

COMMENTARY

**BOILERPLATE TODAY: THE RISE
OF MODULARITY AND THE
WANING OF CONSENT[†]**

Margaret Jane Radin^{*}

Thanks to the vision of Omri Ben-Shahar and the excellence of the scholars contributing to this symposium, students of the law of commercial exchange transactions will now understand how important and interesting, and indeed exciting, boilerplate really is. The various presentations are so rich that my assigned task of commentary cannot approach an adequate summation. Instead of attempting such a task, therefore, I will take up a slightly different one. My commentary will relate some of the ideas presented in the symposium to two themes that I think are significant for the groundwork of contract today: the growing modularity of contracts and the waning of consent as the normative basis of legal enforcement. (The latter is also a major theme of my fellow commentator, Todd Rakoff,¹ whose contributions in this field have been preeminent.)

In conjunction with these two themes, I will touch upon the interplay of standardization and customization; the dialectic of rules and standards; the collapse of the distinction between the contract and the product it relates to; the problem of shoring up (or replacing?) the liberal notion of freedom of the will; and the allied issue of the political status of the regime of private ordering.

I

Henry Smith introduced the important topic of legal modularity, although my focus on it is different from his.² Modularity refers to the practice of building a whole by fastening together preexisting objects, analogous to construction with building blocks. Modularity became important to physical architecture in the first part of the twentieth century and to

[†] © 2005 by Margaret Jane Radin. Noncommercial copying of this work is licensed under the Creative Commons Attribution-NonCommercial License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc/2.5/>.

^{*} William Benjamin Scott and Luna M. Scott Professor of Law, Stanford University. A.B. 1963, Stanford; M.F.A. 1965, Brandeis; J.D. 1976, University of Southern California. —Ed.

1. See Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006).

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

the virtual architecture of computer science in the later twentieth century. Now modularity has become important for law.

By legal modularity, I mean the practice of creating a legal document by selecting and cobbling together terms from a source compendium or from different sources. Some model statutes are modular to some extent because they set forth alternate provisions, building blocks from among which enacting jurisdictions may choose. In contractual practice, firms have for a long time maintained form files that facilitate recombination of terms. Organizations such as the American Institute of Architects (“AIA”) promulgate standardized contractual terms in the form of a compendium where the user may choose among various terms to deploy for a particular transaction.

Boilerplate has long been associated with the idea of standardization. The often-debated question is, “Are standardized adherence contracts good or bad?” That question—let me call it the standard question—is complicated enough. But once modularity is taken into account, the complex issue of standardization versus customization surfaces. Boilerplate can be used not just for standardization but, because terms can be used as building blocks, for customization. In fact as I will recount, a number of the articles in this symposium project a somewhat paradoxical quality by focusing more on the possibility of customization than on the standard topic of standardization.

Standardization versus customization is a complex issue. The “versus” can mislead us. The two characterizations are not really opposed to each other. Instead, both apply to the same contracts when viewed with different levels of generality. Standardization serves customization and vice versa. Uniformity at one level facilitates customization at another. Uniform terms serve as building blocks in a customized document. But those uniform terms themselves may be composed of building-block clauses arranged in a customized way. Likewise, the customized document that arranges the uniform terms in a particular way can be used in a uniform manner and can itself become a building block for a still larger particularized transaction. Uniformity at one level, the level of modularity, facilitates customization at the level further up, and the customization at that higher level can facilitate more uniformity at a still higher level.

This symposium tracks the customized use of standardized clauses—in the AIA contracts mentioned by Kevin Davis in his article,³ in the insurance contracts mentioned orally by Kyle Logue, and in many other instances. In some instances, recipients of standardized clauses can negotiate over them (“You gave me clause 2.3.1, and I want clause 2.3.3”) and thereby achieve a form of customization. As a number of writers pointed out, a standardized form can be customized in practice, informally and ad hoc, by drawing attention to the beneficial terms for some recipients, forgiving harsh terms for some recipients, or both.⁴

3. Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1078–79 (2006).

4. I will consider this practice later. See *infra* text accompanying notes 16–23.

Modularity is greatly facilitated by digitization. The current era has become an era of modularity. Boilerplate, and contract itself, is undergoing a sea change propelled by modularity, a sea change that has yet to be fully recognized and taken into account in legal thought. Recall that the origin of the term boilerplate involved a rigid, heavy metal object, the piece of metal produced by a linotype machine.⁵ Once this object was produced, recombination of the terms it embodied would be practically impossible. This was the first era of boilerplate. In the second era of boilerplate, modularity through recombination became possible. Firms maintained form files; by photocopying, then manually cutting and pasting, and then retyping, variant sets of terms were created. Today, in the third era of boilerplate, digitized repurposing—computer reproduction and recombination—is easier and cheaper by many orders of magnitude. Modularity now comes into play much more regularly and with much finer granularity.

What are the implications of the sea change in modularity made possible by digitization? Here, preliminarily, are three: (1) Standardized clauses can be routinely cobbled together, even for small transactions; (2) Contracts, and the clauses constituting them, can be routinely copied and redeployed by firms other than the one promulgating them; and (3) Digital combination facilitates automated contracting.

First, because various clauses can be routinely cobbled together, even for small transactions—because we can standardize modules at a much finer level of granularity—it is now possible to customize transactions that once had to be standardized. When buying a product online, a consumer could check a box to pay an extra seventy-eight cents to extend the warranty from one year to two, or an extra twenty-seven cents to have dispute resolution by litigation rather than arbitration. The determination of what the consumer should pay for each clause and the total of the selected clauses could be outsourced in real time to an actuarial intermediary, and the customized terms could be presented to the consumer in printable form very quickly. So far, this market has not materialized, although in the future it may; there's certainly an analogous market offline for extended warranties and service on big-ticket items, such as cars, and not-so-big ticket items, such as stereo sets and washing machines. If online contracts become customized in this way, there arise possible questions for normative theory that are intertwined with empirical questions: To what extent will firms include the most onerous possible clauses, which will be varied in the consumer's favor only by consumers with more wealth and more knowledge? And to what extent might this practice exacerbate the divide between haves and have-nots?

Second, because digitized clauses can be routinely copied instantly and accurately anywhere in the world, it is possible for the learning effect that leads to widespread standardization to be accentuated. Once a clause has been tested in court, as Michelle Boardman argues, its legal effect is understood,

5. James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C. L. REV. 153, 158 n.9 (1999).

and it becomes more valuable to other players in the market.⁶ We may see the tendency toward widespread uniform use of successful clauses proceed much more pervasively and rapidly. In this case modularity could lead, at the level we would be interested in for policy determination, to more standardization rather than more customization.

Third, modularity of digitized contracts facilitates automated contracting. Suppose Firm A routinely buys a certain manufacturing input from several suppliers. Firm A could program its computer with a number of different sets of terms it would find acceptable for purchasing this input. The supply firms would program their computers with sets of terms they each would find acceptable for processing sales. When Firm A's automated assembly line signals that more of the input is needed, Firm A's computer could search among different suppliers for one that offers at least one set of terms in common. With an automated "handshake," the two computers could make the deal, and the supplies would be sent on their way to Firm A. Of course, such a procedure would not be suitable for all transactions, but it would cut the cost of many of the more routine kind. And it would have the beneficial side effect of eliminating the battle of the forms for those transactions.

Modularity, whether in architecture, computer engineering, or law, raises an urgent question of interoperability. We contract theorists have not yet begun to address this kind of question, but we must do so. Standardization at one level permits customization at the next level, but customization does not function if the standardized modules are not interoperable. They just make the project break down: the building will be unusable, the computer program non-functional, the legal document inconsistent, confusing, and perhaps useless. The "Frankenstein" contract described by Choi and Gulati is an early example of what happens when interoperability is not a focus of attention.⁷

II

Perhaps a somewhat deeper reflection on modularity involves the dialectic of rules and standards. This dialectic entered the legal literature in the 1970s, initiated by critical legal theorists and later adopted into mainstream discourse.⁸ Unfortunately, this terminology is confusing on a practical level and misleading on a philosophical level. It is practically confusing because when engineers and scientists speak of standards, they are referring to rigid parameters that must be implemented precisely; standards are the reason that light bulbs and plugs fit into their sockets. But that kind of rigid specifi-

6. Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1114–16, 1117–18 (2006).

7. Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1148 (2006).

8. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 57 (1992).

cation is what is meant by “rules” in the rules-and-standards parlance. The rules-and-standards rhetoric is also philosophically misleading, because rules and standards form a continuum based upon the degree of vagueness of a word or term, not a conceptual dichotomy.⁹ Yet because the rules-and-standards parlance has become entrenched (standard?) in legal discourse, it seems useful to refer to it in the context of this symposium, as long as its limitations are kept in mind.

It is a commonplace observation that both rules and standards have their efficiency pros and cons. Rules are rigid and uniform, so they may be knowable, predictable, and administrable, but they are under- and over-inclusive with regard to their objective. Standards are discretionary and particularized, so they can be more accurate with regard to their objective, but they are less certain and administrable. Which type of directive will function more efficiently seems quite dependent on surrounding circumstances. A number of writers in this symposium seem to be arguing for standards (that is, discretionary implementation), as I will discuss shortly. On the other hand, Ronald Mann offers a nuanced argument that rules will function better than standards in the context of credit card regulation.¹⁰ Other writers such as Ahdieh,¹¹ Ben-Shahar and White,¹² and Gilo and Porat¹³ argue that strict implementation of rules can serve a strategic function that is profit-maximizing for the promulgating firm. One such strategy, sometimes called the positivist kiss-off, is well known in jurisprudence; it is sometimes useful to claim that one’s hands are tied by a rule that has previously been laid down.¹⁴ Those who have power in a situation might find their power increased by being able to deny holding it.¹⁵

Now I come to what I consider a remarkable confluence. A number of the articles in this symposium explore the ramifications of treating boilerplate, considered as a rule-like object, as something that can be informally treated as a standard. Bebchuk and Posner argue that in some contexts, it is efficient for firms to promulgate rule-like boilerplate contracts that are covertly implemented as standards.¹⁶ For example, the hotel that posts the rule-like checkout time of 12:00 noon can implement that directive instead as

9. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

10. Ronald J. Mann, “Contracting” For Credit, 104 MICH. L. REV. 899 (2006).

11. Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006).

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

13. 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).

14. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 39–91.

15. For example, consider the faculty that enacts a rule stating that no faculty member may change a grade except for an obvious clerical error.

16. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006). In an earlier article Clayton Gillette advanced a similar idea. See Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 706.

a standard that would (if expressed explicitly) disallow checking out “unreasonably late.” This permits the hotel to be strict with some customers and lenient with others, depending upon what seems advantageous to its profit and reputation. In another example, Jason Johnston argues that under some circumstances, it is efficient for a firm to have strict rules that can be secretly relaxed for those who complain.¹⁷ It is unclear to me that firms would find it useful to incentivize complainers, but perhaps there could be circumstances where that would be true. On the other hand, Clayton Gillette argues that it would often be useful for firms to enforce rules strictly against quarrelsome or complaining customers and relax them for those who are cooperative or easy to deal with.¹⁸

If we extend this type of argument, it might be the case that firms can maximize profit by promulgating onerous terms for poor people while routinely relaxing them for wealthier people who might buy more and become repeat customers. This circumstance would raise a normative–empirical question that is similar to the one I noted earlier with respect to the possibility of paying extra for customization of clauses: Will widespread informal implementation of apparent rules as standards exacerbate wealth disparities? Even if so, should we tolerate the practice in the name of efficiency?¹⁹ Selective implementation of rules as standards poses the further issue of leaving enforcement to the discretion of private firms under circumstances in which patterns of discrimination, on the basis of race or other proscribed characteristics, might not be easy to discern. If a firm routinely singles out white people to benefit by non-enforcement of its ostensibly strict rules, that practice might be difficult to remedy. Moreover, disturbing inequalities in practice may arise even if not specifically envisioned, if a firm finds it efficient to reward those who complain or request better treatment and it turns out that white men are more likely to pursue such requests.

Even sticking to efficiency arguments, there is another side to the coin in considering boilerplate as a rule-like object that can be covertly implemented as a standard. In their article, Gilo and Porat argue that one hidden role of boilerplate can be facilitation of rent-seeking by informal customization that is not socially beneficial.²⁰ Boilerplate, say these writers, may give the appearance of fair contract but may be implemented otherwise. “Beneficial boilerplate” may enable anticompetitive collusion.²¹

In this context, I am reminded of Lon Fuller’s concept of congruence, which he elaborated in his description of the Rule of Law.²² Congruence

17. Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006).

18. Gillette, *supra* note 16, at 705.

19. These are familiar types of questions, of course, but still not easy to answer. Before trying to answer them, we have to realize where they are lurking, and that is my aim here.

20. Gilo & Porat, *supra* note 13, at 1010.

21. *Id.*

22. LON L. FULLER, *THE MORALITY OF LAW* 81–90 (rev. ed. 1969).

means that the law on the books must correspond well enough with the law as it is implemented in practice; otherwise we cannot know and follow the law, as we must be able to do if the Rule of Law is to flourish. When buyers receive confusing or contradictory terms, terms that are too complex to understand, terms that are written as rules but implemented selectively as standards, or terms that mean other than what they say, people cannot follow them and use them to order their affairs, and that is arguably problematic for their autonomy. There seems to be an ironic decision to be made between the amount of choice offered and the practical possibility of actually choosing. Mann, for example, shows that choices involving credit cards are too multifarious and complex—too customized—for people to understand.²³ Would a rigid non-choice rule be better for autonomy because people would at least be able knowingly to say yes or no to it?

III

Many of the articles in this symposium assume the collapse of any distinction between the product, traditionally thought of as the object of exchange, on the one hand, and the contract, traditionally thought of as the agreement fixing the terms of the exchange, on the other. The collapse of the contract–product distinction is a trope that has become very prominent in contract theory, especially in economic analysis, and I refer to it in shorthand as the contract becoming part of the product, or contract-as-product.²⁴ It collapses two conceptual categories—an object and a text referring to an object—into one amalgam that obliterates the distinction between text and object.²⁵ If a cell phone contains a chip that will fail in one year and also comes with boilerplate exonerating the seller of liability for consequential damages, its market value is affected in exactly the same way by these two features; for economic purposes, they are both just features of the product. This idea was clearly stated by Lewis Kornhauser quite awhile ago,²⁶ by Arthur Leff even longer ago,²⁷ and by now has become the dominant position of economic analysts. In this symposium, it is resolutely put forward by Douglas Baird,²⁸ explicitly assumed by Bebchuk and Posner,²⁹ and implicitly assumed by others.

In this dominant economic view, contract terms no longer comprise a separate textual object or artifact that is the repository of independent free

23. Mann, *supra* note 10.

24. See Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

25. See Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002).

26. Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151 (1976).

27. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 144–51, 155 (1970).

28. Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 933 (2006).

29. Bebchuk & Posner, *supra* note 16, at 829.

wills coming together in exchange. Instead, the terms become part of the product, which is a unified set of disparate features: a battery, a forum-selection clause, a micro-processor, and an anti-reverse-engineering clause. The contract-as-product view denies the traditional liberal normative underpinning of contract as instantiation of freedom of the will, or at least renders it problematic. Liberal will theory has become vestigial, at least in these quarters, as I will mention below.

The collapse of contract into product has conceptually been in the offing for a long time; but it has really come to fruition now that both terms and products are digitized. Now we are presented with a bunch of digitized information, some of which is terms and some of which is functional features. The collapse is now literal, and not just conceptual.

The collapse of terms into the product reaches even further fruition, perhaps, with the advent of technological protection measures (TPMs). TPMs are technological self-help. For example, fancy copy protection that disables a program if the user tries to copy it can replace contractual terms that disallow copying. TPMs replace state enforcement with self-enforcement; they substitute an automatic “injunction,” implemented by a private firm, for a remedy, implemented by the state, that must be argued for after an alleged breach.³⁰

Now, if one accepts the conceptual collapse of contract into product, one could think that TPMs are merely an acknowledgment that all terms are part of the product. When all terms are part of the product, it may seem firms should be allowed to choose whether to implement them as digitized contractual terms or implement them as digitized TPMs. A TPM in this view seems like further “productization” of terms that were formerly contractual. But there’s a significant issue lurking here, because TPMs look like self-help, and uncurtailed self-help undermines social ordering because everyone can engage in self-help in response. When, in the liberal story, we exit the state of nature to implement a polity, we are supposed to renounce self-help, at least to a great extent, to escape the war of all against all. This backdrop of liberal theory may well be the primary reason why self-help has by and large been cautiously treated by legislatures and courts. Unlike machine-implemented self-help, boilerplate that—at least theoretically—can come before a court before it is enforced is—at least theoretically—drafted in the shadow of the law.

But what are the legal limits of self-help? This is a question that will now have to be investigated. Can the ideal of public ordering be salvaged by legislating regulatory limits on TPMs? If contract terms are now fully integrated with products, should their limits be developed by thinking about the law regulating defective products rather than the law regulating unconscionable or otherwise defective contracts? The collapse of the distinction between contract and product, and particularly the advent of TPMs, seems

30. See Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INST. & THEORETICAL ECON. 1 (2004).

to undermine even further the problematic distinction, central to traditional liberal thought, between public and private ordering.³¹

IV

The traditional picture of contract is the time-honored meeting of the minds. The traditional picture imagines two autonomous wills coming together to express their autonomy by binding themselves reciprocally to a bargain of exchange. The rhetoric of meeting of the minds has not disappeared. But, as Todd Rakoff says, the normative power of the picture is waning.³² The liberal theory of voluntary exchange transactions between autonomous individuals is now vestigial. The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent, then to mere efficient rearrangement of entitlements without any consent or assent.

In the parlance common in economic analysis, efficient rearrangement of entitlements without consent is known as a liability rule. In the original formulation by Calabresi and Melamed, liability rules were thought problematic for autonomy and were to be implemented only when property rules, because of market failures, were in practice even more problematic for autonomy.³³ If we now accept a view in which firms can routinely change property-rule entitlements of contract recipients into liability rules by placing waivers of recipients' rights into form contracts, we have seriously undermined the traditional normative underpinning of contract (and of much else).³⁴

Because of the historical importance of autonomy and consent, it is evident that many of us are not yet ready to give up the rhetoric. Consent seems obviously fictional in a great many transactions, however, and that is one reason I say that consent is vestigial. Consent is fictional when the terms are filed somewhere we cannot access, as in airline tariffs. Consent is fictional when almost all of us click on-screen boxes affirming that we have read and understood things we have not read and would not understand if we did. Consent is fictional on websites whose terms of service state that just by browsing the site, whether or not one ever clicks on the terms, one has agreed to whatever the terms say, now or as they may be changed in the future. Consent is fictional when the contract ends, as one I saw recently did, with "By reading the above you have agreed to it."

Not everyone is willing to give up on consent. Robert Hillman wants to rescue it. He proposes some legal and practical strategies for making it possible for recipients to read and understand the significance of boilerplate

31. I will return to this topic below.

32. Rakoff, *supra* note 1.

33. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); see also MARGARET JANE RADIN, *CONTESTED COMMODITIES* 16–45 (2001).

34. See Radin, *supra* note 30.

terms before they become bound by them.³⁵ For example, the idea of placing terms on a website for anyone who wishes to view them in advance seems easy to implement. Firms may have incentives to do this. Firms might write contracts that look reasonable and be happy to post them, hoping to enhance their reputation and also hoping the contract will proliferate and become a widespread standard, thereby enhancing its effectiveness.

It is less clear, as Hillman ruefully realizes, that making terms more easily available will result in more people reading them. Hillman wants to shore up vestigial will theory when possible, although his caveats and worries show that it is an angst-ridden endeavor. In a similar vein, Michelle Boardman worries about notice and the ability of insurance policy recipients to understand what their policy covers; she too clings to will theory.³⁶ Others in this symposium seem willing to bite the bullet and abandon will theory in favor of pervasive liability rules: if the market price is correct for the product-cum-terms, it doesn't matter whether any given individual understands the features that we used to call contract terms.³⁷

If we accept the collapse of the terms into the product, is there any remaining role for liberal will theory? It is attractive to try to retain liberal will theory somehow, and I am thus sympathetic to Hillman's project, because it is still our leading candidate for what justifies rearranging entitlements among private parties.

If we want to rely on efficiency to justify rearranging entitlements without consent yet avoid abandoning a commitment to autonomy, we could try saying that there is autonomous bargaining over the total product—consisting of the concatenation of terms and functional features—or at least consent to the attributes of the total product. We can imagine that the user is bargaining over, or at least consenting to, the battery plus forum-selection clause plus microprocessor plus anti-reverse-engineering clause, etc. But this picture does not seem normatively promising. What determines the willingness to pay for the total product, and hence the price of the product, is not the consent of each individual, as in will theory. Instead, it is some other kind of thing, having to do with how a market functions in the aggregate. We do not “knowingly” accept a total product in the sense of “knowing” how the battery will function or how the forum-selection clause will function. The buyer does not knowingly accept the whole product in the way that liberal will theory postulates in order to justify the transfer of entitlement by the buyer's free will. Even if we think that something about an aggregation of individuals and their knowledge does determine willingness to buy the product at what turns out to be the market price, that is, a demand curve, that something does not map onto traditional will theory. Traditional will theory is individualistic in a way that economic analysis is not. The aggregate analysis does not support a notion that in the process by which the

35. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 845–49 (2006).

36. Boardman, *supra* note 6, at 1115, 1117–18.

37. Baird *supra* note 28; Bebchuk & Posner *supra* note 16.

market price of a product is determined, individuals are each expressing their free will by means of voluntary interaction or even by means of a relatively robust and not merely rhetorical understanding of consent.

V

The liberal public–private distinction has been central to the notion of public enforcement of private ordering. Hence, it is central to the traditional notion of contract. Private ordering has been thought of as the expression of free will privately, but in the context of a juridical infrastructure. The juridical infrastructure is necessary to set out the limits of contract—delineate what is off the bargaining table, such as baby-selling, contracts in restraint of trade, murder for hire—and also to police transactions for coercion and fraud. These limits, I would say, are necessary to the idea of private ordering.

The legal realists deconstructed the public–private distinction by showing that contract, which is supposed to be private, cannot exist without its public infrastructure, its infrastructure of legality. The public–private distinction may have been deconstructed enough that it is no longer a workable conceptual distinction. But I still think a pragmatic version of it has remained necessary in order to understand and justify the legal institution of contract and the notion of private ordering in the context of the democratic state and the Rule of Law. Certain functions belong primarily to the state, and certain functions belong primarily to individuals to accomplish without immediacy of state involvement, even though the state supports the background infrastructure. There are borderline cases in which we can't tell whether to call an interaction public or private, but the borderline cases must not overwhelm the system. If the notion of private ordering is to remain viable, then the pragmatic version of the public–private distinction must remain viable.

Here I think certain conceptual moves made by some participants in this symposium tend to undermine the pragmatic public–private distinction and hence to weaken the normative justification of private ordering within the Rule of Law. Contract is moving toward property; contract is moving toward legislation by trade groups; contract is moving toward productization featuring machine-implemented self-enforcement. All of these conceptual changes signify moves that previously belonged to the sovereign infrastructure but are now going over to the firm. For example, in IP law, contract is moving toward property because mass-market end-user licenses are superseding whatever user rights are granted by the federal IP regimes; and those background regimes become in practice irrelevant to the extent that the user's property rights are determined by the mass-market contract and not by the legislated background law.³⁸ The law of the legislature is being superseded by the law of the firm. Legislative rules are tied up with democracy in a way

38. See Radin, *supra* note 25. The acronym I coined for this situation, "EPSER" for "Effacious Promulgated Superseding Entitlement Regime," will probably not become a household word.

that rules promulgated by firms are not, even though democracy in practice, as the positive political theorists show us, is non-ideal. I think we do not yet have a satisfactory way of theorizing this metamorphosis. The only thing I want to say here is that this tendency to migrate sovereign functions to firms puts pressure on the last vestiges of liberal will theory. Boilerplate in the contemporary context is clearly raising the question; we have not yet talked about the kinds of principles we ought to use to think further about it.