THE STRATEGY OF BOILERPLATE

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TABLE OF CONTENTS

INTRODUCTION 1033
I. CONFLICT, COORDINATION, AND COMMUNICATION IN BARGAINING 1038
II. THE SIGNALING FUNCTIONS OF BOILERPLATE 1041
A. *Signaling Character* 1042
1. *Affirmative Signals* 1043
2. *Responsive Signals* 1047
B. *Signaling Group Identity* 1049
III. THE COORDINATION FUNCTIONS OF BOILERPLATE 1050
A. *Conflict and Coordination in Bargaining* 1051
B. *The Focal Point of Boilerplate* 1053
C. *Boilerplate in Explicit Bargaining* 1055
D. *Boilerplate in Tacit Bargaining* 1064
IV. THE IMPLICATIONS OF STRATEGIC BOILERPLATE 1066
A. *Boilerplate and Change* 1066
B. *Rethinking Bargaining Skill* 1068
C. *The Tyranny of Big Concessions* 1070
D. *Bargaining and Adhesion in a Strategic World* 1071
E. *The Missing Focal Points in Law* 1071
CONCLUSION 1073

INTRODUCTION

> *Precedent seems to exercise an influence that greatly exceeds its logical importance or legal force. . . . Sometimes, to be sure, there is a reason for a measure of uniformity, and sometimes there is enough similarity in the circumstances to explain similar outcomes; but more often it seems that there is simply no heart left in the bargaining when it takes place under the shadow of some dramatic and conspicuous precedent.*[1]

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1. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 67–68 (1960).

That boilerplate is pervasive is hardly surprising. In a variety of ways, standardized terms in day-to-day contracts serve an essential cost-saving function. By this measure, one might expect less frequent reliance on boilerplate in high-value contracts among sophisticated parties. Yet standard terms would appear to be no less widespread in contracts among the sophisticated. Notwithstanding their representation by able counsel, charged to craft comprehensive and detailed, but also particularized, contracts, such parties will commonly conclude agreements comprised heavily of traditional terms—contracting norms of a sort—rather than terms tailored to the distinct features of their particular bargain.[2]

Examples of seemingly suboptimal but persistent contracting norms—the choice of standard contract terms over Pareto preferred tailored ones—are abundant. Several scholars have highlighted the longstanding inclusion of unanimous action clauses in sovereign debt contracts, notwithstanding the widespread perception of such terms as inefficient.[3] To similar effect, Michael Klausner and Marcel Kahan have pointed to the standard put-at-par remedy offered in event risk covenants, as well as the use of a standardized rating decline trigger, as suboptimal technologies.[4] Bill Bratton, finally, has noted the curious absence of business covenants restricting the creation and offering of certain new classes of preferred stock.[5]

Why do such standard terms—a species of boilerplate—persist notwithstanding the ready opportunity of sophisticated parties to abandon them in favor of tailored terms more suited to their particular circumstances? Two explanations have most commonly been offered. To begin with, reliance on standard terms may minimize the transaction costs of drafting and negotiating contract terms. Yet the representation of sophisticated parties by

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2. Various scholars have focused attention on boilerplate usage by sophisticated parties, including under the rubric of "The Form." *See, e.g.*, Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006); William W. Bratton, Jr., *The Economics and Jurisprudence of Convertible Bonds*, 1984 WIS. L. REV. 667; Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929 (2004); Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 CHI.-KENT L. REV. 59 (2001); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) [hereinafter Kahan & Klausner, *Standardization and Innovation*]; Marcel Kahan & Michael Klausner, *Antitakeover Provisions in Bonds: Bondholder Protection or Management Entrenchment?*, 40 UCLA L. REV. 931 (1993) [hereinafter Kahan & Klausner, *Antitakeover Provisions in Bonds*].

3. *See, e.g.*, Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 694 (2004).

4. *See* Kahan & Klausner, *Standardization and Innovation*, *supra* note 2, at 751; Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 962.

5. *See* Bratton, *supra* note 2, at 689. Other examples of suboptimal boilerplate can also be identified, including the difficult-to-justify use of a weighted-average approach to calculating conversion price in convertible bonds, *see* Michael A. Woronoff & Jonathan A. Rosen, *Understanding Anti-dilution Provisions in Convertible Securities*, 74 FORDHAM L. REV. 129 (2005), the calculation of anti-dilution adjustments based on the entire amount of a paid dividend, rather than simply the portion of the dividend that exceeds the threshold amount permitted, *see* Marcel Kahan, *Anti-Dilution Provisions in Convertible Securities*, 2 STAN. J.L. BUS. & FIN. 147, 155 (1995), the warrant formula utilized in convertible debt, *see id.* at 158, and the standard anti-dilution provision for the sale of assets, *see id.* at 159.

sophisticated counsel arguably limits the significance of additional drafting or negotiation costs and potentially enhances the returns on tailoring.[6] When a sophisticated party is engaged in complex contracting with another sophisticated party, thus, the transaction costs of tailoring any given term may be quite small as measured against the cost of contracting generally. Complex contracts among such parties, meanwhile, are more likely to constitute particularized transactions, maximizing the return on additional negotiation and draftsmanship.

An alternative model, developed by Michael Klausner and others,[7] posits that network effects in the choice of contract terms may favor reliance on widespread norms. Among sophisticated parties, however, potential network inefficiencies may be readily remedied through internalization of the positive externalities at work. Such parties have the resources necessary to finance the introduction of alternative networks of contract terms or shifts to available alternatives.[8] Perhaps for this reason, competing networks of boilerplate terms can be found within markets populated by sophisticated parties.[9] With the availability of such an alternative, in turn, network effects necessarily constitute a more limited barrier to deviations from the prevailing standard.[10]

While transaction-cost and network-effect theories surely offer some explanation for sophisticated parties' reliance on conventional usages or terms,

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6. This concept is echoed in the analysis of default rules in corporate law. In that context, many have questioned the significance of default rules given the ease with which drafting parties can tailor individually optimal terms. *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).

7. *See* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995); *see also* Ahdieh, *supra* note 3; Kahan & Klausner, *Standardization and Innovation*, *supra* note 2.

8. By way of example, Kahan and Klausner have explored the role of underwriters and outside counsel in such internalization, while Gillian Hadfield and Eric Talley have considered the possibility of private production of corporate law. *See* Kahan & Klausner, *Standardization and Innovation*, *supra* note 2, at 736–40; Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law* (Univ. of S. Cal. CLEO Research Paper No. C04-13; Univ. of S. Cal. L. & Econ., Research Paper No. 04-18, June 2004), http://ssrn.com/abstract=570641; *see also* S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, J. ECON. PERSP., Spr. 1994, at 133, 141–42.

9. The persistence of alternative networks of sovereign debt restructuring terms for much of the last century is a ready example. *See* Ahdieh, *supra* note 3, at 698–99; Choi & Gulati, *supra* note 2.

10. Other explanations for the use of standardized terms have also been offered. Of particular note are network-related "learning effects," which arise from past use of given terms rather than their potential future use (as with network effects). *See* Kahan & Klausner, *supra* note 2, at 719–25. Particular implications of the latter might include a fear of inadvertently becoming subject to regulation, based on use of a new contract term, and the greater potential for litigation around a less widely used (or at least less familiar) term, given existing precedent. Boilerplate might therefore be seen as offering greater control to the drafting party in shaping any future contract interpretation than would arise from any attempt to adjudicate the parties' intentions. In addition to such learning effects, inertia and related behavioral patterns have also been cited to explain the use of boilerplate. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998). While each of these theories may explain some part of the use of boilerplate by sophisticated parties, further exploration may nonetheless be useful.

further attention to this pattern is in order.[11] Boilerplate may serve additional functions in bargaining among sophisticated parties—and perhaps even in contracting generally—than the above models suggest.[12] Specifically, I would supplement existing transaction-cost and network-effect theories with what I will term a "strategic" theory of boilerplate.

A strategic conception of boilerplate begins with a sense of bargaining as characterized by both coordination and conflict. Thinking about bargaining—whether in contracts or elsewhere—is often oriented to the dimensions of conflict between the parties. This is hardly surprising, given how much of what is interesting about the interaction of bargaining parties hinges on the divergences in their preferences, payoffs, and resulting strategies. In point of fact, however, the essential dynamic in bargaining is one of coordination. Contrary to the rhetoric sometimes used to describe bargaining, the ultimate goal is not to win but to agree. Agree on one's preferred terms, no doubt, but agree nonetheless.[13]

Given the resulting mix of coordination and conflict in bargaining, it is necessary to think carefully about the nature of communication in contract negotiations. Although bargaining is—at some level—synonymous with communication, direct communication may not be the most effective tool in bargaining. Given a dimension of conflict, negotiating parties may rarely mean what they say or say what they mean. In the pursuit of coordination, then, alternative means of communication may be necessary.[14]

Adherence to (or deviation from) the contracting norms of a given industry—which I construe as a form of boilerplate[15]—may serve just such communicative functions. Specifically, I consider two related but distinct

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11. In this spirit, Todd Rakoff's exploration of potential theories behind the use and enforcement of form contracts deserves mention. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

12. David Gilo and Ariel Porat have offered an extended enumeration of potential roles for boilerplate in the particular context of standard-form consumer contracts. *See* 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 (2006).

13. *See infra* notes 20–23 and accompanying text. I do not mean to suggest that bargaining parties would prefer any agreement over a failure to agree. Naturally, agreement must fall within the contracting universe acceptable to both parties. *See infra* notes 89–90 and accompanying text. The ultimate goal within any given negotiation, however, is to agree.

14. *See infra* notes 27–30 and accompanying text; *see also* Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 239–41 (2004).

15. It is not *boilerplate* in the sense of some particularly fixed language that is at issue herein, but rather the consistent inclusion of certain conventional contract provisions—contracting norms or standards of a sort. In slightly different terms, the present analysis might be seen as directed to terms that are not negotiated by the parties but fixed for inclusion in advance of any negotiation. *Cf.* Shmuel I. Becher, A Fresh Approach to the Long-Lasting Puzzle of Consumer Standard Form Contracts 8 (May 2005) (unpublished J.S.D. dissertation, Yale Law School) (on file with author); Omri Ben-Shahar & John Pottow, *On the Stickiness of Default Rules*, FLA. ST. U. L. REV. (forthcoming 2006) (manuscript at 1–2, on file with author). Thus, the operative question presented herein is why sophisticated parties propose and incorporate certain conventional terms rather than tailoring more particularized terms. Most broadly, this can be understood as a question of standardization generally, including both its motivations and mechanisms.

functions that boilerplate may serve in contract bargaining, particularly among sophisticated parties but perhaps more generally as well. The first is a signaling function. In the case of boilerplate, however, the signal of interest derives not from the substance of the relevant term but from its character as a standard rather than tailored term. Additionally, I consider potential coordination functions of boilerplate that rest on the nature of boilerplate as a focal point in bargaining.[16] In this pair of signaling and coordination functions, one might find the foundations of a strategic theory of boilerplate.

What do I mean to capture with a strategic approach to boilerplate? In broad terms, the language of strategy calls attention to the potential use of boilerplate as a mechanism for parties to seek affirmative advantage in bargaining.[17] In this vein, I invoke recent Nobel laureate Thomas Schelling's seminal—if perhaps still inadequately appreciated—*Strategy of Conflict*, which explored strategic conduct as "conscious, intelligent, sophisticated conflict behavior [in contests the] participants . . . try to 'win.' "[18]

In emphasizing a sharply instrumental intent behind the use of boilerplate, I highlight strategy in a further sense. When boilerplate is used for strategic reasons, it concerns ends beyond the particular choice of terms. The intent of the party pressing boilerplate terms is divorced, at least in a direct sense, from the content of those terms. The strategic use of boilerplate is about something more than the content of the relevant term.

Finally, the strategic analysis of boilerplate herein serves to call attention to an affirmative role for focal points in law. Focal points have been widely referenced in the legal literature but predominantly in what might be characterized as a passive form. In Schelling's terms, legal scholars have focused on the role of focal points in "tacit coordination"—situations in which conflict (as well as communication) is lacking.[19] But the most significant role of focal points—including boilerplate terms—is strategic. Focal points do not simply exist; they can be created to help parties secure advantage in conflict and bargaining. In its attention to focal points, then, a

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16. Other strategic functions of boilerplate might be identified as well, although they are not emphasized herein. At least three potential "control" functions of boilerplate usage are noted *infra*, at notes 30, 142 & 144.

17. *Cf.* Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 326 (defining "competitive bargaining"). It bears noting, however, that just as simple contracts may not evidence an absence of "venality" or "self-interest" in contract negotiation, *see* Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91, 118–19 (2000), neither may the proposed use of standard terms.

18. *See* SCHELLING, *supra* note 1, at 3–4; *see also* Robert D. Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 300 (1990) ("Strategy is the design of conflict. . . . [O]nce the potential for hostility arises, strategy is the process of structuring the conflict around the means for winning it."); *cf.* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 328 (1991) (referring to Mnookin and Kornhauser's notion of strategy as litigant behavior misrepresenting "intentions, desires, or chances of winning in order to obtain an advantage in settlement negotiations"); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972–73 (1979).

19. *See* SCHELLING, *supra* note 1, at 54, 57–58.

strategic analysis of boilerplate may have implications for legal analysis more generally.

My analysis begins with an acknowledgement of the mixed-motive character of bargaining and suggestion of the resulting distortion of direct communication in contract negotiation. Parts II and III explore the pair of strategic functions noted above. The former considers the potential signaling functions of boilerplate in bargaining, exploring both more conventional signals of character and potential signals of group identity. The latter turns to the coordination functions of boilerplate. After further describing the nature of bargaining as a coordination game and suggesting the resulting applicability of Schelling's focal point paradigm, I successively consider the potential role of boilerplate in both the presence and the absence of communication—cases of "explicit" and "tacit" bargaining.

Part IV concludes by considering various implications of a strategic theory of boilerplate. Among other implications, I posit that notions of bargaining power are necessarily altered within such a theory. Additionally, the approach I propose offers both descriptive and prescriptive lessons for the evolution of boilerplate and for expected bargaining patterns around boilerplate. Finally, if boilerplate has the focal effects I describe, I suggest that the concerns associated with adhesion contracts may arise even in the presence of bargaining parity.

Collectively, these implications offer important lessons for our understanding of contract bargaining. As a descriptive matter, the use of boilerplate by sophisticated parties may owe much to its strategic functions. Even where strategy has historically played little role in the use of boilerplate, however, the analysis and implications offered below suggest the value of *greater* strategic thinking among sophisticated parties in their use of boilerplate.

I. Conflict, Coordination, and Communication in Bargaining

In thinking about the dynamics of bargaining—whether contractual or otherwise—we commonly focus on the dimension of conflict in the relevant interaction. In this perspective, parties have divergent interests that drive their bargain with one another. Each hopes to bargain its way to a greater potential share of the contractual (or similar) surplus. To this end, the parties push, cajole, and otherwise negotiate with each other.

In reality, however, the heart of bargaining is not conflict but coordination.[20] Bargaining parties' operative goal is to reach agreement. This requires terms to which both parties can agree—in essence, terms around which they can coordinate.[21] This primacy of coordination is evident when we think

20. I do not mean to suggest that conflict is lacking in bargaining. Divergent preferences are no less essential to a dynamic of bargaining than the common goal of coordination. Without some such conflict, "bargaining" ceases to be worthy of the name. My point is merely to emphasize the more commonly overlooked dimension of coordination that is also at work.

21. The subject of coordination, as I will elaborate *infra*, is the parties' expectations of one another. *See* Thomas C. Schelling, *Bargaining, Communication, and Limited War*, 1 Conflict

about the desired ends of contract negotiations as opposed to litigation. In bargaining, neither party seeks to crush its opponent. Notwithstanding sometimes loosely used rhetoric, neither aspires to a contract that is *truly* one-sided. Such a contract would, predictably, be rejected. Instead, each party wants the best deal that it can actually get.[22] By contrast, the goal in litigation may be unvarnished victory; dismissal with prejudice is likely to be an attractive outcome to the civil defendant.[23]

If both coordination and conflict are present in bargaining, however, how do they actually play out? What is the balance of coordination and conflict in bargaining? Bargaining, I would suggest, rests on parties' common goal of coordination; the path to that end, however, is littered by their tactical efforts to secure advantage. Thus, each party desires the best possible price; each wants its favored warranty terms, and the like. But each one only wants as much as it can have while still preserving the prospect of agreement. On the playing field of bargaining, then, coordination is the goal, but the participants' successive plays are directed at securing advantage in successive areas of conflict.

This pattern is readily captured in game theory. Contract negotiation and other forms of bargaining are coordination games.[24] The incentives of players thus favor the achievement of some coordination equilibrium.[25] Bargaining is not, however, a *pure* coordination game. As in the Battle of the Sexes, in which husband and wife wish to spend an evening together, but each prefers to spend it at a different venue, bargaining parties seek to agree, but would prefer to do so on their own terms.[26]

Within this pattern, one must think carefully about the nature of communication. Although I will offer an important caveat below—in the form of what Thomas Schelling termed "tacit bargaining"—bargaining is ordinarily grounded in communication. The nature of communication in bargaining, however, is shaped in important ways by the mixed motives at work. In light

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RESOL. 19, 20 (1957); Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 71.

22. Benjamin Franklin, perhaps unsurprisingly, put it well:

> Trades would not take place unless it were advantageous to the parties concerned. Of course, it is better to strike as good a bargain as one's bargaining position permits. The worst outcome is when, by overreaching greed, no bargain is struck, and a trade that could have been advantageous to both parties does not come off at all.

HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33 (1982) (quoting Franklin).

23. Some concession to each side may be valued even in litigation, given its potential to diminish the prospect of appeal, to enhance the likelihood of voluntary compliance, and the like.

24. "[T]he process of agreeing to a set of contractual terms is a coordination game." Eggleston et al., *supra* note 17, at 112; *cf.* Rakoff, *supra* note 11, at 1222 (suggesting role of form contracts in facilitating coordination).

25. *See* Utset, *supra* note 21, at 71–72 (describing coordination game dynamic in negotiation, and potential for coordination failure: parties "may literally talk past each other and fail to reach a bargain"); *see also* F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 51 (1990); Philip B. Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797 (1973).

26. *See* Ahdieh, *supra* note 14, at 240 n.102.

of the element of conflict within the quest for coordination and, perhaps more significantly, the pervasive dimension of conflict in the negotiation of any single term, there is both more and less to communication in bargaining than we might otherwise imagine.[27]

Given a degree of conflict, in essence, ordinary communication may not serve the ends of coordination. Even if parties hope to achieve some coordination equilibrium, if they diverge as to their preferred equilibrium, the reliability of oral communication declines.[28] I may neither mean what I say, nor say what I mean. In such circumstances, other means of communicating intentions, interests, and incentives, as well as other asymmetrically held information—means such as Schelling-style "focal points"—may be critical.[29]

This is the backdrop for the present analysis. My inquiry concerns how both adherence to and deviation from boilerplate might serve a party's communicative goals in bargaining. Such goals may occasionally be of a mutually beneficial character. Thus, the relevant communication may serve to remedy Pareto suboptimal information asymmetries and thereby enhance the collective contracting surplus. At least as often, however, the communicative impact of boilerplate may be intended to advance the particular interests of the drafter. In either case, the information communicated arises not primarily from the substance of the term proposed but from its character as either boilerplate or a tailored term.[30]

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27. *Cf.* Schelling, *supra* note 21, at 31–32 (suggesting that the line between explicit communication and tacit communication may be difficult to draw in the context of bargaining); David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 119–20 (2003). On the whole, the function of communication in bargaining rests on the premise of information asymmetries of one variety or another.

28. *See* Ahdieh, *supra* note 14, at 239–41.

29. *See* SCHELLING, *supra* note 1, at 112. On the difficulties of relying on communication, *see* Goodpaster, *supra* note 17, at 342–43 ("The information the competitive negotiator seeks is the other party's bottom line. How much he will maximally give or minimally accept to make a deal. On the other hand, the competitive negotiator wants to persuade the other side about the firmness of the negotiator's own *asserted* bottom line. The competitive negotiator works to convince the other party that it will settle only at some point that is higher (or lower, as the case may be) than its *actual* and unrevealed bottom line.").

30. Beyond the signaling and coordination functions I explore herein, one might also posit an "agency control" function of sorts. Principals might use boilerplate to control their agents. This has been suggested with reference to form contracts by numerous authors. *See, e.g.*, Avery Wiener Katz, *On the Use of Practitioner Surveys in Commercial Law Research*, 98 MICH. L. REV. 2760, 2769 (2000); *cf.* Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 287–88 (1956) (suggesting utility of reliance on agent in limiting expectations of any potential deviation by the principal). By dictating the inclusion of certain terms in one's contracts up front, and thereby foreclosing negotiation of these terms, corporate entities may constrain the discretion available to their agents. This can occur both through the requirement of certain process boilerplate or the dictation of substantive terms. In the former case, one might point to the standard inclusion of a merger clause and a no-oral-modification clause. *See* Rakoff, *supra* note 11, at 1223–24. Substantively, corporate entities might dictate the inclusion of particular substantive terms such as a unanimous action clause.

Such control of agents may be especially important for the sophisticated contracting parties of interest herein. *See* Ben-Shahar & White, *supra* note 2, at 967–68; Stewart Macaulay, *Private Legislation and the Duty to Read—Business by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1059 (1966); *cf.* Becher, *supra* note 15, at 9 (describing constraints imposed on

II. The Signaling Functions of Boilerplate

Boilerplate may facilitate important signaling functions in contract bargaining. Signaling involves the communication of information that cannot be effectively communicated through explicit statements of intention or character.[31] The offering of a warranty, for example, communicates private information in the hands of the manufacturer regarding the character of the product (or the character of the manufacturer), which could not be communicated by explicit assurances of product quality alone.[32]

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agents by standard-form agreements). Sophisticated parties might thus wish to adopt a firm commitment to certain boilerplate terms in order to more effectively constrain the discretion of their agents in contract negotiations. *Cf.* Eggleston et al., *supra* note 17, at 110–12. Large institutions—with concomitantly large numbers of agents and concomitantly wide discretion in the hands of those agents—might have particular need for a mechanism to constrain the discretion of those charged with negotiating their many contractual obligations. The required use of certain boilerplate in all contracts, or all contracts of a particular variety, might essentially be seen to serve this purpose. *See* Rakoff, *supra* note 11 at 1223 (suggesting effectiveness of corporate hierarchy as only theory of enforceability of adhesion contracts: "In private organizations, as in public bureaucracies, discretion is power—and this is true of discretion at the bottom of the hierarchy as well as at the top."); *see also* Macaulay, *supra*, at 1059.

Such use of boilerplate as a mechanism of constraint might be seen to apply most directly to those employees of the relevant institution who are responsible for contract negotiations. Perhaps even more significantly, however, it may apply to external agents, including outside counsel. The latter may be especially prone to deviation from the principal's aims for any number of reasons. To begin with, they have an incentive to minimize costs, potentially favoring distinct standardized terms or contracts. *See* Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 Wash. U. L.Q. 347, 353–55 (1996) (describing potential for agents to favor standardized terms). Additionally, and following directly from this, external agents may have their own preferred drafting models. Finally, outside counsel's potentially greater repeat player character in a given market, as well as relatively greater autonomy from the principal (as compared to other internal agents), may also increase the relative utility of boilerplate as a mechanism of control of outside agents.

Claire Hill's analysis of the use of "The Form" in large-firm legal practice calls further attention to attorneys' own agendas in contract design. *See* Hill, *supra* note 2, at 62–63. Boilerplate-based constraints on counsel might also be seen as a cost-saving device. *See* Eggleston et al., *supra* note 17, at 120. Similar arguments, in turn, can be made about investment bank agents in corporate finance. Kahan and Klausner's treatment of the independent role of investment banks in facilitating contract standardization can thus be understood as a story of agency costs. *See* Kahan & Klausner, *Standardization and Innovation*, *supra* note 2, at 755. A slightly different example, of course, arises when companies rely on form contracts including a merger clause for use by their sales agents. *See* Rakoff, *supra* note 11, at 1223.

31. "A signal is a costly behavior that can communicate information about the sender when the receiver knows that only senders with a particular characteristic can afford, or are willing, to send the signal." David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 Nw. U. L. Rev. 879, 882–83 (2003); *see also* Steven Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 Harv. J.L. & Tech. 149, 193 (2001) (noting that signals can potentially arise either from words or deeds).

32. *See* Hetcher, *supra* note 31, at 193; Avery Wiener Katz, *The Option Element in Contracting*, 90 Va. L. Rev. 2187, 2222 (2004). The signaling role of boilerplate in bargaining that I propose echoes analysis of the impact of default rules on bargaining. *See, e.g.*, Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L.J. 729 (1992); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 Yale L.J. 615, 617 (1990).

A. *Signaling Character*

Signaling is most commonly conceived to communicate information regarding the character of a party, transaction, or product.[33] Signals might offer information regarding the reliability, viability, or capacity of a potential trading partner, or the costs or risks of a particular deal.[34] Such communications may enhance either collective contracting efficiency or a particular party's share of the contractual surplus. Signals may play an especially significant role in doing so where direct communication is undermined by the presence of some degree of conflict, as in contract negotiations and other bargaining dynamics.[35]

The present argument is distinct from ordinary treatments of signaling, as the signal of interest herein arises not from the substance of the term offered[36] but from the proposed term's consistency with or deviation from the preexisting contracting norm.[37] When a warranty is conceived as a signal of product quality, the notion is that the manufacturer's willingness to stand behind the product communicates private information regarding the product's reliability. Likewise, a signaling conception of unanimous action clauses in sovereign debt instruments posits that they communicate a debtor's commitment to avoid default.[38] Here, by contrast, the notion is that the adoption of or the failure to adopt a standard term—whether it be a warranty or warranty disclaimer, or a unanimous action clause or collective action clause—communicates certain information, independent of the substance of the provision.[39]

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33. "One detects signals attributed to general character traits, such as responsiveness, dependability, and honesty." Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. Rev. 457, 464 (2001) (footnote omitted). The signaling function is widely relied on in the law and economics literature to describe behavior intended to communicate information regarding the character or nature of a particular individual, institution, or product. *See* Eric A. Posner, Law and Social Norms 18–19 (2000).

34. *See* Eggleston et al., *supra* note 17, at 117; *see also* Rubén Kraiem, *Leaving Money on the Table: Contract Practice in a Low-Trust Environment*, 42 Colum. J. Transnat'l L. 715, 736 n.31 (2004) ("[P]eople will behave in a trustworthy manner, or comply with a given set of social norms, simply for fear of incurring reputational or other social sanctions. . . . [T]here is a signaling component to one's behavior, independent of whether one has or has not internalized the relevant norm.").

35. *See supra* Part I.

36. Omri Ben-Shahar and John Pottow characterize this as the "direct value" of the relevant term. *See* Ben-Shahar & Pottow, *supra* note 15, at 3.

37. With an eye to default rules, Ben-Shahar and Pottow have made analogous observations regarding the signaling effects of standard terms and offered potential examples of this pattern. *See id.*

38. *See* William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 Vand. L. Rev. 1, 52 (2004); Choi & Gulati, *supra* note 2, at 939.

39. The notion of boilerplate signaling I suggest is directly in line with Ayres and Gertner's suggestion that a party may adhere to a suboptimal default rule in order to conceal private information regarding the subject matter of the relevant term. *See* Ayres & Gertner, *supra* note 32; *see also* Eggleston et al., *supra* note 17, at 109–10. As Korobkin suggests, however, adherence may also be motivated by a desire to conceal information independent of the relevant term. *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608, 620 (1998).

As explored in the legal literature, signals might generally be grouped into *affirmative* words or deeds designed to signal information regarding the speaker or actor, and statements or moves by a party designed to elicit *responsive* signals from another party. By dint of certain standard or conventional commitments, a party can effectively signal that it will be a suitable contracting partner.[40] Conversely, but still strategically, a party may also rely on the proposed use of boilerplate to elicit signals from its negotiating counterpart about the latter's character. In these successive cases, the proposed use of boilerplate might respectively be said to produce pooling and separating equilibria.

1. *Affirmative Signals*

The proposed use of boilerplate may produce a pooling effect of sorts in speaking to the character of the proposing party or the transaction it proposes.[41] A willingness to rely on boilerplate terms might be seen to signal the absence of any elevated risk of default, litigation, or the like, or the absence of flaws in the particular transaction under consideration.[42] Thus, a party proposing boilerplate would seem to place itself and the relevant transaction at some median level of risk.[43] In other terms, the proposed use of boilerplate could be seen to signal the absence of private information adverse to the potential counterparty.[44] In essence, it signals the absence of any undisclosed reason for standard terms to be less attractive to the relevant party.

Business covenants in both indentures and private loan agreements suggest potential examples. The absence of covenants ordinarily included in a particular type of debt instrument—including certain debt and investment

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40. Naturally, a party may also signal its lack of reliability. *See* Jeffrey Evans Stake & Michael Grossberg, *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 539 (1998) (discussing signaling problem inherent in suggesting entry into prenuptial agreement).

41. *See* Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625 (2001) (book review); *see also* Hetcher, *supra* note 31, at 195 ("To distinguish themselves from bad types, good types engage in actions that are called 'signals.' Signals reveal type if only the good types, and not the bad types, can afford to send them, and everyone knows this.").

42. *See* Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 71–72 (1993); Korobkin, *supra* note 39, at 621; Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1165 n.213 (2003). Lisa Bernstein has spoken of the "relational costs" of deviation from a norm. Such costs might arguably be greater among the sophisticated, repeat player parties of interest herein. *Cf.* Bernstein, *supra*, at 74.

43. *See* Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 CHI.-KENT L. REV. 889, 899 (2004) ("[E]ach party needs to expend costs to convince the other party that it is not using strategic handles itself.").

44. *See* Ayres & Gertner, *supra* note 32. As Ayres and Gertner's default rules analysis makes clear, the strategic use of boilerplate may potentially work both in the affirmative and in the negative. The proposed use of boilerplate may not only help signal positive information but also may serve to conceal adverse information.

covenants[45]—would likely constitute an important adverse signal to creditors. One can appreciate as much with respect to the various types of event risk covenants, as used in the aftermath of the 1988 leveraged buyout of RJR Nabisco. At the outset, limited hostile control change covenants—strongly favorable to management interests—were the norm.[46] Relatively quickly, however, more generally advantageous dual trigger covenants emerged as the standard.[47] On these facts, some adverse signal might be expected to arise from an issuer's continued use of the older standard. Additionally, however, *early* shifts to the newer standard may have offered a signal of private information regarding greater prospects of hostile takeover activity, given a correlation between use of dual trigger covenants and such activity.[48] In the design of the particular event risk covenant used, moreover, further signals might be found, as with the inclusion of a more limited collection of triggering events than was conventional—for example, the exclusion of a change in board composition—or the offering of a less-than-standard remedy.[49]

As suggested by the foregoing examples, the bargaining opportunity sets most suited to boilerplate's signaling effects are binary in nature. The starker a choice—as in the choice between hostile control change and dual trigger event risk covenants—the clearer the relevant signal.[50] By contrast, the coordination functions of boilerplate are at their acme when bargaining parties face an array of contracting alternatives.[51]

As the examples offered also suggest, the relevant boilerplate signal may often have some significant temporal feature. The choice between hostile control change and dual trigger event risk covenants involved a shift in the contractual norm over time.[52] Early movers offered one signal. Late movers offered another. One might further expect that a *pattern* of early or late

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45. *See* Marcel Kahan & David Yermack, *Investment Opportunities and the Design of Debt Securities*, 14 J. L. ECON. & ORG. 136, 142 (1998).

46. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 952.

47. *See id.* at 955.

48. *See id.* at 975–76.

49. In the case of anti-dilution provisions, similarly, some broad signal might be offered by a debtor's election to use the older conversion price standard versus a newer market price term. Such a choice might be expected to signal a relatively narrower conception of the anti-dilution function. *See* Bratton, *supra* note 2, at 687 n.76; Stanley A. Kaplan, *Piercing the Corporate Boilerplate: Anti-Dilution Clauses in Convertible Securities*, 33 U. CHI. L. REV. 1, 29 (1965); *see also* AM. BAR FOUND., COMMENTARIES ON INDENTURES 530 (1971) [hereinafter COMMENTARIES]. More specifically, private information pointing to heightened risk in a transaction might be signaled by the use of a full ratchet provision for calculating conversion price. Such provisions are thus used primarily for riskier transactions or amidst economic turmoil. *See* Woronoff & Rosen, *supra* note 5, at 147.

50. *See* Ben-Shahar & Pottow, *supra* note 15, at 15–16, 21; *cf.* Ayres & Gertner, *supra* note 32, at 739; Korobkin, *supra* note 10, at 1598.

51. *See infra* note 140.

52. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2. Another example of a shift in boilerplate over time, giving rise to similar signaling patterns, was the disappearance of debt covenants and restrictions on subsequent liens and dividends from the debt instruments of large corporations between the 1970s and the mid-1980s, and their replacement by negative pledge covenants against added secured debt and by prohibitions on the sale and leaseback of assets.

shifts in boilerplate usages would offer its own, distinct signal. While not all boilerplate signals will have this character, one might expect some temporal element to often be present in complex contracting, with its gradual shifts in boilerplate over time.[53]

Most importantly, however, as to each of the above examples, it is essential to appreciate a signal of interest that is entirely independent of the substance of the relevant provision.[54] While the substantive choice of term offers some signal on its merits, it also offers a distinct signal as boilerplate or deviation from boilerplate. This becomes clearer when we consider the range of potential proposals to deviate from boilerplate, with changes adverse to the non-drafting party at one end of the spectrum (and suggested by the examples above), and changes of seeming benefit to the non-drafting party at the other. In the case of adverse deviations from boilerplate, *both* the abandonment of a norm *and* the substantive shift to a less favorable term communicate a negative signal to the other party. Minimally, the deviation from boilerplate to offer less favorable terms enhances the strength of the substantive adverse signal.

When one considers proposed deviations that are seemingly beneficial to the non-drafting party, however, this correlation disappears. In the choice between a hostile control change or a dual trigger form of event risk covenant, for example, it bears noting that a relatively uncommon third form—highly favorable to creditors—was also available. Pure rating decline covenants—triggered by *any* rating decline, regardless of cause—deviated from boilerplate, yet offered much more favorable terms to the non-drafting party.[55]

In such circumstances, the distinction between the signal arising from boilerplate deviation and that arising from the substantive choice of term emerges more starkly. Given such divergence, however, there is at least the prospect that even a *favorable* deviation from boilerplate could constitute an adverse signal.[56] This may simply be an issue of raising suspicions regarding the reason for the deviation—suspicions not susceptible to alleviation

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53. *Cf.* Korobkin, *supra* note 10.

54. In their analysis, Ben-Shahar and Pottow are occasionally ambiguous in drawing the line between what they term the "direct value" signaled by a given term, and the signal arising from its character as a boilerplate or tailored term. *See* Ben-Shahar & Pottow, *supra* note 15, at 12–13.

55. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 958–60. Another example of this pattern might be an issuer's use of the less borrower-friendly terms of the original, 1983 Model Simplified Indenture ("MSI"), rather than the 1999 revision. The persistence of obligations subsequent to a sale of assets under Section 5.01 of the 1983 MSI, and their elimination under Section 5.02 of the 1999 version, might constitute a particular example. *Compare Model Simplified Indenture*, 38 BUS. LAW. 741, 755 (1983) (section 5.01), *with Revised Model Simplified Indenture*, 55 BUS. LAW. 1115, 1135 (2000) (section 5.02).

56. *See* Ben-Shahar & Pottow, *supra* note 15, at 2–3; Gilo & Porat, *supra* note 12; Hill, *supra* note 2, at 69 (noting that even improvements in "The Form" may constitute negative signal); *cf.* Korobkin, *supra* note 39. Eggleston, Posner, and Zeckhauser suggest that even the addition of language "to protect the other against one's own opportunism" may constitute an adverse signal. *See* Eggleston et al., *supra* note 17, at 118–19. At the extreme, one might conceive of below-market offers to sell or offers to buy at a premium in this light. Attractive as they may be, such offers may also raise questions. *See, e.g.*, *id.* at 109–10.

through communication, given the mixed motives in play. Among the sophisticated parties of interest in the present analysis, this possibility may be especially significant. Proposed deviations from boilerplate by unsophisticated or unrepresented parties might be written off as devoid of any meaningful signal. By contrast, a sophisticated party and its even more sophisticated counsel are more likely to intend something when they deviate from standard terms.[57] When made by counsel, seemingly favorable deviations from the norm may be more likely to be interpreted as craftiness than as simple concession.

Notably, such adverse signaling may arise even from the most minimal of deviations.[58] Even small changes raise the question, "Why?" Perhaps more importantly, small changes may raise questions as to what further changes are hidden within "The Form."[59] The selection of particular terms from the less borrower-friendly 1983 Model Simplified Indenture ("MSI"), for example, rather than the revised 1999 MSI, might trigger concerns about the entire range of choices made in the relevant indenture.[60]

One might also appreciate the adverse signals attending even favorable deviations from boilerplate within a private information framework. As suggested above, the proposed use of boilerplate might be seen to signal a lack of private information. Deviations toward terms less favorable to the non-drafting party, by contrast, might suggest the presence of such information. The proposal of non-boilerplate terms *favorable* to the other party, however, is no different. It still signals private information; it is simply favorable information. Yet such indication of private information may raise concern about the presence of *other* private information.[61] Stating it differently, it may raise questions about why the party offering the favorable term cannot compete effectively with standard market terms. Why might the party need to offer a premium? Going a step further, the deviation from boilerplate to offer preferred terms might be seen to indicate an unwillingness or perhaps inability to be subject to the market. Such an offer might signal a party *too* anxious to make a deal. Use of a rare, pure rating decline event risk covenant might be expected to trigger such an adverse response, alongside its substantive signal of creditworthiness.[62]

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57. *See* Hill & King, *supra* note 43, at 899 (describing negotiations among sophisticated parties of verbiage to be used in contract as searches for "strategic handles or ambiguities that the other party might exploit").

58. *Cf.* Eggleston et al., *supra* note 17, at 109–10 (noting employer's potential offer of higher sales commission as signal of private information of low sales).

59. *See* Hill, *supra* note 2, at 72, 79 (suggesting worries about adverse signaling may deter even obvious improvements in the forms utilized within large law firms, let alone innovations).

60. *See supra* note 55.

61. *See* Ben-Shahar & Pottow, *supra* note 15, at 17 (describing challenge of "unknown unknowns"); *see also id.* at 19 (suggesting suspicions likely to arise from deviations from default rules); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1825 (2000).

62. Elimination of the standard contractual disclaimer of consequential damages would be to similar effect. *Cf.* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1270–71 & n.205 (2003).

Aside from its adverse or positive effect, favorable deviations from boilerplate might also signal particular understandings or conceptions of the drafting party. Anti-dilution provisions in corporate debt, for example, have been conceptualized in a variety of ways.[63] By offering anti-dilution terms more favorable than the norm, a party might signal its particular understanding of the nature of anti-dilution protections.

In the broadest terms, even favorable deviations from boilerplate may simply call attention to the relevant drafting party or the deal it proposes. Such heightened attention may sometimes be favorable, but may also be unwelcome. This does not mean, of course, that *any* deviation from boilerplate, no matter how favorable, will constitute an adverse signal in toto. Rather, when the substantive change in term is sufficiently favorable, the attendant benefits are likely to drown out any negative signal that the deviation from boilerplate sends. Deviations from the contracting norm may be problematic, by contrast, where they offer only limited substantive benefit to a counterparty.

Finally, the foregoing may suggest the possibility of thinking about the role of boilerplate in bargaining in somewhat distinct terms from those described above. As already pointed out with reference to disadvantageous deviations from boilerplate, the abandonment of a standard term may minimally strengthen the force of the substantive adverse signal. Similarly, when a party proposes favorable deviations from boilerplate, the boilerplate's function might be to establish a negotiating benchmark against which the deviations will more strongly communicate a positive signal. In this conception, the affirmative functions of boilerplate in bargaining can arise from adherence *or* from deviation. Once boilerplate sets a baseline, in essence, favorable deviations from it—for example, a debtor's election of a pure rating decline covenant or use of the original MSI—may offer an even clearer positive signal. As I will suggest below, then, a repeat player might be seen to benefit from defining a relevant contracting norm distant from its reservation point not only for substantive reasons, but also to ensure its consistent ability to offer favorable deviations from the norm and a resulting positive signal.[64]

2. *Responsive Signals*

Each of the foregoing aspects of boilerplate's signaling functions arises similarly in the use of boilerplate not to disseminate information but to elicit it. Just as the proposed use of boilerplate may trigger a pooling equilibrium of sorts by suggesting a median level of risk and lack of private information in the hands of the drafting party, it may also produce a

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63. *See supra* note 49.

64. *See infra* Section IV.B. Again, it bears recalling that the utility of—and perhaps the need for—such signals derives from the limits on direct communication in bargaining, given the presence of some dimension of conflict alongside an operative dynamic of coordination. *See supra* Part I.

separating equilibrium of sorts. In essence, it may permit the identification of more risky counterparties or transactions.[65]

A party may be a less attractive contracting partner for a variety of reasons, including a relatively greater propensity for default or tendency to litigate upon default.[66] When a party resists proposed boilerplate, the drafting party may be signaled of some such greater risk. The median contracting party might be expected to be amenable to standardized terms. By contrast, a party more at risk of default or more prone to litigation is more likely to seek particularized terms pertaining to such contingencies.[67]

Others have discussed this possibility, though primarily with reference to the use of standard-form contracts of adhesion.[68] In this line of analysis, the use of adhesion contracts can be understood as a means to discourage higher-risk counterparties from contracting or to force such parties to reveal their risk profiles.[69] Yet the same principle may operate more broadly; it may play out with form contracts generally. Under the present analysis, it may arise from any proposed use of the contracting norm, even within generally non-standardized contracts. As to such terms, some signaling of adverse information regarding a potential contracting partner may obtain from that partner's desire to deviate from proposed boilerplate.[70]

Here, a binary dimension to the choice between the standard term and the alternative is likely to be even more relevant than with the affirmative signals discussed previously.[71] In the case of responsive signals, furthermore,

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65. *See* Gilo & Porat, *supra* note 12, at 988–89, 990–92.

66. *See* Richard Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1586 (2005) ("[O]ne reason sellers will not negotiate with consumers over changes to a form contract . . . may be that the consumer who asks to negotiate signals to the seller that he may be litigious, or otherwise a troublemaker"); *cf.* Kristin Madison, *Government, Signaling, and Social Norms*, 2001 U. ILL. L. REV. 867, 875 (suggesting range of information about partner that might be effectively signaled).

67. *See* Eggleston et al., *supra* note 17, at 110 (A party "will be less suspicious if the proposed contract is a standard contract, rather than one ostensibly tailored to today's individual circumstances, because a simple standard contract, which applies to heterogeneous circumstances, is less likely to exploit individualized asymmetric information . . . . Therefore, asymmetry of information may lead parties to use equivalent contracts over a broad range of circumstances, even though optimality would require heterogeneous and context-specific contracts."). In the—perhaps unlikely—alternative, a willingness to accept boilerplate without revision might also be seen to signal a prospect of gross default, and consequent disinterest in dickering over contract terms. The responsive signal elicited by the proposed use of boilerplate may consequently be inflected with some degree of noise.

68. *See, e.g.*, Paul Watford, *Contractual Liability in Intellectual Property Disputes—A Case Study:* Buchwald v. Paramount Pictures Corp., 18 COLUM.-VLA J.L. & ARTS 269, 277–78 (1994) (discussing negotiation options for parties faced with adhesion contracts).

69. *See* Eggleston et al., *supra* note 17, at 109–10.

70. This pattern might be readily captured by boilerplate provisions for the non-assumption of debts and liabilities in the case of an asset sale. A counterparty's resistance to such a provision may signal the presence of hidden debts or liabilities. Standard provisions providing for the arbitration of disputes might also be a relevant example. In this case, demand for authority to pursue other means of legal recourse might signal a greater likelihood of, or at least a greater willingness to engage in, dispute. *See* Korobkin, *supra* note 62, at 1270 & n.205.

71. *See supra* notes 50–51 and accompanying text.

the signal attaches even less to the substance of the deviation demanded by the non-drafting party than to the very demand for deviation. This is evident with respect to favorable deviations sought by non-drafting parties. In the latter case, the non-drafting party is not writing on a clean slate. Rather, it has before it a boilerplate provision drafted by its counterparty. To affirmatively reject the boilerplate term and demand a deviation harmful to one's substantive interests would be expected to raise all the suspicions outlined above, yet even more forcefully.[72]

B. *Signaling Group Identity*

Besides providing evidence of the character of a party or the nature of a particular transaction, signals may provide other types of information.[73] For instance, the use of certain boilerplate might be the norm for a particular type of actor or group. A party's proposed use of that boilerplate, then, might help to signal its identity[74] or group membership.[75]

An example of this pattern—in which the choice of particular boilerplate signals information regarding the type of drafting party—might be the standard use of one or the other of two alternative boilerplate terms to govern alterations in the financial terms of sovereign debt contracts.[76] Bond contracts issued under English law have historically included a standardized provision requiring the consent of a supermajority of bondholders for any change.[77] Sovereign bonds issued under New York law, by contrast, included a standard term requiring the unanimous consent of *all* bondholders.[78] The use of one boilerplate term or the other thus helped signal that the contract was an English-law or New York-law bond. More significantly, it was seen as some signal of the grouping of the borrower within the category of either

72. One might reasonably predict that the strategic payoff from the invocation of boilerplate as a signaling device would be characterized by diminishing returns. Over time, the information to be offered or elicited through boilerplate usage is likely to be discounted through some internalization of the potential returns from any such strategic use of boilerplate. In the presence of significant information asymmetries, however, some significant—even if diminished—signaling effect might nonetheless persist. The noise in the information signaled would necessarily increase as negotiators absorb the utility of strategic behavior. Even then, however, it may constitute the best information available.

73. *See* Eggleston et al., *supra* note 17, at 109–10. For example, in the context of trade secrets, "[a]n important function of security measures is to signal to competitors and the public what information belongs to the business." Jermaine S. Grubbs, Comment, *Give the Little Guys Equal Opportunity at Trade Secret Protection: Why the "Reasonable Efforts" Taken by Small Businesses Should Be Analyzed Less Stringently*, 9 LEWIS & CLARK L. REV. 421, 429 (2005).

74. For example, proposing use of the model swap agreement of the International Swaps and Derivatives Association offers some signal of the proposing party's conception of itself.

75. Howard Abrams has suggested a reading of *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960), as involving a signaling of group membership by the contracting parties.

76. *See supra* notes 38–39 and accompanying text.

77. *See* Ahdieh, *supra* note 3, at 698.

78. *See id.* at 698–700; Choi & Gulati, *supra* note 2, at 938.

low-risk or high-risk debtors.[79] For this reason, emerging market debt was commonly issued in New York.[80] By issuing in New York, higher-risk debtors sought to signal their preferred inclusion within the grouping of lower-risk debtors, who could more readily afford a unanimous action requirement and its greater constraints on their future ability to restructure their debt.[81]

Although a less familiar signaling paradigm, such signaling of group identity may offer an even clearer case of the signaling effects of boilerplate. When some sufficient consistency can be observed between particular provisions and the users of those provisions, boilerplate may serve an important classification function.

In sum, some signaling function may be an important element in the strategic use of boilerplate. In essence, by proposing the use of boilerplate, a bargaining party may convey certain information regarding the character and relative risks of the party itself and the proposed transaction. A party may also be able to extract valuable information regarding its counterparty. Finally, in appropriate circumstances, boilerplate may help to communicate identity. In each of these ways, the use of boilerplate may serve important expressive functions.[82]

III. The Coordination Functions of Boilerplate

The use of boilerplate in bargaining may play an important role in facilitating agreement at an equilibrium favorable to a particular party. Because of the multiple equilibrium dynamic of bargaining, some extrinsic mechanism will often be needed to define the parties' ultimate point of agreement.

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79. *Cf.* Ahdieh, *supra* note 3, at 707 (discussing concern among debtor states that changes to standard bond terms to make restructuring easier might increase borrowing costs or exclude debtor nations from international debt markets).

80. *See id.* at 698–700.

81. Other examples of boilerplate terms indicative of group identity might also be offered. A simple case might be the inclusion of a certain type of certified warranty, distinct to a particular group of assertedly "high-quality" producers. In the case of debt instruments, the consistent inclusion of business covenants in junk bonds and their consistent exclusion from investment-grade bonds in the 1980s, *see* William W. Bratton, Jr., *Corporate Debt Relationships: Legal Theory in a Time of Restructuring*, 1989 Duke L.J. 92, 140 & n.211, made the presence of such covenants an effective signal regarding the nature of the relevant issuer. An even clearer example might be the early move to dual trigger covenants, a signal potentially placing the relevant issuer in a category of issuers prone to hostile takeover. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 975. To similar effect would be the inclusion in a convertible security of anti-dilution provisions directed to information barriers, which provisions are used primarily by private companies and public companies with thin trading. *See* Woronoff & Rosen, *supra* note 5, at 133. Yet another example mentioned above would be the use of full ratchet anti-dilution provisions, with the attendant implication of the relative riskiness of the issuer. *See id.* at 145–47. Finally, following from Kahan and Yermack's analysis of the use of covenants in convertible debt securities, one might construct the presence of covenants as a classificatory signal of sorts. *See* Kahan & Yermack, *supra* note 45, at 142–44.

82. *See* Schelling, *supra* note 2, at 115. The term "expressive" is one that Schelling himself used. *Id.* It has since been popularized in the legal literature. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

In this exercise in coordination, boilerplate may offer a "focal point" of sorts, facilitating resolution of the game.

A. *Conflict and Coordination in Bargaining*

As described at the outset, contract bargaining is fairly understood as a type of coordination game.[83] Characteristic of such games is the presence of multiple equilibria. Rather than a single stable solution, an array of potential outcomes, once reached, exhibit significant stability.[84] Bargaining parties might thus reach myriad potential deals over any individual term of their agreement or the agreement as a whole.[85]

How, then, do parties solve the coordination game of contract bargaining? Three scenarios present themselves, assuming each party has some range of acceptable outcomes, from its ideal outcome (that is, near-complete capitulation by the counterparty) to its "reservation point"—the least favorable outcome the party would be willing to accept.[86] Given the existence of such a range for each bargaining party, the first possibility is no overlap. In this case, there is no game at all, as the parties simply cannot agree.[87] Next, there is the possibility that the parties' bargaining ranges abut one another. In this scenario, of course, only one equilibrium is common to both parties. If that point can be identified in bargaining, contracting will occur; otherwise, it will not. Again, however, there is no game.[88]

It is only when the parties' bargaining ranges overlap that multiple equilibria and a resulting game of coordination emerges.[89] In numerical terms, one can imagine a party on one side who is willing to sell for any price greater than $4.00. The buyer, meanwhile, is willing to take the item for free or to pay anything up to $6.00. In this dynamic, any price between $4.00

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83. *See supra* Part I.

84. This multiple equilibrium dynamic in coordination games is often contrasted with the more familiar pattern of the Prisoner's Dilemma. While players' incentives favor defection in the Prisoner's Dilemma, no player can be expected to deviate from the equilibrium achieved in a coordination game. *See* Ahdieh, *supra* note 14, at 230.

85. If all contract terms are efficiently priced, *see* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1209–10 (2003), it bears noting that the implications of non-price negotiations are necessarily limited. Yet any number of constraints, including bounded rationality, *see id.* at 1222–25, and asymmetric information, may limit such contracting efficiency. Further, asymmetric valuations—including asymmetric risk preferences—may also create some enhanced utility from the negotiation of particular contract terms. *See* Korobkin, *supra* note 61, at 1813–14.

86. I borrow the terms of the negotiating process—"reservation point," "bargaining zone," "commitment point," and "deal point"—from Russell Korobkin. *See* Korobkin, *supra* note 61, at 1792, 1794.

87. *See* Mnookin & Kornhauser, *supra* note 18, at 975.

88. *But see* Schelling, *supra* note 30, at 292 n.6.

89. *See* Ahdieh, *supra* note 14, at 235.

and $6.00—any point within the parties' "bargaining zone"—should induce agreement.[90]

But on what price—at what "deal point"—will the parties actually agree? Along the undifferentiated scale from $4.00 to $6.00, anything is possible, including a failure to contract.[91] If some point of agreement is to be reached, however, bargaining power is generally expected to define it. In essence, one would predict a solution at, or at least relatively closer to, the preferred outcome of the party most capable of resisting concessions.[92] In the terms of the Rubenstein bargaining solution, for example, the party with greater capacity for patience—the party facing lower costs of delay—will likely secure a price closest to its preferred result.[93]

Yet why is $6.00 the deal point dictated by a dominant seller's bargaining power rather than $5.00? In essence, this price would appear to leave too much of the surplus with the relatively "powerless" buyer. Yet even if the seller's bargaining power drives the result to the outcome most favorable to the seller yet still within the contracting range of the buyer, the seller does not know whether the buyer's reservation point is $5.00 or $6.00. Recall the dynamic in bargaining, in which players actively compete to secure favorable terms while maintaining an orientation to the ultimate goal of coordination—of agreement.[94] Within this dynamic, each party will rationally seek to define a "commitment point"—a point beyond which it claims it will not concede further—at some remove from its reservation point. The greater the distance that its asserted commitment point stands from its true reservation point, the better.[95]

Each party thus seeks to define a commitment point as close to its preferred end of the contracting spectrum as possible. But how do they do so? If the buyer's real reservation point is $6.00, how might she credibly draw a line at $5.00, or lower? Given a coordination dynamic, the seller is fully aware of the buyer's shared preference to reach agreement. As a result, the seller can be expected to push against the buyer's asserted unwillingness to pay more than $5.00, and to demand $6.00, then $7.00, and so on. When does this pattern come to an end? Naturally, one bound is the buyer's reservation point—$6.00 in our example. But the buyer prefers to pay less. How—if at all—can she define a *lower* price from which she will not concede further?

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90. *See* Johnston, *supra* note 32, at 617; Korobkin, *supra* note 61, at 1792–94, 1817. Howard Raiffa effectively captures this dynamic in schematic terms. *See* RAIFFA, *supra* note 22, at 46.

91. *See* Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277, 328–30 (2003).

92. *See infra* note 177.

93. *See* AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 300–01 (1991); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 10–11 (2002).

94. *See supra* Part I.

95. *See* RAIFFA, *supra* note 22, at 44–65; *see also* Korobkin, *supra* note 61, at 1793, 1808.

At heart, this is an exercise in defining expectations.[96] In coordination games generally—with or without a dimension of bargaining—the operative goal is to coordinate player expectations. Success depends on each party's ability to make accurate predictions of what the other party will expect of it.[97] In the most basic, pure coordination game—in which interests are aligned—this is readily apparent. A husband separated from his wife in a department store, without the ability to communicate with her, must develop some expectation of where his spouse will expect him to go.[98] Absent such expectations, his choice of location becomes random and error-prone. What, then, might be the source of such expectations—and resulting coordination—in contract bargaining?

B. *The Focal Point of Boilerplate*

In its coordination functions, boilerplate may play an important role in shaping expectations. Specifically, boilerplate may serve a "focal point" function in contract bargaining. Assessing the question of how to solve coordination games, Thomas Schelling posited a role for "salience."[99] In multiple equilibria games—circumstances in which more than one stable solution is possible—Schelling argued that solutions could not be found within the strictures of a mathematical model.[100] Instead, he offered the notion of "focal points"—equilibrium solutions that distinguish themselves as unique in some way to parties pursuing coordination—as the key to resolution. In this conception, each party selects its strategy and resulting

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96. *See* Schelling, *supra* note 21, at 20; *see also* SCHELLING, *supra* note 1, at 70; Korobkin, *supra* note 61, at 1793, 1802; Mnookin & Kornhauser, *supra* note 18, at 973. Schelling writes:

> Each party's strategy is guided mainly by what he expects the other to accept or insist on; yet each knows that the other is guided by reciprocal thoughts. The final outcome must be a point from which neither expects the other to retreat; yet the main ingredient of this expectation is what one thinks the other expects the first to expect, and so on. Somehow, out of this fluid and indeterminate situation that seemingly provides no logical reason for anybody to expect anything except what he expects to be expected to expect, a decision is reached. These infinitely reflexive expectations must somehow converge on a single point, at which each expects the other not to expect to be expected to retreat.

SCHELLING, *supra* note 1, at 70.

97. *See* Schelling, *supra* note 21, at 19–20.

98. *See id.*

99. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1658 (2000); *see also* Judith Mehta, Chris Starmer & Robert Sugden, *The Nature of Salience: An Experimental Investigation of Pure Coordination Games*, 84 AM. ECON. REV. 658, 661 (1994) (referring to "Schelling salience" as psychological theory of coordination).

100. *See* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1264 n.83 (2004). The attempt to select a point of agreement among multiple equilibria, Schelling posited, is less "rational" than intuitive—even artistic. *See* Schelling, *supra* note 21, at 21, 22 ("Poets may do better than logicians at this game."); *see also* RAIFFA, *supra* note 22. It requires what might today be termed "fuzzy logic." Party A needs to determine what Party B will expect Party A to expect Party B to be willing to accept, and so on, for agreement at that point will offer Party A the greatest share of the contractual surplus.

coordination point—its meeting place in the department store—based on what point it expects the other party to find salient.[101]

Within this paradigm, if a particular point stands out, it will predictably emerge as the equilibrium solution absent communication. Each party will expect the other to select the prominent point as the likely solution and will therefore choose that point itself. The ultimate coordination point, thus, is simply the one that commands attention as the obvious place for agreement; the winner of the bargain, in turn, is the party whose preferred bargaining outcome sits closest to that point.[102] Assuming a commitment to coordination, the other party cannot withhold its acquiescence and demand greater compromise, for the proposed solution offered by the focal point is the only solution that can effectively align the parties' expectations.[103] Focal points thus determine the outcome of a coordination game by shaping individual expectations of the likely behavior of other individuals.[104]

Describing the role of focal points in facilitating coordination, Schelling began with cases of "tacit coordination"—interactions characterized by both an absence of communication ("tacit") and an alignment of player incentives ("coordination"). When player interests are aligned, lack of communication is the sole obstacle to efficient resolution of the game.[105] In such a dynamic, the role of focal points is readily apparent. For the husband and wife separated in the department store, the focal point of the "lost and found" desk—however irrational it might be—emerges as the appropriate meeting place.[106] By contrast with any other equally good or even preferable meeting place, it stands out and is consequently the best place for each spouse to go and therefore to meet.

While the legal literature has looked to focal points primarily in such cases of tacit coordination, Schelling's most significant insights come as he turns from pure coordination to a bargaining dynamic more apposite to the present analysis. In "tacit bargaining," communication is still lacking, but

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101. Schelling drew evidence of this pattern from a series of ad hoc empirical studies demonstrating that two parties attempting to coordinate without communication could typically intuit a focal point based on common understandings and norms. *See* McAdams, *supra* note 99, at 1660–61; *see also* Smith, *supra* note 42, at 1129 ("Salience is psychological prominence, and experimental studies show that people are good at coordinating by converging on prominent solutions.").

102. *See* SCHELLING, *supra* note 1, at 58–59.

103. *See id.*

104. *See* Ginsburg & McAdams, *supra* note 100, at 1265 ("An equilibrium is focal if it has some feature that draws unique attention to itself, making it stand out among all equilibria. . . . If for some psychological, historical, or cultural reason, the players are aware that one equilibrium draws special mental attention from all the players . . . . [t]he resulting expectations are self-fulfilling: Once a player believes the other players are headed for a particular equilibrium, the player's best response is to engage in the strategy associated with that equilibrium.").

105. *See, e.g.*, Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1898 n.230 (2001) (discussing role of focal points and tacit coordination among U.S. Supreme Court justices during oral argument, when they seek to form coalitions but their ability to communicate is limited); McAdams, *supra* note 99, at 1658–59.

106. *See* SCHELLING, *supra* note 1, at 54.

player interests diverge.[107] Because coordination remains the goal, however, focal points can continue to play a role. Schelling captures as much with his tale of separated parachutists who must find each other, who have identical maps of the terrain on which they have landed, but who cannot communicate.[108] In this dynamic, Schelling predicts that both will walk to the most prominent site demarcated on the map—on Schelling's map, a bridge—*even if that location stands significantly farther from one than the other*. The parachutists have distinct preferences for their meeting place based on how far they must travel. Yet both will travel to the bridge due to its focal power and consequent (perhaps exclusive) ability to facilitate coordination.[109]

Yet Schelling ultimately goes further, to suggest that focal points may be important in facilitating coordination even where communication is open.[110] In this conception, again going beyond most treatments of focal points among legal scholars, the key to the role of focal points is not the absence of communication; focal points are more than a substitute for communication in facilitating coordination. In "explicit bargaining," focal points may serve to redress the shortcomings of communication in the presence of conflict. Recall that when player interests favor coordination at some equilibrium but diverge as to the equilibrium preferred, communication may be an inadequate mechanism of coordination. Into this breach, various types of focal points—including boilerplate—may step in to play an essential role.[111]

C. *Boilerplate in Explicit Bargaining*

Before turning to the true focal point function I would propose for boilerplate in explicit bargaining, we might consider a related strategic pattern in contract bargaining. As with the strategic decision to throw one's steering wheel out the window in a game of "Chicken,"[112] boilerplate may play a

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107. *See* Schelling, *supra* note 21, at 22.

108. *See id.* at 20, 22.

109. *See* SCHELLING, *supra* note 1, at 54–55.

110. *See* Schelling, *supra* note 21, at 27; *see also* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 651 (1976) ("Schelling suggests that two parties who are unable to communicate can concert their actions. . . . He then argues that comparable considerations apply even in cases where the parties can communicate."). Thus, Schelling suggests that "[t]he 'coordination' of expectations [in explicit bargaining] is analogous to the 'coordination' of behavior when communication is cut off; and, in fact, they both involve nothing more nor less than intuitively perceived mutual expectations." *See* SCHELLING, *supra* note 1, at 68.

111. *See* SCHELLING, *supra* note 1, at 112 ("There is evidence that the influence of focal points is powerfully present even in explicit bargaining scenarios. In bargains that involve numerical magnitudes, for example, there seems to be a strong magnetism in mathematical simplicity. More impressive, perhaps, is the frequency with which long negotiations over complicated quantitative formulas converge ultimately on something as crudely simple as equal shares or shares proportionate to some common magnitude.").

112. *See* HERMAN KAHN, ON ESCALATION 11 (1965); Howard E. Abrams, *Economic Analysis and Unconstitutional Conditions: A Reply to Professor Epstein*, 27 SAN DIEGO L. REV. 359, 363 n.26 (1990); Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with*

"credible commitment" function.[113] A bargaining party might thus shape its counterpart's expectation of concessions through a preexisting pattern of boilerplate usage. Specifically, if a party consistently uses the same boilerplate, neither accepting nor proposing deviations from it—even when there might be some apparent gains from such deviation—negotiating outcomes approximating that standard term are relatively more likely. The consistent use of a term may therefore offer some bargaining advantage.[114]

The choice of debt contract terms is again instructive. While publicly issued debt is not characterized by explicit bargaining,[115] the provisions in negotiated private loan agreements track public indentures in significant part.[116] A debtor's consistent use of a dual trigger event risk covenant would likely buttress its capacity to insist on that form in future loan agreements.[117] To similar effect is the enumeration of triggers for anti-dilution remedies. Longstanding provision for adjustments in the standard categories of events—stock splits, stock dividends, non-cash dividends, and warrants—might allow a corporate issuer to resist pressure to provide adjustments for other corporate acts such as cash dividends or tender offers.[118]

Yet this calls attention to a critical caveat to this credible commitment conception of boilerplate in shaping expectations in bargaining. Specifically, the "boilerplate" at work is only so in a particular sense. The analysis herein is about contracting norms or standards within a particular industry or other context; I am interested in the value of adherence to such shared norms. The credible commitment function described above, however, arises with any contract term or form used consistently *by the drafting party*, without regard to its broader usage.[119] A debtor whose loan agreements consistently offer adjustment only for stock splits, stock dividends, and non-cash dividends—but not an equally standard adjustment

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Power Differentials in Negotiations, 5 HARV. NEGOT. L. REV. 1, 109 n.431 (2000); Schelling, *supra* note 30, at 294.

113. *See* Leonard J. Long, *An Uneasy Case for a Tort of Negligent Interference with Credit Contract*, 22 QUINNIPIAC L. REV. 235, 266 (2003).

114. *See* SCHELLING, supra note 1, at ch. 2; *see also* Gilo & Porat, *supra* note 12 at 1016–18. Separately, Schelling has identified the potential for the credibility of a commitment to be enhanced by the linkage of consistent usage to some relevant principle. *See* Schelling, *supra* note 30, at 291. A commitment to equality of treatment might be understood in this light. *See* Ben-Shahar & White, *supra* note 2, at 968–69.

115. One might imagine a construct in which underwriters represent a bargaining counterpart to corporate debt issuers. Even more attenuated would be a theory of rating agencies as engaged—even if only very distantly—in bargaining with issuers. In neither case, however, do we have the kind of explicit bargaining characteristic of competing parties. As to rating agencies, the relevant pattern is actually closer to a pattern of tacit bargaining.

116. The use of standardized terms in loan agreements is of particular relevance to the present analysis, moreover, given the lack of public trading of such debt and the resulting limits on network-effect explanations of standardization. *See supra* notes 7–10 and accompanying text.

117. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 960, 967.

118. *See* Kahan, *supra* note 5, at 153.

119. *Cf.* Korobkin, *supra* note 10, at 1586. This suggests the interesting question of the focal impact of a shift from one's own standard term to some more universally invoked boilerplate term. In such a circumstance, one might imagine loss of the focal power of both points.

for warrants—possesses similar credibility in its ability to hold that ground as the debtor whose consistent usage tracks the wider norm. This initial, credible commitment function of boilerplate in shaping bargaining expectations, then, turns not on the use of a standard form, but on the consistent use of any form.

As the foregoing analysis of credible commitments in contract negotiations suggests, aspects of the role of boilerplate in shaping expectations echo the signaling functions described above.[120] Like signaling of the existence (or absence) of private information or of information regarding group identity, the consistent use of particular terms conveys information regarding a relevant characteristic of a bargaining party. Thus, consistent use of standard, dual trigger covenants might be said to signal both a median level of risk *and* a relative inflexibility in bargaining. The implications of the information offered by boilerplate in its signaling and coordination functions, however, are distinct. The former speak to the merits of the parties' transaction, while the latter concern the nature of their bargaining.

It is important not to overdo this distinction. Often the same information will be in play in both signaling and coordination. Further, that information may be conveyed by the very same speech or conduct. In this sense, one could well bring both signaling and coordination under one common heading. I separate them, however, given the distinct ends to which the same information, conveyed in the same way, is being put. The information attendant to the coordination functions of boilerplate speaks to a party's expectations regarding the bargaining outcomes acceptable to its counterpart. In a sense, boilerplate's coordination functions go to process; they are about the bargaining itself. By contrast, boilerplate's signals do not speak to the expectations of a party in bargaining but to a party's character or private information or to the nature of the proposed transaction. These are relevant to the parties' bargaining, of course, but are more especially about the substance of that bargain. They do not directly speak to what the other side can *expect* in the negotiation process.

As noted above, a corporate debtor's proposed inclusion of a standard, dual trigger event risk covenant might offer certain affirmative signals. Among others, these would include evidence of the relatively conventional risk profile of the debtor, the absence of private information regarding the enterprise's vulnerability to takeover, and the plain vanilla character of the transaction. The same debtor's consistent—even invariable—use of dual trigger event risk covenants, however, might also influence a potential lender's expectations of the likelihood of securing a concession to use a pure rating decline covenant instead.[121] While there is some link between the signaling and coordination functions of boilerplate, then, the crucial feature of

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120. *See supra* Part II.A.

121. The use of a standardized anti-dilution formula to reduce conversion price—the standard remedy—rather than a simple notice requirement or an outright prohibition might also be seen to capture this distinction. While such standard usage offers signals regarding the issuer's fiscal stability, and likely financial needs, it also—if consistent—is likely to shape an investor's expectations in attempting to negotiate the terms of a new loan agreement.

the latter—and what makes it a distinct and particularly interesting element in our understanding of the use of boilerplate by sophisticated parties—is its orientation to player expectations.[122]

Putting aside the credible commitment function of consistent use of a given contract term, and acknowledging the distinction between the signaling and coordination functions of boilerplate, what of the true, focal point function of boilerplate in explicit bargaining? To appreciate this dynamic, we might begin by considering cases in which it might arise. Recall once again the choice of form in the design of event risk covenants.[123] At one bound, a potential debtor might prefer to exclude any such provision. At the other, the debtor might be amenable to go so far as to include a dual trigger covenant with a limited set of triggering events and a put-at-par remedy at 95%. The potential lender, meanwhile, might prefer a pure rating decline covenant, but be prepared to fall back as far as a dual trigger covenant with the standard list of triggering events.[124] Within the resulting bargaining zone between the parties' reservation points (that is, various forms of a dual trigger covenant), no particular solution stands out.

The same might be true in the design of anti-dilution protections for a sale of assets when both debtor and lender agree on the inclusion of some protection but diverge in their views of the appropriate mechanism and form.[125] In the face of a sale of all or substantially all assets of the debtor, standard anti-dilution terms provide for convertibility to the new form of equity offered to existing shareholders.[126] Further, they provide for release of the seller from its obligations and include a put provision for fundamental changes in control.[127] But the American Bar Foundation's *Commentaries* also identify potential alternatives, including merely requiring notice to holders of convertible securities, imposing an outright prohibition on certain corporate acts, or defining the potential triggering events, as well as remedies, in a range of ways.[128] One might imagine a debtor who prefers mere notice but is determined to go no further in offering anti-dilution protection than to offer the lower of a downward conversion or market price adjustment[129] or, in the alternative, the standard terms above. The potential lender, meanwhile, might be expected to favor prohibition but be amenable to the standard terms or to a market price adjustment triggered by a relatively comprehensive litany of triggers. Again, we find a gradation of potential deals that the parties might strike.

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122. On the distinct emphasis of signaling, see Ginsburg & McAdams, *supra* note 100.

123. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 960, 967.

124. *See id.* at 967.

125. *See* Bratton, *supra* note 2, at 684, 688 n.79; Kahan, *supra* note 5, at 159–60; *see also* Commentaries, *supra* note 49, at 527–28.

126. *See* Kahan, *supra* note 5, at 159–60.

127. *See id.* at 160–61.

128. *See* Commentaries, *supra* note 49, at 527–29.

129. *See* Kaplan, *supra* note 49, at 29 (noting distinct theories behind market price and conversion price formulas for anti-dilution clauses).

Most tangibly, we might recall the manifestation of this pattern with price, as outlined above.[130] Our buyer is prepared to pay up to $6.00, while the seller wants at least $4.00. In such a situation, both parties would settle for a price between $4.00 and $6.00. Outside that range, either buyer or seller will demur. At all points except the bounds of the range, however, each party is also prepared to accept a higher or lower price. Hence, our difficulty.

In each of these cases, we have a multiple equilibrium game with no facially apparent solution.[131] Both parties stand ready to contract at some range of points within a spectrum. At all points beside the very bounds of that bargaining zone, however, both parties are also prepared to agree to less favorable terms.[132] It is here that we find the need to coordinate expectations.[133] Each party must develop an expectation of how far its counterpart is willing to concede, yet still contract.[134] Where is the other party's line in the sand?[135]

As suggested at the outset, communication cannot offer an adequate solution to this dilemma.[136] Because players are engaged in *bargaining*—because they seek to coordinate but have divergent interests as to their preferred coordination point—communication is unlikely to include either party's true reservation point.[137] Communication reduces to cheap talk.[138] Each party will insist that its asserted commitment point constitutes its reservation point. The debtor will assert its opposition to any event risk

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130. *See supra* notes 90–95 and accompanying text.

131. This multiple equilibrium pattern might also arise in bargaining over other features of a debt contract's anti-dilution provisions, including the potential prohibition of certain events, a requirement of notice, and the provision of one form of adjustment or another. *See* Bratton, *supra* note 2, at 684, 688 n.79; *see also* COMMENTARIES, *supra* note 49, at 527–28. In a completely distinct contracting context, a multiple equilibrium dynamic might be found in the varied potential treatments of the right of assignment. From a prohibition on assignment, to its authorization with written consent, its plenary authorization with continued liability, or its authorization generally, negotiating parties face multiple potential bargaining outcomes.

132. *See* Schelling, *supra* note 21, at 29.

133. *See* Ahdieh, *supra* note 3, at 732–33 (discussing difficulties in developing accurate expectations among heterogeneous parties); Goodpaster, *supra* note 17, at 344; Schelling, *supra* note 21, at 20; *cf.* David B. Simpson, *The Drafting of Loan Agreements: A Borrower's Viewpoint*, 28 BUS. LAW. 1161, 1163 (1973) (suggesting coordinative power of boilerplate).

134. *See* Goodpaster, *supra* note 17, at 342–43, 344 ("Once the bargaining parties have assured their bottom lines or reservation values and have staked out their respective positions on the bargaining range, nothing inherently seems to impel settlement at any particular point between the positions, except each party's expectations regarding what the other side in fact will accept.").

135. In enumerating the relevant unknowns, one might most broadly think of a counterparty's value system. More specifically, a bargaining party is unsure of the other party's commitment to certain outcomes, its willingness to take certain risks to secure preferred outcomes, and its desire (and ability) to absorb certain costs to do so. Even absent conflicting interests, it should be relatively apparent, such information is likely to be difficult to communicate. Once we introduce the conflict of bargaining, this is even more obvious.

136. *See supra* Part I.

137. *See id.*

138. *See* Ahdieh, *supra* note 14, at 239.

covenant, while the lender will insist that only a pure rating decline covenant will do. Further, our debtor will offer mere notice of a potential dilution, at very best, while the lender will draw the line at an absolute bar. Our buyer, finally, will insist that it can afford no more than a dollar or two, while her counterpart seller will not part with her "mug" for less than $9.00.[139] In each case, a party's insistence on a particular deal point is readily countered by insistence on an alternative deal point and strongly worded—almost boilerplate—assurances that no further concessions will be made.

Within this dynamic, what is the strategic project of each party? Along a spectrum of potential points of agreement, how does one party maximize its share of the contractual surplus? As noted, each hopes to establish a commitment point as distant as possible from its true reservation point as the coordination point from which it will not concede further. Yet this is a task worthy of Sisyphus if any given point of agreement looks no different than any other potential point, including those immediately to either side of it on the parties' spectrum of equilibrium solutions.[140]

If some location—some *focal point*—along the spectrum of shared solutions stood out *or could be made to stand out*, however, that point would likely be important in defining the parties' expectations of what further concessions might be made.[141] In essence, if some particular point stands out from others, a party's insistence on that specific equilibrium solution neces-

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139. *Cf.* Korobkin, *supra* note 39, at 627–28 (describing experimental analysis of the endowment effect).

140. *See* Schelling, *supra* note 21, at 21–22; *see also* Schelling, *supra* note 30, at 281–82 ("There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one always *would* take less rather than reach no agreement at all, and since one always *can* recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, *any* outcome is a point from which at least one party would have been willing to retreat and the other knows it! There is no resting place.").

As suggested above, boilerplate's signaling functions are likely to be at their acme when relevant contracting choices have a relatively binary quality to them. By contrast, the coordination functions of boilerplate—particularly in explicit bargaining—are likely to be most significant when the parties face a range of potential equilibrium solutions. Most obviously, this is true because in a binary contracting universe, both points are focal. One solution is focal because it is boilerplate; the other is focal because it is not.

141. *See* Ginsburg & McAdams, *supra* note 100, at 1266 ("Experiments confirm that, in games of multiple equilibria, salient non-payoff features (focal points) significantly facilitate coordination."); *cf.* Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155, 175–76 (2004) (referring to "multiple paths toward capturing the gains from cooperation and no obvious way . . . to converge on one of them" (quoting Geoffrey Garrett & Barry Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, *in* IDEAS AND FOREIGN POLICY 173, 175 (Judith Goldstein & Robert O. Keohane eds., 1993))). Korobkin's treatment of the status quo bias can be understood in this spirit, as a theory of the role of the status quo—including boilerplate—in coordination. *See* Korobkin, *supra* note 39, at 612; *see also* David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. PA. L. REV. 975, 1010–17 (1998).

sarily enjoys greater credibility as a non-negotiable position. One can appreciate this with reference to boilerplate.[142]

Faced with a range of potential deal points over a given contract term, within a largely undifferentiated bargaining zone, one party might be able to define a credibly firm commitment point by proposing the use of a standard boilerplate term.[143] In essence, a party may be able to instill greater expectation of its unwillingness to deviate from a given term—to concede further—when it proposes a boilerplate term. The proposed use of boilerplate may thus have the effect of differentiating the relevant proposal from the proposed adoption of any other potential deal point within the parties' bargaining zone. Extending Schelling's focal point analysis to the use of boilerplate, the latter may represent a "kind of default" in negotiation.[144]

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142. Distinct from its coordination functions, the proposed use of boilerplate language may help to define the parameters for bargaining over a given term given the cognitive limitations of bargaining parties. *See* Kahan & Klausner, *supra* note 30, at 362–63; Korobkin, *supra* note 10, at 1608. A drafting party's proposed terms may thus define a point around which subsequent negotiations will be conducted, for the simple reason that everything in a contract cannot be negotiated from scratch. *Cf.* Hill & King, *supra* note 43 (suggesting potential for form language to be used as mechanism to insert favorable language into contract). This may be especially true in the complex negotiations of interest herein. In such negotiations, some narrowing in the scope of bargaining over any particular term may be essential, given the total number of terms under negotiation. *Cf.* Nellie Eunsoo Choi, *Contracts with Open or Missing Terms Under the Uniform Commercial Code and the Common Law: A Proposal for Unification*, 103 COLUM. L. REV. 50, 65 (2003) ("Wasting time by bickering over detailed language in a forty-page agreement that primarily addresses scenarios that may never occur . . . is especially annoying to an action-oriented businessman."). Yet there is nothing specific to boilerplate that causes it to serve this narrowing function. Any proposed term may have the effect of constraining the universe of potentially negotiated outcomes. *But see infra* notes 160–167 and accompanying text.

143. Goodpaster analogously refers to the offering of reasons, rationales, or justifications for a particular proposal. These, he suggests, make a position "more credible and, therefore, harder for the other party to assail or counter without providing equal or more persuasive reasons for his or her position." Goodpaster, *supra* note 17, at 345–46; *see also* note 114. It also bears noting, however, that credible insistence on the nature of some point as boilerplate may be effective in shaping expectations, even if it is not actually boilerplate.

144. *See* SCHELLING, supra note 1. Besides helping to influence the particular equilibrium ultimately emerging from bargaining parties' negotiations over any particular term, boilerplate may also be used to define which issues are subject to, and which issues are excluded from, negotiation. *See* Eggleston et al., *supra* note 17, at 113. By using standardized terms in certain parts of a contract but not others, a drafting party may be able to effectively de-emphasize the former. Selective use of boilerplate in a draft contract alongside tailored or even completely open-ended terms may thus define the bounds of the overall negotiation between the parties. In colloquial terms, it may help to define what is on the table. *Cf.* Kahan & Klausner, *supra* note 30, at 362–63 (suggesting utility of initial control of terms given anchoring biases); Korobkin, *supra* note 10, at 1608; Simpson, *supra* note 133, at 1162.

One can visualize this possibility with an eye to standard-form consumer contracts. A form leaving price, quantity, and the warranty term open can be expected to invite negotiation as to each of these terms. By contrast, a form with blanks only for price and quantity is at least relatively less likely to prompt negotiation over the warranty. Instead, the boilerplate standard will be left to define that term. *Compare* Austerlitz German Shepherd Dogs Puppy Guarantee and Contract, http://www.austerlitzshepherds.com/austerlitz/contract.html (form agreement for purchase of dogs, with only two blank terms) (last visited Nov. 15, 2005) *with* Janet Joers, Sample Puppy Contract, http://www.chowchowcentral.com/cccpupcontract.htm (last visited Nov. 15, 2005) (contract with additional blanks). Even if this were not always true—and one would not expect it to be so—it suggests some strategic benefit to the selective use of boilerplate in seeking to influence the scope of any given contract negotiation.

The use of boilerplate for strategic advantage is readily apparent within this conception. In essence, the proposed use of boilerplate creates a basis for a party to insist on its position; it allows that party to hold its ground.[145] Unlike other bargaining positions, as to which the marginal demand for concessions might be expected to bear fruit, boilerplate may serve as a focal point from which a counterparty ultimately seeking agreement may be less likely to expect further movement.[146]

Naturally, such an approach assumes the boilerplate term to be relatively favorable to the relevant party. Given such circumstances, however, the boilerplate may—as a strategic matter—represent the best offer and best outcome likely to be secured. If, by contrast, the boilerplate is unfavorable to a party—or, more specifically, is worse than the deal they can expect to otherwise secure—boilerplate ceases to be of coordinative utility. The boilerplate need not constitute a party's optimal preference; it simply needs to be sufficiently attractive (among the universe of possibilities) that its efficacy as a bargaining position renders it optimal. Considering our event risk covenant example, a debtor's proposed adoption of a standard-form dual trigger covenant constitutes a more difficult bargaining position to displace, even if less favorable to the debtor than a hostile control change covenant. In essence, boilerplate allows the debtor to avoid even worse outcomes.

Boilerplate may thus offer an "indirect means" for advancing one's negotiating position. More concretely, the proposed use of boilerplate may allow a party "to convince the other side that [its] maximum expectation is really [its] minimum breaking-off point."[147]

This coordination function of boilerplate may be especially important when tied to a party's concession on a given term.[148] Behind every negotiated concession is the (rational) fear that it opens the door to a cascade of further demands for concessions: "If you're willing to give that much, why not this much more?" In this situation, the proposed use of boilerplate may be especially useful. It may help to shape expectations that the given con-

145. *See* SCHELLING, *supra* note 1, at 70; *cf.* Goodpaster, *supra* note 17, at 342–43 ("[T]he competitive negotiator wants to persuade the other side about the firmness of [its] own *asserted* bottom line."). Of course, the assertion of the boilerplate or otherwise standard term as one's reservation point is itself cheap talk, at some level. It simply appears less cheap than any other potential negotiating position.

146. *See* SCHELLING, *supra* note 1, at 70–71 ("Most bargaining situations ultimately involve some range of possible outcomes within which each party would rather make a concession than fail to reach agreement at all. In such a situation, any potential outcome is one from which at least one of the parties, and probably both, would have been willing to retreat for the sake of agreement, and very often the other party knows it. Any potential outcome is therefore one that either party could have improved by insisting; yet he may have no basis for insisting, since the other knows or suspects that he would rather concede than do without agreement. Each party's strategy is guided mainly by what he expects the other to accept or insist on; yet each knows that the other is guided by reciprocal thoughts. The final outcome must be a point from which neither expects the other to retreat.").

147. *See* EDWARD PETERS, STRATEGY AND TACTICS IN LABOR NEGOTIATIONS 112 (1955).

148. *See* Schelling, *supra* note 21, at 30.

cession is not susceptible to further backsliding.[149] As a defensive tool, then, boilerplate may serve to cabin negotiated concessions.[150]

By way of example, when debtor and lender are negotiating the enumerated triggers in a dual trigger covenant, the debtor can be expected to favor a short list and the lender a long one. In ultimately giving way—perhaps in exchange for some other concession—a debtor does well to fall back on the standard list of triggering events.[151] A ready answer is then available to the proposed addition of a major asset acquisition trigger, which is not ordinarily included. If the proposed concession includes a non-standard provision for relief from an asset acquisition by the debtor, by contrast, the lender's subsequent proposal of yet further non-standard triggers becomes significantly more difficult to resist.[152]

Yet boilerplate may also be important offensively.[153] When the seemingly ascendant party to a negotiation proposes the use of boilerplate, it acts to create an expectation that further concessions will not be demanded if its proposed terms are accepted.

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149. In this vein, Ben-Shahar and White observe a dramatic deviation between auto manufacturers' contracts with information technology suppliers and the standard contract the manufacturers use with all other suppliers. Notably, the former are more generous not only on intellectual property issues but also more generally. *See* Ben-Shahar & White, *supra* note 2, at 978–79. This can readily be understood within the coordination dynamic I describe. Once the manufacturers deviate from the "hard and fast" form on intellectual property questions, holding their ground becomes more difficult as a general matter.

150. "The same point is illustrated when one tries to give up cigarettes or liquor. 'Just one little drink,' is a notoriously unstable compromise offer; and more people give up cigarettes altogether than manage to reach a stable compromise at a small daily quota. Once the virgin principle is gone, there is no confidence in any resting point, and the expectation is relapse. The very recognition of this keeps attention focused on the point of complete abstinence." SCHELLING, *supra* note 1, at 112.

151. If a debtor is agreeing to triggers, thus, it ought to agree to the boilerplate enumeration of (1) the acquisition of a specified percentage of the debtor's stock, (2) replacement of a majority of the board of directors by a proxy challenge, (3) sale of substantially all the debtor's assets, (4) a merger or consolidation, or (5) the payment of dividends or repurchase of shares over a specified percentage within a defined period. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 955.

152. *See id.* at 961. The same might be said of the enumeration of events triggering antidilution measures. By falling back on a list providing relief in the face of stock splits, stock dividends, and non-cash dividends, but not the equally standard case of warrants, a lender faces the heightened prospect of arriving at an even shorter list. *See* Kahan, *supra* note 5, at 153.

153. Schelling captures this potential in his identification of rivers as focal points in military conflict. *See* Schelling, *supra* note 21, at 26; *see also* SCHELLING, *supra* note 1, at 71 ("If some troops have retreated to the river in our map, they will expect to be expected to make a stand. This is the one spot to which they can retreat without necessarily being expected to retreat further, while, if they yield any further, there is no place left where they can be expected to make a determined stand. Similarly, the advancing party can expect to force the other to retreat to the river without having his advance interpreted as an insatiable demand for unlimited retreat. There is stability at the river—and perhaps nowhere else.").

D. *Boilerplate in Tacit Bargaining*

A more stylized version of the foregoing pattern may also play out in contracting circumstances akin to Schelling's "tacit bargaining."[154] In these circumstances, communication is absent, and there is consequently no negotiation in the ordinary sense. On the other hand, divergent interests mean that bargaining persists. Recall Schelling's example, in which separated parachutists need to locate one another but stand at different distances from various points on their common map. Because the distance between each point and each parachutist is likely to be shorter for one parachutist and longer for the other, their preferred meeting places will necessarily diverge. Yet because they must meet, each will travel the greater or lesser distance necessary for them to do so.[155]

A tacit bargaining of sorts might be said to arise in take-it-or-leave-it contracting dynamics. Most obviously, this would include standard-form consumer contracts in which no mechanism of communication is available. Even if communication could occur, moreover, the non-negotiable terms of the proposed contract put the offeree in essentially the same position. But similar patterns of tacit bargaining can also be found beyond adhesion contracts. Among sophisticated parties, for example, the case of publicly issued debt is suggestive. With such debt, the relevant bond indenture is drafted by the issuer, who then presents its terms—as part and parcel of the issuance—to potential creditors. The latter then choose to accept the terms (that is, purchase the bond) or reject to them. Communication is unavailable and counterproposals cannot be offered.[156]

In analyzing coordination dynamics, Schelling posited that a party whose interests lay closer to the likely focal point for decision might favor non-communication.[157] In the absence of communication, such a party can predictably assume the available focal point will emerge as the equilibrium solution. Given as much, the closer party might even attempt to interrupt communication.[158] By doing so, the party secures a relatively preferred solution. As only a focal solution can effectively coordinate the players' expectations absent communication, non-communication might be better for the closer party.

One might conceive of the public issuance of debt and analogous examples of seriatim bargaining of a sort as having a similar quality. In this dynamic, the issuer or other drafting party can exercise discretion to define

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154. *See* Schelling, *supra* note 21, at 22.

155. *See id.* at 22–23.

156. Auto manufacturers' standard-form contracts with their suppliers, which are not subject to bargaining, are another example. *See* Ben-Shahar & White, *supra* note 2.

157. *See* Schelling, *supra* note 21, at 23.

158. *See* SCHELLING, *supra* note 1, at 146 ("When the outcome depends on coordination, the timely destruction of communication may be a winning tactic. When a man and his wife are arguing by telephone over where to meet for dinner, the argument is won by the wife if she simply announces where she is going and hangs up. And the status quo is often preserved by a person who evades discussion of alternatives, even to the extent of simply turning off his hearing aid.").

its terms, naturally favoring those it prefers. As no rejoinder can be offered, the resulting terms are necessarily focal. If any solution is to be reached, it must be on the drafter's terms. Of course, creditors may elect to "leave it," rather than "take it." If they decide to take it, however, they take it as is.

Yet this proves too much. Any term elected by the drafter—and not boilerplate alone—would have such a focal effect.[159] With non-boilerplate terms, however, the propensity to "leave it" may be significantly greater. Boilerplate terms might therefore have significantly greater focal power.[160]

Non-drafting parties faced with non-negotiable *boilerplate* terms may be more prone to accept such terms as fair, reasonable, or otherwise legitimate.[161] As recently explored by Bob Scott, experimental analysis of Ultimatum Game patterns of play supports this possibility.[162] In this dynamic, one player proposes an allocation of a certain monetary sum, which the other player can either accept or reject, the latter resulting in no payoff to either party. The receiving party should rationally accept any offer that is put forward. In reality, however, players consistently reject offers below a certain proportion. Thus, there would appear to be some assessment of fairness in the receiving party's evaluation of offers, which impacts its ultimate willingness to accept proposed terms.[163]

One might predict such a dynamic in the use of boilerplate terms in bond indentures and other contracts not subject to negotiation.[164] The use of standard dual trigger event risk covenants in a bond indenture, as opposed to manager-friendly hostile control change covenants or creditor-friendly pure rating decline covenants,[165] offers a potential example. Given the nature of public issuance and the resulting lack of communication, the choice among

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159. *See* Korobkin, *supra* note 10, at 1586.

160. *See* Korobkin, *supra* note 61, at 1819 ("Given that a wide bargaining zone provides for a range of possible deal points and that fairness in surplus allocation is a dominant norm, adherence to the fairness norm could theoretically substitute for bargaining . . ."); *see also id.* at 1825–29.

161. *See id.* at 1817–19; *see also* note 114.

162. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003). To related effect, Eggleston, Posner, and Zeckhauser have identified the tendency of what they term "fairness conventions" to favor contract simplicity. *See* Eggleston et al., *supra* note 17, at 114–15. "[If the parties] have a sense of what is a fair division of the surplus, this sense of fairness may provide a focal point around which they bargain, enabling them to reach agreement quickly." *Id.*

163. *See* Ben-Shahar & White, *supra* note 2, at 968–69. Analogously, Claire Hill has suggested that attorneys' deviations from familiar forms may induce strong resistance from counterparties. *See* Hill, *supra* note 2, at 69, 68 n.19.

164. Boilerplate, along with other standard terms, may thus address the need identified by Korobkin to reach consensus on the measurement of fair results. *See* Korobkin, *supra* note 61, at 1820, 1827–28.

165. *See* Kahan & Klausner, *Antitakeover Provisions in Bonds*, *supra* note 2, at 952, 955. Other potential occasions for this pattern of boilerplate usage might also be identified, including use of the older conversion price standard rather than the newer market price standard in anti-dilution provisions. *See* Bratton, *supra* note 2, at 687 n.76. More closely approximating the Ultimatum Game pattern, a sovereign debt issuer might utilize the standard 66.7% requirement for alterations to the *pari passu* clause, rather than a more favorable 50% standard, on the premise that the standard figure might be seen as fairer, notwithstanding the lack of negotiation.

potential event risk covenants is the issuer's alone. Yet a bargaining dynamic remains because of the demands of the marketplace. In the face of this dynamic, use of the standard provision may be important. Potential creditors, deprived of the opportunity to negotiate, might plausibly be expected—in line with the observed expectation of fairness among contracting parties—to find a standard dual trigger covenant significantly more palatable a focal point for agreement.

When a proposed contract term is standard, then, a non-drafting party may consider the absence of negotiation less problematic. This may even be true in the presence of significant bargaining power. Potential creditors of a relatively high-risk corporate debtor may be amenable to boilerplate terms in a public issuance even when they could have readily secured more favorable terms—a pure rating decline covenant, for example—in a private loan agreement. Such boilerplate terms might be considered fair even if less advantageous than potential alternatives.[166] Parties with more limited bargaining power, then, might well be expected to prefer a pattern of tacit bargaining, in the face of relatively favorable boilerplate. This approach may allow them to achieve otherwise unattainable bargaining outcomes. Through the strategic use of boilerplate, they may literally achieve more than they could have bargained for.[167]

IV. The Implications of Strategic Boilerplate

In both its signaling and coordination functions, boilerplate may serve an important strategic role in bargaining. In the right hands and the right circumstances, boilerplate constitutes a weapon of choice in contract negotiation. At least in part, this may help to explain—and to encourage—the use of boilerplate by sophisticated parties. Further, it has potential implications for the evolution of boilerplate and the nature of contract bargaining, among other things. To conclude, some of the more notable implications of strategic boilerplate are suggested below.

A. *Boilerplate and Change*

As discussed in the legal literature, boilerplate would seem to possess a somewhat static and passive quality.[168] It simply *is*. Within a strategic conception, by contrast, boilerplate is *created*, *shaped*, and *used*. If boilerplate has signaling and coordination effects, significant bargaining advantage may

166. This dynamic is likely to be familiar to any lawyer who has sat down for a closing on a new home. While numerous terms contained in the note may appear onerous or overreaching, these are nonetheless likely to be deemed acceptable if they are standard terms. Some presumption of fairness, in essence, is ascribed to such terms. By contrast, tailored terms are likely to be subject to much sharper scrutiny. *See* Korobkin, *supra* note 10, at 1605–09 (observing resistance to alteration of terms in form agreements, even to conform with relevant default rule).

167. *Cf.* Korobkin, *supra* note 85, at 1205–06.

168. *See, e.g.*, John E. Murray, *The Definitive "Battle of the Forms": Chaos Revisited*, 20 J.L. & Com. 1, 11 (2000).

follow from its substantive placement. Self-interested parties would therefore do well to define or redefine contracting norms to fall at Kaldor-Hicks optimal points within potential contracting spectra.[169]

While relevant to contracting parties generally, the opportunity to exercise such influence is likely to be especially available to sophisticated parties. As repeat players, sophisticated parties have both increased opportunity to progressively shift the prevailing norm to a preferred point and strong incentives to do so. By allocating resources to introducing, shifting, and refining boilerplate, they may secure a heightened share of the contractual surplus across multiple contracts.

Sophisticated parties might be expected to encourage such shifts in a variety of ways. Most obvious is their consistent use of particular terms. Across a succession of contracts, repeat players may significantly influence an industry norm. This impact might be built upon by the use of preferred boilerplate in progressively expanding categories of contracts. In this way, repeat players may encourage the migration of preferred contracting norms across distinct contracting subjects.[170]

Most systematically, sophisticated parties might use various forms of organized drafting to encourage shifts in boilerplate to favor their interests. Model covenant and similar model term drafting committees—often of one or another bar association—may be the most common venue for such group exercises in contract design.[171] Industry specific form agreements or model terms, often a product of industry associations, are another.[172] In either forum, even dominant contracting parties may do well to invest in efforts to influence the contracting norms that emerge.

The possibility of boilerplate evolution through organized drafting helps to highlight a final point of interest. While the emphasis herein is on the strategic use—and hence design—of boilerplate by bargaining parties, third parties may also have an important role in the strategic dynamic of bargaining outlined above. This is most readily apparent with reference to the coordination functions of boilerplate, in which the focal effect of the prevailing norm is independent of the source of that norm. Thus, a third party's influence on the norm can play an important role in bargaining outcomes. To this effect, Schelling spoke of the power of mediators to influence outcomes notwithstanding their lack of formal authority to dictate any decision.[173] In the case of boilerplate, one might conceive broadly representative bar associations as operating—at least on occasion—in this fashion.

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169. *See* Ben-Shahar & Pottow, *supra* note 15, at 23–24.

170. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

171. *See* Ben-Shahar & Pottow, *supra* note 15, at 23–24; Kahan & Klausner, *Standardization and Innovation*, *supra* note 2, at 761–64. The American Bar Association's *Commentaries*, *supra* note 49, are a prime example of this pattern. *See* Klausner, *supra* note 7, at 816–18.

172. *See* Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1078–81 (2006).

173. *See* Schelling, *supra* note 21, at 26, 28; *see also* Ginsburg & McAdams, *supra* note 100.

Yet relevant third parties might also include individuals or institutions with incentives to favor particular outcomes, even if not parties to relevant transactions.[174] Consumer groups might be one example. One might even conceive the American Bar Foundation's preparation of the arguably lender-friendly provisions of the *Commentaries* in this light.[175]

A strategic theory of boilerplate suggests a more dynamic pattern of boilerplate development. Boilerplate can be expected to change over time. Such change is not necessarily a product of passive evolution, moreover, but may also be driven by affirmative investment of the time and resources necessary to effectuate it. If boilerplate serves significant signaling and coordination functions, sophisticated players likely to engage in recurrent contracting do well to seek influence in shaping prevailing contracting norms.[176]

B. *Rethinking Bargaining Skill*

Following directly from the analysis in Section A is a potential need to rethink the nature of bargaining power. In essence, both the signaling and coordination functions of boilerplate suggest that bargaining skill (and bargaining power) in negotiations may not be exclusively about a party's ability or capacity *within* the negotiation, as we conventionally think of it.[177] Rather, a significant aspect of bargaining skill and power may be the capacity to lay the groundwork for negotiation. At least some part of a party's bargaining power may turn on the pre-negotiation definition of relevant boilerplate—including in the ways outlined above. In Schelling's terms, an essential skill (and fruitful task) may therefore be "to set the stage in such a way as to give

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174. *See* Davis, *supra* note 172, at 1088.

175. *See* Simpson, *supra* note 133, at 1163; *see also id.* at 1166 (offering example). While Simpson suggests negotiating against the lender-friendly terms contained in the *Commentaries*, this is rendered more difficult by the very fact of those terms' inclusion in the *Commentaries*. *See id.* at 1167.

176. As the implications of a strategic theory of boilerplate for boilerplate evolution suggest, such a theory speaks broadly to the important trends toward standardization in the world today. Across an array of technological, financial, and other sectors of the world economy, greater attention to the strategic dynamic of standardization is in order.

177. *See* Russell Korobkin, *Bargaining Power as Threat of Impasse*, 87 MARQ. L. REV. 867, 867 (2004) ("[R]elative bargaining power stems entirely from the negotiator's ability to, explicitly or implicitly, make a single threat credibly: '*I will walk away from the negotiating table without agreeing to a deal if you do not give me what I demand.*' The source of the ability to make such a threat, and therefore the source of bargaining power, is the ability to project that he has a desirable alternative to reaching an agreement, often referred to as a 'BATNA.' "); *cf.* Bratton, *supra* note 2, at 688 (referring to traditional bargaining power rationale for adoption of particular term); Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCIENTIST 149, 149 (1983) (noting confluence of negotiating power and military power in international relations: "At the international level, negotiating power is typically equated with military power.").

The foregoing analysis thus resonates with Daniel Barnhizer's suggestion to expand our assessment of bargaining power beyond "ad hoc generalizations drawn from the class struggles of the last 150 years." *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 142 (2005). These include a party's "alternatives," "opportunity to negotiate," and "traditional status-based classifications." *See id.* at 143; *see also* Adler & Silverstein, *supra* note 112, at 20 (noting need to go beyond parties' BATNAs to consider "what each party can do *for* and *to* the other," and their related dependence on one another).

prominence to some particular outcome that would be favorable."[178] With the use of boilerplate and similar focal points, thus, the "focus for agreement [may] not just reflect the balance of bargaining powers" but also may affirmatively "provide[] bargaining power to one side or the other."[179]

In the case of signaling, to begin, the ability of a party to shape contracting choices in binary terms may help to enhance the signaling effect of particular contracting proposals.[180] More interestingly, a repeat player might find utility in defining the prevailing contracting norm downwards, even independent of the party's substantive contracting preferences.[181] Beyond the substantive benefits, a lower bar may enhance the signal arising from any favorable deviation that the relevant party can consistently make.

As to the coordination functions of boilerplate, the same principles apply. Here, one would expect efforts by sophisticated parties to define the prevailing norm in terms proximate to their preferred choices. By doing so, they enhance the prospect of securing such favorable terms. Most interestingly, this is true independent of the conventional bargaining power of the party. Thus, in David's bargaining with Goliath, David might be expected to secure potentially significant advantage by having helped to define a contracting norm closer to his preferences. Echoing the above discussion of changes in boilerplate, moreover, it is notable that David may have greater capacity to influence the contracting norm than the outcome of his head-to-head negotiations with Goliath. Thus, intermediately sized market participants with the foresight to plan ahead and the resources necessary to participate in organized drafting projects may be particularly advantaged by participation in such efforts.

Even relatively "weak" bargaining parties can gain advantage along the aforementioned lines, even if they cannot establish preferred terms as the prevailing standard. Assuming boilerplate favorable to its potential counterparties, a relatively weak party's task need not be to establish new boilerplate but simply to undermine the focal power of existing boilerplate.[182] A party does so, in essence, through the creation of competing boilerplate and consequent destruction of the salience of the prevailing norm. There is no need to *replace* existing boilerplate; rather, a bargaining party need simply *displace* it as the dominant norm.[183]

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178. *See* Schelling, *supra* note 21, at 29. To analogous effect is Marc Galanter's analysis of how repeat players control the nature of the law by controlling what cases are appealed. *See* Galanter, *supra* note 170. Russell Korobkin's identification of "zone definition" as a significant element of negotiation might also be noted. *See* Korobkin, *supra* note 61, at 1792–94.

179. SCHELLING, *supra* note 1, at 68.

180. *See supra* note 50 and accompanying text.

181. *See supra* note 64 and accompanying text.

182. *See* Schelling, *supra* note 21, at 29 n.8.

183. In this vein, some analogy might be made to Klausner's suggestion of the power of menus of corporate charter terms, in undermining network effects in corporate law. *See* Klausner, *supra* note 7, at 839–41.

A final element of bargaining skill to be added to our conventional account arises particularly from the coordination functions of boilerplate. Specifically, the capacity to bind oneself—or "self-commitment," as Schelling terms it[184]—may be a significant factor in a party's bargaining success.[185] As described above, if a party can credibly assert its commitment to a particular contract term across varied circumstances—even those in which its own incentives vary—it may be able to more effectively insist on that term in any given case.[186] Its hands, or so the story goes, are tied. This is true, moreover, regardless of the breadth of usage of the relevant term among other parties.

C. *The Tyranny of Big Concessions*

Boilerplate's role in coordination may also place constraints on the willingness of bargaining parties to offer limited concessions. Recall that the proposed use of boilerplate is beneficial on account of the focal character of the proposed equilibrium behind the proposal. Given as much, even small deviations from boilerplate are dangerous. Once a small concession from boilerplate is made, the ability of a party to hold to its new position is significantly undermined.[187] If the party's commitment is not to the exact terms of the boilerplate, then concessions beyond the first become more difficult to resist. Expectations of further concessions can therefore be expected to rise.[188]

Small concessions may consequently give up the game. Abandoning the focal point may open a party up to potential collapse of its bargaining position.[189] In Schelling's terms, given the "dependence of a 'focal point' solution on some characteristic that distinguishes it qualitatively from the surrounding alternatives . . . . small concessions [may be] less likely than large ones."[190]

In certain circumstances, then, large concessions may be more readily made than smaller ones. Shifts to an alternative point with its own focal power are not subject to the same pressure toward further concessions. Rather, such points—for example, some alternative standard applicable to the same issue—enjoy credibility similar to the original bargaining position. Such positions with distinct focal power, however, are generally likely to fall

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184. *See* Schelling, *supra* note 30, at 286.

185. *See id.* at 282. In Schelling's terms, the "power to constrain an adversary may depend on the power to bind oneself." SCHELLING, *supra* note 1, at 22.

186. In recording contracts, for example, studios have long required a contract term in which the recorded product is denoted a "work-for-hire" to avoid the strictures of the 1976 Copyright Act. *See* Phillip W. Hall Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 210–16 (2002). Even musicians with significant bargaining power may have at least some part of that advantage undermined by the studios' consistent characterization of all sound recordings as works-for-hire.

187. *See supra* notes 143–147 and accompanying text.

188. *See id.*

189. *See* Schelling, *supra* note 21, at 30.

190. *See* SCHELLING, *supra* note 1, at 111.

at some remove from the party's original position. For this reason, one might reasonably predict a peculiar dynamic in which large concessions are more readily made than smaller ones.[191]

D. *Bargaining and Adhesion in a Strategic World*

The literature of adhesion contracts—standard-form consumer contracts—is voluminous.[192] Much of the discussion of boilerplate among legal scholars, in fact, arises in the context of that literature. The above analysis of boilerplate, however, suggests a complex power dynamic at work in its use, even outside the adhesion contract context.[193] More importantly, and by contrast with prevailing transaction-cost and network-effect theories of the use of boilerplate outside of consumer contracts, it suggests an aggressively strategic use of boilerplate even among similarly situated parties.

Following naturally from this, it might be said that boilerplate generally—whatever power dynamic is evident on the face of the relevant parties' interaction—may raise adhesion-style issues. Some of the very concerns about power, and even coercion, that are commonly raised with reference to adhesion contracts may also deserve attention outside that context.[194] If boilerplate terms enjoy significant focal power, it is useful to appreciate their implications for contracting power generally.

This should not be overstated. I do not mean to suggest that the use of boilerplate generally—even among differently situated parties—is involuntary. To the contrary, both among sophisticated parties and even between producers and consumers, most boilerplate is likely voluntary in some reasonable sense. My more limited point is that our sensitivity to involuntariness in consumer contracts may have some relevance in peer-to-peer contracting as well. In essence, we do well to be cognizant of such issues in cases in which the focal power of a prevailing term is sufficient to constitute the type of market power we conventionally expect to find in standard-form consumer contracts.

E. *The Missing Focal Points in Law*

Given the nature of bargaining as a coordination game, it is hardly surprising to find extensive references to focal points in legal scholarship. With limited exceptions, however, these references overlook the most important implications of Schelling's focal point analysis. Echoing legal scholars' inattention to the divergence between Ronald Coase's actual arguments and the

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191. Kyle Logue suggests as a potential example of this pattern the tendency of commercial insurers to have alternative standard forms, the first of which represents its opening position and the second its fallback.

192. *See, e.g.*, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429 (2002); Korobkin, *supra* note 85.

193. To analogous effect, see Ben-Shahar & Pottow, *supra* note 15, at 23–24 (noting potential antitrust concerns in design of default terms).

194. *See* Gilo & Porat, *supra* note 12.

inaptly characterized Coase Theorem,[195] focal points are omnipresent in legal scholarship but in ways that arguably miss their most significant functions.

To begin, legal scholars tend to acknowledge a role for focal points primarily when there is no conflict between the parties (that is, pure coordination).[196] Yet conflict was exactly what Schelling's focal point analysis was intended to address.[197] While focal points may be the key to a resolution when conflict is absent but communication is impossible, Schelling's essential project was to highlight the utility of focal points in solving mixed-motive games.[198]

Even beyond this observation, talk of focal points in the legal literature almost exclusively speaks to circumstances in which communication is lacking. Obviously, this is unsurprising, given the discussion above. Yet even where conflict is introduced, *tacit* bargaining tends to be the emphasis. The most interesting functions of focal points, however, arise in the presence of communication—in explicit bargaining.[199] For it is here that our instincts tend to mislead us, suggesting erroneously that communication should suffice to remedy coordination failures.

Finally, and perhaps as a result of the foregoing, focal points in the legal scholarship tend to have a relatively passive quality to them.[200] They *exist* rather than are *created*; even when they are created, they are not a product of unilateral action undertaken for strategic purposes. A more active and aggressive dynamic of focal points, however, follows directly from their role in the presence of both conflict and communication. Further, it is arguably such a strategic dynamic of focal points that has greatest implications for, and application to, legal analysis.

The foregoing analysis of boilerplate's coordination functions thus invites a broader awareness of, and attention to, focal points among legal scholars. Across an array of subjects, Schelling's focal point analysis may offer valuable insight. In particular, when coordination is required, focal strategies—in the hands of both public regulators and private competitors—may offer important devices for the shaping of player incentives.[201]

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195. *See* Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989); *see also* Westbrook, *supra* note 27, at 105 n.277.

196. *See, e.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers *Trilogy to* Gilmer, 44 HASTINGS L.J. 1187, 1232 (1993) ("This problem instantiates a broader problem, described by the economist Thomas Schelling as that of achieving tacit coordination between parties with identical interests when communication is impossible.").

197. *See* Schelling, *supra* note 21, at 19.

198. *See id.* at 23.

199. *See* SCHELLING, *supra* note 1, at 68; *see also* Eisenberg, *supra* note 110, at 651. Schelling has suggested that "[t]he 'coordination' of expectations [in explicit bargaining] is analogous to the 'coordination' of behavior when communication is cut off; and, in fact, they both involve nothing more nor less than intuitively perceived mutual expectations." SCHELLING, *supra* note 1, at 71.

200. *See, e.g.*, Ginsburg & McAdams, *supra* note 100; Whytock, *supra* note 141.

201. *See, e.g.*, Ahdieh, *supra* note 14.

Conclusion

For all the talk of boilerplate among legal scholars, further attention to its widespread use is in order. Particularly among sophisticated parties, persistent adherence to contracting norms, as opposed to the tailoring of Pareto—or even Kaldor-Hicks—optimal terms remains inadequately theorized. I offer a strategic theory of boilerplate in such circumstances. Through its signaling and coordination functions, the proposed use of boilerplate—and occasionally deviation from it—may enable a bargaining party to advance its interests.

Broadly, boilerplate may serve important communicative functions, otherwise constrained by the intertwined dynamic of coordination and conflict at work in contract bargaining. On occasion, this may serve to enhance joint contractual surplus through the dissemination of information that advances the collective interests of parties. At least as commonly, however, the proposed use of boilerplate may serve to maximize a particular party's share of the contractual surplus by encouraging agreement at a coordination equilibrium more favorable to its desired outcome.

Appreciation of such a strategic role for boilerplate holds various implications. It requires us to rethink the nature of bargaining skill and power and counsels some alteration in our expectations about patterns of contract bargaining. In the right circumstances, large concessions may be easier to offer than small concessions. Further, if boilerplate enjoys significant focal power, concerns of involuntariness may have at least some application to contracting outside the standard-form consumer contract.

It bears noting, moreover, that the strategic role of boilerplate may arise even beyond the sophisticated parties of interest herein. Thus, boilerplate's strategic functions shape contracting generally. In any given case, boilerplate may be more or less prone to play a signaling or coordination function. Those functions, however, are not inherently limited to the interaction of sophisticated parties.

Perhaps most importantly, the foregoing analysis offers a treatment of focal points as instrumental and even aggressive tools of engagement among contracting parties. In this, it deviates from the widespread discussion of focal points in a passive light. Given the affirmative power of focal points in the hands of both regulators and private parties, however, greater attention to their role and use is in order. Such attention may be particularly deserved with regard to the role of focal points in the growing patterns of standardization driving the global economy today. At a minimum, the foregoing analysis counsels greater awareness among contracting parties of the power of boilerplate as a bargaining tool. By influencing the shape of boilerplate and engaging in its selective use, parties to contract negotiations may secure significant advantage.