RISK-AVERSE CONTRACT INTERPRETATION

ADITI BAGCHI*

I

INTRODUCTION

What kind of contract is boilerplate? Is it typical—because it literally describes most actual contracts? Is it anomalous—because it departs from standard ideas about contract formation, which apply to most other contracts? Is it not contract at all—because it lacks meaningful assent on one side? How courts should deal with boilerplate seems to turn on these prior questions regarding its basic character: If it is not contractual at all, then it should not be enforceable. If it is normal contract, then it requires no special treatment. If it is anomalous, though legitimate and enforceable, it would call for its own interpretive regime.

It turns out, though, that how we interpret boilerplate has repercussions for what it is, or how we conceive its legal status. That is, only if our interpretive methodology makes good sense of boilerplate—if it renders boilerplate the recognizable product of the kind of consent we are looking for in contract, and delivers outcomes that serve autonomy and efficiently govern transactions—only then can we justify applying the apparatus of contract to boilerplate and thereby accept it as the means by which the terms of innumerable transactions are set.

In this Article, I argue that boilerplate is properly regarded as normal contract. We can treat it "normally" for two reasons. First, contract interpretation should always take into account factors that scholars deem especially important in the context of boilerplate. Thus, if we understand general contract interpretation in that way, boilerplate does not require its own interpretive regime. More specifically, boilerplate only functions if we take into account the standard market terms that it ordinarily accompanies. I argue, however, that courts should always take standard market terms into account as a benchmark for interpreting ambiguous contract language. More generally, contract interpretation should always incorporate external references of reasonable meaning. Properly applied, such an externally-sensitive methodology would operate to account for third-party effects of boilerplate interpretation without requiring a specialized procedure.

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* Professor of Law, Fordham University School of Law; J.D. Yale Law School; M.S. Oxford University; A.B. Harvard College. Many thanks to John Coyle for inviting me to participate in this symposium.

The second grounds for treating boilerplate normally is that some kinds of contextual considerations regarding the process of formation are self-effacing with respect to boilerplate. Because it is appropriate for courts to take into account communications between the parties regarding ambiguous contract terms when interpreting those terms, we might worry that courts will assign meaning to meaningless variation among boilerplate or retroactively imbue communications between contracting parties with significance they did not have. But the general rule works fine for boilerplate as long as courts recognize boilerplate as such. That is, if a given text is standardized, that just means that the parties did not in fact negotiate the language of that term and that evidence pertaining to their negotiations is therefore not relevant to its meaning. This news is not hard to swallow for courts that understand contract as no less than the product of markets than the work product of attorneys.

The interpretive method recommended here is normative triangulation, under which courts interpret ambiguous contract terms in light of the parties' background duties.[1] Normative triangulation seems at first blush orthogonal to standard postures in the debate on contract interpretation. The primary debate is between formalism and contextualism, and the contested question is how much inquiry courts should make into the circumstances of contract. Formalists would defer to party choice, and at least sharply limit judicial inquiry into facts outside the text of an agreement where it records a transaction between sophisticated parties.[2] Contextualists would have courts more easily incorporate a variety of contextual considerations, including communications between the parties, their prior course of dealing, course of performance, and trade usage.[3]

This debate is misguided in two important respects. First, participants in the debate, but especially contextualists, tend to assume that the relevant context is largely specific to the parties, such that contextualization is substantially the same as tailored gap-filling. But the relevant contextual facts are usually not specific to the parties, rather they describe the market in which they operate.[4]

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1. I have presented the theoretical foundations of normative triangulation elsewhere. *See generally* Aditi Bagchi, *Interpreting Contracts in a Regulatory State*, 53 U.S.F. L. REV. (forthcoming 2019).

2. *See, e.g.*, CATHERINE MITCHELL, INTERPRETATION OF CONTRACTS: CURRENT CONTROVERSIES IN LAW (2007); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

3. *See, e.g.*, Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223 (1999); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

4. For reasons different than those offered here, Steven Burton advocates the use of objective evidence such as "the objective circumstances when the contract was made, any relevant trade usages, and any practical construction (course of performance)" over "subjective" evidence like course of dealing, negotiation history, or statements of intention. Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 353 (2013). What he describes as objective evidence is better described as market-general, or exogenous to a single transaction. Neither category is properly described as subjective, though particular pieces of evidence may be subjective and both types of evidence may be misused for subjective inquiry.

The second mistake is committed mostly by formalists. One of their compelling arguments sounds in judicial humility—or, in its more snarky form, a charge of judicial incompetence. That is, some formalists argue that parties will generally be risk-averse and prefer that judges undertake a more minimal inquiry.[5] Contextual evidence, on this view, actually makes it easier to manipulate the judicial process and renders its outputs more unpredictable.[6] Others argue that because more information is more expensive, at least sophisticated parties would not wish to pay more to reduce the odds that courts will get the right answer. Their ambitions are more limited; they just want courts to get it right "on average."[7]

In this Article, I argue that, while some parties are more risk-averse than others, risk aversion is indeed the appropriate stance *of courts* in selecting their interpretative methodology. Courts should avoid assigning meaning to contract language that is surprising; contract interpretation should not be creative. This risk aversion argues in favor of judges discounting both their own untethered understanding of contract language *and* their judgments about the particular intentions of contracting parties in favor of the third, often overlooked leg of interpretation—social determinants of contract terms. The interpretive preferences of courts need not merely mirror those of parties because contract is a regulatory tool of the state whose purposes include, but are not limited to, actualizing the preferences of various contracting pairs. From the perspective of the state, the external bases for private agreement are doubly significant: they are both predictive of contracting parties' intentions, and therefore indirect evidence of those intentions; and also independently indicative of what a reasonable contract under those circumstances would be.

Non-particularized, contextual information is generally appropriate in normative triangulation, which charitably reads the terms of a contract as compliant with background duties—which, in most commercial contexts, will

5. Eric Posner, *A Theory of Contract Law under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 754 (2000) (arguing that "many elements of our legal system make most sense if we understand them to be a response to the regrettable but unavoidable fact that our courts are incompetent when it comes to enforcing contracts."); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 316–18 (1992) (arguing that "judicial passivity . . . may facilitate desirable commercial behavior" by encouraging contracting parties to create the best structures for dealing with unknown contingencies).

6. *See* MITCHELL, *supra* note 2, at 115; Alan Schwartz, *Incomplete Contracts*, *in* 2 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 277, 280 (Peter Newman ed., 1998) (arguing that as "private parties do not condition contracts on unobservable or unverifiable information" they would reject judicially-imposed default rules aimed at resolving cases where "relevant variables are unverifiable."); Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 76 (2013) (stating that courts' reliance on often unreliable and contradictory extrinsic evidence "undermines the usefulness of contracts as tools to predictably constrain another party's behavior.").

7. *See* Schwartz & Scott, *supra* note 2, at 577 ("only unusual contracts have this 'bet the ranch' quality. In the typical case, it is good enough that courts get things right on average.").

turn on market norms.[8] While we do not have reliable information about exactly what courts do well,[9] market norms should be relatively cheap for courts to discern. Just as courts are better at filling in price than quantity, courts are better at ascertaining market norms and reading contract terms in that context than they are at attempting to reconstruct the particular bargain that any two contracting parties may have struck. Risk aversion thus cuts in favor of assuming contracts are market-conforming unless there is a clear indication that the parties chose to meaningfully depart from the market standard.

Normative interpretation delivers especially important benefits in the context of boilerplate. Where terms are used en masse, they have consequences that no single private user has reason to assign substantial weight. However, a court that interprets a term in a fashion that ordinarily takes into account that it governs many similarly—even if not identically worded—deals cannot but take into account the reasonableness of the interpretation across the market. The court will naturally avoid the distortions that arise from interpreting a single agreement in isolation. In particular, a court interpreting boilerplate should favor the interpretation that minimizes externalities both to other users of the given boilerplate and to other concentrated groups with a stake in the boilerplate. Systematically interpreting boilerplate in this way will make it more costly for bilateral sets of contracting parties to transact on anti-social terms.

In this Article, I proceed as follows. Part II briefly describes the debate between contextualists and formalists. It summarizes and advocates normative triangulation as an intermediate position that prioritizes "market-general" contextual considerations over "party-tailored" kinds of considerations. Similarly, because normative triangulation justifies external reference on the public availability of background conditions, I argue that some kinds of market-general considerations are more appropriate than others. For example, the theory would favor published prices, formal trade association guidance, and Securities and Exchange Commission (SEC)-filed agreements over information available only via witness testimony.[10] The interpretive methodology here is not specific to boilerplate.

Part III applies normative triangulation to boilerplate and argues that doing so ameliorates many concerns about present treatment of boilerplate without

8. *See generally* Bagchi, *supra* note 1, at 1.

9. There is no empirical certainty about judicial incompetence. *See* Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—'Real' Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 918 (2000) (stating that "it would seem desirable to develop some basis for arguing that this level of incompetence is in generally characteristic of judges or of the legal system in deciding all kinds of cases.").

10. In this respect, the recommendations here depart from contemporary practice, which appears to rely primarily on testimony. *See* Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63, 63 (2015) ("[U]sages are not typically demonstrated through the introduction of the types of 'objective evidence' that the strategy's defenders suggest will reduce the risk of interpretive error" but instead through testimony of parties or their employees).

requiring any special doctrinal edifice. This Part also defends the application of a general contract law to apparently distinct species of contract like boilerplate.

In Part IV, I consider the implications of my recommended interpretive approach for how we understand boilerplate. In particular, I address those who argue that we are better off dismissing boilerplate as unilateral and therefore non-contractual. I argue that recognizing boilerplate as socially situated actually redeems it as no more or less bilateral than many other forms of contract about which we are sanguine in a market-based society. Like most private agreements, boilerplate is embedded in public markets and reflects the virtues and vices of a market economy. Finally, Part V concludes.

II

SOME CONTEXT

In this part, I argue that courts should typically use some context to resolve the meaning of ambiguous terms. Moreover, some considerations that might be labeled contextual are relevant for ascertaining whether language is reasonably susceptible to a proffered meaning—that is, to determining whether the language is ambiguous. Trade usage is already sometimes treated as akin to dictionary evidence.[11] Some other evidence of market norms can be treated similarly.

Once a term is marked as ambiguous, a wider swath of evidence is admissible in every U.S. jurisdiction. But even then, courts have reason to prefer some kinds of contextual evidence over others, or at least, to be guarded about their use of evidence under the direct control of parties and more solicitous of evidence that generally characterizes the market in which an agreement was forged. Contract terms will indicate to what extent an agreement was market-conforming, and therefore, the extent to which any given term should be read as consistent with market practice.

In Subpart A, I first situate this position between prevailing formalist and contextualist methods of interpretation. In Subpart B, I offer a more direct defense of normative triangulation, which would justify attention to external

11. Although trade usage is favored over other contextual evidence, Lisa Bernstein has documented that there is not always a single trade usage out there. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1805 (1996) ("[A]lthough the Code's adjudicative philosophy presupposes the existence of an embedded set of unwritten customs that are truly known and agreed upon by the transactors, there is some evidence that the existence of such customs might be less pervasive than the Code assumes."); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715 (1999) (concluding after examining four industries that "'usages of trade' and 'commercial standards' . . . may not consistently exist, even in relatively close-knit merchant communities.").

As explained in Part III.B *infra*, my approach favors objective evidence of trade usage over less reliable evidence. Even then, there is no claim that trade usage is necessarily the best use of language. Its evolution is arbitrary and the result of institutional politics and path dependence. *See generally* David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999). Still, parties are entitled to have their language read consistent with trade usage where it exists if reading it otherwise would amount to a windfall for one party.

references such as market practice. In Subpart C, I then discuss the specific implications of normative triangulation on the kinds of evidence that courts should consider and the weight such evidence should bear.

A. Formalism and Contextualism

Formalists and contextualists are not monolithic scholarly camps, but the labels roughly delineate two broadly different approaches to contract interpretation.[12] Formalists would have courts rely more heavily on text. Parties can incorporate context into their agreements or invite courts to consider context. But some of the most robust recent proponents of formalism, Robert Scott and Alan Schwartz, expect most sophisticated parties to prefer limited judicial inquiry.[13] In part because, in their view, there are low returns to providing courts with more information; doing so does not make courts more likely to get it right. Others are more skeptical and argue that providing courts with more information actually makes it more likely that they will get it wrong.[14] But it is enough on the Scott and Schwartz view that, as long as courts get it right "on average," risk-neutral firms will be unwilling to pay for deeper judicial inquiry that merely reduces the mean variation from the "correct answer."[15]

Contextualists are of many stripes. Some are relationists who argue that because contractual relationships are almost always so much thicker than their accompanying written agreements, privileging the latter over the former—when push comes to shove—will do injustice to the party whose entitlements under the real terms of their relationship go unacknowledged.[16] Ignoring background understandings also threatens to hollow out relationships, as they might reduce to their recognized form. Other contextualists do not rely on a theory of contractual relationships but, like California Supreme Court Justice Roger Traynor—the most consequential contextualist—argue from a theory of

12. The formalist-contextualist debate does not encompass all relevant interpretive questions but it is the dominant debate regarding appropriate interpretive methodology. *See* Shahar Lifschitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 523 (2017) (arguing there are a number of different questions on which people disagree; it is not as simple as formalism versus contextualism).

13. *See* Alan Schwartz & Robert Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 931 (2010) ("[B]usiness parties commonly prefer judicial interpretations to be made on a limited evidentiary base, the most important element of which is the contract itself.").

14. *See, e.g.*, Posner, *supra* note 5.

15. Schwartz & Scott, *supra* note 13, at 931 (defining the correct answer to interpretation questions as the mean of the distribution of possible interpretations and observing risk neutral firms are indifferent to mean variation).

16. *See generally*, IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980). *See also* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 711 (1990) ("In a relational approach to contract, interpretation and supplying terms both require investigation of the norms of the relationship and of the social context."); Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43, 53 (1993); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000).

language.[17] Language has no meaning outside of context and is too pluralistic to privilege a single meaning.[18] Judges, in any case, do not have access to true meaning. Judges that purport to read text in isolation from context are merely subconsciously projecting context based on their own, unrepresentative experiences without allowing contracting parties to offer evidence of the context that actually informed their particular agreements.

Formalists respond that they are not denying any parties the opportunity to have context incorporated into interpretation of their agreements. Theirs is the pluralist position, in that they would allow parties to choose. However, contextualists reply broadly that context is required even to know which choice parties wanted to make with respect to any particular obligation.[19] That is, even where parties have specified that their agreement is fully merged, it might be that they did not mean that a particular kind of contextual fact should be disregarded.[20] Context is required even to interpret the scope of the opt-in to formalism.

The debate between contextualism and formalism is at once fundamental and intractable. It is fundamental in that it tracks deeper questions about how the state should regard the institution of contract. To the extent that contract is a straightforward delegation of power for the purpose of enhancing the welfare of two parties at a time, formalism has strong appeal. Indeed, its primary contemporary proponents, Schwartz and Scott, assume this vantage point openly. But to the extent that contract is a hybrid institution that represents one method of regulating private behavior, and therefore aims to achieve substantive justice between parties and across markets, it is peculiar to defer so categorically to the apparent choices of private parties. If one conceives the substantive justice at issue in contract as derivative from private morality, then it is also problematic for the resolution of contractual disputes to diverge substantially from the moral entitlements of the parties as they derive from moral practices, such as promise or agreement. One might also doubt that parties can wholly control the bundles

17. *See* Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643–46 (Cal. 1968) (arguing that as the meaning of language is imprecise, rationally interpreting contracts "requires at least a preliminary consideration of all credible evidence offered to prove the intentions of the parties").

18. *See* Burton, *supra* note 4, at 351 ("It is doubtful . . . that there is 'majority talk' with constant meanings for parties and judges in different places, with different life experiences, at different points in time, and with respect to relevant contract language.").

19. *See* Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1135 (2016) (arguing that contextualism is needed to resolve the initial meta-question of how parties prefer to have their agreements interpreted). *But see* Ronald Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 26 (2014) (positing that sophisticated parties are able to embed as much context as they want, so they will not want courts to insert it).

20. It is for this reason that straightforward empirical evidence about the frequency of "pro-formalist" provisions in contracts does not resolve the matter of party preference. The inquiry is further skewed by the use of only select contracts in any empirical study because those are the contracts readily available. *See, e.g.*, Uri Benoliel, *The Interpretation of Commercial Contracts: An Empirical Study*, 69 ALA. L. REV. 469, 489 (2017) (finding that over seventy-five percent of contracts filed with the SEC contain a merger clause).

of obligations they assume in contract, in the way that parties to friendship cannot pick and choose freely among the duties of friendship. If the kind of obligation that is contract has a finite set of forms, parties are not free to mold contract to their will. Thus, the choice between contextualism and formalism is not reducible to a factual dispute. It gets at basic questions concerning what contract is about.

Of course, these foundational questions are not live for all scholars and practitioners. For many observers, the choice between contextualism and formalism is intractable. This is at least partly because exactly what parties are expecting and why they choose to draft as they do are empirical questions.[21] We do not have conclusive answers to them.[22] It is also uncertain whether this method of interpretation will deliver market outcomes that we prefer. We have no reason to believe that a method entirely untethered from consideration of market outcomes will deliver optimal market outcomes outside a general faith that unattended markets operate efficiently. All that said, and as formalists emphasize, we do not really know what judges are doing when they interpret contracts, and the opacity of how they exercise wide-ranging and often untrained discretion is alarming.

Without minimizing the stakes of this debate, there are at least a couple important propositions that it overlooks, or underplays. First, participants in the debate, but especially contextualists, tend to emphasize those features of context that are largely specific to the parties, such that contextualization is substantially the same as tailored gap-filling. For example, classic contextual evidence includes evidence of the parties' prior dealings and their communications with each other in the course of arriving at their agreement. There are many cases where such evidence will reveal some concrete understanding that the parties mutually shared. This evidence is not properly characterized as subjective, but it is tailored in that it does not speak to the meaning of any contract other than the particular agreement at hand.

The most relevant context, however, is usually not specific to the parties; instead, it describes the market in which those parties encountered one another. In fact, evidence of market behavior may have been the kind of context that drafters of the contextualist Uniform Commercial Code (UCC) had primarily in mind.[23]

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21. *See* Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 642 (1999) ("[I]t is disagreement over the underlying empirical issues . . . that principally separates formalists and nonformalists.").

22. *See* Joshua M. Silverstein, *Contract Interpretation Enforcement Costs: An Empirical Study of Textualism versus Contractualism Conducted via the West Key Number System*, 47 HOFSTRA L. REV. 1011, 1016 (2019) (finding no statistical difference in the level of interpretation litigation between textualist and contextualist regimes).

23. *See* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 401 (2004) (arguing that those we associate with contextualism aim more generally to "infuse contracts with commercial reasonableness").

The larger market within which parties contract drives their bargain in myriad respects. Most obviously, it dictates price. To the extent there is price variation in the market, market evidence will indicate whether the buyer purchased the higher quality—in terms of quality of good, service, or contractual guarantee—version of the contract or a lower quality one. Where pricing is largely homogenous within a delineated market, courts can expect that terms largely mirror those that are used elsewhere on the market. If the relevant obligation is unclear everywhere on the market—which is less likely to be true over time—then the court can use a wide range of information that speaks to how market participants understand the market rather than relying on the parties' declarations about their private understandings.

A second observation runs counter to formalist arguments. Formalists are skeptical about the capacity or skill of judges to accurately interpret contracts. Ordinarily, one would expect that more information would improve the accuracy of interpretation because one explanation for why different individuals might attach different meanings to the same language is that they bring different information sets to their readings.[24] Formalists argue, however, that litigation is an imperfect process for collecting information to begin with, so the disadvantages of a skewed information set—because of strategic discovery and even strategic ex ante evidence production—outweigh the advantages of a common reference set. For this reason, some formalists argue that parties will generally be risk-averse and prefer that judges undertake a more minimal inquiry.[25] Low-quality information supplied by parties can actually distort judicial reasoning and make judicial error more probable.[26] But even if courts make good use of information, its cost may be unjustified. Scott and Schwartz argue that sophisticated parties are risk-neutral and do not care how wrong courts are or how often, as long as they get things right on average.[27] As long as the errors produced by acontextual interpretation do not predictably favor one party over the other, the parties will rather forego the cost of context information.

It is not easy to know who is risk-averse.[28] Should courts undertake to determine whether the parties to a given transaction are diversified repeat-players? Does anything depend on whether the *parties* regard themselves as risk-

24. *See* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 526 (2004) ("In the interpretive setting, outcome risk derives from variations in the distribution of agent-specific information sets. A widely dispersed distribution of information sets means that factfinders or performers will interpret the same materials differently.").

25. *See* MITCHELL, *supra* note 2, at 108–23; Posner, *supra* note 5, at 773 (arguing that incompetent courts should rely on simple formalities rather than inquire into complex contextual considerations that they will misapprehend).

26. *See* MITCHELL, *supra* note 2, at 108–23; Posner, *supra* note 5, at 773.

27. *See* Schwartz & Scott, *supra* note 13, at 931.

28. Although Scott and Schwartz concern themselves with sophisticated parties that are ostensibly risk-neutral, others theorize that contracting parties as usually risk-averse, and motivated to contract partly for that reason. *See, e.g.*, Katz, *supra* note 24, at 526 ("[C]ontracting parties usually dislike risk and are willing to expend resources to avoid it.").

neutral with respect to interpretive outcomes, and can we fairly treat the presence or absence of integration and merger clauses as indicative of their self-understandings in this regard?[29] Because classification of contracts on most dimensions is messy, courts will need to have defaults that do not require transaction categorization—or they will have to require that parties do some kind of self-classification for them. Even if it turns out that parties are often risk-neutral at the drafting stage, it will behoove the courts to approach their own interpretive task with risk aversion.

Risk aversion argues in favor of judges discounting both their own untethered understanding of contract language *and* their judgments about the particular intentions of contracting parties in favor of the third, often overlooked leg of interpretation: social determinants of contract terms. Social constraints—usually market constraints—are significant in two respects. First, they predict what contracting parties will do and therefore operate as evidence of what parties are likely to have intended to do. Separately, market context indicates what a reasonable contract under the circumstances would be. This substantive reasonableness is analytically distinct from the matter of party intent, but we can expect it to consistently align with a reconstructive focus.

Why should risk-averse courts favor evidence of market context? Formalism will work where courts have confidence that they know parties' preferences, whether meta-preferences about judicial method, levels of risk aversion toward transactional and adjudicatory outcomes, and in the long run, party responsiveness to judicial defaults. But these preferences and conduct norms will vary enormously, not only by industry but also by contract.[30] Formalism might prompt parties to give judges information about what they want—but then again, if parties do not so adapt, and if courts are wrong about what they think parties want based on the four corners of the contract, there is little opportunity for ex post correction and contracts will be less valuable to parties. The punitive character of formalism gone wrong does not come with any guarantee that parties will reform as formalists intend.[31] Parties who do not get what they need from

29. *See* William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 983 ("If State-imposed instrumental rules . . . lack the capacity to motivate the behavior of a reasonably large number of contracting parties, such rules will be very counterproductive, even if measured in strictly efficiency terms.").

30. *See* Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1, 33 (2009) (arguing that parties in industries whose contracts are harder to write will prefer contextualism, and this explains divergence in drafting practices among industries); James W. Bowers, *Murphy's Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 RUTGERS L. REV. 587, 599 (2005) (noting that even members of a trade who prefer formalist arbitration of their agreements with each other might prefer formalism in their dealings with a more heterogeneous set of parties that includes their banks, equipment suppliers, etc). *See generally* Gilson et al., *supra* note 19, at 29 (describing factors that drive parties' interpretive preferences).

31. *See* Curtis Bridgeman, *Default Rules, Penalty Default Rules, and New Formalism*, 33 FLA. ST. U. L. REV. 683, 684 (2006) ("[T]he formalism they advocate is actually penalty-like in spirit."); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 854 (1999) (arguing that the punitive character of formalism can act as a deterrent).

judicial adjudication will resort to other methods of dispute management that might be more costly or less easily overseen by public authority.

As compared to a more open-ended contextualism, prioritizing external references over particularized evidence promises to cabin the inquiry in ways that make its results more predictable.[32] While the discretion that multi-textured interpretive analysis confers on judges might be used to the advantage of the socially disadvantaged,[33] it is not clear that those who are economically weak will systematically enjoy the favor of judges. Judges should be risk-averse about how their colleagues of various social and political backgrounds will exercise discretion that any interpretive rule confers on them. A more cabined inquiry is preferable over one that just directs judges to an elusive truth about a matter like objective intent that is not even factual in character. Parties that are not well-served by formalism may opt out of court-administered contract law, and parties ill-served by contextualist courts will similarly flee to alternatives that may be inferior from the standpoint of efficiency or public regulation.[34]

Just as courts are better at filling in price than quantity, courts are probably better at ascertaining market norms and reading contract terms in that context than they are attempting to reconstruct the particular bargain that any two contracting parties may have struck. Parties cannot so easily manipulate evidence of how other market participants behave. Their contracts may be public record, as where filed with the SEC or in other litigation, or market behavior may be coordinated by trade associations or simply described in trade publications. More fundamentally, market constraints are actual *constraints* on rational actors, such that it is reasonable to assume their transactional conduct conforms to market norms. In those cases where parties have gone off-market in some way, their divergence should be evident between the agreement and market data. Their aberration will usually be evident without reference to particularized negotiation histories or internal corporate email threads, or other costly and manipulable evidence commonly associated with contextualized interpretation. Risk aversion cuts in favor of assuming contracts are market-conforming unless there is a clear indication that the parties chose to meaningfully depart from the market standard—and this means favoring some contextual evidence, but not all.

32. *See* Katz*, supra* note 24. *Cf.* Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297, 301–02 (2014) (arguing that courts should look at how intention evolves over the course of performance). Some contextualist approaches would open the door wider than others.

33. *See* Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 WAKE FOREST L. REV. 607, 608 (2010) ("[D]eliberate attempts to expand the use of implicit contextual factors are better understood as attempts to delegitimate existing contract regimes and shift bargaining power to apparently disadvantaged groups.").

34. *See* Matthew C. Jennejohn, *Contract Adjudication in a Collaborative Economy*, 5 VA. L. & BUS. REV. 173, 209 (2010) (arguing that contextualist interpretation often poorly serves collaborative agreements, with the consequence that they rely heavily on extra-legal governance mechanisms).

B. Normative Triangulation

The suggestion to rely heavily on evidence of market norms is not just convenient. It is the most reasonable method of contract interpretation on its own terms, given basic features of the institutional setting in which contract interpretation takes place. Drawing from Donald Davidson's concept of triangulation, Brian Langille and Arthur Ripstein suggested that contracts are and should be interpreted by incorporating facts about the world into party intent, irrespective of whether parties actually thought about those facts.[35] We cannot know what others mean just by the sounds or marks they make. We rely on language, and language has no meaning except in the common space shared by speaker and listener.[36] Ripstein and Langille argue that in contract, as in ordinary speech, in light of the inherent limitations on the intelligibility of others, we "must take his or her beliefs to be largely true" and figure out what people are saying "by finding a way to make most of what a speaker says come out true."[37] The factual world thus serves as a reference point for filling in apparent gaps in the meaning of words in contract.

In a recent article, I extended this method to reference shared norms.[38] The interpretive method that I labeled normative triangulation is doubly normative. First, the facts at which it is directed, the objects of interpretation, are normative. It aims to decipher the parties' *obligations* toward one another under the contract. Second, normative triangulation is normatively *motivated*.[39] The best method of interpretation is the one that best advances the state's policy agenda—a normative agenda. One of the primary commitments of the state in the context of contract adjudication is market support. That is, courts aim to facilitate efficient commerce.

Courts are justified in preferring one interpretation over another where interpreting a term in one of those ways will undermine the market—either by undermining confidence in it, as where a term would enable unjust enrichment or fraud; or by undermining its allocational efficiency, as where the term would facilitate price opacity or eliminate competition along some dimension. Although a contract that makes it harder to observe or respond to opportunism, or that renders price opaque, may not be actually prohibited, those contracts still run afoul of soft norms against unjust enrichment and misrepresentation. Indeed,

35. *See* Brian Langille & Arthur Ripstein, *"Strictly Speaking – It Went without Saying,"* 2 LEGAL THEORY 63–64 (1996) (positing that considering relevant facts about the world can help overcome the shortcomings of traditional contract interpretation).

36. *See generally* Barry C. Smith, *Conventionality of Language & Social Nature of Language*, *in* ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 368–71, 416–19 (Edward Craig ed., 1998).

37. Langille & Ripstein, *supra* note 35, at 73–74.

38. *See generally* Bagchi, *supra* note 1 (describing and defending the concept of normative triangulation in greater detail).

39. *Cf.* Robert H. Myers, *Finding Value in Davidson*, 34 CAN. J. OF PHIL. 107–36 (2004) (arguing that we must assume that others' values and desires, not just their reactions and perceptions, are the same as our own, but on epistemic grounds).

contract terms regularly implicate such soft norms and when they are interpreted by courts, judges are not charged with just trying to figure out what parties were thinking. Judges are ultimately agents of the state, and the state is not indifferent to whether parties intended to comply with background legal norms. Reading contracts charitably, courts triangulate between the reader, speaker, and the external world—notably, the market, with its attendant norms. They do so in order to try to make what contracting parties actually said come out right, that is, compliant with hard and soft legal norms. Nothing in this approach directs courts to go further by optimizing contract terms, whether from a welfare or justice perspective.[40] The aim of normative triangulation is only to read terms as compliant with negative constraints, such as background legal norms. Courts ask what reasonable parties could have meant and not what maximizing rational and self-interested actors would have wanted.[41]

When parties operate in a market, courts read ambiguous terms as market-conforming where there is no indication that the parties were trying to transact on alternative terms. Contracts are the product of markets, and markets are in many ways the products of states. Courts can and do read contracts in a way that preserves and promotes the market institutions for which states are responsible.

C. Interpretive Priorities

Normative triangulation highlights the importance of external references generally and market norms and expectations in particular. It turns out to amount to a triangulation not just between speaker, reader, and external world, but also between formalism and contextualism. Formalism directs courts to the parties' formal choice of words and contextualism directs courts to the particular circumstances of transactions. Both are inward-looking in different senses; their focus is on facts specific to the contracting parties.

Normative triangulation is driven by the observation that contracts are not forged in isolation. It makes central to interpretation the same fact that is central to formation, that is, that contracting parties are usually operating in markets that heavily constrain the plausible combinations of terms available to them. While an infinite range of design possibilities are available to contracting parties as a theoretical matter, we do not observe this range of variation in the world. That is not to say that there is no variation, and it might very well be that judges attentive to it have allowed more variation to flourish in common law regimes than in others. Nevertheless, by virtue of the consideration requirement, contract is literally quid pro quo exchange, and the options available to parties on the

40. *But cf.* Peter M. Gerhart & Juliet P. Kostritsky, *Efficient Contextualism*, 76 U. PITT. L. REV. 509 (2015) (arguing that courts should interpret obligations to be the most efficient (surplus-maximizing) ones for the transaction).

41. *See* John F. Coyle & W. Mark C. Weidemaier, *Interpreting Contracts Without Context*, 67 AM. U. L. REV. 1673, 1703 (2018) ("[A]lthough often couched as an inquiry into the contracting parties' intentions, interpretation often resembles nothing more than a guess as to what reasonable parties would want language to mean.").

market write the upper and lower bounds on what each party will accept. It is also unduly costly to innovate new designs for the vast majority of transactions, for which the costs of search, negotiation, and drafting—and uncertainty—are likely to render innovation in the exercise of drafting simply not worthwhile.

These descriptive facts go hand in hand with my normative claim, that because contracts are creatures of the market and in turn collectively create that market, they must be treated as objects of regulation by adjudicating courts. Courts are not only justified in using the fact that contracts are products of the market to decode their best meaning; they are justified in preferring some meanings over others because markets are the product of contract. Markets are public institutions that are essential to the basic structure of society, and the state is responsible for their justice and efficiency.[42]

The upshot is that courts use external market references in two ways: they are evidence of what parties were doing, and they are evidence that speaks to what parties should be doing. Because normative triangulation entails reading these things to come together, it supports heavy use of market information over information that does not similarly reveal either the factual or normative constraints to which parties were subject. This is not to say that information about parties' actual understandings is irrelevant. To the contrary, party intent remains the anchor of interpretation. But with the starting point that because we have no direct access to those intentions, they are inevitably a conceptual construct rather than a matter of psychological fact, the question is only the relative weight to be assigned to different evidence of party intentions. The theoretical underpinnings of normative triangulation warn against exaggerated reliance on either text or the particularized circumstances under which any given agreement is concluded.

A variety of evidence might speak to what parties could reasonably expect from each other in any given market, where background legal norms favor competition and reciprocity, and disfavor unjust enrichment and certain forms of advantage-taking. Even within the set of evidence that describes the market, normative triangulation suggests some kinds of evidence might have priority over others. The justification for construing contractual obligations in line with market norms lies in soft norms against unjust enrichment, misrepresentation, and other open-ended doctrines that have a penumbra that judges tend to recognize under unconscionability generally.[43] These legal doctrines call out transactional behavior that should be recognizably wrong to contracting parties After all, normative triangulation trades on the idea that parties are subject to background legal duties that are established prior to any given transaction. On rule of law

42. *See* Bagchi, *supra* note 1, at 55 ("Contracts are the product of markets and markets are in many ways the products of states. Courts can and do read contracts in a way that preserves and promotes the market institutions for which states are responsible.").

43. *Cf.* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 294–95 (1975) (arguing that the proper role of unconscionability is only to effectuate doctrines like mistake and duress).

grounds, background duties that are publicly discernable can be enforced more robustly than those whose applicability may turn on private knowledge. The interpretive methodology would favor, then, published prices, formal trade association guidance, and SEC-filed agreements over information available only via witness testimony.

III

TRIANGULATED BOILERPLATE

The preceding discussion concerned contract interpretation generally. This Part will consider how its recommended method of interpretation might play out with respect to boilerplate. Normative triangulation is particularly well-suited to handling boilerplate. It not only directs us to consider just the kind of market evidence that many scholars have argued is critical, it also offers a justification for why courts can take into account a wider range of considerations, including third party effects, rather than more classical understandings of contract interpretation would suggest—of either the formalist or contextual varieties.

Subpart A demonstrates how boilerplate might be read on my view. Subpart B considers how boilerplate handles the particular problem of random variation. Finally, Subpart C considers whether boilerplate and perhaps other species of contract would do better on interpretive regimes that are tailored to contract-type.

A. How it Works

Consider the following hypothetical liability waiver:

> I hereby RELEASE, WAIVE, DISCHARGE, AND COVENANT NOT TO SUE ["Company"], their officers, agents, or employees (hereinafter referred to as RELEASEES) from any and all liability, claims, demands, actions, and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained by me, or to any property belonging to me, while participating in such activity, while in, on, or upon the premises where the activities are being conducted.

The first feature to consider is overbreadth. The term purports to waive liability not only for all negligence but even intentional wrongdoing that might result in injury on Company's premises. Such a waiver cannot be enforced as written because liability for intentional torts, including gross negligence, cannot be waived.[44] The resulting problem of enforcement is a species of the problem of ambiguity in that courts have to choose among several possible meanings to assign the term, each of which is plausible given background principles. The term can be read to waive liability for a variety of separate events, such that the court can strike waiver for some of them. Or it can be read as waiving liability for them as a set, in which case it should be struck if over-inclusive. Accordingly, courts

44. *See, e.g.*, Stark v. Sandberg, 381 F.3d 793, 800 (8th Cir. 2004) ("Under Missouri law 'there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest.'").

will generally either reform the contract provision to bring it within the scope of the law, or they will decline to enforce the term altogether on the grounds that the waiver stands or falls as written.[45]

The principle of charity, which normative triangulation dictates, might at first blush advise in favor of the former route. But the principle is not supposed to be literally charitable in the sense of being maximally generous to a drafter. Rather, the principle recommends assuming that the drafter set out to articulate an obligation consistent with background obligations.[46] In this case, private law already stipulates the conditions under which private parties are liable to each other for negligence and intentional wrongdoing. Most private entitlements to recourse are alienable. We might read the legal regime, or interpret public policy, to be that the state is utterly disinterested in whether a remedy is available outside of those limited cases where waiver is actually disallowed.

There are at least two reasons, though, to think that the boundaries of alienability are rather a compromise between deference to private agreement and a more pervasive state interest in private recourse. First, the justifications for private remedy—I will not rely on any singular account—are varied and complex, and do not consistently imply a sharp conceptual boundary between permissible and impermissible waiver. Second, the system of private entitlements that provides civil recourse for injury informs the way business is conducted more generally, and the degree of risk aversion with which people go about their lives. That is, private waiver has broad externalities. Liability waivers are therefore a good example of private terms in which the state has a residual interest, even where it allows private agreement to control.

Importantly, because normative triangulation is a theory about interpretation and not a theory about the appropriate scope of direct regulation, it does not have anything to say about whether liability waivers should be enforced as such. It speaks only to the question of how they should be enforced when they are poorly drafted and therefore of uncertain consequence. As with interpretative defaults that require employment contracts and collective bargaining agreements to speak with crystal clarity when employees waive rights under civil rights statutes, charity here suggests a sticky default in favor of the background tort regime.[47] The parties can contract out of it—through waiver—but they have to be clear. The justification for this already common result is not the far-fetched contention that most parties do not really mean for the term to be subject to reform. The better justification for a sticky default in contract interpretation

45. *See* Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 876–78 (2011) (proposing that courts that strike down unconscionable terms can fill the gap by substituting the most reasonable term, the most unfavorable term, or the minimally tolerable term).

46. *See* Bagchi, *supra* note 1, at 1 (defining the principle of charity as "where contracts are ambiguous, they should be construed to comply with . . . background norms").

47. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084 (2012) (defining sticky default rules as rules that "selectively deter opt-out by artificially increasing its difficulty").

would openly rely on the state's interest in the other half of the law of obligations. The interests protected by tort are compromised by the cumulative externalities generated by private waiver. Fidelity to text controlled by one party will just insulate that party and similarly situated parties from whole doctrinal structures designed to hold them accountable.[48] Courts need to use some more sophisticated method for reading boilerplate to justify deferring to these kinds of private agreements at all.

To read boilerplate as I recommend here, a court would not need to know many facts ostensibly key to the parties' consent. The meaning a court ascribes to boilerplate in one contract is presumptively the same as that ascribed to similar language in other contracts by other judges.[49] It is not important to the judicial decision of how to handle such a liability waiver how large the font in which the provision was printed or where it appeared in the form. Neither the knowledge that any one consumer brought to the transaction nor what the vendor knew that the consumer knew figure importantly. This is because a court aiming to discern the meaning of boilerplate will know, given evidence of similar language elsewhere, that the language was not drafted by the parties at hand for their transaction. If font size or knowledge actually distinguish a given transaction from most of those governed by similar language, that could be noteworthy. But if external context reveals that the parties seem to have aimed to incorporate a standardized term, then the court should assign it a standardized meaning that does not depend on the tailored circumstances of contract that may very well be important for other types of agreement. Those kinds of facts relating to individual notice and consent are not excluded because of any special rule, on this view, but because context reveals that the parties were aiming for standardized meaning—that is, context reveals that the text in question is boilerplate—and it would undermine their purpose for a court to weigh particularized facts. Again, if parties altered standard language in ways that conveyed an intent to depart from standard meaning, then a court could appropriately take those local changes into account.

Several scholars have recommended a kind of reasonable expectations rule for consumer boilerplate.[50] While normative triangulation does not deliver that standard, it does direct courts to consider both what the standard package in similar transactions might be, as well as whether the market is improved or suffers

48. *See* Woodward, *supra* note 29, at 991–93 (observing that formalism in the context of one-sided form contracts has the effect of distributively favoring the controlling vendor "regardless of the reason or theory for moving toward more formalism in interpretation").

49. Ideally, we would expect and prefer that judges attribute uniform meaning to boilerplate. *See* Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1210 (2006) (arguing that the benefit of boilerplate turns on lower information costs associated with its modularity, which in turn requires that provisions are transplantable with minimum disruption to meaning).

50. *See, e.g.*, Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 544–47 (1971).

under this or that proposed interpretation. Because public policy considerations have an ordered status within interpretive disputes, on this view, it is not difficult but natural to account for the aggregate consequences of standardized terms.

One might worry that the method used here only directs courts in one direction over another where one interpretation would render the contract unenforceable on public policy grounds. While those cases are the easiest, normative triangulation also provides interpretive guidance, but is not wholly determinative, in cases where the background legal norm is merely a soft legal norm—one that would not specifically authorize nonenforcement of the agreement if read in one way rather than the other. Courts have reason to prefer one meaning over another when the former vindicates a legal norm that is immanent in one or more doctrines but does not extend to prohibit transactions that undermine it.

For example, consider a hypothetical agreement for the sale of lumber between two firms that contains the following arbitration provision: All disputes arising out of the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.

In the course of delivery, a third party is injured by seller. Seller claims that buyer is liable for costs related to the accident because buyer had already inspected and approved the lumber; buyer claims that seller is responsible because the injury was caused by seller's negligence. Seller might also claim that the dispute arises out of the contract while buyer argues that the dispute is unrelated because it is only incidental that there was lumber on the truck and that it was being delivered to buyer.

There is little in the language of the contract to guide the court. However, if buyer can show that similarly-worded arbitration provisions are usually read to govern only disputes relating only to each party's performance obligations and not to their third party liabilities, it gives the court good reason to interpret the arbitration provision to exclude the proposed application. This would be reasonable not because it is likely that the parties themselves harbored this expectation at time of writing; it is likely they never contemplated the question. The court would act instead on soft legal norms that favor market conformity—evident in case law that fills in contractual gaps by market reference, as well as an elaborate regulatory structure devoted to facilitating market function.[51] On the other hand, if the court concluded that the Federal Arbitration Act has expressed a policy favoring expansive application of arbitration provisions, that

51. Because the court would not understand its move to read the contracts consistent with others as predicated on parties' preferences, it would be less paradoxical if the reading now consistently assigned were not the one preferred by parties. Parties are in a better position to actively depart from settled interpretations by way of new language than are courts positioned to ascertain empirically which interpretation most parties actually prefer. *Cf.* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 684 (2017) (arguing that courts should reject canons of interpretation of choice-of-law clauses where those interpretations are at odd with majoritarian preferences).

would give the court a reason to read the provision as seller proposes. In either case, the court would use some soft norm that bears on the substance of the transaction to prefer one interpretation of the agreement over the other. The result is not to write the deal as the state would have it; the court could do that, but it will normally choose not to substitute its judgment for that of the parties as to the myriad facets of the transaction. The expected result is rather that the court will read the deal so that it conforms better with policy judgments that the state has already made.

B. Small Variations

One of the interesting phenomenons that recent scholarship reveals is that lawyers seem to tinker with contract language even if they do not report a clear understanding of it.[52] Of course, sometimes small changes to standardized language reflect thoughtful adaptation.[53] But in other cases lawyers may alter language as a result of principal-agent problems, against the interests of their clients, rather than because the lawyers even believe that they are improving transaction design.[54] Sometimes the changes are simply unmotivated, to the point where the resulting text has no ascribable intention behind it.[55] This phenomenon is alarming because the fact that parties are changing the language from what others had previously used would normally be taken to be evidence of a conscious choice, and invite courts to reconstruct the intention behind modifications to the language.

Where a change in language renders a written term unambiguous, then the change is consequential indeed, as it forecloses opening the box of multi-faceted criteria that courts can and should bring to bear on ambiguous terms. But once that box has been opened, small variations are important only if they really do reflect mutual agreement to depart from the rejected language.

Modifications that are made by one party—as in standard form language—are not modifications to consumers unless consumers can be expected to know that the language is different from what they would ordinarily encounter on the market. They are likely to be so aware only if the seller is motivated to draw their

52. *See* Coyle & Weidemaier, *supra* note 41, at 1703 (studying choice-of-law and arbitration provisions to show that there is widespread, unjustified variation in apparently standardized language).

53. *See* Matthew C. Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 77 (2018) (arguing that lawyers might find ways to adapt "almost boilerplate" to their particular purposes, rather than use boilerplate that is suited to all transactions).

54. *See* Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 76 (2017) (arguing that the high number of edits between completed merger agreements and the precedent that it was based off of may be the result of "inefficient precedent selection and document design").

55. *See generally* Stephen J. Choi et al., *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017) (detailing the existence and implications of contractual provisions that are created during the creation of boilerplate language that are not based on rational design, but are nonetheless incorporated into the market standard).

attention to it, which the seller would presumably do only if the waiver was more limited than found elsewhere on the market.

Most small variations in language are likely to be restrictive as a seller attempts to expand the protection offered by a waiver that consumers will not read. If a change is unaccompanied by any other departure from market price—such as a lower price—a charitable reading would assign little weight to the change, except where it renders the term unambiguous. Although courts are not tasked with ensuring equivalence of exchange in the context of deciding the enforceability of an agreement, at the point of interpreting the significance of a particular change to ambiguous language, a court can rely on a general expectation that, were such a change to provide greater protection to the seller, the buyer would be compensated for this departure in some way. The justification for such angled interpretation lies in a normative presumption that the market operates efficiently and does not enable sellers to exploit cognitive or informational limitations on the part of particular buyers—not an empirical assumption that such exploitation does not take place.

What justifies such an expectation on the part of the court? The principle of unjust enrichment sometimes forms the independent and sufficient basis for a legal claim, but unjust enrichment and reciprocity together inform a host of other doctrines such as consideration, promissory estoppel, unilateral mistake, unconscionability, and restitution. Each of these doctrines, together with the default of expectation damages, may be read to directly or indirectly imply that in competitive commercial markets, absent special transaction costs, parties can be expected to contract on market terms. For example, if the price of a good is higher than the usual market price, we would expect to find some other feature of the contract, relating to time frame, delivery, or liquidated damages, that explains the premium. If an agreement is silent on price, courts default to market price.

Where the parties are clear about the terms of exchange, it is not necessary for a court to reconstruct their reasons for adhering to or departing from typical market terms. But where language is ambiguous, among the relevant considerations—together with evidence of particular party intent—is prevailing industry practice, often under the heading of trade usage, though this might have a narrower meaning. Industry practice, unlike trade usage, is relevant even where the parties have no specific knowledge of those practices because it informs our collective understanding of fair exchange with respect to a particular transaction type. Again, the pragmatic advantages of a market default may be greatest where parties avoid undertaking a costly effort to learn and agree upon obligational content. Courts should allow consumers to avail themselves of the expectation that a given merchant will not deviate from market practice in only a single, largely unobservable term.

C. General or Specialized Interpretive Methodology?

Interpreting boilerplate with a focus on the market of which it is a product, and which it in turn helps to constitute, might seem easier to achieve if we were to develop a specialized procedure for interpreting boilerplate. We need not incorporate the theoretical baggage of normative interpretation, with its insistence on the dual mandate of courts both to facilitate transactional choice and regulate transactional activity. We might instead, more pragmatically, ask which method of interpretation best suits consumers, on the assumption that in the context of boilerplate, that is the million-dollar question. Of course, neither that question nor some variation of it could be the guiding question for interpretation in general. But why not untether the legal doctrine that pertains to boilerplate from doctrine that applies to markedly different species of contract?

There are pragmatic and theoretical disadvantages to such fragmentation. Practically, contracts would have to be labeled as one type or another. They would almost certainly not neatly fall into the categories we develop. And this will result in gradual case law and extra litigation costs as parties attempt to establish contract type. If parties were to pre-label contracts at formation, they would solve the problem of labeling for judges, only to take on those difficulties and attendant costs themselves. Further, the category of boilerplate is nebulous. There are terms that appear in almost every contract in an industry but are tinkered with on the margins. Or perhaps the terms are even discussed by each set of parties and they decide, upon deliberation and negotiation, on just the same language as others. Many contracts that could be considered boilerplate are not passively drafted, nor are they contracts of adhesion. To what extent should boilerplate between consumers and corporations be treated as similar to those between employees and employers, or between sophisticated purchasers and sellers? If parties study different kinds of boilerplate and choose one frequent term, should that qualify as boilerplate?

An interpretive methodology that is consistent across contract types avoids having to adjudicate or offer answers to such questions. Instead, the interpretive analysis should vary based on the relationship between contract language and relevant market references. Attention to both of these data points will ensure appropriate variation in interpretive methodology without carving up the practice of contract interpretation into apparently unrelated exercises.

That brings us to the theoretical advantage of a general method of contract interpretation, or at least a general theory that indicates how any given contract should be approached. Unless we adopt new theories of justification for contract enforcement for apparently aberrant species of contract—that is, unless courts undertake to enforce different kinds of contract for different kinds of reasons—variation in interpretive methodology is unprincipled and will turn on questions about how to maximize welfare in each transaction area that are speculative and probably unanswerable. If we do not know, because we cannot know with

certainty what the consequences of various interpretive regimes are,[56] then we should arm ourselves with the best speculation about consequences and then ground state practices in a theory of justification.

The basic justification for enforcing different kinds of contract is likely always to be the same. While for some scholars it is about choice and for others it is about efficiency, those who are looking to the former will see the pursuit of choice animating all of contract. Likewise, those who regard the institution as fundamentally designed to promote welfare will not see that justification cabined to any transaction type. If our theories of justification are universal, we do better with an interpretive theory grounded in the best justificatory theory, though we will differ on what that is. That justificatory theory will then motivate the particular ways in which the general method of interpretation should be applied to each contract—not each contract type.

IV

THE INEVITABILITY OF MARKET-EMBEDDED TERMS

Does applying a general interpretive methodology imply that boilerplate has no distinctive features? Of course not; boilerplate has distinctive properties that explain why we have the concept. Moreover, boilerplate does challenge traditional understandings of contract. In this part, I argue that classical views of contract do not call for a rejection of boilerplate as pseudo-contract; instead, boilerplate reveals the myths of classic contract. In fact, even ostensibly bespoke contract suffers from many of the alleged normative deficiencies associated with boilerplate. Thinking about boilerplate should cause us to reconsider what the virtues and vices of ordinary contract really are. We should worry always, and not just with respect to boilerplate, about the phenomenology of promise and consent and how they compare to the idealized consent and promise of contract theory. And we should worry less about intrusion on the bilateral character of contract because contract is always the product and maker of public markets.

Recently, Robin Kar and Peggy Radin have mounted a powerful challenge to the very idea of boilerplate as a kind of contract.[57] They argue that most boilerplate is unilaterally imposed with no substantive knowledge of it by one party.[58] They reject the "blank check" concept, arguing that contract does not

56. *See* Sunstein, *supra* note 21, at 642 ("[W]ithout normative claims of some kind, it is impossible to know what counts as a 'mistake' or an 'injustice' in interpretation, and hence the idea of 'error costs' seems dependent on the antecedent theory of interpretation, in which case the theory cannot be chosen on the basis of an (antecedent) inquiry into error costs.").

57. *See generally* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contracts and Shared Meaning Analysis*, 132 HARV. L. REV. 1135 (2019) (rejecting meaning based on one party's language as pseudo-contract and urging for the unearthing of shared meaning).

58. *See id.* at 1140 ("At the end of this process, 'contract'—which now allows businesses to create legal obligations unilaterally without obtaining any actual agreement over many boilerplate 'terms'—is no longer contract. 'Agreement' is no longer agreement. 'Consent' is no longer consent; 'assent' is no

allow for such a thin notion of consent.[59] They contend that those who would attempt to accommodate boilerplate within the prevailing contract framework are "assimilationists" who effectively impede a more appropriate regulatory stance on boilerplate.[60]

Much of this account is compelling. Kar and Radin offer a "shared meaning" analysis of contract language that persuasively shows that boilerplate does not have a shared meaning that is the product of a cooperative attitude, which is the basis for interpreting text in general, including contract text.[61] While I agree with much of their specific observations, I doubt that contract is often characterized by consent as robust as they would require.

Most of our contracts are the product of serious constraint, both moral and material.[62] We are often not free to contract with the people we want for what we want, let alone on terms we prefer. Our choice to contract is thus never robustly voluntary in the way that popular lore often regards contract. Nevertheless, it is useful to treat these highly constrained choices as free for contract purposes because they reveal information about our preferences given the constrained possibilities within which we operate. Moreover, treating our choices as binding—in the limited sense in which contracts are binding at all—advances our interest in using our limited resources to pursue our particular projects with as much discretion as possible.

To be sure, our discretion is sharply cabined. Is consent to boilerplate so thin that it fails to generate any important information about our preferences? Does it actually reduce our capacity to navigate the market in order to get what we want in order to do what we want with our lives? Probably not. Boilerplate does not reveal our individual preferences about the subject matter of the boilerplate. But we have no reason to think that the choice to enter into the transaction at all does not reveal preferences about other dimensions of the transactions. Contracts that contain boilerplate still reveal preferences about more salient terms concerning the nature of the good or service purchased and price. Moreover, even boilerplate will sometimes reveal some aggregate information about our preferences. It might reveal what the population is prepared to tolerate. If our willingness to tolerate a boilerplate term is not sensitive to its cumulative character, then courts should read boilerplate to limit those third party effects.[63] In some cases, the state needs to prohibit it straight out. For

longer assent; and 'terms'—which now include enormous streams of boilerplate text that are delivered but never read by anyone—are no longer terms with shared meaning.").

59. *See generally id.*

60. *See id.* at 1160–66.

61. *See generally id.*

62. *See generally* Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433 (2019).

63. *See* Aditi Bagchi, *At the Limits of Adjudication: Cumulative Externalities from Standard Term*s, *in* COMPARATIVE CONTRACT LAW 439, 450–54 (Larry DiMatteo & Martin Hogg eds., 2015) (arguing

example, if boilerplate waives our copyright interest in certain material, we may not care about our individual property interest but worry about concentration of copyright ownership in a single holder. The problem here is cumulative externalities—not consent—and the state needs to ensure that a reading that achieves unintended aggregate consequences is avoided.[64] We would rely on political process to reject the practice of intellectual property accumulation. We would not achieve this result through the backdoor of revitalized contractual consent.

In fact, there is some reason to think that boilerplate might reduce costs, and therefore, ultimately the price paid by consumers. It is an empirical question to which we do not have satisfactory answers.[65] Certainly, there are countries that have a less permissive stance toward boilerplate[66] and their economies have not collapsed. But it is not easy to tease apart the particular effects of boilerplate on transactions, and we cannot say with confidence that rejecting all boilerplate would not raise prices for many buyers, or, for example, wages for many employees. While these effects on individual transactions are likely to be small, to the extent that individual consumers and workers vary in how much they would pay for better terms, it might be that restrictions on boilerplate end up transferring value within the set of consumers and employees, and perhaps from those with the least ability to afford better terms to those in a position to buy better contractual protections. In a society where people are subject to so many indecent risks, such as catastrophic health care costs, it is a little odd to protect people from the risks associated with boilerplate. Against a backdrop of inequality, we have to be careful not to romanticize what contract can achieve. It can only help individuals make the most of what they have. If they start out with little, neither weaker nor more stringent standards for contract will help them.

The preceding discussion illustrates one of the public dimensions of contract, that is, its dependence on public institutions for the distribution of entitlements on which it operates. This Article has attempted to weave together, and thereby show the interrelatedness, of several different public dimensions of contract. Of greatest significance has been the way in which contract is the by-product of markets.

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that in order to contain cumulative externalities, judges may play an important role in reading boilerplate contracts to limit third party effects).

64. *See id.* at 450 ("[C]umulative externalities demonstrate why consent is beside the point. While consent to contract might inoculate a party from objections to its terms on the grounds that those terms harm the other party . . . consent cannot plausibly confer on parties the right to harm third parties.").

65. *Cf.* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J. L. ECON. & ORG. 150 (1995) (stating that the appropriate legal rule will depend on empirical considerations like the relative cost of ex ante and ex post decision-making, the cost of acquiring information, and the probability of a dispute).

66. *See* Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95), art. 3(2) (regulating consumer boilerplate in the European Union). *See also* Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1070 (2005) (contrasting the European Union approach with the U.S. approach).

This is especially, but not uniquely, true of boilerplate. The difference between a transaction whose essential terms are dictated by market constraints and a transaction memorialized in a written agreement with standardized terms is a matter of degree and not kind. Although the language of contract theory often describes contracting parties as if they were communicating with each other to decide the terms of a relationship with each other, there is little *sui generis* about most contracts. They are mostly picking and choosing contract partners because those partners offer particular terms. Once they find each other, they are rarely settling the essential terms of their mutual dealing. Only in very large-scale transactions does that take place. In multiple respects, contracts are not bespoke in a *meaningful* sense even where the written agreements that reflect them are drafted from scratch. Even parties prepared to bear the costs of a fully customized agreement are reluctant to explore untested language subject to unpredictable interpretation. The deal is priced by a market and not by private valuations of consideration—the latter driving primarily the choice to buy or sell at all. Finally, less salient terms reflect expectations that are taken from the market, not derived from *sui generis* preferences. Normative triangulation helps direct us to the external facts that drive individual bargains.

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CONCLUSION

Boilerplate has challenged contract scholars and the judges charged with adjudicating disputes that arise under it. As a contractual phenomenon, it is indicative of massive changes in the way contracts are formed in our society. It is the byproduct of a mass market economy.

Because the phenomenon of boilerplate is bound up with major social changes and market developments, whether it seems anomalous or difficult depends on the degree to which we allow the social facts out of which it arises to show their face on the stage of contract law. This Article argues that contract adjudication should always give those background facts a central place in an effort to understand what any two parties are trying to do together. If courts are appropriately averse to the risk of assigning surprising meaning to contract language, they will consistently look to background norms to generate default interpretations. If they do that, courts may have to grapple with new questions concerning the social history of particular provisions, but they will not have to invent new interpretive methodologies.