

4-26-2006

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### Recommended Citation

D. Gordon Smith, *The "Branding Effect" of Contracts*, 12 HARV. NEGOT. L. REV. 189 (2006).

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# The “Branding Effect” of Contracts

D. Gordon Smith†

Why do people create contracts? Mark Suchman suggests that contracts have both technical and symbolic properties.<sup>1</sup> On the technical side, “contracts establish intricate frameworks of procedures, commitments, rights, and incentives – all in order to accomplish practical objectives in the governance of human transactions.”<sup>2</sup> Of course, contracting parties often deviate from the terms prescribed in contract documents without ending up in court.<sup>3</sup> Thus, Ian Macneil has asserted that people make contracts “[f]or exactly the same reason people make architectural drawings for a building which are likely never to be used because making them is part of the process of getting the final plans and finally building the building.”<sup>4</sup>

Macneil’s conception of the role of contracts hints at the possibility of symbolic properties in contracts. Suchman embraces that possibility, arguing that “contracts evoke normative principles and illuminate social experiences – at times expressing identity, solidarity, forbearance, and faith, and at times expressing differentiation, inequality, domination, and distrust.”<sup>5</sup> In his case study of the MasterCard IPO<sup>6</sup> and its predecessor piece on the Google IPO,<sup>7</sup> Victor Fleischer describes one possible symbolic manifestation of contracts: the “branding effect” of legal infrastructure. The purpose of this essay

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† Professor of Law, University of Wisconsin Law School. Thanks to Guhan Subramanian, Michael Simkovic, and Crystal Blum for organizing this conference, to Vic Fleischer for inviting me to comment on his work, and to Darian Ibrahim for inviting me to present this paper at a workshop for the faculty of the University of Arizona James E. Rogers College of Law.

1. Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC’Y REV. 91, 91 (2003).

2. *Id.* at 99.

3. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

4. Franklin G. Snyder et al., *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 691 (2005).

5. Suchman, *supra* note 1, at 100.

6. Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, 12 HARV. NEGOT. L. REV. 137 (2006).

7. Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581 (2006) [hereinafter Fleischer, *Brand New Deal*].

is to examine this purported branding effect and suggest possible refinements to the concept. A more informed evaluation of the prevalence and importance of branding effects awaits further empirical study.

Legal scholars have studied contractual relationships for decades,<sup>8</sup> and articles on “relational contracts” continue to appear regularly in law reviews.<sup>9</sup> The overwhelming majority of legal scholars who write about contractual relationships, however, strive to evaluate or advance contract doctrine.<sup>10</sup> Other scholars, taking their cue from the seminal work of Stewart Macaulay,<sup>11</sup> have focused on the management of contractual relationships.<sup>12</sup>

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8. For foundational work in this area, see Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Macaulay, *supra* note 3; Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465; Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). Of course, one can trace the idea of relational contracts even further back. See, e.g., Karl Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L.J. 704 (1931).

9. See, e.g., Donald J. Smythe, *Bounded Rationality, The Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227 (2004); William C. Whitford, *Relational Contracts and the New Formalism*, 2004 WIS. L. REV. 631 (2004).

10. Papers published in the Northwestern University Law Review in connection with the excellent symposium entitled “Relational Contracting Theory: Unanswered Questions” reveal the dedicated interest in legal doctrine among those who write about relational contracts. See, e.g., Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 737 (2000) (“I want to situate Macneil’s relational contract theory within the story of the development of contract law”); Eric Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 751 (2000) (“If Macneil is right, and courts cannot resolve contractual disputes by discovering initial contractual intentions on the basis of documents and other evidence, cannot use such intentions (even if they exist) to guide behavior late in the life of a relational contract, cannot enforce contracts in a way that maximizes their value *ex ante*, cannot fill in gaps by imagining the hypothetical bargain – then what should the courts do?”); Robert E. Scott, *A Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 847 (2000) (“the central task in developing a plausible normative theory of contract law is to specify the appropriate role of the state in regulating incomplete contracts”); Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 838 (2000) (“a continuing challenge is for courts to recognize the special characteristics of relational contracts and to develop a set of default rules that are more responsive to the problems that those characteristics generate”).

11. See Macaulay, *supra* note 3, at 55.

12. The best-known recent work in this genre belongs to Lisa Bernstein. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1746-88 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

The study of contractual relationships could have taken a different path in the legal academy. Instead of focusing on contract doctrine or relationship management, legal scholars could have elected to study contract documents. For the better part of the last three decades, however, such studies have been performed primarily by economists<sup>13</sup> and a smattering of others<sup>14</sup> who work outside of the legal academy. As a result, those who draft and interpret contracts professionally have not contributed substantially to our understanding of contractual structures.<sup>15</sup>

Economists often frame the discussion of contract documents around the concept of *opportunism*, which Oliver Williamson defines as “a condition of self-interest seeking with guile.”<sup>16</sup> Under this view, the potential for opportunism arises because contracting parties are constrained by *bounded rationality* – the notion that, try as they

13. Much of the work here emanates from Oliver Williamson’s and Benjamin Klein’s work on “transaction cost economics.” See, e.g., Oliver E. Williamson, *Transactions Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); Oliver E. Williamson, *Organization Form, Residual Claimants, and Corporate Control*, 26 J.L. & ECON. 351 (1983); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 526 (1983); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 AM. ECON. REV. 356 (1980).

14. For work in sociology, see Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997); Lauren B. Edelman & Mark C. Suchman, *The Legal Environment of Entrepreneurship*, in THE ENTREPRENEURSHIP DYNAMIC (Claudia Bird Schoonhoven & Elaine Romanelli eds., 2001); Mark C. Suchman, *On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley* (1994) (unpublished Ph.D. dissertation, Stanford University).

15. The notable exception is Henry Hansmann. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996). For other recent examples, see D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315 (2005); D. Gordon Smith, *The Exit Structure of Strategic Alliances*, 2005 U. ILL. L. REV. 303 (2005); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002); Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J.L. ECON. & ORG. 83 (2001); Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy*, 54 STAN. L. REV. 887 (2002).

16. OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 30 (1998). He also observed:

I do not insist that every individual is continuously or even largely given to opportunism. To the contrary, I merely assume that some individuals are opportunistic some of the time and that differential trustworthiness is rarely transparent *ex ante*. As a consequence, *ex ante* screening efforts are made and *ex post* safeguards are created. Otherwise, those who are least principled (most opportunistic) will be able to exploit egregiously those who are more principled.

*Id.* at 64.

might, people cannot foresee all future contingencies.<sup>17</sup> Bounded rationality precludes the possibility of drafting complete contracts. When one of the contracting parties invests in an asset that cannot move from one use to another without losing productive value (what Williamson calls *asset specificity*<sup>18</sup>), the other contracting party can engage in “holdup.”<sup>19</sup>

Holdup occurs when one contracting party threatens another with economic harm unless concessions are granted by the threatened party.<sup>20</sup> Holdup is, essentially, opportunism realized. The power of holdup exists only within contractual relationships, not in initial contract negotiations, and results from the investment of relationship-specific assets by one of the parties. Anticipation of holdup is said to motivate the structure of contractual relationships. In particular, the potential for holdup encourages contracting parties to enter into long-term relationships or to vertically integrate.

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17. Actually, bounded rationality is more complex than being limited in cognitive competence. It might also include an inability to negotiate future plans because parties “have to find a common language to describe states of the world and actions with respect to which prior experience may not provide much of a guide.” OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* 23 (1995). Finally, bounded rationality might include an inability to write contracts in such a way that they can be enforced by a third party. *Id.*

18. WILLIAMSON, *supra* note 16, at 54.

19. The literature on holdups is voluminous, and much of it revolves around the much-debated case of Fisher Body and General Motors, first discussed in Benjamin Klein et al., *supra* note 13, at 308-10. The subsequent debate over Fisher Body has been spirited. See Ronald H. Coase, *The Acquisition of Fisher Body by General Motors*, 43 *J.L. & ECON.* 15 (2000) (no evidence of holdup in relationship between GM and Fisher Body); Robert F. Freeland, *Creating Holdup Through Vertical Integration: Fisher Body Revisited*, 43 *J.L. & ECON.* 33 (2000) (no evidence of holdup in the relationship between GM and Fisher Body until after the acquisition); Ramon Casadesus-Masanell & Daniel F. Spulber, *The Fable of Fisher Body*, 43 *J.L. & ECON.* 67 (2000) (merger of GM and Fisher Body was not motivated by a desire to avoid holdup); and Benjamin Klein, *Fisher-General Motors and the Nature of the Firm*, 43 *J.L. & ECON.* 105 (2000) (evidence of holdup in relationship between GM and Fisher Body exists and fear of holdup motivated the acquisition). The latest contribution by Ronald Coase to that debate has descended into allegations of professional misconduct. Ronald Coase, *The Conduct of Economics: The Example of Fisher Body and General Motors*, 15 *J. ECON. & MGMT. STRATEGY* 255, 255 (2006) (wondering “. . . what it is about the conduct of economics that led so many able economists to choose error rather than truth”).

20. The term “holdup” is sometimes used synonymously with “opportunism.” Conrad S. Ciccotello et al., *Research and Development Alliances: Evidence From a Federal Contracts Repository*, 47 *J.L. ECON.* 123, 127 (2004). Masten et al. suggest the possibility of holdup in the absence of asset specificity. They use the term “temporal specificity” to describe a situation in which “timely performance is critical, [and] delay becomes a potentially effective strategy for exacting price concessions.” Scott E. Masten et al., *The Costs of Organization*, 7 *J.L. ECON. & ORG.* 1, 9 (1991).

Victor Fleischer is after something completely different from transaction cost economization.<sup>21</sup> The branding effect is not aimed at reducing the potential for opportunism by a counterparty to a contract, but rather at increasing the attractiveness of a product to present and future users, or at improving the image of a company in the eyes of regulators, judges, and juries.

Fleischer’s work on the branding effect in contracts fits neatly into a scholarly framework proposed by Mark Suchman, who has argued for a “serious scholarly consideration of contracts as *things*, that is, for the analysis of contract documents as *social artifacts*.”<sup>22</sup> The purpose of approaching contracts as social artifacts is to reveal more about the contracting parties by invoking a broader set of questions than those normally addressed through transaction cost economics.<sup>23</sup> As noted above, Suchman suggests that contracts have both *technical* and *symbolic* properties, and Fleischer’s “branding effect” may be one of those symbolic properties.

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21. In *Brand New Deal*, Fleischer describes the objects of his studies as “deal structures.” He mentions relational contracts only in passing, Fleischer, *Brand New Deal*, *supra* note 6, at 1589, though his description of the deal structures reveals that he is focusing on contractual terms. For example, in his study of the MasterCard IPO, Fleischer examines a “reverse” dual-class voting structure and the creation of a charitable foundation. See Fleischer, *supra* note 6, at 149-54. Whether all deal structures are “relational” in a Williamsonian sense is a thornier question. Fleischer connects deal structures to transaction cost analysis, *see id.* at 137 n.1 (“Deal structures are generally driven by a desire to manage transaction costs.”), but transaction costs exist in all contracting environments, and some of the deal features cited by Fleischer – for example, Google’s use of the “Dutch auction” format for its initial public offering and Ben & Jerry’s decision to sell stock only to Vermont residents – are relevant primarily to the sale transaction rather than to the management of the ongoing relationship.

The issue is further muddled by the propensity of law professors to refer to all contracts as relational. See, e.g., Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. Rev. 847, 852 (2000) (“All contracts are relational, complex and subjective.”). Ian Macneil has stated, “I start from the proposition that all contracts of every kind, are relational, and they all occur in relations. Even the most truncated ones you can think of occur within relations.” *Symposium: The Common Law of Contracts as a World Force in Two Ages of Revolution: A Conference Celebrating the 150th Anniversary of Hadley v. Baxendale, Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 679 (2005). Though I have situated my analysis within the relational contracting literature because I am interested in the study of contract documents, and economic studies focus overwhelmingly on long-term contractual relationships, “branding effects” do not seem uniquely relevant to contracts on the relational end of the relational-discrete continuum.

22. Suchman, *supra* note 1, at 92.

23. Suchman defines “artifact” as a “discrete material object, consciously produced or transformed by human activity, under the influence of the physical and/or cultural environment.” *Id.* at 98. Artifacts are not speech, gestures, or merely ideas. They are “concrete bits of ‘material culture,’ and they merit study because of what they reveal about the lives and times of their makers and users.” *Id.*

In his case study of MasterCard, Fleischer examines the branding effect of MasterCard's use of a charitable foundation as a substantial post-IPO shareholder.<sup>24</sup> Fleischer claims that MasterCard has positioned itself as a "financial services company that supports family values and understands the limits of consumerism"<sup>25</sup> and as a brand that consumers associate with safety and security.<sup>26</sup> These messages embedded in MasterCard's brand are aimed at present and future users of MasterCard's services and possibly at regulators, judges, and juries. While branding may play an important role in addressing information asymmetries between a company and its customers, thus reducing the potential for opportunism,<sup>27</sup> this signaling function (discussed further below) is distinct from the pure transaction cost economization described above. Under Williamson's framework, transaction cost economization occurs within the contractual relationship, whereas the "branding effect" is a positive externality of that relationship.

The MasterCard foundation would fit neatly into Fleischer's account of a branding effect if the charitable donations were targeted to a cause that fit MasterCard's brand image. In this instance, however, the Foundation exists to support "programs and initiatives that help children and youth access education, understand and utilize technology and develop the skills necessary to succeed in a diverse and global workforce"<sup>28</sup> and "organizations that provide microfinance programs and services to financially disadvantaged persons and communities in order to enhance local economies and develop entrepreneurs."<sup>29</sup> According to Fleischer, these causes blur the branding story:

Here, the branding potential is powerful – \$600 million is a lot of money to give away – but the fit is unclear. MasterCard's stated purposes related to education and microfinance. The strongest case to be made is that the MasterCard brand image includes access to the upper middle class lifestyle. Education

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24. The foundation holds about 17% of the voting shares of MasterCard. This stake represents a claim to 10% of the financial rights in the company and is worth approximately \$600 million.

25. Fleischer, *supra* note 6, at 141.

26. *Id.*

27. See, e.g., Soo Jiuan Tan, *Strategies For Reducing Consumers' Risk Aversion in Internet Shopping*, 16 J. CONSUMER MARKETING 163, 166 (1999) (using experimental methods to demonstrate that "a well-established brand name is more effective than a new brand in reducing the risk perception of consumers in Internet shopping").

28. Fleischer, *supra* note 6, at 152.

29. *Id.*

and microfinance are both associated with upward class mobility. By giving money to such causes, MasterCard can enhance its brand image as a facilitator of the Priceless lifestyle. And it may create a few more MasterCard customers to boot. By shackling the foundation's ability to give for four years, however, the brand impact is muted. To the extent the public notices the foundation at all, they may notice it for the corporate governance gimmick that it is rather than the social institution that it may become.<sup>30</sup>

The weakness of the branding story in this instance raises an obvious question: is it really a branding story at all? The primary obstacle to answering this question is that Fleischer's notion of branding effect needs more development. What follows are some thoughts on how one might refine the theory of branding effects.

First, branding may be a form of signaling, but the branding effect identified by Fleischer also has a function unrelated to signaling, and it is this distinctive function that is most interesting with regard to the future study of contract documents. In the economic literature, contracting parties use signals to mitigate information asymmetries.<sup>31</sup> For example, prior to investing in a startup technology company, venture capitalists might want to know whether the company has good management, a culture of innovation, and a viable market niche. Gathering and measuring information to make these analyses may be impossible or, at least, very expensive. As a result, venture capitalists rely on signals, such as patent applications, as external indicators of these positive attributes.<sup>32</sup> Patent applications convey some information directly (*e.g.*, the nature of the invention), but the signaling function of patent applications flows from the indirect transmission of information (*e.g.*, regarding firm productivity or innovative activity).<sup>33</sup>

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30. *Id.* at 152-53.

31. For the seminal work on signaling, see A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974); A. Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973). Parallel works by evolutionary biologists deal with similar issues. See, *e.g.*, Richard Dawkins & John R. Krebs, *Animal Signals: Information or Manipulation?*, in BEHAVIORAL ECOLOGY: AN EVOLUTIONARY APPROACH 282 (John R. Krebs & Nicholas B. Davies eds., 1978).

32. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1505-06 (2001) ("Venture capitalists use client patents (or more likely, patent applications) as evidence that the company is well managed, is at a certain stage in development, and has defined and carved out a market niche.").

33. For an extensive discussion of the information conveyed by patents, see Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625, 646-55 (2002).



Branding may perform a similar function between companies and consumers or investors by conveying information about firm or product quality that would otherwise be difficult to discover, produce, or transmit. Fleischer acknowledges the possibility that a deal structure might serve as a “reputational bonding mechanism,”<sup>34</sup> which is a conventional economic term that approximates “branding.”<sup>35</sup> On the other hand, Fleischer contends that “deal structure is an effective advertising medium when it reaches early adopters and opinion leaders: sophisticated, knowledgeable consumers who start trends.”<sup>36</sup> Though Fleischer refers to this form of advertising as “consumer signaling,” it is not signaling in the conventional economic sense because it is not aimed at mitigating information asymmetries.<sup>37</sup> The possibility that deal structures have a marketing component is the most innovative and intriguing aspect of Fleischer’s work.<sup>38</sup>

This marketing component of deal structures is not focused on the transmission of information, but instead on the creation of meaning.<sup>39</sup> Thus, commentators often describe branding through

34. Fleischer, *Brand New Deal*, *supra* note 7, at 1629.

35. Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

36. Fleischer, *Brand New Deal*, *supra* note 7, at 1629.

37. In addition, the messages described by Fleischer may not be costly to produce. *Id.* When messages are inexpensive to produce, they can be replicated by dishonest imitators, thus undermining their usefulness as signals. They are, in the jargon of economics, “cheap talk.” David M. Kreps & Joel Sobel, *Signalling*, in *HANDBOOK OF GAME THEORY WITH ECONOMIC APPLICATIONS*, VOL. 2, 850, 863-65 (Robert J. Aumann & Sergiu Hart eds., 1994).

38. The following discussion of branding is general, and, among other omissions, it does not account for possible differences in brands. *See, e.g.*, Alice M. Tybout & Gregory S. Carpenter, *Creating and Managing Brands*, in *KELLOGG ON MARKETING* 74, 80-100 (Dawn Iacobucci ed., 2001) (identifying three types of brands – functional, image, and experiential – each of which might be employed in one of three branding strategies – corporate, family, and product).

39. *See* Bobby J. Calder & Steven J. Reagan, *Brand Design*, in *KELLOGG ON MARKETING*, *supra* note 38, at 58 (“To market, we have to go beyond the product. We must transcend whatever the product is as a physical or objective entity. We must create and convey the meaning of the product.”). The *meaning* of a brand is separate from the *markers* of that brand. Douglas Holt illustrates the distinction as follows:

Consider a new product that a company has just introduced. Although the product has a name, a trademarked logo, unique packaging, and perhaps other unique design features – all aspects that we intuitively think of as the brand – the brand does not yet truly exist. Names, logos, and design are the material markers of the brand. Because the product does not yet have a history, however, these markers are empty. They are devoid of meaning. Now, think of famous brands. They have markers, also: a name (McDonald’s, IBM), a logo (the Nike swoosh, the Travelers umbrella), a distinctive design feature (Harley’s engine sound), or any other design element that is uniquely associated with the product. The difference is that these markets have been filled

references to emotional<sup>40</sup> – or even religious<sup>41</sup> – concepts. Brand meanings are created through stories,<sup>42</sup> and these stories have many authors.<sup>43</sup> Fleischer adds “deal structures” to the list of stories that contribute to a brand’s identity.

Second, the “branding effect” is pervasive, just as brands themselves are pervasive.<sup>44</sup> Though Fleischer disclaims the notion that “every deal has important branding implications,”<sup>45</sup> it is not hard to imagine that many of the deals that fall within Fleischer’s contemplation – including “IPOs, mergers and acquisitions, securities offerings, executive-compensation arrangements, and other matters of

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with customer experiences. Advertisements, films, and sporting events use the brand as a prop. Magazines and newspaper articles evaluate the brand, and people talk about the brand in conversation. Over time, ideas about the product accumulate and fill the brand markers with meaning. A brand is formed.

DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* 2-3 (2004).

40. See, e.g., JAMES B. TWITCHELL, *BRANDED NATION: THE MARKETING OF MEGACHURCH, COLLEGE, INC., AND MUSEUMWORLD* 12 (2004) (“The taste of Evian is not on the palate but in the imagination”); ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT* 107 (1986) (“By pairing the brand name of the product with stimuli that naturally elicit positive emotional responses from people, over many repetitions, consumers learn to associate the brand with positive emotions. When they think of the brand they’ll have good feelings about it.”).

41. PATRICK HANLON, *PRIMAL BRANDING: CREATE ZEALOTS FOR YOUR BRAND, YOUR COMPANY, AND YOUR FUTURE* 6-7 (2006) (“Brands are belief systems. . . Believing is belonging.”); MARTIN LINDSTROM, *BRAND SENSE: BUILD POWERFUL BRANDS THROUGH TOUCH, TASTE, SMELL, SIGHT, AND SOUND* 175-92 (2005) (describing ten rules for “tak[ing] a brand beyond its traditional loyal base of consumers toward a bonding that resembles a religious relationship”).

42. See SETH GODIN, *ALL MARKETERS ARE LIARS: THE POWER OF TELLING AUTHENTIC STORIES IN A LOW-TRUST WORLD* (2005). Godin explains the importance of storytelling, in part, by appealing to the same reasoning that underlies the use of signals: “Stories are shortcuts we use because we’re too overwhelmed by data to discover all the details.” *Id.* at 2. Ultimately, however, Godin’s message is that stories convey *meaning* rather than *information*. See *id.* at 8 (“A great story is true. Not true because it’s factual, but true because it’s consistent and authentic.”).

43. HOLT, *supra* note 39, at 3 (“A brand emerges as various ‘authors’ tell stories that involve the brand. Four primary types of authors are involved: companies, the culture industries, intermediaries (such as critics and retail salespeople), and customers (particularly when they form communities).”).

44. Patrick Hanlon defines “brand” as “any product, service, personality, organization, social cause, political ideology, religion, movement, or other entity searching for popular appeal.” HANLON, *supra* note 41, at 6-7. See also Tybout & Carpenter, *supra* note 38, at 74 (“Brands are one of the most universal aspects of modern markets. Nearly every company, whether or not it competes in consumer markets, has a brand – an identity, a name, a reputation.”).

45. See Fleischer, *Brand New Deal*, *supra* note 7, at 1586.

internal corporate governance<sup>46</sup> – contribute to the formation of a brand. As noted above, brands are shaped by stories, and many of these transactions are stories. For example, if using a Dutch auction for its initial public offering marks Google as “innovative, egalitarian, playful, [and] trustworthy,”<sup>47</sup> using a firm-commitment offering may support the image of another company as staid, traditional, elitist, or sneaky.<sup>48</sup>

Third, the branding effect is only one form of symbolic communication used in contracts. Mark Suchman suggests other possibilities. For example, contracts might be “sacred symbol[s that] . . . link the lived-reality of individual transactions to broader cultural belief systems . . .”<sup>49</sup> Suchman also asserts that some contract structures become “*ideograms*, representing concepts and postures that the parties cannot or will not explicitly verbalize.”<sup>50</sup>

Fourth, the branding effect may sometimes coincide with transaction cost stories. For example, one might argue that Google’s use of the Dutch auction was an attempt to maximize the proceeds of the IPO,<sup>51</sup> or that MasterCard’s use of a charitable foundation was motivated by a combination of regulatory cost engineering and takeover protection, rather than a desire to enhance the MasterCard brand.<sup>52</sup> Of course, if the branding effect and transaction cost stories always coincided, one might question the value of adding branding effects to the analytical arsenal. But the occasional coincidence of transaction cost economization and branding does not diminish the value of understanding Fleischer’s branding effect. Indeed, Fleischer’s criticism of the MasterCard lawyers implies that a deeper understanding of the branding effect would enhance the value that lawyers bring to transactions.

46. *Id.*

47. *Id.* at 1584.

48. Of course, the goal of branding is to stand out from the crowd. See FRANCIS J. KELLY III & BARRY SILVERSTEIN, *THE BREAKAWAY BRAND: HOW GREAT BRANDS STAND OUT* 253 (2005) (“breakaway branding is at the heart of how you win in the world”). So, the idea that firms contribute to their brand image by doing what everyone else is doing may seem more like a missed opportunity than a branding event.

49. Suchman, *supra* note 1, at 111.

50. *Id.* at 112.

51. See, e.g., Anita I. Anand, *Is the Dutch Auction IPO a Good Idea?* (Yale Law Sch. Ctr. for Law, Econ. & Pub. Pol’y, Working Paper No. 320, 2005), available at <http://ssrn.com/abstract=794464> (“Google’s Dutch auction was successful”); John C. Coffee, Jr., *IPO Underpricing and Dutch Auctions*, N.Y.L.J., Sept. 16, 1999, at 5 (“[i]n an efficient, frictionless world . . . [i]ssuers would turn to a Dutch Auction format to sell their stock to the highest bidder”).

52. Fleischer, *supra* note 6, at 152-53.

Fleischer's work on the branding effect in contract structure is part of a larger stream of scholarship that focuses on contract documents rather than on contract doctrine or dispute resolution. Empirical studies of contractual terms have become more common over the past decade,<sup>53</sup> but by and large, the questions asked by those studies are limited to the transaction cost framework. Fleischer's work, on the other hand, is part of a promising new avenue of research that may yield new insights about why contracting parties use certain deal structures and avoid others.

One of the important implications of asking new questions about contract structure is that we are forced to reconsider the role of lawyers as the primary drafters of contracts. In a world of transaction cost economization, lawyers are "transaction cost engineers."<sup>54</sup> As Fleischer observes, the idea of transaction cost engineering may explain the central role of lawyers in contract drafting and relationship formation: "In navigating clients through the regulatory thicket, lawyers have an obvious comparative advantage over bankers and managers."<sup>55</sup> But if Fleischer is right about the branding effect of deal structures, lawyers must be more than transaction cost engineers; they must also coordinate their clients' efforts to enhance the branding effect of corporate transactions.

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53. In a 1991 article, Glenn Hubbard and Robert Weiner observed: "The role of contractual arrangements – while important in many markets for commodities and industrial products – has not received much attention in empirical work." R. Glenn Hubbard & Robert Weiner, *Efficient Contracting and Market Power: Evidence From the U.S. Natural Gas Industry*, 34 J.L. & ECON. 25, 26 (1991).

Also in 1991, the *Journal of Law & Economics* published papers presented at a conference organized by Ronald Coase on "Contracts and the Activities of Firms." In his introduction to the conference, Coase wrote: "In organizing this conference I was impelled by the belief (in which I am not alone) that theory is outrunning our knowledge of the facts in the study of industrial organization and that more empirical work is required if we are to make progress." Ronald H. Coase, *Contracts and the Activities of Firms*, 34 J.L. & ECON. 451 (1991).

54. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253 (1984).

55. Fleischer, *supra* note 6, at 139.

