

## COMMENTARY

### THE LAW AND SOCIOLOGY OF BOILERPLATE

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In my view, the scholarship presented at this symposium demonstrates that, in order to analyze form contracts and boilerplate successfully, one must carry out a set of operations that embodies an approach I will call law and sociology. But I presume I was invited to be a commentator at this conference on boilerplate not because the article I wrote on one branch of the subject awhile back exemplified this methodological approach, but because it took a rather strong substantive position.<sup>1</sup> And so I think I ought first to say a brief word about that.

The article in question concerned contracts of adhesion in, roughly speaking, the consumer context,<sup>2</sup> and the position I took was that what I called the “invisible” terms of those contracts—the large number of terms not disciplined by the actual bargaining or shopping behavior of consumers even in price-competitive markets—ought to be treated by the law as presumptively unenforceable. The burden should be put on drafting firms to show their form terms were worth judicial enforcement rather than on adherents to the forms to show the terms were unconscionable; and if this burden were not met, the courts should apply the general, legally implied default terms instead of the drafter’s terms. This was not then, and is not now, the law, but I would not be candid if I did not say that I still think that, as regards the domain I was addressing, I was right.

In particular, I am not persuaded by the article presented at this symposium that seems to me most directly to challenge my thesis (although by no means aimed at me personally): Lucian Bebchuk and Richard Posner’s *One-Sided Contracts in Competitive Consumer Markets*.<sup>3</sup> As I understand it, Bebchuk and Posner assert that what appear to be “one-sided” consumer contracts in fact function to allow firms, concerned about their reputations, to satisfy those consumers who have worthy complaints while resisting

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1. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

2. More precisely, the situation discussed was defined by seven attributes involved in mass contracting, of which the last was: “The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.” *Id.* at 1177.

3. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006). I understand that a piece by Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006), will be part of the printed version of the symposium, although not the public presentation. I have read a draft of the article and have roughly the same response to it that I make to Bebchuk and Posner.

other customers who present complaints that are overblown or unjustified. Since this may be to the benefit of most consumers, the existence of these one-sided contracts does not show that consumers do not understand what they are agreeing to. In such circumstances, Bebchuk and Posner say, the “courts would do well to take a hard line in enforcing the terms of one-sided consumer contracts in the absence of evidence of fraud.”<sup>4</sup> For if this is done, then in the shadow of the law where most cases will be decided, the one-sided terms of the form contracts will be counterbalanced by the other-sided nature of the market in reputation, in which sellers worry about their good name much more than consumers do theirs. Apparently, this approach is to apply without regard to how harsh the content of the form terms is, because the primary function of the form terms is to give firms the room they want in which to maneuver.

Without belaboring the issue, Bebchuk and Posner seem to me to do nothing to show that this combination of judicial enforcement and the reputational concerns of firms will produce systematically desirable results. There is no reason to think it will in any way lead firms to recognize voluntarily the supposed legitimate claims of decent consumers at a volume or a value that is congruent with, or even regularly near to, any known measure of a proper number—resembling, that is, either any known legal measure of harm or any known economic measure of an incentive for efficient behavior. They offer no model of how the market in reputation works, or of why the values it generates are responsive to anything other than firms’ fears of how much reputational damage particular claimants are, for a myriad of possible reasons, in a position to cause. Nor do they consider whether the existing transaction costs of the legal system might allow firms to differentiate between merited and unmerited claims even if consumers are able to claim reasonable legal rights. Finally, on a somewhat different dimension, Bebchuk and Posner do not consider the impact on the individual liberty of consumers of a practice of giving firms (with the help of the proposed standard for legal enforcement) a blank check so blank that, when after-contracting disputes do arise, consumers are forced to be nothing more than supplicants.

Well, perhaps it is not surprising that I still think what I think.<sup>5</sup> I am not going to go on this way because I have already said in my prior article what I have to say. I would much rather try to address the much broader range of issues and much more varied set of situations raised by the rest of this collection of articles.

The articles presented at this symposium are remarkable for the intelligence with which they approach the problem of boilerplate, for the amount of work they represent (especially those based on empirical investigation), and for the variety of approaches taken and subjects addressed. It is too much to hope to find a unified conclusion that all the papers would support.

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4. Bebchuk & Posner, *supra* note 3, at 834.

5. But if the reader wants to see a pretty good straight-on attack on my article, he should read Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002).

But I do think there is a single thread that appears in the fabric of many of the papers that is worth teasing out. It is, as I have already suggested, a methodological thread, and the essence of it can be stated simply: in order to understand boilerplate and to determine the law's proper response to it, one must approach it by building a structural model of how it is produced and used that goes beyond the model assumed both in ordinary contract law and in much of the economic analysis of law as well. Or, more simply, what the articles reveal is the need for a sophisticated and differentiated law and sociology of boilerplate.

It is not a new idea that legal rules can only be evaluated when viewed as constituent parts of a working social system. Indeed, built into the standard doctrinal treatment of ordinary (that is, non-boilerplate) contracts, one can already see an implicit institutional dynamic. We should support the regime of contracts, we are told, because the practice of making, relying on, performing, and enforcing contracts enhances welfare and enlarges freedom. While these asserted connections between contract and welfare and freedom are often treated as if they were in some sense "natural," they in fact rest on two structural constructs. They rest on an assumed form of the direct relationship between the parties, and on an assumed market in which the parties' relationship is embedded.

Viewed as a dyadic interaction, contracts are assumed to be the product of bargaining and mutual assent. Enforcing their terms presumptively enhances welfare because parties generally know what is good for them. When they trade quid pro quo, each party choosing what he is to get over what he is to give, each party comes out better off, and the same set of resources produces greater satisfaction overall. And enforcing the terms of contracts also presumptively enlarges freedom because each party chose to enter the arrangement. Taking someone's voluntary commitments seriously both dignifies his freedom and also enhances his opportunities for expressing that freedom.

Viewed now as part of a working social system, contracts are assumed to be the products of competition in the marketplace. Speaking systemically, enforcing the terms of contracts presumptively enhances welfare because competition establishes conditions under which the individual deals people make lead, as if guided by an invisible hand, to an efficient use of society's resources to satisfy wants. Enforcing contractual terms under these conditions also presumptively enhances freedom because competition among the participants on one side of the market (for instance, among employers or producers) creates, as much as possible, choice and an absence of duress for those on the other side (for instance, for workers or consumers).

Many rules of the general law of contracts reflect these assumptions in doctrinal form. The modern theory of consideration, which makes a promise presumptively worthy of enforcement merely because it was bargained for a return promise or performance, is one.<sup>6</sup> The refusal to treat general social

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6. Thus, the *Second Restatement of Contracts* says that consideration is satisfied—that is, a promise is presumptively enforceable—if the promise was bargained for a performance or return

circumstances as constituting duress, so long as a competitive market is in place, is another.<sup>7</sup> If we assume that these doctrines are intended to further freedom and welfare, they do so only because of the postulated underlying dynamics.

Any such model of course never matches all the features of the circumstances to which it is applied; to require that would be to demand an infinity of models to match the innumerable quirks of life. Fit is always to some extent a matter of judgment. But the question of the fit of this standard contractual sociology as regards boilerplate has been an explicit topic of concern for contracts scholars—especially with regard to consumer contracts, but also, for example, with regard to franchise arrangements—at least since Friedrich Kessler’s famous article on contracts of adhesion.<sup>8</sup>

Unless we say that the value of simplicity is so great that we will apply the traditional model even when it fits very poorly, we have two main choices. Either we can take the elements of the standard model—individual actors, bargains, and markets—and try to have a more subtle understanding of them; or we can introduce additional structural features. To some degree, of course, the two paths merge; the dividing line between additional subtlety and additional features is a blurry one. But it seems to me that the older articles that discussed boilerplate in terms of markets dominated by monopolies or oligopolies,<sup>9</sup> and the recent articles that expanded the “rational actor” with ideas of “bounded rationality,” “satisficing” instead of maximizing, and the numerous heuristic mistakes ordinary people make,<sup>10</sup> fall within the “standard model, more subtlety” group. So do some of the articles at this symposium. But many of the articles here collected do something different. Looking at the facts regarding how, in particular contexts, boilerplate is pro-

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promise, with no further showing of the justice of enforcement required. By contrast, if enforcement is sought on the grounds that the promise was relied on or that it was given in recognition of a previously received benefit, the justice of enforcement must be independently shown. See RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 79, 86, 90 (1981).

7. Thus, in the paradigmatic case of a transaction that was overturned purely and simply because of the impact of general circumstances not caused in any respect by the other party, who merely took advantage of them, the Court said:

The contrivance of an auction sale, under such circumstances, where the master of [the stranded ship] was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract.

Post v. Jones, 60 U.S. 150, 159 (1856) (auctioning off for very little money the cargo of a whaling ship stranded in the Bering Straits with winter coming on and few other ships around). The contrary view, that even in a competitive marketplace, transactions can be coercive—for instance, for the poor or for the unskilled worker—is surely not frivolous. Indeed, this point of view is represented in some statutory law—for instance, in statutes establishing minimum wages—even though it is surely not adopted by the common law of contracts.

8. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contracts*, 43 COLUM. L. REV. 629, 636 (1943).

9. E.g., Kessler’s article, *id.* at 632.

10. E.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

duced and used, their authors have found that the gap between the assumed general model underlying contract law and the phenomena to be addressed is so great as to be unbridgeable simply by positing deviations from perfect contractors or perfect markets. Instead, they have had to take note of and build models based on additional institutional and cultural structures. In doing so, while I do not say that they will adopt the term, they seem to me to have crossed into terrain best labeled “law and sociology.”

The models developed in these various essays are by no means the same, either in the social phenomena highlighted or in the legal conclusions proposed. Whether the differences among these various models reflect the variety of observed social life or simply the many eyes of different beholders seems to me a topic for another day after more work has been done. For the present, what seems to me more important is to look at the range of issues that these essays suggest ought to be addressed. As I count them, there are four sorts of considerations that go into the making of the more complex types of model these authors use.

First, if we are to cover the range of situations in which boilerplate appears, we need a particularized identification of the parties involved. The characters that stalk the Restatements of Contracts are the well-known, acontextual “A” and “B”; prior thinking about boilerplate has extended this to “firm” and “consumer,” and sometimes “insurance company.” But on the evidence of these papers, prior thinking has not gone nearly far enough. The model that Omri Ben-Shahar and James J. White present in *Boilerplate and Economic Power in Auto Manufacturing Contracts*,<sup>11</sup> for example, is not just a model of “sophisticated businesses” making deals with “sophisticated businesses”; it is specifically a model of “Original Equipment Manufacturers” doing business with their “tier-1” suppliers. At least some of their explanations for what they find in the parties’ contract forms turn on the particularity of this relationship.<sup>12</sup>

Moreover, the portraits of parties drawn in these more complex designations often have reference not to how the parties are situated vis-à-vis a contractual or market relation but rather to other features of their social or institutional positions. Much of the mystery that Stephen Choi and Mitu Gulati investigate relates specifically to sovereign issuers of debt using language that has in view non-sovereign issuers.<sup>13</sup> The alternatives that Kevin Davis discusses relate specifically to nonprofit drafters of form contracts.<sup>14</sup> Or, to use other words, implicit in the analysis of many of the papers is the

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11. Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006).

12. See, e.g., their discussion of the degree to which tier-1 companies can successfully hold up the Original Equipment Manufacturers for additional benefits after the contracts have been signed. *Id.* at 974–76.

13. Stephen J. Choi & G. Mitu Gulati, *Contract as Statute?*, 104 MICH. L. REV. 1129, 1133–34 (2006).

14. Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075 (2006).

claim that, in order to determine the law rightly, we need to consider the particular institutional location of the parties involved.

Second, to understand many of the dynamics of the use of boilerplate, it seems we need to consider the broad network of relationships that these institutionally located entities have. The law of contracts usually focuses, and focuses rather narrowly, on the direct relationship of the entities that are making a deal (who are typically, in the litigation context, the juridically defined parties). When we build models of what is actually going on regarding boilerplate, however, we find that what those who make deals do, is greatly influenced by what others are doing—others with whom they are not making deals but with whom they are linked in systematic relationships.

Of course, a dynamic of this sort was to some degree implicit in the traditional view that parties were greatly affected by the market. This approach remains important for considering the uses of boilerplate, too. We find, for example, that boilerplate used to define the obligations undertaken in some instruments is standardized because standardization facilitates creation of a market for these contractual instruments, which are meant to be publicly traded.<sup>15</sup> But many of the essays in this collection consider other, rather particular, institutional contexts that structurally link drafters or users of boilerplate. Thus, we find that the boilerplate used by any one insurance company will tend to be the same as that used by another in good part because that standardization enables actuarial data to be collected and shared across a much larger set of language-defined “events.”<sup>16</sup> Meanwhile, in yet other industries, such as construction or real estate—in which contractual instruments are neither put on the market nor subject to an actuarial risk analysis—contractual terms are often standardized for the yet different reason that they are drafted by one or a few trade associations.<sup>17</sup> Yet elsewhere, perhaps because none of these dynamics is in play, the terms used by any one firm may be standardized for its customers but quite different from the terms insisted on by its competitors.<sup>18</sup>

Third, the implication of several of these essays is that the category “boilerplate” has itself taken on a cultural meaning, and that that fact is of practical significance. A set of contractual words represented to be, and accepted as, boilerplate—accompanied by the meaning (articulated or implied) that “this is boilerplate” or “these are standard terms” or “we always use terms like these” or “everyone uses terms like these”—is different in important ways from the same set of words absent those assertions.

Indeed, there are at least three sorts of differences. First, lawyers in a position unilaterally to draft contracts treat boilerplate differently. Indeed,

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15. Choi & Gulati, *supra* note 13, at 1140–41 (swaps and derivatives); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 947 (2006) (commodities contracts).

16. Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1114 (2006).

17. Davis, *supra* note 14, at 1078.

18. Ben-Shahar & White, *supra* note 11, at 958–63 (automobile manufacturers); Ronald J. Mann, “Contracting” for Credit, 104 MICH. L. REV. 899, 907–08 (2006) (credit card issuers).

we have the suggestion that even when premier law firms draft instruments running to billions of dollars, it may be true that “no one will have an incentive to figure out the true meaning of such terms. Instead, attorneys will uncritically include the terms in all their contracts.”<sup>19</sup> Second, as some of the essays point out, the fact that language is boilerplate can be used strategically in negotiating deals and contracts. The assertion “this is boilerplate” can be used to signal that certain terms are not negotiable<sup>20</sup> or to create favorable focal points in negotiations that are inherently cooperative and distributive at the same time.<sup>21</sup> Third, partly as a result of the preceding dynamics, boilerplate may not relate to the resulting document in the same way that the same words, if not boilerplate, would. If the purpose of a paragraph was to be the “x” boilerplate term, perhaps subtle differences in expression between it and other contracts’ ways of saying “x” are not significant.<sup>22</sup> Or if, as Henry Smith suggests, various structural forces will lead a contract made of boilerplate to be more modular than a bespoke one is, more an agglomeration of different clauses not strongly connected to each other, then perhaps we should simply expect more disjointedness in the document viewed as a whole.<sup>23</sup>

Fourth, as is perhaps already clear, boilerplate, seen in light of the institutional and cultural points already made, sometimes intersects with legal rules differently from the way ordinary contract language does. If Henry Smith’s point, just mentioned, is right, then we should perhaps depart from the usual rule of contract construction that expects the same word in different parts of a document to mean the same thing. To follow our usual practice may misinterpret the actual meaning of the language in light of the dynamics involved in its creation.

Perhaps of greater importance, several of the papers make a special point of the need to pay close attention to the incentives created by ordinary legal rules when applied to the particular institutional context at hand. They want us to consider the real possibility that the dynamics created by a rule may in context produce a result that is quite different from, possibly opposite to, what was intended. For example, Robert Hillman worries that a rule requiring ongoing website disclosure of a firm’s standard terms for its e-sales might not only fail to achieve its intended goal of generating market forces adequate to discipline the terms, but might also give firms an

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19. Choi & Gulati, *supra* note 13, at 1154.

20. David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 987 (2006).

21. Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1053–66 (2006).

22. Choi & Gulati, *supra* note 13, at 1149–50.

23. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006).

argument that will insulate their terms from being disciplined by the doctrine of unconscionability.<sup>24</sup>

Of course, the possibility that the rules of contract law might be counterproductive is not new; there have long been claims that, for instance, the Statute of Frauds enables more frauds than it prevents.<sup>25</sup> And this idea has had theoretical form at least since Robert Merton's famous article regarding unanticipated consequences appeared in 1936 in the *American Sociological Review*.<sup>26</sup> But the point the present articles seem to bring home is that it is not possible to trace the actual incentive effects of various rules of the game without a considerable amount of institutional specificity. Thus, for example, Michelle Boardman points out that when courts interpret ambiguous language in insurance policies distinctly against the drafting companies, intending to teach them a lesson and to spark clearer redrafting, the courts in fact add value to the very language that they have now made clear. The value of a term to an insurance company is to be judged primarily by how clearly it defines an actuarial risk rather than by how likely it is to be construed in the company's favor in a particular lawsuit. Construing it against the drafting party, but construing it clearly, thus makes redrafting less, not more, likely.<sup>27</sup>

To summarize, if we are to build an adequate descriptive model of how boilerplate is produced and used and of the effect of legal rules on the process, we need to consider: the types of parties involved in the transaction, described with some degree of institutional specificity; the structured ways in which they interact with other parties, including parties not involved in the deals at issue; the cultural meaning of boilerplate in the particular context; and the various incentives (intended or unintended) any proposed rules will create in light of the actual use being made of boilerplate. Seen in this light, the traditional model of transactions incorporated in contract law represents just one of the possible models of the relevant social dynamics; indeed, as applied to boilerplate it might even be thought of as the corner solution that abstracts most completely from the phenomena to be observed. As I have already said, the papers here presented do not come together to suggest a single alternative. Instead, the overall conclusion to be drawn from the work of this symposium is that we need to construct many—or at least several—structural models if we are rightly to understand and respond to the phenomena at issue.

Turning now to the prescriptive part of the matter, contract law, as already discussed, has traditionally been justified by connecting its rules, through its relatively simple view of personal dealings and market interac-

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24. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

25. See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.1, at 105–06 (3d ed. 2004).

26. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936).

27. Boardman, *supra* note 16, at 1107.

tions, with individual freedom and the general welfare. These two broad ideals remain relevant to the world of boilerplate. Although many of the symposium articles take a general welfare norm as their criterion of good law, or at least good contract law, enough is said or noticed to remind us that the legal system has other goals as well—and especially, as regards boilerplate, that we might care about its effects on freedom in one or another of its guises. As Douglas Baird suggests, this point is of great relevance to perhaps the most heated current debate regarding form contracts—the use of boilerplate to remove large swathes of contracts from the courts to the arbitrators.<sup>28</sup> But it stretches much more broadly. Robert Hillman, for example, sees it implicated in how the terms of e-commerce are publicized.<sup>29</sup>

To complete our job, then, we need to consider how the law can connect boilerplate as it works in several different dynamic situations with the overall goals of furthering freedom and welfare. As some of the papers suggest, a first approach to this problem in any particular instance is to look at the existing rules and the existing institutional arrangements to see if the on-the-ground situation as it presently exists does enough to police the private use of boilerplate—does enough to give us confidence that the result will tolerably achieve the preservation of freedom and provision of welfare.<sup>30</sup> If so, fine; if not, we need to consider the alternatives.

Some of the essays in this collection describe the alternatives in terms of the substantive rules that should apply to specific situations—for example, Douglas Baird's interesting re-analysis of the illegitimacy of the contract clause at stake in *Williams v. Walker-Thomas Furniture Co.*<sup>31</sup> But, by and large, the alternatives are what might be thought of as legal-process alternatives: recommendations regarding the different law-making or law-applying institutions that might best be given the job of drafting, interpreting, applying, or rejecting boilerplate. In addition to the obvious possibilities of legislation and judicial decision, the authors suggest in one setting or another turning matters over to expert administrative agencies,<sup>32</sup> nonprofit trade associations,<sup>33</sup> law firms that are leaders in a field,<sup>34</sup> and even (although somewhat uncertainly) publicity-minded watchdog groups.<sup>35</sup> (This profusion also, I think, reflects the sensibility of law and sociology.)

Which institutional set up best responds to which particular dynamic for the drafting or use of boilerplate is obviously a question to be answered at

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28. See Baird, *supra* note 15, at 949–50. On the “mandatory arbitration” issue in general, see Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761 (2002), and the several articles in Symposium, *Mandatory Arbitration*, 67 *LAW & CONTEMP. PROBS.* 1 (2004).

29. Robert A. Hillman, *supra* note 24, at 846–47.

30. See Mann, *supra* note 18, at 910; see also Hillman, *supra* note 24, at 841–842.

31. 350 F.2d 445 (D.C. Cir. 1965); Baird, *supra* note 15, at 941–42.

32. Mann, *supra* note 18, at 922–24.

33. Davis, *supra* note 14, at 1099; Choi & Gulati, *supra* note 13, at 1139–41.

34. See Choi & Gulati, *supra* note 13, at 1132.

35. See Hillman, *supra* note 24, at 853.

retail. But for precisely that reason, we need to give some thought to what might be said in general about making those judgments. We can start by saying that, if authoritative legal weight is the ultimate goal, then the basic design question has to be made at some point by a constitutionally established branch of government: judges or legislators. But obviously we need to go further than that. How should we decide whether judges should decide a matter themselves, or instead defer to a trade association by choosing to give it the power to offer authoritative interpretations of common language? And how should we decide whether legislators should take an issue away from judges through legislation—and then either decide the matter themselves or in their turn delegate it to an administrative agency?

In one sense, this is not at all a new problem in the law of contracts. “Who should authoritatively decide?” was necessarily an issue in, for example, the replacement in large part of the common law of sales by the Uniform Sales Act and then the Uniform Commercial Code; in the supersession in large part of the common law of securities transactions by acts of Congress and rules of the S.E.C.; and in other like actions. If it be thought that the driving force behind these movements was that different and specialized dynamics were present in the sale of goods, in transactions for securities, and so forth, then perhaps we are simply facing a new instance of an old trend.

If so, probably the most traditional analysis of the conclusions we have reached about boilerplate in terms of appropriate legal process would be that, since it seems that we need different models to fit various phenomena throughout the economy, primary emphasis should be put on action by legislatures and administrative agencies. It is not that judges cannot build models—they do it, sometimes very self-consciously, when deciding what rules to apply to specific types of transactions, and they sometimes consider specifically the role of boilerplate within those models.<sup>36</sup> But looked at comparatively, specialized administrative agencies—and to some extent the staffs of legislative committees—can become expert about matters in their particular domains in a way that general-jurisdiction judges cannot. The processes used in agencies and legislatures allow for the development of a scope of information and variety of methodology beyond what litigants typically develop. Legislatures—and agencies too—naturally operate in the real world of multiple interests, which can only be recreated artificially, if at all, in the confines of a traditional lawsuit.

On this view, the judges would continue to apply to boilerplate the general common law model of contract, with its standard tests for enforceability and its standard modes of interpretation, and would continue to police only the outer margins of commercial practices through the doctrines of unconscionability or undue surprise. It would be left to legislatures to address particular sectors of the economy in which the “general rules” of contract fit so poorly that there was real distress, and they might do so either by enacting different rules on their own or by authorizing administrative agencies to

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36. See, e.g., *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843 (N.J. 1967).

do so. The agencies could, in turn, decide when deference to the views of private trade groups and the like was appropriate.

Perhaps that is the right analysis, but there are also real costs to viewing judicial action so narrowly. Legislation directly, and administrative action derivatively, depend on political action; and, rightly or wrongly, in the United States, we have a set of political institutions intentionally structured to make it difficult to develop the necessary political will. If we think application of the single legal framework of tradition to the manifold varieties of boilerplate is often greatly overbroad, there are many “wrong” outcomes lurking within that institutional conservatism. Moreover, the percentage of contractual disputes that implicate boilerplate is so large, and the present law, based on its simple model, fits them so poorly, that even if the judges do only somewhat better than they are now doing, the improvement in the law can be great. Even modestly sophisticated models ought to generate better results in many cases.

In short, I fear that the traditional analysis of what is “best” may cause us to lose sight of what is only “better.” It is a mistake to assume that, because the judges cannot do everything, therefore they can do, or ought to do, nothing. In much of the writing on boilerplate—not necessarily in this collection—one senses just below the surface (and sometimes right on the surface) a looming fear that, if the judges are unleashed, they will simply muck up a situation in which the private parties are producing, if not a great solution, at least a tolerable one. This attitude seems to me to hold the judges to a higher standard than it holds those responsible for the boilerplate. The courts also usually produce “if not a great solution, at least a tolerable one.” The question is whether the judges can improve on the product produced by those who write and use the boilerplate. If a reasonably careful look shows that the dynamics of the on-the-ground situation do not do much to police the private use of boilerplate—which as we have seen in this symposium is a situation-by-situation question—then it seems to me wrong to fear the judges’ efforts.

Perhaps this phobia is fueled by a mistaken belief that, if the judges err, there will be no further correction. But this is of course not true. Judges in other jurisdictions may disagree; later judges in the same jurisdiction may overrule. More generally, although what the judges say in interpreting, displacing, or revising boilerplate may constitute mandatory rules (or mandatory allocations of powers to interpret) as regards the private parties, judicial decisions, except in constitutional cases, represent only default rules as regards the legal system as a whole. They are always subject to revision by legislation or by properly authorized administrative action. Of course, there will be some stickiness in getting these other institutions to act, and that may mean that only if the judges produce a really bad result will they be corrected. But as has already been said, the same stickiness means, if the judges are not supposed to act, that only if the drafters of boilerplate produce a really bad result will they be corrected. It is a question of who in the system is allowed to take the initiative. If we think on balance that judges will improve outcomes by trying to build models like those suggested by the

authors in this symposium rather than by simply applying doctrines based on the truncated model of ordinary contract law, then we should not only let them, but indeed ask them, to try.

Moreover, if we are to sort out the welter of possible models regarding boilerplate—if we are to develop an informed view of how many and what sort of models are needed—participation by the judges offers us some important intellectual advantages. Because they have a general jurisdiction and because they have to explain and not merely declare the rules they apply, judges in their ordinary work have to take a broad view of the whole terrain and consider what the crucial features are that differentiate situations. By contrast, law that depends on legislation or administrative regulation tends to become (if I may borrow a term I have used elsewhere) “sectorized.”<sup>37</sup> A different set of rules governs each sector of the economy, and for their legitimacy these rules trace back to specific enactments rather than to general principles. Because each rule ultimately derives from a legislative enactment representing a particular political moment, there is no reason why the rules in different sectors should represent similar analyses or methodologies or cohere in any way with each other. The structure of the legal materials defeats rather than encourages development of a general understanding of the phenomena.

It seems to me, therefore, that there is still a considerable role, practical and intellectual, for judicial action. The alternative, it seems, is for the courts to go on treating boilerplate and standard forms as if they were ordinary clauses in ordinary contracts. In many cases, in light of all that has been said at this symposium, that will produce the wrong result; and even in the cases in which it produces the right result, that right result will be rationalized on traditional grounds and therefore, intellectually speaking, accidental. The legal system as a whole certainly can do better, and in my view, the judges can, too.

The recognition that boilerplate has an institutional context—that how it is written and used, why it is written and used, and by whom it is written and used make a difference—is both true and important. That it makes life more complicated for those who study, teach, and write about contract law only proves its worth. That it also makes life more complicated for the existing institutions of the law cannot be denied, but it does not make sense to respond by pretending that what is true is not so. Rather, we have to think about the best way to pursue enough complexity to capture what is true while at the same time generating law that is clear enough for practical social purposes.

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37. Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL-AVIV U. STUD. L. 9, 18 (1992).