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# Contract Meta-Interpretation

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# Contract Meta-Interpretation

Shawn Bayern\*

*This Article provides a general framework for resolving the contract law’s ambivalence between textualism and contextualism, one of the most difficult questions in modern contract interpretation. Simply put, the Article’s argument is that courts need to determine the parties’ preferences as to how their contracts should be interpreted; this “meta-interpretive” inquiry can then direct the court’s interpretation or construction of the parties’ substantive rights and duties. Moreover, the Article argues that while contextualist interpretation is not, and should not be, mandatory for all interpretive questions under contract law, contextualism is necessary to resolve the initial “meta-interpretive” question: What interpretive regime do the parties prefer? Recognizing this distinction, and applying this two-step inquiry, can resolve some of the academic and practical debates between textualists and contextualists, and it can also explain some features of modern contract law.*

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## INTRODUCTION

Interpretive questions are the core questions of contract law. Problems of assent, unexpected circumstances, and remedies can all be conceived through an interpretive lens.<sup>1</sup> In addition to their theoretical and structural significance, interpretive questions are also among the most frequently litigated matters in contract cases.<sup>2</sup>

Still, there is little agreement on the right approach to interpreting contracts.<sup>3</sup> The interpretive debate centers on the tension between the impulse to do justice in individual cases and the desire to impose rules of general scope and application; this tension leads some (the “contextualists”) to favor a broad inquiry into the intent of contracting parties<sup>4</sup> and others (the “textualists”) to favor a narrower, supposedly more predictable interpretive focus on the text of written contracts.<sup>5</sup>

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<sup>1</sup> See, e.g., Shawn Bayern, *Offer and Acceptance in Modern Contract Law: A Needless Concept*, 103 CALIF. L. REV. 67 (2015) (arguing that questions of contract formation are fundamentally interpretive questions); Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CALIF. L. REV. 1127 (1994) [hereinafter *Expression Rules*] (presenting the interpretive basis for many individual rules governing contract formation); Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 211 (2009) [hereinafter *Impossibility*] (discussing a legal test for unexpected-circumstances cases that has a conceptual grounding in an interpretive question); George S. Geis, *Empirically Assessing Hadley v. Baxendale*, 32 FLA. ST. U. L. REV. 897, 952 (2005) (“Contract interpretation raises some of the same questions as *Hadley* . . .”).

<sup>2</sup> See STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* 1 (2009) (“Issues of contract interpretation are important in American law. They probably are the most frequently litigated issues on the civil side of the judicial docket. They are central to the settlement of a larger number of contract disputes . . .”); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 & n.3 (2010) [hereinafter *Redux*] (summarizing sources). Similar patterns apply to a variety of more specialized cases, like online contracting and government contracting. See W. Stanfield Johnson, *Interpreting Government Contracts: Plain Meaning Precludes Extrinsic Evidence and Controls at the Federal Circuit*, 34 PUB. CONT. L.J. 635, 636 (2005); Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 88 (2008) (“With regard to the scope of issues involved in online contracting, the most frequent focus of litigation has been on laws related to the element of assent, followed by frequent arguments over unconscionability, public policy, and contract interpretation.”).

<sup>3</sup> E.g., Schwartz & Scott, *Redux*, *supra* note 2, at 929-30 (“[T]he interpretation debate has become both livelier and more highly contested than ever.”).

<sup>4</sup> E.g., Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism*, 97 CALIF. L. REV. 943, 950 (2009) [hereinafter *Rational Ignorance*]; James W. Bowers, *Murphy’s Law and The Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 RUTGERS L. REV. 587, 588-92 (2005).

<sup>5</sup> E.g., Schwartz & Scott, *Redux*, *supra* note 2, 938-39; Alan Schwartz & Robert E.

The debate plays out along several dimensions: the contextualists focus more on the subjective intent of the parties, whereas the textualists objectivize “intent”;<sup>6</sup> the contextualists admit a larger base of evidence whereas the textualists prefer a smaller base;<sup>7</sup> the contextualists consider post-formation information, whereas the textualists would require that courts adopt the epistemic limitations of the parties at the time of contract formation.<sup>8</sup>

I do not wish to hide my own biases: I think textualism, at least in its stronger forms, is a misguided approach to the interpretation of contracts, both on grounds of justice and grounds of efficiency.<sup>9</sup> In my view, the commercial and juristic gains of enforcing the deal that parties actually made, when it is possible to discern that deal, clearly overwhelm the benefits that might derive from the purported regularity or reduced administrative costs of a textualist regime.<sup>10</sup> Moreover, I dispute that textualist regimes even achieve the predictability they purport to achieve or that they are any more administrable than rules that pay more attention to what individual parties wanted (or what reasonable parties in their circumstances would have wanted).<sup>11</sup>

To advance the debate, however, my initial goal in this Article is to attempt to convince the opposing sides that there need not be a single answer — a single regime for interpreting contracts.<sup>12</sup> Instead,

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Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 577 (2003) [hereinafter *Contract Theory*].

<sup>6</sup> See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1756-60 (2000) [hereinafter *Emergence*] (discussing the objective and subjective strands in the history of contract interpretation).

<sup>7</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 576 (“Put another way, a firm’s preference at contract time is to have courts make interpretations on the minimum evidentiary base unless it would be costless to widen the base. But it is not costless. As the permissible evidentiary base widens, each party has incentives to introduce more evidence and, in turn, will need to contest more evidence. Since trials are expensive, risk-neutral firms are Willistonians.”).

<sup>8</sup> See Eisenberg, *Emergence*, *supra* note 6, at 1770 (“In short, modern contract law has appropriately moved from a static conception of interpretation, that tended to focus on the text as of the moment of contract formation, to a dynamic conception, that encompasses events before and after that moment. To put this differently, under modern contract law the text of a contract runs through time.”).

<sup>9</sup> See generally Bayern, *Rational Ignorance*, *supra* note 4 (critiquing a prominent textualist argument made previously in Schwartz & Scott, *Contract Theory*, *supra* note 5).

<sup>10</sup> Cf. Shawn J. Bayern, *Against Certainty*, 41 HOFSTRA L. REV. 53, 65-81 (2012) [hereinafter *Against Certainty*] (critiquing the overuse of rhetoric concerning certainty and predictability in classical and modern legal argumentation).

<sup>11</sup> See *infra* Part I.B.

<sup>12</sup> I am indebted to the work of Schwartz and Scott, which I have critiqued in

textualists should recognize that their stated goals can be realized only in some, not in all, cases; contextualists, for their part, should recognize that a commitment to context and to the intent of contracting parties compels the adoption of an approach that looks more like textualism in several important circumstances.<sup>13</sup>

The thesis of this article is straightforward; it has two parts. Importantly, the article's central arguments do not concern contract interpretation itself; they concern *meta-interpretation*, or the selection of an interpretive regime to use when addressing interpretive questions.<sup>14</sup> The article's first, most general argument is that contracts should be interpreted using the methodology that best suits their circumstances on grounds of morality and policy. Apart from limited exceptions,<sup>15</sup> the methodology that satisfies this criterion will be the one that the parties preferred — or, failing that, the one that reasonable parties in their circumstances would have preferred.<sup>16</sup> The determination of this preference mirrors the underlying interpretive inquiry in contract law.<sup>17</sup> This part of my thesis is not itself original; it is often latent, and occasionally expressed, as a premise in arguments

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other respects, for drawing the attention of academic commentary to this point. See, e.g., Schwartz & Scott, *Redux*, *supra* note 2, at 930-31 (“Thus, we do not argue that the state should enact mandatory rules that require courts to make formalist interpretations. Rather, we argue that the state should create interpretative rules that instantiate party preferences . . .”). In more recent work, Professor Scott and others have argued explicitly that even beyond contracting parties' choices in individual cases, contract law's interpretive regime need not be “unified,” and they have critiqued the notion (as this Article does) of a universally applicable interpretive regime. See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design 1-2* (Columbia Law Sch. Ctr. for Law & Econ. Studies Working Paper Grp., Paper No. 469, 2014), available at <http://ssrn.com/abstract=2394311>.

<sup>13</sup> See *infra* Part I.

<sup>14</sup> This Article uses the prefix “meta-” in its now-familiar sense to refer to a recursive layer of abstraction, or a proposition about propositions. Cf. W.V. Quine, *Logic Based on Inclusion and Abstraction*, 2 J. SYMBOLIC LOGIC 145, 147 (1937) (introducing the notion of a “metatheorem”). Thus, interpretive analysis concerning interpretation is “meta-interpretation.” Cf. Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2 (attributing the witticism “[a]nything you can do, I can do meta” to his colleague Leon Lipson). Some sources credit the rise of the prefix in modern scholarship to DOUGLAS HOFSTADTER, *GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* (1979) (discussing recursion and meta-theory generally).

<sup>15</sup> See *infra* Part I.B.

<sup>16</sup> See *infra* Part I.A.

<sup>17</sup> For a discussion of the underlying interpretive inquiry applied by modern contract law, see *infra* Part II.

on both sides of the debate about contract interpretation.<sup>18</sup> Usually this principle's role is simply to serve as one step in an argument that leads, monotonically or at least very generally, to a unitary interpretive regime that covers all or most cases.<sup>19</sup> Instead, my argument is that this principle should provide the basis for the dynamic selection of an interpretive regime, a selection that may vary from situation to situation based on many relevant factors.<sup>20</sup>

My second argument is that courts should adopt a contextualist mode of interpretation for determining the parties' choice of an interpretive regime, at least in those cases where the parties' choice of an interpretive regime matters. That is, courts should use all available information to determine the agreement that the parties had, or the agreement that reasonable parties would have had, about their preferred mode of interpretation, whether that mode ultimately be textualist, contextualist, or something else.

I call the combination of these two principles *meta-contextualism* because it uses a contextualist mode of interpretation to answer the meta-interpretive question about what interpretive regime to apply.<sup>21</sup> Though at one level of generality meta-contextualism is sensitive to the circumstances that surround a contract, it tolerates much or all of the principles of textualist interpretation where the circumstances call for it — particularly, although not exclusively,<sup>22</sup> where the parties preferred or would prefer a textualist interpretive regime.

In showing how contract law should be pluralistic in the possibilities of interpretive regimes it considers, I also intend to show that contract law in fact already implements, somewhat covertly, the principles I suggest.<sup>23</sup> For example, we can conceive the parol-evidence rule as an important, though admittedly confused, step toward the recognition that written text does not always carry the same importance in all contractual settings.<sup>24</sup> Similarly, we can harmonize what some commentators have argued is a mandatory

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<sup>18</sup> E.g., Schwartz & Scott, *Redux*, *supra* note 2, at 930-32 (arguing that the interpretive regime should be subject to the choice of the parties); Gilson et al., *supra* note 12, at 1-2.

<sup>19</sup> *But see* Gilson et al., *supra* note 12, at 1 (offering a more nuanced view that nonetheless suggests more formal divisions, and more of an inclination toward textualism, than this Article's framework).

<sup>20</sup> *See infra* Part II.

<sup>21</sup> *Cf. supra* note 14 and accompanying text (discussing terminology).

<sup>22</sup> *Contra* Schwartz & Scott, *Redux*, *supra* note 2, at 930-31 (arguing in favor of a default regime of textualism for contracts between most business firms).

<sup>23</sup> *See infra* Part II.

<sup>24</sup> *See infra* Part II.

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contextualism in the law with the law's occasionally textualist tendencies. And the classic differences between the merchant law and the common law suggest that the regulation of private contracts is open to plurality in interpretive methodologies.

This article proceeds in two stages. First, in Part I, I critique a variety of what I consider to be problematic arguments in favor of the proposition that all parties, or a broad class of them, do or should prefer a single interpretive regime.<sup>25</sup> I do this because the field is dominated by strong and often very sophisticated arguments for very particular rules of contract interpretation; I respect these analyses, but I believe they are ultimately mistaken. Having done this, I then in Part II affirmatively build up the more context-sensitive meta-interpretive principles that I have outlined above.<sup>26</sup> In Part III, I briefly show how modern contract law already accommodates some of these principles.

#### I. THE LIMITS OF GENERALIZED SOLUTIONS TO THE META-INTERPRETIVE PROBLEM

A chief contention of my “meta-contextualist” argument — that determining the parties’ chosen interpretive regime requires sensitivity to context-specific information about the parties’ preferences — relies on the more fundamental proposition that there is no general, context-insensitive way to select a universal interpretive regime (or even one of broad application). If it were possible to show that a single interpretive regime (either textualist or contextualist) were appropriate to all situations, then courts should simply apply that regime; there would be no further meta-interpretive question to decide.

Despite a variety of attempts to present a single interpretive regime as universally optimal — or even just as optimal in a large, very general class of cases<sup>27</sup> — this Part contends that there has been no persuasive account of the reasons or scope for such a general interpretive regime. It does so first by critiquing the theoretical bases of such regimes — for example, the view that all parties, or at least all rational or reasonable parties, will prefer textualist modes of interpretation — and then by critiquing the empirical arguments in favor of such regimes.

To be clear, I define *meta-interpretation* as the legal determination of the appropriate interpretive regime to apply in a particular case.

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<sup>25</sup> See *infra* Part I.

<sup>26</sup> See *infra* Part II.

<sup>27</sup> See, e.g., Schwartz & Scott, *Redux*, *supra* note 2 (arguing in favor of a default regime of textualism for contracts between most business firms).



Determining the legal meaning of the parties' expressions is an interpretive question;<sup>28</sup> determining the mechanism by which to determine that legal meaning is a meta-interpretive question. For example, if a written contract specifies that one of the parties must deliver "a dozen eggs," the meaning of the words "dozen" and "eggs" raise interpretive questions.<sup>29</sup> The different possibilities that a court faces in selecting an interpretive regime for answering this question — for example, relying on a dictionary, or admitting trade usage or course of dealing — raise meta-interpretive questions.

A. *Theoretical Derivations About Rational Contracting Parties: Schwartz and Scott on Contract Theory, Risk-Neutrality, and Textualism*

In an extremely influential article, Professors Alan Schwartz and Robert Scott in 2003 offered a theoretical economic argument that rational parties — and thus, according to them, business firms — prefer textualism; indeed, I take their argument to be the leading modern statement of the law-and-economics movement's theoretically derived formalism.<sup>30</sup> The argument is subtle, and I have critiqued some of its features in detail in prior work.<sup>31</sup> After summarizing Schwartz and Scott's argument, this Section quickly outlines my prior critique and then offers a new general critique in view of their more recent formulations of the argument.<sup>32</sup>

At the outset, it is important to clarify that I share several significant premises with Schwartz and Scott. In particular, as I have noted above, I endorse their view that a single interpretive regime need not be appropriate in all cases.<sup>33</sup> Moreover, with limited exceptions that I describe in Part III.B, I agree with Schwartz and Scott that the parties' preferences should ordinarily dictate the choice of an interpretive regime.<sup>34</sup> Moreover, even in specific cases where I do not think the parties' preferences should *dictate* the choice of an interpretive regime, I believe their preferences are *relevant* to the court's determination of the appropriate interpretive regime to use. With those agreements in

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<sup>28</sup> RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981) ("Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.")

<sup>29</sup> See *id.* § 200 cmt. b.

<sup>30</sup> See generally Schwartz & Scott, *Contract Theory*, *supra* note 5. As of September 2015, according to Westlaw, the individual article had been cited 297 times.

<sup>31</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 946 (critiquing Schwartz and Scott's argument by, among other things, distinguishing probability from uncertainty).

<sup>32</sup> See Schwartz & Scott, *Redux*, *supra* note 2.

<sup>33</sup> *Id.* at 930-31.

<sup>34</sup> *Id.*

mind, we differ only on the mechanism by which the interpretive regime should be chosen in individual cases.

Schwartz and Scott's approach to meta-interpretive questions in contract law is deductive and theoretical; that is, their method to address meta-interpretive questions is to deduce an answer based on the necessary behavior of rational parties, as modeled by formal economics. They do briefly survey empirical evidence that they believe supports their position,<sup>35</sup> but their argument fundamentally attempts to demonstrate on theoretical grounds that rational parties, particularly business firms involving five or more people, are (1) necessarily risk-neutral and (2) as a result of that risk-neutrality, prefer a textualist mode of interpretation.<sup>36</sup> My most practical disagreements with Schwartz and Scott are that I deny that business firms are necessarily risk-neutral and that risk-neutral firms necessarily prefer textualism.

To understand the debate, it will be helpful to elaborate Schwartz and Scott's deductive model in some detail. The essential insight of their model, which is quite intuitively appealing at first, is that a risk-neutral party will be a contract textualist because admitting more evidence increases the costs of litigation without changing the expected value of the court's interpretive result.<sup>37</sup> This conclusion depends on a model of interpretive results as (1) reducible to scalar values that (2) have a mean value that is invariant to the amount of evidence used during the interpretive process.<sup>38</sup> Moreover, their model

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<sup>35</sup> *Id.* at 955-57.

<sup>36</sup> *See id.* at 947-56.

<sup>37</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 574-77 ("Thus, courts that interpret contracts as typical parties prefer would be indifferent to variance as well, and sensitive only to the costs of administering their evidentiary standard."). I of course mean "expected value" in the literal technical sense as defined in the analysis of random variables. *See, e.g.*, CHRISTIAAN HUYGENS, *DE RATIOCINIIS IN LUDO ALEÆ* (1657) (introducing the basic notion underlying the modern understanding of random variables).

<sup>38</sup> *See, e.g.*, Schwartz & Scott, *Contract Theory*, *supra* note 5, at 575-76 ("In other words, the court is as likely to make an interpretation that is more favorable to the buyer (less favorable to the seller) than the correct answer as the court is likely to make a less favorable interpretation. Judicial errors therefore cancel, in expectation."). This point is the focus of much of my prior critique:

[Suppose] [w]e are told that a court is going to pick some number from among all whole numbers (that is, from the range of numbers that looks like "... -3, -2, -1, 0, 1, 2, 3 ..." where both ends extend to infinity). Furthermore, we are told that there is no more reason to suppose this number will be greater than fifty rather than less than fifty. From this, it might be tempting to conclude that the expected value of the number the

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of the difference between textualism and contextualism — which I accept for the purposes of this discussion — is also essentially scalar; the different interpretive modes simply allow a court to use a larger or smaller “evidentiary base”<sup>39</sup> to carry out its interpretive process. On one end of the spectrum, a court might flip a coin (using no evidence at all). On the other, a court might use all relevant evidence that the parties submit. Schwartz and Scott’s argument for textualism is an argument for what they call the “minimum evidentiary base,” which includes specifically “the parties’ contract, a narrative concerning whether the parties performed the obligations that the contract appears to require, a standard English language dictionary, and the interpreter’s experience and understanding of the world.”<sup>40</sup>

I have previously given an example of how I understand the way in which Schwartz and Scott intend for their model to work:

Suppose my contracting partner and I agreed on the number fifty. Schwartz and Scott’s central conclusion is that even if the larger base of information reduces my risk (say, makes it nearly certain that the court will decide on the number fifty, rather than something between thirty and seventy), using this larger base of information will not be worthwhile because of its costs: I’ll have to introduce more evidence, contest more evidence, go through a longer trial, and pay my lawyers more. Given that I didn’t care about the risk (formally, the variance) in the court’s result in the first place, I would prefer not to pay to reduce it.<sup>41</sup>

My earlier critique of this model was quite technical and drew a distinction between the lack of systematic bias and the affirmative assertion of a statistical mean; it thus depended on the difference

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court will pick is fifty. After all, if we have no reason to suppose that the court’s number will be higher or lower than fifty, then it seems like each possibility is equally likely in fully symmetric ways, and thus the average value appears to be fifty. Reasoning in this way, however, is fallacious. Just because we have no reason to believe that the court’s number is more likely to be greater than fifty than it is to be less than fifty, and vice versa, does not mean that the expected value of the court’s number is fifty. Consider that we might also have no reason to believe the number is going to be higher or lower than sixty, or seventy, or any other given number.

Bayern, *Rational Ignorance*, *supra* note 4, at 961.

<sup>39</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 575.

<sup>40</sup> *Id.* at 572.

<sup>41</sup> Bayern, *Rational Ignorance*, *supra* note 4, at 954-55.

between uncertainty and probability.<sup>42</sup> But a response to Schwartz and Scott's argument need not be so technical; moreover, a technical response could conceivably fail to respond to a more general insight that their model suggests, which is simply that a contextualist interpretive regime has costs that a textualist interpretive regime might productively avoid.<sup>43</sup> This Section develops a variety of more general responses to Schwartz and Scott's model.

### 1. Risk-Neutrality

First, it is important to consider the premises of the argument. Schwartz and Scott intend for their model to apply to all risk-neutral parties.<sup>44</sup> As they recognize, this is not a small limitation on the application of their deductive recommendations because, for example, economists frequently model individual people as risk-averse rather than risk-neutral.<sup>45</sup> (The terms *risk-averse* and *risk-neutral* are specialized but have easily accessible meanings: a risk-neutral party would be indifferent between receiving \$500 and a 50% chance of winning \$1,000; a risk-averse party would prefer the certain \$500 to the risky bet with an identical expected value.)<sup>46</sup> Accordingly, they intend for their model to apply only to contracts between firms; they would rule out from their analysis all contracts where at least one of the parties is an individual.<sup>47</sup>

Even this application, however, is questionable, because not all firms are risk-neutral. It is standard in *economic* commentary to treat business firms as if they are risk-neutral, because economists typically model business firms as if they maximize profit. As Schwartz and Scott say, their claim is that "firms maximize expected profits" and "[p]rofit maximization implies risk neutrality."<sup>48</sup> This implication is sound on logical grounds if the premises are correct; if a firm were risk-averse, it would not be maximizing expected profits because it would prefer a lower but definite expected value (e.g., \$499) over a riskier but higher value (e.g., a 50% chance of receiving \$100), just as individuals would. The problem, however, is simply that the economic modeling of an

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<sup>42</sup> See *id.* at 960-72.

<sup>43</sup> See Schwartz & Scott, *Redux*, *supra* note 2, at 930.

<sup>44</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 565 & n.44.

<sup>45</sup> See generally Schwartz & Scott, *Redux*, *supra* note 2, at n.49.

<sup>46</sup> See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 44-49 (5th ed. 2008); Bayern, *Rational Ignorance*, *supra* note 4, at 954.

<sup>47</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 946-47.

<sup>48</sup> Schwartz & Scott, *Redux*, *supra* note 2, at 947.

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entity does not imply that the model matches the entity's properties in the real world or under the legal conceptions of business firms. If Schwartz and Scott's claim is that "firms maximize expected profits," it is trivial to falsify that claim with a counterexample because many firms, in the real world, do not maximize expected profits. Many, by law, can or must consider values other than profits; for example, Delaware recently passed a statute permitting "public benefit corporations" that balance profits with other goals. The key section of the statute reads as follows:

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.<sup>49</sup>

This counterexample is admittedly somewhat facile; Schwartz and Scott might happily be willing to exempt the relatively few "public benefit corporations" from an updated version of their analysis.<sup>50</sup> My initial point, however, is only that "firms" is not the right category and requires, at a minimum, further restriction.

As it happens, in their original statement of their argument, Schwartz and Scott did not mean to include all firms in their model; they restricted their argument's scope explicitly to the following group of entities:

(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm. These economic entities can be expected to understand how to

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<sup>49</sup> DEL. CODE ANN. tit. 8, § 365(a) (2015).

<sup>50</sup> It is, however, interesting to point out the role that profit-maximization plays in their argument: Schwartz and Scott assume risk-neutrality as a result of profit maximization. As a result, while I suspect the structure of their argument requires them to exempt public-benefit corporations that might be an odd result because there is little evident reason that a public-benefit corporation would or would not prefer textualism or contextualism in a contract dispute on that basis alone. At least loosely, this observation reinforces my argument, *supra* note 44 and accompanying text, that the *form* of an entity is a poor basis for guessing that entity's preferred decision to meta-interpretive questions, at least once the analysis shifts to real firms rather than modeled, theoretical ones.

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make business contracts, and the theory we develop applies only to contracts between two such firms.<sup>51</sup>

This category, however, is still far too broad if the goal is to identify risk-neutral entities. More generally, if the goal is indeed to allow parties to choose the interpretive regime that governs them, assuming a preference for textualism in the entire foregoing group would be unjustified for several reasons.

First, as the existence of public-benefit corporations suggests, the role of corporations is broader, in the real world, than economists typically conceive it to be. I do not want to overstate this point; I readily admit that profit-seeking is a major goal — probably the chief goal, and probably appropriately so — of American business corporations. But the economic analysis of entities often misses subtleties in their operational and legal characteristics and structure, and, as a result, “an entity that is organized in the corporate form and that has five or more employees”<sup>52</sup> is unlikely to track risk-neutrality in any meaningful way.

For one thing, the considerations permitted by Delaware’s new statute authorizing public-benefit corporations are not unique across corporate law and are not limited to a special class of socially conscious corporations. Many states, as a default rule, permit or require boards of directors of regular business corporations to balance a variety of goals in making business judgments. For example, New York’s corporate law reads as follows:

In taking action . . . a director [of a corporation] shall be entitled to consider, without limitation, (1) both the long-term and the short-term interests of the corporation and its shareholders and (2) the effects that the corporation’s actions may have in the short-term or in the long-term upon any of the following:

- (i) the prospects for potential growth, development, productivity and profitability of the corporation;
- (ii) the corporation’s current employees;
- (iii) the corporation’s retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the corporation;

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<sup>51</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 545.

<sup>52</sup> *Id.*

- (iv) the corporation's customers and creditors; and
- (v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.<sup>53</sup>

Despite the prevalence of economists' conceptions of firm as risk-neutral profit maximizers, no lawyer would assume, given this legal structure, that every corporation organized in New York would act in a single, easy-to-characterize way. For one thing, the statute explicitly admits goals other than profit-maximization into the calculus of those who oversee the firm. For another, it problematizes simple conceptions of "profit maximization" by, for example, permitting directors to consider "both the long-term and the short-term interests of the corporation and its shareholders."<sup>54</sup> Even if risk-neutrality harmonizes with the maximization of the long-term interests of shareholders, it may well be within the "short-term interests of the corporation and its shareholders" to optimize profits subject to constraints upon risk; indeed, it is hard to imagine what the difference between short-term and long-term interests are unless those interests diverge based partly on a tolerance for risk. This is because a fully rational, risk-neutral party facing no time pressure would presumably perceive no differences between "the long-term and the short-term interests."<sup>55</sup>

More fundamentally, corporations and other legal entities are not simple or easily susceptible to formal modeling; far from being managed by machines or anything resembling an academic conception of rationality,<sup>56</sup> they are human endeavors subject to complex legal and organizational structures. As corporate statutes make clear,<sup>57</sup> even

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<sup>53</sup> N.Y. BUS. CORP. LAW § 717(b) (2015).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 583-87 (1999) (tracing the intellectual history of the idea); see also MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* 47 (1986) (presenting the idea of an ownerless corporation as a theoretical exercise); Shawn Bayern, *Of Bitcoins, Independently Wealthy Software, and the Zero-Member LLC*, 108 NW. U. L. REV. 1485 (2014) (describing a realistic mechanism, in view of legal and technological developments, by which organizational law may permit ownerless for-profit entities operated by algorithm).

<sup>57</sup> E.g., MODEL BUS. CORP. ACT § 8.01(b) (2006) (outlining the powers of the corporate board of directors).

if the board decides on a strategy to maximize profits, it ordinarily pursues that agenda either by voting among people or, more typically,<sup>58</sup> by hiring individual executives who act as agents of the corporation.<sup>59</sup> If humans are risk-averse, it is difficult to conceive the firms they operate as *necessarily* risk-neutral. Even if corporate structures mitigate the so-called irrationality of people, nothing guarantees that they do so entirely.

Much of the discipline of corporate law, indeed, aims to address the agency problems that arise between shareholders and directors — that is, between those who residually stand to earn the firms' profits and those who make decisions in pursuit of those profits.<sup>60</sup> Any private goal of the directors, without which there would not be much need for corporate law or the extensive commentary it has generated,<sup>61</sup> undermines the notion that a corporation is necessarily risk-neutral in anything approaching the sense in which Schwartz and Scott would need it to be for their meta-interpretive argument to hold.

Finally, corporations may set, by charter, many not-for-profit purposes. Indeed, though again this is not meant as a serious objection to Schwartz and Scott's argument on its own, corporations (including, of course, those with more than five employees) may easily be organized as not-for-profit corporations.<sup>62</sup> But they may also be set up as for-profit corporations that give power to individual people or entities who are not legally required, and who do not in fact,

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<sup>58</sup> See MELVIN EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 4-14 (1976) (discussing the evolution of the board of directors from management to oversight).

<sup>59</sup> See *id.* at 20-31.

<sup>60</sup> See *id.* at 31-40; REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 8-16 (2004); John. C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301, 1303-05 (2001) (offering an institutional analysis that considers the agency problems in corporate law associated with lawyers); Zohar Goshen, *Controlling Corporate Agency Costs: A United States-Israeli Comparative View*, 6 CARDOZO J. INT'L & COMP. L. 99, 100-02 (1998) (describing the importance and extent of agency costs in a comparative study of corporate law).

<sup>61</sup> See, e.g., ALI PRINCIPLES OF CORP. GOVERNANCE § 5.01 (1994); EISENBERG, *supra* note 58, at 40-62.

<sup>62</sup> See, e.g., CAL. CORP. CODE §§ 5150–5153 (2015). For LLCs, see UNIF. LTD. LIAB. CO. ACT § 104 (2006) [hereinafter "ULLCA"] ("A limited liability company may have any lawful purpose, regardless of whether for profit."). Distinguishing for-profit from not-for-profit LLCs under the ULLCA has no obvious or formal solution; it would require, in the general case, a substantive review of the LLC's operating agreement and perhaps the history of the LLC's operation. See generally *id.* § 104 cmt. b (discussing the ULLCA's "expansive approach" to including different types of organizations under a single umbrella form).



uniformly seek profit for shareholders — much less in a perfectly risk-neutral manner.<sup>63</sup> For example, the Model Business Corporation Act allows directors to take many actions that do not directly seek profit, such as aiding scientific progress or making charitable contributions,<sup>64</sup> and in general corporate charters may specify or authorize goals beyond simple profit-maximization.<sup>65</sup> This is not just an academic point; it is intended as a sharply realistic one in an age where many familiar corporations are controlled by small blocks of special shareholders who can pursue their own conceptions of the corporation's best interests with little practical opportunity for legal challenge.<sup>66</sup>

Schwartz and Scott's categorization of limited partnerships and professional partnerships as necessarily risk-neutral is similarly overbroad, for mostly similar reasons. Like corporations — particularly private or closely held ones — unincorporated business entities often, in practice or even as a matter of legal right, are often structured in ways that do not suggest perfect profit maximization or risk-neutrality.<sup>67</sup> For example, the typical limited partnership gives exclusive operational control over the operations of an entity to a single party or a small group of them — the general partners — and these partners can act as they see fit,<sup>68</sup> limited for the most part only by fiduciary duties.<sup>69</sup> The mere organizational status suggests little about risk-neutrality.

Much of my criticism of Schwartz and Scott's argument, on this score, is mainly that it incorrectly identifies firms that are likely to be risk-neutral when they enter contracts. Had they limited their

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<sup>63</sup> See MODEL BUS. CORP. ACT § 3.02 (2006) (authorizing conduct that does not directly maximize corporate profit); *Id.* §§ 8.30(b), 8.31 (outlining default standards of governance that may be displaced by charter).

<sup>64</sup> *Id.* § 3.02.

<sup>65</sup> *Id.* § 2.02 (permitting the corporate articles to vary corporate purpose).

<sup>66</sup> E.g., Matthew Yglesias, *All Hail, Emperor Zuckerberg: How Facebook's IPO Gives a Stunning and Unprecedented Amount of Power to Its CEO*, SLATE, (Feb. 3, 2012, 3:29 PM), [http://www.slate.com/articles/business/moneybox/2012/02/facebook\\_s\\_ipo\\_how\\_mark\\_zuckerberg\\_plans\\_to\\_retain\\_dictatorial\\_control\\_his\\_company\\_.html](http://www.slate.com/articles/business/moneybox/2012/02/facebook_s_ipo_how_mark_zuckerberg_plans_to_retain_dictatorial_control_his_company_.html).

<sup>67</sup> See UNIF. LTD. P'SHIP ACT § 110(a) (2001) (permitting the partnership agreement to specify arbitrary provisions that govern the partnership).

<sup>68</sup> *Id.* § 406 ("Each general partner has equal rights in the management and conduct of the limited partnership's activities. Except as expressly provided in this [Act], any matter relating to the activities of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners.").

<sup>69</sup> *Id.* § 408 (enumerating fiduciary duties within limited partnerships). For more information, see SHAWN J. BAYERN, *CLOSELY HELD ORGANIZATIONS* 177-91 (2014).

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argument to contracts between publicly traded firms, or firms over a certain market capitalization, I would have less to complain about, although it still will prove very difficult to draw broad organizational lines aimed at the distinction that their argument needs to draw between risk-neutral parties and those that may act in risk-averse (or for that matter risk-preferring) ways. Without substantially more empirical evidence, I do not see how any lawyer could perceive them to have made a plausible case that the organizations they identify are, in the real world, necessarily risk-neutral.

In the end, one of my principal disagreements with Schwartz and Scott's argument is that the identification of textualist contracting parties cannot proceed along the general lines they have drawn. As I will develop later in Part II, the question of parties' meta-interpretive preferences requires substantially more attention to context. Importantly, it is probably impossible to identify an entity and, from that identification alone, infer that the entity was entirely risk-neutral in making all its contracts. To their credit, Schwartz and Scott do recognize this point, but they seem to bury that recognition, perhaps for rhetorical reasons. Thus, for example, they make two telling admissions that suggest they agree that a single firm may act in ways that are occasionally risk-neutral and occasionally risk-sensitive. First, they admit that firms are not risk-neutral, and thus presumably might prefer a contextualist mode of interpretation for their contracts, when "a correct interpretation is particularly important to them."<sup>70</sup> They dismiss this case, however, merely by saying "[f]ew business contracts have this 'bet the ranch' character, however."<sup>71</sup> This dismissal is surprising, if only because of the number of firms that fail, that run into trouble, or that for whatever other reasons have a "particularly important" contract or set of contracts that went badly for them. The force of Schwartz and Scott's argument is essentially that parties are happy to be textualists only when their contracts do not matter to them; maybe few individual contracts matter to the largest corporations, but it is surely not uncommon for firms in general to have "particularly important" contracts.<sup>72</sup> Second, Schwartz and Scott

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<sup>70</sup> Schwartz & Scott, *Redux*, *supra* note 2, at 947. As they note, they elaborate this point in more detail in their original statement of their argument in Schwartz & Scott, *Contract Theory*, *supra* note 5, at 575-77.

<sup>71</sup> Schwartz & Scott, *Redux*, *supra* note 2, at 947-48.

<sup>72</sup> Reviewing any first-year contracts casebook turns up many cases that would have a "bet the ranch" character for firms. Among interpretation cases alone, LON L. FULLER ET AL., *BASIC CONTRACT LAW* (9th ed. 2013), a leading contract-law casebook, includes several cases that would have this character. For example, *Beanstalk Grp.*,

note that risk-neutral firms commonly enter into contracts to hedge, assign, or otherwise mitigate risk, which is hard to explain if firms are uniformly risk-neutral:

A third motive to contract is to transfer risk from more to less risk-averse parties. The legal enforcement of these contracts sometimes is necessary because the transferee of risk has an incentive to breach when large risks materialize. Risk-shifting contracts are not considered here, in part because one of the parties to them commonly is an insurer, and insurance contracts are the subject of a distinct and heavily regulated legal field. Moreover, although many contracts have an insurance component (e.g., commodities contracts, currency hedging), these contracts tend not to give rise to litigation.<sup>73</sup>

The dismissal of this possibility is surprising as well. It is important to note that it is logically incomplete; the possibility of risk-averse parties' entering risk-shifting contracts is ignored because *commonly* one is an insurer (not because one party is *always* an insurer), and because other sorts of risk-shifting contracts *tend not* to give rise to litigation — an unsupported empirical observation that, while probably true for financial instruments like options contracts, is questionable in the case of supply and output contracts that so commonly shift risks.<sup>74</sup>

In short, the economic assumption that firms are risk-neutral may work in economic theory, but there is little reason to believe that the tendency toward risk-neutrality is strong enough in the real world to perform the function that Schwartz and Scott need it to perform. Their argument aims to set actual legal policy, not to advance an economic model for the sake of economic discussion. If the goal is to do what commercial parties want, it is not enough merely to assume that they want textualism.

## 2. The Limits of Scalar Interpretive Modeling

My earlier work developed in some detail a technical objection to Schwartz and Scott's argument. In short, the objection was that

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Inc. v. AM Gen. Corp., 283 F.3d 856, 859 (7th Cir. 2002), involves a claim to 35% of the value of the "Hummer" line of automobiles.

<sup>73</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 565 n.44.

<sup>74</sup> See, e.g., *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975) (granting specific enforcement on a contract for the sale of natural gas because, even though the gas was not unique, the purpose of the contract was to arrange a supply of gas to avoid the risk of market changes or market failure).

asserting that courts' interpretations of contracts lacks bias is different from asserting that there is a definite mean numeric value around which the courts' interpretations will fall.<sup>75</sup> If there is no definite mean, then there is no reason for parties to trust that courts will, on average, reach the "correct" result.<sup>76</sup> There is way to state a broader objection more generally and with less technical language, however.

Recall that Schwartz & Scott's argument depends on the notion that courts, on average, will reach the right interpretive result even if, in individual cases, they will diverge from the parties' initial expectations.<sup>77</sup> This is, after all, what makes their assumption of risk-neutrality relevant; they conclude that risk-neutral parties prefer textualism specifically because they would prefer not to pay for more precise interpretation in individual cases.<sup>78</sup> Under Schwartz and Scott's model, the parties initially contract and have a shared idea of what they have agreed to do, but it is too expensive to draft a contract that covers every possible contingency.<sup>79</sup> A question later arises about the rights and duties of the parties. The parties' original conception could answer this problem in theory, but because of the limitations of the drafting process, this original conception is not verifiable to the court.<sup>80</sup> If the parties are textualists, they commit the question to the court knowing that the expected value of the court's interpretive distribution is the parties' original conception.<sup>81</sup>

The difficulty with conceiving information and communication in this way is that it assumes that the parties can use, at the time when they produce their contract, language that produces a distribution with a known mean but is nonetheless ambiguous and leads to different outcomes in courts. Though this is potentially conceivable in theory, it is implausible in practice. I believe the difficulty lies specifically in the translation of Schwartz and Scott's admittedly insightful formal model to real cases. It is one thing, in other words, to

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<sup>75</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 961-62. Schwartz and Scott responded to my critique in their most recent statement of their argument, Schwartz & Scott, *Redux*, *supra* note 2, at 945 n.47, merely by distinguishing uniform from normal distributions. It is not clear how that is a response to my critique, because my argument was that their argument justifies no particular model's distribution.

<sup>76</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 960 & n.53.

<sup>77</sup> See Schwartz & Scott, *Contract Theory*, *supra* note 5, at 573-84.

<sup>78</sup> See *id.* at 574-77.

<sup>79</sup> Schwartz & Scott, *Redux*, *supra* note 2, at 954-55; Schwartz & Scott, *Contract Theory*, *supra* note 5, at 598-601.

<sup>80</sup> "Verifiability" is a term of art in economic contract theory. See Schwartz & Scott, *Contract Theory*, *supra* note 5, at 605-08.

<sup>81</sup> See *id.* at 592-93.

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talk of a mean interpretive result; it is another to make the concept operational and tie it to real contract language. Schwartz and Scott never make clear the paradigmatic contract language they have in mind, nor do they argue that such paradigmatic cases are an appropriate basis on which to construct default legal rules. This abstraction ends up undermining their argument.

Consider more specifically: if the parties can use language that leads to a known and agreed-upon interpretive mean, why does any ambiguity remain? Schwartz and Scott describe the language that generates a known mean as follows:

It is optimal for risk-neutral firms to invest resources in drafting until the writing is sufficiently clear, in an objective sense, so that the mean of the distribution of possible judicial interpretations is the correct interpretation  $i^*$  [i.e., a scalar value corresponding to the correct interpretation]. Contracts sketched out in less detail than this would generate interpretation distributions whose mean could be anywhere.<sup>82</sup>

But if the parties are confident that the language they use will produce a definite mean result — a particular value  $i^*$  — why does any ambiguity remain in the language they have used? Why can't the courts settle uniformly on the mean interpretive result, which is evidently public knowledge anyway? In other words, what room in the real world remains for specific purposive language that is characterized by two propositions: (1) there is general agreement on the “mean” interpretation, but (2) there is nonetheless symmetrical variance around this mean as a result of uncertainty?

With respect, it seems that Schwartz and Scott's model permits a much narrower conclusion than they intend. They wish to show that all risk-neutral parties prefer textualism, but it appears they have shown, at most, that such parties prefer textualism specifically for terms about which there is no possible real-world dispute. This is because, for language with an uncontroversial mean interpretive result that has symmetric variance, no ambiguity remains; there would be little reason for anyone, including courts, to adopt a meaning other than the known mean value.

To put it differently, how can a legitimate dispute arise out of a publicly known distribution? If there is a legitimate dispute about language, why would there be an agreement about the mean interpretive result *ex ante*; conversely, if there were a general

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<sup>82</sup> *Id.* at 577.

agreement, why would ambiguity remain? Note that this is not simply a case where the parties have a private understanding of terms that they cannot prove to courts,<sup>83</sup> because under Schwartz and Scott's model, their expectation is specifically that the *courts* will reach a mean interpretive result (with some expected variance).

Even putting this problem aside, it is hard to discern a meaningful justification for the "minimal evidentiary base" based on theoretical argumentation alone, rather than an argument with more empirical sensitivity. Recall that the "minimal evidentiary base" they promote, and consider to be textualist, is "the parties' contract, a narrative concerning whether the parties performed the obligations that the contract appears to require, a standard English language dictionary, and the interpreter's experience and understanding of the world."<sup>84</sup> Schwartz and Scott's assertion of this base of evidence as the minimal necessary for courts to reach correct interpretive results on average appears to rest only on their intuitions about the costs and utility of different classes of evidence. It is hard to see how the practical question of evidentiary utility could be decided as a theoretical matter; there simply isn't enough information in the theory to conclude that "a dictionary" is useful but that trade usage is not justified by its administrative costs.<sup>85</sup> Schwartz and Scott would presumably agree that flipping a coin — despite incurring administrative costs drastically lower than typical adjudication — is insufficient for courts to reach the right interpretive result on average,<sup>86</sup> but why is a dictionary plus a stochastic resolution sufficient? What affirmative argument is there for the minimal evidentiary base?<sup>87</sup>

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<sup>83</sup> Economic contract theorists refer to this case as one where information is "observable but not verifiable." See Schwartz & Scott, *Contract Theory*, *supra* note 5, at 605 ("A datum of information is 'observable but not verifiable' if a party can observe it, but cannot verify the information's existence to a third party such as a court at an acceptable cost.").

<sup>84</sup> *Id.* at 572.

<sup>85</sup> I mean this information-theoretic point in a technical sense — specifically, that the information contained in an expression of the theory is insufficient to derive such complex specifics regarding textual sources. Cf. Andrei N. Kolmogorov, *Logical Basis for Information Theory and Probability Theory*, 14 IEEE TRANSACTIONS ON INFO. THEORY 662 (1968) (relating information theory to compressibility and complexity).

<sup>86</sup> Given that plaintiffs can specify the interpretive question at issue, an interpretive regime that rests on a coin flip would encourage plaintiffs to ask implausible interpretive questions because they would have a 50% chance of being judged "correct" as to those questions.

<sup>87</sup> Cf. Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 Ky. L.J. 43, 47-48 (2007) (identifying parties' incentives to behave opportunistically under textualist

### 3. Dynamic Versus Static Analysis: The Possibility of Settlement

I have previously identified a problem for Schwartz and Scott's stochastic view of courts.<sup>88</sup> Simply speaking, if the parties agree on the court's mean interpretive result and they are risk-neutral, why would they ever litigate a contract in the first place? In some respects, this is the *ex post* mirror image of argument in the previous Section that language with a known mean is unambiguous. The point here is stronger, though: language with a known mean is not worth litigating. To put it differently, if Schwartz and Scott's model actually applied to contracting parties, it is difficult to see why they would ever bring a lawsuit — and thus difficult to see why the argument should be a basis for a widespread meta-interpretive default. If lawsuits are not brought, parties do not experience the litigation costs that Schwartz and Scott's textualist argument aims to permit to them avoid.

To summarize, then, despite a recent defense of it, Schwartz and Scott's model remains difficult to apply in a legal setting. Their assumptions about risk-neutrality are stronger than is appropriate for a legal, rather than an economic, analysis; their model, insightful as it is in theory, is difficult to apply to real cases; and if it were correct, it would prove too much because it would make litigation unnecessary in the first place.

Nonetheless, in responding as I have done to their argument, I do not wish to minimize their concerns about the costs of dispute resolution. I take those costs to be the chief modern reason that contract textualism is at least plausible in some contexts. Costs do matter. As Schwartz and Scott put it:

[A]lthough accurate judicial interpretations are desirable, accurate interpretations are costly for parties and courts to obtain. . . . [I]f adjudication were costless, courts could minimize interpretive error by hearing all relevant and material evidence. . . . Since no interpretive theory can justify devoting infinite resources to achieving interpretive accuracy, any socially desirable interpretive rule would trade off accuracy against . . . adjudication costs.<sup>89</sup>

This is correct, so far as it goes. My disagreement with Schwartz and Scott arises only when they purport to derive a specific default legal rule of extremely widespread applicability (covering, as they wish to

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interpretive regimes).

<sup>88</sup> Bayern, *Rational Ignorance*, *supra* note 4, at 968-71.

<sup>89</sup> Schwartz & Scott, *Redux*, *supra* note 2, at 930.

do, contracts between all but the smallest firms) on the basis of theoretical deductions. There is also, perhaps, a difference in emphasis. While it is surely right that “no interpretive theory can justify devoting infinite resources to achieving interpretive accuracy,” infinite resources were never on the table — at least not in the real world. In real cases, evidentiary bases are discrete rather than continuous and context-specific rather than context-neutral; the question is not “[c]an we pick a number corresponding to how much evidence to admit” but rather “[i]s this particular piece of evidence admissible?” Moreover, rules of evidence already serve as barrier to the (already extremely remote) possibility that the world will devote all its economic resources to the resolution of contract disputes.<sup>90</sup> Accordingly, while Schwartz and Scott are clearly right to argue that evidence must be cut off at some point, that observation alone does not lead to anything like a widespread textualist default. Perhaps it leads only to a recognition that it is useful to keep, rather than to throw away, evidence law.<sup>91</sup>

#### B. *Empirical Evidence About Actual Contracting Parties*

Some commentators have adduced what they believe is empirical support for a broad rule — perhaps just a default rule — of textualism. Usually arguments along these lines take the following form: because parties do X, they prefer textualism, and thus textualism is a sensible default meta-interpretive rule.<sup>92</sup> These arguments have, so far, been unpersuasive. It is important to recognize, however, that such arguments have the capacity to be persuasive. If it were truly the case that all parties of a particular type always preferred textualism, and if an empirical study could establish this preference convincingly, then the study would indeed be a sound argument in favor of textualism in the cases to which it applied. The problem is not with the enterprise of the empirical analysis of parties’ meta-interpretive preferences; the problem is simply that those making arguments based on empirics have, so far, generalized too broadly from the available data.

Before considering particular empirical arguments, it may help to lay some general groundwork. The modern empirical economic arguments,

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<sup>90</sup> See, e.g., FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

<sup>91</sup> See generally *id.* 102–103.

<sup>92</sup> See *infra* Part I.B.2.



like Schwartz and Scott's leading theoretical economic argument discussed in Section A, are attentive to the costs of adjudication.<sup>93</sup> In particular, they seek to balance those costs against the economic benefits of a more informed judicial interpretive method that is more likely to produce a correct answer in individual cases. Given this pattern, it may be helpful to note that while litigation costs are not insignificant, they are a vanishingly small part of the total value of all contracts — of all gains through trade in the economy of the United States. Tampering with the latter out of excessive concern with the former poses, at the least, a significant danger of economic loss.

Although evidence is not comprehensive, it appears that a typical contract case costs between \$70,000 and \$100,000 if litigated to trial.<sup>94</sup> In 2005, state courts in the United States decided 8,917 contracts cases,<sup>95</sup> implying that cases that led to resolution in court cost less than \$900 million. In 2005, the gross domestic product ("GDP") of the United States was \$14.37 trillion. Of course, \$900 million is a significant amount; as the old joke goes, add \$900 million here and \$900 million there, and eventually you're dealing with real money.<sup>96</sup> Nonetheless, \$900 million is .006% (or one in about 16,000) of the GDP.

Of course, most cases settle, perhaps before being counted in these statistics. The effect of the default interpretive regime on settlement rates is complicated and contested, but even Schwartz and Scott seem to admit that their textualist proposal would not increase settlement rates.<sup>97</sup> As a result, the only question at stake seems to be: to what extent can we reduce the 0.006% drain on the economy that contract

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<sup>93</sup> See *infra* Part I.B.2.

<sup>94</sup> See Adam J. Eckstein & Matthew P. Gabriel, *Alternatives to Arbitration: Reconsidering the Use of Arbitration Provisions in Contracts*, US LAW (Fall/Winter 2003), [http://www.martintate.com/article\\_Eckstein\\_Gabriel\\_USLAW\\_mag.pdf](http://www.martintate.com/article_Eckstein_Gabriel_USLAW_mag.pdf); Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CASELOAD HIGHLIGHTS 1, 7 (2013), [http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph\\_online2.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx).

<sup>95</sup> DONALD J. FAROLE, JR., U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STAT. BULL., CONTRACT BENCH AND JURY TRIALS IN STATE COURTS, 2005, (Sept. 2009), *available at* <http://www.bjs.gov/content/pub/pdf/cbajts05.pdf>.

<sup>96</sup> The joke is often attributed to the American politician Everett Dirksen. See *Senator Everett McKinley Dirksen Dies*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/minute/Senator\\_Everett\\_Mckinley\\_Dirksen\\_Dies.htm](http://www.senate.gov/artandhistory/history/minute/Senator_Everett_Mckinley_Dirksen_Dies.htm) (last visited Nov. 14, 2015).

<sup>97</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 968-71 (arguing that more precision in interpretive results should increase the likelihood of settlement if it has any effect at all); see also Schwartz & Scott, *Redux*, *supra* note 2, at 933 n.21 (apparently agreeing that for risk-neutral firms, the default meta-interpretive rule will not influence settlement rates).

litigation represents? If the litigation were solely a loss, this might be a productive question for a very small administrative agency to consider; the problem, however, is that the economy receives something substantial for that \$900 million: it receives a reliable adjudicatory system that backs up the commercial deals of American businesses. How much is it appropriate to risk in order to reduce that cost? Moreover, how much would textualism reduce it; would it even make a significant difference in the total amount, keeping in mind that the typical difference between textualism and contextualism involves only the production of such evidence as trade usage and evidence of course of dealing?<sup>98</sup> Despite general popular rhetoric suggesting the waste associated with litigation,<sup>99</sup> I am aware of no empirical evidence suggesting that the economic savings in reducing the evidentiary base for commercial litigation would be significant.

The remainder of this Section considers the limited, specific empirical evidence about parties' meta-interpretive preferences specifically, and it addresses conceptual problems with the use of such evidence to justify default rules in modern contract law.

#### 1. The Limited Empirical Evidence of Parties' Meta-Interpretive Preferences

As commentators on all sides of the debate seem to agree, empirical evidence of parties' meta-interpretive preferences is extremely limited.<sup>100</sup> Professor Geoffrey Miller and the late Professor Ted Eisenberg conducted one significant recent study in which they found that, in contracts with choice-of-law clauses to which public companies are parties, the parties more often choose the law of New York than that of any other state.<sup>101</sup> Schwartz and Scott take this to be significant because, having characterized New York's meta-interpretive contract law as textualist, they believe the choice of New York reflects a choice by contracting parties in favor of textualism.<sup>102</sup>

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<sup>98</sup> See Schwartz & Scott, *Contract Theory*, *supra* note 5, at 574-77.

<sup>99</sup> See generally Shawn J. Bayern, Comment, *Explaining the American Norm Against Litigation*, 93 CALIF. L. REV. 1697, 1705-11 (2005) (citing popular sources).

<sup>100</sup> See, e.g., Schwartz & Scott, *Redux*, *supra* note 2, at 955 (referring to the "sketchy evidence that exists").

<sup>101</sup> Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1511 (2009) ("Although no state has more than 50 percent of the designations, New York is clearly the dominant state with over 40 percent of the choices of law . . . designations.").

<sup>102</sup> Schwartz & Scott, *Redux*, *supra* note 2, at 956.

There are several problems with such an inference, however. Most importantly, Eisenberg and Miller give several other explanations for a choice of New York law that confound specific empirical inferences as to parties' motives:

Since at least the early nineteenth century New York State, and especially New York City, have played a special role in the nation's commercial activity. New York has a keen awareness of the financial benefits of choice of law provisions and has cultivated its role as the choice of law for commercial matters through early efforts to promote enforceability of arbitration clauses, through legislation, and through the creation of specialized business courts.<sup>103</sup>

As Eisenberg and Miller also point out, there are many provisions of substantive New York law that public firms might favor; an inference that they are specifically choosing textualism is unfounded.

There are several further problems with the inference from this study that firms prefer textualism. One is that Professors Eisenberg and Miller have studied only public companies,<sup>104</sup> not all the firms to which Schwartz and Scott intend to apply their analysis.<sup>105</sup> Another, perhaps more significant, problem is that there is a wide variety in the choices of law that even large public firms have made. New York's law, recall, was chosen in fewer than half the cases that Eisenberg and Miller studied, and for particular types of contracts, the choice is even less evident.<sup>106</sup> Thus, public firms chose New York law in only about 25% of cases involving the purchasing of assets, only about 20% in licensing agreements, only 17% in mergers, and, perhaps of special note, in only 18% of cases involving legal settlements, where regularity of administration is presumably of special importance to at least one of the parties.<sup>107</sup> Indeed, in settlement contracts, parties chose California law — Schwartz's and Scott's paradigmatic contextualist regime<sup>108</sup> — about as often as they chose New York.<sup>109</sup> The picture that the limited empirical data paints is one of variety, not one of consistency.

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<sup>103</sup> Eisenberg & Miller, *supra* note 101, at 1481.

<sup>104</sup> *See id.* at 1475, 1511.

<sup>105</sup> *See* Schwartz & Scott, *Redux*, *supra* note 2, at 952-55.

<sup>106</sup> *See* Eisenberg & Miller, *supra* note 101, at 1491.

<sup>107</sup> *Id.*

<sup>108</sup> *See* Schwartz & Scott, *Redux*, *supra* note 2, at 956.

<sup>109</sup> Eisenberg & Miller, *supra* note 101, at 1491.

## 2. Conceptual Problems with Empirical Approaches

Aside from the limitations in the empirical evidence, there are two theoretical reasons to be skeptical of drawing strong inferences, in this particular debate, from studies like Eisenberg and Miller's. One is that if parties particularly want textualism, they can ask for it, so there is little reason to use choice-of-law clauses as a proxy for the underlying substantive choice.<sup>110</sup> Moreover, parties can choose arbitration, in which they can certainly lay out their own rules of evidence. While it may be difficult to arrange, from scratch, for the sort of private legal system that Lisa Bernstein characterizes in several studies,<sup>111</sup> it is not difficult to opt out of the public legal system if it does not provide for parties' desired rules or the opportunity to choose such rules.<sup>112</sup>

But there is a deeper and more important problem with the focus on the empirically demonstrated preferences of broad classes of contracting parties. Specifically, in deciding meta-interpretive rules, we are not limited to a single, majoritarian regime. Schwartz and Scott recognize this; indeed, I consider their argument innovative in this regard.<sup>113</sup> But just as the legal system need not answer the meta-interpretive question identically for contracts involving individuals and contracts among firms (as they suggest),<sup>114</sup> it need not answer the question identically for all contracts involving firms.

Perhaps the notion of "majoritarian defaults" has caused some confusion. The concept of majoritarian defaults is common in the theoretical legal and economic commentary on contract law.<sup>115</sup> As Professor Russell Korobkin puts it:

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<sup>110</sup> This is, admittedly, the subject of some debate, because Schwartz and Scott deny that interpretive rules are default rules, rather than mandatory rules, in current law. I consider this matter further in Part III.

<sup>111</sup> See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1766 (1996); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 711 (1999).

<sup>112</sup> See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 696-99 (2001) (discussing courts' stated public policies in favor of arbitration). See generally Marissa Dawn Lawson, Note, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 REV. LITIG. 463, 463-64 (2004) (critiquing the ease with which arbitration clauses in contracts can displace the public legal system).

<sup>113</sup> See *supra* note 12.

<sup>114</sup> See Schwartz & Scott, *Redux*, *supra* note 2, at 947 n.49. See generally *supra* Part I.

<sup>115</sup> See, e.g., Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM.

The traditional analysis concludes that default contract terms should mimic those terms that the majority of contracting parties would agree upon if negotiating and drafting a relevant provision were cost-free. Default rules created according to this process, often referred to as “majoritarian” defaults, minimize the number of occasions in which parties will need to contract around default rules in order to arrive at an efficient outcome.<sup>116</sup>

Used properly, this notion can serve as a useful theoretical device in analyzing default rules in contract law — for example, in distinguishing commonplace rules from “penalty defaults.”<sup>117</sup> But the concept may also confuse analysis because it suggests that default rules should be decided by vote, rather than by a sensitive analysis of factors present in particular cases. What is at issue here, in some sense, is improving the “resolving power” of contract law, as with a microscope; a focus on choosing the right “majoritarian default” can easily obscure the more important analytical exercise in which courts are typically engaged, which is to determine which features of a case trigger relevant legal principles. That broader analysis — essentially an attempt to address a reference-class problem<sup>118</sup> — may well produce insights that are absent if cases are grossly lumped together and then decided as the majority would decide them. Perhaps this is why the notion of “majoritarian defaults” has made almost no impact in courts, compared to academic commentary.<sup>119</sup> When courts interpret

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L. REV. 1603, 1632 (2009) (“Majoritarian default rules maximize the probability that the terms to which promisors are being held correspond with the ones they intended but failed to express or imply, and they save the majority of individuals the costs of specifying those terms, which respects their personal sovereignty by decreasing the barriers to creating promissory obligations.”).

<sup>116</sup> Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 613-14 (1998).

<sup>117</sup> See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 101-07 (1989); see, e.g., Ian Ayres, *Default Rules for Incomplete Contracts*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 586 (Peter Newman ed., 1998); Richard Craswell, *Contract Law: General Theories*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 1, 3-4 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

<sup>118</sup> In statistical reasoning, there is often a preliminary problem of identifying a reference class for appropriate analysis. See HANS REICHENBACH, *THE THEORY OF PROBABILITY: AN INQUIRY INTO THE LOGICAL AND MATHEMATICAL FOUNDATIONS OF THE CALCULUS OF PROBABILITY* 374-78 (1949). For a modern discussion in a legal context, see generally Edward K. Cheng, *Law, Statistics, and the Reference Class Problem*, 109 COLUM. L. REV. 92 (2009).

<sup>119</sup> As of December 24, 2015, the phrase “majoritarian default,” according to a

contracts, they do not look ultimately to what a “majority” of some arbitrary group of parties would have done. They aim instead to determine what was “reasonable” for the parties “in the circumstances” under which they contracted.<sup>120</sup>

C. *Philosophical Arguments that Broadly Disregard the Preferences of Contracting Parties*

A further type of argument defends textualism on philosophical grounds that have little to do, directly, with the intent of — or even the interests of — the parties to a particular dispute. Inspired, broadly speaking, from philosophy rather than economics or legal doctrine, these arguments present textualism as desirable because it is more certain, more consistent with abstract “rule of law” values, more “legal” rather than “political,” and so on.<sup>121</sup>

I have responded to many arguments along these lines in prior work.<sup>122</sup> I have little to add here, other than to note that nothing has been offered to justify a rule in the general case that is at odds with the parties’ interests. If parties can agree to arbitrate disputes, it would be odd to refuse to let them structure their dispute in court in typical cases — particularly if all they attempt to do is to inform a court, *ex ante*, that they believe certain evidence to be unreliable and thus do not wish for it to be used in resolving their dispute (or vice versa). It would, accordingly, be strange to ignore the parties’ preferences in the circumstances of their contracting. On this point, I endorse Schwartz and Scott’s argument, with the limited exception that in some cases factors other than the parties’ expressed wishes may be relevant to the meta-interpretive question, in specific cases only, on grounds of justice or policy.<sup>123</sup>

D. *The Limits of Undifferentiated Contextualism*

Sections A through C in this Part have critiqued arguments for undifferentiated (or insufficiently differentiated) textualism. That is,

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search on LexisNexis, appeared in over 300 academic articles but in only three American court cases.

<sup>120</sup> RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981).

<sup>121</sup> See Bayern, *Against Certainty*, *supra* note 10, at 76-86 (discussing such arguments).

<sup>122</sup> *Id.* (arguing that arguments that depend on a rule’s certainty or regularity are often misplaced and not logically tied to rule-of-law values).

<sup>123</sup> See *supra* Part I.B; see also Schwartz & Scott, *Redux*, *supra* note 2, at 952 (“[W]e urge courts to follow party preferences regarding the interpretive rules.”).

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they have addressed problems with theoretical economic, empirical economic, and philosophical arguments that counsel a broad textualism for contract law. This Section addresses why a nuanced approach to meta-interpretation is more functional than a simple rule of universal contextualism — that is, than a simple rule that courts should always recognize all information that may have a role in determining the parties' intent or other matters that bear on any interpretive matters.

Whereas (as Sections A through C showed) it does not seem sufficient to derive preferences for textualism from parties' general characteristics, features of particular contracting situations may well suggest that the parties intend for a textual document to govern their substantive rights and duties to the exclusion of other contextual information. The clearest indication of this occurs when a textual document, or set of them, is the object of specific, lawyerly negotiation. For example, if lawyers for both sides extensively negotiate specific, complex textual language that is customized to the parties' situation, actually consider the writing a final statement of their deal, and make tradeoffs that affect the written document, it may be appropriate for a court to ignore other information in constructing the parties' substantive rights and duties. This situation provides a useful demonstration of how meta-contextualism differs from general contextualism. When faced with a setting that may fit the template I am describing, courts should use all contextual information (including information about how the negotiations proceeded, how the parties conceived the written document, and so on) to make an initial determination concerning the interpretive preferences of the parties; that interpretive may well be a conclusion that the parties intended for their shared text to be the exclusive basis of their substantive rights and duties, in which case the court should ordinarily proceed on a textual basis.<sup>124</sup>

A broader contextualism is insufficient in these cases simply because it is at odds with the parties' intent. The parties may well choose to take the risks associated with textualism in exchange for its benefits. There is simply no reason to assume, in general, that parties do this; the proposition must be shown to apply to the parties in a given case,

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<sup>124</sup> This remnant of contextualism in the meta-interpretive inquiry concerning the parties' interpretive preferences goes a long way to explaining the supposedly mandatory contextualism that modern law enforces. See *infra* Part II.A for more comprehensive discussion on this point.

or else courts substitute theoretical judgment for the efficiency and justice of enforcing individual parties' substantive deals.<sup>125</sup>

An even simpler case of the appropriateness of textualism in specific settings involves standardized financial options.<sup>126</sup> Individual consumers may purchase or generate and sell economic rights on underlying securities, such as stocks, in order to speculate or to hedge risk.<sup>127</sup> A universal understanding of such financial options is that, while they are contracts — and even contracts that involve individuals — their performance is standardized through a clearinghouse, tightly regulated, and subject to essentially no interpretive variance based on individual circumstances.<sup>128</sup>

## II. THE MECHANICS OF META-INTERPRETATION AND META-SUBSTANTIVE AGREEMENT

The touchstone of moral and efficient contract enforcement, in the first instance, is the parties' actual agreement, to the extent that agreement exists. The actual agreement matters for moral — or justice-based — reasons because a significant justification of contract law is to give parties what they want, at least so long as what they want is not unconscionable and does not trigger another exception to the appropriate enforcement of contracts.<sup>129</sup> Various justifications of contract law on grounds of autonomy, parties' "will," and so forth also depend on the parties' voluntary request for legal enforcement to aid their business (or other) purposes.<sup>130</sup> The actual agreement matters for

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<sup>125</sup> See generally *supra* Parts I.A–C (discussing the limits of generalized solutions).

<sup>126</sup> See generally AMERICAN STOCK EXCHANGE, LLC ET AL., CHARACTERISTICS AND RISKS OF STANDARDIZED OPTIONS (1994) (describing the legal nature and risks of standardized financial options issued by the Options Clearing Corporation and traded on public exchanges).

<sup>127</sup> See *id.* at 18-22.

<sup>128</sup> See THE OPTIONS CLEARING CORP., UNDERSTANDING STOCK OPTIONS 7 (1994), available at <https://www.cboe.com/LearnCenter/pdf/understanding.pdf> ("A stock option is a contract . . ."); cf. *id.* at 5 ("Prior to the existence of option exchanges and [the Options Clearing Corporation], an option holder who wanted to exercise an option depended on the ethical and financial integrity of the writer or his brokerage firm for performance.").

<sup>129</sup> Mel Eisenberg has offered the most comprehensive statement of this view, begun in Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982) [hereinafter *Bargain Principle*]. For Professor Eisenberg's more recent statement of the goals of modern contract law, see Eisenberg, *Emergence*, *supra* note 6, at 1745 ("The basic contracts principle is as follows: First, if but only if appropriate conditions are satisfied, and subject to appropriate constraints, contract law should effectuate the objectives of parties to a promissory transaction.").

<sup>130</sup> For perhaps the broadest modern statement of this position, see CHARLES FRIED,



reasons of efficiency because it is the parties' subjective conceptions that create the economic surplus at issue in contract law in the first place; a contract is only productive if the parties believe it is productive.<sup>131</sup> If there were a costless, perfectly accurate way to discern and then enforce the parties' actual, subjective agreement, I am unaware of any modern position that would oppose enforcement of that agreement on principle (putting aside, of course, appropriate defenses such as unconscionability or impossibility).<sup>132</sup> Moreover, despite overtures to the classical "objective" principle of assent in contract law, modern law specifically recognizes, rather than ignores, the mutual understanding between the parties when such a mutual understanding is found to exist.<sup>133</sup>

Of course, in the real world there is no costless and perfect mechanism to determine the parties' subjective agreement; as a result, various objective conceptions of parties' expressions come to matter in contract doctrine.<sup>134</sup> But even so, the interpretive target — in

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CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION I (1981) (laying out the "moral basis of contract law"); see also Anthony T. Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404, 416-17 (1981) (reviewing FRIED, *supra*, and critiquing Fried's arguments).

<sup>131</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 960 & n.53 ("Schwartz and Scott say that courts should aim to reach correct interpretations because (1) courts should hold a contracting person to do only 'what he had agreed to do,' and (2) maximizing contracting surplus 'is unattainable if courts fail to enforce the parties' solution but rather impose some other solution[, and courts should therefore] ascertain the solution that the parties actually adopted.'") (citing Schwartz & Scott, *Contract Theory*, *supra* note 5, at 569); Eisenberg, *Bargain Principle*, *supra* note 129, at 760-63; Eisenberg, *Emergence*, *supra* note 6, at 1745.

<sup>132</sup> Cf. ARTHUR CORBIN, CORBIN ON CONTRACTS § 572b (1971) ("No contract should ever be interpreted and enforced with a meaning that neither party gave it") (referenced in FULLER ET AL., *supra* note 72, at 686); Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007) (laying out a subjective view of contract enforcement).

<sup>133</sup> RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."); see Eisenberg, *Expression Rules*, *supra* note 1, at 1134 ("Where both parties have the same, unreasonable, meaning, one or both parties may have been at fault in their use of language, but the fault caused no injury. Indeed, a party would be at fault to press an interpretation of an expression that he himself did not attach to the expression"); see also *Berke Moore Co. v. Phoenix Bridge Co.*, 98 A.2d 150, 154 (N.H. 1953) (interpreting a contract, even prior to the emergence of modern contract law, in light of the explicitly subjective "mutual understanding" of the parties).

<sup>134</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 21, 201 (1981).

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determining how reasonable parties would interpret expressions — is the parties' actual agreement if that agreement exists.<sup>135</sup>

Nonetheless, just as parties may have agreements as to *substantive* rights and duties, they may have agreements as to *meta-substantive* matters — matters that determine how courts (or other institutions) are to construct their rights and duties. Thus, for example, an agreement to arbitrate is meta-substantive in this sense; it is an agreement of the parties not about their particular substantive obligations under a contract in the first instance, but of how their obligations are to be determined and enforced. Choice-of-law and choice-of-forum provisions — and even just substantive choices of law or forum, even if not explicitly expressed in written agreements — are similarly meta-substantive.<sup>136</sup> Other provisions can, less obviously, be conceived as meta-substantive. For example, what Mel Eisenberg has described as “structural agreements” is in an important sense meta-substantive because they do not dictate rights and duties but instead provide a contractual mechanism to facilitate the future development of rights and duties:

In another kind of promissory structure, one party makes a promise that increases the probability of exchange, but that promise does not require either a promise or an act in exchange. I call such promissory structures *structural agreements*.

Under the bargain principle, bargains between capable and informed actors are enforced according to their terms. This principle rests in large part on the premises that bargains produce gains through trade, that capable and informed actors are normally the best judges of their own utilities, and that those utilities are revealed in the terms of the parties' bargain.

Although the bargain principle is most conventionally applied to classical bargains, it applies to structural agreements as well. Structural agreements, like classical bargains, involve promises designed to promote economic exchange. The terms of

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<sup>135</sup> See Bayern, *Rational Ignorance*, *supra* note 4, at 960 n.53 (discussing interpretive targets).

<sup>136</sup> Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971) (“The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”). Note that § 187(1) appropriately distinguishes what was “chosen by the parties” from what might have been “an explicit provision in their agreement.” *Id.*

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structural agreements, like the terms of classical bargains, are normally bargained out. And as in the case of classical bargains, the promisor in a structural agreement makes his promise because it will serve his economic interest. Reasons comparable to those for enforcing classical bargains are therefore applicable to structural agreements: structural agreements are entered into to produce gains through trade; a capable and informed actor is normally the best judge of his own utility; and that utility is revealed in the terms of his agreement. . . . A structural agreement is a governance structure that is designed and intended to promote the probability of gains through trade.<sup>137</sup>

Just as parties may intend to enter into an agreement that facilitates future trade, parties may also structure their current trade, and they may express preferences about the resolution of differences. One such preference may be a choice of interpretive regime, such as a choice for the court (or other organization) constructing the contract's legal duties to be contextualist or textualist. To the extent parties have meta-interpretive preferences, it is consistent with the bases of modern contract law — largely for the reasons Professor Eisenberg identifies<sup>138</sup> — for courts to honor those preferences in the general case.

Note that just as ordinary interpretive questions often need to be resolved without direct evidence of the parties' expressed intent — or indeed where it is known that the parties had no specific intent, expressed or otherwise, on the matter — meta-interpretive questions may need to be resolved similarly. Glanville Williams, a significant Welsh jurisprudential scholar of the twentieth century, outlined in 1945 a framework that remains useful for characterizing different forms of what are commonly called “interpretive” questions.<sup>139</sup> Professor Williams recognized that a traditional form of interpretation of language included “consequences logically implied in the language,” but he observed that “the legal doctrine of implied terms goes much farther than this,” and he laid out three successively broader categories of implication. First, there are “terms that the parties . . . probably had in mind but did not trouble to express”;<sup>140</sup>

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<sup>137</sup> Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1009-10 (1998).

<sup>138</sup> *See id.*

<sup>139</sup> *See generally* Glanville L. Williams, *Language and the Law — Part IV*, 61 L.Q. REV. 384 (1945) (referenced in FULLER ET AL., *supra* note 72, at 444-45).

<sup>140</sup> Williams, *supra* note 139, at 401.

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second, there are “terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention”;<sup>141</sup> and finally, there are “terms that the parties, whether or not they had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the Court because of the Court’s view of fairness or policy or in consequence of rules of law.”<sup>142</sup>

This framework applies equally well to meta-interpretive matters and sheds light on the way that courts should divine answers to meta-interpretive questions. First, the parties might have literally expressed an answer to the question, as for example some well-drafted integration clauses do.<sup>143</sup> Second, the parties might have used expressions to one another that logically imply an answer to the question, as for example some vaguer merger clauses do.<sup>144</sup> Third, it may be clear from context that the parties intended a particular interpretive regime to govern them. Fourth, a court might infer that parties would have had such an intent had they considered the question. Fifth and finally, a court may decide on an interpretive regime for reasons of morality, policy, or doctrine.

Accordingly, the resolution of meta-interpretive questions need not itself be merely interpretive, in Williams’s initial senses; it may result from the operation of doctrine, or from a court’s acceptance of propositions of morality or policy that suggest or require an interpretive regime to govern certain types of cases.

The remainder of this Part lays out a framework for the resolution of meta-interpretive questions.

#### A. *The Intent of the Parties*

The first guiding principle for the selection of an interpretive regime is as follows: where the parties express a specific intent for a textual

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 690 (2007) (“Courts should, and do, enforce the analog of merger clauses that recite such intentions as: ‘No liability whatsoever is to attach to any representations made during negotiations and before a final written agreement is signed.’”).

<sup>144</sup> For example, it is common to see language like, “This Contract . . . contain[s] the final and entire agreement between the parties, and neither they nor their agents shall be bound by any terms[,] conditions, statements, warranties or representations, oral or written, not herein contained.” *Greenfield v. Heckenbach*, 797 A.2d 63, 68 (Md. App. 2002).

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document to govern them and for non-textual features of their course of conduct not to govern them, that intent should (subject to specific exceptions outlined above)<sup>145</sup> be upheld. Thus, for example, a strong, specific merger clause that sophisticated parties voluntarily adopt should ordinarily be upheld. The justification for this principle is simple and follows from the reasons that courts enforce the parties' agreement in the first place. There is no overriding judicial interest in adopting a particular mode of interpretation if the parties have explicitly taken the risk that a court's (or other institution's) textualist interpretation of a document or set of documents governs them. Just as parties might take risks as to other conditions, there is no reason they should not be permitted to take this risk in the general case.

Relying on text alone to determine the parties' meta-interpretive preferences is insufficient, however. There are at least two reasons for this. For one thing, text alone, taken out of context, may not evidence an actual agreement between the parties, as the example of a strong, non-negotiated (and likely unread) merger or integration clause in a consumer form agreement makes clear. If courts were to enforce such an agreement, it would not be because the parties affirmatively agreed upon it. For another, other evidence may be insightful as to the parties' preferences regarding meta-interpretive questions — that is, regarding textualism, contextualism, and other possible modes of interpretation. Even where the parties have not adopted a specific merger clause, other evidence may be helpful in determining the intent of the parties to be, effectively, textualists. For example, when sophisticated parties conduct an extended negotiation about the details of textual language, it may become clear that they intend for a certain set of textual documents to govern them. Similarly, evidence of the circumstances of contract may well suggest that the parties intended for the text of a contract to trump more general trade usages.

It is important to stress that the parties' choice to use text, alone, is not sufficient as an evidentiary matter to suggest that their meta-interpretive choice favors textualism. There are two candidate reasons for text to play this role (that is, for the mere use of text to imply an agreement that the parties prefer textualism), though neither is ultimately persuasive. The first reason is evidentiary; text is supposed to be harder to fake than evidence about, for example, course of dealing. But this is probably no longer true. For one thing, much text is now electronic, and electronic text is often changeable.<sup>146</sup>

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<sup>145</sup> See *supra* Part I.B.

<sup>146</sup> See, e.g., U.S. Patent No. 3,660,819A (filed Jun. 15, 1970), *available at*

Conversely, because of the nature of electronic communication, there is often more evidence available to corroborate features beyond the text of contracts — like evidence of course of dealing or course of performance. For example, while in the past a written, signed agreement was difficult to forge and an informal conversation difficult to substantiate, today an electronic version of a signed agreement can often be subject to evidentiary dispute while the pre-contractual conversations (conducted, for example, by email) may be relatively reliable.<sup>147</sup> Second, text may promote deliberation; there is some truth to the notion that a signed writing is what Lon Fuller called a “natural formality,”<sup>148</sup> or a device that carries weight to ordinary people and suggests to them that a formal process carries substantive significance. Most people in American society would likely assume that signing a written contract alters their legal rights and duties in some way. But while writings, or signed writings, are enough of a natural formality to suggest that they have some role — and perhaps a significant role — there is no evidence that people assume that merely by signing a document they agree to be governed by the language of that document, as interpreted by a court, to the exclusion of all other evidence of the circumstances of the signing. As a trivial counterexample, it would be hard to believe that most people would expect to be bound to a writing that they signed under duress.<sup>149</sup> More generally, however, even where parties intend to be bound by a signed document, they likely have no specific intent to be governed by a court’s context-less interpretation of that document, without regard to the way they (and their counterparties) understand language. At least, no textualist commentator has offered evidence that parties do typically have this intent.

Indeed, while text is perhaps weighty in some environments and has historically served as a natural formality, natural formalities change. Much textual communication today is conducted online, in a manner

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<https://www.google.com/patents/US3660819>; U.S. Patent No. 3,161,861A (filed Nov. 12, 1959), available at <http://www.google.com/patents/US3161861>.

<sup>147</sup> For a general discussion of computer forensics, see EOGHAN CASEY, *DIGITAL EVIDENCE AND COMPUTER CRIME: FORENSIC SCIENCE, COMPUTERS, AND THE INTERNET* (3d ed. 2011).

<sup>148</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941).

<sup>149</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) (“If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.”); *id.* § 175(1) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

that is far less formal than the use of physical paperwork.<sup>150</sup> Contracts can be concluded in written language that resembles a verbal or telephone-based conversation far more than a carefully negotiated, intentionally integrated agreement. As just one interesting example, a federal court recently ruled that the following conversation, conducted over an online instant-messaging network, had legal significance in modifying a contract:

pedramcx (2:49:45 PM): A few of our big guys are really excited about the new page and they're ready to run it

pedramcx (2:50:08 PM): We can do 2000 orders/day by Friday if I have your blessing

pedramcx (2:50:39 PM): You also have to find some way to get the Sub IDs working

pedramcx (2:52:13 PM): those 2000 leads are going to be generated by our best affiliate and he's legit

nicktouris is available (3:42:42 PM): I am away from my computer right now.

pedramcx (4:07:57 PM): And I want the AOR when we make your offer #1 on the network

nicktouris (4:43:09 PM): NO LIMIT

pedramcx (4:43:21 PM): awesome!<sup>151</sup>

As the court put it: "A close reading of the instant messages and careful consideration of the behavior of the parties during the conversation indicate clear assent on the part of both parties . . . ."<sup>152</sup> This result is perfectly consistent with modern contract law,<sup>153</sup> but more importantly, it demonstrates an exceedingly informal use of text. It is important to recognize that the use of communications media changes over time, often in generational ways; thus, for example,

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<sup>150</sup> See Alejandro Mosquera & Paloma Moreda, *The Use of Metrics for Measuring Informality Levels in Web 2.0 Texts*, PROC. 8TH BRAZILIAN SYMP. INFO. & HUM. LANGUAGE TECH. 184 (2011), available at <http://www.aclweb.org/anthology/W11-4523> (presenting ways of measuring informality in online texts).

<sup>151</sup> CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020, 2011 U.S. Dist. LEXIS 29999, at \*10-11 (S.D. Fla. Mar. 23, 2011).

<sup>152</sup> *Id.* at \*19.

<sup>153</sup> E.g., RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); see generally Bayern, *Rational Ignorance*, *supra* note 4.

reports suggest that younger people prefer using text rather than voice for informal long-distance communication.<sup>154</sup> It is hard to imagine that an invariant rule treating the use of text as a natural formality to indicate the adoption of an integrated agreement could be appropriate today, even if it ever was appropriate in the past. To put it bluntly, text messages transmitted over mobile phones are among the *least* deliberative forms of communication that now exist. In any event, text is quite varied; rather than pointing to a single sort of special, deliberative ceremony, the use of text points in no special direction on its own.<sup>155</sup>

That said, many circumstances do suggest that the use of text is meant to exclude other evidence. Careful, back-and-forth negotiations led by counsel and aimed at producing modifications to a shared textual document can indicate the importance of the textual document. Certain regularized transactions, such as standardized option agreements,<sup>156</sup> do likely come without a meaningful context beyond their textual details — and this is more likely to be the case for parties without significant prior history, or whose communication is mediated largely or solely by counsel. It is not text alone that creates this attention to text, however; it is the understanding of what parties expect the text to mean in particular situations.

The second guiding principle for the resolution of meta-interpretive questions, then, should be that parties' intent about meta-interpretive questions must be determined based on the circumstances of their contracts. Because any feature of the circumstances might matter, this principle requires *meta-contextualism*: that is, the use of context to resolve the meta-interpretive question. This principle stands opposed to one that might be called *meta-textualism* (i.e., that the mere adoption of text is sufficient to inform courts about the parties' intended resolution to meta-interpretive questions).

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<sup>154</sup> See Dara Kerr, *Teens Prefer Texting over Phone Calls, E-mail*, CNET (Mar. 19, 2012, 8:10 PM), [http://news.cnet.com/8301-1023\\_3-57400439-93/teens-prefer-texting-over-phone-calls-e-mail](http://news.cnet.com/8301-1023_3-57400439-93/teens-prefer-texting-over-phone-calls-e-mail). *But see* AMANDA LENHART ET AL., PEW RESEARCH CTR., WRITING, TECHNOLOGY AND TEENS (Pew Internet & Am. Life Project 2008), *available at* <http://www.pewinternet.org/2008/04/24/electronic-communication/> (“[T]eens continue to rely primarily on telephone or face-to-face interactions . . .”).

<sup>155</sup> Regardless, in contract law and in deciding meta-interpretive questions in particular, the extent to which text is a natural formality is entirely an empirical fact, and nothing dictates its use from first principles (unlike, perhaps, in constitutional law where there is at least a preliminary argument that what the various houses of Congress and the President “passed” was the text of a bill).

<sup>156</sup> For an introduction to standardized options, see THE OPTIONS CLEARING CORP., *supra* note 128.



The distinction between meta-contextualism and simple contextualism is significant, because it points the way to a resolution that has so far eluded courts and commentators. Some commentators have discerned a mandatory rule in modern contract doctrine in favor of a contextualist interpretive regime.<sup>157</sup> But the ability to arbitrate, and the enforceability of strong merger clauses, suggests such a mandatory rule is not universal. One way to localize the mandatory features of interpretive rules is to identify meta-contextualism, but not contextualism, as mandatory in modern law. Thus, parties can change the interpretive regime under which their contracts will be interpreted, but they cannot change the mechanism by which their preferences about that regime will be interpreted.

It is interesting to consider why meta-contextualism, if appropriate, should be mandatory. What prevents parties from having meta-meta-interpretive preferences? For example, why shouldn't parties have preferences about the manner in which meta-interpretive questions are answered? There is no theoretical answer to this question; the answer is simply that while it is common for commercial (and other) parties to have and to express preferences about the interpretive regimes that courts should use to construct their legal duties, it appears rare for parties to have or to express preferences concerning higher-order interpretive questions specifically. If parties had such preferences, there would be no reason to ignore them systematically.

Moreover, even if parties expressed meta-meta-interpretive preferences (again, preferences about how the meta-interpretive regimes governing their contracts should be selected), the meta-meta-interpretive question would likely require context in order to achieve the goal of meeting the parties' expectations. At bottom, whatever the parties' preferences, there is some level at which context is necessary to discern them. Otherwise, there would be no mechanism to defeat fraud and duress — or even, much more mildly, to give weight to a party's unwritten interpretive preferences. At the final layer in the

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<sup>157</sup> See Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 792 (1999) (“[N]ot only are past practices stronger than ordinary default rules and explicit provisions, but this hierarchy is mandatory [under the U.C.C.]: namely, the parties cannot easily opt out of it.”); David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 648 (2001) (referring to “the difficulty of displacing custom and conduct [in interpretive analysis of contracts] (a difficulty which makes them ‘quasi-mandatory’)”); see also Schwartz & Scott, *Redux*, *supra* note 2, at 964 (“The rules of the Restatement, the UCC, and many jurisdictions are mandatory and require courts to use broad evidentiary bases when interpreting merchant-to-merchant contracts.”) (referencing Snyder, *supra*, and Ben-Shahar, *supra*).

interpretive abstraction, something more than the mere adoption of text is necessary to indicate that the parties intended for the text (and not other features of the situation) to govern them. Thus, if meta-meta-interpretive preferences were common, then meta-meta-contextualism likely ought to become mandatory.

The distinction between meta-textualism and meta-contextualism is explained nicely by a distinction between the *Restatement of Contracts* and the *Restatement (Second) of Contracts* on a particular hypothetical case. The case is as follows: two parties, fearing eavesdropping, establish a code so that the word “buy” means “sell” and vice-versa. Suppose, though the Restatement’s example does not make it clear, that other features of the situation establish that the parties further intend that their writings (plus the code) be the sole basis on which their agreements are to be interpreted.<sup>158</sup> Under this prearranged code, the buyer sends a written “order to sell” (intended as an “order to buy”).<sup>159</sup> Is this writing, from the perspective of the sender, an order to buy or an order to sell? The First Restatement answers with the literal text of the order, ignoring the code;<sup>160</sup> the Second Restatement reverses this result.<sup>161</sup> Clearly, the Second Restatement’s interpretation is superior; it permits parties to do something useful to them without compromising anyone else’s interests. But what if the parties’ written order were modified to further confound eavesdroppers? Suppose it read: “This is not a code, regardless of any prior agreement! This is an order to buy.” A meta-textualist would at some point, upon some level of strength or completeness in the writing, be committed to interpreting the order as one to buy; a meta-contextualist could extend — as I believe it would be proper to do, for much the same reasons as in the simple case — the Second Restatement’s reasoning to this more complex case.<sup>162</sup> And the reason to extend the case is the same reason

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<sup>158</sup> Compare RESTATEMENT (FIRST) OF CONTRACTS § 231 cmt. a, illus. 2 (1932), with RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b, illus. 4 (1981).

<sup>159</sup> Compare RESTATEMENT (FIRST) OF CONTRACTS § 231 cmt. a, illus. 2 (1932), with RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b, illus. 4 (1981).

<sup>160</sup> RESTATEMENT (FIRST) OF CONTRACTS § 231 cmt. a, illus. 2 (1932).

<sup>161</sup> RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b, illus. 4 (1981).

<sup>162</sup> In 1993, a *Saturday Night Live* sketch parodied a generalized version of this situation. In the sketch, a subway performer alternated between telling a passerby, in speech, “I don’t need your handout, man! I’m not a begg[a]r! I’m just playing here!” and, in song, contradicting this message with lyrics like “Please give me money. I’m very hungry. Please give me money so I can eat.” See Transcript, *Saturday Night Live: Jeff Goldblum/Rob Schneider* (NBC television broadcast Oct. 9, 1993), available at <http://snltranscripts.jt.org/93/93subway.phtml>. The sketch nicely captures a tension that frequently arises in contract interpretation: At which time is the speaker’s intent

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motivating the Second Restatement: it permits the parties to do something useful without harming anyone else's interests.

Apart from the individual features discussed above, there are many other features of cases that may matter in resolving meta-interpretive questions. If parties are not in fact risk-neutral<sup>163</sup> — as I have argued most parties are not, and as most commentators agree at least that *individuals* are not<sup>164</sup> — one important party preference, either expressed or latent, is to limit potential risk on a contract.<sup>165</sup> It is often impossible to do this without reference to context. For example, if parties are taken to use language in a way that is not known to them because their trade usage is ignored, they potentially run significant risk that they will have duties much greater than they anticipated under *all* their contracts, and it will be difficult to avoid this risk because often parties that use trade jargon do not recognize that they are doing so.<sup>166</sup> As a result, where necessary to limit the risk faced by risk-averse parties, it will be necessary for courts, in answering interpretive questions, to pay enough attention to context to recognize trade usage. This suggests, of course, that ordinarily, there should probably be a default rule in favor of contextualism, which explains the rules of modern contract law, as expressed in the *Restatement (Second) of Contracts*<sup>167</sup> and the Uniform Commercial Code.<sup>168</sup>

#### B. Mandatory and Quasi-Mandatory Bases for Meta-Interpretive Selection

The intent of the parties should not be the exclusive determinant of meta-interpretive questions, for the same reasons that not all substantive rights and duties are under the control of the contracting parties more generally. For example, parties cannot enter

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more reliable when he or she expresses contradictory intents?

<sup>163</sup> See *supra* Part I.A.1.

<sup>164</sup> See Schwartz & Scott, *Contract Theory*, *supra* note 5, at 550 n.16 (“Individuals are assumed to be risk-averse while firms are assumed to be risk-neutral.”).

<sup>165</sup> Cf. Eisenberg, *Impossibility*, *supra* note 1, at 209 (adopting a similar “bounded-risk” principle to help decide cases of impossibility, impracticability, and frustration).

<sup>166</sup> See, e.g., Dan Pallotta, *I Don't Understand What Anyone Is Saying Anymore*, HARV. BUS. REV. (Dec. 5, 2011), available at <http://blogs.hbr.org/2011/12/i-dont-understand-what-anyone/> (decrying several types of jargon).

<sup>167</sup> E.g., RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981) (“Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.”).

<sup>168</sup> E.g., U.C.C. § 1-303 (2015) (giving effect to “course of performance,” “course of dealing,” and “usage of trade”).

unconscionable contracts<sup>169</sup> or specify unlimited penalties as a remedy.<sup>170</sup> These rules all have analogues in the meta-interpretive sphere. This Section briefly considers several cases in which parties do not, and should not, have free rein to pick an interpretive regime.

### 1. *Contra Proferentem*

One doctrinal rule possibly conceived as a mandatory (or at least quasi-mandatory) meta-interpretive rule is the concept of *contra proferentem* (“against the offeror”)<sup>171</sup> — the doctrine that interprets forms against the drafter.<sup>172</sup> This rule would have little effect if a form itself could displace it. It is not clear, however, that the rule is entirely mandatory. Consider a situation in which a sophisticated party, with an understanding of the relevant risks and the practical constraints of the form-drafter’s position (such as fear of reputational damage and so forth),<sup>173</sup> agrees to accept any terms that a form-drafter creates. Nothing in general ought to prevent this in the right type of case. There is likely a sense, however, in which such an agreement could never be absolute; at least, the bounds of ordinary unconscionability doctrine would prevent such an agreement from committing the form-taker to have agreed to such oppressive terms that they would amount to slavery.<sup>174</sup> The situation roughly parallels that of a principal who agrees to waive the duty of loyalty of an agent; law and commentary is ambiguous on whether that should be permitted,<sup>175</sup> but, even where

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<sup>169</sup> See *id.* § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

<sup>170</sup> See U.C.C. § 2-718; RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).

<sup>171</sup> For a general discussion of this rule, see David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 436 (2009).

<sup>172</sup> *Id.* at 434-38.

<sup>173</sup> Cf. ERIC A. POSNER, LAW AND SOCIAL NORMS 150-51 (2000) (outlining such concerns); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1257-65 (1999) (describing several potential reasons for parties’ behavior beyond incentives provided by the law, including reputational concerns and the internalization of moral obligations).

<sup>174</sup> See JOHN STUART MILL, ON LIBERTY 124-27 (C. Shields ed., 1956).

<sup>175</sup> Compare DEL. CODE ANN. tit. 6, § 18-1101(c) (2015) (“To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member’s or manager’s or other person’s duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.”), with REVISED UNIF. LTD. P’SHIP ACT § 103(b)(3) (2014–2015) (denying partners in general partnership the ability to “eliminate” the fiduciary duty of loyalty, but permitting them to narrow it).

absolute waiver is not permitted, waiver has a fairly wide potential scope.<sup>176</sup> Though some courts would interpret forms against drafters even where the form-recipient is commercially sophisticated and represented by counsel,<sup>177</sup> most courts no longer extend the doctrine to that case.<sup>178</sup> Still, courts likely would not countenance an agreement to accept *any* terms a form-drafter might offer, regardless of the content of those terms. In short, the rule of *contra proferentem* appears to function more as a sticky default<sup>179</sup> than as a true mandatory rule, at least where the recipient of the form is sophisticated.

Against individuals or unsophisticated parties, the rule takes on more of a mandatory quality. Form terms must essentially, under modern law, be reasonable to be enforced.<sup>180</sup> This rule may be conceived as part of a broader, meta-interpretive rule that denies the drafter of a bulk form an interpretive regime other than the one imposed by law — the one that filters form terms through a lens of unfair surprise.<sup>181</sup>

## 2. Formal Preconditions to Enforceability

The law occasionally overrides the parties' meta-interpretive intent by imposing formal preconditions to the enforceability of promises. Thus, for example, regardless of parties' concern for the interpretive value of their oral promises, where the Statute of Frauds applies an oral promise may not be enforced.<sup>182</sup> Admittedly, these formal requirements are, under modern law, a relatively minor exception to the general principle of the supremacy of parties' meta-interpretive intent, because courts and later statutes have consistently limited the Statute of Frauds; as Lon Fuller and Mel Eisenberg wrote:

The best general guide to the judicial interpretation of the Statute of Frauds is to remember this simple truth: the courts

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<sup>176</sup> REVISED UNIF. LTD. P'SHIP ACT § 103(b)(3) (2014–15).

<sup>177</sup> See *E. Bus Lines, Inc. v. Bd. of Educ.*, 509 A.2d 1071, 1073-74 (Conn. App. Ct. 1986) (applying the rule of *contra proferentem* against a bus company and in favor of a municipality even though the bus company “had participated actively in drafting the contract terms”).

<sup>178</sup> See *Beanstalk Grp. v. Am. Gen. Motors Corp.*, 283 F.3d 856, 858 (7th Cir. 2002) (citing several cases).

<sup>179</sup> Cf. *Snyder*, *supra* note 157 (discussing such default rules).

<sup>180</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211 & cmt. c (1981).

<sup>181</sup> See *id.* § 211.

<sup>182</sup> See U.C.C. § 2-201 (2015) (imposing a codified statute of frauds for contracts for the sale of goods over \$500); RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981) (outlining the rule of the Statute of Frauds that has become embedded in the common law).

have not favored the Statute of Frauds. Generally — although certainly not invariably — whenever the words of the Statute leave any leeway (and often when they do not), the courts have restricted its meaning and found ways of making an oral agreement enforceable.<sup>183</sup>

But where the Statute of Frauds is applied, it substitutes a formal rule for the meta-interpretive intent of the parties. The force of the formal rule is that only the parties' signed, written expressions, rather than the totality of their expressions, are to be interpreted to construct the parties' substantive rights.

### 3. Other Exceptions to the General Principle

There are other ways in which courts might vary from parties' intent, or from reconstruction of the deal the parties would hypothetically have made even if that deal is evident, in applying an interpretive methodology. For example, evidence could theoretically be ruled inadmissible under procedural rules, like the *Federal Rules of Evidence*, even though the parties would have preferred at the time they formed their contract that courts consider it in constructing their substantive obligations. Thus, for example, even "relevant evidence" may be precluded if it is "outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."<sup>184</sup> Similarly, it is possible, as a general matter, that a court could exclude evidence that violates constitutional rights, legislative rights, or other matters of strong public policy; this doctrine has not been developed significantly by the courts in the context of meta-interpretation, probably because it does not often arise, but several scenarios are possible. For example, in an extreme case, suppose the parties have an explicitly racist meta-interpretive intent when they make their contract; in that case, as a matter of public policy, courts should not permit that intent to govern meta-interpretation, just as they should not permit it to govern substantive rights.<sup>185</sup>

Perhaps a more nuanced case would involve a meta-interpretive intent that shifts a significant decisional burden to the court; for example, if the parties intend that the court employ an overly complex

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<sup>183</sup> LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 1038 (8th ed. 2006).

<sup>184</sup> FED. R. EVID. 403.

<sup>185</sup> See *RESTATEMENT (SECOND) OF CONTRACTS* § 178 (1981) (describing when terms are "unenforceable on grounds of public policy").

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algorithm to interpret their contract, it is possible that the court will simply not oblige them. The most significant implementation of this principle probably arises in the doctrines concerning the vagueness of the parties' expressions of intent to one another; thus, for example, under the Second Restatement, "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."<sup>186</sup>

Others have urged potentially broader departures from the notion that parties should explicitly be able to control their meta-interpretive intent, although whether they do this and their impacts are controversial. For example, Professor Omri Ben-Shahar has argued that courts should fill gaps in contracts to favor the party with the stronger bargaining power, on the thought that the stronger party would have been able to fill in terms that suited its own interest.<sup>187</sup> This is itself a meta-interpretive principle; that is, it guides courts' interpretations, instructing them to evaluate the general bargaining power of the parties in order to interpret their substantive obligations to each other. One problem with this interesting view, however, is that the weaker party may not agree with the stronger party's (and Ben-Shahar's) general, meta-interpretive principle even where it would not have the power to fight specific terms dictated to it by the stronger party. At least, were Ben-Shahar's argument valid, the recognition of the distinction between interpretive and meta-interpretive questions would commit him to the notion that the weaker party would indeed need to accept his meta-interpretive principle; that is, that the stronger party would indeed need to be able to extract assent from the weaker party not just on substantive but also on meta-substantive principles.

### III. META-INTERPRETATION IN DOCTRINE: THE PAROL EVIDENCE RULE

This Part briefly lays out some ways in which modern contract doctrine already adopts the meta-contextualism I propose. Note that the discussion in Part III.B also supports this proposition because it helps explain the law's combination of mandatory meta-contextualism with default (but modifiable) substantive-contextualism. Specifically,

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<sup>186</sup> *Id.* § 33(1).

<sup>187</sup> Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 398 (2009). I have outlined some general critiques of this theory in an unpublished manuscript. See Shawn J. Bayern, *The Limits of Bargaining Power as an Interpretive Aid* (Fla. State Univ. Pub. Law Research Paper No. 381, 2009), available at <http://ssrn.com/abstract=1430704>.

it suggests that (1) the choice between textualism and contextualism is largely under the control of the parties, and (2) this choice (i.e., the meta-interpretive one) is decided on contextualist rather than textualist grounds. The law on this matter is inconsistent, however, and the current state of the doctrine is not a significant feature of my normative argument; this Part's sketch of the law is meant only to shed some light on existing doctrine and to suggest that what I propose is, by virtue of its partial appearance in existing doctrine, workable.

The parol-evidence rule is the main mechanism by which parties may choose their interpretive regime under modern law. Rife with confusion, the rule — at least, the form of it expressed by the *Restatement (Second) of Contracts* — is nonetheless largely consistent with the principles that this Article has outlined.

The Second Restatement's parol-evidence rule reads in relevant part, as a black-letter matter, as follows:

- (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
- (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.<sup>188</sup>

An “integrated agreement,” in turn, is defined as simply “a writing or writings constituting a final expression of one or more terms of an agreement.”<sup>189</sup> This suggestion of the relevance of the parties' intent for the writing to constitute a final agreement is confirmed by section 209(3) and the official comment to section 209. Section 209(3) reads: “Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.”<sup>190</sup> The comment to the section reads as follows:

No particular form is required for an integrated agreement. Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive. The intention of the parties may also be manifested without explicit statement and without signature. A letter,

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<sup>188</sup> RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

<sup>189</sup> *Id.* § 209(1).

<sup>190</sup> *Id.* § 209(3).



telegram or other informal document written by one party may be orally assented to by the other as a final expression of some or all of the terms of their agreement. Indeed, the parties to an oral agreement may choose their words with such explicit precision and completeness that the same legal consequences follow as where there is a completely integrated agreement.<sup>191</sup>

As a result, the Second Restatement's parol-evidence rule appears to work roughly as follows: first, the court determines — using all available evidence, including evidence outside the writing — whether the parties intended a writing to preclude other evidence of the parties' intent as to substantive rights and duties. If so, the court constructs the parties' duties from the writing;<sup>192</sup> otherwise, it does not treat the writing as anything more than it has found the parties intended it to be.<sup>193</sup>

In short, this is just the meta-contextualist approach I propose. It is meta-contextualist in both senses important to my argument: it (1) separates the interpretive and meta-interpretive questions, and then (2) uses context to answer the meta-interpretive question.

Indeed, the parol-evidence rule could be simplified if we stopped here. The Restatement, and much modern doctrine, complicates the matter by distinguishing further between “partial” and “full” integrations.<sup>194</sup> In my view, such a distinction is a red herring. All that matters, as to the particular substantive question that has arisen in litigation, is whether the parties have intended for the interpretation of their agreement to be textualist or contextualist. This is true regardless

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<sup>191</sup> *Id.* § 209 cmt. b.

<sup>192</sup> The Restatement is contextualist in one further respect, which is that it would use the context of an integrated writing to interpret it. *See id.* § 212(1) (“The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances . . .”). While I agree that this is an appropriate default rule, my approach to meta-interpretation would require that the court first determine what the parties' intent was as to the interpretation of the writing; thus, I would reframe § 212(1) as explicitly meta-contextual rather than contextual. It is not clear that the Restatement intends in § 212(1) to prevent parties from making a meta-interpretive choice, but the Restatement is clearly contextualist in this regard. *See id.* cmt. c (“The rule . . . permits reference to the negotiations of the parties, including statements of intention and even positive promises, so long as they are used to show the meaning of the writing.”).

<sup>193</sup> *See id.* § 216 cmt. e (“[A merger] clause does not control the question whether the writing was assented to as an integrated agreement, the scope of the writing if completely integrated, or the interpretation of the written terms.”). This is so because the existence of the clause alone is only evidence — not presumptive evidence — about the parties' intent.

<sup>194</sup> *See id.* § 210 (defining “completely integrated” and “partially integrated” agreements).

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of whether the written agreement is “partially” or “completely” integrated; indeed, the level of integration of the agreement need never be found as a general matter, because the only relevant legal question in deciding a case is whether the parties intended the writing to answer the question that has arisen. Much effort could be saved in determining the role of written agreements if this distinction in the parol-evidence rule were dropped and if courts paid attention simply to the distinction between interpretive and meta-interpretive questions — between the duties that the parties have agreed upon and the way in which the parties have agreed that the duties are to be determined.

#### CONCLUSION

Modern contracting parties often understand enough about contract law to have meta-interpretive preferences — that is, preferences that concern the interpretive regime that courts or other institutions should use to determine the parties’ substantive, first-order rights and duties under a contract. Recognizing parties’ meta-interpretive preferences is important simply because they may have such preferences; as in the rest of contract law, that parties have decided a matter is weighty and often dispositive.

As with other interpretive matters, however, it is difficult to derive from theoretical principles what parties actually want. The world of contracting is too diverse and complicated to be reduced to simple theories that aggregate large groups of parties. The appropriate resolution to meta-interpretive questions should parallel the resolution of interpretive questions, and at least in the first instance, any relevant features of context may be necessary to determine those preferences in individual cases. This Article has defended the use of context to resolve meta-interpretive questions — a position it has called *meta-contextualism*.

Treating meta-interpretive questions like other questions strongly suggests that meta-interpretive rules of contract law should be default rules, as commentators like Alan Schwartz and Robert Scott have argued.<sup>195</sup> That is, that such rules should be under the control of the parties. But the recognition of meta-interpretive questions as harmonious with other features of parties’ agreement should restore a focus on what actual contracting parties, rather than theoretical ones, prefer. Schwartz and Scott’s leading modern defense of economically motivated contract textualism answers meta-interpretive questions, at least for broad classes of business firms, based largely on an economic

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<sup>195</sup> See Schwartz & Scott, *Contract Theory*, *supra* note 5, at 596; see also *supra* Part I.A.

simplification of the world — namely, on the proposition that business firms maximize profits and are therefore necessarily risk-neutral. In the economic study of actors, it has often proved helpful to characterize actors as maximizers of particular criteria; thus, for example, economists often say that individuals maximize utility, firms maximize profits, administrative agencies maximize revenue (in order to expand their influence), and politicians maximize votes (to increase their chances of reelection).<sup>196</sup>

Like many economic simplifications, the proposition that business firms maximize profits is insightful and contains some truth. But like many economic simplifications, it is not in fact true.<sup>197</sup> It is certainly not accurate enough to derive, in the general case, a broad risk-neutrality among all firms that have five or more employees, or all firms adopting particular organizational forms, as Schwartz and Scott argue.<sup>198</sup> As a result, while Schwartz and Scott have put forward a virtuosic argument in favor of textualism, it is an argument that does not, on its own terms, apply outside the theoretical world of academic economists.

It may, however, be true that some parties do, in particular situations, prefer textualism or something similar to it.<sup>199</sup> If parties have this preference, it should ordinarily influence the way courts construct substantive rights and duties. The reasons for this influence follow only from parties' actual preferences, however, and it will ordinarily be necessary to look at context, rather than just text, in order to determine those actual preferences — at least at enough of the context to be confident, for example, that the parties are sophisticated and intended their merger agreement to apply. For sophisticated firms, this determination is unlikely to require even so much context as to require discovery; a court could likely, properly, decide that two public companies are sophisticated, were represented by counsel, and intended their merger clause to govern the rest of their contract. Often there will not be any way for the parties to dispute this plausibly. The door must remain open, however, to nontextual sources when it appears those sources suggest there was in fact no meta-interpretive agreement — or else, in applying textualism to the parties' individual case, we would be doing something other than following their preferences.

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<sup>196</sup> COOTER & ULEN, *supra* note 46, at 16.

<sup>197</sup> Similarly, it would be hard to explain all political behavior with the proposition that politicians maximize votes and administrative agencies maximize revenue.

<sup>198</sup> Schwartz & Scott, *Contract Theory*, *supra* note 5, at 545-47; *see also supra* Part I.A.1.

<sup>199</sup> *See supra* Part I.

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Though the parties' intent ordinarily should govern, both as to meta-interpretive questions and as to substantive questions in contract law generally, this Article has also outlined situations in which the choice of an interpretive regime should not be fully under the control of the parties.<sup>200</sup> For example, it is appropriate that the rule of *contra proferentem* be difficult to displace, particularly in the case of consumer contracts and insurance contracts.

In general, the law has tended to move toward the view that this Article has proposed. Ordinarily the law is not understood in this way, partly because it is overly complicated<sup>201</sup> and partly because not enough attention has been paid to distinguishing interpretive from meta-interpretive questions. In the end, however, it would not be a radical shift to adopt this Article's doctrinal suggestions. The shift would simply restore focus to the parties' actual intent, as opposed to (1) on one hand, an aimless view of the role and mechanics of contract interpretation, and (2) on the other, a solely deductive, theoretical view that infers parties' preferences without regard to what those preferences really are.

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<sup>200</sup> See *supra* Part I.

<sup>201</sup> See *supra* Part II (discussing the needlessly complicated doctrines of "partially" and "completely" integrated documents).