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 805–06, 813 (1941). More recent views on this topic can be found in Ayres & Gertner, *supra* note 53, at 123–27; Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 571 (2006) ("[T]here is no doubt that in a simple economic model, the parties have an incentive to externalize their costs on courts. One way of doing so may be to leave gaps in their contracts in the expectation that courts will fill them properly in case there is a dispute.").

191 *See* Posner, *supra* note 160.

192 *Varney*, 111 N.E. at 823.

193 Baer v. Chase, 392 F.3d 609, 614, 618–21 (3d Cir. 2004) (third alteration in original) (internal quotation marks omitted).

194 *See* Scott, *supra* note 186, at 1652–61 (empirically examining the frequency of indefiniteness rulings during the years 1998 to 2002).

The same values that motivate the indefiniteness doctrine are quite relevant to an assessment of broadcast contracting. When a third party insists that an agreement confers outside enforcement rights, but the agreement is silent about the existence of these rights, this claim presents concerns analogous to those of the indefiniteness doctrine. The initial counterparties might easily have specified that these rights were present; failure to do so should be viewed with suspicion. Moreover, an inquiry into the intent of the initial counterparties with respect to this term presents significant judicial burdens, and it is legitimate to question whether courts should be forced to take up this mantle.

This is not to say that the entire contract should be annulled for indefiniteness. If the promisee wants to sue the promisor for breach, who cares if the agreement fails to mention third-party rights? But a claim for damages by a third party should be tossed out, by analogy to the indefiniteness doctrine, unless the initial parties make clear provisions to the contrary. This is such a fundamental term, with respect to the third-party claim, that the initial counterparties should be required to spell it out if they want these rights to attach. Indeed, this is likely the default rule that most contracting parties would prefer. Furthermore, this default should attach even when a third party would clearly benefit from the contemplated exchange—as in, for instance, the creditor– or donee–beneficiary context. There is an important analytical distinction between contracting for a benefit to an outsider and granting a right to sue for breach to that outsider.

What should be sufficient to alter a default rule denying outsider rights? Certainly the parties should not be required to eliminate all ambiguities about the implementation of these rights. Just as other contractual language can satisfy indefiniteness concerns while continuing to raise interpretation issues, the exact contours of third-party rights might be resolved through adjudication. But the agreement should indicate explicitly, at a minimum, that outside rights will be available to certain parties, and it should provide a judge with a plausible formula or framework for determining whether a given outside litigant falls within this defined class. Otherwise, an outside claim should be rejected.

How would this formal default rule impact the systemic transaction costs of contracting? With respect to upfront drafting and negotiation costs, the effects cut both ways. Insistence on some formal statement about third-party beneficiaries may increase drafting costs for parties that do indeed wish to establish outside enforcement rights; they must now include this term instead of leaving it to the courts to grant third-party liability through a more accommodating default standard. But there might also be a net savings to parties who do not wish to convey outside rights but fear the possibility of such claims. With my proposed default, they would not need to include exculpatory language that disclaims third-party-beneficiary rights. Under the prevailing legal approach, these parties may feel a need to expend drafting efforts to ensure that outside claims will be invalidated. It is difficult to determine how these effects would balance out; I suspect that they may roughly offset each other, but the question is empirical.

The effect on back-end litigation costs may be more significant. As described above, there is a real likelihood that the current default standard requires some promisors to defend against third-party plaintiffs that the original contracting parties never anticipated or sanctioned. Hawkeye John's should jump to mind,[195] and many other lawsuits border on the egregious. In 2000, for example, boxing fans sued Mike Tyson for a refund of their ticket prices, claiming that they were third-party beneficiaries of Tyson's boxing contract and that their right to see a "legitimate heavyweight title fight" was thwarted when Tyson was disqualified for biting his opponent's ear.[196] In 2002, the winner of the Miss North Carolina beauty pageant resigned after the state pageant became aware of revealing photos taken by her former boyfriend. She had a change of heart, however, and sued the Miss America Organization (MAO) when it refused to let her compete, claiming that she was a third-party beneficiary of the franchise contract between North Carolina and MAO.[197] And in 2007, a prospective lottery player sued Speedway Super Convenience Store, claiming that the store's refusal to sell him an Indiana lottery ticket amounted to a breach of the contract between the store and the state lottery commission. Further, the plaintiff claimed that he was protected as a third-party beneficiary of this contract and that he would have won the lottery, over $11 million, if only the damned store had sold him that ticket.[198] The average year sees more than 100 published opinions,[199] and while some of these complaints undoubtedly have merit, many more are dismissed as the long-shot claims of disgruntled boxing fans, beauty queens, and lottery aspirants.

Adopting a default rule that requires an explicit grant of outsider rights would go a long way towards eliminating these specious lawsuits. Two counterparties who really do seek to commit broadly, such as those seeking the gains from broadcast contracting, can specifically establish these rights. And those wishing to avoid outside claims will be protected by the default.

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[195] *See supra* notes 2–8 and accompanying text.

[196] They lost. Castillo v. Tyson, 701 N.Y.S.2d 423, 424 (App. Div. 2000) (internal quotation marks omitted).

[197] She lost. *See* Revels v. Miss Am. Org., 641 S.E.2d 721 (N.C. Ct. App. 2007). The agreement did state that MAO would accept the winner of the North Carolina pageant as a contestant in the finals, but the court quickly concluded that there was no evidence supporting a conclusion that the contestant was an intended beneficiary. *See id.* at 724. For a detailed recounting of the facts of this case, see Revels v. Miss Am. Org., 599 S.E.2d 54, 56 (N.C. Ct. App. 2004).

[198] He lost. *See* Andrews v. Speedway SuperAmerica LLC, No. 1:09-cv-1242-WTL-DML, 2010 WL 2985938 (S.D. Ind. July 27, 2010). Apparently the plaintiff arrived at the store after 10:00 PM seeking to play his birthday numbers. The store's policy was to not sell tickets after 10:00 PM, even though the state lottery commission permitted tickets to be sold until 10:40 PM. The plaintiff could not get to another store in time and was furious when that night's winning draw matched his birthday.

[199] *See supra* note 9.

Again, the net effect on the transaction costs of exchange is ultimately an empirical question. But I would contend that an open-ended standard inviting many different types of outside claims is unlikely to be the optimal default.

2. *Costs of a Formalist Approach (and Some Mitigants).*—I recognize that moving towards a formal default rule will potentially bypass some deserving claimants. Two counterparties who really do wish to convey third-party rights, but are unaware of this default, may have their unexpressed, but nevertheless real, intentions frustrated. Yet there are at least three responses. First, a promisee will always maintain enforcement rights and might still bring a lawsuit for breach on behalf of (and potentially with the financial support of) an aggrieved third party. In the donee–beneficiary context, for instance, a promisee may seek specific performance. Or, in the alternative, the promisee may mitigate a promisor's breach by hiring a substitute performer to provide the good or service to the third party and suing the promisor to recover this incremental outlay.[200]

Second, an adversely impacted third party who reasonably relies on a promise or statement by the initial counterparties might be able to pursue a claim on the basis of promissory estoppel.[201] *Restatement (Second)* § 90 famously provides that a promise may become binding, even in the absence of bargained-for consideration, if a party changes her position in reasonable reliance on the promise.[202] Note further that the language of § 90 explicitly mentions the possibility of actionable third-party reliance.[203] This means that a third party might still sue a promisor under a direct promissory estoppel theory, assuming that the third party has taken action or

[200] Admittedly, in the creditor–beneficiary context, the unavailability of third-party rights might have the effect of inefficiently requiring two lawsuits instead of one: (1) the beneficiary's lawsuit against the promisee and (2) the promisee's lawsuit against the promisor. *See* Eisenberg, *supra* note 13, at 1392.

[201] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[202] The exact language reads:

> § 90. Promise Reasonably Inducing Action or Forbearance
>
> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee *or a third person* and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Id. (emphasis added).

[203] Henry Smith has recognized this risk:

> [T]hird-party beneficiary contracts create the potential for unfair surprise. Third persons, who presumably lack information about private understandings between the parties, may rely on the contract's language in planning their own affairs. In these circumstances, giving priority to the shared intent of the parties poses the risk of substantial hardship.

Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1186 (2003) (alteration in original) (quoting Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1174 (1998)).

forbearance on a statement in the contract, even if a formal default rule would deny a third-party-beneficiary claim.

Return, for example, to the lawn mowing example used earlier in this Article: Abe promises to pay Beth $50 to mow Cam's lawn. But Beth never shows up to complete the job, and Abe cannot be bothered to bring a lawsuit against Beth. Under my default rule, Cam would not enjoy third-party enforcement rights because Abe and Beth did not mention the possibility of outside claims at all in their agreement. Cam, however, might still maintain a promissory estoppel claim against Beth if he heard about the contract with Abe, took some action or forbearance in reliance on that contract, and a court ruled that justice required Beth to keep her promise.[204] Similarly, a third-party promissory estoppel claim might be expected in the creditor–beneficiary context, especially if the third party fails to enforce the initial claim in reliance on this substitute contract. Of course, there is considerable ambiguity surrounding reliance claims, and it may not always be clear exactly when it should be reasonable for an outsider to rely on promises made between two other people. But the promissory estoppel theory should protect against egregious reliance problems, even in the absence of third-party-beneficiary rights.[205]

Finally, a more formal default rule is justifiable as a mechanism for channeling explicit documentation of third-party rights. We routinely deny contractual enforcement privileges under the indefiniteness doctrine, even if this may frustrate the expectations of the contracting parties. The justification here is grounded in an externality problem: it does not make sense to allow parties to externalize the costs of forming a contract on the courts via interpretation litigation. This same logic applies to the availability of third-party claims. Since the contract between the initial counterparties is the sole legal basis for outside rights, we should require some formal documentation of third-party enforcement or annul the claims of others by analogy to indefiniteness. This will provide incentives for clearer documentation of contractual intention and drive down both litigation expense and adjudicatory error.[206]

[204] It is possible, of course, that Beth's liability might also be reduced under RESTATEMENT (SECOND) OF CONTRACTS § 90 "as justice requires."

[205] For more on the historical embrace and continued legal robustness of promissory estoppel, see Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake*,*"* 52 U. CHI. L. REV. 903 (1985); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); and Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1996).

[206] This move towards a "formalist" approach to third-party rights is also consistent with recent academic literature suggesting that greater reliance on contractual text would help the overall interpretive task. *See, e.g.*, Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009); Alan Schwartz & Robert E. Scott, *Contract*

3. Renegotiating Rights away from Third Parties.—Finally, how should we understand efforts by the initial counterparties to revoke third-party rights through modification of an agreement that clearly conveys these rights? Here I would argue that there is less need for change. Rather, the approach taken by *Restatement (Second)* § 311 is a sensible way to deal with the modification problem, though one or two slight adjustments might be preferable.[207]

First, by default, a grant of third-party rights should be revocable by mutual modification. If the goal of contract law is to support private gains via trade, then a mutual revocation or modification of outsider rights is ample evidence that the situation has changed and that the initial counterparties expect to benefit further by an adjustment to the broadcast contract. This approach is also consistent with a notion that third-party rights spring from the intent of promisor and promisee: if that intent changes, then so should the rights.

There should be two exceptions, however, to this general presumption that modification can annul third-party-beneficiary claims. First, a third party who loses rights should still be able to pursue a promissory estoppel claim under *Restatement (Second)* § 90. It is quite easy to imagine that third parties might reasonably rely on a contract expressly designating them as beneficiaries, and subsequent reversals could bring liability under § 90 when a significant investment or forbearance has occurred, just as any other statement to a third party can invite reliance claims.[208]

Second, a promisor and promisee should be able to contract for irrevocable, ironclad third-party rights if they clearly document this preference. As discussed earlier,[209] the effectiveness of broadcast contracting will be undermined if outsiders fear that the purported commitment can be easily reversed via modification. Accordingly, some parties may indeed wish to opt into an irrevocable commitment to gain the full benefits of broadcast contracting. Contract law should support explicit

Interpretation Redux, 119 YALE L.J. 926 (2010). *But see* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION (2009) (criticizing the formalist approach to interpretation); Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CALIF. L. REV. 943 (2009) (same); Juliet P. Kostritsky, *Interpretive Risk and Contract Interpretation: A Suggested Approach for Maximizing Value*, 2 ELON L. REV. 109 (2011) (same).

[207] It is not clear to me, for example, why third-party assent to a benefit in response to a request by promisor or promisee should play any part in annulling future attempts by the initial counterparties to adjust third-party rights. *See* RESTATEMENT (SECOND) OF CONTRACTS § 311(3). This is simply assent to a gift promise and should not, without more, make a legal difference. The question may be entirely academic, however, as I am not aware of any case involving a dispute of this nature.

[208] It is not clear to me, however, why the broader rights provided by RESTATEMENT (SECOND) OF CONTRACTS § 311(3)—annulling the attempted modification of rights instead of protecting the third party's reliance interest—is the optimal approach. Rather, I would think that these claims could be adjudicated under a § 90 theory. *See* Eisenberg, *supra* note 13, at 1419.

[209] *See supra* Part II.D.

language to that effect. Fortunately, *Restatement (Second)* § 311 does exactly that.[210]

CONCLUSION

Sorting legal concepts into traditional doctrinal cubbyholes is an untidy endeavor. Torts bump up against crimes, and constitutional law collides with procedure. In this vein, contract law scholars sometimes joke that most legal topics can be swallowed by private ordering. Recently, this hyperbole has become more interesting as individuals purport to modify regimes like civil procedure, tort, and property by contract.[211] These attempts to shove legal concepts through the sieve of contract law raise significant concerns—both about preserving necessary legal safeguards and about the ability of contract law to manage the mashup.

Broadcast contracting should be seen as one manifestation of this trend. This Article has demonstrated how a promisor can use the law of third-party beneficiaries to broadcast a binding commitment to many different outsiders. This is quite distinct from bilateral contracting, and it is a powerful legal construct, allowing a promisor to instantly adjust her legal obligations in diverse areas of activity. The concerns about using contracts to evade legal obligations are not normally present in this context, however, because broadcast contracting is limited to expanding (not diminishing) baseline legal commitments. The ability to explicitly define who receives enforcement rights—and thereby to exclude some classes of outsiders—is also an important feature of broadcast contracting, raising interesting concerns about balkanized legal microcosms.

From a normative perspective, this Article has advanced two general propositions. First, contract law should continue to empower private parties to write broadcast contracts and convey outside enforcement rights. The private strategic gains of one-stop multilateral commitment rest comfortably with the underlying goals of contract law. Second, legal treatment of third-party claims relies far too heavily on conjecture about a vague standard. In this context, the goals of contract law would be better served by moving toward a rule that, grounded in the familiar concerns of the indefiniteness doctrine, insists on explicit grants of third-party rights as a precondition to outside liability.

210 RESTATEMENT (SECOND) OF CONTRACTS § 311(1).

211 *See* sources cited *supra* note 131.