Article

Contractual Depth

Cathy Hwang[†] and Matthew Jennejohn[††]

INTRODUCTION

In March of 2018, the news broke that British firm Cambridge Analytica had improperly obtained the private information of 87 million Facebook users—and that Facebook had known about it long before it took action to stop the leak.[1] Over the next two years, a story unfolded that rivaled the best of fiction: conservative political operatives and donors were involved in the data leak, journalists uncovered evidence of foreign involvement, and there was evidence that the stolen data was used to influence election outcomes.[2]

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† Barron F. Black Research Professor of Law, University of Virginia School of Law.

†† Professor of Law, BYU Law School. For helpful comments and conversations, we are grateful to Curt Anderson, Adam Badawi, Douglas Baird, Omri Ben-Shahar, Brad Bernthal, Sadie Blanchard, Albert Choi, Andrew Gold, Thomas Haley, David Hoffman, Michael Knoll, Da Lin, Barak Richman, Zenichi Shishido, George Triantis, Andrew Winden, and to other participants at workshops at the University of Chicago, Arizona State, Loyola Chicago, UC-Boulder, the AALS Annual Meeting, and the BYU Winter Deals Conference. We also thank a number of in-house counsel, law firm partners, and executives, who have asked to remain anonymous in order to speak candidly, for their participation in interviews. Many thanks to Annalee Hickman for exceptional library support and to Matthew Cunningham and Olivia Roat for excellent research assistance.

1. *In re* Facebook, Inc. Section 220 Litig., No. 2018-0661, 2019 WL 2320842, at *4–6 (Del. Ch. May 30, 2019); *see also* Natalie Giotta, *Facebook's Data Mishap and the Case for Regulation*, BRENNAN CTR. FOR JUST. (Mar. 22, 2018), https://www.brennancenter.org/our-work/analysis-opinion/facebooks-data-mishap-and-case-regulation [https://perma.cc/5TA2-AZ62] (detailing the history of the leak and Facebook's delayed response).

2. Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2022), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/TU67-7TDD]; Anton Janik Jr., *Hacking Your Vote from Inside Your Head: How Cambridge Analytica Altered Reality via Social Media to Induce Specific Voting Behavior*, JD *SUPRA* (Mar. 22, 2018), https://www.jdsupra.com/legalnews/hacking-your-vote-from-inside-your-head-98542 [https://perma.cc/K7HT-HNUD].

Lost among the juicier headlines was a little oddity of contract law: although Facebook's leak had been a breach of its agreement with its *users*, its users did not sue. Rather, the Federal Trade Commission sued Facebook, eventually fining the company $5 billion.[3]

Why did a regulator step in when Facebook breached its bilateral agreement with its users? As it turns out, Facebook and the FTC had a bit of a history. In 2012, as part of a settlement in an FTC investigation, Facebook promised to include additional language in its terms of service about how it would use consumers' personal information.[4] From then on, Facebook's terms of service reflected not just a bilateral agreement with its users, but also its compliance with the FTC settlement.

The FTC's influence on the design of Facebook's terms is not unusual. Parties often design their contracts with regulators in mind, and how a court may later interpret the contract is a parallel or even secondary consideration. As one general counsel put it, "internet company privacy policies and terms of use are drafted for regulators."[5]

But existing contract law and theory overlook how regulators and other institutions shape the design of contracts. Contract law and theory have long focused on the role of courts. Once contracting parties satisfy the requirements of offer, acceptance, and considera-

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3. Press Release, Fed. Trade Comm'n, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/YZ8L-ELP2] ("Facebook, Inc. will pay a record-breaking $5 billion penalty, and submit to new restrictions and a modified corporate structure that will hold the company accountable for the decisions it makes about users' privacy . . . ."). The fine and other restrictions were the result of Facebook's violation of a 2012 FTC order in which Facebook promised to make changes about how it used and obtained users' personal information. *Id.*; *see also* Cecilia Kang, *F.T.C. Approves Facebook Fine of About $5 Billion*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html [https://perma.cc/26LP-KS5E] (reporting on the FTC's approval of the $5 billion fine against Facebook for mishandling user information by allowing Cambridge Analytica, a British political consulting firm, to harvest Facebook users' personal information).

4. Press Release, Fed. Trade Comm'n, FTC Approves Final Settlement with Facebook (Aug. 10, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook [https://perma.cc/37SU-QQCX] (announcing that the FTC had accepted a settlement with Facebook to resolve charges that "Facebook [had] deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public.") The settlement required Facebook to take steps to fulfill its promises to consumers going forward, including giving consumers additional information and obtaining consumers' express consent before sharing information. *Id.*

5. Interview #5 (May 31, 2019). This interview participant served as general counsel of an online services company.

tion, they can bring disputes about breaches to a court, which can then interpret the parties' meaning and enforce the contract accordingly.[6] Existing contract theory provides barely a whisper of how modern contracts may be designed for regulatory audiences.[7] Scholars and judges widely assume, particularly in commercial exchanges, that parties make their promises with courts in mind.[8]

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6. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."); RESTATEMENT (SECOND) OF CONTRACTS § 22 (AM. L. INST. 1981) ("The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.").

7. The closest prior scholarship has come are articles by Victor Fleischer and by Steven Schwarcz, which argue that an important role of transactional lawyers is navigating the regulatory framework of a deal. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 238 (2010); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007). Fleischer, for instance, describes the role of a transactional lawyer as that of a "regulatory arbitrageur" who helps clients navigate regulations to obtain the best deal. Fleischer, *supra*, at 236–38. A more recent paper by James Tierney touches upon similar themes. *See* James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874 (2020) (arguing contract drafters engage in "anticipatory self-regulation" because they see their audience as policymakers). Although those papers reference the regulatory aspects of transactional lawyering, this Article differs materially with respect to the scope of its empirical analysis, which examines contracting in multiple industries, and by integrating the multidimensionality of contractual audiences into an overarching theory of contract design's relationship with contract law. This expands the scale of this Article's implications beyond prior scholarship, with its reach ranging from contract interpretation to the modular design of complex agreements to renegotiation.

Outside of those prior papers, the majority of contract theory is focused on courts as the audience for contracts. In a series of influential papers, for example, Albert Choi, Robert Scott, and George Triantis have discussed the various ways that parties—especially sophisticated commercial parties—design their contracts with later interpretation and enforcement by a court in mind. *See, e.g.*, Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006) [hereinafter Scott & Triantis, *Anticipating Litigation*] (examining the efficiency of investment in the design and enforcement phases of the contracting process, and arguing that parties can lower overall contracting costs by using vague contract terms ex ante and shifting investment to the ex post enforcement phase); Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. L. REV. 187 (2005) [hereinafter Scott & Triantis, *Incomplete Contracts*] (considering the role of litigation in motivating contract design); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010) (arguing that parties can use vague contract provisions efficiently—for example, material adverse change clauses in acquisition agreements may remain vague because they are rarely litigated).

8. This law-centered view is reflected in the very definition of "contract." *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

This Article takes a first step toward updating contract theory to reflect the new reality of twenty-first century contract design.[9] It argues that contracts can contain more than a straightforward message directed at the single institution of the court. Rather, modern contracts may be written for multiple audiences. When contracts are written for multiple audiences, they contain multiple layers of meaning, exhibiting what this Article calls "contractual depth." Understanding contractual depth introduces several new insights that have the potential to enrich how we understand contract law, theory, and practice.[10]

The Article also examines market practice for evidence on the theory of contractual depth. Pursuing a familiar empirical strategy in contract scholarship, pioneered by Stewart Macaulay in his famous 1963 paper,[11] the Article reports the results of a series of interviews with industry insiders—law firm partners, general counsel, and executives. To obtain a broad, if preliminary, grasp of contractual depth's prevalence, those interviews were taken across a wide range of markets. While this strategy sacrifices empirical depth for breadth, it is particularly appropriate at this exploratory stage, where pro-

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A notable exception to the common assumption that contracts are customized tools for risk allocation addressed to an enforcement court is a strand of literature that shows how path dependency and precedent-driven contracting practices slow the adoption of contract terms. *See, e.g.*, Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1 (2013) (describing how parties draft contracts by using precedent and making changes on the margins, instead of engaging in blank-page drafting and choosing terms that, in a vacuum, are the best ones); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347 (1996) (describing why parties choose not to use the most efficient contract terms).

9. In that respect, this Article makes an advance to our understanding of the "law in action" rather than focusing on philosophical issues that are ever, and perhaps increasingly, *de rigueur* in contract scholarship. *See* Robert E. Scott, *The Promise and the Peril of Relational Contract Theory, in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY 107 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013) ("Many of the other bright stars in contract are formally trained in analytic philosophy and focus their energies on classical contract doctrine and the extent to which it adheres to deontological principles grounded in Kantian notions of autonomy.").

10. *See*, *e.g.*, Cathy Hwang & Matthew Jennejohn, *Deal Structure*, 113 NW. U. L. REV. 279 (2018) (arguing that modern agreements are complex pieces of technology, and contract law should be tailored to the structure of a contract); Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281 (2016) (showing how relational contracts in high technology industries are "multivalent" agreements that respond to multiple types of exchange problems).

11. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963) (using interviews and written inquiries, as well as surveys of literature, contracts, and court cases, as the basis for the report).

gress is made as much by raising new questions as answering old ones.

The qualitative evidence gathered through this approach suggests that regulatory effects on contracting, such as the FTC's intervention into Facebook's terms, are wide-ranging. Interview participants consistently reported taking actions that are consistent with the essentials of the contractual depth theory and readily provided examples of its operation in their specific contexts. Further research is needed to develop detailed understandings of the theory: for instance, how different regulatory regimes affect the layering of meaning in commercial agreements across markets. But these preliminary interviews substantiate this Article's baseline claims. It appears that a variety of modern agreement types in many markets exhibit contractual depth: not only in internet privacy policies but also in agreements governing complex mergers and acquisitions, semiconductor manufacturing, energy generation, defense contracting, and insurance.[12]

Given the Article's exploratory spirit, drawing firm implications for doctrine and policy would be premature. We can, however, hazard preliminary thoughts on normative areas where contractual depth stands to make significant contributions. First, the theory of contractual depth contributes to the long-standing debate over how courts should interpret contracts. Leading scholars have argued that the "incompleteness" of agreements—in particular, parties' inability to anticipate all the potential contingencies that may befall a contractual relationship when they negotiate a contract—creates a gap between contractual means and ends.[13] This Article introduces contractual depth as another contributor to this gap. When contracts speak to multiple audiences, the gap between the parties' end goals and the ways they can write them down may widen or become entrenched. This additional source of contract gaps may introduce new implications for contract interpretation and the design of default rules in contract law.

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12. This trend can be understood as an instance of the more general expansion of the administrative state over the last century. As most U.S. law students learn, this expansion began in earnest with New Deal-era legislation and the U.S. Supreme Court's decision in *West Coast Hotel Co. v. Parrish*, where the Court upheld the constitutionality of a state's minimum wage legislation, ending the Lochner Era's deference to private parties' freedom of contract. *See* Lochner v. New York, 198 U.S. 45 (1905); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). This, in turn, accounts for the rather unsurprising, but surprisingly overlooked, regulatory effects on contracting that have led to layered contracts.

13. *See* Scott & Triantis, *Incomplete Contracts*, *supra* note 7, at 190.

Second, contractual depth complicates the common assumption that incomplete contracts can often be easily renegotiated. Conventional wisdom argues that, if parties discover a gap after signing, then they can renegotiate the deal to fill the gap.[14] When contracts are layered, however, the demands of a regulatory regime may interfere with parties' ability to renegotiate. Renegotiation may be "sticky."[15]

Third, this Article discusses the possibility of mitigating contractual depth's interpretation and renegotiation issues through contract design. In particular, more clearly differentiating between a contract's various layered messages through modular design may allow terms directed to one audience to be cabined from terms directed to another.

The remainder of this Article proceeds as follows. Part I sets the stage for the theory of contractual depth by reviewing existing scholarship on the relationship between contract design and enforcement. Most scholarship assumes that contracting parties write contracts for courts. And while work on relational contracts has acknowledged a second audience—the broader trading community that may enforce a contractual breach through reputational sanctions—that literature has largely overlooked the possibility of a third audience: the (often labyrinthian) regulatory regimes that influence modern contract design. It is that gap in the literature to which this Article responds.

Part II introduces the theory of contractual depth: the idea that modern agreements are often written with multiple audiences in mind. It also provides a preliminary answer to a question the theory naturally raises: How prevalent are layered contracts, anyway? To answer that question, we undertake a series of original interviews

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14. Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 892–97 (2003) (responding to Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003)). A line of research in contract economics studies how this renegotiation process can be structured at the outset to prevent an opportunistic party from abusing it. Richard Holden & Anup Malani, *Renegotiation Design by Contract*, 81 U. CHI. L. REV. 151 (2014) (examining components of the renegotiation design mechanism and holdups); Aaron S. Edlin & Benjamin E. Hermalin, *Contract Renegotiation and Options in Agency Problems*, 16 J.L. ECON. & ORG. 395 (2000) (arguing that achieving first-best depends on, inter alia, bargaining in renegotiation).

15. "Stickiness" is a growing metaphor in studies of contract and treaty design. *See* Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1 (2021) (arguing that when contract provisions are path dependent, renegotiations are "sticky" and therefore rarely improve the agreement); *see also* Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. INT'L L.J. 357 (2020) (documenting renegotiation of international treaties to avoid arbitration stickiness).

with practicing in-house and law firm attorneys who design contracts for a wide range of contexts. These interviews reveal the extent to which regulators' preferences make their way into contracts, and how a diverse collection of regulations across multiple jurisdictions can add further depth to contracts.

Part III explores potential implications of contractual depth for enforcement and practice. Focus turns first to interpretive problems relating to contractual depth, then to the effect drafting for multiple audiences has on the renegotiation of agreements, and finally to the possibility that structural tools may be used to clarify parties' intent when designing agreements for multiple audiences. Like the empirical analysis presented in Part II, this Part's normative discussion should be considered preliminary—a starting point for further study. As our empirical understanding of layered contracting increases, we expect the normative issues introduced here to both broaden and deepen with subsequent analysis.

We conclude with thoughts on next steps for future research.

I. THE COURT AS CONTRACT'S AUDIENCE

To whom do parties write a contract? In certain respects, it's a strange question to ask: Some parties—particularly unsophisticated bargainers—may make promises without much thought at all about the possibility of enforcement. Yet most of us have a sense when signing on a dotted line that the force of the state may be invoked to hold us to our promises.

This Part of the Article introduces the research on contract design, which envisions a tight coupling between the contracts that parties draft and the courts who will enforce them. An influential line of scholarship argues that, in a very literal sense, commercial parties carefully design their agreements to signal to a court how it should approach the problem of interpreting and enforcing the contract.[16] Specifically, parties use rule-like terms in their contracts to define performance obligations with precision, thereby inviting a court to employ a plain-meaning interpretive approach. When parties use standard-like terms that vaguely define performance, they invite the court to examine the broader factual context of a transaction.[17] The design stage and enforcement stage of a contract are two sides of the

16. Scott & Triantis, *Anticipating Litigation*, *supra* note 7, at 865–78; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 573–94 (2003).

17. Schwartz & Scott, *supra* note 16, at 592–94.

same coin: the contract is the means by which parties speak to the court.

This Part also identifies how scholars have stretched that court-centric perspective. The literature on relational contracting argues that courts are not the only game in town: rather, informal sanctions, not just formal contract law, also enforce contractual commitments.[18] Informal enforcement relies, for example, on reputational sanctions—what Robert Ellickson refers to as "the sting of negative gossip"—within a business or social community.[19] Where such informal sanctions are potent, parties may not resort to courts and formal law at all.

But even relational contracting theory's recognition of a second audience stops at only two institutions: formal law, enforced by courts, and informal social norms, enforced by the community. Furthermore, relational contracting theory has tended to separate the operation of the two institutions. An influential line of theoretical and empirical work argues that formal and informal institutions are substitutes for one another.[20] And alternative theories that view formality and informality as complements still compartmentalize the two institutions.[21] As a result, relational contract theory is an important step in the right direction, but it still comes short of providing a comprehensive account of how a single agreement might be designed with multiple audiences simultaneously in mind.

This Part of the Article sets the stage for the further expansion that Part II will undertake, and it proceeds as follows. Part I.A begins by introducing a useful way to think about contracts: as the means to achieve the parties' ends.[22] While that characterization may sound obvious, it helps to frame an important problem that bedevils many agreements: contractual "incompleteness."[23] Parties' inability to fully

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18. Avner Greif, *Commitment, Coercion, and Markets: The Nature and Dynamics of Institutions Supporting Exchange*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 727–86 (Claude Menard & Mary M. Shirley eds., 2005) (arguing that markets rest on combinations of formal contract enforcement and informal coercion-constraining institutions).

19. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 143 (1991).

20. *See, e.g.*, Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003) (noting research suggests that transforming informal agreements into legally binding obligations is often counterproductive to parties' enforcement interests).

21. *E.g.*, Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1028–29 (2009) (categorizing relational and legal as "two distinct ways" of contracting).

22. *Id.* at 1025.

23. Scott & Triantis, *Incomplete Contracts*, *supra* note 7, at 188–95; Philippe Agh-

foresee future events attenuates the connection between means and ends, driving a wedge between what the parties wish to achieve (their ends) and what they can write down (the means). The discussion of the incompleteness problem here provides important framing for the entirety of the paper, but it will be particularly critical in the normative discussion presented in Part III.

Part I.B discusses how parties often attempt to overcome the incompleteness problem through careful drafting choices that signal to a court how it should approach interpreting and enforcing the agreement. This Subsection begins with a brief overview of the debate between formalists and contextualists that will be familiar to many readers. It then discusses Scott and Triantis's influential work on the relationship between contract design and formalist and contextualist interpretive approaches. In short, so long as a court is responsive to careful drafting choices, parties can control in significant part the extent to which the court considers broader transactional context when interpreting the agreement. This introduces an important implication: parties' ability to address their agreement to a court as its primary audience is critically important to their ability to address the incompleteness problem.

Finally, Part I.C discusses relational contract theory, which introduces the idea—revolutionary in its time—that contracts are written for a second audience: an informal enforcement community. That is, parties sometimes make promises that they intend to be enforced in a court applying formal contract law, and sometimes they make promises that they intend to be enforced informally, such as through reputational sanctions in their trading community. This expansion from one to two possible audiences for a contract represents the furthest extent to which theory has deviated from the purely court-centric model. However, it is important to note that a crucial assumption of this perspective is that parties retain control over their choice of enforcement institution—i.e., contracting parties carefully tailor their agreements so that some disputes go to litigation and others are enforced informally.

Taken together, these three Sections of Part I show that contract law struggles to make room for multiple audiences. Current contract theory is quite parsimonious: conceptually, a contract is a straightforward tool for parties to achieve their ends. Contracts' imperfections arise entirely from parties' inability to draft perfectly complete contracts, a problem they attempt to remediate by using terms that steer courts as they interpret and enforce a disputed agreement.

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ion & Richard Holden, *Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?*, 25 J. ECON. PERSPS. 181, 182–83 (2011).

Even the introduction of a second enforcement institution—informal sanctions—serves only that central goal. Thinking outside of this box requires a material addendum to the concept of what a contract is—and in later Parts, the notion of contractual depth introduces that new perspective.

A. CONTRACTS AS MEANS TO PARTIES' ENDS

At the most basic level, contracts are conceptually quite simple. Parties have ends they wish to achieve by cooperating with one another. Contracts are the means that make it possible to achieve parties' contractual ends.[24]

For example, suppose that two parties intend to work together to build a housing development, and to share the profits that they earn from that joint venture. The parties' equal split of hoped-for profits is their contractual ends. To achieve these ends, the parties might draft a contract with a provision requiring that one party conduct research to find a good location for the project, while the other party procures building materials to build the building. They might draft another provision that specifies that, if each party performs their part of the bargain, they will share profits fifty-fifty. That contract is the means for achieving their ends.

If parties can fully articulate the means for achieving their given ends, then the role of contract law and courts is straightforward. If one party fails to fully perform, thereby jeopardizing the achievement of the parties' joint ends, the breaching party is liable for breach. Say, for instance, that one party fails to conduct a search for a good location. The job of the court is to verify that failure to perform, and then require the breaching party to compensate their contractual partner according to their expectations.[25]

In many transactions, however, the process of contract design and enforcement is not so easy. Often, contractual means do not align with contractual ends.[26] In other words, contracts are not perfect devices for achieving parties' goals. Because parties cannot fully anticipate future events, contracts will be inevitably "incomplete."[27] Events

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24. Kraus & Scott, *supra* note 21, at 1025 (describing the difference between contractual ends, which is what the parties want to achieve, and contractual means, which is the way through which they achieve those ends).

25. Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 703–04 (2007) (arguing that "courts have a further facilitative role: to encourage exploration of investment opportunities by protecting the promisee's verifiable reliance . . .").

26. Kraus & Scott, *supra* note 21, at 1051–53.

27. Scott & Triantis, *Incomplete Contracts*, *supra* note 7 (providing an overview

may unfold that affect the parties' common ends, but the contractual means do not clearly determine what the parties should do, or who should bear the risk.

A chestnut from first-year contracts, *Bloor v. Falstaff Brewing Co.*,[28] provides an example of how contractual incompleteness creates a mismatch between the parties' ends and the contractual means they use to achieve them.[29] Ballantine, a beer company, sold the trademark, distribution accounts, and other assets of the Ballantine beer label to Falstaff Brewing.[30] In the asset sale, the parties encountered a contracting problem typical in many M&A transactions: are the assets actually of the quality that the seller represents, and will they perform as expected in the future?[31] To address the post-consummation risk that the Ballentine assets would underperform after Falstaff bought them, Falstaff agreed to pay Ballantine a royalty over a number of years for each barrel of Ballantine beer sold, presumably in exchange for a lower initial purchase price.[32] Of

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of the concept of contractual incompleteness).

28. 601 F.2d 609 (2d Cir. 1979).

29. Kraus & Scott cite to another useful example: *Hunt Foods & Industries, Inc. v. Doliner*, a case about the acquisition of Eastern Can Company by canned food giant Hunt Foods. Kraus & Scott, *supra* note 21, at 1048 (citing 270 N.Y.S.2d 937 (1966)). Hunt Foods became concerned that, during a break in negotiations, Eastern Can would try to solicit a better outside offer. *Id.* To assuage Hunt Foods's fears, Eastern Can allowed Hunt Foods to purchase, for one thousand dollars, an option to purchase the stock of Eastern Can's majority shareholder, Doliner. *Hunt Foods*, 270 N.Y.S.2d at 939. Eastern Can believed that the option was conditional—Hunt Foods would only be allowed to execute the option if Eastern Can did, indeed, try to solicit an outside offer. *Id.* But what was written in the contract—the contractual means—was an unconditional option that Hunt Foods could execute under any circumstance. Kraus & Scott, *supra*, at 1049. In a later dispute, a New York court agreed with Eastern Can, finding that, in essence, the contractual ends of a conditional option did not align with the contractual means of an unconditional option. The court noted that it was possible that the parties agreed to a written condition for the stock option, even though they did not include the condition in their written agreement. *Hunt Foods*, 270 N.Y.S.2d at 940 ("[T]he alleged oral condition precedent cannot be precluded as . . . factually impossible."). In other words, incompleteness, as Kraus and Scott predicted, drove the ends-means misalignment. Kraus & Scott, *supra*, at 1051.

30. *Bloor*, 601 F.2d at 610.

31. *Id.*

32. *Id.* at 612–13. Victor Goldberg's careful analysis of the transaction at issue in *Bloor* reveals that the deal was not a simple distribution agreement but rather more akin to an "earnout" following an M&A deal. Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting* Bloor v. Falstaff, 44 ST. LOUIS U. L.J. 1465, 1466 (2000) ("The essential feature of the contract is that Ballantine was exiting the beer business and was making a one-shot sale of some of its assets to Falstaff. That purpose is crucial for understanding the role of this 'best efforts' clause. The buyer of an asset is naturally concerned about the asset's quality. There are numerous devices for assuring the buyer that he is not purchasing a 'lemon.' The seller could, for example, provide

course, such a royalty arrangement created an incentive for Falstaff to limit the sales of Ballentine beer, and the length of the arrangement made specifying all of Falstaff's performance obligations impossible. A gap between the ends of the parties and their contractual means arose. As we will see in Part I.B below, the Ballentine and Falstaff used a particular contractual mechanism to reduce that gap as much as possible.

At this stage, it is important to note that scholarship finds the origins of contractual incompleteness within the contracting parties themselves.[33] Parties' inability to fully foresee future events in a complex economic landscape and their bounded rationality leads to gaps in contracts. In the next Section, we will discuss contract design strategies parties use to minimize those gaps as much as possible. However, looking ahead to Part II, one of this Article's basic contributions is to expand the causes of contractual gaps to include not only parties' transaction costs but also regulatory demands that may be orthogonal to parties' ends, however well expressed in a contract they may be.

B. PARTY CONTROL OF TEXT OR CONTEXT

The idea of contractual incompleteness discussed in Part I.A above animates one of the most fundamental and longstanding debates in contract law: what are courts supposed to do in situations where a contract is incomplete? For decades, contract theorists typically have taken the court as the starting point for answering that question. That is, the choice of how to address incompleteness is in a judge's hands.

Judges' options fall, more or less, into two broad camps. In one camp are textualists, who argue that courts should stick to the plain meaning of the text of an agreement and not use context to interpret a disputed contract—generalist courts should look only at the four corners of the contract to ascertain parties' intent.[34] In the other are contextualists, who argue that courts should use outside evidence to

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extensive representations and warranties. Or, the buyer could incur significant due diligence expenses. Or, the seller could make a portion of its compensation contingent upon the quality of the asset. The royalty arrangement in this transaction, essentially an 'earnout,' served precisely this role.").

33. *See, e.g.*, Scott & Triantis, *Incomplete Contracts*, *supra* note 7, at 190 (noting that, from a lawyer's perspective, incompleteness stems from the parties leaving gaps in the contract).

34. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott., *Text and Context: Contract Interpretations as Contract Design*, 100 CORNELL L. REV. 23 (2014) (setting out the basic differences between textualism and contextualism, and describing the two modes of interpretation as binary, with one excluding the other).

determine intent—extrinsic evidence, such as the parties' previous course of dealing or performance and the norms of the industry in which the parties operate, can help courts understand parties' contractual goals.[35]

A more recent line of contract law scholarship advances a different perspective, arguing that parties have greater control over what interpretive regime will be applied than prior scholarship has appreciated. Instead of the court being the starting point in the selection of an interpretive approach, the parties' design choices in the disputed contract itself provide the starting point. In an influential paper, Scott and Triantis argue that parties recognize that there are transaction costs associated with both ex ante contract design and ex post contract enforcement, and that the two costs are linked.[36] When parties invest more in ex ante contract design—for instance by drafting more specific, rule-like performance obligations—the expected cost of ex post enforcement decreases. By contrast, when parties invest less in ex ante contract design—for instance by drafting a vague, standard-like performance obligation—the expected cost of ex post enforcement increases. By choosing between rule-like and standard-like terms in their agreement, parties signal to a court what interpretive approach to take: rule-like terms invite a strict adherence to text, while a standard-like term asks the court to consider the broader context of the transaction. To a significant extent, parties control the choice of text versus context.[37]

The *Bloor v. Falstaff* contract provides a useful illustration of why parties may choose between rule-like and standard-like terms. Part of the consideration that Falstaff agreed to pay Ballentine for the assets was in the form of the ongoing royalty payments for barrels of

35. *Id.*; *see also* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 931–32 (2010) (laying out some basic differences between textualist and contextualist interpretation regimes); Schwartz & Scott, *supra* note 16, at 545–47 (arguing that textualism is the appropriate way to interpret commercial contracts between sophisticated parties). For more on the debate between text and context, see *id.*; Hwang & Jennejohn, *supra* note 10 (discussing the limits of the text/context debate in light of modular and integrated contract design).

36. Scott & Triantis, *Anticipating Litigation*, *supra* note 7, at 836 ("[The] resolution of this tradeoff [between front-end and back-end costs] in each contracting instance determines the parties' optimal choice between precise and vague terms"); *see also* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005) (defining the cost of a contract as the ex ante negotiating and drafting costs, plus the probability of litigation multiplied by the sum of the parties' litigation costs, the judiciary's litigation costs, and judicial error costs).

37. Gilson, Sabel & Scott, *supra* note 34 at 23 (noting that sophisticated parties have already "embed[ed] as much or as little of the contractual context as they wish in an integrated writing").

beer sold.[38] The royalty structure created a perverse incentive for Falstaff: the less Ballentine beer it sold over the agreed time period, the less it would have to pay Ballentine.

From Ballentine's perspective, it would be ideal to specify the number of barrels Falstaff would have to sell. This would simply predetermine the royalty payments Ballentine would receive. From Falstaff's perspective, however, specificity would be quite unattractive because any manner of unexpected contingencies might affect beer sales. What if a competitor lured customers away from Ballentine beer? What if a factory fire interfered with production? What if a general economic recession reduced demand? Of course, the parties could dicker over Falstaff's specific obligations in all those circumstances (and more), but one can see how the costs of anticipating those contingencies and then defining performance in the contract quickly spiral upwards.

Instead, Ballentine and Falstaff did what Scott and Triantis, and others, anticipate. Rather than investing in the ex ante specification of rule-like terms, they used a vague standard to determine Falstaff's performance obligations: Falstaff was required to use its "best efforts" to sell the Ballentine beer.[39] That simple drafting device, commonly used in a wide range of commercial settings, shifts transaction costs from drafting to enforcement, and, in the event of a dispute, it calls upon the court to search the broader context of the transaction to determine whether Falstaff's efforts were indeed "best."[40]

In short, so long as courts respect parties' drafting decisions, the choice of interpretive regime is largely within the control of the contracting parties. Parties who want the court to apply a textualist read can be more specific, while parties who want the courts to fill in contractual gaps with contextualism can choose vague terms. Contract design and enforcement are closely linked, further cementing the idea that parties draft contracts with only courts in mind.

C. RELATIONAL CONTRACTING: FROM ONE AUDIENCE TO TWO?

Relational contract theory introduces a second audience for contracts: commercial or personal communities, which can impose informal sanctions for breach.[41] On its face, the relational contracting

38. Bloor v. Falstaff, 601 F.2d 609, 610 (2d Cir. 1979).

39. *Id.*

40. *Id.*

41. For an excellent overview of relational contract theory by one of its leading scholars, see Juliet P. Kostritsky, *A Paradigm Shift in Comparative Institutional Governance: The Role of Contract in Business Relationships and Cost/Benefit Analysis*, 2021 WIS. L. REV. 385.

literature expands the number of institutions enforcing agreements from one to two. Now contracts can be enforced through formal contract law or informal commercial norms. But even this theory has largely construed relational contracting to still be a single-audience game.

This line of research begins with Stewart Macaulay's and Ian Macneil's respective research.[42] Macaulay and Macneil identified transactions where the parties did not plan on enforcing their contractual commitments with contract law and the formal court system.[43] Rather, parties who entered into these "relational contracts" relied upon informal enforcement institutions, such as reputational sanctions either professionally or socially.[44]

For instance, suppose informal sanctions were available to the parties in *Bloor*. If Ballantine and Falstaff had expected to continue dealing with one another for quite some time, informal sanctions could have been available. In that case, the threat of terminating the relationship for good might prevent one of them from breaching the agreement.[45] The hope of keeping repeat business would keep them

42. Stewart Macaulay, *supra* note 11 (showing, through interviews of businesspeople, that although businesspeople seldom draft complete contracts, they also rarely use legal sanctions to adjudicate disputes when they inevitably arise); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980) (describing the norms that underlie modern relational transactions and arguing that relational contracts are everywhere); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (exploring relational questions under classical and neoclassical contract law); *see also* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 [hereinafter Macneil, *Relational Contract*] (arguing that relational thinking is "a necessary element" in accounts of legal development); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981) (arguing that conventional doctrine fails to adequately explain the nature and function of relational contracts, and exploring the relationship between relational contracts and other clauses); BARAK RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE (2017) (describing the informal trading networks of the New York diamond industry and other ethnic trading networks that sell goods based on trust and community enforcement).

43. Macaulay, *supra* note 11, at 55–56; Macneil, *Relational Contract*, *supra* note 42, at 509.

44. Macaulay, *supra* note 11, at 63–64; Macneil, *Relational Contract*, *supra* note 42, at 509.

45. Victor Goldberg's careful analysis of the *Bloor v. Falstaff* facts indicates that the parties expected precisely the opposite—that the deal would be a one-shot sale of assets, because Ballantine was exiting the market—and therefore this informal sanction was unavailable in the actual relationship. Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting* Bloor v. Falstaff, 44 ST. LOUIS UNIV. L.J. 1465, 1466 (2000); *see also* Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981, 1018–19 (describing the process by which companies used formal contracts, combined with relational

in line. Relatedly, if they operated within a network of other companies in the beer industry, then spreading the word of poor performance in the network may also make them think twice before breaching.

Additional examples of informal enforcement abound, but perhaps the best-known example is Lisa Bernstein's, in which she describes the informal enforcement that governs New York City diamond traders, most of which are culturally homogenous.[46] Bernstein and other scholars, too, have described illustrative informal enforcement in industries as far-reaching as whaling,[47] pirating,[48] cotton trading,[49] and Midwest equipment manufacturers.[50] The sequence of events is quite similar in these industries: parties enter into a contract and one party breaches. Instead of turning to courts for formal enforcement, parties bad-mouth each other professionally or socially. Fear of reputational sanctions—which might mean expulsion from an important professional organization or even a country club—motivates parties to behave well in a way not dissimilar to formal sanctions through a court. And while many accounts of informal enforcement involve homogenous, tightly-knit communities within which individuals have many points of social and professional contact,[51] more recent accounts have also suggested that informal

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tools, such as threat of terminating the relationship, to motivate performance).

46. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 157 (1992) (studying how culturally-homogenous diamond merchants in New York City used extralegal tools to ensure performance of their contracts); *see also* Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 351 (1981) (articulating a theory of the ethnically homogeneous middleman group based on an analysis of Chinese economy transactions); JANET T. LANDA, ECONOMIC SUCCESS OF CHINESE MERCHANTS IN SOUTHEAST ASIA: IDENTITY, ETHNIC COOPERATION AND CONFLICT 121–29 (2016) (analyzing Chinese merchant networks in southeast Asia); AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 58–90 (2006) (studying medieval Jewish trading networks).

47. Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 85 (1989) (presenting evidence of informal enforcement overtaking formal enforcement in the whaling industry).

48. Peter T. Leeson, *An*-aargh-*chy: The Law and Economics of Pirate Organization*, 115 J. POL. ECON., 1049, 1049 (2007) (describing the extralegal systems that pirates developed to provide checks on captain predation and to "create piratical law and order").

49. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745 (2001) (analyzing relational contracting in the cotton industry).

50. Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 562 (2015).

51. One recent account, for example, documents the use of non-binding prelimi-

enforcement can thrive even when parties do not have otherwise strong connections with each other.[52]

Evidence of informal enforcement leads to the grand question for relational contracting theory: What is the relationship between formal and informal enforcement?[53] Do they operate in tandem, complicating the design process for parties, who must now address two audiences? Or are they exclusive to one another, so that parties choose between one or the other, in that way focusing only on a single enforcement audience?

For many relational contracting theorists, formal and informal institutions are an either/or choice.[54] "This substitutionary relationship arises because formal enforcement is understood to 'crowd out' informal social norms" or enforcement mechanisms.[55] And, because informal enforcement is viewed as often more efficient, parties will choose informal governance. Thus, the formal legal system is viewed as superfluous, and what really matters in contracting is the informal "law in action." From this perspective, parties do not operate with two audiences—formal and informal—in mind.[56]

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nary agreements among people in Hollywood who operate in a tight-knit industry. Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 DUKE L.J. 605, 617–42 (2015) (discussing the use of non-binding agreements—or "soft contracts"—in modern Hollywood filmmaking).

52. *See, e.g.*, Bozovic & Hadfield, *supra* note 45 (describing the existence of informal contracting amongst both innovative and traditional businesses in Southern California).

53. *See* Scott, *supra* note 9, at 122–23.

54. Chapin F. Cimino, *The Relational Economics of Commercial Contract*, 3 TEX. A&M L. REV. 91, 112 (2015).

55. *See* Matthew Jennejohn, *Braided Agreements and New Frontiers for Relational Contract Theory*, 45 J. CORP. L. 885, 891 (2020) [hereinafter Jennejohn, *Braided*]; Matthew Jennejohn, *Do Networks Govern Contracts? Evidence from Biopharmaceutical Development*, J. CORP. L. (forthcoming 2022) (on file with author).

56. Readers familiar with the relational contracting literature may note that the substitutionary view discussed here is not universally held, however. A group of theorists reject the either/or choice of a unitary enforcement system and view formal and informal institutions as complementary to one another. This approach has roots in Macauley's later work but finds its fullest articulation in Gilson, Sabel & Scott's recent research. *See* Gilson, Sabel & Scott, *supra* note 34; *see also* Stewart Macaulay, *The Real and Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 44–47 (2003) (explaining formal and informal institutions and arguing the "paper deal" will not always reflect the "real deal" because writing is often inconsistent with the actual expectations of the parties). Still, even this view of formality and informality's tandem operation is attenuated.

The starting point for Gilson, Sabel & Scott's complementary approach to the relationship between formal and informal enforcement is Scott and Triantis' theory, discussed above, that parties can shift costs between ex ante design and ex post en-

In short, the relational contracting literature complicates our notions of contract enforcement, but perhaps not as much as it could. With the introduction of the relational contracting idea, classic debates, such as the scope of the parol evidence rule, were no longer restricted to the courts.[57] Rather, the relational contracting literature made the debate a comparative one, asking whether formal or informal enforcement is better, and in what contexts.[58] However, formal and informal institutions are usually seen as distinct choices, rather than audiences that parties must speak to simultaneously. In that respect, relational contracting scholarship is a step in the right

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forcement by choosing between rules and standards in their agreements. Gilson, Sabel & Scott, *supra* note 34, at 57; *see also* Scott & Triantis, *Anticipating Litigation*, *supra* note 7. Recall that including a rule-like term in a contract may require a significant investment—one may have to retain expensive advisors, for instance, to predict future contingencies—but it reduces back-end litigation costs and provides a clear, detailed contractual text for a court to interpret and apply. Gilson, Sabel & Scott, *supra* note 34. On the other hand, including a standard-like term may reduce upfront drafting costs but increase litigation costs. *Id.*

Gilson, Sabel & Scott take this a step further by connecting the choice between rule-like terms and standard-like terms to the general characteristics of a market. Gilson, Sabel & Scott, *supra* note 34, at 43. They identify two key characteristics that market exhibit: First, the level of uncertainty affecting transactions in the market; and, second, the scale of the market (i.e., the number of parties transacting with one another, and the number of transactions they engage in). *Id.* These two characteristics determine the broad trends of contract design observed from market-to-market. In situations where uncertainty is low, parties tend to use rule-like terms because they can more readily anticipate future contingencies, and it is comparatively cheap to define those highly specified terms. *Id.* at 44. In turn, these markets tend to prefer textualist contract interpretation, particularly when the scale of the market is great. *Id.* at 58–60. In situations of high uncertainty but significant scale—i.e., where courts encounter many disputes involving these high uncertainty transactions—parties use standard-like terms, because they have some comfort that the court's familiarity with the deal type will reduce litigation costs. *Id.* at 60–63 and 73–74. Gilson, Sabel & Scott also introduce a third possibility: In situations of high uncertainty but low scale, such as the highly idiosyncratic transactions that characterize collaborative innovation, parties use "braiding" mechanisms that establish formal processes for information sharing. *Id.* at 63–65. In this situation, Gilson, Sabel & Scott argue that textualism is most appropriate, because courts are ill-equipped to ascertain parties' expectations, which are inchoate in such transactions. *Id.*

As a sweeping account of a non-unitary system of contract law across the entire U.S. economy, the Gilson, Sabel & Scott story is to be admired. For our purposes here, however, we simply note that the system envisioned is still largely unitary for any given party. Except perhaps for large conglomerates that operate across multiple markets, parties largely find themselves within one institutional logic—and one enforcement audience—or the other.

57. *See* Posner, *supra* note 36.

58. *See, e.g.*, Gilson, Sabel & Scott, *supra* note 34; discussion *supra* note 56 and accompanying text.

direction, but further work is needed to bring contract theory in line with the realities of contract practice, a task we undertake in Part II.

II. THEORY AND EVIDENCE OF CONTRACTUAL DEPTH

Do modern contracts speak only to two audiences? Anecdotal evidence suggests that they do not. Facebook's recent privacy-policy woes, for example, suggest that a third-party who is not a signatory to the privacy policy is involved in shaping the policy.[59] And Facebook's situation is by no means unique: hints of third-party, non-signatory involvement in private contracting are everywhere, easily spotted but not at all explained.

This Part shows how and why third parties intervene in private contracts. In short, the administrative state, as well as other third-party influences on contracting, affect how parties draft their contracts. As a result, contract designers must consider more than the *parties'* intent when drafting a contract. Instead, contract designers are also using the same document to communicate and comply with third parties, from regulators to future assignees. The fact that contracts are drafted to speak to multiple audiences cause the phenomenon of contractual depth.

The remainder of this Part sets forth the theory of contractual depth. Part II.A introduces the contours of the theory. At its core, the theory is simple: contracts often speak to more than one audience. For a classic contract theorist, this theory upends a well-accepted assumption in contract law: contracts create evidence for a single ex post adjudicator whose only job is to unearth the parties' original intent. For a judge, contractual depth complicates interpretation: it means that when reading a contract, a particular provision *may* be evidence of the parties' intent but may also be the parties' attempt to speak to some third-party contract influencer.

Part II.B then presents preliminary evidence to support this theory. In particular, it uses evidence from original, semi-structured interviews with contract designers—general counsels, law firm attorneys, and other contract negotiators—to show, specifically, how third-parties influence the form, structure, and substance of contracts.[60] This evidence, which is collected from a range of industry

59. Kate Conger, Gabriel J.X. Dance & Mike Isaac, *Facebook's Suspension of 'Tens of Thousands' of Apps Reveals Wider Privacy Issues*, N.Y. TIMES (Sept. 20, 2019), https://www.nytimes.com/2019/09/20/technology/facebook-data-privacy-suspension.html [https://perma.cc/BY66-98QN]; *see also supra* notes 1–4 (discussing Facebook privacy issues).

60. For more information on interview methodology, see *infra* Part II.B.4.

settings, is meant to suggest further, more targeted avenues of inquiry for future study to undertake.

A. HOW CONTRACTUAL LANGUAGE GAINS DEPTH

Contractual depth can be considered the latest step in a long-running development in contract law. For many decades, contract law and theory focused on formal contracts and formal enforcement—that is, the idea that parties enter into a binding contract for the purpose of having it later adjudicated by a judge.[61] The enforcement outcomes for formal contracts are familiar: reliance or expectation damages, depending on the contract.[62] Relational contracting expanded that universe of potential ex post readers to include a second group: informal enforcers.[63] Informal enforcers consist primarily of social or professional networks that can impose reputational sanctions for breach.[64]

Instead of stopping at two institutions, contractual depth posits the possibility that an even greater number of institutions review the terms of an agreement. It also acknowledges that those additional institutions review contractual terms with different doctrinal lenses than the ex post adjudicators who enforce contractual promises. Contracts are designed in a varied, complicated institutional environment, and are influenced by a network of institutions.

Contractual language gains depth when it is written for more than one audience. In addition to a court or private tribunal called upon to enforce the parties' contractual promises, those additional audiences may include participants in secondary markets or regulatory institutions that will review the language of the agreement. Those regulatory institutions may be public or private institutions applying a different set of doctrines that regulate the bargaining process, such as antitrust law or corporate law, or they may be administrative agencies, such as the Federal Trade Commission or the Consumer Financial Protection Bureau, reviewing terms under a consumer protection mandate.

Writing for multiple institutional audiences makes the language of the contract multi-layered.[65] One layer of the agreement remains

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61. *See supra* Part I.B for a more detailed discussion of formal contracting.

62. *See* RESTATEMENT (SECOND) CONTRACTS § 346 (AM. L. INST. 1981) (outlining damages as the remedy for formal contracts).

63. *See supra* Part I.C for a detailed discussion of how relational contracting expands the ex post adjudicatory audience from one (courts) to two (courts and informal enforcers).

64. *See supra* notes 46–50 and accompanying text.

65. *See*, *e.g.*, Patrick Goethals, *A Multilayered Approach to Speech Events: The*

the classic contract, where contractual language is directed to an enforcement court and reflects the parties' intentions on how to allocate risk between themselves. Subsequent layers reflect the parties' attempts to comply with third party demands, such as regulatory obligations. Of course, those subsequent layers of the agreement reflect the parties' intentions—parties intend to comply with certain regulatory obligations, for instance, rather than running afoul of the law. However, the critical point is that the different layers are often not fully separated from one another. Responding to a regulatory audience may affect the underlying risk allocation between the parties, for instance. To fully understand that risk allocation, one must also appreciate the effect of the regulatory layer.

The argument that contractual language has multiple layers is one way to think about the complex notion of "intertextuality" in semiotics, which studies the communication of meaning.[66] Intertextuality refers to text as socially embedded within a wider literary system.[67] Text is a reconfiguration of other texts, and in that respect it bears within it multiple perspectives or "levels."[68] This makes the relationships between those levels the subject of interpretation, rather than focusing upon the text as an isolated artifact.[69]

However, advanced literary theory is not required to identify obvious examples of linguistic layers in everyday life. Disney car-

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Case of Spanish Justificational Conjunctions, 42 J. PRAGMATICS 2204, 2204 (2010) (identifying three layers of meaning that differentiate a set of causal conjunctions in the Spanish language).

66. For a useful overview of the theory of intertextuality, see GRAHAM ALLEN, INTERTEXTUALITY (2000).

67. María Jesús Martínez Alfaro, *Intertextuality: Origins and Development of the Concept*, 18 ATLANTIS 268, 268 (1996) (surveying the term 'intertextuality' and its development from Julia Kristeva's original conception as a dynamic text embedded in relational literature); Thaïs Morgan, *Is There an Intertext in This Text? Literary and Interdisciplinary Approaches to Intertextuality*, 3 AM. J. SEMIOTICS, no. 4, at 1, 24–27 (1985) (providing an overview of intertextuality, particularly Julia Kristeva's deconstructive process and Michael Riffaterre's "levels" definition, and arguing the semiotics of intertextuality can bridge the gap between knowledge in the humanities and the sciences). In her seminal essay on the subject, Kristeva even supplies three different definitions of the term. Julia Kristeva, *Word, Dialogue, and Novel*, *in* DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART 64, 86–87 (Leon S. Roudiez ed., Thomas Gora, Alice Jardine & Leon S. Roudiez trans., Columbia Univ. Press 1980) (1977) (defining "intertextuality" as a destabilizing process spurred by context and organized first by the *word*, then by the *dialogue*, which relates a word or philosophical problem within language, and finally by *ambivalence* and *transcendence*, which contextualize words and dialogue into a novel).

68. See Morgan, *supra* note 67, for a discussion of intertextuality as "levels" of understanding.

69. Alfaro, *supra* note 67.

toons are a good example: while ostensibly targeted toward children, they also contain numerous literary, social, and even risqué references to keep parents entertained.[70] Similarly, writers often write dialogue in movies and television in anticipation of the words' translation into multiple languages.[71] Finally, a religious text may contain layers of messages, some accessible for new initiates and others so subtle that they require extensive study to uncover.[72] In all of these cases, a text is being written with multiple audiences in mind. Many modern contracts exhibit the same multi-layered features as these everyday writings—one contract is meant to speak to multiple different audiences.

The notion of contractual depth advanced here differs from prior scholarship in contract design that has embraced greater levels of complexity. As discussed *supra* Part I.C, prior scholarship on rule-like and standard-like terms, and the bulk of the work on relational contracting, has compartmentalized diversity in contracts. Parties use a standard for an exchange hazard that is uncertain, a rule for another hazard that is more definite, or parties enforce one part of performance through the formal law and courts and another part of performance through informal sanctions.[73] The idea of contractual depth here embraces the simultaneity largely missing in those accounts. As one of us previously argued, some contract terms are "multivalent" in the sense that they can respond to multiple types of exchange hazards at once—an argument that nevertheless still envisioned the court as the single audience for such a provision.[74]

The theory of contractual depth partakes more generally of the longstanding notion that the legal system shapes, if indirectly, private ordering. One of the most oft-cited adages in legal scholarship is

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70. In the Disney animated film *Hercules*, for example, one character says to another that "I haven't seen this much love in a room since Narcissus discovered himself"—a reference to Narcissus, a character in Greek mythology who was so beautiful and self-absorbed that he fell in love with his own reflection. HERCULES (Walt Disney Co., 1997).

71. In another scene from *Hercules*, one character declares to the titular character, "Sorry, kid. Can't help ya . . . Two words: I am retired." *Id.* Of course, "I am retired" is three words, not two—but that line is a reference to the fact that Hercules is about Greek mythology, and "I am retired" in Greek is, indeed, only two words. Internet Movie Database, *Hercules (1997) Trivia*, https://www.imdb.com/title/tt0119282/trivia [https://perma.cc/4DN5-FTJX].

72. *See*, *e.g.*, Olivier Simonin, *Communication and Levels of Meaning*, 33 J. LITERARY SEMANTICS 41, 53 (2004) (noting that layers of narration are "conspicuously used in parables").

73. *Id.*

74. Jennejohn, *Braided*, *supra* note 55, at 908.

the idea that bargains are struck "in the shadow of the law."[75] Put another way, laws and regulations provide the guardrails within which parties may privately order their affairs.[76] The classic example of bargaining within the shadow of the law is divorce: Robert Mnookin and Lewis Kornhauser, who coined the phrase in their 1979 article of the same name, note that "the primary function of divorce law [is] not [ ] imposing order from above, but rather providing a framework within which contemporary divorcing couples can themselves determine their postdissolution rights and responsibilities."[77]

Regulators are the modal additional audience we have in mind when talking about contractual depth. And, in fact, many contracts speak to regulators. In New York state, for example, a complex web of municipal housing laws leaves very little room for individual landlords and tenants to contract.[78] In fact, there is so little room for private ordering in New York City housing laws that many landlords simply use a standard-form apartment lease agreement provided by regulators, with some additional agreements contained in a rider.[79] The result of the numerous regulations is that these riders, even though limited in scope, must be designed with regulatory compliance in mind. Similarly, contracts in the banking industry,[80] the con-

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75. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (describing the process of divorce as private ordering within the boundaries of the law); Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 639 (1976) (coining the term "private ordering" and defining it as law to which private parties themselves agree via agreement or contract).

76. Mnookin & Kornhauser, *supra* note 75.

77. *Id.* at 950.

78. Luis Ferré-Sadurní, *How New Rent Laws in N.Y. Help All Tenants*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/nyregion/rent-laws-new-york.html [https://perma.cc/Q7QG-HJPK] (reporting on the new laws passed in 2019 to protect tenants and noting that "[t]aken together, the new laws—on everything from evictions to security deposits to rent caps for residents of mobile homes—represent a significant shift in power away from landlords and cement New York's standing as a national leader of policies favorable to renters").

79. One New York real estate website, for example, warns renters to read leases carefully, because despite recent changes to New York state laws that are substantially more tenant-friendly, "[m]any landlords still largely rely on standard lease forms, . . . which are often designed to protect the landlord." *Renters Beware: 14 Things to Look for in that Lease*, BRICK UNDERGROUND (June 10, 2021), https://www.brickunderground.com/blog/2013/06/renters_beware_11_things_to_look_out_for_in_that_lease [https://perma.cc/EY7L-HSKF].

80. *See, e.g.*, John Crawford, *The Moral Hazard Paradox of Financial Safety Nets*, 25 CORNELL J.L. & PUB. POL'Y 95, 101 at n.29 (2015) (describing the scope of reforms for financial institutions that have been implemented since the financial crisis, many of which were rules written under the Dodd-Frank Wall Street Reform Act); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203,

sumer finance industry,[81] and the mortgage industry[82] must comply with federal, state, and local regulations and are therefore crafted with regulators as a potential audience. The interviews reported in Part II.B below discuss examples of such in greater detail.

It is important to note, however, that, while regulators will be our primary focus in this Article, they are not the sole additional audience to which contracts might be addressed. For instance, a large literature now documents how the expectations of other parties in a market can lead contracting parties to adopt standardized terms.[83] For instance, the likelihood of transferring a contract to a third party assignee may lead parties to use familiar standard terms.[84] Customized terms that deviate from what is "market" may signal to third parties, such as stockholders, that something is amiss in a transaction.[85]

Also, as one of us has argued, when contracting parties are organizations rather than individuals, internal constituencies can also be considered an additional audience to which a contract is written.[86] A common rationale for using standardized purchasing terms in large organizations, for instance, is to keep sales teams, who may be motivated to agree to creative terms to capture lucrative commissions, on the straight and narrow.[87] In that case, the sales team is an

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124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

81. *See, e.g.*, Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1060–61 (2016) (noting that Dodd-Frank created a new Consumer Financial Protection Bureau, which is a "federal agency that describes itself as a '21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing rules, and by empowering consumers to take more control over their economic lives'" (quoting *The Bureau*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/the-bureau [https://perma.cc/A8CZ-PCVL])).

82. Julie R. Caggiano, Jennifer L. Dozier, Richard P. Hackett & Arthur B. Axelson, *Mortgage Lending Developments: A New Federal Regulator and Mortgage Reform Under the Dodd-Frank Act*, 66 BUS. LAW. 461–62 (2010) (discussing the Consumer Finance Protection Bureau's role in regulating the mortgage market).

83. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 815–20 (1995) (discussing the rise of standards and suboptimal contracts in response to network externalities in corporate law and among bondholders); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 718 (1997) [hereinafter Kahan & Klausner, *Standardization and Innovation*] (introducing the article's focus on the "increasing returns" of standard contract terms); Kahan & Klausner, *supra* note 8.

84. *See* Kahan & Klausner, *Standardization and Innovation*, *supra* note 83.

85. *Id.*

86. Cathy Hwang, *Collaborative Intent*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 30) (on file with author).

87. *See, e.g.*, *id.* at 26–38 (providing evidence of collaborative contractual for-

audience to the contract, even though it obviously will not have a direct role to play in enforcing the contract in the event of a dispute.

B. CONTRACTUAL DEPTH IN PRACTICE

This Section presents evidence from original interviews with contract designers to establish the contours of the theory. These contract designers include law firm partners and in-house counsel with experience in a variety of industries, from semiconductor manufacturing to energy to online services.

Together, their responses reveal several themes about contractual depth. First, interview participants often discussed the role of regulators in shaping contract design. Second, interview participants discussed how multiple third-party audiences can influence the design of a single contract, thereby creating even more complicated layers. Finally, the interviewees noted that, when boilerplate was used in consumer contracting, the regulator was not only a parallel influence on the design of the contract, but the dominant one. The following Subsections discuss these findings in more detail.

1. The Regulatory Agency as Audience

Overwhelmingly, interview participants reported that regulators were an important audience for their contracts. Their insights are organized below by the industry or market in which they work.

a. Online Services

One respondent who worked on internet terms of use and privacy policies, for example, noted that internet terms of use have four audiences. Regulators were the most important audience. Judges—the audience that most of contract law considers most important—are only second-most important:

> [T]he least important is the consumer. The second least important [are] your internal constituencies. . . . [The third constituency is] plaintiff's lawyers and judges [that will decide those cases]. And then, of course, . . . really the only audience that mattered ultimately was the regulators because they are the ones who come in and either redesign your policy for you or try to shut you down.[88]

As an example, he described the Federal Trade Commission's influence on the crafting of his company's auto-renewal provision. The interview participant was general counsel of an internet company that provided subscription-based services. As with many similar services, this company wished to have an auto-renewal provision in

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mation among departments like lead sales teams).

88. Interview #1 (Dec. 18, 2018).

their contracts with consumers, which allowed the company to charge for subscription services on a recurring basis until the consumer opted out. The interview participant noted that:

> The FTC [was] sort of taking the position that, as long as [the auto-renewal] is disclosed and there's consent, you're okay. In other words, . . . you put the disclosure before technically the [consumer's] decision made. So, you have to put the [auto-renewal] disclosure on [the first] page . . . . [W]e did exactly what the FTC wanted. And so we always had to be aware of what the FTC was saying.[89]

Another interview participant agreed that regulators played a major role in contracts to which the regulators were not party, noting that internet terms of use and privacy policies were explicitly drafted for regulators:

> [P]rivacy policies and terms of use are drafted for regulators. One of our outside counsel says that you draft these not for the consumer but for the FTC and class action plaintiffs. It is a little cynical, but we're trying to draft in a way that, if you were ever subjected to an inquiry or lawsuit, you can say here is where we disclosed this clearly. There are a lot of specific things you have to deal with in terms of substance, but that takes precedence over other considerations. These would be as short as possible, but unfortunately, we're trying to solve for the rights we have, copyright infringement, consumer protection laws, privacy laws. That's why we don't have readable privacy policies.[90]

b. *Regulated Industries*

Unsurprisingly, in highly regulated industries, regulators can have a particularly large influence on companies' private contracts. For instance, in the energy industry, contracts between a utility and a power generator for the purchase of electricity are typically subject

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89. *Id.* The EU's introduction of the General Data Protection Regulation (GDPR) was another common example interview participants mentioned. *See*, *e.g.*, Interview #2 (Feb. 15, 2019) (noting that the EU's "GDPR has caused quite a brouhaha among tech companies. It is hard to say you're not a company serving EU users, so our privacy attorneys have been working overtime to make sure everything is compliant. Everyone has revised their terms of service and privacy policies in light of GDPR."). For further discussion of the EU's global regulatory reach, see Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).

Another point interview participants made was that, at times, their companies changed their terms of use and privacy policies in response to regulatory processes where a government requested or demanded user data. *See*, *e.g.*, Interview #2 (Feb. 15, 2019) ("Another area where the terms of service have been revised is in light of regulatory overlay—data sharing with governments. This is the second company where I'm in a disruptive industry, and governments are trying to figure out how to regulate us. Government wants all your data. We push back of course. But there are data that we share. . . . [I]n order to do that, we have to update the privacy policy and terms of service in order to get consent. . . . [W]e adjust our policies going forward in order to address the regulatory change.").

90. Interview #5 (May 31, 2019).

to the oversight of a state regulator.[91] One in-house attorney described the effect of the regulator on the process of designing an agreement as follows:

> As you're negotiating the agreement, [you] have to keep consistent with the regulatory overlay. One of my tasks as the regulatory lawyer on the team was to write the advice letter to the regulator explaining how the agreement was in compliance. Specifically, these letters include a section called "Consistency with Commission Decisions" that spells out how the contract complies.[92]

The regulator would decide to approve a contract based on the advice letter the interviewee wrote.[93]

Review of publicly available advice letters in California illustrates the extent of the California Public Utilities Commission's influence on the contract design process. As a supplement to its regulations, the Commission provides standard terms and conditions for electricity purchase agreements, including those that can be modified and those that cannot.[94] The advice letters describe all of the key terms of the agreement, note specifically when the Commission's modifiable standard terms were changed, and explain how those modifications are consistent with the Commission's regulations.[95]

c. Mergers & Acquisitions

M&A agreements also exhibit contractual depth. Antitrust provisions in M&A contracts, which are explicitly drafted with regulators in mind, are a good example.[96] Many major M&A deals require preclearance from a regulatory authority before closing. In practice, preclearance requires that parties apply to the Department of Justice or the Federal Trade Commission, allowing the relevant agency to review their contract and other relevant deal documents before money and property can change hands.[97] The agencies' review of the trans-

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91. Cal. Pub. Utils. Comm'n, 132 FERC ¶ 61,047 (2010) (demonstrating the federal government affirms that states can regulate the prices of wholesale electricity sales).

92. Interview #2 (Feb. 15, 2019).

93. *Id.*

94. *See* CALIFORNIA PUBLIC UTILITIES COMMISSION, AB 57, AB 380, AND SB 1078 PROCUREMENT POLICY MANUAL (2010).

95. *See*, *e.g.*, CALIFORNIA PUBLIC UTILITIES COMMISSION, SOUTHERN CALIFORNIA EDISON ADVICE LETTER 2514-E (May 16, 2011), https://library.sce.com/content/dam/sce-doclib/public/regulatory/filings/approved/electric/ELECTRIC_2514-E.pdf [https://perma.cc/C2WB-CYZD].

96. Interview #4 (Apr. 19, 2019).

97. *Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N., https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review [https://perma.cc/A3VG-W236].

action is based on whether the agencies believe that the deal will cause over-consolidation in a particular industry post-closing.

Many transactions are cleared by the government quickly and without much extra expense. Transactions between major industry players, however, are more likely to undergo a "second request" review process, in which the government requires production of and reviews numerous documents to help it determine whether the merger will result in an over-consolidation—and, if so, in what sectors or geographical areas.[98] A second request is an expensive undertaking and can even result in the government requiring that one party or both parties divest certain parts of their businesses to avoid that over-consolidation.

The United Airlines and Continental Airlines merger in 2010 is one example. At the time of announcement, United was the country's third-largest carrier, and Continental was the country's fourth-largest.[99] After the $3 billion merger, they would become the country's largest carrier[100] and together, the merged company was expected to result in high prices for consumers because "[t]hough the new company does not intend to raise fares, . . . one of the rationales for airline mergers is to cut capacity. . . . In addition, United and Continental will no longer be competing against each other on some routes, allowing them to save money but offering travelers fewer options."[101]

As a condition to obtaining approval for their merger, the Department of Justice required the companies to take certain actions that would reduce the over-consolidation risk: they were required to transfer some Newark Airport takeoff and landing rights, as well as some additional assets, to Southwest Airlines, another major U.S. airline.[102] In requiring this divestiture, the DOJ noted that prior to the merger, United and Continental offered competing non-stop service on several routes, and one of the largest such routes was non-stop service from Newark Airport, "where Continental has a high share of service and where there is limited availability of [takeoff and land-

98. *Id.*

99. Press Release, The United States Department of Justice, United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns (Aug. 27, 2010), https://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response [https://perma.cc/C6HH-VJQ9].

100. Jad Mouawad & Michael J. de la Merced, *United and Continental Said to Agree to Merge*, N.Y. TIMES (May 2, 2010), https://www.nytimes.com/2010/05/03/business/03merger.html [https://perma.cc/P333-E3S4].

101. *Id.*

102. Press Release, *supra* note 99.

ing] slots, making entry by other airlines particularly difficult."[103] The requirement to transfer slots to Southwest, a lower-cost competitor with a smaller footprint in the New York area, "will likely significantly benefit consumers."[104]

Divestitures can seriously affect the value of one or both companies and may cause a deal to be terminated. A major proposed merger between AT&T and Time Warner, for example, was recently nearly thwarted by antitrust authorities.[105]

As a result, contracting parties have every incentive to avoid regulator-mandated divestitures, and, at the least, to avoid having to incur the costs of the divestitures. One way that parties can do the latter is by specifying within the contract what happens when the government requires a divestiture—which of the companies will be required to divest, how the divestiture will change the consideration in the deal, and so forth. And, unsurprisingly, contracting parties in deals where antitrust risk is high do just that—they specify how parties will share divestiture responsibility, costs related to antitrust review, and the like.

But in addition to specifying what happens in the event of a regulator-mandated divestiture, contracting parties take an additional step to avoid regulatory costs: they unbundle the parts of their agreement that describe their potential antitrust issues into a side agreement so that regulators do not have easy, direct access to information. The design of the antitrust portions of the M&A deal is a direct response to the fact that antitrust regulators are an anticipated audience member of the contract. M&A provisions in the main M&A contract, which is easily accessible to regulators, are written in vague terms. In contrast, side letters, which are not publicly available and which, in addition to divvying up the parties' responsibilities, reveal where the contracting parties believe their antitrust issues might lie, are much more specific.

If regulators were *not* an anticipated audience for M&A contracts, the antitrust provisions in M&A contracts would surely look different. As others have noted, sophisticated parties—of which parties in M&A deals are paradigmatic examples—are not only able to

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103. *Id.*

104. *Id.*

105. Edmund Lee & Cecilia Kang, *AT&T Closes Acquisition of Time Warner*, N.Y. TIMES (Jun. 14, 2018), https://www.nytimes.com/2018/06/14/business/media/att-time-warner-injunction.html [https://perma.cc/D7FJ-DBSU] (reporting that the deal had closed and that previously, the DOJ had challenged the deal). A federal district court in the state of Washington ruled in favor of the companies, which allowed the deal to close. *Id.*

choose what substance to put into their contracts, but also *how* that substance is expressed. In particular, parties can choose between more rule-like or more standard-like provisions, and that choice affects both ex ante contracting cost and ex post litigation risk.[106]

Sophisticated parties can and should be very rational about the form of their provisions: provisions that are likely to be litigated or disputed ex post should be drafted as rules to reduce ex post costs, while provisions that are less likely to be disputed should be drafted as standards.[107] In fact, others have shown how sophisticated parties tailor the form of their provisions in this way: Choi and Triantis, for example, have argued that it is rational to draft high-stakes material adverse change provisions in M&A contracts as vague standards because those provisions are very rarely litigated, so it makes little sense to invest ex ante cost in making them more specific.[108]

Because M&A contracts are often disputed, conventional wisdom suggests that they should be drafted as rules, rather than standards. However, anticipated regulatory oversight, and a desire to keep regulators from knowing where the parties believe their antitrust issues lie, drive parties to write antitrust provisions as vague standards.

And antitrust is not the only place where parties draft their provisions in an irrationally standard-like way because regulators are an anticipated audience of the contract. Provisions relating to national security review, too, are often drafted as standards, when rules would appear to make more economic sense. Under the Exon-Florio Amendment, the President of the United States is authorized to review business combinations that result in a U.S. entity being controlled by a foreign entity.[109] In practice, this means that parties involved in an M&A deal can choose, voluntarily, to seek pre-clearance from the Committee on Foreign Investment in the United States (CFIUS), a federal interagency committee that reviews transactions.[110]

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106. *See supra* Part I.B; Choi & Triantis, *supra* note 7, at 852 (describing the trade-off between front- and back-end contracting costs and the use of rules and standards to toggling between those costs).

107. *Id.* at 853.

108. *Id.* at 881.

109. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius [https://perma.cc/VKV2-VL59] (describing CFIUS and its functions).

110. *Id.* ("CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States ('covered transactions'), . . . in order to determine the effect of such transactions on the national security of the

During the CFIUS review process, CFIUS can require that the parties take expensive steps to mitigate national security risk, "rang[ing] from assurance letters between CFIUS and the parties . . . to complex agreements that can impose burdensome operational requirements or even require restructuring aspects of the transaction itself."[111] If a transaction is not pre-cleared by CFIUS, there can be "uncertain and potentially devasting results, including [CFIUS] requiring divestiture many years after the deal has closed."[112] Recently, for example, CFIUS required Chinese gaming company Kunlun Tech to sell Grindr, a U.S.-based gay dating app that Kunlun acquired in 2016 and 2018 without CFIUS review, because of national security concerns potentially relating to Chinese ownership of personal data.[113]

The agreement governing the $7 billion merger between auto parts makers WABCO Holdings and ZF Friedrichshafen provides another recent example.[114] Like the antitrust provisions in the United-Continental agreement, the WABCO-SF Friedrichshafen agreement's CFIUS provisions, while long, are general: they merely require both to use reasonable best efforts to obtain CFIUS approval and note in general terms the timeline and process for obtaining that approval.[115] In terms of each party's responsibility for complying with CFIUS in order to mitigate national security concerns, the agreement merely notes, in very few words, that neither company needs to take actions that are not pre-conditions to the closing of the deal or that would reasonably be expected to have a material adverse effect on the companies.[116]

Given the expensive and potentially devasting results of not acquiring CFIUS pre-clearance, contract theory predicts that CFIUS provisions in the agreement, like antitrust provisions, would be high-

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United States.").

111. *Overview of the CFIUS Process*, LATHAM & WATKINS LLP 8, https://www.lw.com/thoughtLeadership/overview-CFIUS-process [https://perma.cc/FS2J-HV94].

112. *Id.* at 4.

113. *U.S. Pushes Chinese Owner of Grindr to Divest the Dating App: Sources*, REUTERS (Mar. 27, 2019), https://www.cnbc.com/2019/03/27/us-pushes-chinese-owner-of
-grindr-to-divest-the-dating-app-sources.html [https://perma.cc/G6XH-NUB6] (reporting on the fact that CFIUS ordered Chinese company Kunlun to divest U.S. dating app Grindr).

114. Wabco Holdings Inc., ZF Friedrichshafen AG & Verona Merger Sub Corp., Agreement and Plan of Merger (Mar. 29, 2019), https://www.sec.gov/Archives/edgar/data/1390844/000119312519089436/d726995dex21.htm [https://perma.cc/5UXE-VDXS].

115. *Id.* § 6.4(b).

116. *Id.*

ly specific.[117] CFIUS provisions, however, are also standard-like, offering little information about how the parties will divide national security risk or share in the costs of potential divestiture or transactional restructuring—another direct result of regulatory involvement in private contracting.

One interview participant, the general counsel of an energy company, noted that the efforts provisions of M&A contracts would be written with regulatory oversight in mind:

> The biggest difference [between energy deals] and other kinds of transactions is the level of closing uncertainty. . . . If I'm doing a typical M&A transaction, I might have an HSR condition to closing, but I have a pretty good idea whether that's going to be a problem or not. . . . If you are highly regulated, and if it is something that the public is highly interested in, [it becomes more uncertain].[118]

d. Manufacturing

Some of the most complex contracting designed to address regulatory audiences is found in manufacturing.[119] Many areas of manufacturing rely upon a multi-industry trade association that provides standard quality procedures for a wide variety of markets.[120] Industry-specific trade associations then provide additional terms that fit within that broad framework.[121] Individual original equipment manufacturers will then draft their own standard terms that fit within that industry-specific framework.[122] As a result, the contract govern-

117. Choi & Triantis, *supra* note 7.

118. Interview #8 (Aug. 6, 2019).

119. Interview #13 (Oct. 10, 2019) (noting how class action lawsuits for products liability claims shapes the design of indemnifications provisions in automotive supply chain agreements); Interview #10 (Oct. 8, 2019) (same); Interview #14 (Oct. 11, 2019) (same). In other industries, such as semiconductors, the regulatory overlay appears to be less extensive. *See* Interview #3 (Apr. 18, 2019).

120. The International Organization for Standardization promulgates quality management standards followed in numerous industries. *ISO 9000 Family Quality Management*, ISO, https://www.iso.org/iso-9001-quality-management.html [https://perma.cc/29ZE-CFHA].

121. In automotive manufacturing, for instance, the International Automotive Task Force creates a set of standards that nest within ISO 9001:2015 for suppliers and original equipment manufacturers in the automotive industry to use. *See* International Automotive Task Force, IATF 16949: Quality Management System Requirements for Automotive Production and Relevant Service Parts Organizations (2016). The IATF standards are used uniformly across the automotive industry. Interview #9 (Oct. 8, 2019) (noting the foundational role the IATF standards play in the industry); Interview #10 (Oct. 8, 2019) (same); Interview #13 (Oct. 10, 2019) (same).

122. For example, Ford Motor Company's supplier manual has requirements that build upon the IATF 16949 standard, which in turn builds upon ISO 9001. *See* Ford Motor Company Customer-Specific Requirements for IATF-16949:2016, FORD MOTOR CO. (2017), https://www.iatfglobaloversight.org/wp/wp-content/uploads/2016/

ing a supply relationship is like a nesting doll, combining cross-industry standard terms, industry-specific standard terms, OEM-specific standard terms, and then, finally, terms customized to the particular transaction.[123]

A contracting officer at an aerospace systems supplier described a similar arrangement in defense contracting:

> The Federal Acquisition Regulations [or FAR] is the umbrella for everything the government buys everywhere. Then each agency for the government has a separate, more restrictive set of rules that use FAR as the umbrella. For instance, the Department of Defense has its set of rules called the DFAR. And then departments within an agency have an additional set of rules under that. For instance, the Air Force has its own set of rules within DFAR. And departments within the Air Force have their own rules. For instance, the Air Force's Force Material Command has rules called the FMC FAR. It is like a nesting doll. The additional layers cannot eliminate regulations from the higher layers, they can only add to them. So, as you go down the chain, it gets more and more complex.[124]

Those regulations obviously shape the contracts between the U.S. government and the prime contractors that deal with it directly. Importantly, however, those regulations also affected the contracts between the prime contractors and their sub-contractors:

> Certain terms required by the FAR will flow through from the contract between the Department of Defense and the prime contractor to the agreement between the prime contractor and the second-tier supplier. FAR has some mandatory provisions, and, whether you love them or hate them, they are non-negotiable. So, as a second-tier supplier, you might push back on certain provisions when negotiating an agreement, but the prime contractor would say, too bad, they're mandatory under FAR.[125]

e. *Insurance*

Insurance is another industry where recent changes to regulation had a major impact on private contracts. Primary health insurance providers draft their policies subject to federal and state regulatory review. One interview participant, a former general counsel at a large health insurer, noted that the Affordable Care Act directly changed the substance of a previously common termination provision in their contracts:

12/Ford-IATF-CSR-for-IATF-16949-1May2017.pdf [https://perma.cc/BT2U-47A3].

123. *See id.*

124. Interview #6 (June 12, 2019); Interview #15 (Dec. 21, 2020) (describing how agency-specific rules are embedded within the FAR, and noting that the FAR limits room for maneuver in negotiations); Interview #13 (Oct. 10, 2018) (describing a similar effect in automotive supply chains).

125. *Id.*; *see also* Interview #10 (Oct. 8, 2019) (noting the constraining effect of the framework of industry standards in automotive supply chain contracting); Interview #12 (Oct. 9, 2019) (noting the ways in which suppliers and OEMs can and cannot deviate from standard terms in the automotive industry); Interview #11 (Oct. 8, 2019) (same).

> The regulatory overlay definitely impacts language in the contracts, such as coverage limitations and restrictions. In health insurance, . . . renewability of the contract [is one of] the biggest issue[]. . . . [Before the enactment of the Affordable Care Act,] if the claims were way out of whack, and you'd lose money, then you could terminate [under the contractual provision]. But under the [ACA] changes, now you can't terminate [because of the guaranteed renewal].
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> . . .
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> The market is incredibly regulated on coverage, exclusions, pricing, and broker requirements. [This poses] a very substantial compliance burden.[126]

2. When Multiple Regulators Overlap

Thus far, this Article has discussed how the role of regulators as an anticipated audience for contracts creates depth—a feature of contracts where one contract speaks to multiple audiences. But regulators themselves are not monolithic. When more than one regulator is involved, contractual depth becomes more complex.

This is especially true for contracts that must operate across multiple jurisdictions. For example, the European Union began to implement the General Data Protection Regulation (GDPR), a sweeping new law that has numerous implications for consumers' control over their personal data.[127] The adoption of GDPR in Europe meant that companies had to modify their contracts to comply with GDPR, as well as with pre-existing U.S. regulations. One general counsel of an internet company noted:

> We designed our privacy policy last year to address the GDPR, and now we have to address California's new CCPA, which comes into effect in January. Overall there is a consistency of approach [among the regulators]. But there are specific rights that must be tailored to each, so there isn't a one size fits all. This just makes the contracts longer and less readable. We try to make it as plain spoken as possible, but . . . if a regulator doesn't see the exact words they're looking for, they'll ask for it to be inserted.[128]

In other words, even though the company's contracts did not directly involve any regulators as a party, regulators in both California and Europe review the contracts to ensure compliance. If the contracts are not in compliance, regulators will intervene and ask for modifications. These contracts, even though they do not involve regulators directly, must be written with regulators in mind.

When a company has a presence across multiple states, the effect is similar:

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126. Interview #7 (July 8, 2019).

127. Arjun Kharpal, *Everything You Need to Know about a New EU Data Law That Could Shake up Big US Tech*, CNBC, May 25, 2018, https://www.cnbc.com/2018/03/30/gdpr-everything-you-need-to-know.html [https://perma.cc/RX9H-LN52].

128. Interview #5 (May 31, 2019).

> You have 50 states, and each had their own . . . equivalent of the FTC Act or unfair and deceptive business practice. . . . I had to go up and sit down and meet with the Attorney General of Vermont twice because they got really hot under the collar . . . [regarding the risk of] financial fraud and taking advantage of the older people. And so, they were looking at our terms of use and privacy policy. . . .
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> . . .
>
> [T]hey would say, well, if you had this kind of thing in your . . . your terms of service, that would make us feel better. Even though we knew that no one would read it, . . . you're just placating the attorney general and so we would make a change [to our terms] . . . .".[129]

Another general counsel, who worked in the health insurance industry, agreed:

> Insurance contracts are often subject to the regulators of multiple states, and those states can have different processes. For example, many states have control over pricing and other terms—there, you have to file your rates and get approval. Other states are "file and use" jurisdictions, where the insurance provider files the policy with the regulator and can begin using it immediately, subject to a post hoc review process. We would deal with these multiple regulatory overlays by having a standard policy and then state-specific addenda, which were subject to the review of the respective regulators.[130]

Companies face similar issues when attempting to draft contracts that require oversight by both state and federal regulators. One interview participant, the general counsel of an energy company, discussed how state and federal regulators affected their contracts: "[w]e do have federal versus state regulations that overlap. Every state has its own version of the EPA [Environmental Protection Act], and then the federal government has its [industry-specific commission]."[131] He noted that these overlapping requirements introduced questions of "which governs and which preempts. In our contracts, we have to make sure we know what the state environmental agency is going to say, what the [industry-specific commission] is going to say, what the Department of Energy is going to say."[132]

Contracting across multiple jurisdictions—and therefore writing with multiple jurisdictions' regulators in mind as potential audiences of the contract—can lead not only to contractual *layers*, but contractual *complexity.* The result is often lengthy and dense contractual documents: "[w]e keep telling the regulators that you can't tell us to

129. Interview #1 (Dec. 18, 2018).

130. *Id.*

131. Interview #8 (Aug. 6, 2019).

132. *Id.*

make it simple and to do thirteen specific things—that's why we have 5,000-word policies."[133]

Perhaps most interestingly, contracting with multiple jurisdictions' regulators in mind leads to the existence of "phantom provisions" in contracts—provisions that respond to jurisdictions X's regulators that end up in contracts in jurisdiction Y. One interview participant, for instance, noted that one state's requirements could end up in a contract governed by another state's laws, simply because as a matter of contract production, it was too cumbersome to write separate contracts for each different jurisdiction. As a result, the provision responding to North Carolina regulators ended up in contracts across multiple provisions:

> [A] new law came down [in North Carolina] . . . We would talk with our development team and say, "could we just isolate [the new changes required by law to] only North Carolina people . . . ?" . . . But they said, you know what, it's just easier to give [the changes] to everybody."[134]

At times, one state's regulatory influence on a contract can also lead to several states' convergence on the same term:

> [W]e would make a change throughout [all U.S. states] . . . [because] we did not want to have a situation where we had certain standards or certain provisions that would benefit [users in] one or two states, but not everybody else, because that also can be used against us. . . . It can be an unfair business practice if you're giving New York residents a perk that you're not giving Iowa [residents]. And so, we would roll that out across everybody.[135]

Even when several states' different regulatory requirements do not cause phantom provisions to exist in contracts, using one contract to speak to multiple regulators inevitably complicates the contract. One interview participant, for instance, reported that when an internet company's terms of use needed to respond to multiple regulators, the terms of use sometimes had multiple paragraphs in the document, each responding to a different regulator:

> [We had] this big, long paragraph that California required . . . and it had to be above the signature line . . . . But [then there's] the automatic renewal language . . . . that's really important to the FTC. So, we had two sets of paragraphs. [T]hey're supposed to be in the exact same spot. So, we had to . . . choose one of them. . . . [W]e just finally pulled all of the state-required language stuff out, put in terms of use . . . at the bottom . . . so the automatic renewal language could go in by the signature. . . . [T]hat's why all of a sudden there's like these three big paragraphs that show up out of nowhere in the bottom of our terms and use going forward for all states . . . .[136]

With these kinds of state-specific paragraphs in place, the interviewee essentially said that one paragraph applies to those individuals in

133. Interview #5 (May 31, 2019).
134. Interview #1 (Dec. 18, 2018).
135. *Id.*
136. *Id.*

California, another for individuals in New York, another for individuals in North Carolina, and so on.

3. When Regulators Act as Counterparty

Several interview participants noted that, particularly in consumer contracting, a regulator may be a far more important influence on the design of the agreement than one of the contractual parties.[137] In such situations, interviewees emphasized that consumers were typically the audience *least* likely to affect the language of the agreement.[138] As one former general counsel of an internet company described it:

> We tried to . . . draft [the language] at a seventh-grade reading level. We tried to draft it clear. I tried to make them smaller. . . . [I]f someone did read it, I wanted them to be able to read it and understand it. But we knew from our data that almost nobody clicked on the terms of the privacy policy. . . , [C]ustomers just weren't reading them.[139]

At first glance, contracts that change without one party's input seem to be at odds with a fundamental principle of contract: that a contract reflects the parties' bargained-for exchange.[140] But, as other scholars have noted, lack of consumer involvement in these kinds of clickwrap contracts—contracts such as privacy policies and terms of service that online service providers ask consumers to sign before using their services—is well-established and well-documented in the literature.[141] In fact, not only are consumers not involved in negotiating and drafting these contracts, they also do not read them[142] and may not have the tools to understand them.[143]

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137. *See*, *e.g.*, *id.*; Interview #5 (May 31, 2019). Other interviewees focused their entire discussion on regulators and did not spend much time discussing the importance of contractual parties. *See* Interview #2 (Feb. 15, 2019).

138. *See*, *e.g.*, Interview #1 (Dec. 18, 2018); Interview #5 (May 31, 2019).

139. Interview #1 (Dec. 18, 2018).

140. *See supra* Part I.A.

141. Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 13–21 (2009); Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 106–08 (2011); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 998–1001 (2008).

142. David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 399 (2013) ("Armed with evidence that consumers essentially never read licenses, contracts, or warranties, opponents of mandatory disclosure have begun to make inroads against one of the most popular regulatory approaches to voluntary transactions.").

143. Kevin Litman-Navarro, *We Read 150 Privacy Policies. They Were an Incomprehensible Disaster.*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html [https://perma.cc/26A8-3QUV] (reporting on 150 privacy policies and noting that, for exam-

Intuitively, it is not a surprise that consumers do not engage in the drafting or negotiation of clickwrap agreements. Clickwrap agreements are often full of boilerplate provisions—standard provisions that appear, often verbatim and almost by rote, across many contracts.[144] And while boilerplate can be found in many contracts, it has been particularly well-documented in consumer contexts.[145] As a result, consumers might rationally believe that many clickwrap agreements contain the same information, so reading individual agreements has little marginal benefit—and without reading them, consumers have little reason to negotiate them or otherwise advocate for change. Moreover, there is much evidence to suggest that even if consumers read the agreements, they might not understand or be able to process them because they are too complex, technical, or long.[146]

In these situations, where the regulator looms so large in the design process compared to an actual contractual party, the regulator steps into the shoes of consumers in a functional sense. This leads to a unique example of the contractual depth phenomenon. In such situations, the influence of a regulator may not necessarily lead to multiple layers of meaning in an agreement. If a contracting party is essentially absent from a negotiation for all practical purposes, then

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ple, Facebook's privacy policy is so long that it takes nearly twenty minutes to read and is also so complex that readers need a college reading level to understand it).

144. MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2013) (describing how boilerplate provisions evolved); Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 5 (2017); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929 (2004); Kahan & Klausner, *supra* note 8, at 348; Kahan & Klausner, *Standardization and Innovation*, *supra* note 83, at 718; Klausner, *supra* note 83, at 762.

145. Michigan Law Review held a symposium on the topic that yielded several excellent papers about boilerplate in the consumer context. *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Omri Ben-Shahar, *Foreword* to *Boilerplate: Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821 (2006).

146. Douglas Baird argues, for instance, that boilerplate is just another standard product in a market selling many standardized goods and that exploitation of consumers by companies through boilerplate is no more or less dangerous than exploitation through other product attributes. Baird, *supra* note 145, at 937; *see also* Cathy Hwang & Matthew Jennejohn, *The New Research in Contractual Complexity*, 14 CAP. MKTS. L.J. 381 (2019) (providing an overview of recent work on contractual complexity, and noting that many contracts are too long, technical, or complex to be understood).

whatever layer of meaning they may have contributed to the agreement is missing. In that respect, the regulator is not layering additional meaning on top of the meaning supplied by a contracting party but is rather filling a void that otherwise would persist.

4. Summary and a Note on Methodology

The findings in this Part are informed by semi-structured interviews with contract designers. Contract designers include in-house and law-firm attorneys who have experience drafting contracts. Interview participants have experience in a variety of industries and in companies of varying type, size, and national/international presence.

Interviews for this Article were conducted by telephone or in-person on the dates indicated in the Appendix. To allow interview participants to speak more freely, we promised to report on our conversations on a no-name basis. For brevity and confidentiality, we identify each participant within the text of this Article by using a reference number.

To identify interview participants, we used a snowball sampling technique, in which we asked interview participants to introduce us to additional potential participants.[147] A shortcoming of this method is that it is hard to obtain an unbiased sample.[148] However, personal introductions also allow us to gain access to interview participants who might not otherwise speak to us about their work.

In a wide variety of industries and contexts, contract drafters reported drafting their contracts with regulators in mind.[149] In some situations, such as online services, the regulators were not just a background presence but an active participant in the drafting process.[150] Furthermore, it was not uncommon for parties to draft their agreements with multiple regulatory audiences in mind, leading at times to conflicting demands.[151] Finally, in some cases, interviewees reported that regulators were the most important audience—sometimes even more important than the actual contract counterparties.[152]

In short, drafting to regulatory audiences attenuates the simple story that parties have complete control, limited by their foresight

147. Leo E. Goodman, *Snowball Sampling*, 32 ANNALS MATHEMATICAL STAT. 148, 148 (1961).

148. Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOCIO. METHODS & RSCH. 141, 160–61 (1981).

149. *E.g.*, Interview #1 (Dec. 18, 2018).

150. *E.g.*, *id.*

151. *See* Interview #7 (July 8, 2019).

152. *See, e.g.*, Interview #1 (Dec. 18, 2018).

and rationality, over their contractual ends. Contracts often contain layers of meaning, since they are drafted to multiple audiences at once. The wide range of exploratory interviews undertaken here suggest that how those layers accrue in any given market or discrete contracting situation may differ materially: as regulatory frameworks change from market to market, presumably so do drafting patterns. In that respect, the suggestive empirical evidence here opens a number of new avenues for future research to analyze.

III. THEORETICAL AND PRACTICAL IMPLICATIONS

The discussion above introduces us to a commercial world where parties often craft their contracts with multiple audiences in mind. The formulation of contractual language turns not only upon how a court may view it; rather, parties also consider how regulators will view the term.[153] Moreover, there are instances when the regulators' influence is very real indeed, such as where agencies review draft language.[154]

This Part discusses the potential implications of contractual depth for important areas of doctrine, theory, and practice. The discussion here should be viewed in the same exploratory spirit as the positive analysis above. The goal is to identify topics of import for future study, rather than to conclude debates.

Part III.A considers implications for contract theory. As discussed above, leading scholars have convincingly argued that parties' inability to anticipate all the potential contingencies of a contractual relationship ex ante creates a gap between contractual means and ends.[155] This Article introduces another driver of this gap: multiple audiences may influence or constrain contract design. Because contracts must do more than simply be the means that parties use to achieve their ends—they must speak to other audiences beyond a court—there is an even wider gap between the parties' ends and what they can write in their contract. To illustrate, this Section discusses *Masterson v. Sine*,[156] a familiar parol evidence rule case that demonstrates a court contending with a gap made, in part, due to constraints arising from adjacent areas of the legal system.

Part III.B connects the theory of contractual depth with an important recent conversation in contract theory: renegotiation. Economists writing on contracts and economic organization argued that

153. *See supra* Part II.B.1.
154. *See supra* Part II.B.
155. *See supra* Part I.B.
156. 436 P.2d 561 (Cal. 1968).

the prospect of renegotiation has important implications not only for contractual relationships but also, more broadly, the theory of the firm. Contractual depth complicates renegotiation, because the multiple audiences involved in a layered agreement may restrict the scope of renegotiation. Renegotiation therefore becomes less likely, and perhaps therefore less likely to color initial negotiations, too.

Finally, Part III.C discusses how parties can use contract design to recapture a meaningful level of control over their agreements. In previous work, we have discussed the role of modular contract design in improving contracts.[157] Here, this Article turns again to modular design: it suggests that, in theory, modularity may alleviate some of the interpretation and enforcement problems presented by layered contracting in particular. It also discusses the limits of modularity as a solution to interpretive problems and suggests some areas for future research.

A. INTERPRETING LAYERED CONTRACTS

What does contractual depth mean for enforcement? Drafting agreements for multiple audiences may exacerbate the gap between parties' ends and their contractual means. As discussed in Part I.C above, even relational contracting's vision of the two-audience model envisions, for the most part, a clean division of labor between the two enforcement institutions involved.[158] But now, there are not only more than two audiences, but contractual language is addressed to them simultaneously. For example, in antitrust-related M&A provisions, the same provisions must serve as the contractual means for the parties' contractual ends *and* respond to regulators. This becomes even more complicated when different audiences' demands differ, creating conflicts within the institutional network that contract designers inhabit. Multiple audiences may make the gap between parties' ends and contractual means even wider.

Regulatory audiences may also restrict the language that is included in an agreement. As we discussed previously, it is not unusual for deal attorneys to limit the specificity of antitrust risk shifting provisions in an M&A contract for fear of tipping off regulators about the business combination's potential areas of anticompetitive concern.[159] Instead, contract designers may use vague antitrust provisions in the main contract and put details into an undisclosed and in-

157. Hwang & Jennejohn, *supra* note 10; Cathy Hwang, *Unbundled Bargains: Multi-agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403, 1418 (2016).

158. *See supra* Part I.C.

159. *See supra* Part II.B.1.

formal side agreement.[160] This action—stripping substance out of the main contract in the face of regulatory oversight—exacerbates contractual incompleteness and widens the gap between ends and means. In the absence of antitrust regulatory risks, parties would have presumably preferred to include, in the main contract, a more detailed account of how they would divide antitrust risk and liability. Ideally, the parties would draft as complete a contract as possible about this matter—thereby mapping contractual means closely with contractual ends. The introduction of an antitrust regulator, however, causes them to remove those provisions from the contract—thereby increasing incompleteness and widening the gap between contractual means and ends.

This new type of gap between contractual means and ends—whether additions to or subtractions from the contract—complicates questions of contract enforcement. It is often noted that generalist judges have trouble interpreting and enforcing incomplete contracts.[161] And the question of how judges *should* fill contractual gap has long been of both theoretical and practical import: if the parties left something ambiguous, how is a neutral arbiter, ex post, supposed to know what the parties would have wanted? Contracts with depth can compound the problem, pushing contracts to be especially under-inclusive or over-inclusive of meaning.

The classic parol evidence case, *Masterson v. Sine*, provides a simple example of a situation where a court must contend with incompleteness arising in part from the restrictions of a regulatory environment.[162] The transaction at issue in *Masterson* involved a property conveyance that reserved for the grantor an option to repurchase the property on certain terms.[163] Allegedly, at the time of contracting, the parties made an oral side agreement that the option was personal to the grantors, who wished to keep the land in their family.[164] When the grantor declared bankruptcy, the question arose of whether the trustee in bankruptcy could exercise the option, or was unable to do so due to the alleged oral agreement.[165]

In deciding to allow evidence of the oral agreement, Justice Traynor, writing for the majority, justified the holding in part due to the difficulties he perceived the parties had in customizing the deed

160. *Id.*
161. Gilson, Sabel & Scott, *supra* note 34, at 174.
162. 436 P.2d 561 (Cal. 1968).
163. *Id.* at 562–63.
164. *Id.*
165. *Id.*

accomplishing the conveyance due to the formalities imposed by state law.[166] Traynor wrote:

> [T]he difficulty of accommodating the formalized structure of a deed to the insertion of collateral agreements makes it less likely that all the terms of such an agreement were included. . . . There is nothing in the record to indicate that the parties to this family transaction, through experience in land transactions or otherwise, had any warning of the disadvantages of failing to put the whole agreement in the deed. This case is one, therefore, in which it can be said that a collateral agreement such as that alleged "might naturally be made as a separate agreement."[167]

In other words, the law's requirements for a standardized structure for deeds limited Masterson and Sine's ability to fully customize the agreement to achieve desired ends. What could have been included in the contract went unsaid.

Relatedly, contractual depth unsettles a central assumption in contract theory that parties, especially sophisticated parties, have full control—or as much control as their bounded rationality will allow—over the substance and form of their contracts. The literature on rules and standards, discussed in Part I above, assumes that parties *choose* whether to draft provisions as rules or standards.[168] Because sophisticated parties are so good at choosing what goes into a contract and how, the argument goes, parties have also introduced all the evidence they would care to introduce into a contract, and would therefore prefer textual interpretations ex post.[169] But contractual depth unseats that assumption and brings to light new questions. For example, if parties do not have full control over the substance and form of their contracts, can they really use rules or standards strategically, as the literature suggests?

What does the attenuation of parties' ability to render their intentions into contract terms mean for how courts should interpret contracts, ex post? In particular, what does it mean for the age-old question of whether a textualist or contextualist approach is most appropriate when interpreting contracts?[170] Views of interpretation

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166. *Id.* at 565.

167. *Id.* at 565 (citations omitted). Notably, the dissent was having none of it: "What difficulty would have been involved here, to add the words 'this option is nonassignable'? The asserted 'formalized structure of a deed' is no formidable barrier." *Id.* at 572 (Burke, J., dissenting). Putting aside the factual dispute between members of the court, we use the majority opinion's view of the matter as a useful example of the broader phenomenon this Article explores.

168. *See supra* Part I.B.

169. *See* Hwang, *supra* note 157, at 1443.

170. In previous work, we have ventured into this debate. Hwang & Jennejohn, *supra* note 10 (discussing the limits of the text/context debate in light of modular and integrated contract design). A large and vibrant body of literature, both classic and modern, also addresses this question. *See*, *e.g.*, Gilson, Sabel & Scott, *supra* note 35

typically fall into one of two interpretive camps.[171] In the first are textualists, who argue that courts should only look within the four corners of an agreement and construe the plain meaning of its terms.[172] Prominent contract theorists have argued that a textualist approach makes particular sense when interpreting contracts between sophisticated parties, which have both the technical sophistication and financial means to carefully craft their agreements.[173] In the other camp are contextualists, who have argued that courts ought to consider the broader, often-unwritten context of the transaction to discern the parties' true meaning.[174] The Uniform Commercial Code, which governs many commercial transactions big and small, generally takes a contextualist approach.[175]

This Article's theory of contractual depth suggests a new argument for the contextualist side of that debate. Textualist arguments typically rely upon the idea that sophisticated commercial parties are more capable of ordering their affairs than courts, and therefore

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(describing the tension between textualist and contextualist approaches to contract interpretation); Schwartz & Scott, *supra* note 35, at 939 (laying out some basic differences between textualist and contextualist interpretation regimes); Schwartz & Scott, *supra* note 16, at 544 (setting out a modern formalist/textualist theory of contract law and contractual interpretation); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 751–53 (2000) (describing the different judicial interpretations of contracts); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contract Interpretation*, 146 U. PA. L. REV. 533 (1998) (discussing the parol evidence rule in contract interpretation).

171. Gilson, Sabel & Scott, *supra* note 34, at 25–26.

172. *Id.* (describing a textualist regime as one in which "generalist courts cannot choose to consider context").

173. *E.g.*, Hwang, *supra* note 157, at 1443 ("Textualists argue that when drafting contracts, sophisticated parties make a considered decision whether to allocate more time and money to the front-end drafting costs, or whether to roll the dice on back-end litigation costs. As a result, [sophisticated parties] have . . . included [all] of the contractual context they [need] in a . . . contract. Because they have already made this tradeoff, sophisticated parties prefer textualist interpretations of contracts.").

174. Gilson, Sabel & Scott, *supra* note 34, at 25–26 ("[I]n a contextualist regime, these courts must consider [context].").

175. *Id.* at 27 ("As stressed by Karl Lewellyn and partially reflected in the Uniform Commercial Code . . . , many commercial parties do business in a deeply nuanced world where formal and informal understandings mix in a mélange of explicit terms and underlying practice whose joint application to the particular contract can be illuminated by the parties' course of dealings." (citing U.C.C. §§ 2-202(a) cmts. 1(b), 2; 1-303 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2012)); *id.* at 27 n.8 ("[T]he meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing." (quoting U.C.C. §§ 2-202(a) cmts. 1(b), 2; 1-303 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2012))).

courts should not attempt to interpret the context of an exchange.[176] A textualist approach gives courts a minimal role, limiting the harm they can do when they stray from the plain language of a contract.[177] Textualism also allows the parties to precisely communicate their wishes to the enforcement court, knowing that courts will interpret the written language, and only the written language.[178]

Evidence that sophisticated commercial parties design their contracts for multiple audiences challenges textualism's underlying assumption that parties are able to carefully tailor their contracts to reflect their interests. In reality, transactional attorneys must draft contract language within a dense network of institutions, which can have conflicting demands.[179] This backdrop casts a long shadow over private ordering. Parties' range of maneuverability in the drafting process is more limited than prior theory assumes—they sometimes forgo precise allocations of risk to comply with a regulator's requirements, or they may add on additional language to satisfy an agency.[180] In these situations, the justifications for textualism are weaker, and to adhere to textualism only undermines the countervailing goal of ascertaining intent. At the extreme, as contractual depth makes contract terms more ambiguous, a commitment to plain meaning requires courts to refuse to enforce agreements on grounds of indefiniteness,[181] and parties can no longer trust that their promises will be enforced.

Finally, contractual depth complicates the operation of default rules in contract enforcement.[182] Default rules are applied in the interpretive process when there is no express agreement between con-

176. *See* Schwartz & Scott, *supra* note 16, at 547 ("[I]n contrast to the UCC and much modern scholarship, . . . textualist interpretation should be the default theory for [contracts between firms]."); Schwartz & Scott, *supra* note 35, at 944–47.

177. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 758–60 (1999) (criticizing U.C.C. Article 2's incorporation of commercial norms because it "moves the meaning of explicit provisions as close as possible to the meaning of customary terms, and in so doing transforms many customary practices into quasi-mandatory standardized provisions in all contracts in the relevant market").

178. Schwartz & Scott, *supra* note 16, at 547 ("Business firms . . . commonly prefer courts to adhere as closely as possible to the ordinary meanings of words, to apply a 'hard' parol evidence rule, and to honor 'merger clauses' (which state that the parties intended their writing to be interpreted as if it were complete).").

179. *See supra* Part II.B.

180. *Id.*

181. Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1657–61 (2003).

182. Many thanks to Andrew Gold, whose thoughtful feedback directed us toward this possibility.

tracting parties—i.e., they fill "gaps" in an incomplete contract.[183] For instance, if two parties fail to provide a liquidated damages provision in their agreement, which pre-determines the amount of damages in the event of a breach, American contract law typically supplies the default remedy of expectation damages, measured as the expectation of the aggrieved party.[184]

The question then arises of how to define the substance of the default rules of contract law. A common approach is to select a "majoritarian" default, or in other words, a "rule that the broadest number of parties would adopt were transactions costs low enough for negotiators to tailor-make their own rules."[185] By nature, selecting that majoritarian default rule requires a court to consider the hypothetical bargain that parties would typically strike in such a situation.[186]

Contractual depth complicates that exercise of estimating the hypothetical bargain parties would typically want. Judges' ability to accurately imagine what term the majority of parties would want in a particular situation has always been suspect. Parties are heterogeneous, exchange environments are complex, and generalist judges have limited commercial expertise.[187] Contractual depth adds an additional challenge: judges must also ascertain the regulatory audiences that the hypothetical provision must address.[188] They must guess not only how the parties would wish to allocate risks but also how other audiences will view those terms, and how that may influence whatever default the parties would wish.[189] The complexity of the interpretive process increases dramatically. This adds an additional limit to the normative argument for majoritarian defaults in contract law. In some markets, where multiple audiences shape contract design,

183. Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1525 (2016) (describing default rules as the ways that law fills in the gaps when parties leave parts of the contract blank).

184. Theresa Arnold, Amanda Dixon, Madison Sherrill & Mitu Gulati, *The Myth of Optimal Expectation Damages*, 104 MARQ. L. REV. 141, 142 (2020) ("The textbook answer has long been that courts should set damages at the amount that puts the jilted party in as good of a position as she would have been in had the contract been performed—expectation damages.").

185. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 850 (2000).

186. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1819–22 (1991) (describing the process of defining the default rule).

187. *See* Gilson, Sabel & Scott, *supra* note 34, at 88–92 (discussing the costs of using generalist courts in interpretation of commercial contracts).

188. *See supra* Part II.B.1.

189. *See supra* Parts II.B.3, II.B.4.

identifying common default rules may be too complicated a task for generalist judges.

B. STICKY RENEGOTIATION

Contractual depth also contributes to one of the most important ideas in contract economics: renegotiation. At first glance, contract renegotiation seems like a mundane idea: parties execute a contract and, as time passes and their trading situations change, they revisit the terms.

The stakes in renegotiation can be high, as the COVID-19 pandemic's effect on deals exemplifies. The pandemic disrupted many contracts, from weddings to supply chains,[190] but perhaps the highest economic stakes were found in the multi-billion M&A deals that teetered on the brink. Luxury retailer Louis Vuitton's $16 billion acquisition of storied American jeweler Tiffany & Co. provides a splashy example.[191] As the pandemic shuttered Tiffany's stores around the world, Louis Vuitton quickly got cold feet.[192] Louis Vuitton pressed for a renegotiation of the deal price, and it eventually achieved a reduction shortly after litigation commenced.[193]

An influential line of economics scholarship argues that the prospect of renegotiating a contract can have powerful and potentially negative effects on the initial design of a transaction.[194] In many

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190. David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979 (2021) (explaining how the COVID-19 pandemic has disrupted and will continue to impact the completion of certain social contracts, including weddings, conferences, and other large gatherings).

191. Lauren Hirsch & Elizabeth Paton, *Tiffany's $16 Billion Sale Falls Apart in Face of Pandemic and Tariffs*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/09/business/lvmh-tiffany-deal-lawsuit.html [https://perma.cc/DU7M-K4G2] ("Last November, LVMH Moët Hennessy Louis Vuitton, the world's largest luxury goods conglomerate, announced plans to acquire Tiffany & Company . . . . Nine months later, the agreement is in tatters. On Wednesday, LVMH said that it was pulling out of the deal, citing a highly unusual request by the French government to delay the closing as well as the damage caused to the luxury industry by the pandemic.").

192. *Id.* For more detailed discussion of the renegotiation and litigation timeline between Louis Vuitton Moët Hennessey ("LVMH") and Tiffany, see Matthew Jennejohn, Julian Nyarko & Eric Talley, *Contractual Evolution*, 89 U. CHI. L. REV. (forthcoming 2022) (manuscript at 3–4) (on file with authors); Matthew Jennejohn, Julian Nyarko & Eric Talley, *COVID-19 as a Force Majeure in Corporate Transactions*, (Colum. L. and Econ., Working Paper No. 625, 2020), https://papers.ssrn.com/abstract=3577701 [https://perma.cc/5HS8-ACGL].

193. *See* sources cited *supra* note 192.

194. Benjamin Klein, *Why Hold-Ups Occur: The Self-Enforcing Range of Contractual Relationships*, 34 ECON. INQUIRY 444, (1996) (explaining that transactors will sometimes purposely agree to incomplete contract terms to save on costs but that doing so can lead to hazardous consequences); Benjamin Klein, Robert G. Crawford & Armen

transactions, parties must engage in what is known as "relationship-specific investment"—that is, they must make investments that are only worth their full value in that contractual relationship.[195] Switching to a different contractual partner would mean suffering a material discount.[196]

Many transactions involve relationship-specific investment. In M&A, for instance, multi-step transactions are common, and parties must each make some relationship-specific investment in order to determine whether a full deal can be achieved.[197] For example, M&A parties might do diligence on each other, or prepare financial models about how the combined company might perform after a merger. These initial investments are not recoupable if the deal falls through but necessary for the parties to determine, as an initial matter, if they will merge.[198]

But relationship-specific investments also render the investing party vulnerable to an opportunistic partner, who, knowing that the investing party has few good alternatives, can renegotiate the agreement once performance has started in order to secure a greater share of the contractual surplus.[199] This devious use of contractual renegotiation is often described as the "hold-up" problem.[200]

That opportunistic renegotiation of a contract can put a party in a bad spot. To address the issue, a party may attempt to put guard-

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A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978) (exploring the risks of post-contractual reneging on contracts within the context of appropriable specialized quasi rents).

195. Jennejohn, *Braided*, *supra* note 55, at 890 (citing Klein, Crawford & Alchian, *supra* note 194; Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 REV. ECON. STUD. 115 (1999)) ("An exchange requiring such relationship-specific investments—i.e., investments in assets that can only be sold in the alternative to third parties at a material discount—renders the investing party vulnerable to an opportunistic partner, who, knowing that the investing party is over a barrel, can "hold-up" the party as performance unfolds in order to secure a greater share of the contractual surplus."); Cathy Hwang, *Deal Momentum*, 65 UCLA L. REV. 376, 387 (2018) (citing Schwartz & Scott, *supra* note 25, at 663) ("[I]n complex deals, parties may not be able to resolve enough uncertainty before entering into a full, detailed, and definitive acquisition agreement. In order to resolve uncertainty and determine whether the deal is feasible and worthwhile, parties need to make relationship-specific investments that cannot be recouped if the deal does not materialize.").

196. Jennejohn, *Braided*, *supra* note 55.

197. See, for example, Albert H. Choi & George Triantis, *Designing and Enforcing Preliminary Agreements*, 98 TEX. L. REV. 439 (2020) for a discussion of multi-stage contracting and relationship-specific investments.

198. *Id.*; Hwang, *supra* note 195.

199. Klein, Crawford & Alchian, *supra* note 194; Hart & Moore, *supra* note 195; Klein, *supra* note 194.

200. Klein, *supra* note 194; Klein, Crawford & Alchian, *supra* note 194.

rails on any renegotiation: a party can try to design a contract that has provisions that prevent the counterparty from engaging in that bad behavior.[201] Of course, anticipating all the ways that one's partner can shirk its performance obligations is difficult, if not impossible, and so whatever contract one designs will inevitably be imperfect. As a result, one might use broad standard-like language, such as a "best efforts" provision, in the agreement.[202] The attraction of such a vague standard of performance is also its weakness: ultimately, "best efforts" can only be determined after the fact, which does not ensure one will actually get the benefits of its bargain.[203]

The theory of contractual depth introduces a new potential source of constraint on renegotiation. Renegotiation of contracts that have layers requires multiple parties to come back to the negotiating table—not just the parties to the contract. Instead of being a bilateral bargaining problem, renegotiation becomes a multilateral collective action problem.[204] That makes renegotiation that much more difficult to undertake.

When renegotiations are challenging, concerns over ex ante strategic behavior in anticipation of renegotiation may be overblown. Companies may be significantly less concerned about the hold-up problem that renegotiation makes possible. These ideas, however, do require scholars to significantly rethink some of the fundamental aspects of the modern theory of the firm and contract economics, which are largely animated by the hold-up problem.[205] In that respect, the theory of layered contracting introduced here opens an important new horizon in the theoretical and empirical study of the contemporary economy.

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201. Holden & Malani, *supra* note 14 (explaining how a "renegotiation design" by contracts can achieve optimal self-serving, biliteral investment).

202. Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 612–13 (2d Cir. 1979) (demonstrating a case where a buyer breached its contractual duty to use best efforts to sell seller's brand of beer).

203. Even a "best efforts" provision—or perhaps *particularly* a "best efforts" provision, which is ultimately a vague standard—invites shaded performance. *See* Oliver Hart & John Moore, *Contracts as Reference Points*, 123 Q. J. ECON. 1, 6 (2008) (distinguishing between consummate and shaded performance); *id.* at 3 ("[A] party is happy to provide consummate performance if he feels that he is getting what he is entitled to, but will withhold some part of consummate performance if he is shortchanged—we refer to this as 'shading.'").

204. For a pioneering overview of collective action problems, see MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

205. *See* Bengt Holmstrom & John Roberts, *The Boundaries of the Firm Revisited*, 12 J. ECON. PERSPECTIVES 73, 80 (1998) ("There is no doubt that hold-up problems are of central concern to business people.").

At the same time, limiting the scope of renegotiation can be problematic in situations of economic distress. Consider, for example, recent contract disruptions caused by the COVID-19 pandemic.[206] Even under normal circumstances, large-scale gatherings like conventions, weddings, and concerts might sometimes need to be canceled. A musician might catch a cold, for example, requiring them to cancel a show.[207] A couple might have travel issues due to weather, causing them to need to push back the date of their destination wedding.[208]

When these events occur, parties often renegotiate, whether or not the contract explicitly allows for adjustment of terms.[209] For example, when buying a ticket, ticketholders may have agreed that if the concert is canceled, it will be rescheduled, and their tickets will be automatically transferred to another date.[210] And even though the

206. *See COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, https://www.huntonak.com/en/covid-19-tracker.html (last visited Nov. 22, 2021) (identifying 933 contract disputes filed in response to alleged pandemic-related breaches).

207. *E.g.*, Dee Lockett, *Rihanna Cancels Grammy Performance Due to Bronchitis*, VULTURE (Feb. 15, 2016), https://www.vulture.com/2016/02/rihanna-cancels-grammy-performance-bronchitis.html [https://perma.cc/W6KQ-4MC3] (reporting that Rihanna had to cancel her 2016 Grammy Performance because of bronchitis); Jocelyn Vena, *Taylor Swift Cancels Tour Dates Due to Illness*, MTV NEWS (July 6, 2011), http://www.mtv.com/news/1666883/taylor-swift-tour-dates-cancelled-illness [https://perma.cc/QE69-BKYD] (reporting that Taylor Swift had to cancel several dates on her summer 2017 tour after coming down with bronchitis); Emily Yahr, *What Happens When a Major Concert Gets Canceled at the Last Minute?*, WASH. POST (Apr. 28, 2014), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/04/28/what-happens-when-a-major-concert-gets-canceled-at-the-last-minute [https://perma.cc/32NL-P5TZ] (mentioning recent concerts that have been canceled because performers fell ill).

208. *Local Couple May Have to Postpone Wedding Because of Hurricane Michael*, ABC NEWS (Oct. 10, 2018), https://www.13abc.com/content/news/Local-couple-may-have-to-postpone-their-wedding-because-of-Hurricane-Michael-496704491.html [https://perma.cc/B8B5-JCXH] (reporting on a couple whose dream Florida wedding was threatened by Hurricane Michael).

209. *E.g.*, Christopher Elliott, *Yes, It's Possible to Get a Refund on a Nonrefundable Airline Ticket; Here's How*, USA TODAY, https://www.usatoday.com/story/travel/advice/2019/07/19/flight-refund-how-to-get-refund-on-nonrefundable-plane-ticket/1772832001 [https://perma.cc/R934-4FXX] (July 21, 2019) (detailing an airline customer's successful efforts to get a refund after canceling a nonrefundable ticket); Michael Lee, *Washington Wizards Have Plan to Reimburse Season Ticket Holders*, WASH. POST (Oct. 7, 2011), https://www.washingtonpost.com/blogs/wizards-insider/post/wizards-plan-to-reimburse-season-ticket-holders/2011/10/07/gIQAvyf8SL_blog.html [https://perma.cc/PK5E-98K5] (detailing the Washington Wizards' plans to reimburse season ticket holders for games lost because of the NBA lockout).

210. *E.g.*, *Updated Information About Event Status, Refunds, and Options*, TICKETMASTER (Jan. 1, 2021), https://blog.ticketmaster.com/refund-credit-canceled-postponed-rescheduled-events [https://perma.cc/L3CU-MABE] ("[A]ny refund

contract between the wedding venue and the betrothed may not explicitly allow for rescheduling of weddings, a venue that hopes to make its customers happy might try to accommodate an unforeseen travel delay. A similar dynamic occurs in advanced supply chains affected by the current pandemic around the globe.[211]

Regulatory involvement throws a wrench in these renegotiations—even if that regulatory involvement is necessary. During the 2020 pandemic, for example, many states and cities banned large-group gatherings.[212] Parties organizing large-group events faced a new challenge: how should they renegotiate their contract given the uncertainties of the unfolding pandemic?[213] Many organizers chose to cancel their plans entirely, or to guess at how long postponements might need to be.[214] Others chose to postpone and to comply with

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and/or credit policies are determined on an event-by-event basis by the Event Organizers, and may be subject to limitations set by the Event Organizer.").

211. *See*, *e.g.*, Didier Chenneveau, Karel Eloot, Jean-Frederic Kuentz & Martin Lehnich, *Coronavirus and Technology Supply Chains: How to Restart and Rebuild*, MCKINSEY & CO. (2020), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Operations/Our%20Insights/Coronavirus%20and%20technology%20supply%20chains%20How%20to%20restart%20and%20rebuild/Coronavirus-and-technology-supply-chains-How-to-restart-and-rebuild.pdf [https://perma.cc/J2AH-EVFR] (recommending ways that companies can design and build their future supply chains with risk management firmly in mind); *Beyond COVID-19: Supply Chain Resilience Holds Key to Recovery* (2020), BAKER MCKENZIE, https://www.bakermckenzie.com/-/media/files/insight/publications/2020/04/covid19-global-economy.pdf [https://perma.cc/C5RJ-CQAG] (exploring how the global pandemic is reshaping supply chains and sectorial activity and providing where to look for recovery as lessons emerge on long-term business resilience); *Navigating COVID-19: Supply Chain Considerations*, CLEARY GOTTLIEB (July 15, 2020), https://www.clearygottlieb.com/-/media/files/alert-memos-2020/navigating-covid19-^t supply-chain-considerations.pdf [https://perma.cc/FT9P-8UW9].

212. *See, e.g.*, Zeke Emanuel, Topher Spiro, Maura Calsyn, Thomas Waldrop, Nicole Rapfogel & Jerry Parshall, *State and Local Governments Must Take Much More Aggressive Action Immediately to Slow Spread of the Coronavirus*, CTR. FOR AM. PROGRESS (Mar. 14, 2020), https://www.americanprogress.org/issues/healthcare/news/2020/03/14/481763/state-local-governments-must-take-much-aggressive-action-immediately-slow-spread-coronavirus [https://perma.cc/VH3C-WH64] (reviewing state and local bans on large gatherings because of COVID-19).

213. Alex Sherman, *Shedding Tears, Negotiating Refunds and Zoom Weddings: Getting Married in the Age of Coronavirus*, CNBC (Mar. 28, 2020), https://www.cnbc.com/2020/03/27/coronavirus-and-weddings.html [https://perma.cc/5UGC-SE9M] (detailing wedding negotiations, cancellations, and postponements during the COVID-19 pandemic).

214. *See A List of What's Been Canceled Because of the Coronavirus*, N.Y. TIMES (Jan. 21, 2021), https://www.nytimes.com/article/cancelled-events-coronavirus.html [https://perma.cc/TT7J-L2DG]; Cady Lang, Eliana Dockterman, Andrew R. Chow, Ashley Hoffman, Megan Mccluskey & Rachel E. Greenspan, *Here's Your Comprehensive Guide to All the Events Canceled Because of the Coronavirus*, TIME (Mar. 24, 2020), https://time.com/5801956/events-canceled-coronavirus [https://perma.cc/X8AR

new government guidance.[215] Many state bar examiners chose this last route, choosing to postpone state bar exams and eventually host them in large rooms with physical distance between the exam-takers or with individual exam-takers sitting inside their own hotel rooms.[216] State actors, such as the U.S. federal government, commandeered private productive capacity, limiting parties' ability to renegotiate their supply arrangements.[217]

Of course, regulatory interventions such as those are necessary, particularly in a crisis of the current pandemic's scale. Our point here is more subtle, though no less important: current contract theory has not appreciated how the regulatory overlay affects renegotiation, and the conventional wisdom of how contract design can shape renegotiations has an important blind spot.

In short, layered contracting can limit renegotiation, introducing both social costs and benefits. These effects have been entirely overlooked in prior research, and this Article sets the stage for future work to explore this important policy issue.

C. STRUCTURAL RESPONSES TO THE CHALLENGES OF DEPTH

Contract design provides another avenue for dealing with the issues of complexity and layered contracting. Other scholars—and us,

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-KNUF] (listing major events that have been canceled because of the COVID-19 pandemic); *COVID-19 Complaint Details*, HUNTON ANDREWS KURTH COVID-19 RESOURCE CENTER, https://www.cognicion.com/covid (select "Contract Disputes" in the "Category, Subcategory" filter; then select "Event cancellation" in the "Contract Disputes" drop down options) (listing contract disputes due to COVID-19 event cancellations).

215. *Olympic Games Postponed to 2021*, TOKYO 2020 (Mar. 24, 2020), https://tokyo2020.org/en/news/joint-statement-from-international-olympic-committee-and-tokyo2020 [https://perma.cc/KC7D-MVJ9].

216. *July 2020 Bar Exam: Jurisdiction Information*, NATIONAL CONFERENCE OF BAR EXAMINERS (Sept. 24, 2020), https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information [https://perma.cc/ME77-6BDX] (providing jurisdiction announcements about changes regarding the July 2020 bar exam); Stephanie Francis Ward, *Bar Exam in Hotel Rooms Offered Test-Takers Social Distancing and Private Bathrooms*, A.B.A. J. (Sept. 22, 2020), https://www.abajournal.com/web/article/bar-exam-in-hotel-rooms-offered-test-takers-social-distancing-and-private-bathrooms [https://perma.cc/DZJ7-SGE4] (detailing how test-takers completed the Texas bar exam in individual hotel rooms).

217. *See, e.g.*, Memorandum from the National Security & Defense to the Secretary of Health and Human Services, Order Under the Defense Production Act Regarding General Motors Company (Mar. 27, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company [https://perma.cc/AR9B-SL64].

in previous work[218]—have discussed the benefits of modularity in contract design.[219]

In general, the structure of how contract provisions are put together falls along a spectrum, with modular design on one end and integrated design on the other. A modular contract is one in which parts of the contract are separated from each other and connected through standardized connectors, so that each individual part can be easily replaced without disrupting the rest of the system.[220] Car tires are an example: they can easily be switched out without disrupting the rest of the car. On the other end of the spectrum is integrated design, where contractual provisions are thickly connected with each other and require each other to work.[221]

In previous work, we have discussed how modular design allows contract designers to make a clearer choice between a textual or contextual approach to interpretation.[222] One of us has also discussed how modular design allows multiple teams of contract designers to work on a project at the same time, and how modularity can also allow specialized areas of the law to be separated and worked on by specialist attorneys, thereby lowering contract-drafting costs.[223]

When contracts are layered, making contracts modular ex ante may also help reduce overall contracting cost. In previous Parts, this Article outlined a central challenge in layered contracting: it is hard, ex post, for courts to distinguish between the parts of the contract that primarily serve to memorialize the parties' bilateral agreement and the parts that parties include primarily for signaling value or regulatory compliance.[224]

Separating the contractual ends from the compliance-related parts of the contract may help. One participant, for example, described writing terms of service in plain language in one section of the contract, and appending the required regulatory language in an-

218. Hwang & Jennejohn, *supra* note 10.

219. *See, e.g.*, Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1176–77 (2006) (discussing modularity within individual contracts); George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177 (2013) (describing how modular contracts improve collaboration in creating standardized contract provisions).

220. Hwang & Jennejohn, *supra* note 10, at 300–01.

221. *Id.* at 301.

222. *Id.*

223. Hwang, *supra* note 157.

224. *See supra* Part III.A.

other section. In theory, this can help courts interpret contracts more efficiently ex post.

But using modularity to distinguish the layers of the contract remains, at this junction, a conceptual approach—numerous practical hurdles remain. Most obviously, it can be tricky—if not impossible—to separate regulatory overlays from contractual means. Even apparently simple modular separations can be thwarted by logistical hurdles. For example, one interview participant noted that, as general counsel, he wanted to create different forms of the same contract for use in different jurisdictions.[225] His business team, however, sometimes found the multiple forms to be too cumbersome as a practical matter.[226] As a result, that company used the same form—with a provision that was dictated by only one jurisdiction's particular law—in multiple jurisdictions.[227]

A challenge for future research, then, is to consider ways to more cleanly separate (or label) the ways that layered contracting influences contractual means, with the purpose of helping to streamline interpretation.

CONCLUSION

Many modern contracts have depth that accrues as parties speak to multiple audiences—not only courts and commercial communities but also regulators. Through a series of interviews with general counsel, executives, and law firm partners advising in a wide range of markets, this Article shows how these additional audiences affect both the structure and substance of contracts. This Article argues that drafting agreements to multiple audiences attenuates the connection between parties' economic ends and their contractual means. Contractual depth may also make the renegotiation of agreements more difficult—or "sticky"—which introduces both costs and benefits in the contracting process. Finally, the Article also explains how modular design may address the complexities that arise from contractual depth. Overall, the Article strikes an exploratory note, inviting further theoretical and empirical research on the new issues it illuminates.

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225. Interview #7 (July 8, 2019).

226. *Id.*

227. Interview #1 (Dec. 18, 2018). For more on the limits of modularity in contract design, see Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71 (2018) and an excellent recent intervention by Tal Kastner, *Systemic Risk of Contract*, BYU L. REV. (forthcoming 2021) (on file with authors).

APPENDIX A: INTERVIEWS AND METHODOLOGY

The findings in this Article are informed by interviews with highly qualified attorneys who have experience as contract negotiators in a variety of contexts. The attorneys had experience either as in-house counsel or in private practice, and some attorneys had experience in both types of positions. Most attorneys had familiarity primarily with a single practice type and industry, but a number of the interviewees had experience with multiple industries and practice types over the courses of their careers.

The interviews were semi-structured.[228] When interviewing participants, we asked the same set of open-ended questions about contracting. We took notes and transcribed the answers in real time.

For brevity and anonymity, each interview participant is identified within the text of the article by a reference term, which is noted in the chart below. To protect participants' anonymity, we promised not to identify any participant or their company by name, and, within the text, we often edited out details from answers that we believed would too easily identify the participants and their employers.

To identify interview participants, we used a snowball sampling technique, asking each interview participant at the end of the interview if they could introduce us to additional potential participants. The main shortcoming of this method is sampling bias. However, personal introductions helped us gain access to a group of highly qualified attorneys that would otherwise not speak to us. Without a personal introduction, it would be hard to gain access to these individuals.

The chart below provides more information about individual interview participants.

Reference Term	**Interview Date**	**Description**
Interview 1	December 18, 2018	General counsel, large private internet company
Interview 2	February 15, 2019	General counsel, large private internet company"
Interview 3	April 18, 2019	In-house attorney, large

228. For additional discussion of this method and broader questions of causal inference in qualitative research, see RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS (Henry E. Brady & David Collier eds., 2d ed. 2010); James Mahoney, *Strategies of Causal Inference in Small-*N *Analysis*, 28 SOCIO. METHODS & RSCH. 387 (2000).

Reference Term	**Interview Date**	**Description**
		public semiconductor company
Interview 4	April 19, 2019	Partner, law firm advising on Mergers & Acquisitions transactions
Interview 5	May 31, 2019	In-house attorney, large private internet company
Interview 6	June 12, 2019	Contracting officer, large public aerospace company
Interview 7	July 8, 2019	General counsel, large public insurance company
Interview 8	August 6, 2019	General counsel, large private energy company
Interview 9	October 8, 2019	Partner, law firm advising automotive suppliers and original equipment manufacturers
Interview 10	October 8, 2019	Partner, law firm advising automotive suppliers and original equipment manufacturers
Interview 11	October 8, 2019	Partner, law firm advising automotive suppliers and original equipment manufacturers
Interview 12	October 9, 2019	Partner, law firm advising automotive suppliers and original equipment manufacturers
Interview 13	October 10, 2019	Partner, law firm advising automotive suppliers and original equipment manufacturers
Interview 14	October 11, 2019	Partner, law firm advising automotive suppliers and original equipment manufacturers
Interview 15	December 21, 2020	Contracting attorney, U.S. Department of Defense