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PSEUDO-CONTRACT AND SHARED MEANING ANALYSIS

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Over the last several decades, courts and legal scholars have struggled with whether or when to consider boilerplate text as contract. Recent attempts to draw all boilerplate text into "contract" seek to end that struggle but have shifted contract law away from its traditional focus on enforcing parties' actual agreements and common understandings. This has required a series of ad hoc "fixes" to contract law reminiscent of the medieval use of "epicycles" to try to square geocentric theories of planetary motion with recalcitrant observations of a nongeocentric universe. This shift has been transforming the meanings of contract law's central concepts. We view the shift as an undiagnosed paradigm slip, resulting in a generalized theory of "contract" as a mere assumption of risk that allows private obligations to be created unilaterally without reaching the actual agreements required by core contract law principles. Some now call this new sort of obligation "contract." But it is pseudo-contract, resembling contract without fulfilling its necessary conditions of validity.

The recent paradigm slip into pseudo-contract raises a complex blend of linguistic, factual, conceptual, practical, normative, and doctrinal problems. Under the mantle of "contract," the problems of pseudo-contract have remained largely hidden. In this Article we expose these problems and develop a more nuanced and coherent method of analysis — shared meaning analysis — that courts and other legal analysts can use to determine when any particular piece of boilerplate text does, or does not, contribute an actual term to a contract.

Because facts about language have received insufficient attention in discussions of how boilerplate text may (or may not) contribute to contract meaning, we launch our analysis by developing several seminal insights into the dependence of meaning on social cooperation from the language philosopher Paul Grice. Drawing on his insights into language, we develop a contemporary definition of the shared meaning of a contract (or the "common meaning of the parties") as that meaning that is most consistent with the presupposition that both parties were using language cooperatively to contract. We then offer a simple conceptual test that courts can use to discern this shared meaning, distinguish contractual from noncontractual uses of boilerplate text, and prevent contract from slipping into pseudo-contract. We pay particular attention to diagnosing deceptive or misleading uses of boilerplate text. Using examples ranging widely from clickwrap

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consumer contracts to high-end boilerplate contracts between sophisticated parties, we show how shared meaning analysis applies generally to many varieties of contract.

INTRODUCTION

The Restatement (Second) of Contracts states that when interpreting a contract, "the primary search is for a common meaning of the parties."[1] Courts therefore engage in contract interpretation when they seek to discern parties' shared meaning.[2] Regardless of one's normative theory of contract, the central focus of justification is on the enforcement of common terms that parties agree to when they form contracts. Without the presence of an actual agreement freely reached, the state is not easily justified in enforcing a contract, because instead of enhancing the parties' freedom of contract, the legal system would be limiting it.[3]

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[1] RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (AM. LAW INST. 1981).

[2] A contract may, of course, also have legal consequences that are not traceable to the parties' actual agreements over meaning, but discerning those consequences should, properly speaking, be a matter of construction and law — not interpretation and fact. *See id.* § 200 reporter's note; Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833–38 (1964). The Restatement (Second) of Contracts similarly explains that "[t]o the extent that a mutual understanding is displaced by government regulation, the resulting obligation does not rest on 'interpretation.'" RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c.

[3] This premise holds for a wide range of normative theories of contract, though it is often framed in terms of freedom of choice without attention to how choice can be exercised to produce agreements with shared meaning. For autonomy theorists following Immanuel Kant, for example, contract enforcement is justified by respect for private parties' autonomous choices to pursue their otherwise separate purposes by entering into cooperative arrangements with legal force. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS §§ 18–21, at 57–61 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (explaining Kant's "Doctrine of Right" as it relates to contract); Arthur Ripstein, Essay, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1407–08 (2006). For contract-as-promise theorists, such as Professor Charles Fried, contract enforcement is conditioned on the existence of a promise with freely chosen content. *See* CHARLES FRIED, CONTRACT AS PROMISE 57 (2d ed. 2015).

For reliance-based theorists, such as Professor Patrick Atiyah, only promises that are both freely chosen and reasonably relied upon should give rise to contractual liability. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 2–4 (1979); *see also* GRANT GILMORE, THE DEATH OF CONTRACT 67–80 (2d ed. 1995). For neo-Aristotelian theorists, such as Professor James Gordley, the capacity of free choice is viewed as having a particular natural function (it aims to foster human flourishing), but some actual exercise of that capacity is still needed to give content to a contract. *See generally* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991). For theorists who would ground contract enforcement in the logic of property transfer, such as Professor Peter Benson, the content of the transfer must still be free and voluntary to be legally recognized. *See* Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW 118, 127–38 (Peter Benson ed., 2001). Contract law can also be understood in terms of empowerment — that is, as a body of doctrine that enables parties to fashion legally enforceable commitments so as to engage other parties' instrumental motives and induce a reciprocal action or promise. Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 763–77 (2016).

For an early statement of the classical economic view that revealed preferences measure utility, see P.A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 ECONOMICA 61 (1938). Freely chosen agreements are therefore sometimes said to produce information about the

The famous case of *Thompson v. Libbey*[4] might well have begun with a conversation in 1883 that proceeded as follows. Mr. Thompson entered Mr. Libbey's place of business and proposed: "If you give me all of your logs marked 'H.C.A.' cut from the last two winters, then I will pay you ten dollars per thousand feet, boom scale at Minneapolis, Minnesota." Mr. Libbey said, "I accept." By using language to make offers and acceptances, the two would have formed a contract, which included a shared meaning to which both parties actually agreed.[5]

Now consider the kind of text often called "contract" in today's computer-based information society. Ms. Gerhardt decides to purchase a song online from the iTunes Store to listen to on her personal device. After she clicks the "purchase" link for a listed price of ninety-nine cents, a digital box opens on her computer screen with a hyperlink labeled "terms and conditions." The digital text at this hyperlink would stretch to thirty-two pages if printed.[6] The box requires her to click "I agree" to complete the purchase. Ms. Gerhardt cannot rationally read so much text for such a small purchase, so she just clicks, as most consumers now do.[7]

Given that an actual agreement with common meaning is central to the normative justification of contract, these two examples — separated by great expanses of time and momentous changes in communication technologies — invite a significant question: Did all of the boilerplate text[8] attached to Apple's digital offer contribute a shared meaning to the agreement that the parties reached today in the same way that all of the sentences in Mr. Thompson's oral offer did to the earlier agreement in 1883? Theorists that we will call "assimilationists" say yes. We disagree, and we will demonstrate that our view is supported by clear linguistic considerations.

We define an "assimilationist" as any court or theorist that tries to assimilate all boilerplate text to "contract" so long as it is delivered with actual or merely constructive "notice" to a party who agrees to a more basic transaction. Assimilationists assume that all boilerplate text serves

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routes to mutual preference satisfaction and their enforcement to promote an efficient allocation of resources.

[4] 26 N.W. 1 (Minn. 1885).

[5] Here we consider a purely oral hypothetical and abstract from the actual facts of the case, which involved a dispute over whether a reduction to writing excluded additional terms. *See id.* at 1–2.

[6] *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 75 (2014) (noting that iTunes's 2014 boilerplate "terms and conditions" were thirty-two pages in length).

[7] *See, e.g.*, *id.* at 10–11; Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014). For further discussion, see *infra* section III.C.3, pp. 1176–77.

[8] We define "boilerplate text" as any preformatted text that is provided during contract formation to multiple parties, on multiple occasions, or both.

the same essentially contractual function, and they do not recognize the critical difference between terms that parties cooperatively communicate and agree to during contract formation and the increasingly copious boilerplate text that is merely tacked onto that agreement but never read. To track this fault line, we put many contemporary uses in today's boilerplate of "term," "agreement," and "contract" (and others like "consent" and "assent") in scare quotes, and we will continue to do so throughout, because they have fundamentally different meanings than the same-sounding words as used in 1883. At first slowly and imperceptibly, but now with mounting speed and generality, many courts and legal analysts have responded to the expanding uses of boilerplate text in the digital age by diminishing the type of agreement (now usually called "assent") required to produce "terms" and "contracts."[9]

At the end of this process, "contract" — which now allows businesses to create legal obligations unilaterally without obtaining any actual agreement over many boilerplate "terms" — is no longer contract. "Agreement" is no longer agreement. "Consent" is no longer consent; "assent" is no longer assent; and "terms" — which now include enormous streams of boilerplate text that are delivered but never read by anyone — are no longer terms with shared meaning. Contract, which was for centuries a legal regime grounded in actual agreement with common understanding, has in many instances become pseudo-contract — a system of private obligations with expanding contents that are created unilaterally by one party. The fake "terms" in a regime of pseudo-contract invite burgeoning forms of deception that are difficult for courts to discern because they are hidden under the mantle of "contract."

The changes in technology that have been altering how people communicate to form contracts began incrementally but have accumulated over time — with especially large transformations gathering over the last two decades. Until the latter part of the nineteenth century, many non-oral contracts were still written by hand. Though the Gutenberg printing press had been invented in the fifteenth century, its use was expensive and required physical manipulation of movable block types (commonly referred to as "typesetting") for each printed page.[10] Production of text began to change in the 1910s, when standardized typewriter use became widespread.[11] This technology allowed parties to begin to use typed documents and wires to contract or reduce their agreements to writing. A limited number of duplicate copies could also be created while typing — typically by using multiple sheets of carbon paper.

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[9] For extensive discussion of this shift, see MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 30 (2013).

[10] Jay T. Last, *Two Communications Revolutions*, 86 PROC. IEEE 170, 170 (1998).

[11] Kate Boyer, *"Miss Remington" Goes to Work: Gender, Space, and Technology at the Dawn of the Information Age*, 56 PROF. GEOGRAPHER 201, 206 (2004).

When the photocopier went to market in 1959, mass duplication of text became much easier and less expensive.[12] Beginning in the late 1970s, the invention of the personal computer freed businesses from reliance on typewriters and gave them greatly expanded abilities to produce, store, and manipulate standard form text. Computer printers then made mass duplication of standard form text even easier and less expensive. With the rise of the internet and online contracting beginning in the mid-1990s,[13] it finally became possible to deliver massive amounts of pre-stored boilerplate text to multiple parties via mere hyperlinks or in other digital forms. All of these technological developments have changed how parties typically contract. The most recent developments are exceptional, however, in that they have generated an unprecedented explosion in the amount of boilerplate text that is often conveyed during contract formation and in the methods and forms in which it is conveyed.[14]

With each small change in technology, courts tried valiantly to extend traditional contract law concepts and principles to these new settings.[15] But much like the proverbial frog in the pot of boiling water, these attempts to stretch older terms and concepts to new situations ul-

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[12] THOMAS KERN & LESLIE P. WILLCOCKS, THE RELATIONSHIP ADVANTAGE: INFORMATION TECHNOLOGIES, SOURCING, AND MANAGEMENT 89 (2001).

[13] John A. Rothchild, *Introduction*, *in* RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 1, 1 (John A. Rothchild ed., 2016) ("The inception of electronic commerce may be dated to 1995, when the U.S. National Science Foundation privatized its internetworking project, the NSFNet, eliminating the acceptable use policy that had restricted the network's use to non-commercial purposes.").

[14] Contracting has, in other words, shifted with larger societal developments from pre-print, to print, to information-based technologies and communications platforms. For a helpful description of these changes, see RICHARD SUSSKIND & DANIEL SUSSKIND, THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS 145–87 (2015). The most recent changes from print-based to information-based societies are proving every bit as monumental as earlier transitions from oral to written and from written to print-based societies. *See id.* ("Although we think little today of using word processing software and laser printers to produce high-quality documentation, these facilities were rare as recently as the 1980s and only came into widespread usage in the 1990s. . . . A succession of technological innovations, such as large-volume photocopiers, transferable word processing files, high-capacity printers, and Internet-based file transfer, have changed the way we produce and distribute documents." *Id.* at 150.).

[15] Many courts have struggled with these issues but not always in an altogether satisfying manner. *See, e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28–30 (2d Cir. 2002) (addressing issues of reasonable notice in a clickwrap context); Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (examining reasonable notice in a browsewrap context); DeJohn v. .TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (C.D. Ill. 2003) (addressing need for reasonable accessibility of linked terms); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (finding mutual assent in a clickwrap context); State *ex rel.* U-Haul Co. v. Zakaib, 752 S.E.2d 586, 593–94 (W. Va. 2013) (suggesting need for accessibility of text in clickwrap contexts). *Compare also, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996) (suggesting assimilationist approach to evaluating boilerplate text in a rolling contract context), *with* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (construing boilerplate text that comes after the point of purchase as mere proposals for addition to a contract).

timately kept the surface of contract law looking the same while obscuring a more fundamental break in function. The last two decades have brought the law into a qualitatively different phase of development. Incremental attempts to preserve the coherence of legal doctrines have passed a tipping point, resulting in a qualitative break in the meaning and function of central concepts in the law.

We will describe the result of this process as an unconscious or undiagnosed "paradigm slip." In an unconscious paradigm slip, each small step in application aims to preserve the purposes, basic concepts, and coherence of a body of doctrine, but the overall result is a largely unintended and more fundamental change in the meanings and functions of its core concepts.[16] As a result of a largely unconscious paradigm slip in contract law, many courts and scholars now assume that all boilerplate text contributes "terms" to a "contract" in largely unproblematic ways akin to the simpler uses of language to form contracts in 1883. They assume that pseudo-contractual text should be enforced as "contract" with minimal requirements of "assent," unless there is some standard contract law obstacle to enforcement arising from something like illegality or unconscionability. This is to treat pseudo-contract as contract without adequate reflection. A major noncontractual intrusion into the traditional sphere of contract law and modern market activity has gone largely unrecognized; or, at least, the full depths and problematic nature of the intervention have escaped widespread notice.

Perhaps an appropriate normative theory could be developed to ground what is occurring in the expanding regime of pseudo-contract, explaining how state enforcement of so many new "terms" can be justified other than by actual agreement with shared meaning. We suspect, however, that the paradigm slip has been generated less by a need for novel conceptions of private ordering and more from insufficient attention to linguistic questions of how text can produce shared meaning. Lacking any sound reason to replace contract, we must seek better methods of evaluating boilerplate text so as to bring contract law back into coherence with its core concepts, principles, and justifications. In this

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[16] Professor Thomas Kuhn first coined the term "paradigm shift" to describe what happens when enough observations about the world challenge a dominant theory that a fundamental shift to a new and incommensurable theoretical paradigm is needed, and is consciously produced, in order to account for the full set of facts. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10–22 (3d ed. 1996). A paradigm *slip* is different because it involves facts on the ground that are changing, and courts that are trying to extend prior doctrines and theories of contract to new situations in incremental fashions without deviating greatly from past precedent. The break is not necessarily recognized consciously, but the result is that some contemporary statements of contract law doctrine are no longer commensurable in meaning with seemingly identical legal statements from prior eras. For a discussion of some processes in contract law that fit this description, see generally Margaret Jane Radin, *The Deformation of Contract in the Information Society*, 37 OXFORD J. LEGAL STUD. 505 (2017).

Article, we offer "shared meaning analysis" as a way to broach that possibility by getting clearer on the central commitments of contract meaning and interpretation.

Shared meaning analysis contrasts with assimilationist approaches to evaluating boilerplate text but is consistent with long-standing approaches to contract interpretation, which are grounded in a nuanced and careful assessment of the common understandings that parties produce when they use language to form contracts. To help courts discern these shared meanings under today's conditions, we add precision to traditional approaches by building on the linguistic distinction, first treated rigorously by the philosopher of language Paul Grice, between what sentences mean (including any sentences delivered in boilerplate text) and what people mean when they use language to communicate with one another (including to form contracts).[17] We then define the "shared meaning" of a contract as the meaning parties produce and agree to during contract formation that is most consistent with the presupposition that both were using language cooperatively to form a contract.[18] This definition captures the most important considerations that have guided courts and helped them to discern the common meaning of the parties for centuries, in both historical and contemporary circumstances.

Part I builds on Grice's seminal insights into meaning to show how contract meaning depends on linguistic cooperation and what we call shared meaning. Part II argues that the dependence of contract meaning on linguistic cooperation is deep and, for all practical purposes, ineliminable. Whereas assimilationist approaches to evaluating boilerplate text appear simple enough on their face, they dispense with presuppositions of linguistic cooperation and thus face challenges of linguistic indeterminacy that have not yet been addressed, nor even recognized. Nor have assimilationists advanced any adequate normative theory for why contract formation by means of assumption of risk by noncognizant parties ought to replace traditional contract, with its basis in actual agreement with shared meaning.[19] Part III offers practical guidance to avoid the problems inherent in assimilationist approaches and the paradigm slip into pseudo-contract. It describes a simple conceptual test that courts can use to identify parties' shared meanings and separate contract from pseudo-contract in a principled and practical

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[17] *See* H. Paul Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS 41, 41–43 (Peter Cole & Jerry L. Morgan eds., 1975) [hereinafter Grice, *Logic and Conversation*].

[18] The common meaning of the parties cannot be discerned if the only factor considered is what a sentence would mean to a competent language speaker, regardless of whether it was ever cooperatively communicated. This approach is sometimes dubbed "objective." A contract also cannot be properly interpreted based on a deviant interpretation held secretly by one party. This approach is sometimes labeled "subjective."

[19] For an example of an assimilationist opinion that reconceives contract as mere assumption of risk, see *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). The court in *Gateway 2000* declared: "A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome." *Id.* at 1148.

manner. It then shows how shared meaning analysis applies generally to many varieties of contract, ranging from consumer clickwrap purchases to much larger transactions with high-end boilerplate text between sophisticated parties. The conclusion recapitulates the complex, interrelated, and mutually reinforcing problems of assimilationist approaches and the normative preferability of shared meaning analysis.

I. THE FOUNDATIONS OF CONTRACT MEANING: CONTEXT, CONVERSATION, AND COOPERATION

When changes in technology alter the way people communicate and the amount of text that can be delivered during contract formation, it is difficult to assess how contract law should respond without referring to linguistic fundamentals. Therefore, we begin by examining how parties use language to produce actual agreements for contracts.

The natural home for language use is to speak to other people in oral conversation. Sometimes, however, written or digital documents can be used in conversation in precisely the same way that oral language might have been. In either event, closer attention to how parties produce shared meanings through interpersonal linguistic exchange will clarify how contract meaning is produced.

Contract meaning depends on an implicit presupposition of cooperative language use to form a contract. To ground this claim, we draw on the work of Professor Paul Grice, the philosopher of language most responsible for establishing how aspects of meaning depend on linguistic cooperation. Recently, Grice's insights have proven influential for understanding a broad range of legal questions,[20] including some

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[20] *See, e.g.*, Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 260–61, 268–70 (1993) (invoking Grice to analyze how ambiguous or equivocal invocations of *Miranda* rights should be construed during police interrogations); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 933 n.20, 990–93 (1996) (invoking Grice's theory of conversational implicature to explain the effectiveness of legal reasoning by analogy); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1582–85 (1998) (invoking Grice to explain aspects of the evidentiary value of scientific testimony in judicial proceedings); Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 563–64 (2013) (identifying applications of Grice to patent construction); Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 716–19 (1985) (applying Grice's maxims to the psychology behind false advertising); Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 71–72 (1993) (examining the law of defamation using insights from Grice); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 505–06 (2005) (invoking Grice to analyze how religious symbolism should be assessed for Establishment Clause purposes); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1068–69 (2015) (invoking Grice to argue that the Necessary and Proper Clause is a source of implied congressional power to promote the general welfare); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1182–83, 1226–27 (invoking Grice to explain the status and content of

that relate to contract.[21] The relevance of Gricean insights to many legal questions is now widely accepted, especially when it comes to questions of constitutional and statutory interpretation.[22] Thus far, however, the most important implications of Grice's work for how to evaluate boilerplate text and diagnose the recent paradigm slip into pseudo-contract have not been recognized.

Nor have these contemporary linguistic insights been developed to produce a general and systematic approach to contract interpretation that reliably tracks the common meaning of the parties. One reason is that insufficient attention has been paid to linguistic questions as they apply to contract formation and meaning. Also, Grice's insights must be adapted in several ways to the contract setting. Building on Grice's well-known distinction between "speaker meaning" (or what a speaker

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many traditional canons of statutory interpretation); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 397–99 (1985) (invoking Grice's maxim of quality to defend the absurdity doctrine in statutory interpretation); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1106–08, 1131–33 (2003) (invoking Grice to explicate underappreciated costs and benefits to formalism as opposed to context sensitivity, with special applications to property law); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 949–52 (2009) (interpreting the Second Amendment using insights from Grice); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1955–56 (drawing on Grice and the interpretation-construction distinction to analyze how originalist constitutional theorists can rely on unwritten extraconstitutional sources in some forms of constitutional decisionmaking); Peter Meijes Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 381–83 (1990) (examining the treatment of perjury in criminal trials through a Gricean lens); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 544 (2011) (proposing a test for applying Grice's theories of conversational implicature to the legislative process).

[21] *See, e.g.*, Richard Craswell, *Do Trade Customs Exist?*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 118, 130–36 (Jody S. Kraus & Steven D. Walt eds., 2000); Jeffrey M. Lipshaw, *Lexical Opportunism and the Limits of Contract Theory*, 84 U. CIN. L. REV. 217, 242–43 (2016) (drawing on Grice to suggest that the amount of lexical opportunism that occurs in the day-to-day practice of contractual relations and litigation undermines the prospects of a general theory of contract); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1175–76 (2006) (invoking Grice to argue that "boilerplate is the first way station on the road from contract to property" because it is the result of "a trade-off between communicating intensively in a narrow sphere [and] communicating in a more stripped-down formal way in a wider variety of contexts"); Peter Meijes Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CALIF. L. REV. 189, 206–12 (1986) (applying Gricean theories to indicate the context sensitivity of offers and acceptances).

[22] *See* sources cited *supra* notes 20–21; *see also, e.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW (2014) (drawing on Gricean insights to guide interpretation in statutory and constitutional settings); Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 149–50 (2007) (exposing Gricean problems with originalist approaches to constitutional interpretation that are framed in terms of a search for framers' intentions instead of public meanings); Lawrence B. Solum, *Semantic Originalism* 1–2 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [http://perma.cc/8GFF-AYZ3] (relying on Gricean devices to provide a theoretical foundation for "original public meaning" as opposed to "'original intentions' of the framers" as a cornerstone for constitutional interpretation — if not constitutional construction).

intends when he or she utters a sentence) and "sentence meaning" (or what a sentence means independent of its occasion of use),[23] we offer a contemporary definition of the "shared meaning" of a contract. The shared meaning of a contract is the meaning that is most consistent with the presupposition that both parties were using language cooperatively to form a contract. Contract meaning has always properly depended on shared meaning in this sense,[24] but the recent paradigm slip from contract into pseudo-contract has begun to delink "contract meaning" from the common meaning of the parties.

A. Linguistic Cooperation and the Distinction Between Sentence Meaning and Speaker Meaning

It would be difficult to overstate the importance of Grice's insights into how meaning is produced in interpersonal linguistic exchange. In *Grice on Meaning: 50 Years Later*, Professor John Searle credits Grice with "revolutioniz[ing] and deepen[ing] our conception of language"[25] and producing one of the "two crucially important ideas that came out of the philosophy of language practiced in Oxford in the 1950's."[26] Though some details of Grice's work have proven controversial, the revolutionary ideas that Searle describes and that have withstood the test of time do not depend on acceptance of any controversial details. Rather, the core ideas we take from Grice are two. First, there is a distinction between what a *sentence* means and what a *speaker* means by uttering a sentence within a particular conversational context.[27] Second, when speakers use language to communicate, they speak in social contexts and implicitly rely on certain cooperative norms that govern the use of language to convey meanings.

Grice offers a series of examples to clarify the distinction between speaker meaning and sentence meaning.[28] One of the most famous is a

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[23] *See generally* Grice, *Logic and Conversation*, *supra* note 17. Grice first began to develop his analysis of this distinction in *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, 4 FOUND. LANGUAGE 225 (1968); and *Utterer's Meaning and Intentions*, 78 PHIL. REV. 147 (1969). Over the years, Grice further developed his analysis and applied it to propose resolutions to a host of philosophical problems. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989).

[24] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (AM. LAW INST. 1981) ("[T]he primary search [in contract interpretation] is for a common meaning of the parties . . . .").

[25] J.R. Searle, *Grice on Meaning: 50 Years Later*, 26 TEOREMA 9, 18 (2007).

[26] *Id.* He identifies the other major development as J.L. Austin's theory of illocutionary acts. *Id.*

[27] *Id.* at 10 (noting the central contribution was to "distinguish between sentence and word meaning on the one hand, and speaker or utterance meaning on the other hand").

[28] *See, e.g.*, Grice, *Logic and Conversation*, *supra* note 17, at 50–57.

recommendation that damns with faint praise.[29] Consider a recommendation by a law professor to a Supreme Court Justice who seeks to hire a law clerk. Imagine the letter says:

RECOMMENDATION LETTER

Dear Justice —

I am writing to recommend my student, Xavier Marshall, for a clerkship in your chambers. I know Xavier very well, having had him in four of my courses — two of which required extensive legal research and writing.

Xavier showed up on time every single day. I hope you will give Xavier your most serious consideration.

[Signed]

The sentences in this recommendation say a number of things: that the professor had Xavier in four classes, that Xavier showed up on time every single day, and that the professor hopes the Justice will give Xavier serious consideration for a clerkship position. To state that the sentences say these things means that anyone with a competent understanding of English, but no knowledge of the circumstances of utterance, would understand these sentences to have these meanings.[30] That is sentence meaning. But the professor's recommendation also clearly implies, without any sentence ever saying, that the student is unqualified for a Supreme Court clerkship.

How can this additional meaning be part of what the professor successfully conveyed with this recommendation, when the meaning is neither contained in nor can be logically derived solely from the sentences in the recommendation? It is not the sentences on their own that damn with faint praise. Every sentence in the recommendation letter could be true of an excellent candidate for a Supreme Court clerkship.

Grice resolves this issue by directing attention away from sentence meaning and back to the social and interpersonal nature of conversation, where speaker meaning can be discerned. People typically use language in interpersonal conversations with other people — and not just to utter sentences in the abstract, with no intended audience or conversational purpose.[31] Conversations are, in turn, distinguished by their

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[29] In Grice's version, "A is writing a testimonial about a pupil who is a candidate for a philosophy job, and his letter reads as follows: 'Dear Sir, Mr. X's command of English is excellent, and his attendance at tutorials has been regular. Yours, etc.'" *Id.* at 52.

[30] *See, e.g.*, *id.* at 44 (construing the meaning of a *sentence* in English as the conventional meaning that one would attribute it "[g]iven a knowledge of the English language, but no knowledge of the circumstances of the utterance"). There is, of course, a further question whether knowledge of the English language already brings an element of social context into the equation.

[31] Grice actually makes two distinct points to explain the predominantly conversational nature of language use. First, "[a] dull but, no doubt at a certain level, adequate" explanation of the predominantly social use of language is "that people DO behave in these ways; [that] they have learned to do so in childhood and not lost the habit of doing so; and, indeed, [that] it would involve a good deal of effort to make a radical departure from the habit" relating to language use. *Id.* at 48.

purposes and are governed by cooperative norms, which shape how language can be used to communicate meanings. In one crucial passage, Grice explains:

> Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction. This purpose or direction may be fixed from the start (e.g., by an initial proposal of a question for discussion), or it may evolve during the exchange; it may be fairly definite, or it may be so indefinite as to leave very considerable latitude to the participants (as in casual conversation). But at each stage, SOME possible conversational moves would be excluded as conversationally unsuitable. We might then formulate a rough general principle which participants will be expected (ceteris paribus) to observe, namely: Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged. One might label this the COOPERATIVE PRINCIPLE.[32]

Based on this understanding of how language works, Grice then introduces the technical concept of a "conversational implicature." The conversational implicatures of uttering a particular sentence to another person in a conversation are whatever one must assume the speaker to have rationally sought to convey with the utterance, within the particular conversation, in order best to preserve the assumption that the speaker was observing the Cooperative Principle applicable to that conversation.[33]

People sometimes convey meanings by conversational implicature — that is, by implicitly presupposing and relying upon the cooperative norms that govern interpersonal linguistic exchange.[34] These meanings, which are now commonly referred to as "speaker's meaning[s],"[35] can go beyond and sometimes even contradict sentence meaning.

Second, and more fundamentally, "any one who cares about the goals that are central to conversation/communication (e.g., giving and receiving information, influencing and being influenced by others) must be expected to have an interest, given suitable circumstances, in participation in talk exchanges that will be profitable only on the assumption that they are conducted in general accordance with [certain cooperative principles and maxims that govern the social use of language]." *Id.* at 49.

[32] *Id.* at 45.

[33] PAUL GRICE, *Utterer's Meaning and Intentions*, *in* STUDIES IN THE WAY OF WORDS, *supra* note 23, at 86, 86.

[34] At the same time, however, conversational implicatures and the application of the cooperative norms that give rise to them depend on the nature of speech and conversation, and not on extralinguistic considerations that might make other norms (like norms of politeness) relevant to speech. Grice thus says that "[t]he conversational maxims, . . . and the conversational implicatures connected with them, are specially connected . . . with the particular purposes that talk (and so, talk exchange) is adapted to serve and is primarily employed to serve." Grice, *Logic and Conversation*, *supra* note 17, at 47.

[35] *E.g.*, GRICE, *supra* note 33, at 103; Solum, *Constitutional Texting*, *supra* note 22, at 145.

For example, by writing a recommendation letter to the Justice, the law professor and Justice are engaging in a conversation that has the common purpose of producing information relevant to the Justice's hiring decision. Neither of them is joking or being dishonest or indulging in irrelevancies. When it comes to sentence meaning, however, the recommendation letter says far too little to help the Justice make a hiring decision. To preserve the presupposition of cooperation, the Justice must therefore infer either that the professor lacks sufficient evidence to say anything more that would be relevant to this hiring decision[36] or that this letter contains the main information that the law professor has that is relevant to the hiring decision.[37]

The first explanation is precluded by the fact that according to the letter, the professor had Xavier in four courses, two of which required extensive legal research and writing. Given that experience, the professor could have easily said something useful about Xavier's legal research and writing skills. Both the professor and the Justice know — and know that the other knows — that the mere fact that Xavier showed up on time for class every day is an insufficient ground to hire him for a Supreme Court clerkship. Hence it can be inferred — by the Justice or any third party who understands the cooperative purposes of this conversation and the relevant aspects of the legal trade — that the professor meant to imply that the student is *not* qualified for a Supreme Court clerkship. In Grice's words, the professor "must . . . be wishing to impart information that he is reluctant to write down."[38]

The professor successfully conveyed a recommendation not to hire by conversational implicature, without ever conveying any sentence with that meaning. The meaning was part of the professor's speaker meaning, which the professor succeeded in sharing with the Justice only by relying on implicit norms of linguistic cooperation.[39]

Part of the power of the recommendation example lies in how obvious the professor's implied meaning is, despite the impossibility of logically deriving it from the literal meaning of any sentence or combination of sentences conveyed. The professor's implied meaning will be obvious even to people who have never heard of nor made conscious reference to any of Grice's technical linguistic work or rules of linguistic cooperation. When people understand one another's meanings, the simple fact

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[36] On this interpretation, the professor would be trying to adhere to what Grice calls the "maxim[s] of Quality," which instruct parties not to make any contributions to conversations that they believe to be false or for which they lack adequate evidence. *See* Grice, *Logic and Conversation*, *supra* note 17, at 46.

[37] On this interpretation, the professor would be trying to adhere to one of Grice's maxims of "Quantity," which instructs parties "not [to] make [their] contribution[s] more informative than is required," *id.* at 45.

[38] *Id.* at 52.

[39] *Id.* ("This, then, is what he is implicating."). Grice calls this a case of implicating something by *flouting* a maxim of Quantity. *Id.*

of the matter is that they often use complex linguistic capacities, without knowing every detail about how the capacities work. What is missing from a conception of meaning that focuses only on literal meaning, as derived solely from sentence meaning and logic, is a recognition of the more complex ways that people rely on the cooperative norms of language to communicate meanings.

Social context and presuppositions of cooperation matter for an interpretation of the mutual understandings that people produce with language. That is true when parties use language to form contracts just as it is for examples of damning with faint praise, or countless other linguistic implicatures that are part of everyday social life. In contract law, presuppositions of cooperative language use to contract are commonly used to ground inferences that parties' contracts contain, among other things, reciprocally conditioned commitments to induce one another's actions or commitments (and not, say, to two disconnected unilateral commitments). In *Wood v. Lucy, Lady Duff-Gordon*,[40] Judge Cardozo also relied on these presuppositions to find an implied duty to use reasonable efforts to distribute products under an exclusive licensing arrangement that would have created no obligations at all to distribute if one were to look only at sentence meaning.[41] Construed literally, the contract created obligations to remit royalties for any sales but no obligations to sell. But there was more to this contract than its literal meaning.[42]

B. The Conversational Maxims that Allow Parties to Produce Agreements with Shared Meaning

Though Grice's seminal work on language is critical for contemporary understandings of meaning, it must be developed in several ways if one is to understand contract meaning. One reason for this is that Grice distinguishes conversation types by their purposes but focuses most of his attention on articulating the conversational maxims that apply to conversations that aim at an exchange of information.[43] When parties use language to form contracts, their aim is different: it is to propose

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[40] 118 N.E. 214 (N.Y. 1917).

[41] *Id.* at 215.

[42] In *Wood*, the duty to use reasonable efforts could be inferred from the presupposition that the parties were using language cooperatively to contract and hence to induce return actions or commitments from one another. For further explanation, consider the cooperative maxims discussed in section B.

[43] Grice concedes this limitation of his theory. While recognizing that conversations can serve many purposes, he notes that his descriptions of conversational maxims presume conversations that aim at "a maximally effective exchange of information." Grice, *Logic and Conversation*, *supra* note 17, at 47. He explains that because of this limitation, his "scheme needs to be generalized to allow for such general purposes as influencing or directing the actions of others." *Id.* But he also concedes that "there are too many types of exchange . . . that [his theory of conversational maxims] fails to fit comfortably." *Id.* at 48.

and discuss terms in an attempt to reach a mutually acceptable agreement for a contract. The agreement they seek is future oriented, relating to commitment rather than knowledge. Parties seek to reach an agreement with common terms that each might be willing to commit to *make true* — conditional on the other playing his or her part. To that end, parties engage in a number of familiar speech acts — such as offers, counteroffers, acceptances, rejections, and revocations — to see if they can reach an actual agreement for a contract.

When discussing cooperative conversations that aim at the exchange of information, Grice suggests that adherence to the general Cooperative Principle requires joint commitment to four more specific conversational maxims[44]:

- *The Maxim of Quantity* instructs parties to say neither too much nor too little given the shared purpose of the conversation and the practical interests and attention of the parties.[45]
- *The Maxim of Quality* instructs parties not to make any contributions to conversations that either believes to be false or for which either lacks adequate evidence.[46]
- *The Maxim of Relation* instructs parties to make their contributions relevant to the conversation's common purpose.[47]
- *The Maxim of Manner* instructs parties to make their contributions clear and perspicuous by avoiding obscurity of expression, ambiguity, undue length, and lack of coherence in orderly presentation.[48]

Two of Grice's maxims — the Maxims of Quantity and Manner — apply well to contract formation as he originally stated them. To cooperate linguistically to form a contract, parties must seek to say neither too much nor too little (the Maxim of Quantity) given the parties' common aims and practical purposes in contracting. Parties must also seek

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[44] Grice refers to four "categories" of maxim: "Quantity, Quality, Relation, and Manner." *Id.* at 45. For ease of presentation, we refer to these "categories" as four "Maxims" (of Quantity, Quality, Relation, and Manner), using capitalization to mark our revised terminology.

[45] *Id.* at 45 (explaining that the Maxim of Quantity "relates to the *quantity* of information to be provided" (emphasis added)).

[46] *Id.* at 46 (explaining these maxims fall under the more general supermaxim, "Try to make your contribution one that is true").

[47] *Id.* (parsing the maxim, "Be relevant").

[48] *Id.* (explaining how all these more particular requirements fall under the supermaxim, "Be perspicuous").

to speak clearly and perspicuously, as required by the Maxim of Manner, to produce a common meaning of the parties.

But because contracts involve commitments rather than knowledge, whereas Grice's Maxim of Quality is focused on beliefs, evidence for beliefs, and knowledge, the Maxim of Quality requires adaptation to apply to uses of language to contract. Grice's Maxim of Quality must be expanded to contain an additional requirement, which relates to commitment:

> ◆ *The Contractual Maxim of Quality* instructs parties to offer or agree to commit themselves only to that which they are willing and able to do.[49]

Parties may be unwilling or unable to do something because of physical facts, such as a known impossibility, or because of legal facts that render what they are offering inalienable or market-inalienable.[50]

Breach of Grice's original Maxim of Quality can be understood as a form of bad faith during the process of negotiation.[51] Making statements that one does not believe or for which one lacks adequate evidence can subject contracting parties to legal sanctions,[52] and is also addressed by other contract doctrines,[53] including rules that set forth invalidating conditions related to fraud, concealment, and nondisclosure.[54] The *Contractual* Maxim of Quality, which requires parties to be sincere in their commitments, has a different import. It suggests that parties cannot use language cooperatively to contract without producing a common understanding that each is committed to playing his or her

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[49] To breach this maxim would be to make an insincere commitment. A corollary of the Contractual Maxim of Quality is that parties cannot knowingly accept any such "commitments" and maintain consistency with the cooperative norms that allow parties to produce shared meanings for legally enforceable contracts. For some recognition of these facts in the law, see RESTATEMENT (SECOND) OF CONTRACTS §§ 76(1), 159 cmt. d (AM. LAW INST. 1981).

[50] For example, if one were to say, "If you murder my uncle, then I will pay you $1000," no one would construe this as a serious attempt to induce murder by means of a legally enforceable contract because everyone knows that murder is illegal. The statement might be an attempt to reach some other kind of agreement in a black market without any legal enforcement mechanisms. But it is impossible to alienate the "right to murder" by contract because one lacks the "right" in the first place. Some other things, like sexual affection, can be legally given away but not sold in some jurisdictions and are therefore improper subjects of sincere contractual commitment. The term "market-inalienability" refers to any such things that may be given away but not sold. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 17 (1996); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987).

[51] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (noting that one meaning of "good faith" refers to "honesty in fact").

[52] *Id.* cmt. c ("Bad faith in negotiation . . . may be subject to sanctions.").

[53] *See id.* (mentioning §§ 90 and 208 and some applications of "rules as to capacity to contract, mutual assent and consideration").

[54] *See id.* §§ 159–162.

respective part to perform in good faith.[55] That there is an implied and nonwaivable duty of good faith at the performance stage in every contract[56] can therefore be inferred from presuppositions of linguistic cooperation given the shared aim of contracting.

Grice's original Maxim of Relation can similarly be further specified for contract law. Here one important specification is that when people use language to form contracts, they seek to identify something that each person would be willing to commit to doing or transferring in order to engage the other person's instrumental and largely self-interested motives and to induce a return action or commitment.[57] Parties seek to induce the return action or commitment by making a legally enforceable commitment.[58] Otherwise they would be making an informal promise, not a contract. Parties who use language cooperatively to contract must therefore abide by the following maxim:

> ◆ *The Contractual Maxim of Relation* instructs parties to commit themselves to a contract (as opposed to a merely informal promise) only when they mean to make a formal legal commitment — that is, when they mean to confer legal standing on the other party to be able demand compliance, to grant that party the power to invoke the formal power of the state in cases of noncompliance, and to submit to rather than trying to remove any other background legal rules that distinguish contracts as legally enforceable obligations from mere informal promises.

The Contractual Maxim of Relation is reflected in, among other things, a different aspect of the implied duty of good faith and fair dealing. The Restatement (Second) of Contracts says that "[t]he obligation of good faith and fair dealing extends [beyond the performance stage, as

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[55] *See id.* § 205 cmt. d (describing obligation of good faith in performance).

[56] *See id.* § 205. The precise requirements of this duty are infamously hard to specify, in part because the ways people can fail to act cooperatively during the course of performance are so varied, context specific, and often subject to human imagination. The Restatement (Second) of Contracts thus says:

> A complete catalogue of types of bad faith [at the performance stage] is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Id. cmt. d. Still, the existence of this duty is settled. *Id.* § 205.

[57] For an attempt to develop a general theory of contract, which explains many of its core doctrines and resolves many of its apparent doctrinal inconsistencies in terms of this fact, see generally Kar, *supra* note 3.

[58] *See id.* at 772–73, 799–800.

already described,] to the assertion, settlement and litigation of contract claims and defenses."[59] The obligation of good faith at the enforcement stage is another nonwaivable and implied duty in every contract,[60] which can be inferred from the cooperative use of language to contract. It is "violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts."[61] It extends further to "dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract" and to any "abuse of a power to determine compliance or to terminate the contract."[62]

This is not the only norm of linguistic cooperation that can be derived from reflection on what makes language use relevant to contracting. But it is an important one, which we highlight here because we will make reference to it again later when discussing pseudo-contractual arbitration clauses. In describing some aspects of the cooperative norms that govern language use to contract, we do not mean to foreclose further thought about other aspects that may constrain good faith uses of language to contract.

The "shared meaning" of a contract can now be defined at a suitable level of generality as that meaning that is most consistent with the presupposition that both parties were using language cooperatively to contract — that is, in accordance with the four relevant Maxims of Quantity, Quality, Relation, and Manner, and any further specifications of them. The shared meaning of a contract differs from both sentence meaning and any one party's speaker meaning.[63] We believe that shared meaning is what courts have for centuries meant to refer to by focusing contract interpretation on a search for the common meaning of the parties.[64]

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[59] RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e.

[60] *Id.* § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its . . . enforcement.").

[61] *Id.* cmt. e.

[62] *Id.* We will return to these points later, when we discuss boilerplate text that purports to delete another party's ability to seek meaningful redress for the violations of legal rights or otherwise withdraw commitment to good faith in handling disputes at the enforcement stage. *See infra* section III.E.5, pp. 1203–06 (discussing arbitration clauses that come in boilerplate text).

[63] Our definition of the shared meaning of a contract builds on Grice's work but is not reducible to either Gricean sentence meaning or Gricean speaker meaning. Shared meaning is not identical to Gricean sentence meaning because Gricean sentence meaning does not depend on any presuppositions of linguistic cooperation, whereas shared meaning does. Shared meaning is not identical to Gricean speaker meaning because Grice understands speaker meaning in terms of subjective mental states and not in terms of any common meaning of the parties. Parties can produce shared meanings that deviate from their subjective mental states if they uncooperatively fail to disclose those mental states because shared meaning is that meaning that is most consistent with presuppositions of linguistic cooperation to contract.

[64] The proper object of contract interpretation can be and has been put in different terms — not all of which appear completely satisfactory to us from a contemporary linguistic point of view. In some common law jurisdictions, reference is sometimes made, for example, to a *consensus ad item*

C. When Boilerplate Text Produces Pseudo-Contract, Not Shared Meaning

It is now possible to diagnose an underappreciated linguistic problem with doctrines that try to assimilate all boilerplate text into "contract meaning" with lax rules of "assent." Contract meaning is the common meaning of the parties, and parties can produce common meaning only by relying on the cooperative norms that govern use of language to form contracts. To determine whether a particular piece of boilerplate text contributes a valid term to a contract, one must therefore ask whether the text was ever entered into a linguistic exchange in a sufficiently cooperative manner to create a common meaning of the parties.[65]

Contemporary boilerplate text is often so long that it would wildly violate the Maxim of Quantity if it were considered to add "terms" to a "contract." Much of it is also difficult enough to understand that it violates the Maxim of Manner — which says to speak clearly and perspicuously.[66] True, businesses are now delivering copious amounts of boilerplate text during contract formation or sometimes shortly thereafter. But delivery of text is not the same thing as successful production of shared meaning for a contract.

It follows that courts that purport to "interpret" such boilerplate text as "contract" in an emerging regime of pseudo-contract are engaging not in contract interpretation, but rather in a form of construction — that is, they are attributing legal effect to text that fails to produce any common meaning of the parties. They are allowing some parties, but not others, to create pseudo-contractual obligations unilaterally, which are masked as "contractual" obligations, without ever achieving the common meaning that is required for valid contract terms by core contract law principles. They are thus distorting or stretching many of contract law's central concepts, typically with no recognition of the paradigm slip.

Boilerplate text is not in and of itself pseudo-contract, but much of it is best analyzed as pseudo-contract in social context. There are both cases where boilerplate text adds valid terms to contracts (as in many uses of high-end boilerplate between sophisticated firms and some uses

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(agreement to the same thing) or to a "meeting of the minds." We find it hard to obtain greater clarity on the core idea that these phrases attempt to convey without explicitly defining the "shared meaning" of a contract with reference to the cooperative norms that govern use of language to contract.

[65] Of course, even if boilerplate text has been cooperatively communicated, it may produce a term that is invalid on some other, more familiar legal ground, such as unconscionability or illegality. Here we are focusing on linguistic grounds for invalidity — that is, on circumstances in which boilerplate text fails to produce any term at all because it was not cooperatively communicated to create a common meaning of the parties.

[66] *See* Grice, *Logic and Conversation*, *supra* note 17, at 46.

in consumer contracts)[67] and cases where boilerplate text creates only pseudo-contract (as in many cases of unread and unreadable boilerplate text in online consumer transactions).[68]

II. CONTRACT MEANING DEPENDS ON LINGUISTIC COOPERATION

Before offering a practical method to discern the common meaning of the parties in contemporary circumstances, it is important to recognize that the choice between shared meaning analysis and assimilationist approaches is no mere matter of preference. Contract meaning depends on linguistic cooperation in ways that are subtle and difficult to recognize. Here we show this. We then show that despite their growing influence, assimilationist approaches have not yet offered a fully workable or coherent alternative to centering contract interpretation on the common meaning of the parties.

A. The Simple Example of Amber and Paolo

To illustrate just how deeply contract meaning depends on linguistic cooperation, we focus on contract formation and turn to a specific type of language that frequently occurs in contract formation settings. This is the use of if-then statements, sometimes called "conditionals." Because people who use language to contract are trying to induce others to make return actions or promises, relations of conditionality go to the heart of contracts. The common understandings that parties produce with if-then statements are critical to contract meaning. But some common and uncontroversial aspects of the meanings of these if-then statements can be discerned only if one presupposes that parties are using language cooperatively to form contracts.

Consider the case of Amber and Paolo. Both are competent English speakers, who have full capacities to contract and know that about one another. Amber goes to Paolo's painting business and says, "If you paint my house, then I will pay you $1000."[69] Paolo replies, "I accept."

If this were all that were known and said, then both parties and any court would rightly conclude that Amber and Paolo have formed a contract. Given the context in which the linguistic exchange occurred, Amber's if-then statement would be construed as an offer, which — by being communicated directly to Paolo in this conversation — gave Paolo

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[67] *See infra* sections III.C.4, pp. 1178–79 (discussing example of boilerplate text that adds terms to a consumer contract); III.D.1–2, pp. 1184–89 (discussing boilerplate text that adds terms to contracts between sophisticated parties).

[68] *See infra* sections III.C.1–4, pp. 1174–79 (discussing examples of boilerplate text that is mere pseudo-contract, often in consumer contract settings); III.E, pp. 1192–206 (same); III.F, pp. 1207–13 (same).

[69] It should be noted that this is often identical in meaning to "If you paint my house, I will pay you $1000" — thus suggesting that people do not always need to explicitly include the "then" in English to mean an if-then relation.

a power to accept. Because Paolo's response of "I accept" came immediately after Amber's offer, and was directed to Amber in the same conversation, his response would rightly be construed as an acceptance of Amber's offer. The actual agreement of the parties would be the content of what both Amber offered and Paolo accepted. This content would be identical and would be the shared meaning of their contract.

B. Norms of Cooperation Distinguish Offers from Assertions

As simple as these conclusions might seem, courts and parties that reach them must rely on social presuppositions, including cooperative use of language to contract.[70] When, for example, Amber says, "If you paint my house, then I will pay you $1000," there is nothing about the meaning of this sentence, standing alone, that would allow Paolo or a court to infer that Amber means to make an offer rather than an assertion. Offers and assertions can have the same propositional content, but they are different speech acts. To assert something is to claim that it is true.[71] To offer something in a contractual setting is to express to another person willingness to do something or transfer something (to make some content true) conditional on that person's acceptance and typically some return commitment or action.[72] In the simple conversation between Amber and Paolo, Amber says only, "If you paint my house, then I will pay you $1000." Nothing about the literal meaning of this sentence requires an interpretation that Amber is making an offer rather than an assertion, so why is it clear that Amber has made an offer?

The answer lies in implicit reliance on social context, conversational implicatures, and a presupposition of cooperative use of language to

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[70] There is, of course, a further question — in fact a prior question — how Amber and Paolo acquired common knowledge that they were engaging in a cooperative linguistic exchange that aimed at contract formation. Amber's if-then statement is the first thing she said to Paolo, so common knowledge of the type of conversation they are engaging in might seem hard to come by. But this common knowledge can be derived from a combination of facts about the social context of the linguistic exchange and certain features of the content of Amber's if-then statement: (1) Amber approached Paolo at his ordinary place of business to begin the conversation (and hence at a place where use of language to contract would have been usual but to produce mere knowledge unusual); (2) Paolo's place of business suggests that Paolo is a painter by trade and typically charges for painting jobs; (3) Amber's if-then statement made reference not only to painting, in the antecedent, but also to money, in the consequent (and money is a common inducement in contracts but a less frequent contribution to a bare assertion of an if-then statement); (4) it is uncommon for relative strangers to approach one another and merely assert an if-then statement to describe a fact, whereas it is quite common for relative strangers to use if-then statements as opening gambits for proposed bargains or contracts; and (5) Amber uttered her if-then statement directly to Paolo, and the statement made direct reference to actions by Paolo and Amber in its antecedent and consequent, respectively (which is an extraordinarily common use of if-then statements to contract but a rare feature of if-then statements used to make assertions). The assumption that Amber and Paolo were using language to contract is thus warranted in this social context.

[71] *Assert*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[72] RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981); *id.* § 71.

contract. If one presupposes that Amber and Paolo are both using language cooperatively to contract, then — in order to preserve the assumption that Amber was observing the relevant cooperative norms of language use (including the Contractual Maxim of Relation, which tells her to make her linguistic contributions relevant to the shared purpose of this particular type of conversation[73]) — one must assume that Amber's if-then statement was meant as a relevant contribution to the parties' shared aim of reaching a mutual agreement for a contract. Given the stage of this conversation, her use of an if-then statement is best explained as consistent with this cooperative norm, and relevant to this shared linguistic purpose, if it is interpreted as proposing an initial offer for a contract, not making an assertion.

When Paolo says, "I accept," he uses a special linguistic marker to communicate his acceptance. That this is not an assertion[74] derives from the presupposition that Paolo is seeking to cooperate in this linguistic exchange by contributing something relevant to the parties' shared purpose to form a contract. Paolo may have been forced to use a special linguistic marker to convey his acceptance because — unlike Amber's offer — Paolo's sentence did not state any content at all relevant to any contract terms. He just said: "I accept." Still, given where they are in this formation conversation, the best way to preserve the assumption that Paolo was using this language cooperatively to contract is to construe Paolo's utterance as an acceptance of the terms and shared meanings that were under discussion between Amber and Paolo at that time. Those terms were fully conveyed by Amber's offer in this simple example, and it is thus the shared meaning produced by use of this if-then statement that is the content of the actual agreement between Amber and Paolo.

C. Linguistic Cooperation Settles Many Other Aspects of Contract Meaning

Even if use of an if-then statement is correctly construed as an offer, an offer leaves numerous further questions about what the precise content of the offer is. These linguistic indeterminacies are not always easy to see because they are typically settled by implicit reliance on conversational implicatures and presuppositions of cooperative language use rather than by conscious thought. To get a sense of the indeterminacies, one need only consider how many different shared meanings if-then statements can have in different contexts where they create offers.

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[73] *See supra* p. 1153.

[74] Paolo might have used the word "accept" to make an assertion if he had, for example, told someone that he had accepted Amber's offer.

Take a version of an example made famous by Professor Samuel Williston. If one person were to say to a homeless person lacking a coat in cold weather, "If you go into this store with me, then I will buy you a coat," most courts and parties will intuitively know that this if-then statement is an offer of a conditional gift, not an offer of a contract.[75] Or, consider how a person who has lost a pet might use superficially similar if-then language to fashion a reward sign, which states: "If you find and return my pet, then I will pay you $100." In such a case, most courts and parties will intuitively know that unlike the offer of the coat to the homeless person, the pet owner is not offering a gift with a condition. She is offering a reward contract to induce someone — anyone — to look for her pet and return it. Yet it is equally clear that the pet owner's if-then statement seeks to induce people without ever requiring a legal commitment from anyone to find her pet. That makes this pet owner's use of if-then language very different from that of Amber when Amber says: "If you paint my house, then I will pay you $1000." Amber's offer is neither an offer of a reward nor an offer of a conditional gift — even though it uses the same if-then language. If only the words and logical connections (sentence meanings) are considered, then many other situations that might look like contracts will likely be misconstrued: if parties are joking; if parties are temporarily mentally impaired by drugs or alcohol; and, no doubt, in many other situations.

There are similar linguistic indeterminacies in the contract between Amber and Paolo, but they are not immediately obvious because they are typically resolved without conscious thought by reliance on conversational implicatures. For example, though it is clearly part of the simple contract between Amber and Paolo that Paolo is required to paint Amber's house, this requirement is not actually part of the sentence meaning of the statement that Amber offered and Paolo accepted. That sentence was simply: "*If* Paolo paints Amber's house, then Amber will pay Paolo $1000." This sentence would be true even if Paolo never painted Amber's house because the sentence says merely that Amber will pay *if* Paolo paints — thus showing that the requirement that Paolo paint cannot be part of the literal meaning of the sentence. Similarly, nothing about the literal meaning of Amber's if-then sentence says or logically implies that if Paolo does not paint Amber's house, then Amber will not pay Paolo $1000. That content is nevertheless another uncontroversial aspect of the shared meaning of this contract. This contract contains an implied understanding that failure to paint will result in nonpayment.

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[75] Williston and his coauthor put the example in more archaic language as follows: "[A] benevolent man says to a tramp, — 'if you go around the corner to the clothing shop . . . you may purchase an overcoat on my credit.'" 1 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 112, at 380 (rev. ed. 1936).

So how do courts and parties know what people like Amber and Paolo mean (or what their common meaning is) when they use if-then statements like the one in this simple example? These aspects of contract meaning derive neither from any sentence meaning nor from any subjective mental states of the parties but rather from the presupposition that both were using language cooperatively to form a contract. By the Contractual Maxim of Relation, each must therefore be presumed to be using the if-then sentence that was offered and accepted to induce the other to engage in some return action or commitment by taking up a legally enforceable commitment. Amber is best interpreted as adhering to this maxim if she is understood as trying to induce Paolo to commit to painting her house with her offer — even if that commitment is neither contained in nor logically implied by the sentence meaning of her offer. And Paolo is best interpreted as adhering to this maxim if he is understood as accepting that Amber will pay only if he paints her house — even though that content is neither contained in nor logically implied by the sentence meaning of Amber's offer. We show this more formally in the Formal Argument that Contract Meaning Depends on Cooperation.[76]

As this example demonstrates, pervasive and uncontroversial aspects of contract meaning, including both the relations of conditionality in this example and Paolo's commitment to paint, depend on presuppositions of cooperative language use to contract. Courts and parties make free use of this presupposition to infer significant aspects of contract meaning. The only reason these facts have not yet been sufficiently appreciated is that the linguistic capacities that allow for discernment of the common meaning of the parties typically operate unconsciously.

D. Assimilationist Approaches Are Linguistically Indeterminate and Unsuitable for Addressing Pseudo-Contract

If contract meaning is the common meaning of the parties, what could be the source of the "contract meaning" of the texts we are calling pseudo-contract? Assimilationist approaches to handling boilerplate text reject the grounding of contract meaning in shared meaning produced through cooperative linguistic exchange. To the extent that assimilationists are even aware of this rejection, they typically avoid the issue of actual agreement and gesture toward overall economic efficiency or individual assumption of risk[77] as a proposed basis for enforcing pseudo-contractual "terms."

At this point, it is well to recall the overarching political and philosophical context of which the traditional grounding of contract meaning

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[76] This formal argument can be found in the Appendix, *infra* pp. 1216–19.

[77] *See, e.g.*, Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002).

in actual agreement is a significant component. The premises of freedom of contract — and also freedom from contract — suppose parties with equal capacities to define and enter into only those terms that both agree offer expected gains for each, trusting a well-functioning legal system to focus legal enforcement on their shared agreements. Assimilationists have not yet recognized the depth of the normative problems with construing pseudo-contract as contract and giving some parties — but not others — the unilateral right to shape aspects of "contracts" without producing common meanings to which both parties have actually agreed.[78]

In addition, assimilationist approaches have neither recognized nor addressed certain problems of linguistic indeterminacy that call the coherence and general workability of their proposals into serious question. Consider Judge Easterbrook's assimilationist recommendation in *Hill v. Gateway 2000, Inc.*[79] that courts should simply absorb copious boilerplate text into "contract" using lax requirements of "assent." In explanation of this proposal, Judge Easterbrook offered the following simple-sounding view concerning assumption of risk by boilerplate recipients: "[P]eople who accept [an offer that is accompanied by copious boilerplate text] take the risk that the unread terms [really, texts] may in retrospect prove unwelcome. Terms [really, texts] . . . stand or fall together."[80]

But Judge Easterbrook did not address the linguistic question of how all this boilerplate text is to be translated into "contract meaning." Nor did he sense any special difficulties with analyzing what "risks" are being "assumed" as part of the common meaning of the parties.

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[78] For an influential example of judicial reasoning that does not distinguish pseudo-contract from contract, thus allowing pseudo-contractual obligations to be produced unilaterally without reaching an actual agreement with common meaning, see *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

[79] 105 F.3d 1147.

[80] *Id.* at 1148 (internal citations omitted).

Judge Easterbrook's proposal will start to look strange if one takes a closer look at some of these unread "terms."[81] Here are five examples of boilerplate sentences found in a recent version of iTunes's online "terms and conditions," which — like the sentence in Amber's offer — take the form of if-then statements:

- "If you see content submitted to the Apple Music Service that does not comply with these Guidelines, [then] use the Report a Concern feature."
- "If you want to designate a different payment method or if there is a change in your payment method status, [then] you must change your information in the Account Settings menu on your device or computer . . . ."
- "[I]f you . . . do not recognize charges on your receipt or payment method statement," then "use Report a Problem on your receipt."
- "If you breach this restriction, [then] you may be subject to prosecution and damages."
- "If your Apple Music Subscription is cancelled, [then] you will lose access to any feature of the Apple Music Service that requires an Apple Music Subscription."[82]

Without any context of utterance, these five if-then sentences are just sentences. Should they be construed as anything more, just because they are delivered during contract formation? Each sentence has the same

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[81] Judge Easterbrook in *Hill* was focused only on an arbitration clause. *See id.* at 1147.

[82] APPLE, *iTunes Store — Terms and Conditions* (Oct. 21, 2015), https://web.archive.org/web/20151101004701/https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/BDR6-96V6] (Internet Archive Wayback Machine reproduction of the Apple iTunes "terms and conditions" that were effective on November 1, 2015). For the current version, see APPLE, *Apple Media Terms and Conditions* (Sept. 17, 2018), https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/P7YG-KGBM]. For a comical presentation of the "terms and conditions" cited in the main text, which offers easier reading, see R. Sikoryak (itunestandc), *iTunes Terms and Conditions: The Graphic Novel*, TUMBLR, https://itunestandc.tumblr.com/tagged/comics/chrono [https://perma.cc/PT27-75ET].

Examples like these are not isolated. Even limiting attention just to if-then statements, the very same "terms and conditions" contain at least the following additional examples of boilerplate sentences with questionable contractual meaning:

- "If you join a Family, [then] the features of Family Sharing are enabled on your compatible devices and computers automatically."
- "If you move a rental to a compatible device and then use the iTunes Service to restore that device, or choose Settings > Reset > Erase all content and settings on that device, [then] the rental will be permanently deleted."
- "If you sign up for an Account or use a Service covered by this Agreement on a non-Apple-branded device or computer, [then] you may have access to only a limited set of Account or Service functionality."
- "If you turn off automatic renewal, [then] you will continue to have access to the Apple Music Service for the remainder of your Apple Music Subscription term."
- "If you prefer that we do not collect and use information from your iTunes library in this manner, [then] you should not enable the Genius feature."

APPLE, *iTunes Store — Terms and Conditions*, *supra*.

logical form as Amber's if-then statement ("If you paint my house, then I will pay you $1000"), which in logical notation is $p \supset q$, though each uses different p's and q's, and many seem to have different meanings and implications.

Assimilationist approaches to handling boilerplate text bear the burden of explaining precisely how courts are supposed to translate boilerplate if-then statements like these into "contract meanings." There are only so many possibilities, and none seems appropriate. If, for example, the "contract meaning" of these sentences is to be construed in terms of sentence meaning, then these sentences might have clear enough meanings, but they would merely convey information — that is, they would be fact-stating. They would therefore create no contractual commitments at all, which contradicts the picture of general contractual absorption inherent in assimilationist proposals.

In any event, it would be perverse to try to reparse "contract meaning" in terms of sentence meaning. In a pseudo-contractual regime of that kind, Amber would have to spell out more fully what she means to propose whenever she makes even a simple offer like, "If you paint my house, then I will pay you $1000." She would need to say something much more complex, lengthy, and potentially confusing than this simple sentence conveys on its own.[83] The contemporary boilerplate text that is used by vendors rarely attempts to add all the content, including all the complex relations of conditionality, that is ordinarily supplied by conversational implicature. So even in a pseudo-contractual regime that tries to ground contract meaning in sentence meaning, most vendors would need to start adding a great deal more text to their boilerplate "terms and conditions." They could not rely on trade usages, or contextual cues to meaning, because sentence meaning is the meaning that a competent language speaker would give a sentence without any knowledge of its context of use. It is not clear that such a legal regime of pseudo-contract would even be possible, let alone desirable, given parties' practical purposes in contracting and their everyday reliance on linguistic cooperation to produce shared understandings.

If, on the other hand, the "contract meanings" of these five if-then statements were construed in terms of the shared meanings they produced during contract formation, then — because none of this boilerplate text was entered into any formation conversation consistent with the cooperative norms of language use to form a contract — these sentences would contribute no shared meanings (and hence no valid terms) to any contract. Courts and parties often overlook this fact because

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[83] She would have to say something like: "If you paint my house, then I will pay you $1000. And if you do not paint my house, then I will not pay you $1000. In addition, I want you literally to commit to painting my house; meaning I'm not just trying to induce you to act without any accompanying obligation. So what do you say? Will you accept my offer?" In section C, *supra* pp. 1158–60; and the Appendix, *infra* pp. 1216–19, we discuss how these additional contents are more typically derived from conversational implicatures.

boilerplate text can appear to have identifiable meanings if and when it is read. But that does not establish that it was entered into a linguistic exchange in a sufficiently cooperative manner to create a common meaning of the parties.

Perhaps someone will suggest that these boilerplate sentences should be construed fictionally *as if* they had the exact same conversational implications as Amber's if-then statement ("If you paint my house, then I will pay you $1000"), which in social context was not an assertion but an offer, the acceptance of which obligated Paolo to paint the house. Paolo's commitment to paint came from the antecedent of this if-then statement (the part that came directly after the "if") but was derived by conversational implicature, not from sentence meaning.[84] From this point of view, when an Apple customer clicks "I accept," the Apple customer would thus have to be "interpreted" as having made commitments to each and every one of the antecedents in these five other boilerplate sentences. That cannot be right as the commitments themselves would be ludicrous. There is obviously no contractual obligation by Apple customers who click "I accept" to (1) "see content submitted to the Apple Music Service that does not comply with these Guidelines"; (2) "designate a different payment method"; (3) "not recognize charges on [their] receipt or payment method statement"; (4) "breach this restriction"; or (5) have their "Apple Music subscription [be] cancelled."[85]

What the absurdity of these proposed "contractual obligations" shows is that neither parties nor courts are treating all boilerplate if-then text as fictionally having the same conversational implicatures as Amber's if-then statement either — that is, as straightforward offers with terms for a contract. But then how do courts and parties determine what parties actually mean by these if-then statements in social context?

Upon closer inspection, in many cases of actual boilerplate text, the text appears to have an identifiable meaning only if and when it is read because — contrary to the picture of general contractual absorption suggested by assimilationist proposals — courts and parties are implicitly interpreting the boilerplate text as contributing to a conversation that has a noncontractual purpose. When, for example, Apple's boilerplate text says, "If you see content submitted to the Apple Music Service that does not comply with these Guidelines, [then] use the Report a Concern feature,"[86] and a consumer clicks "I accept" without reading, no one will likely interpret Apple as having made a contractual offer with this sentence. They will construe this as an instruction for use in case a user wants to report a concern. Similarly, when Apple's boilerplate text says,

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[84] *See supra* sections II.B–C, pp. 1157–60; *infra* Appendix, pp. 1216–19.

[85] APPLE, *iTunes Store — Terms and Conditions*, *supra* note 82.

[86] *Id.*

"[I]f you . . . do not recognize charges on your receipt or payment method statement," then "use Report a Problem on your receipt,"[87] Apple is offering another instruction for use, not an offer of terms for a contract. Apple is offering a mere instruction for use even though the instruction is presented under the misleading label of "terms and conditions."

It is simply not true that all boilerplate text found under the contemporary label of "terms and conditions" is being assigned a "contract meaning" and treated by everyone as adding "terms" to a "contract" once a consumer clicks "I accept." The text that is typically disputed as contract is actually quite narrow. The vast majority of these disputes involve forum selection clauses, arbitration clauses, exculpatory clauses, covenants not to compete, or the scope of end user licenses of intellectual property. None of the if-then sentences under discussion here falls into these categories.

Reconsider the two hypotheticals that began this Article. One of the biggest changes in contracting between 1883 and today lies in how much text parties can deliver to one another during contract formation. Whereas an oral use of language in 1883 might have stopped with, "If you give me all of your logs marked 'H.C.A.' cut from the last two winters, then I will pay you ten dollars per thousand feet, boom scale at Minneapolis, Minnesota," the contemporary linguistic exchange between Apple and Ms. Gerhardt required her to click "I accept" after receiving much more copious boilerplate text, which contained all five of the if-then statements just listed and much, much more. No one reads all of this text during contract formation, nor could anyone and still function in life.

But there is often an actual agreement with common meaning hidden in a forest of noncontractual boilerplate. Ms. Gerhardt uncontroversially clicked "I agree" to the basic offer, "If you pay Apple ninety-nine cents, then Apple will give you a personal license to listen to this song" — an if-then statement that *was* cooperatively communicated. This if-then sentence did function linguistically like Amber's, even if it was accompanied by more extensive boilerplate text that failed to produce any common meaning of the parties. This distinction is quite obvious upon reflection, yet assimilationist approaches exclude it. Also, when it comes to actual cases of contract interpretation, assimilationists simultaneously rely upon and reject presuppositions of linguistic cooperation in an ad hoc and unjustifiable manner. They seem to know not what they do.

There are deep issues with assimilationist approaches to interpreting boilerplate text. These issues could be avoided if courts had a simple and workable method to discern the common meaning of contracting parties and hence the scope and content of their contracts. Shared meaning analysis will provide that method.

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[87] *Id.*

III. SHARED MEANING ANALYSIS: A PRACTICAL METHOD TO DISTINGUISH CONTRACT FROM PSEUDO-CONTRACT

We have drawn on technical resources from Grice to expose the dependence of contract meaning on linguistic cooperation. These technical resources make explicit the formal foundations of certain linguistic intuitions and patterns of reasoning that people, including actors within the court system, rely on to understand the common meaning of the parties. Because these linguistic capacities are parts of natural language but the rules of linguistic cooperation that produce this linguistic knowledge are typically followed unconsciously, there is a real sense in which competent English speakers who seek to discern the scope and meaning of contracts grasp, even if unconsciously, the relevant distinctions — between Gricean speaker meaning and sentence meaning, between shared meaning (traditional contract) and meaning that is not shared (pseudo-contract). Even if those technical terms are never used, it should be unsurprising to find these distinctions reflected in legal doctrine and practice in various ways.

The recent paradigm slip into pseudo-contract means, however, that the legal landscape has become much less coherent and much less sensitive to facts about how shared meaning works. As the rapid explosion of boilerplate text in digital formats has begun to unsettle linguistic intuition, many courts have felt forced to try to assimilate all boilerplate text to "contract." This move ignores basic facts about how language works and erases the distinction between shared meaning (contract) and meaning that is not shared (pseudo-contract). Because this distinction is critical to discerning the common meaning of the parties, courts need a simple and workable method to anchor their linguistic intuitions and accurately locate the common meaning of the parties in today's world.[88]

A. The Conceptual Test of Shared Meaning Analysis

When approaching a legal dispute over a particular piece of boilerplate text, courts should first determine whether a contract was formed and then, if so, consider separately whether the disputed text was conveyed in a sufficiently cooperative manner to contribute a valid term to the contract. Assimilationists fail to separate these two questions, but the questions are conceptually distinct. Conflation of them is an error. Once the initial question of contract formation is answered in the affirmative, it will be easier to address the separate question of which text contributed valid terms to the contract. To answer this second question

[88] Offering a theoretical account of the foundations of intuitive legal knowledge can also be important in its own right. In this case, legal knowledge depends on intuitive knowledge of shared meaning.

correctly, while confining our analysis to linguistic grounds for invalidity, we offer a simple conceptual test that courts can use to identify the common meaning of the parties in contemporary settings.

We suggest that courts imagine that all of the written and digital text exchanged during contract formation is converted into oral form and takes place in a face-to-face conversation between the relevant parties. With respect to any disputed boilerplate text, courts can then ask the following question:

> Could this boilerplate text have plausibly contributed to an oral conversation that contributes terms to a contract consistent with the presupposition that both parties were observing the cooperative norms that govern language use to form a contract?[89]

Any boilerplate text that meets this test falls within the correct boundary of parties' actual agreement for a contract, and courts can rely on their ordinary linguistic intuitions to interpret the contract meaning of the text. Otherwise the boilerplate text is mere pseudo-contract, which does not contribute to the common meaning of the parties and should not be enforced.

Courts can then draw on this simple conceptual test to ask three types of questions that may be relevant in particular disputes over boilerplate. First, courts can identify with greater assurance which boilerplate text does — and does not — fall within the correct scope of parties' contracts.[90] Boilerplate text that contributes shared meaning to a contract should be enforced as contract, unless there is a standard contract law obstacle or defense.[91] But the rest is mere pseudo-contract. Second, courts can discern hidden conflicts between boilerplate text and the common meaning of the parties that might otherwise go unnoticed. Courts have developed numerous doctrines attempting to resolve such conflicts in limited circumstances,[92] but courts have not yet articulated

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[89] The cooperative norms that govern language use to produce contracts were described above. *See supra* section I.B, pp. 1150–54. Sometimes, to preserve the presupposition that parties were using language cooperatively, one must conclude that a great amount of boilerplate text delivered during contract formation was not aimed at creating terms with shared meanings but rather at serving some other noncontractual purpose. We discuss examples of some noncontractual purposes below. *See infra* section III.F, pp. 1207–13.

[90] A simple example might be the listed price of an item for digital purchase. These prices typically come in digital text, which is boilerplate text because it is provided to multiple recipients, on multiple occasions, or both. In the context of an online purchase, price is nevertheless typically conveyed in a clear enough manner that an actual mutual understanding of the price term is created. Boilerplate text of this sort is often not problematic in the same way as many other kinds of more copious boilerplate text. In such a case, a contract for purchase can include the agreed-upon boilerplate price even if certain other boilerplate text falls outside the scope of the parties' actual agreement and contract.

[91] How shared meaning analysis helps with this first question is discussed *infra* in sections C, pp. 1173–82; and D.1–2, pp. 1184–89, which extend the analysis to contracts between sophisticated parties.

[92] Some of these are described *infra* in sections E.1, pp. 1192–95; and E.3–4, pp. 1196–203.

a general method to discern and resolve hidden conflicts in any contractual context. As a result, some courts have begun to misconstrue pseudo-contractual boilerplate text that conflicts with parties' contracts as adding terms to their contracts. That obviously cannot be right, and shared meaning analysis will help courts avoid this error.[93] Third, courts can better determine the actual meanings of many other remaining classes of boilerplate text, which are often not contractual at all.[94] We use the phrase "ride-along" text to refer to any boilerplate text that merely rides along with, or accompanies, the language that parties use cooperatively to produce their actual agreements and contracts.

In order to avoid any possibility of confusion, we note that our proposal to imagine an oral conversation in no way depends on the misguided notion that oral contracting is somehow an ideal. We merely find that the linguistic capacities that allow language users to discern common meaning are often much easier to apply to oral uses of language.[95] The point of the conceptual test is to place linguistic understanding on firmer ground when the more complex ways that boilerplate text is often conveyed in the digital world make it less easy to understand than in an oral hypothetical. The conceptual test should be understood in that spirit of usefulness.

B. How Shared Meaning Analysis Differs from Previous Proposals to Address the Problems of Boilerplate Text

Shared meaning analysis differs from previous proposals for addressing problems with boilerplate text, and many of its distinctive features can be understood by means of a contrast with previous proposals. That boilerplate text creates problems for contract law is by now well accepted by most courts, scholars, and policymakers. Previous attempts to address these problems nevertheless bypass linguistic questions and accept the conflation of pseudo-contract with contract. Attempts that are constrained in this way necessarily result in limited solutions.

For example, Professor Karl Llewellyn famously proposed that contractual assent should be construed to include "blanket assent" to all unknown boilerplate text that is "not unreasonable or indecent" and

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[93] The way that shared meaning analysis would identify and eliminate hidden conflicts is described *infra* in section E, pp. 1192–206.

[94] The way that shared meaning analysis can be used to interpret noncontractual boilerplate text is discussed *infra* in section F, pp. 1207–13.

[95] One reason for this may be that the human capacities for natural language evolved primarily in contexts of oral linguistic exchange, with writing being an extremely late development in human history. *Compare, e.g.*, Marc D. Hauser, Noam Chomsky & W. Tecumseh Fitch, *The Faculty of Language: What Is It, Who Has It, and How Did It Evolve?*, 298 SCIENCE 1569 (2002), *with* WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 83–84 (1982) ("The first script, or true writing, that we know, was developed among the Sumerians in Mesopotamia only around the year 3500 BC." (citations omitted)).

does not "alter or eviscerate the reasonable meaning of the dickered terms."[96] What Lllewellyn refers to as "dickered terms" can be understood as actual agreement with shared meaning, which is distinct from mere assumption of unknown risk. But because Llewellyn did not have contemporary linguistic resources to understand how shared meaning is produced, he was never able to draw this distinction in a principled manner. Llewellyn's proposal also has the unprincipled consequence that the scope of assent that he stipulates[97] — and not what parties actually agree to in language — would mark the boundaries of "contract" even when there is no shared meaning or actual agreement to many boilerplate "terms."

Llewellyn's ad hoc solution — namely, to deem unenforceable any "terms" that are "unreasonable" or "indecent" — may help cure some of the most egregious problems with the paradigm slip. But this proposal unlinks "contract" from parties' actual agreements and common understandings. It is not grounded in core contract law principles, and it does not accurately track the common meaning of the parties.

To avoid mistaken outcomes in other ways, many courts have felt the need to stretch other familiar doctrines, like unconscionability, public policy, or state laws that govern false advertisement or misrepresentation — often distorting those doctrines in the process.[98] Solutions like these are often narrow and limit the scope and content of parties' "agreements" by something noncontractual — such as considerations of substantive fairness or public policies — rather than by the shared meanings that parties produce and actually agree to in language.[99] There are,

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[96] KARL N. LLEWELLYN, THE COMMON LAW TRADITION 370 (1960) ("Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.").

[97] That is, whatever might be considered "dickered" plus any unread text that is not "unreasonable" or "indecent." With the use of this latter language, Llewellyn appears to have been trying to rule out what we call "hidden conflicts" with actual agreement. *See infra* section III.E, pp. 1192–206. He was trying to articulate a distinction that is very hard to draw correctly without the linguistic resources that we use to clarify the scope and content of parties' actual agreements.

[98] As an example of stretching unconscionability, Professor Russell Korobkin has suggested that the salience of boilerplate texts — that is, whether the texts are in fact considered by many consumers when contracting — should be used to identify cases of procedural unconscionability. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1207 (2003). He then suggests that determinations of substantive unconscionability should turn on whether enforcement of boilerplate texts would be more costly to buyers than beneficial to sellers ex ante. *Id.* at 1208.

[99] Perhaps it would be better to say "purport to limit" because we suspect that linguistic intuitions relating to shared meaning are often implicitly relied on under these other rubrics to reach

of course, situations where an actual contract term should not be enforced due to unconscionability, public policy, or some noncontractual source of law.

Many other proposals try to address the problems created by boilerplate text by relying on market regulations of some form. If failure to reach fully informed agreement is the problem, then one popular proposal has been to require more perspicuous disclosure of boilerplate text in some contexts. Mandated disclosure regimes are currently one of the most widespread regulatory techniques used in a variety of contractual settings.[100] Some have proven largely effective — like the Food and Drug Administration requirement that foods containing eight major allergens ("milk, eggs, fish, Crustacean shellfish, tree nuts, peanuts, wheat, and soybeans") contain warnings for any consumers who may be allergic.[101] Over time, however, it has become increasingly clear that heightened disclosure requirements do not always produce more common understanding.[102] Once the paradigm slip has taken place, there is just too much boilerplate text for mere disclosure to be a viable solution.[103]

These problems with generalized disclosure have led many scholars to search for more sophisticated disclosure regimes, which target specific classes of information that are especially important and require disclosure in forms that are simple and comprehensible. Professor Cass Sunstein favors empirical work to identify the formats that will work best in specific contexts.[104] He and others suggest the use of default forms that will "nudge" consumers into the choices that are typically best for them.[105] Professors Ian Ayres and Alan Schwartz have similarly

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nonenforcement decisions. This is not an adequate solution because legal concepts that are well adapted to some purposes are not so well suited to others. Stretching legal concepts to try to serve more than one unrelated function can disserve each function.

100 BEN-SHAHAR & SCHNEIDER, *supra* note 6, at 3 ("'Mandated disclosure' may be the most common . . . regulatory technique in American law.").

101 Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, § 202(2)(A), 118 Stat. 905, 906 (2004) (codified at 21 U.S.C. § 343 (2012)).

102 For a comprehensive discussion, see BEN-SHAHAR & SCHNEIDER, *supra* note 6.

103 Overreliance on mandated disclosure regimes can, in fact, even have unintended costs. Professors Omri Ben-Shahar and Carl E. Schneider have collected numerous legal examples and empirical studies, which highlight these costs and show that the costs are often "disproportionately borne by exactly the people who most need protection." *Id.* at 169. They believe that the problems are, in fact, sufficiently pervasive that it would be better to bar mandatory disclosure regimes presumptively: "This would spare the world much pointless regulation and might help drive lawmakers — legislatures, administrative agencies, and courts — to search harder for solutions actually tailored to problems." *Id.* at 183. We see the dangers of overreliance on mandatory disclosure regimes but do not believe required disclosures are always problematic — as we will explain in the main text. We also believe that shared meaning analysis is a solution that is "actually tailored to problems" created by the paradigm slip.

104 *See* Cass R. Sunstein, Essay, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1363 (2011).

105 *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83–87 (2008); Michael S. Barr, Sendhil Mullainathan

proposed consumer protection regulations that would require businesses to disclose in a specially marked box at the forefront only any boilerplate text that is unknown to many consumers and disadvantages them the most — where that class of boilerplate text is to be identified with empirical methods.[106] Another possibility, recently suggested by Professors Ariel Porat and Lior Strahilevitz, is to personalize disclosure using big data.[107]

Proposals like these can certainly help produce more common understanding and shared meaning in some contexts. These proposals are valuable and fully consistent with shared meaning analysis. Nonetheless, one must understand their limitations — especially when standing alone. The current era produces so much information overload that no mandatory disclosure regime can guarantee that all boilerplate text will be delivered in a sufficiently cooperative manner to create shared meanings. Proposals of this kind would succeed best in the context of more general methods that ground the scope and content of contracts in the shared meanings that parties actually agree to through the cooperative use of language.

At this point, it is instructive to consider the conclusions that Professors Omri Ben-Shahar and Carl E. Schneider — two especially harsh critics of mandatory disclosure regimes — draw from the problems they see with such regimes. In *More Than You Wanted to Know: The Failure of Mandated Disclosure*, Ben-Shahar and Schneider collect numerous legal examples and extensive empirical data showing that mandatory disclosure regimes regularly fail to produce common understanding. They cynically suggest that overreliance on mandatory disclosure regimes can "undercut other regulation, deter lawmakers from adopting better regulation, impair decisions [for example, due to information overload], injure markets, exacerbate inequality, and in some important cases, cripple valuable enterprises."[108] Because they accept the paradigm slip from contract into pseudo-contract, however, they are ultimately unable to come up with any legal solutions.[109] All they can do is suggest — or,

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& Eldar Shafir, *The Case for Behaviorally Informed Regulation*, *in* NEW PERSPECTIVES ON REGULATION 27 (David Moss & John Cisternino eds., 2009).

106 Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 545 (2014) ("Instead of promoting informed consumer assent through quixotic attempts to have consumers read ever-expanding disclosures, this Article argues that consumer protection law should focus on . . . situations in which consumers expect more favorable terms than they actually receive.").

107 Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 (2014). The authors describe "Big Data" as "the process whereby computers sift through enormous quantities of data to identify patterns" — in this case to "predict individuals' future behavior." *Id.* at 1434–35.

108 BEN-SHAHAR & SCHNEIDER, *supra* note 6, at 169.

109 They admit as much. After arguing that mandated disclosure regimes are often so poorly suited to their aims that they should be presumptively barred, they say that it is "the wrong —

more accurately, hope — that nonlegal mechanisms, such as online reputational databases, private advisors, or private rating services, might reduce some problems with boilerplate text.[110] While that may be true contingently, and some of the time, this proposal in no way addresses the full range of problems created by boilerplate text once the paradigm slip has taken place.[111]

The difficulties posed by pseudo-contractual boilerplate text appear to us insurmountable without close examination of linguistic fundamentals. What all these previous proposals share is, in fact, some implicit acceptance of the conflation of shared meaning (contract) with meaning that is not shared (pseudo-contract). Shared meaning analysis takes a different and — we hope — more helpful approach. Instead of accepting the paradigm slip into pseudo-contract and proposing a series of partial or conceptually inapt "fixes," shared meaning analysis gives courts the resources they need to discern the common meaning of the parties based on how language actually works.

Shared meaning analysis is not a form of paternalism or market regulation. It does not depend on informal sanctions or any fanciful attributions of an "opportunity to read." It recognizes the standard defenses, but does not try to cure the paradigm slip by asking courts to render valid contract terms legally unenforceable based on legal concepts — like indecency, unreasonability, or conflict with public policy — that are distinct from the common meaning of the parties (unless there is actual unconscionability or some other standard defense).[112]

Unlike prior proposals for dealing with the problems created by boilerplate text, shared meaning analysis flows from the core principles that justify contract enforcement by the state based on actual agreement with common meaning. It offers a principled but flexible method of discerning the common meaning of the parties, which courts can integrate into their common law reasoning, thus creating a tool with sufficient scope, accuracy, power, and coherence to cure the paradigm slip into pseudo-contract.

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indeed a bad — question" to ask what these legal regimes should be replaced with, *id.* at 183, because they see no "panacea," *id.* at 184.

110 *Id.* at 184–90.

111 Substantive market regulations, which prohibit some terms or classes of terms based on content deemed objectionable, are not the exact right solution either. There may be many good reasons for substantive regulations, but the core problem with the paradigm slip is that it allows more into "contracts" than was actually agreed to through the cooperative use of language — not that it enforces some terms that could never be agreed to in principle. Even when substantive regulations are used to respond to problems of pseudo-contract, they are typically produced too slowly and are too narrow in scope to respond to all of the problems of pseudo-contract in rapidly evolving markets.

112 Where these other legal concepts are relevant to contract law, they can return to their rightful shape instead of serving as imperfect proxies for an absence of shared meaning.

C. Shared Meaning Analysis Question I: Identifying the Scope of Parties' Actual Agreements

The first question that the conceptual test of shared meaning analysis can help courts answer more accurately is whether any disputed piece of boilerplate text contributes to an actual agreement between parties. Actual agreement is a boundary line. Without any actual agreement, there is no contract; whereas any boilerplate text that falls within the scope of parties' actual agreements adds terms to a contract that are presumptively legally enforceable. Actual agreements also have content, which is identical to the common meaning of the parties. This has implications for the scope of parties' actual agreements and contracts.

Unfortunately, as we have been suggesting,[113] some of the earliest and most influential cases to deal with the explosion of boilerplate text in the information age draw the boundary line around actual agreement in the wrong place.[114] These cases, whose approach we called "assimilationist," have contributed to an expanding regime of pseudo-contract by conflating pseudo-contract with contract. As these cases were being decided, technological changes were transforming the uses of digital and written text and methods of communication in ways that were novel enough, and complex enough, that many courts were left without a clear understanding of how best to extend traditional contract law concepts and principles to these rapidly evolving settings. Amid the whirlwind of technological change, many courts and scholars lost track of a fact that implicitly grounded and still grounds their thinking about contracts in many other settings: parties can reach an actual agreement for a contract with a common meaning only by engaging in a cooperative linguistic exchange.[115]

In cases where the distinction between an actual agreement with shared meaning and other attached content is already clear enough,

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[113] *See supra* section II.D, pp. 1160–65.

[114] For examples of highly assimilationist ways of evaluating boilerplate text by courts, see *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); and *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). Both of these cases were decided just at the inception of the digital revolution in consumer markets. In *ProCD*, for example, even though the item at issue was a CD-ROM, the purchaser had gone into a computer store to purchase it, rather than downloading it online. *Id.* at 1450. The court was aware of the looming changes, but did not decide the case in a setting where those changes were all clear or well understood. It should be noted that in other cases, like *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), courts have not followed the *ProCD* approach.

For examples of assimilationist approaches in the scholarly literature, see, for example, Baird, *supra* note 77; Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets,* 104 MICH. L. REV. 827 (2006); Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 144–51, 155 (1970); and Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151 (1976).

[115] These norms were described in sections I.A–B, *supra* pp. 1146–54. Absent a major change of background normative commitments, which explain how exercises of free will can produce actual agreements and mutual understanding, these background commitments are still the norms in which contract law is grounded.

there is no need for courts to use the conceptual test of shared meaning analysis. This might happen when, for example, there is an offer in an email that also has an "unsubscribe" button and the offer is accepted. In such a case, no court or party would think that the "unsubscribe" text is part of the common meaning of the contract. In cases where discernment of common meaning is more difficult, however, use of the conceptual test of shared meaning analysis can help ensure that contract meaning stays grounded in the common meaning of the parties. The following examples illustrate how courts can use the conceptual test of shared meaning analysis to identify the correct scope of parties' actual agreements and contracts.

1. Boilerplate Inclusion with a Purchase Order. — There are some cases where all of the boilerplate text exchanged during contract formation could have been exchanged in an analogous face-to-face oral conversation consistent with the Maxim of Quantity (which says to say neither too much nor too little) and the Maxim of Manner (which says to be clear). Consider Angelo, a merchant who faxes an order for camping gear to Premier Camping using his business letterhead stationery. Shortly thereafter, Angelo receives a standard form email from Premier Camping, which says in full:

> We are in receipt of your order and will ship the requested merchandise out by the end of the next business day. We have debited the purchase price from your account on file.
>
> You may find your tracking number by logging onto your account and pressing "recent orders." Please use that tracking number for any inquiries or to check the status of your shipment. We thank you for your business.

In this case, the parties used a combination of written, digital, and faxed text to form a sales contract. Angelo's purchase order was the offer and Premier Camping's email, the acceptance.[116] Premier Camping's acceptance was boilerplate text because it was an electronic confirmation with preformatted text that is delivered verbatim to multiple parties and in response to many purchase orders.[117] Angelo's offer contained some boilerplate text as well, because he used standard letterhead to identify his company as the purchaser.

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[116] *See* U.C.C. § 2-206(1)(b) (AM. LAW INST. & UNIF. LAW COMM'N 2017) ("[A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance . . . by a prompt promise to ship . . . ."). It should be noted, however, that this specific U.C.C. rule is not required to reach this conclusion. This is because an offer is only a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981). The purchase order manifested just such a willingness in context. An acceptance of an offer is just "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Id.* § 50(1).

[117] At the beginning of this Article, we defined "boilerplate text" as any preformatted text that is delivered during contract formation to multiple parties, on multiple occasions, or both. *See supra* note 8.

Applying the conceptual test of shared meaning analysis, all of this language could indeed have been entered into an oral cooperative linguistic exchange that aimed at contract formation consistent with the Maxims of Quantity and Manner. To the extent that the boilerplate text may have contained some difficult terms for some consumers (for example, "tracking number," "the status of your shipment," "next business day"), both parties are merchants who — it is reasonable to assume — share the same understanding of these phrases and know that the other also knows what they mean in their trade. Courts with sufficient understanding of the trade can thus rely on their ordinary linguistic intuitions to interpret the contributions that all this boilerplate text makes to the formation and content of this contract. This will involve some reliance on conversational implicatures and presuppositions of cooperative language use. Reliance on conversational implicatures will be critical for discerning the relations of conditionality in the contract and in concluding that it was an offer for a bilateral contract.

Even though this text was short and clear enough to have been entered into a cooperative linguistic exchange, it should be noted that not all of it is relevant to the creation of terms for a contract. Indeed, while Premier Camping's email manifests acceptance of the terms in Angelo's offer, and does so while communicating content that differs from that found in Angelo's offer, the acceptance is not plausibly construed as seeking to add any terms to the contract. The thank you is nice, as is the provision of information regarding the tracking number and how to access it. But upon reflection neither party and no court would think this particular boilerplate text seeks to add any terms to the contract. As is often the case, the parties are merely utilizing some text for some noncontractual purposes.

2. Large-Scale Exclusion with a Purchase Order. — Many other cases involve boilerplate text that is too copious to have been exchanged cooperatively during contract formation. Suppose Angelo, who is now a consumer, orders camping gear with a handwritten, faxed purchase order and receives a nearly identical confirmation by email. But there is one key difference in the text exchanged. This email — while otherwise identical — contains a hyperlink entitled "terms and conditions" with thirty-two pages of complex boilerplate text. Like most consumers, Angelo does not click on the link. He sees the email as confirmation of his order but does not give it any further attention.

The conceptual test of shared meaning analysis requires imagining that all of this text is converted into an oral conversation. One would have to imagine Premier Camping trying to communicate orally not just the short text in the email, as in our first example, but also the entire thirty-two pages of this more complex boilerplate text as a condition of the sale. If Premier Camping had tried to do this, then it would have lost the sale, even though the smaller amount of text that was cooperatively exchanged is otherwise the same as in our previous example. The

conceptual test of shared meaning analysis suggests that the confirmation email contributed an acceptance to the common meaning of the parties, whereas the thirty-two pages of additional boilerplate text was mere pseudo-contract.

Still, the parties clearly meant to form a contract and did in fact reach an actual agreement for an exchange — just one that did not include the thirty-two pages of boilerplate text included in the hyperlink. That is why it is important to distinguish questions of contract formation from questions of whether a particular piece of boilerplate text contributed a valid term to a contract that was formed. Though this example differs from the previous one in that it includes a hyperlink to thirty-two pages of additional boilerplate text and involves a consumer, shared meaning analysis suggests that this linguistic exchange produced an actual agreement with a common meaning that is identical to that in our previous example.[118]

3. Contemporary Clickwrap in a Standard Consumer Purchase. — For a related situation that frequently arises in contemporary consumer contracts, let us return to the example of clickwrap described at the start of this Article. In that case, Ms. Gerhardt sought to purchase a license to a song from Apple for ninety-nine cents. During contract formation, but before Ms. Gerhardt could click "I accept" to the final purchase, Apple attached a hyperlink to thirty-two pages of boilerplate text. With all this digital text being exchanged, how can one determine which text contributed to a common meaning of the parties and which did not?

The conceptual test of shared meaning analysis suggests converting these internet communications into an oral, face-to-face conversation. If one were to do this, one would have to imagine a salesperson for Apple cooperatively engaging with Ms. Gerhardt to establish a few terms and conditions for the sale of a license for ninety-nine cents. Before allowing her to consummate the final sale, the salesperson would have then tried to do something remarkable. The salesperson would have tried to read the entire additional thirty-two printed pages of boilerplate text to Ms.

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[118] These conclusions are fully consistent with current United States law, under which courts would be required to treat Angelo's purchase order as an offer, and Premier Camping's email confirmation as an acceptance of the offer — even though the acceptance contains boilerplate text that is additional to or different from the parties' actual agreement. U.C.C. § 2-207(1) ("A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon . . . ."). Just as shared meaning analysis recommends, courts would then be required to treat the thirty-two pages of additional boilerplate text as offering at most proposals for addition to the contract. *Id.* § 2-207(2) (explaining that in contracts involving at least one nonmerchant, "[t]he additional terms are to be construed as proposals for addition to the contract").

Gerhardt, most likely causing her to terminate the conversation and sale.[119]

The conceptual test of shared meaning analysis makes it easy enough to see that Apple could not, in fact, have sought to introduce all this boilerplate text into a cooperative linguistic exchange that aimed at producing a common meaning of the parties. The attempt would have violated both the Maxim of Quantity and the Maxim of Manner, thus establishing that this thirty-two pages of text was mere pseudo-contract.[120]

Of course, Ms. Gerhardt still clicked "I accept," rather than declining the purchase. If stated orally, this would have still allowed for contract formation.[121] The parties' subsequent behavior in exchanging money for the license similarly establishes that they both meant to form a contract.[122] So indeed there is still a contract. Shared meaning analysis just clarifies that the actual agreement produced by this linguistic exchange contained an exchange of a license (as described in the short product description that was cooperatively conveyed through the iTunes website) for ninety-nine cents, but not the additional thirty-two pages of boilerplate text that were delivered uncooperatively and failed to produce any common meaning of the parties.[123]

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[119] This fact is well known among courts and scholars who favor assimilationist approaches to evaluating boilerplate. In *Gateway 2000*, for example, Judge Easterbrook said:

> Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.

105 F.3d at 1149. We agree with these observations, but we do not believe that Judge Easterbrook recognized the correct normative, linguistic, doctrinal, or practical implications of these facts for contract law.

[120] For those who worry that treating contract meaning as the common meaning of the parties would undermine contemporary contract law, it should be remembered what is in these thirty-two pages of boilerplate text. The five examples of boilerplate if-then text that were described in section II.D, *supra* pp. 1160–65, are all actual examples of boilerplate text found in one iteration of Apple's "terms and conditions." But none of this text is being treated as contract by anyone, as explained in the main text of section II.D, which means that this objection is overblown. It would not affect contract law or practice to treat many instances of boilerplate text as noncontractual.

[121] Contract formation requires "a manifestation of mutual assent to the exchange," RESTATEMENT (SECOND) OF CONTRACTS § 17(1), where "[t]he element of agreement is sometimes referred to as a 'meeting of the minds,'" *id.* § 17 cmt. c. In this case, both parties agreed to an exchange with the terms that were actually placed up for cooperative discussion, even if other boilerplate text was merely attached and did not create any common meaning of the parties.

[122] *See id.* § 19(2) (allowing conduct to manifest the assent required for contract formation, so long as the person "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents"); *see also id.* § 22 cmt. b ("Assent by course of conduct"); U.C.C. § 2-207(3) ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.").

[123] This case should not, in other words, be treated all that differently from the one in which Angelo was a consumer and used a handwritten purchase order to form a contract rather than

4. Getting More Boilerplate Text into a Small Purchase Contract. — The problem with the thirty-two pages of boilerplate text in the last two examples is that it was far too long to enter into a cooperative linguistic exchange that aimed to produce an actual agreement for those relatively small purchases. The length limits that shared meaning analysis places on boilerplate text depend on social context, the type and value of the contract, and the parties' practical aims and attention in a particular setting. Even in the case of a small purchase, it is possible to imagine parties using more boilerplate text to add terms to a contract.

Without alienating Ms. Gerhardt, Apple might have sought to emphasize that the purchase would be for a personal license to listen to the song on only one computer. Apple might have manifested this intention clearly and cooperatively enough in the context of a small digital sale by having different buttons ("For Single-Computer Listening" and "For Multiple-Platform Listening"), clearly marked, and with different prices. By clicking on the button marked "For Single-Computer Listening," Ms. Gerhardt would have then made her actual agreement to purchase a limited license clear and consistent with presuppositions of cooperative language use by both parties.[124]

In such a case, the conceptual test of shared meaning analysis would yield a more nuanced set of conclusions. To convert all of this text into a face-to-face, oral conversation, one would have to imagine something like an employee directing customers to use one of two checkout lanes, the first for single-computer licenses and the other for multiple-computer licenses. Apple's use of the button would have therefore done enough to distinguish this more limited boilerplate text from the other thirty-two pages to bring this more limited content into the cooperative discussion. The pressing of the clearly marked button would have been analogous to Ms. Gerhardt responding to this cooperative communication by choosing the checkout lane for single-computer licenses. The resulting contract would have therefore contained an actual agreement with shared meaning and one more term than in our previous clickwrap example — but still not with any valid "terms" arising from the additional thirty-two pages of boilerplate text that were never cooperatively communicated.

This example shows that utilizing shared meaning analysis would not interfere with freedom of contract. The point of shared meaning

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clicking a purchase button online — and where a similar conclusion would have been required by current American law but not by assimilationist approaches to evaluating boilerplate text. *See supra* section III.C.2, pp. 1175–76.

124 Apple might even have required Ms. Gerhardt to click another special button before completing the purchase that said: "I understand that the content I am purchasing is for my personal use only on ONE SINGLE COMPUTER. If you would like to purchase a multiple-platform license, please reload this page and click on 'Multiple-Platform Purchase.'"

analysis is to help courts identify with more accuracy what parties have in fact agreed to by freely contracting; the point is not to regulate parties' agreements for fairness or on any other ground.[125] Consistent with shared meaning analysis, parties can always try to enter as much text as they want into a linguistic exchange. But they cannot create a common meaning of the parties without actually creating that common meaning. Vendors that hope to use boilerplate text to produce a common meaning of the parties would therefore need to choose their battles wisely and find innovative ways of cooperatively communicating those terms that are the most essential to their proposed contracts.

It is at this point that we find valuable proposals to engage in empirical work to identify targeted disclosures that are most responsive to facts about human psychology and linguistic comprehension. We earlier noted a set of proposals that fall into this category from Sunstein, Ayres, Schwartz, Porat, Strahilevitz, and others.[126] Instead of proposing legislative requirements to make specific disclosures based on evolving empirical work, however, shared meaning analysis would effectively place the burden on businesses to establish that the boilerplate text they are using is producing common understanding in social context. A common law method like this would help align market incentives with the production of common meaning and would generate more common meaning as by an invisible hand. Unlike slow-moving legislation, based on empirical work that often develops at an equally slow rate, shared meaning analysis would automatically keep pace with rapidly evolving markets.

Parties could, of course, also still try to introduce all thirty-two pages of boilerplate text into linguistic exchanges like the one leading to the contract between Apple and Ms. Gerhardt. Parties might still decide to place all this text under the misleading title of "terms and conditions," even if much of it serves no plausible contractual function. But if courts were to use shared meaning analysis, thereby grounding contract meaning in the common meaning of the parties, that would create a disincentive to produce excessive or mislabeled boilerplate text.[127]

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[125] This does not mean that we are averse to such regulation in the right circumstances. Our point here is just that shared meaning analysis is not a regulatory doctrine. Indeed, it is sometimes more accurate to construe *deviations* from shared meaning analysis as impinging on private ordering.

[126] *See supra* notes 104–107 and accompanying text.

[127] In fact, because shared meaning analysis can help courts identify the actual agreements that parties reach in contemporary formation settings, the real danger is that using assimilationist approaches instead to evaluate boilerplate text is doing damage to private ordering. When Friedrich Hayek wrote on the importance of free markets and private ordering for aggregating information that is otherwise hard to collect about the routes to human welfare, *see* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945), he was assuming a legal regime of contract, grounded in parties' cognizant agreements, not pseudo-contract, grounded in something else. We now know that treatment of copious boilerplate text as "contract" when it is not grounded in cognizant agreement can incentivize the design of text that is inefficient when enforced as "contract." *See* Korobkin, *supra* note 98, at 1205–06; *infra* section III.E.2, pp. 1195–96. This risk is common

5. A Short and Clear Reduction to Writing. — Yet another possibility is that written text is being used to reduce an actual agreement to writing. Recall the 1883 hypothetical we described at the start of this Article, and assume now that Mr. Thompson and Mr. Libbey reduced their oral agreement to writing. The written document in the actual case was very short and plausibly produced in this manner. It said in full:

> AGREEMENT.
>
> HASTINGS, MINN., June 1, 1883.
>
> I have this day sold to R.C. Libbey, of Hastings, Minn., all my logs marked 'H.C.A.,' cut in the winters of 1882 and 1883, for ten dollars a thousand feet, boom scale at Minneapolis, Minnesota. Payment, cash, as fast as scale bills are produced.
>
> [Signed] J.H. THOMPSON,
> Per D.S. MOOERS.
> R.C. LIBBEY.[128]

It is easy enough to apply the shared meaning test in this example because we assumed that Thompson and Libbey did in fact communicate all of these terms orally and face-to-face before reducing them to writing. All of the text in this short document could have been exchanged orally, consistent with the Maxims of Quantity and Manner. Shared meaning analysis thus suggests that the entire written document contributed to an actual agreement and contract between the parties — though it would also allow for reformation of the written contract if there were any mistake in the reduction to writing.

6. Reconsidering the "Duty to Read." — On the facts of *Thompson v. Libbey*, or other cases involving similarly short written documents, it is possible to make linguistic sense of early common law pronouncements relating to the so-called "duty to read." In 1875 — around the time when *Thompson v. Libbey* was decided — the U.S. Supreme Court said in relation to a similarly produced written document that "[i]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained."[129] That may have been true enough of many written contracts in the late nineteenth century, when mass printing of preformatted text was so costly that writings were typically much shorter. But in the information age, we now know that a

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when the boilerplate text is not "salient," in the sense that it does not affect the contracting decisions of a substantial group of consumers or other relevant contracting parties. Korobkin, *supra* note 98, at 1206. Boilerplate text that is not "salient" in this sense is often not part of a contract under shared meaning analysis. Not enforcing these pseudo-contractual provisions will not only help return contract regimes to the core of private ordering but will also help produce more efficient markets.

[128] Thompson v. Libbey, 26 N.W. 1, 2 (Minn. 1885).

[129] Upton v. Tribilcock, 91 U.S. 45, 50 (1875).

great amount of boilerplate text is neither read nor understood by anyone.[130] Too much has changed between 1883 and today to attribute reading and understanding to people who have been overloaded with boilerplate text without closer attention to how text produces a common meaning of the parties.

As Professor Charles L. Knapp has observed, "[t]he duty to read, although regarded as a part of contract law," is not really "a 'duty' imposed *by* contract, but rather a statement about how parties should behave during the contract-making process."[131] In fact, the "duty to read" was never really a duty because failure to comply with it did not render sanctions appropriate. Failure merely allowed for an implication of reading and understanding when neither took place. But the so-called "duty to read" was also "a statement about how parties should behave during the contract-making process"[132] because parties really should read and try to understand text that is cooperatively communicated, like the brief text in *Thompson v. Libbey*. Failure to do so is a failure to cooperate that will not affect the common meaning of the parties, because the common meaning of the parties presupposes linguistic cooperation. When, by contrast, copious boilerplate text is delivered to consumers during contract formation in many contemporary formation settings, it is often the *business* that is behaving badly by violating the cooperative norms of language use and trying to say too much — not the consumer, who cannot but fail to read all of the lengthy text if the consumer is to live a normal life.

Unfortunately, some modern courts have carelessly lifted early common law statements about the so-called "duty to read" and projected them into contemporary circumstances where justifications for the doctrine no longer apply.[133] Courts are wrong to do this because the same

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[130] Bakos, Marotta-Wurgler & Trossen, *supra* note 7, at 32.

[131] Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1085–86 (2015). Because there are numerous exceptions to the so-called "duty" in fact, *see id.* at 1089–112, Knapp argues that the so-called "duty to read" — even if applied out of context as some contemporary courts have done — would be better construed as reflecting a mere rebuttable presumption that all written text delivered during contract formation has been read and understood by the recipient. *Id.* at 1083 (arguing that the best harmonization of the case law suggests that "the 'duty to read' rule would better be denominated as 'a presumption of knowing assent'"). If this presumption of knowing assent is meant to be evidentiary, then it no longer tracks the facts about what is likely read and understood in circumstances where copious boilerplate text is delivered during contemporary contract formation. If this presumption of knowing assent is instead meant to help courts identify parties who may have been behaving poorly or uncooperatively during contract formation, then the rule is also out of date. We therefore recommend a more explicit limitation of the so-called "duty to read," as explained in the main text.

[132] *Id.* at 1085–86.

[133] *See, e.g.*, Uhar & Co. v. Jacob, 840 F. Supp. 2d 287, 292 (D.D.C. 2012) (citing *Upton*, 91 U.S. at 50, without critical examination, for the proposition that "[i]f the defendants signed the lease without reviewing its contents, the cost of that error must be borne by the defendants alone"); Morales v. Sun Constructors, Inc., 541 F.3d 218, 221 (3d Cir. 2008) (quoting *Upton*, 91 U.S. at 50, without scrutiny, for contemporary application of "duty to read"); Warner v. United States, 103 Fed. Cl. 408, 414 (2012) (same).

principles of cooperative language use that justify the original so-called "duty to read" require rejection of its application to many contemporary boilerplate settings. If courts are interested in discerning the common meaning of the parties and correctly identifying the scope of their actual agreements, then the so-called "duty to read" should be limited to text that was cooperatively communicated.

D. Sophisticated Parties and High-End Boilerplate

The conceptual test of shared meaning analysis is meant to help courts identify the common meanings of the parties where that might otherwise be difficult. Because it draws on linguistic facts about how shared meaning is produced, and because shared meaning is the core of contract, the method should be applicable to all contracts, from consumer purchases of everyday items to more complex transactions between sophisticated parties that hire expensive attorneys who use boilerplate templates to draft contracts. To our knowledge, high-end boilerplate has not yet been a topic for linguistic analysis. But in the contemporary digital environment, it is necessary to consider how facts about meaning apply to boilerplate text exchanged among sophisticated parties. In this section we discuss examples of high-end boilerplate and how its contribution to common meaning can be discerned using shared meaning analysis.

Professors Schwartz and Robert E. Scott have criticized contract scholars — which would include both of us — who try to understand contract law from a unified perspective and identify principles applicable to the entire field, from consumer contracts to contracts between sophisticated businesses.[134] They believe that contracts between businesses should be separately understood and interpreted with special methods,[135] whereas we believe that the core principles of contract law and core facts about language require all contracts to be subject to the same fundamental principles of interpretation. Shared meaning analysis is an attempt to articulate those fundamental principles in a way that avoids the problems of previous blanket approaches.

Shared meaning analysis differs from an extreme "four corners" or "textualist" approach to contract interpretation, such as that recommended by Schwartz and Scott for contracts between sophisticated firms.[136] The Schwartz-Scott approach would strictly limit the evidence

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[134] Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 568–94 (2003).

[135] *See id.* (arguing that "[a] Willistonian, or 'textualist,' theory of interpretation [that] assumes that contracts often have 'plain meanings' that are apparent to judicial interpreters" with a minimal evidentiary basis of just the text, *id.* at 572, should apply specifically to "business contracts," *id.* at 589).

[136] *See id.* at 589.

upon which contract interpretation is based to the text found in a written document.[137] Schwartz and Scott believe that sophisticated parties would prefer such an interpretive rule from an ex ante perspective because a purely noncontextualist approach to interpretation leads, it is claimed, to more efficient dispute resolution in many situations.[138]

From our point of view, there is a serious linguistic problem with the Schwartz-Scott proposal. Though they do not recognize the technical distinction between sentence meaning and speaker meaning and did not have access to our proposed definition of the "shared meaning" of a contract when they made their proposal, Schwartz and Scott seem to be recommending that courts rely only on sentence meanings when interpreting contracts between firms.[139] For reasons discussed above, however, contract meaning is not sentence meaning even in circumstances

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[137] Limiting their recommendations to contracts between sophisticated firms, Schwartz and Scott show formally that once sophisticated parties have entered into a contract, the expected value of an interpretive style that more accurately discerns the common meaning of the parties is, all other things being equal, identical to that of an interpretive style that allows for more variance in error due to the exclusion of probative evidence from context. *Id.* at 576 ("A risk-neutral party cares about the mean of the interpretation distribution but not the variance. This is because the variance term measures risk [of interpretive error] while risk-neutral parties are indifferent to risk."). But because they assume that interpretive styles that examine broader classes of evidence must be inherently more costly, they argue that formalist approaches to interpretation should be preferred by sophisticated parties that value efficiency highly. *Id.* at 584–85.

[138] *Id.* Of course, part of their proposal rests on the view that formalist approaches will incentivize sophisticated firms to make the contents of their actual agreements clearer to courts, using text that can be understood easily (at little cost) without any (or at least as few as possible) contextual clues. *Id.* at 589–90. If formalism were to lead to written contracts that were easily understandable without social context, then the Schwartz-Scott proposal might lessen the risks to the efficacy and usefulness of contract law that we describe. But given the linguistic considerations set forth in Parts I and II, *supra* pp. 1144–65, and in the Appendix, *infra* pp. 1216–19, we suspect that the Schwartz-Scott proposal underestimates the degree to which the content of actual agreements arises from conversational implicatures, not sentence meanings, and misconstrues how reasoning from social context works. This leads to two problems with their cost-benefit analysis. First, their proposal to eliminate all evidence of social context assumes, incorrectly, that the evidence and reasoning needed to infer conversational implicatures is always highly costly. Second, their proposal mistakenly assumes that it is less costly to render all contract meaning in terms of sentence meaning, when that would require extraordinarily lengthy documents that are very difficult and costly to understand. *See supra* section II.D, pp. 1160–65. Indeed, a proposal to render all contract meaning in terms of sentence meaning may not even be coherent or workable given parties' practical purposes in contracting. *See supra* section II.D, pp. 1160–65.

[139] Schwartz and Scott distinguish languages only by "linguistic communities," such that what they call "*M*" consists of a "single linguistic community" that speaks what they call "majority talk." Schwartz & Scott, *supra* note 134, at 570. They propose that a fully textualist style should be able to proceed without any reliance on evidence from context, with mere knowledge of majority talk, and with "a standard English language dictionary, and the interpreter's experience and understanding of the world." *Id.* at 572. This sounds very much like they are proposing that contract meaning should be understood as sentence meaning, or the meaning that a competent speaker of English would attribute to a sentence without any knowledge of its context of utterance. But even when purporting to use a fully "textualist" or "four corners" approach to interpretation, courts often do and must implicitly rely on conversational implicatures to identify even the "plain meaning" of text. *See supra* Part II, pp. 1156–65.

where courts allow review of very little contextual evidence during contract interpretation.[140] A proposal to eliminate all evidence of context from interpretive disputes is not a sound one if one's aim is to produce a contract regime that coheres with the fundamental principles of contract law and basic facts about how common meaning is produced. Nor is it the proposal that sophisticated firms will find most useful in all settings.[141]

1. Sovereign Bond Contracts (and the Term that Went Astray). — To illustrate how shared meaning analysis can be applied to boilerplate text in contracts between sophisticated parties, we turn first to the example of sovereign bonds. Sovereign debt instruments have recently received sustained attention from legal scholars and practitioners,[142] and much is known about how boilerplate text is produced and evolves in sovereign bonds.

Sovereign bonds are typically issued by nation-states in auctions in which banks or other highly sophisticated and wealthy institutional investors are either the underwriters, the bulk of the initial buyers, or both.[143] The corporate attorneys who draft these instruments do not start from scratch. They build from forms developed in prior deals and repeat great amounts of text verbatim.[144]

In doing this, corporate attorneys often express respect for precedent and for the fact that many boilerplate text clauses have proven their effectiveness in past transactions.[145] This respect for precedent might

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[140] *See supra* Part II, pp. 1156–65.

[141] For one thing, this approach can sometimes make it more difficult (that is, more expensive and sometimes even linguistically impossible) for sophisticated firms in a competitive environment to make credible promises that are specific enough to outcompete other sophisticated firms who are limited to making equally vague promises by a textualist approach to interpretation. Hence, under the Schwartz-Scott proposal, sophisticated firms would have fewer reasons to contract in the first place. This fact may help to explain why the Uniform Commercial Code has not taken up the recommendations of Schwartz and Scott in any general way when it comes to contracts between merchants or firms. *See, e.g.*, Schwartz & Scott, *supra* note 134, at 583 (recognizing that despite their arguments, "the UCC strongly urges a contextualist interpretive style").

[142] *See, e.g.*, MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2012); Lee C. Buchheit & Jeremiah S. Pam, *The* Pari Passu *Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869 (2004); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929 (2004). For other useful work on the use of boilerplate in corporate contracting, see Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

[143] *See* Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 4 (2013).

[144] *See* Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 LAW & SOC. INQUIRY 72, 96 (2013).

[145] Professors Mark Weidemaier, Robert E. Scott, and Mitu Gulati believe there may also be some agency problems, especially where younger corporate attorneys fear the risk of error and are overly cautious about changes. *See id.* at 96–97. There is a larger literature on the "stickiness" of high-end boilerplate. *See, e.g.*, Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default*

appear to contradict a more transactional ideal of contracting, under which sophisticated parties use fresh language to reach fully bespoke agreements over all text and terms in every case.[146] But the view that these parties are engaging in blind copying is not entirely accurate either. To test it, Professors Mark Weidemaier, Robert E. Scott, and Mitu Gulati collected extensive data on sovereign bond instruments going back to the nineteenth century.[147] Their data suggest that "sovereign debt lawyers behave collectively more like sophisticated market actors [that is, more in accordance with a transactional ideal] than the stories [concerning respect for precedent] imply."[148] For example, "[i]nstead of blind copying, [sovereign debt lawyers] appear to engage in frequent contract tailoring," and "instead of overlooking mistaken additions to contract boilerplate, they demonstrate a thorough understanding of the language used in their contracts."[149]

Unlike in the simpler cases described so far, the conceptual test of shared meaning analysis suggests that all of the boilerplate text found in sovereign bond instruments created in this fashion could have been exchanged in a more complex, oral, face-to-face discussion among these expert corporate lawyers — acting as agents for the primary parties — to produce an actual agreement with shared meaning. So long as indirect investors are equally sophisticated, as many typically are, sovereign bonds should be able to create shared meanings that are widely understood in social context by participants in sovereign bond markets. The presumption of large-scale boilerplate exclusions that applies to some consumer clickwrap agreements[150] does not apply to high-end boilerplate used by many sophisticated parties in circumstances like these. But this difference flows from the same basic principles about how shared meaning is produced, not from categorically different interpretive approaches that apply to different kinds of contracts.

By using shared meaning analysis in application to contracts between sophisticated parties, courts can avoid grave interpretive errors that a purely noncontextualist approach might cause. Consider the well-studied example of *pari passu* clauses. These clauses appear in many contemporary sovereign bonds,[151] just as in many other debt instruments, and typically say something like this:

Rules, 33 FLA. ST. U. L. REV. 651 (2006); Choi & Gulati, *supra* note 142; Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 286–93 (1985); Kahan & Klausner, *supra* note 142.

146 *See* Weidemaier, Scott & Gulati, *supra* note 144, at 75.

147 *Id.* at 81–82.

148 *Id.* at 73; *see also* GULATI & SCOTT, *supra* note 142 (discussing sovereign debt lawyers' stories).

149 Weidemaier, Scott & Gulati, *supra* note 144, at 73.

150 *See supra* section III.C.3, pp. 1176–77.

151 Weidemaier, Scott, and Gulati find that *pari passu* clauses appear in 98.7% of the sovereign bonds that they studied beginning in 2000. Weidemaier, Scott & Gulati, *supra* note 144, at 83 tbl. 1.

> These Notes rank, and will rank, equally (or *Pari Passu*) in right of payment with all other present and future unsecured and unsubordinated External Indebtedness of the issuer.[152]

Construed literally and without context, these clauses would allow single unsecured creditors to insist on a ratable share of any payments made under a plan to restructure debt, even for those creditors that refused to participate in the restructuring.[153] This "contractual right" would seem to come from the text of the note if construed literally — not from any restructuring plan. Yet when one court allowed for that interpretation in *Elliott Associates, L.P.*,[154] its decision "sent shock waves through the sovereign debt world."[155] The decision was viewed by most sophisticated and knowledgeable parties as having been decided wrongly, as allowing for vulture funds to use *pari passu* clauses to gain unintended advantages over bondholders that had actually participated in the restructuring of the debt, and as "raising the possibility that copycat litigation would complicate future efforts to restructure distressed sovereign debt."[156] Yet this erroneous interpretation is strongly suggested by a noncontextualist approach to contract interpretation, and this interpretation would indeed be the correct one in many debt instruments that are not sovereign bonds.[157]

Shared meaning analysis would not approach the interpretation of *pari passu* clauses with such a blind commitment to noncontextualist reasoning. Shared meaning analysis would instead ask how these particular *pari passu* clauses function among sophisticated parties who are using language cooperatively to contract but who also know that sovereign entities cannot be liquidated. If everyone knows that fact, then everyone knows that the formalist or textualist interpretation cannot be right. It would probably violate the Maxim of Quantity to say that explicitly and stipulate a nontextualist interpretation. Yet *pari passu*

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[152] *Id.* at 73.

[153] This is because — taken out of context — clauses like this seem to "ensure[] that the debt will have the same priority as all the borrower's other unsecured debt in the event of a liquidation." *Id.* at 74. This would be the clear reading if the clauses were to appear in unsecured corporate debt. But because sovereign entities cannot be liquidated, *id.*, it is less clear what text like this could mean in the context of a sovereign bond. Still, the formal or literal meaning should be the same regardless of context.

[154] Elliott Assocs., L.P., General Docket No. 2000/QR/92, P 2 (Ct. App. of Brussels, 8th Chamber, Sept. 26, 2000).

[155] Weidemaier, Scott & Gulati, *supra* note 144, at 74.

[156] *Id.*

[157] The fact that a noncontextual interpretation of *pari passu* clauses conflicts with the understandings of sophisticated parties has led some scholars to search for explanations for why this boilerplate text would remain in sovereign bonds after *Elliott*. *See* GULATI & SCOTT, *supra* note 142, at 33–44 (offering ten basic theories to explain why boilerplate text is sticky in order to try to explain why *pari passu* clauses remain in sovereign bonds). We believe that a key part of the correct explanation is that these clauses have sovereign-bond-specific and nonformalist shared meanings in context, as we will explain in the main text that follows.

clauses continue to be used in sovereign bonds, so shared meaning analysis recommends searching for the interpretation that would give parties the most relevant assurances needed in social context to induce investment. That interpretation provides the meaning that is most consistent with presuppositions of cooperative language use in this social context.

Lee C. Buchheit and Jeremiah Pam offer what we take to be the best expert answer to this puzzle: *pari passu* clauses are best interpreted in the context of contemporary sovereign bonds (but not other debt instruments) not literally but rather as "a representation by the borrower that no unsecured but senior claims exist at the time of the loan," thus making it "an event of default for a borrower to allow a subsequent lender to obtain priority in this manner."[158] Shared meaning analysis would have allowed the court in *Elliott* to get this interpretation right and avoid the grave errors that can be caused by inattention to how parties use language to create common meanings in social context. The fact that sophisticated parties have not removed *pari passu* clauses from sovereign debt instruments and believe *Elliott* was wrongly decided suggests that they may think the clauses serve a useful and meaningful function, which can be identified by looking at the origins of these clauses and asking how their language could be rendered consistent with presuppositions of cooperative language use in social context.[159]

The arguments that Scott and Schwartz advance for a purely noncontextualist approach to interpretation are completely general and purport to apply to all contracts and terms between sophisticated parties. The arguments should therefore apply to *pari passu* clauses in sovereign bonds. Yet examples like these contradict the view promoted by Schwartz and Scott that sophisticated parties always assume or prefer a fully noncontextualist approach to contract interpretation — even when they value efficiency highly. That should not be altogether surprising given that conversational implicatures are important and pervasive aspects of contract meaning in numerous ways that typically go unrecognized.[160] Contract meaning is shared meaning.

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[158] Weidemaier, Scott & Gulati, *supra* note 144, at 80 (citing Buchheit & Pam, *supra* note 142, at 905).

[159] Some further evidence for this proposition can be found in how sophisticated parties talk about the meanings of *pari passu* clauses in sovereign bonds. In their empirical studies of this topic, Weidemaier, Scott, and Gulati found that sophisticated lawyers who draft sovereign bonds — especially at the senior levels — told origin stories (stories about how the clauses originated in social context) to try to make sense of the clauses. *Id.* at 73. From the perspective of shared meaning analysis, this focus on origin stories makes sense. It reflects the correct — if only implicit — intuition that the contractual meanings of these clauses depend on the cooperative uses to which they were put in the particular social settings in which they originated, given the shared purposes that sophisticated parties have in contracting for sovereign bonds. Though some have offered alternative origin stories and suggested different meanings for *pari passu* clauses, we find the interpretation offered by Buchheit and Pam to be most convincing and in line with shared meaning analysis.

[160] *See supra* Part II, pp. 1156–65.

2. Provision of Mandatory Boilerplate for Associations of Sophisticated Parties. — In a different pattern of boilerplate production than that developed around the *pari passu* clauses in sovereign bonds, some associations that are made up largely of private businesses provide standardized contract terms that their members are required to use for some market exchanges. Sometimes this boilerplate text is meant to codify preexisting informal business norms, though the process of "codification" sometimes yields more specification (and more shared understanding of those specifications) than existed beforehand.

Professor Lisa Bernstein has collected an extensive list of examples, which are as varied as the American Cotton Shippers Association, the Kansas City Board of Trade, and the General Arbitration Council of the Textile and Apparel Industries (Worth Street Rules).[161] Other examples include the International Swaps and Derivatives Association (ISDA)[162] and numerous Technology Standard-Setting Organizations.[163] Associations like these "publish codes of industry standards or promulgate standard-form contracts that memorialize industry custom in contractual boilerplate."[164]

Though all of these associations operate differently, they share some common traits that can be illustrated by looking at one of them in more detail. ISDA is an organization the main purpose of which is to facilitate private markets for derivatives and swaps.[165] Derivatives are typically invested in to hedge against market fluctuations in time or between countries, such as currency risk, interest rate risk, or supply source risk.[166] A swap is a derivative contract where two parties exchange financial instruments.[167] Most swaps involve exchange of cash flows of one party's financial instrument for those of another.[168] For example, a country with large short-term debt obligations at high rates could swap for a longer-term debt obligation with lower rates.

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161 Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1805 n.134 (1996).

162 Sean M. Flanagan, Student Article, *The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association*, 6 HARV. NEGOT. L. REV. 211, 229–34 (2001).

163 *See, e.g.*, FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (Mar. 2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf [https://perma.cc/YKM8-K266]; Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, 1 INNOVATION POL'Y & ECON. 119, 128 (2000).

164 Bernstein, *supra* note 161, at 1806 n.134.

165 *About ISDA*, INT'L SWAPS & DERIVATIVES ASS'N, http://www.isda.org/about-isda/ [https://perma.cc/CV5N-NYUC].

166 JAMES D. COX ET AL., SECURITIES REGULATION 560–62 (7th ed. 2013).

167 *Id.* at 562–65.

168 *Id.* at 563.

Though many derivative and swap terms are negotiated and flexible, ISDA manages a detailed standardized contract called the Master Agreement, first created in 1987 and last revised in 2002.[169] The Master Agreement sets forth standard boilerplate text that is intended to add terms to the contracts that are required as conditions for member firms that buy and sell derivatives and swaps over the counter.[170] Among other things, the Master Agreement details what happens in case of default by a trading party (most often bankruptcy), which is complicated in the case of derivatives because one bankruptcy affects other participants.[171] The Master Agreement is supposed to organize the market in a way that will limit losses to avoid disruption of the market as a whole.[172] This safeguard is something that most private businesses want some assurance of before investing, and boilerplate text like this helps facilitate these markets.

How does shared meaning analysis relate to boilerplate text required of members in particular businesses or trade associations? Many of the issues posed by boilerplate that is generated by trade associations are not issues of contract scope or interpretation. For example, the requirement of some industry-wide boilerplate terms could be anticompetitive under certain (perhaps many) circumstances — creating ensconced collusion and making new entry into the market difficult or economically impossible (too risky, or otherwise too expensive).[173] Still, the participants in associations like these are typically sophisticated parties who understand and even play a role in producing changes from time to time to the required boilerplate text. Though the linguistic interactions are more complex, it is possible to understand most or all of this boilerplate text as contributing to a longer-term oral conversation in which the text is actually conveyed and understood at some point by most or all of the relevant sophisticated parties. So unlike in the case of consumer clickwrap purchases, there should be fewer problems with this type of high-end boilerplate creating actual agreements with shared meanings. Most disputes should be over how to interpret the shared meaning of this boilerplate text in social context, rather than over whether the boilerplate text contributes terms to the contracts.

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169 *See* INT'L SWAPS & DERIVATIVES ASS'N, USER'S GUIDE TO THE ISDA 2002 MASTER AGREEMENT, at i (2003), https://www.isda.org/a/IAEDE/UG-to-2002-ISDA-Master-Agreement.pdf [https://perma.cc/3RAG-NCMK]; Flanagan, *supra* note 162, at 230.

170 Flanagan, *supra* note 162, at 230, 243–45.

171 *Id.* at 231, 233.

172 *See id.* at 232.

173 *See, e.g.*, Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 328, 384–85 (2010).

3. Unwritten Implications from Trade Usage, Course of Dealings, and Course of Performance. — When copious boilerplate text is included in contracts between sophisticated parties, a separate question is whether that fact (or any other facts about contracts between sophisticated parties) precludes unwritten implications from contributing shared meanings to their contracts. Those who support a distinct, formalist approach to interpreting contracts between sophisticated parties object to unwritten implications from trade usage, course of dealings, or course of performance.[174]

Most arguments for a purely noncontextualist approach to interpreting such contracts depend on an overly narrow construal of how unwritten implications can arise from social context. Bernstein has, for example, studied implications from trade usage and argued for a purely noncontextualist approach.[175] In a series of empirical papers, she suggests that fewer trade usages exist than many assume.[176] But she views "trade usages" as existing only when there are "unwritten, industry-wide" conventions of language that are "geographically coextensive with the scope of [a] trade,"[177] fully specifiable in dictionary-like definitions, and about which there is no significant disagreement among merchants.[178] Empirical work that makes these assumptions is not dispositive of whether unwritten implications contribute to the shared meaning of contracts between sophisticated parties because — as many of our examples have shown — many unwritten implications are nothing like dictionary-like definitions that are generally accepted within an entire trade.

Consider, for example, the construction trade. In this trade, it is common for businesses or other parties that need construction to hire an architect, create detailed specifications, and invite general contractors to bid on the project as specified. In creating their bids, general contractors typically turn to subcontractors, who are experts with respect to particular parts of the project, and ask for bids for the various parts. General contractors depend on the bids of local subcontractors when submitting their own bids. General contractors are also typically required to place

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[174] *See, e.g.*, Lisa Bernstein, *The Myth of Trade Usages: A Talk*, 23 BARRY L. REV. 119, 126 (2018); Schwartz & Scott, *supra* note 134, at 593; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1712–15 (1997) (briefly outlining a formalist versus a realist approach to contract interpretation and where trade usage and course of dealings fit in).

[175] Shared meanings can arise from broader contextual sources, such as courses of dealing or courses of performance, as well.

[176] For a recent synopsis of these arguments, see Bernstein, *supra* note 174, at 121–23. Another strand of her argument is that even if some trade usages exist, it is costly enough to establish them in court that merchants should not want courts to rely on such evidence from an ex ante perspective. *Id.* at 126–27.

[177] *Id.* at 121.

[178] *Id.* at 121–23.

a deposit when bidding for a contract, which they will lose if they are granted the project and do not perform. These bidding processes create a pricing mechanism for construction services, which are unique and otherwise hard to price.

Bids have the linguistic form of a conditional: "If you pay me a specific amount of money, then I will perform these services." In social context, bids are typically construed as offers due to presuppositions of cooperative language use to contract. But there is nothing about a purely noncontextual approach to interpretation that requires that conclusion.[179] Unlike ordinary offers, bids by subcontractors are also typically construed as containing an unwritten promise to keep the offer open, so that the offer cannot be freely revoked after a general contractor has relied on it in submitting a bid.[180] This unwritten promise cannot be derived from a purely noncontextualist approach to interpretation either. It can, however, be inferred from presuppositions of cooperative language use and common knowledge of how bidding processes work. If everyone in the construction trade knows that general contractors are relying on subcontractors' bids (but cannot immediately accept them) when making their own bids, and that general contractors need a firm offer in case they get the contract and are required to perform at the relied-upon price, then it is not necessary on an informal phone call or even in a written bid to specify that a bid is irrevocable. It would, in fact, probably violate the Maxim of Quantity to go on at length in such communications about these well-known facts and implications. The unwritten implication that bids are firm offers derives from presuppositions of cooperative language use in social context, but there is no dictionary-like definition at play here at all — of what, exactly, "if" and "then"?

Dictionary-like definitions were not in play in deriving the conversational implicatures in the contract between Amber and Paolo either, or in the correct interpretation of *pari passu* clauses in sovereign bonds. Shared meaning analysis allows the common meaning of the parties to vary locally and to be derived from presuppositions of cooperative language use in social context — not just from dictionary-like definitions of terms. We suspect that some of the more extreme arguments for noncontextualist approaches to interpretation derive from insufficient attention to these broader ways that social context can alter the common meaning of the parties.

Unlike the formalist approach promoted by Schwartz, Scott, and Bernstein, shared meaning analysis is fully consistent with legal provisions found in the Uniform Commercial Code, the Convention on the International Sale of Goods, and many other commercial laws from

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[179] *See supra* section II.B, pp. 1157–58.

[180] *See, e.g.*, Victor P. Goldberg, *Traynor (*Drennan*) Versus Hand (*Baird*): Much Ado About (Almost) Nothing*, 3 J. LEGAL ANALYSIS 539, 540 (2011).

around the world that direct courts to consider unwritten trade usages or other shared understandings that are produced in social context when interpreting contracts. The Uniform Commercial Code correctly defines an "agreement" as "the bargain of the parties in fact, as found in their language *or inferred from other circumstances*, including course of performance, course of dealing, or usage of trade."[181]

Of course, when sophisticated parties contract against the backdrop of written boilerplate codifications of informal business norms, that fact may have some bearing on whether it is consistent with presuppositions of cooperative language use to have left certain other mutual understandings unwritten. But this is a matter of degree, not kind, and courts will err if they ignore implications from social context completely. That much should be clear from the examples discussed in this and prior sections.

E. Shared Meaning Analysis Question II: Eliminating Hidden Conflicts and Deception

The second question that the test of shared meaning analysis can help courts answer more accurately is whether there are any hidden conflicts between boilerplate text and the common meaning of the parties. Boilerplate text that presents a hidden conflict with contract is not just pseudo-contract. It is pseudo-contract that deserves an extra level of scrutiny because it undermines contract and may even be deceptive. Boilerplate text that falls into this second category should be discarded as a basis for any contract claim or defense.

We have introduced the term "ride-along text" to refer to any text that does not contribute to parties' actual agreements, as identified by shared meaning analysis, but merely accompanies the narrower exchanges of language that produce a common meaning of the parties. Hidden conflicts often involve a species of ride-along text, but the conflation of pseudo-contract with contract has made it difficult for courts to see this fact and properly address hidden conflicts. Shared meaning analysis offers courts a general and flexible way to avoid legal errors that can result from failures to recognize and eliminate hidden conflicts.

1. Pseudo-Contract Can Mask Hidden Conflict and Deception. — As an example of how shared meaning analysis might help courts detect hidden conflicts and deception, consider *Izadi v. Machado (Gus) Ford, Inc.*[182] The dispute in *Izadi* began with a newspaper advertisement for car sales, which stated in prominent print at the top that the dealership would subtract a "minimum trade-in allowance" of $3,000 for any trade-

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[181] U.C.C. § 1-201(b)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (emphasis added).

[182] 550 So. 2d 1135 (Fla. Dist. Ct. App. 1989).

in vehicle (that is, regardless of actual value).[183] The ad then prominently displayed three — but only three — pictures of vehicles, including a 1988 Ford Ranger Pick-Up, with three initial list prices and three final prices lowered by $3,000 for a "trade-in."[184] This additional text did not say three more times that the $3,000 subtraction for each vehicle was for any trade-in, regardless of value. It just said what the final price would be if $3,000 for a "trade-in" were subtracted in each of the three cases.[185]

All of this text was boilerplate text because it was preformatted and provided to multiple parties and on multiple occasions during contract formation.[186] Using shared meaning analysis and converting all this boilerplate text into an oral conversation, these statements would have been part of a single oral conversation governed by the Contractual Maxim of Relation. This maxim says that contributions to a contractual conversation must be relevant to parties' aims in contracting given the stage of the formation conversation. In order to preserve the presupposition that Gus Machado Ford was using language cooperatively to form a possible contract, one would therefore need to assume that an agent for the dealership meant for this opening statement about a minimum trade-in allowance of $3,000 "for any vehicle" to be relevant to the three explicit sales that it proposed just thereafter in the very same formation conversation. If one presupposes cooperative language use, then this implication would be further solidified by the explicit reference made to the three prices being lowered by $3,000 (the exact same amount mentioned in the exact same formation conversation) for a "trade-in." Shared meaning analysis thus suggests that the language in the ad conversationally implied — even though it never literally said — that there would be a $3,000 minimum trade-in allowance for any vehicle, regardless of worth, as part of the proposed terms for the sales of the three advertised vehicles. The contents of the multiple offers conveyed by this ad were related to one another by conversational implicature as parts of the same conversation.

But when Izadi responded to the ad and the parties agreed to a sale of a 1988 Ford Ranger Pick-Up, a dispute arose. Izadi believed they had agreed to a contract that allowed for a $3,000 minimum trade-in deduction for any vehicle, including his own, which was worth less than $3,000. The car dealership countered by pointing to the literal meaning of text in the ad and arguing that it had agreed only to a deduction for the lesser worth of Izadi's actual trade-in vehicle. In the court's words, the car dealership sought to support its interpretation by pointing to the

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183 *Id.* at 1136–37.

184 *Id.* at 1137.

185 *Id.*

186 This is the definition we introduced at the beginning of this Article. *See supra* note 8.

"infinitesimally small print under the $3,000 figure [at the top of the ad] which indicated [that the $3,000 minimum allowance] applied only toward the purchase of 'any New '88 Eddie Bauer Aerostar or Turbo T-Bird in stock' — neither of which was mentioned in the remainder of the ad."[187]

Use of the conceptual test of shared meaning analysis suggests that oral communication of the ad would have conversationally implied — without literally saying — that the $3,000 minimum trade-in allowance applied to the purchase of a 1988 Ford Ranger Pick-Up. When the car dealership tried to add an additional limitation, through "infinitesimally small print," one would have to imagine that an agent for the dealership proposed this additional limitation only inaudibly, under his breath. This proposed limitation was not communicated clearly enough to comply with the Maxim of Manner — which says to communicate clearly. It therefore failed to contribute any proposed terms that were ever under discussion or actually agreed to when the parties formed their contract.

Shared meaning analysis thus clarifies why this infinitesimally small boilerplate text — unlike the rest of the boilerplate text in the ad — was at best pseudo-contract. If it were treated as contract, this pseudo-contractual text would be more problematic than some other kinds of pseudo-contract because it presents a hidden conflict with the common meaning of the parties. Hidden conflicts like these are not always easy to discern without shared meaning analysis. Discernment is especially difficult when the same term ("contract") is used for both contract and pseudo-contract — thus encouraging the conflation of contract with text that undermines contract.

This conflation could have easily led to legal error. Lacking the resources of shared meaning analysis, the court in *Izadi* felt forced to try to harmonize all the language in the ad and resolve the apparent conflicts between the infinitesimally small boilerplate text and what it called the "prominent thrust" of the ad using an "objective" approach to interpretation.[188] But pseudo-contract that conflicts with the common meaning of the parties cannot contribute any shared meaning to a contract. Because such pseudo-contractual "terms" are invalid, there should have been no question whatsoever of their weight or thrust — only how to detect and eliminate the hidden conflict.

The court ultimately held that the parties' contract was for the purchase of a 1988 Ford Ranger Pick-Up at the price listed along with a minimum trade-in allowance of $3,000 for any vehicle regardless of worth. Shared meaning analysis would endorse that conclusion but

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[187] *Izadi*, 550 So. 2d at 1138.

[188] *Id.* at 1138–39 ("It is of course well settled that a completed contract or, as here, an allegedly binding offer must be viewed as a whole, with due emphasis placed upon each of what may be inconsistent or conflicting provisions." *Id.* at 1138.).

would also eliminate the risk of error inherent in the court's attempt to harmonize pseudo-contract with contract.

Notably, the court also went further to find that the ad constituted a form of false or misleading advertising because it was a bait-and-switch ad[189] — in other words, an ad that was "made not in order to sell the advertised product at the advertised price, but rather to draw the customer to the store to sell him another similar product which is more profitable to the advertiser."[190] This conclusion depended on an implicit distinction between the meaning communicated cooperatively by the ad in its social context (that is, the "bait") and the conflicting meaning of the infinitesimally small boilerplate text that also appeared in the ad but was never cooperatively communicated (that is, the attempted "switch"). Shared meaning analysis makes this distinction explicit, thus giving courts a more reliable method to police deception and hidden conflicts that pose as "contract."

2. Assimilationist Approaches Invite Expanding Forms of Market Deception. — As the previous example demonstrates, shared meaning analysis will sometimes suggest that some text creates valid terms while other text is mere pseudo-contract. Even boilerplate text found in a single document like the ad in *Izadi* can sometimes require this division. This is a feature of shared meaning analysis, not a bug. To appreciate why, consider how assimilationist approaches to handling boilerplate text might approach similar cases of hidden conflict.

For an assimilationist, when Izadi responded to the ad, he "assented" to many risks, including that of being bound by the infinitesimally small boilerplate text in the ad. On this interpretation, there would have been no possibility of finding deception, even though it was clearly present, because the deception would have been masked as "contract." But deception is not the same thing as contract — just as consent to the risk of being legally bound by unknown "terms" (really, text) is not the same thing as an actual agreement to terms with shared meaning. There is every reason to keep deception and contract distinct, which means that there is every reason to keep pseudo-contract and contract distinct.

When courts use the same term ("contract") for both contract and pseudo-contract, it becomes all too easy to assume without reflection that pseudo-contract should be legally enforced as "contract" just by virtue of its perceived association with contract. That this cannot be assumed — and is, in fact, often false — is perhaps easiest to see in cases of hidden conflict because the normative justifications for contract enforcement all point toward the legal enforcement of parties' actual agreements (which are contract) and against the legal enforcement of

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[189] *Id.* at 1139–41.

[190] *Id.* at 1139 n.8 (quoting Tashof v. FTC, 437 F.2d 707, 709 n.3 (D.C. Cir. 1970)).

the conflicting boilerplate text (which is mere pseudo-contract). Assimilationist approaches to handling boilerplate text make it difficult for courts to keep track of distinctions that are vital to contract law.

Because of these facts, market forces have begun to interact with assimilationist legal doctrine to create powerful incentives for businesses systematically to mislead consumers through what is sometimes called careful contract design. This euphemistic phrase refers to the design of boilerplate text to exaggerate the expected benefits of a proposed contract to consumers while minimizing the expected costs.[191] Professor Oren Bar-Gill discusses this problem in depth in *Seduction by Contract*, but the primary focus of his book is on contract design that engages consumers' irrationalities (their heuristics and biases).[192] A further problem is that in a legal regime of pseudo-contract, businesses now have incentives to make use of extensive pseudo-contractual text to take advantage of consumers' *rationality* in not reading an overwhelming amount of boilerplate text.

The economic incentive in a legal regime of pseudo-contract is, in fact, for one party to endeavor to place boilerplate text that would disadvantage the other (when compared to the cooperatively communicated terms) in pseudo-contract that is unlikely to be read. The incentive is then to place any terms that would deceptively exaggerate the benefits of the entire "contract" (where that is construed to include all the pseudo-contract as well) squarely into the cooperative discussion. When pseudo-contract is enforced as contract, this encourages a shift from traditional systems of private ordering, grounded in actual agreement and common understanding, to systems of mass deception that merely pose as "contract" in many consumer markets.[193] This is the *Izadi* problem writ large, and it is one that the law cannot adequately address without the resources of shared meaning analysis.

3. Doctrinal Resistance to Pseudo-Contract. — While the trend in case law suggests ever-expanding assimilation of boilerplate text to "contract," the common law offers numerous counterexamples, especially when it comes to policing hidden conflicts between boilerplate text and the common meaning of the parties. What has been lacking thus far is an overarching theory that explains what unites these doctrines and a general method to identify and eliminate hidden conflicts in any contractual setting. Shared meaning analysis provides that missing theory and method.

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191 For extensive discussion of this general problem, see OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 21 (2012).

192 *See id.* at 2.

193 Bar-Gill makes a similar point in relation to the active engagement of heuristics and biases. *See id.* ("Competition, many believe, works to increase efficiency and protect consumers. But competition does not alleviate the behavioral market failure [under discussion]. It may even exacerbate it.").

To demonstrate undiscerned unity in the common law's resistance to hidden conflicts, we collect a nonexhaustive list of examples that are suggestive of a common principle. These examples range from legal doctrines that govern warranty disclaimers to applications of the parol evidence rule and methods of interpreting insurance policies.

Consider first how courts treat disclaimers of express warranties. Express warranties can be created in a number of ways — for example, through affirmations of fact, promises, descriptions, samples, or models — so long as one party makes a representation relating to the subject matter of an exchange and the representation "becomes part of the basis of the bargain."[194] It is not uncommon for a purchase to come with copious boilerplate text that purports to disclaim all warranties but is never cooperatively communicated or read.

Using the test of shared meaning analysis, many general disclaimers of warranties that come in overly copious boilerplate text could be entered into an oral conversation, which takes place face-to-face, only by violating the Maxim of Quantity. The statements or representations that create express warranties are, by contrast, typically entered directly into cooperative linguistic exchanges that create a common meaning of the parties. Contrary to assimilationist approaches to handling boilerplate text, shared meaning analysis thus suggests that these express warranties are parts of the parties' actual agreements and contracts, whereas many such general boilerplate disclaimers are mere pseudo-contract. Because these pseudo-contractual disclaimers conflict with the common meaning of the parties, they conflict with contract and cannot be legally enforced as parts of contracts. The current law that governs warranty disclaimers is fully consistent with the recommendations of shared meaning analysis in all of these respects: it does not deem general boilerplate warranty disclaimers to be enforceable parts of contracts. But these rules governing warranty disclaimers are inconsistent with the apparent recommendations of assimilationist approaches to handling boilerplate text.[195]

Consider next how courts treat parol evidence. Courts will sometimes refuse to enforce a boilerplate integration clause that purports to render a written document both final and complete when there is clear enough parol evidence from the course of negotiations to suggest that

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194 U.C.C. § 2-313(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

195 The current law tends to treat these boilerplate disclaimers as invalid. The stated theory — which fits well with the basic concepts that animate shared meaning analysis — is that "'[e]xpress' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms." *Id.* § 2-313 cmt. 1.

the parties entered into other actual agreements with additional content — either orally or in writing.[196] This might happen if a consumer, upon purchasing a product and at the urging of a sales representative, were to pay extra for an extended warranty on the product at the point of sale. Assume that the product comes with shrinkwrapped boilerplate text, which is very long, is not likely to be read, and contains the sentence, "This written document contains the final and complete terms relating to the purchase and warranty of this product." Assume that this shrinkwrapped boilerplate text also states that the consumer may return the item within thirty days if dissatisfied, but describes only a standard warranty, not the extended warranty that was actually purchased.

An assimilationist could conclude that the consumer assumed the risk that the extended warranty he purchased might be modified by boilerplate text that came in the shrinkwrap package, and that his failure to read the text and return the product shows he accepted only a standard warranty in the end. If the shrinkwrapped text were deemed a final and complete record of their actual agreement, just because it says so in (likely unread) boilerplate text, then the parol evidence rule could be used to prevent the consumer even from introducing evidence of a receipt to establish purchase of the extended warranty. This assimilationist approach is silent concerning issues of deception, hidden conflicts with contract, and the common meaning of the parties.

Shared meaning analysis would mitigate these problems. If the communications were all converted into oral form, then the fact that the parties explicitly discussed and agreed to an extended warranty would make an extended warranty part of the common meaning of the parties. The boilerplate integration clause and standard warranty text that came only later in the shrinkwrap package would be mere pseudo-contract. Because this particular pseudo-contractual text conflicts with the common meaning of the parties, neither the integration clause nor the shorter warranty would be part of the contract, and the consumer would be allowed to show evidence that he purchased the extended warranty. This is, in fact, how many courts would treat this sort of situation — which once again shows that assimilationist approaches are not entirely accurate restatements of the law.

Consider another well-settled example: cases in which there is an oral or implied condition precedent to a written agreement. This might occur with respect to the sale of a home if two parties were to enter into an oral agreement that is expressly conditioned on the purchaser's ability to obtain financing. Assume that the parties later sign a standard real estate "purchase agreement," which states that it is the "final and

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[196] *See, e.g.*, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1968); Levien Leasing Co. v. Dickey Co., 380 N.W.2d 748, 752 (Iowa Ct. App. 1985); Int'l Milling Co. v. Hachmeister, Inc., 110 A.2d 186, 191 (Pa. 1955).

complete agreement between the parties," is meant to reduce their agreement to writing, and lacks any written condition relating to financing. An assimilationist approach might suggest that no such condition could be part of the parties' actual agreement or contract. But that is not in fact the law,[197] and if it were, it would conflict with the common meaning of the parties. In the context of a standard home purchase, one party can introduce evidence of a condition precedent relating to financing even if the condition does not appear in a written agreement that purports to be completely integrated.[198]

The "reasonable expectations doctrine," which is applied mainly in some insurance policy contexts, is yet another doctrine that shows the common law's sensitivity to problems of hidden conflict.[199] Consider the court's reasoning in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co*.[200] In this case, C & J Fertilizer wanted to obtain insurance relating to a number of different risks, including the risks of burglary and robbery.[201] In the discussions leading to the insurance contract, the parties explicitly discussed the fact that the coverage under the "Mercantile Burglary and Robbery Policy" would require "visible evidence of burglary,"[202] but the court explained that "[f]rom the trial testimony it was obvious the only understanding was that there should be some hard evidence of a third-party burglary vis-a-vis an 'inside job.'"[203] The parties' use of the term "burglary" in this way during contract formation was consistent with the purchaser's understanding at the time, with how people in that locale generally understood the term, and with how local police officials understood it based on prevailing definitions of burglary

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[197] *See, e.g.*, Hicks v. Bush, 180 N.E.2d 425, 427 (N.Y. 1962) ("Parol testimony is admissible to prove a condition precedent to the legal effectiveness of a written agreement, if the condition does not contradict the express terms of such written agreement." (internal citations omitted)).

[198] *Id.* ("[T]he parol evidence rule does not bar proof of every orally established condition precedent . . . .").

[199] The reasonable expectations doctrine was first explicitly recognized and articulated as a tendency in insurance contracts, worthy of explicit doctrinal formulation, by Robert E. Keeton — then a professor and later a federal judge. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966–74 (1970) [hereinafter Keeton, *Part One*]; Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281, 1322 (1970). For a description of the early and subsequent history of this doctrine, and some of its limitations, see Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990). For a description of some parallel developments in English law relating to the former doctrine of "fundamental breach," which was once applied far beyond the insurance contract context but has been superseded by consumer protection statutes enacted throughout the European Union, see Stephen Waddams, *The Problem of Standard Form Contracts: A Retreat to Formalism*, 53 CAN. BUS. L.J. 475, 480–81 (2012) (book review).

[200] 227 N.W.2d 169 (Iowa 1975).

[201] *Id.* at 171.

[202] *Id.*

[203] *Id.* at 172.

from the criminal law.[204] C & J Fertilizer ultimately purchased a "Mercantile Burglary and Robbery Policy" as insurance against the risk of burglary.

Sometime after purchasing this policy, C & J Fertilizer received a lengthy brochure from the insurance company, which — as is often the case — contained copious boilerplate text that purported to set forth the full "terms" of the "policy agreement."[205] One unread boilerplate passage purported to redefine "burglary" in a narrower way than what the parties had actually discussed, so that it included only burglaries that left "visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry."[206] When C & J Fertilizer was victimized by a burglary and submitted an insurance claim, the insurance company tried to refuse coverage, citing this boilerplate text redefinition of "burglary."[207] But there was no disagreement that this was a burglary in the sense discussed during contract formation.

Using the conceptual test of shared meaning analysis and converting all of this text and language into an oral, face-to-face conversation, the statements regarding coverage for burglaries (viewed as outside jobs) were clearly communicated to produce a common meaning of the parties. The boilerplate text that came later in the long-form insurance policy was, by contrast, part of a communication that was far too copious to be entered into a cooperative conversation that could alter the common meaning of the parties. This boilerplate text was thus pseudo-contract, which — because it conflicted with the common meaning of the parties — would undermine the parties' actual contract if enforced as contract. Shared meaning analysis suggests that this boilerplate text should have been discarded from the parties' contract, and that the insurance claim should have been covered because it was a claim for losses due to burglary, as that term was used when the parties formed their contract.

The court ultimately came to the correct conclusion in this case, but only on the basis of the reasonable expectations doctrine,[208] which says that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[209] Though application of the reasonable expectations doctrine led to the right result, the doctrine has proven problematic in several respects. It is often vague and difficult for courts to apply. Its application can sometimes lead to pernicious results —

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[204] *See id.* at 173.
[205] *Id.* at 172.
[206] *Id.* at 171.
[207] *Id.*
[208] *See id.* at 176–77.
[209] Keeton, *Part One*, *supra* note 199, at 967.

including some that run contrary to parties' actual agreements due to reliance on the concept of a "reasonable expectation" rather than the common meaning of the parties. Reliance on the concept of a "reasonable expectation" to determine the contours of insurance contracts — as opposed to actual agreement and the common meaning of the parties — is, finally, hard to square with the core principles that justify contract enforcement by the state.[210] These problems may explain why the reasonable expectations doctrine has thus far been limited mostly to insurance contracts, where the doctrine first emerged and where its contours are still not completely clear.[211]

Shared meaning analysis offers a better and more principled way to reach the correct legal result in many cases that involve hidden conflicts. On this view, the issue in *C & J Fertilizer* was neither with anyone's reasonable expectations nor with anything specific to the insurance policy context that would require a special approach to contract interpretation. The issue was with how to identify and remove a hidden conflict between pseudo-contract and contract. Because shared meaning analysis focuses contract enforcement on parties' actual agreements, a shared meaning analysis of *C & J Fertilizer* fits better with the proper aims of contract law than does application of the reasonable expectations doctrine as typically stated.

This approach to hidden conflicts also extends far beyond the narrow confines of insurance contracts and could harmonize results like this with legal doctrines that eliminate hidden conflicts in the other contexts discussed in this section. Once one sees that sound linguistic considerations can be used to harmonize the results in these seemingly disparate lines of cases and ground them in core contract law principles, these different lines of cases will appear less like varied exceptions and more like common manifestations of a deeper principle. The deeper principle, which is central to contract law, is that contract meaning is the common meaning of the parties. That is the principle that shared meaning analysis helps to make vivid, effective, and easily extendible to broader circumstances of hidden conflict.

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[210] For more criticisms, which may involve some overstatement, see, for example, Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 433–45 (1998), where the authors describe problems of unpredictability, lack of coherence with contract principles, and uncertainty; Mark C. Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107, 145–49 (1998); and Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 112 (2007), where the author noted, "[O]nly two jurisdictions — Alaska and Hawai'i — accept the doctrine as it was originally formulated, by permitting policyholders' expectations to trump clear policy language."

[211] *See* Roger C. Henderson, *The Formulation of the Doctrine of Reasonable Expectations and the Influence of Forces Outside Insurance Law*, 5 CONN. INS. L.J. 69, 70–71 (1998).

4. Restatement (Second) of Contracts Section 211 Is Still Part of the Law. — At this point, it is worth remembering that the Restatement (Second) of Contracts, which was published in 1981, contains one clear provision that purports to deal with standardized agreements and to treat boilerplate text in a way that is consistent with core contract law principles.[212] Section 211 states that "[w]here [one] party has reason to believe that [another] party manifesting . . . assent [to a standard form] would not do so if he knew that the writing contained a particular term [or text], the term [really, text] is not part of the agreement."[213]

Section 211 was not drafted with the benefit of contemporary understandings of how shared meaning works. The provision nevertheless tries to articulate a test for the common meaning of the parties in what may have been the best language available at the time. The provision is plainly inconsistent with assimilationist approaches to evaluating boilerplate text. The recent expansion of assimilationist doctrine, much of which took place after the publication of section 211 in 1981, has left some scholars with the view that section 211 is no longer an accurate restatement of the law.[214]

The paradigm slip from contract into pseudo-contract means that these scholars are partially right. Still, in response to the suggested demise of section 211, it should be noted that all of the examples of hidden conflicts discussed in this section fit the basic model in which one party has tried to introduce copious boilerplate text into a contract formation setting. But, based on the narrower language and text that the parties cooperatively communicated during contract formation, some boilerplate text fell outside the parties' actual agreement and also conflicted with it. In all of these cases, the party that attached the more copious boilerplate text thus had "reason to believe"[215] — based in the parties' actual agreement — that the other party who was "manifesting . . . assent [to the standard form] would not do so if he knew that the writing contained [the] particular term [or text]."[216] The evidence that the party "manifesting assent" would not agree to the standard form in each of these highly varied examples, if he knew of the offending boilerplate text, is that in each case, the unread boilerplate text conflicts with the parties' actual agreement. These conflicts are easily discernible with

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[212] RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981).

[213] *Id.* § 211(3).

[214] *See, e.g.*, Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 757–60 (2016); *see also* Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 899–901 (2016) (noting courts' disagreement over section 211 but discussing its potential application in the context of the internet of things).

[215] RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

[216] *Id.*

shared meaning analysis but easily obscured by assimilationist approaches to handling boilerplate text.

In each of the cases discussed in this section — the boilerplate text limitation on the automobile trade-in, the boilerplate text disclaimer of warranty, the boilerplate text integration clause, the boilerplate absence of a condition precedent, and the boilerplate text limitation on policy coverage — section 211 of the Restatement is correct, if read literally, that courts are not treating the conflicting pseudo-contract as "part of the agreement."[217] The examples described in this section thus suggest that the basic principles reflected in section 211 are not, in fact, completely lost to the common law. These are not just some random collection of special doctrines. Though the paradigm slip is real, it is still opposed by some historical and contemporary legal doctrines, which can now be further harmonized and explained by reference to the core principles that justify contract enforcement by the state.

So what is one to say in response to the claim that assimilationist approaches to boilerplate text are now so well rooted in current contract law and practice as to be necessary and irremovable parts of the system? One should respond that if taken at face value, assimilationist doctrine is actually incompatible with many other well-recognized aspects of legal doctrine and practice. The recent expansion of assimilationist doctrine is creating underappreciated tensions and incoherencies in contract law, coupled with grave threats to traditional systems of private ordering. Some assimilationist legal doctrine may be getting repeated more from habit than from careful thought.

5. Pseudo-Contract Is Distorting Arbitration. — The examples of hidden conflicts discussed thus far are all parts of well-settled law. There is, however, another class of boilerplate text that raises problems of hidden conflict but that the law has not yet properly addressed from this standpoint. Here we consider the increasingly common phenomenon of boilerplate text that purports to require the submission of all disputes that arise out of a contract to binding arbitration. These boilerplate provisions often contain class certification waivers as well.

When should such boilerplate text be legally enforced as contract, and when is it better construed as pseudo-contract that may even conflict with contract? The U.S. Federal Arbitration Act[218] (FAA), which states that written agreements to arbitrate are legally enforceable,[219]

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[217] *Id.*

[218] 9 U.S.C. §§ 1–16 (2012).

[219] *Id.* § 2 ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

might appear to make this question easy. Congress passed the FAA to counter generalized judicial hostility to arbitration as an alternative to litigation and to allow actual agreements to arbitrate to proceed regardless of such hostility.[220]

When the FAA was drafted in 1925, contract was still contract. Consistent with that fact, from 1925 until the mid-1980s, the U.S. Supreme Court consistently and correctly read the FAA to require an actual agreement to arbitrate, which was part of the common meaning of the parties and had been further reduced to writing.[221] But beginning in the mid-1980s, the Supreme Court began to issue a series of decisions that have allowed firms to use pseudo-contractual arbitration provisions to prevent consumers from pursuing class actions or otherwise exercising their legal rights to redress.[222] That these contemporary boilerplate arbitration texts are parts of a "contract," and reflect an actual "agreement" to arbitrate for FAA purposes, has just been assumed, without appropriate attention, due to the unconscious paradigm slip from contract into pseudo-contract. Hence the Supreme Court and many litigants have begun to focus their attention on secondary questions — such as whether there are "such grounds as exist at law or in equity for the revocation of any contract [to arbitrate]"[223] or whether state laws that would render an arbitration clause unenforceable are preempted by the FAA.[224]

This reasoning moves too quickly. There is a prior question that deserves more careful attention — and, indeed, that cannot properly be avoided. Consistent with larger patterns of handling hidden conflicts in the common law, the prior question is whether boilerplate arbitration text would, if enforced, produce a hidden conflict with the common meaning of the parties. When parties use language to contract, one of

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220 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citing Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008)).

221 *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804 (2015).

222 *Id.* (explaining that "until the mid-1980s, obligations to arbitrate rested on consent," but "[t]hereafter, the U.S. Supreme Court shifted course and enforced court and class action waivers mandated when consumers purchased goods and employees applied for jobs" in circumstances that postdated the "demise of negotiated contracts"); *see also* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting) ("It has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses.").

223 9 U.S.C. § 2 (allowing exceptions to enforceability of written arbitration clauses when "such grounds . . . exist at law or in equity for the revocation of any contract"). For U.S. Supreme Court opinions that go straight to this second stage of the analysis, see, for example, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); and *Concepcion*, 563 U.S. 333.

224 *See, e.g.*, Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1426–29 (2017) (holding that judicially created Kentucky rule that "single[d] out arbitration agreements for disfavored treatment," *id.* at 1425, was preempted by the FAA); *DIRECTV*, 136 S. Ct. at 469–70 (holding that statute that removed possibility of agreement to arbitrate was preempted by the FAA).

the standard presuppositions of the cooperative linguistic exchange is that each party is trying to identify a commitment or action that would be sufficient, if legally enforceable, to induce the other to make a return commitment that is also legally enforceable.[225] That presupposition explains why every contract includes an implied and nonwaivable duty of good faith and fair dealing that extends to the enforcement stage and to dispute resolution.[226] If a written arbitration provision conflicts with the common meaning of the parties and is mere pseudo-contract, then it cannot be part of their actual agreement or contract.

Whether a particular boilerplate arbitration provision was conveyed in a sufficiently cooperative manner to produce a common meaning of the parties — and hence contribute an actual term to a contract — is ultimately a question of state law. The U.S. Supreme Court has no jurisdiction over this question, and state courts that have unreflectively followed the U.S. Supreme Court into this paradigm slip have wrongfully relinquished their common law authority. Under a better interpretation of the common law of contracts and its core principles, hidden conflicts that involve boilerplate arbitration provisions should be identified and eliminated whenever application of the provision would make a contractual obligation effectively unenforceable. Hidden conflicts can also arise when arbitration provisions remove class certification procedures in application to contracts that are small enough, or for breaches that are minor enough, that only class actions would allow for meaningful avenues of legal enforcement.[227]

Other hidden conflicts can arise if pseudo-contractual arbitration text purports to require procedures that are too costly, too one-sided, or too geographically remote to allow for contract enforcement. Because contract meaning depends on linguistic cooperation within particular exchanges of language, boilerplate arbitration text can even present hidden conflicts in relation to some disputes, or some classes of consumers, but not others. Whenever a hidden conflict exists — whether in general

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[225] *See supra* section I.B, pp. 1150–54 (introducing and discussing this aspect of the Contractual Maxim of Relation); *see also supra* Part II, pp. 1156–65 (noting that this presupposition is critical for disambiguating the meaning of if-then statements, or conditionals, used to form contracts). If parties are not trying to induce one another to make legally enforceable commitments, they are not contracting at all.

[226] *See supra* section I.B, pp. 1150–54; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its . . . enforcement."); *id.* cmt. e (discussing obligation of good faith at the enforcement stage).

[227] Obviously, we realize that Justice Scalia came to a different legal conclusion in *Italian Colors*, 570 U.S. at 235–38. But he never addressed the question whether there was an actual agreement to arbitrate, under a proper understanding of contract law, which means that the analysis we propose is not foreclosed by this opinion. Nor could it be so foreclosed, as the analysis we propose raises a question of state law. We also agree with Justice Kagan's dissent in that case, *id.* at 246–50 (Kagan, J., dissenting).

or in application to a particular dispute — the conflicting pseudo-contract should be discarded under the best interpretation of the state common law of contracts and its core principles.[228]

Parties are, of course, still free to agree in advance to arbitrate a broad range of disputes. But they cannot agree to arbitration without actually doing so as part of the common meaning of the parties. The enforcement of pseudo-contractual arbitration clauses that conflict with contract creates the worst kind of threat to common meaning. But it is important to recognize that in many contemporary circumstances, not all written boilerplate arbitration provisions that could be agreed to are separated out and placed into a linguistic exchange in a sufficiently cooperative manner to create a common meaning of the parties. The fact that a written arbitration provision could have been agreed to does not mean that it was. Far too many pseudo-contractual arbitration provisions are beginning to be misconstrued as contract due to the paradigm slip into pseudo-contract. This is creating incentives to force arbitration through deception rather than contract.

Because all of these conclusions flow from core contract law principles, none of them runs afoul of the U.S. Supreme Court's recent decisions that hold the FAA to preempt state laws that seek to single out arbitration clauses for special treatment and place them on a lesser footing than other types of contract provisions.[229] Those decisions are perfectly consistent with — and, indeed, may require more explicit acknowledgment of — the fact that nothing in the FAA suggests that pseudo-contractual arbitration clauses should be placed on a *higher* footing than contract either.

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[228] If cases in a particular state jurisdiction appear to go in another direction, it is important to check whether those state court decisions are relying on the U.S. Supreme Court's conflation of pseudo-contract with contract. A great number of lower courts have begun to repeat the U.S. Supreme Court's broad pronouncements about the enforceability of written arbitration clauses without recognizing that the U.S. Supreme Court has no legal authority to turn pseudo-contract into contract as a matter of state law. *See, e.g.*, Davis v. USA Nutra Labs, 303 F. Supp. 3d 1183, 1189 (D.N.M. 2018); Plazza v. Airbnb, Inc., 289 F. Supp. 3d 537, 546 (S.D.N.Y 2018); Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1151 (N.D. Cal. 2015); Tompkins v. 23andMe, Inc., Nos. 13-CV-05682 et al., 2014 WL 2903752, at *4 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016); Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 786 (N.D. Ill. 2011).

[229] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on an equal footing with other contracts . . . ." (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006))).

F. Shared Meaning Analysis Question III: Interpreting Other Classes of Ride-Along Text

Courts will need to address the third question of shared meaning analysis[230] only if parties seek to base a contractual claim or defense on boilerplate text that neither is part of the parties' actual agreement (as identified with the first question)[231] nor conflicts with the common meaning of the parties (as identified with the second question).[232] As noted, we use the term "ride-along" text to refer to text that rides along with or accompanies the communications that parties use to produce actual agreements through linguistic cooperation.[233] Having discussed the most problematic cases of hidden conflicts between pseudo-contract and contract, we now turn to the question of how to handle other classes of ride-along text with shared meaning analysis.

We launch this broader discussion with an observation that is critical to a proper understanding of these questions but has thus far escaped widespread notice. *Uses of boilerplate text have been rapidly diversifying in the information age.* With the rise of online sales and technological advances that allow production and conveyance of massive amounts of digital information, it has become much easier for businesses to attach copious ride-along text to communications that are exchanged during contract formation.[234] Consumers do not and could not rationally read all this boilerplate text,[235] and neither courts nor scholars have the time to read all that much of it either. These facts have begun to distort judicial and scholarly understandings of what all this boilerplate text is actually doing in social context. Many assimilationists assume — without carefully looking — that all this boilerplate text must be there to serve the same linguistic function of seeking to add terms to a contract. But that is just an assumption, and no evidence for it is ever provided. The assumption is false.

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230 We introduced the three questions that can be addressed with the conceptual test of shared meaning analysis in section A, *supra* pp. 1166–68.

231 This is the question whether a particular piece of boilerplate text contributes to the common meaning of the parties and hence contributes a linguistically valid term to their contract. Sections C and D, *supra* pp. 1173–92, describe how judges and their law clerks can address this question with shared meaning analysis.

232 This is the question whether ride-along boilerplate text presents a hidden conflict with the common meaning of the parties and hence with their actual agreement and contract. Section E, *supra* pp. 1192–206, describes how judges and their law clerks can address this question with shared meaning analysis.

233 Boilerplate text that has not been entered into a cooperative conversation but conflicts with a term that has been properly agreed to is a special case of ride-along text, which we treated in the last section.

234 *See* RADIN, *supra* note 9, at 8; Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 464 (2002).

235 BEN-SHAHAR & SCHNEIDER, *supra* note 6, at 12–13; Bakos, Marotta-Wurgler & Trossen, *supra* note 7, at 2.

To illustrate, consider the following text — which is not at all an outlier — from boilerplate text that Apple Music currently provides to iTunes users via browsewrap and would presumably be considered "contract" under an assimilationist approach. It says:

> iOS apps may request access to Apple Music and your Media Library. If you give such permission to an app, it can access information like your media library on [your] device, whether you are an Apple Music subscriber, your music and video play activity, and your For You recommendations. . . . *You can disable an app's access on your iOS device in Settings . . . .*[236]

Now consider what the boilerplate text that we italicized means when it says to a consumer, "You can disable an app's access on your iOS device in Settings." What, in other words, is Apple Music doing with this text by placing it in its browsewrap "terms" via a hyperlink in the context of an online consumer purchase? To be sure, the text (if and when it is ever read) is telling consumers that they can disable an app's access in Settings. But does this text really mean to create a contractual term, condition, or obligation once "accepted"? It appears merely to provide an answer to a frequently asked question or an instruction for use.

On reflection, it would seem perverse to assume that this italicized sentence must seek to contribute legally enforceable terms to a contract just because it appears in ride-along text that was conveyed during contract formation. No one would think that Apple had actually breached the resulting contract if its developers were, for instance, to come up with an easier and more user-friendly way to disable an app's access without going to Settings and could therefore eliminate the Settings bar altogether in a useful software update.

Examples like this suggest that online sellers have begun to require a kind of "I accept" click after linking to many classes of boilerplate text, some of which may not be intended or understood by anyone to serve any contractual function at all. Perhaps they are doing this out of an abundance of caution, mere habit, or laziness. But placing noncontractual boilerplate text under a misleading label like "terms and conditions" can only cause obfuscation. This sort of obfuscation is currently encouraged by assimilationist approaches to handling boilerplate text.

Earlier we canvassed numerous other examples of noncontractual ride-along text, which give a sense of just how prevalent noncontractual uses of boilerplate are becoming in some consumer markets.[237] The tree of contract is getting lost in an expanding forest of pseudo-contract, and the forest is being mistaken for the tree. Many businesses are now using

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[236] APPLE, *Apple Music & Privacy* (Sept. 17, 2018) (emphasis added), https://support.apple.com/en-us/HT204881 [https://perma.cc/X8DT-PHMC]. For other examples of noncontractual ride-along text, the reader is invited to review the five examples of boilerplate text from the Apple iTunes "terms and conditions" set forth on page 1162.

[237] *See supra* section II.D, pp. 1160–65.

ride-along text to: 1) answer frequently asked questions; 2) provide instruction manuals (or more piecemeal instructions for use in other types of hyperlinks or written documents); 3) offer detailed descriptions of product features or ingredients; 4) provide warnings about the potential harms associated with certain uses; 5) offer information relevant to pursuing customer service inquiries or repairs; 6) allow for the storage of information relevant to usage or future contractual exchanges without necessarily adding terms to a contract (like prestored credit card or personal address information); 7) provide information relevant to current policies or program features; 8) provide disclosures of information (which may or may not be legally required); 9) spell out certain background legal rules that apply independently of any contract (and might relate to things like copyright, licensing, privacy, lemon laws, or the fact that certain disclosures are legally required); and, more generally, 10) meet a number of more highly variegated and evolving functions that are often highly trade or context specific.

This list is not an attempt to categorize all of the possible uses of ride-along text or offer detailed examples of how every type of ride-along text should be legally construed. Still, this list suggests just how hopelessly simplistic it is to make the blanket assumption that all boilerplate text conveyed during contract formation must seek to add terms to a contract. Without closer attention to the diversifying types of conversations to which boilerplate text now contributes (some contractual, some noncontractual and increasingly heterogenous), assimilationist approaches that seek to turn all this text into "contract" cannot help but create misunderstandings of many classes of boilerplate text.

It is time for a critical reappraisal of the unreflective view that unless all boilerplate is assimilated to "contract" with new and lax requirements of "assent," the expanding uses of boilerplate text in the information age will be stymied.[238] This view is quite common among courts and scholars who favor assimilationist approaches to handling boilerplate text, but the view may be getting things exactly backward. Given the ease with which copious ride-along text may be attached to digital contracting communications, one might equally predict that there may now be many more — rather than fewer — noncontractual functions that ride-along text serves. The currently widespread assumption to the contrary is technologically and linguistically naïve, inaccurate, and increasingly dysfunctional.

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[238] *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451, 1453 (7th Cir. 1996); RADIN, *supra* note 9, at 23–25; Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT 251, 251–52 (Franklin G. Miller & Alan Wertheimer eds., 2010) (observing that "consent, in the robust sense expressed by the ideal of 'freedom of contract'" is arguably "absent in the vast majority of the contracts we enter into these days, but its absence does little to affect the enforceability of those contracts," *id.* at 251, and that "making too many commercial transactions subject to serious challenge on consent/voluntariness grounds would undermine the predictability of enforcement that is needed for vibrant economic activity," *id.* at 252).

When handling broader classes of ride-along text, courts should always consider whether the text in question is even being used to add terms to a contract. Often, it will be obvious in context that a noncontractual function is being served — as in the Apple Music example of the instruction for how to disable an app's access in Settings. At other times, it may be equally obvious that a contractual function is sought — such as text that seeks to specify an agreed-upon method of delivery.

Courts can use the conceptual test of shared meaning analysis to sort all this out and handle disputes over broader classes of ride-along text based on its actual and shared meaning in context. To illustrate, we will now consider several applications of the test to broader classes of ride-along text. We begin with a single fact pattern, then build variations into it.

1. Purchase of an eBook License with Diverse Ride-Along Text. — Consider Jasmine, a consumer who decides to purchase a license to an eBook, *Remembrance*, as part of a promotional sale from Amazon for $15.95 that includes a free one-week trial. In order to sign up, Jasmine is asked to enter payment information into a box on her computer screen, which says that $15.95 will be automatically deducted using her payment information if she does not cancel within a week. After she enters this payment information, another box opens and asks her to confirm the purchase. That box contains several hyperlinks, including one entitled "cancellation instructions," another entitled "terms and conditions," and yet another that says "privacy policy." Jasmine does not click on any of these hyperlinks and just hits "confirm." A week later $15.95 is deducted from her account on file.

How much of this text contributed valid terms to the resulting contract? If all of this text were converted into an oral conversation, then one might imagine a sales agent orally offering to sell a personal license to *Remembrance* for $15.95 as part of a free one-week trial. All that content could have been cooperatively communicated in an oral conversation for a small purchase like this. But the text at the three hyperlinks would have likely been too copious to have been entered into a cooperative oral conversation that aimed at contract formation for such a minor purchase. The text at these hyperlinks was thus ride-along text.

The boilerplate text in the "cancellation instructions" was also ride-along text that is best interpreted as serving a noncontractual purpose. Rather than seeking to add terms to a contract, the text merely provides information about how to cancel an order if one is dissatisfied.

Next, consider what might have happened if Jasmine had decided to change her payment information during the trial period. Not knowing how to do this, she may have gone back to the promotional page and clicked on "terms and conditions." There she might have performed a search on the thirty-two pages of boilerplate text and found boilerplate text that answers her question — like this text, from Apple's online "terms and conditions": "If you want to designate a different payment

method or if there is a change in your payment method status, [then] you must change your information in the Account Settings menu on your device or computer."[239]

Converting this text into an oral conversation makes it clear that this particular boilerplate text is better construed as replacing an oral call to a customer service representative to get an answer to a frequently asked question — not to add terms to a contract. Provision of a hyperlink that includes this information with the contract was just a useful way to let consumers know where to find it.

In fact, the closer one looks at the details of some contemporary online transactions, the more noncontractual linguistic functions one will see. When, for example, Jasmine entered her original payment information into a box on her computer screen during contract formation, she communicated information that could have easily been communicated as part of an oral conversation consistent with the Maxims of Quantity and Manner. Neither party nor any court will, however, consider this information to create any binding terms of a contract because they will understand that her obligation was to pay, not to pay in a particular manner. That is why Jasmine could unilaterally change her payment information without breaching or modifying any terms of the contract.

How do courts and parties know all this? By relying on social presuppositions, including the cooperative use of language, while carefully attending to the many different types of linguistic exchanges to which boilerplate text may now be contributing. A careful look at the facts suggests that a great amount of boilerplate text that is being exchanged during contract formation no longer serves a contractual purpose. These facts contradict the blanket assumption of contractual absorption reflected in assimilationist approaches to evaluating boilerplate.

2. Reductive Ride-Along Text in an End-User License Agreement. — Next, assume that Jasmine decides to copy and sell *Remembrance* for only $9.95, thus undercutting Amazon's sales at $15.95. Amazon, who owns the copyright to *Remembrance*,[240] sues for copyright infringement and breach of contract, citing text from the end-user license agreement (EULA) that appeared in the boilerplate "terms and conditions" but that Jasmine — like most consumers — never read.

Because the boilerplate text found in this EULA was too copious to have been entered into a cooperative conversation during contract formation, it is ride-along text in this social context.[241] Unlike the examples

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[239] APPLE, *iTunes Store — Terms and Conditions*, *supra* note 82.

[240] This assumption is probably not realistic for most purchases like this, as Amazon will typically be a third-party beneficiary to the end-user license agreement, construed as existing between the original copyright holder and the purchaser. We nevertheless make this simplifying assumption for ease of presentation in this example.

[241] In some contracts between sophisticated parties, more of the EULA's actual text may have contributed to a common meaning of the parties — especially if it reduced to writing well-known trade usages or other informal business norms.

of purely noncontractual ride-along text discussed in the last section, however, at least some of this boilerplate text appears to serve a contractual purpose by spelling out the contours of the personal license that Jasmine purchased. It is also clear from the express and implied terms that the parties cooperatively exchanged during contract formation (that is, apart from this more detailed boilerplate EULA) that Jasmine was purchasing a personal license to the eBook and not the underlying copyright rights.

EULAs can be lengthy, but many of their "terms" may do nothing more than spell out the standard legal restrictions on use that come with a single user license under federal copyright law or relevant state laws. Hence, this text can be construed as purporting to reduce to writing certain aspects of the actual agreement that the parties reached cooperatively with other language during contract formation or to provide information about relevant background legal standards. We will call this "reductive" ride-along text.

Concerning reductive ride-along text, shared meaning analysis suggests that its enforceability depends on whether it is an accurate reduction to writing. Amazon should win in any dispute over Jasmine's copying of the eBook because such copying violated federal copyright law, regardless of whether those laws are accurately restated in the EULA. If Amazon were to cite boilerplate text in the EULA that is an accurate reduction to writing (as, for example, if there were a clause that said that the end user "will have the right to read the book on her personal reading devices but not to reproduce, distribute, or publicly display its content"),[242] then it should win on its claim for copyright violation. The outcome would be different, however, if Amazon were to try to make use of a boilerplate EULA provision that purported to restrict Jasmine's personal license in ways that were neither part of the common meaning of the parties nor derived from applicable background law. In that case, the ride-along text would have been an inaccurate reduction to writing.

3. Deceptive Ride-Along Text in an End-User License Agreement. — In the last example involving reductive ride-along text that accurately reduced to writing the common meaning of the parties and applicable background law, shared meaning analysis would produce the same legal result as assimilationist approaches to handling boilerplate text. In other situations, however, differences will emerge. Consider a hypothetical discussed by the court in *ProCD, Inc. v. Zeidenberg*,[243] one of the most influential early cases to endorse an assimilationist approach to boilerplate EULAs. Even while espousing assimilationism, the court noted in passing that "[o]urs is not a case in which a consumer opens a package to find

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[242] *See, e.g.*, APPLE, *iTunes Store — Terms and Conditions*, *supra* note 82 ("You agree not to modify, rent, loan, sell, or distribute the Services or Content in any manner . . . .").

[243] 86 F.3d 1447.

an insert saying 'you owe us an extra $10,000' and the seller files suit to collect."[244]

What exactly is the problem with the text in this hypothetical? The court sensed an obvious problem but did not see the problem as sufficient to pose an obstacle to assimilating all of the boilerplate text in the EULA to "contract." It saw no obstacle because it surmised that "[a]ny buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price."[245]

But we now know that that suggestion is not at all realistic. Most consumers do not and cannot read all contemporary boilerplate text before deciding whether to return or cancel a purchase.[246] If Jasmine's EULA had contained this boilerplate text, then under the *ProCD* approach, Jasmine would have therefore been "contractually" obligated to pay $10,015.95 for *Remembrance* because she failed to read the entire EULA and to cancel the order within the trial period. This would be an erroneous legal result because use of a EULA to create a price increase, instead of placing the proposed price increase in the price that was cooperatively communicated, is plainly deceptive.

Use of shared meaning analysis can help courts avoid legal errors like these. As in the prior example, this boilerplate EULA is best analyzed in context as reductive ride-along text. But unlike in the prior example, it is an inaccurate reduction to writing of the common meaning of the parties or any applicable background legal standards. This reductive ride-along text should be discarded and cannot add any fake "terms" to this contract.[247] The result would also be the same if the deceptive price increase were for merely one cent, rather than $10,000 — thus showing that the analysis here is not about price unconscionability.

When applying the test of shared meaning analysis to boilerplate text, one question that courts should always consider is whether the disputed boilerplate text is best construed as replacing an oral conversation that has a contractual or noncontractual purpose. Some seemingly contractual boilerplate text may also be better construed as reductive ride-along text in context, in which case its enforceability should depend on whether it is an accurate reduction to writing of the common meaning of the parties or background legal standards. In either event, the recent tendency to try to assimilate all boilerplate text to "contract," whether or not it comfortably fits, will tend to distort the functions of many classes of boilerplate text and produce legal error.

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[244] *Id.* at 1452.
[245] *Id.*
[246] *See, e.g.*, Bakos, Marotta-Wurgler & Trossen, *supra* note 7, at 3, 32.
[247] *See supra* section II.D, pp. 1160–65.

CONCLUSION

Many courts have begun to use assimilationist approaches to evaluate boilerplate text, thus contributing to a largely unconscious paradigm slip from contract into pseudo-contract. This has created problems for contract law, but the full depth and interrelated nature of the problems have not yet been fully appreciated. The problems exposed in this Article are linguistic, conceptual, practical, factual, normative, and doctrinal.

One linguistic problem with assimilationist legal doctrines is that they fail to comprehend how language works to produce a common meaning of the parties. The proper object of contract interpretation is — and always has been — the common meaning of the parties, which means that assimilationist doctrines get contract interpretation wrong. Assimilationist approaches also face challenges of linguistic indeterminacy that have not yet been recognized or met and that appear to us insurmountable.[248]

Turning to conceptual problems, the assimilationist conflation of shared meaning (traditional contract) with meaning that is not shared (pseudo-contract) has begun to shift and distort the meanings of many core contract law concepts — including "assent," "agreement," "interpretation," "term," "bargain," and even "contract" itself. Because of these conceptual distortions, many legal actors, as well as the public, have begun to lose track of what contract and freedom of contract even are.

These conceptual conflations are creating practical problems for many markets. Because courts are finding it harder to distinguish pseudo-contract from the common meaning of the parties, the legal regime of pseudo-contract is incentivizing new and expanding forms of mass-market deception, especially in many consumer markets, and an inexorable race to the bottom for pseudo-contractual "terms" of poor quality.[249]

Many of the assumptions made by assimilationists are also factually incorrect — and, indeed, technologically naïve and outdated. In proposing to lump all boilerplate text into "contract" (really, pseudo-contract), assimilationist approaches fail to recognize just how many noncontractual functions boilerplate text now serves.[250]

With regard to normative problems, the paradigm slip from contract into pseudo-contract wrests "contract enforcement" from the traditional

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[248] *See supra* section II.D, pp. 1160–65.

[249] For a classic explanation of why information asymmetries can produce a race to the bottom in product quality given competitive markets, see generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). Legal regimes of pseudo-contract create information asymmetries relating to many pseudo-contractual "terms" that are parts of "contracts," thus creating an analogous race to the bottom in the quality of these "terms." This race to the bottom would not exist if the law were to enforce contract rather than pseudo-contract.

[250] *See supra* section III.F, pp. 1207–13.

justifications of contract enforcement by the state — all of which focus on shared agreements, freely reached, as the central case.

These developments have, in turn, begun to create serious tensions and incoherencies in legal doctrine. Courts that do not perceive a clear alternative to assimilationist approaches often feel that their only real choice must be to assimilate either all boilerplate text to "contract" or none. Feeling that "no assimilation" is not feasible, they often opt for "all assimilation," but this requires reducing — and often eviscerating — the traditional requirement of actual agreement with common meaning for contract. When problems with this evisceration become too extreme, courts have begun to create a series of special doctrines to avoid some of the worst results.[251] But these narrow sources of doctrinal resistance are often framed in ad hoc language and are not enough to halt the growing paradigm slip into pseudo-contract.[252]

Like a tangled yarn, these different problems — the linguistic, conceptual, practical, factual, normative, and doctrinal problems with the paradigm slip into pseudo-contract — are highly interwoven and very difficult to separate out and discern, let alone address, in piecemeal fashion. That is part of the nature of a paradigm slip. Once it has occurred, the use of similar-sounding words with fundamentally different meanings can mask major changes in the functions of the law and prevent clear understanding of all the problems created by the transformation. From within the new caricature of a contractual paradigm, it can be hard even to see outside and to imagine an alternative legal regime that is more coherent and might address all these problems at once.

Shared meaning analysis offers an alternative paradigm of contract interpretation that is grounded in core contract law principles and has sufficient scope and flexibility to solve many of the problems highlighted in this Article. It offers a nuanced and flexible approach to validating contract terms, which could be used to bring contract law back to a true and coherent contractual paradigm.

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[251] *See supra* sections III.B, pp. 1168–72; III.E.1, pp. 1192–95; III.E.3–4, pp. 1196–203.

[252] *See supra* sections III.B, pp. 1168–72; III.E, pp. 1192–206.

APPENDIX: FORMAL ARGUMENT THAT CONTRACT MEANING DEPENDS ON COOPERATION

In this Appendix we return to the example of Amber and Paolo considered in Part II of this Article and introduce some logical notation to clarify further how pervasive aspects of contract meaning depend upon implicit presuppositions of linguistic cooperation.

When Amber says, "If you paint my house, then I will pay you $1000," she is uttering a sentence that can be broken down into two smaller sentences — which we denote by p and q, respectively — connected by if-then language. In standard logical notation, Amber's sentence has the logical form of $p \supset q$ ("If p then q"), where p is "Paolo will paint Amber's house," and q is "Amber will pay Paolo $1000." We denote the sentence in Amber's offer as follows:

(1) $p \supset q$ ("If Paolo will paint Amber's house, then Amber will pay Paolo $1000").

It will be remembered that "sentence meaning" is the meaning that a competent speaker of a language would attribute to a sentence independent of any knowledge of its occasion of use. "Speaker meaning" is the meaning that a speaker intends to convey to another person within an interpersonal conversation, which often depends upon both parties relying on implicit presuppositions of linguistic cooperation. Building on these distinctions, we have defined the "shared meaning" of a contract as the meaning that is most consistent with the presupposition that both parties were using language cooperatively to contract (even if one party was not acting fully cooperatively, so long as the presupposition was warranted). In the main Article, we explained why this presupposition was warranted in the social context,[253] and how it could be used to ground the inference that Amber's sentence was an offer, not an assertion. Here we focus on several additional aspects of the shared meaning of this offer (and ultimately the contract once the offer was accepted) that go beyond mere sentence meaning.

Formal logic tells us that $p \supset q$ ("If p then q") has the exact same truth conditions as — and is thus identical in sentence meaning to — the following other truth-functional statements:

(2) $q \vee \neg p$ ("Either Amber will pay Paolo $1000 or Paolo will not paint Amber's house"); and

(3) $\neg(p \wedge \neg q)$ ("It is not the case that both Paolo will paint Amber's house and Amber will not pay Paolo $1000").

But p cannot be part of the sentence meaning of Amber's offer, or be logically derived from it, because it is logically possible for both $\neg p$ and $p \supset q$ to be true (that is, for both "Paolo will not paint Amber's house" and "*If* Paolo paints Amber's house, then Amber will pay Paolo $1000" to be true). Similarly, $\neg p \supset \neg q$ cannot be part of the sentence meaning

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[253] *See supra* note 70.

of Amber's offer, or be logically derived from it, because it is logically possible for both $\neg(\neg p \supset \neg q)$ and $p \supset q$ to be true (that is, for both "It is not the case that if Paolo will not paint Amber's house, then Amber will not pay Paolo $1000" and "If Paolo paints Amber's house, then Amber will pay $1000" to be true). Hence, the following two propositions are not part of the sentence meaning of the offer that was accepted by Paolo:

(4) p ("Paolo will paint Amber's house"); and

(5) $\neg p \supset \neg q$ ("If Paolo does not paint Amber's house, then Amber will not pay Paolo $1000").

Yet it is uncontroversial that the contract between Amber and Paolo requires Paolo to paint — such that (4) is part of the contract meaning. It is also uncontroversial that the contract contains an understanding that failure to paint will result in nonpayment — such that (5) is also part of the meaning of the contract. Everyone is in agreement about that. The only question is how these additional terms, and hence these additional aspects of contract meaning, were derived if not from the sentence meaning in Amber's offer.

The answer lies in implicit reliance on conversational implicatures and presuppositions of cooperative language use. In order to preserve the assumption that Amber was observing the cooperative norms that govern language use to form contracts when she used her if-then statement as an offer, one must interpret Amber's opening gambit of $p \supset q$ as proposing a commitment on her part to do something she would not otherwise be inclined to do, as an inducement to getting Paolo to do something in return that he would not otherwise do — all through an appeal to his largely self-interested and instrumental sources of motivation. Otherwise Amber's utterance of $p \supset q$ would not be relevant to contract formation at this stage of their conversation, and would violate the Contractual Maxim of Relation, which says to use language to contract only in ways that are relevant to the shared purpose of contracting. Amber's reference to her payment of $1000 in her if-then statement can be understood as a proposed inducement of the relevant kind only if it is conversationally implied that if Paolo does not paint, she will not pay. This is one bit of additional content that cannot be derived from Amber's sentence meaning: (5) $\neg p \supset \neg q$.

Absent special circumstances, people who use language to contract also typically seek to induce a return commitment, and not just incentivize another person to act. Because there is nothing to rebut that presumption in this case, it can be conversationally implied by the Contractual Maxim of Relation that Amber sought an actual commitment from Paolo to paint her house. This is the second bit of additional content that cannot be derived from Amber's sentence meaning: (4) p.

As this simple example shows, the actual agreements that parties reach when they use language to contract are often much more complex

and elaborate than anything that can be derived from sentence meaning without a presupposition of cooperative language use — or from the mere subjective intentions of the parties. The contract in this case includes not just (1)–(3) but also (4)–(5).

Now, Amber might have tried to express all this additional content with sentence meanings, rather than relying on conversational implicatures. The result would have been something sounding very odd, like:

> If you paint my house, then I will pay you $1000 (i.e., "$p \supset q$"). And if you do not paint my house, then I will not pay you $1000 (i.e., "$\neg p \supset \neg q$"). In addition, I want you to commit to painting my house; meaning I'm not just trying to induce you to act without any accompanying obligation (i.e., I want a commitment to p, and not just the action of p, to be part of our contract). So what do you say? Will you accept my offer?

But it would have been unnecessarily verbose for Amber to have said all this to Paolo in real life because all this additional content can be conversationally implied from Amber's simpler $p \supset q$ and presuppositions of cooperative language use in social context.

It is implausible, finally, to suggest that "if" and "then" have special conventional meanings when used in conversations to contract, such that (4)–(5) can be derived from a special and nonlogical use of "if" and "then." The problem with that suggestion is that even parties who are contracting can cancel the conversational implicatures of (4) and (5) without saying anything that is contradictory in meaning.

For example, Amber could have said: "If you paint my house, then I will pay you $1000. And I don't need any commitment from you to paint." If she had said that, she would have canceled the conversational implicature from (1) — via the Contractual Maxim of Relation — to (4), thus creating an offer for a unilateral contract (which invites acceptance only by full performance and not by a return promise). Similarly, Amber could have said: "If you paint my house, then I will pay you $1000. Actually, even if you do not paint my house, I will probably pay you the $1000, as you're a good friend." There would be no inconsistency in meaning here — though this would admittedly suggest that Amber is more likely making a noncontingent request to a friend than trying to induce a contract. Still, this means that Amber can cancel the conversational implicature from "If p then q" to "If not-p then not-q" — or from (1) to (5) — without any linguistic inconsistency in social context. And that, in turn, means that the "if" and "then" in her original offer did not have any special conventional meanings from which (4) and (5) could be derived. These aspects of contract meaning derive instead from presuppositions of linguistic cooperation in social context.

We have focused here on relations of conditionality because they are pervasive enough in contracts that their examination reveals the depth of the dependence of contract meaning on presuppositions of linguistic cooperation. Yet presuppositions of linguistic cooperation are important

to discern not only the common meanings of express and implied conditions but also many other aspects of contract meaning. Even if courts and parties rarely recognize this dependence consciously or explicitly, they rely on presuppositions of linguistic cooperation to derive critical and pervasive aspects of contract meaning.