# BOILERPLATE SEMANTICS: JUDGING NATURAL LANGUAGE IN STANDARD DEAL CONTRACTS

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Many corporate finance lawsuits involve the interpretation of commonly-used boilerplate contracts, the meaning of which is thought to be widely understood. In some cases, however, judges interpret these contracts in ways that upend market actors' expectations about the meaning of terms and frustrate the presumed intent of the parties. Given this experience, and the legal profession's long history with boilerplate, it is a source of frequent surprise that certain standard provisions continue to be used, sometimes almost verbatim, even after becoming notorious sources of conflict.

A number of persuasive explanations have been advanced for this phenomenon, but this Essay argues that they are incomplete, and an overlooked additional factor helps explain the persistence of trouble-making language. Many boilerplate clauses that become the subject of controversy share a type of ambiguous semantic structure that linguists know well, but that we as lawyers are rarely trained to identify. This type of structure lends itself well to boilerplate, but contributes to confusion and opportunistic reading of contract language. Semantically ambiguous constructions can seem straightforward enough to a drafting lawyer on first read, but they contain multiple layers of often-hidden meaning that provide fertile ground for later disputes.

Despite the confusion that these structures create, their ambiguities are difficult to spot and correct, especially using the interpretive processes that we lawyers are accustomed to using. Thus, even earnest attempts to correct problematic language can end up falling short. This Essay identifies these structures using three well-known boilerplate provisions whose interpretations have proved controversial. The Essay also discusses ways in which lawyers can learn to recognize these structures and suggests that algorithms designed to process natural language may be able to "see" them even when humans struggle to do so.



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## INTRODUCTION

A key tenet of the legal realist school of thought is that judges decide cases based on their own policy preferences, and work their doctrinal analyses to fit the result they want.[1] Evidence of this is easy to find in cases involving corporate finance transactions, where boilerplate language, reproduced nearly verbatim from deal to deal, is commonplace.[2] The tension that courts sometimes identify is one between a literal reading of the boilerplate language—an approach that promotes consistency and predictability in the multitude of deals that use the same text—and a desire to effect the outcome that the parties intended (or would have intended had they bargained over it).[3] In some cases, judges decide outcomes that come as a surprise to market participants, either because they frustrate the presumed intent of the parties by stretching language beyond recognition, or because they read the language so closely that its meaning becomes absurd.[4]

It is not surprising that judges make decisions that come to be viewed as motivated—that is the nature of the legal realist critique.[5] More surprising is that some boilerplate provisions continue to be used, almost

1. For a description of this and other features of legal realism, see Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005).

2. *See* Jeremy McClane, *Boilerplate and the Impact of Disclosure in Securities Dealmaking*, 72 VAND. L. REV. 191, 194 (2019) (describing the prevalence of boilerplate in transactional documents). The foregoing, as well as other work using natural language processing, led to me to appreciate the linguistic perplexity described in this Essay.

3. *See, e.g.*, *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1039–40 (2d Cir. 1982) (discussing the desirability of uniformity of interpretation in boilerplate commercial agreements in contrast to assessment of drafter intent). *See also* Cathy Hwang and Matthew Jennejohn, *Deal Structure*, 113 N.W. L. REV. 279, 282 (2018) (noting that some scholars "have argued that courts must review only the plain meaning of a written term (a textual approach), while others have insisted that courts consult the broader, unwritten context of the transaction (a contextual approach)").

4. *See, e.g.*, S. Albert Wang, *We Mean What We Don't Say: The* Archer Daniels Midland *Case, Reputation, and the Curiosity of Refunding Clauses*, 23 YALE J. REG. 121, 122 (2006) (describing the use of boilerplate terms in financial contracts that seem to contravene the parties purpose and the language's literal reading).

5. *See* Leiter, *supra* note 1, at 50.

word for word, even after becoming well-known sources of conflict.[6] Scholars have puzzled over boilerplate's stickiness in such situations, positing explanations in path dependency and switching costs,[7] lack of diligence on the part of lawyers,[8] or risk aversion coupled with plain ignorance about what terms mean when used for so many decades after their original purpose is lost.[9]

While these explanations each have their appeal, this Essay argues that, for important types of boilerplate clauses that commonly give rise to disputes, an additional explanation should be taken into account that facilitates these other phenomena. Certain boilerplate-centered disputes share a common pattern relating to a type of semantic ambiguity that linguists know well but that we as lawyers are ill-trained to identify, much less fix.[10] The ambiguity turns on the difference between what linguists refer to as *opaque*, as opposed to *transparent* constructions, and how the sentences in which they are embedded trigger different logical processes in natural language.[11]

The ambiguities in these constructions are ones that we resolve all the time in conversation, so easily and naturally that we hardly think about it.[12] In written language they are devilishly hard to spot, and even harder

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6. This point has been made by Mitu Gulati and Robert Scott as well as others. *See, e.g.*, MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 10–11 (2013) ("Boilerplate clauses—standardized clauses that have been used by rote over long periods of time—often remain unchanged, even when a court decision has created uncertainty regarding the clauses' meaning. In short, boilerplate clauses are sticky: They seem resistant to amendment even when amendment seems desirable."); *see also* Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. REV. 1040, 1078 ("Once a contractual term is widely employed, parties rationally may believe that others have studied the term and concluded that it operates well. This may lead them to set aside their own view that the term is deficient and could be improved.").

7. *See* GULATI & SCOTT, *supra* note 6, at 11. *See also* Robert Anderson and Jefferey Mannes, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57 (2017) (describing a path-dependent evolution of merger agreements caused by lawyers' "editorial churning").

8. GULATI & SCOTT, *supra* note 6, at 89; *see also* Rodrigo Olivares-Caminal, *To Rank* Pari Passu *or Not to Rank* Pari Passu*: That is the Question in Sovereign Bonds after the Latest Episode of the Argentine Saga*, 15 LAW & BUS. REV. AM. 745 (2009).

9. *See* GULATI & SCOTT, *supra* note 6, at 89.

10. *See* Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1569 (2014) (arguing that lawyers often misperceive semantic ambiguities, because "our intuitions about how language works clash with our lawyerly intuitions about how to prove a claim methodically").

11. *See* Thomas McKay & Michael Nelson, *The De Re/De Dicto Distinction*, *in* Stanford Encyclopedia of Philosophy (Winter 2011 ed. Supp. to Propositional Attitude Report), https://plato.stanford.edu/archives/win2011/entries/prop-attitude-reports/dere.html [https://perma.cc/7WN8-PSQ3]. The different kinds of constructions, and the split in meaning that they produce, occur in all natural languages, not just English.

12. *Id.*

to correct. When courts try to interpret them, they often describe the ambiguity as one related to a particular word or term. (What is the meaning of *approve*? How do we define *pari passu*?). However, the interpretive difficulties in such language begin in more upstream mental processes that are prompted by the sentence as a whole, and the relationship between so-called "intensional" verbs and the state of mind (or supposed state of being) of those to whom the verbs apply.[13] Thus, focus on individual words or terms provides only limited help for courts (or lawyers and investors) in resolving the meaning of such statements. On the contrary, such language is especially susceptible to being read in whatever manner best comports with the reader's preconceptions or preferences.

Blame for the ambiguous language is often placed at the feet of the drafter—commonly assumed to be an overworked law firm associate borrowing language from precedent documents.[14] But this blame may be unduly harsh, given that these ambiguities are difficult to see even in simple cases. When language involves a collection of abstract concepts, as it often does when dealing with financial transactions, the ambiguities can become invisible in our efforts to make sense of the mass of intricate obligations that describe a complex deal. Because these kinds of ambiguities are hard to spot, it is easy for lawyers to miss them in crucial places when they draft new documents.[15] And even where contract verbiage attracts attention for its ambiguous nature, efforts to correct the ambiguities are sometimes directed at the wrong part of the language, leaving the door open for more problems down the road. Other times, courts' failure to perceive the true source of ambiguity in contract language leads to precedent that renders the boilerplate clause virtually meaningless in practice, but all the while any educated, bright law firm associate (or partner) reading it sees clear meaning and is hard pressed to justify removing it.

This Essay explains how these ambiguities work, and how they perpetuate problems in contract interpretation and drafting. It proceeds in the first part by explaining the semantic ambiguity that I argue is at the core of some persistent boilerplate-related disputes. Understanding the ambiguity requires first understanding some concrete examples of it, which then help a reader to see it in more abstract language. The second part then describes a series of important cases in which this problem

13. *See id.*

14. For a discussion of boilerplate document creation in which "junior level scribes do most of the drafting, and senior lawyers review in carefully honed bursts" see Claire A. Hill, Why Contracts are Written in "Legalese," 77 Chi.-Kent L. Rev. 59, 77 (2001). Hill also discusses how this process "represents the accumulated wisdom of everyone who has worked on it . . . [but] the iterations are not always efficient at correcting mistakes." Id. at 80.

15. To be sure, there are times when the drafter is to blame. The reader of this Essay may rightly blame its drafter for anything that is ambiguous or just plain bad.

features prominently, but where it has gone unrecognized by courts and lawyers. The examples include a common redemption clause found in preferred stock and bond covenants, a change of control provision found in many debt investment contracts, and the infamous *pari passu* clause that shook the international finance legal community and brought an entire sovereign country almost to its knees.

## I. OPAQUE VERSUS TRANSPARENT CONSTRUCTIONS: A BRIEF NUTSHELL

To see how semantic ambiguity creates trouble in legal drafting, it is essential to understand how linguists distinguish between textual constructions that they refer to as *transparent* and ones that are *opaque*.[16] The most basic difference is that transparent constructions have one logical meaning, while opaque ones have multiple, logically true readings.[17] For some of these readings, inference rules are valid, and for some of them they are not.[18] The paradigmatic examples of "intensional" verbs that tend to generate opaque phrases are *want*, *look for*, *know*. A number of words that appear commonly in commercial boilerplate and other contracts also fit into this category: words like *approve*, *offer*, *promise*, *intend* and the words they relate to. These can be contrasted with transparent constructions, those that usually involve verbs such as *take*, *eat*, *kill*, *write on*. The difference is that transparent verb constructions lead to certain logical conclusions by necessity, whereas opaque ones have multiple possible implications.

The ambiguity in opaque constructions does not lie in the verb or the noun individually (although it is easy to think so), but in the "semantic relationship between the two."[19] What this means for the difference between transparent and opaque constructions is perhaps best explained with an example.

Take the following sentence pair, which illustrates a paradigmatic *transparent* construction:

*I killed Batman.*

*I killed Bruce Wayne.*

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16. Different terms are sometimes used, but for purposes of this paper, I use the terminology most commonly found in texts of natural language. *See, e.g.*, BARBARA H. PARTEE, ALICE TER MEULEN & ROBERT E. WALL, MATHEMATICAL METHODS IN LINGUISTICS 93–94 (1990).

17. Janet Dean Fodor, The Linguistic Description of Opaque Contexts 7, 12 (June 1970) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology), https://dspace.mit.edu/handle/1721.1/12970 [https://perma.cc/Q8CX-FW8W].

18. *Id.*

19. *See id.*

As in all transparent constructions, if one of these sentences is true, both must be true.[20] From the sentence "I killed Batman," it is also possible to conclude logically that I killed Bruce Wayne. There is exactly one human (real or imaginary) that I could be talking about in this sentence, whether the sentence is written or spoken.

The opaque construction of this sentence works differently. For example, take the opaque verb, *to know*. If I said, instead:

*I know Batman is Batman.*

*I know Bruce Wayne is Batman.*

Here, the first sentence does not necessarily imply the second. The truth or falsehood of the second statement depends on things that cannot be inferred from the first, given how it is constructed. If this were the end of the story, the problem might not be that important. We can all agree on rules of inference for simple statements like the ones above (just as we agree that I could never kill Batman). However, these kinds of phrases add an extra layer of interpretation that can lead people to draw different conclusions from the same sentence, and become convinced that their interpretation is the "right" one.

### *A. Two Ways of Reading Opaque Phrases*

The difficulty with opaque constructions lies in the fact that they have multiple readings, any of which can be true under different states of the world. Linguists break these readings into two categories, the *de re* reading and the *de dicto* reading.[21] These Latin terms translate roughly to "about the thing" (like the legal term *in rem*) and "about the word" (like the legal term *dicta*).[22] The difference between the two breaks along the line between sentences that are about a specific thing that someone has in mind (the *de re* interpretation), and sentences that are about a category of thing, i.e., the thing that the word describes (the *de dicto* interpretation).[23] Again, this distinction is best explained by example. For instance, consider the following sentence which has distinct *de re* and *de dicto* readings.

*I want to be the President.*

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20. *See id.* at 90 (discussing inferential rules related to transparent and opaque constructions).

21. PARTEE ET AL., *supra* note 16, at 409.

22. *See id.*

23. *See* McKay & Nelson, *supra* note 11.

The *de dicto* interpretation of this sentence would be that I want to go into politics, run for president and win. It is the category of the thing called "President" that I have in mind.

A *de re* interpretation would be that I literally want to be Donald Trump (or whoever happens to be president when I make the statement).

These kinds of sentences are everywhere in spoken and written natural language. They usually relate in some way to the state of mind of someone—either the speaker or a person referred to—or about a hypothetical state of the world.[24] They are ambiguous because this mental state could vary depending on the identity of the speaker, and the context from which the sentence draws. Consider another example:

*She promised to take care of Mike* could have two readings:

*De re*: she promised to take care of a specific individual whose name is Mike. (Maybe Mike is her wayward brother who needs looking after).

*De dicto*: she promised to take care of some set of people who need help, and one of those people happens to be Mike. (Maybe she is an ER doctor and Mike is one of her patients).

In the first interpretation, there is exactly one person about whom the sentence makes sense—a specific Mike whom she promised to help. In the second interpretation, it is not important that the person she is talking about happens to be Mike. She may have no idea that the person's name is Mike. She may, in fact, have made the promise about many other people as well, and if Mike had not shown up in the ER, we might have correctly substituted "Mike" with another name. Sentences involving verbs like "promise" are often open to these kinds of differing interpretations.

Hopefully the distinction between *de re* and *de dicto* is becoming clearer by now. But just for fun, consider another example: suppose I said *I want to buy a house on Neil Street.*

The expression "want to buy," like many statements of desire or intent, is opaque and has *de re* and *de dicto* two readings.

A *de re* reading: *There is a specific house that I want to buy, and it is located on Neil Street.*

And a *de dicto* reading: *I want to buy a house. Any house will do, as long as it is on Neil Street.*

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24. *See id.*

As in the other examples, the *de re* interpretation assumes that there is one specific thing (and no other thing) that makes the sentence true, while the *de dicto* interpretation assumes that there is a class of things that could make the sentence true, and the thing referred to in the sentence just happens to be the most obvious example, or perhaps the one that happens to be closest to mind when the sentence is created. Without any other guidance on what the language means, either interpretation could be completely right or utterly wrong.

To see how, it is useful to think about how *de re* and *de dicto* interpretations are dealt with differently in speech than they are in writing. Take a classic intensional verb construction "*looking for*." If I say to you, "*I am looking for a newspaper*," there are a number of plausible interpretations. The *de re* interpretation might refer to a particular, single copy of a particular newspaper. Maybe there is a specific copy of the *New York Times* on which I started filling out the day's crossword puzzle, and now I want to find it so I can finish. On the other hand, the *de dicto* interpretation might refer to any old newspaper (the *National Enquirer* would do), or perhaps any copy of a particular city's paper (I want to read today's *New York Times*, but I don't care which individual copy I get). Context is critically important to resolving the meaning the speaker intends.

In everyday communication, this context comes from many sources, most of which we don't even think about. If you saw me working on the *New York Times* crossword puzzle earlier, you might guess that I'm looking for that copy of the *Times* over which I had been pulling my hair out. You might even try to help me find it or think about where you last saw me with it.

If, on the other hand, I am walking around with a handful of fresh-cut flowers from my garden, you might realize that I'm just looking for something to hold the flowers in. If you don't happen to have a newspaper, you might help me by handing me something that works just as well—a spare vase, or even a paper bag if you don't have anything else. We derive meaning about opaque constructions from these kinds of context cues all the time. But when the same constructions are written down and divorced from context, their meaning becomes less certain, because written text is missing common communication signals like tone of voice, inflection, physical gestures, facial expressions and body language that we often rely on to understanding meaning.

While certain verbs tend to create semantic ambiguity, it also turns up where these verbs relate to words that could refer to one specific object, or many interchangeable ones (pages, newspapers, dollars).[25] The

25. *Id.* (discussing opacity in universal quantifiers).

ambiguity stems from the fact that the statement pertains to something that is imagined in a person's mind, or a hypothetical state—an idea about something they are referring to, or a perceived state of the world. Without context to understand the underlying interests at stake, these statements are easy to misinterpret. Moreover, the interpretation the reader favors is commonly anchored to whatever set of circumstances about which he or she was mostly recently thinking, so much that the reader stops seeing any other possible meanings.[26]

Without any other context to guide understanding, this can lead to outcomes that seem odd to those who may come to the language with a different set of preconceptions. By analogy, it would be as if I said I was looking for a newspaper, and you handed me a paper bag. To a third party, this might look absurd. From a different vantage point, however, it might make perfect sense. Depending on the third party's preconceived notions, they may see this as either an appropriate or clearly erroneous interpretation of the language.

### *B. Difference Between Semantic Ambiguity Other Kinds of Ambiguities Lawyers are More Familiar With*

The semantic ambiguity found in opaque constructions differs from other types of ambiguities with which we lawyers are more familiar. In particular, the semantic ambiguity of opaque constructions should not be confused with three other types of ambiguity that lawyers are adept at dealing with, what we might call *lexical ambiguity*, *vagueness* and *syntactic ambiguity*.[27]

*Lexical ambiguity* refers to words that have multiple meanings.[28] These are words for which a dictionary would contain multiple entries to explain the different ways the same word can be used. *Vagueness* refers to words or phrases that have such open-ended interpretations as to render them almost meaningless, or at the very least, open to necessarily subjective interpretation.[29] Syntactic or structural ambiguity refers to uncertainty of meaning that arises when one part of a sentence could refer to more than one other part of the sentence.

To illustrate lexical ambiguity and vagueness, suppose I said to you, "*This part is too deep*." The word "*part*" could refer to part of a lake, or part of a law review article, or the part in someone's hair perhaps. The

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26. *See* Anderson, *supra* note 10, at 1569.

27. *See* Lawrence B. Solum, *Legal Theory Lexicon 051: Vagueness and Ambiguity*, LEGAL THEORY LEXICON (June 24, 2018), https://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le.html [https://perma.cc/QS44-XC7D].

28. *Id.*

29. *See id.*

immediate context in which one said (or wrote) the phrase would clue us in to the meaning that was intended. If we were swimming in Lake Michigan, it would be pretty clear that the meaning is supposed to be "portion" or "area" of the lake. By contrast, if I had just come from the barber with a hairstyle involving a severe separation line dividing the mop on my head, you might assume that I was talking about the part in my hair (as I recently was when a barber convinced me to get a "hard part" shaved into my hair—something that didn't work very well for me).

These different meanings of the word "part" would be examples of lexical ambiguity, and nearby words might help to give enough context to understand which meaning is intended.[30] The words "*too deep*" would be the vague portion of the comment. How deep is too deep? Does it depend on how well you can swim, or how tall you are? Or what your hair styling preferences are? The meaning is subjective and highly relative.

Lexical and vagueness ambiguities are precisely what lawyers are well equipped to interpret. These ambiguities tend to turn on the meaning of a particular word, or group of two or three words. So we can get out our dictionaries from whatever year we think relevant and see precisely what meaning a word had at the time in which the people who drafted some clause used it. Vagueness doesn't lend itself to dictionary definition, but can be ascertained by reference to modal or paradigmatic examples.[31] In business law, this is often things like market practice. "What kind of delay is too long?" "Well, the industry standard is ten days, so anything longer than that is too long."

The kind of semantic ambiguity described in this Essay is also different from ambiguities that arise from syntax. Syntactic ambiguity (sometimes called structural ambiguity) flows from the order of words and sometimes punctuation in a sentence. This type of ambiguity often results in uncertainty over which words modify which other words. For example, the sentence: "The professor said on Tuesday he would give an exam," could mean that the exam will be on Tuesday, or that the professor spoke the words, "I will give an exam," on Tuesday.[32] The dual meanings derive from ambiguity over what part of the sentence "on Tuesday" modifies. In law, this kind of problem is frequently addressed by certain canons of

30. It is this kind of ambiguity that studies using word co-location and frequency counts are best suited to understanding. *See, e.g.*, Thomas R. Lee and Stephen C. Mouritsen *Judging Ordinary Meaning*, 127 YALE L.J. 788, 831 (2018) (describing the use of frequency and collocation to determine meaning). I argue that the kind of ambiguity I principally discuss here, however, does not lend itself so well to study through collocation or frequency counts alone.

31. *See id.* at 821 (discussing reference to prototypes as a means of resolving vague or lexically ambiguous terms).

32. This kind of ambiguity has famously been used in comedy. For example, Groucho Marx is reported to have joked: "This morning I shot an elephant in my pajamas. How he got in my pajamas I'll never know."

construction, and heuristics like the Rule of the Last Antecedent. Such conventions attempt to address syntactic ambiguities by providing a common practice for consistently deciding which parts of a sentence modify which other parts.

Opaque constructions raise problems quite different from these other forms of ambiguity. These constructions occur at the level of the sentence, and at their root, at the level of the idea being expressed by the relationship between a specific class of intensional verbs and the words they modify. They are harder to recognize, and trickier to resolve. Because most of us do not usually see them, we tend to ascribe the confusion they cause to lexical ambiguity, syntax or vagueness and set out trying to interpret words and find modal examples. Sometimes, this works well enough for a given situation, but sometimes this creates the appearance of solving the problem while really pushing it off to the next dispute. Even worse, sometimes it leads to perverse results that seem to defy common understanding of what the boilerplate language is supposed to do.

## II. SEMANTIC AMBIGUITY IN CORPORATE FINANCE BOILERPLATE

Although any contract might contain opaque constructions, boilerplate lends itself to them especially well. Boilerplate provisions in indentures and other corporate finance documents are, in practice, not negotiated much if, at all.[33] Their language, usually drafted in the past and fine-tuned over the course of successive deals, becomes fixed, sometimes by law, and often by the expectation that parties to a deal will use so-called market standard terms.[34] So standard is the language of many of these contracts that it takes the form of privately agreed statutes, governing financial transactions in a largely uniform manner.[35]

Lawyers and courts have plenty of experience with boilerplate's opacity. It may seem odd, then, that problems of interpretation sometimes arise in provisions that are so heavily used and purportedly well-understood. Disputes that arise over these contracts are often framed as a clash between the plain meaning of the terms, and the goals that the terms

33. *See, e.g.*, *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) ("Boilerplate 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."); *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 962 (1981) ("The remainder of the indenture is invariably made up of boilerplate provisions that typically are not discussed at all by either the representatives of the issuer or those of the lead underwriter; indeed, most of those provisions are not even discussed by counsel for the respective parties, and many of them are required by federal law to be inserted into the indenture verbatim.").

34. *See Broad v. Rockwell Int'l Corp.*, 642 F.2d at 962.

35. This point that has been persuasively made by other scholars, see Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1159–73 (2006).

must have been intended to serve. However, for some disputes, this framing is misleading and diverts parties' attention away from the real problem.

The cases where this problem reveals itself most conspicuously show a broad pattern in which the question boils down to whether contract language allows one thing to be substitutable for, or equivalent with, another. The structure of the legal inquiries in such cases usually runs along the lines of: "does this situation (*or concept, term, word*) fit within the category of things defined as X in the contract?" The analysis thus devolves into an inquiry of what "X" means, and whether the situation at hand truly fits it. This is a natural mode of legal interpretation, and I don't mean to suggest that it always leads to wrong answers; in many cases, the outcome might be completely reasonable. But when sentences are opaque, a critical question, prior to the definition of any one term, is which readings are present in the text. Without addressing that question, the underlying confusion over the meaning of boilerplate language is unlikely to be resolved even with a refined definition of terms.

Three specific examples serve to illustrate the point: the first deals with bond and preferred stock call provisions, the second, with change of control covenants, and the third, with equal treatment clauses.

### *A. Early Redemption Provision*

One example of semantic opacity in the corporate finance world can be found in a redemption provision commonly seen in debt and debt-like instruments, such as bond indentures and preferred stock. A paradigmatic case, *Franklin Life Insurance v. Commonwealth Edison*,[36] involved a clause in the terms of preferred stock providing that none of it "may be redeemed through refunding, directly or indirectly, by or in anticipation of the incurring of any debt...."[37] The purpose of the clause is to stop a company from borrowing new money at a lower interest rate to redeem, or pay back, all of the preferred stock (or debt) held by investors (who, for all practical purposes, are creditors). Creditors and investors resist this kind of redemption with borrowed money because it causes them to lose out on their investment: they invest in reliance on the ability to receive a steady stream of payments at a certain return for a certain period of time, and redemption thwarts that expectation. In essence, the clause says that the borrower can't pull out of the deal just because someone else later offers better terms.

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36. 451 F. Supp. 602 (S.D. I. 1978), *aff'd*, 598 F.2d 1109 (7th Cir. 1979).

37. *Id. See also Morgan Stanley & Co. v. Archer Daniels Midland Co*., 570 F. Supp. 1529, 1530–31, 1532 (S.D.N.Y. 1983); *Shenandoah Life Ins. Co. v. Valero Energy Corp*., Civ. A. No. 9032, 1988 WL 63491, at *4, *6 (Del. Ch. June 21, 1988).

As with other opaque constructions, the operative part of this clause seems, at first glance, to be clear and sensible enough. Only if one has studied corporate law enough to know how courts have utterly defanged it would one realize how curious it is that this vestigial clause has survived, largely intact, in so many agreements for so long.[38] In *Franklin*, the company (ComEd) had issued preferred stock containing the early redemption provision to the Teacher Retirement System of Texas and other investors.[39] The company later issued *common* stock and used the proceeds to redeem the preferred.[40] If that were all that had happened, it might have been the end of it. However, the transaction made it necessary for the company to borrow more money (at lower prevailing interest rates, of course) to replace the funding it had gotten by issuing the now-redeemed preferred stock in the first place.[41]

When the preferred stockholders sued, the company argued that it had redeemed from *common stock*, and not "in anticipation of debt," even though the whole transaction had necessitated taking on more debt.[42] The question before the court was whether or not the redemption was, in fact, done in anticipation of the issuance of debt. In a somewhat labyrinthine analysis, the court ends up focusing on the words "refunding" and the word "anticipation." After seeming to agree with the defendant company's assertion that "since common stock...cannot be refunded, refunding through an issue of common stock is permissible,"[43] the court then frames what it sees as the key question of the case, asking "[w]here did the money used to redeem the preferred stock come from and was that source in anticipation of debt?"[44] The court draws a distinction between money that came from the sale of common stock and the proceeds from the subsequent debt, homing in on the words "refunding operations" to reason that the common stock issuance cuts off the connection between the redemption and the later-incurred debt.[45]

One might look at this decision either as a faithful, if hyper-literal, reading of the contract (redemption was funded by issuing common stock, not through refunding via debt), or as a decision that misses the forest for

38. *See, e.g.*, Wang, *supra* note 4, at 122 (exploring why firms continue to use such clauses in contracts when they "have no legal value").

39. *See Franklin Life Ins. Co.*, 451 F. Supp. at 605.

40. *See id.* at 606.

41. *See id.*

42. *See id.* at 603–04.

43. *Id.* at 613.

44. *Id.* at 615.

45. *Id.* In addition, the court claims that any other interpretation would mean that other provisions of the indenture allowing for early redemption of preferred stock would be difficult to exercise. However, the court does not mention the likely possibility that all of the redemption provisions were intended to be difficult (although not impossible) to exercise.

the trees (the point is to protect investors like the Teacher Retirement System, not let borrowers wriggle out of deals with a shell game of money transfers). Either way, one might also see the decision as driven by a policy preference on the part of the judge (borrowers should be free to get better bargains) in the legal realist vein. My argument here is simply that the parties' struggle with the language, and the opportunity for policy preferences to creep into what looks like a decision about reading text, is rooted in an ambiguity that remains overlooked in a litigation fixated on defining individual terms.

The interpretive difficulty that the court identifies comes from the fungibility of money, and it is one that arises often in financial contracts. However, the reason the court struggles with this difficulty is that the true culprit is a misunderstanding of *de re*/*de dicto* interpretation, compounded by the reference to money. The fungibility of money is not solely to blame and attempts to account for it in drafting would not fix the problem. The reason is that when reading this provision, by the time we get to the fungibility of money (i.e., the question of where the specific money for a transaction came from and whether it is in the category of money that shouldn't have been used), we've already made a choice (whether we realize it or not) about which reading to favor. Like many clauses that deal with a hypothetical state, the clause "in anticipation of debt" is opaque. In the *de re* reading, it could mean that there is a specific debt transaction someone is about to do, and the thing they are doing now is in anticipation of it. Or in the *de dicto* reading, "in anticipation of debt" could refer to any debt transaction, concrete or still hypothetical, that the issuer might conceive.

To see the issue, consider a more concrete example. If I say, "I anticipate buying a house on Neil Street," I could mean that I have a specific house in mind that I intend to buy (the *de re* reading), or I could mean that I want to buy some house on Neil Street, but I don't care which one or on which part of Neil Street it is located (the *de dicto* reading). Both readings are plausible, and no one would say that I lied if I didn't know which house on Neil Street I wanted to buy. It wouldn't matter if the houses were fungible or if I had any money to buy a house at all under the *de dicto* reading—it could even be the case that there are no houses on Neil Street right now, that the set of things, "houses on Neil Street" is empty. It could still be true that, if there ever comes into existence a thing that fits the category of "a house on Neil Street," then I anticipate buying it.

Fungibility wouldn't matter unless it were clear that we were arguing about which specific house on Neil Street I want to buy, or whether I had a specific house in mind at all. But that argument would have already dismissed (or ignored) the *de dicto* reading of the statement. To extend the comparison, imagine that I have a mortgage on a house on Farmington Avenue, and that I have promised not to redeem (or refund) my mortgage

in anticipation of buying a house on Neil Street. If I redeemed my mortgage (say, from money I had saved), when no houses were for sale on Neil Street, but then bought the first one that went on the market, it would still be quite possible that I had redeemed in anticipation of buying the house on Neil Street. But the court's reasoning would be the finance equivalent of saying, "Since the plaintiff does not know (or cannot show) that there was a house on Neil Street the defendant anticipated buying when he redeemed, it cannot be the case that the defendant anticipated buying a house on Neil Street."

Cast in more concrete terms, the logical problem in the court's interpretation of the language is easier to see. There may be policy reasons for a court to refrain from limiting someone's ability to pay off their mortgage and buy a new house, but the reason would not flow inevitably from the language of the hypothetical contract in my example. Nor would it matter that the word "refunding" appeared in the clause, because regardless of whether one is redeeming or refunding (or whether it is possible to refund), the ambiguity is over what is being done "in anticipation of debt (or buying a house on Neil Street)", not which action happened at what point in time.

It is understandable that courts would struggle with this kind of ambiguity. Looking at a set of facts, judges are likely to start with the narrower, *de re* interpretation, parsing boilerplate with the specific factual scenario before them in mind, and ascertaining whether facts fit into a certain category or not. Courts often do this parsing in the name of literalism, even though they overlook some perfectly plausible, and quite literal alternative readings. Basing a decision on a specific fact pattern is easier to grasp and police, but it undermines the goal of consistency and, in this case at least, renders the clause in question almost useless. Any smart issuer or borrower can get around it easily. The courts sanction this under the guise of strict reading of the language and the fungibility of money, but there is still a sense that something doesn't quite add up. How can this clause that is meant to protect investors contain such a massive unnoticed loophole?

Somewhat perversely, these cases set a precedent for future cases that might have otherwise been easier for a court to interpret. In the well-known case *Morgan Stanley v. ADM*,[46] the court interpreted similar language but on different facts. Given those different facts, it might have been even easier for a court to implement what seems obvious as the purpose behind the provision, even using the *de re* reading of the boilerplate. However, the court gravitated toward the *Franklin* precedent to rule against the bondholders. The decision purports to be faithful to the contract language, but seems perplexing when that language is considered

46. *Morgan Stanley & Co. v. Archer Daniels Midland Co*., 570 F. Supp. 1529, 1532 (S.D.N.Y. 1983).

more carefully. A policy justification may help make sense of it, but seems to contravene the broader policy of giving plain meaning to the language and promoting consistency in interpretation.

Perhaps even more perplexing is the fact that such language continues to be used, almost unchanged even after these cases have shown how troublesome the language can be.[47] Again, the nature of opaque constructions helps to explain. The language is like an optical illusion, its most "natural" reading reflecting the conceptual starting point of the reader. To understand why, it helps to imagine a lawyer drafting a bond indenture and seeing that provision. On first read, it looks perfectly reasonable. A borrower cannot redeem the bonds with other, lower interest debt. Without knowledge of the case law, one wouldn't see it as overly ambiguous, let alone useless. Even with knowledge of case law, when reading it *de dicto* (as lawyers are more likely to do when abstracting away from specific circumstances), it is easy to think one of two things— that either the cases that invalidated it were somehow idiosyncratic, or that even if they weren't, there are probably *some* set of circumstances in which this clause would be useful, even though the *de re* reading of it means that any issuer with any sense can evade it easily.

Leaving "useless" boilerplate in a contract may not be the biggest problem, however. After all, no one is paying by the word.[48] The bigger problem is that attempts to fix this language run into the same problem that courts have in deciphering it. The trouble goes back to the assumption that the linguistic challenge involves money's fungibility or defining a specific term, and so someone considering possible fixes is likely to start thinking through every possible way in which money could be moved around. The possibilities are so numerous that the attempted fix becomes unwieldy, and perhaps not worth the cost. And dealing with the perceived problem may not fix the bigger semantic issue anyway.

### *B. Change of Control Provisions*

Another example of the kind of boilerplate described in this Essay involves change of control provisions. These provisions are commonly found in corporate debt contracts, and as the name suggests, they protect

47. *See generally* Aditi Bagchi, *Other People's Contracts*, YALE J. REG. (2015) (arguing that ambiguous clauses in contracts can negatively affect third parties).

48. The observation that it is low cost to leave language in has also been made by Gulati and Scott. *See* Mitu Gulati & Robert E. Scott, *The Costs of Encrusted Contract Terms*, 3 (Jan. 26, 2016) (draft), *available at* https://www.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/encrusted_boilerplate_jan_26_2016-workshop_final.pdf [https://perma.cc/7DAR-94T7] ("[T]he terms may continue to be employed because parties see no reason to eliminate a term they view as costless and thus incur a risk, however small, of jeopardizing the understood meaning of their agreement.").

lenders (who are, for purposes of corporate debt, *investors*) if a borrower experiences a change in control. Ultimately, if a lender thinks it is making a loan to a company controlled by a familiar group of people, the lender might want to be able to back out of the loan if control of the company suddenly shifts to an entirely new group people.

Despite the rationale for this provision, litigation over its meaning led to an important decision invalidating the lenders' protection and gutting what most observers thought to be a mechanism to protect debt investors.[49] Unlike many situations involving boilerplate-related disputes, lawyers took note of the outcome of the case and changed the terms of their standard indentures—the contracts governing public debt issuances.[50] The changes they made, while sound given the language of the court's decision, left the true problem unsolved. Thus, the language left open a linguistic loophole through which courts have continued to impose an interpretation different from the one that the drafters had in mind.

The case in point is *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*[51] The main issue in the case was whether the board of directors of Amylin, the issuer of notes (i.e., the borrower), could simultaneously both approve and disapprove of a slate of insurgent nominees to their board of directors. The relevant clause in the case, called the "Continuing Directors" provision, stated that if the membership of the board of directors changed (because of a merger, or a shareholder acquisition of a controlling stake, for example), it would constitute a change of control unless the majority of the new board was made up of either directors from before the change, or new directors approved by the old directors. In essence, under the terms of the Continuing Directors provision, change of board membership and disapproval of new board members would mean Amylin's creditors would be able to get their money back and exit the deal, while approval of new members would mean that the creditors would be stuck lending to a company controlled by relative strangers.

The events giving rise to the dispute began in January 2009, when Icahn Partners, an 8.8 percent stockholder, "notified Amylin of its intention to nominate a slate of five directors to Amylin's [twelve]-person board."[52] The following day, Eastbourne Capital Management, a 12.5

49. *San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc.*, 983 A.2d 304 (Del. Ch. 2009).

50. *See, e.g.*, *Delaware Court of Chancery Rules on "Poison Puts,"* Gibson Dunn (June 8, 2019), https://www.gibsondunn.com/delaware-court-of-chancery-rules-on-poison-puts/ [https://perma.cc/K9W2-X8TV]; *Delaware Court Interprets Continuing Director "Poison Put" Provision*, Fried Frank (June 12, 2009), https://www.friedfrank.com/siteFiles/Publications/9F6864655B1198888B90E8F3B0B63765.pdf [https://perma.cc/GT7F-XK4C].

51. 983 A.2d 304.

52. *Id.* at 306.

percent stockholder, "notified Amylin of its intention to nominate its own five-person slate."[53] The Amylin board opposed both of these insurgent slates, both in public statements and proxy communications.[54] Because the election of more than five of the dissidents' unapproved nominees would trigger Amylin's Continuing Directors provision, Eastbourne sent a letter asking the Amylin board to devise a workaround to prevent the notes from having to be paid off early.[55] Specifically, Eastbourne asked the board to compile an "approved" slate of directors that would include a "'significant number' of the nominees from each of Eastbourne's and Icahn's slates."[56]

Typically, a board approves director candidates whom it backs for election, and an insurgent slate necessarily runs in opposition to the candidates the directors nominated.[57] Therefore, as the lenders argued, it was difficult to see how the board could approve of the candidates running in opposition to those whom the board had formally approved. However, in this instance if the board could not "approve" of the election of these directors while also disapproving of them, the Continuing Directors provision would be triggered, and the company would be forced to lose money buying back the notes.[58] The insurgents thus successfully talked the board into "'approving' the dissident slates for purposes of the... [n]otes" even though they did not approve of the insurgent slates for purposes of the general election.[59]

The court approached the case as though it turned on the meaning of the word "approve" and as often happens in such cases, looked to a dictionary to help settle the matter. The court concluded that, since the relevant definition of "approve" refers to a formal act, the board could formally approve of the insurgent slates without really approving of them.[60]

On its face, the outcome seems reasonable, even if it contravenes the purpose of the change of control provision—to give lenders a way out of a deal with parties they had no intention of dealing with. The court took a policy position, framing its decision as preventing boards from entrenching themselves and seeking to prevent financial hardship that would be imposed on a company forced suddenly to pay out huge sums to

53. *Id.* at 309.

54. *Id.* at 306, 310.

55. *Id.* at 309.

56. *Id.*

57. For a perspective on this practice, see Sidley Austin LLP, *The Best Practices Calendar for Corporate Boards and Committees* 5 (2019), *available at* https://www.sidley.com/~/media/uploads/best-practices-calendar [https://perma.cc/U42W-KX73].

58. *Amylin*, 983 A.2d at 310.

59. *Id*. at 310.

60. *Id.* at 314.

redeem its debt.[61] Unlike other instances of literal interpretation thwarting contract purpose, the court's interpretive method appears sound enough. However, the approach misses the real source of ambiguity in the contract language, and by doing so leaves lawyers fixing the wrong problem when trying to account for this case.

A few points about the court's reasoning help make clear why its focus on the word "approve" by itself misses the real problem and perpetuates confusion. How can a board approve of directors for election and disapprove of them for election at the same time? And if "approve" has a clear dictionary meaning, why does it mean different things at different times in the context of the very same occurrence? It seems like the court is simply picking a side and allowing the directors to sidestep their contractual obligations.

An analogy helps to illuminate why. If I said, "I approve of the election of the President," I could have four different possible meanings in mind. It could be the case that I approve of the fact that the office of President is an elected office (as opposed to appointed or chosen in a coup). It could also be true that I approve of the election of the President, whoever it happens to be at a given time (maybe I think it's a patriotic duty to approve of the duly elected President). It's possible that I approve of the process by which our current president was elected (and hope there was no Russian interference). Or alternatively, it could be that I approve of the specific individual who happens to currently occupy the Oval Office, or even someone who occupied the office in the past. In a conversation, you might ask a question or two to clarify, or listen for tonal clues or vocal emphasis, before deciding whether to talk to me more or to block me permanently from your social media.

Note that this ambiguity has nothing to do with the literal meaning of the word "approve." Under any definition of that word, the same ambiguity would arise. Thus, in our boilerplate clause, under the *de dicto* reading, "approve of the election of directors" can logically have multiple meanings. One meaning is that parties approve of the process of the election of directors, no matter who they are. Another reading is that that parties approve of the process of election of some specific people who are up for election as directors. It could also mean that parties approve of the directors themselves. When you break out these different meanings you see that these are not "approving of the same people for different purposes" as the court suggested. These are literally and logically approving of very different things. And while understanding this does not instantly resolve the ambiguity in the contract, neither does a resort to the dictionary. Changing the word "approve" to "giving formal sanction" in the sentences above doesn't change anything, and in fact, the same ambiguity would still exist, which perhaps explains why lawyers who try

61. *Id.* at 306.

fixing the clause by adding qualifiers like "formal or informal" before "approve" continue to encounter problems. It doesn't help to clarify what people might mean by saying those things, but more to the point, it doesn't clarify what the contract actually requires.

Failing to understand the distinction between *de re* and *de dicto* readings leads to confusion. Given the ambiguity, the starting point of interpretation matters a lot, and can vastly color a reader's view about which answer is "right." Imagine that I changed the example above to say "Most Democrats approve of the election of the President." The multiple meanings would still exist, and at least some of them would remain literally true; but given one's priors, a person with no other context could easily be drawn to a particular interpretation, and have a very strong idea about the statement's reasonableness. If you are the drafter, you may have the *de re* reading in mind when you drafted (or reviewed the boilerplate)—assuming that directors would approve of specific people to be "continuing directors." The company (and the court in this case) is coming from the *de dicto* reading, focused on an entire class of thing, "election of directors," or at least a certain type of process. Mixing these readings leads to muddled interpretations and even more perplexing arguments. By analogy, the noteholders' (or lenders') argument becomes the parallel of: "since you don't approve of the election of Donald Trump, it must be the case that you don't approve of the election of the President."

The company and insurgent directors also employ a *de re* reading, interpreting the word "approve" to mean two contradictory things simultaneously to explain how the board could approve of unapproved directors. But a more logical interpretation was available all along: that the board can approve the category of people, "elected directors" (the *de dicto* reading) regardless of their personal feelings about specific individuals.

These ambiguities are easily missed, which is perhaps why even after a case like *Amylin*, lawyers have kept using the same boilerplate, and to the extent they have made changes, they haven't solved the problem. If the drafter reviewing a standard template is assuming a *de dicto* reading, a general boilerplate sentence might seem unassailably clear and uncontroversial on paper ("we approve of the election of the president"). But later the phrase causes trouble when a reviewer reads it under a certain set of facts, giving it the *de re* reading ("so it must be the case that you approve of Donald Trump's election?"). The ambiguity gives courts enough wiggle room (and perhaps, justification) to read a policy preference into the language, facilitating the type of motivated judicial reasoning that legal realists have long described.

Whether this kind of judicial wiggle room is a good thing or not might depend on whether you are more sympathetic to one side or the other. But whichever side seems more persuasive, no fixation on individual words or resort to a dictionary is necessary—in fact, it does not actually resolve the ambiguity at all.

A few doctrinal points should be addressed regarding this case: First, one might argue that the judge's opinion represents a policy decision, meant to avoid what might have actually been a perverse result (forcing the company to pay out huge amounts of money to bondholders). The provision at issue in *Amylin*, referred to sometimes as a "poison put" is often thought of as an anti-takeover device or entrenchment tactic, and as such, it should only be triggered if the board wants to fend off a hostile action.[62] If the board did not want to fend off hostile action, (as it seemed ultimately not to want to do in *Amylin*), or if it sought to entrench itself (as it might have wanted to do) then it looks like the court got the right result. So why care about any of this?

Second, after a case like this, shouldn't we expect lawyers to do a better job drafting these documents, regardless of the source of ambiguity? These points are sensible, and both can be addressed together. Poison put clauses may operate as antitakeover or entrenchment devices, but that isn't their only or even primary purpose; they are meant to serve a noteholder protection function.[63] It is not clear why anti-entrenchment concerns should trump the protection that noteholders understood to be part of the bargain they made when they decided to lend money. And the intention for creditor protection to be part of the bargain is evidenced by the answer to the second objection: in the wake of *Amylin*, some of the biggest law firms in debt capital markets did amend their standard change of control provisions to try to prevent an *Amylin*-like result.[64] Moreover, the case

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62. For further background on poison puts, *see* Richard A. Steinwurtzel and Janice L. Gardner, *Super Poison Puts as a Protection against Event Risks*, 3 INSIGHTS 3, 7–8 (Oct 1989) (discussing change-of-control provisions to respond to the threat of hostile acquisition, among other risks, including changes in board composition and third-party share ownership thresholds).

63. *See id.*

64. *See, e.g.*, Indenture Among DISH DBS Corp., Guarantors & Wells Fargo Bank, Nat'l Ass'n, (Dec. 27, 2012), *in* DISH DBS Corp., Current Report Form 8–K (Dec. 27, 2012):

> 'Continuing Director' means, as of any date of determination, any member of the Board of Directors of DISH Network Corporation who: (a) was a member of such Board of Directors on the date of this Indenture; or (b) was nominated for election or elected to such Board of Directors with the affirmative vote of a majority of the Continuing Directors who were members of such Board at the time of such nomination or election or was nominated for election or elected by the Principal and his Related Parties.

*Id. See also* AMC Networks Inc., Prospectus Supplement (Dec. 10, 2012):

> '*Continuing* Directors' means, as of any date of determination, any member of the Board of Directors of the Company who: (1) was a member of such Board of Directors on the date of initial issuance of the debt securities of the applicable series; or (2) was nominated for election or elected to such Board of Directors with the approval of a majority of the Continuing Directors who were members of such Board of Directors at the time of such nomination or election.

*Id.*

involved a hostile situation—two insurgent investors were trying to wrest power over the company from the existing board, despite the board's wishes. The clause didn't prevent the shareholders from electing the directors they preferred, it simply allowed the noteholders out of the deal if that happened. This was exactly the type of situation the clause was written for.

Whichever side one thinks is right, one might reasonably ask why this question of interpretation matters. Legal realists recognize that judges make decisions based in part on policy preferences. This may be desirable and even expected. However, the trouble with overlooking the *de re*/*de dicto* distinction, even if a court comes to the "right" answer otherwise, is that it doesn't fix the underlying ambiguity and thus leaves fertile ground for future conflict. This, in turn, hinders' parties' ability to account for past mistakes and contract effectively in the future. Despite lawyers' attempted corrections after *Amylin*, the same change of control clause found its way back to court.

In *Law Debenture Trust Co. v. Petrohawk Energy Corp.*,[65] the Delaware Court was again asked to construe a change of control provision, this time one that had been "fixed" to ensure that directors would have to approve (and not oppose, formally or informally) the election of new directors for them to be "continuing directors."[66] The litigation arose from a merger transaction in which board members of one merging company were appointed (rather than elected). Despite the language in the indenture, the court again found for the issuer (i.e., the debtor company) and thwarted the bondholders' protection.[67] The bondholders objected because the new directors would not be elected at all, and therefore their election could not be approved.[68] The company passed a resolution "approving the nomination and election" of all of the soon-to-be-new board members, even though there would be no election.

The court admitted that the (new, supposedly fixed) boilerplate led to a "gray matter grinding" set of arguments, but ultimately agreed with company.[69] Observers thought it was a blatant favoring of corporate management, and that is no doubt a plausible argument. But it is much easier for a court to impose its own judgements (and indeed, believe it is correct in those judgments) when this kind ambiguity arises. The lawyers drafting the indenture made the same mistake that the *Amylin* lawyers had made, and it ended with a similar decision: that "approval of the election of directors" meant an abstract approval of the idea of the election of

65. *Law Debenture Trust Co. v. Petrohawk Energy Corp.*, No. Civ.A. 2422-VCS, 2007 WL 2248150, at *1–2, *14 (Del. Ch. Aug. 1, 2007).

66. *Id.* at *2.

67. *Id.* at *1, *10, *13–14.

68. *Id.* at *10.

69. *Id*. at *11, *14.

certain directors, even if no election ever actually took place (arguably, the *de dicto* reading), rather than a specific election of specific directors (the *de re* reading). The ambiguity stems from the same linguistic issue. Focus on the word "approve" and its relationship to the word "disapprove" missed the mark completely.[70]

### *C. Pari Passu*

By now, the controversy over *pari passu* is a well-known cautionary tale in corporate finance about the perils of misunderstanding your boilerplate. It has been colorfully described as a contractual "gray hole."[71] The cases that made the term famous involved a clause slipped into numerous debt contracts, and on its own this clause may never have caused much trouble. But in the context of sovereign debt restructuring undertaken by Peru and Argentina, the clause created drawn-out conflicts that cost both countries dearly.[72]

The *pari passu* story is already familiar to many business law scholars. Like many countries in the world (including the US), the Republics of Peru and Argentina must borrow money to function. The money they borrow funds government operations, which means that it pays for everything from the construction of roads and bridges, to provision of social services such as health care and pensions.[73] These countries borrow money by selling sovereign bonds to investors in the capital markets, much the same way that the US sells Treasury bills. In the early 2000's however, after years of economic decline and faltering tax revenue, these countries (along with many others) struggled to pay interest on their debt and began to default.[74]

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70. *Id.* at *10–11. I note that one could argue that there is a syntactic ambiguity here as well, with regard to which word, "election" or "directors" is modified by "approve." However, such ambiguity is the not the source of the problem here. Rather, the problem stems from ambiguity with regard to whether approve refers to a specific thing (whether a specific election or individual directors) or a category (elections in general of any director). The modifications to the clause in this case were intended to make clear what had to be "approved" but it did not make clear which semantic reading was intended.

71. *See* Stephen Choi, Mitu Gulati and Robert Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L. REV. 1, 4 (2017).

72. Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 CAP. MKTS. L.J. 132, 132–35 (2103).

73. *See e.g.*, Republic of Argentina, Prospectus, D-117 (September 23, 2016) *available at* https://www.sec.gov/Archives/edgar/data/914021/000090342316001278/ex99-d.htm [https://perma.cc/4KH4-JXCV] (describing the government's main expenditures).

74. *See NML Capital v. Republic of Argentina*, 1:14-cv-08630-TPG, Memorandum of Law of the Republic of Argentina in Opposition to Motion by 526 Plaintiffs in 37 Actions Seeking Partial Summary Judgment at 5-7 (SDNY 2015) (on file with the author).

The governments of Peru and Argentina each attempted to restructure their debt by allowing their bondholders to exchange their defaulted bonds for new ones issued at a lower value, leaving the bondholders with pennies on each dollar of their original investments.[75] Many bondholders agreed to this swap, reasoning that it was better to have pennies than nothing. Others sold their bonds for even less. Who would be willing to buy defaulted sovereign bonds worth far less than their face value? One such willing purchaser was Elliott Associates, a fund run by Paul Singer, that purchased a large amount of defaulted sovereign debt issued by Argentina and Peru (as well as others) for a steep discount to face value.[76]

While most of these nations' remaining bondholders agreed to restructure and accept less than the face value of their investments, Singer refused.[77] Suing in several jurisdictions around the world, Singer convinced a court in Brussels to hold that a provision in Peru's bonds known as the *pari passu* clause—a long-used and little-noticed clause ostensibly meant to provide equal treatment to different classes of bondholders—mandated the result that no bondholders who had agreed to restructure could be paid until Elliott and other holdout funds were also paid.[78] Without being able to pay its old bondholders and complete its restructuring, Peru was effectively blocked from borrowing any more money in the international capital markets. The consequence of this was that the government could not raise funds it needed for roads, health care, military and other government functions. Needless to say, it was a bad scenario for Peru.

The decision took many in the finance world by surprise, and numerous experts criticized the decision.[79] The experts could not agree on exactly what the phrase meant, but most agreed that the court's ruling was wrong.[80] The consensus was that the provision was certainly not intended to allow one small group of creditors to hold an entire country to ransom over debt securities, but it was not clear what the provision was, in fact, supposed to do.

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75. *See id.*

76. *See id.*

77. These bonds had restructuring provisions that required a supermajority (85 percent) of bondholders across all series and 66.5 percent of bondholders within each series to agree to changes in the terms. This allowed a minority of bondholders to hold up a restructuring. *See* Sebastian Grund, *Restructuring Argentina's Sovereign Debt: Navigating the Legal Labyrinth*, COLUM. BLUE SKY BLOG (Dec. 3, 2019), https://clsbluesky.law.columbia.edu/2019/12/03/restructuring-argentinas-sovereign-debt-navigating-the-legal-labyrinth/ [https://perma.cc/WX5S-KDBC]. More modern Argentine bonds have fewer exacting requirements. *See id.*

78. *See Elliott Assocs. L.P. v. Banco de la Nacion*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chamber, Sept. 26, 2000).

79. *See* Choi, Gulati & Scott, *supra* note 68, at 18.

80. *See id.*

There are many issues with the *pari passu* clause that scholars have described in depth, and these scholars bring strong explanatory perspectives to the sovereign bond debacle.[81] Missing from the conversation is how this conflict bears the calling card of the problem this Essay describes: an interpretation by a court that seems outrageous to observers, but about which the only thing everyone can agree is that the court construed the language incorrectly.[82] And despite the perceived errors, lawyers continue to use the problematic language, unable to see the court's interpretation as anything other than an anomaly unlikely to be repeated.[83] When Elliot successfully repeated its strategy against Argentina in 2011, this time with in New York federal court, finance and legal professionals were again caught off guard.[84] The court's decision (and the consequences for Argentina's fiscal position) gave Singer and his fund the leverage to demand the full face value (or close to it) of the defaulted bonds.[85]

Like other examples of opaque constructions, the *pari passu* clause does not necessarily give the impression of having a clear interpretation. Nonetheless, for some lawyers experienced in debt and restructuring, it appears to have meaning. The relevant portion of the phrase as formulated in Argentina's bonds reads:

"The notes rank and will rank without any preference among themselves and *pari passu* with all other unsubordinated public external indebtedness of the [debtor]."[86]

Terms like "rank" and the latin *pari passu* may be unfamiliar even to corporate finance lawyers. With knowledge of these terms, a meaning (or

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81. *Id.*

82. *Id.*

83. *See id.* at 14 (explaining that the ambiguous language was used for years following the Brussels decision). The authors quote one lawyer they interviewed who summed up the sentiment of many: "Why should we change the clause? No court in New York or London would ever make such an error. This was an aberrant decision from an obscure court in Brussels." *See id.* at 19. British lawyers stated no British court would ever rule in the same unduly textualist fashion as had the New York courts. *Id.* at 51.

84. *See id.* at 19–20.

85. *See id.*

86. *See id.* at 25. *See also NML Capital, Ltd v Republic of Argentina*, No. 08 Civ. 6978(TPG), 2011 WL 9522565 (S.D.N.Y. Dec. 7, 2011). The *pari passu* clause included in Argentina's 1994 Fiscal Agency Agreement (Clause 1(c)) reads as follows:

> "The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement)."

*Id.* at *1. The injunction was entered in 2012. *See NML Capital Ltd. v. Republic of Argentina*, No 08 Civ 6978(TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012), *aff'd*, 727 F.3d 230 (2d Cir. 2013).

more precisely, several plausible meanings) seems to emerge.[87] The basic idea is that debtholders should be being on equal footing with one another, treated equally when it comes to payment.[88] This explanation might seem clear enough (if potentially needless) in the context of sovereign debt. But an examination of this statement reveals opaque constructions that split the phrase into numerous *de re* and *de dicto* readings.[89]

The courts' interpretation leaned on the fact that the word "payment" came before the *pari passu* term. In the court's reading, this meant that bonds had to be paid at the same time in the same way. Perhaps for this reason, some commentators declared that the clause could not mean that they would have to make pro rata payments, despite the result in the Peruvian and Argentine litigations.[90] Two prominent scholars describe the situation succinctly: "What we have then is a contract provision where one side takes the position that *pari passu* does not mean ratable payments and the other side by inference is unprepared to reject the ratable payments interpretation."[91] The conflict in interpretations follows the words upon which various interpreters focused. The court focused on equal treatment as "proportionality."[92] Some commentators suggested that the word "rank" is actually the important one.[93] Still others said that the important words are "ratably" or "pro rata."[94] In all events, the arguments generally broke down into those advocating for the interpretation of specific words

87. One commentator contends that the language has a plain meaning and endorsed the approach of the courts: "Ratable payment means that the debtor is obliged to pay its creditors equally." *See* Robert Cohen, *Sometimes a Cigar is Not a Cigar: The Simple Story of* Pari Passu, 40 HOFSTRA L. REV.11, 12 n.5 (2011) ("When the debtor cannot pay everything it owes to all of its creditors, *pro rata* payments are required. A creditor protected by a *pari passu* clause may seek to enforce its *pari passu* right to be paid the same percentage of the amount it is currently due as the debtor pays to other creditors.").

88. *See id.*

89. One clue to this is the number of different interpretations that different lawyers came up with when asked about the meaning of the clause. One scholar begins to see the different readings with the observations: "From a close reading of the clause, it can be argued that it has two limbs: (1) an internal limb, that is, that the bonds will rank *pari passu* with each other; and (2) an external limb, that is, that the bonds will rank *pari passu* with other unsecured (present or future) indebtedness of the issuer." Rodrigo Olivares-Caminal, *The* Pari Passu *Interpretation in the* Elliott *Case: A Brilliant Strategy but an Awful (Mid-Long Term) Outcome?*, 40 HOFSTRA L. REV. 39, 46 (2011).

90. *See id.*

91. *See* Gulati & Scott, *supra* note 68, at 27. *See also* Gelpern, *supra* note 92 (describing the Argentine litigation as an equal treatment clause that resulted in unequal treatment).

92. *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978(TPG), 2120 WL 5895786, at *3 (S.D.N.Y. Nov. 21, 2012) (focusing on the word "proportionally," and stating that it "obviously refer[s] to the use of the same proportion in paying down two kinds of debts").

93. Olivares-Caminal, *supra* note 109, at 46.

94. *See id.* at 46–47.

(and arguing over which words to interpret) and those advocating for a meaning that comported with logic and presumed intent.

The ambiguity, however, was a product of more than individual words, and was more than a fight between literal meaning and intent. This is because the operative phrase in the *pari passu* clause creates several layers of opacity.[95]

To see why, consider what many have observed about the clause—that the words *pari passu* themselves could be replaced with "equally" "equal treatment" "equal footing," etc.[96] Focus on the precise term (as the court did) doesn't really matter so much. It is almost a red herring in terms of where the most perplexing ambiguities lie. The phrase *will treat someone equally*, much like *will offer*, *will pay*, *will rank* is opaque and lends itself to multiple (logically correct) interpretations.

Moreover, words like *all, any* and *each* take on additional opaque meanings when used in conjunction with an opaque construction. All, each, every, are described by linguists as "universal quantifiers."[97] The relationship between such words and intensional verbs creates particularly opaque constructions.[98] And yet, these kinds of constructions are used frequently in boilerplate documents.

Understanding this is easier when explained with a concrete example. If I said:

*I promise to give all the children a coloring book*

This has several possible *de re* readings:

*There is exactly one coloring book, and I will give it to all the children* (collectively, to share or not share as they please); or

*There is exactly one coloring book, and I will give it to each child for a few minutes apiece.*

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95. Again, the first clue to this fact is that there are so many different interpretations advanced by different lawyers. As described by one scholar:

> Simplifying the discussion, there are mainly two possible interpretations: (1) the narrow or 'ranking' interpretation, where obligations of the debtor rank and will rank *pari passu* with all other unsecured debt; and (2) the broad or 'payment' interpretation, that when the debtor is unable to pay all its obligations, they will be paid on a *pro rata* basis (as in the *Elliott* case). [Professor] Wood is of the opinion that the key word is 'rank' and that 'rank' means 'rank,' not 'will pay' or 'will give equal treatment.'

*Id.* at 40.

96. Olivares-Caminal, *supra* note 109, at 46.

97. *See* Fodor, *supra* note 17, at 12.

98. *See id.*

There are also a number of possible *de dicto* readings:

*I will give every child something, such that the thing I give them is in the category of things called coloring books, and it is the same title of coloring book. I will give them out all at the same time.*

Or:

*I will give every child something, such that the thing is in the category of things called coloring books, and it is the same title of coloring book. I will give them/it out at different times.*

The ambiguity comes both in terms of exactly *what* I give the children, and *when* I give it to them, and inheres in the structure of the phrase itself. I could substitute the word "give" for "offer," "pay," "exchange," "rank" or "treat" and the multiple meanings would not go away. They exist in the relationship between the universal quantifier "all" and the verb expressed in intensional terms, as well as object of the verb. In the case of *pari passu*, things were further complicated by ambiguity in the purpose behind the inclusion of an equal treatment provision. Terms referring to "same," "proportional" or "equal" treatment, when combined with universal quantifiers compound the ambiguities. Change the examples above so that the word "a" is "the same" and the multiple meanings remain. At first read, however, one can see why the sentence might seem clear enough to someone drafting a contract.

There are numerous ambiguities in the *pari passu* clause, and not all of them can be explained with the *de dicto*/*de re* distinction. However, one of the main sources of confusion relates back to the way that people reading the clause focus on one interpretation that comports with their priors. The courts here are basically saying: "You promised to give each child a coloring book, therefore it must be the case that you have to give everyone a coloring book before you can give anyone a coloring book." As a matter of logic, it is not true that the second part of the sentence is necessarily implied by the first. But the simple, more concrete example helps to illustrate why the Peru and Argentina decisions were met with such surprise by many in the industry. It seems obvious that the clause could not have been intended to mean something that is logically untrue. Courts in both cases (whether knowingly, with ulterior motive, or completely innocently) used a *de re* reading—one specific *de re* reading in fact, and ceased recognizing other, completely plausible readings.

That the courts in the *pari passu* cases produced odd outcomes was clear to industry observers. What seemed less clear to them, surprisingly, was how many different logically correct readings there could be. Many eminent lawyers who claimed to know what the clause meant each came

to different interpretations.[99] Each thought theirs was the most correct, and that the court's decision created a perverse and unintended result.[100]

But the courts' decisions are also a natural consequence of semantic ambiguity, which goes part-in-parcel with the relatively abstract and intention-oriented language in which boilerplate contracts are written. In many cases, there is no single correct meaning; or rather, there are numerous completely correct meanings. The ambiguity doesn't render the language meaningless, but its many meanings may be invisible: each lawyer reading the language can see one or maybe a few reasonable interpretations, and that, for them, becomes *the* meaning (or small set of possible meanings). Once locked in, it is hard to see the other meanings that are there.

This also may help explain the collective action problem that caused the *pari passu* language to be utilized in numerous deals even after the Peru and Argentina lawsuits made clear how troublesome these clauses could be. How do busy lawyers justify taking the time and energy to correct a clause that, to their eyes, seems reasonably clear (if perhaps not all that useful)? If lawyers misperceive the ambiguity, they are likely to chalk the courts' decisions up to case-specific idiosyncrasies (using rationales such as "that proceeding was ex parte," or "Argentina angered the judge" that were seen in the *pari passu* cases.). And no doubt those factors played a role. But if lawyers can't see the ambiguities inherent in a contract provision, they can't get an accurate picture of how open to motivated interpretation the language will be in the future.

The methods of legal reasoning partly explain why it is easy for lawyers to become anchored to a specific reading of boilerplate language. In New York and many jurisdictions, courts construing a clause in a commercial contract begin with the text and try to determine what the parties might reasonably have believed objectively, when they entered into the agreement.[101] Evidence of context is barred by the parol evidence rule if it would alter otherwise unambiguous language.[102] The goal is to create

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99. *See* Mark Weidemaier, Robert Scott and Mitu Gulati, *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 LAW & SOC. INQUIRY 72, 72–76 (2013).

100. *See* GULATI & SCOTT, *supra* note 6, at 31–32 (discussing the ruling and reactions to it, in particular, the criticism and worry about encouragement of restructuring holdouts and continued misinterpretation of the *pari passu* clause). To be fair, the court in the *Elliott* case did refer to some sources of expertise on market practice and the purpose behind *pari passu*; however, most commentators view these sources as dubious and their conclusions as motivated, or at the very least, far from the only or even most compelling explanation.

101. *See, e.g.*, *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412 (2012) ("We begin 'where all such inquiries must begin: with the language itself.'") (quoting *United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 241 (1989)).

102. *See, e.g.*, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997) ("Ordinarily, a merger clause provision indicates that the subject agreement is completely integrated, and parol evidence is precluded from altering or interpreting the agreement.");

predictability by giving effect to easily discoverable meanings. In the Argentina *pari passu* case, the district court, as well as the Second Circuit, took this as their starting point, but perhaps did not appreciate that the meaning they found was not the only meaning, the clearest meaning or the most "easily discoverable" meaning. To the extent they did realize it, perhaps they thought it served their goals better to disregard the plausibility of other readings, something they could easily do given the confusing nature of the text.

I do not contend that semantic ambiguity provides the whole explanation for the decisions described above. As scholars have well documented, many institutional features of the sovereign debt market help to explain why terms were slow to change even after these decisions were made. A compelling explanation is that a collective action problem, compounded by faulty cost-benefit analysis and agency costs, made change slow and cumbersome. One can't help but think, however, that if a problem had been glaringly obvious on the face of the documents, that it would have been much easier to get the necessary parties together to fix this problem. Miscalculation of risk and status quo bias are based partly on one's past experience, but they are also exaggerated by interpretive flaws that are far from salient. Imagine a lawyer trying to get a group of busy people together to change what seems like a fringe reading of a contract term, or worse, a problematic interpretation that few can even see in the first place.

## III. MOVING BEYOND OPACITY

The cases described here are just a few of numerous possible examples. In many cases involving the interpretation of commonly-used contract language, courts are declining to (or pretending not to) appreciate that there are multiple correct interpretations. And worse, because of the nature of the way we process opaque constructions, and the fact that we, as lawyers, are not trained to understand them, it can be hard to see that something is missing in boilerplate's interpretation. There are often multiple "easily discoverable meanings" for an opaque proposition. And what is easily discoverable may be different for different parties, but nonetheless equally legitimate. By not appreciating this, courts are sometimes arriving at decisions that don't serve the intentions of the parties well, but also don't carefully follow the text of the agreements either. Sometimes they are even committing themselves, in the name of strict logic, to results that don't make logical sense at all. As has been noted, interpreting commercial contracts often involves "distinguishing

*Norman Bobrow & Co. v. Loft Realty Co.*, 577 N.Y.S.2d 36, 36 (App. Div. 1991) ("Parol evidence is not admissible to vary the terms of a written contract containing a merger clause.").

between meaningful language and empty boilerplate."[103] But the fact that courts see meaning in what others regard as meaningless boilerplate should give us pause. It is not that the language is meaningless or that it has a single clear meaning; it is that there are many legitimate readings.

I contend that boilerplate contracts are particularly susceptible to this kind of problem. As with legislation, boilerplate language has to be broad enough to generate similar expectations across a multitude of individual situations. This kind of drafting necessitates describing categories of things that will ultimately be interpreted against a background of specific facts. It is in this kind of situation that parties' preconceptions can lead to undetected schisms in meaning. The drafting party (or reviewing party) may have a categorical idea in mind (knowingly or unknowingly, favoring a *de dicto* reading) that may seem perplexing in specific situations (that pull one towards a *de re* reading). Or the drafter may have a specific situation in mind (funneling him or her into a *de re* reading) that leads to an awkward category definition. In either case, the need to draft relatively broadly favors the use of opaque constructions, in which different imagined states of the world can be accommodated. Tailored contracts can, and do, suffer from this problem as well; however, more customized provisions are more likely to be written against a particular set of facts that all parties have in mind. That has a better chance of leading to consistent reading, if not less use of opaque constructions overall.

Recognizing the problem of semantic opacity in contracts of all kinds still has the effect of calling into question an agreement's actual shared meaning (both of the parties in a specific case, and every party to every deal using the same language). But it recasts the challenge that boilerplate clauses present. Instead of arguing about any single literal meaning or intended purpose, it would be more faithful to both text and purpose to identify the logically true readings that have escaped notice and assess how they fit with a transaction's intended outcome and the market's expectations.

The examples described above illustrate the problem, but don't point to any obvious ways to fix it. Without a possible intervention that might help, noticing this phenomenon may seem like little more than a curiosity without any practical significance. But even without a clear solution, there is reason to think that the problem is worth giving more thought because in order for courts and lawyers to solve problems with boilerplate, they have to start trying to solve the right problem, and not be misled by zeroing in on interpretive issues that don't address boilerplate provisions' deeper opacity.

Doing so requires the ability to recognize the problem in the first place. From the first year of law school, lawyers are taught to parse legal

103. Choi, Gulati, & Scott, *supra* note 68, at 67.

texts in a particular way. We are taught canons of construction, and interpretive norms and maxims. These are all helpful and necessary. They focus on problems that lawyers often encounter with legal language—problems like vagueness, syntax or lexical ambiguity. It would be a modest tweak to this curriculum to import some of the basic teaching of linguistics into the lawyer's training as well. Instead of focusing only on the meanings and context of particular words, learning to recognize structures that might give rise to multiple correct interpretations would help lawyers to avoid falling into traps embedded in boilerplate language and help them better serve their clients.

That is, of course, if it is possible for this mode of reading to be readily learned and applied. One problematic feature of opaque constructions is that they are hard to spot, even when you know what to look for. It is easy to be misdirected to a particular word and focus on possible ambiguities in it, at the expense of fixing the structural ambiguity in the sentence. Or language may look like it has only one reasonable interpretation, and even well-trained people may miss all the possible meanings in a sentence altogether. One possible solution to this may lie in the area of natural language processing. Automated language processing tools are a powerful tool for examining trends in language and are becoming more widely available and user-friendly.[104] Law firms already use natural language processing to assist in document review, and to flag contract provisions for their compliance with market norms. Algorithms are even used to identify some types of ambiguity and problematic language. It is easy to imagine using similar algorithms to make clear the splits in meaning caused by opaque constructions as well.

Another problem, of course, is that even if lawyers can identify this language, sometimes it is difficult to draft around. As the examples above illustrate, if it is difficult to do away with all of the possible meanings then it is simply an incomplete contracting problem that is more efficient to leave in place than it is to fix. However, it is clear that the existence of at least some conflicting interpretations are completely unknown to most lawyers and judges. Awareness of blind spots in the contract language parties use would be a step toward allowing them to make more intentional decisions about where contracts can and should be left incomplete.

Also, it is worth asking, would we get rid of all of these ambiguities if we could? Are there times when this kind of language actually serve the parties well? Perhaps a "closer" reading would allow for more discussion of what parties wanted, or at least, a more consistent way to introduce market practices and norms into litigation, and more principled way to know when such discussion is warranted by an ambiguity, as opposed to a

104. *See* Jeremy McClane, *Regulating Substance Through Form: Lessons from the SEC's Plain English Initiative*, 55 HARV. J. LEGIS. 265, 309 (2018) (discussing the use and broadening availability of computational language processing).

seemingly ad hoc intervention that happens to suit a particular court's needs.

## CONCLUSION

Lawyers trying to fix boilerplate, and judges trying to interpret it may sometimes be looking in the wrong place. This can help explain why change to problematic standard contracts comes slowly (if at all), and why attempts to fix problems sometimes result in even more disputes. If lawyers can't spot the structures that make interpretation so difficult, it is little wonder that disputes continue to arise, and lawyers continue to miss the mark when trying to correct problems with the language that drives large portions of the capital markets. The dilemma is not always a fight over a meaning that is lost or has ceased to exist. Sometimes, it is about recovering several meanings that have become invisible. Spotting these hard-to-see meanings would lead to a better understanding of their role in enabling judicial policymaking. But more importantly, awareness of linguistic opacity and its effect on contracts would enable better cost-benefit analysis of using standard language, and provide a more sensible starting point both for interpretation and correction.