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Contract Interpretation 2.0: Not Winner-Take-All But Best-Tool-For-The-Job

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Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job

Lawrence A. Cunningham*

ABSTRACT

In a centuries-old debate among contracts scholars, one group supports a presumption favoring a text-centered approach to the interpretation of a written agreement—the plain meaning taken from the four corners—while opponents urge a broader understanding of context—what the parties intended and the circumstances of their negotiation. The contending positions have so hardened that, in a jarring juxtaposition this Essay will reveal, recent academic classifications of the same state laws are exactly opposite to each other: contextualists classify certain states as contextualist that textualists say are textualist!

Yet despite the persistence of acute polarization, the author also documents—and applauds—promising trends in the literature toward hybridization and compromise, a search for factors to guide the selection of interpretive tools rather than putting some off limits or setting up default rule presumptions. While scholars have thus long obscured a common-sense reality, a new wave of research is making it clearer to all sides that text and context are both useful, depending on the details of different jobs.

More modern, advanced, and sensible, this new view of contract interpretation replaces a stubborn “winner-take-all” approach to the debate with a flexible and practical “best-tool-for-the-job” approach. To illuminate its importance and value—call it contract interpretation 2.0—this Essay turns to Warren Buffett’s contracting philosophy and practices. The famous investor and businessman is also a polyglot teacher, and his approach to contracts, especially acquisition agreements and employment arrangements, illustrates the imperative of using the right tool for the job.

TABLE OF CONTENTS

INTRODUCTION	1626
I. HISTORICAL DEBATE AND SOME CURIOUS CLASSIFICATIONS.....	1628
II. CONTEMPORARY DEBATE AND THE MOVE TO COMPROMISE	1633
A. <i>The Stubbornness of Traditional Dualism</i>	1634
B. <i>Breaking the Stubborn Binary</i>	1640

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III. BERKSHIRE'S CONTRACTS	1644
A. <i>Informal Promises Repeated for Decades</i>	1645
B. <i>Early Major Informal Acquisition Agreements</i>	1646
C. <i>Unbundled Agreements</i>	1648
D. <i>The Spirit and the Letter</i>	1652
E. <i>Coda</i>	1655
CONCLUSION	1655
APPENDIX	1657

[Y]ou cannot prove a mere private convention between the two parties to give language a different meaning from its common one . . . to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church.

—Oliver Wendell Holmes¹

[T]hough a private convention is not competent to change the meaning of five hundred feet to one hundred inches, or the meaning of Bunker Hill Monument to the Old South Church, the local or technical usage, if different from ordinary or normal usage, may be competent to produce this result.

—Samuel Williston²

White can be made to mean black, five can be made to mean ten, 500 feet can be made to mean 100 inches, and Bunker Hill Monument can be made to signify Old South Church.

—Arthur L. Corbin³

INTRODUCTION

Some written agreements are so clear and manifestly complete that it would waste time and risk error to weigh competing narratives about the background of a deal to make sense of its terms. Other written agreements, however, are so opaque and fragmentary that it would be hubristic to believe a person can confidently discern meaning or intention from the document alone.

¹ *Goode v. Riley*, 28 N.E. 228, 228 (Mass. 1891). *But see* *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”).

² 2 SAMUEL WILLISTON, *SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS* § 611, at 1180 (1926).

³ 5 MARGARET N. KNIFFIN, *CORBIN ON CONTRACTS* § 24.8, at 54–55 (Joseph M. Perillo ed., rev. ed. 1998).

Despite such intuitions, many leading contracts professors for nearly a century have argued in favor of *either* a formal text-centered approach or a context-oriented approach to the interpretation of all or broad categories of written agreements with little regard for how *both* tools are useful depending on the details of different jobs. Increasingly, however, some scholars are acknowledging the reality that different settings warrant different approaches.⁴ They follow the law in many states, which evades tidy classification as textualist or contextualist because, rather than wedded to one school, courts often choose the more suitable doctrine given the interpretation task at hand.⁵

Part I of this Symposium Essay briskly reviews the historical terms of this binary debate. Discussion culminates in a revealing juxtaposition of recent academic classifications of state law on this subject: the same states are presented in starkly different ways, as contextualist by contributors to the contextualist Corbin treatise, and as textualist in research commissioned by two of today's leading defenders of formalism, Professors Alan Schwartz and Robert Scott.⁶ Any number of similar examples could be collated to reflect the wide variety of tools in actual use by judges within and across states. This Essay compares Corbin with Schwartz-Scott because the author was one of the editors of the Corbin treatise and found the contrast both striking and potentially inculcating.

Part II offers a slightly longer review of recent scholarship, showing both the persistence of stubborn polarization and the light of a new hybridization ahead. Selections highlight principal positions and trends, especially toward hybridization, compromise, and search for factors to guide the selection of interpretive tools rather than putting some off limits or ranking them according to some default rule hierarchy.

Part III turns to the philosophy and practice of contracts according to Warren Buffett of Berkshire Hathaway. Legal scholarship tends

⁴ See, e.g., Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 508 (2005); Juliet P. Kostriksky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 KY. L.J. 43, 44 (2007–2008).

⁵ See, e.g., Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 540 (1998) (“In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.”); William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 940 (“[V]ery often within a single jurisdiction there are both hard and soft [parol evidence rule] decisions.”).

⁶ See *infra* Appendix.

to focus on law cases or theory, but recent efforts increasingly look at actual contracts and parties, with particular interest in corporation acquisition agreements, and the question of formal contract versus informal trust. This author chose to contribute insight from Berkshire Hathaway because of personal experience with the company and its culture and because the company's practices provide a rich trove of material.

I. HISTORICAL DEBATE AND SOME CURIOUS CLASSIFICATIONS

The formalist position held sway throughout most of the history of contract interpretation in the United States, stretching back to the late nineteenth century. Professor Samuel Williston's treatise, first published in 1920–1922 and expanded in 1938, stated a strong evidence exclusion rule (the “parol evidence rule”), a limit to a document's “four corners,” and a “plain meaning” rule.⁷

The realist movement raised doubt about these stances, prescribing a broader search of context in contract interpretation. Professor Karl Llewellyn pushed for this take in commercial law, helping to craft the “incorporation” approach in the Uniform Commercial Code, released in the mid-1950s and adopted nationwide by the next decade. Llewellyn, presciently, appreciated the wide variety of contract types and urged a correspondingly contextual approach to interpretation.⁸ Start with the writing, yes, but determine meaning according to all probative circumstances: “the contract in fact,” he called it, including course of dealing, course of performance, and usage of trade.⁹

With even greater force, Professor Arthur Corbin—Llewellyn's teacher—spent decades in the mid- to late twentieth century challenging the formalist approach as an intellectual matter.¹⁰ How could any writing prove its own completeness and how can any word or document prove its own meaning, he wondered. Scholars by the score and judges by the dozen were persuaded. The apotheosis of Corbin's influence was a series of 1968 opinions by Chief Justice Roger Traynor of

⁷ See Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269, 296–99 (2000). Williston is often portrayed as a staunch formalist, but as the epigraphs to this Essay suggest, this is not entirely accurate, as his approach was more pragmatic than that.

⁸ See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 400 (2004).

⁹ *Id.* at 467–69.

¹⁰ See, e.g., Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965); see also Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1231–34, 1236 (1999).

the California Supreme Court, who sparked a judicial trend in favor of this approach.¹¹ The approach is also adopted expressly in the Restatement (Second) of Contracts, drafted during the 1960s and 1970s and released widely during the 1980s.¹²

Corbin's intellectual critique succeeded: all participants in the debate, including staunch formalists, now agree that the plain meaning rule is suspect because words rarely have one plain or true meaning ascertainable from an inspection of a writing alone.¹³ Fellow contract law scholars joined forces, in both law review articles and treatises.¹⁴ By the 1990s, this trend, soon to be called contextualism, softened the parol evidence rule, loosened the four corners doctrine, and diluted the plain meaning rule.¹⁵ By 1999, a dozen states could be counted in the vanguard.¹⁶

Yet while the Restatement (Second) has been influential on many topics in contract law—most adopted and cited without discussion or debate¹⁷—its influence on interpretation has been more limited.¹⁸ And the contextualist trend soon slowed, as a resurgent formalism has taken hold since 1991, as Schwartz and Scott discerned a strong preference for this approach among many parties, especially businesses.¹⁹ Most recently, the pair authored two seminal articles urging formalism

11 *E.g.*, *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643–48 (Cal. 1968) (en banc) (Traynor, C.J.).

12 RESTATEMENT (SECOND) OF CONTRACTS §§ 210, 212, 214 (AM. LAW INST. 1981).

13 I call the response the “plain enough meaning rule.” Cunningham, *supra* note 7, at 295 n.117.

14 *E.g.*, John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 345 (1966–1967); E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 940–42 (1967); John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1344 (1975).

15 See Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OR. L. REV. 643, 644 n.2 (1995).

16 KNIFFIN, *supra* note 3, § 24.7. Besides California: Alaska, Arizona, Illinois, Iowa, Missouri, Nevada, New Jersey, New Mexico, Pennsylvania, Texas, Vermont, and Washington. *Id.*

17 Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 515–17 (1998).

18 See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596–98 (1995) (attributing this to features of the drafting committee and process); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 821–22 (2004) (attributing this to a resurgent formalism generally).

19 See ALAN SCHWARTZ & ROBERT E. SCOTT, *COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES* 204–24 (2d ed. 1991) (demonstrating that merchants opt out of many U.C.C. provisions—for example, merchants regularly use contract clauses to disclaim U.C.C. standard warranties—and questioning whether the statute meets their needs).

as the default rule for business contracts, one in 2003²⁰ and another in 2010.²¹

Throughout this period, a striking difference appeared in the judicial versus academic worlds: while judges continued to choose one of the two doctrines to interpret a contract in cases before them, professors insisted that one or the other way was superior. Even scholarly classifications of the cases seemed to reflect this difference. For instance, many states are classified as contextualist by one leading authority—*Corbin on Contracts*—and as textualist in another—research commissioned by Schwartz and Scott (referred to below as the S&S Survey).²² Some highlights follow; a table in the appendix juxtaposes quotes and citations, which may be worthwhile to skim now.

Many differences in this juxtaposition can be explained on various, somewhat technical grounds—such as date, state versus federal law, high state court or low, degree of clarity, and so on. But ultimately the best explanation for these and innumerable other such apparent anomalies is the inherent untidiness of the cases.²³ They are products of the peculiar facts and procedural posture of a given case and the outlook and temperament of the given judge as well as the wider state of thought on questions of both contract law generally, interpretation particularly, and broader intellectual movements.²⁴

²⁰ Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) [hereinafter Schwartz & Scott, *Limits*].

²¹ Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 929 (2010) [hereinafter Schwartz & Scott, *Redux*] (describing their 2003 piece as “iconic”).

²² Compare KNIFFIN, *supra* note 3, § 24.7 (Corbin treatise classifying series of states as part of a contextualist trend; the author participated in drafting some of these examples), with Schwartz & Scott, *Redux*, *supra* note 21, at 928 n.1 (citing Robert E. Scott, State by State Survey (Oct. 7, 2009) [hereinafter S&S Survey]) (reporting unpublished state-by-state survey supporting dominant formalist outlook; on request, Professor Scott supplied the survey to the author).

²³ Differences may also be methodological. The Corbin treatise was prepared over many years to report cases as they were decided without necessarily a systemic attempt at an overall classification. The S&S Survey indicates having “looked at major cases within each state to see whether courts follow the New York common law ‘textual’ approach, or the California contextual approach.” S&S Survey, *supra* note 22. Acknowledging that conclusions are “a bit rough” due to some inconsistencies within states, the authors found most courts follow the former. *Id.* The S&S Survey’s assessment of the textualist approach blends the stern parole evidence rule, four corners rule, and plain meaning rule. So if a court embraces any of these, the S&S Survey appears to classify it as textualist. That is certainly a fair approach. But on the other hand, the parole evidence rule may be formalist, but it is not truly textualist: it actually operates to exclude texts—as well as oral statements—based on their timing not their tenor; it never excludes evidence on the grounds that evidence is about meaning.

²⁴ Excerpting passages from judicial opinions to determine a state’s position in complex debates recalls Llewellyn’s classic compendium of canons of statutory construction that depict courts firmly intoning that “The Law is X,” juxtaposed with an equally majestic statement that “The Law is not X.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS*

With Illinois, for example, Corbin cited a 1999 intermediate appellate opinion expressly declaring the need to look at “context,” not merely a “dictionary,” and a Seventh Circuit opinion saying “Illinois cases continue to allow extrinsic evidence [to show ambiguity].”²⁵ The S&S Survey, after acknowledging “[s]ome inconsistency, but generally follow[ing] the textual, common law approach,”²⁶ cites a 1999 Illinois Supreme Court case, with the comment, “although the court suggested that it may later adopt another approach, still follows the four corners rule,” and quotes that opinion’s endorsement of the plain meaning rule.²⁷

For Nevada, Corbin cited a 1991 Nevada Supreme Court opinion engaging with the debate and coming down clearly on the contextualist side, while the S&S Survey cited a 2008 Nevada Supreme Court opinion stating a more traditional version of the parol evidence rule, which does not cite the earlier case.²⁸ For New Hampshire, Corbin cited two state supreme court opinions supporting the contextual approach whereas the S&S Survey cites a reformation-due-to-mistake case, without providing an illustrative quotation, which cites Corbin and the Restatement (Second) extensively in support of doing so despite what the writing plainly said.²⁹

In both Missouri and Pennsylvania, neither Corbin nor the S&S Survey identified any cases of their respective supreme courts; rather, Corbin cited federal appellate courts applying the respective state’s law and the S&S Survey cited intermediate state courts.³⁰ For Pennsylvania, Corbin quoted a 1981 Third Circuit opinion confidently predicting a thoroughgoing contextualist approach, while the S&S Survey quoted two intermediate appellate court opinions stating the plain meaning rule and a traditional, firm parol evidence rule. For Missouri, Corbin quoted a 1984 Eighth Circuit opinion that rejected the plain meaning rule to insist on hearing evidence of surrounding circumstances, whereas the S&S Survey quoted intermediate appellate cases from 1975, 2001, 2002, and 2008 stating formalist doctrines.³¹

app. C (1960). For a current attempt to overcome the problem as a matter of interpretation of statutes and constitutions, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

²⁵ See *infra* Appendix.

²⁶ S&S Survey, *supra* note 22.

²⁷ See *infra* Appendix.

²⁸ See *infra* Appendix.

²⁹ See *infra* Appendix.

³⁰ See *infra* Appendix.

³¹ See *infra* Appendix.

The same variation can even be seen in the two states that are widely seen as exemplars of the contending camps—New York as textualist and California as contextualist.³² True, a few famous cases in each state illustrate the opposing ideologies, and the appearance of these cases in casebooks does emit a sense that those states stand for the competing schools. But there is greater complexity beyond these surfaces.

The leading New York case, *Mitchill v. Lath*,³³ adopts a Willistonian position in refusing to consider evidence of an alleged side agreement to remove an unsightly structure as part of a real estate sales agreement.³⁴ Yet in addition to a vigorous dissent in the case disputing how the rule was applied, New York's most influential judge, Benjamin Cardozo, came down clearly on Corbin's side and left behind precedents upon which New York state judges continue to draw.³⁵

In California, Traynor's *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* ("PG&E")³⁶ opinion remains the beacon of contextualism, but has been roundly criticized, including prominently by Ninth Circuit Judge Alex Kozinski in *Trident Center v. Connecticut General Life Insurance Co.*³⁷ And while the California Supreme Court has not overruled PG&E,³⁸ language in later cases conflicts with it.³⁹ Professor Susan Martin surveyed the California cases,

³² See Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1478 (2010).

³³ 160 N.E. 646 (N.Y. 1928).

³⁴ *Id.* at 647.

³⁵ *E.g.*, *Utica City Nat'l Bank v Gunn*, 118 N.E. 607, 608 (N.Y. 1918) ("To take the primary or strict meaning is to make the whole transaction futile. To take the secondary or loose meaning, is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice."); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) ("The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."); see Larry A. DiMatteo, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, 28 PACE L. REV. 315, 324 (2008).

³⁶ 442 P.2d 641 (Cal. 1968) (en banc) (Traynor, C.J.).

³⁷ 847 F.2d 564, 569 (9th Cir. 1988) (applying California law). A promissory note disclaimed right of prepayment yet the borrower proffered evidence supporting an alternative meaning based on another clause providing for prepayment upon default—and the court felt constrained, against its better judgment, to admit it under California law. *Id.* at 569–70.

³⁸ On January 11, 2017, the California Supreme Court declined the opportunity to do so when it chose not to review the lower court's decision in *Jibe Audio LLC v. Beats Electronics, LLC*, No. B267633, 2016 WL 4978409 (Cal. Ct. App. Sept. 19, 2016), *petition for review denied*, No. S238096 (Cal. Jan. 11, 2017).

³⁹ See *Nedlloyd Lines B.V. v. Superior Court of San Mateo Cty.*, 834 P.2d 1148, 1155 (Cal. 1992) (en banc) (holding that a contract with a choice-of-law clause was unambiguous on its face under important textualist policy which argues against exposing written contracts "to alteration

finding a richer and more variegated doctrinal approach than either repudiation or embrace, pure contextualism or its opposite.⁴⁰

Yet despite judicial recognition of the unruliness of words and documents—sometimes manifestly clear and complete, sometimes neither—some still insist there should be one law of contract interpretation or at the very least a default rule system.⁴¹ On the other hand, there are signs of an emergence of a greater interest in delineating appropriate tools according to contract type.⁴² Even so, enough of the historical polarization persists to obscure this laudable goal, as a selective review of the recent literature will suggest.

II. CONTEMPORARY DEBATE AND THE MOVE TO COMPROMISE

The contract interpretation debate is not solely about text versus context but also implicates several intertwined policy issues. For one, which approach better promotes efficiency values such as commercial certainty and predictability? Textualism might, to the extent that parties preparing written agreements know where they stand. Yet contextualism might to the extent parties know disputes will be resolved based on all relevant information. Contextualists, therefore, can claim to be probing the particular subjective intentions of the very parties to a transaction whereas textualists must be content with saying that in many cases the generally understood objective meaning of words is enforced.

In each case, moreover, there is risk of judicial error—not discerning meaning accurately, whether subjective or objective. And there are costs: formalism might induce greater ex ante investment in drafting clarity with reduced ex post costs of dispute resolution

by self-serving recitals based upon fading memories of antecedent events[.] . . . a serious impediment to the certainty required in commercial transactions”); see also *Wagner v. Columbia Pictures Indus., Inc.*, 52 Cal. Rptr. 3d 898, 903 (2007) (excluding extrinsic evidence that “contradict[ed]” an integrated contract on the ground that such evidence cannot be used “to show intention independent of an unambiguous written instrument”); *Machado v. S. Pac. Transp. Co.*, 233 Cal. App. 3d 347, 352 & n.3 (1991) (“The cardinal requirement in the construction [of a contract] is that the intention of the parties as gathered from the four corners of the instrument must govern.”).

⁴⁰ Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 Sw. U. L. REV. 1, 9 (1995).

⁴¹ See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 42 (2014) (attributing hardened polar positions in debate to a “shared presumption of the unitary nature of contract law and the mandatory nature of interpretation doctrine”).

⁴² See James W. Bowers, *Murphy’s Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 RUTGERS L. REV. 587, 590 & n.12 (2005) (citing numerous articles).

whereas contextualism might reduce ex ante drafting costs while increasing ex post enforcement costs.⁴³ The net costs can be modeled.⁴⁴ But at bottom, these models pose empirical questions that evade definitive resolution.⁴⁵ Instead, scholars have inferred the costs of each methodology from observations about the propensity of parties to choose one state's laws over another, or from the propensity of trade associations to craft their own rules.⁴⁶

Above all, these issues—efficiency, intent, error risk, and costs—vary across contract types and participants, a reality courts have long understood but that contemporary scholarship only lately seems poised to develop. For instance, while Schwartz and Scott in 2003 argued in favor of a textualist default rule, they expressly acknowledged: “A textualist theory of interpretation, however, will not suit all parties all of the time.”⁴⁷ They also stressed that their default rule prescription is designed solely for business contracts, not necessarily consumer contracts—a good, useful distinction, though the wide variety of contracts warrants more than those two dimensions alone.

A. *The Stubbornness of Traditional Dualism*

In 2003, and amplified in 2010, Schwartz and Scott observed that businesses likely want their contracts to be interpreted accurately, as intended, but when disputes arise, both sides push for competing interpretations; it is costly for courts to determine the truth and they cannot guarantee finding it.⁴⁸ So there is a trade-off between accuracy and cost. Assuming this is true, what would most contracting parties, ex ante, want courts to do when resolving future unknown disputes: focus on the writing or admit extrinsic evidence? The former is obviously cheaper administratively but the latter may yield the correct an-

⁴³ See Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 883 (2010) (“The ex ante cost of drafting more precise contract language may be greater than the expected litigation cost entailed in enforcing the standard.”); *id.* at 852 (“[D]rawing on the line of scholarship that analyzes the rules-standards dichotomy in the design of legal rules, recent work frames the choice between vague and precise contract terms as a tradeoff in information costs: precise contract provisions raise contracting costs on the front end, but reduce enforcement costs at the back end.”).

⁴⁴ E.g., Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005).

⁴⁵ Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 352 (2013).

⁴⁶ E.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001); Miller, *supra* note 32, at 1477.

⁴⁷ Schwartz & Scott, *Limits*, *supra* note 20, at 547.

⁴⁸ See *id.* at 580; Schwartz & Scott, *Redux*, *supra* note 21, at 952–55.

swer; the former adds some transaction costs toward setting forth terms accurately.

According to Schwartz and Scott, however, most businesses would prefer the formalist approach and to exclude evidence, even relevant evidence. Because it is the parties' contracts, their preferences should rule, and courts should therefore take the formalist approach, at least generally.⁴⁹ Schwartz and Scott stress that preferences are heterogeneous and that some parties might ex ante prefer a contextualist approach to interpretation.⁵⁰ That also means enforcing written choice-of-interpretation directives, such as integration or no-oral-modification clauses—which not all courts do.⁵¹ Schwartz and Scott stress that they are by no means arguing for adoption of mandatory rules of formalist interpretation, only that this be the default rule.

As to ambiguity, Schwartz and Scott say parties will be satisfied when courts have enough information to reach the correct answer “on average.”⁵² They say, as to type of language, that the plain meaning rule applies when written in ordinary language, whereas a contextual default admits evidence to interpret technical language.⁵³ On the four corners rule, the assumption that parties prefer formal approaches endorses it along with a firm parol evidence rule that restricts extrinsic evidence. This, they say, comports with what most U.S. courts do, based on their survey.⁵⁴

This is as formalist as they go, recognizing they are not literalists or fools, as “literalism is impossible.”⁵⁵ Rather, the argument is that businesses will generally prefer that courts exclude various categories of evidence, including pre-contractual negotiations and course of dealing. True, they acknowledge, such information may improve the chances that a judge would correctly discern intention. But their primary point is that the costs of doing so are high. The author would add a final qualification to this prescription, which is that regardless of

49 See Schwartz & Scott, *Limits*, *supra* note 20, at 583.

50 See Schwartz & Scott, *Redux*, *supra* note 21, at 930 n.11.

51 See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 12, § 179 cmt. a, illus. 1 (illustrating that a court might decide as a matter of public policy not to enforce a clause that states “no prior negotiations shall be used to interpret this agreement” if enforcing it would “unreasonably deprive it of relevant evidence” to resolve ambiguity and “thereby hamper it in the fair administration of justice”).

52 See Schwartz & Scott, *Limits*, *supra* note 20, at 618.

53 See Schwartz & Scott, *Redux*, *supra* note 21, at 932.

54 See *infra* Appendix.

55 Schwartz & Scott, *Redux*, *supra* note 21, at 933.

whatever preference a business has for formally negotiated and written business contracts, most business contracts are not reached that way but rather formed by email, phone, the exchange of forms, or in meetings, where determining terms without context is challenging at best.⁵⁶

Professor Steven Burton offers a critique of Schwartz and Scott and an alternative, illustrating the traditional approach to debate in this area which seeks to prescribe alternative one-size-fits-all solutions.⁵⁷ Burton says what is “novel and crucial” in Schwartz and Scott’s work is their thesis that majoritarian preference is judicial accuracy on average.⁵⁸ Burton cannot imagine what average accuracy entails in determinations of linguistic meaning—especially in court. In the author’s view, most might happily trade error for cost savings, and textualism with limited evidence might do that—parties only need to clarify their drafts up to the point of getting 50-50 accuracy and cut litigation costs by leaving evidence out. But Burton calls average accuracy “incoherent” and it may well be an unreliable baseline given the nature of both litigation and language (ambiguity, vagueness, dialect, context).⁵⁹ So Burton believes that most firms will not concur in seeking the correct answer on average because there is no such thing.

Burton observes that the hypothesis of trading off accuracy for savings cannot be verified empirically but can be explored through comparing alternative approaches to see what approach yields greatest accuracy at least cost.⁶⁰ Burton says his prescription beats Schwartz and Scott on these terms.⁶¹ He contrasts them with the contextualism associated with Corbin and Traynor.⁶² Burton says these two made the purpose discovering subjectively intended meanings whenever possible, supposedly enabled by admitting more evidence—a weak parol

⁵⁶ Bowers, *supra* note 42, at 590 n.11.

⁵⁷ Burton, *supra* note 45, at 341.

⁵⁸ *Id.* at 347.

⁵⁹ *Id.* at 359; see also Jeffrey M. Lipshaw, *Models and Games: The Difference Between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613, 643 (2008) (“The model is based on a number of assumptions about the way firms do business that are open to debate.”); Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99, 104 (2005) (invoking philosophy of language to challenge assumption that if words had a given meaning at time of contract formation any later attempt to offer a different meaning is opportunistic).

⁶⁰ See Burton, *supra* note 45, at 352–54.

⁶¹ *Id.*

⁶² *Id.* at 352.

evidence rule, no four corners rule, and skepticism of plain meaning.⁶³ So contextualism is costly.

Burton offers something in between, which he calls “objective contextual interpretation.”⁶⁴ It blends the defense Schwartz and Scott offered on the one hand and Corbin et al. on the other by admitting more evidence than Schwartz and Scott but less than Corbin. For example, it might *include* this evidence: the whole document, the contract’s purpose, the objective setting at contract formation, trade usage, and course of performance; but *exclude* what he says is “familiar contextualism” evidence, such as negotiating history, course of dealing, and subjective party testimony.⁶⁵ While Burton thus pushes a form of “doctrinal hybridization,” blending Corbin and Williston, it remains singular in approach.⁶⁶

Professors Gilson, Sabel, and Scott recently reflected on rising appetite for what might be called a situational compromise—literalism for contracts among legal sophisticates and contextualism for novices.⁶⁷ This is an important step in the literature, though they pause ahead of taking that normative leap to lament the prevailing state of debate. Citing Llewellyn and Traynor, they perceive contextualism to have greatest appeal for settings involving consumers in mass markets or inexperienced businesspeople.⁶⁸ There, “powerful intuitions” may warrant probing context to uncover party intention through more evidence.⁶⁹ In contrast, textualism draws the line at legally sophisticated parties, who prefer the regime that follows their instructions.⁷⁰ For sophisticated parties and “bespoke” contracts, they say, “context is endogenous.”⁷¹

In their bespoke contracts, sophisticated parties can include as much or as little context as they wish. The great strength of this freedom is empowering people along with reducing the costs of contracting and dispute resolution. Relatedly, this regime “creates an

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.* at 353.

⁶⁶ *See generally* STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* ch. 6 (2009). The principal arguments favoring Burton’s approach are the fiendish elusiveness of the concept of subjective intent and the value of enabling nonparties to rely on the written word of others’ contracts without probing mental states or bargaining contexts.

⁶⁷ Gilson et al., *supra* note 41, at 26–27.

⁶⁸ *Id.* at 38–39.

⁶⁹ *Id.* at 39.

⁷⁰ *Id.* at 40.

⁷¹ *Id.*

incentive to draft carefully.”⁷² Gilson et al. stress that, at least when “uncertainty is low and risks can be allocated in advance,” many sophisticated parties will prefer formalist interpretation and will “rationally invest” enough in drafting so courts arrive at the “‘correct interpretation’ more often than not.”⁷³

Yet while rightly clarifying how the competing schools offer different tools suitable for different jobs—and probably deflecting criticism about being right “on average”—the authors make three observations about the lamentable state of debate. First, they identify a “deep puzzle”—since the rival models seem to apply to two different prototypes, why the debate for supremacy?⁷⁴ The answer they discern: a “shared presumption of the unitary nature of contract law and the mandatory nature of interpretation doctrine.”⁷⁵ But while too many do indeed say any judicial choice in one case applies to all cases, one lesson from the debate and the cases, increasingly accepted on both sides, is that different settings warrant different tools.

Nevertheless, the authors note a second regrettable implication of the prevailing debate, which is that in addition to being binary, it is “winner-take-all.”⁷⁶ Again, this is neither inevitable nor desirable, as a proper debate would arrive at whatever “winnings” are sustained by the evidence and logic. The authors’ third lament is most provocative: an important difference between the two approaches, they write, is that contextualism is more “imperialist.”⁷⁷ In other words, contextualism rejects textualism, whereas textualism accepts contextualism by embedding context in contract design.

Many contextualists are sensitive to such critiques, such as Professor Shawn Bayern, who says that contextualists are textualists when warranted.⁷⁸ Bayern laments “little agreement” among U.S. scholars on contract interpretation, but attributes this to polarity between those who crave justice in particular cases (tending toward subjective intent based on abundant evidence) versus aspirants for general efficiency (objective manifestations discerned from texts).⁷⁹ But beware the false choice, as contextualism can promote efficiency too, and tex-

⁷² *Id.* at 41.

⁷³ *Id.* at 42.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 43.

⁷⁷ *Id.*

⁷⁸ Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1100–01 (2016).

⁷⁹ *Id.* at 1099.

tualism may often be the correct interpretive tool in light of context.⁸⁰ For instance, enforcing a notice deadline missed by ten minutes might seem harsh, but if context reveals a volatile market setting then a literalist insistence on the deadline is apt: contextualism leads to textualism.⁸¹

Professors Peter Gerhart and Juliet Kostritsky recently offered a more emphatic example of hybridization that rejects the “false choice” of textualism versus contextualism.⁸² They note that parties to contracts have different interests and preferences and that, while both may wish to minimize contracting costs, they assess costs and related trade-offs differently.⁸³ So the notion of an intention of “the parties” is elusive.⁸⁴ It is therefore futile to search for ultimate intent but important to find shared meaning.⁸⁵ While the model they propose for doing this is complex, in essence it is designed to put before judges enough information, as they pithily put it, to “avoid the problems of textualism (which can make easy cases difficult) and anything-goes contextualism (which can make difficult cases unmanageable).”⁸⁶

Finally, consider recent calls for an enlarged textualism—one even more liberal than Corbin: admitting evidence of transactional circumstances to probe the genuineness of assent. While on its surface this sounds like an “anything-goes” contextualism, in fact proponents implicitly focus on the setting that Gilson et al. say is ripe for contextualism—whether subjective intent is in doubt despite objective manifestations. Professor Larry DiMatteo and Dean Blake Morant, for instance, advocate such an approach for consumers as well as small businesses.⁸⁷ Within that domain, moreover, the contextual probe is

⁸⁰ Bayern stresses a preliminary question, whether parties intended a textualist or contextualist approach, and argues that courts should—and many do—discern this intention using a contextualist approach. *Id.* at 1102.

⁸¹ See, e.g., *Arcos Ltd. v. E.A. Ronaasen & Son* [1933] AC 470 (HL) 474 (appeal taken from Eng.) (rejecting argument that goods commercially equivalent to those allowed in the contract must be accepted, even though they are commercially equivalent, because the goods were slightly larger than allowed for in the contract language and the contract did not leave room for ambiguity).

⁸² Peter M. Gerhart & Juliet P. Kostritsky, *Efficient Contextualism*, 76 U. PITT. L. REV. 509, 509 (2015).

⁸³ *Id.* at 512.

⁸⁴ *Id.* at 567.

⁸⁵ *Id.*

⁸⁶ *Id.* at 509.

⁸⁷ See Larry A. DiMatteo & Blake D. Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549, 564–65 (2010); Blake D. Morant, *Contractual Interpretation in the Commercial Context*, in *COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES* 248, 262 (Larry A. DiMatteo & Martin Hogg eds., 2016).

on a specific set of problems less likely to afflict legal sophisticates for whom Gilson et al. advocate formalism, to wit, “subjective factors related to power, class, gender, or race.”⁸⁸

Despite the seemingly wide gap between Morant and Scott—Morant’s teacher—Gilson is right that textualists and contextualists are looking at two different problems. And neither is inherently more imperialist than the other—textualists can be contextual at least by accepting context when parties direct context, and contextualists can be textualists at least when the context so dictates, which may include the prototypical settings of legally sophisticated parties.

On the other hand, contextualists who exert contextualism despite party intentions—such as Traynor’s strained view of what an indemnity clause means—may indeed be guilty of imperialism as Gilson et al. charge.⁸⁹ Likewise, formalist prescriptions of slavish adherence to party intent may also go too far. After all, it is often difficult to specify the exact evidence and interpretive rules ahead of time, and not all judges are as error-prone as strict formalists may fear.

All would do well to follow the example of recent scholarship—including that of Scott and his colleagues—pursuing compromise that breaks the stubborn binary tradition. In this terrain, debate will address what factors determine which regime to apply, including above all the relative roles to be played by parties *ex ante* or judges *ex post*. Much of the scholarship reviewed above laid the groundwork for this stage of debate, and the pieces highlighted in the next Section consciously cultivate this direction.

B. *Breaking the Stubborn Binary*

As early as 2009, Professor Adam Badawi presciently noted that the efficiency arguments championed for formalist interpretation can likewise be marshalled on behalf of the contextualist approach.⁹⁰ The issue ultimately is party ability to draft relatively more or less completely, as that will determine which approach they prefer, Badawi says.⁹¹ Low drafting costs promote completeness and presumably formalist appetites whereas high drafting costs might stimulate a more contextualist taste.⁹² Sometimes the latter approach is more cost effec-

⁸⁸ Morant, *supra* note 87, at 262.

⁸⁹ Gilson et al., *supra* note 41, at 43.

⁹⁰ Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1, 1 (2009).

⁹¹ *Id.* at 28–31.

⁹² *Id.* at 48–54.

tive.⁹³ This perspective helps explain some observed phenomena, such as a pro-formal propensity of grain, cotton, and diamond merchants and the more context-hungry deals in construction, software development, and mergers.

Badawi develops a model of choice of interpretive regimes according to diverse settings driving alternatives.⁹⁴ Many businesses may favor formalism as Schwartz and Scott contend, but not all, and not for every contract they make. Preferences depend on factors such as transaction type, drafting costs, and capacity to be relatively complete. Badawi suspects that formalism is preferred for deals that are frequent and certain, the optimal conditions for complete contracts, like the setting of high-frequency commodity contracts.⁹⁵ But deals that are “infrequent, uncertain, and high-stakes” may point to contextual interpretation, whether one-shot or relational, Badawi says.⁹⁶

Professor Scott, more than a decade ago, observed that half the population is motivated by a reciprocity norm of fairness.⁹⁷ Courts often invoke indefiniteness to refuse contract enforcement, he observed, and so wondered why parties might deliberately leave their contracts incomplete, especially since it is relatively cheap, particularly for the legally sophisticated, to condition performance in various ways or provide references to constrain discretion.⁹⁸ A compelling explanation in many cases is a common norm—a “taste for reciprocal fairness” creates conditions for self-enforcing contracts, which may also be efficient, Scott theorized.⁹⁹

More recently, Professor Wendy Netter Epstein marshalled a body of experimental evidence on the relevance of such norms of reciprocity and trust for certain categories of contracts. She criticizes prevailing doctrine (such as definiteness), and both sides of the interpretation debate, for encouraging excessive contract specificity in contexts where greater flexibility is more valuable.¹⁰⁰ Research she as-

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 5–6.

⁹⁶ *Id.* at 6.

⁹⁷ Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1644 (2003).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1683; see also Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 778 (2010) (“[S]trategic ambiguity in the joint venture agreement may provide incentive for greater cooperation and at the same time may amplify the perception of shared risks.”).

¹⁰⁰ Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297 (2014).

sembles cautions that high contract detail impairs autonomy, which can reduce trust, undermine reciprocity, and stifle motivation and innovation.¹⁰¹ In settings where those goals are valuable, the business content and legal treatment of contracts should be more flexible.¹⁰²

The costs can be acute for contracts involving principal-agent relationships entailing effort and cooperation. Applying formalist techniques to trust-laden settings produces direct costs of increased specificity during negotiation and drafting plus impaired trust that often results. “Control-based contracting,” as Epstein calls it, stimulates checking and meeting requirements rather than satisfying the spirit of a deal.¹⁰³ Reposing some measure of discretion, in contrast, stimulates trust and positive reciprocity.¹⁰⁴

In short, echoing Gilson, Sabel, and Scott, determining the right interpretative tool for the job is to a large degree a question of contract design.¹⁰⁵ If so, certain settings—Epstein says those characterized by complexity, uncertainty, limited market incentives, need for cooperation, and an appetite for innovation—warrant a more dynamic interpretation.¹⁰⁶ Then evidence of intention draws on both text and context—both pre- and post-contractual, meaning potentially course of dealing, negotiation history, and course of performance.¹⁰⁷

In other work, Gilson et al. address the concern that excessive formalism can crowd out such desirable norms, which they argue overlooks how formal and informal contracting are complements, not substitutes.¹⁰⁸ Likewise informed by the growing experimental literature, and illustrated by real-world contracts, they explore how practice does both: dealing with uncertainty through a combination of formal articu-

¹⁰¹ *Id.* at 310.

¹⁰² *Id.* at 332.

¹⁰³ *Id.* at 300.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 309 n.49.

¹⁰⁶ *Id.* In certain settings, Epstein prescribes greater formality, especially if compliance is the primary goal and concerning the price term in medical services contracts. See Wendy Netter Epstein, *Revisiting Incentive-Based Contracts*, 17 *YALE J. HEALTH POL’Y L. & ETHICS* 1 (2017); Wendy Netter Epstein, *Price Transparency and Incomplete Contracts in Health Care* (unpublished manuscript on file with author).

¹⁰⁷ See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 *CALIF. L. REV.* 1743, 1770 (2000) (“[M]odern contract law has appropriately moved from a static conception of interpretation, that tended to focus on the text as of the moment of contract formation, to a dynamic conception, that encompasses events before and after that moment. To put this differently, under modern contract law the text of a contract runs through time.”).

¹⁰⁸ Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 *COLUM. L. REV.* 1377, 1377 (2010).

lation and informal mechanisms.¹⁰⁹ The combination facilitates mutual assessment of performance, not solely for adherence to the formal standards but for a propensity toward cooperation and collaboration in response to new developments.¹¹⁰

As an example, formal contracts call for sharing information on progress and prospects which, in turn, builds a culture of reciprocity and trust on which the parties proceed. Rather than formal contract crowding out informal norms, the two features complement each other. The insight is readily applicable to recurring contract law debates such as when preliminary negotiations and letters of intent should become binding—the model suggests later rather than earlier—and the related notion of good faith—courts should be more temperate in imposing any duties to negotiate in good faith. But for this Essay’s purpose, the broader point is how this work productively illustrates hybridization of two lines of thought.

Further strides can be seen as law draws on more disciplines for illumination—beyond both economics and linguistics—to what people making contracts actually think about what they are doing. Professor Tess Wilkinson-Ryan explores the concept of the “psychological contract,” which stresses both the importance and predictability of the subjective, idiosyncratic understandings that people have of their contractual obligations.¹¹¹ Specifically, those understandings of duty are not fully captured by either the text that formalists centralize or even much of the background law and context that contextualists pursue.

Rather, there are subjective states of expectation that are independent of contract law’s default rules: people don’t know what those default rules are.¹¹² On the other hand, they routinely accept that their duties include a general moral and social obligation of trust and reciprocity. They also “incorporate relationship-specific informal norms and agreements into the psychological contract, even when . . . outside, or even in conflict with, the explicit provisions.”¹¹³ Few judges and scholars in the textualist-contextualist debate seem to be attuned to these realities.

¹⁰⁹ *Id.*

¹¹⁰ See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009).

¹¹¹ Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 843 (2012).

¹¹² See LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* 2–3, 239 (2d ed. 2016).

¹¹³ Wilkinson-Ryan, *supra* note 111, at 845–46.

Finally, in recent research Professor Cathy Hwang explored the phenomenon of unbundling—deals involving multiple written agreements, such as corporate mergers or acquisitions consummated using one principal agreement along with numerous ancillary ones, governing employment, transition services, and intellectual property.¹¹⁴ Such a modular approach improves the quality of each with related negotiation and drafting conducted by subgroups of relevant principals and professionals.¹¹⁵ Yet such unbundling poses challenges for conventional debate between textualists and contextualists. For one, is each agreement to be taken literally on its own or is each a part of the text for all other parts of the transaction? Hwang's insights point to the rationality of applying different interpretive techniques to different kinds of agreements—what is good for the merger agreement may not be good for the employment contract.¹¹⁶

Professor Jeffrey Lipshaw, who practiced corporate contracting for several decades at the highest levels before entering teaching, offers the following wise insight that supports being skeptical of textualists and contextualists alike:

Most business agreements worth litigating over were, at the time of their creation, a complex synergy of individual intentions and motivations, more or less complete communications, drafting practices, pressures, and deadlines, many of which propelled the contract to its execution as a thing, a deed, or an event, and not necessarily as a logical and coherent text. In contrast, merely focusing after-the-fact on the logic and coherence of the text is, as often as not, an economist's simplification, a moralist's ideal, or a lawyer's delusion.¹¹⁷

III. BERKSHIRE'S CONTRACTS

Warren Buffett, head of Berkshire Hathaway, famously criticizes excessively detailed contracts over which lawyers labor as wordsmiths; he prefers informality, including handshakes, “gentlemen's” agree-

¹¹⁴ Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403 (2016).

¹¹⁵ *Id.* at 1417.

¹¹⁶ See Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1026 (2009) (noting that sophisticated parties sometimes bifurcate promises between those enforceable by courts as contracts and those stating relational terms lacking such judicial recognition).

¹¹⁷ Jeffrey M. Lipshaw, *Lexical Opportunism and the Limits of Contract Theory*, 84 U. CIN. L. REV. 217, 219–20 (2016).

ments, oral promises, and agreements he personally drafts.¹¹⁸ Yet Berkshire has also executed highly stylized, lengthy, and technical agreements laden with legalese, boilerplate, and heavily negotiated terms. When using outside deal counsel, Berkshire always uses the same firm, Munger, Tolles & Olson, founded by Berkshire Vice-Chairman Charlie Munger.

Buffett's aversion to legalistic contracting is due in part to his frugality—he would rather do most things himself because it is cheaper—and in part to appreciating that rule-based contracting can convey mistrust and therefore destroy trust rather than build it. He is especially content with trust-based arrangements when he has a preexisting trust-based relationship but there are examples of both (1) trust-based deals without prior relationships (including a highly informal publishing arrangement with the author of this Essay)¹¹⁹ and (2) rule-based deals involving friends (highlighted by an excruciatingly detailed asset purchase agreement between Berkshire, The Washington Post Co., and Buffett's long-time close personal friend Don Graham).¹²⁰

In general, during the company's earliest years, when smaller and simpler, its contracts, even its acquisition agreements, were informal; in more recent years, as the company grew in scale and complexity, the acquisition agreements assumed greater formality. Amid such a variety of contracts, there seems little doubt that not all will be best understood using the single approach of formalism or the single approach of contextualism. Rather, as a review of some Berkshire contracts—informal and formal—will show, contract design varies and so too should contract interpretation.

A. *Informal Promises Repeated for Decades*

Begin with two of the most famous of the many informal promises Buffett has made repeatedly since taking control of Berkshire fifty years ago. The first concerns his regular declaration that he regards Berkshire as a partnership, not a corporation, among him, Munger, and all other shareholders. This conception is the first of a dozen operating principles Berkshire publishes in its annual reports,

¹¹⁸ See generally Lawrence A. Cunningham, *Berkshire's Disintermediation: A Managerial Model for the Next Generation*, 50 WAKE FOREST L. REV. 509 (2015).

¹¹⁹ See LAWRENCE A. CUNNINGHAM, *THE ESSAYS OF WARREN BUFFETT: LESSONS FOR CORPORATE AMERICA* (4th ed. 2015).

¹²⁰ LAWRENCE A. CUNNINGHAM, *BERKSHIRE BEYOND BUFFETT* 176 (2014).

dating to the mid-1980s and included in every one since 1995.¹²¹ If there is a partnership, then Buffett's fiduciary duties are more demanding than for corporate directors. If taken literally—in their plain meaning and without admitting extrinsic evidence—these statements suffice to form a partnership.¹²² But in context, they are aspirational statements of business philosophy to convey a conviction that shareholders are owners along with Buffett. No one has sued Buffett over this—and no such claim is imaginable given Buffett's probable discharge of a partnership duty—but it illustrates the limits of literalism.

Second, for forty years, Buffett has repeatedly declared, in official Berkshire documents and in presentations and commentary, that when Berkshire acquires a company, it intends to hold it forever, not sell.¹²³ And he has made good on that promise, retaining even companies that struggle financially. Berkshire makes this specific point in acquisition discussions and it is often a basic rationale for many sellers to Berkshire, especially families and entrepreneurs, who value the commitment of permanence. But no such promises appear in the formal acquisition agreements Berkshire signs. That makes sense because an intention, backed by practice, is probably all that can realistically be given and provides the seller a sufficient basis to proceed. A formalist interpretation of such texts would bar admitting such statements, practices, or rationales, deemed discharged by the parol evidence rule. Again, there has never been a breach of such a promise so it has not been tested in court, but this illustrates the appeal of formalism.

B. Early Major Informal Acquisition Agreements

Now take two quotes from a pair of Buffett's recent chairman's letters to Berkshire shareholders about some of its earliest acquisition agreements. While both are from the corporate field of acquisitions, long known for a high degree of stylized legalistic formality, both also involve personal characteristics that warranted a different touch: one

¹²¹ See, e.g., BERKSHIRE HATHAWAY, INC., 2016 ANNUAL REPORT 108 (2017) (“Although our form is corporate, our attitude is partnership. Charlie Munger and I think of our shareholders as owner-partners, and of ourselves as managing partners.”).

¹²² See LAWRENCE A. CUNNINGHAM, THE BUFFETT ESSAYS SYMPOSIUM 20 (2016) (colloquy between Professor Edmund Kitch and Mr. Buffett).

¹²³ E.g., Anthony Bianco, *The Warren Buffet You Don't Know*, BLOOMBERG (July 5, 1999, 12:00 AM), <https://www.bloomberg.com/news/articles/1999-07-04/the-warren-buffett-you-dont-know> (“We buy everything, even a stock, with the idea that we will hold it forever.”); see, e.g., Letter from Warren Buffet, Chairman of Berkshire Hathaway Inc., to Shareholders of Berkshire Hathaway Inc. (1988), <http://www.berkshirehathaway.com/letters/1988.html> [<https://perma.cc/CZ2P-RDY6>].

selling group was a family and the other a friend of Buffett's. The first describes one of Berkshire's earliest—and still historically most important—acquisitions in terms of size: the 1967 purchase of National Indemnity Company (“NICO”), which today is the largest insurance company in the world.

[Insurance] has been the engine that has propelled our expansion since 1967, when we acquired National Indemnity and its sister company, National Fire & Marine, for \$8.6 million. Though that purchase had monumental consequences for Berkshire, its execution was simplicity itself.

Jack Ringwalt, a friend of mine who was the controlling shareholder of the two companies, came to my office saying he would like to sell. Fifteen minutes later, we had a deal. Neither of Jack's companies had ever had an audit by a public accounting firm, and I didn't ask for one. My reasoning: (1) Jack was honest and (2) He was also a bit quirky and likely to walk away if the deal became at all complicated.

[The purchase agreement we used to finalize the transaction was 1½ pages long.] That contract was homemade: Neither side used a lawyer. Per page, this has to be Berkshire's best deal: National Indemnity today has GAAP (generally accepted accounting principles) net worth of \$111 billion, which exceeds that of any other insurer in the world.¹²⁴

The second informal Berkshire acquisition agreement describes one of the company's earliest family-business acquisitions—likewise among the most important for establishing Berkshire's trust-based approach to its long-term business relationships. The deal is the 1983 purchase of Nebraska Furniture Mart (“NFM”) then owned by the Blumkin family.

I went to see Mrs. B (Rose Blumkin), carrying a 1¼-page purchase proposal for NFM that I had drafted. . . . Mrs. B accepted my offer without changing a word, and we completed the deal without the involvement of investment bankers or lawyers (an experience that can only be described as heavenly). Though the company's financial statements were unaudited, I had no worries. Mrs. B simply told me what was what, and her word was good enough for me.¹²⁵

¹²⁴ BERKSHIRE HATHAWAY INC., 2014 ANNUAL REPORT 8 (2015) (Chairman's Letter); *see also id.* at 128–29 (excerpting the National Indemnity contract).

¹²⁵ BERKSHIRE HATHAWAY INC., 2013 ANNUAL REPORT 15 (2014) (Chairman's Letter); *see also id.* at 114–15 (excerpting the Nebraska Furniture Mart contract).

Both of these early informal contracts referenced the company's financial statements—in NICO's case, its balance sheets and income statements represented to be fairly presented,¹²⁶ and in NFM's case, its income tax returns, and incorporated accounting data, to be certified at closing as fairly presented.¹²⁷ But suppose there was some variation in fact. How would a judge determine whether the variation violated the representations? In NFM's case, there are differences between tax accounting and financial accounting that make it difficult to interpret the representation using the plain meaning rule. Some context seems required.

Compare both of these informal agreements with the dozen or so more recent Berkshire acquisitions of large publicly traded companies where each makes financial statement representations elaborated in great detail in the pattern more familiar to sophisticated merger agreements.¹²⁸ They explicitly reference arcane points, such as encompassing notes to the financial statements and the schedules to SEC filings, and delineate inclusion, as of multiple periods and specified dates, of the balance sheet, income statement, and cash flow statement. They invoke generally accepted accounting principles in the United States. Such exquisitely delineated detail is almost certainly negotiated and drafted in the expectation that the words will be taken at face value. Context matters and sometimes that means the plain meaning rule.

C. *Unbundled Agreements*

Two subsequent Berkshire transactions illustrate the unbundled nature of corporate acquisition agreements, in which a formal stylized merger agreement is accompanied by ancillary agreements concerning matters such as employment. The first concerned The Scott Fetzer Companies in 1985.¹²⁹ Berkshire was a white knight amid hostile takeover overtures that put Scott Fetzer “in play.” The merger agreement, signed for Berkshire by Munger and probably written by him at least in part, spanned just four pages when first executed and only eight pages upon being amended and restated in final form—about twenty percent the average length of contemporary merger agreements.¹³⁰

126 BERKSHIRE HATHAWAY INC., *supra* note 124, at 128.

127 BERKSHIRE HATHAWAY INC., *supra* note 125, at 114.

128 For a list of recent Berkshire acquisitions, see CUNNINGHAM, *supra* note 120, at 135–36.

129 See Amended and Restated Agreement and Plan of Merger Dated November 26, 1985 Among Berkshire Hathaway Inc., BHI Acquisition, Inc. and The Scott & Fetzer Company [hereinafter Scott Fetzer Agreement] (on file with author).

130 This inference is based on merger agreement length data from 1994 and in consultation

Among a few simple representations was the central one concerning SEC filings and financial statements, and among a few contingencies was a supermajority shareholder approval requirement (two-thirds instead of the majority state law required).¹³¹ There is both a no-talk clause (without any fiduciary out) and a best efforts clause, which has an additional novelty: after requiring a Scott Fetzer shareholder vote, it provides that if the two-thirds vote is not received, Scott Fetzer would call a second meeting the next quarter and “proceed with extraordinary diligence to solicit proxies.”¹³² The contract then explains:

The purpose of the two-possible-stockholder-solicitations procedure . . . is (i) to cause the first (and probably only) solicitation to be scheduled early to facilitate early payment of merger proceeds to Scott Fetzer shareholders and (ii) to assure that Parent, an extremely creditworthy and responsible corporation which is committed to the proposed merger with minimal contingencies, for the benefit of Scott Fetzer’s shareholders, will remain committed to the Merger for an extended period of time and will receive for its benefit in exchange for its commitment, a very thorough consideration of the terms of the proposed transaction by Scott Fetzer shareholders, the mutual commitments being deemed reasonable because the Agreement is submitted to an inherently demanding test of approval by two-thirds of Scott Fetzer shares outstanding.¹³³

The brevity, novelty, and clarity of this agreement distinguishes it from many others and reflects a sophistication that would warrant judges interpreting the contract literally in many places but contextually in others. And the contract explained itself—the statement of purpose does not contain any obligation but aids in understanding the duty to call a revote and act with extraordinary diligence.¹³⁴ Purpose is one quest of contextualist interpretation, which this contract provides on its face, illustrating how parties can put as much or as little context in their writings as they wish.

with Professor Jeffrey Manns, who has performed data analyses on merger agreements. See Jeffrey Manns & Robert Anderson IV, *The Merger Agreement Myth*, 98 CORNELL L. REV. 1143 (2013).

¹³¹ See Scott Fetzer Agreement, *supra* note 129, §§ 3.1(d), 3.2(c), 4.2.

¹³² See *id.* §§ 4.2, 4.7.

¹³³ *Id.* § 4.2.

¹³⁴ See *id.*

As to the best efforts clause, should a fiduciary out be read into it? The text plainly does not contemplate that, but the two-thirds vote and the explanatory paragraph may warrant permitting the board some leeway, whether or not strictly required by law. On the other hand, the context is important: this is a white knight acquisition competing with contending hostile bids the Scott Fetzer board was determined to resist. Scott Fetzer and Berkshire both likely preferred the tightest possible clause. Again, a contextualist approach may result in a literalist reading.

The Scott Fetzer acquisition agreement also called for Berkshire to honor the seller's existing senior executive employment agreements.¹³⁵ On this point, Berkshire made a separate employment contract with the CEO, Ralph Schey, about which Buffett wrote in his chairman's letter to Berkshire shareholders a few years later:

[O]ur compensation arrangement with Ralph Schey was worked out in about five minutes, immediately upon our purchase of Scott Fetzer and without the "help" of lawyers or compensation consultants. This arrangement embodies a few very simple ideas—not the kind of terms favored by consultants who cannot easily send a large bill unless they have established that you have a large problem (and one, of course, that requires an annual review). Our agreement with Ralph has never been changed. It made sense to him and to me in 1986, and it makes sense now. Our compensation arrangements with the managers of all our other units are similarly simple, though the terms of each agreement vary to fit the economic characteristics of the business at issue, the existence in some cases of partial ownership of the unit by managers, etc.¹³⁶

We therefore have two very different kinds of agreements: a formal merger agreement (if an unusually short one) and an informal employment agreement (though obviously containing the key compensation terms). For good reason: the merger agreement serves a specific discrete and temporary one-off function—the Scott Fetzer board getting the Scott Fetzer shareholders to approve the merger so that it can be closed with ownership acquired. While a degree of trust is important, and the fewer provisions the better, it is easy to zero in

¹³⁵ See *id.* § 4.4.

¹³⁶ BERKSHIRE HATHAWAY INC., 1994 ANNUAL REPORT 73 (1995) (Chairman's Letter), as reprinted in CUNNINGHAM, *supra* note 119, at 73–74.

with maximal detail on exactly what is vital without addressing anything else.

In contrast, the employment agreement addresses an ongoing working relationship of indefinite duration—it lasted fourteen years through Schey’s retirement at seventy-five. While compensation and incentives are important, it is hard to say what will matter most. Hence the common use of open-ended best efforts clauses in employment contracts. To repeat, if formalism is good for the merger agreement, contextualism can be better for the employment contract.

For the second example, Berkshire usually carries over incumbent managers’ contracts upon acquisition—and some are elaborate. Take that of David Sokol, head of MidAmerican Energy when Berkshire acquired it in 2000.¹³⁷ The contract is fifteen single-spaced pages with great detail, including intricate treatment of termination.¹³⁸

Sokol was among Berkshire’s most visible subsidiary CEOs and widely seen as Buffett’s successor.¹³⁹ Yet in 2011, he embroiled Berkshire in controversy by front running—buying stock in a company before pitching it to Buffett as an acquisition target.¹⁴⁰ The contract was pivotal because it restricted the company’s termination right under a tight definition of “cause.”¹⁴¹

The definition runs 267 words; sub-defines concepts like “willful”; sets qualifications like gross misconduct and demonstrable injury; and requires advance warning of deficiencies and passage of a board resolution meeting stated criteria.¹⁴² For an executive in trouble, this provides strict, plain parameters; a court need not even look up willful in a law dictionary.

But suppose an executive gets in trouble under a vague approach like Schey’s contract. It sets a term, so something like cause is needed to terminate. But exactly what depends on both general legal definitions and the specifics of the deal.

Presumably front running would qualify, so Sokol would have been out under the Schey contract; under his actual contract, Berkshire’s termination was more difficult. Sokol’s lawyer even claimed the agreement permitted front running.¹⁴³ In the end, Berkshire fol-

¹³⁷ CUNNINGHAM, *supra* note 120, at 132–33.

¹³⁸ See MidAmerican Energy Holdings Co., Amended and Restated Employment Agreement (Feb. 25, 2008) (on file with *The George Washington Law Review*).

¹³⁹ CUNNINGHAM, *supra* note 120, at 113.

¹⁴⁰ *Id.* at 113–14.

¹⁴¹ See MidAmerican Energy Holdings Co., *supra* note 138, at 6, 12.

¹⁴² *Id.*

¹⁴³ Ben Protess & Peter Lattman, *Sokol Is Accused of Misleading Buffett on Trades*, N.Y.

lowed the procedures and terminated Sokol—but clearly these formal provisions were for his benefit, not theirs.

D. *The Spirit and the Letter*

At stake in the degree of formality or informality used in creating—and interpreting—contracts is what matters more: the letter or the spirit of agreement. On this issue, another pair of Berkshire contracts illustrates how an informal promise has been observed most solemnly while a formal one has been honored quite conditionally. In each example, Berkshire acquired a public company with a family-held bloc concerned with aspects of history or operations: in 2000, the paint manufacturer Benjamin Moore & Co., which had a longstanding commitment to an independent distributor model rather than using big box retailers, and in 2013, H.J. Heinz Company, the condiment maker, with an abiding loyalty to its hometown community of Pittsburgh.¹⁴⁴

With Benjamin Moore, several contracts were signed, including a formal merger agreement and a shareholders' agreement committing Moore family members and other insiders to the transaction. All participants appreciated the centrality of the independent distributor system to the company as related public disclosure made plain.¹⁴⁵ Yet the formal agreements contained no related promises. Shortly after closing, however, hearing concerns from distributors about continuity, Buffett made a video in which he expressly promised to maintain the system and not sell through big box retailers.¹⁴⁶ When successive CEOs at Moore signaled willingness to break that promise out of business necessity, Buffett would remove them, putting his commitment to the distributors first.¹⁴⁷

TIMES (Apr. 27, 2011, 4:18 PM), <https://dealbook.nytimes.com/2011/04/27/berkshire-releases-report-on-sokol/>.

¹⁴⁴ See *infra* notes 145, 148.

¹⁴⁵ See, e.g., Offer to Purchase for Cash All Outstanding Shares of Common Stock of Benjamin Moore & Co. at \$37.82 Net Per Share by B Acquisition, Inc. (Nov. 17, 2000) (on file with *The George Washington Law Review*) (“The Company substantially relies on independent dealers for distribution of its architecture products which provide the majority of the Company’s revenue and profits. This network consists of more than 3,700 retailers with more than 4,700 storefronts in the U.S. and Canada.”); Press Release, Benjamin Moore to Be Acquired by Berkshire Hathaway (Nov. 8, 2000), <http://www.berkshirehathaway.com/news/nov0800.html> (“Headquartered in Montvale, New Jersey, Benjamin Moore’s products are distributed throughout North America through a network of authorized dealers.”).

¹⁴⁶ Colleen Leahey, *The Wrath of Warren Buffett: How Benjamin Moore Almost Broke His Promise*, FORTUNE (Sept. 17, 2014 6:45 AM), <http://fortune.com/2014/09/17/warren-buffett-benjamin-moore/>.

¹⁴⁷ *Id.*; see CUNNINGHAM, *supra* note 120, at 66–67.

In Heinz, the merger agreement devoted an entire section to the company's cultural connection to Pittsburgh. It declared that "after the Closing, the Company's current headquarters in Pittsburgh, Pennsylvania will be the Surviving Corporation's headquarters."¹⁴⁸ A covenant, which survives the closing and was made by the acquisition subsidiary Berkshire jointly owned (called the "Parent"), promises: "[A]fter the Closing, Parent shall cause the Surviving Corporation to preserve the Company's heritage and continue to support philanthropic and charitable causes in Pittsburgh."¹⁴⁹ The contract referenced the company's contractual right to name Pittsburgh's professional athletic stadium, called Heinz Field, and required keeping that name.¹⁵⁰ The contract required the parties to reference these commitments in their press releases about the deal.¹⁵¹

But within a year of the Heinz deal, the company, led by managers appointed by Berkshire's co-acquirer, 3G, cut more than 300 jobs at Pittsburgh headquarters.¹⁵² A further Pittsburgh dilution occurred soon thereafter, when Heinz merged with Chicago-based Kraft to form The Kraft Heinz Company. While the company adopted dual headquarters and asserted it was keeping its Pittsburgh covenants, locals perceived a hollowing out and migration to Chicago.¹⁵³ The actions may not have violated the covenants but the reasonable questions mark the contrast with Moore: there a most informal promise is honored with spirited punctiliousness while here a highly formalized one is more technically managed.

What of enforcement? In Moore, a contextualist likely would say the distributors can enforce Buffett's promise. For one, the promise is not in writing but by video, so the parole evidence rule doesn't apply to prevent absorbing all circumstances.¹⁵⁴ Amid known distributor centrality and concerns, express promises are made directly to distribu-

¹⁴⁸ Agreement and Plan of Merger by and Among H.J. Heinz Co. and Hawk Acquisition Sub, Inc. § 7.15 (Feb. 13, 2013) [hereinafter Heinz Agreement] (on file with *The George Washington Law Review*).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See James R. Hagerty, *In Kraft-Heinz Deal, Will Chicago or Pittsburgh Lose More Jobs? Tussle to Retain Positions Likely to Emerge Between Hometowns of Packaged-Food Giants*, WALL ST. J. (Mar. 25, 2015), <https://www.wsj.com/articles/in-kraft-heinz-deal-will-chicago-or-pittsburgh-lose-more-jobs-1427308717>.

¹⁵³ See Jessica Wohl & Greg Trotter, *Kraft Heinz Headquarters to Move to Chicago*, CHI. TRIB. (July 17, 2015), <http://www.chicagotribune.com/business/ct-kraft-heinz-chicago-headquarters-0717-biz-20150716-story.html>.

¹⁵⁴ See Leahey, *supra* note 146.

tors who, if induced to remain, give consideration or at the very least foreseeably rely.¹⁵⁵ A formalist might get hung up on the exact words Buffett uttered to test for promissory commitment, press on whether such a promise requires Berkshire board approval, or even ask whether it must be in writing under the one-year clause of the statute of frauds.

In Heinz, a textualist might observe that the language is less precise or ironclad than one might expect of a long-term corporate promise. For instance, there's no time frame (just repeatedly saying from and after "Closing") or benchmarks (only vague references to preserving "heritage" and supporting charities).¹⁵⁶

For another, the promises are made by the buyer which, upon closing, owns the seller, and will not sue itself for breach. The agreement disclaims third party enforcement rights other than stated exceptions such as option holders and personnel covered by indemnification.¹⁵⁷ There is no mention of, say, Pittsburgh headquarters' personnel, Pittsburgh charities, or the Heinz family. As a formal matter, it seems there is either no promise at all or at best a promise without a plaintiff.

What might contextualism prescribe? To Buffett and other devotees of informal, trust-based relations, the agreement memorializes a commitment—with imprecision understandable given the context. A court could declare conflict between the Pittsburgh promises and the third party beneficiary clause and admit extrinsic evidence to determine intention. It might ask whether it is plausible to believe that the Pittsburgh promises were only included as a publicity stunt. If so, the clause is deceptive, and if that is troubling, granting standing to Pittsburgh interests could be appropriate.

The Heinz merger agreement says it is governed by Delaware law or by Pennsylvania law, Heinz's state of incorporation, to the extent its law is mandatory.¹⁵⁸ Which way a court comes out, however, depends not on whether those states are listed as contextualist by Corbin or formalist by Scott—and we saw that both claim Pennsylvania—but on which tool seems better for the task.

In the circumstances, the Moore promise seems more an avuncular assurance of intention than a contractual commitment—much like

¹⁵⁵ *See id.*

¹⁵⁶ *See* Heinz Agreement, *supra* note 148, § 7.15.

¹⁵⁷ *See id.* § 10.09.

¹⁵⁸ *Id.* § 10.05.

Buffett's vows of permanence, which he also uttered in the video.¹⁵⁹ Heinz likewise may well involve an expression of "intent for the time being," statements of business conviction rather than legal covenant—much like Buffett's vows of Berkshire as a partnership.

But this complexity shows that it would be desirable to develop a body of literature that provides guidance to courts in choosing the right tool for the job rather than continuing the binary debate. And that is the budding trend the scholarship illustrates, which hopefully will be nurtured.

E. Coda

If scholars have paid insufficient attention to what judges do—arguing the superiority of a single tool when judges use multiple variations—judges may pay too little attention to what recent scholarship offers: guidance on how to select the right tool for the job, which includes ascertaining the reasons why parties chose given contractual forms.

The illustrations in this Part—Buffett's informal promises of partnership and permanence; purchases of NICO and NFM; takeovers and employment agreements such as Scott Fetzer or David Sokol; and other assurances amid merger, from Benjamin Moore and H.J. Heinz—illustrate that many factors influence contract design.

Courts would do well to think about that when selecting appropriate tools for the interpretation job. They can draw on the rich scholarship canvassed in the previous Section, especially work pointing towards hybridization. At the very least, the Berkshire examples show that adopting a highly formal, delineated, bargained-for exchange manifests an upfront investment that warrants back-end deference and at least a presumption of formalist interpretation; adopting looser, flexible, underspecified terms signals the opposite and warrants the opposite presumption.

CONCLUSION

The history of contract interpretation in the United States is largely formalist, punctuated by occasional disruptions (Traynor in *PG&E*, 1968), trends (1990s), and tributaries (U.C.C.) that are more realistic and contextual. The American story of contract interpretation is one of the minority of contract doctrines where formalism survived

¹⁵⁹ Leahey, *supra* note 146.

the realist critique. And despite the realist trend that percolated during the 1990s, it soon was checked by a formalist renewal.

Meanwhile, scholarship has historically positioned debate in binary, winner-take-all terms, where either formalism or contextualism is generally superior and therefore the designated default rule. But recent strands of scholarship suggest awakening to a new horizon, in which there is no one-size-fits-all and choosing the right tool for the job is more important than anyone being “right” or “winning.”

Hence the future of contract interpretation debate promises—at long last—to emerge from a binary debate to a hybrid where participants recognize that the right tool for the job varies. This will not end debate but transform it. Neither binary nor winner-take-all debate will focus on what kinds of contracts warrant what kinds of treatment, what the default rule should be for both determining treatment and application, and so on. But while many articles over multiple decades have referenced such variability in passing, the horizon promises taking such remarks more seriously. As a dip into the contracts of Berkshire Hathaway suggests, hybridization has greater promise than stubborn rehashing does.

APPENDIX: ACADEMIC CLASSIFICATIONS OF STATE LAW
CONTRACT INTERPRETATION

Following are excerpts from two resources taking stock of state law on contract interpretation—one a research memorandum for Professors Schwartz and Scott and the other sections on interpretation in Professor Corbin’s treatise. The juxtaposition illustrates the challenge of classifying such law into simple categories such as textualist and contextualist. Six states are presented as being textualist by one source and contextualist by the other.

Schwartz & Scott Classified as Textualist¹⁶⁰	Corbin on Contracts Classified as Contextualist¹⁶¹
ILLINOIS	
<p><i>See River’s Edge Homeowners’ Ass’n v. City of Naperville</i>, 819 N.E.2d 806, 808 (Ill. App. Ct. 2004) (saying that the Illinois supreme court has declared the four corners rule, and never reversed or modified it); <i>Air Safety, Inc. v. Teachers Realty Corp.</i>, 706 N.E.2d 882, 885 (Ill. 1999) (although the court suggested that it may later adopt another approach, still follows the four corners rule: an agreement, when reduced to writing, “must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence”) (quoting <i>Western Illinois Oil Co. v. Thompson</i>, 26 Ill.2d 287, 186 N.E.2d 285 (1962)).</p>	<p><i>Trade Center, Inc. v. Dominick’s Finer Foods, Inc.</i>, 711 N.E.2d 333 (Ill. App. Ct. 1999) (“The word ‘sales,’ standing alone, does not answer the questions ‘sales of what?’ and ‘where?’ One must look to the context.”); <i>Dawson v. General Motors Corp.</i>, 977 F.2d 369, 372 (7th Cir. 1991) (applying Illinois law) (“external discussions” between the “alleged” parties prior to the formation of their contract “can be used to demonstrate ambiguity, for Illinois cases continue to allow extrinsic evidence for that purpose”).</p>

¹⁶⁰ Citations and parentheticals in this column are reproduced as presented, and in the order presented, in the Schwartz and Scott survey, with the exception of minor formatting changes to accommodate this Essay’s table format. S&S Survey, *supra* note 22.

¹⁶¹ Citations in this column are reproduced as presented in *Corbin on Contracts*, with the exception of minor formatting changes to accommodate this Essay’s table format. KNIFFIN, *supra* note 3, § 24.7; *id.* (Cumulative Supp. 2001 Spring). Unless otherwise specified, quotations used in the parentheticals are from the cases but drawn from the source’s text with minimal change.

MISSOURI

Commerce Trust Co. v. Duden, 523 S.W.2d 97, 99 (Mo. Ct. App. 1975) (“absent ambiguity the intent of the maker of a legal instrument is to be ascertained from the four corners of the instrument without resort to extrinsic evidence”); see also *Blackburn v. Habitat Development Co.*, 57 S.W.3d 378 (Mo. Ct. App. 2001). *Newco Atlas, Inc. v. Park Range Const., Inc.*, 272 S.W.3d 886 (Mo. Ct. App. 2008) (Contract interpretation should ascertain parties’ intent and give effect to that intent. Where the language of the contract is unambiguous, the intent of the parties will be ascertained from the language of the contract alone and not from extrinsic or parol evidence of intent. “A contract is ambiguous only if its terms are reasonably open to more than one meaning, or the meaning of the language used is uncertain.”) (quoting *Sonoma Management Co., Inc. v. Boessen*, 70 S.W.3d 475 (Mo. Ct. App. 2002)).

Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d 781, 784–85 (8th Cir. 1984) (applying Missouri law) (“[T]he court is justified in considering more than the mere words of the contract. The surrounding circumstances at the time of contracting and the positions and actions of the parties are relevant to the judicial interpretation of the contract.”).

NEVADA

M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd., 193 P.3d 536, 540 (Nev. 2008) (“Parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict . . . written instruments which dispose of property, or are contractual in nature and which are valid, complete, unambiguous, and unaffected by accident or mistake . . .”).

Hilton Hotels v. Butch Lewis Prods., 808 P.2d 919, 921–22 (Nev. 1991) (“Although some courts . . . refuse to delve beyond the express terms of a written contract, the better approach is for the courts to examine the circumstances surrounding the parties’ agreement in order to determine the true mutual intentions of the parties. Courts today tend to be willing to look beyond the written document to find the ‘true understanding of the parties.’”).

NEW HAMPSHIRE

In re Lemieux, 949 A.2d 720, 722 (N.H. 2008) [survey offers no quotation or paraphrase but the case granted reformation of an instrument due to mistake, citing Corbin and the Restatement (Second), despite plain meaning of contract language].

R. Zoppo Co. v. City of Dover, 475 A.2d 12, 15 (N.H. 1984); *Rogers v. Cardinal Realty*, 339 A.2d 23, 25 (N.H. 1975) (“Intent should be determined not only in light of the instrument itself, but also in view of all the surrounding circumstances.”).

PENNSYLVANIA

See Shepard v. Temple University, 948 A.2d 852, 856–57 (Pa. Super. Ct. 2008) (“The intent of the parties to a written agreement is to be regarded as being embodied in the writing itself. The whole instrument must be taken together in arriving at contractual intent. Courts do not assume that a contract’s language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed. When a writing is clear and unequivocal, its meaning must be determined by its content alone.”); *see also Ragnar Benson, Inc. v. Hempfield Tp. Mun. Authority*, 916 A.2d 1183, 1190 (Pa. Super. Ct. 2007) (“If a written contract is unambiguous and held to express the embodiment of all negotiations and agreements prior to its execution, neither oral testimony nor prior written agreements or other writings are admissible to explain or vary the terms of that contract.”) (quoting *Lenzi v. Hahne-mann University*, 664 A.2d 1375, 1379 (Pa. Sup. Ct. 1995)).

Mellon Bank, N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1010 (3d Cir. 1981) (applying Pennsylvania law) (“In a world where semantics is a science instead of an art we might be able to read a contract and understand it without question. However, English is often a difficult and elusive language, and certainly not uniform among all who use it. External indicia of the parties’ intent other than written words are useful, and probably indispensable, in interpreting contract terms. If each judge simply applied his own linguistic background and experience to the words of a contract, contracting parties would live in a most uncertain environment.”).

IOWA

See Batterton Waterproofing, Inc. v. RKC Realty, L.L.C., 669 N.W.2d 262 (Table), 2 (Iowa Ct. App. 2003) (when terms of the contract are unambiguous, there is no reason for the court to rely on evidence not within the contract itself). *But see In re Mt. Pleasant Bank & Trust Co.*, 426 N.W.2d 126, 130 (Iowa 1988) (“Construing a contract of debatable meaning by resorting to surrounding and antecedent circumstances and negotiations for light as to the meaning of the words used is never a violation of the parol evidence rule. And debatability of meaning is not always discernible at the first reading of a contract by a new mind. More often it becomes manifest upon exposure of the specific disputed interpretations in the light of the attendant circumstances.”).

Dental Prosthetic Servs., Inc. v. Hurst, 463 N.W.2d 36, 39 (Iowa 1990) (treatise comments: “The court repudiated the plain meaning rule and did not impose any requirement that extrinsic evidence show a meaning to which the contract language was reasonably susceptible, nor did it ask that this evidence be analyzed to determine whether it showed ambiguity.”).