Parol Evidence Rules and the Mechanics of Choice
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Contractual obligations are chosen obligations. They are chosen in two senses. First, each party chose to enter into the agreement that generated their contractual obligations. Each assented to the deal. Second, the parties have the ability to choose the terms of their agreement, and thereby determine the content of their contractual obligations. Parties can decide what the deal is.

Many rules of contract law therefore address how parties choose. Some concern parties’ choices to enter into legally binding agreements. These include rules governing offer and acceptance, implied-in-fact contracts, Statutes of Frauds, and formation defenses. Other rules concern the terms parties have chosen. Examples include hierarchies of interpretive evidence, plain meaning rules, default obligations, and contra proferentem. Taken as a whole, these rules do two things: they tell adjudicators how to decide whether and how parties have exercised their power to choose; and they inform sophisticated parties what they must do to exercise a legally effective choice.

This essay argues that contract theorists should pay more attention to how contracting parties make choices and to how the law determines the choices they have made. Or as I put the point below, theorists should pay attention both to the mechanics of choice and to legal mechanisms for choosing. I make the case by exploring the relevance of both to one theory: Hanoch Dagan and Michael Heller’s choice theory of contracts.¹ Dagan and Heller argue that enabling party choice is a the core value of contract law. Yet they pay little attention to the mechanics of choice or legal mechanisms for choosing. That neglect, I argue, renders their theory incomplete.

I support that claim through a close examination of a single mechanism of contractual choice: the parol evidence rule. The analysis starts from Dagan and Heller’s suggestion that we do better with different laws of contracts for different transaction types, or “spheres of contract.” Examples of such spheres include agreements between firms, employment contracts, consumer contracts and intra-family agreements. I examine how, starting from a clean slate, we might design a parol evidence rule for each

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of two such spheres: negotiated contracts between firms and consumer contracts. Neither of the resulting parol evidence rules corresponds to parol evidence rules one finds in the case law or treatises. For negotiated contracts between firms, the analysis suggests a hard integration rule, requiring firms to say when they intend that a writing be integrated. For consumer contracts, I argue for automatic integration of standard terms against consumer-side parol communications, together with a mandatory rule that terms are not integrated against a business’s parol representations or promises to the consumer. The arguments for each rule rely in part on the social values at stake in that sphere. But the difference between the recommended rules derives from the different mechanics of choice in each. Whereas Dagan and Heller argue that local rules of contract law should be crafted in light of “the normative concerns driving different contract types,” this essay demonstrates that the mechanics and available mechanisms of choice are at least as important.

Along the way, the essay makes several other contributions. I argue against the English Law Review Commission’s argument that the parol evidence rule is not a distinctive rule of law. I provide an analysis of parol evidence rules that emphasizes rules for integration, an oft overlooked element of any parol evidence rule. I argue that contemporary formalist scholars have not been formalist enough in their thinking about integration in contracts between firms. And I provide a critical analysis of the parol evidence rule in the American Law Institute’s draft Restatement of the Law of Consumer Contracts.

Part One introduces Dagan and Heller’s choice theory, as well as the ideas of the mechanics of choice and legal mechanisms for choosing. Part Two provides an overview of existing parol evidence rules by way of a critical analysis of the English Law Review Commission’s 1986 report on the rule. Part Three argues that the mechanics of choice in two types of transactions, negotiated contracts between firms and consumer contracts, recommend different integration rules for each. Part Four briefly draws some conclusions, both for thinking about Dagan and Heller’s choice theory and contract theory more generally.

1 The Choice Theory and the Mechanics of Choice

Isaiah Berlin suggested that thinkers can be divided into two broad camps: foxes and hedgehogs. The categories play on a fragment from Archilochus: “The fox knows many things, but the hedgehog knows one big thing.” A hedgehog is a system builder. Hedgehogs relate all things to “a single, universal, organising principle in terms of which alone all that they

2 Id. at 7.
are and say has significance.”4 A fox attends more to difference. Foxes’ thinking is more “scattered or diffused, moving on many levels, seizing upon the essence of a vast variety of experiences and objects for what they are in themselves, without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision.”5

In The Choice Theory of Contract, Dagan and Heller describe Samuel Williston as something like the Grand Hedgehog of Contract Law. Williston attempted to construct a unified theory of contract law as a whole, taking commercial contracts as the paradigm and ignoring the many differences in the laws that govern other types of transactions. “This distinctive, early twentieth-century American trajectory elevated commercial transactions to the core of contract, and, as a byproduct, substantially obscured the generative role of diverse contract types.”6 Dagan and Heller suggest that many contracts scholars remain captive of this Willistonian world-view, seeking unifying principles and generally applicable rules.

Dagan and Heller recommend, of course, that contract theorists look at the world more like foxes.7 In fact, they argue, there are many different types, or “spheres,” of contractual transactions. Examples include agreements between businesses of various types, employment relationships, consumer transactions, and agreements among family members. Because different spheres implicate different values, the law should not treat all alike. More specifically, the sometimes competing values of community

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4 Id.
5 Id. at 1-2
6 Dagan & Heller, supra note 1, at 8.

It is worth noting that Book V of the first edition of Williston’s treatise, which occupies the bulk of volume two, was devoted to “Particular Classes of Contract.” These included chapters on Contracts for the Sale of Land, Contracts for the Sale of Personal Property, Contracts of Employment and Contracts to Marry, Contracts of Bailment and of Innkeepers, Contracts of Affreightment, Bills of Exchange and Promissory Notes, and Contracts of Suretyship. 5 Samuel Williston, The Law of Contracts § 633, 1225 (1st ed. 1924) (hereinafter “Williston (1st)”).

and efficiency take on different forms and receive different weights depending on the sphere of contracting. A universal law of contract cannot take account of the specific mix of values at stake in one sphere or another. We should not, therefore, seek one big law of contract, but should instead construct local contract laws for the various spheres of contracting.

But this is not all. In addition to this intersphere legal pluralism, Dagan and Heller also advocate for intrasphere pluralism of contract types and terms. No matter the social values at stake in one or another sphere, parties’ autonomous choice should remain a guiding principle. Party autonomy is valuable for at least two reasons. First, and most familiarly, autonomous choice is a good in itself. Second, autonomous choice can address the fact that even within a single sphere of contracting there is no one right way to balance competing values. Party choice provides a means of resolving conflicts between our normative commitments.

Dagan and Heller suggest that the law should enable intrasphere choice in two ways. First, the law should ensure that within any given sphere there is a choice among “contract types”—pre-established or off-the-rack transaction structures. Predefined contract types promote efficiency. By giving individuals a menu to choose from they reduce transaction costs. But they are more than that. Contract types also enhance autonomy by providing pre-established relational forms that embody various mixes of values and share cultural meanings, thereby generating new meaningful forms of acting together. “[W]hen contract law offers us multiple contract types, it participates in the ongoing social production of stable categories of human interaction by consolidating people’s expectations of themselves and others. In this, law enlarges the range of valuable options available to us.”

But choice among contract types is not the only choice parties should be able to make within a given sphere. Autonomy requires also granting parties the power to make alterations to the off-the-rack contract types society offers. A commitment to voluntariness “implies that people should generally be able to choose not only among various contract types, but also terms within each.” Dagan and Heller’s “choice theory” therefore advocates both a choice among contract types, and the power to choose to alter individual terms of a type.

Although Dagan and Heller say a lot about the value of choice, they do not say much about how parties make such choices. There are two salient dimensions to how contracting parties choose. The first is parties’ preexisting abilities to choose, and the conditions under which they are able to make informed, autonomous and therefore valuable choices. I will

8 Dagan & Heller, supra note 1, at 80.
9 Id. at 3.
10 Id. at 76.
11 Id. at 109.
call this the “mechanics of choice” in one or another sphere of contracting. Although Dagan and Heller do not spend a lot of pages on the topic, they do not ignore the mechanics of choice altogether. For example:

Sometimes, cognitive, behavioral, structural, and political economy reasons imply that more choice may actually reduce freedom. But those circumstances will be local to certain contract types or market structures, not universal to contract as a whole. Frankly, we just don’t know in which contexts the probable effects of these concerns are significant enough to justify limiting multiplicity. ¹²

Dagan and Heller also argue that the mechanics of consumer choice suggest mandatory restrictions on businesses’ ability to include hard-to-read terms like arbitration clauses or class-action waivers. “[C]hoice theory implies that [these terms’] inclusion in consumer contracts should not be able to upset consumers’ background expectation of relatively unimpeded access to courts or to reasonably equivalent procedures for dispute resolution.”¹³

Dagan and Heller have less to say about a second topic, which I will call the “mechanisms of choice.” These are the tools that the law gives parties for exercising their power to choose, or what Ian Ayres has called “altering rules.”¹⁴ Consider, for example, Dagan and Heller’s positive view of section 17.42 of Texas’s Deceptive Trade Practices and Consumer Protection Act, which empowers consumers to waive the Act’s protections.¹⁵ Dagan and Heller are in favor of the opt-out provision, as “people should, in some circumstances, be able to choose between purchasing a good with the protections of consumer transaction law or by using sales law.”¹⁶ They do not discuss, however, what a consumer must do to opt out of such protections—the mechanisms needed to ensure a fully informed and valuable choice.

¹² Dagan & Heller, supra note 1, at 127. See also id. at 74 (“The impediments to secure contracting often depend on the specific features of the particular contract type and therefore each type requires its own legal facilitation.”), 106-07 (suggesting that how people choose and the design of choice mechanisms “should be . . . a major focus of behavioral and institutional economics studies of contract law”).
¹³ Id. at 112.
¹⁶ Dagan & Heller, supra note 1, at 71. See also id. at 82 (advocating that consumers be able “make their own (individual) choices between the ‘souk’ or ‘bazaar’ mode of ‘as is’ contracting and the ‘errands’ model of consumer protection law”).
It is worth paying attention to those details. Section 17.42 requires that “(1) the waiver is in writing and is signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; and (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.”\(^{17}\) It further requires that the consumer’s counsel be independent of the business. And it requires that the waiver be:

1. conspicuous and in bold-face type of at least 10 points in size;
2. identified by the heading “Waiver of Consumer Rights,” or words of similar meaning; and
3. in substantially the following form: “I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver.”\(^{18}\)

This choice mechanism makes perfect sense given the mechanics of consumer choice—the challenges of ensuring informed consumer agreement to a term such as this. The Texas legislature appears to have been worried that a consumer might assent to waive the Act’s protections without fully understanding what she was giving up, as consumers regularly assent to unread standard terms. The resulting mechanism of choice, however, is enormously expensive for consumers. One might guess that few if any Texans will exercise this power of choice that the Texas legislature has granted them.

The remainder of this essay examines one of the most important mechanisms of choice in U.S. contract law: the various versions of the parol evidence rule. A parol evidence rule affects mechanisms of contractual choice in two ways. First, if a writing is integrated, the rule limits the evidence an adjudicator may consider when determining what terms parties have chosen. In this way, parol evidence rules determine how parties can exercise their power to choose terms. Sometimes parties must express their choice of terms in a writing. Second, modern parol evidence rules treat integration as itself a matter of choice. A writing is integrated only if the parties have agreed that it shall be a final statement of some or all of the terms of their agreement. U.S. courts have crafted several rules for determining when parties have made that choice. That is, they have provided parties with various mechanisms for exercising the choice to integrate.

It is widely recognized that different U.S. jurisdictions employ different parol evidence rules. Most accounts of those rules, however, describe each as a single rule for all contracts. The choice theory suggests

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\(^{18}\) Id. § 17.42(b) & (c).
taking a more vulpine perspective. Perhaps there is not, or should not be, one big parol evidence rule, but local parol evidence rules for distinct spheres of contracting.

Two empirical studies suggest that courts might in fact apply the rule differently in different categories of transactions. In 1972, Robert Childres and Stephen Spitz reported a study of 149 cases in which they found courts more likely to apply the rule strictly to contracts between parties with some expertise and business sophistication, and less likely to apply it strictly to contracts between parties lacked such sophistication. And though not a comparative study, the Reporters for the American Law Institute’s draft Restatement of the Law of Consumer Contracts (“Draft Restatement”) state that they find the vast majority of courts applying a soft parol evidence rule to consumer contracts—holding that a presumption of integration is rebuttable, whether or not the writing contains an integration clause.

Part Three explores the idea of local parol evidence rules from the design perspective, focusing on two spheres of contracting: negotiated contracts between firms and consumer contracts. The analysis does not start from the parol evidence rules courts in fact apply, but asks how if we were to start from a blank slate we might design a parol evidence rule for each sort of transaction. I argue that the design should reflect not only the values at stake, but also the mechanics of choice in each sphere. Before getting there, however, it is necessary to say a few words about parol evidence rules generally.

2 Parol Evidence Rules: The Basics

All modern parol evidence rules share a basic structure. A finding that a writing is integrated limits, in one way or another, the evidence that an adjudicator may consider to determine the content of the parties’ agreement. The limitation applies to evidence from outside the writing—“parol” or “extrinsic” evidence. A partially integrated writing excludes parol evidence of terms contrary to those in the writing; a completely integrated writing excludes parol evidence of terms contrary or in addition to those in the writing. We might call this the “terms” component of a parol evidence rule, as it cuts off evidence of contrary or additional terms. Some have


suggested that integration should also limit the types of evidence an adjudicator may consider when interpreting the words in the writing. More specifically, they have argued that except in cases of ambiguity, the words in an integrated writing should be interpreted according to their plain meaning—the meaning that can be gotten from the writing alone, without the aid of extrinsic evidence. I suggest calling this the “interpretive” component of a parol evidence rule. U.S. jurisdictions differ on the details of both the terms component and the interpretive component of the parol evidence rule.

Interesting and important as these sub-rules are, I want to focus on a third part of any parol evidence rule: the rule for determining whether a contractual writing is integrated, and if so, whether partially or completely. I will call this the “integration component,” or the “integration rule.”

There is today broad agreement that a writing is integrated if and only if the parties both intended that it would serve a final statement of some or all terms of their agreement. As Williston puts the point: “The parol evidence rule does not apply to every contract of which there is written evidence, but only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.” Similarly for Corbin, a writing is integrated when the parties “have both assented as the complete and accurate integration of that contract.” Integration, everyone today concurs, is a matter of party agreement.

In a 1986 report on the parol evidence rule, English Law Review Commission suggested that it follows from the agreement-based understanding of integration that there is in fact no such thing as a parol evidence rule.

22 Among U.S. scholars, the claim dates back at least to Wigmore, who emphasized that the integration question “is a question of the nature of the act and of the party’s intention to embody it solely in the writing.” 4 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 2427, 3423 (1905). Judicial expressions of the idea can be found even earlier. Thus in an 1859 case in the Court of the Exchequer, Lord Pollock held that the defendant could introduce parol evidence that a bill of sale had been given as security for an earlier loan, reasoning:

The jury have found that it was agreed to give the bill of sale; they have not found, nor does it appear to us, that the writing was intended to contain the whole agreement, and we are of opinion that the rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.


23 2 Williston (1st) § 633, 1225.

Although a proposition of law can be stated which can be described as the “parol evidence rule” it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of a contract. We have considerable doubts whether such a proposition should properly be characterized as a “rule” at all.25

If integration is merely one contract term among others, then what has traditionally been called the “parol evidence rule” is in fact no more than a specific application of general principles of contract law. It is not the existence of the writing that matters, but the content of the parties’ agreement, as with any other contract term.

The conclusion which emerges . . . is that there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intentions of the parties, objectively judged, and not on any rule of law.26

In fact, a writing is not even necessary. On the agreement-based view, parties could integrate an oral exchange by agreeing that it shall serve as a final statement of some or all of their agreement.27 If integration is simply a matter of agreement, the so-called parol evidence rule is nothing more than a specific application the general law of contract.

Although it relied in part on several U.S. sources, the Law Commission reached this conclusion in with respect to the parol evidence rule in England only. And perhaps the claim that there is no distinctive parol evidence rule in English law is correct, or partly correct. But it does not describe parol evidence rules in the United States. There are at least three reasons why this is so.

First, the fact that parties have the power to contract for one or another type of term is not a given, but is itself a rule of law. Contract law sets a host of mandatory limits on parties’ ability to contract. Parties do not

26 Id. § 2.16, 13 (emphasis in original).
27 Id. § 2.20, 14-15 (citing commentators who hold this view).
have the power to contract for terms contrary to public policy. A contract for murder will not be enforced. An employer and employee do not have the power to contract for a salary below the minimum wage, or out of safety or antidiscrimination laws. A landlord and residential tenant do not have the power to contract out of the implied warranty of habitability. Corporate board members cannot fully contract out of their fiduciary obligations to shareholders. The power to contract for one or another term is not a given. It results from lawmakers’ choice to grant persons that power.

This is all the more so with respect to a term like integration, which limits the evidence courts may consider when determining the parties’ legal obligations. Contract law grants parties broad powers to determine their first-order obligations to one another—roughly, the obligations whose nonperformance constitutes a breach. But integration is not about the parties’ first-order obligations. It is what might be called a “framework rule.” Framework rules do not specify the parties’ performance obligations, but determine how those obligations can be undertaken, how they will be construed, the consequences of their breach, who will adjudicate disputes, and the like. As Jody Kraus and Robert Scott put the point, such terms concern not the contractual ends—the parties’ proximate reasons for entering into the transaction—but the contractual means—the legal tools parties can use to accomplish those ends.

Although contract law empowers parties to modify many framework rules, it also places limits on those powers. The penalty rule, for example, curtails parties’ ability to determine the remedy for breach. Parties do not have the power to contract out of liability for fraud in the inducement. A clause that requires modifications to be in writing is likely to be ineffective under common law, though effective under the Uniform Commercial

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28 In addition to first-order duties, a contract might provide for first-order permissions, powers and other jural relations. I ignore these additional types of contract terms only for the sake of simplicity.


31 See ABRY Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1059, 1061, 1064 (Del. Ch. 2006) (refusing to enforce clause limiting liability for fraud); Restatement (Second) of Contracts § 196 (1981) (“A term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy.”).
And some jurisdictions require that a choice of law clause specify “the law of a jurisdiction which has a real relation to the contract.”

The distinction between first-order and framework terms is important inter alia because the reasons for extending freedom of contract with respect to first-order terms need not apply pari passu to framework terms. As Ian Macneil observed, the power to contract should be defined and limited by “the general purposes of society in enforcing contracts through its courts.” The framework rules that govern the creation, interpretation and enforcement of contractual agreements should reflect society’s reasons for enforcing exchange agreements. Limits on parties’ ability to contract for first-order obligations are often reasonably described as one or another form of parentalism. Limits on parties’ ability to contract for alternative framework rules are more likely to reflect the social interests in enforcement, interests that individual parties do not get to decide.

One can easily imagine a legal world in which contracting parties did not have the power to specify a writing’s evidentiary value. In fact, prior to the emergence of the agreement-based parol evidence rule it was not obvious that parties had such a power. The best evidence rule automatically excluded oral evidence of terms contrary to those in a writing, and did not provide parties a means for choosing otherwise. The parol evidence rule does not simply flow from general principles of contractual freedom. It represents a legal decision to grant to parties the power to determine a writing’s legal effects. That makes it a rule of law.

The second error in the Law Commission’s suggestion that the parol evidence rule is not a distinct legal rule is that the parties’ agreement that a writing shall be the final statement of some or all of the terms might do more than exclude extrinsic evidence of contrary or additional terms. It might also trigger a plain meaning rule of interpretation, whether or not the parties agreed to that rule. More generally, the law might attach to the

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35 The best evidence rule established an evidentiary hierarchy: written evidence, which was commonly under seal, could not be contradicted by oral evidence. See generally Salmond, The Superiority of Written Evidence, 6 L. Q. Rev. 75 (1890).
36 There is some confusion among authorities on the interpretive component of U.S. parol evidence rules. In the first edition of his treatise, Williston advocated a plain meaning rule for integrated agreements. See 2 Williston (1st) § 606, 1164-67. Corbin rejected that interpretive rule on the theory that meaning can never be plain except in context. See Arthur Linton
parties’ agreement to integrate default legal effects that go beyond the content of that agreement.\textsuperscript{37} If a parol evidence rule includes an interpretation component, though that component is triggered by the parties’ agreement to integrate, it is not itself a matter of agreement. It is a legal default.

One might object that a plain meaning interpretive component is designed to capture how a majority parties expect or want their integrated writing to be interpreted, and therefore is also agreement based. Williston, for example, argues that a plain meaning interpretive component reflects how most parties think about an integrated writing.

In an ordinary oral contract or one made by correspondence, the minds of the parties are not primarily addressed to the symbols which they are using; they are considering the things for which the symbols stand. Where, however, they incorporate their agreement into a writing they have attempted more than to assent by means of symbols to certain things, they have assented to the writing as the adequate expression of the things to which they agree.\textsuperscript{38}

\textsuperscript{37} I say that interpretation components specify default legal effects because parties could presumably contract out of plain meaning interpretation by expressing their intention that the agreement be interpreted in light of the surrounding context. Such clauses are rare, but not unheard of. In \textit{Corthell v. Summit Thread Co.}, for example, the Maine Supreme Court considered an employment agreement that “specified that the terms of the contract were ‘to be interpreted in good faith on the basis of what is reasonable and intended, and not technically.’” 167 A. 79, 80 (Me. 1933).

\textsuperscript{38} 2 Williston (1st ed.) § 606, 1165.
If most parties who produce integrated writings prefer that those writings be interpreted according to their plain meaning, then a plain meaning interpretation component is designed in a way to capture their intentions or agreement.

That response, however, does not save the Law Commission’s thesis that the parol evidence rule is merely an application of general contract law principles. A plain meaning interpretive component remains a default rule. It does not require that parties actually agree that the writing will be interpreted according to its plain meaning, but simply attaches that consequence to the parties’ agreement that the writing serve as a final statement of terms. It might well be that an interpretation component is designed to effectuate what most parties would agree to if they considered the issue. But the resulting interpretive rule is not a product of the parties’ agreement to it.

Third, and most significantly for my purposes, if integration is a matter of agreement there must also be a legal rule that governs how parties can or must express their agreement to integrate for it to be legally effective. That is, an agreement-based parol evidence rule must include an integration component, a mechanism of choice.

U.S. courts recognize two ways parties can effectively express or evince their shared intent to integrate. First, parties can include in the writing an integration clause. An integration clause expressly says that the writing is the final statement of some or all terms. For example:

This instrument embodies the whole agreement of the parties. There are no promises, terms, conditions, or obligations other than those contained in this contract, and this contract shall supersede all previous communications, representations, or agreements, either verbal or written, between the parties.

Second, if the writing contains no integration clause, a court will look to whether it appears to be intended as final statement of some or all terms. “Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement.”

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39 Although integration clauses occasionally address how the writing should be interpreted, many do not.
40 Putting the question in these terms clarifies that the parol evidence rule also includes a default. In U.S. law, the generic default is that a writing is not integrated.
42 Restatement (Second) of Contracts § 209(3) (1981).
Modern U.S. parol evidence rules therefore establish two mechanisms of integration—two ways that the parties’ can effectively express or indicate their agreement to integrate. I will call the first the “express prong” of the rule, and the second the “implied prong.” Just as a contractual agreement can be either express or implied-in-fact, so too an agreement to integrate can be either express or implied. A writing that contains an integration clause is expressly integrated. When the parties have not expressed their agreement to integrate in words, but the character of the writing indicates such an agreement, the writing is impliedly integrated.

Although U.S. courts broadly agree on the two prongs of the integration rule, they differ on what evidence a decision maker may consider when determining the parties’ intent to integrate.

The integration components of more formalist, or “harder,” parol evidence rules provide that if the writing appears on its face to be intended as a final statement of some or all the parties’ obligations, it is integrated. That is, a writing alone can suffice to demonstrate its integration, even if there exists contrary parol evidence. Extrinsic evidence of the parties’ intent vel non to integrate is admitted only if the writing alone does not answer the question. As Williston puts it, “the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms.”

The integration components of less formalist, or “softer,” parol evidence rules are quicker to permit extrinsic evidence. The decision maker should always consider all available evidence of the parties’ intent, even if the writing appears to be integrated—in fact, even if it includes an integration clause. Thus Corbin writes: “If the offered evidence is relevant and credible on the issue of . . . integration, it should never be excluded, for the reason that, whatever are the written words, those issues are always debatable.” The Second Restatement adopts Corbin’s approach: “A writing cannot of itself prove its own completeness.”

The current edition of Williston’s treatise acknowledges that the Second Restatement adopts a soft integration rule, but reports that the majority rule is a hard one. The most recent edition of Farnsworth’s

43 Williston (1st ed.) § 633, 1226.
44 Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L.Q. 161, 173 (1965). See also Arthur L. Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 642 (1944) (“Just as no written document can prove its own execution, so none can prove that it was ever assented to as either a partial or a complete integration, supplanting and discharging what preceded it.”).
treatise, on the contrary, suggests that “the prevailing view [is] that other evidence, including evidence of prior negotiations, is still admissible to show that a writing was not intended as a final expression of the terms it contains.”\textsuperscript{47} Under either rule, extrinsic evidence may be introduced to show an invalidating cause such as misrepresentation, duress or mistake.

To summarize this third point: The express and implied prongs identify two ways parties can effectively express their intent to integrate. Hard or soft evidentiary rules further specify what evidence courts may consider when determining whether the parties have satisfied one or the other prong.\textsuperscript{48} \textit{Pace} the Law Commission Report, none of these components simply follow from the general principles of contract law. They are legal rules that determine what parties must say or do to effectively integrate a writing. They are legally established mechanisms of integration.

The Law Commission was therefore wrong to conclude that because integration is a matter of agreement, the so-called parol evidence rule is not a distinct rule of law. It is not a given that parties should have the power to determine a writing’s legal effect. The fact that the law grants them that power is a substantive rule. Depending on the jurisdiction, integration can also have legal effects that extend beyond the content of the parties’ agreement. An agreement that the writing shall be a final statement of terms can trigger a plain meaning rule, a default legal effect that does not stem from the parties’ agreement. And U.S. parol evidence rules specify not only that parties have the power to integrate a writing by agreement, but also how they can effectively express that agreement, and what evidence legal decision makers may consider when determining whether the parties have reached such an agreement. These rules too are not matters of party agreement.

\section{Integration Rules and Spheres of Contracting}

The above discussion follows the vast majority of judicial statements and scholarly discussions by treating the parol evidence rule as one rule for all contractual agreements. As noted above, there is some empirical evidence that courts apply the rule differently depending on who the parties are or the sort of transaction they are engaged in. This Part argues that there are good reasons to adopt different parol evidence rules for, to use Dagan and Heller’s terminology, different spheres of contracting. I discuss two spheres: negotiated contracts between firms and consumer contracts. The method is top down. Rather than looking at how courts in fact apply the

\begin{itemize}
    \item \textsuperscript{47} 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.3, at 227 (3d ed. 2004).
    \item \textsuperscript{48} An even more complete and complex description of integration rules would also discuss the fact that there are rules for both partial and complete integration, and that these might differ from one another.
\end{itemize}
rule in each of these spheres, I ask what rule they should apply in each. I
begin by describing the social values at stake and the mechanics of consent
in each sphere. I then ask what parol evidence rule would best serve those
values given those mechanics. This analysis suggests parol evidence rules
for these spheres that significantly differ from the common, generic
formulations of the rule, and from each other.49

3.1 Negotiated Contracts Between Firms

Consider first transactions in which two large firms negotiate the
details of a high-value exchange. To keep things simple, I’m going to help
myself to Alan Schwartz and Robert Scott’s description of such exchanges.50
Whether or not correct in all its details, their account will provide a useful
element to work with.

The transactions Schwartz and Scott analyze have three
caracteristics. First, both parties are sophisticated, meaning that each has
the knowledge and reasoning capacity to identify the terms that best serve
its interests. “Firms and markets are structured so as to minimize the
likelihood of systematic cognitive error by important decision makers
within the firm.”51 Second, a firm’s primary goal is to maximize shareholder
returns, which it achieves by maximizing its own profits.52 Third, in a
transaction between two firms, the way each maximizes its individual profit
is by maximizing the joint surplus, which will be split between them
according to each firm’s exogenously determined bargaining power.53 In
addition to these three features, I will limit my analysis to contracts in
which a significant number of terms have been negotiated. This excludes,
for example, an adhesive end-user license agreement that might exist
between two firms by virtue of an employee’s decision to update a software
package. I am interested in written agreements that both sides have read

49 Eric Posner has also recommended a tailored parol evidence rule. But he
considers only the decision between hard and soft versions of the rule.
“[W]hen contracts are conventional and complex, soft-PER is optimal. . . .
When contracts are unconventional and simple, hard-PER is optimal.” Eric
A. Posner, The Parol Evidence Rule, The Plain Meaning Rule, and The
50 Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of
51 Id. 545-46. Schwartz and Scott suggest the following rough-and-ready
rule for which firms meet this description: “(1) an entity that is organized in
the corporate form and that has five or more employees, (2) a limited
partnership, or (3) a professional partnership such as a law or accounting
firm.” Id. at 545.
52 Id. at 550-51.
53 Id. at 549.
and understood. This is the case when firms have negotiated a significant number of terms.

I am also going to help myself to Schwartz and Scott’s thesis that society enforces agreements between firms for the same reasons firms enter into them, namely, to secure the greatest gains of trade possible. Society does not enforce agreements between firms because, for example, such agreements generate a moral obligation to perform, because their breach creates a moral obligation to compensate, or because they generate intrinsically valuable relationships or forms of community. Society enforces these agreements because doing so increases overall welfare.

This similarity between society’s reasons for enforcing firm-to-firm agreements and firms’ reasons for entering into them, together with the assumption that firms are sophisticated in the sense defined above, entails that contract law should be designed to give firms both the first-order and the framework terms that they want. Firms, pursuing their own ends, can be expected to choose the contract terms that also advance society’s reasons for enforcing their contracts. It is the above assumptions that generate the observed congruence between efficiency and autonomy theories of contract law.

All this provides support for an agreement-based parol evidence rule for contracts between firms. In this sphere and under the above assumptions, we should want courts to treat a writing as integrated if and only if the parties intend it to be a final statement of some or all terms. What this means at the design level is crafting an integration rule that gives firms maximal power to determine when a writing is integrated. Contract law should provide firms a cheap, fast and predictable mechanism for determining a writing’s legal effects.

It is a little odd that U.S. law does not provide a formality that sophisticated parties can use to signal their intent to integrate. The parol evidence rule confers on parties a legal power. It enables them to determine a writing’s legal effects by expressing their shared intent that it serve as a final statement of legally effective terms. A short, canonical form with

54 *Id.* at 546 (arguing that it is futile “to pursue either distributional goals or contractual fairness” in contracts between firms, as “firms will contract away from redistributive or fair legal rules that do not maximize joint surplus”).


56 The following analysis assumes that the default is that a writing between firms is not integrated. This is the current rule, and makes a fair bit of sense. Firms produce many writings during the course of negotiations. It would be strange to expect them to say for each one that it is not intended to be a final statement of terms.
which to express that intent would be extremely useful. Karl Llewellyn, no advocate of formalism writ large, recognized that “a business economy demands a means of quick, not one of ‘informal’ contracting.” 57 Although form books are full of model integration clauses, there exists in U.S. law no canonical formula, comparable to “F.O.B.” or “as is,” that parties can use to integrate a writing. The seal once served something like that function, and still does in some jurisdictions. But the seal was always a blunt instrument, as putting a writing under seal had other legal effects as well. 58 A legally efficacious formality—such as printing the words “Final Statement of All Terms” or “Final Statement of Terms Included” at the top of a document—would provide parties who wish to integrate the writing a useful tool for doing so. The fact that U.S. law includes no such formality is a historical accident, perhaps attributable to a general movement away from formalities in the early twentieth century, the period during which the modern, agreement-based parol evidence rule was popularized.

Given that U.S. law does not include an integration formality, what should the integration rule for negotiated contracts between firms be? Recall that there are in the U.S. two prongs to generic integration rules. To satisfy the express prong, the parties must express their intent to integrate in an integration clause; to satisfy the implied prong, it must appear from the writing as a whole that the parties intended it as a final statement of some or all terms.

An express integration rule provides firms a cheap and certain means of effectively expressing their intent to integrate. Thus if two firms negotiate a writing that includes an integration clause, courts should at least presumptively treat the writing as integrated. The only question is whether they should consider extrinsic evidence that might suggest a contrary result—whether the express prong should be a hard or a soft rule.

A number of efficiency-minded scholars have applied cost-benefit analysis to argue that sophisticated parties prefer textualist interpretive approaches generally. 59 Under the above assumptions, cost-benefit analysis

57 K. N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 741 (1931). Llewellyn pointed to empirical evidence in support: “[W]hen we see the great exchanges devising means for exchanging written and signed memoranda of sales of grain and stocks—and, so far as an outsider can determine, profiting by the necessity—the notion that speed requires utter informality loses cogency.” Id. at 740. See also Richard Craswell, Offer, Acceptance and Efficient Reliance, 48 Stan. L. Rev. 481, 544-53 (1996).
58 Again Llewellyn makes the point, arguing that the problem with the seal as not the seal itself, but “the persistence of archaic and arbitrary incidents in promises effective purely through their ancient form.” Id. at 739.
59 See, e.g., Craswell, supra note 57, at 544-53; Kraus & Scott, supra note 29; Posner, supra note 49; Schwartz & Scott, supra note 50; Robert E. Scott,
is appropriate in this sphere. By maximizing joint gains, cost-benefit analysis advances both the interests of firms and those of society in maximizing welfare. If these writers are correct, it follows that firms are better served by a hard express integration prong.

Avery Katz has argued that such cost-benefit arguments for textualism are incomplete. The problem is that we lack good empirical data about key variables. These include the relative costs of drafting and of adjudication under various rules, parties’ responsiveness to legal rules of construction, the accuracy gains that can be expected from permitting extrinsic evidence of meaning, and whether permitting extrinsic evidence makes outcomes more or less predictable. “[T]he traditional scholarly approach to form and substance founders on a lack of information about the likely consequences of formal and substantive modes of interpretation.”

I agree with Katz that we lack the empirical data to know whether textualism is more efficient generally. But I believe the cost-benefit analysis is more tractable if we limit ourselves to a narrower question: Should courts consider extrinsic evidence when construing an integration clause in a negotiated writing between firms. To keep things relatively simple, I focus on four variables: (1) interpretive accuracy, or how likely a third-party adjudicator’s interpretation is to match the parties’ actual agreement; (2) costs of drafting; (3) costs of adjudication; and (4) predictability of outcomes.

A natural solution in such circumstance is to let sophisticated parties decide for themselves, on the assumption that they generally know more than lawmakers do about which framework rules serve their interests. That solution is not available, however, for the integration rule—which is in part a rule for deciding how the parties have decided which interpretive approach they prefer. Even if we want to allow parties to choose how their choices are to be interpreted, we still need a rule for determining when and how they have exercised that choice.

I am using “interpretive accuracy” to refer both to the absence of adjudicative error—when a court misreads the parties’ expressed intent—and to the absence of party error—when the parties fail to express themselves as the legal rule requires for their desired result.

For other lists of relevant factors, see Alan Schwartz & Robert E. Scott, Contract Interpretation Redux, 119 Yale L.J. 926, 941 (2010); Katz, id. at 522-36; Posner, supra note 49, at 543-47.
In negotiated transactions, both parties have taken some care to read the writing. And if both parties are firms, in the sense defined above, they have understood it. Absent fraud, duress or some other invalidating cause, the existence of an integration clause is therefore extremely strong evidence that the parties intended the writing to be a final statement of terms. Neither firm is likely to have agreed to the language by mistake. Nor are courts likely to mistake an integration clause’s meaning—the legal effect the parties intend. Permitting extrinsic evidence of the parties’ intent to integrate would therefore result in few gains in accuracy. It is true that excluding such evidence might cause some parties to invest more at the drafting stage, so as to ensure that the integration clause unambiguously expresses their intent to integrate (costs a canonical formality would reduce). But there exist many form clauses to copy and paste, and any increase in drafting cost is likely offset by the advantage of lower adjudication costs, greater accuracy and greater predictability. With respect to express integration, then, the largest gains come from excluding extrinsic evidence of the parties’ intent to integrate, unless it is introduced to show fraud, duress or some other invalidating cause.

All this suggests a hard express integration rule for firm-to-firm negotiated contracts: A writing is integrated if it expresses the parties’ intent to integrate in the form of an integration clause, regardless of any extrinsic evidence that the parties did not intend to integrate it. What about when the writing does not include an integration clause? Should the integration rule for negotiated contracts between firms also include an implied prong?

There is a good argument that, on the above assumptions, implied integration is out of place in this sphere. The law does not recognize implied arbitration, implied damage limitation, implied no-modification or implied anti-waiver clauses. It more than a little strange that it recognizes implied integration. There are two reasons to think firms would to better without implied integration—with what I will call a “strict express integration rule.”

First, absent an integration clause, interpretation of the parties’ intent to integrate is likely to be more expensive, less accurate, and more difficult to predict. Rather than enforcing the writing’s express terms, a court must infer what the parties probably intended its legal effect to be—either from the writing alone (a hard implied integration rule) or from the writing plus extrinsic evidence (a soft implied integration rule). In either case, the evidence will be circumstantial at best, which means more erroneous and unpredictable outcomes. And the interpretation of implied meanings is always more resource intensive and less certain than is the interpretation of express ones. On might guess that on this basis alone sophisticated parties, who value cheap, accurate and predictable judicial findings, are likely to say when they intend a writing to be integrated.
Second, firms are *ex hypothesi* highly responsive to legal rules. Just as we can expect a plain meaning rule to cause sophisticated parties to invest more to express their agreement clearly,\(^6\), so a strict express integration rule will make it all the more likely that sophisticated parties will add an integration clause to writings they intend to be final statements of terms—especially since the costs of doing so are so low. If the law were to require firms who wish to integrate a writing to say so, the vast majority would do just that, magnifying the rule’s advantages.

Of course a strict express integration rule would increase drafting costs. And some parties who intend a writing to be a final statement of terms might forget to say so in it. But those costs should be weighed against the potentially large gains in accuracy and predictability, as well as reduced litigation costs. So long as firms are largely responsive to the integration rule, there seems little to be gained by and much to be lost by recognizing implied integration.

To my knowledge, no one who recommends formalist rules of interpretation for agreements between firms has suggested a formalist integration rule of this type. Eric Posner, who advocates a hard parol evidence rule for certain categories of transactions, does not say that those parties should be required to express their intent to integrate in words.\(^{63}\) Jody Kraus and Robert Scott argue that courts should respect parties’ choice of framework rules, or “contractual means,” including their choice of a rule of interpretation. But when Kraus and Scott discuss the parol evidence rule, they simply state that courts “have devised various neutral tests for determining whether parties intended to integrate part or all of their agreement into a final, legally enforceable writing.”\(^{64}\) And though Alan Schwartz and Robert Scott recommend a hard integration rule for agreements between firms,\(^{65}\) they also support the “presumption . . . that the contract is fully integrated if it appears final and complete on its face,” and


\(^{63}\) Posner, *supra* note 49.

\(^{64}\) Kraus & Scott, *supra* note 29, at 1047. *See also id.* at 1052 n.124 (“Courts have long recognized that a writing can be found to be a total integration even in the absence of a merger clause.”). The appellate case Kraus and Scott use to illustrate how the parol evidence rule should work dealt with a writing that seems not to have included an integration clause. *Id.* at 1053-62 (discussing *Hunt Foods and Indus. v. Doliner*, 270 N.Y.S.2d 937 (App. Div. 1966)). The lower court in the case had applied a soft implied integration rule, concluding that the writing was integrated based on the circumstances surrounding its execution. *Hunt Foods & Indus., Inc. v. Doliner*, 49 Misc. 2d 246, 249 (N.Y. Sup. Ct. 1966), rev’d, 26 A.D.2d 41 (N.Y.A.D. 1966).

\(^{65}\) Schwartz & Scott, *supra* note 50, at 589-90.
argue that such a rule “maximizes party discretion over the content of the legally enforceable contract.”

It is a little odd for these formalists to adopt such non-formalist integration rules. In firm-to-firm transactions, party control over integration is not maximized by a rule that allows courts to make judgment calls absent an express statement of the parties’ intent to integrate. Exactly the opposite. Assuming arguendo that the empirical evidence supports formalism writ large in this sphere, it also supports requiring firms that want to integrate a writing to say so. That is, it supports a strict express integration rule.

3.2 Consumer Contracts

A consumer contract is a contract between an individual buyer acting primarily in her private capacity—the consumer—and a business that regularly sells goods, services, software or other products to such individuals. In a typical consumer contract, the business drafts a set of standard terms without consumer input. The business then gives those standard terms, which are often lengthy and written in technical language, to consumers on a take-it-or-leave-it basis. The consumer pays attention not to the standard terms, but to a few primary terms, such as the price and the description of the product—how well the product will work, its entertainment value, how long it will last, etc. Whereas the primary terms are put in front of the consumer’s eyes, the standard terms are listed separately in an accompanying document or on a linked webpage, or they arrive later with the product. The consumer, who is focused on primary terms, almost never reads or comprehends the standard terms, but indicates her assent to them by signing at the bottom of a long document, by clicking a HTML button labeled “I agree,” by completing the transaction to which the terms are appended, or by not cancelling the transaction when the terms arrive.

There are important differences between the mechanics of choice in consumer contracts and those negotiated contracts between firms. In a consumer contract, the parties arrive at the transaction with different incentives, knowledge and cognitive abilities. Businesses that sell to consumers are repeat players. As such, it makes sense for them to invest significant resources, including attorney time, in drafting the standard terms they give to consumers so as to ensure that those terms serve the business’s interests. Consumers do not hire lawyers to read the standard terms they are given, and typically do not have the legal sophistication necessary to fully understand them. And because most consumer transactions are low-value, the risks of significant harm slight, and the business’s terms adhesive, it is not rational for the consumer to invest the resources it would take to understand the business’s standard terms. It is not rational for consumers to

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66 Schwartz & Scott, supra note 61, at 960.
read, and in fact most do not. Thus on one side of a consumer contract is a business sophisticated enough to draft standard terms that serve its interests, and on the other is a consumer who has not read or understood those terms. As the Reporters for the draft Restatement of the Law of Consumer Contracts observe this “asymmetry in information, sophistication, and stakes between the parties to the contract” presents a fundamental challenge to the law of contracts.

Although the mechanics of choice in consumer contracts differ from those in negotiated contracts between firms, the values at stake are similar. Dagan and Heller observe that consumers do not typically want rich relationships with the businesses that sell to them. For consumers, these transactions “are like errands whose friction needs to be minimized if contract is to be loyal to its ultimate normative commitment to autonomy as self-determination.” Moreover, when the business is a firm whose primary goal is to maximize its own returns, it would be a mistake for the consumer to think she was entering into a morally thick relationship. Thus Dagan and Heller suggest that consumer contract law be structured to “prevent[] firms from (ab)using consumes’ misconceptions of being morally bound to comply with, rather than challenge, unfavorable conditions.”

The value of a typical consumer contract is not the relationship it creates between the consumer and a firm, but the welfare gains to each party. In this respect consumer contracts are not so different from negotiated contracts between firms: the goal of contract law should be to help both sides maximize the gains of trade. Or so I will assume for the analysis that follows.

All that said, the asymmetries between the parties to a consumer transaction suggest that considerations of fairness are more salient in this sphere than they are in firm-to-firm transactions. Whereas a firm has the capacity to secure its share of any surpluses of trade, it is not obvious that consumers are always in a position to do so—at least insofar as unread standard terms affect the division. Thus the commonly felt need for oversight of such terms, whether ex ante by regulating permissible terms or ex post by judicial review for substantive unconscionability.

So what should a parol evidence rule for consumer contracts look like? The mechanics of choice in this sphere, and especially the fact that consumers do not read standard terms, suggest that there is little point to adopting an agreement-based parol evidence rule—a rule that conditions

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68 Draft Restatement, Reporters’ Introduction, at 1.
69 Dagan & Heller, supra note 1, at 81.
70 Id. (citing Tess Wilkinson-Ryan, Intuitive Formalism in Contract, 163 U. Pa. L. Rev. 2109 (2015)).
integration on the parties’ shared intent that a writing serve as a final statement of terms. Consumers care about price and product features. It is almost impossible to get them to pay attention to standard terms. This general truth almost certainly applies to technical terms like integration clauses. No matter what the mechanisms of choice, the mechanics of choice mean that most consumers will not be aware of or understand a contractual provision the terms are integrated. Agreement without understanding provides no obvious benefits here.

That said, there are good reasons to treat a business’s written standard terms as integrated against at least some forms of extrinsic evidence. Those reasons derive from the argument for permitting businesses to set standard terms in the first place.

Standard terms can, under the right conditions, benefit both businesses and consumers. The reason is that standardizing terms allows a business to save resources by spreading the costs of drafting over many transactions. In a competitive market, we can expect the business to pass at least some of those savings on to consumers in the form of a lower price.

Of course there is also the worry that permitting businesses to unilaterally set standard terms might harm consumers—the fairness concern noted above. Even if the happy story about reduced prices is true, there is no guarantee for any given standard term that the resulting price reduction will exceed its substantive costs to consumers. If, for example, an arbitration clause with a class-arbitration waiver effectively prevents consumers from enforcing their legal rights, it is not obvious that consumers come out ahead, even if they pay a somewhat lower price as a result. And standard terms might have negative externalities or offend our sense of fairness in other ways.

If we are worried that business will use their unilateral power to impose inefficient or unfair terms, the solution is not to insist that consumers make more informed choices. Lawmakers cannot change the mechanics of consumer choice, any more than a mechanical engineer can alter the laws of physics. The solution is, rather, to set substantive limits on

71 For a vivid illustration, see Omri Ben-Shahar & Adam S. Chilton, *Simplification of Privacy Disclosures: An Experimental Test* (April 13, 2016), http://dx.doi.org/10.2139/ssrn.2711474 (finding that warning boxes highlighting terms many consumers might find important had little effect on consumer comprehension, decision making or understanding of their legal rights).

72 In fact, agreement without understanding can have negative consequences. Thus Tess Wilkinson-Ryan has suggested that consumers’ agreement to predictably and rationally unread terms can cause them to believe that they are bound by terms to which they might otherwise and which might be legally unenforceable. *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017).
the content of the standard terms firms can choose, either through ex ante regulation or ex post judicial scrutiny.

Assume for the sake of argument that we have or could construct a system of substantive checks that permits businesses to set standard terms in a way that increases welfare on both sides. Such a system can realize the advantages of standardization only if individual consumers do not have the power to alter a business’s standard terms. But existing rules of contract construction could allow just that. Under Article Two of the Uniform Commercial Code, for example, if one party makes a counter proposal with different or additional terms, subsequent performance by the other can either operate as an acceptance of those terms or, in some circumstances, extinguish contrary terms in the earlier offer. Under such a rule, a consumer might alter a business’s standard terms by sending the business a pre-purchase message proposing an alternative term, knowing the message will likely be lost in the shuffle of corporate bureaucracy. If the business then fulfills the order, it might unwittingly accept those terms or alter its own. Though the individual consumer might benefit from having her proposed term included in the agreement or having the business’s standard term deleted, the result would be a system of contracting that would ultimately cost all consumers. The costs would come from a combination of business-side expenses associated with the nonstandard terms and business-side policies designed to protect against such consumer-side modifications—costs that in a competitive market would be passed on to consumers in the price. In short: if standard terms can benefit all parties, then a rule that thwarts individual consumer attempts to modify standard terms benefits both consumers and businesses.

All this suggests treating standard terms in consumer contracts as completely integrated against consumer-side communications. In other words, a consumer should not be permitted to introduce her own extrinsic communications as evidence of terms that are contrary or additional to the business’s standard terms.

What about business-side communications? Such communications might include extrinsic representations to consumers generally or extrinsic agreements that the business’s agents might enter into with a single consumer. A business might have good reasons to want to integrate standard terms against such parol evidence. It might, for example, want to protect itself against the risk that one of its agents will misrepresent to a consumer the standard terms, or make promises or assurances that extend beyond those terms. Integration can reduce a business’s agency costs, producing savings that the business can pass on to consumers in the form of lower prices.

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73 The above is a much oversimplified description of the rule in U.C.C. 2-207.
Such considerations might be compelling if consumers typically read and relied on standard terms or understood that standard terms are integrated, putting them on notice not to rely on an agent’s statements. But we know that neither is the case. When it comes to rogue agents, businesses are the cheapest cost avoiders. The example illustrates a broader principle. As the reporters for Draft Restatement of the Law of Consumer Contracts put the point: “Since the standard contract terms do not represent a joint effort by both parties of drafting and memorializing a negotiated agreement, there is less justification to allow them to override business-side affirmations or promises made to the consumer.”74 In fact, is difficult to see why a predictably unread standard term in a consumer contract should prevent the enforcement of other affirmations or promises that the consumer is likely to see and understand.

The upshot of the above discussion is twofold. First, the mechanics of choice in the sphere of consumer contracts militate against an agreement-based integration rule. Whether standard terms are integrated should not depend on the parties’ shared intent to integrate.75 Second, there are good reasons to treat all standard terms as completely integrated against consumer-side communications, and not integrated against communications by the business. That is, integration should be complete but of limited effect. It should excluding only some types of extrinsic evidence.

Together these points suggest for consumer contracts a mandatory or default rule that standard terms are completely integrated against consumer-side communications, and a mandatory rule that they not integrated against business-side communications. If the consumer-side component of the rule is a default, a business could opt-out of it by including something like an anti-integration clause in its standard terms—though it is not obvious why any business would want to do so. Under no circumstances, however, should a business be able to integrate its standard terms against its own communications. That is, the limited effect of integration should be mandatory.

The current draft Restatement of the Law of Consumer Contracts, which seeks to state the rule courts currently apply to consumer contracts, tracks some of the above suggestions. Most important in this respect is section 8(a): “Standard contract terms presumptively constitute an integrated agreement with respect to these terms.” This rule departs from the Restatement (Second) of Contracts, which states that absent an

74 Draft Restatement § 8 cmt. 3.
75 Wigmore, who was very influential in establishing the modern agreement-based parol evidence rule, also recognized that some types of legal documents are subject to “compulsory integration,” in which case the parties’ agreement to integrate is unnecessary. See Wigmore, supra note 22 §§ 2450-2453, 348-59 (discussing “Integration required by Law”).
integration clause a writing is completely integrated when “in view of its completeness and specificity [it] reasonably appears to be a complete agreement.” Section 8(a) instead attaches a presumption of integration to all standard terms, no matter the character of the writing or how the writing appears to the court.

Moreover, although section 8(a) does not address the effect of the presumptive integration—whether it applies to both consumer-side and business-side communications—other provisions of the Draft clarify that the integration of standard terms does not exclude business-side parol communications. Thus section 7 provides that “[a]n affirmation or promise made by the business, which is made part of the basis of the bargain, becomes part of the contract,” and that “[s]tandard contract terms that purport to negate or limit [this rule] are not enforceable.” And section 6 states further that “[m]aking a material affirmation of fact or promise that is inconsistent with the standard contract terms” is presumptively deceptive, rendering the contract voidable by the consumer. Together these rules provide a mandatory exemption of significant business-side parol communications from the effect of integration—as the above analysis recommends. The Draft does not include parallel rules for consumer-side parol communications, meaning that they would be excluded by section 8(a)’s presumption of integration.

That said, other parts of the Draft differ from the rule I have argued for. Although section 8(a) provides for a default integration rule, section 8(b) states: “Standard contract terms containing an express complete integration clause presumptively constitute a completely integrated agreement with respect to the transaction.” This provision suggests that the presumptive integration rule in section 8(a) is not a complete integration, but a partial one. A partial integration excludes only evidence of terms contrary to those in the writing, and not evidence of additional terms. The argument for integrating standard terms against consumer-side parol communications,

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76 Restatement (Second) of Contracts § 209(3) (1981) (emphasis added).
77 Id. § 7(a) & (c).

Section 7(a) limits itself to business-side affirmations or promises that are “made part of the basis of the bargain.” The reporters adopt that limitation based on the Uniform Commercial Code’s rules for warranties, which provide that a seller’s affirmation, promise, description or sample creates an express warranty only if it is “part of the basis of the bargain.” U.C.C. § 2-313. See Draft Restatement § 7 cmt. 2. The comments to section 2-313 suggest that seller statements are presumptively part of the basis of the bargain “unless good reason is shown to the contrary.” U.C.C. § 2-313 cmt. 8. If this is what “basis of the bargain” means in the Draft Restatement, the “basis of the bargain” language in section 7(a) might not make much of a difference in practice.
78 Id. § 6(b)(1).
however, applies equally to evidence of additional terms. The section 8(a) presumption should be that standard terms are completely integrated against consumer-side communications, which would render section 8(b) otiose. It is also worth noting that sections 8(a) and 8(b) describe soft integration rules. Each creates only a “presumption” of integration, rebuttable by extrinsic evidence. Although this is consistent with the approach of many courts and the Second Restatement, section 8(c) adds something new. Whereas most soft integration rules leave it up to the court to determine, based on the totality of the evidence, whether the parties intended the writing as a final statement of some or all of the terms, section 8(c) identifies only one type of extrinsic evidence sufficient to defeat the presumption of integration.

The presumptions in subsections (a) and (b) are rebutted when the standard contract terms contradict or unreasonably limit an affirmation or promise, which is made part of the basis of the bargain between the business and the consumer.

The comments state that this provision is the logical corollary of sections 6 and 7, discussed above, which suggests that the rule applies only to business-side parol communications. In other words, section 8(a) says that a business’s parol affirmation or promise that was part of the basis of the bargain but varies from the standard terms renders standard terms non-integrated.

It is not obvious that this rule is intended to mean what it says. Sections 6 and 7 together limit the effect of integration. Section 7 exempts from any integration business-side communications that are part of the basis of the bargain; section 6 supplements that rule by classifying business-side communications that material differ from standard terms as misrepresentations, triggering other consumer-protective measures. This means that a business’s standard terms can be integrated against consumer-side communications, but not against business-side ones. Section 8(c), however, states that the presumption of integration is “rebutted” when a standard term that contradicts or unreasonably limits an extrinsic affirmation or promise. Read literally, this means that a single parol affirmation or representation by the business that varies from the standard terms might render the standard terms as a whole non-integrated. This would open the door to any evidence of contrary or additional terms—including consumer-side evidence. Although such a rule might deter firms from making parol promises or representations that vary from the standard

79 Draft Restatement § 8 cmt. 3.
terms, it is not clear that the punishment fits the wrong—especially as the
rule does not require fault.\textsuperscript{80}

One might guess that section 8(c) is intended to address not whether
the standard terms are integrated, but the limited effects of integration. All
this could be fixed by replacing sections 8(a), (b) and (c) with a single rule
providing that standard terms are automatically integrated with respect to
c consumer-side communications and are never integrated with respect to
business-side ones.

Although I believe the Draft Restatement gets the details wrong, it
gets the broader point right. Agreement-based integration rules are out of
place in consumer contracts. If allowing businesses to set terms is likely to
result in greater consumer welfare (a big “if”), we achieve better outcomes
with a default or mandatory integration rule—one that does not turn on the
parties’ agreement. At the same time, and for some of the same reasons,
efficiency recommends mandatory limits on the effects of integration.
Standard terms should never displace a business’s contrary or additional
parol affirmations or promises, though they should withstand a consumer’s
unilateral attempts to modify them.

\section{Implications for a Choice Theory of Contract}

The above analysis illustrates the value of attending both to the
mechanics of choice and to the available mechanisms of choice when
thinking about different legal rules for different spheres of contracting.
Dagan and Heller argue that “application of familiar contract concepts . . .
should vary depending on the normative concerns driving different contract
types.”\textsuperscript{81} But even if we hold normative concerns constant—as the above
analyses of negotiated contracts between firms and of consumer contracts
largely do—the mechanics of choice can recommend varying the rules of
contracting. These variations can include both differences in the
mechanisms of choice that the law provides parties and differences in the
choices parties are empowered to make. More generally, the quality of
choice matters. Party choice adds value when the law can provide, given
the local mechanics of choice, mechanisms of choice that in practice
enhance party autonomy.

The above discussion only begins to address these issues. For one
thing, parol evidence rules govern, in Dagan and Heller’s vocabulary,
parties’ ability to choose contract terms, as distinguished from their choice
among pre-established contract-types. The mechanics of choice are also

\textsuperscript{80} The better deterrent is that suggested in section 9 of the Draft
Restatement, which allows a court to replace a derogating term with “[a]
term that operates against the business, if the derogating term was inserted
by the business in bad faith.” Draft Restatement § 9(3).

\textsuperscript{81} Dagan & Heller, supra note 1, at 7.
relevant to thinking about whether and how the law should provide choice among contract types. It is not enough, for example, to simply say that workers should be given a choice between being employees and being independent contractors.\textsuperscript{82} We need to know more about whether, given the mechanics of choice in this sphere, there exist mechanisms that in practice give workers the ability to make valuable choices in the matter.\textsuperscript{83} The same holds true for giving consumers a choice between contract types, as illustrated by Part One’s discussion of Texas’s attempt to provide for consumer choice.

In addition, the above analysis considers two spheres in which similar values are at stake. Maximizing the welfare gains for each party is paramount in each. It might be that mechanisms of choice should also vary depending on the normative concerns of one or another sphere of contracting. In contexts in which we want contract law to support thicker moral relationships or forms of community, yet other variations on the parol evidence rule might be appropriate. If, for example, society’s reasons for enforcement involve the parties’ actual moral obligations to one another, we might want it to be more difficult for parties to prevent courts from examining relevant extrinsic evidence of their actual agreement.\textsuperscript{84} A complete choice theory of contract would address not only what parties in various contracting spheres should be able to choose, but also the mechanisms of choice that best serve the normative concerns within each sphere.

Although there remains more to say, the above discussion is enough to demonstrate the importance of paying greater attention to both the mechanics of choice and available mechanisms of choice. Dagan and Heller have a lot to say about giving parties the power to choose and the choices that should be available to them. They say much less about the mechanics and available mechanisms of choice—how parties make legally efficacious choices. But party choice can operate to enhance autonomy and resolve competing values only when parties are willing and able to choose. Whether and where this is the case is relevant to any theory of contract law, including the choice theory. It is not enough, for example, to argue in the

\textsuperscript{82} Id. at 112.

\textsuperscript{83} Dagan and Heller recognize something like this concern when they discuss possible reasons for limiting freedom of contract. Id. at 130.

\textsuperscript{84} I have elsewhere made a related argument for adopting different legal rules for determining parties’ intent to contract in four contexts: gratuitous promises, preliminary agreements between firms, agreements between spouses, and reporters’ promises of confidentiality. Gregory Klass, Intent to Contract, 95 Va. L. Rev. 1437, 1469-99 (2009). The law does and should adopt rules for interpreting parties’ intent to contract depending on the “different balances between the sometimes conflicting reasons the law has for holding promisors liable for their breaches.” Id. at 1442.
abstract that a commitment to party autonomy allows us to resolve conflicts between and disagreements about the values within any given sphere of contracts. The availability of that solution depends on the actual mechanics and available mechanisms of choice within each sphere.