THE BOILERPLATE OF EVERYTHING AND THE IDEAL OF AGREEMENT IN
AMERICAN LAW AND LITERATURE

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ABSTRACT

Borrowing the notion of standardized terms from the language of law, The Boilerplate of Everything and the Ideal of Agreement in American Law and Literature interrogates boilerplate—a presumptively obscure form—as a paradigm of expression. Using contract as a conceptual entry-point, I reveal the significance of the ideal of agreement in American literature and legal discourse from the nineteenth century to the current era.

The first part of The Boilerplate of Everything focuses on legal texts read in light of literary theory. In Chapter One, I analyze common standardized terms in contracts and argue that this type of boilerplate points to a limiting principle, creating a source of interpretive authority within a document. The contract document thereby reflects and/or manifests an ideal of agreement involving the will and intention of the parties. Chapter Two examines the use of the term “boilerplate” in judicial opinions and legal writing, presenting boilerplate as an exemplar of contractual expression that instantiates the deconstructive notion of iterability. The special conceptual status of boilerplate indicates the persistence of the ideal of genuine agreement as a legitimating origin. I thereby reveal the ongoing role of agreement as a touchstone of contract and communication in American legal discourse.

The second half of the project confronts American literature corresponding with the development of contract. In Chapter Three, I identify the nineteenth-century notion and practice of contract as a significant, and previously overlooked, element of Herman Melville’s “Bartleby, the Scrivener.” I demonstrate how “Bartleby” anticipates the significance and limits of contract as an instrument of freedom in the American cultural consciousness during emancipation. Chapter Four reads Thomas Pynchon’s The Crying of Lot 49, published contemporaneously with the first
invocation of “boilerplate” by the Supreme Court in connection with contract. I argue that
Pynchon’s quintessentially postmodern work emphasizes the enduring seductiveness of the
possibility of a “meeting of minds,” reinscribing it in a qualified and dynamic form.

Demonstrating the expressive potential of boilerplate as well as its generative
capacity to shape identity and agency, The Boilerplate of Everything illuminates the American
imagination and the possibilities for individual expression, interpersonal connection and
freedom.
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INTRODUCTION

The Elusive Meeting of the Minds in American Law and Literature

The standardized contract provisions colloquially referred to as “boilerplate” fail to seize the collective imagination. Instead, “boilerplate” conjures a blurry text viewed only peripherally. However, from its position on the margins, boilerplate significantly impacts contemporary American experience. Boilerplate shapes, even if it does not always unequivocally govern, the innumerable quotidian and monumental transactions that give material structure to our lives. Standard form contract terms establish the boundaries of countless transactions. This function of standard provisions results, in part, from the increasing power of corporations in the marketplace and in the law.¹ Thus, for example, we encounter standard form contract terms when we seek to obtain healthcare, purchase goods, travel by rail, sea or air, or use the Internet, cell phones or credit cards, not to mention, obtain a mortgage or make other significant financial arrangements.

¹The recent landmark case of Citizens United v. Federal Election Commission (2010), in which the Supreme Court struck down limits on corporate spending in election campaigns, has increased the power of corporate actors in the political sphere in an increasingly evident manner. Proliferating standard provisions mandating the arbitration of future disputes in consumer and employment contexts also suggest the current ability of corporations to leverage further the existing imbalance of power between individuals and corporate agents. In the aggregate, such contract terms, known as mandatory pre-dispute arbitration provisions, threaten to resituate the rule of law in the hands of the private, corporate sector (see Radin 2007, 198-99), with potentially inequitable results. A potential employee or consumer confronted a mandatory pre-dispute arbitration provision must waive the right to settle any future legal disagreement through the courts; the process of arbitration disproportionately disadvantages those “one-shotters” (Galanter 97) such as a consumer or employee, who might need the legal framework of discovery to make a factspecific case or the collective benefits of a class action to bring a case at all. Employers and corporations on the other side requiring arbitration— “repeat players” (97), with knowledge of the system—are also likely familiar with particular arbitrators and their respective frameworks. This gives them an additional advantage, because unlike courts, arbitrators are not bound by applicable law nor are their decisions necessarily published or explicates (see Budnitz 1172-73). Further empowering corporate actors, the Court held that the enforceability and unconscionability of an arbitration agreement was for an arbitrator, not the Court, to decide (Rent-a-Center, West, Inc. v. Jackson 2779). Even more recently, the Court’s decision in AT&T Mobility LLC v. Concepcion (2011) upheld the validity of an arbitration provision despite its practical effect of curtailing class actions, and thereby preventing meritorious suits from proceeding at all.
Although it might not be at the forefront of our thoughts, the phenomenon of boilerplate permeates the American cultural consciousness along with the presumptions and ideals the notion of boilerplate reflects. Thus, for example, Google’s recent cheeky notice of privacy policy changes enabling user data to be shared among its many services indicates the extent to which both the presumptive obscurity of boilerplate and a renewed appreciation of its significance have entered the popular culture. Google’s announcement, “We’re changing our privacy policy and terms. Not the usual yada yada,” with a link to “[l]earn more,”\(^2\) reflects a corporate awareness of the legal and reputational dangers of unilateral action in contract. On the webpage devoted to outlining the nonnegotiable terms, which involve further encroachments on user privacy, Google asserted, “This stuff matters.”\(^3\)

Borrowing the idea of boilerplate from the language of law, *The Boilerplate of Everything* makes contract the conceptual entry-point into the notion and practice of American agreement in law and literature. As a colloquialism that, as I argue, cannot be reduced to a single legal consequence or notion, “boilerplate” reflects the necessary overlap and interplay between domains of expression in American life. In addition, by identifying boilerplate as a paradigm of expression,\(^4\) this dissertation contributes substantively to the understanding of American law and literature; it reveals the significance of the ideal of agreement and of the contractual framework in American literature and legal discourse. Looking back to the nineteenth century, I explore the

\(^2\) The notice was posted on the Google website, <http://www.google.com/>, on January 26, 2012.
\(^4\) I use the term “expression” to refer to sign that manifests the phenomenon of iterability, or the qualities that Jacques Derrida explores by which a mark becomes readable (1988). Derrida refers to “writing” in this way (10), broadening the notion of writing beyond inscription to include speech. With the hope of avoiding some confusion about the meaning of writing, I have chosen to use the word “expression.” Although the project ultimately focuses on the written language of contract, one form of expression, the use of the term “expression” reflects an acknowledgement of the communicative potential of other types of marks, and even the expressive possibilities of silence discussed in Chapter Four.
attenuation and qualification of agreement as reflected in contract from its emergence as a notion of autonomy and agency in the United States. I show that an ideal of agreement, involving agency, knowledge and meaningful choice, not only informed notions of contract in the nineteenth century but persists in postmodern literature and contemporary legal thinking. By examining the ways in which this ideal is manifested through ostensible “form language,” I demonstrate the expressive potential of boilerplate as well as its generative capacity to shape identity and agency. As such, *The Boilerplate of Everything* enables a better understanding of how we, as Americans, imagine ourselves, and thus it illuminates the possibilities for individual expression, interpersonal connection and freedom.

*The Boilerplate of Everything* explores the interrelations among law, literature and the insights of deconstruction. Borrowing methodologically from a deconstructive approach of considering the exception or the marginal to illuminate the rule or the center (see Derrida 1976, 55-57), I pursue this insight substantively and consider the values revealed by the classification of exception. I also draw on the deconstructive awareness of the mutually constituting nature of text and context as well as the generative capacity of expression (see Derrida 1988, 60, 79). Using “postmodern” to refer to a mode of expression that manifests the performative potential of language and the possible elusiveness of the intended origin, which deconstruction identifies, I consider boilerplate as a postmodern paradigm. As an exemplar of the phenomenon of written expression—one manifestation of what Jacques Derrida terms “iterability” (1988)—boilerplate enables an examination of contract as both a practice and an ideal of agreement. Boilerplate thereby illuminates the nature of agreement in America from the nineteenth century “Age of Contract” to the current digital age, or what might be termed the “Age of Boilerplate.”
As a dynamic vehicle of intention, agency and commitment, situated in a market of exchange, contract serves as a site for the negotiation of the often-competing values that inform American life, such as capitalism, the notion of free will and resulting responsibility. Contract thereby plays a significant conceptual role in American literature and culture, and it has been richly explored as an historical phenomenon refracted through literature in the nineteenth century (see Thomas 1997). *The Boilerplate of Everything* contemplates the nineteenth century as a seminal period for the American notion of contract, but also situates contract in a broader temporal and theoretical framework. I view contract in the United States as an ongoing phenomenon, the present manifestation of which illuminates not only the idea of contract retrospectively but also the ideal that persists in framing an American notion of agreement. From a still broader conceptual perspective, I consider the nature of expression through written language, examining the expression of agreement or interpersonal connection, as epitomized by contract documents. Demonstrating the contribution of a humanistic perspective on American law, *The Boilerplate of Everything* thereby serves to advance a robust interdisciplinary agenda that reveals the transformative possibilities of language.

I. Unraveling an Ideal of Agreement in *The Wings of the Dove*

A brief discussion of Henry James’ novel *The Wings of the Dove* (1902), published on the heels of the “Age of Contract,” seeks to demonstrate the conceptual significance of a postmodern notion of contract as a performative and potentially catalyzing undertaking to the understanding of social interaction and the nature of expression. As a dynamic process and an ideal of connection that implicates interpersonal subjectivity and objective markers of value, contract offers a model of expression that can be examined in, and
shed light on, literature. *The Wings of the Dove* contends with the challenges of interpersonal connection along with those presented by the potentially polysemous nature of expression, situating these dynamics in a framework of economic exigency. Boilerplate does not figure centrally in the examination of the novel that follows, although the discussion touches on issues that boilerplate brings to the fore. This brief reading takes a step back; it points to contract as a site for the negotiation of the complex processes of articulating agreement, and the performative possibilities of expression, which, as *The Wings of the Dove* illustrates, can transform relations in positive and negative ways. As such, the novel can be read as an exploration of the elusiveness of agreement as an expressed form, whether in speech, writing or otherwise—the negotiation of which in legal and literary discourse is at the heart of this project.

Among other things, the novel engages with, and in, processes of negotiation. In his Preface to the novel, James describes a topic that long intrigued him: a young person whose end is certain, “early stricken and doomed, condemned to die,” but who seeks to invest in the experience of the process of life, “passionately desiring to…achieve…the sense of having lived.” “[A]t best, but half the matter,” this “image,” in James’ view of the novel, is to be complemented by the “picture of the struggle involved…the gain recorded or the loss incurred” (xxxi). Using similarly transactional language, James describes the novel as the product of his own negotiation with his subject matter. James’ chosen theme, as he imagines it, “might have a great deal to give, but would probably ask for equal services in return, and would collect this debt to the last shilling” (xxxi). Along with the trope of transaction, James calls attention to the novel’s interest in the challenge of communication and the possibilities and impact of articulation. His premise, as he notes, does not invite direct handling, “formed…to make the wary adventurer walk round
and round it” (xxxii), thus suggesting both the resistance to comprehension and manipulation that expression can pose as well as the communicative potential of indirect expression.

These issues emerge at the center of the novel as well. By avoiding the process of naming things directly, James’ protagonist Kate Croy “embodies the novels’ style as well as the interpretive stance it demands” in her approach to expression (Mitchell 194). When Kate’s secret fiancé, Merton Densher, encourages her to spell out the terms of their arrangement, she resists, stating, “If you want things named you must name them” (James 378). In its exploration of Kate and Densher’s plan to attain both marriage and means through the relationship of each with the American heiress, Milly Theale, the novel demonstrates the ways in which silence and ambiguity facilitate the possibility of “profit” (James 388), or the mutual benefit of parties (Mitchell 205). James reveals how the process of deal-making and the articulation of terms constitute and transform the novel’s central characters. Tracing different approaches to expression through written, spoken and unspoken language and their effects on interpersonal connection, The Wings of the Dove serves as a study of the possibilities and limits of expression, as well as the potential of the articulation—or perhaps even just the establishment—of a deal to transform relationships and perspectives, for better or worse.

The novel begins by reversing the idealized (or romantic) trajectory of agreement, situating its protagonists at the brink of what might be called colloquially a “meeting of the minds”5 and thereby pursuing the implications of contract. “[C]onsent[ing],” by his own

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5 In American legal discourse, as far back as the early nineteenth century, courts invoked a “meeting of the minds” as the foundation of a contract. Rather, than a profound psychic connection, however, the phrase has long denoted objective manifestations of agreement, reflecting the formal constraints of contract. Thus, for example, in 1828, the Supreme Court of Judicature of New York asserted, “A contract is the meeting of the minds of the contracting parties, on the subject matter of negotiation. The understanding of one party not communicated to or concurred in by the other party, can have no binding effect” (Murray v. Bethune, 191).
account, “under stress, to a practical fusion of consciousness” of his protagonists (xli-xlii), James acknowledges the fraught and contextually-dependent nature of consent, as he undertakes the project of manifesting genuine interpersonal connection. He aims to depict Kate and Densher as “a pair of natures well-nigh consumed by a sense of their intimate affinity and congruity, the reciprocity of their desire…with qualities of intelligence and character that they are meanwhile extraordinarily able to draw upon for the enrichment of their relation, the extension of their prospect” (xliv). In doing so, the novel foregrounds a near-ideal of agreement, before tracing its development and unraveling in the process of expression and experience.

As the narrator of *The Wings of the Dove* explains in their first appearance together in the novel, Kate and Densher would strike an outsider as “old friends” by virtue of their “particular phases of apparent earnestness in which they might have been settling every question in their vast young world,” and the “periods of silence” that would have supported the inference of “a long engagement” (James 41-42). These apparent moments of connectedness—notably tacit—resonate even more strongly, in light of the fact that “there had been for them as yet no formal, no final understanding” (42). James thereby posits the possibility of a genuine, yet unarticulated, connection, which can emerge from a history of shared experience and/or be manifested by behavior indicating such familiarity; the role of silence suggests the limits of direct and particularized or tailored expression in facilitating connection.

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6 In the first chapter, before Kate and Densher are introduced to the reader as a couple, the novel offers an account of negotiation between Kate and her father Lionel Croy, which is informed in part by both parties’ awareness of Kate’s feelings for Densher (see James 15-16). In contrast to the deep connection between Kate and Densher manifested in the scenes following, this exchange illustrates the other extreme of the process of connection. What Lionel Croy seems is, a reader is told, scarcely connected to who he is; he cannot be held to his word. Kate understands “how little any answer he might make [to her inquiries] would have in common with the truth” and the “futility of any effort to hold him to anything” (6, 3). To the extent that Kate recognizes her father’s duplicitous character, this scene offers a counterpoint to the near-perfect connection between Kate and Densher subsequently described, in that each interaction approaches but stops short of complete alienation or connection, respectively.
Soon after, Kate pledges herself explicitly, “[s]uddenly” asserting to Densher, “I engage myself to you for ever” (James 68). Densher reciprocates, and they mutually establish their connection in an iconic performance of agreement. As the narrative recounts, “They had exchanged vows and tokens, sealed their rich compact, solemnized…their agreement to belong only, and to belong tremendously, to each other. They were to leave the place accordingly an affianced couple” (69).

As the legal scholar Ian Macneil suggested, an agreement like this, or one in which parties “don’t say anything else except yes” should be viewed as contractual, notwithstanding the lack of, or failure to articulate, a “core” transaction (Snyder 685). James’ novel can be read as an exploration of this notion and of the necessary embeddedness of contract in social relations that Macneil identified (see 1980; 2000). Along with the development of the relationship, the novel traces the possibilities of language and communication as well as their impacts on interpersonal relations through the introduction of an exchange involving more explicit terms.

Kate and Densher might be intimately psychically connected, but although they have pledged themselves to one another, they have not yet achieved their objective of marriage. Rather, financial constraints challenge their shared goal of pursuing a life together, and, as such, they see in Milly the possibilities of wealth. For Kate, in particular, Milly’s financial and social independence, seeming terminal illness and interest in Densher present an opportunity for Densher to marry into her fortune and thus soon inherit the means to pursue a married life with Kate. Embodying a certain American liberty—indeed, the very ideal of freedom of contract—Milly is unhampered by familial or economic considerations: “she had to ask nobody for
anything, to refer nothing to anyone; her freedom, her fortune and her fancy were her law” (James 125). More markedly than the “sudden” pledge of love that precipitates the couple’s official engagement, Kate and Densher’s plan, which involves concealing their engagement to each other and encouraging Milly’s feelings for Densher, takes the form of a negotiated transaction—explicitly identified by Densher after the fact as a “contract” in which a “price [was] named...[and] paid” (James 387).[^7]

James highlights the complexity of expression—that is, the ways we communicate through language or other signs and the various ways in which these signs manifest meaning—by tracing the potentially divisive effects of speaking plainly and attempting to realize the terms of such an exchange. Kate and Densher’s articulation of the terms of an “understanding” and their endeavor to follow through on their deal signal the breach in their “intimate affinity.” The process of reaching an agreement concerning their joint plan simultaneously distils their distinct perspectives and commitments going forward.^[8] Densher’s suggestion to Kate that he remain in Venice to foster his relationship with Milly in exchange for the consummation of his relationship with Kate takes the form of a bargain: “‘Well,’ he said, ‘I’ll stay, on my honour, if you’ll come to me. On your honour’” (James 382). Pushing the point with

[^7]: The characterization of social interaction in transactional terms pervades the novel (see Mitchell 192-93). Thus, for example, once in Venice, Milly considers her own and her companion Susan Shepherd’s social connections as enabling her to “almost repay to Aunt Maud and Kate with interest the debt contracted by the London ‘success’ to which they had opened the door” (James 315). The novel also introduces Kate to the reader in terms of economic value. Viewing herself in her father’s mirror, “[s]he didn’t hold herself cheap, she didn’t make for misery. Personally, no, she wasn’t chalk-marked for auction” (3). While she is determined to control her destiny (“She hadn’t given up yet, and the broken sentence, if she was the last word, *would* end with a sort of meaning” (3)) she understands herself to be recognized in economic terms, at least by her father: “It gave [Lionel Croy] pleasure that she was handsome, that she was in her way a tangible value” (6). This perspective contrasts with the intimacy that Kate and Densher’s interactions suggest in the scene that follows, yet it also establishes financial considerations as an inescapable factor for the protagonists.

[^8]: Faced with the predicament of his limited means, for example, Densher “wonder[s] at [Kate’s] simplifications, her values. Life might prove difficult—was evidently going to; but meanwhile they had each other and that was everything. This was her reasoning, but meanwhile, for *him*, each other was what they didn’t have, and it was just the point” (James 44).
Kate, Densher characterizes the transaction in broader reciprocal terms: “If you decline to understand me I wholly decline to understand you. I’ll do nothing” (383).9

Their discussion concludes with an affirmation of reciprocity and a promise of future connection (“‘On your honour?’ ‘On my honour.’ ‘You’ll come?’ ‘I’ll come’” (383)). Thereafter, however, the novel traces the physical and emotional distance between Kate and Densher, revealing the ongoing dynamism of contract. Rather than operate as a simple reflection of a shared intention that thereby assures a mutually-desired outcome, the instance of formal agreement between Kate and Densher marks their differing positions. In addition, it indicates the reality of an unknown future and it suggests the challenges to commitment that the future imposes. The role of the deal in The Wings of the Dove not only demonstrates the paradox of contract, which necessarily imagines the parties at odds in changed or undesirable circumstances, but it also underscores the potential of expression (and of silence) to impact and reconfigure perspectives and relations. In this case, the novel suggests the collateral implications of the process of transacting, as differences in perspective become entrenched and insurmountable.

The final description of Kate, which concludes the novel, highlights the way that the process of contract can alter relations: “But she turned to the door, and her headshake was now the end. ‘We shall never be again as we were!’” (James 509):

The novel touches on issues that boilerplate brings to the fore, by troubling an easy distinction from “clear, unequivocal, and unambiguous language” (National Equipment

9 In American contract doctrine, the notion of consideration reflects the significance of a mutuality of obligation in contract, even if only as a formal matter. As Roy Kreitner notes, in the late nineteenth- and early twentieth-centuries, the question of consideration or of which promises were enforceable became the center of contract law (1881). Kreitner traces how gift giving posed a challenge to the neo-classical legal perspective that presumed a reasoning subject and thus threatened to unsettle doctrines of contract (1925), an insight that resonates in light of the way that James’ depiction of Milly as gift-giver invites speculation as to her intentions.
Rental, Ltd. v. Szukhent 323). In particular, the novel explores the limits of language that purports to reflect reality in an unambiguous manner, and at the same time identifies the potential for connection manifested and generated by silence or indirection. Yet the novel disrupts the attribution of a definitive outcome to either mode of communication by acknowledging the potential for signification in various forms along with the dynamism of experience. For example, toward the end of the novel, Densher recalls that silence—indeed disconnection—served as both a mark and a term of his arrangement with Kate: “they had practically wrapped their understanding in the breach of their correspondence. He had moreover, on losing her, done justice to her law of silence” (James 410). Thus, signs of communication, as the novel suggests, are necessarily impacted by the context in which they are situated and also precipitate the possibility of altering or redefining its context.

The significance of context, central to the process of contracting, and indeed, the very notion and function of boilerplate, is not dismissed by the novel. Instead, financial constraints not only set in motion but ultimately prevail over Densher and Kate’s plan for a life together. In addition to complicating the roles of silence and articulation with respect to interpersonal connection, the novel also presents a dialectical view of freedom and constraint, in which limitations can generate possibility. Thus, for example, while Milly faces no familial or monetary constraints, she seems hampered by a lack of experience negotiating others’ desires as

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10 Thus, for example, Densher’s insistence on speaking plainly or adhering to a view of the truth as one-dimensional impacts, and at times, limits the possibilities of relations (see Mitchell 195).
11 Kate’s social successes and the narrative of the novel itself demonstrate the expressive possibilities of ambiguity (see Mitchell; Sangari 295-96).
12 Milly’s final letter to Densher is another example of the signifying potential of silence. Kate purports to know its content sealed (“I know without [breaking the seal]” (494)). The unread letter continues to haunt Densher and remains a divisive force between him and Kate, despite the fact that it has been tossed in to the flames by Kate unopened. The trope of the incompletely delivered, and ultimately burned, letter also appears in “Bartleby,” as discussed in Chapter Three, in the form of “dead letters,” which “speed toward death” (47).
a result (Mitchell 202), and fails to discern the objectives of those around her. Kate’s social
talent, on the other hand, flourishes perhaps out of necessity (204).

_The Wings of the Dove_ thereby reveals the dynamism and performative nature of
expression as well as the significance of context, which this project brings to an understanding of
the American notion and practice of contract. The novel’s ending reinforces the possibilities of
expression in the absence of “plain” speech. Although the novel withholds certain particulars,
such as the content of Milly’s final letter to Densher as well as Kate’s ultimate decision whether
or not to take Densher’s inheritance and leave him as per his terms, it grants the reader a
profound sense of the characters and the nuances of their relationships. The fleeting moments of
intimate silence in the novel also attest to the elusive but alluring possibility of genuine
connection, and its role in framing our understanding of interpersonal relations or agreement.

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_The Boilerplate of Everything_ approaches contract—a practice of manifesting shared
intention that foresees and necessarily operates in a dynamic and diachronic context—as a case study in
expression through language. At the same time, contract as a vehicle of interpersonal connection
illuminates the values and assumptions that inform American understandings of freedom, agency and
agreement. The idea and treatment of contract in the law thereby offers a conceptual tool with which to
explore interpersonal relations and expression in the field of literature. This dissertation also examines
the reception and treatment of contractual expression in the legal discourse and in canonical American
literature. In doing so, it calls attention to the phenomenon of agreement in America and the
incongruities that result from an enduring American commitment to the ideals of autonomy and agency
that are informed by capitalism.
II. Incongruities and an Ideal from the Age of Contract

Contract emerged in the nineteenth century as a framework of connection and social participation in the United States at a pivotal moment in the nation’s collective experience. As the United States began to redefine itself with the rise of capitalism and a developing rejection of slavery, the idea of a formalized transaction of agreement permeated American culture; contract was understood beyond its legal function as a reflection of what it meant to be a free member of society. Growing out of the Enlightenment notion of obligation created through the exercise of free will, contract provided the prevailing conceptual framework for social relations; it served as “the very symbol of freedom” during the era of slave emancipation and offered a “worldview [that] idealized ownership of self and voluntary exchange between individuals who were formally equal and free” (Stanley x). In practice, contract did not merely imply values such as agency, freedom, and responsibility; it functioned as the very manifestation of the status of freedom and autonomy, both as a transaction and as a social relation grounded in notions of “self ownership, consent and exchange” (x). Contract in this seminal period thereby reflected a collective investment in the notions of agency, autonomy, and the resulting responsibility of individuals, laying the groundwork for a presumption of agency and choice in the practice of agreement in the United States.

Developing with capitalism, contract also facilitated the celebration of free-market relations (Stanley xii–xiii). Legal principles of contract reflected a commitment to the free market, treating transactions permissively and granting individual parties the power to decide their terms (see Friedman 2005, 203). With contract, the market— itself a construct that suppresses disparities in opportunity, resources and power—came to color the notion of liberty in the United States.
Thus contract potentially naturalized or diminished the salience of constraint and inequity, making evident the structures of power that necessarily limit the realization of the ideal of contract. Nineteenth-century vagrancy laws, for example, compelled the poor to enter into a contractual labor relation in exchange for aid, reflecting the potential for the ideals of contract to reinforce disparities of power (Stanley 134–37). Drawing on the principle of the free market to justify coercion, such vagrancy laws were framed as granting beggars an opportunity to enter into an exchange relation. In this way, beggars were liberated, albeit against their will, from a situation of dependency (137). Notions of choice, freedom, and autonomy were thereby figured in the context of a market entered by individuals on necessarily unequal footing and sometimes unwillingly. As a result, contractual relations also functioned at times to validate or naturalize these inequities.

At the very least, contract remained vulnerable to existing structural forces. For example, contracts for labor urged by Southern planters on freedmen aimed to replicate the controls of slavery, including mandating personal conduct. In addition, contract terms were changed and violated to the detriment of freedmen, former slaves were coerced into signing new contracts, and others were driven out of neighborhoods for failure to participate in wage labor (Stanley 42–43). Still others were forced into marriage contracts (45). While the ability to contract with respect to one’s wage labor and marriage represented freedom from slavery, the power of the laborer in a free market remained limited. In addition, many of the rights of contract were denied women within the marriage contract under laws of coverture (59).13

The function of contract in the nineteenth century thereby demonstrates the potential of the process of agreement to suppress a collective awareness of constraint and/or to

13 Stanley (140-41) also highlights the challenge that the reality of working women posed to the notion of freedom involving a circumscribed domestic sphere.
reinforce inequities. Yet, notwithstanding its limits, the notion of contract played a role in facilitating the pursuit of freedom by individuals. For example, contract was invoked to lessen if not overcome the power of former masters over their former slaves (Stanley 1998, 42–44). Though their suits were not always successful, former slaves drew on contract principles to enforce their rights to wages and proper treatment through litigation. In addition, freedwomen invoked the language of contract in claims against their husbands for ill treatment or lack of support in marriage (51).14

Thus, despite the incongruities of its role as a vehicle and manifestation of freedom, contract figured in the collective American imagination in connection with a narrative involving agency and autonomy—one which continues, as this project demonstrates, to inform the American idea of contract as a manifestation of will and the American ideal of interpersonal connection. As such, contract serves as a provocative and productive prism through which to refract American conceptions of agency, autonomy and agreement.

The objective criteria of manifested agency and agreement that long informed American contract law continue to influence the approach of courts today (see Specht v. Netscape Communications Corp. (2002)). Although legal scholarship and discourse does not fail to acknowledge the dynamism of contract and the possibility of constraint, contracts are presumed enforceable.15 In addition, courts typically intervene at the moment that a relationship

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14 The outcomes of these claims may have been limited, but a number of freedwomen succeeded in having their husbands arrested for whipping them (Stanley 51).
15 Doctrines of impracticability, frustration of purpose and unconscionability, for example, provide courts with approaches to contracts deemed unfair or inadvisable to fulfill (see Ayres and Speidel 861, 561). In practice, courts will consider whether a party ought to have taken steps to minimize the impact of changed circumstances and whether parties have allocated the risk through the agreement; relief is not often granted. (862). Unconscionability also proves a difficult defense to mount successfully (see Slawson 2006, 859-60).
is irreparably altered, when parties turn their backs on one another. At this point, judges must generate an account of the agreement and the expectations of the parties. Thus, at times judges seek to reconstruct a narrative of agreement by engaging the parties’ expressions of will in the form of their documented contract or other manifestation of intent. In the process, judges continue to invoke the language of intent and agreement and, into the twenty-first century, the notion of a “meeting of the minds” (see Soley v. Wasserman).

III. Boilerplate as Postmodern Paradigm: Methodology and Substance

In its various roles, boilerplate permeates contemporary American life and has become the focus of much contract scholarship and debate (see, e.g., Ben Shahar), which are considered in depth in the pages that follow. Boilerplate also deserves attention as a phenomenon in language. As expression that is understood to be dissociated from intent, boilerplate instantiates the deconstructive phenomenon of iterability (see Derrida 1988, 10). It exemplifies the process by which meaning, and thus connection, is produced through signs no longer tethered to a particular intentioned origin. Yet, at the same time, boilerplate operates as the medium of contractual expression. Indeed, at times, the recognition of expression as standard form marks it as contractual (see Longview Aluminum, L.L.C. v. United Steel Workers). As an expressive form situated in legal discourse, boilerplate also demands an interdisciplinary approach, attuned to the insights and discursive contexts of law and literature.

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16 The Wings of the Dove draws on this idiom of breach. Immediately before making her final pronouncement in the novel, Kate “turned to the door, and her headshake was now the end” (James 508). As Milly becomes aware of the nature of Densher and Kate’s relationship and relinquishes her struggle to live, she is famously described as having “turned her face to the wall” (410).

17 Derrida describes how the “sign possesses the characteristic of being readable even if the moment of its production is irrevocably lost” (1988, 9)
Thus, I build on and borrow from the various strands of the law and literature enterprise. I am concerned both with the project of interpretation and the revelatory nature of narrative (see Baron 1997, 1066). At the same time, The Boilerplate of Everything advances the law and literature project methodologically, in an effort to realize a more robust form of interdisciplinarity. I look to law and literature, not as unitary and bounded systems, but as overlapping and at times distinct sites of expression. These sites mutually inform one another, as

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19 Jane Baron has identified the interest in literary theory as applied to the law as the “hermeneutic strand” of the law and literature endeavor (1997, 1064-65). She refers to scholars interested in “attending to the stories told within law by clients, by lawyers, by judges, and by doctrine itself. Narrative law-and-lit is interested in those stories not for moral uplift or interpretive insight but rather for evaluating the stories’ persuasive impact, their evidentiary value, and their epistemological implications” (1066). I do not take up directly what Baron identifies as the “humanist” strand” of law and literature, or the argument that lawyers ought to read literature so as train lawyers in empathy and familiarize them with human nature (1064), though the discussion presupposes the imaginative possibilities of literature and the potential implications for understanding the workings of contract.

20 This project takes to heart the critique of law and literature scholarship that fails to remain cognizant of the ways in which disciplines are constituted through assumptions regarding the very boundaries and content (or lack thereof) of the disciplines (see Baron 2005, 2774).
they remain in dialogue with other factors—such as social, historical and political forces—that share in constituting the cultural context of each. While remaining sensitive to modes of operation of different discourses, I seek to disrupt the implicit hierarchy of literary and legal texts that has been identified as symptomatic of the law and literature enterprise (see Baron 1997; 2005). Deriving tools from and applying them to a range of texts, I identify values that both shape and, at times, connect the discourses.

Drawing on literary theory, I identify a model of expression in legal discourse that illuminates the process of interpersonal connection and agency envisioned in canonical American literature. In the notion of contractual form language, *The Boilerplate of Everything* exposes a rich conceptual paradigm for the process of expression; contract language illustrates the deconstructive position that all expression can be attenuated from a reclaimable and intentioned source (see Derrida 1988, 10). In the chapters that follow, I explore both the implicit significance of the attenuated origin as well as the possibilities for agency and connection that the phenomenon of iterability can engender.

**IV. Reading the Fine Print: The Chapters that Follow**

In order to pursue this interdisciplinary agenda, *The Boilerplate of Everything* attends to the ways in which expression is understood to operate in legal and literary discourses. As such, the first chapter interrogates the boundaries of literature and law by applying the notion of an author function suggested by Michel Foucault in his essay, “What Is an Author?” Foucault posits the author as a limiting principle, that—while fictional and, at times, multiple—serves to establish an interpretive boundary. As such, the presence of the author defines the “mode of being of [a] discourse” (211). While Foucault distinguishes the contract, among other forms of
expression, as having no author (211), the chapter identifies interpretive signposts typically built into a written contract in the form of common boilerplate provisions. Analyzing the function of these provisions, which purport by their terms to constrain meaning, the chapter troubles the distinction between contract and literature that Foucault suggests.

Examining the presumed point of distinction between contractual and literary expression, the first chapter marshals a particular definition of boilerplate, that of standard terms “typically found at the back end of a contract … deal[ing] with recurring matters” (Smith 167); it examines those ubiquitous recurring provisions that make a document recognizable as a contract. The chapter thereby analyzes the process of contractual interpretation and uncovers the narrative of agreement that the law engages. Identifying in contract an analogous role to the limiting principle of literature that Foucault terms the “author function,” the chapter highlights the implicit power of an idea of agreement, which the contract document potentially reflects and/or manifests through common boilerplate provisions. This notion, and potential fiction, of agreement frames judicial interpretation and legitimizes the enforcement of contract as a reflection of the will of the parties. By examining this point of congruence in the shared inclination of contract law and literature toward an interpretive reference point, albeit a dynamic one itself subject to interpretation, the chapter also illuminates the values that inform each discourse. Chapter One thereby recuperates Foucault’s claim concerning the role of the limiting principle in defining a discursive mode of being and analyzes contract as a written work in American case law and doctrine. Whereas the limiting principle of the author indicates the privileging of expressions of an individualized perspective, the operation of boilerplate in the legal discussion and treatment of contract language reflects a subtle shift in the limiting function from the paradigm of the individual to the shared intent, or agreement, of the parties. As such, as
the subsequent chapters reveal, the market and its attendant structures of power inform collective understandings and legal enforcement of contractual interaction.

After establishing the notion of agreement as a limiting principle that legitimizes judicial intervention, I move beyond a comparative discursive framework. Broadening the dissertation’s perspective on standardized terms in the law, in Chapter Two I survey the conception and treatment of boilerplate in legal scholarship and case law. In doing so, I draw again on literary theory, in particular the deconstructive analysis of Jacques Derrida, to reveal boilerplate—or a mark dissociated from an intentioned origin—as a paradigm of expression. In addition, by situating the notion of boilerplate within the American history and ideal of contract as a fraught vehicle of agency in a market, I present boilerplate as an exemplar of contractual expression. As such, boilerplate, the attenuated medium of contract, offers a legally significant example of the deconstructive notion of iterability.

In addition to bringing to light the real life implications of the deconstructive view of the nature of expression, Chapter Two undertakes deconstruction’s methodological project of exploring the rule by way of the exception. As the special circumscription and treatment of certain terms as boilerplate indicates, an ideal of agreement persists as a touchstone in contract doctrine and discourse even in the current boilerplate age. As such, in its analysis of judicial language and contract scholarship—most notably, scholarship associated with a law-and-economics approach to contract—Chapter Two reveals an enduring narrative of contract as a vehicle of expression and autonomy. In this way, I uncover an implicit, but persistent, commitment to the ideals of agency, freedom and autonomy that have long underpinned the notion of contract, if in a qualified form.
Having established boilerplate as a conceptual model of expression that simultaneously illuminates an American framework of capitalist exchange and an investment in freedom and agency, I reap the benefits of this insight in its application to American literature. The chapters that follow offer fresh readings of two canonical American literary works that are revealed to identify and anticipate the challenges to interpersonal connection in the United States that contract exemplifies.

Chapter Three reads Herman Melville’s story, “Bartleby, the Scrivener” (1853) in light of the constraints of context and challenges of expression epitomized by boilerplate. Viewed conceptually, form language highlights the elusiveness of intent and the performative potential of language. In addition, it precipitates explicit consideration of the context that necessarily shapes the meaning of language, as well as the collective sense of a particular expression as standardized. In Chapter Three, I take up the conceptual model of expression that boilerplate provides; I build on the previous chapter’s proposition that the challenges standardized terms present are inherent to contract. In doing so, I identify the nineteenth-century notion and practice of contract as a significant, and previously overlooked, element of “Bartleby.” Reading the tale in light of the limits of contract and the notion of boilerplate as a speech act dissociated from the specific intention of an individual, Chapter Three indicates the importance of form language for an understanding of American literature. It also shows how boilerplate serves to illuminate the nature of expression through language.

Hired to reproduce contractual documents, Bartleby ultimately refuses to generate boilerplate. However, his signature refrain, “I would prefer not to,” by which he manifests a desire to exit the framework of capitalism and contract, reflects the structure and content of
standard contract language. A reiterated form that enters the language of the law office, the phrase serves as an attenuated manifestation of the characters’ wills, complicating the distinctions between particularized, or idiosyncratic, and standardized expression. As a sign of Bartleby’s inscrutability—or the elusiveness of intention—as well as of his distinct character, the refrain indicates the expressive potential of boilerplate: The repeated phrase marks him as “singular” (see Melville 1949, 3) and grants him an identity, even as it ensures that his intentions remain enigmatic. Indeed, Bartleby’s use of the form serves his successful, if temporary, resistance to the broader structure of contract. Ultimately, however, the structure of contractual employment denies Bartleby the opportunity to “prefer not.” Bartleby dies in prison, like a vagrant or a forger, though the lawyer-narrator admits that he is neither. Situated in a social framework that naturalizes inequity and inequality through contract, Bartleby’s defining response is not only absorbed into the dominant language of exchange but can be seen to be derived from it; the language of preference can be traced to standard-form nineteenth century transactional documents with which Bartleby’s employer’s chambers are engaged. As the chapter reveals, the tale illustrates the way in which boilerplate exemplifies the phenomenon of iterability. In addition, it demonstrates how “Bartleby” anticipates the significance and limits of contract as a vehicle of freedom in the American cultural consciousness during emancipation. By reframing our thinking on contract through an historical and literary perspective, the chapter calls attention back to the broader social structures that continue to inform the possibility of agency.

These structures serve as the backdrop to the subject of the final chapter, which resituates boilerplate in postmodern American life. In Chapter Four, I consider Thomas Pynchon’s “exemplary postmodern text” (Castillo 39), The Crying of Lot 49, as an exploration of
the challenges to agency in a world of enveloping capitalism and digital networks. Without first agreeing to or even understanding the nature of the mandate imposed upon her, Pynchon’s protagonist, Oedipa, finds herself “named” as the executor of the estate of her former lover, a California “real estate mogul” (1). As a result, Oedipa confronts repeated augurs of elusive meaning that reflect the operation of boilerplate, such as the silenced post-horn and the stamps to be auctioned by the estate. In addition, the American landscape of “census tracts, special purpose bond-issue districts, shopping nuclei,” with its “hieroglyphic sense of concealed meaning” (13, 14), bears the imprint of boilerplate and capitalism.

Contemporaneously with the plot of the novel, Supreme Court Justice Hugo Black dissents from a decision validating a contractual provision that he believes was arguably hidden from, if not incomprehensible to, the weaker parties to the transaction, and not meaningfully negotiable. In *National Equipment Rental, Ltd. v. Szukhent* (1964), Justice Black contemplates “genuine agreement,” involving “clear, unequivocal, and unambiguous language,” which he contrasts with the “weak…imitation” of agreement in the “standard printed form” of the contract in question (332, 319). Boilerplate, however, disrupts his narrative concerning the capacity of—indeed necessity for—contract terms to reflect freely- and knowingly-entered agreements. As the expressive medium of contract, boilerplate serves as both the site and the symptom of the limits of agreement in contract. Warning that the Court’s holding in this case will precipitate the unfortunate inclusion of similarly inequitable terms in “the boilerplate of everything” (328), Justice Black not only gestures toward the sinister possibilities of the social framework explored in *Lot 49* but also acknowledges the existing prevalence of boilerplate in mid-twentieth century American life.
In light of the treatment of boilerplate in Szukhent, Chapter Four reads Lot 49 as a depiction of the always-already elusiveness of agreement that comes to characterize the current digital era. Framed by the markets of exchange that open and close the novel, the narrative reflects the power of the capitalist structure to naturalize inequity and marginalize disadvantage. At the same time, a quest for “Meaning” (Pynchon 64) not only propels Oedipa to the novel’s unsettled and anticipatory end but guides the reader’s approach to the text, even if it results in an awareness of indeterminacy. Thus, the chapter demonstrates how Pynchon’s quintessentially postmodern work emphasizes the enduring seductiveness of the possibility of a meeting of the minds via communication.

In contemporary life, in which the multinational corporation has arguably subsumed the “government monopoly” (Pynchon 38) on power that Lot 49 or its protagonist imagines, the vision—or even the fantasy—of a “network by which X number of Americans are truly communicating whilst reserving their lies, recitations of routine, arid betrayals of spiritual poverty, for the official government delivery systems” (Pynchon 140-41) resonates poignantly. The detritus of American life made salient in Lot 49 has itself become a vehicle of power for the powerful. Today, small print exerts power from the margins of our endeavors, at times encroaching on alternative modes of connection, such as the social media networks to which Pynchon seems to presciently gesture, and even on access to the courts (see Compucredit Corp. v. Greenwood). Yet, as Lot 49 suggests, an ideal of true communication or genuine agreement continues to resonate. Indeed, it persists in particular in current boilerplate scholarship.

Through these interventions, The Boilerplate of Everything makes one further contribution to interdisciplinary scholarship: It demonstrates the generative potential of
deconstruction and of a postmodern perspective on law as well as literature. As language recognized to be operating independently of particularized intention and in relations of power, boilerplate offers a paradigm of contract and of expression more broadly. However, the deconstructive recognition of the interplay of text and context points to the significance of the label “boilerplate”: While boilerplate may epitomize expression and the process of agreement, its notional, if not practical, treatment as the exception to the rule of traditional contract language, reflects an ongoing investment in the possibility of a “meeting of minds.” The paradoxical singularity of boilerplate, in this way of thinking, attests to the norm that presumes “authentic” connection or “genuine” agency and agreement. As such, I highlight the importance of social change in pursuit, if not absolute attainment, of this ideal. By considering boilerplate as both paradigm and exception, I demonstrate the way in which deconstruction calls attention to the social structures that enable transactions and give them legal and social meaning. In addition, I identify the contemporary relevance of the deconstructive intervention, which itself implicitly affirms the collective presumption of an intentioned origin.

A conceptual postmodern perspective brings to light the performative possibilities of contract language. As such, I point to the possibility of generating experience through expression. The myriad ways that contract language has already been shown to operate might be harnessed to further an agenda that takes seriously the collective desire for freely-entered and meaningfully-agreed-to terms of contract. In uncovering the persistence of an ideal of agreement in American culture, *The Boilerplate of Everything* identifies the current “Age of Boilerplate” as a particular opportunity, and indeed, reflecting a collective desire, to aspire to the ideal of contract that continues to frame—implicitly, but persistently—so much of the American imagination.
CHAPTER ONE

What Is a Contract?: The Boilerplate Document and the Absent Author

As a dynamic vehicle of intention, agency and commitment situated in a market of exchange, contract manifests the negotiation of the often competing-values that inform American life, such as capitalism, free will and resulting responsibility. These values also reflect an investment in the possibility of expression and accountability, which is necessarily colored by the operation of the market. In the United States, contract emerged as the economy developed in the nineteenth century (see Friedman 2005, 203), and at the same time, it came to figure prominently in an American conception of freedom (Stanley x). In American law, contract involves a promise, a “voluntary intercourse” (see Fuller and Eisenberg 4), the legal enforceability of which depends on a number of additional elements, involving among other things the process of bargaining and considerations of equity (8). The idea of contract in American law does not mandate one particular form of writing, and in many cases, contract need not implicate writing at all.21

Contemporary contract, as a form of writing that manifests agreement, significantly impacts the collective American experience, though perhaps more subtly than nineteenth-century contract’s role as a defining collective outlook. The rhetoric of contract persists in contemporary life. In addition, contract documentation abounds, framing innumerable commonplace and monumental interactions, including transactions on the Internet, to purchase

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21 This is in contrast to other legal systems in which contract is subsumed by the category of texts as indicated by Michel Foucault’s treatment of contract discussed below. American contract law requires documentation of certain types of contracts, such as transfers of real property and contracts for over a year pursuant to the so-called statute of frauds. This requirement, however, reflects the conception of these instances of mandatory documentation as special cases or exceptions to the rule.
software, obtain medical care, secure a mortgage or use a credit card, to name a few examples. Contract documents also proliferate in transactions such as mergers, acquisitions and loans that involve sophisticated parties. In the discussion that follows, I consider the written form of contract as a phenomenon of expression as well as the values this particular genre of writing reflects; I explore the ways in which transaction documents indicate, through their form, an ongoing but attenuated cultural investment in agency, responsibility and the possibility of communicating intention. In doing so, I attend to boilerplate, or standardized contract terms, as a particular feature of the written contract.

This chapter undertakes a preliminary examination of the form of the written contract expression (which boilerplate will be shown in subsequent chapters to epitomize) by reading closely a particular type of boilerplate. Contract language ostensibly manifests the particular voluntary exchange of the parties. In today’s digital age, contract has become increasingly modular, and thus even more easily tailored to particular specifications (Radin 2007, 191). Yet, a number of standard provisions stand out as common conventions of expression that frame a document as a contract (see Longview Aluminum, L.L.C. v. United Steel Workers 880) and figure as the signposts for interpretation in an imagined future. “Typically found at the back end of a contract,” these boilerplate terms “deal with recurring matters” (Smith 167)

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22 In contrasting the epic to the novel, M.M. Bakhtin’s discussion suggests the ways in which a the form of a genre communicates a worldview consonant with its content. Thus, for example, he describes the “radical degree of completedness” of the “epic world,” resulting from the “epic distance, which excludes any possibility of activity and change.” This completedness of the epic, he explains, is achieved “not only in its content but in its meaning and values as well. The epic world is constructed in the zone of an absolute distanced image, beyond the sphere of possible contact with the developing, incomplete and therefore re-thinking and re-evaluating present” (17).

23 The chapters that follow explore the complicated notions and operations of boilerplate in various manifestations and contexts; they consider the role of standardized terms as both the paradigm of contractual expression as well as the notional exception that reflects an ideal of agreement as a form of static, freely entered interpersonal connection, the substance of which can be captured or articulated in language.

24 The presence in a contract of certain commonplace provisions may “evidence an intent to be bound by the agreement” (see Longview Aluminum, L.L.C. v. United Steel Workers 880).
such as governing law, severability and integration. By their terms, these provisions define the boundaries of the text and impose limits on how the document ought to be read. Existing, almost invisibly, on the margins of the contract, necessarily ancillary to the key terms of agreement (see Gilo and Porat 2007, 66), yet quietly exerting an impact on the operation of the contract, these standard terms epitomize the conceptual role of boilerplate.

As explicit interpretive instructions, these boilerplate, or standard, provisions suggest that the notion of agreement—understood to be manifested in and exerting pressure from beyond the written text—functions as an analogue in contract to the role of the author posited by Michel Foucault in his famous essay “What is an Author?” In this essay, Foucault identifies the author as a fictional boundary on the interpretive possibilities of the text. Foucault speaks of a “poetic or fictional text” (215); however, as a genre of volitional expression and undertaking, the written contract also reflects an interest in the delineation of the meaning of this shared intention. Not the central terms of a transaction, the commonplace boilerplate terms discussed here are not typically the subject of dispute. Their seeming straightforward operation, and, indeed, the commonplace experience of seamless communication, attest to the effectiveness of expression in ordinary life. This is so, notwithstanding the necessary dynamic context, the “dialogic orientation,” to borrow M.M. Bakhtin’s language, that is a property of any discourse (see Bakhtin 279). Although usually uncontested, the most commonplace boilerplate terms nonetheless mark, if unobtrusively, the necessary negotiation of the possibilities of meaning in which language inevitably engages. The written contract purports by its terms to govern a future

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25 In the dialogic operation of the utterance Bakhtin envisions, the particular enlisting of an utterance presupposes its rejoinder (274) and thus suggests the space created by and limits of expression in a shared understanding.
relation; these provisions, which articulate interpretive rules, can thus be seen as a central component of the contract document as a genre of writing.

Notably, for purposes of considering the mode of expression that characterizes the genre of the contract document, Foucault specifically identifies contracts as authorless texts. In literal terms, Foucault is correct that contracts do not have an author, per se. However, this chapter identifies an analogue to the author in contract that these recurring boilerplate terms reveal. These provisions indicate written contracts’ particular demand for and difficulty of establishing an “author function,” or a limiting principle. An examination of the contemporary form of the written contract in terms of boilerplate and drafting conventions that inscribe fictions of stability of meaning into the contractual text illuminates the persistence of an ideal of agency and of the expression of intent; this ideal thus figures in a genre whose limiting principle manifests itself without reference to the individual.

Thus, instead of the author, or a fiction of a delineated individual, as Foucault presents it, an idea of agreement—which the contract document potentially reflects and/or evidences—frames judicial interpretation and legitimizes the enforcement of contract as a reflection of the will of the parties. As such, an ideal of contract as manifesting freedom, agency and intention through language implicitly informs the routine practice of contract even in its most standardized, and perhaps constrained, form. This chapter also thereby underscores the value of Foucault’s insight concerning the role of the author, demonstrating the way in which an author function enables us to better understand the operation and mark the boundaries of a discourse, even one without an author per se.
Such an analysis sheds light not only on the nature and function of the written contract as a genre but on the imbricated relationship of legal expression and literature.\textsuperscript{26} The operation of boilerplate as a limiting function in the legal discussion and treatment of contract language reflects a subtle shift from the paradigm of the individual to the shared intent, or agreement, of the parties, necessarily informed, as subsequent chapters explore, by the market and its attendant structures of power. The examination of common contractual provisions that follows thereby reveals the centrality of agreement as a site at which the tensions between ideal of agency and its implementation in a world of markets and constraint are negotiated and/or deferred.

I. Foucault’s Author

In “What Is an Author?,” Michel Foucault interrogates the role played by the author in our understanding of writing, identifying the function of the author as a defining characteristic of the discourse of literature. Foucault suggests that the author is a fictional construct that serves as a source of interpretive authority. As a manifestation of our impulse to contain the proliferation of meaning, the author is a function of our reading of the text, but one that allows us to restrict the possibilities of interpretation. Tracing the source of the construction of the author as a limiting function in literary criticism, Foucault points to Christian tradition, and specifically to Saint Jerome, who, among other things, defines the author as a constant, static and discrete entity, which thereby neutralizes contradictions between texts.\textsuperscript{27} Thus the author

\textsuperscript{26} In doing so, this discussion lays the groundwork for the discussion in Chapters Three and Four of the conceptual role of boilerplate in nineteenth-and twentieth-century-American literary works

\textsuperscript{27} Foucault (214) explains that if, in Christian tradition, [t]he name as an individual trademark is not enough [to identify an author] when one works within a textual tradition...How, then, can one attribute several discourses to one and the same author? How can one use
grows out of an impulse to construct an interpretive lens that would result in a coherent, stable text. Emerging from this tradition, Foucault suggests, the concept of the author serves to mark the boundaries of the possibilities of meaning: “[T]he author is not an indefinite source of significations that fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction” (221). The stability of such fiction—that of the author, and that of the author as limiting principle—is qualified; Foucault notes that a plurality of self becomes manifest in all discourses endowed with the author function. To the extent that an external reality offers a more stable reference point, it is not subsumed in the author function, which does not refer to a “real individual, since it can give rise simultaneously to several selves, to several subjects—positions that can be occupied by different classes of individuals” (216). Thus, even if we view the author as a limiting principle, according to Foucault, this function is a sort of fiction, because the author involves, in and of itself, a proliferation of meaning; the author remains subject to a range of possibilities of interpretation, as does the text.

Central to Foucault’s analysis is the role the author function plays in characterizing various discourses. “In a civilization like our own,” Foucault explains, “there are

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the author function to determine if one is dealing with one or several individuals? Saint Jerome proposes four criteria: (1) if among several books attributed to the author one is inferior to the others, it must be withdrawn from the list of the author’s works (the author is therefore defined as a constant level of value); (2) the same should be done if certain texts contradict the doctrine expounded in the author’s other works (the author is thus defined as a field of conceptual or theoretic coherence); (3) one must also exclude works that are written in a different style, containing words and expressions not ordinarily found in the writer’s production (the author is here conceived as a stylistic unity); (4) finally, passages quoting statements made or mentioning events that occurred after the author’s death must be regarded as interpolated texts (the author is here seen as a historical figure at the crossroads of a certain number of events).

28 Chapter Four explores the troubling of the binary of fact and fiction in connection with The Crying of Lot 49.
a certain number of discourses endowed with the ‘author function’ while others are deprived of it” (211). In addition, “[t]he author function does not affect all discourses in a universal and constant way” (212). Thus Foucault argues that the presence of an author, as manifested by the author’s name, “serves to characterize a certain mode of being of discourse” (211). By way of illustrating the impact of the named author on our conception of a text and the discourse in which it operates, Foucault presents a number of examples of authorless forms, which highlight the centrality of the author function in defining a discourse. In addition to the “private letter,” and the “anonymous text posted on a wall,” Foucault offers the contract, which “may well have a guarantor – it does not have an author” (211). Lacking the name of its author, which, in the case of a literary work, “seems always to be present, marking off the edges of the text, revealing, or at least characterizing, its mode of being,” the contract, in Foucault’s view, operates differently than authored texts and does not enjoy the function of the author as an authoritative interpretive principle.

Foucault’s insight suggests that the presence of an “author function” or analogous mechanism of limitation promises to illuminate the mode of existence of a discourse, or, as this discussion suggests, the function of a genre of writing; one may identify forms of fictions of

29 Foucault reinforces a fundamental connection between the author function and the nature of the discourse, asserting, “The author function is...characteristic of the mode of existence, circulation, and functioning of certain discourses within a society” (211).
30 Without the stamp of an author, the contract does not enjoy the status of a literary work (Foucault 211). While the contract is an artifact of a market transaction, Foucault’s situation of the contract between the private realm of the “private letter” and the public realm of the “anonymous poster” signals its liminal position as a document of a private relationship that must be publicly legible. For a thorough discussion of the difficulty of definitively ascribing the contract to either the public or private realm, see Clare Dalton’s “An Essay in the Deconstruction of Contract Doctrine.”
31 In suggesting that literary theory is itself a genre, Ralph Cohen offers a notion of genre as a “form of discourse related to other forms of discourse but with a history of its own” (62). In other words, a genre of writing, according to Cohen, functions both synchronically, sharing features or conventions with other genres, and diachronically,
limitation in searching for a genre’s source of interpretive authority. The question that Foucault poses with respect to the author resonates in the discourse of contract: “How can one reduce the great peril, the great danger with which fiction threatens our world?” (221). While the possibility of a limiting function or an interpretive lens designed to reveal a coherent and stable text (and, hence, system) has been much debated in the field of law, legal discourse continues to engage, at least at times, in the fiction of an interpretive process that reveals an ostensibly inherent static meaning. Robert Cover (1983) identifies the “problem of the multiplicity of meaning” (16) and the “jurisgenerative” tendency of the law (15), which judges are called upon to constrain (53). While legal meaning may be performed by judges, the state, and perhaps even communities (see Cover 1983, 42), legal discourse seeks systems of interpretation that will identify the correct, or best, meaning of a text (see Dworkin viii-ix). Not only does legal discourse engage in the limitation of meaning, or the development of principles analogous to the author function in literary discourse, but the documentation of contract as a volitional undertaking, in particular, anticipates the possible enforcement of an agreement. As instruments of agreement that purport to govern the behavior of the parties, written contracts represent attempts to fix consensual meaning in a text, and consequently enlist the attendant authority of developing over time. Borrowing from Cohen, this chapter aims to identify conventions of limitation in the genre of the written contract and examine their function in light of the notion of the author in literature.

32 For Foucault this question is ironic in tone. Notwithstanding the acceptance of certain defined fictions, or “legal fictions,” however, the discourse of law insists more generally on being non-fictional and engaging in transparent signification of reality.

33 The Critical Legal Studies movement produced compelling arguments revealing the instability of our interpretive methods (see Gordon 1981; Singer).

34 Discussing how justice, as a function of the law, does not achieve its “dream of adequation... that the world can be resolved into matching terms” (6), Wai Chee Dimock identifies one of the tensions in the processes of circumscription of meaning.

35 Cover (1983) dismisses the presumption of a methodologically paramount hermeneutic with “Justice Jackson’s famous aphorism: ‘We are not final because we are infallible, but we are infallible only because we are final’” (42, citing Brown v. Allen, 344 U.S. at 540).

36 Such meaning for some is found in the “objective indication of the words,” (Scalia 29), itself, perhaps, a fiction of limitation that is explored further in the chapters that follow.
the law. As such, Foucault’s essay prompts the question of the nature of the limiting principles, if any, of the written contract as a genre or discourse. In addition, an identification of this limiting principle promises, in Foucault’s analysis, to illuminate the operation of the discourse of contract.

Contract involves the voluntary reallocation of resources in the form of property or risk, and the written contract may have one or a number of drafters. The identities of the drafters, however, do not function to set the boundaries of the text, unlike the name of the author of a literary text. Most obviously, we do not typically consider the written language of a contract the product of a single idiosyncratic vision or inspiration; even nonnegotiable standard-form contracts, referred to as contracts of adhesion (see Graham v. Scissor-Tail 172), are typically treated as a result of at least two parties’ participation. In Foucault’s terms, one does not expect the language of the contract to reveal an author represented in its human individuality by a single proper name. Consistent with Foucault’s vision of a discourse defined by the presence or absence of the author is the fact that the “writers” of contracts are typically referred to as “drafters.” The term “drafting” reflects the belief that the construction of the language of a

37 In “The Law Wishes to Have a Formal Existence,” Stanley Fish explains the appeal of formalism in the law, in general: “Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one…can ignore; it is the thesis that one can devise procedures that are self-executing (161).” However, as Fish shows, the assertion by a judge, for example, “of ready-made, formal constraints” in the language of a contract being interpreted, “is belied by his efforts to stabilize what he supposedly relies on, the plain meaning of absolutely clear language. The act of construction for which he said there is no room is one he is continually performing” (164).

38 In this manner, the contract might arguably serve as an exemplary legal text rather than the judicial opinion. While most forms of legal writing ostensibly rely on language that functions independently of the individual human author, the judicial opinion manifests a tension between the judge as legal agent and the judge as individual author as reflected in the imprimatur of his or her name on the opinion. The official recording of judges’ concurring and dissenting opinions highlights the complicated nature of the judge’s authorial role, as an institutional mouthpiece for a potentially idiosyncratic viewpoint. As Deborah Gordon explains, even wills conventionally eschew idiosyncratic expression, notwithstanding the significant role that an individual narrative can play.
contract is a mechanical and perhaps provisional exercise, which presumably enjoys a different status from that of writing. In addition, the text of a contract is typically constructed, both by its drafters and the courts, through the additional filters of the forms, principles, language and practitioners of the law as well as the social networks and markets in which it is situated. Contracts draw legitimacy and authority from the notion of a consensual “meeting of the minds.” Reflecting the situation of contract expression in a broader conversation, perhaps, the documentation of contracts in practice comprise standardized terms or at the very least conventional language and forms. In addition, as the ostensible product of negotiation, the contractual document signifies as a manifestly dialogic form of expression; its terms and their relation to one another reflecting an effort by at least two parties in a context of contractual convention already richly populated by meaning to force language to submit to their particular intentions (see Bakhtin 294). Thus, as Foucault suggests, the author as a fiction of a stable individual identity is thereby absented, and as a result the function of stability may be assigned to a different type of authority.

39 In the corporate context in particular, it becomes increasingly difficult to locate the individual behind or within the contract as individuals typically execute contracts in their capacities as employees and/or representatives of a corporate entity that is the actual party to the contract (see Macaulay 2003, 46). Chapter Two touches on the way in which contract language at times operates in a homogenous network and draws significance from its presence in a network or as a standard formulation (see Kahan and Klausner).

40 Bakhtin’s assertion that language “is populated—overpopulated—with the intentions of others” such that “forcing it to submit to one’s own intentions and accents…is a difficult and complicated process” (294) is borne out in contract disputes in which differing understandings of the meaning of the agreement are revealed, at times as a result of circumstances unforeseen by parties. The classic English law contract case of Raffles v. Wichelhaus (1864), offers one, seemingly literary example: In this case one party agreed to sell and the other to buy cotton to be arriving on a ship named Peerless. Neither knew however of the existence of two such named ships and the buyer purchased the cotton that arrived on a ship named Peerless in October rather than from the seller whose merchandise arrived on another Peerless in December. The court in this case found no agreement existed between the parties regarding the delivering ship. Even with respect to boilerplate or standard terms, the power of the context to refract, enrich or limit meaning that Bakhtin identifies is manifest in cases where no meaning was contemplated by the parties until an instance of disagreement (see In re Lehman Holdings Inc.).
What then, if anything, takes the place or serves a function related to that of the author in the discourse of written contracts? If no comparable author function exists in the genre of the written contract, what does that indicate about the nature of this form of writing? As noted, the law, generally, and written contracts, in particular, seek to function in a manner consistent with one of the functions of the author; contracts, as documents that invite their re-encounter in a different context,\(^{41}\) rely on fictions or constructs to, at least on the face of things, narrow the possibilities of meaning. Thus it is reasonable to expect that something related to the “author function” can be identified with respect to a contemporary written contract through an examination of its text and the applicable principles of interpretation applied by the courts and commentators.

As this chapter will illustrate, common boilerplate terms manifest the way that the author’s role is filled in contracts. Without the stamp of an author, the contract does not enjoy the status of a literary work, which signals of itself that it “must be received in a certain mode, and that, in a given culture, must receive a certain status” (Foucault 211). Instead, these ancillary terms typically frame a document as a contract and provide instructions for how the terms should be read. Foucault’s situation of the contract between the private realm of the “private letter” and the public realm of the “anonymous poster” indicates contract’s liminal position as a document of a private relationship that must be publicly legible to draw power from its enforceability by the state (see Dalton). As such, the contract document, as an artifact of a market transaction, manifests an investment in the individual agency that precipitates and justifies agreement as well

\(^{41}\) As long as the substance of the agreement is not in question, parties may be unlikely to turn back to the language of a contractual document. It is primarily in the event of some question or doubt as to the terms of the agreement or otherwise changed circumstances that parties will consult the contractual language. Stewart Macaulay distinguishes between the “real deal” and the “paper deal,” asserting that in certain circumstances parties never consult the writing (Macaulay 2003; see also Macaulay 1963).
as the collective norms, or conventions of a possible future reader/enforcer. Fittingly, Henry Smith locates the common recurring boilerplate provisions that frame the contract on a spectrum between standardized expressions of property rights, which can or ought be understood by all, and contractual expression, which he envisions as expression tailored to a particular interaction between specific parties (163). By identifying these common place boilerplate terms as standard and thus modular (167), Smith situates these provisions analogously to Foucault’s categorization of the written contract: They inhabit a zone between an undifferentiated public expression and a personalized private one.

Commonplace boilerplate terms that frame the written contract thus negotiate the tension between the ostensibly public and private roles of contract language. An examination of the operation of these fictions of stability or limitation of meaning not only sheds light on the power and appeal of the particular form of fiction represented in certain discourses by the author, but, as suggested by Foucault, invites a better understanding of the particular discourse in which this limiting principle operates. As Stanley Fish asserts, the language of law cannot necessarily ensure a single, incontrovertible reading or interpretation, but it can constrain the rhetorical shape of, or the “path” taken to the legal result (1991, 172). Thus, in analyzing the manifestations of the limiting principle of contract and the shape they give to the legal treatment

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42 The discussion below questions the presumption in Henry Smith’s approach that the terms of a contract are necessarily contained and restricted in their capacity to signify so as to operate as discrete elements of an overarching expression of transaction.

43 This is notwithstanding the legacy of Foucault’s essay, including, most notably, Roland Barthes’ essay, “The Death of the Author.”
of contract language, this chapter illuminates the values and tensions that continue to inform contract as a particular mode of expression.44

II. The Contract, the Agreement and the Writing

Before turning to the way in which the particular recurring boilerplate provisions operate, this section considers the relationship between contract and its written documentation, as reflected in its current definition as well as its roots in William Blackstone’s *Commentaries on the Laws of England*. An understanding of the development of our conception of the “work,” in this case, the idea of the contract, in connection with a search for the “author,” or other limiting interpretive principle, follows from Foucault’s analysis; Foucault identifies the definition of the work itself as inherent in the critical approach of “analys[ing] the work through its structure” (207).45 In addition, such an examination reveals the way in which the ambiguous relationship of writing to the concepts of agreement and contract is built into our current notion of the written language of the contract.46

The difficulty of defining the relationship in the law between writing and the agreement, as well as the role of writing in contract interpretation generally, can be traced to Blackstone’s treatment of the contract, as the next section demonstrates.

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44 Bakhtin invokes the “belief systems of certain genres of expression” in his discussion of the operation of language (289). In his comparison of the novel to the epic, he identifies the ways in which the content, meaning and values of the genre correspond with the genre’s relation to the past, for example (17, 20).

45 Although “work” and “text” are loaded and distinct terms in Roland Barthes’ essay “From Work to Text,” in relying on a translation that does not reflect a distinction by Foucault, I do not intend to suggest the distinction between the terms articulated by Barthes, who considers the work a “fragment of substance” and the text a network, or a “methodological field” (57).

46 Perhaps this is not surprising in light of the fact that the Anglo-American conception of contract does not rest on a general requirement of writing, viewing contract as a form of promise. This is in contrast to the continental tradition from which Foucault writes, in treating the contract as subset of the written text.
A. The Notion of Contract: Blackstone’s Commentaries and the Role of Writing

An examination of the conception of contract reflected in Blackstone’s Commentaries brings into relief the ambiguity inherent in the current notion of contract. In analyzing the implications of the Commentaries’ structure, Duncan Kennedy opines that the treatise “is the single most important source on English legal thinking in the eighteenth century, and it has had as much (or more) influence on American legal thought as it has had on British” (209).47 Blackstone’s language continues to resonate in our current definition of contract, and an examination of Blackstone’s treatment of contract reveals the seeds of certain tensions present in more recent principles of contract drafting and interpretation.

Blackstone defines a contract as “an agreement upon sufficient consideration, to do or not to do a particular thing” (2: 442). While the notion of agreement as part of a bargain is at the heart of Blackstone’s proffered definition of contract, it is itself explained in abstract terms. “The agreement” comprises the first of the three points that Blackstone asserts must “be contemplated in all contracts” (2: 442).48 An agreement, Blackstone explains, is “a mutual bargain or convention,” which therefore requires that there “at least be two contracting parties of sufficient ability to make a contract” (2: 442). Blackstone does not elaborate on the requirement of the “ability to make a contract” other than to consider it in terms of possession of property and related means of transfer; he does not shed light on the constitution or manifestation of the agreement (or of the bargain or convention). In addition, by suggesting that an agreement may be constituted by a convention, as well as a bargain, Blackstone seems to allow for the inclusion

47 In Kennedy’s view, Blackstone’s Commentaries, published in England between 1765 and 1769, represent one of the only systematic efforts to organize the common law system on the basis of theory (209).
48 The other two being, as reflected in Blackstone’s definition, “[t]he consideration” and “[t]he thing to be done or omitted, or the different species of contracts” (2: 442).
of both express and implied contracts, which, in the case of the latter, “are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform” (2: 443). In this manner, the notion of agreement is distanced from the participation or actions of the contracting parties, and as such, its relationship to the writing of a contract becomes difficult to determine.

Kennedy’s analysis of the structure of the Commentaries exposes the rationalization and naturalization of certain tensions and contradictions in the law. Kennedy’s methodology of examining the function of classification in the Commentaries invites an examination of the relationship of the realms of contract and writing. Blackstone’s enterprise is one of organization, but, reflecting the English law approach to contracts, the Commentaries does not use the notion of writing as an overarching basis of classification of agreement, distinguished from that engaged in verbally. Instead, as Kennedy points out, the distinction between the express and implied contract dominates Blackstone’s conception of the contract (322, see Blackstone 2: 443). The overlapping spheres of writing and agreement in contract discourse disrupt the easy categorization of contract with respect to writing. Instead, the difficulty of defining the relation between the two suggest the dynamism of the relationship in contract.

49 Blackstone’s definition of express contracts also leaves open the question of the role of writing. He states, “[e]xpress contracts are where the terms of the agreement are uttered and avowed at the time of the making” (2: 443).
50 As a result of the codification of certain oppositions in Blackstone’s Commentaries, Kennedy shows, inherent contradictions in the law became obscured and naturalized, setting the stage for the liberal treatment of rights as the mediator of the fundamental contradiction of power and liberty in the law.
51 Kennedy distinguishes our current understanding of contract, which relies on the idea of voluntariness to differentiate between contract and tort (322-24).
Although writing does not in itself serve as a general basis for classification in Blackstone’s conception of contract, it is inherently related to the function of particular types of contracts. Blackstone’s treatment of the four “general species of contracts,” —“sale or exchange,” “bailment,” “hiring and borrowing” and “debt” (2: 446)—fails to clarify the relationship between the writing of the contract and the agreement that the contract represents or constitutes. For example, in describing debt, he addresses the functions of certain types of written contracts, such as bills of exchange and promissory notes (2: 464). In addition, “debts by specialty, or special contract” are, according to Blackstone, “such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal” (465). As such, this form of debt is characterized by writing, but Blackstone’s language preserves the possibility of either conception of the writing—the deed or instrument may constitute the agreement, as the money “becomes” due, or the writing may represent it, as the money is “acknowledged to be” due. Although the performative nature of certain contracts such as the promissory note is implicit in their operations as instruments, Blackstone’s discussion also reflects the notion of the written document serving as a constative statement. Specifically, Blackstone touches on the

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52 Blackstone defines a promissory note as “a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large” (2: 467). A bill of exchange is a “security;” “[I]t is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account” (2: 466). Blackstone also notes that the mechanics of endorsement and presentation for acceptance of such debt instruments involve writing, while acceptance of such contract may be “verbally or in writing” (2: 469). He distinguishes between the forms of debt, however, on the basis of whether the contract of the drawer is express, as in the case of a promissory note, or implied, as in the case of a bill of exchange (2: 468). As such, the mention of the function of writing is not explicitly related to the notion of agreement generally, but seems in certain cases to be the sole form of manifesting aspects of the agreement.  

53 I draw on J.L. Austin’s terminology, as developed in *How to Do Things with Words*, in which he explores the nature of what he terms the “performative utterance” and, in doing so, attempts to develop a methodology of identifying or distinguishing performative utterances from other or “constative” statements. In his essay “Limited Inc abc…,” Jacques Derrida (1988) reads Austin as demonstrating the problem of distinguishing between the two types of language functions. The contract serves as an interesting example of language that may simultaneously operate as performative and constative. This aspect of contract is explored further in the chapters that follow.
probative value of writing in the context of the principle of *nude pacts* in his discussion of the element of consideration. According to this principle, an agreement “to do or pay any thing on one side, without any compensation on the other, is totally void in law” (2: 445). This rule, Blackstone explains, “was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned” and may not hold in the event “such promise is authentically proved by written documents” (2: 445-46). By employing the notion of proof, Blackstone seems to suggest that the written documents presented would evidence an element of the contract, the promise, that exists external to the written documents.54 At the same time, Blackstone’s conception of the contract remains ambiguous as the promise may itself be constituted by the document.55 The structure and language of Blackstone’s treatment of contracts thereby reveal an ambiguous notion of contract, as an agreement existing independent of physical proofs, but evidenced by them, as well as an agreement constituted by such physical evidence, that is, the writing.

B. Current Definitions of Contract

The definition of contract in *Black’s Law Dictionary* reflects Blackstone’s impact on current thinking. Until recently, in its sixth edition, *Black’s Law Dictionary* literally echoed Blackstone, providing the following as its initial definition of a contract: “An agreement between

54 By conflating writing with material evidence, Blackstone implies an inherent value in writing, subtly privileging, in terms of stability, the written contract over the oral one.

55 Along the same lines, Blackstone explains that “every bond, from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of good consideration” (2: 446). In this manner, the written text points inward, again, in an ambiguous way, toward “internal evidence,” of the necessary contractual element, sufficient consideration.
two or more persons which creates an obligation to do or not to do a particular thing” (322).56
This definition preserves the uncertainty concerning the relationship between the writing of an agreement and the agreement, or contract, and the question of whether the agreement at the heart of the contract has an existence beyond that of its written form. The Dictionary also describes a contract as “[t]he writing that sets forth such an agreement.”57 In addition, citing treatises on contract law, it acknowledges that “[t]he term contract has been used indifferently to refer to three different things: (1) the series of operative acts by the parties resulting in new legal relations; (2) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also as an operative fact in itself; (3) the legal relations resulting from the operative acts.”58 The suggestion that the written form serves as “operative fact” of agreement as well as “evidence of their having performed the necessary operative acts” suggests the performative and constative functions of the language, that the writing itself constitutes the agreement of the parties, while simultaneously representing it, and thus serving to document its independent existence, in a constative way.59 The Dictionary’s

56 The eighth edition of Black’s Law Dictionary offers a refinement of this definition: “An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” Courts have acknowledged their reliance on Black’s Law Dictionary in statutory and contract construction (see McMahan v. Greenwood 488 note 8).
57 Compare the final entry under the definition of “agreement” in the sixth edition of Black’s Law Dictionary: “The writing or instrument which is evidence of an agreement.”
59 The notion of the writing serving as proof relates back to Blackstone’s discussion. One drafting convention that seems to have survived since the eighteenth century is that of concluding a written document with a reference to its evidentiary function. Contemporary contracts often include language similar to the following: “IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed on its behalf by its officers thereunto duly authorized, all at or on the day and year first above written.” An example of the use of “In Witness whereof” language on signature page of an agreement can be found in the seventeenth-century Scottish reference book of George Dallas, II, A System of Stiles, As Now Practised within the Kingdom of Scotland (56).
definition of agreement similarly complicates the relationship between the writing as agreement and the notion of agreement independent of its documentation. Agreement is defined as a “mutual understanding between two or more persons about their relative rights and duties regarding past or future performances,” as well as a “manifestation of mutual assent by two or more persons.”60 While the definition suggests that the agreement is a “mutual understanding,” which may exist independently of the written form of the contract, it also acknowledges the sense of the term as the very manifestation of the agreement.

Further complicating the notions of contract and agreement and their relationship to the writing is the assertion by one court that a contract or agreement is not equivalent to the piece of paper on which it is written (see Phillips v. Grace Hosp.).61 Thus the Dictionary definition and contemporary treatment of contract reflect the way in which contract law constructs a notion of agreement that may be derived from within the written language, as well as invoked as a limiting principle by virtue of seeming, at times, to exist beyond the text. In this manner, the notion of agreement may be likened to that of the author, which “is a principle of a

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60 This formulation appears in contemporary case law, such as TLZ Properties v. Kilburn – Young Asset Management Corp. and McGoey v. State (citing the Restatement, Second, of Contracts §20) as well as the Restatement, Second, of Contracts, which asserts that courts have found that an agreement “is nothing more than a manifestation of mutual assent by two or more legally competent persons to one another” (§ 3).

The “Restatements” of various branches of law, including contracts, grew out of efforts by the American Law Institute, an organization of lawyers, judges and scholars, to clarify and simplify the law and further its adaptation to social needs. While the first Restatement of Contracts, published in 1932, was produced to “state clearly and precisely in light of the [courts’] decisions the principles and rules of the common law,” the current theory reflects the approach whereby weight is given to “all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs” (Fuller and Eisenberg 8). Samuel Williston, the reporter of the first Restatement of Contracts, among others, led the classical contract law school of thought, which viewed contract law in terms of a set of axioms believed to be self-evident and subsidiary rules deduced from these axioms. The Second Restatement bears the stamp of Arthur Corbin, considered a foundational thinker in modern contract law. In the estimation of legal scholars, “both the theory of the Restatements and other factors often work to prevent a Restatement from setting out the best possible rule in any given area” (8).

61 In Phillips v. Grace Hospital, the court found two separate arbitration agreement forms as constituting a single agreement or contract.
certain unity of writing” that is both inscribed within the text and seemingly prior to or outside of it (Foucault 215). With respect to a literary work, the “design” or intent of the individual deemed author, are for Foucault, simply aspects “of the individual which we designate as making him an author are only a projection…of the operations we force texts to undergo” (213). As such, this discussion turns to the examination of these operations in contract documents, which might manifest a projection of an ideal, or at least an idea, of agreement between the parties, informed by their particular intent, or design.

In the absence of a dispositive “principle of thrift in the proliferation of meaning” (Foucault 221) in the form of the author, a number of contractual provisions manifest the genre’s particular demand for and process of establishing an “author function.” In this light, certain common contractual provisions and their treatment by courts may be seen as reflections of the genre’s inclination to stabilize the relationship between the agreement and the written text, and, more generally, the meaning of the text. These provisions reflect this desire even as they both gesture toward an agreement that precedes the writing and manifest and inscribe the agreement in the text.

III. Principles of Contract Construction

As a result of the opposing desires for stable meaning embodied in the language of the law, or in the case of contracts, the written agreement, and interpretive flexibility in light of the possibilities engendered by both language and circumstance (see Singer 11-14; Derrida 1988, 7, 12), a fiction of limitation emerges in contract in a form that remains subject to interpretation. In particular, this function reflects the significance of the intent of the parties or
the consensual agreement in this genre, and its role as a fiction that seems to exist beyond the
language of the text. At the same time, the language of the written document itself often
functions to constitute or affect the nature of the agreement (see Hill 208, 212-13; Dent 311).62
Specifically, the inclusion of certain boilerplate provisions at times changes the operation of the
agreement. For example, one court has stated that the presence in a contract of a choice of law
and venue, severability and survivorship, or an explicit integration provision “evidence[s] an
intent to be bound by the agreement” (Longview Aluminum, L.L.C. v. United Steel Workers
880). Courts have also often invoked the possibility of uncovering the substance of the
agreement in the language of the written document, asserting, for example, that “[i]n construing
a written contract, the primary concern of the court is to ascertain the true intentions of the
parties as expressed in the instrument” (McMahan v. Greenwood 486). As such, the
“expression” of the agreement in the instrument through the inclusion of certain language serves
to locate the agreement or the “true intentions of the parties” within the writing. At the same
time, of course, the meaning of language of the contract cannot be fixed and is ultimately subject
to judicial interpretation.63 Certain boilerplate provisions, however, along with rules of
construction invoked by courts, function to create the semblance, or fiction, of stability, while
remaining subject, like Foucault’s author, to the possibilities of interpretation. Whereas the

62 The process of documenting a contract (or refraining from doing so) itself may impact the relationship of the
parties, and may be undertaken with this very intention. As Chapter Two explores, the language of contract at times
signifies and operates at odds or in addition to the legal or literal significance, to the extent that can be identified, of
the language. Thus, for example, sophisticated parties to complex business transactions may employ an ambiguous
contract document as a bond between them to avoid future litigation (Hill 208, 212-13). In other circumstances,
business people might avoid complex or unusual terms to preserve trust and communicate the intention of amicable
resolution in the event of future conflict (Dent 311).

63 The chapters that follow look beyond the parsing of these particular boilerplate terms by courts to consider the
social structures that inform the operation of expression in contract and constrain the ideals of agency and autonomy
that contract reflects. As discussed in Chapter Two, contract terms also potentially signal in various ways, not only
to courts, but to parties to the transaction, as well as to third parties.
author, according to Foucault, marks the boundaries of literature in its treatment of the individual, the conventions of contract construction and the recurring boilerplate formulations discussed below reveal the significance of agency and intention for the genre of the written contract. The sections that follow explore a number of overarching principles of contract construction as well as a few types of recurring provisions that frame the reading of the document, and thus what courts understand to be the agreed-upon terms.64

A. Plain Meaning and Ambiguity

As suggested above, the court’s authority to enforce a contract emerges from the idea of a consensual agreement entered into by the parties. Although the structure of contract developed along with and is informed by the market, the form and treatment of the document underscore the significance of the possibility—or ideal—of circumscribing common agency and shared intention. Thus, in construing a contract, courts have relied on the notion of “plain meaning,” or the possibility of clear and unambiguous contractual language reflecting the intentions of the parties, to which the court may defer (see Cress v. Recreation Servs. 851; First Bank and Trust Co. of Illinois v. The Village of Orland Hills 304).65 Upon finding the language of a contract “unambiguous,” courts have, in some cases, purported to restrict their examination

64 Fittingly, because these types of provisions typically appear at the end of the contract text they also tend to function as a visual frame, marking the boundaries of the document.
65 In Cress, the Appellate Court of Illinois dismissed a defendant’s claim of inapplicability of add-back payments to pension benefits under an employment contract in the absence of an explicit limitation on damages in the employment contract. The opinion stated, “It is well established that where the terms of the contract are clear and unambiguous, they must be enforced as written” (851). In First Bank and Trust Co. of Illinois v. The Village of Orland Hills, the Appellate Court of Illinois affirmed a motion to dismiss a successor-in-interest’s claim to a contractual right to disconnect water service, finding that a contract amendment replaced the relevant provision of the agreement: “The principal objective in construing an agreement is to give effect to the intent the parties possessed at the time they entered into that agreement. When the agreement’s provisions are unambiguous, we are to ascertain the parties’ intent from the language of the agreement” (304).
The notions of ambiguity and plain meaning exemplify the way in which the process of contract construction involves an exercise, or at least an invocation, of interpretive authority, as courts apply even seemingly straightforward principles. James Boyd White asserts, “since there is in fact no such thing as a ‘literal’ reading of words [the] repudiation of ambiguity and complexity itself works as [a]…claim to authority” (147). The everyday operation of language, however, suggests that norms or conventions more often than not govern a collective understanding of expression and attest to the functional possibility, at times, of a “plain” meaning. As the chapters that follow pursue in greater depth, however, a convention also involves a collective acceptance of the boundaries of context and the meaning and values that contribute to a sense of what is reasonable.

The existence of boilerplate provisions that purport by their language to guide the reading of contracts also highlight the possibilities of context and interpretation that precipitate these terms. When construed by a judge, the language of the contract becomes a component if

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66 In *KMS Fusion, Inc. v. United States*, for example, the Court of Federal Claims held that the U.S. government decision not to renew a contract was reasonable under terms of agreement with contractor. In doing so, the court asserted that contract ambiguity occurs only when a contract is susceptible to two reasonable interpretations. In such a case, factors outside the contractual terms may be considered (76-77). In *Cress v. Recreation Services*, the Appellate Court of Illinois also pointed to the possibility of plain meaning, asserting that “[a] trial court may not employ extrinsic evidence in construing a contract unless it is necessary to resolve an ambiguity in the contractual terms” (838). In *Bock v. Computer Associates International, Inc.*, however, the Seventh Circuit Court of Appeals held that a severance agreement summary provided by an employer in a suit by a former employee to enforce the severance agreement could be considered under doctrine of extrinsic ambiguity, notwithstanding the finding that the agreement was not intrinsically ambiguous. The court asserted that “strong extrinsic evidence indicating an intent contrary to the plain meaning of the agreement's terms can create an ambiguity” (708).

67 Discussing the way that formalism is fashioned by the law, Stanley Fish notes that the contracts scholar, Arthur Corbin refers to the “plain and definite meaning…achieved by the court” (1991, 174).

68 In a similar vein, Peter Brooks points out with respect to the “unacknowledged narrativity of the law” that the law implicitly recognizes the power of storytelling in its efforts “to formalize the conditions of telling” (2002, 6). The parol evidence rule discussed below performs the function that Brooks identifies, while indicating the reach of the formalizing impetus of the law beyond the courtroom; the parol evidence rule and the related statute of frauds,
not the very site of a contested meaning of agreement. As such, the basic principle of contract interpretation directing the court to examine first the clarity of the plain language of the written contract already functions as a fiction of limitation that privileges writing as a vehicle of agency and expression of intent. Such fiction of limitation gestures toward the possibility that writing serves a unique function in the expression or manifestation of the agreement, operating as an authoritative source from which the intention of the parties or the agreement may be derived. As a result, the genre of written contracts reflects the idealized possibility of locating the meaning of the agreement in the written language of the document.

B. The Parol Evidence Rule

Without an author ostensibly marking the borders of the text, a contract remains subject to the courts’ definition of its parameters, which may be derived from the substance of the law, as well as agreement inferred from circumstance, trade practice, or other evidence viewed as external to the writing. The parol evidence rule and its application reflect the problem of circumscribing the text of the agreement, as well as the ambivalence of the law regarding the relationship between a written text and the agreement between the parties. Like the notion of plain meaning, the parol evidence rule also gestures toward the possibility that writing enjoys a privilege of authority, in certain circumstances.

The classic contracts case of Zell v. American Seating Co. (1943) demonstrates the operation of the parol evidence rule and the way it grants authority to a written document in establishing the terms of the agreement. Seeking $476,000 for commissions alleged to have been requiring the documentation of contract terms in certain situations, for example, potentially impact parties’ understanding of the significance of their expression.
earned in obtaining war contracts for American Seating totaling $5,950,000, Lucian T. Zell pointed to the terms of agreement between the parties communicated orally and in writing in 1941. The written portion of the agreement took the form of a letter from American Seating that was accepted and signed by Zell. It established the company’s employment of Zell “at a total compensation for said period of Three Thousand Dollars, payable One Thousand Dollars each month, such payment to be in full for your expenses and compensation for all work done on our behalf during said period” (543). In addition, the letter provided “As above mentioned, the sum of Three Thousand Dollars will be full compensation, but the Company may, if it desires, pay you something in the nature of a bonus.” Zell invoked the oral portion of the contract, alleging that the parties agreed at the time that the letter was signed that “in the event that the plaintiff was successful in procuring contracts for the defendant, then [American Seating] agreed to pay [Zell] in addition to said $1,000 a month, a further sum in the nature of a bonus in an amount equal to from three per cent (3%) to eight per cent (8%) of the contract or purchase price of said contracts, the exact amount within said limits to be later determined by the parties.” In light of the $5,950,000 of contracts procured prior to 1944, the differential between the three thousand dollar fee documented and the allegedly agreed for commissions was not only significant but reflected a transaction different in kind. Nonetheless, the District Court dismissed the suit against American Seating, in light of the written terms, and particularly the written reference to a bonus, which, the court explained, “emphasizes the fact that the monthly payment constituted the only obligation of the defendant with respect to compensation, and that anything more would be left entirely to the defendant's sole discretion” (543).
Reflecting policies favoring written evidence, seeking to limit fraud and to avoid misleading a fact finder (see Masterson v. Sine 227), the parol evidence rule serves as an interpretive principle\(^{69}\) according to which the terms of writing intended by parties to be the final and comprehensive expression of their agreement may not be contradicted, varied or supplemented by evidence of prior written or prior or contemporaneous oral agreements.\(^{70}\) As Zell v. American Seating demonstrates, the parol evidence rule lends authority to the written document, thereby constraining context. Agreement may thereby be performed rather than reflected in the document; the authority of the document has the potential to impact the relation and the transaction between the parties. At the same time, however, the application of the rule depends on the parties’ intention to manifest their contract in the writing, reflecting the challenge of locating the agreement and fixing its relationship to the writing. As such, even in its most conservative form, the rule embodies the ambiguity reflected in Blackstone’s treatment of contract—the possibility that the writing is the agreement and that the writing reflects an independently existing agreement. In addition, while the parol evidence rule may treat oral or noncontemporaneous written agreements as superseded by the writing of a contract, it does not necessarily restrict the consideration of such evidence for purposes of interpretation.\(^{71}\) Thus

\(^{69}\) Although Black’s Law Dictionary suggests that the parol evidence rule operates as a rule of evidence, many authorities do not consider it as such (Hadjyannakis 39 note16).

\(^{70}\) U.C.C. § 2-202 (1978), 3 Corbin on Contracts § 573 and Williston on Contracts 1: §4:5 provide formulations of the rule.

\(^{71}\) The Second Restatement asserts that “[a]ny determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties” (§212 comment b).

Section 2-202 of the Uniform Commercial Code, entitled “Final Written Expression: Parol or Extrinsic Evidence” provides:

(1) Terms with respect to which the confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms
parol evidence is admissible as an aid in interpreting the meaning that the parties are understood to have expressed, at least in part, in writing, further indicating the difficulty of assigning writing a distinct interpretive status and in locating the boundaries of the text of the contract.

While the parol evidence rule stems from the premise that parties may assent to the integration of their agreement, or the function of the writing as the final and complete expression of their contract (see Hadjiyannakis 39), it evolved away from a principle that conflates writing with agreement. This development was evidenced by an increased willingness of courts’ to fill gaps in the writing of a contract by supplying terms (Hadjiyannakis 38). Liberalizing the rule, courts and commentators abandoned the “four corners” approach to its application, which relied on the apparent completeness of the writing on its face, in addressing the question of whether the document itself was fully or partially integrated (43-54). The Second Restatement of Contracts, reflects this move away from formalism; as part of the genre of Restatements of law that initially sought to clarify and ultimately manifested the tensions in various areas of legal doctrine, the Second Restatement asserts that a written contract is partially

as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be supplemented by evidence of:
(a) course of performance, course of dealing, or usage of trade (Section 1-303); and
(b) consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.
(2) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous.

Fish highlights the tensions in the language of the Code, in the current version reflected among other ways in the juxtaposition of “record” and “intended,” and their reproduction of the conflict supposedly being resolved (1991, 164). Along similar lines, Fish raises the question of how one distinguishes between supplemental and contradictory evidence.

72 As Helen Hadjiyannakis notes, parties may assent to a writing representing the final expression of only those terms of the agreement included in the writing (39). The notion of integration, a term coined by John Wigmore, for the “process of embodying the terms of a jural act in a single memorial,” (9 § 2425 at 75-76), reflects the underlying possibility of the performative aspect of the writing, that the writing will constitute or “embody” the agreement.
integrated, unless the court finds otherwise (§ 216(1); see U.C.C. § 2-202(b)). Thus the approach of the Second Restatement envisions an independently existing agreement between the parties that may be reflected in part by the writing. As such, the writing is presumptively understood to be final with respect to the matters expressed, but cannot be assumed to represent the totality of the agreement. Consistent with such a vision is the Second Restatement’s reliance on the actual intent of the parties based on all relevant evidence in determining whether the agreement is totally integrated in the writing (see §210 comment b, §214(b)). Along these lines, courts became more inclined to consider extrinsic evidence in determining the question of integration (Hadjiyannakis 54), reflecting the function of an agreement independent of the writing as an ostensibly constraining interpretive principle. Implicit in this approach, therefore, is the notion of an agreement as preceding and at times superseding the writing of the contract, rather than being manifested by it. In the current age of proliferating form contracts, however, a neo-

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73 Subsequent to the four corners approach, treatment of the notion of agreement varied among conceptions of the rule but reflected a trend toward the idea of an independently-existing agreement functioning as a primary interpretative principle. For example, Williston’s proposed test, adopted by the Restatement of Contracts §240(1)(b), allows evidence of a consistent additional term to be brought to a written contract, including one deemed complete on its face, if similarly situated parties would naturally undertake such an agreement without including such term in the writing (Hadjiyannakis 45). This formalistic approach relied on a presumed intention of the parties that their agreement be integrated, indicating an understanding of an agreement that is not based on a determination of what actually transpired between the particular parties. Such approach also reflects a conception of an agreement as constructed as much by external norms as by the specific intentions or actions of the parties (see Hadjiyannakis 45). Wigmore, in contrast, looks for the actual intent of the parties as construed from all relevant evidence in determining whether the agreement is totally or partially integrated in the writing (see § 2430 at 98). However, Wigmore views the writing itself as the primary source for determining the intent of the parties, proposing as the “chief and most satisfactory test” of the parties’ intent, “whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing” (99). Wigmore’s treatment of intent reflects the developing notion of an agreement that exists in actuality, but for Wigmore such independently existing agreement may be best derived from the writing.

74 The California case of Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.(1968) famously eroded the parol evidence rule in California, as the state supreme court dismissed the possibility of an unambiguous contract document because it is not “feasible to determine the meaning the parties gave to the words from the instrument alone” (644-45). Nonetheless, subsequent cases have distinguished or declined to follow this precedent (see Wilson Arlington Co. v. Prudential Insurance Co. of America).
formalist trend has emerged, touted by some scholars in certain situations (see Scott 2000). To the extent this view is taken up, the writing manifests the agreement.

According to the principle of partial integration, when the writing explicitly engages the terms of an agreement, it may be regarded as the source of authority in defining such aspect of the agreement. However, the agreement exists, at least in theory, beyond the parameters of the written document; as interpreted by the courts, the terms of the agreement may be drawn from a number of sources in addition to the writing, including implications in fact and by law. While a term implied by fact is said to be based on the inference of actual agreement by the parties, an implication of law involves the reading by the court into the contract of a term imposed by law, which may be alien to the parties (Hadjiyannakis 55). Thus, the law exerts its authority on the construction of the agreement by injecting terms with respect to which the writing is silent; at times, the law overrides contract terms prohibited by law. As such, the written terms of a contract may be read by courts in light of, and as supplemented by, an agreement that is constructed from evidence of actions, circumstances and custom beyond the

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75 Lisa Bernstein’s work has also underscored the possibility that parties at times desire adjudicators to take a formalist approach (1996).
76 In cases involving the enforceability of terms to which a consumer may or may not have acceded by clicking an icon on a computer screen, when parties were constructively notified of the terms—that is, given the opportunity to become aware of them and walk away from a deal—courts will treat the fine print as the agreed upon terms (see Bar-Ayal v. Time Warner Cable Inc.). This is so, notwithstanding the awareness of courts and scholars that consumers overwhelmingly tend not to read such terms.
77 In certain cases, the parol evidence rule may function to exclude terms from being implied in fact. However, it does not exclude obligations imposed by law from the terms of the contract. In Tyus v. Resta, for example, the court held that an implied warranty of habitability was not excluded by an integration clause because the parol evidence rule does not apply to obligation imposed by law (434).
78 Hadjiyannakis discusses the confusion regarding implications of fact in the Second Restatement (55 note 112), and the way in which an implication of law could be treated as an implication of fact (55-56).
79 In In re Pyramid Operating Authority, Inc. v. City of Memphis, the Bankruptcy Court applied the rule under Tennessee law that performance under the contract is excused when parties agree to its legal impossibility.
terms of the writing, as well as from terms provided by law.⁸⁰ In this manner, the rule complicates the project of locating an ostensibly stable interpretive source for understanding the contract. It makes room for default positions of the law as elements of agreement as well as for various sources of evidence of agreement within and beyond the document.

IV. Boilerplate Responses to Question of Written Authority: Common Contractual Provisions

Against a backdrop of various sources of interpretive authority available in the construction of a written contract, certain conventions of form, or “boilerplate” provisions, have become common in transaction documents. These common provisions demonstrate the significance of the constraint of meaning to the genre of the written contract; they also indicate the situation of the expression of agreement somewhere between a tailored form and a prescribed convention. While a literary work may rely on the author—a product of the individualism and private property that characterize our society and, as such, located in a discourse of originality (Foucault 222)⁸¹—a contract operates in a discourse of form and precedent; agency and intention

⁸⁰ In discussing the enforceability of form contracts generally, Randy Barnett asserts that “contract law is itself one big form contract that goes unread by most parties most of the time” (644).

⁸¹ Not all literature involves or invokes originality, but the idiosyncratic voice or lack thereof serves as a characteristic by which legal discourse, at least, marks its distinction from literature. Northrop Frye identified the law’s tendency to promote the fiction of originality in literature, asserting that “the conventional element in literature is elaborately disguised by a law of copyright pretending that every work is an invention distinctive enough to be patented,” leading “the conventionalizing forces of modern literature” to go unrecognized (96). Foucault’s identification of the author as a limiting principle draws on this insight, as the author functions as a means of limitation, and as such a stabilizing force in the discourse of literature, by virtue of its ostensible identifiable idiosyncrasy from which the uniqueness of the text is derived and through which the language of the text may be understood. Picking up on Frye’s point, as well, Mark Rose argues that “the dominant modes of aesthetic thinking have shared the romantic and individualistic assumptions inscribed in copyright. But these assumptions obscure important truths about the process of cultural production” that involve the conventionality of literature and the way in which “texts permeate and enable one another” (2-3). In his essay “Kafka and His Precursors,” Jorge Luis Borges succinctly and powerfully demonstrates that creative works cannot be thought of as discrete or unidirectional in their influence on each other (199).
are subsumed into the idea of a formalized agreement. As a result, the fiction of limitation becomes manifest in the form of the language itself, which is presumed to be static and stable across texts (see Smith). At the same time, the operation of prevalent boilerplate forms reveal the ostensible or posited agreement between the parties—an instance of agency, intention and resulting interpersonal connection—as the ideal and fiction of limitation. This ideal of agreement thereby informs our understanding of contract and the boundaries of the document that purports to manifest contract. The sections that follow examine some of the ways that boilerplate terms and the form of a contract document reveal a notion of agreement as a fiction of limitation.

A. The Merger Clause: Defining the “Work”

Merger clauses, prevalent in written contracts, relate most directly to the discussion above concerning the limitations and ambiguities of the parol evidence rule. The following is a model merger provision:

This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties’ agreement in the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement (Stark 2003, 566).

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82Within recognized conventions of expression, however, tailored language is typically treated as a better reflection of parties’ intent relative to nonnegotiated or standard terms, as the following chapter discusses.
83 According to Williston on Contracts, “merger clauses have become common and are now ubiquitous in standard form contracts” (11: §33:23). The trend to include merger provisions may be seen as reflecting efforts to achieve more modular, and hence efficient, drafting, as contemplated by Smith.
84 In a transaction that involves a number of transaction documents, it is typical to make reference to such other documents (e.g., “This agreement, together with the [other named agreements], constitutes…”).
According to contract doctrine, merger clauses articulate the intent of the parties concerning the extent to which the writing is the integration of their agreement (see Lord §33:21). This type of provision, along with other common contractual forms discussed below, serves as another manifestation of the effort to locate the interpretive authority of the contract in the written text (see Stark 2003, 566). In language that suggests a performative role for the written provisions of the contract, the document itself situates the agreement within the explicit terms of its text, and in doing so defines, to some degree, the nature of the agreement.

To a certain extent, the writing, or the inclusion in the writing of a particular form, such as the merger clause, has been granted the authority to define the boundaries of the text to be construed as the agreement. Thus, for example, courts have relied on the presence of a merger clause in refusing to impose an obligation that would have been otherwise implied by law (see Vacuum Concrete Corp. of Am. v. American Mach. & Foundry Co. 774). Similarly, in considering whether an agreement is ambiguous, courts have limited the scope of their examination to the terms of the written document that contains a merger, or integration, clause.

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85 Ex Parte Palm Harbor Homes, Inc. also states that when a contract contains a merger clause, the agreement is termed to be an “integrated agreement,” such that evidence of prior or contemporaneous agreements will not be admitted by courts to contradict the terms of the agreement.

86 In Vacuum Concrete Corporation, in light of a contract term stating that the agreement constituted the entire agreement of the parties, the District Court did not imply a covenant on the part of a licensee to exercise the alleged standard of diligence in exploiting the licensed device: “[T]he merger or integration clause…negates the thought that they intended to impose…a duty upon AMF not contained in the contract” (774). Alan Schwartz and Robert E. Scott (2003) discuss the efficiency of such a textualist default interpretive approach, which draws on limited contextual evidence, in contracts between firms. A case such as Rosenblum v. Travelbyus.com Ltd., discussed below, in which the limits of the text itself becomes the subject of consideration, reflects the contextual possibilities that the documented language at times enables, rather than restricts.
As such, the writing may be treated at times as the authoritative source of the limits or substance of the agreement.88

Although a merger provision manifests a framework by which a court “limits, excludes, and chooses” (Foucault 221) the terms that constitute the contract, the language of the provision remains subject to the possibilities of interpretation. Thus, though unauthored, these boilerplate provisions reflect an elastic structure of limitation akin to Foucault’s author.89

Foucault highlights the interplay between the boundaries of a work and the notion of the author, suggesting that “the word work and the unity that it designates are probably as problematic as the status of the author’s individuality” (208). The operation of the merger provision as an indication of the parameters the agreement between the parties demonstrates a similar tension in the realm of contract discourse. While the presumed agency of the parties and the notional

87 Longview articulated the proposition that, in the absence of an explicit integration clause, a court “may look at objective evidence to ascertain the parties’ intent,” in contrast with those instances in which an integration clause was included in which the court must confine itself to an examination of “intrinsic ambiguity or whether the language of the agreement itself evidences any ambiguity” (880).

88 For example, the Supreme Court of Vermont held that if a written contract contains an integration clause, the writing becomes the exclusive medium for determining the understanding of the parties, and prior agreements covering the same subject matter are unenforceable (Hoeker v. Department of Social and Rehabilitation Services, citing Second Restatement § 210). In Hoeker, in light of a merger provision in the written contract, which made any oral promise to provide supplemental wraparound services unenforceable the court dismissed a claim for damages based on alleged breach of a foster-parenting contract that involved the failure to arrange for counseling and respite care as supplemental wraparound services. In addition, the Seventh Circuit Court of Appeals has stated that written contracts are presumptively complete in and of themselves; when merger clauses are present, this presumption is even stronger (Bock v. Computer Assoc. Int’l, Inc.). Other courts have viewed carefully written, well-reasoned and thoroughly negotiated contracts as presumptively complete, and the added presence of an integration clause as further strong evidence that the parties intended the writing to be the complete and exclusive agreement between them (see Local 377 v. Humility of Mary Health Partners).

89 As proponents of the Critical Legal Studies movement have shown, the law may be read to mandate a number of interpretations, and fails to assure a particular outcome. At the same time, it has been argued that, notwithstanding the flexibility of the law to justify or enable a range of interpretation, the interpretation and application of the law by courts remains predictable, for the most part, on the basis of judges’ politics, philosophies, personalities, experience, etc. (see Singer 13-25).
resulting agreement frame an understanding of contract, the challenges of locating their expression in the document are related to the challenge of defining agreement.

One case illustrates the way in which context can be circumscribed in more than one reasonable way because of the very presence of standard provisions. In addition, this case demonstrates the performative potential of contract terms to signify beyond, or even at odds, with their plain meaning. In Rosenblum v. Travelbyus.com Ltd., the analysis of Judge Ripple, writing for the Seventh Circuit Court of Appeals, of the function of a merger provision reflects the interplay of written text and context, both within and in framing the documents. It also demonstrates the range of possibility of interpretation that remains notwithstanding—or, put another way, that can be generated by—the language of the written document. In this case, Michael Rosenblum, the seller of a travel-related media business, brought an action against Travelbyus.com, the buyer of the business, for breach of the acquisition contract and fraud. The acquisition agreement governing the sale of the business was conditioned upon and entered into contemporaneously with an employment agreement between Rosenblum and the company in which Rosenblum was to serve as the company’s senior vice president (660). Despite Travelbyus’s claim that the dispute was subject to an arbitration provision in the related employment agreement, the Court of Appeals found that the merger clause in the acquisition agreement and the absence of explicit language incorporating other agreements expressed the parties’ intent not to apply the arbitration provision of the employment agreement to the contemporaneous and related acquisition agreement.90 While the Court of Appeals affirmed the

90The court explained that a “merger clause does not incorporate other contracts by reference, rather, a merger clause negates the impact of earlier negotiations and contract drafts and states that the written contract is the complete expression of the parties’ agreement” (665). The court further explicated: “A
power of the written document to exclude other terms, its discussion of the case (and the fact of a contrary finding by the lower court) reveals the potential susceptibility of the language of the document to multiple interpretations—or, more specifically, the challenge of circumscribing context when a text explicitly contributes to generating the parameters in which it is to be read. Judge Ripple held that notwithstanding the court’s finding that both documents “were both necessary…as components of a comprehensive business transaction….they are not two sections of the same agreement; they are separate, free-standing contracts” (663). In support of this view of the function of each document as discrete and comprehensive, the opinion points to “the internal structure of each contract,” in particular, the existence of other commonplace boilerplate terms. The opinion notes that “[b]oth agreements contain noncompete provisions,” such that if, as the lower court found, the employment agreement were incorporated into the acquisition agreement, one of the noncompete provisions would be “wholly superfluous.” Reflecting the privileging of the written text, and the context created within the text, over that of the “transaction” as a whole, Judge Ripple’s opinion explains that each contract is “complete on [its] own. There are no terms missing from either contract that must be filled in with borrowed terms from the other. Both are supported by consideration and meet all of the conditions of a valid contract…the contracts deal with distinct subject matter and contemplate different periods of completion” (663). Thus, the Court of Appeals concludes that the “parties’ deal consisted of two

merger cause, in effect, assures the parties that their entire agreement is memorialized in the written contract and permits either party to invoke the parol evidence rule to exclude evidence of additional contractual terms not included in the written agreement.” However, the acquisition agreement between the parties in this case defines the employment agreement as an agreement executed “contemporaneous[ly]” with the acquisition agreement (664). In addition, the language of the merger provision references prior but not contemporaneous agreements: “This Agreement together with the other agreements and documents to be delivered pursuant to this Agreement constitute the Entire Agreement between the Parties pertaining to the subject matter hereof and supersede all prior agreements…whether oral or written” (660). As such, one might argue, by the court’s reading, that the parol evidence rule does not exclude the terms of the written employment agreement in light of its contemporaneity with the acquisition agreement.
agreements” and find “no indication that the parties intended” the terms of one to govern the other. In reversing the lower court’s finding of integration, the Court of Appeals draws on the structure and substance of the document to make its case, noting as well the absence of the employment agreement from a series of schedules explicitly indicated to be “integral parts” of the acquisition agreement (665 note 5).91

The lower court’s finding of the incorporation of one agreement into the other is similarly based on the language of the text(s), rather than testimony of circumstances surrounding the agreement or other information more typically considered contextual evidence.92 Specifically, the District Court invoked the language of the merger provision, which states that the acquisition agreement “together with the other agreements and documents to be delivered pursuant to [the acquisition agreement] constitute the entire agreement between the Parties pertaining to the subject matter hereof.” In addition, the lower court points to the acquisition agreement’s contemplation of the employment agreement as “the employment agreement to be executed by the [parties] contemporaneous herewith” and the inclusion of the employment agreement as a condition precedent to the acquisition agreement (664). In light of the inclusion of “other agreements and documents to be delivered pursuant” to the acquisition agreement in its provision entitled “Entire Agreement,” the lower court tells its own plausible story about the

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91 Given the unavailability of the schedules, I am unable to assess this assertion in light of the types of documents enumerated.
92 Scholars often gesture toward a choice between a broader or narrower context in interpreting agreements, but stop short of addressing the challenge of circumscribing context even under the most textualist or formalist of approaches. See, for example, Schwartz and Scott’s suggestion of a textualist default approach for efficient drafting and interpretation of contracts between firms and Smith’s discussion of modularity, which elides the potential polysemy of language and possibilities of context. The various ways in which the pieces of the puzzle of relevant provisions can be fit together to form an arguably coherent whole challenges the neatness of modularity implied in Smith’s analogy between contract terms and computer language.
parties’ intentions, especially in the context of the acknowledged “comprehensive business transaction.” As such, this case illustrates the extent to which, even in a seemingly straightforward application of the principles of integration, the context and boundaries of the relevant document can remain subject to debate. In doing so, the case reflects the way in which the language of the document itself generates context(s) but cannot definitively stabilize it.

Thus, a merger provision does not invariably independently determine the integration of the agreement. *Williston on Contracts* asserts, citing the *Second Restatement*, a merger clause “is likely to conclude the issue of whether an agreement is completely integrated. Consistent additional terms may then be excluded even though their omission would have been natural in the absence of such a clause. But such a clause does not control the question whether the writing was assented to as an integrated agreement, the scope of the writing if completely integrated, or the interpretation of the written terms” (11: §33:23 note 7). Nonetheless, the Seventh Circuit has asserted that “the presence of a merger clause is strong evidence that the parties intended the writing to be the complete and exclusive agreement between them” (Rosenblum v. Travelbyus.com Ltd. 665).

While such an approach reflects the possibility that the writing operates as a source of authority, the inclusion of a merger clause only assures a presumptive interpretation. Along similar lines, reflecting the limits of the rhetorical boundaries of boilerplate provisions such as the merger clause, cases at common law have been in conflict as to whether a merger clause would exclude an implied warranty, an implication of law. If read as a paraphrase of the

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93 The Court of Appeals invoked the “four corners rule,” indicating its goal of relying on the text of the document to bound the document: “When determining under Illinois law whether something is incorporated into a contract we limit our inquiry to the four corners of the contract” (664).
parol evidence rule, courts held that a merger provision did not exclude terms implied by law, whereas, when construed as a disclaimer of warranties, courts have found that such provision overrode the implication of a term by law (Hadjiyannakis 74-77).

Courts have also held that extrinsic evidence, beyond the language of the document, may be admitted for consideration to demonstrate “that apparently clear contract language means something different from what it seems to mean” (Bock v. Computer Assoc. Int’l, Inc. 707), even in the presence of a merger provision. The discussion of the courts’ approach to contract in Bock v. Computer Associates International, Inc., a Seventh Circuit opinion invoked in Rosenblum, reflects the tension inherent in privileging the writing as an authoritative and stable source of meaning of the parties, subject to interpretation and the “plain” reading of the court. Considering a suit by a terminated employee against his former employer to enforce a severance agreement, the Court of Appeals held, in an opinion penned by Judge Cudahy, that the employer’s summary of the severance agreement could be considered as evidence under the doctrine of extrinsic ambiguity. Judge Cudahy explained, “We do not mean to belittle the importance of the terms outlined in the original agreement. Under the objective theory of contract, agreements are generally analyzed in terms of the objective (plain and ordinary) meaning of the terms they contain” (707). Invoking Judge Learned Hand’s famous explanation, Judge Cudahy’s comments suggest the performative power of the written terms to define the substance of the agreement and thus the contract: “Judge Learned Hand has instructed: It makes not the least difference whether a promisor actually intends the meaning which the law

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94 Moore v. Pennsylvania Castle Energy Corp., for example, articulates the proposition that an “integration clause” is a portion of a particular contract that restates the rationale of the parol evidence rule within the terms of the contract.

95 Singer speaks to the tension in the law between the desire to maintain the authority and stability of meaning and the need for flexibility of interpretation (11-14).
will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation” (708). The court acknowledges that Judge Learned Hand’s comments reflect “the staunchest objectivist stance,” yet it maintains that unless both parties share an understanding of the meaning of the language of the agreement, the “plain and ordinary meaning” will be ascribed to the language of the agreement. Whether there was a meeting of the minds between the parties “is determined by reference to what the parties expressed to each other in their writings, not by their actual mental processes” (708). However, the opinion asserts that “the overriding purpose in construing a contract is to give effect to the mutual intent of the parties at the time the contract was made,” and, as such, evidence extrinsic to the document “indicating an intent contrary to the plain meaning of the agreement's terms can create an ambiguity” and may therefore be considered. In this manner, the opinion implicitly recognizes the challenge of circumscribing context. In doing so, however, it gestures toward the notion of a static and determinable agreement, existing beyond the terms of the written document that may be ascertained in understanding the written language.

B. Modification and Severability Provisions: Recognizing Contingency

Contract’s operation in the market as a mechanism for profit underpins the oft-stated goal of contract construction to reflect the intent of the parties. As such, the process of stabilizing meaning of contract terms, to the extent it takes place, reflects only one manifestation of the goal of risk allocation, which informs the idea and practice of contract. The chapters that follow take a broader view of contractual expression in light of the market, but even at the level of the document, certain provisions manifest an awareness in the genre of contingency and
changed circumstance even as they purport to control meaning by their terms. The contract
document itself, and the terms discussed in this chapter in particular, speak to an imagined judge,
among other readers,96 and thereby demonstrate, if not reflect, an awareness of contingency and
change. In particular, modification provisions, which seek by their terms to preserve the
integrity of the agreement as manifested in the writing, anticipate a future moment of
interpretation in altered circumstances explicitly. A modification clause might read as follows:
“This Agreement may not be amended, changed, supplemented or otherwise modified except by
an instrument in writing signed on behalf of all of the parties.”

Another example of a contingency-sensitive interpretive signal is the severability,
or separability clause, which may be included to preserve the operation of a contract in which
one or more provisions are found to be invalid. A severability clause might state, “If any
provision of this Agreement is held invalid, illegal or unenforceable, the validity, legality and
enforceability of the remaining provisions of this Agreement are not affected or impaired in any
way” (Stark 550).

One version of a severability clause acknowledges possible pitfalls of
severability: that the remaining contract will be substantially different than what might have been
initially considered by the parties. The following language points more explicitly to the notion
that the contract document represents a certain agreement or relation that existed at a moment in
time, and not merely any agreement that remains once any invalid or unenforceable provisions
are stricken: “If any provision of this Agreement is determined to be invalid, illegal or

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96 Contract documents may also signal to parties coming to agreement and to third parties (see Fleischer
2006).
unenforceable, the remaining provisions of this Agreement remain in full force, if the essential
terms and conditions of this Agreement for each party remain valid, binding and enforceable”
(Stark 2003, 551). This language, however, reflects the challenge of maintaining meaning, even
with an eye to the need for flexibility. As with the very identity of the “author,” the “essential
terms and conditions”—though often collectively agreed upon or even intuited—remain subject,
especially when contested, to determination and interpretation by an authoritative reader⁹⁷ of the
contract, the court.⁹⁸

Much like the merger clause, the severability clause reflects an existing principle
of contract construction⁹⁹—courts will tend to construe a contract so as to give it meaning as a
whole, and so as to give meaning to as many of its provisions as possible (Ex Parte Celtic Life
Ins. 769; McMahan v. Greenwood 491),¹⁰⁰ in light of principles of law and public policy. In this
manner, the severability provision manifests and implicitly acknowledges the various modes of
reading to which a contract document may be subject. In anticipation of an authoritative reader’s

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⁹⁷ Foucault’s analysis implicitly imagines readers fluent in the language of a discipline, and leaves open the
possibility of an authoritative reader.

⁹⁸ Even if parties refrain from presenting a dispute to a court, a court’s expected construction(s) of a contract, among
other things, will frame the way the parties perceive the implications of the terms of a document. This chapter does
not take up the issue of the possibility of designating of a forum, the choice of law, or even an alternative arbiter,
such as an arbitrator along with a set of rules for arbitration. These designations similarly implicate the question as
to whether the provisions reflect the parties’ intentions or are to be read as colored by them.

⁹⁹ In fact, a court may find a contract severable despite the absence of an explicit provision to this effect,
especially if the unenforceable provision can be separated and is severable from other parts of the contract
(see Vegesina v. Allied Informatics, Inc. 53). The Second Restatement states that even if a contract cannot
be divided into separate agreements, a term may be severable and the rest of the contract enforceable if the
term is not an “essential part of the agreed exchange” (Stark 2003, 543-44).

¹⁰⁰ In Ex Parte Celtic Life Insurance, the Supreme Court of Alabama explained that there is a “general ‘duty
of the court to preserve so much of a contract as may properly survive its invalid and ineffective
provisions’” (769). In McMahan v. Greenwood, a Texas Court of Appeals applied the principle that “in
construing a written contract, courts should examine and consider the entire writing in an effort to
harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.
No single provision taken alone will be given controlling effect; rather, all the provisions must be
considered with reference to the whole instrument” (491).
response to the document,\textsuperscript{101} the severability agreement articulates a standard of reading that, necessarily, leaves room for the reinjection of meaning. Notably, however, even as it opens the door to the court’s view of the “essence” or substance of the agreement, the severability provision frames this exercise in terms of a search for the parties’ agreement.

As with the merger provision, the reinscription of an interpretive framework within the text of the written contract in the form of a severability provision, may at times, but not invariably, be granted authority by the interpreter to limit the possibilities of meaning. In determining contract severability, as with contract interpretation generally, courts attempt to identify the parties’ intent or the substance of the agreement, which may be manifested or described by the writing, but may also be derived from other evidence.\textsuperscript{102} As the Court of Appeals of Georgia stated, “The intent of the parties determines whether a contract is severable” (Vegesina v. Allied Informatics, Inc. 53). Similarly, under New York law, “in making such a determination, the primary factor to consider is the intent of the parties as determined by a fair construction of the terms and provision of the contract itself, by the subject matter to which it has reference, and by the circumstances existing at the time of contracting” (Municipal Capital Appreciation Partners I, L.P. v. Page 394).\textsuperscript{103} As indicated by the language of the court, the intent of the parties may be most immediately but not exclusively reflected in the writing of the contract. A severability clause would therefore seem to function as the most direct expression of

\textsuperscript{101}Considering the role of the reader, Stanley Fish, for example, considers the text, reader and ultimately community of readers as possible sources of interpretive authority (1980).
\textsuperscript{102} As one court explained, “[t]here is no precise test for determining whether a contract is severable or entire” (Municipal Capital Appreciation Partners I, L.P. v. Page 394). In this case, the court’s analysis was based on the nature of the integrated agreement rather than the absence of a severability provision.
\textsuperscript{103}The Georgia Court of Appeals has made a similar pronouncement, asserting that “the ‘primary task’ in determining contract severability remains that of ascertaining the intention of the parties” (Bulloch South, Inc. v. Gosai 755).
such intent of the parties (see Anders v. Hometown Mortgage Servs. 1031-32). At the same time, however, even when considering the language of the writing, courts have looked beyond the presence or absence of a severability clause in ascertaining the intent of the parties concerning severability. Courts have sought indirect expression of an intent of severability in the structure of the written agreement as a whole.\(^{104}\) This interpretive move once again reflects the court’s search for the overarching agreement as the source of the meaning of the contract.

Thus, as with all written contractual language, the severability clause remains subject to interpretation by the courts, and their search for the agreement, or the principle of unity of the text, as informed by the writing, law, circumstance, or otherwise. Like the author, who functions to neutralize contradictions between texts (Foucault 215), the agreement, as conceived by the courts, often gives coherent form to the contract. However, the irregularity of the authority drawn from the severability clause and similar interpretive signals inscribed in the contract is also a function of the conceptual role of the agreement, which, as a possible analogue to Foucault’s author, is performed by the writing and also treated as external to and independent of it.

\(^{104}\) For example, the Court of Appeals of Georgia asserted, “The parties’ intent may be expressed directly, through a severability clause, or indirectly, as when the contract contains promises to do several things based upon multiple considerations” (Bullock South, Inc. v. Gosai 755). In a similar fashion, courts have examined contracts that included severability clauses, finding that a provision in question was not severable as a result of the court’s holistic view of the writing; in determining the meaning of the written language in light of the idea of an agreement between the parties, the court read an explicit severability clause as failing to represent the parties’ greater intent. Thus, for example, the Appellate Court of Illinois found that the specific provisions of an employment agreement, “which plainly exalt[ed]” certain invalid provisions “as ‘essential’ to the agreement, necessarily [overcame] the general and all-encompassing severability clause” (Hill v. Names & Addresses, Inc. 1089). Similarly, the Supreme Court of Wyoming found that when the parties intended to create a condition precedent that had to be satisfied before the terms of the contract became effective, a severability clause included in a contract for sale of special use permits did not nullify the condition precedent to the agreement. Because, as the court stated “[a] severability clause cannot operate to effectuate a result which is contrary to the intent of the parties,” as expressed in the language of the written contract, the writing did not nullify the requirement of the condition precedent (Mad River Boat Trips, Inc. v. Jackson Hole Whitewater, Inc. 369).
C. Headings and Conspicuousness: The Physicality of the Written Contract

The role of the very form of the document, in terms of the function of headings and conspicuous text, demonstrates perhaps most dramatically the ongoing struggle to stabilize meaning in the contract document. Principles of construction concerning the physical form of the text suggest an effort to grant authority to the agreement embodied in the writing. Courts have held that while headings do not control the meaning of the substantive provisions of a contract, they may be brought as evidence in support of a particular interpretation (Cantor Fitzgerald, L.P. v Cantor 582 note 35). In addition, courts have invoked headings as the basis for inferring the intention of the parties concerning the meaning of the language of an agreement (see Waterbury Teachers Ass’n v. City of Waterbury 272). Suggesting the potential power of headings to frame meaning, a common boilerplate provision, seeks, by its terms, to reclaim even the interpretive function of the heading, through language such as the following: “The descriptive headings herein are inserted for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement.” Although this language may not in all circumstances ensure the effect it suggests, the provision indicates the generative power of the documented language and serves as yet another attempt to stabilize the meaning of the written language and locate that stabilizing authority within the text itself.

The role of conspicuous language in a document similarly reflects the challenge in contract doctrine of locating agreement in and beyond the document. As noted, inclusion of a

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105 In Waterbury Teachers, a Connecticut court dismissed a claim by a principal for breach of contractual and statutory obligation to negotiate new employment duties since the duty to evaluate teachers, listed in ‘examples of duties’ in revised job specifications, was not shown to be a newly-added duty as to which negotiation was necessary: “It also is important to note that the addition to the notice of examination of a principal was made under the heading ‘Examples of duties.’ It is obvious from the heading itself that such a listing of duties was not intended to be all inclusive” (272).
merger clause only assures a presumptive interpretation, and some courts have held that unless
the provision is specifically agreed to by the parties, a merger provision does not serve as
compelling evidence of the parties intentions (Stark 2003, 567). Practical guides to drafting
therefore advise the inclusion of a merger provisions in a conspicuous form, such as capital
letters or bold type (see Stark 2003, 567). Courts have also held that certain contractual
provisions, such as disclaimers of implied warranties, must be written conspicuously (see
Macdonald v. Mobley 919),106 in capital letters or contrasting type or color (see Lawrence v.
CDB Servs. 44),107 in order to override the operation of such obligations imposed by law.

These principles serve as reminders of the possibilities of context in which these
documents signify. The presumptive text of the contract may be drawn from the law or
convention rather than the explicit writing of the parties. Thus, in order to express the agreement
of the parties effectively, or function authoritatively so as to overcome the presumed relationship
of the parties with respect to some areas of agreement, the written language must not only adhere
to particular linguistic formulations but must also assume a particular physical form. Absent
conspicuous manifestation of a limitation of liabilities, for example, a court would likely
construe the contract as including certain warranties, broadening the text of the contract beyond
the writing to include warranties implied at law.

106 In Macdonald, the court applied a statutory requirement of conspicuousness. This requirement is also
codified in the Uniform Commercial Code §2-316(2). In Yauger v. Skiing Enterprises, the Supreme Court
of Wisconsin invalidated a waiver provision, finding, among other things, that “there was nothing
conspicuous about the paragraph containing the waiver” (64) in a contract document of a half page.
107 Lawrence v. CDB Services 44 held valid an employer release agreement for injuries to the employee
resulting from negligence. The release provision, in contrasting boldface type on front page of document,
was understood by the court to express intent that that employee was waiving his right to sue his employer
because of negligence of employer or its employees. Print size may be one important but not necessarily
dispositive factor for courts assessing the adequacy of a document as a release (see Leon v. Family Fitness
Center (No.107), Inc. 925). In the California case, Leon v. Family Fitness Center, the presentation of a
release provision in the middle of a contract document in the same font used in most of the agreement, not
prefaced by a heading, was deemed not to be conspicuous.
As reflected by the operation of headings and conspicuous contract provisions, the form of the written contract, in Foucault’s terms, “marks the manner in which we fear the proliferation of meaning” (222); the tensions that result from the effort to demarcate, and thus give substance to the meaning of, agreement are thus manifest in the form of contract and its treatment. Conventions of drafting, involving the use of headings and bolded, capitalized or otherwise conspicuous writing, reflect the extent to which interpretive authority is inscribed within the physical form of the document. Through conspicuous terms, the writing exercises performative power to determine the agreement. Yet, the notion of the parties’ agreement (involving agency and intention) grounds the performative power of salient terms, and as such, the role of headings and conspicuous terms serves as yet another marker of the operation of the notion of agreement in the “scission” (see Foucault 215) between an ideal of genuine agreement and the way it is performed. As a result, the written document, said to evidence the existence of an agreement, also becomes the substance of the agreement when the operative language takes on a required physical form. Common principles of contract construction and their effects on the writing of a contract thereby reflect the way in which the notion of agreement both negates and affirms the “division and distance” (Foucault 215) between the writing and its ostensible source.

V. Agreement and the Author

Suggesting that writing “has freed itself from the theme of expression,” Foucault characterizes writing as being “identified with its own unfolded exteriority” (206). Yet, rather than preserve the individual, the writing now effaces “the writing subject’s individual characteristics” (206), thereby reducing the “mark of the writer” to “the singularity of his absence” (207). In addition, Foucault explains, the author’s name marks a discourse as distinct
from “ordinary everyday speech” and, as such, is “not something that is immediately consumable” (211). Although fictional or literary works need not be understood by reference to an individual author or idiosyncratic work, Foucault’s discussion implicitly suggests original identity and production as feature associated with literature and the author function he envisions. Interpretive approaches to literature vary in the significance they grant the author. Nonetheless, Foucault’s insight offers an initial approach to the understanding of contract in light of manifestations in the written form of an analogous limiting principle.

Contract, long recognized as an objective correspondence of signs (see Holmes 464), currently proliferates in American life in its written manifestations. Identified with its “own unfolded exteriority,” the written form of contract exerts—perhaps increasingly with the prevalence of standard form agreements in everyday life—the performative power to manifest agreement. With respect to contract, then, the document marks the elusive agreement that it performs and reflects. In addition, the manifestations of the limiting principle of agreement in the text, in the form of standardized terms—as opposed to the potentially idiosyncratic marks of a writer’s “individual characteristics” 108—mark the written contract as not immediately consumable. As such, the conventions of contract construction and the common standard contract terms discussed above reflect the manifestation of “a certain discursive set” and in doing so, suggest the status of the document as part of a certain “discourse within society and a culture” (211).

108 While this need not be the case in fictional or literary works, such as serialized genre fiction, for example, the valorization of the individual and the original work remains a possible, if not necessary, feature of literary discourse that does not have a clear analogue in legal discourse and production of texts. As such, the role of individual and the related concept of originality offer a point of differentiation between forms of expression in law and literature.
The contract document, typically, a product of precedent, and thus legal expertise, as well as of the competing interests of parties, has no “author,” according to Foucault. Yet, as suggested in the discussion above, the notion of the “author function” as a limiting, and indeed, liminal, principal, sheds light on the “mode of being” of the contract as a form of writing. Unlike literature, the limiting principle of contract cannot take the form of a proper noun. However, the genre of the written contract document makes “specific demands” on language (Bakhtin 43), which are highlighted and manifested in commonly recurring provisions that purport to limit the interpretation of the text. In light of Foucault’s analysis of the author, then, the above discussion highlights the “manner in which the text points to this figure that, at least in appearance, is outside it and precedes it” (205); the contract document, as made salient by the generic interpretive instructions embedded within it, points to the notional figure of the agreement of the parties. Thus, the absence marked by the writing of contract might not be understood to involve the “singularity” of “individual characteristics,” but instead the notional shared agreement of the parties that ostensibly generates and legitimates the contract. A text, “always contains a certain number of signs referring to the author” (215), and the boilerplate forms discussed refer to the significance of agreement in our understanding of the contract document.

In this manner, agreement, as an ideal of agency and intention, though cut off from the subjectivity and idiosyncratic expression of an involved individual or party, fills the role of the author in the discourse of contract. In doing so, it serves, like the author, as a limiting principle that can only constrain the significance of a text subject to the other competing forces
and modes of reading. Thus, commonplace boilerplate terms reflect the treatment of agency and intention in the genre of the written contract.

The chapters that follow widen the perspective on boilerplate and standardized language, exploring the impact of the market and frameworks of power on the operation of the text; agency and intention in contractual expression are necessarily mitigated and mediated by contextual factors, including, most markedly the preeminence of the market, and the prioritization of the bargain over expression for its own sake. Demonstrating the expressive range of boilerplate, or standardized terms conceived broadly, the next chapters move beyond the interpretive framework of the author function. While, as this chapter describes, the form of the contract might be best understood as marking the very absence of agreement through the text, the following chapters reveal that the ideal of agreement, involving agency and intention, as external and preceding the language of contract persists in contract law and indeed, in American literature. As Foucault suggests, the aspects “of the individual which we designate as making him an author are only a projection…of the operations we force texts to undergo” (213). Taking up this role, the agreement manifested through the form of the contract—and in the very notion of boilerplate, as will be explored further—reflect an ideal of agreement and the hold it has on our understanding of the possibilities of expression and interpersonal relations.
The global economic downturn of the early twenty-first century precipitated, among other things, public debate about the inequitable impact of fine print in various contexts. Just weeks prior to the 2008 collapse of Lehman Brothers in connection with the mortgage market crisis, one of the first harbingers of the economic shift, Verlyn Klinkenborg asserted in an editorial piece in the *New York Times* that the “illusion of free will is almost complete” as contracts govern “[n]early everything [we] do” (A22). Among his “favorite examples” of the pervasive control of contracts, Klinkenborg identified “e-mail messages from corporate friends, who send notes of only a line or two, followed by legal boilerplate longer than the Magna Carta.” Exemplifying the phenomenon of iterability, by which a sign is both readable and altered in a new context (Derrida 1988, 10-11), the Magna Carta, in Klinkenborg’s account, transforms from an iconic expression of fundamental rights to a generically lengthy, perhaps impenetrable, legal document. Klinkenborg’s observation also supports a larger deconstructive point concerning contract, especially in the present day: Rather than an exception to the rule that contract draws on and thus manifests an exercise of free will, the typically non-negotiable fine print, or boilerplate language, of contract can be understood as the very paradigm of contract practice and expression.

Taking a broad view of the notion of standardized language, this chapter examines the nature of contract as a form of expression and a cultural phenomenon that reveals the contours of the American notion of freedom. To do so, the chapter considers the language of
boilerplate—meaning both the term “boilerplate” as well as the standardized provisions to which it refers—as an entry point to understanding the American conception of contract. Looking beyond the particular instantiation of boilerplate, discussed in the previous chapter, as terms that literally and figuratively frame a contract document, this chapter identifies a variety of meanings and treatments of boilerplate in U.S. Supreme Court opinions and legal scholarship. The range of contractual instances identified as and characteristics attributed to boilerplate in judicial and scholarly thinking reveal boilerplate as an as an exemplar of contract language, rather than an exception. As this chapter will demonstrate, boilerplate instantiates the phenomenon of iterability—or the necessary possibility of the signifying form being repeated in a new context, freed from a referent (Derrida 1988, 10-11)—in contemporary American life, and thus serves as a model of expression, in general.

At the same time, the notion of boilerplate as a distinct form of contract language, notwithstanding its prevalence as well as its expressive range, indicates an ongoing investment in a traditional notion of contract understood to be tailored and expressive of will. The term “boilerplate” takes on varied meanings in Supreme Court opinions and scholarly approaches; ¹⁰⁹

¹⁰⁹ “Boilerplate” figures in a number of ways in the language of judges, including in cases dealing with issues that are not related to contract, as considered in greater depth below. Even within the realm of contract, because of the variety of contexts in which scholars think about the operation of form language (see Rakoff 2007, 203), “boilerplate” is used by different people to mean somewhat different things. In the context of automotive-supply contracts, Omri Ben-Shahar and James J. White refer to the non-negotiated templates drafted by original equipment manufacturers for their contracts with tier-1 suppliers as “boilerplate.” For Ben-Shahar and White, “boilerplate” is regularized (as related to each manufacturer), one-sided, non-negotiated language that is nonetheless understood by and binding on sophisticated parties. Clayton Gillette similarly invokes the term “boilerplate” in referring to “widespread contracts,” or standardized language, between buyers and sellers (100). Stephen J. Choi and G. Mitu Gulati refer to standardized language between sophisticated parties as boilerplate in the context of bond and derivative contracts, stressing the lack of power imbalance (2007, 145). In this context, standardization exists in the market as a whole, unlike the automotive supply contract situation. For Ronald Mann, boilerplate has the potential to be made legible through standardization but may also remain invisible in the context of credit card agreements to consumers who will be bound and affected by such language. Michelle Boardman refers to “fixed language common to an industry or across industries” (177), but views it as predominantly inscrutable, especially, as she discusses, in the case of insurance contracts. Thus by virtue of its being “standardized,” boilerplate is potentially
its invocation, nonetheless, as a particular mode of expression—a shorthand for a particular constellation of contractual circumstances that lead one to view the words in a certain way—reveals the persistence of a legitimating rationale of contract that involves knowing participation and autonomy.\textsuperscript{110} This ideal of agreement, as I refer to it, can be traced back to the related notions of freedom and agency that contract manifested and epitomized in the nineteenth century “Age of Contract.”

As a “worldview [that] idealized ownership of self and voluntary exchange between individuals who were formally equal and free” (Stanley x) as well as a function of the market, which necessarily creates equivalences in circumstances of inequality, nineteenth-century contract served at times to naturalize inequities. In the current age, the constraints on freedom naturalized through contract—the way contract generates an “illusion of free will”—may be more evident. However, the perception of boilerplate as a distinct phenomenon and

\textsuperscript{110} Margaret Radin refers to a “knowing understanding” involving “affirmative action” as elements of the traditional notion of contract as a manifestation of consent (2000, 1126).
mode of expression attests to an ongoing belief in the contract ideal. As such, the current “Age of Boilerplate” can be understood as an outgrowth of the treatment of contract in the nineteenth century. At the same time, the current age serves as a particular moment in American history that can shed light on the American conception of agreement, freedom and agency revealed through the phenomenon of boilerplate.

This chapter begins to identify the contours of the American ideal of agreement by considering the ways courts and scholars discuss boilerplate. As such, this chapter approaches boilerplate as a form in language or a type of utterance. The very difficulty of pinning down a single definition of “boilerplate,” along with the paradoxes inherent in the conceptions and functions of language to which it refers, offer a point of entry into a consideration of our current notion of contract.¹¹¹ The complexity of boilerplate also facilitates consideration of the insights of deconstructive approaches to speech-act theory,¹¹² boilerplate sheds light on the theoretical functions of formulaic utterances, or “written communication,”¹¹³ more generally, expressed by scholars such as Jacques Derrida. The chapter thereby suggests that the way in which we use language, especially to speak about contracts, illuminates a persisting ideal of contract as a vehicle for social participation.

¹¹¹ Citing Arthur Leff, Rakoff notes that a standard form contract may be distinguished from a contract of adhesion, as in the case of cases of “battles of the forms” under UCC 2-207 between merchants (Rakoff 1983, 1207 note 118). The scholarship considered here, however, does not extend to such transactions, focusing instead on situations in which there is some asymmetry, at least in terms of which party drafts the form.
¹¹² I do so aware of the peril. As Dennis Patterson has noted, as a result of “its association with deconstruction, any mention of the term [postmodernism] in analytically minded circles is met with ridicule” (64).
¹¹³ In “Signature Event Context,” Jacques Derrida interrogates the relationship between writing and context, among other things, and, in doing so, self-consciously invokes the phrase ‘written communication’ as he demonstrates that the traits of writing may be generalized to all language and experience (7-11). Because this essay focuses on the function and treatment of actual writing, I borrow the term acknowledging the post-modern resonances of Derrida’s usage. Derrida speaks largely to a philosophical presumption of the subordinate position of writing to speech, challenging the meaningfulness of distinctions between types of gestures (Derrida 1988). This chapter, however, uses the instance of actual writing or text to refer to printed matter (rather than in the theoretical sense) as a case study in examining the implications of Derrida’s theories, among other things.
To this end, this chapter situates the current era of contract in relation to the emergence of contracts in the nineteenth century. It then troubles the meaning of “boilerplate,” surveying the ways in which the term is invoked in Supreme Court opinions. Justices often dismiss language labeled boilerplate (or “mere boilerplate”) as insufficiently expressive, though not typically in the context of contractual issues. Examining chronologically the rhetorical treatment of boilerplate by the Supreme Court in cases involving contractual issues, the discussion that follows reveals the role of boilerplate as the language of contract; it also points to the lurking tension between the fact of standard-form contract terms and the ideal of knowing participatory agreement. The chapter then turns to the many ways that scholars figure boilerplate. In doing so, the discussion demonstrates the expressive possibilities of standard-form language by exploring certain of Derrida’s insights. In particular, through an analysis of the phenomenon of iterability, the chapter underscores the relation between boilerplate and its presumed counterpoint, the traditional view of contract as tailored, intentioned expression. Nonetheless, as the final section of this chapter explains, contemporary scholarship views boilerplate as a special case. In doing so, the approaches of scholars collectively affirm an ideal of agreement, as a conceptual touchstone that frames their understanding of boilerplate. In this manner, the chapter reveals not only the expressive potential of boilerplate but the enduring ideal of agreement in an Age of Boilerplate that the very conceptual distinctiveness of boilerplate reinforces.

I. An Ideal of Agreement from the Age of Contract to the Age of Boilerplate

Because of the deference given by courts to what was considered contractual freedom (Friedman 2005, 404), scholars identify the nineteenth century as the moment in which the law of contracts in the United States came into its own. In the view of some historians, this
freedom, understood to involve the unhampered autonomy of the parties to enter into a contract, reflected a belief that the arrangement was based on mutual agreement (see Atiyah 4). Contract also figured prominently in emancipation; former slaves were understood as free in large part because of their ability to contract (Stanley x, 9). A sign of emancipation, contract was understood as an obligation resulting from a freely-entered bargain struck by individuals who were, at least formally, equal and autonomous (Stanley 1). Contract thereby symbolized the values of agency, freedom, and responsibility and manifested freedom and autonomy, functioning as a transaction and social relation based on ideas of “self ownership, consent and exchange” (x).

As such, as the Introduction and Chapter Three discuss, the notion of contract had an impact on individuals and played a role in facilitating their pursuit of freedom. Former slaves drew on contract principles, if not always successfully, to enforce their rights to wages and proper treatment through litigation; freedwomen invoked the language of contract in claims against their husbands for ill treatment or lack of support in marriage (51). Nineteenth-century contract thereby served as both a metaphor and a vehicle for social participation, reinforcing ideals of autonomy, self ownership and consent (Stanley x).

By “mark[ing] the difference between freedom and coercion” (Stanley 2), however, contract reinforced inequalities and constraints to which parties were already subject. In this manner, the incongruities between free expressions of autonomy and the constraints of the market were absorbed if not resolved in the treatment of contracts. The very notion of American freedom and, in Willard Hurst’s vision, individualism or self-realization, is framed in this period.

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114 In Willard Hurst’s celebrated account of the late nineteenth century, the law went beyond mere laissez-faire policy, and actively facilitated the realization of individuals’ potential in large part using contract law.
in terms of market exchange. In tandem with manifesting principles of autonomy and liberty in
nineteenth-century America, contract also facilitated the celebration of free-market relations
(Stanley xii–xiii).

Thus, in the American experience, contract served as a powerful but necessarily
qualified ideal. Beyond the experience of contract, legal doctrine and case law have tapped into
the rhetoric of the ideal of agreement, or the possibility of a “meeting of the minds,” while also
acknowledging the limitations of contract in practice as a vehicle of human connection and
expression of autonomy. Nineteenth-century contract law already privileged objective
indications of intent, reasonable understandings, and trade practice (Hurst 14, 21), thereby
delineating the idea of agreement as the expression of an autonomous individual. At the end of
the century, Oliver Wendell Holmes pointed out in his famous essay, “The Path of the Law,” that
to understand contract law one must recognize “that the making of a contract depends not on the
agreement of two minds in one intention, but on the agreement of two sets of external signs—not
on the parties’ having meant the same thing but on their having said the same thing” (464). The
idealized rhetoric of contract as a “meeting of the minds” has long been informed by the formal

Celebrated as a vehicle for expressions of freedom and autonomy, contract, as it
emerged from the nineteenth century, was and remains a function of the market. In this manner,
the vision and function of contract in this seminal period laid the groundwork for a presumption
of agency and choice in the experience of agreement, and of contract in particular. As a result, in
the context of globalization and digitalization in which forms of contract proliferate, the tensions
inherent in contract law continue to yield complicated notions of agency and social participation.
The incongruities of contract as a manifestation of free will endure in a world of proliferating “standard-form agreements;” threads of the narratives woven from and around the experiences of industrialization and emancipation persist in our presumptions and values. Agency, autonomy, and assent still underpin traditional approaches to contract. The market, as it has evolved, also remains a defining element in our understanding of contracts. The prominence of a law-and-economics approach in judicial consideration of contracts, as well as in a significant portion of contract scholarship, reflects the possibility of efficient market transactions as a powerfuljustification of contract enforcement. As in the past, market-based justifications are not necessarily compatible with those based on the idea of consent.

From one perspective, contract is not currently viewed as the principal vehicle for securing one’s rights or expressing autonomy. As Justice David Souter noted at the end of the twentieth century, “Including a provision in a private contract, by contrast [to the Constitution or statutes], is barely a prima facie indication that the right secured is “important” to the benefited party (contracts being replete with boilerplate), let alone that its value exceeds that of other rights not embodied in agreements … or that it qualifies as “important”… as being weightier than the societal interests advanced by [principles expressed in statutory form]” (Digital Equip. Corp. v. Desktop Direct, Inc. 879).115

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115 In this case, the Supreme Court held that refusal to enforce a settlement agreement is not immediately appealable under the collateral order doctrine as a practical construction of the “final decision rule.” The rule allows parties to appeal from a narrow class of decisions that do not terminate the litigation but must be treated as final, codified in Section 1291 of the Judicial Code.
Following the traditional approach, however, certain contemporary thinking reflects an enduring belief in contract as a vehicle for the enhancement of freedom and welfare. For some, contract still retains its possibility for enabling self-realization. Thus:

Contracts are assumed to be the product of bargaining and mutual assent. Enforcing their terms presumptively enhances welfare because parties generally know what is good for them. When they trade quid pro quo, each party choosing what he is to get over what he is to give, each party comes out better off, and the same set of resources produces the same sense of satisfaction overall. And, enforcing the terms of contracts also presumptively enlarges freedom because each party chose to enter the arrangement. Taking someone’s voluntary commitments seriously both dignifies his freedom and enhances his opportunities for expressing that freedom (Rakoff 2007, 202).

Though it has always been understood to be qualified, the conceptual framework of contract as a function of a “meeting of the minds” endures into the current digital age and can seem almost inescapable. Agreement in the law does not technically reflect a subjective “meeting of the minds.” However, as the preceding chapter demonstrates, the notion of an original instance of actual agreement remains a compelling justification that underscores traditional canons of contract interpretation. Noting the persistence of this notion in judicial language, Stewart Macaulay has observed that

Despite almost a century of celebrating an objective theory and hundreds if not thousands of cases talking about a duty to read, contract is still supposed to rest on choice. Academic writers can brush aside the phrase “the meeting of the minds,” but courts still mention it constantly because it does express an important rationalization widely accepted in society for contract liability (2003, 63).

Yet, even in some scholarship that views itself as moving past a “meeting-of-the-minds” model, the framework of agreement persists implicitly.

In the current digital age, a new paradigm for contracts may be emerging. In an era of endlessly reproducible text and hence both easy standardization and easy customization of
terms (Radin 2007, 190), contract—and thus the way we think about agreement—can be seen to have taken a new turn. Indeed, in seeking a new approach to contracts, scholars have self-consciously given attention to the phenomenon of boilerplate, the largely non-negotiated, standardized language of contracts that has become pervasive in contemporary American life.\textsuperscript{116}

This recent scholarly attention, highlighted in \textit{Boilerplate: The Foundation of Market Contracts} (2007) (hereafter, \textit{Boilerplate}) and related work, indicates a view of this form language as a new paradigm or subset of contract. Many scholarly pieces on boilerplate focus on the specific context of the particular type of transaction being considered, rather than generalize about the nature of boilerplate.\textsuperscript{117} Yet the existence of a collection focused on “boilerplate” reflects the view that boilerplate is a distinct form, a phenomenon different from traditional contract (Ben-Shahar 2007, xiv).\textsuperscript{118}

Nonetheless, as this chapter will ultimately demonstrate, an ideal of agreement persists in the notion of boilerplate and its treatment in some areas of legal scholarship.\textsuperscript{119} This ideal of agreement continues to resurface in a number of ways, in contrast to the views expressed by some scholars, who see themselves as disavowing, or at least moving beyond, a traditional

\textsuperscript{116} Arguably, the phenomenon and scholarly awareness of boilerplate are not new. The prevalence of standard form contracts has been acknowledged for years (see Slawson 1971), but the preponderance of standardized agreements has become more pronounced, especially in the experience of ordinary life (Korobkin 1203; Hillman and Rachlinski 435).

\textsuperscript{117} However, not all follow this approach. Henry Smith, for example, conceives of boilerplate as particular common provisions that relate to recurring issues, and thus as a specific portable type of expression distinguishable from contract. Robert Ahdieh takes what might be a broader view, including not only standardized terms but the “contracting norms of a given industry”\textsuperscript{9} to be forms of boilerplate (1036).

\textsuperscript{118} Some scholars have resisted the re-conceptualization of standard-form contracts. Randy Barnett, for example, has suggested that a consent theory of contract is applicable to both traditional and form contracts (627). However, Margaret Jane Radin’s book on the phenomenon of boilerplate, \textit{Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law}, arguing for a new analytic framework for the particular phenomenon that boilerplate presents, further demonstrates the theoretical shift, at least by some.

\textsuperscript{119} At least one scholar calls into question the network model of shared norms. Annelise Riles identifies the breaks or disconnections in the experience of participants in the global derivatives market.
approach. The most common, and perhaps fundamental, manner in which the ideal of agreement is invoked is in the distinction of boilerplate from the idea of traditional contract. By distinguishing boilerplate, such scholarship implicitly identifies traditional contract as a persisting and relatively coherent norm. In this manner, contract considered non-boilerplate serves as an ideal, even as the reality of the “heterogeneity of contractual contexts” precludes a coherent theory of contract (Schwartz and Scott 543). Recent discussions of boilerplate also invoke, though often indirectly, other aspects of an ideal of agreement, such as a synchronic instance of intention.

Collectively, then, this scholarship tells another story, which is at odds with the turn away from traditional contract that some of the authors understand their work to represent. Though presumably considering a new model, these different approaches to boilerplate contain a number of narrative threads. These threads, when read together, reveal as a reference point the notion of autonomous actors voluntarily entering into a knowing agreement. As a result, the implicit narrative of the possibility or ideal of agreement continues to underpin an idea of contract, even in an Age of Boilerplate.

In light of the pervasiveness of standard-form-contract terms in contemporary society, boilerplate, like contract in the nineteenth century, offers a provocative lens through which to view the values and processes of contemporary agreement.\textsuperscript{120} By attending to the language of and surrounding boilerplate, this chapter will explore both the function of boilerplate

\textsuperscript{120} A contract document can create a connection between “the parties’ lived reality [and] an overarching worldview,” which may have implications for how we understand ourselves (Suchman 126). In considering the role of contract documents, scholars must also remain cognizant of the possibility that documents may be peripheral to the arrangement between or interaction of parties (Macaulay 1963) and/or operate in ways that are not directly expressed in the particular language they contain. In some situations, reading the documents at all may not make sense or is deemed unnecessary (Macaulay 2005, 126 note 38).
as a paradigmatic instance of expression as well as the particular persisting notion of agreement that it implies. To do so, the following sections will consider the etymology of the term boilerplate and its invocation in judicial opinions, before turning to the most recent treatment of boilerplate by legal scholars. Throughout, this chapter relies on and applies the approach and insights of speech-act theory. Through this application to the language and operation of contract, the chapter also seeks to illuminate and underscore the significance of a deconstructive perspective for the understanding of contract in the United States.

II. The Meaning of “Boilerplate,” or, Perspectives on a Constative Utterance

A. A Diachronic Perspective

Like “contract” in the nineteenth century, the term “boilerplate” in the current age evokes various aspects of a phenomenon, in this case involving standardized terms. Yet boilerplate, in contrast to contract, does not mark a distinctively legal notion that ultimately permeated the cultural imagination. Instead, the expression boilerplate has been drawn into the legal vocabulary from the broader cultural lexicon of technology. The term boilerplate emerged from the industrial age and its etymology reflects the material mechanisms of social participation and individual realization in American culture. In addition, the evolution of the word highlights the characteristics of boilerplate in contemporary usage that complicate our view of contracts as a potential medium of agreement.

Originally, boilerplate referred to ship siding and the plating of ship and locomotive steam engine boilers of the Industrial Revolution (Stark 2003, 9; Bast 155). By some accounts, the term also referred to the standard-sized, but individually-marked, identification plates that were attached to each boiler (Stark 2003, 9). By the end of the nineteenth century,
“boilerplate” referred to the print casts of syndicated articles that were sent to local newspapers. Thus, before the height of the “Age of Contract” in the late nineteenth century, boilerplate was a material artifact associated with literally transportable language. The usage of the word boilerplate became increasingly figurative as, by the start of the twentieth century, it came to refer to the content of syndicated news items and later, to generic expression, especially the formalized standard language of contract (Bast 155).

Currently, the term retains its figurative sense of standardized language, though contractual provisions are increasingly being conflated with consumer products themselves through what Margaret Radin calls ‘technological protection measures’ that operate as forms of self-help or private injunctions, such as anti-copying software devices (2002, 1139). Such developments suggest that there may soon be a new era of a material manifestation of boilerplate; at the very least, they highlight one of the many notable characteristics—this one involving the interplay between the figurative and literal—that color contemporary conceptions of boilerplate.

B. In Judicial Opinions: More than “Mere” Boilerplate?

Before turning to the varied use by contemporary scholars of the term “boilerplate,” I aim to offer an overview of the cultural resonance of the word by examining its

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121 Certain contemporary invocations of the term echo the suggestion of mobility implied by its earlier usage, such as Smith’s notion of boilerplate as “self contained…highly standardized” and portable and thus less context dependent than more-tailored contractual terms (164). Smith’s consideration of boilerplate, touched on in the preceding chapter, also envisions its mechanical operation; he discusses the types of boilerplate provisions discussed in Chapter One: “provisions that typically are found at the back end of a contract and deal with recurring matters” (Smith 167), such as the governing law, merger and severability provisions, but he also notes the “broader sense” of boilerplate as “any standardized term in a contract” (167 note 11).

122 Radin identifies three eras of boilerplate, the first “involved a rigid, heavy metal object, the piece of metal produced by a linotype machine” (2007, 190). The second was a period of “modularity through recombination…by photocopying [form files], then manually cutting and pasting, and then retyping.” The third era, in which we find ourselves, is that of “digitized repurposing—computer reproduction and recombination” (191).
use in judicial opinions, especially those of the Supreme Court. The usage of the word “boilerplate” in judicial opinions underscores the range of ways in which we conceptualize form language. In addition, an examination of these opinions, spanning the latter half of the twentieth century to the present, illuminates the broader issue of how we think about the role of agency and the relation of the role of agency to our use of language in the law. More often than not, the word “boilerplate” appears in an opinion that does not address a contractual dispute, reflecting the relevance of both standardized language as much as original, specific and intentioned expression in various areas of the law. A closer examination of the handful of cases in which members of the Court invoke the word “boilerplate” in the context of a contractual dispute further reflects the way in which the idea of boilerplate—standardized repeated language—has both been thought of as part of the composition of, if not the key to, written contracts for some time, and has been invoked as paradigmatically opposed to an ideal of negotiated agreement. As such, the use of the word itself reflects the ongoing tension in the relation between the ideal of agreement reflected in contract and boilerplate as a regularized component of a contractual document; contemporary scholarship thus contends with and manifests this tension. From a speech-act perspective, the various usages also indicate the many ways in which words can mean, and suggest an idea of form language as conceptually distinct from original formulations.

Most often, the word “boilerplate” is invoked in Supreme Court opinions in dismissing language as ineffective as a result of its being unsupported, generic, and/or lacking specificity (see Washington v. Confederated Tribes of Colville Indian Reservation (1980);
Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson (1968); Watkins v. Murray (1989)(Marshall, J., dissenting to denial of writ of certiorari); Matsushita Elec. Indus. Co., Ltd. v. Epstein (1996); Kentucky Dept. of Corrections v. Thompson (1989)(Marshall, J., dissenting). The legal circumstances in which language is labeled “boilerplate” are varied. The Justices, for example, dismiss a bankruptcy court approval of a plan of reorganization as “boilerplate” (Protective Committee v. Anderson); find “boilerplate” prison regulation provisions ineffective (Kentucky Dept. of Corrections v. Thompson (Marshall, J., dissenting)); and, in a death penalty case, reject the claim that the “boilerplate” language of a verdict form succeeded in correcting insufficiently informative jury instructions (Watkins v. Murray (Marshall, J., dissenting to denial of writ of certiorari)). In such cases, the reference to boilerplate is pejorative; Justices often reject the language in question as “mere boilerplate” (Protective Committee v. Anderson; Kentucky Dept. of Corrections v. Thompson (Marshall, J., dissenting)), “no more than glorified boilerplate” (Aberdeen & Rockfish, Co. v. Students Challenging Regulatory Agency Procedures (SCRAP) (1972)) or “only boilerplate” (Matsushita Elec. Indus. Co., Ltd. v. Epstein). In other cases, boilerplate refers to meaningless language that lacks legal force as a result (Kuhlmann v. Wilson (1986); Lambert v. San Francisco (2000)(Scalia, J., dissenting)).

Although language philosopher J.L. Austin ultimately weakened the distinction between “constative” and “performative” utterances (see Austin 1961; 1975), these categories of

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125 Along similar lines, in Watkins v. Murray, Justice Thurgood Marshall dissented to the Court’s denial of writ of certiorari in a death penalty case in which the trial court failed to inform the jury that it must consider mitigating evidence and to explain concept of mitigation. According to Justice Marshall, the jury instructions were “insufficient to inform the juries of their duty to consider factors in mitigation. Nor did the verdict form correct this error, as it merely stated in boilerplate language that the juries had considered evidence in mitigation of the offense… the instructions provided absolutely no guidance on what constitutes relevant mitigating evidence or how the juries should have considered such evidence” (909-10).
speech act serve to illuminate the many ways in which boilerplate signifies. By “constative,” Austin suggests an utterance that is descriptive and can be deemed true or false. A “performative utterance” in Austin’s initial articulation would include an utterance that is not true or false and “the uttering of [which] is, or is part of the doing of an action” (1975, 5). In speech-act terms, then, “boilerplate” in these cases operates as a constative, or descriptive, statement of a performative utterance, the act of which is its failure to perform.

While further examination of boilerplate taken up in the sections that follow reveals the performative potential of boilerplate—which operates, at times, at odds with its operation as a constative utterance—the tagging of generic language as “boilerplate” suggests its functional ineffectiveness as expression in the law. Justice Antonin Scalia’s dissent to the Supreme Court’s denial of a writ of certiorari, or a petition to review a lower court, serves as one example. Justice Scalia discusses the lower court’s denial of particular facts so as to avoid considering relevant precedents regarding the Takings Clause of the Fifth Amendment, limiting the government’s power to take private property for public use; he states: “[these precedents] can surely not be evaded by simply adding boilerplate ‘ordinary [zoning] criteria’ language to the denial. The increasing complexity of land-use permitting processes, and of the criteria by which permit applications are judged, makes an ‘ordinary criteria’ claim almost always plausible” (Lambert v. San Francisco). In a related vein, boilerplate has been rejected by the Court

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126 Shoshana Felman explores the paradox of the promise in Don Juan in connection with the difficulty encountered by Austin in offering a satisfactory constative statement of the performative. In doing so, she discusses the “subversive, and self-subversive, potential of the performative” reflected in Austin’s work (43).

127 In this case, the owners of a hotel sued the City of San Francisco for denying their application for a permit to convert residential units to tourist use, when, pursuant to the City’s land-use law requiring owners to contribute to the replacement costs of residential units, the owners offered a sum significantly lower than the city’s estimation of these costs. The hotel owners claimed that the requirement that property owners pay a replacement fee is unconstitutional under Supreme Court precedents. The California Court of Appeal affirmed the trial court’s rejection of the owners’ claim (a decision affirmed by the majority of the Supreme Court in its denial of a writ of
because of its lack of specificity (see, e.g., Wilkinson v. Austin (2005); Am. Textile Mfrs. Inst., Inc. v. Donovan)\textsuperscript{128} and it is seen as at odds with a substantive vehicle of communication that can further knowing consent. Notably, in Justice Thurgood Marshall’s dissent to the Court’s denial of a grant of certiorari in a capital case involving a waiver of a jury trial, he finds the fact of the defendant having signed “the boilerplate waiver form voluntarily…constitutionally inadequate” evidence of the waiver being “knowing and voluntary” (Jells v. Ohio 1114). In this opinion, the standardized form of language labeled “boilerplate” reads as not only insufficiently considered, but also as incapable of facilitating “knowing” consent. The usage thereby suggests an ideal of specific, original language as an effective vehicle of expression under the law, at least in certain circumstances. Thus, in these invocations of “boilerplate,” outlines emerge of a conception of language to which an ideal of agreement might gesture.

certiorari). In doing so, the California court denied that the issue of replacement fees played a part in the City’s decision to deny the permit, asserting instead that the City rejected the permit petition due to ordinary zoning criteria. Justice Scalia rejected this account, pointing to the court’s acknowledgement that the City compared the fee amount proposed with significantly higher offers by other hotels that succeeded in obtaining permits. As such, the ordinary criteria, or “traditional zoning concerns, [such] as compatibility with surrounding development, effect on traffic patterns, and availability of housing stock” (1550), arguably have a legal effect, justifying the denial of a permit for the City. In Justice Scalia’s analysis, these generic, or boilerplate, provisions, by their nature, ought not to.

In a similar vein, in Anderson v. Liberty Lobby (1986), Justice William J. Brennan dissented to a holding that the Supreme Court should weigh evidence at the summary judgment stage of a libel case: “The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions…. But the Court's opinion is also full of language which could surely be understood as an invitation-if not an instruction-to trial courts to assess and weigh evidence much as a juror would” (265-66).\textsuperscript{128} In Wilkinson v. Austin (2005), the Court held that prisoners have a liberty interest protected by the Fourteenth Amendment due process clause to avoid assignment to a state supermax prison and that the state’s informal, non-adversary procedures for placement were adequate to safeguard inmates’ liberty. Concerning the new procedures, the Court observed, the “District Court ordered the Bureau of Classification to prepare a ‘detailed and specific’ statement ‘setting out all grounds’ justifying OSP placement including ‘facts relied upon and reasoning used.’ The statement shall ‘not use conclusory,’ ‘vague,’ or ‘boilerplate language’” (220). In American Textile Manufacturers Institute, Inc. v. Donovan (1981), the majority opinion discussed the Occupational Safety and Health Administration (OSHA)’s failure to make a necessary determination or statement of reasons for the wage guarantee requirement: “[W]e decline to accept this “boilerplate” statement as a sufficient determination and statement of reasons within the meaning of the Act” (540 note 74).
Yet Supreme Court usage of the term “boilerplate” in a few other opinions suggests a view of language that gains, rather than loses, its significance by virtue of its lack of originality. For example, holding that Congress did not intend the anti-discrimination protections of Title VI to apply to employees of U.S. companies working outside the United States, Chief Justice William Rehnquist noted that the statutory definition of “commerce” as involving trade “between a State and any place outside thereof” was “ambiguous and [did] not speak directly to the question presented [of whether the statute applies extraterritorially” (E.E.O.C. v. Arabian American Oil Co. 250 (1991)). Instead, the significance of these words, in particular whether they are to be read as applying outside the United States, is derived by way of reference to the same language in other circumstances. As Rehnquist asserts, “The intent of Congress as to the extraterritorial application of this statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas” (250-51). More recently, interpreting a statutory requirement that “no action shall be brought” by prisoners unless all administrative procedures are exhausted under the Prison Litigation Reform Act, Chief Justice John Roberts overturned the lower court’s dismissal of the entire action in the event a prisoner failed to exhaust some but not all of the claims asserted in the complaint. The Appellate Court’s assertion that Congress would have used word “claim” rather than “action” had it intended courts to retain unexhausted claims and dismiss only balance of suit was rejected by Roberts on the basis of the “boilerplate” nature of the provision:

This statutory phrasing—‘no action shall be brought’—is boilerplate language. There are many instances in the Federal Code where similar language is used, but such language has not been thought to lead to the dismissal of the entire action if a single claim fails to meet pertinent standards. Statutes of limitations, for example, are often introduced by a variant of the phrase ‘no action shall be brought,” but we have never heard of an entire complaint being thrown out
simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such rule would serve. The same is true with respect to other uses of the ‘no action shall be brought’ phrasing (Jones v. Bock (2007) 220).

Thus, while the “boilerplate” label often suggests a lack of meaning or substance, in some instances, the designation of language as boilerplate also suggests the way in which meaning is ascribed by way of reference to the presumed significance of the same language in other circumstances.

Even though the characterization of language as “boilerplate” may precipitate a determination of the language’s particular significance,\textsuperscript{129} the judicial treatment of the operation of boilerplate reflects the greater legitimacy usually granted to language not considered boilerplate. At the same time, certain invocations of the term in judicial opinions reflect the complexity of the operation of language in general, as well as the fact that the line between “mere boilerplate” and meaningful language is not always clear. Boilerplate, like any utterance, has the potential to exert its performative power, even in contravention of its constative meaning. In \textit{Sumner v. Mata} (1981), for example, the Court found that a federal appellate court erred in reconsidering facts already reviewed by the state appellate court in a petition for habeas corpus involving a claim of misidentification. Writing for the majority, Chief Justice Rehnquist suggested that the federal appellate court could have avoided reversal “had [it] simply inserted a boilerplate paragraph in its opinion” to the effect that it had reviewed the factual record and found that it failed to support the state court’s determinations (549). The majority opinion thereby recognizes the potential impact of a “boilerplate” reference to the review process. In the

\footnotesize{\textsuperscript{129} The type of analysis of the import of standard terms may be colored by its designation as boilerplate in a particular context. In the well-known case of \textit{Sharon Steel Corp. v. Chase Manhattan Bank, N.A.} (1982), the Second Circuit Court of Appeals asserted that in the case of indenture provisions, the “[b]oilerplate provisions are thus not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact” (1048).}
The above survey begins to illustrate the range of ways in which “boilerplate” is understood to operate. Most notably, in the majority of instances, “boilerplate” is used by the Supreme Court as a pejorative label for language that is perceived as failing in one way or another to do its legal work (even if that failure, is itself an act). In many areas of the law, the

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130 The opinion also implies a postmodern role for language, in which articulation (or at least the requirement thereof) precipitates consideration.

131 The way in which the language of the judicial opinion performs in tension with its stated objective calls to mind Stanley Fish’s discussion in “The Law Wishes to Have a Formal Existence” (1991) of Judge Alex Kozinski’s opinion in **Trident Center v. Connecticut General Life Insurance Company** (847 F.2d 564 (9th Cir. 1988)).
generic, unspecific nature of language identified as boilerplate is taken to indicate insufficient contemplation and/or as unable to transmit sufficient information to support principles of justice to which the law aspires. In other words, the treatment of “boilerplate” by the Supreme Court—in most instances, not in the context of contract-related questions—subtly suggests a privileging of specially tailored legal language and distinguishes boilerplate from the presumption of legitimacy associated with terms not considered boilerplate.

C. Concerning Contract Disputes: Boilerplate as/vs. “Genuine Agreement”

The majority of invocations of the term “boilerplate” in Supreme Court opinions do not involve a contractual question. The trajectory of the term’s usage in contract-related opinions reflects the ambiguous relationship between ideals of contract law and the notion of boilerplate. An examination of the idea of boilerplate in the handful of cases dealing with contract-related issues sets the stage for an evaluation of the recent scholarly approaches. Specifically, the Court opinions discussed reflect no clear delineation of boilerplate as a part of or an opposition to an ideal of contract. Instead they suggest an ambivalence concerning the relation between boilerplate and agreement. The treatment of contract and agreement in the case law reflects the deeply intertwined nature of the two legitimating and often contradictory contractual principles of agreement and the market reflected in contemporary scholarship.

In its contemporary sense (as opposed to a reference to scrap metal), the term “boilerplate” first appeared in Justice Hugo Black’s dissenting opinion in the case of National Equipment Rental, Ltd. v Szukhent (1964). In Szukhent, the Court upheld the validity of the terms of a standard form contract for the leasing of farm equipment by the Szukhents, a team of farmers in Michigan, from National Equipment Rental, a New York equipment leasing company.
Specifically, the Court held valid the designation of an individual chosen by and aligned with National Equipment to act as the agent of the Szukhents for service of process in the event of a suit; by designating an agent to receive process for the Szukhents in New York, National Equipment sought to establish the jurisdiction of a New York (rather than Michigan) court over the parties. Objecting to the majority of the Court’s validation of the provision on the basis of its divergence from the negotiated and knowingly accepted terms of a “genuine agreement” (332), Justice Black’s dissenting opinion invokes boilerplate as a fundamental and presumptively benign aspect of a contractual document. He warns, that the validation of the appointment of Florence Weinberg (the wife of an officer of National Equipment Rental) as the Szukhents’ agent in this case will lead to the unfortunate inclusion of similar clauses in “the ‘boilerplate’ of everything” (328). The opinion thus anticipates the often ambivalent and ambiguous scholarly and judicial acknowledgement of boilerplate as a manifestation of contract.

This case, precipitated by National Equipment Rental’s claims against the Szukhents for payment under the lease agreement, does not involve parties on both sides who are equally legally savvy and knowledgeable. Rather, as the dissenters suggest, this case implicates an asymmetric relation of power. Although standard terms often leverage a superior bargaining position of one party over another, Justice Black’s invocation of the term “boilerplate” in his dissenting opinion is neither pejorative nor suggestive of legally ineffective language. Instead, in this first in a number of cases involving the Court’s rhetorical negotiation of the role of agreement and agency, the word “boilerplate” denotes language which constitutes

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132 A second dissenting opinion, penned by Justice Brennan and joined by Chief Justice Earl Warren and Justice Arthur Goldberg, rests on the argument that federal standards should be used to define agency and that such standards were not met. In formulating these standards, Justice Brennan’s opinion invokes the power relation between the parties, as well.
part of a written contract. At the same time, Justice Black expresses reservations regarding the
majority’s decision to find valid the service of process and thus, to subject the Szukhents to suit
in a forum “thousands of miles from home” (324) on the basis of an agent unknown to them who
was designated in fine print (319). Justice Black’s concerns thereby reveal ways in which
boilerplate is, nonetheless, conceived as a potential hidden threat to the ideal of agreement.

In Szukhent, the majority opinion as well as Justice Black’s dissenting opinion
reflect a vision of contract as a vehicle for the realization of actual intentions. In the majority
opinion written by Justice Potter Stewart, the service of process of the agent designated in the
document is valid, despite the fact that she was not personally known to the Szukhents. The
analysis on which the opinion rests its holding gestures toward the contractual document as
reflective of the Szukhents’ meaningful consent to the appointment of Florence Weinberg as
agent as well as to the fact that Weinberg notified the Szukhents that process had been served.
Though the majority opinion ultimately takes a pragmatic approach, resting its holding on the
fact of actual notification of the parties by the agent, that is, an ex-post view of the prompt and
successful service of process,133 its discussion of the document reflects the need to counter
claims of its ineffectiveness as articulated in the dissent. Referring to the document in
addressing Justice Black’s critique, the majority opinion acknowledges the significance of
agreement as a cognitive participatory process. The majority opinion underscores its
understanding of the original will of the parties as reflected in the language of the document,134

133The appointed agent was not obligated under the terms of the lease to notify the parties promptly of service of
process (314). Justice Stewart’s opinion makes clear that “[a] different case would be presented if Florence
Weinberg [the designated agent] had not given prompt notice to the respondents, for then the claim might well be
made that her failure to do so had operated to invalidate the agency” (318).
134By Justice Stewart’s careful account, this language was “inserted by the petitioner and agreed to by the
respondents” (316).
as it quotes the relevant paragraph of the contract and discusses its purpose and the parties’ intent. Describing the form of the document, the majority opinion underscores its accessibility and thus supports its view of it as a manifestation of actual agreement. The majority opinion observes that the equipment was obtained “under a lease … on a printed form not less than a page and a half in length, and consisting of 18 numbered paragraphs.” It goes on to note that the provision in question appeared in “the last numbered paragraph… just above the respondents’ signatures and printed in the same type used in the remainder of the instrument” (313). In marking the proximity of the Szukhents’ signatures to the relevant provision, the majority implicitly counters the claim that the Szukhents were unaware of such language.

Thus even the majority view attempts to bolster the legitimacy of its holding by framing the facts to suggest an agreement reflecting a knowing and participatory process. Justice Black’s dissenting opinion invokes a legitimating ideal of agreement more explicitly; it underscores the distinction between the document as entered into and the terms of a “genuine agreement” (332) to appoint a “genuine agent” (323). In characterizing the relationship of the parties, Justice Black’s dissenting opinion stresses the asymmetry of the parties’ knowledge and

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135 Although Justice Stewart excerpts the relevant contractual language in his opinion, he includes the entire paragraph in a footnote, as follows:

This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N.Y., as agent for the purpose of accepting service of any process within the State of New York (313 note 3).

136 Justice Stewart cites the choice-of-law language and the place in which the contract is deemed executed in support of his assessment that “[t]he purpose underlying the contractual provision here at issue seems clear. The clause was inserted … in order to assure that any litigation under the lease should be conducted in the State of New York” (316).

137 Justice Black’s dissenting opinion stresses the fact that the appointed agent was not personally known to the Szukhents, noting that “[o]nly after this suit was brought was it reluctantly revealed that Mrs. Weinberg was in truth the wife of one of the company’s officers” (319). The majority opinion rejects the argument that a possible conflict of interest undermines the validity of the agency, asserting that this view “ignores the narrowly limited nature of agency here involved” (317). In this way, the majority’s position reflects a more formalized vision of agency than the ideal of an actual or “genuine” agent invoked in Justice Black’s dissenting opinion.
power by highlighting the role of the Szukhents as country farmers\textsuperscript{138} and of the company as a “nationwide” rental business (319).\textsuperscript{139} Justice Black’s dissent invokes the physical nature of the document to underscore the imbalance of power and the lack of meaningful agreement. In contrast to the clearly numbered provisions described by the majority, the dissent notes that the relevant clause was “[i]ncluded in the 18 paragraphs of fine print” (319).\textsuperscript{140} The argument of the dissent then resists the possibility of the waiver of substantive rights through form language:

To give effect to the clause about service of process in this standardized form contract amounts to a holding that when the Szukhents leased these incubators they then and there, long in advance of any existing judiciable dispute or controversy, effectively waived all objection to the jurisdiction of a court in a distant State, the process of which could not otherwise reach them….The right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum is as ancient as the Magna Charta (324-25).

Justice Black’s critique of the majority’s holding invokes a standard of, in his words, “genuine agreement”\textsuperscript{(332)} involving authentic connection. Thus, his opinion argues for “clearly and unequivocally denounc[ing] as invalid any alleged service of process on nonresidents based on purported agency contracts having no more substance than [the one in question]” (323), especially given the fact that the agent was not personally known to the Szukhents. Considering the asymmetries of power between the parties that should weaken the force of the language of the document, Justice Black stresses the importance of negotiation:

“When one party, at its leisure and drawing upon expert advice, drafts a form contract, complete with waivers of rights and privileges by the other, it seems to me to defy common sense for this

\textsuperscript{138}This dissenting opinion re-introduces the respondents by name and notes their familial relation, making them more tangible as people than they might seem from the majority opinion: “Steve and Robert Szukhent, father and son farming in Michigan” (319). In addition to this introduction, Justice Black’s dissenting opinion uses similar phraseology referring to them as Michigan farmers no fewer than six times (319, 320, 323, 326, 327, 332).

\textsuperscript{139}Justice Black also refers to National Equipment as “[t]he New York company” (319) (which is technically, a Delaware corporation (318)), underscoring both the company’s relative sophistication and the advantage it enjoyed of bringing suit in a New York, rather than Michigan, court.

\textsuperscript{140}Justice Black’s citation of the relevant provision is preceded by an ellipsis (323) subtly emphasizing the way in which it might be lost in the fine print. The majority opinion includes a footnote citing the provision in full (313 note 3), but isolates the relevant language in its discussion (313).
for this Court to formulate a federal rule designed to treat this as an agreement coolly negotiated and hammered out by equals” (326). Indeed, he asserts, “[i]t is hardly likely that these Michigan farmers, hiring farm equipment, were in any position to dicker over what terms went into the contract they signed” (326). The ideal of a negotiated agreement, as Black envisions it, not only avoids the inequalities of position between the parties but contemplates some form of active participation and cognizance of the meaning and impact of the terms.141

Justice Black’s dissenting opinion explicitly distinguishes the form document from his ideal of agreement, involving transparency and agency:

This printed form provision buried in a multitude of words is too weak an imitation of genuine agreement to be treated as a waiver of so important an constitutional safeguard….Waivers of constitutional rights to be effective…must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language. It strains credulity to suggest that these Michigan farmers ever read this contractual provision…And it exhausts credulity to think that they or any other laymen reading these legalistic words would have known or even suspected that they amounted to an agreement of the Szukhents to let the company sue them in New York should any controversy arise….The idea that there was a knowing consent of the Szukhents to be sued in the courts of New York is no more than a fiction—not even an amiable one at that (332-33).

He also points to the latent threat of such language; in his view “this innocent looking provision for service of process in New York” leads to the “inevitable[e]” injustice of causing the Szukhents to bear the costs of litigation in another state rather than their own (327). This “very unjust result, is greatly aggravated…by [this] holding that a man can, by cleverly

141 This dissenting opinion analogizes this situation to that of an insurance contract, citing Supreme Court precedent acknowledging that “[t]he phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow” (326, citing Aschenbrenner v. United States Fidelity & Guarantee Co., 292 U.S. 80, 84-85 (1934)). Michelle Boardman discusses how this disparity endures in the context of insurance contracts.
drafted form, be successfully inveigled into giving up in advance of any controversy his traditional right” service of process and suit in his home state (327). 142

The law should not, in Justice Black’s view, grant form language the power to override the role of contract as an agreement considered and intended by two equally situated sides who are able equally to “negotiate[],” “dicker” and “hammer[]” out binding terms. 143 While Justice Black’s dissent makes clear the threat of the “form contract” as a surreptitious means of exercising power over a counter-party, the invocation of the term “boilerplate” operates as an acknowledgement of the accepted role of such formulaic (presumably non-negotiated) language: “The end result of today’s holding is not difficult to foresee. Clauses like the one used against the Szukhents—clauses which companies have not inserted, I suspect, because they never dreamed a court would uphold them—will soon find their way into the ‘boilerplate’ of everything from an equipment lease to a sales contract” (328). Thus, Justice Black’s dissenting opinion reflects a belief in a notion of authentic agreement, involving genuine agency, that legitimates and underwrites an enforceable contract. Yet his opinion cannot overlook the already existing prevalence of regularized language—boilerplate—which constitutes all types of

142 Justice Brennan’s dissenting opinion, which advocates federal standards to define agency, proposes denying validity in a case of conflict of interest and requiring that the appointment include the explicit condition that process be immediately transmitted to the principal (333). In light of the company’s role in preparing the document, the “individual purchaser [would not be] bound by the appointment without proof, in addition to his mere signature on the form, that the individual understandingly consented to be sued in a State not of his residence” (333). Justice Brennan’s language echoes Justice Black’s suggestion of a “genuine agreement” in its requirement of evidence of “knowin[g] and intelligen[t] consent” (334). Justice Brennan’s language also prefigures the dismissal of “mere boilerplate” that arises in later, noncontractual Court opinions. He asserts that “[i]t offends common sense to treat a printed form which closes an installment sale as embodying terms to all of which the individual knowingly assented” (334). Four of the nine judges share this view, suggesting a persisting if minority belief in an ideal of contract, at least in 1964.

143 Justice Black’s dissent captures the function of boilerplate as non-negotiable form language, asserting that “[t]he Court should reject any construction of [the governing statute or related formulation of standards] to help powerful litigants to achieve unbargained for take-it-or-leave-it contracts” (328). Implicitly, Justice Black recognizes the performative power of the language of the Court. Though he attributes to National Equipment the intent to precipitate such an outcome with the service of process provision, Justice Black notes that the Court’s holding serves “to guarantee that whenever the company wishes to sue someone who has contracted with it, it can, by force of this clause, confine all suits to courts sitting in New York” (327) (emphasis added).
contracts—indeed, “everything.” Justice Black’s dissenting language suggests as well an awareness of the nature of boilerplate and the way in which form language is generated and proliferates, echoing earlier articulations in new contexts.

In its use of the term “boilerplate,” Justice Black’s dissenting opinion implicitly acknowledges the ubiquity of form language as the medium of consent, or at least, as evidence of agreement. Even as Justice Black rejects the legitimacy of “form contracts” in overriding “genuine” deliberation and consent, or the lack thereof, the invocation of the term implies an accepted and potentially benign function in the manifestation of contracts. As such, the language and approaches of the Court suggest that in 1964 the ideal of agreement persists but does not necessarily prevail in practice. In this context, the introduction of the idea of “boilerplate” does not directly oppose it to meaningful language. Instead, the “boilerplate” contemplated serves as a component of contract that may, but not necessarily, impact parties. In this regard, it functions more like the language of contractual documents generally, rather than as a counter-paradigm.

Not long after Szukhent, the case of United States v. Seckinger (1970) invokes the idea of boilerplate as a component of a written contract. In Seckinger, the Court considered a common provision in fixed-price government contracts that states that a private contractor hired by the government “shall be responsible for all damages…that occur as a result of his fault or negligence” (208 note 9). In particular, the Court engaged the question of whether such language could be construed to indemnify the government in the event of government negligence, with the majority holding that it could. In this case, both Justice Brennan’s majority

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144Chapter Four broadens the perspective on the appeal of agreement in American culture, reading the Crying of Lot 49, in light of Justice Black’s contemporaneous dissenting opinion in Szukhent.
and Justice Stewart’s dissenting opinions insist “that the contract clause does mean exactly what it says” (216), while taking differing stances on the substance of the meaning. This case of quintessentially standardized language—in use “for more than 30 years” (218) and, as a result, disengaged from a coherent original rationale exemplifies the challenge of harnessing meaning in language. The opinions acknowledge the paucity of information concerning the history of the clause and, in the language of the majority opinion, the ultimate inaccessibility of “evidence concerning the actual intention of these particular parties with respect to that provision” (208). Yet, they each rhetorically invoke a legitimizing origin, that of, in the words of the majority, the “intention of the parties” (213), or, as the dissenting opinion puts it, of the “drafter of this clause” (220). Together, these opinions demonstrate the challenge of interpretation as well as the appeal of a determinative origin of intent, reflected in much contemporary scholarship. Against this backdrop of a quintessential case of contract language construction, Justice Stewart, writing in dissent, seizes on the neutral but potentially dynamic notion of “boilerplate,” asserting that as a result of the Court’s holding, “this innocuous boilerplate language [that by its terms indemnifies the government for any negligence of the

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145 This is the language of the majority opinion. The dissenting opinion uses similar wording: “For more than 30 years it has evidently been understood that these words mean what they rather clearly say—that the contractor cannot hold the Government for losses he incurs resulting from his own negligence” (218).

146 In yet another example of Fish’s insight about the potential of judicial language to perform its own contradiction (1991), the majority opinion belies its own assertion of the clarity of the language by restating it: “We agree with the dissenting opinion that the contract clause does mean exactly what it says. What it says is that Seckinger shall be ‘responsible for all damages’ arising from its negligence, that is, that the burden of Seckinger’s negligence may not be shifted to the United States” (216).

147 The majority opinion notes that “the clause was required in government fixed-price construction contracts as early as 1938…This fact merely precipitates confusion, however, because it was not until the passage of the Tort Claims Act in 1946…that the United States permitted recovery in tort against itself…Viewed in the pre-Tort Claims Act context, the purpose of this clause is totally unclear” (208).

148 The majority opinion acknowledges a determinative origin to be inaccessible: “there is not only no representation that further proceedings would aid in clarifying the intentions of the parties[,] there is…tacit agreement that the background of the clause has been explored as thoroughly as possible” (209).

149 The majority opinion mentions the issue of the need to seek the intent of the parties five times in its opinion (208, 209, 211, 212, 213).
contractor] is turned inside out” (218). Although, in Justice Stewart’s view, “[f]or more than 30 years it has evidently been understood that [the] words [of the contract] mean what they rather clearly say—that the contractor cannot hold the Government for losses he incurs resulting from his own negligence,” the majority opinion “says that the provision really is a promise by the contractor to reimburse the Government for losses it incurs resulting from its negligence”—liability for which a contractor could not have accounted when bidding to obtain the deal (218).

While Justice Stewart’s dissenting opinion conjures the possibility of contract language gone awry, it concludes with the proscription that “the author of the standard-form agreement…[should] state its terms with clarity and candor” (221).\(^{150}\) In doing so, it reasserts the possibility of boilerplate as not only acceptable and benign, but also capable of manifesting the substance of agreement.

*Seckinger* offers a view of “boilerplate” as standardized but by all accounts indicative of the substance of an agreement. However, two years later, in *The Bremen v. Zapata Off-Shore Co.* (1972), the majority of the Supreme Court upheld the enforceability of a forum selection clause, designating the venue for a suit, which was negotiated between sophisticated parties because, among other reasons, this “was not simply a form contract with boilerplate language that [one party] had no power to alter” (12 note 14). The majority opinion written by Chief Justice Warren Burger points to the record of alterations to the terms of the contract and to

\(^{150}\) It is possible that Justice Stewart considers the circumstances of this case more egregious than those in *Szuhent* because he sees in this case a greater disparity in power and information, among other things. His emphasis on the government’s responsibility is reinforced in his next sentence: “Surely no less is required of the United States of America when it does business with its citizens” (221-22).
the placement of the relevant clause near the signature line in support of its conclusion. Citing Szukhent for the principle that “parties to a contract may agree in advance to submit to the jurisdiction of a given court...[in] accord[] with ancient concepts of freedom of contract” (12), The Bremen majority deems the forum selection clause a “vital part of the agreement” (14 note 16). In light of evidence that the provision was duly considered and negotiated by the parties, the majority opinion offers it as a paradigm of contractual language distinct from boilerplate. In doing so, it also absorbs Szukhent into this conceptual landscape, notwithstanding the difference in the relative bargaining power of the parties and record of negotiation in the two cases.

Viewed together, the language of these opinions presents a manifestation of singular and “knowing” or meaningful expression in a dialectical relation with standardized boilerplate. However, the language of these opinions also blurs this distinction and complicates the relation; contract language both contrasts with and comprises boilerplate. Indeed, the subsequent extension of The Bremen’s holding to the enforcement of a forum selection clause printed on the back of a cruise ticket in the well-known case of Carnival Cruise Lines v. Shute (1991) illustrates the way in which the form document becomes conceptually blurred with what might be thought of as a non-boilerplate, dickered contract.

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151 The majority opinion’s mention of the proximity of the provision to the signature line echoes the majority opinion in Szukhent: “The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties’ signatures” (12 note 14).

152 Similarly, in Burger King Corp. v. Rudzewicz (1985), the Court sought evidence of fair notice to franchisees based in Michigan that they might be subjected suit in a Florida court and that they “purposefully invoked the benefits and protections of a State’s laws” (482). Pointing to the terms of the agreement, including “contractually required payments in Miami,” as “substantial record evidence indicating that [the franchisee] most certainly knew that he was affiliating himself with an enterprise based primarily in Florida” (480), the majority opinion distinguishes the language of the contractual documents as meaningful and accessible indications of the substance of the agreement as opposed to “merely boilerplate declarations in a lengthy printed contract” (484).

153 Specifically, The Bremen involved an “arm’s-length negotiation by experienced and sophisticated business men” (12) in a “far from routine transaction” (13), as opposed to the circumstances in Szukhent, described as involving Michigan farmers entering a form agreement with a New York company.
As reflected in the above exploration of Supreme Court opinions, judges may invoke “boilerplate” to denote an unoriginal formulation, that is, one which is not drafted for the particular circumstances, and not explicitly negotiated. However, the significance of characterizing an utterance as “boilerplate” varies. Outside the realm of contract law, “mere” boilerplate often lacks legitimacy and force, though its operation in a network of meaning in which its citationality can be used as an interpretive tool is acknowledged. In contracts, courts recognize the prevalence and operation of standardized terms, and opinions suggest the reality of boilerplate constituting the greater part of the body of a contractual document.\textsuperscript{154} Still, in the background, an ideal of knowing participatory agreement lurks in tension with the operation of boilerplate.

III. Boilerplate as Language, or the Expressive Potential of a Performative Utterance

A. Notions of Boilerplate in Scholarship

The varied treatment of boilerplate in the case law resonates in contemporary legal scholarship. To the extent that boilerplate reflects an exception to the rule of a traditional understanding of contract, form language identified as boilerplate might be seen—as Justice Black verged on suggesting—as the antithesis of a dickered, tailored contract, which ostensibly reflects a “meeting of the minds.” Yet, the approaches of scholars to standard contract terms complicate an understanding of the term boilerplate.

\textsuperscript{154} In \textit{Broad v. Rockwell International Corp.}, for example, a suit for a breach of an indenture, Fifth Circuit Court of Appeals Judge Randall noted that aside from the “business portions of an indenture,”—which are typically values represented in numeric terms, such as the principal amount of the notes, their interest rate, redemption prices and dates—“the remainder of the indenture is invariably made up of boilerplate provisions” (962). Even these terms, as the opinion implicitly acknowledges, tend to be embedded in standard-form provisions (see 948 note 22).
The expression boilerplate has been used to refer to “widespread contracts,” or standardized language, between buyers and sellers (Gillette 100); “fixed language common to an industry or across industries,” such as insurance terms (Boardman 177); and templates created by a particular original equipment manufacturer for contracting with certain suppliers, as in the automotive industry (Ben-Shahar and White), to name a few examples. Others identify as boilerplate those terms that may be “ancillary to the main terms of the transaction” (Gilo and Porat 2007, 66) or are “typically found at the back end of a contract and deal with recurring matters such as assignment and delegation, successors and assigns” (Smith 167). Boilerplate has been recognized in contracts involving sophisticated parties on both sides as well as those between individual consumers and corporations. It has been considered in contexts involving asymmetries of power as well as in those lacking such imbalance (see Choi and Gulati 2007, 145).

Because of “the range of situations in which boilerplate appears” (Rakoff 2007, 203), a variety of characteristics come to the fore; it becomes hard to pin down a single view of what we think of as boilerplate or how boilerplate language functions. Boilerplate has been identified by scholars as being both standardized and increasingly customizable (Radin 2007, 190); opaque to some parties and transparent to others (Boardman 176); inscrutable to all (or most) but familiar and, hence, valuable (Choi and Gulati 2006, 1152 note 83, 1160; Kahan and Klausner 721 note 16); presumptively reflective of substantive agreement (Johnston 2007); one-sided and non-negotiated but understood and accepted by parties (Ben-Shahar and White);

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155 Imbalances of power as reflected in the ability to set the boilerplate terms have been seen as compromising contract legitimacy (see Rakoff 1983). In practice, however, the use of one-sided terms may not always be consistent with a narrative of exploitation. Examining software license contracts, for example, Florencia Marotta-Wurgler finds no evidence of strategic use of dispute resolution provisions such as forum selection and choice of law clauses to the detriment of consumers (2007), nor does she find evidence that software publishers impose more unfavorable terms on consumers at later stages of rolling contracts (2009).
ubiquitous and context-specific (Rakoff 2007; Gillette 98); and portable and modular, in a way that maximizes context-independence (Smith 164).

Collectively, the scholarship sheds light on the variance, nuance, and implications of even the notion of standardization, arguably the most basic characteristic of form language.\(^\text{156}\) Some studies also stress and/or invoke aspects of negotiability. Boilerplate has been identified as a starting point for, if not the result of, negotiation (Ahdieh 1051–67; Johnston 2007, 15). In addition, notwithstanding the sense of boilerplate as an unintelligible stereotype, it has been shown to communicate in a variety of ways. At times, boilerplate can signal meaning in complex and multiple contexts and can do so beyond or at odds with the “plain meaning” of the words composing it (see Suchman 111-12; Gilo and Porat 2007; Gelpern and Gulati; Ahdieh).\(^\text{157}\) From a very different perspective, picking up on earlier approaches to standard forms,\(^\text{158}\) other scholars suggest that in the consumer context the terms of a contract are most accurately, if problematically for some, considered as part of the bundle that constitutes the product, rather than as a form of language (Baird; Radin 2007).

\(^{156}\) Ben-Shahar and White find overwhelming uniformity in the language of contracts used by each original equipment manufacturer in contracts with tier-1 automotive suppliers—noting the one million annual procurement contracts entered by General Motors all governed by the same terms—but find varied terms across original equipment manufacturers (31). In the context of bond and derivative contracts, standardization exists in the market as a whole, unlike the automotive supply contract situation, though Choi and Gulati (2007) have identified some variance in the words used for terms that are nonetheless considered interchangeable by the market (152).

\(^{157}\) Contracts can enable communication with third parties, or individuals or institutions not party to the contract (Suchman 112), as evidenced by Gelpern and Gulati’s work on sovereign bond contracts. Although contract language is not always central to parties’ interactions (Macaulay 1963), even between parties, contract terms sometimes signal meaning beyond the enforceable substance of a deal. For example, to preserve trust, business people might avoid complex or unusual terms, which may signal to a counterparty that one party seeks to resort to legal enforcement rather than pursue amicable resolution in the event of future conflict (Dent 311). Even the form of the deal can communicate information, such as the nature of a brand image (Fleischer).

\(^{158}\) Margaret Radin (2007) points out that this conception of contract is not new, tracing it back to Arthur Leff’s (1970) article, “Contract as Thing” and Lewis Kornhauser’s (1976) “Unconscionability in Standard Forms.” Decades prior, in a 1939 Book Review, Karl Llewellyn called attention to the “problem of standardization” (705), describing standardized forms as “a block-contract, for one side (or both) to take or leave,” with the process of standardization serving as “a counterpart of standardizing goods and production processes” (701).
Thus the variety and nuance of meaning of boilerplate, as reflected particularly in recent law-and-economics scholarship, suggest the conceptual complexity of a largely invisible term for much of the substance of contractual documents. The various approaches therefore invite closer consideration of the ways in which boilerplate is positioned relative to the traditional model of contract, and, in particular, the role of an ideal of agreement. A consideration of the use of language in connection with boilerplate also promises to shed light on our notion of contracts and on the operation of generic utterances more broadly. The prevalence of and variety of circumstances in which boilerplate is identified suggest a possible view of boilerplate as a paradigm of contract rather than the exception. Yet, as this chapter shows, a number of scholarly approaches to boilerplate lay claim in various ways to the ideal of contract as a voluntary and knowing arrangement between self-owned individuals.

B. A Literary Perspective

Although it is rarely addressed explicitly, the role of language—the way we use words—continues to resonate throughout the discussions of boilerplate and contracts. Omri Ben-Shahar’s Preface to *Boilerplate* provides one example of the way in which the function of language remains an unavoidable if implicit component of our conception of contracts. Even in the context of considering how our agreements and legally enforceable contracts function in the market, Ben-Shahar’s Preface illustrates the extent to which the questions surrounding boilerplate—What is it? How does it operate? How should we treat it?—are bound up with language.

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159 A notable exception, Douglas Baird’s argument that standard form provisions should not be considered a special cause for concern as a result of its being “fine print,” rejects the idea that by being comprised of words, boilerplate should be considered distinct from product features.
Beginning with his title, “Preface, Or: A Boilerplate Introduction,” Ben-Shahar draws on the polysemy of the term, to play with the idea of boilerplate. Like the title, the first sentence puns,160 “It is tempting to open this volume with yet another ‘boilerplate’ salute to the challenge that standard-form contracts pose for contract law doctrine” (ix). In this way, Ben-Shahar both taps into the colloquial sense of boilerplate as hackneyed language—and hence not particularly expressive—and raises the question of the relationship between boilerplate and other forms of contract. Taking a view of standardized contracts from a perspective of genre, Ben-Shahar identifies boilerplate as “the building blocks of standard-form, nonnegotiated contracts” (xiv). The Preface then suggests that genre makes a difference on a policy level, as concerns about market regulation gain traction around the issue of the enforceability of boilerplate (ix). Ultimately, Ben-Shahar distinguishes boilerplate, identifying it as a “legal phenomenon different from contract” (xiv).

In addition to touching on genre, the Preface indirectly identifies aspects of the operation of boilerplate language as a form of utterance. These qualities of boilerplate reveal certain assumptions about meaningful communication and our view of traditional contract. Ben-Shahar remarks on the familiar form of the typical (or boilerplate) symposium introduction (ix), touching indirectly on theoretical aspects of the operation of boilerplate language as an expressive form. By noting the familiar structure of the “standard” or boilerplate symposium introduction, the Preface sheds light on use and structure of language more broadly (ix). Suggesting that “introductions are indeed standard and predictable” (xii) and readers “can recognize their boilerplate structure” (x), Ben Shahar implicitly identifies what might be a defining quality of boilerplate as a form of utterance—the acknowledged iterability boilerplate

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160 The pun itself invokes the counterintuitive richness of the term boilerplate.
exemplifies. Boilerplate cannot exist as an original (Kahan and Klausner) but, instead, must always gesture toward or duplicate a pre-existing form. Boilerplate does not refer to what might be considered an original or tailored formulation. In addition, once identified as boilerplate, language may be read as unoriginal or standard form (Rakoff 2007, 204; Choi and Gulati 2007, 147).

The operation of boilerplate thereby exemplifies the phenomenon of iterability, or the necessary possibility of the signifying form being repeated in a new context; the always already existing nature of boilerplate brings to mind Derrida’s suggestion of an unrecoverable origin as the necessary condition for “all language…and ultimately…the “totality of ‘experience’” (Derrida 1988, 10). The notion of boilerplate, however, simultaneously marks a special case, which references contract as negotiated, tailored, intended expression from which it is distinguished.

By beginning with an exposition of the introduction Ben-Shahar chose not to write, his Preface evokes the failed promise, or alternate path, suggested by the fact of contract and central to contract as a discourse. Ben-Shahar self-consciously rejects the option of writing a “boilerplate introduction” that would contrast the contract law approaches of negotiation and product regulation, in part because such an introduction would be glossed over (ix). Like contractual boilerplate, Ben-Shahar asserts, standard introductions “are not read

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161 The standardized or unoriginal form that characterizes boilerplate calls attention to the attenuated nature of expression in contracts, which attenuation at times impacts contract legitimacy.

162 This rhetorical stance is also evocative of the opening lines of Derrida’s “Declarations of Independence” in which he explains that he will not keep his promise of speaking on the topic for which he was engaged (a textual analysis of the Declaration of Independence and the Declaration of the Rights of Man) but acknowledges that he “will speak …a little about what [he] won’t speak about, and about what [he] would have wanted—because [he] ought—to have spoken about” (7). Fittingly, he expresses his intent to speak about “the promise, the contract, engagement, the signature, and even about what always presupposes them, in a strange way: the presentation of excuses” (7).

163 By his account, Ben Shahar would suggest that boilerplate is best considered in the context of product regulation (ix).
by anybody…there is really no audience for introductions” (x, xii). In this manner, Ben-Shahar touches on the idea of an absent receiver, which for Derrida is a necessary element in constituting the structure of writing (1988, 7). However, in doing so, it also suggests a hierarchy in which boilerplate is ranked below original expression in terms of salience and legibility. This riff on breaking the mold, especially in the rhetorical suggestion of the pointlessness of “boilerplate structure[s],” reflects doubt concerning the communicative (or other) impact of “standard” and “predictable” language, at least in introductions (x). The paradox of the opacity or invisibility of boilerplate as an ostensible foundation of contract, and hence, perhaps agreement, recalls Derrida’s notion of the function of rupture as a necessary condition of human interaction. Yet, in place of the ubiquity of this break highlighted by Derrida, Ben-Shahar views boilerplate—unread, un-received—in contrast to contracts. This approach underscores the value and salience of the original, rather than standardized, usage of language, implicitly invoking the legitimating ideal of agreement in connection with contract.

By distinguishing boilerplate from contract language—rather than conceptualizing contract or all language in terms of forms of boilerplate, as both deconstructive and realist approaches might suggest—Ben Shahar creates a space for an ideal of original, salient and accessible contract language, reflective of a contemplated and participatory agreement. This gesture, toward an ideal of agreement reflected in contract, even as boilerplate is acknowledged not to fit this model, is shared by others (see Boardman; Hillman; Mann; Smith; Radin 2012).

The persistence of such an ideal, in the margins of judicial opinions as well as in contract

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164 This assertion calls attention to the fault lines between genres of scholarship, as Bill Gleason has pointed out to me; whereas Ben Shahar’s assertion may be true with respect to a compilation of legal scholarship, it may not apply equally to a scholarly work in literature nor perhaps to a single work of legal scholarship by a single author or set of authors.

165 In some contexts, however, standardized terms may have market value stemming from the fact that they are identified as common boilerplate rather than the substantive content of the terms (Kahan and Klausner 721 note 16).
scholarship, explored in more depth below, may also suggest a counterpoint to Derrida’s interest in the unattainable origin or, in contract terms, perhaps, the absent original. In contracts, it might be seen as taking the form of the urge to identify or gesture towards an origin of intent even as its impossibility is manifest or acknowledged.

Questions regarding the function of language and applicability of deconstructive notions may not be as remote from the existing market-oriented discourse concerning “boilerplate” as they might initially seem. Instead, the Preface asks us to explore the form of utterance that is considered “boilerplate” and its relation to our idea of contracting. It also suggests the possibility that such issues may, at the very least, be illuminated through a theoretical approach more closely associated with literary analysis; considerations of expressive form and function suggested by Derrida resonate in an examination of boilerplate. In addition, the scholarly thinking around boilerplate taken as a whole, while focused on legal and contractual implications, also sheds light on less salient aspects of the Derridean theories that are called into play.

In order to pursue these suggestions further, I turn briefly to a few aspects of Derrida’s work.

C. Contracts in Light of Speech Act Theory

The term “iterability” is drawn from the deconstructionist work of Jacques Derrida, and specifically his collection of essays in *Limited Inc* (1988). In the first essay, “Signature Event Context”—appropriately titled for application to the question of the operation

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166 Boilerplate as comprised of words is not a focus of contract theory, as exemplified by the lack of attention given the drafting of contracts from a theoretical perspective (see Smith 167).
and legal enforcement of contractual writing—Derrida explores the relation of writing to communication and representation, problematizing the distinctions between these notions. The essay begins with an epigraph taken from J.L. Austin’s *How to Do Things with Words*: “Still confining ourselves for simplicity to *spoken* utterance,” which opens the door for Derrida’s critique of the philosophical distinction between the spoken and written mark and the suggestion of a hierarchical relation between the two. In addition, Derrida’s writing style highlights the difficulty of creating clear classifications on the basis of the notions of performative and constative utterances, a challenge evidenced by Austin’s ultimate move away from those very classifications (Austin 1975). Derrida’s retort to the philosophical privileging of speech as a more immediate form of interaction may now be a familiar deconstructionist approach. Yet the points he makes along the way become newly relevant and suggest a fresh perspective on the questions involving the operation of boilerplate and contract language more generally.

“Signature Event Context” begins by exploring the word “communication” and the question of its correspondence with “a concept that is unique, univocal, rigorously controllable, and transmittable: in a word, communicable” (1988, 1). To the extent contracts, or an ideal of legally enforceable agreement, presupposes to some degree a transmission of information or intent,¹⁶⁷ Derrida’s exposition is relevant from the beginning. In exploring the idea of “communication,” Derrida invokes the notion of the performative introduced by Austin (1975), or the possibility of words having illocutionary or perlocutionary force; he suggests, “[w]hat takes place, in this sense, what is transmitted, communicated, does not involve

¹⁶⁷ As the preceding chapter explores, intent not only signifies an originating psychic moment but is also, of course, a common term of art in American law, and in contract doctrine in particular. Though the law looks to objective indications of intent, the continued use of the term as well as the positing of an ostensible origin to which the law relates and arguably draws legitimacy invokes, if implicitly, the ideal of an originating moment of subjective intention that is communicable through the objective criteria identified by the law as manifestations of agreement.
phenomena of meaning or signification” (1988, 1). But at the same time, Derrida questions whether this is the “literal or primary” meaning of the word and whether it is even possible to determine what such a meaning would be, thereby characteristically troubling the definition of literal meaning as well as its relation to context (2-3). Already, in the interplay between the physical and figurative, Derrida’s theorizing suggests an approach to the notion of boilerplate, which is at once a form in the material sense (compare Baird; Radin 2000), as much as an idea of how words are organized.

Various approaches to the operation of boilerplate reflect the complexity of how words mean, alluded to by Derrida. For example, boilerplate terms have been shown to affect the pricing of a bond; terms that deviate the standard term on the market, for example, may negatively impact a bond’s price, not because of their substantive meaning, but because the market recognizes the term as a departure from the accepted standard and thus a potential risk (Kahan and Klausner). Similarly, it has been suggested that adherence to or deviation from a standard in negotiating contracts may signal or communicate information to a counterpart. Such a signal derives from the relation of the term to an accepted standard rather than from the substance of a term (Ahdieh 1037). In some cases, such as the classic example of insurance terms, the legal import of certain boilerplate terms is unlikely if not impossible to derive reasonably from the words; no arguable plain meaning or literal meaning exists. These terms, acknowledged by courts to be inscrutable, are therefore construed—or imbued with meaning—

168 Courts have described the challenge of interpreting the meaning of insurance terms: “Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered” (S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc. (1997) 206 ).
by judicial interpreters. In the case of insurance-contract boilerplate, the judicially pronounced meaning of terms unfamiliar and incomprehensible to a lay reader is then adopted by repeat-player insurers to the detriment of consumers (Boardman). Read in light of contract language, then, Derrida’s discussion calls to mind the various ways in which the documented words of contracts convey meaning, including and beyond the constative declarations of the substance of their ‘plain meaning.’

Most dramatically, from a speech-act perspective, boilerplate provisions, or in this context, terms identified as “ancillary” to a transaction (see Gilo and Porat 2006), have been shown to operate in nuanced and complicated ways, which not only blur the line between constative and performative utterances but suggest the tension between these potential forms of operation. In speech-act terms, the words of a contract may operate constatively—that is, in manner that describes the substance of the statement—or performatively, which in Austin’s initial articulation would mean that “the uttering of the sentence is, or is part of the doing of an action” (Austin 1975, 5). Though Austin uses examples of performatives, which on closer examination may be seen to be classic operations of law, such as saying “I do” in the course of a marriage ceremony or bequeathing a watch in a will (5), boilerplate has been shown to “perform” more subtly by screening, signaling, obscuring information, or giving the document in which it appears an overall appearance of fairness, among other things (see Gilo and Porat 2006, 2007).169 Complex boilerplate terms might, for example, help screen out one-time users by

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169 All legally enforceable contractual language, except perhaps headings—though, in practice, this point might be argued—could be said to exert the force of the law, operating performatively by creating the terms of the agreement. However, as the preceding chapter demonstrates, the boundaries and nature of an agreement are not necessarily encompassed in contractual language, nor do the relevant words operate in a static and constant manner.
raising transaction costs of entering into the arrangement (Gilo and Porat 2006, 989-90).\footnote{Terms that generate a lot of paperwork, for example, discourage consumers from investing time and effort for a one-time transaction (Gilo and Porat 2006, 989)} Firms can also use boilerplate terms to gain information about consumers, embedding benefits that may only be read and thus enjoyed by more discriminating consumers (Gilo and Porat 2006, 1000-1). As a result, such language only takes effect—that is, performs or grants the benefit that it describes—in certain situations. Exploring and ultimately abandoning the possibility of distinguishing performative and constative utterances, Austin conceded that “very commonly the same sentence is used on different occasions of utterance in both ways” (1975, 67). As these examples indicate, not only can language operate performatively as well as constatively, in some circumstances, the constative and performative roles of the utterance function independently of and perhaps even in contradiction to one another; this is the case, for example, in which the complex form of the language serves to suppress information of benefits from consumers (see Gilo and Porat 2006).

The performative operation of ancillary contractual terms identified as boilerplate goes beyond the communication between consumer and provider.\footnote{Clare Dalton has demonstrated the way in which contract in general resists being ascribed to either the public or private realm.} Complex boilerplate language, by making it hard for consumers to determine the value offered, facilitates price increases and tacit collusion and hinders the entry of new suppliers to the market (Gilo and Porat 2007, 72; Gilo and Porat 2006, 1006-08).\footnote{Gilo and Porat give the example of cell phone contracts in which each provider offers a complicated menu of services at varying process, making it difficult for consumers to compare deals as a whole. As a result, Gilo and Porat suggest, firms could offer noncompetitive terms; a firm only stands to make a small profit by offering more competitive terms because many consumers will have difficulty assessing the benefit embedded in complex competing terms and resist switching providers hastily in light of the costs associated with making the switch. The difficulty firms have in convincing customers that they are offering a better deal also serves as a barrier to the entry into the market of new firms (2006, 1009). Gilo and Porat note that collusion with beneficial boilerplate provisions is more sustainable than collusion over value-reducing boilerplate terms (2006, 1011).} When reviewing contracts for fairness, judges look
at the entirety of the arrangement rather than an individual term (Gilo and Porat 2007, 74). By placing benefits, such as the ability to cancel a subscription, in boilerplate language that might be difficult to understand, firms may also convince courts of the fairness of a contract as a whole, even as they attempt to avoid the costs associated with offsetting value-reducing terms (Gilo and Porat 2006, 1014-15). Thus, the operation of boilerplate illustrates not only the unstable boundaries of performative and constative utterances as a classification system, as implicitly acknowledged by Austin and underscored by Derrida, but also the integral role of context, or the very interrelation between context and text explored by Derrida. For Derrida, “the import of context can never be disassociated from the analysis of a text…a context is always transformative-transformable” (1988, 79).

Considering the miscellaneous terms that typically frame written contracts, such as governing law or the severability provisions discussed in the preceding chapter, one assessment of boilerplate characterizes it as less context dependent and hence more modular than other tailored contract language. Specifically, Henry Smith considers boilerplate akin to computer software language, which can be switched on and off or discretely sectioned off (166-67). Smith acknowledges, however, the potential challenge of bounding the context of a contract; he recognizes that contract may entail the terms of the document and/or those terms in light of the common law or statute (170). As Derrida suggests, certain language can create the event it names (Derrida 1986, 8; see Miller 2001, 137) and, as reflected in the above discussion and that of Chapter One, boilerplate terms are not only read within a context—whether that of the document(s), portions thereof, other actions and/or expressions of the parties

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173 In Derrida’s words, a certain kind of act such as the signing of the Declaration of Independence, “performs, it accomplishes, it does what it says it does” (1986, 8).
and/or the law—but also contribute to the establishment of the boundaries of the contract and the context in which (or to Derrida’s thinking, with which) they operate (Derrida 1988, 79).

D. The Phenomenon of Iterability

While Derrida’s discussion is philosophical, considering the nature of writing in broad terms as expression, it is also suggestive of an approach to understanding the operation of the “classical, narrowly defined concept of writing” (Derrida 1988, 9). The variety of ways in which scholars and judges understand boilerplate to communicate meaning further suggests that Derrida’s insight may open a view to the operation of actual writing—as we usually conceive of it: the words on a page, or screen—in contracts and to our conception of boilerplate, in particular. Derrida identifies as the necessary characteristic of the broad concept of what he terms “writing” that it continue to “be readable even when what is called the author of the writing no longer answers for what he has written, for what he seems to have signed, be it because of a temporary absence, because he is dead or, more generally, because he has not employed his absolutely actual and present intention or attention” (1988, 7). Thus, to write, for Derrida, is to produce a mark that continues to be productive of meaning even in the non-presence of its author or “of any receiver” (7-8). Derrida thereby counters the traditional notion of the need for realized or “actual…intention” (and in doing so, suggests the necessity of the possibility of absence or lack) in granting a mark meaning or, in his terms, the potential to be

174 Derrida places the emphasis on the word “actual.” Derrida insists in “Limited Inc a b c…,” his response to John R. Searle’s critique of “Signature Event Context,” that “at no time [did Derrida’s essay “Signature Event Context”] invoke the absence, pure and simple, of intentionality. Nor is there any break, simple or radical, with intentionality. What the text questions is…their telos, which orients and organizes the movement and the possibility of a fulfillment, realization and actualization in a plenitude that would be present to and identical with itself” (1988, 56).
read. Iterability\textsuperscript{175} is this possibility of each mark to be repeated and function meaningfully even if removed from its original context as well as “the ‘intention to communicate’ of the original maker of the mark” (Miller 2001, 78).

For Derrida, the absence of sender and receiver is linked to the unattainable origin of self and of the role of the unconscious in rupturing or distancing the author of a mark (Miller 2001, 95-97). As such, this absence relates as much to the formulation of meaning by the self as it does to what we would generally term communication between parties. At the same time, the impossibility of fulfilling an intention or of fully realizing it, along with the idea of an absent speaker, calls to mind the legal view of contract, tracing back to the nineteenth century, as an “objective” manifestation of intent (“external signs,” in Holmes’ words, rather than “the agreement of two minds in one intention” (457)). This aspect of contract theory supports in practice Derrida’s proposition that some form of rupture is a necessary characteristic of communication. In addition, the association between contract and speech-act theory provides a way to reframe our thinking on contracts. It suggests, for example, that the possibility of distance between pure intention and the manifestation of agreement may be a defining characteristic of the operation of contract, as well.

E. Contracts and Iterability

The necessary possibility of changed circumstances of an utterance, such as the absence of speaker or receiver, relates in Derrida’s thinking to the notion of repeatability as an

\textsuperscript{175} Derrida’s notion of iterability is “a new name for what is given many different names in the course of Derrida’s work: dif\textsuperscript{f}\textsuperscript{e}rance, hymen, suppl\textsuperscript{e}ment, pharmakon, dissemination, writing, margin, parergon, the gift, the secret, and so on” (Miller 2001, 77). The plethora of such names, each of which is invoked in a particular way, suggests that “no one of [these names] is proper;” instead the notion itself has only “deferred” names (78).
element of the phenomenon of iterability. The necessarily unattainable actualization of intent and the related temporal dimension of repetition discussed by Derrida resonate remarkably in the context of a consideration of contracts generally, and boilerplate in particular. Drafted and entered into in a particular moment, contracts may reflect a certain meaning at the time or be experienced in a certain way (or ways) by those involved. Often, however, the very parties to a contract never achieve a holistic sense of the contents of a document representing or manifesting their agreement because of the mediating role of attorneys as drafters and negotiators. In addition, the agreement proscribed by a contract is often carried out by people other than those involved in negotiating or executing the document (Macaulay 2003, 59). Potentially lacking a source of coherent authorial intent or even an approximation thereof, contracts, especially those replete with boilerplate terms, exemplify the phenomenon of signification in which intention can never “actualize or fulfill itself…[i]n no case will it be fulfilled, actualized, totally present…to itself” (Derrida 1988, 56).

Contracts and the acts of entering into them generate meaning in other ways that illustrate Derrida’s assertions. The execution of a contractual document or the act of entering into contract can function to establish a relationship, reflecting Derrida’s view of the

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176 Playing with the idea of repetition as a feature of iterability (see Miller 2001, 75), Derrida asserts,

“I repeat, therefore since it can never be repeated too often: if one admits that writing (and the mark in general must be able to function in the absence of the sender, the receiver, the context of production, etc., that implies that this power, this being able, this possibility is always inscribed, hence necessarily inscribed as possibility in the functioning or the functional structure of the mark)” (1988, 48).

177 Because a relationship can take place over time and is enmeshed in the fabric of changing social conventions, bonds, and hierarchies of power, the process of exercising agency with respect to a transaction can be dynamic and incremental (Macneil 1981, 1041; Macaulay 1963). Thus, as relational contract scholars have pointed out, a relationship involving exchange, or what can be called a contract, does not necessarily involve a single, identifiable instance of mutually understood agreement or a discrete moment in which agency is exercised (Macneil 1981, 1041; 2000, 878; Macaulay 1963), but can be best understood, instead, as situated in a framework of dynamic and complex “enveloping relations” (Macneil 2000, 881). In addition, the ways in which the articulation of a relationship in a written contract can operate are complex. In addition to acknowledging the establishment of relationship, in a
production of meaning. In some contexts the substance of a contract, if not the text of a
document, is in practical terms an agreement to agree; an establishment of a relationship, rather
than a precise articulation of the terms and specifics of all future behavior and contingencies (see
Macaulay 1963, 6-7). While presumably instantiating an agreement or a directive of how to
move forward, contracts by their nature necessarily simultaneously envisage a different outcome,
an instance of disagreement. In this manner, contracts communicate a vision of two distinct
futures, which can be understood in light of Derrida’s notion of the disseminative nature of the
mark.\textsuperscript{178} For Derrida, words are always already ruptured, divided in themselves (Miller 67).\textsuperscript{179}
Even more basically, in practice, the language of the contract often languishes, exerting little
power over the relationship until parties return to a document in a moment of disagreement (see
Lipshaw 101). As a result, people necessarily consider the language of the contract in changed
circumstances, illustrating the operation of the phenomenon of iterability in real-world situations.

\textsuperscript{178} An utterance is cast forth such that words “scatter like seeds or break open, like a dehiscent seedpod, and in doing
so are inaugurally productive” (Miller 2001, 67). Rather than focusing solely on the polysemy of language, and thus
as might be commonly supposed the indeterminacy of language—an issue that Austin attempts to negotiate
throughout his lectures—Derrida distinguishes polysemy from dissemination (1988, 2). Miller points out that even
the back cover of \textit{Limited Inc}. in paperback mistakenly characterizes Derrida’s idea as the “fundamental
indetermina[cy]” of linguistic meaning (65), a position Derrida disavows in his “Afterword” to \textit{Limited Inc}. Instead
Derrida asserts, “I do not believe I have ever spoken of ‘indeterminacy,’ whether in regard to ‘meaning’ or anything
else. Undecidability is something else again. While referring to what I have said above and elsewhere, I want to
recall that undecidability is always a \textit{determinate} oscillation between possibilities…These possibilities are
themselves highly \textit{determined} in strictly \textit{defined} situations….They are \textit{pragmatically} determined” (1988, 148). The
idea of meaning being determined by virtue of its effects resonates particularly in a discussion of the operation of
language in law, as the process of applying law potentially performs the truth, justice and/or appropriateness of its
determinations.

\textsuperscript{179} As Miller attempts to explain, “The hardest part of iterability to understand is the way it ‘broaches and breeches’
(Samuel Weber’s translation of the difficult French word \textit{entame}) the utterance even the first and perhaps the only
time it is spoken. Iterability is \textit{différance}, that is, an opening within the utterance itself that makes it differ from
itself, within itself. Iterability opens a gap within the utterance, but also makes it defer itself, opening abysses of
temporality before and after, in a kind of future anterior” (Miller 2001, 83).
Thus iterability involves not only a rupture from a presumed origin, destination and, in Derrida’s words, “context of production,” but a rupture within the utterance in the present and over time.

F. The Language of Contracts: Boilerplate and Iterability

The operation of contracts and contractual documents helps demonstrate the links between the Derridean theory and the practical use of language. An examination of boilerplate, as a constituting element of contractual documents, suggests further the relevance of the theory to an understanding of the genre. In particular, the notion of iterability as involving not only repetition but a necessarily altered context and an absent or inaccessible origin calls to mind a defining characteristic of boilerplate: Boilerplate never refers to what might be considered an original formulation—and by identifying something as boilerplate it becomes unoriginal (see Rakoff 2007, 204).\(^\text{180}\) Boilerplate always operates in relation to an antecedent provision, referring implicitly to its own repetitive or citational nature. In certain contexts, such as that of debt markets, boilerplate users enjoy “learning benefits,” stemming from the fact of the prior existence and use of similar provisions. These benefits involve, among other things, market participants’ and legal practitioners’ familiarity with the provision and thus a collective sense of its meaning (Kahan and Klausner 719-24). Similar “network benefits” can accrue to users as the terms continue to proliferate (725-27), and in the case of language associated with a financial instrument, being viewed as idiosyncratic rather than standard boilerplate can negatively affect the value of a security (see 724). This is so, even as users may rely on terms that they have not assessed or understood other than recognizing their prior use, and thus, the implicit imprimatur

\(^{180}\) Characterizing a provision as boilerplate causes it to be treated generically in certain cases even if its wording varies somewhat from what are considered equivalent boilerplate provisions. For example, Choi and Gulati have found over a dozen versions of a \emph{a pari passu} clause in sovereign debt contracts but warn against reading meaning into what they believe to be idiosyncratic rather than intentional deviations in light of the lack of relation between the creditworthiness of a country and the chosen clause (2007, 147).
of the market’s acceptance (see 721 note 16). Thus, certain forms of boilerplate may suggest a paradigmatic instance of a disseminative mark or form, freed from a determinate origin and functioning in and in relation to a network of usage.\textsuperscript{181}

Approached from this perspective, the idea of boilerplate resonates even more strongly in Derrida’s discussion of “writing.” He asserts, “The possibility of repeating and thus of identifying the marks is implicit in every code, making it into a network [\textit{une grille}] that is communicable, transmittable, decipherable, iterable for a third” (1988, 8). Suggesting the process of producing meaning through repetition that takes place with boilerplate, Derrida’s language points us back to the etymological origins of the term—the boiler grille and then the print cast. In doing so, he also evokes the challenge of decipherability that often, perhaps paradoxically, accompanies boilerplate (see Boardman). In addition, the network evokes the multiparty and diachronic structure in which contracts, and boilerplate in particular, operate. Finally, the idea of the generative and disseminative nature of the iterable mark offers a way to understand the seeming paradoxes of boilerplate; this view of the mark suggests an approach to boilerplate’s characteristic transparency and opacity, portability and broader contextuality in non-binary terms.\textsuperscript{182} This perspective enables a view of boilerplate as a paradigmatic utterance, even as it serves as the exception to a traditional contract or signature norm.

A closer examination of the discussion in \textit{Limited Inc} furthers a sense of the relationship between boilerplate as a concept and the phenomenon of iterability being explored. By its very title, \textit{Limited Inc} invokes the world of boilerplate construction by suggesting

\textsuperscript{181}At some point, Kahan and Klausner note, even if a firm identifies a potential improvement in the term, the firm will no longer alter it (721). However, they also point out that this cap on “learning” does not relate to changes precipitated by actual issues encountered in the use of the term or new judicial rulings (721 note 17).
\textsuperscript{182}The chapters that follow, in particular Chapter Four, explore the disruption of binaries in the context of literary works.
corporate identity, a structure always already one step removed from an intentioned consciousness. Corporate documents are replete with standardized terms (Kahan and Klausner 715) and the “Inc” of the title calls to mind the ink on the page, which along with the notion of the corporation, evokes boilerplate text and the relation between material form and concept epitomized by boilerplate. In addition to the boilerplate-generating conditions of a corporate world, the title suggests the structure of boilerplate. In particular, it suggests its disseminative and recurring nature in the repeated allusion (“limited” and “inc,” suggesting incorporation) to the deferral of liability and/or identity.

Derrida explores the notion of the deferred presence of the individual and its relation to the corporate structure explicitly in his essays. Responding to a critique by John R. Searle, Derrida considers how to refer to him and plays with the idea of the absent sender and recipient. Picking up on Searle’s acknowledgement, in connection with his discussion, of his intellectual indebtedness to two other individuals (one of whom, Derrida notes, he himself exchanged ideas with, thereby implying his own contribution), Derrida considers the paradigm of the singular author. He refers to “a Searle who is divided, multiplied, conjugated, shared” (1988, 31) and determines that “the expression ‘three + n authors’ seems to me to be more rigorous for the reasons…involving the difficulty I encounter in naming the definite origin, the true person responsible” for the argument to which he is responding (36). As a result, Derrida decides to name “the presumed and collective author … ‘Société à responsabilité limitée’—literally, ‘Society with Limited Responsibility (or Limited Liability)’—which is normally abbreviated to

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Sarl” (36), itself a reference, an altered echo of the proper name Searle. In this manner, Derrida transforms the identifiable author, the paradigmatic singular signatory and reveals the archetypical author to be no different in kind than a corporate entity. In this manner, his discussion further underscores a link rather than a break between boilerplate terms and what is placed outside the margins of the scholarly consideration of boilerplate, often referred to as “nonboilerplate contracts” (see Choi and Gulati 2007, 151).

G. In Theory: Boilerplate as/vs. Signature

The judicial opinions examined above suggest an ambivalent view of the relationship of boilerplate to contract, indicating the value the law places generally on non-boilerplate, or actively negotiated and considered terms. From a theoretical perspective, the relation may be less inconsistent, but not in line with the distinction between “mere” boilerplate and effective, tailored expression evident in case law. Instead, Derrida’s discussion of the function of a signature, a presumptively authentic utterance reflective of and tied to a unique individual, suggests the ways in which boilerplate may be viewed as part of continuum of expression shared with contract language. Such an approach stands in contrast to Ben-Shahar’s conception of boilerplate, for example, as distinct, at least in its legal operation, from contract (xiv).

Among other things, Derrida explores the phenomenon of iterability through an examination of the signature—a mark which indicates a source, it “marks and retains his having been present,” but also as Derrida notes, “[b]y definition…implies the actual or empirical

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183 The repeated references to Sarl and the discussion of the signature throughout Limited Inc also call to mind the signature block of a contract, which typically follows the miscellany of boilerplate to which Smith refers in his consideration of its modularity (167).
nonpresence of the signer” (1988, 20). Like the language of a contract, and the signature on a transaction document, the signature contemplated by Derrida marks the existence of the signer in a dynamic and diachronic manner. Derrida assures us that “the absolute singularity of a signature-event and a signature-form” in fact occurs; there are signatures every day (20).

“[W]hat must be retained [in the signature] is the absolute singularity of a signature-event and a signature-form;” it involves, for Derrida, the possibility of reproducibility: “[T]o be readable, a signature must have a repeatable, iterable, imitable form; it must be detached from the present and singular intention of its production” (20). Thus, for Derrida, the signature is a singular mark of expression suggesting the once presence of a unique individual, the signer. This mark must be repeated and contemplated in terms of the absence of the signer to be “readable.”

Boilerplate is often associated with language that is not singularly conceived, yet the example of a signature as necessarily “detached from the present and singular intention of its production” suggests that boilerplate may be seen as operating in a manner resembling rather than at odds with paradigmatically individualized expression. In other words, Derrida’s illustrative discussion of the signature, in which he attests to the possibility of counterfeiting one’s own signature, reflects the extent to which even an archetype of individualized expression must be repeatable and dynamic as a function of iterability. In this light, boilerplate—already recognized as a repeatable form, detachable from an originating source—shares features with the signature, an epitome of an individualized utterance. As a result, from a theoretical perspective at least, boilerplate shares qualities with what Ben-Shahar and others might consider the

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184 Derrida explores the way in which the signature marks a signer’s non presence and “marks and retains his having-been present in a past now or present [maintenant] which will remain a future now or present [maintenant]” (1988, 20).
negotiated and considered ordinary contract language or “nonboilerplate contract” (see, e.g., Choi and Gulati 2007, 151).

IV. Boilerplate as a Special Case: Agreement and the Market

A. Constructing the Meaning of Boilerplate through Scholarly Approaches, an Overview

One way to approach the question of how to understand the nature of boilerplate as a form of utterance and whether it functions as a paradigm of or an exception to the more general operation of expression is by turning once again to the ways in which its meaning is constructed. Legal interpretation often establishes meaning performatively—that is, as a result of the operation of power (see Cover 1986). However, interpretive power does not always, if ever, emanate from a single source (see Hartog 1985), and as a result, to reinforce their authority, legal doctrine, judicial opinions and scholarly approaches often draw on a justificatory narrative and/or point to a source of interpretation.\(^{185}\)

For contracts, which operate in a market, the rationale of agency and participation reflected in the discredited phrase “the meeting of the minds” endures, at the very least, in the postmodern sense of making its mark through its absence. Agreement in American contract law has been understood as a technicality based on an objective measure, as in a correspondence or similarity of signs, rather than an identification of a shared subjective intent. As Oliver Wendell Holmes, Jr. asserted, “nothing is more certain than that parties may be bound by a contract to things which neither of them intended ….The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said” (457).

\(^{185}\) As Robert Cover asserted, “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning” (1983, 4).
Nonetheless, as Holmes acknowledged, contract doctrine drew, and it continues to draw, heavily on the rhetoric of agreement and the possibility of a “meeting of the minds.” Over a century later, the idea of an ideal of agreement remains a touchstone, even as it is distinguished or qualified. Radin’s twenty-first century language echoes that of Holmes: “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 the meeting of the minds has not disappeared,” though the voluntary theory of exchange outlined above has arguably become “vestigial” (2007, 196).

While the notion of a meeting of the minds may have lost its appeal from a functional perspective, it survives as a shadow, a point of comparison or an enduring if implicit ideal, not only in judicial rhetoric but in much of the scholarship concerning boilerplate. Many scholars view boilerplate in contrast to “nonboilerplate contracts” (see Ben-Shahar; Choi and Gulati 2007), thereby implicitly affirming a participatory model or ideal of agreement, distinct from boilerplate. In doing so, they also conceptually evoke Derrida’s mention of the “tethering to the source” in his discussion of a “signature-event and a signature-form” (1988, 20). Knowing, participatory and voluntary agreement involving a reasonable choice remains a possible rationale for the enforcement of a contract that ostensibly evidences this legitimizing source.

186 Anticipating the operation of boilerplate before the twenty-first century digital age, Todd Rakoff argued that contracts of adhesion should be presumptively unenforceable. He defined such contracts as “a printed form that contains many terms and clearly purports to be a contract,” drafted by one party, non-negotiated, and in which the principle obligation of the adherent party is money for services; he distinguished them from “ordinary contracts” (1983, 1177). As a result, his discussion serves similarly to reinforce the notions of contractual freedom that justify the enforcement of contractual terms (1173).
Thus, most commonly, scholarship focused on the phenomenon of boilerplate contrasts it with contract, implicitly affirming the value of the traditional model. In the course of analyzing a particular operation of boilerplate, some work, however, also presents evidence of ways in which the boilerplate functions as an expression of the parties’ agreement. Thus, boilerplate may be presumed distinct from traditional contract in such discussions. Yet, in some of these accounts, boilerplate can be seen, if not acknowledged, to be doing some of the work of a traditional contract: expressing and manifesting agreement. Another scholarly approach implicitly identifies boilerplate as a faulty version of contract, which might be rehabilitated to some extent through interventions such as disclosure, education and clarification to facilitate meaningful, participatory agreement. These proposals thereby aim toward an approximation of intentioned agreement, though they are not necessarily explicitly recognized as doing such. Yet other scholars distinguish boilerplate from traditional contract, focusing on a particular and homogenous market, and this market framework does not resemble the model of an agreement negotiated between two parties. Even in this context, however, at least one element of the ideal of agreement remains, in the form of the proposal of an alternative static and intentioned source, which legitimates the interpretation of the resulting agreement’s terms.

B. Evidencing Agreement Through Boilerplate

The scholarship in *Boilerplate* is framed by an implicit affirmation of a participatory model or ideal of agreement, distinct from boilerplate. However, in the course of analyzing particular boilerplate transactions, a number of discussions identify the ways that such boilerplate can serve to facilitate negotiation and/or express the substance of the agreement. In
this manner, boilerplate can be understood as a medium of agreement, recalling the ideal of traditional contract.

Jason Scott Johnston’s analysis of the operation of standard-form contracts, for example, illustrates the way in which boilerplate might facilitate bargaining between firms and consumers, thereby contributing to the development of value-enhancing relationships between them. As Johnston explains, firms such as hospitals, retail sellers, and credit card companies may empower their management to make exceptions to the standard terms on a case-by-case basis (14–17). Standard form language serves as a baseline from which agents of a firm have the discretion to negotiate with consumers. Therefore, Johnston advocates presumptive enforcement of the standard terms, which he views as reflecting the agreement between the parties. His suggestion that additional promises or concessions by firms should also be enforced in the event of clear evidence (13) underscores the view of boilerplate as the presumptive expression of agreement.

Other scholarship demonstrates boilerplate terms as reflecting the agreement between sophisticated parties. In Ben-Shahar and White’s analysis of the particular operation of standard-form provisions in auto-manufacturing contracts, boilerplate continues to exhibit qualities of traditional contractual terms. While the authors focus on the efficiency of the transactions reflected in the boilerplate, their discussion reveals the extent to which non-tailored terms express the substance of the arrangement. The terms of automotive-supply contracts are not dickered over, other than with respect to price and product design. Yet they do not remain unread; instead “[e]very party reads the boilerplate and understands its legal effect and its

187 The specificity of the evidence for the practice of renegotiation in Johnston’s account (14-15), and perhaps the availability of this feature to consumers, varies among types of transactions.
economic consequences” (30). In addition, these boilerplate provisions impact not only the ongoing relationship between the parties, but also the internal structure of the drafting organization. Ben-Shahar and White suggest that hierarchies are created within firms so as to safeguard the use of the form “as is” (43). As such, this boilerplate—in its form and content—reflects the goals of a contracting party and is arguably understood by the contractual counterpart. To the extent that the specific types of boilerplate express or facilitate agreement in practice, then, the ideal of agreement continues to be reflected in the structure and account of these transactions.

C. Facilitating the Possibility of Boilerplate as an Expression of Agreement

The ideal of agreement continues to resonate not only in accounts of the operation of boilerplate but in proscriptive views of contract law. A number of policy proposals reveal an underlying belief in the possibility of expressing agreement through boilerplate. These proposals tend not to characterize boilerplate as a medium of agreement. Yet the discussions reveal the enduring role of traditional contract as a conceptual framework, as they underscore the role of the parties’ terms in communicating the substance of the deal. Seeking transparency, clarity, and respect for the language of the contract, these proposals reveal an assumption about the potential for boilerplate to approach or approximate, if not achieve, a framework of agreement.

From very different vantage points, a number of scholars continue to maintain the importance of honoring and clarifying contract language. In doing so, they draw on a model that

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188 For example, Ben-Shahar and White identify the way in which the standardized broad termination rights of original equipment manufacturers, though arguably unenforceable for lack of consideration or under the statute of frauds for failure to state a quantity term, transform a transaction into a succession of short-term arrangements (32).
suggests a connection between contract language and the agreement that legitimates its enforcement, despite the challenges involved in attempting to recover a mutually intended meaning that might never have existed. In the context of sophisticated party transactions, for example, some advocate favoring parties’ terms over default rules. The presumptive enforceability of terms articulated by parties to a contract reflects a belief in the expressive possibility of contract language and in boilerplate as a vehicle of agreement, notwithstanding the acknowledged practical limitations of a “meeting-of-the-minds” model.

For example, in their discussion of the benefits of privileging the terms in the documentation of transactions between sophisticated business entities, Alan Schwartz and Robert E. Scott (2003) suggest both that these contracts are about agreement and that this agreement can be communicated through contract language. Their proposal contemplates the parties’ ability to draft provisions that will reflect particular arrangements and makes no specific mention of boilerplate. Yet agreements between firms are likely made up, to a large extent if not entirely, of already existing forms of provisions—what are often termed boilerplate clauses—exemplified by the merger provision that they discuss by way of example (589). In their view, agreement, as in what the parties “plausibly meant” as reflected in the document, should guide courts and thus justifies legal enforcement (570).

They justify this approach, which implicitly lays claim to the ideal of participatory and cognizant agreements expressed by others (Boardman; Hillman; Mann; Rakoff 1983), in part as an affirmation of autonomy, since the “court is making the person do what he

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189 Drawing on practical experience, Jeffrey M. Lipshaw asserts that words only take on meaning at the time of their application to the circumstance at hand, such as that of a dispute that precipitates interpretation. He suggests, therefore, that in interpreting contracts, judges should abandon the search for ex ante mutually intended meaning.
had agreed to do” (Schwartz and Scott 569, emphasis added). The proposal also reflects, however, an awareness of the limits of expression generally and in contract in particular. For Schwartz and Scott, the “correct answer” that courts should enforce is whatever contractual arrangement “the parties intended to enact” (568-69). Unsurprisingly, they do not go so far as to invoke actual or subjective intention;\(^{190}\) intention is defined as what a party “could plausibly believe [its counterpart] meant when the parties contracted” (569).

This view is illustrative of a theoretical framework that acknowledges the potential inaccessibility of an ideal of agreement,\(^{191}\) considering agreement pragmatically as a function of the parties’ manifested intentions.\(^{192}\) The rhetoric of agreement remains central to the discussion, however, as interpretation is conceptually anchored in the substance of the agreement as reflected in a document. As a result, the idea of agreement as connection continues to be marshaled to lend weight to the legitimacy of the best practice, according to this view, of contract interpretation.

The ideal of agreement also continues to resonate in other policy approaches to boilerplate as a somehow distinct form. Collectively, these proposals demonstrate the persisting desire to salvage the possibility of genuine agreement in standard-form arrangements. Michelle Boardman’s analysis of insurance contracts, for example, resembles that of Schwartz and Scott to the extent that it invokes the notion of a contractual document that reflects the agreement of

\(^{190}\) Compare Derrida’s unemployed “actual and present intention or attention” (1988, 7) and the acknowledged inaccessibility of “evidence concerning the actual intention of these particular parties with respect to that provision” in Seckinger (208).

\(^{191}\) In a similar vein, Derrida (1976) asserts “the impossibility that a sign, the unity of a signifier and signified, [can] be produced within the plentitude of a present and absolute presence. This is why there is no full speech” (69).

\(^{192}\) Of course, this is a familiar approach in contract doctrine (see Holmes and discussion above). Lipshaw underscores and challenges the pervasive presumption in a plethora of approaches to contract law that “mutually intended meaning…[has] affixed as of the time of the agreement’s making” (101).
the parties. Though it focuses on consumer insurance policies rather than sophisticated party transactions, Boardman’s approach grounds the legitimacy of enforceability of the contract in the parties’ understanding and consideration of the terms—the agreement. She identifies the unintended consequences of courts’ efforts to elucidate standard insurance policy terms for consumers’ benefit, illustrating how such efforts result in the perpetuation of binding boilerplate clauses that remain inscrutable to consumers.

Yet the ideal of agreement endures, not only as the impetus for the courts’ misguided efforts, but in the policy implications of Boardman’s piece. In her suggestion to counter the consumer vulnerability to “the hidden text” and “unclear or misleading calcified language” (185), Boardman suggests a document whose language reflects an arrangement closer to an ideal of agreement. She resists the use of a reasonable-expectations doctrine completely “divorced from contract language,” by which courts interpret ambiguous clauses according to the consumer’s reasonable expectation of the meaning, because it removes incentives for drafters to clarify the terms of the document (185). Similarly, she cautions against unmeasured application of the doctrine of *contra proferentem*, or construing the document against the drafter, in the case of unambiguous but disputed provisions. This approach, Boardman argues, serves to

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193 As Omri Ben Shahar pointed out to me, insurance contracts may be viewed as a special case or a paradigm of boilerplate because they manifest the product in their fine print and, drafted by trade associations and regulators, reflect the distance between boilerplate and the parties’ intentions. As a whole, an insurance contract comprises more than one type of boilerplate, as it contains tailored details in its “Declarations” section, such as the premium, policy limits, and deductible, as well as the terms set out in an accompanying preprinted policy.

194 Boardman asserts that the reasonable-expectations doctrine fails to act as an incentive for insurers to clarify contract terms because of the unrebuttable presumption in some jurisdictions that insurance contract language is unreadable; “once the application of the doctrine is divorced entirely from the policy language, the insurer has no incentive to make it clear because no level of clarity would help” (181). The discussion does not address the potential impact of other factors on courts’ interpretive stance, such as a concerted effort by agents and brokers to make clear the significance of the terms.
“belittle the role of language; to give drafters (and particularly insurers) an incentive to fix language, language must carry weight with the court” (185).

Ultimately, then, Boardman’s vision of a contractual document that is understood by the parties, and hence legitimately enforceable as an expression of agreement, is based in the traditional ideal. Though this line of scholarship acknowledges the parties’ potential cognitive and other limitations to contract that strain the possibility of an ideal of agreement, yet other policy suggestions involving disclosure, clarification and education reflect this goal. These proposals seek ways to create conditions for knowing, participatory and voluntary agreement involving a reasonable choice.

Scholarship identifies other ways in which particular forms of boilerplate fail to mediate an ideal of agreement in a consumer context, again indicating the role of traditional contract as the standard. Considering credit card account agreements, for example, Ronald J. Mann points to the strain placed on the informed assent model of traditional contract law. Terms are often changed unilaterally by credit card companies whose notices to consumers are “notoriously unreadable” or otherwise fail to reach the consumer, and which are not negotiable (107). In any case, the language of such agreements may not be intelligible to “a card holder of reasonable care and intellectual capacity” not only because of the specialized nature of the terms but also due to their physical form, including the abundance of terms typically compressed into small, single-spaced type (107–08). Echoing the concern of Justice Black in Szukhent,

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195 Mann points out, however, that through their behavior cardholders can modify their credit arrangements with credit card companies, in particular by deciding which card to use and when (109).

196 In noting the form of a document, and thereby challenging its readability, Mann taps into a recurring theme in judicial discussions of contract legitimacy, demonstrated in Szukhent in the competing characterizations of the form of the document in question to support divergent claims by Justices concerning the accessibility of the terms. Similarly, Justice Stevens’s well-known dissenting opinion in Carnival Cruise Lines v. Shute (1991) highlights the
Mann characterizes these arrangements, along with the frequent amendments circulated by the card companies as “not the typical bargained-for modifications of contract theory” (108).

The cognitive propensities of contracting consumers further impede the process of what might, in this view, be legitimately called contract making. As Robert A. Hillman has identified concerning Internet transactions, many consumers fail to read standard form provisions, even given the time and opportunity, and do not tend to search for favorable terms (85). In the event consumers read and fully understand contractual terms, they are unlikely to incorporate this information in a rational decision-making process (see also Korobkin). Human tendencies to underestimate the possibility of adversity, to give too much weight to the possibility of common events and to under weigh the possibility of something unusual (Mann 110; Hillman and Rachlinski 450–54) further compromise the process of agreement in its ideal form.

By evaluating Internet and credit card arrangements in terms of assent, cognition and deliberation, these studies indicate the persisting role of agreement as a legitimating touchstone for contract. Indeed, notwithstanding the various impediments, which attenuate the possibility of agreement, both Hillman and Mann offer policy proposals that continue to gesture toward an ideal of participatory agreement that involves cognition and voluntary assent.

Mann’s policy approach not only rests on an implicit ideal of agreement in contracting, but implies that it might be approximated through boilerplate. Specifically, Mann aims for increased cardholder understanding of arrangements, proposing the standardization of

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challenge of finding the relevant provision and appends a copy of the ticket in its actual type size to underscore the point (597).
credit card agreements along with a ban on certain terms such as universal default provisions
(Mann 115–17). He also suggests public disclosure initiatives to educate consumers about the
meaning of terms (119)\textsuperscript{197} in an attempt to design a situation in which standardized non-
negotiated forms at least can legitimately be seen to reflect both parties’ understanding of the
arrangement.

Hillman’s consideration of the prudence of mandating ongoing online disclosure
of terms in Internet transactions reflects a similar conception of boilerplate as a potential vehicle
for agreement. Although Hillman identifies practical limitations on realizing the ideal of
agreement, his policy proposal also strives to lend substance to the designation of online
standardized forms as contracts. Hillman expresses concern that mandatory disclosure could
backfire by ensuring enforceability, yet he, like Mann, is drawn to the framework of an ideal of
agreement: “By increasing the opportunity to read e-standard forms, contract law
would…reinforce autonomy reasons for enforcing contracts,” allowing consumers to read and
choose the best terms for them (88). By his own account, Hillman thereby aims to grant
“freedom of contract…some meaning in the realm of e-standard form transactions” (88).
Hillman’s piece concludes with an ambivalent assertion of the “symbolic victory [of disclosure]
for those advocating greater fairness in e-standard form contracting” (93).

As such, for these scholars, boilerplate, though problematic, might still be nudged
toward a reflection of comprehension and voluntary choice. This inclination toward aspects of
an ideal of agreement, in turn, reveals the ongoing role of agreement in legitimizing the

\textsuperscript{197} The Credit Card Accountability and Responsibility and Disclosure Act of 2009 (or The Credit CARD Act) took
up such initiatives, requiring card issuers to make agreements publicly accessible the Internet and authorizing
regulations that specify the format of such agreements posted (§204).
enforcement of such arrangements as contract. In other words, although scholarship has long recognized agreement as a reflection of intention and agency as an “ungraspable” “point of origin” (see Derrida 1976, 36), the treatment of boilerplate as conceptually distinct from an ideal of ordinary contract language continues to draw on and reinforce the appeal of such an ideal. Even if agreement is never fully present in its ideal form, it is invoked as a determining factor in distinguishing legitimate and illegitimate enforcement of contract (see Boardman). In addition, scholarly policy suggestions with respect to “boilerplate” are implicitly modeled on visions of the ideal or near-ideal workings of “nonboilerplate” or “ordinary” contract. As such, they often strain to approximate the qualities of participation and cognition of parties that justify the enforcement of contractual terms.

D. The Function of the Market: Allowing Agreement to Recede?

The beginning of this chapter touched upon the role of contract as a vehicle and/or metaphor of social participation, a function complicated in part by contract’s situation in the market. As Lawrence Friedman described it “[t]he law of contract is…roughly coextensive with the free market” (1965, 20). Suggestive of this view of the history of contract law, much scholarship concerning boilerplate follows economic theory and focuses on market operations (see Bebchuk and Posner). Some scholars have examined the operation of boilerplate in the particularly circumscribed market of debt contracts, such as indentures and bond and derivative transactions. In doing so, this approach implicitly invokes Derrida’s conception of iterability.

Rather than considering boilerplate language as a distinct form of contractual expression

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198 Rakoff (2007) outlines the way in which the “traditional justifications for enforcing contracts already rest on implicit institutional dynamics,” which implicate assumptions such as the nature and value of conditions generated by a competitive market. These assumptions are reflected in doctrinal norms, such as “the refusal to treat general social circumstances as constituting duress, so long as a competitive market is in place” (202).
requiring adjusted default rules and interpretive approaches to facilitate the possibility near-ideal agreement, this viewpoint concentrates on the way the market determines the significance of contract provisions. By viewing the meaning and function of boilerplate as a market phenomenon, operating in a network of participants, this perspective implicitly invokes the Derridean notion of the necessarily diachronic operation of a mark in a network.

A consideration of boilerplate as it operates in a market may be seen as an embrace a postmodern approach to the process by which boilerplate communicates meaning in a network, or even in the absence of a network (Riles 629)—that is, freed from a determinate original instance of agreement. However, even network-oriented visions of the operation of boilerplate retain elements of an agreement-based model in various ways.

One view of boilerplate imagines a framework in which common miscellaneous terms can be detached from their original source, in contrast to the traditional vision of contract as an expression of parties’ agreement. As Smith asserts, this form of boilerplate can be developed by knowledgeable drafters who need not know precisely where and in what circumstances the terms will end up (166). Smith’s approach, like the picture of the bond market revealed by Marcel Kahan and Michael Klausner’s study, discussed below, indicates a move away from the notion of a coherent, static agreement underpinning the meaning of boilerplate and other terms, toward a dynamic process exemplifying the phenomenon of iterability. Yet Smith distinguishes boilerplate from contract. Provisions such those discussed in the preceding chapter that speak to common contractual issues—governing law or severability, provisions, or even captions, for example—differ, in Smith’s framework, from the “freely customizable” terms of contract (163). For Smith, these common terms exist on the continuum between “information-
rich contract rights limited to a particular deal [and] simple standardizable property rights availing against ‘the world’” (164). In effect, then, Smith’s approach preserves a notion of traditional contract as expressive of the idiosyncrasies of parties to the arrangement.

Perhaps even more markedly, analyses of the process of standardization of terms, or the creation of boilerplate, in corporate contracting reveal a framework in contrast to the traditional view of contract. According to Kahan and Klausner, in the context of debt contracts, terms recognized as boilerplate derive value as a result of their recurring and widespread use, rather than their constative operation as the expression of the substance of a particular agreement. Such boilerplate can offer increasing returns to parties as a result of learning and network effects, which reflect efficiencies of drafting and the familiarity and relative uncertainty of terms (718–20, 726).\(^{199}\)

In this particular environment, then, the operation of boilerplate leads to a conception of contract that is justified and/or understood through the network or networks created by a market, rather than a notion of participatory agreement. The impact of these boilerplate provisions depends not on the intention of an original drafter or contract participant,\(^ {200}\) but on the moment in time and context in which it is read and whether it is recognized as boilerplate or standard language. As such, this analysis reveals the performative function of language, its establishment of value. It also illuminates the way this language performs by virtue of its being distanced from an originating moment and intentioned drafter.

\(^{199}\) The possibility of diffuse and multiple contributors to innovation complicate the framework Kahan and Klausner (Gelpen and Gulati 1680–81); the diffuseness and elusiveness of an identifiable origin or catalyst for a change in contract terms supports the deconstructive insight that a mark can signify, and indeed become transformed, independent of an intentioned source.\(^ {200}\) Nor perhaps the “plain meaning” of the words as objective manifestations of an instance of agreement (compare Schwartz and Scott 568–69).
Though parties to a bond indenture—a debt contract that reflects the terms of a bond\textsuperscript{201}—intend to be bound by the terms, it is not their understanding of the specific meaning of the language that is manifested in the market. Instead, the market manifests a collective reading of these terms as compared to similar provisions in other bond indentures. While in certain circumstances it might be difficult to identify a collective understanding of a term (Bernstein 1999, 715), in the case of bond indentures, the identification of terms as idiosyncratic rather than standard boilerplate in the market can negatively impact the value and liquidity of a security (Kahan and Klausner 724). The operation of the language of indentures thereby demonstrates the disseminative, dynamic and untethered nature of a mark, rather than a synchronic meeting-of-the-minds model of contract.

It is notable, then, that even in an analysis of boilerplate language in bond and derivative transactions, in which scholars self-consciously move away from the traditional idea of agreement as a model, aspects of the ideal of agreement resurface on the margins. Specifically, in Choi and Gulati’s contract policy proposal, the possibility of grounding an understanding of contract in a synchronic instance of intention cannot be set aside. Discussing boilerplate terms in sophisticated party transactions—or repeating transactions in which all parties are equally knowledgeable and sophisticated players—Choi and Gulati underscore the distinctness of the operation of this contract language as compared to other “nonboilerplate” contracts. They stress that such language ought not to be understood as a reflection of a “meeting of the minds” as it is in the “traditional model of contract interpretation” (2006, 1130).

\textsuperscript{201} Indentures typically follow a standard format, covering terms such as the interest rate and date of maturity of the bond. Indentures are almost completely comprised of boilerplate, with the exception of the numbers that reflect the negotiated pricing terms.
However, their approach ultimately reincorporates at least one aspect of the traditional model, that of the intentioned drafter to whom we should turn for interpretive legitimacy.

Before discussing this aspect of Choi and Gulati’s proposal, it is helpful to consider the countermodel that emerges from their description of the operation of this type of boilerplate. Choi and Gulati implicitly identify the ways in which boilerplate in a circumscribed market operates independently of drafters’ and parties’ intent. Their view of such boilerplate terms thereby suggests the untethered nature of a mark as an aspect of the phenomenon of iterability. They describe how “boilerplate terms may take on unexpected meanings that radically alter the distribution of rights and duties of contracting parties” (1132). In these circumstances, boilerplate no longer operates as an expression of the substance of parties’ agreement as manifested in the “plain meaning” of the terms. Thus, the operation of boilerplate in a network creates challenges for parties seeking to correct a “misinterpretation” of a provision by a court. Because a term operates in relation to other similar provisions and a coordinated response by market participants is often impossible, a drafter’s choice to amend the contract language in one transaction may not succeed in signaling the intended clarification to the market or courts. Instead, it may generate further unfavorable rulings and/or thwart the parties’ goal of clarification. In addition, a revised term may have unintended effects, such as raising suspicions regarding the straightforwardness of the new term or the willingness of the counterparty to cooperate (Choi and Gulati 2007, 155–56). In this manner, Choi and Gulati’s discussion implicitly underscores the phenomenon of iterability, as marks continue to communicate and

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202 This also suggests that whether or not boilerplate operates as expected, the terms have an impact rather than fade into meaninglessness, in contrast to its connotation in much of the case law, as discussed above.

203 As with the examples of the operation of boilerplate language discussed above, these unintended functions of altered, in some respects, clarified terms, trouble the notion of a divide between performative and constative utterances explored by Austin.
operate in a network—here identified as the bond or derivative market—in a way that reflects their rupture from an intentioned and synchronic source, or an ideal of agreement. Indeed, subsequent work by Anna Gelpern and Gulati (2006) highlights the fact that even the precipitating source of revised boilerplate may be diffuse and multiple (1680–81). The difficulties parties face in the event of a judicial misinterpretation—or an interpretation by courts that does not match the understanding of the market—also reflect the impossibility of fully delineating the context of an expressive mark as well as the reciprocal and dynamic relationship of text and context.204

As is the case with most of the legal scholarship concerning boilerplate, Choi and Gulati’s analysis does not explicitly consider the speech-act implications of their observations and suggestions. One of their proposals, however, indicates in particular a self-conscious rejection of the agreement-as-legitimating-source, or the “meeting of the minds” model of understanding contracts. Suggesting that boilerplate terms be approached more like statutes, Choi and Gulati recommend the designation of a standard-setting entity for the definitive interpretation of provisions so as to avoid judicial interpretive discretion. Notably, the designation of such an agency would allow it to revise constantly the meaning of boilerplate terms not only for contracts negotiated in the future but also all previously negotiated contracts. The boilerplate section of contracts no longer would reflect a particular snapshot of time but rather form a network of dynamic terms, changing flexibly with the needs of the market or in reaction to ill-advised court interpretations of boilerplate. When a court gets an interpretation of a term incorrect, the designated legislative

204 Choi and Gulati discuss in detail the failure to modify the wording of a pari passu clause, which ranks debtors equally, in sovereign debt contracts by drafters representing sovereign debt-issuers, notwithstanding misinterpretations by courts and successful suits against sovereigns extracting significant settlements (2007, 1133-38). Their discussion thereby illustrates forces beyond the intention of an author/drafter that contribute to the operation of a mark as it expresses meaning.
source could correct the interpretation, affecting not only subsequent but all preexisting contracts that we argue courts should take as conclusive (Choi and Gulati 2007, 158).

In the scholarship surveyed, this suggestion goes the furthest toward explicitly affirming the diachronic and dynamic nature of the iterable mark. In doing so, it reflects a paradigmatic instance of the phenomenon of the generative capacity of writing and its rupture from the circumstances of its production as contemplated by Derrida.

Though Choi and Gulati’s approach seems to be one of the fullest embraces of a market-based system distinguished from the traditional interpretive approaches to contract, their proposed framework and discussion reflects both the inclination toward a relatively static legitimating point of origin as well as the enduring appeal of the traditional contract model. Choi and Gulati assert along with other scholars of corporate boilerplate (see Ben-Shahar and discussion above) that an appropriate interpretive approach must recognize “the special nature of boilerplate contracts in markets consisting of sophisticated parties” (2007, 145). They propose that in interpreting such boilerplate terms, courts should analyze a “general market understanding,” rather than that of individuals, the starting point of which would involve “discerning the intent of the original drafters of the term” (159). Yet following a statutory approach, Choi and Gulati suggest an interpretive model that also involves a view by courts of the historical record of a term. Because “the original drafting parties provide the best source of

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205 Choi and Gulati outline the traditional interpretive approach to contract as follows:

[C]ourts first attempt to discern the intent of the parties (the meeting of the minds) from the language of the contract. Second, if actual intent is obscure, courts will turn to the course of dealings and course of performance between the contracting parties in an attempt to indirectly determine intent. Courts will sometimes use course of dealings or course of performance between a set of parties to trump even explicit terms in the contract. Third, courts will look to industry custom and practice. Lastly, courts will examine the Uniform Commercial Code for a specifically applicable term, if any (2006, 1145-46).
information on the original meaning of boilerplate contract terms,”

direct evidence of the drafters’ intent, such as “memoranda detailing the purpose,” should be invoked rather than the intent of specific parties to the agreement (159).

This approach thereby substitutes one origin story for another in a practical effort to ground the interpretation of frequently used terms in the synchronic, intentioned original drafting process. Choi and Gulati’s analysis goes on to counter concerns raised by the very phenomenon of iterability, specifically, the ever-changing contexts in which a term might be used. In the face of the “potential lack of connection behind the understanding and the particular context of the contracting parties that have chosen to adopt the boilerplate term” (2007, 159), Choi and Gulati point to the ameliorative effects of “a regime that makes the historical

206 Choi and Gulati suggest both the potential dynamism of the significance of a boilerplate term and the desire for a stabilizing origin in their description of boilerplate as “more like incantations, in which the parties, by invoking boilerplate language, avail themselves of the historical reasons for the survival of these terms in generations of contracts” (156).

207 Theoretical scholarship that references the model of statutory interpretation reflects the centrality of intention to the process of relating meaning to gestures or utterances, as well as the infinite regression that a search for intention, or even a definition of intention, may entail. In particular, Stanley Fish, a self-identified “intentionalist originalist” (2008, 1111), asserts that “[f]or interpretation to be a rational activity…there must be an object prior to and independent of the interpreter’s activities” (1138 note 98), which he identifies as intention. Fish explains that he is not proposing a search for subjective intention, which is more appropriately relegated to the field of psychology. He explains that a study of intention as “physical-biological-psychological fact” requires “[a]mong other things, a theory of mind, an account of physiology and its relationship to cognitive processes, a program of controlled experiments designed to infer mental states….The act of interpretation requires none of these. Rather it requires an understanding (and specification) of what role an actor/author is performing in a particular institutional setting” (1131). This approach leaves open the question of how one might derive the “meaning” of legislation when a legislator or legislature as an institutional actor could be understood to have more than one intention in that capacity. In the context of contracts, the idea that as “an interpreter what you are interested in is not what is going on physiologically or psychologically in the intending agent’s mind….but what he or she or they had in mind given the quite limited range of purposes that might belong to persons engaging in this or that area of legal performance” (1131) might be more problematic given the possible foregrounding of the relation between text and context. In a situation in which it is not clear whether a contract was formed or whether a transaction involved one contract or two, as in the case of Rosenbloom v. Travelbyus.com discussed in Chapter One, courts will necessarily have to do something other than interpretation, to Fish’s mind (see 1129), since the very question of the nature of the act and thus the “intention” remains in question. More generally, the evidence of such intention will presumably be manifested in texts and gestures which themselves must be “interpreted” in connection with an authorial intent, as Fish sees it, potentially creating a situation in which, from a theoretical perspective, a least, interpretation will ultimately have to be abandoned. Fish acknowledges the methodological uselessness of intentionality (1114 note 17). At the same time, the discussion in this chapter underscores Fish’s assertion that to read a text as having meaning we have “no choice but to” assume intent (1113), a point that may be implicit if not highlighted in Derrida’s approach.
understanding conclusive,” and incentivizes the creation and dissemination of a record of the drafters’ intent (160). Thus even in the context of a network model, which treats terms as disengaged from any “meeting of the minds” of the parties, this approach to boilerplate invokes a familiar framework. It seeks a source of meaning in the manifested presumably static intentions of original drafters, or an original moment that we refer back to in agreement.

These scholarly discussions thereby suggest another way of understanding the operation of boilerplate—at least in homogenous markets—one that may be contrasted with the static intentioned model connoted by a “meeting of minds.” However, the traditional model persists even in this conversation, if on its fringes. Choi and Gulati still aim to recoup the authority of the intent of a drafter, though they allow for this intent to be detached from that of the parties to the arrangement. In addition, and more fundamentally, an ideal of agreement remains the standard against which boilerplate is explicitly distinguished as a special case (see Ben-Shahar). This is so even though Choi and Gulati, like many others, acknowledge the practical limits of the traditional framework, especially the possibility of determining intent. Contracts “are not always complete,” even when they involve sophisticated parties. Traditional contract interpretation often involves assessing what would have been the intent of the parties had they considered the situation (Choi and Gulati 2006, 1159).

Viewed from a broader perspective of how we understand and interpret contract language, Choi and Gulati’s approach might not be considered exceptional. Instead, it reflects a particular choice of how to define the context of the language in question. As Choi and Gulati point out (2006, 1150), the market does not treat subtle differences in the wording of certain
provisions as significant, suggesting that rather than its inherent formulaic or standard nature, boilerplate is constituted by a recognition of it as such.

V. Conclusion: Paradigm or Exception?: “The Boilerplate of Everything”

The above exploration of the American notion of “boilerplate” began with a survey of what the term “boilerplate” means to judges and scholars, examining its varied treatments with the aim of highlighting connections between speech-act theories and the recognized functions of certain contractual language identified as “boilerplate.” In doing so, this chapter attempts to suggest, following the Derridean model, that we ought to examine what we put on the margins of our inquiry along with what we place its center. “Boilerplate” often connotes meaningless, ineffective language—suggesting the expressive potential of language perceived to be original—except in the context of contracts. I have therefore sought to highlight those instances, particularly in scholarship, in which boilerplate is defined in relation to contract. In doing so, I suggest that the identified characteristics of boilerplate also illuminate the nature and limits of contract language and our processes of expression.

While agreement in the law does not technically reflect a subjective “meeting of the minds,” the notion of an original instance of actual agreement remains a compelling justification that underscores traditional canons of contract interpretation. In addition to the enduring appeal and ambivalent treatment of the rationale of genuine, negotiated agreement in doctrine and case law, this chapter identifies an ideal of agreement as a persisting touchstone; scholarly approaches to boilerplate tend to gesture toward an approximation of intentioned agreement, or, in distinguishing boilerplate, suggest another form of legitimating static and intentioned source of the resulting contract. Collectively, this thinking implicitly preserves the
possibility of an ideal of agreement, which for some scholars serves as a goal they seek to attain, if imperfectly. By distinguishing or isolating boilerplate as a special instance of contract, the scholarship thereby reasserts to a significant degree the enduring appeal of the ideas of agency and participation associated with the rhetoric if not the reality of contract.

By highlighting the unattended rhetorical and expressive aspects of boilerplate, this chapter also illustrates the ways in which boilerplate—as a recognizably reiterated expression that may operate independently of an intentioned origin and change over time—exemplifies of the phenomenon of iterability. Identified by scholars as a “building block” of some market-based contracts, boilerplate cannot be simply categorized as ineffective or meaningless, though this connotation is not insignificant as it may inform our sense of the terms. Instead, the discussion above reveals the variety and complexity of the ways in which a “boilerplate” utterance signifies in connection with contract. As such, it sheds light on some aspects of speech-act theory as it relates to expression generally. In the end, viewing boilerplate as a paradigm of expression, this line of inquiry suggests that the very impossibility of realizing a moment of originating agreement, the elusiveness of the meeting of the minds, may be understood as a defining and necessary feature of contracts broadly conceived. To the extent it is considered exemplary, however, boilerplate distinguishes itself as a concept within the realm of speech acts. In doing so, it underscores both the enduring significance we grant human agency, even as it is recognized to be attenuated, as well as the persuasive force of imperfect processes that enable us to seek a legitimating origin.

As a case study in expression, boilerplate thereby provides a theoretical model that can be applied to expressive forms besides those of contract. It does so, however, from
within a distinct cultural and historical context. Thus, as the chapters that follow demonstrate, boilerplate notionally refracts both the tensions in the American notion of freedom as a function of a market and an enduring ideal of agreement, involving agency, will, and interpersonal connection from the nineteenth century into the postmodern era.
CHAPTER THREE

“Bartleby”: A Story of Boilerplate

Currently in the United States, individuals are inundated with standardized or “boilerplate” terms, which they cannot necessarily negotiate if they seek to transact on the Internet, purchase software, obtain medical care or use a credit card, to name a few examples. Although the distinct problems posed by standard-form agreements have been noted for some time (see Slawson 1971; Rakoff 1983, 1186), the pervasiveness of boilerplate terms has been identified as a phenomenon of contemporary life (see Korobkin 1203; Hillman and Rachlinski 435). As discussed in the preceding chapter, recent scholarship distinguishes such transactions from the traditional notion of a dickered-for arrangement between two more or less equally-situated parties. This chapter builds on a different premise, one suggested by the discussion in Chapter Two: that the challenges standardized terms present are inherent to contract. As that chapter demonstrates, form language, viewed conceptually, highlights the elusiveness of intent. In addition, form language precipitates explicit consideration of the context that necessarily shapes the meaning of language, as well as the collective sense of a particular expression as standardized. By viewing contract from an historical and literary perspective, this chapter applies the conceptual insights of the preceding chapter and applies them in reading a signature piece of nineteenth century American literature. In doing so, this chapter calls attention back to the broader social structures that inform the possibility of agency.

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208 At times, individuals might be able to mitigate the impact of certain terms through their behavior, such as by choosing between credit cards with varying terms in different circumstances (Mann 109).

209 Karl Llewellyn discussed the “problem of standardization” in 1939. Llewellyn described standardized forms as “a block-contract, for one side (or both) to take or leave,” and the process of standardization as “a counterpart of standardizing goods and production processes” (705, 701).

210 The treatment of “boilerplate” in case law and scholarship is explored in depth in the preceding chapter.
As a name for standardized terms, “boilerplate” did not become part of the
American lexicon until the twentieth century.212 Nonetheless, boilerplate is a significant
conceptual presence in “Bartleby,” as the stuff of contract and as a form of expression. Bartleby
is hired as a “law-copyist” to copy and help “verify… word for word” the “accuracy
of…cop[ies]” (12) of documents generated in the “snug business” of a lawyer dealing in “rich
men’s bonds, and mortgages, and title deeds” (4). Bartleby’s job is therefore to participate in
producing standardized, form language, or what we now might identify as boilerplate. Bartleby

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211 I use the term “boilerplate” to refer to language understood to be standard form, which, as discussed below, is
often invoked in circumstances involving a disparity in bargaining power, though not necessarily, as the preceding
chapter shows.

212 As the preceding chapter discusses, the term “boilerplate” is invoked in reference to standard contract language in
a Supreme Court opinion for the first time in 1964 in Justice Hugo Black’s dissenting opinion in National
Equipment Rental, Ltd. v. Szukhen (328).
is not only copying indentures and the like, thereby reproducing their forms, but these types of documents are both reflective as a whole of an accepted template and replete with specific instances of familiar and standardized formulations.

Bartleby is better known, however, for his mysterious decision to stop copying and ultimately working for the attorney-narrator altogether. Fittingly, as this chapter reveals, his signature refrain, “I would prefer not to,” with which he attempts to extract himself from the process of boilerplate production, is itself a type of form language.

Standardized language might be thought of as an exception to the convention of expression that is tailored to a particular circumstance and is reflective of intention. As a result of its derivative nature, perhaps, language identified as boilerplate is often dismissed as meaningless or inscrutable. The preceding chapter explores how, in relatively recent usage, the term “boilerplate” has been invoked in Supreme Court decisions most often in dismissing language as ineffective as a result of its being unsupported, generic, and/or lacking specificity.213 Justices have rejected the language in question as “mere boilerplate” (Protective Committee v. Anderson 434; Kentucky Dept. of Corrections v. Thompson 474), “no more than glorified boilerplate” (Aberdeen & Rockfish, Co. v. Students Challenging Regulatory Agency Procedures (SCRAP) 1214), or “only boilerplate” (Matsushita Elec. Indus. Co., Ltd. v. Epstein 398), though not commonly in the context of contract. While one might think of standardized terms as quintessentially inexpressive, such provisions are typical of contract, a manifestation of connection and ostensible indication of intention. In this light, the operation of boilerplate can

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be seen to exemplify the phenomenon of iterability—or the necessary possibility of each mark to be repeated and function meaningfully even if removed from its original context as well as “the ‘intention to communicate’ of the original maker of the mark” (Miller 2001, 78).\footnote{As discussed in the preceding chapter, Jacques Derrida identifies and explores this phenomenon in Limited Inc.} One can therefore consider boilerplate as a paradigmatic form of expression rather than as an exception to a rule of particularized expression indicative of intention.

As a type of utterance that might be understood as an exemplar of citation or standardization, boilerplate grants a new perspective on the bounds and possibilities of what is generally viewed as individual expression, or a manifestation of intent. Thus, while Bartleby is often understood as uniquely inscrutable, the tale complicates the distinction between copy and original as well as their relation to legibility. As a result, the story enables us to see boilerplate, a patently derivative form, as characteristic of rather than opposed to traditional contract, even as it seems to epitomize the contrary of an expression of individual will. By considering Bartleby as a purveyor of form language, this chapter highlights the contingency of agency and expression in contract; it identifies the challenges to expression of intent as a fundamental component of contract rather than as an exception to the norm. This chapter also points to the performative potential of contractual terms. Specifically, it explores the way in which Bartleby succeeds in establishing an identity and altering contractual terms in his own favor—at least for a time—even as his intentions remain elusive. Ultimately, this reading of “Bartleby” underscores the significance of embedded social structures and relations of power in determining the possibility of agency through contract. In addition, it reveals the way in which “Bartleby” anticipates the significance and limits of contract as a sign and vehicle of freedom in the American cultural
consciousness during emancipation, as the story presciently situates questions of freedom and will in the context of contract.

I. Nineteenth-Century Contract: An Always-Already-Qualified Ideal

Contract in nineteenth century America served as an ideal of social participation, demonstrating in practice the limits and potential of a system based, in part, on the idea of a “meeting of the minds.” By the mid-nineteenth century, the idea of a contract as a “meeting of the minds” was already part of the discourse of American contract law. As the Supreme Court of Judicature of New York asserted in 1828, “A contract is the meeting of the minds of the contracting parties, on the subject matter of negotiation. The understanding of one party not communicated to or concurred in by the other party, can have no binding effect” (Murray v. Bethune 191). Although the phrase suggests a psychic connection, the court’s language indicates that the term is understood to express the essence of contract informed by certain objective and formal constraints. By the end of the century, Oliver Wendell Holmes, Jr. noted the role of objective manifestations of intent that necessary inform the notion of a meeting of the minds in his well-known essay, “The Path of the Law.” Holmes explained that to understand contract law one must understand “that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties’ having meant the same thing but on their having said the same thing” (464).

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215 Thus, for example, in 1844 the New York Chancery Court denied a claim for specific performance of a contract to sell a church to the complainants because, among other things, of “an insuperable defect” to the establishment of a contract to do so; in this case, the offer for sale was met with a conditional acceptance (Cammeyer v. The Corporation of the United German Lutheran Churches 186). Enumerating examples of American and English common law precedent, the court explained that “there was no meeting of the minds of the contracting parties upon all essential points of the agreement. One proposed a payment in cash in hand, the other a payment in some other mode or time to be settled between them” (186). As such, no contract was formed for the court to enforce. As the court explained, the plaintiff’s “acceptance was clogged with a proviso that the terms of payment were thereafter to be agreed upon.”
Embodying the aspirations and constraints suggested by the notion of a meeting of minds in the context of legal responsibility, contract informs “Bartleby” both as a social framework and a material artifact. Bartleby is hired to reproduce, among other things, the contractual documents that facilitate and/or manifest transactions in debt and real property. In the decades that follow the publication of “Bartleby,” contract in the United States comes to be viewed as “the pith of social existence” (Stanley 3), reflecting the prescience of the social critique that can be read in the tale.

Contract law has been viewed as “roughly coextensive with the free market” (Friedman 1965, 20), which is emerging as a central social institution in nineteenth-century America (Hurst 8). The social constraints of capitalism have been explored by scholars, who, among other things, identify Bartleby as a model of the alienated worker who is unfulfilled, disaffected and exhausted by the work he performs for another (see Barnett 1974). Naomi Reed goes further suggesting that we read “Bartleby” not only as a parable about labor politics but as a “complex meditation on the structure and workings of capitalism and of circulation under capitalism” (249). Such readings highlight the inequity and inequality inherent in the social structure, which contract at times both perpetuates and naturalizes. As a framework of circulation as well as participation, the idea of contract—with its incongruities—permeates not only mid-nineteenth century American society but the very law offices of the narrator of the tale.

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216 As Amy Dru Stanley notes (3), in The Law of Contracts (1873), Theoplihus Parsons wrote of contract: “All social life presumes it and rests upon it.”

217 In light of the complicated relation between individuality (or individual expression) and social norms (or standardized form) discussed below, it is important to note that in Willard Hurst’s account the legal order was understood by “workaday people” to be designed to benefit the people. The goal of “protect[ing] and promot[ing] the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression” was an implicit central principle of the law, which in the nineteenth century was predominated by the growth of the law of contract (5-6, 10). Bartleby’s signature “not” puts pressure on the limits of freedom in this context and raises the question of the possibility of creative expression that does not follow the logic of the market.
“Bartleby” can therefore be read in light of the role of contract in society coincident with the writing and publication of the story in 1853.\textsuperscript{218} Contract in nineteenth-century America reflected a “worldview” that “idealized ownership of self and voluntary exchange between individuals who were formally equal and free” (Stanley 5). It thereby demonstrated the American belief in the ideas of agency, autonomy and the resulting personal responsibility. As discussed in the Introduction and in the preceding chapter, contract assumed a predominant role in American law in the early and mid-nineteenth century; it reflected the belief in market economics and the view of the law as facilitating private autonomy (Stanley 13, 10).

By the 1840s, in which most of the action of “Bartleby” seems to take place,\textsuperscript{219} contract was a shared touchstone in the language of abolitionists of varying political aims and approaches (Stanley 18).

Situated in the free market, contract served, at times, to naturalize inequities and inequalities.\textsuperscript{220} Nineteenth century vagrancy laws requiring the poor to enter into a contractual labor relation in order to receive assistance demonstrate the potential for ideals of contract to further existing power imbalances (see Stanley 134-37). Viewed as freeing beggars from circumstances of dependency, at times against their will, these laws enlisted the principle of the

\textsuperscript{218}“Bartleby, the Scrivener. A Story of Wall Street” appeared in \textit{Putnam’s} in two parts in November and December, 1853.

\textsuperscript{219} As Barbara Foley points out, it is hard to date the story (89). The office of Master of Chancery was abolished in 1848 and the narrator complains of having “only… a few short years” to benefit from the position (4), placing Bartleby’s arrival at the office around 1843-44. However, at the end of the story, the prison grub-man refers to famed forger, Monroe Edwards, as already dead, though he died in 1847. Dating the events in the story in this way, Foley notes, “we immediately see that the story could not, strictly speaking, have taken place at all” (89).

\textsuperscript{220} The marriage contract is one paradoxical example of the limits of notions of contract as an expression of autonomy: Once married, women no longer had a right to contract or enter into a position of ownership and a husband had a property right in his wife’s labor. Nineteenth-century “domestic relations” entailed a husband or master’s rights and a wife or servant’s obligation of obedience. Nonetheless, these subordinate roles of wives and servants were not considered inconsistent with contract principles of contract by nineteenth-century legal thinkers, (Stanley 16). The absence of women in “Bartleby,” other than the narrator’s reference to the “woman residing in the attic,” who is responsible for the scrubbing, sweeping and dusting of the law office (21), can be read as an implicit acknowledgement of the gendered boundaries of the qualified freedoms that contract enables.
free market to validate coercion (137). This point resonates in “Bartleby” in particular: When he refuses to quit the space that was once the narrator’s office, Bartleby is taken to prison, or “the Tombs as a vagrant,” where he ultimately dies (42). More generally, nineteenth-century notions of liberty, autonomy and choice came to the fore in the context of market in which individuals did not always participate willingly or with comparable resources. Thus, contractual relations were susceptible to existing structural forces and could potentially reinforce and justify these inequities.

Although the ideal of contract was limited in practice, contract remained a part of individuals’ pursuit of freedom later in the nineteenth century. Former slaves, for example, invoked contract to mitigate the power of their former masters (Stanley 42-44). Through litigation marshalling contract principles, former slaves attempted, though not always successfully, to enforce their rights to wages and proper treatment. Similarly, claims by freedwomen against their husbands concerning violence or failure to provide shelter, food and clothing in marriage mobilized the language of contract. These claims may not have generated dramatic outcomes, but resulted, at the very least, in arrests of a number of physically abusive husbands (51).

Contract can thus be understood as a framework for the potential register of will in which the notions of agreement, agency and consent are necessarily qualified. The unattainable ideal of contract infuses the narrative of “Bartleby” and the expression of and interaction between the narrator and the title character. We might credit the social structure that

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221 The narrator recalls how Bartleby, once in the Tombs, “[b]eing under no disgraceful charge,” is “permitted…freely to wander about the prison, and especially, in the enclosed grass-platted yards thereof” (38). In this description, the irony of the notion of “freedom” to move within a consummate site of constraint, a prison, seems to be lost on the narrator. Bartleby’s circumscribed freedom arguably evokes in an extreme manner the constraints naturalized in the notion of contract freedom.
contract facilitates with conferring, at least for a time, the “not…very arduous … but very pleasantly remunerative” office of the Master of Chancery on the narrator, a self-described “unambitious lawyer[,]” “filled with a profound conviction that the easiest way of life is the best” (4). This appointment “considerably increase[s]” his business (4), generating a need for more scriveners and thereby introducing Bartleby into the narrative and the social framework upon which the lawyer seeks to capitalize.

The narrator’s acceptance of a “worldview” of contract—along with the tensions that it entails—is revealed early on in his attitude toward the position of Master of Chancery, the easy and profitable nature of which contrasts with the work conditions of his staff of scriveners (see Barnett 1974, 380). Although the role of a Chancery judge is to rule according to equity,222 the narrator’s comment on the office and its discontinuation situates him in the world of equivalences and contract. He asserts,

I seldom lose my temper, much more seldom indulge in dangerous indignation at wrongs and outrages; but I must be permitted to be rash here and declare, that I consider the sudden and violent abrogation of the office of Master of Chancery by the new Constitution, as a —premature act; in as much as I had counted upon a life-lease of the profits, whereas I only received these a few short years (4).

The narrator purports to offer his opinion “by the way” (4). However, his impassioned aside sheds light on the extent to which he has internalized the entitlements that a framework of contract potentially naturalizes. Frustrated by the relatively slight check on his social privilege, the narrator expresses a view of the process of equity as a means to easy profit.

222 An 1818 legal treatise, for example, describes the Chancery Court of New York as “a tribunal…with jurisdiction and powers emanating from justice, connected with the guardianship of widows, orphans and all persons under divine visitation—in short, a tribunal before which no species of grievance, remediless at common law, can make its appearance in vain—none in the form of a complaint without meeting adequate relief” (Blake xii).
By foregrounding the narrator’s incidental indignation, the narrative invites the reader to consider the persuasiveness of the narrator’s claim. In fact, not everyone shared the narrator’s view of the office of Master of Chancery in the first half of the nineteenth century. Calls for reform of what was considered a corrupt system of patronage culminated in the 1846 New York Constitutional convention and its elimination of the position (Riddle 61). The same convention notably addressed, though ultimately failed to incorporate, a proposal granting equal suffrage to “negroes.” The narrator’s single-minded focus on his own pecuniary gain as well as his apparent inattention to debates concerning actual issues of justice, suggest an outlook consistent with the formal equivalences expressed through contract.

II. The Idea of Boilerplate

Situated at the cusp of a period defined by America’s investment in contract, “Bartleby” invites us to consider the form that the expression of agreement takes. For the narrator, the documentation of transaction is a means of generating profit. The work of producing copy, however, is not as straightforward as it might seem, as evidenced by the convention of verifying accuracy that Bartleby resists. The possibility of agreement manifested by a standard form—an understood to be unauthored and citational—also colors the notions of

223 Mary-Madeline Gina Riddle (72 note 34) cites Leo H. Hirsch, “The Negro and New York, 1783-1865,” 16 Journal of Negro History 384 (1931). Because, as revealed in the “sequel,” Bartleby worked in Washington prior to coming to New York, Riddle speculates that he could have handled documents connected to slavery and related injustices (72).
224 Having “counted upon a life-lease of the profits” from the position (4), the narrator implies an expectation interest in what he understood to be an agreement.
225 Although an indenture, or other standard transactional document, may have tended in the nineteenth century to be less involved than documentation of some more complex contemporary transactions, such agreements nonetheless reflect the pervasiveness of legal formulations. Goldsbrow Banyar Land Papers (1728-1868) on file at New York Historical Society provide examples. Additional examples abound in nineteenth century form books, such as United States Form Book: Containing Every Variety of Conveyancing, Commercial and Other Precedents, with Directions for Executing the Same by a Member of the New York Bar (1845), Paraclete Potter’s The Attorney’s Companion: Containing the Rules of the Supreme Court, Court of Chancery, and Court of Errors of the State of New-York; Notes
agency and participation that contract was understood to reflect, as well as the very idea of connection it demonstrates.

Although “boilerplate” does not come to refer to standardized legal terms until the twentieth century, its etymological origins call to mind the material mechanisms of mobility that inform social participation and individual realization in American culture.226 “Boilerplate” evokes mobility and the process of mechanical production as well as the challenges to individual agency that grew out of the industrial age. In this light, it also suggests the tensions in the idea of the free labor market in which Bartleby participates. Although Bartleby hand writes copies for a living, he does so “silently, palely, mechanically” (12), indicating that he has been subsumed to some extent by the process of automation. Indeed, he is prized by his employer as a “valuable acquisition” because of those qualities that imply the dehumanizing aspects of his role as precursor to, or replacement of, the print cast: “his incessant industry…his great stillness, his unalterableness of demeanor under all circumstances” (20).

In the nineteenth century, printed legal forms—while not yet identified as “boilerplate”—are already circulating in the world of lawyers and clerks. At this time, legal form books provided printed models for the documentation of deeds, mortgages, indentures and

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226 As discussed in the preceding chapter, “boilerplate” emerged as the term for the iron plating used on ship and locomotive steam engine boilers and as ship siding (Stark 2003, 9; Bast 155), and may have also referred to standard-sized identification plates on boilers (Stark 2003, 9); the term became increasingly figurative, denoting print casts of syndicated articles and, later, the content of the syndicated news and then the standardized terms of contract and generic expression, in general (Bast 155).
pleadings, among other things. Thus a scrivener, like Bartleby, might regularly encounter standardized language in the medium of a printed precedent.

In addition to forms related to financial and other transactions, Bartleby might encounter standard templates in his role as a clerk for a Master of Chancery. For example, injunctions were issued by the Chancery Court, which followed a standard text, duplicates of which were made at times using a printed form or template, in which specifics were filled by hand by the clerk. Other than the proper names of complainants and defendants, the particulars of the injunction, such as the requirement to “desist and refrain from…issuing serving or levying any executions upon the said judgment,” could also follow a standardized formulation. Notably, pre-printed templates of injunctions contained a certification signed and dated by the clerk that the document is “a true copy of an injunction issued out of [his] Office, under the Seal of the Court of Chancery.”

Thus, boilerplate was present in the practice of some Chancery clerks in its role as a material mold or fixed form as well as in the sense of standardized terms. In addition, as indicated by the certification, a clerk was not only involved in verifying the accuracy of copies,

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227 Examples include United States Form Book: Containing Every Variety of Conveyancing, Commercial and Other Precedents, with Directions for Executing the Same by a Member of the New York Bar (New York: C. Wells, 1845); Paraclete Potter, The Attorney’s Companion: Containing the Rules of the Supreme Court, Court of Chancery, and Court of Errors of the State of New-York; Notes of Cases of Practice at Law; and Practical Forms by a Gentleman of the Bar (Poughkeepsie, P. Potter, 1818); The Form Book: Containing Nearly Three Hundred of the Most Approved Precedents for Conveyancing, Arbitration, Bills of Exchange, Promissory Notes, Receipts for Money, Letters of Attorney, Bonds, Copartnerships, Leases, Petitions, and Wills by a Member of the Philadelphia Bar (Philadelphia: Haswell, Barrington & Haswell, 1830). The copyright page of the United States Form Book itself displays the following stamp: “Stereotyped by RICHARD C. VALENTINE, 45 Gold-street, New York.”

228 Form books include “Precedents of Executions in Chancery,” compelling payment or a performance of a duty (see Potter 46–47).

229 For one example, see the Injunction, dated January 14, 1801 to William G Miller in the New York Historical Society Papers.
as described by the narrator in “Bartleby,” but his signed attestation, singular evidence of his participation, became a part of the form document itself.

By being identified as standard or commonplace, boilerplate is necessarily situated in a network of communication, and as a result, might be viewed as transparent and accessible. Yet, as conveyed by the image in “Bartleby” of “five hundred pages” of “a law document…closely written in a crimpy hand,” (12) the form of a legal document does not call to mind legibility, figuratively or literally. Boilerplate production does not suggest an engagement with particularly expressive language; the narrator describes the process of comparing documents for accuracy, as “a very dull, wearisome and lethargic affair,” which “to some sanguine temperaments… would be altogether intolerable” (12).230

An examination of form-book precedents substantiates the narrator’s assessment. A precedent of a “Deed of Trust or Assignment for the Benefit of Creditors” (The Form Book 193-95), for example, comprises repeated legal formulations as well as standardized options to adjust the form to suit the circumstance at hand. In this form, some of the language of “Bartleby” can be heard:

Deed of Trust or Assignment for the Benefit of Creditors

This INDENTURE, made the … day of … Anno Domini …, between A. B….., of the one part, and C. D. of the same place, of the other part.

WHEREAS the said A. B. owing to sundry losses and misfortunes, is at present unable to discharge his just debts, and is willing to assign all his property for the benefit of his creditors:

Now THIS INDENTURE witnesseth, that the said A. B. as well in consideration of the premises, and for the purpose of making a just distribution of his estate and effects among his creditors, as

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230 Barnett points out the way in which the narrator fails to comprehend the extent to which such work might take a toll on a human temperament, identifying the inequities of a social structure that treats its workers as less than human (1974, 380).
also of the sum of one dollar, to him in hand paid, by the said C. D. the receipt whereof is hereby acknowledged hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over, unto the said C. D. his heirs and assigns, all that certain messuage &c. \(^{231}\) [here describe the lands, tenements, &c. intended to be conveyed.] \(^{232}\) AND also all his goods, chattels, and effects, and property of every kind, real, personal, and mixed: TO HAVE AND TO HOLD, receive and take the same to the said C. D. his heirs and assigns, to the proper use and behoof of the said C. D. his heirs and assigns, for ever. In trust, however, and to the intent and purpose that he, the said C. D. shall and do as soon as convenient sell and dispose of all the lands, tenements, goods, and chattels, of him the said A. B. and collect and recover all the outstanding claims and debts to him due, and with the moneys arising therefrom, after deducting his reasonable costs and charges, shall and will pay, &c. \(^{233}\)

If no preference is to be given, say: “pay and discharge all the just debts of him, the said A. B. equally and ratably, without distinction or preference.”

But if a preference is to be given, then say: “pay and discharge a certain debt of one thousand dollars, due and owing by the said A. B. to a certain E. F. and satisfy and take up a certain note for … dollars, drawn by said A. B. and endorsed by G. H. and discounted at the…Bank …, and the residue, after discharging said debt and note, shall divide and distribute equally and ratably among the several creditors of the said A. B. without preference or distinction.”

If a release is stipulated for, say: “Pay and discharge equally and ratably all debts due by the said A. B. to any person or persons who shall within sixty days from and after the date of these presents, execute to the said A. B. a release of their claims respectively.” AND the surplus, if any remains, after fulfilling all the trusts aforesaid, pay over and return to the said A. B. his heirs, executors, administrators or assigns, in a reasonable time hereafter.

In testimony whereof, the said A. B. hath hereunto set his hand and seal, the day and year above written.

Sealed and delivered, &c. \(^{234}\)

As is characteristic of such precedents, this model deed is replete with legal formulations that perform in particular ways in the law, such as the “grant, bargain, sell, assign, transfer, and set over” of “lands, tenements, goods, and chattels.” Such formulations signal a

\(^{231}\) The truncated language cited here follows the form presented in *The Form Book* (194). In other form agreements in this collection, such as a “Deed by Executors,” the reference to the property reads: “messuage or tenement and tract of land” (185). “Messuage” refers specifically to a dwelling house (*Bouvier’s Law Dictionary*).

\(^{232}\) The brackets and the instructions they contain appear in the form itself.

\(^{233}\) In a form of “Assignment of Copy-right in Books,” this phrase reads in full: “shall and will pay or cause to be paid” (*The Form Book* 59).

\(^{234}\) Typically, an agreement will end with the following or a similar formulation: “Sealed and delivered in presence of” with a space or spaces for the signatures of witnesses, as in the model “Grant of an Annuity or Rent Charge” in *The Form Book* (224).
specialized language, which therefore cannot be easily accessed by an untrained reader. In addition, these phrases themselves repeat and subtly change in the text of the deed, further complicating the task of reproduction, even for someone familiar with these types of documents. The act of reproducing such a template by hand transforms the original into a unique material form, while subjecting individual will to the project of conforming expression to a standard manifestation.

By invoking the process of boilerplate production, “Bartleby” lays the groundwork for the question of the relation between originality and legibility, or singularity and the possibility of connection. The tale opens with the suggestion that scriveners comprise a “somewhat singular set of men” (3). In this manner, the narrative juxtaposes the mundane and, by definition, unoriginal process of reproducing text—which, being legal documentation, is, as evidenced by the model deed above, already formulaic—with the purportedly extraordinary nature of this population. The narrator implicitly contrasts this work product, or this type of expression, with poetry or art; he “cannot credit that the mettlesome poet, Byron, would have contentedly sat down with Bartleby” to examine such a document (12). This suggests, as well, a presumption that the standard language of contract lacks the expressiveness or originality to communicate transcendentally as art.

The word “credit”—a term which the narrator plausibly associates with mortgages, bonds and other dealings with debt, like the deed of trust—also invokes the context of the economic market that is so closely tied to the notion of contract in the nineteenth century (see Friedman 1965, 20; Stanley xii-xiii). Credit calls to mind the way that the form language of

235 Thus the standard language of contract marks it as “not something that is immediately consumable” (Foucault 211), as discussed in Chapter One.
contract manifests a transaction in a commercial context. In apposing credit and poetry, the narrator’s speculation highlights his presumption of two distinct forms of expression. Early in the narrative, the tale thereby invites contemplation of the expressive qualities of formalized commercial articulations in light of notions of poetry and creative, or perhaps, idiosyncratic, speech. Again, by placing these assumptions in the mouth of the narrator, a character whose perspective we are thereby invited to assess, the narrative subtly calls into question the conclusiveness of this distinction.

Not unlike the narrator, perhaps, current legal thinking tends to distinguish form language from particularized or tailored speech; boilerplate operates in relation to an antecedent provision and refers implicitly to its own citational nature. Yet this defining characteristic does not necessarily fix the significance or accessibility of such language. Instead, as the preceding chapter explores, the range of circumstances and ways in which boilerplate is shown to signify in recent accounts bolsters the suggestion that standardized terms operate in a manner consistent, rather than distinct from the norms of communication and perhaps even the possibilities of poetry.

Twenty-first century contract scholarship reveals language identified as boilerplate to be a complicated medium of expression and an indication of expressive possibility.236 "Boilerplate" refers to standard form language in contract; however, the varying

236 In recent studies of contract explored in the preceding chapter, boilerplate has been identified in a “range of situations” (Rakoff 2007, 203), and, as a result, form language can be seen to communicate in a variety of ways, which may at times seem contradictory. As discussed in Chapter Two, scholars have variously characterized boilerplate as both standardized and customizable (Radin 2007, 190); opaque and transparent, depending on the reader (Boardman 176); largely inscrutable but valuable as a result of its familiarity (Choi and Gulati 2006, 1152 note 83, 1160; Kahan and Klausner 721 note 16); context-specific (Rakoff 2007) and portable, maximizing context-independence (Smith 164). Contractual form language at times signals meaning beyond or at odds with the “plain meaning” of the words it comprises, in complex and multiple contexts (see Suchman 111-12; Ahdieh; Gilo and
degrees of standardization and modes of operation of formulations to which the term refers highlight the role of context in framing particular language as boilerplate. The many ways that boilerplate is identified and characterized also indicate its centrality to the documentation and expression of contract.

In this manner, boilerplate not only manifests some of the incongruities of contract by formalizing an agreement that may never have been intended or freely entered into in the fullest sense, but it also demonstrates the possibilities of signification, when even meaning and intention might be thought to be absent. In light of the presumptive unattainability of actualized intention and the necessary possibility that a mark signify if repeated in a new context (see Derrida 1988, 56), boilerplate can be understood to reflect a quality shared by all forms of expression.237

At the same time, however, the banality of the very term “boilerplate” in contemporary parlance suggests a crucial characteristic of form language: In the context of everyday expression, at least, we know boilerplate when we see it. Like the term “boilerplate” itself, such language is recognized as unoriginal and is not understood in terms of its metaphoric

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237 Throughout “Bartleby,” the necessary possibility of signification “in the absence of the sender, the receiver, the context of production, etc.” (Derrida 1988, 48) resonates in familiar ways. For example, the narrator overhears a conversation about the mayoral election and mistakes it for a debate as to whether or not Bartleby will quit his chambers. Fittingly, the narrative does not frame the exchange in such definitive terms, but allows it to unravel for the reader in time: “‘I’ll take odds he doesn’t,’ said a voice as I passed. ‘Doesn’t go?—done!’ said I, ‘put up your money’” (31). The narrative thereby demonstrates the dynamic potential of expression as well as the possibility of signification in the absence of a sender—here, just a disembodied voice—and of a receiver. The narrator’s comment does not, in his account, find its intended destination, as he describes how he “passed on, very thankful that the uproar of the street screened my momentary absent-mindedness” (31). The notion of “absent-mindedness” itself evokes the phenomenon of iterability and the ways in which one might not be completely present to oneself. Nonetheless, his statement takes on significance when repeated to the reader.

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The fact that certain expression is collectively taken to be generic and thus, at times, flat or meaningless, underscores the way in which boilerplate is necessarily defined by a shared context in which it resonates as such.

Boilerplate, as a concept, therefore, illuminates and troubles the binaries that “Bartleby” seems to present. In doing so, boilerplate enables us to reconsider “Bartleby” in terms of a particular context, that of the social framework of contract. Ultimately, this perspective reveals the ways in which the narrative of “Bartleby” unsettles the distinction between the “singular” and the universal. It also complicates the significance of discerning intention or of legibility that the tale might at first glance seem to propose.

III. Reading “Bartleby” (and Bartleby)

A. “An Adequate Understanding of the Chief Character About to Be Presented”

From the outset, “Bartleby” invokes the epistemological question of what it means to know another or how we understand ourselves to comprehend another.239 It does so

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238 The same might be said for “cliché,” which like “boilerplate” derives from the name for a stereotyped block (OED Online).
239 In Warner Berthoff’s reading, Melville’s stories often bring into focus “the storyteller’s own resolute efforts to work his way through the narrative occasion and to do it justice” (10). Berthoff points to “Bartleby” as an example of an instance of a first-person narration in which “this effort merges with the character’s dramatic struggle...to act out the part that has fallen to him in the story” (10 note 1).
against the backdrop of an ideal of contract, as well as the material manifestation of intent and
ostensible agreement.

In the familiar manner of a sentimentalist’s tale (Bickley 34), the story begins
with the suggestion of knowledge about to be shared, yet at the same time, it involves promise of
the unusual. The first-person narrator foregrounds his perspective from the outset: “I am a rather
erly man,” he explains; “The nature of my avocations, for the last thirty years, has brought me
into more than ordinary contact” with legal copyists (3), and, thus, at least one aspect of the
expression of contract. The narrator describes his work, his chambers and his employees,
identifying this context as “indispensable” to a reader’s comprehension of his subject (4). He
thereby implicitly attests to his belief in the possibility of a “meeting of the minds.”

The narrator pursues his goal notwithstanding limitations, some of which he
acknowledges. Despite the narrator’s conviction “that no materials exist for a full and
satisfactory biography of this man,” he proceeds to attempt to enable “an adequate understanding
of [his] chief character”(4). The narrator explains, “While, of other law-copyists, I might write a
complete life, of Bartleby nothing of that sort can be done” (3). The narrative also reminds

Berthoff’s comments invoke an alternative model of connection, between the storyteller and reader, which
nonetheless draws on notions of contract and social participation. Berthoff explains that a storyteller “serves not
only himself but the common future” as “he engages his readers actively, deliberately, into that vast unending civil
process which men and women are bound to by their character as…historical and imaginative beings (12). Noting
the way in which a storyteller “covenant[s] with his readers,” he suggests that in its ideal form, “the conspiracy of
fiction is…a ritual enterprise for the binding together of minds and souls in space…and in time” (12 note 2), or a
contract broadly described.

Contract doctrine of this period treats the written agreement as a manifestation of the parties’ intent, even to the
exclusion of evidence of common practice (see Allen v. Dykers & Alstyne 583 (N.Y. 1842): “[A]s the agreement
between the parties was in writing, the question as to the defendants’ right [to dispose of collateral in question in this
case], must be determined, as in other cases depending upon the construction of written instruments, by consulting
the terms and provisions of the agreement, and thus endeavoring to ascertain the understanding and intent of the
parties.”).

The narrator asserts, “if I pleased, [I] could relate divers histories, at which good-natured gentlemen might smile,
and sentimental souls might weep” (3).

In the course of the narrative, the narrator also repeatedly avoids confrontation, which might also suggest a
temperamental investment in pursuing agreement, or a conventional semblance thereof.
readers more subtly of the necessarily qualified nature of knowledge and communication. The reference early on to the “chief character” is immediately followed by the narrator’s description of himself (“Imprimis: I am a man who, from his youth upwards, has been filled with the profound conviction that the easiest way of life is the best” (4)). Thus, to join the narrator in seeking an “adequate understanding,” a reader is reminded that she must take the narrator’s perspective into account.244 At the beginning of the story, the reader is thereby prompted to consider the possibilities of knowledge of another as well as the nature of its expression and the significance of context.

Characterizing his scriveners, and his staff as a whole, as a “set,” in terms of their contribution to his business, the narrator continues to indicate his largely materialistic perspective.245 He forgives the scrivener, Turkey, for his inebriated state after twelve noon because Turkey is otherwise useful: “as he was in many ways a most valuable person to me, and all the time before twelve o’clock, meridian, was the quickest, steadiest creature, too, accomplishing a great deal of work in a style not easily to be matched—for these reasons, I was willing to overlook his eccentricities” (6). Similarly, Nippers is described, “like his compatriot Turkey,” as “a very useful man…[who] wrote in a neat swift hand… and…dressed in a gentlemanly sort of way [and thereby]…reflected credit upon” the narrator’s chambers (8). The narrator therefore values him, too, even though Nippers “manifest[s]… diseased ambition,” along with indigestion, “usurp[ing]…strictly professional affairs, such as the original drawing up of legal documents” (8,7).

244 Liane Norman takes the position that the impact of the tale depends on the reader’s judgment of the narrator.
245 The narrator’s office routine has been viewed as a reflection of his prudent and utilitarian outlook (Bickley 35; Riddle 63).
As the narrator’s comments indicate, these two scriveners are themselves idiosyncratic; each in their way manifests a signature—Turkey with a “style not easily matched” (6) and Nippers in “the original drawing up of legal documents” (7). Yet, the narrator characterizes Bartleby as “the strangest” of a “singular set” (3). In part, this may be a matter of degree. The narrator’s assessments of his scriveners reveal the distinctive way that each resists the dominant order of employment at will epitomized by the nineteenth-century notion of freedom of contract and reflected in the narrator’s expectations and values. As Michel de Certeau suggests, resistance by the weak takes the form of the “tactic”: “a calculated action” in a “terrain imposed on it and organized by the law of a foreign power,” which must “operate[] in isolated actions” and “take[] advantage of ‘opportunities’” (37). In Nippers’ “unwarrantable usurpation of strictly professional affairs” (7) and Turkey’s general uselessness past noon, a reader can identify the diversion of time and resources away from the employer and “precisely not directed toward [his] profit” (De Certeau 25). The narrator’s account thereby inadvertently reveals the inequity of the framework of contract, or the limits of the freedom it represents, through the “resistant activity” (De Certeau 18) of the scriveners.

Himself constrained by a tight labor market (Foley 111 note 19), the narrator tolerates and perhaps minimizes the “eccentricities” (10) of these scriveners because of their usefulness and value to his business. Against this backdrop, the challenges Bartleby presents for

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246 Simultaneously evoking homogeneity and individuality, the phrase a “singular set,” also calls to mind the recurring formulation, “all and singular,” meaning collectively and individually, typically qualifying references to real property in nineteenth-century forms of deeds and mortgages. See, for example, precedents of “An Assignment for the Benefit of Creditors,” a “Deed of a Master in Chancery,” and a “Mortgage of Lands by Husband and Wife” in United States Form Book: Containing Every Variety of Conveyancing, Commercial and Other Precedents, with Directions for Executing the Same by a Member of the New York Bar (54-58, 140-141, 272-73).

247 De Certeau distinguishes the “tactic” from the “strategy,” which “postulates a place that can be delimited as its own,” and from which one can “capitalize acquired advantages” (36). In contrast to the strategy, the tactic operates “without any base where it could stockpile its own winnings, build its own position” (37).
the narrator, such as his refusal to work and, ultimately, to quit the premises, and the difficulty
the narrator has in eliciting what he deems to be satisfactory explanations can be understood as
an exaggerated version of what the narrator already encounters in his chambers. Bartleby,
however, offers no ameliorative contribution to the success of the narrator’s business. As a
result, the narrator’s differentiation of Bartleby furthers the sense that his distinctiveness for the
narrator stems from his “passive resistance” (17) to the successful functioning of the narrator’s
business.

In addition, Bartleby distinguishes himself because, like boilerplate, he offers no
window on the origins and intentions that generate his expression. Bartleby does not provide a
defining history for himself. Still, an origin is suggested by virtue of his existence and
“qualifications”(11) as well the “vague report” of his work in the dead letter office, which is
shared in the “sequel” to the tale (3). As with boilerplate, a past is implied, if unattainable and
not determinative.

The “sequel,” although appended to the end of the narrative, offers a speculative
account of the events preceding Bartleby’s employment by the narrator. By offering this
information in an afterword, the narrative framework privileges the experience of attaining
information and challenges the linearity implied by a view of contract as a manifestation of
intent. Instead of presenting the events chronologically, the narrative reveals a different
temporal structure, tracing the experience of acquiring/constructing meaning. 248 Thus the

248 In this manner, the narrative structure calls to mind the process of contract interpretation by some courts. In a
moment of breach, courts often seek to reconstruct an original instance of mutual intent, which may or may not have
occurred. As Chapter Two discusses, for example, in United States v. Seckinger (1970), the Supreme Court
acknowledged inaccessibility of “evidence concerning the actual intention of [the] particular parties with respect to
[a contested standard] provision” (208). The majority and dissenting opinions both noted the dearth of information
concerning the parties’ intention, but they also underscored the relevance of the “intention of the parties” (213) or of

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reader’s experience is at odds with the neat view of knowledge acquisition implied by the narrator’s approach. The narrator asserts, “Bartleby was one of those beings of whom nothing is ascertainable, except from the original sources, and, in his case, those are very small” (3). Yet, Bartleby is to be comprehended, to the extent he can be, as he unfolds to the reader in the particular context of a first-person narrative of the lawyer, about whom little, if anything, is ascertainable, except from his account. “Bartleby” thus begins by emphasizing the singular and original. However, the narrative complicates these notions, associating the singularity of the scrivener with his production of the always-already-copy, and hinting at the potentially universal challenges of uncovering individual intent.

B. Deconstructing the Singular Signature and the Relation of Original to Copy

“Bartleby” subtly troubles the distinction between original and copy, along with the hierarchies they suggest. The narrator deems “great accuracy… imperative” in the “quadruplicate” transcription of testimony before the High Court of Chancery, calling his staff to compare copies while he plans “to read from the original” (14). The scriveners are charged with copying documents, the significance of which the Master of Chancery is ostensibly granted the power to determine (Rowe 123-24). Yet the “original”—or, here, a transcript or already copy of testimony—as it is reflected in the document is already imperiled, as demonstrated by the possibility of change implicit in the need to verify. In addition, the possibility of a change

the “drafter of this clause” (220). The intent of the parties is touched upon five times by the majority opinion (208, 209, 211, 212, 213). In correspondence with me, Stewart Macaulay suggested the possibility that the neat formulation of intent takes the place of a less manageable though arguably more relevant intuition of a court as to the deal’s fairness.

Along these lines, Lewis Leary characterizes the tale as a “small story of a quiet man with no past, no future, only endlessly present to sustain” (25).

The clerk’s certification of accuracy on pre-printed forms of injunction discussed above, for example, similarly signal the possibility of inaccuracy.
suggests the potential to challenge the designations of original and copy.\textsuperscript{251} With his “unprecedented” (15) behavior, Bartleby refuses to participate, further compromising the balance between “original” and “copy” that the narrator strives to maintain.

As Chapter Two suggests, in his discussion of the role of a signature, Jacques Derrida provides a model that helps frame the relation between what we understand as original and copy. For Derrida, the signature marks the existence of the signer in a dynamic and diachronic manner. It indicates a source; it “marks and retains his having been present,” but also “[b]y definition…implies the actual or empirical nonpresence of the signer” (1988, 20). “[W]hat must be retained [in the signature] is the absolute singularity of a signature-event and a signature-form,” which involves, for Derrida, the possibility of reproducibility: “[T]o be readable, a signature must have a repeatable, iterable, imitable form; it must be detached from the present and singular intention of its production” (1988, 20).

A singular mark of expression, the signature thus suggests the once presence of a unique individual, the signer. This mark must be repeated and contemplated in terms of the absence of the signer to be “readable.” As such, the communication of “the absolute singularity of a signature-event and a signature-form” (1988, 20) necessarily involves both the possibility of repetition—the creation of a standardized form—and the possibility of the signer’s absence.

Boilerplate is language that is by definition not singularly conceived. However, the example of a signature as necessarily “detached from the present and singular intention of its production” suggests that what we identify as form language is also not completely at odds with

\textsuperscript{251}In the twenty-first century contract context, the fact that, once identified as boilerplate, language is at times read as unoriginal or standard form, even when the formulation changes somewhat (Rakoff 2007, 204; Choi and Gulati 2007, 147), indicates the conceptual aspect of the designations of original and copy.
paradigmatically individualized expression. In other words, Derrida’s illustrative discussion of the signature reflects the extent to which even an archetype of individualized expression must be repeatable and dynamic as a function of the phenomenon of iterability.\(^\text{252}\) Thus boilerplate—already recognized as a repeated form, detached from an originating source—can be seen as sharing features with the signature, an epitome of an individualized utterance.\(^\text{253}\) As Derrida notes, J.L. Austin analogizes the function of the signature to “the formula ‘hereby’ in official documents,” suggesting that the operation of the contract as evidence of agreement is, like the signature, both a sign of the once-present intention and its potential present non-presence (1988, 20). From this perspective, an examination of Bartleby’s relationship to boilerplate promises to shed light on the significance of expression in the tale and its relation to the possibility of “understanding…[its] chief character” (3-4).

The narrator demonstrates his acceptance of the social structure and his contentment with his position in it, among other things, in describing himself as “an eminently \textit{safe} man” (4). Attesting to his “prudence” and “method,” the narrator invokes the name of his famous client, John Jacob Astor as an imprimatur of his professional achievement (4). Astor’s is the only “true name” other than Bartleby revealed by the narrator (compare Felheim 375).\(^\text{254}\) If like a signature, a proper name serves as a reference to human individuality, the way in which

\(^\text{252}\) Derrida imagines the construction of “a differential typology of form of iteration” such that we “will be dealing with different kinds of marks or chains of iterable marks and not with an opposition between citational utterances, on the one hand, and original event-utterances on the other” (1988, 18).

\(^\text{253}\) The idea of the signature as presumptively original as it relates to an identity or signer but not necessarily as it relates to marks that have been made in the world draws attention to the contextual contingency of the notion of originality. Derrida gestures toward the complexity of the relationship between individuality or originality and standardization or reproduction: “I imitate and reproduce my ‘own’ signature incessantly. This signature is imitable in its essence” (1988, 34).

\(^\text{254}\) As Marvin Felheim points out, the narrator remains nameless and the rest of the staff, Turkey, Nippers and Ginger Nut are identified by nicknames. Felheim asserts, presumably referring to these characters, “For Bartleby alone, a name is reserved” (375). Not only does Astor serve as an icon of wealth at this time but his name is transformed into currency in the narrative. As a result, one might question to what extent this reference might even be thought of as a “true name.”
the narrator refers to John Jacob Astor further encourages a deconstructive reading of the text. The narrator’s treatment of this name draws attention to the nature of the link between the sign of the individual, one’s name or one’s signature, and the presence of the human being. In addition, it highlights the necessarily repeated form and performative possibilities of language, of which boilerplate can be viewed as a paradigm.

In the context of this narrative, Astor’s name is already iconic as a reference to wealth yet it remains evocative of Astor’s particular signature and individual presence; as a client, John Jacob Astor would have been in contact with the narrator to communicate his wishes255 in writing,256 if not in person. The way in which Astor’s will is refigured as income for the narrator reflects the narrator’s success as a participant in this social system and his subscription to a contractual worldview.

The narrator’s discussion of Astor not only signals a perspective informed by capitalism and contract, but also indicates that notions of originality and the formulaic continue to be challenged in this story. Admitting his enjoyment in repeating Astor’s name, the narrator appears unaware of its connotation of gross wealth (Foley 92), self-interest and dishonesty (Barnett 1974, 380 note 6). Underscoring the way in which John Jacob Astor’s name has already evolved into a gold standard for business acumen, the narrator relishes repeating it “for it hath a rounded and orbicular sound to it, and rings like unto bullion” (4). As Reed points out, not only does the narrator assume that bullion will be transformed into coin but he constructs his sentence to reflect an already achieved transformation (263). The passage invites a process of repetition

255 Astor’s lawyer would be charged with pursuing these desires on his behalf, necessitating at least a modicum of a meeting of the minds.
256 See for example, the handwritten letter from John Jacob Astor to J.P. Van Ness at the New York Historical Society, which includes a power of attorney and is marked by his distinctive signature.
or reading, as a reader cannot appreciate the significance of the “rounded orbicular sound” the first time around (Reed 263). As a result, the reader experiences the recontextualization that occurs through repetition of form and in which the narrator is himself involved. Like the reference to the “sequel”—a story of a past event that is positioned as future narrative—the narrator’s conflation of his client with bullion and of bullion with coin highlights the process of expression.

The narrator’s treatment of John Jacob Astor’s name also evokes the operation of boilerplate; as Reed sees it, just as he equates assumption and fact, bullion and coin, the lawyer “rhetorically erases the gap between … copy and original” (263). By enabling the reader to experience the dynamic and diachronic process of signification in which a repeated form takes on new significance (see Derrida 1988, 40), this presentation demands a process of reading (or rereading), which again disrupts a neat opposition of original and copy.

As suggested at the end of the narrative by the prison-grub man’s characterization of Bartleby as a “forger” (45), Bartleby catalyzes the disruption of such dualistic notions. Connoting both creation and illicit copying (thereby, arguably, producing an original form), the term “forge” suggests the complicated relationship between original and copy and the difficulty

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257 Reed’s reading underscores the ethical implications of the narrator’s process of signification. Reed views Bartleby’s actions and expressions, including his refusal to check copy, and then ultimately to work at all, as an attempt to resist circulation and the “relations of equivalence” that permeate the social world in which he is situated (255). In this light, the narrator is implicated in this system by his willingness to equate Astor with currency and his characterization of his staff in terms of their use value. In addition, and perhaps more fundamentally, the narrator is involved in the allocation of property and wealth, and the production of contracts and the transactions that they manifest and reflect.

258 Along these lines, it is also worth noting that the narrator refers to his work with forms and legal documentation—as “a conveyance and title hunter, and drawer-up of recondite documents of all sorts”—as his “original business” (11). As John Carlos Rowe points out, a “simple distinction between the endless repetition of copying and the originality of the literary text is precisely what Melville renders problematic in his writings, particularly in the period from Pierre (1852) to The Confidence-Man (1857)… ‘Bartleby’ undercuts the concept of writing as the representation or ‘copy’ of an original idea that escapes the constraints of language” (120).
of maintaining a neat opposition between the two. By inviting the reader to question once more the hierarchy of original and copy, the narrative points to both the complicated relation between the individual and the signature,\textsuperscript{259} as well as the structure of the law that defines a counterfeit.

Following Derrida’s suggestion that one can counterfeit one’s own signature (1988, 21), one might begin to wonder about the relative placement of the “original.” Bartleby is read by the prison grub-man as of a type (“they are always pale and genteel-like, them forgers” (45)).\textsuperscript{260} The narrative thereby implies not only “the possibility that the ‘original’ text may be led astray, that the ‘copy’ may take the place of its model” (Rowe 126), but that an ostensible original can be read as standard form. By creating something that purports to be an original but is not understood as such, forgery breaches and complicates the boundary between copy and original.

The narrator maintains that he “was has never socially acquainted with any forgers” (45), suggesting that the idea of Bartleby as a “gentleman forger” implicates the social structure and the characters’ positions in it, as well. The phrase can be read in a number of ways: A reader might infer that Bartleby is seen as illegitimately posing as a gentleman in refusing work. At the same time, the classification “gentleman forger” could also reflect the view of Bartleby as attempting to create a new identity for himself, pushing toward a gentleman’s life by

\textsuperscript{259} As Derrida asserts (1988, 20), there are signatures “every day[: e]ffects of signature are the most common thing in the world.” While the mark of the individual is a common place phenomenon it is also characterized by the “condition of [its] impossibility, of the impossibility of [the] rigorous purity [of the effects of a signature].”

\textsuperscript{260} The grub-man has in mind another iconic figure, Monroe Edwards, who was not only a famed forger but also slave smuggler (Jones). Once again, the narrative subtly situates the world of Wall Street in the broader context of the pressing ethical questions of the day. As Riddle points out, Wall Street was so named because of a wall erected by the Dutch to contain their Indian slaves and prevent entry by slaves’ relatives (60 note 7).
preferring to avoid unskilled labor. The wording not only complicates the notions of original and copy, it subtly points to the social hierarchies of resources and opportunity. These hierarchies implicate the formal equality that contract and the free market enable and naturalize.

Designations of copy and original implicate the social structure as well as the nature of interpersonal connection within it. The narrator displays his belief in the easy distinction between, and manipulation of, “privacy and society” (12), thereby introducing a related binary to be complicated and disrupted. Calling attention to the “ground-glass folding doors [that] divided [his] premises into two parts”—his and the scriveners’—the narrator presumes the ability to control his access to his staff: “According to my humor, I threw open these doors or closed them” (11). Placing Bartleby on his side of the door but behind a “high green folding screen” and before “a small side window” facing a wall (11-12), the narrator dubs this a “satisfactory arrangement.” Leaving Bartleby “entirely isolate[d] from [his] sight, though not remove[d]…from [his] voice” (12), the narrator believes himself to have constructed an optimal combination of isolation and connection. He concludes, “And thus, in a manner, privacy and society were conjoined.” However, Bartleby’s behavior and the subsequent narrative call

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261 In Barnett’s reading, when Bartleby dismisses the narrator’s suggestions of unskilled work, he is voicing the predicament of the worker who is denied the opportunity to do meaningful labor (1974, 383).

262 Concerning the decades that follow the events in “Bartleby,” Stanley asserts that as a metaphor for freedom in postbellum America, “[i]n principle, contract reconciled human autonomy and obligation, imposing social order through personal volition rather than external force. To contract was to incur a duty purely by choice and establish its terms without the constraints of status or legal prescription” (2).
into question the clarity of the boundaries between connection and isolation, as well as any individual’s control over such boundaries.

As the narrative demonstrates, privacy and society might not be so easily distinguished nor conjoined in a satisfactory manner. Similarly, connection and isolation cannot be simply disentangled, nor can the singular expression from the commonplace or copy. Demonstrating these tensions, Bartleby’s signature response further reveals the possibilities of expression.

C. “I Would Prefer Not To”: Ceasing and/or Perpetuating the Production of Boilerplate

For the first few days of his employment, Bartleby does “an extraordinary quantity of writing…copying by sun-light and by candle-light” (12). As his employer, the narrator is not completely satisfied, however, asserting, “I should have been quite delighted with his application, had he been cheerfully industrious. But he wrote on silently, palely, mechanically” (12). The narrator’s description and critique manifest the constraints of capitalism along with his acceptance of the prevailing structure. While the work, at least of checking copy, is in the narrator’s account “a very dull, wearisome and lethargic affair”(12), he

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263 Scholarship has also touched upon the way in which Bartleby challenges the expected boundaries between public space and domesticity. Gillian Brown discusses Bartleby as an anorexic, reflecting a self-contained ideal of domestic privacy” (147). Ann Smock asserts that “Bartleby’s being, thus, settled in the narrator’s Wall Street chambers is precisely, the peculiar, and unsettling thing that has come to pass there” (70). Stanley describes the accepted distinction between the domestic sphere and the market that accompanied an idea of contract as freedom from slavery in the nineteenth century, as well as the ways in which nineteenth-century realities disrupted this distinction. The reality of working women challenged the notion of freedom involving a circumscribed domestic sphere (140-41). Stanley discusses the prostitute as a special case in her last chapter. The prostitute embodied the tensions in the notion of contract envisioned as an antithesis of slavery; the prostitute operated in the market but in doing so revealed the conflict between the idea of freedom of contract and the convention of female dependence in the domestic sphere.

264 Indeed, the narrator’s chambers—the space that Bartleby inhabits—are situated between a “white wall” on “one end” and another “black by age and everlasting shade” on the other (4-5). Bartleby, with “his gray eye dimly calm” (13), might be read as creating an indeterminate area complicating stark distinctions.
appears unaware of the incongruity and unlikelihood of undertaking the related work of copying with “cheerful[] industr[y].”

Bartleby soon resists this work and, to a significant extent, Bartleby demonstrates his singularity in the way that he sets himself apart from the framework of contract and capitalism, or of the imagined ideal they represent. In particular, Bartleby is known for his signature response to the narrator’s requests, among other things, that he perform tasks related to copying and that he provide information about himself. Repeatedly Bartleby asserts, “I would prefer not to” (12, 13, 14, 18, 19, 25).265

The narrator is “stunned” by Bartleby’s preference not “to examine a small paper” and appeals to the reader to “[i]magine [his] surprise, nay, [his] consternation, when, without moving from his privacy,” Bartleby issues a “singularly mild, firm” reply (13). Again, the narrator demonstrates his reliance on his daily routine as it reflects the privileges granted him by the broader social structure. In contrast, Bartleby’s contingent “would prefer not to” calls attention to this particular context established by the dominant order, and “clever[ly] utiliz[es]”266 time both rhetorically and in practice.

A bit later, the narrator diffuses the possibility of another perspective that might challenge the prevailing system. He uses hyperbolic terms to describe, though indirectly, his experience with Bartleby. The narrator refers to the typical response of a “man [being] browbeaten in some unprecedented and violently unreasonable way.” In his account, such a man “begins to stagger in his own plainest faith. He begins as it were, vaguely to surmise that,

265 In other instances, Bartleby’s response, though not exactly the same, is similar. See, for example: “I would prefer not to quit you” (33), “I would prefer not to make any change” and “I would prefer to be doing something else” (40).

266 De Certeau discusses how the tactics of the weak “pin their hopes…on a clever utilization of time, of the opportunities it presents and also of the play that it introduces into the foundations of power” (38-9).
wonderful as it may be, all the justice and all the reason is on the other side” (15). More so, perhaps, than Nippers’ and Turkey’s tactics of resistance, Bartleby’s maneuver “produce[s] a flash shedding a different light on the language” (De Certeau 37) of the narrator’s world.

Seeking affirmation from his staff—a dynamic informed by the relative positions of power and freedom of the lawyer and his employees—the narrator falls back on the familiar social structure. He frames Bartleby’s obligation in terms of responsibility, calling on Bartleby to do his “duty” (16). The narrator thereby demonstrates his dominant position in this environment in his attempt to capitalize on it. Indeed, Bartleby’s failure to adhere—at least in part, like Turkey and Nippers—to the conventions of his employment elicits the unfavorable judgment of his colleagues when solicited by their employer. For example, when the narrator inquires of Turkey about an incident early in the day: “Am I not right?,” the employee responds “in his blandest tone,” “With submission, sir…I think that you are” (15). Nippers’ response touches on terms of fairness drawn from the framework of responsibility that the narrator invokes, noting that “this was the first and last time he would do another man’s business without pay” (16), and then later, even more explicitly, “I think his conduct quite unusual, and, indeed, unjust, as regards Turkey and myself” (18).

The narrative presents these responses in a suggestively ambiguous way.

Although the scriveners’ level of intolerance varies with the time of day, they voice disapproval

267 Scholars have identified the way in which the emerging legal standard of reasonableness and prudence is manifest in the narrator’s speech; “Bartleby” has been read as a critique of Melville’s father-in-law Lemuel Shaw’s work as chief justice of the Massachusetts Supreme Court developing “the reasonable man standard” in tort cases (Stark 1979, 166; see Matteson).

268 In this manner, the narrator can be seen to enjoy the ability to engage in what de Certeau calls a “strategy,” or the manipulation…of power relationships that becomes possible as soon as a subject with will and power [such as a] business…can be isolated” (35-36). Distinguishing “the place of its own power and will, from an ‘environment,,’” a “‘strategic’ rationalization” enables “one to capitalize certain advantages” (36).

269 On another occasion, in the afternoon, Turkey “roar[s],” “I think I’ll just step behind his screen, and black his eyes for him!” (18).
of Bartleby’s behavior in terms that echo those of the narrator. It is difficult to determine the extent to which their responses express their “intent.” Equally likely, the scriveners’ positions reflect one of a limited range of possible choices available to employees being asked to weigh in by an employer whose opinion is easily surmised. As Leo Marx points out, in contrast to Bartleby’s “prefer,” “submission” is the word favored by the other copyists (99). As such, the scriveners’ exchanges with the narrator follow the structure of nineteenth-century contract: agency may be imputed even if choice is somewhat limited. Again, the narrator is able to exploit his gains, or at least his dominant position in the office, drawing on the responses of his employees to justify his own. As he tells Bartleby, “you hear what they say…come forth and do your duty” (16).

At first, the narrator’s perspective leaves no imaginative space for Bartleby’s refusal: “Immediately it occurred to me that my ears had deceived me, or Bartleby had entirely misunderstood my meaning” (13). In this instance, the presumptions that underlie the possibility of a “meeting of the minds” become salient; the narrator assumes a connection with Bartleby, but on the conventional terms that have reinforced his relative position of privilege. The narrator finds it hard to engage, underscoring the extent to which his assumptions are challenged. Sitting “awhile in perfect silence,” he is unable to identify “anything ordinarily human about” Bartleby in his “calm” and “composed” elusion (13). The narrator’s predicament, however, also mirrors that of Bartleby to the extent that the narrator finds himself in a situation that allows no easy response and that once again leads him to silence and avoidance. This can be attributed to Bartleby’s tactical manipulation of time and language to resist established rules from within the

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270 Derrida identifies Bartleby’s phrase “I would prefer not to” as “foreign to every other human language,” and thus a way of responding without a response (1996, 74).
employment framework. While some read Bartleby as speaking outside of the given framework of will and necessity (see Agamben 254), on closer examination, Bartleby’s “singular” expression becomes part of the discourse. Like the language of contract a few decades later, Bartleby’s language manifests his will, if imperfectly, and impacts at least for a time, the workings of the narrator’s office.

Bartleby’s phrase is singular in this context, but the repeated refrain and its variations further complicate the distinctions between particularized expression and standardized form. The ways in which the form appears in the narrative reflect the possibilities of signification. The phrase operates as a sign of Bartleby’s unique character and, in doing so, comes to signify because and/or despite its inscrutability.

Bartleby’s assertion “I would prefer not to” is startlingly novel at first, but it soon becomes familiar to the characters as well as to the reader. After Bartleby repeats the phrase twice, the narrator, in his incomprehension, takes it up himself, echoing, “Prefer not to…What do you mean?” to which Bartleby once again responds with the same phrase (13). This exchange demonstrates the way in which the operation of language is understood through

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271 De Certeau notes the “homologies between practical ruses and rhetorical movements” (39). For de Certeau, the diversion of time by an employee “from the factory for work that is free, creative, and precisely not directed toward profit” is an example of a “popular tactic,” which takes place “[i]n the very place where the machine [an employee] must serve reigns supreme” (25-26).

272 The repeated versions of Bartleby’s phrase, like the narrator’s introductory remarks, can be seen to complicate the notions of “extraordinary conduct” (14), and “common usage” (15), to use the narrator’s terms.

273 The operation of Bartleby’s signature refrain underscores the dynamism of the phenomenon of iterability and the necessary interrelation of context and text in signification (see Derrida 1988, 12). As Derrida asserts, “Every sign…can be cited, put between quotation marks; in doing so, it can break with every given context, engendering an infinity of new contexts in a manner which is absolutely illimitable. This does not imply that the mark is valid outside of a context, but on the contrary, that there are only contexts without any center or absolute anchoring [ancrage].”

274 In adopting Bartleby’s expression, the narrator abandons the first-person conditional form that ostensibly links the language to an originating source and context, highlighting the possibility of citation that Derrida suggests is implicit in all human experience (1988, 9-10, 12).
practice rather than definition, as Ludwig Wittgenstein emphasizes in his notion of “language-games” (1: 11e §23). Unable to move beyond or represent itself, language has meaning in the process of usage, or “practice” (see Wittgenstein 1:81e), which necessarily involves some communal and repetitive aspect. Revealing the way in which Bartleby’s response begins to suggest a different, if not original, language game in the office, the narrator tells of having “gaz[ed] at [Bartleby] awhile, as [Bartleby] went on with his own writing” (13). Although Bartleby baffles the narrator by responding in his “own” way, he is also presumably still engaged in the production of copy or boilerplate.

Like boilerplate, the origin of which is unknown or obscure, and the significance of which is not driven by nor, perhaps, indicative of intention, Bartleby’s “I would prefer not to” continues to signify in a shared exchange even as it seems to manifest an attempt to exit the existing framework of communication. Through repetition, Bartleby’s language affects the discourse of the office and approximates the outcome of a give-and-take negotiation. For example, Bartleby’s assertion that he “would prefer not to” acquiesce to the narrator’s request to “just step around to the Post Office” (19) precipitates an attempt at clarification. The narrator’s query, “You will not?” elicits the reply, “I prefer not.” Bartleby’s response thereby distills the issue of agency that informs the tale (see Agamben) and suggests the potential dynamism of citation and signification that might be possible even if will or intention is not actualized.

Viewed as a language game, Bartleby’s reply opens up rules or options that were not presented in the narrator’s question; where the narrator attempts to limit the choice to will or won’t,

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275 As Wittgenstein explains, the process of defining or making explicit the nature of the rule is ultimately unsatisfactory; “any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations themselves do not determine meaning” (1:80e). Developing his point that meaning is conveyed in the usage of language, Wittgenstein asserts, in an imagined exchange that illuminates and arguably resembles that between the narrator and Bartleby, “If it is asked: ‘How do sentences manage to represent?’—the answer might be: ‘Don’t you know? You certainly see, it when you use them.’ For nothing is concealed” (2:128e §435).
Bartleby re-introduces the possibility of preference. Even if Bartleby’s phrase does not reflect an intention, it produces an effect. The narrator implicitly acknowledges this, recounting Nippers’ query whether he “would prefer to have a certain paper copied on blue paper or white…not in the least roguishly accent[ing] the word ‘prefer,’” making it “plain” to the narrator “that [the word ‘prefer’] involuntarily rolled from his tongue” (28).

The phrase “I would prefer not to” takes on significance in the course of Bartleby’s own repetition, as it comes to be a mark of his distinctive character. In addition, as Nippers’ query indicates, it becomes incorporated into the language of those with whom Bartleby prefers not to transact. Prefiguring boilerplate, the formula begins to have its own life, freed from a defining origin but still understood in reference to its citationality or repetition. Creeping into the minds and speech of those around Bartleby, his language informs their understanding of him, notwithstanding its inaccessibility. Early on, the narrator considers Bartleby’s eating habits in an effort to make sense of him, and, in doing so, implicitly affirms the potential power of preference. Despite a diet of hot spicy ginger-nut cakes, Bartleby maintains a sedate demeanor. The narrator reasons: “Ginger, then, had no effect upon Bartleby. Probably he preferred it should have none” (17).

As the story progresses, Bartleby’s words are again taken up by others. They thereby reflect various perspectives but do not necessarily facilitate what might be thought of as

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276 As the story progresses, the way in which iteration can “alter[] at once and without delay…whatever it seems to reproduce,” becomes even more apparent (see Derrida 1988, 40). Already, however, the possibility of incompletely actualized intentions or missed connections has entered the tale in the form of the missive that the narrator imagines might be awaiting him at the Post Office.

277 The narrator intuits the operation of the term independent of intention, vowing to “get rid” of Bartleby, as he “already has in some degree turned the tongues, if not the heads of myself and my clerks” (28). Derrida speaks of “effects produced, if not intended” in connection with the question of what it means to “more than simply misread[]” in his exchange with John R. Searle (1988, 41).
a meaningful connection or even a “meeting of the minds.” As a result, the narrative is quite funny at times, underscoring the many ways in which the language continues to resonate. For example, when the narrator accidentally comes across Bartleby camped out in his office on a Sunday,\textsuperscript{278} he resolves to try to learn something of Bartleby’s “history” (25). However, anticipating Bartleby’s preference not to reveal it, the narrator plans to release Bartleby from his employment and to square things off financially. In approaching Bartleby, the narrator assures him, invoking Bartleby’s phrase, “I am not going to ask you to do anything you would prefer not to do—I simply wish to speak to you.” Bartleby, however, reframes the terms of the conversation, asserting that he “would prefer not to” tell anything about himself or his origins—indeed, he goes on to assert, “At present I would prefer not to be a little reasonable” (26).

Overhearing the conversation, Nippers turns Bartleby’s language against him in a threat to give him his due. He lashes out, “\textit{Prefer not, eh?...I’d prefer} him; I’d give him preferences” (27). In doing so, he precipitates the narrator’s request: “I’d prefer that you would withdraw for the present.” By this point, when the narrator acknowledges his recent tendency of “involuntarily using this word ‘prefer’ upon all sorts of not exactly suitable occasions,” the reader has already noted it for herself.

Nippers’ departure is followed by the approach of the then-deferential Turkey, whose comments demonstrate the extent to which Bartleby’s language of preference may be put to work by others in the absence of full or actual intention. Turkey suggests that if Bartleby “would but prefer to take a good quart of ale every day, it would do much toward mending him, and enabling him to assist in examining papers” (28). Thus, Turkey, remaining oblivious of the

\textsuperscript{278} See the discussion below regarding the implications of Bartleby’s presence.
way that his own habitual noontime drink compromises his productivity, reads Bartleby in light of his own particular worldview. When the narrator remarks “slightly excited[ly]” on Turkey’s use of “the word,” Turkey does not immediately understand the narrator’s reference but eventually replies, “Oh, prefer? oh yes—queer word. I never use it myself. But sir, as I was saying, if he would but prefer—.” The narrator interrupts, “you will please withdraw” to which Turkey responds, “Oh certainly, sir, if you prefer that I should” (28-29). Here, the reader’s recognition of the citationality of the term “prefer,” which the speakers seem unable to grasp consistently, drives the humor of the narrator’s straight-laced account.

Bartleby’s response not only becomes a familiar form in the office discourse, but for a time alters the terms of his employment. Relatively early on, the narrator acknowledges that it soon became a fixed fact of my chambers, that a pale young scrivener, by the name of Bartleby…copied for me at the usual rate of four cents a folio (one hundred words); but he was permanently exempt from examining the work done by him…moreover, said Bartleby was never, on any account, to be dispatched on the most trivial errand of any sort; and that even if entreated to take upon him such a matter, it was generally understood that he would “prefer not to”—in other words, that he would refuse point blank (19-21).

The narrator’s description of the situation reads like a contract, specifying its subject and terms, and clarifying language where the drafter anticipates ambiguity. Notably, in restating the significance of the “general[,] underst[anding]” of Bartleby’s signature refrain, the narrative indicates the way in which the phrase has come to have meaning and an effect on office procedure.

The narrator describes how “[a]s days passed on, [he] became considerably reconciled to Bartleby” (20), who for a while continues to copy but refuses to participate in other office tasks. The narrator admits “[s]ometimes…falling into sudden spasmodic passions” with
Bartleby because “it was exceedingly difficult to bear in mind all the time those strange peculiarities, privileged and unheard of exemptions, forming the tacit stipulations on Bartleby’s part under which he remained in [the] office.” Thus, the narrator accedes for a time to Bartleby’s terms, in exchange for which he depends on Bartleby’s unfailing presence, such that it is (“he was always there”), and enjoys “a singular confidence in his honesty…[feeling his] most precious papers perfectly safe in his hands.” When, “[n]ow and then” the narrator “would inadvertently summon Bartleby …to put his finger…on the incipient tie of a bit of red tape,” the response, although infuriating, is not surprising—at least in the retrospective telling: “Of course, from behind the screen the usual answer, ‘I prefer not to,’ was sure to come.” While the narrator expresses his frustration, he acknowledges, “every added repulse of this sort which I received only tended to lessen the probability of my repeating the inadvertence” (20-21). In this way, Bartleby’s form language actually alters the employment arrangement in practice, notwithstanding the abstruseness of the phrase.

Bartleby can thus be seen to effectively engage “tactics” of the weak, as envisaged by de Certeau. For de Certeau, a “tactic insinuates itself into the other’s place, fragmentarily, without taking it over in its entirety, without being able to keep it at a distance” (xix). Bartleby’s language and presence are similarly insinuated into the place of contractual labor relations in ways that “turn to” Bartleby’s “own ends forces alien” (de Certeau xix) to him. Along these lines, it is worth noting that the narrator finds Bartleby camped out in his chambers on a Sunday (21), diverting the narrator from “the purpose of going to Trinity Church that

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279 In other words, the narrator seems to have learned the rules of the language game that he is engaged in with Bartleby. He is able to participate in the game, knowing what to do even if he is not able to articulate what it means.
morning” (25). Bartleby’s presence in this instance literally manifests de Certeau’s notion of the “tactic,” impacting the “utilization of time” in “the space of the other” (de Certeau 39, 37).

“A[ppare]ing in his shirt-sleeves,” Bartleby startles and “unman[s]” the narrator (21). By “tenanting…law-chambers” (21) in a building considered by the narrator “entirely unhallowed by humanizing domestic associations” (34), Bartleby challenges the ostensibly clear boundaries between the domestic and commercial spheres. He thereby disrupts the social scheme that comes to accompany the notion of freedom of contract. Bartleby’s ongoing presence in the building, even after the narrator has relocated his offices, precipitates yet another turn of the narrator’s language and the structure of contract against himself. The language and framework of responsibility implicate the narrator when a “perturbed looking stranger…who proved a lawyer” (38-39) informs him that, as “the person who had recently occupied rooms at No. --- Wall Street,” the narrator is “responsible for the man…left there” (39).

Bartleby’s ability to reframe the terms of a discussion, at least for a time, is also reflected in his response to the narrator’s entreaty “as a friend,” that Bartleby “comply as far as may be with the usages of this office” (26). In this instance, the narrator seeks to revert to a

280 This challenge is significant in light of the way in which, “[s]ince the rise of abolitionism, white citizens were taught that a fundamental difference between freedom and slavery lay… in home life” and even more so “in women’s place at home” (Stanley 148).

281 The narrator suggestively notes that in accordance with the “custom of most legal gentlemen occupying chambers in densely-populated law buildings,” there were “several keys” to the door, one of which “was kept by a woman residing in the attic, [who] weekly scrubbed and daily swept and dusted my apartments” (20). In addition to the keys in the narrator’s and Turkey’s possession, the narrator refers to one more key, the keeper of which, at least at the moment of telling, is unknown. The narrative thereby frames the discovery of Bartleby subverting the norms and social hierarchies that the narrator expects and relies upon in terms of the acceptable roles of labor in the market. In its reference to the washing woman, the narrative suggests an alternative role for Bartleby and foresees the ways in which the structures of contract and its related freedoms fail to allow for it. If the prostitute points to the tensions in the nineteenth-century ideal of freedom of contract by mixing the domestic sphere and the market in an unacceptable way (Stanley), Bartleby seems to inhabit the opposite end of the spectrum of transgression; he refuses to accept money, and ultimately to perform the labor requested of him, but “mak[es] his home” (22), in chambers of commerce, so to speak.
different language game, which reflects the “safe[ty]” of a familiar social hierarchy. In doing so, he presents a relatively narrow range in which his relationship with Bartleby can be defined, conflating friendship with his position as employer or “master” and entreatimg, almost demanding, of Bartleby to commit to work in the future: “Say now, you will help to examine papers to-morrow or next day: in short, say now, that in a day or two you will begin to be a little reasonable: say so, Bartleby.”282 In response, however, Bartleby similarly demonstrates the possibilities of shrewdly wielded language, avoiding future commitments, preferring “[a]t present…not to be a little reasonable” (26).283 Here, Bartleby’s tactical resistance is again apparent: He succeeds in asserting the terms of their interactions by broadening the temporal frame of potential commitment.

On its face, Bartleby’s signature phrase expresses both a preference for as well as the challenge of attaining an alternative axis of opportunity. In doing so, it also implicitly affirms a shared reality. Bartleby speaks and is perceived in terms of negation; “[l]ike a very ghost,” he nonetheless “appear[s] at the entrance to his hermitage” (19), straddling solitude and the “society” of the office. If the tale itself is a testament, he even leaves a mark. Rather than try to remove himself, when Bartleby is told he “must go” from the narrator’s chambers, Bartleby’s response is “I would prefer not” (30). This reply and his subsequently more explicit “I would

282 The social hierarchies that contract and capitalism potentially reinforce are reflected in the narrator’s attempt to convince Bartleby of his obligation to help examine copies. In addition to presenting the work as a copyist’s duty (“Every copyist is bound to help examine his copy. Is it not so?”), the narrator’s language reflects the assumption of the laborer’s investment in the system of the “master,” pointing out the “labor saving” benefits of the practice for Bartleby and referring to the copies as Bartleby’s “own” (15). After being rebuffed by Bartleby’s “I would prefer not to,” the narrator seeks to underscore the unreasonableness of Bartleby’s position, characterizing his own “request [as one] made according to common usage and common sense” (15), a punning allusion, perhaps, to the financial stakes of the practice for the narrator. If we take the pun one step further, it can be read as a prescient comment on the financial value of accepted practice, which has been documented in recent contract scholarship (see Kahan and Klausner) as discussed in Chapter Two.

283 When the narrator demands of Bartleby, “What is your answer,” Bartleby’s response suggests the intertwined possibilities of extending the dimensions of the conversation and remaining limited by its form. He asserts, “At present, I prefer to give no answer” (26)—simultaneously answering and refusing to answer (see Derrida 1996, 74).
prefer not to quit you” (“gently emphasizing the not”) (33) speak to the impact of his presence and expression. These evasive assertions demonstrate the signification that results because of and/or despite the qualified nature of the connection Bartleby establishes and represents. For a time, then, Bartleby’s presence has meaning in connection with a language game, the rules of which he succeeds in establishing.

D. The Dynamics of Boilerplate: Elusive Intentions and Shared/Dominant Language

Not only does Bartleby’s language reverberate in and, to some extent, impact the narrator’s chambers, on closer examination, the language of preference is not necessarily an original one. Rather, it is already part of the discourse of the lawyer’s office and the transactions in which he is involved. As Ann Smock points out, “to prefer” is to designate one debt for repayment ahead of another (70). Thus we might read Bartleby’s distinctive language as borrowed from the network of transaction that he seems to be trying to avoid (see Reed 258 note 32). More specifically, his formulation functions as a boilerplate form might—framing contractual relations even as it communicates will or intent only obliquely. Further, it can be seen to be adapted from the very boilerplate language of a contract or judgment being copied.

284 More generally, Bartleby draws attention to the necessary possibility of absence implicated by presence, and vice versa, in the nature of expression and arguably experience (see Derrida 1988, 9-10). As Derrida states, “the spacing [espacement] that constitutes the written sign…which separates it from other elements of the internal contextual chain (the always open possibility of its disengagement and graft), but also from all forms of present reference…is not the simple negativity of a lacuna but rather the emergence of the mark.” Derrida points to “the impossibility that a sign, the unity of a signifier and signified, [can] be produced within the plentitude of a present and absolute presence. This is why there is no full speech” (1976, 69). From this perspective as well, Bartleby can be seen as embodying the rule rather than an exception.

285 John Carlos Rowe points to the criminal context, rather than the commercial, and the phrase “to prefer charges” (119).

286 See the model “Deed of Trust or Assignment for the Benefit of Creditors” presented above. This language appears in Chancery Court opinions, as well. In Johnson v. Corbett (N.Y. Ch. 1844), for example, the New York Chancery Court referred to a “preference in payment” and a “preferred debt.”
In this way, Bartleby succeeds, at least for a time, in using the very language of boilerplate to resist the structure of contract.  

From this perspective, as well, Bartleby demonstrates the universal structure of communication as necessarily constrained by the social dynamics of power. In doing so, he shares with the narrator the particular language of contract and debt. When Bartleby refuses to work and to quit the premises of the lawyer’s office, the narrator pays him some more than he believes he is owed and suggests that Bartleby lock the door behind him and slip the key under the door. Having said goodbye, the narrator realizes that this quiet procedure “seemed sagacious as ever—but only in theory,” wondering “how it would prove in practice” (31). He explains, “It was truly a beautiful thought to have assumed Bartleby’s departure; but after all that assumption was simply my own, and none of Bartleby’s. He was more of a man of preferences than assumptions.”

The narrator marks his failure to connect with Bartleby in a familiar way by using form language of debt. Where Bartleby speaks in preferences—albeit, “not to”—the narrator is involved in assumption, yet another contractual term, this one reflecting the undertaking of debt or risk. However, the framework of contract and exchange also constrains the narrator, at least

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287 De Certeau points to the “[i]nnumerable ways of playing and foiling the other’s game (jouer / déjouer le jeu de l’autre), that is, the space instituted by others,” as characterizing the “resistant activity” of those who “lack their own space, [and thus] have to get along in a network of already established forces and representations” (18). Putting contract language into play, Bartleby “prefer[s] not to” in contrast to the pro rata or “no preference” structure contemplated in the model “Deed of Trust or Assignment for the Benefit of Creditors” presented above.

288 Like the notion of contract as a vehicle and/or emblem of freedom, perhaps, the narrator’s imagined “procedure” (31), has a compelling narrative trajectory, at least to his own mind. “Buil[ding] all he ha[s] to say” on the assumption “that depart [Bartleby] must,” the narrator becomes “charmed” with his own plan, which on further consideration—like freedom of contract—has the potential to diverge in practice from the ideal in theory. As the narrator acknowledges, the ideal also reflects the assumptions of some but not others.
imaginatively, as suggested above, as well as practically\(^{289}\) and ethically.\(^{290}\) Indicating the way in which the rules of a language game, or the nature of an interaction, more generally, are necessarily informed by an amalgam of social forces, for a while the narrator understands his “mission in the world” as providing Bartleby “with office-room for such period as [he] see[s] fit to remain.” However, social pressure in the form of “unsolicited and uncharitable remarks” of the narrator’s “professional friends” (35-36) ultimately leads him to insist again that Bartleby leave.\(^{291}\) The narrator seems to understand responsibility in terms of an even exchange, something that might never be practically or philosophically possible\(^{292}\) but is consistent with notions of contract and laissez-faire capitalism in the nineteenth century.

The possibilities, as the narrator imagines them, of his relation to Bartleby are not realized.\(^{293}\) The narrator’s imagination is informed by an ideal of contract to which Bartleby does not subscribe. Notwithstanding the narrator’s hopes, his scriveners continue in their

\(^{289}\) The narrator’s world, as presented to the reader, is almost entirely his livelihood. The narrator’s reaction to Bartleby having “given up copying” is framed by demands made upon him by his business: “At length, necessities connected with my business tyrannized over all other considerations. Decently as I could, I told Bartleby that in six days’ time he must unconditionally leave the office” (29). He also tries to pay his debt or assume his responsibility with money. He tells Bartleby, “I am very sorry for you; here is money; but you must go” (30).

\(^{290}\) Recounting how he found Bartleby in his office on a Sunday and dug into his personal effects, the narrator implicitly attests to his violation of Bartleby’s privacy. In the narrator’s account, he “groped into [the] recesses [of pigeon holes in Bartleby’s locked desk]” and “dragged… out… an old bandanna handkerchief, heavy and knotted,” which he chose to open (23). Although the narrator seems to sense his ethical lapse, he justifies his actions through the structure of ownership (see Barnett 1974, 382): “I mean no mischief, seek the gratification of no heartless curiosity, thought I; besides, the desk is mine, and its contents too, so I will make bold to look within” (23).

\(^{291}\) Here the narrator is again caught up in the framework of contract. As Stanley explains (98), charity to beggars was viewed in nineteenth-century America as a breach of the code of contract. Bartleby is not begging, but just as the norms of a contractual worldview impose on Bartleby some of the punishment of a vagrant or forger, the narrator’s social circle seems to classify him as improperly doling out charity.

\(^{292}\) Derrida refers to the “aporias of responsibility” in connection with the ideas of language, singularity and the possibility speaking for oneself (1996, 61).

\(^{293}\) The narrator’s approach to his relation to Bartleby repeatedly demonstrates his acceptance of the terms of contract and capitalism. For example, when he finds that Bartleby has not left his office, he points out that Bartleby has “not even touched [the] money [that he left for him] yet” (33). The narrator thereby reveals his assumption that Bartleby ultimately will adhere to the conventions of the market. The narrator frames responsibility in the same way, posing the questions, “What earthly right have you to stay here? Do you pay my taxes? Or is this property yours?” (33). Barnett (1974, 382) ascribes the narrator’s reaction to his sense of ownership and suggests that the narrator comes to terms with Bartleby by thinking of him as property, “as harmless and noiseless as any of these old chairs” (35).
accustomed idiosyncratic roles, with Bartleby “standing at the window in one of his profoundest
dead-wall reveries” (35). The narrator fantasizes in terms of agency that Bartleby “of his own
free accord, would emerge from his hermitage and take up some decided line of march in the
direction of the door.” The familiar language of debt transactions returns in his reflections; “Will
it be credited?” the narrator asks, wishing not to “acknowledge” having left “the office without
saying one further word” to Bartleby. Confounded by Bartleby’s preference not to leave, the
narrator ultimately flees the offices himself. In doing so, he reverts again to the discourse of
contractual relations and assumed debt, “slipping something” in Bartleby’s hand, as he says
goodbye (38). Underscoring the way in which Bartleby emphasizes the necessary possibility of
a lack in communication as well as in the equivalences of contract, the narrator’s offering goes
unreceived, “dropp[ing] to the floor.”

Bartleby resists this framework of connection, and he and the narrator fail to
understand themselves to be engaged in a recognizable transaction. The failure to transact,
however, takes a familiar form and becomes incorporated into the prevailing social structure.
Bartleby ultimately wastes away in prison, like a vagrant, treated as though he is failing to pay
his debt to society, and unable or unwilling to have another assume his ostensible obligation.
Bartleby is denied the opportunity to “prefer not,” and is understood solely in relation to the
work he is not properly doing. When Bartleby prefers to remain put, the narrator acknowledges

294 The narrator’s difficulty in classifying the situation reveals the ways in which a framework of contract imagined
as a form of freedom fails to account for the circumstances at hand, as well as the ways in which the narrator’s
conceptual frame of reference is limited to this ideal. Earlier the narrator “reconciled” himself to Bartleby, in large
part because of “his incessant industry,” which he characterizes as “freedom from all dissipation” (20). The narrator
thence demonstrates a view of work understood to be freely entered into, even if it is mandated by the structure of
the law (see Stanley and the discussion above).
295 As a figure “of frustrated destinations,” Bartleby challenges the narrator’s investment in the “illusion of origins
and ends—author-audience, sender-receiver….that grounds the movement of signification by simulating direction
and intention” (Rowe 126).
that even a charge of vagrancy does not quite fit. Going through the available legal remedies, the narrator asks himself, “surely you will not have him collared by a constable and commit his innocent pallor to the common jail? And upon what ground could you procure such a thing to be done—a vagrant is he? What!…a wanderer who refuses to budge? It is because he will not be a vagrant, then, that you seek to count him as a vagrant. That is too absurd” (37). Yet, Bartleby is indeed put in jail, like one charged with vagrancy, and then is taken for a forger (45)—someone who copies, doing the scrivener’s work, for his own improper ends. The challenges confronting Bartleby, who ultimately prefers not to forge ahead, are thus manifest. Although Bartleby maintains that he is “not particular” (40)—a refrain that nearly supplants his expressed preference “not to” in his penultimate encounter with the narrator—the socio-legal system incorporates him, to the extent it does, by classifying him in breach, as a vagrant or forger.

Thus, although Bartleby is able to manipulate the language of contract and for a time renegotiate the terms of his employment, the broader framework of contract ultimately prevails. “Bartleby” thereby illustrates the tensions in the notion of contract as a paradigm of freedom, which become evident in the later part of the nineteenth century; wage labor, as an asymmetrical relation of power, comes to symbolize the opposite of slavery (Stanley 9).296 At least in principle, the narrator cannot force Bartleby to work, or even to “tell anything about” himself—he tries, and fails, to cajole him to do so of his own “will” (26).297 Instead, Bartleby’s fate foretells the “coercive underside of market relations” in postbellum America, as “freed

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296 As Stanley explains, the common law rule that a free man’s ability to dispose of his labor at will was “well established… [along with the] legal understanding of wage labor as both a free contract and a relation of authority and subordination” (83). In the latter half of the nineteenth century, “[t]he ruling theory of wage labor defined the marketplace as the arbiter of the wage contract but the employer as the final arbiter of daily relations at work” (82).

297 Stanley asserts that, in postbellum America, contract was a “relation of voluntary exchange …It was an axiom of Enlightenment philosophy that contract derived from and governed individual will and that free will was intimately connected to rights of proprietorship” (3).
slaves who refused to enter into wage contracts” faced “punish[ment] as vagrants” (Stanley 122). Treating Bartleby in this way, the legal order marks him as out of place. And although it enters the language of the office for a time and buys a temporary respite, Bartleby’s preference “not to” is ultimately deemed not to be operative contract language. To the extent that Bartleby is understood to be productive it is as a forger; Bartleby’s expression is deemed illegitimate rather than a copy. In either case, society relegates Bartleby to the margins and contains him with those who defy the parameters of the law.

IV. Conclusion: The “Sequel”: Limits and Possibility of Expression

As the language of contract, boilerplate manifests agreement. In this role, it suggests the inversion of the hierarchy of original to copy that remains possible in the operation of contract: Counter-intuitively, boilerplate can be read as a norm that implies the once-presence of an original potentially lacking boilerplate’s performative power to establish a contract. The dynamism of the mark and the temporal inversion that a rethinking of the relation of original to copy implies are apparent in the “sequel” of the tale, which gestures toward, but is “wholly unable to gratify” the reader’s “curiosity as to who Bartleby was and in what manner of life he led prior to the present narrator’s making his acquaintance” (46). The narrator “divulge[s]” another quintessentially indefinite and peripatetic form of expression, “one little item of rumor” of a “vague report” of Bartleby’s work in “the Dead Letter Office at Washington.” Envisioning Bartleby “assorting [these letters] for the flames” (47), the narrator assumes them to reach a dead end. However, the letters do not necessarily remain unread. The narrator puts their familiar,

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298 The characterization of something as dead in this narrative, and arguably elsewhere by Melville, is provocative. Bartleby is described as engaged in “dead-wall reveries” (24), but the possibility of being lost in thought over or facing a “dead wall” might be read to suggest not necessarily the limits of the content of Bartleby’s imagination but
almost standard, forms back into circulation. He describes “a ring…a bank-note…hope…good tidings,” even as they “speed to death” (47).299

Thus, at the end of the narrative, a reader is invited to consider whether these “dead letters,” like Bartleby, constitute exceptions to the rule of expression or might be read as exemplary forms. Demonstrating the necessary possibility of being readable in the absence of sender or receiver, these letters, along with Bartleby and boilerplate, offer an alternative standard.300 The dead letters thereby suggest a model for the narrator’s own missive, the tale itself; they remind a reader of the extent to which his curiosity remains ungratified as to Bartleby’s intentions as well as the narrator’s. The reader can only speculate concerning the extent to which the narrator was willing or able to assume the risk or responsibility implied in the relationship he imagined with Bartleby.

Bartleby’s inscrutability as well as his potential for representing a common truth or standard resonate not only in the character of the narrator but in the tale as a whole, as suggested by the cryptic final refrain of the story. The last line, “Ah, Bartleby! Ah, humanity!” (47) implies both a recognition of the singularity of the individual and the universality of this human condition. However, the conflation of Bartleby’s circumstance with the general human

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299 The temporal structure of this part of the narrative is intriguing. The narrator imagines Bartleby engaged in the “business…of continually handling these dead letters,” which “by the cart-load…are annually burned” (46-47). Since, in the narrator’s account, this has taken place before he and Bartleby became acquainted, the letters are at the time of telling no longer “speed[ing] towards death” (47), but have been destroyed. The narrative allows the letters to be read, however, again making salient the phenomenon of iterability: The letters have moved toward a telos that the reader does not experience as fully actualized.

300 As Derrida explains, “a letter does not always arrive at its destination, and since this belongs to its structure, it can be said that it never really arrives there, that when it arrives there, its possibly-not-arriving [son pouvoir ne-pas arriver], torments it with internal divergence” (1975, 107). As he asserts elsewhere along similar lines, “intention, or attention, directed towards something iterable which in turn determines it as being iterable, will strive or tend in vain to actualize or fulfill itself, for it cannot by virtue of its very structure, ever achieve this goal” (1988, 56).
experience, or the assumed norm, evokes the structural problem of making equivalences in situations of inequality and inequity.

Ultimately, the inherent limits of the ideal of contract imagined by the narrator and the worldview he represents restrict the possibility that Bartleby introduces. Reflecting prevailing structures of power, Bartleby’s singular actions are incorporated into the existing social and legal framework. Bartleby is thereby refigured in terms of familiar models of deviation. Though indebted to no one, Bartleby dies in a debtors’ prison, treated like a vagrant or a forger. In addition, as Bartleby’s language circulates back into the dominant discourse, the expression of preference, when spoken by others, follows the accepted norm: Characters other than Bartleby “prefer” rather than “prefer not” (17, 27-8, 31, 37). Thus Bartleby’s language and his story continue to resonate. However, they, like boilerplate or contract language more generally, are communicated within and informed by the structure of power that does not necessarily recognize or correct for disparities of opportunity that impact experience. At the same time, the narrative acknowledges the possibilities of diverse and diffuse vehicles of expression, including democratic elections (as well as the mob) (31, 40), which have the potential to recalibrate relations of power, if sometimes subtly. In this manner, the tale

301 Instances in which the narrator paraphrases Bartleby highlight this phenomenon. When quoted, Bartleby tends to formulate his assertions in the negative. And when he does not answer with “prefer not,” he gestures toward an alternative or toward isolation (“I would prefer to be doing something else” (41), “I would prefer to be left alone” (27)). However, when Bartleby’s responses are restated by the narrator, they lose this quality of negation. In the narrator’s account, for example, “[Bartleby] apprised me, that his original determination remained the same; in short that he still preferred to abide with me” (37).

302 As discussed earlier, at the time of writing, the narrator no longer holds the position of Master of Chancery.
demonstrates both the possibilities of signification as well as the limits of expression necessarily situated within a social structure.\footnote{The narrator has the privilege of telling the story but his power over the narrative cannot be absolute in light of the nature of expression.}

With emancipation, contract as a sign and vehicle of freedom comes to permeate the American consciousness more dramatically in the decades that follow “Bartleby.” The story anticipates these developments, presciently situating questions of freedom and will in the context of contract. A focus on the idea of contract and the form language that tends to manifest it legally thereby enables us to read “Bartleby” as an exploration of the nature of expression in general and in the particular context of the market that informs nineteenth-century America. In addition, it reminds a reader of the ongoing challenges to agency in the current framework of contract,\footnote{For example, Antonio Jackson brought an employment discrimination suit against his former employer Rent-A-Center, West, Inc., challenging the enforceability of an arbitration agreement he signed as a condition of employment. The provision stipulated that an arbitrator would resolve any dispute relating to the agreement’s enforceability. In 2010, the Supreme Court held in Rent-A-Center, West, Inc. v. Jackson that it was for an arbitrator, rather than a judge, to determine the enforceability of the arbitration agreement, when the agreement as a whole, rather than the specific provision was challenged as unconscionable. The majority opinion, penned by Justice Antonin Scalia suggested, however, the unlikelihood of success of a challenge of unconscionability to the provision itself (2780). In his dissenting opinion, Justice John Paul Stevens characterized as “fantastic” (2788) the Court’s reasoning, which requires, among other things, that a party challenge “the particular sentences that delegate such claims to the arbitrator, on some contract ground that is particular and unique to those sentences (2787, emphasis in original).} in which the accepted market context enables the naturalization or, at least, acceptance of imbalances of power.
CHAPTER FOUR

The Boilerplate of Everything in *The Crying of Lot 49*

Confronting the universal challenges of agency, communication and interpretation in the particular context of mid-twentieth century America, Thomas Pynchon’s novel, *The Crying of Lot 49* (1966) takes on the presumptions and stakes of contract revealed by the concept of boilerplate. As Chapter Two explains, boilerplate—the idea of a distinct form of contract language characterized by standardization—suggests an attenuation of agency and intention of one or both contracting parties. This attenuation involves the nature and limits of self-knowledge and expression as well as the social frameworks that inform the parties’ relation to one another. The qualified connection that boilerplate represents exemplifies the structure and operation of contract, yet the notion of boilerplate attests to its distinct conceptual role. The differentiation of boilerplate as a special contractual form reveals the power of the ideals of freedom, agency and interpersonal connection that persist in contract.

As the preceding chapter’s reading of “Bartleby” demonstrates, the notion of boilerplate sheds light on the inherent challenges to the ideal of autonomy and agency that emerged with contract as a collective outlook in the nineteenth century. *Lot 49* reflects the temporal and geographic advance of the American capitalist project from nineteenth-century Wall Street to the landscape of twentieth-century California. In doing so, the novel attests in quintessentially postmodern terms to the enduring appeal of the ideal of agreement. It does so by uncovering the very aspects of experience that preclude the realization of the ideal, which are made salient by boilerplate: the necessary attenuation of interpersonal connection, and indeed
self-knowledge, as well as inherent constraints on agency along with those imposed by social frameworks.

*Lot 49* engages these issues thematically from the outset. Without first agreeing to, or even understanding, the mandate imposed upon her, the novel’s protagonist, Oedipa Maas, finds herself “named” as the executor of the estate of her former lover, Pierce Inverarity, a “real estate mogul” (Pynchon 1). As a result, she leaves her comfortable California suburb for provocatively-named San Narciso, the original site of Inverarity’s land speculation, “near L.A.” (13), and in doing so, becomes aware of the range of the American experience of capitalist opportunity. Exploring the possibilities and challenges of agency through this role, Oedipa becomes enmeshed\(^{305}\) in a quest for determinative meaning, which underscores the premise, as well as the lack, of a precipitating moment of authentic connection or agreement.

As an “exemplary postmodern text” (Castillo 39), *Lot 49* challenges the protagonist’s and the reader’s presumptions concerning the possibility of definitively locating the significance of a sign and thus of identifying an “underlying truth” (Pynchon 36) in the world. The novel presents this challenge in the context of a complacent and prosperous America that relegates a dis-inherited population to the margins (see Gleason; Hansen); such collectives become defined by their shared and/or facilitated isolation and the resulting de-

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\(^{305}\) Names, along with other details in the novel, are suggestively allusive, tapping into a reader’s desire to decode the novel or identify a unitary significance. Maas in Afrikaans means “mesh” (Gleason 84), underscoring the role of the network and thus of contingency and relation in the process of signification. Oedipa’s first name can also be read to shed light on her struggle to identify a unitary significance; by invoking the myth of a prophecy fulfilled in unexpected ways, the name Oedipa reminds the reader not only of her gendered position in relation to the dominant system, but also of the very possibilities of fate.
individualization. The U.S. Postal Service and a master narrative of American (and world) history figure in the novel as models of connection and social involvement — to which the Tristero is understood as a possible rebuttal. In doing so, they evoke the qualified social participation, naturalized through contract and the market, that can be traced back to the nineteenth century.

The plot of *Lot 49* takes place contemporaneously with the U.S. Supreme Court’s consideration of a form contract in the case of *National Equipment Rental, Ltd. v. Szukhent* (1964). In this case, Steve and Robert Szukhent, a father and son farming in Michigan, leased farm equipment from National Equipment Rental, a company based in New York, signing onto terms printed on a lease that was presented to them by the company. Among its terms, the contract document designated a New York resident, Florence Weinberg, to accept process for the Michigan farmers in New York so as to establish the jurisdiction of a New York court over the parties in the event of a suit. Weinberg was chosen by the company and was not personally known to the Szukhents, nor was she required by the terms of the contract to notify the Szukhents in the event process was served. Claiming that the farmers failed to make payments under the lease, National Equipment brought suit in a New York court, after serving a summons and complaint to Florence Weinberg as the individual designated in the lease.

Fittingly, the case focuses on the question of whether Florence Weinberg was validly “named” (324) as agent for service of process — thereby subjecting the Michigan defendants to the jurisdiction, and burden, of an out-of-state court (in this case, in New York).

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306 The description of his group given to Oedipa by one member of the Inamorati Anonymous demonstrates this point. With the goal of overcoming the addiction to love, members become isolates; rather than attending meetings, group members support one another anonymously and without ever meeting more than once (see Pynchon 91).
However, the resonance of the case with the narrative of *Lot 49* lies in its engagement of the question of whether parties can be held to terms to which they may not have “genuine[ly]” agreed (332) and, more broadly, of the nature of agreement manifested in a standard form document. Despite their opposing positions, the majority opinion and Justice Hugo Black’s dissenting opinion each treat the documented form of contract as indicative of the extent of the parties’ volition and intention, which in turn legitimate its status as a binding contract. In doing so, the opinions reflect views of the possibilities of expression and autonomy, as well as the relation between form and meaning.

In light of the fact that the Szukhents were notified by the designated individual (despite no contractual term obligating it), the majority of the Supreme Court was willing to subject them to suit in a New York court. Justice Black dissenting opinion, on the other hand, framed the case in terms of contract’s role as a vehicle of meaning. His opinion invokes the possibility of “genuine agency, not a sham” (323) and “genuine agreement,” involving “clear, unequivocal, and unambiguous language,” that contrasts with its “weak…imitation” (332). In his view, the law ought not to recognize this nonnegotiable “standard printed form” (319) imposed by a more powerful party on a weaker counterpart as an agreement to waive the fundamental right to be tried in a local court. Justice Black thereby gestures to the possibility of contract as a definitive manifestation of authentic agreement, in a manner that corresponds to the way Oedipa frames her search for meaning in *Lot 49*.

Justice Black’s anxious invocation of boilerplate, however, complicates the either/or structure of actual agreement or its “weak…imitation” (332) that his opinion suggests. As Justice Black warns—in the first Supreme Court opinion to invoke the term “boilerplate” in
connection with contract: “Clauses like the one used against the Szukhents—clauses which companies have not inserted, I suspect, because they never dreamed a court would uphold them—will soon find their way into the ‘boilerplate’ of everything” (328). As such, Justice Black acknowledges the ubiquity of boilerplate as the medium of contract and, as a consequence of the Court’s holding in this case, its sinister role, themes evocative of the cryptic symbols and possible plots pervading Lot 49.

The binary framework implied in Justice Black’s opinion resembles the analytic structure that Lot 49 repeatedly invokes and, arguably, undermines by highlighting the indeterminacy of either/or choices in the novel. Justice Black’s commitment to the idea that contract ought not compel individuals against their will, especially when confronted with more powerful corporate counterparts, underpins the rhetorical force of his argument. Lot 49 also explores the challenge of expression and agency in the American context of increasing corporatization and silenced or marginalized individuals. Thus, in light of boilerplate, as the notion of form that marks an instance of agreement, while potentially obscuring meaning and disengaging agency in the particular framework of the American market, the novel can be read as commentary on the contemporary phenomenon of contract.

In its disruption of the distinction between truth and fantasy and in its treatment of self-knowledge as attenuated, Lot 49 bears the stamp of postmodernism. The novel also presents a view of a world of ubiquitous and entangled connections, which can be read as a glimpse into the tensions epitomized by boilerplate in the century that follows. The near-hermetic hold that the operation of the market exerts on the form of the novel evokes the challenges to connection and social participation posed by contract into the current day, particularly in the form of
boilerplate. As the form document of agreement becomes the substance of contract, boilerplate—typically unread, nonnegotiable stereotype—serves as the medium of legally enforceable agreement. At the same time, as a notional exception, the idea of boilerplate reveals the presumptive intentionality and freedom of contract.

*Lot 49* foresees the possibilities of expression, demonstrated by standard form contract, suggesting connection in the margins, in silence, elision and most importantly, perhaps, in the imagination. In the structure of its plot, the novel also underscores the lasting place of genuine connection and agreement in the American imagination, which the idea of boilerplate implies. By frustrating its protagonist and its reader, *Lot 49* emphasizes the seductive draw of the possibility of a “meeting of minds,” and the related notion of a coherent sense or knowledge of self, which continues to underpin an American understanding of contract.

As Justice Black’s opinion indicates, agreement—along with the agency and interpersonal connection it presupposes—figures as a conceptual anchor in the discourse of contract. Yet, the phenomenon of boilerplate challenges the distinction between transparent and opaque language, and between genuine and imaginary, or posited, connection. In practice, as the preceding chapters show, boilerplate exhibits most, if not all, of the expressive potential ascribed to traditional, or non-boilerplate, contract language. In doing so, boilerplate highlights the attenuation of agency that informs expression in general. At the same time, boilerplate evokes an ideal of full, freely-exercised and communicated intention by marking its absence. From this perspective, boilerplate can be seen to exemplify a postmodern notion of communication in which form generates meaning rather than manifests an ostensible intention. As such, the function of boilerplate brings to light the often polysemous interplay of form and substance as
well as the seductiveness of the possibility of connection that remains on the margins of contemporary life—themes at the heart of Lot 49.

I. Szukhent: Imagining Agents, Agency and the Possibility of “Genuine Agreement” in a World of Boilerplate

The 1964 Supreme Court case of National Equipment Rental, Ltd. v. Szukhent involved a suit in a New York federal court by National Equipment Rental, a farm equipment leasing company based in New York, against Steve and Robert Szukhent, farmers in Michigan. The Szukhents had entered into a lease for equipment with National Equipment, and National Equipment brought suit alleging the Szukhents’ failure to make payments under the lease. The lease, a printed form of over a page provided by National Equipment Rental and signed by the Szukhents, contained in its final paragraph a designation of an agent to receive service of process in New York on behalf of the Szukhents in the event of a suit. The Szukhents did not know Florence Weinberg, the New York resident designated agent by the terms of the lease; she was chosen by National Equipment Rental and married to one of its officers. The lease did not contain any undertaking by Weinberg, as agent of the Szukhents, to act on behalf of or give notice to the Szukhents, as her principals.\(^{307}\)

Bringing suit against the Szukhents for a default under the lease, National Equipment Rental delivered a copy of the summons and complaint against the Szukhents to

\(^{307}\)In the view of the majority of the Second Circuit Court of Appeals, which found the service of process insufficient to establish jurisdiction of a New York court over the Szukhents where the agent made no undertaking in the lease to act for or give notice to the Szukhents as principal, parties need not provide for notice of the principal “when individuals freely contract for a method of substituted service” (80). However, the Circuit court considers the absence of such a provision in “determining the meaning and effect of the provisions of the contract” in this case, in particular concerning whether “there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act, and the agent is subject to control by the principal” (80-81).
Weinberg, as the agent of the Szukhents named in the lease. In this manner, the company aimed
to fulfill the corporation’s obligation under the Federal Rules of Civil Procedure that a summons
and complaint be personally served on the counterparty, and thereby establish the New York
court’s jurisdiction over the parties.\(^{308}\) Although she was not obligated to do so by the terms of
the lease, Weinberg notified the Szukhents that process had been served on her as their agent.
This reflected the policy of National Equipment concerning leases that named Weinberg as agent
for service of process, as did the company’s supervision of Weinberg as she executed her
responsibilities in this capacity. Arguing that Weinberg’s role seemed closer to that of the agent
of National Equipment Rental (30 F.R.D. at 4),\(^{309}\) the Szukhents successfully brought a motion
in the District Court to quash the service of process, which the Second Circuit upheld (311 F.2d
79 (1962)) on appeal, and a five-Justice majority of the Supreme Court subsequently reversed.
The majority opinion by Justice Potter Stewart treated as “well-settled” the principle that agency
was validated by Weinberg’s prompt acceptance of the summons and notification of the
Szukhents (375 U.S. at 316). At stake for the Szukhents in this case, in the view of dissenting
Justice Black, was whether they were determined to have waived “all objection to the
jurisdiction of a court in a distant State the process of which could not otherwise reach them”
(324) and, thus, whether they must bear the financial burden of defending themselves in a state in
which they do not reside. Invoking the Magna Carta, Justice Black stressed the long-recognized

\(^{308}\) Although the Rule allows for such service to be made by “leaving copies…[at the individual’s] dwelling house or
usual place of abode,” it demonstrates a commitment to the substantive goal of agency in its requirement that the
accepting person “resid[e] therein” and be “of suitable age and discretion” (see Federal Rule of Civil Procedure 4(d)
cited in Szukhent 312 note 1). The Rule also limits its applicability to service of process “[u]pon an individual other
than an infant or an incompetent person,” further underscoring the implicit goal of meaningful notification. As an
alternative, the Rule allows for delivery of a “copy of the summons and of the complaint to an agent authorized by
appointment or by law to receive service of process”—the aspect of the statute touched upon in this case.

\(^{309}\) Counsel for the Szukhents argued that Weinberg, “a person unknown to defendants and unrelated to them, was,
inferentially, a ‘representative of the plaintiff in some capacity’” (30 F.R.D. at 4). In his dissenting opinion, Justice
Black enumerates a number of aspects of the relationship between Weinberg and National Equipment Rental to
support this position. See discussion in Chapter Two and below.
significance of the “right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum” (325).

Although this case came before the Supreme Court as a question of whether agency was effectively established\(^{310}\) in the particular sense of the legal relationship between an agent and principal, the Justices’ discussions reflect more broadly on the nature of a party’s ability to exert or manifest agency in entering an agreement. As such, the opinions implicitly touch on the role of the document in expressing the terms of a contract, and more peripherally, on the dynamics of power that the document both manifests and perpetuates. Justice Black’s dissenting opinion and, to a lesser extent, Justice Stewart’s opinion on behalf of the majority\(^{311}\) reveal an investment in the notions of interpersonal connection and free and intentional participation in agreement.

The majority opinion treats the contract document as an indication of the parties’ agreement to the terms, but grounds its decision in a pragmatic, formalized ex-post view of the transaction.\(^{312}\) In contrast, Justice Black highlights the power dynamic that he perceives in the

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\(^{310}\) The District Court held that despite the designated agent having “promptly notified the respondents of the service of process and mailed copies of the summons and complaint to them, the lease agreement itself had not explicitly required her to do so, and there was therefore a ‘failure of the agency arrangement to achieve intrinsic and continuing reality’” (375 U.S. at 314).

\(^{311}\) Justice Stewart’s analysis gestures toward the contractual document as a reflection of the Szukhents’ meaningful consent to the appointment of the agent. Reflecting a pragmatic approach, Justice Stewart takes an ex-post view of the prompt and successful service of process. However, in its discussion of the document, the majority opinion demonstrates the need to counter Justice Black’s depiction of the document as failing to manifest agreement. The majority opinion looks at the language of the relevant provision reading it to “clear[ly]” reflect its purpose “assur[ing] that any litigation under the lease should be conducted in the State of New York” (316). Describing the form of the contract as a whole (“a lease . . . on a printed form not less than a page and a half in length, and consist[ing] of 18 numbered paragraphs”) and the location and appearance of the relevant clause “just above the respondents’ signatures and printed in the same type used in the remainder of the instrument” (313), Justice Stewart’s opinion implicitly attests to a view of contract language as reflective of a knowing and participatory process. Presenting the facts to be considered, the District Court acknowledged in its majority opinion that “the clause appointing Florence Weinberg was no buried fineprint clause” (30 F.R.D. at 4).

\(^{312}\) Under the terms of the lease, the appointed agent was not obligated to notify the parties promptly of service of process (314). Weinberg did so promptly, however, and Justice Stewart’s majority opinion makes clear that “[a]
transaction, painting a picture of inequity that colors the reading of the document as an expression of consent. In Justice Black’s view, the Szukhents, a father-son team of “Michigan farmers,” transacting with a “New York company” aided by its lawyers (319), are being held to terms that were arguably hidden if not incomprehensible to them and that were not meaningfully negotiable. Situating the contract in the context of an asymmetrical structure of power, Justice Black questions the validity of the form document as an expression of the parties’ intent. For Justice Black, the inclusion of “the clause about service of process in this standardized form contract” reflects the disparity of knowledge and bargaining power between the parties (324, 326).

The form of the lease evidences the inequitable structure, distinguishing the document from ideal or genuine expression: “This printed form provision buried in a multitude of words is too weak an imitation of genuine agreement to be treated as a waiver” of the parties’ right to avoid suit in a jurisdiction not their own (332). Justice Black thereby invokes the possibility of an agreement “deliberately and understandingly made…established…by clear, unequivocal, and unambiguous language” (332). In this manner, the dissenting opinion taps into a view of expression as reflecting an “intent to communicate” (Pynchon 14) and effectively transmitting the specific content of that communication. This expressive possibility also depends on, and indeed presumes the accessibility of, a dynamic of “equals” (375 U.S. at 326).

313 Justice Black underscores the disparity in bargaining power between the parties by repeatedly referring to the lessees in this manner (see 319, 320, 323, 326, 327, 332). In doing so, Justice Black taps into a dark view of the market, as facilitating or naturalizing inequity.
314 Justice Black asserts, “Where one party, at its leisure and drawing upon expert legal advice, drafts a form contract, complete with waivers of rights and privileges by the other, it seems to me to defy common sense for this Court to formulate a federal rule designed to treat this as an agreement coolly negotiated and hammered out by equals” (326).
Positioning standardized terms at odds with meaningful communication, Justice Black rejects “[t]he idea that there was a knowing consent of the Szukhents to be sued in the courts of New York” (333). Instead, he gives an ominous gloss to the possibility of straying from the world of patent representation of will; for him, such agreement “is no more than a fiction—not even an amiable one at that.”

Justice Black’s insistence on an interpretation of the federal rule “as contemplating a genuine agent, not a sham” (323), similarly reflects a binary structure involving competing coherent narratives. For Justice Black it is significant that the appointed agent’s interests were not aligned with those of the lessees. He stresses that Weinberg was not personally known to the Szukhents, was chosen by National Equipment Rental and was married to one of its officers (319). Justice Black notes that the record falls short of revealing whether she was even further invested in the company’s interests as a stockholder or director (323 note 9). In this manner, the opinion stops short of attributing to the company an exploitative intent, but it depicts a hidden network of connections that reflect a structure of power compromising the purported relationship between the parties. Rather than viewing the relation of agency in terms of its sometimes arbitrary attenuation, Justice Black offers an alternative narrative; he perceives a coherent connection, which he believes to be inappropriate and misplaced.

Thus Justice Black’s treatment of contract conjures an either/or structure of competing narratives of intention. His approach resonates with the repeated suggestion and destabilization of a similar framework for the interpretation of signs in Lot 49. As the novel

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315 The majority opinion rejects the argument that a possible conflict of interest undermined the validity of the agency, as it “ignores the narrowly limited nature of agency here involved” (317). In doing so, the majority opinion thereby reflects a formalized vision of agency, which contrasts with the notion of a “genuine” agent invoked in Justice Black’s dissenting opinion (323).
relates midway through Oedipa’s adventures, “Either the Trystero did exist, in its own right, or it was being presumed, perhaps fantasied by Oedipa, so hung up on and interpenetrated with the dead man’s estate” (88). In distinctively postmodern terms, the novel explores the ideal of agreement and the original moment of freedom and self-knowledge that it presumes: The novel conspicuously challenges the assumption of an available, identifiable origin or source—or self, for that matter—in the search for meaning. In addition, the theme of absent originals or origins reverberates throughout the text. As a literal representation of the phenomenon of iterability, or the possibility of a mark to have meaning in a changed context, including the absence of its sender, the “dead man’s estate” exemplifies the unrecoverable origin as the necessary condition for “all language…and ultimately…the “totality of ‘experience’” (Derrida 1988, 10). The imaginative hold exerted upon Oedipa by the estate thereby calls attention to the dynamism and contingency of her “presumption” (or even, perhaps, fantasy)316 of the Tristero; while it frames her thinking, the residue of Pierce Inverarity’s life cannot be consolidated into a single indisputable significance.

In addition to the challenge in accessing the self or the will of another, the novel alludes to the constraints on agency imposed by social frameworks. Never having been granted the opportunity to accept or reject the responsibility of executing Pierce Inverarity’s estate, Oedipa comes home to “find” herself in the role (Pynchon 1). As this discovery suggests, circumstances necessarily constrain the possibility of agency and freedom, even in ordinary

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316 It is fitting in the context of a discussion of Lot 49, in which paranoia figures prominently, but has also been read by some to be a mode of communication, creativity and/or connection (see Olehla 66; Plater 190; Johnston 1991, 47), that Justice Black’s warning in the context of a dissenting opinion can be read as an expression of paranoid anxiety concerning the sinister possibilities of a largely invisible commonplace.
course. As such, in situating Oedipa’s exploration of meaning—and the meaning of a mark—\(^{317}\) the novel acknowledges the structures of expression and power that trouble the presumption of a discrete, static origin or moment of agency.

In light of the novel, the operation of the mark surfaces in Justice Black’s opinion to trouble the opposing possibilities of a deliberate, uncoerced transaction that can be identified through unequivocal expression and a mere fiction of agreement documented in standard form. Boilerplate—a manifestation of expression attenuated from a static intentioned origin—figures in Justice Black’s prediction of the sinister outcome\(^ {318}\) of the Court’s decision to uphold the validity of the contractual assignation of agency: “The end result of today’s holding is not difficult to foresee. Clauses like the one used against the Szukhents—clauses which companies have not inserted, I suspect, because they never dreamed a court would uphold them—will soon find their way into the ‘boilerplate’ of everything from an equipment lease to a sales contract” (328). The opinion thereby invokes a clear line between legitimate and unenforceable expressions of agreement in lamenting its abandonment by the Court. At the same time, however, Justice Black’s invocation of boilerplate as the established medium of contract

\(^{317}\) One can identify as the objects of Oedipa’s interpretative focus the will, the stamps, the muted post-horn, each of which is treated by Oedipa as representations of intention in manner that recalls the treatment in contract doctrine and case law of common contract conventions discussed in Chapter One.

\(^{318}\) After first discovering the symbol of the muted post-horn, which Oedipa will soon see even in “fragments of dreams” (Pynchon 95), she learns of Mike Fallopian’s theory of private mail delivery in the United States “as a parable of power” in the federal government’s “design[] to drive any private competition into financial ruin” (39). “So began for Oedipa,” the narrative asserts, “the languid, sinister blooming of The Tristero” (39-40). Yet the narrative calls attention to the range of possibilities that this seemingly straightforward assertion occasions by immediately following this sentence with qualifications and attenuations: “Or rather, her attendance at some unique performance, prolonged as if it were the last of the night….As if the breakaway gowns, net bras, jeweled garters and G-strings of historical figuration that would fall away were layered dense as Oedipa’s own street clothes…; as if a plunge toward dawn indefinite black hours long would indeed be necessary before The Tristero could be revealed in its terrible nakedness” (40). Even in its imagined revelation, the Tristero raises more questions than it answers: “Would its smile, then, be coy, and would it flirt away harmlessly backstage…and leave her in peace? Or would it instead…bend to her alone among desolate rows of seats and begin to speak words she never wanted to hear?” (40). In this light, Justice Black’s presentiment about the future of boilerplate leaves open the question of the significance of contract language, as well.
concedes the already existing frameworks of expression and power that attenuate the ideal of freely- and knowingly-entered agreement.

By acknowledging the pervasiveness of ostensibly acceptable or benign form language, the dissenting opinion complicates its binary vision of authentic and fictional contractual communication. As a distinct conception of contract language, boilerplate amounts to an implicit alternative to the standard of tailored, presumptively negotiated language that purportedly manifests fully comprehended and freely entered commitment. Yet, “boilerplate”—arguably a “weak imitation” of “genuine agreement”—performs as contract and marks a document as such. Justice Black’s invocation of boilerplate, a paradigm of speech not tethered to a determinate origin but nonetheless indicative of contract and hence agreement, invites another perspective on the nature of connection and expression.

As the preceding chapters explore, the concept of form language indicates the persistence of an ideal of authentic connection from which it is distinguished. In its distinction from traditional contract, the idea of boilerplate reveals a belief in substantive connection represented by signs, and thus manifested in contract language. In practice, contract terms identified as boilerplate demonstrate the possibilities of expression, and perhaps even agreement, precipitated by attenuated agency and freedom. In doing so, boilerplate points to the generative

319 Though boilerplate often conjures a blurred text of unremarkable language, form language is viewed as presumptively enforceable by courts (see Graham v. Scissor-Tail).
320 An attempt to deviate from identifiable boilerplate form may be incomprehensible or misunderstood by counterparties, and thus, perhaps, less effective in facilitating or manifesting agreement or connection (see Kahan and Klausner 724).
321 Notwithstanding Justice Black’s strong language concerning what he seems to regard as authentic contract, American contract doctrine does not explicitly require subjective connection. However, the possibility of genuine connection continues to permeate the legal imagination rhetorically. Language suggesting functional, if not profound, connection continues to permeate judges’ discussions of contract. Specifically, an interaction in which parties understand one another sufficiently to agree is often, even in recent contract cases, referred to as a “meeting of the minds,” even though this term is not typically recognized by scholars as a legal standard in contract doctrine (see CDO Plus Master Fund Ltd. v. Wachovia Bank, N.A (2009)).
capacity of form to further substantive connection or agreement, even as it marks an absent origin or intent. As such, boilerplate instantiates postmodern expression. As a concept and a model of expression, boilerplate brings to light the way in which *Lot 49* foresees both the ongoing constraints to agency and connection in American life as well as the enduring appeal of an ideal of determinative manifested connection, or the possibility of a “meeting of the minds.”

II. The Postmodern American Legacy in *Lot 49*

From the outset, *Lot 49* situates the problem of communication and agency in the context of an American narrative of expansion facilitated by capitalist enterprise. As such, the novel calls to mind the potential of contract to naturalize inequities, as exemplified, to Justice Black’s mind, by a “New York company” operating with the behind-the-scenes help of its team of lawyers to deprive a father-son team of “Michigan farmers” of basic rights through a form agreement. Following the ostensible trail of an alternative to the “government monopoly” of the U.S. postal service (Pynchon 38) (the dominant mail system[^322]), *Lot 49* invites consideration of the conventional norms of connection as informed by the white, male, mainstream capitalist structure of mid-twentieth century America. The novel repeatedly presents a choice of alternatives as to, and thereby affirming, the significance of experience. However, it denies its protagonist, and indeed the reader, a definitive resolution. In doing so, the narrative introduces the possibility of additional perspectives, disrupting neat categorizations, but reinforcing the reader’s quest to find meaning in the text.

[^322]: The gendered pun (see Gleason 94) fittingly situates Oedipa on the margins of society along with the underground communities and users of the WASTE system she discovers.
A. The Medium is the Message: The Subject and Significance of “The Crying of Lot 49”

In its treatment of the relation of form and meaning, *Lot 49* reveals dynamics of agency and social forces that trouble the possibilities of equitable participation in American life. The idea of boilerplate as a distinctive type of contract exemplifies the mutually-constituting relation of form and meaning, as well as the dynamic interplay of expression and context. As Justice Black’s warning about certain contractual terms “soon find[ing] their way into the ‘boilerplate’ of everything” indicates, standard language—often characterized by its inscrutability and dissociation from an identifiable and/or intentioned source—constitutes contract as well as the limits of such connection, serving both as its medium and as its sometimes conflicting messages.

*Lot 49* engages this issue of form as meanings (see Gibb 110), not only in its thematic treatment of technology and media (see Couturier 6), but also in the way the novel deals with expression through form more broadly. Even before the novel’s opening lines, the title raises central themes of the novel in the interplay of form and meaning, resonant with the operation of boilerplate terms. A fragment echoed in, and/or echoing, the novel’s final phrase, the title’s ambiguous subject evokes the question of agency. The “lot” of the title frustrates a

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323 As the novel demonstrates, “[i]f truth is dependent upon our perspectives…then any text is multiple” (Gibb 110).
324 In *Lot 49*, Marshall McLuhan’s assertion that the “medium is the message” resonates in the treatment of technologies and systems of communication that serve as “extension[s] of ourselves” (McLuhan 7; see Couturier 11; Schaub 54). This insight stems from a consideration of the role of technological innovation as it impacts American culture (see McLuhan 7-12). Maurice Couturier views the novel as an “elaborate textbook on communication in its various aspects…obliquely described and analyzed through their various failures to achieve their goal” (6). The nature of contract and of its documented form is also in turn impacted by technology as Margaret Radin points out. The standard language of contract has evolved from the “first era of boilerplate,” involving “a rigid, heavy metal object, the piece of metal produced by a linotype machine,” which “[o]nce… produced, [meant that] recombination of the terms it embodied would be practically impossible” (2007, 190). The “second era of boilerplate” involved “modularity through recombination [made] possible” through the use of forms which were photocopied, manually cut and pasted and then retyped. In the “third era of boilerplate, digitized repurposing—computer reproduction and recombination” has been made easier, bringing “[m]odularity…into play much more regularly and with much finer granularity” (191).
search for a definitive agentic source, suggesting both an audibly expressive subject (a lot crying) and an expressed object (a lot being cried). In addition, “lot” connotes both a marketable tract and an unhappy destiny. The title thereby situates questions of human agency and expression in an epigrammatic critique of the American narrative of the conquest of the West (see Hansen 595) and of the myth of American progress in general.

Inviting the reconstruction of the fragmentation suggested by and within the title, “lot” echoes the word “plot,” or the circumscription of a material and/or narrative landscape (see Castillo 27). In this manner, the title gestures toward a coherent narrative, or at least the quest for one, which in the novel takes the form of Oedipa’s search for a plot, in both the benign and sinister senses of the word. In doing so, it engages the reader’s desire to do the same.325 A reader, enticed along with Oedipa into tracing the significance of recurring signs, can identify in the title an allusion not only to the Echo Courts motel in which Oedipa first finds herself during her trip to San Narciso,326 but also to the notion of an echo as a cry cut off from a human agent or determinate source. The fragmentary form of the title evokes the myth of Echo, fated to repeat portions of another’s antecedent expression.327 In this manner, the title operates, arguably, as a form of boilerplate, modular (see Smith) and relative to a definitive origin. In doing so, the title, operating in synecdochical relation to the novel, tantalizes the reader with the

325 As Robert Gibb notes, “plot” is “the novel’s central pun” (98).
326 Oedipa sees a mural that resembles her as she approaches the motel, reinforcing the suggestion of significance in Echo Courts’ situation in the town of San Narciso. Although the overly allusive nature of names in the novel is itself a key element of the narrative (see Castillo 28), the invocation of the myth of Echo and Narcissus here suggests the link between the problem of agency— involving one’s own or another’s will—and that of self-knowledge. In the course of seeking to act as his agent, and thus make manifest Pierce Inverarity’s will, Oedipa finds herself enmeshed in an equally challenging quest for self-understanding.
327 Thomas Schaub points to McLuhan’s Understanding Media: The Extensions of Man (1964) as “[t]he origin of Pynchon’s use of the Narcissus myth” (Schaub 54), which refers to Echo’s attempts to win Narcissus’s love “with fragments of his own speech” (McLuhan 41).
possibility of “clear, unequivocal, and unambiguous language” that precipitates a true connection, even as it refuses to actualize it.

As it highlights but fails to fulfill the desire for meaning and connection, the novel goes further, demonstrating the dynamism, and thus expressive potential, of an echo. The lot of the title and of the elusive American dream is refigured as the car lot of Mucho’s recurring nightmare; the lot of the homestead comprises the automobile, another symbol of American freedom and possibility, which Mucho “had believed in” (Pynchon 4) but has become a “futureless” object of exchange (5). Troubled by the “the way each owner, each shadow, filed in only to exchange a dented, malfunctioning version of himself for another...[a]s if it were the most natural thing” (5), Mucho dreams of the “creaking metal sign” of the National Automobile Dealers’ Association at the used car lot “that said nada, nada, nada against the blue sky” (118). Pointing to the trauma of Mucho’s experience as a used-car salesman, the text of the sign also toys allusively with Ernest Hemingway’s short story “A Clean Well-Lighted Place” in which the sparseness of the prose underscores the significance of what is not said. _Lot 49_ capitalizes on the presumption that meaning lurks behind what is explicitly articulated but refuses to deliver an unambiguous interpretive key.

The reverberation of the novel’s opening in its concluding pages further signals its intentional form, but simultaneously resists subjection to a definitive account. The novel’s final imagery of a hermetic market and constrained agency in the auction of the eponymous lot recalls the sale of sealed containers that opens the novel; the “heavy door [closing] on the lobby windows and the sun” at the novel’s end (Pynchon 152) heightens the sense of a “closed system” (see Mangel 92) suggested by the bracketing of the narrative between its title and identical last
words. Offering a critique of the market’s ability to transform idiosyncratic and alternative expression into a generic form of capital, the novel describes Loren Passerine, “the finest auctioneer in the West…hover[ing] like a puppet-master” over the final scene (151-52). In this manner, the auctioneer channels the forces of the market that supplant or at least qualify individual agency, adding one more gloss on the “American continuity of crust and mantle” (147). Yet, the title as expression-in-progress, along with the novel’s open ending, also challenges the impassability of the novel’s boundaries. The reader last hears of Oedipa “settled back, to await, the crying of lot 49” (152), suggesting (possibly significant) events to come beyond the manifested plot. By injecting the possibility of agency beyond the pages of the text, the novel once again tantalizes the reader with the possibility of a “meeting of minds.”

B. Oedipa’s Attenuated Agency: “Tangled Enough to Make the Job of Sorting It Out More than Honorary”

As the case of Szukhent demonstrates, language deemed unambiguous derives power from its implicit identification of an agentic source. The plot of Lot 49 fittingly concerns the execution of a will, and particularly Oedipa’s suspicion of a “duty… to bring the estate into pulsing stelliferous Meaning” (Pynchon 64). As such, the novel explores agency not only through the interplay of form and meaning but also in the limits experienced by its protagonist. Oedipa’s sense of powerlessness challenges the presumption of an actor free of constraints. At the same time, the novel troubles the relation between seemingly internal will and external

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328 See Gleason for a discussion of Pynchon’s ordered labyrinth in Lot 49.
329 See Chapter One for a discussion of the role of agreement in contract discourse as both manifested by and framing the text of a contract document.
constraint, presenting a complex picture of the interrelation between external social frameworks and internal conflict in its treatment of Oedipa.

In her search for meaning, Oedipa’s experiences and her perspective on them make salient the internal and external challenges to agency that she encounters. Framing the question of how one manifests will in the landscape of American capitalism, the novel immediately positions its protagonist in an identifiable material context. Introducing Oedipa in its opening lines, the novel pronounces:

One summer afternoon Mrs Oedipa Mass came home from a Tupperware party whose hostess had perhaps put too much kirsch in the fondue, to find that she, Oedipa, had been named executor, or she supposed executrix, of the estate of one Pierce Inverarity, a California real estate mogul who once lost two million dollars in his spare time but still had assets numerous and tangled enough to make the job of sorting it out more than honorary (1).

The interwoven social and market economies330 that serve Oedipa’s “sense of buffering, insulation” (Pynchon 10), signal her relatively privileged situation. In its reference to hermetic, plastic containers that occasion a luncheon, the narrative also suggests Oedipa’s insularity. Social categories are not simply imposed on Oedipa, however, but also exert a hold on her from within.

330 When Oedipa’s questions the source of Metzger’s knowledge of her visit to Mexico with Pierce, he attributes it to his handling of Pierce’s taxes. The exchange, which also illustrates the interrelatedness of the social and commercial, comes in the course of Oedipa and Metzger’s socializing, precipitated by their roles as co-executors:

‘Aha,’ said Metzger, from an inside coat pocket producing a bottle of tequila.
‘No lemons?’ she asked, with movie-gaiety. ‘No salt?’
‘A tourist thing. Did Inverarity use lemons when you were there?’
‘How did you know we were there?’ She watched him fill her glass, growing more anti-Metzger as the level rose.
‘He wrote it off that year as a business expense. I did his tax stuff” (21).

On some level Oedipa is aware of the role of commerce in her relationship with Pierce. Recalling their relationship in fairy-tale terms, she notes how “dauntless, perhaps using one of many credit cards for a shim, [Pierce had] slipped the lock on her tower door and come up the conchlike stairs” (11). In this metaphoric acknowledgement of the role of Pierce’s financial resources in the process of her seduction, Oedipa implicitly invokes the interrelatedness of social and commercial life.
Identifying herself in gendered terms, Oedipa seeks to delimit her role. Reacting to the letter, Oedipa is nonplussed: “She had never executed a will in her life, didn’t know where to begin, didn’t know how to tell the law firm in L.A. that she didn’t know where to begin” (3). The narrative thereby slyly suggests Oedipa’s own dispositional lack of agency (having “never executed a will in her life”), as well as the challenge of expression that necessarily involves the process of making meaning. Turning to Mucho in “an excess of helplessness,” she “let[s] Mucho go first” to tell about “his defeat” of a day (3). Several pages later, when Oedipa reveals the letter, Mucho usurps the stereotype of helplessness, “withdr[awing] along a shy string of eye blinks,” begging off involvement, insisting “you got the wrong fella…I’m not capable” (7). Disrupting a teleology of gender, though not negating its presumptions, Mucho’s behavior troubles the nature of Oedipa’s passivity and demonstrates the performative aspect of the role.

As Oedipa learns of the duties of executor in explicitly financial and legal terms, she seeks to assign the task. Her initial reaction, “‘Hey...can’t I get somebody to do it for me?’” (10), indicates, again, her presumptions of privilege and disengagement. The novel reinforces the way Oedipa’s sense of her own agency draws from but cannot be solely attributed to an external social structure, when she endeavors to make sense of the collected “revelations which...seemed to come crowding in” (Pynchon 64). Suggesting that there remains more in her

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331 Morphing into legal form (“to find that she, Oedipa, had been named executor, or she supposed executrix, of the estate of one Pierce Inverarity”), the opening sentence of the novel implies the existence of a letter penned by lawyers, which mediates the information for Oedipa, a detail explicitly confirmed a page later.

332 Roseman, Oedipa’s lawyer, “outlined what she was in for: learn intimately the books and the business, go through probate, collect all debts, inventory the assets, get an appraisal on the estate, decide what to liquidate and what to hold on to, pay of claims, square away taxes, distribute legacies...” (Pynchon 10).

333 When she first tells Roseman that she has “to execute a will,” his response, “‘Oh, go ahead then...don’t let me keep you’” (9), reflects the possibility of a different presumption concerning personal agency, but also its improbability as the implicit basis of the joke.
power to do than she first acknowledged, the narrative relates how she later revisited her responsibility: “For one thing, she read the will over more closely” (64). At the same time, Oedipa views her agency in terms of existing structural barriers: “If only so much didn’t stand in her way: her deep ignorance of law, of investment, of real estate, ultimately of the dead man himself” (64). She reverts to a monetary valuation of the limits she confronts, reflecting, “The bond the probate court had had her post was perhaps their evaluation in dollars of how much did stand in her way” (64).

Disrupting any neat counterpoint between agency and powerlessness, the narrative underscores Oedipa’s role in constructing her passivity. Having “gently conned herself into the curious, Rapunzel-like role of a pensive girl somehow, magically, prisoner among the pines and salt fogs of Kinneret, looking for someone to say hey, let down your hair” (Pynchon 10), Oedipa occupies a position parallel to Remedios Varo’s weavers in the castle, which Oedipa herself fails to see (Gibb 99). Instead, Oedipa has applied her cognitive powers to the project of conjuring herself into a fairy tale, set apart from the transactional world of “books” and “business,” in which she remains dependent on what she imagines as an outside force to deliver her. The image in Varo’s painting of “frail girls with heart shaped faces, huge eyes, spun gold hair” in a tower, “embroidering a kind of tapestry which spilled out the slit windows and into a void, seeking hopelessly to fill the void” (Pynchon 11) offers one answer to her questions. The painted tapestry containing “all the other buildings and creatures, all the waves, ships and forests of the earth” (Pynchon 11) demonstrates an individual’s contribution to the fashioning of one’s

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334 The bond is another example of a generic indication of intention, which functions like contract to manifest will or intent as well as suggest the possibility of the failure of an original instance of intent to persist or be realized.
world (Gibb 99). Like the mention of her own involvement in “conn[ing]” herself into the role, the narrative suggests that Oedipa, “[h]aving no apparatus except gut fear and female cunning to examine this formless magic…may fall back on superstition or take up a useful hobby like embroidery, or go mad, or marry a disc jockey” (Pynchon 12). Thus, embroidery in its metaphoric sense remains available to Oedipa—indeed seems already to have been exploited by her. Similarly, the potential inherent in shaping one’s world and destiny, even, as the narrative suggests, out of ostensibly limited materials, remains. As such, the constructed universe that Oedipa considers further complicates the idea and implications of agency.

C. “If It Was Really Pierce’s Attempt to Leave an Organized Something Behind After His Own Annihilation”: The Elusive and Dynamic Self

In its treatment of Oedipa’s autonomy, the novel challenges presumptions that underpin the idea of American capitalist success as a function of choice and freedom. In addition to complicating the notions of constraint and agency and their attendant possibilities, the novel deconstructs the presumption of a unitary self, in particular in its treatment of the ostensible intentioned source of Oedipa’s mandate to execute a will. The project of sorting out the estate of “a California real estate mogul who once lost two million dollars in his spare time” implicates the capitalist framework of American success. It also indicates a deconstructive perspective that troubles the notions of causation, experience and absence as well as the possibility of agency. Thus, for example, the novel attests to Pierce’s wealth through an involved conceit of lack, referring to lost sums that fail to impact, and thereby underscore, the value of remaining “assets numerous” (Pynchon 1).

335 Oedipa’s failure to realize a possibility beyond the binary of a “knight of deliverance” and entrapment in “the void” is for Gibb what precludes her ability to “call into being…the Word” (149).
The association of Pierce Inverarity with the casual deployment of wealth evokes earlier literary considerations of American material success contract as presupposing a free and intentioned actor. Wondering about the circumstances of Pierce’s death, Oedipa recalls “a whitewashed bust of Jay Gould that Pierce kept over the bed on a shelf so narrow for it she’d always had the hovering fear it would someday topple on them” (Pynchon 2). As a former Wall Street broker turned speculator and railroad developer, Jason “Jay” Gould (1836–1892) links the nineteenth-century world of emerging contract and capitalism imagined by Herman Melville’s “Story of Wall Street” to the promise of speculation in California. As an owner of the Union Pacific Railroad, Gould can be credited with literally moving the American project of capitalism West, where we find our protagonist. By invoking an iconic robber baron, one-time Wall Street broker and railroad magnate in the form of a “whitewashed bust” positioned for a fall, the novel’s first paragraph gestures toward the dark underside of the capitalist achievements of the Gilded Age.

Building on Melville’s depiction of the challenge of agency in the developing ideal of nineteenth-century contract, Lot 49 can be read as picking up on the “dead letter” of “Bartleby”’s sequel (see Melville 1949, 46). Emblematic of the challenge to unequivocal comprehension of self and other, the dead letter manifests the absent sender as well as the possibility of an absent recipient. As dead letter, Pierce’s will precipitates Oedipa’s search for a coherent identity. Seeking to ascertain whether she has successfully received Pierce’s message,

336 For “Bartleby”’s attorney-narrator, the name of his iconic client, John Jacob Astor, is the stuff of money: “It has a rounded and orbicular sound to it, and rings like unto bullion” (Melville 1949, 4). Chapter Three discusses the significance of this description by the narrator.

337 The invocation of Gould also furthers the resonance of boilerplate in the text due to the etymological link between contract boilerplate and the railroads of the industrial age, as the term is said to have referred to the plating of steam-engine boilers (Bast 155).
Oedipa begins by conjuring her last interactions with Pierce, the memory of which, at first, fittingly, eludes her (see Pynchon 2).

The novel’s account of Oedipa’s recollections reinforces a sense of Pierce’s multifaceted and elusive identity, implying the parallels between the challenge of connecting with another following death and that of executing or understanding another’s, or perhaps even one’s own, will in life. By late at night, Oedipa considers her last conversation with Pierce:

[This long-distance call, from where she would never know (unless he’d left a diary) by a voice beginning in heavy Slavic tones as second secretary to the Transylvanian Consulate looking for an escaped bat; modulated to comic-Negro, then on into hostile Pachuco dialect, full of chingas and maricones; then a Gestapo officer asking her in shrieks did she have any relatives in Germany and finally his Lamont Cranston voice, the one he’d talked in all the way down to Mazatlán (2-3).]

Even as the multiplicity of Pierce’s voices calls it into question, a touchstone persists, for Oedipa at least, of a coherent identity that would serve as an intentioned source—and of the potential, suggested by Pierce’s name, for it to be accessed. Oedipa implicitly acknowledges the dynamism of Pierce’s identity, referring to him in terms of “the last of his voices she ever heard” (Pynchon 3), that of Lamont Cranston, one of many identities of the pulp-fiction character, The Shadow. Yet, she retains faith in the possibility of definitive answers imparted by an authentic self; “she would never know” the origin of his call, “unless now he’d left a diary” (2)).

Slipping into Oedipa’s consciousness (see Gleason 89), the narrative relates that “[t]he shadow waited a year before visiting. But now there was Metzger’s letter” (3). Oedipa cannot resist

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338 As Gibb asserts, Oedipa “wants authorship, intention” (107).
339 In Oedipa’s conjecture that a diary could reveal the location of the call, a reader is struck by Oedipa’s elision of the interpretive project entailed in reading a diary and by the irony of her suggestion that more rather than less definitive information would be revealed in death. As the exchange between Pierce and Oedipa is recounted, Oedipa does not succeed in completing a sentence (“Pierce, please,” she’d managed to get in, ‘I thought we had---’” (3)). When Pierce hangs up, the narrative offers the reader a seemingly conclusive moment, but it takes the form of “[s]ilence, positive and thorough” (3).
seeking an explanatory account that transforms the inconstant shadow into a discrete
determinative origin, though she fails to reduce it to a single version. She conjectures, “Had
Pierce called last year then to tell her about this codicil [in which Oedipa was named co-
executor]? Or had he decided on it later, somehow because of her annoyance and Mucho’s
indifference?” (3).

Rather than reflect an exception to the rule, Pierce serves as an indicative
demonstration of the dynamic and fragmented nature of identity, challenging the presumption
of a determinate original. Mucho’s modification of Oedipa’s name to “Edna Mosh” to allow “for
the distortion on [the] rigs” (Pynchon 114) illustrates this point, evoking the dynamism of
intelligible expression. Metzger’s description of a lawyer’s “extended capacity for convolution”
(21), relayed as Oedipa watches the film Cashiered, in which Metzger is featured “performing
under the name of Baby Igor” (18), follows similar lines: “A lawyer, in a courtroom, in front of
any jury, becomes an actor, right? Raymond Burr is an actor, impersonating a lawyer, who in
front of a jury becomes an actor. Me, I’m a former actor who became a lawyer. They’ve done
the pilot film of a TV series, in fact based loosely on my career, starring my friend Manny Di
Presso, a one-time lawyer who quit his firm to be an actor” (22). The narrative thereby disrupts
and reframes the search for authentic identity; just as “[t]he film…can be repeated endlessly”
(Pynchon 22), “the possibilities of recursion are endless and endlessly mutable” (Gibb 103).

340 The “quiet ambiguity” of the “phone line [that] could have pointed in any direction, been any length” becomes transformed for Oedipa “in the months after the call, to what had been revived: memories of his face, body, things he’d given her, things she had now and then pretended not to’ve heard him say” (Pynchon 3).

341 Oedipa’s own experience reminds the reader of the way in which one can fail to recognize oneself as definite and coherent. Having left Metzger, driving into the late night to Berkeley, Oedipa “fell asleep almost at once, but kept waking from a nightmare about something in the mirror, across from her bed. Nothing specific, only a possibility, nothing she could see…When she woke in the morning, she was sitting bolt upright, staring into the mirror at her own exhausted face” (Pynchon 81).
Thus, as the reordering of the reels of *Cashiered* further demonstrates, the narrative calls into question the possibility of identifying a single coherent original.342

D. A View of San Narciso: “Special Purpose Bond-Issue Districts” and “Access Roads to Its Own Freeway”

Having complicated the notions of agency and a stable identifiable origin of self, which underpin the ideal of contract, the novel evinces the phenomenon of boilerplate in its depiction of the American landscape. Defined in relation to a precursor that may not exert the same performative contractual power, the notion of boilerplate signals an elusive determinate original.343 In doing so, boilerplate implicates a relation both of form and in time. As Oedipa ventures from her suburban enclave “with no idea that she was moving toward anything new” (Pynchon 14), the terrain begins to reflect the form of boilerplate, as a conceptual phenomenon. The discussion that follows identifies the ways that novel’s treatment of the landscape evokes the standard form of contract as a material manifestation of an understanding of an individual’s place in society. As such, the narrative reminds readers that in America human interrelation is situated in pervasive commercial and financial frameworks. As the discussion that follows explores, the novel thereby calls to mind the role of contract as a qualified but naturalized vehicle of agency that continues to facilitate the American capitalist project in the twentieth century. At the same

342 Matthew Eklund’s discussion of music in the novel furthers this point, as well. As he notes, music repeatedly figures as derivative expression in the novel (see 217-18): the Paranoids have copied the image of the Beatles; the Scope has an electronic music policy, with live jam sessions (“they put it on the tape ...live” (Pynchon 34)); the Yoyodyne stockholders sing hymns “to the tune of Cornell’s alma mater” (65) and Aura Lee; and at the very outset of the novel Oedipa listens to the Muzak in the market (2). Yet rather than convey that “[e]ven traditional or sentimental music does not retain the meaning of its original sound” (Eklund 218), the treatment of music in the novel complicates the very notions of originality and meaning; the instances of music in the novel demonstrate the dynamism of expression, thereby calling into question the presumptive authority of a stable authentic source.

343 As I suggest in the preceding chapters, boilerplate is distinct from contract language in being understood as unoriginal.
time, the narrative reminds the reader of the enduring hold of the ideal of agreement as an instance of determinate, meaningful interpersonal connection.

Describing San Narciso, the narrative troubles the notion of the generic or derivative. “Like many named places in California” (Pynchon 14), San Narciso reflects the broader American landscape; yet, as the novel implicitly suggests, Oedipa’s trajectory might involve something new, indicating the experiential component of originality and thus of the necessary interplay of form (or text) and context in generating meaning. In addition, San Narciso reflects Pierce’s identity as its originator, or “founding father” (Pynchon 15; see Couturier 15), and perhaps, in light of its name, Oedipa’s own sense of self, both of which remain elusive.

“[L]ess an identifiable city than a grouping of concepts—census tracts, special purpose bond-issue districts, shopping nuclei, all overlaid with access roads to its own freeway” (Pynchon 13), San Narciso demonstrates the power of capitalism and contractual form to mold the environment. Boilerplate, or the form language of bond issues, becomes transformed—albeit through a “special” or unusual “purpose”—into the materiality of the city. Rather than generate a sense of human presence or experience, the landscape manifests capitalism (Hansen 593). Described in legal and financial terms, San Narciso fits in with the conventional narrative of American expansion, but also suggests its underside: “it had been Pierce’s domicile, and headquarters: the place he’d begun his land speculating in ten years ago, and so put down the plinth course of capital on which everything afterward had been built, however rickety or grotesque toward the sky” (13). As such, the description of San Narciso evokes the American history of expansion West and the process and policies of exploitation and expropriation,
undergirded by presumptions of Anglo-Saxon entitlement (see Frymer). The “freeway” and its “access roads,” built upon a network of commerce also call to mind an American notion of liberty and social participation. Since emancipation and the nineteenth century “Age of Contract,” freedom in the United States has figured in connection with the free market. The “exhausted busful of Negroes going on to graveyard shifts all over the city” that Oedipa encounters in the San Francisco night (98) exemplify the naturalization of the limitations and inequities of this framework in American culture.

As Oedipa surveys San Narciso, assuming that the city’s role as the locus of Pierce Inverarity’s initial real estate investments “would set the spot apart, give it an aura” (14), the paradoxical tensions inherent in boilerplate become manifest in the narrative and in the form of the landscape described. As a reiterated, unoriginal form, boilerplate is often associated with meaningless expression; the presumed banality of boilerplate implies a belief in the signifying potential of tailored, original language. This presumption is complicated, however, by boilerplate’s role as a medium of agreement in contract, and more generally, the impossibility of a “private language” (see Wittgenstein 1: 94e § 269), which points to limits of truly idiosyncratic expression. Nonetheless, Oedipa reflects these presumptions, projecting her search for a distinct identity (belonging to Pierce or herself) onto the terrain; she seeks a sense of the singularity of the place, which would thus lend it significance.

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344 The historical privileging of land speculation as a way to establish land ownership reflected who is recognized as part of American society (see e.g., Johnston v. McIntosh (1823); Frymer).

345 The naturalization of inequity is discussed in more detail in the preceding chapter in connection with the nineteenth-century emergence of contract as a symbol of freedom.

346 For an expanded discussion of this point, see Chapter Two.

347 Compare contract discourse and judicial language that reflects the presumption that tailored or individualized language indicates meaningful intent to agree to a contract. In The Bremen v. Zapata Off-Shore Co. (1972), for example, the majority of the Court upheld the enforceability of a provision, among other reasons, because it “was
“But,” a reader learns, “if there was any vital difference between [San Narciso] and the rest of Southern California, it was invisible on first glance” (15). Indeed, “[n]othing was happening” when Oedipa “drove into San Narciso on a Sunday in a rented Impala,” nor is the impact of this scene unprecedented. Instead, it resembles for Oedipa an earlier, similar, form.348 As she “looked down a slope, needing to squint for the sunlight onto a vast sprawl of houses…she thought of the time she’d opened a transistor radio to replace a battery and seen her first printed circuit” (14). The “printed circuit” seemingly embossed in the form of real estate development on the landscape of Southern California evokes the template of boilerplate (Bast 155), in its temporal relation to a precursor as well as its suggestion of communication.349

The form of the transistor thereby signals the very “intent to communicate” (Pynchon 14) so central to contract doctrine, even as it necessarily falls short of the ideal of unambiguous connection. Oedipa similarly reads in the template of technology and of human not simply a form contract with boilerplate language that [one party] had no power to alter,” noting the record of alterations to the terms of the contract (12 note14).

348 Later in the novel, Oedipa also understands the muted post-horn in terms of its recurrence; her encounters with the symbol “beat up on” her as a “malignant, deliberate replication” (Pynchon 100-101) and she implicitly classifies the post horn as re-iterative: “A couple-three times would really have been enough. Or too much” (100). Her association of the symbol with a recurring standard provokes an anticipation of future sightings, reflecting the dynamic process of repetition: In the course of the night, “[s]he grew so to expect it that perhaps she did not see it quite so often as she later was to remember seeing it” (100). However, as the reader moves with Oedipa into a proximate future deeply informed by her past (“[s]he grew so to expect it that…”) and then a more distant moment of retrospection (“as she later was to remember seeing it”), the narrative undermines the notion of a defining present of original experience. In doing so, the passage underscores the “constructive, fictive, falsifying aspect” of memory as itself a form of repetition; a narration can take the form of an involuntary memory that “creates…the memory of a world that never was” (Miller 1982, 7). In addition, the notion of such a dream-like repetition is necessarily premised on a more “grounded, logical” form of repetition; this follows from the belief that the “validity of the mimetic copy is established by its truth of correspondence to what it copies” (Miller 1982, 9, 6). Thus, the dream-state relies and is always present in the notion of a stable mode of representation, notwithstanding the ways in which they subvert one another (see Miller 1982, 9). The narrative suggests the tangled relation between the forms of repetition, adding another layer of possibility in its description of the night. A reader is told, “Later, possibly, [Oedipa] would have trouble sorting the night into real and dreamed” (95), thereby disrupting the distinction between actual and imagined, or day and night, and adding another layer of contingency (“possibly”) that qualifies even this disruption.

349 As the narrative suggests, the pattern of buildings reflects the contract boilerplate of bond issuances that facilitated its development.
life an essential quality of the potential for connection and communication, as “[t]he ordered swirl of houses and streets, from this high angle, sprang at her now with the same unexpected, astonishing clarity as the circuit card had. Though she knew even less about radios than about Southern Californians, there were to both outward patterns a hieroglyphic sense of concealed meaning” (14). The particulars or substance of such connection are not necessarily crucial: “There’d seemed no limit to what the printed circuit could have told her (if she had tried to find out)” (14). Instead, it is the suggestion of a possible connection that resonates with Oedipa, even as, or because, connection itself remains elusive and indistinct: “in her first minute of San Narciso, a revelation also trembled just past the threshold of her understanding. Smog hung all around the horizon” (14).

In this manner, the passage tantalizes the reader, along with Oedipa, with promise and limits of connection, or “revelation.” Oedipa's intuition of, or desire for, “concealed meaning” incorporates a dynamic narrative of a past moment of understanding (a “hieroglyphic sense”) of which a cryptic form remains. Thus, like the language of contract at times, the

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350 By the next chapter, the novel uses the Tristero to name the catalyzing discoveries in the quest for revelation. Although revelations are promised at the outset of the novel (10) and referenced throughout (see 14, 31, 64, 71), their particular significance remains elusive. The narrative thereby refigures revelation to mean something attenuated or indeterminate, if not always out of reach. At best, if the contingencies the narrator suggests are indeed realized, Oedipa’s situation is comparable to revelation (“As if...there were revelation”) and even then not necessarily in her grasp but “in progress all around her” (31). The pronouncement in the next sentence that “[m]uch of the revelation was to come through the stamp collection that Pierce had left, his substitute often for her” (31), elides a revelatory present and confirms a future in which one revelation is “no more disquieting” than another (64). By the end of the novel, revelation might simply comprise a knowledge of the multiplicity of perspectives: “Having begun to feel reluctant about following up anything,” Oedipa avoids pursuing certain leads “le[aving things] alone, anxious that her revelation not expand beyond a certain point” (137). As such, the narrative figures revelation itself as subject to interpretation, rather than as a determinate event. In addition, it positions revelation as part of a process rather than an endpoint.

351 Contract, as I discuss in Chapter Two, can be an exercise in imagining an alternative future. In an instance of agreement parties imagine the dissolution of their relationship and consider some of the terms that will govern their interaction when this occurs. Claire Hill explains the presence of ambiguity and inartful language in an agreement as parties’ way of bonding themselves not to pursue litigation. At the same time, the terms of a contract may signal meaning in the process of generating agreement. For example, to preserve trust, a party might avoid complex or
landscape signals to Oedipa a promise of connection, as well as the distance and haze\footnote{The passage suggests both temporal and physical distance (in its reference to hieroglyphics and the view from above) as well as a more generalized sense of diffusion and a lack of clarity (“[s]mog hung all round the horizon” (14)). As the language of the narrative indicates, not only is meaning elusive, remaining “concealed” as a product of time and/or distance (Oedipa gazes “from this high angle”), but this elusiveness reflects the nature of one’s relation even to oneself. In Oedipa’s “first minute of San Narciso”—her first moments of self examination—meaning eludes her.} she understands to be standing in its way. However, for Oedipa, the elusiveness of definitive meaning only reinforces its significance and her sense of its potential to be revealed. Surveying the scene, Oedipa “and the Chevy seemed parked at the centre of an odd religious instant.” In this statement, however, the word “seem” subtly introduces the possibility of an alternative to Oedipa’s perspective. Framing Oedipa’s ostensible understanding of the scene in terms of simile and contingency, the narrative offers multiple perspectives on the significance of the landscape: “As if, on some other frequency, or out of the eye of some whirlwind rotating too slow for her heated skin to feel the centrifugal coolness of, words were being spoken. She suspected that much” (14). By gesturing implicitly to the limits of Oedipa’s insight,\footnote{Gibb asserts that the fact of multiple perspectives is precisely the point that Oedipa misses.} the narrative denies the reader, even as it underscores the desire for, determinate significance—or a single definitive perspective, as reflected in the notion of “genuine agreement.”

E. The Boilerplate of Everything Mediating and Manifesting Agreement: Stamps and WASTE

Introducing the “the stamp collection Pierce had left” as the medium of “[m]uch of the revelation” (31), the narrative primes the reader with the suggestion of significance. In addition to evoking the idea of a template, the stamps call to mind the conceptual model of boilerplate, a special form of copy, that mediates and manifests the process of human connection.
Boilerplate occupies a liminal position between the ideal and reality of agreement in contract. Indicating a contract to deliver, stamps also operate at the threshold of communication between sender and recipient; by their function, stamps facilitate connection in the interstices of transaction and expression. The stamps that constitute Lot 49 of Pierce’s estate not only highlight this role, but also render uncertain the meaning of seemingly oppositional classifications.

For Oedipa, the stamps at first represent an interference in her relationship with Pierce; they were “his substitute often for her—thousands of little colored windows into deep vistas of space and time…he could spend hours peering into each one, ignoring her. She had never seen the fascination. The thought that now it would all have to be inventoried and appraised was only another headache” (31). Yet the narrative insinuates another possible role for the stamps, noting that Oedipa has “[n]o suspicion at all that [the collection] might have something to tell her” (31). Taken out of the context of a teleological transaction of expression, the stamps ostensibly fall short of their implicit promise of delivering information. Nonetheless they evoke the form of contract; the stamps perform for Oedipa as fine print, obscuring and clouding a relationship rather than lucidly communicating the connection that it manifests. As the narrative reveals, whether or not Oedipa can uncover what if anything the stamps have “to tell her,” they mediated her relationship in palpable ways.

As the operation of form language demonstrates, the nature of expression, even of the stamp, is contingent and contextually determined. The narrative speculates, presumably voicing Oedipa’s thoughts, “if she hadn’t been set up or sensitized, first by her peculiar seduction, then by the other almost offhand things, what after all could the mute stamps have told
her, remaining then as they would’ve only ex-rivals” (31-32). The narrative thereby gestures toward a context—here, the sensitization—that necessarily informs a reading of the mark. The finding by Genghis Cohen, the “most eminent philatelist in the L.A. area,” that the stamps contain “irregularities” and are therefore valuable (75) reveals the potential multiplicity of perspective that enables a proliferation of meaning. As “little colored windows into deep vistas of space and time,” the stamps evidence their expressive potential beyond marking a simple transaction to facilitate communication. Cohen’s characterizations of the altered stamps as “an honest forgery” containing “a deliberate mistake” (78) also introduce a complex (both/and) conception of intention, challenging the binaries of agency and passivity as well as of sincerity and deceit. In addition, by containing “irregularities,” the “obviously counterfeit” stamps disturb the categories of copy and original (see Gibb 103 note 16), operating as both. The paradox of “an honest forgery” reveals the source of the stamps’ value, at least to Oedipa. For her, the irregularities of the stamps indicate intention; they suggest a message, which remains elusive. Cohen asks, “Why put in a deliberate mistake?” (78).

As unique derivatives, which call a reader’s attention to their author or creator’s intentions, the stamps implicate the model on which they are based. As Robert Hansen points out, the stamps described in the novel reflect the “conventional iconography of an heroic American past: Columbus’ discovery of the New World, Manifest Destiny and the conquest of

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354 For an involved discussion of the relationship between an original and derivative expression, see also Chapter Three.
355 Gibb notes the way that Cohen’s characterizations of the stamps underscore the complexity of the relationship between the original and counterfeit, or “the real and the phony” (103 note 16).
356 This suggestion is underscored for the reader by the play in Pierce Inverarity’s name on the philatelic term “inverse rarity” (see Duyfhuizen 82).
357 The official U.S. postage stamp is of course itself a derivative form that thereby indicates a certain value and a network of connection. As a standard form, the salience of the stamp may be diminished by virtue of this commonplace role.
the West, and the great promise of individual freedom symbolized by the Statue of Liberty”
(595). The rare deviations highlight this narrative and undermine its authority. Thus,

In the dark green from the 1893 Columbian Exposition Issue (“Columbus Announcing His
Discovery”), the faces of three couriers, receiving news at the right-hand side of the stamp, had
been subtly altered to express uncontrollable fright…In the 1947 Postage Stamp Centenary Issue,
commemorating the great postal reform that had meant the beginning of the end for private
carriers, the head of a Pony Express rider at the lower left was set at a disturbing angle unknown
among the living. The deep violet of the 3¢ regular issue of 1954 had a faint, menacing smile on
the face of the Statue of Liberty (144).

The dying sailor Oedipa encounters after her survey of San Francisco nightlife asks her to mail a
letter whose stamp resembles “the familiar carmine 8¢ airmail, with a jet flying by the Capitol
dome…[with] a tiny figure in deep black, with its arms outstretched” at the top (103-4). While
Oedipa cannot recall “what exactly was supposed to be” figured on the stamp, she “knew it
wasn’t anything like that” (104). Replacing an image of a Native American above the Capitol in
the official 8¢ stamp, the figure in black of the narrative draws an assiduous reader back to the
significance of the nearly-erased antecedent (see Hansen 597).

As part of an alternative network of communication, the WASTE system, the
stamps also draw attention to the inconspicuous exception that frames the norm. Often literally
on the margins of a contract document, boilerplate, understood as the exception to the salient
terms of agreement, again offers a model for understanding the interplay of form and substance
and the desire for connection, in this case suggested by the novel’s depiction of WASTE.

Reflecting the performative possibilities of boilerplate to manifest or even further agreement (see
Johnston 2007, 15), the stamps in the WASTE system not only serve as “substitute[s]” for
human connection but they also facilitate communication. Notably, the operation of the WASTE
system manifests its meaning through process and form, eliding or parodying the conventional
content of personal missives. Thus, for example, when Oedipa receives a letter from Mucho, she focuses on “its outside,” as a result, perhaps, of “an intuition that the letter would be newsless inside” (33). A reader does not learn more about the content of the letter nor, for that matter, the specifics of Pierce’s will. Along similar lines, the workers at Yoyodyne enact the conflation of form and substance, exchanging letters outside the “government monopoly” (38) on “principle” (39); workers who neglect to send a letter a week through the Yoyodyne system are fined so as “[t]o keep it up to some reasonable volume” (39). One letter is opened, but its contents, clichés,\(^\text{358}\) or standard formulations, reinforce process as the central message. “Dear Mike” the letter reads, “how are you? Just thought I’d drop you a note. How’s your book coming? Guess that’s all for now. See you at The Scope” (39).

Yet, as the novel explores the possibilities of signification, it does not abandon but, rather, keeps the conventional meaning of the language in play. Contract terms offer a model of the resulting possibilities of signification; both the identifiable form and the literal import of the language of contract, to the extent it is read, perform and constitute agreement,\(^\text{359}\) sometimes in tension with one another.\(^\text{360}\) “WASTE” telegraphs its referential capacity as it complicates the process of interpretation; Stanley Koteks tells Oedipa, “It’s W.A.S.T.E., lady…an acronym, not ‘waste’” (70).\(^\text{361}\) Nonetheless, although W.A.S.T.E. “stands for” a collective goal or desire (“We Await Silent Tristero’s Empire” (139)), the acronym also indicates

\(^{358}\) “Cliché,” like “boilerplate,” derives from the name for a stereotyped block.
\(^{359}\) The presence of standard formulations such as a choice of law and venue, severability and survivorship, or an explicit integration provision in a document can signal its form as a contract to a court, as these provisions “evidence[s] an intent to be bound by the agreement.” (Longview Aluminum, L.L.C. v. United Steel Workers 880).
\(^{360}\) As discussed in Chapter Two, boilerplate can signal meaning in complex and multiple contexts and can do so beyond or at odds with the “plain meaning” of the words composing it (see Suchman 111-12; Gilo and Porat 2007; Gelpern and Gulati; Ahdieh).
\(^{361}\) The novel’s approach in complicating, but not dispelling, the seeming significance of an acronym is of a piece with its treatment of “N.A.D.A. in Mucho’s nightmare of the “creaking metal sign” (118) discussed above.
the physical manifestation and conceptual situation of the WASTE system. The muted-post-horn symbol of WASTE pervades the material detritus of the environment. “Waste” also alludes to the system’s figuratively and geographically fringe operations. Indicating the marginal status of WASTE users, the Inamorato Anonymous identifies among them a “whole underworld of suicides who failed” (94) and Oedipa perceives signs of WASTE beyond her comfort zone of Kinneret-on-the-Pines. In the night of “the infected city,” Oedipa sees the symbol in Chinatown in chalk (94); in Golden Gate Park in a children’s jump rope game (96); while riding the bus with “Negro” night-shift workers; “[s]omewhere near Fillmore…tacked to the bulletin board of a laundromat, among other scraps of paper offering cheap ironing and babysitters” (98); in the gestures of a Mexican girl (99); “[o]ut at the airport,” in “the little balance book” of a “steady loser” at a poker game and “[i]n one of the latrines” (99). Although ubiquitous, WASTE marks the outsider as such; it draws attention to and thus reveals the significance of the marginal, “[d]ecorating each alienation, each species of withdrawal” (100). WASTE thereby invites a fresh view of the conventional, reframing a reader’s perspective so that “what seems marginal…[is revealed as possibly] at the heart of the system itself” (Gleason 92).

In the night, Oedipa “might have wondered what undergrounds apart from the couple she knew of communicated by WASTE system. By sunrise she could legitimately ask

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362 Here the dynamism of the form is emphasized by the children’s chant as a possible unintentional mutation through sound:

“Tristoe, Tristoe, one, two, three,
Turning taxi from across the sea”

Oedipa asks, “Thurn and Taxis you mean?” They’d never heard it that way” (96).

363 Molly Hite argues that Pynchon “uses the device of ‘descriptive residue’ to initiate a radical questioning of whether anything can be merely residue” (76).

364 Fittingly, by the end of the novel, Oedipa “kn[ows] the [irregular stamps] by heart” (144).

365 Gleason references Jonathan Culler, Framing the Sign: Criticism and its Institutions (172) in making this point. As Gleason points out, the novel itself is permeated by “waste” in the form of puns (for a “quick sampler” of the puns in the novel, see Gleason 92), traditionally considered the cast-offs of literature. As a reflection, perhaps, of their “high magic” (Pynchon 105), puns necessarily engage multiple readings; they make salient the polysemy of language, while necessitating a shared perspective.
what undergrounds didn’t” (101). Thus, the post horn functions as the “boilerplate of everything,” remaining both marginal and the norm (“there was somehow always the post horn”) (100). In light of boilerplate, which functions paradigmatically as contract but is understood as the exception to a prevailing rule, the ubiquitous but obscured network of WASTE suggests the unacknowledged centrality of alienation, or at the very least mitigated agency and connection, in the American experience.

F. Form Language as a “Thrust at Truth and a Lie”: Possibilities and Limits of Connection in and Through the Margins

Suggesting its signification of a party’s compromised agency and freedom, standardized language may be viewed by courts as “mere boilerplate” and thus dismissed as inauthentic or ineffective. However, Justice Black’s warning and the fact of proliferating standard-form contracts in contemporary transactions disturb an easy distinction between meaningful expression of agreement and “form” language. Indeed, Justice Black’s language points to the marginal form as the very medium of agreement. Building on its view of the elusiveness of a coherent, stable self and the resulting attenuation of agency, Lot 49 explores the possibilities of expression in elision and on the margins, exemplified by the WASTE system. The novel introduces the symbol of the alternative communication system in a literally cryptic manner, emphasizing the possibility of connection in lapses of explication. Notably, using a diagram, the narrative presents the muted post-horn as Oedipa encounters it. As Oedipa discovers, on a “latrine wall, among lipsticked obscenities,” below a notice pertaining to WASTE, “faintly in pencil, was a symbol she’d never seen before, a loop, triangle and trapezoid,

366 See discussion in Chapter Two.
thus: "(38). Rather than suggesting significance beyond or reflected by the symbol, the novel’s description engages with the very form of the mark, deconstructing it into even more ciphers. Refraining from naming the figure, the narrative thereby highlights the possibility of form as meaning; the novel calls attention to the possible significance of silence and elision in the process of connection—a phenomenon that the muted-post horn symbolizes and boilerplate exemplifies.

The performance of *The Courier’s Tragedy* that Oedipa attends, in which “a new mode of expression takes over,” demonstrates the possibility of expression in silence. At a point in the play, “[c]ertain things will not be spoken aloud” (54). Notwithstanding the silence, the audience experiences agreement, or a common understanding, even if they and the novel’s readers are no longer privy to its particulars: “It is all a big in-joke. The audiences of the time knew, Angelo knows, but does not say” (55). Describing a collective understanding demonstrated through silence, the narrative also highlights its contextual contingency. The fact of an “in-joke” persists and is experienced in a new context, while the passing of time furthers the elusiveness of the particulars of the understanding.

Other fleeting instances of attenuated connection in the novel demonstrate the possibility of this “new mode of expression,” as they invoke the theme of the silenced post-horn. In doing so, they also make salient the constraints inherent to agency as well as imposed by the structure of relations. Thus, for example, Oedipa emerges from her night in San Francisco to encounter the old sailor, to whom she is drawn by the post horn “tattooed in old ink now beginning to blur and spread” on the back of his hand (101). As Oedipa offers her help, elision
manifests the connection between her and the sailor, highlighted by the presence of the symbol of the muted horn:

“Can I help?” She was shaking, tired.

“My wife’s in Fresno,” he said…. “I left her. So long ago, I don’t remember. Now this is for her.” He gave Oedipa a letter that looked like he’d been carrying it around for years. “Drop it in the,” and he held up the tattoo and stared into her eyes, “you know. I can’t go out there. It’s too far now, I had a bad night.”

“I know,” she said. “But I’m new in town. I don’t know where it is” (102).

Although the narrative offers the shared reference point of the WASTE system (“Drop it in the…you know” “I know”), the connection remains attenuated, as exemplified by the symbol of the muted horn. Oedipa finds herself

overcome all at once by a need to touch [the tattooed sailor], as if she could not believe in him, or would not remember him without it. Exhausted, hardly knowing what she was doing, she came the last three steps and sat, took the man in her arms, actually held him, gazing out of her smudged eyes down the stairs, back into the morning…. “I can’t help,” She whispered, rocking him, “I can’t help.” It was already too many miles to Fresno (102).

Thus, Oedipa is not fully present, even to herself, “hardly knowing what she was doing…gazing…back into the morning,” resigned to the limitations of her agency or power.

Undoing the presumption of a present, autonomous intentioned source of connection, the novel thereby enacts the dynamics, if not the ideal, of contract, in which parties may participate though lacking self-knowledge and without fully contemplating their engagement.

Dynamics of power also bear on the exercise of agency and the process of connection; another episode of attenuated connection calls attention to the interplay of structures of power in human relations. Caught up in the dance of the deaf-mute convention, Oedipa marvels at the absence of collisions as “[e]ach couple on the floor danced whatever was in the fellow’s head” (107). This scene subverts the choice Oedipa presumes between order and chaos,
in the silent expression of each “fellow’s” individual rhythm. However, the “mysterious consensus” does not emerge from a social order free of hierarchy or coercion. Oedipa’s participation is not entirely voluntary; “grabbed” by “a few of the men” in the lobby, “every one of them drunk,” Oedipa “tried to struggle out of the silent, gesturing swarm, but was too weak.” “[S]wept…on into the ballroom,” Oedipa is “seized about the waist by a handsome young man,” and she “follow[s] her partner’s lead,” as do the other women in the room (“[e]ach couple…danced whatever was in the fellow’s head” (emphasis added)), “limp in the young mute’s clasp.” After the dance, she flees, “demoralized” (107).

These episodes thereby explore the always-qualified nature of freedom and agency, along with the possibility of connection that these ideals offer in practice. The WASTE box is, according to the tattooed sailor, “[u]nder the freeway” (102), highlighting the potentially productive lacuna in the foundation of the accepted view of liberty. Oedipa’s speculation about the post horns as manifestations of agency and desire similarly makes salient the standard dynamic of power: As “intrusions into this world from another,” the proliferating post horns reflect

God knew how many citizens, deliberately choosing not to communicate by U.S. mail. It was not an act of treason, nor possibly even of defiance. But it was a calculated withdrawal, from the life of the Republic, from its machinery. Whatever else was being denied them out of hate, indifference to the power of their vote, loopholes, simple ignorance, this withdrawal was their own, unpublicized, private. Since they could not have withdrawn into a vacuum (could they?), there had to exist the separate, silent, unsuspected world (101).

Thus, the world of alternative communication might not exist completely apart from the conventions of power but instead is precipitated by and absorbed into the dominant structure in a

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367 As Couturier suggests, the postal monopoly operates, “[f]or all good Americans who have pledged allegiance to the flag at school” as “a foundation stone of the American way of life: it doesn’t only guarantee satisfactory communications among members of the community; it also allows the government to censor offensive materials, like books and other publications” (10).
silent form. Capitalism and the naturalization of the market—and the critique they engender—undergird the “freeways” of Lot 49.

The consolidation of the WASTE stamps into lot 49 of Pierce’s estate sale demonstrates the way in which the market determines, if not exclusively, the value of this seemingly alternative or idiosyncratic network of communication. Among other things, Pierce’s legacy involves limiting the stamps’ role as vehicles of alternative connection and defining their value in a collectors’ market (see Couturier 13). Oedipa’s musings reflect the hold of the market, along with the notion of an intentioned narrative, on her, and arguably the reader’s, imagination. Oedipa wonders about the significance of the fact that “[e]very access route to the Tristero could be traced also back to the Inverarity estate,” allowing herself a choice between commerce and narrative coherence: “Meaning…that all of them were Pierce Inverarity’s men? Bought? Or loyal, for free, for fun, to some grandiose practical joke he’d cooked up, all for her embarrassment, or terrorizing, or moral improvement?” (140).

In the end, Oedipa nearly imagines a future beyond the binary matrix that frames her understanding. She contemplates the Tristero waiting “if not for another set of possibilities to replace those that had conditioned the land to accept any San Narciso among its most tender flesh without a reflex or a cry, then at the least, at the very least, waiting for a symmetry of choices to break down, to go skew” (150). Her sense of self, however, remains constituted by existing structures of power. In her mind, the law surfaces as a force that limits her willingness to pursue the potential of disrupted categories. She considers the reaction of the court, which suggests the various possibilities, and implications, of legal expression: “What would the probate judge have to say about spreading some kind of legacy among…all those nameless, maybe as a
first installment? Oboy. He’d be on her ass in a microsecond, revoke her letters testamentary, they’d call her names” (150).

In the form of a question, the narrative fittingly conjectures that “Oedipa Maas [might] yet be [Pierce’s] heiress” (147), suggesting the internalization of the norms that Pierce represents and thereby further complicating the notion of “genuine” agency. At the same time, the novel returns again to the touchstone of intention, highlighting its power to frame our understandings, even as we begin to recognize it as attenuated and perhaps even unconscious: “had [Oedipa as heiress] been in the will, in code, perhaps without Pierce really knowing…?” (147). As such, the novel does not present a single persuasive interpretation of the signs Oedipa encounters, nor does it offer a simple view of the nature of hierarchies of power in twentieth-century America. Instead, Lot 49 troubles the presumptions that undergird an ideal of “genuine agreement,” including the very nature of agency and autonomy. However, in challenging the instinct for close reading in the service of a comprehensive understanding, the novel continues to tap into the desire for a determinative interpretive source of expression368 that makes the idea of contract compelling. Just as Justice Black understands the validation of a non-negotiated contract as an unamiable fiction, a reader is hard pressed not to seek “an elaborate, seduction, plot” (Pynchon 20) carefully mapped by the author. Yet the novel insists that this exercise involve an awareness of the dynamism and multiplicity of signification, as Pierce “had told [Oedipa] once, ‘that’s all the secret, keep it bouncing’” (Pynchon 148).

368 John Dugdale notes (132) that “Oedipa’s first step in her new role is to ‘read over the will more closely.’”
III. Conclusion

Contract discourse in the United States has long disavowed the significance of subjective intent. However, the treatment of—the sensitivity to—form language reveals the presumption of an ideal of connection. This ideal endures as a powerful, if implicit, justification of contract enforcement, even as transactions are necessarily colored and constrained by the sometimes inequitable norms of the market. In his dissenting opinion in *Szukhent*, Justice Black envisioned an ideal of authentic agreement, gesturing toward a principled and controlling social compact. In this context, however, boilerplate as the form language of contract challenges the either/or model of connection and agreement toward which Justice Black gestures; in Justice Black’s language, boilerplate assumes an ambiguous role, potentially functioning as both a signal of connection and as noise in the system (compare Mangel 95). The multifaceted operation of boilerplate surfaces only momentarily in Justice Black’s anxious premonition. Yet, the complexity of the relation between expressive form and content as well as the ever-present challenge of sorting between intentioned signs and “random occurrences” (88) figure centrally in *Lot 49*. In light of the tensions inherent in contract, Oedipa’s appointment as agent can be seen to presume a compact and thus precipitate the search for the substance of the purported agreement.

If we view boilerplate as a paradigm of derivative or attenuated expression, the novel can be read to underscore a deconstructive view of boilerplate as an exemplar of expression in general. In addition, in its troubling of the presumed antipodes of “genuine agreement” and a “fiction” of consent (see 375 U.S. at 423), the operation of boilerplate as a medium of qualified connection—also suggested by the “replicated” (Pynchon 101) figure of the
muted post horn—offers one way to imagine the “excluded middles” (150) of *Lot 49*. In the novel’s refusal to satisfy the desire for a static, determinate answer, it directs a reader back to the possibility of “both/and,” which deconstruction identifies and boilerplate instantiates. In particular, the novel repeatedly refuses to resolve the question of significance, or, put another way, to allow the reader to realize the possibility of a meeting of the minds as determinate and unchanging. However, in doing so, the novel also underscores the hold that a meeting of the minds has on our imaginations, reinscribing it in a qualified and dynamic form. At the end, the novel presents a stream of consciousness in which Oedipa considers the possible ways to understand all that she has encountered:

Either you have stumbled indeed, without the aid of LSD or other indole alkaloids, onto a secret richness and concealed density of dream; onto a network by which X number of Americans are truly communicating whilst reserving their lies, recitations of routine, arid betrayals of spiritual poverty, for the official government delivery system...Or you are hallucinating it. Or a plot has been mounted against you...all financed out of the estate in a way either too secret or too involved for your non-legal mind to know about even though you are co-executor, so labyrinthine that it must have meaning beyond a practical joke. Or you are fantasizing some such plot (140-141).

Although Oedipa comprehends the situation in terms of mirroring oppositions, the choices collectively underscore the persistence, in her mind at least, of an intentioned narrative informed by the structures of power that permeate American society.

Imagining an alternative mode of communication, the novel makes salient, and arguably participates in the construction of, an ideal of connection. Yet, the way in which the market is enlisted to police the boundaries of the narrative can be read as a prescient commentary on the current difficulties of opting out that the novel suggests. The elusive possibility of an alternative system of connection, forming a “network by which X number of Americans are truly

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369 Johnston characterizes *Lot 49* as a “schizo-text” on the basis of this aspect of the narrative (1991, 78 note 7).
communicating” (141) and/or are engaging in “a calculated withdrawal, from the life of the Republic, from its machinery” (101), has become an even more poignant and pointed dream in light of the challenges to agency, and indeed access to the law, posed by the use of boilerplate by powerful corporate parties in our current age.370 In light of the phenomenon of boilerplate, Lot 49 underscores, and indeed anticipates, the current challenges of expressing agency and seeking connection in an environment in which form language quietly polices contemporary life.

370 Recent legal decisions have bolstered the power of boilerplate for corporate actors. In addition to Rent-A-Center, West, Inc. v. Jackson (2010) discussed in the final note of the preceding chapter, more recently, in AT&T Mobility LLC v. Concepcion (2011), the Court held a mandatory predispute arbitration provision enforceable, notwithstanding its preclusion of a class action remedy.
AFTERWORD ON ASPIRATION

The preceding chapters attest to the elusiveness of the individual subject\textsuperscript{371} and the mitigation of agency and choice. As dramatized in American literature, the dynamics of enforceable agreements in American life contribute to the naturalization of disproportionate constraints on individuals by more powerful actors. Frederic Jameson’s identification a quarter century ago of the “world space of multinational capital” (92) and its implications for the individual continue to resonate today, perhaps even more strongly. The resulting decentered network provides the site for boilerplate to proliferate, as a medium of connection and exchange disjoined from a particularized individual intention;\textsuperscript{372} the increasingly diffuse nature of the current “world space” not only foreshadows boilerplate’s growing pervasiveness, it also serves as the particular cultural moment in and through which the very idea of boilerplate emerges. As such, the identification of certain formulations of expression as “boilerplate” in the later twentieth century and even more pointedly in recent years can be understood as a rearticulation—or re-iteration—of the value, or at least ideal, of authentic agreement. Thus, as this dissertation demonstrates, the ideal of interpersonal connection, grounded in notions of individual freedom and agency, persists, with a necessarily changed significance, even into the twenty-first century.

Written in the early years of the new century, David Foster Wallace’s essay, “Consider the Lobster,” indicates the ongoing desire for authentic connection—if, at times,\textsuperscript{371}\textsuperscript{372}

\textsuperscript{371}The different forms of elusive subject in “Bartleby” and The Crying of Lot 49 lend support to Jameson’s view that fragmentation has displaced alienation of the subject in the postmodern period (63).

\textsuperscript{372}In her examination of private law enacted in derivative markets, Annalise Riles counters the network model, suggesting another way in which boilerplate operates in the mitigation of individual agency and intention in the process of agreement. Instead of a network, she identifies the compartmentalization, “pockets of lack of knowledge…genres of opacity,” that are enabled through the process of contractual documentation (629).
through self-knowledge—in recent postmodern\textsuperscript{373} writing. A deconstructive investigation of the self, the essay undertakes a search for meaningful intention. In doing so, it brings the market and consumer culture from the periphery (where it frames Oedipa’s search for “Meaning” in \textit{The Crying of Lot 49}, for example) to the center as the impetus for self-examination and an understanding of others.

Specifically, Wallace’s discussion of the phenomenon of the Maine Lobster Festival as a correspondent for \textit{Gourmet} magazine serves as an occasion to consider the moral implications of an accessible American luxury. In doing so, the essay seeks to uncover the intentions and beliefs of lobster-eating Americans. Subtly analogizing the tourist (“an insect on a dead thing” (240 note 6)) to the lobster, the essay addresses Americans as consumers in a market. By denaturalizing a commonplace practice and the social conventions that surround it, Wallace calls attention to a collective unmindfulness of the existence of an ethical dilemma; the essay asks whether and how this act, causing great suffering to a vulnerable sentient creature, may be justified.

The essay hones in on an implicit, though not unchallenged,\textsuperscript{374} consensus about the acceptability of certain forms of consumption, as demonstrated by the industry celebrating them. At the same time, readers encounter an idiosyncratic individual perspective in the essay’s examination of the author’s particular agency and ethical responsibility. Situated in specific

\textsuperscript{373} Although Wallace viewed his work as following the self-consciousness of postmodern writing such as that of Thomas Pynchon and Don DeLillo, he refrained from labeling his own work as postmodern. In an interview with Charlie Rose, he noted that postmodernism seems to have run its course now that “irony, cynicism, irreverence” have entered the culture as a whole. Yet, as Jameson argues, the loss of the artist’s critical distance from the culture characterizes the postmodern moment (85-87). In this project, I have used the term “postmodern” to refer to a mode of expression that manifests the deconstructive insights regarding the performative potential of language and the possible elusiveness of the intentioned origin, notwithstanding its hold on our imaginations.

\textsuperscript{374} The essay includes an account of the tolerated presence of animal-rights activists at the Festival (244).
personal circumstances, the distinctive narrative voice interjects details, at times as asides in footnotes and parentheticals, that convey a sense of the narrator’s individual character. Permeating the account, the narrator’s singular experiences foster a sense of intimacy, notwithstanding an implicit collective awareness of the limits of interpersonal connection. In the opening paragraph, a parenthetical qualification plays ironically with the paradoxes of shared meaning and the limits of experience and imagination. Following his description of the geographical boundaries of Maine’s midcoast lobster region, Wallace notes, “(Actually, [the midcoast] might extend all the way up to Bucksport, but we were never able to get farther north than Belfast on Route 1, whose summer traffic is, as you can imagine, unimaginable)” (235).

Ultimately, after tracing the taxonomy and biology of the lobster along with options for its preparation, Wallace poses the “question that’s all but unavoidable at the World’s Largest Lobster Cooker and may arise in kitchens across the US: Is it all right to boil a sentient

375 Outlining the featured events at the Maine Lobster Festival, Wallace writes, for example, “Your assigned correspondent saw it all, accompanied by one girlfriend and both his own parents—one of which was actually born and raised in Maine, albeit in the extreme northern inland part, which is potato country and a world away from the touristic midcoast” (236).

376 In a footnote to the assertion that the Maine Lobster Festival “shares…the core paradox of all teeming commercial demotic events: It’s not for everyone” (240), Wallace “confess[es:]”

I have never understood why so many people’s idea of a fun vacation is to don flip-flops and sunglasses and crawl through maddening traffic to loud, hot, crowded tourist venues in order to sample a “local flavor” that is by definition ruined by the presence of tourists. This may (as my festival companions keep pointing out) all be a matter of personality and hardwired taste….But, since this FN will almost surely not survive magazine-editing anyway, here it goes:….To be a mass tourist, for me, is to become a pure late-date American: alien, ignorant, greedy for something you cannot ever have, disappointed in a way that you can never admit (240 note 6).

As suggested below, in communicating an idiosyncratic perspective, Wallace, perhaps counter-intuitively, furthers the project of mutual understanding.

377 For example, Wallace’s account of PETA’s presence at the Festival is attributed in part to “the oral testimony of Dick, our florid and extremely gregarious rental-car liaison” (244), whose conversation with Wallace, it is explained, “takes place on Route 1, 30 July, during a four-mile, 50-minute ride from the airport to the dealership to sign car-rental papers” (245). A footnote then provides “the short version regarding why [Wallace and his companions] were back at the airport after already arriving the previous night;” it “involves lost luggage and a miscommunication about where and what the midcoast’s National franchise was—Dick came out personally to the airport and got us, out of no evident motive but kindness. (He also talked nonstop the entire way, with a very distinctive speaking style that can be described only as maniacally laconic; the truth is that I now know more about this man than I do about some members of my own family)” (245 note 12).
creature alive just for our gustatory pleasure? A related set of concerns: Is the previous question irksomely PC or sentimental? What does ‘all right’ even mean in this context? Is the whole thing just a matter of personal choice?” (243). Wallace thereby hints at the seemingly value-neutral position of the free market, in which private exchange, or, in this case, literal consumption, elides collective ethical implications. The essay’s approach to this question suggests a postmodern mode, in which the act of articulation generates intention, or at least an authorial position that invites response. Wallace probes his own position, underscoring the divided and attenuated intentionality that might be his default position. “As far as I can tell,” he asserts, “my own main way of dealing with this conflict has been to avoid thinking about the whole unpleasant thing” (246).

Yet, recalling the stakes of “Bartleby,” the essay shakes its narrator, and ostensibly the reader, from a complacent acceptance of the existing balance of power naturalized by the market. In its description of the lobster seeking to escape a boiling pot of water, Wallace’s essay revisits the implications of denying a preference “not to.” Weighing the possibility that lobsters do not experience pain as unpleasant, Wallace acknowledges “the facts of the frantically clanking lid, the pathetic clinging to the edge of the pot” that force him to reject this attractive prospect: “Standing at the stove, it is hard to deny in any meaningful way that this is a living creature experiencing pain and wishing to avoid/escape the painful experience. To my lay mind, the lobster’s behavior in the kettle appears to be the expression of a preference; and it may well be that an ability to form preferences is a decisive criterion for real suffering” (251).

378 In doing so, Wallace indicates the self-conscious search for self-knowledge that the essay undertakes, noting, “I for one can detect a marked upswing in mood as I contemplate this latter possibility” (250-51).
Wallace makes a compelling case for the significance of the lobster’s “preference” or expressed will. Although the essay shies away from a strident animal-rights perspective and avoids taking a conclusive position on the ethics of eating lobster or other sentient creatures, it denaturalizes a pattern of behavior in which the power to choose is allocated among the impacted beings asymmetrically.

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Although a far cry from the drama of the boiling lobster, the opportunity to act on a preference remains an enduring if elusive ideal in the current environment of proliferating boilerplate. By literally reconfiguring the landscape, the recent mortgage and resulting financial crises have drawn attention to the fine print of contracts, which critics suggest were unintelligible, thereby failing to facilitate choice. Spotlighted as a vehicle of power that capitalizes on a lack of knowledge and agency, fine print has thereby been implicitly characterized by some policy-makers as “no more than [an unamiable] fiction” of agreement—to borrow from Justice Black’s dissenting opinion in *National Equipment Rental, Ltd. v. Szukhent* (333). The resulting concern with clarity of terms of agreement in practice, policy discussions and contract scholarship demonstrates a continued collective investment in freedom and choice resonant of the same themes in literature.

379 In a second parenthetical in a footnote, Wallace asserts, “Not that PETA’s any sort of font of unspun truth. Like many partisans in complex moral disputes, the PETA people are fanatics” (247).
380 As touched on in the Introduction, the use of “plain” language by providers of goods or services on the Internet to describe their terms has increasingly become the working standard. Scholarship on the failure of obligatory disclosure catalogues the legion instances in ordinary American life in which steps are taken to communicate terms, risks and other information to individuals (Ben-Shahar and Schneider). This work also indicates the shift in scholarly thinking away from mandating more and more disclosure about contract terms to consumers (see Leib; Mann 114; Ben-Shahar and Schneider). The discussion and notes that follow identify policy initiatives concerned with clarity and disclosure to facilitate meaningful agreement.
Contemporary interventions in the world of boilerplate continue to reflect the deeply-held American belief in contract as an opportunity to make good choices, which also serve the collective economic well-being. In addition, they demonstrate the constructive possibilities of contract language in furtherance of this social ideal. Standard-form language has been harnessed as a vehicle for disclosure and clarification intended to empower consumers.\(^{381}\) Initiatives for a succinct standard form to enable parties to understand terms and comparative shop, and perhaps negotiate, demonstrate the potential for boilerplate to facilitate an ideal of contract.

The contemporary focus on the form of contractual documents serves as yet another indication of how we imagine the possibilities of agency and freedom in the United States. Disclosure and clarification initiatives reflect the significance of preference in contract. However, they do not necessarily foster meaningful choice. As the notion of boilerplate as a distinctive form of contract reveals, structures of power impact the meaning of contractual expression and the realization of the contract ideal.

As such, some scholars and policy makers are currently seeking ways to adjust or address the resulting frameworks of power that inform the role of contract in facilitating agency and agreement.\(^{382}\) More broadly, contract scholarship is seeking ways to make the process of

\(^{381}\) The Consumer Financial Protection Bureau’s “Know Before You Owe” initiative, for example, seeks to clarify credit card and student debt terms. In addition, the Bureau is currently working to develop a streamlined mortgage disclosure form to enable comparative shopping (see http://www.consumerfinance.gov.).

\(^{382}\) For example, as discussed in the Introduction, the prevalence of mandatory pre-dispute arbitration provisions—contract terms requiring parties to agree to the arbitration of any future disputes that might arise—in consumer and employment contexts serves as one example of a legal and cultural phenomenon that potentially exacerbates the imbalance of power through contract. Today, an individual purchasing a product or starting a new job must often waive the right to settle any future disagreement in court and agree to resolve disputes through arbitration. The process of arbitration disproportionately disadvantages an individual, such as a consumer or employee, who has no previous experience with arbitration and might stand to benefit from the legal framework of discovery to make a fact-specific case, or may need the collective benefits of a class action to bring a case at all. Entities on the other
contract more participatory and expressive of an individual’s choice (see Kim; Eigen).

Collectively, these efforts reflect the desire as well as the potential for a richer form of agreement and social participation through contract, even if necessarily short of the ideal.

No single intervention can alter the dynamics of contract and the significant, if sometimes quiet, role of boilerplate terms. Both “Bartleby” and Lot 49 remind us that expression may be indeterminate and individuals might not always know their own minds, let alone achieve a true meeting of minds. As Wallace’s essay indicates, however, the possibility, or at least the pursuit, of agreement and the ideals of individual freedom and agency that it presumes persist in the American imagination. Moreover, “Consider the Lobster” suggests the ways in which pursuit of an ideal of agreement might also further self knowledge and agency.

Addressing the potential inequity of the inability to prefer not to arbitrate (that is, the inability to prefer not to forgo a chance to bring to court a dispute against an employer or corporation that has not yet arisen), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which established the Consumer Financial Protection Bureau, requires the Bureau to study and report to Congress on arbitration in consumer transactions. Dodd-Frank empowers the Bureau to “prohibit or impose conditions or limitations on the use [of] arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers” (§ 5518). Dodd-Frank also grants the U.S. Securities and Exchange Commission (the SEC) authority to ban mandatory arbitration in the securities context and prohibits mandatory arbitration in mortgage and home equity loan contracts (§1414). The proposed Arbitration Fairness Act would reset the presumption in favor of a transparent and reviewable trial in a court of law in employment, consumer, and civil rights disputes. Myriam Gilles and Gary Friedman envision an alternative mode of pursuing class-wide claims through state attorneys general (2012).
Thus, in his essay, Wallace marks his perspective as idiosyncratic and personal, but, in doing so, he gestures toward the productive possibilities of a common view—if not agreement, per se, then the process of negotiating a shared understanding. The immediacy of Wallace’s voice, addressing his readers directly, underscores the presence of an individual seeking to reach an understanding with another. At the same time, by his own account, Wallace is searching for his own position on the subject, and so the expressed intimacy with the reader suggests the potential of interpersonal connection to further self-knowledge, and thus a richer form of agency. The very process of negotiating a common understanding can be seen to sharpen the expression of individual identity as well as commitment. He explains, “I’m curious about whether the reader can identify with any of these reactions and acknowledgements and discomforts. I’m also concerned not to come off as shrill or preachy when what I really am is more like confused” (253).

In closing, Wallace inquires of “Gourmet readers” directly, “Do you think much about the (possible) moral status and (probable) suffering of the animals involved? If you do, what ethical convictions have you worked out…? [Alternatively,] what makes it feel truly okay, inside to just dismiss the whole thing out of hand?... I am not trying to bait anyone here—I’m genuinely curious” (253-54). Muting the discussion that the essay seeks to provoke, however, Wallace concludes by conceding that “these questions lead straightaway into such deep and treacherous waters that it’s probably best to stop the public discussion right here. There are limits to what even interested persons can ask of each other” (254). In doing so, “Consider the Lobster” recognizes the possibility of attenuated connection that follows its acknowledgement of

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383 A recent study of online contracting indicates that parties are more apt to comply with contract terms after marginally participating in drafting or choosing terms (see Eigen).
the divided self. It also demonstrates the persistence of an ideal, however unattainable, of mutual understanding that drives the pursuit of our knowledge of self and other.

Wallace’s essay offers yet another example of how this ideal implicates the power dynamics of the American market economy and vice versa. It also demonstrates the ongoing literary interest in the process of denaturalizing structures of power in pursuit of an understanding of self and others, or of a meeting of minds. Even more importantly perhaps, it concedes the limits of agreement, and thus implicitly the limits of contract. Yet, at the same time, it has already introduced the very questions that it admits it might not be able to handle, and thus reflects the persisting phenomenon of an aspiration of agreement.

As the case law and the contemporary realities of boilerplate suggest, the enduring narrative of the ideal of agreement can fuel a sense of injustice, underscoring the distinction between contract as experienced and as imagined in the law. At times, however, a narrative of a meeting of minds informs, or has the potential to inform, the experience of contract. As Americans continue to hold on to the possibility of agency and freedom, the current “Age of Boilerplate” not only precipitates this particular ideal, if on the margins, but also presents the paradoxical opportunity to reclaim some of the promise of contract. The ubiquity of contract, if in “standard form,” thus offers a chance to aspire through law, social action and artistic expression to the persisting, if implicit, American ideal of agreement.


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