Private Rules and Standards

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There is an enormous literature on rules and standards as forms of legal commands. Most of this literature focuses on rules and standards in public laws such as statutes, regulations, and judicial opinions. Less attention is given to the rules/standards choice in private legal drafting, such as in contracts, wills, or patents.

Considering the rules/standards choice in private drafting raises novel issues that the literature has not adequately examined. Unlike legislatures and agencies that are supposed to act in the public interest, private drafters are motivated by their own self-interest. The rules/standards choice in private legal drafting therefore depends not only on well-known public policy considerations such as a balance between the certainty of rules and the flexibility of standards, but also on a drafter's private self-interested incentives.

This Article presents a model of these incentives and how they affect the rules/standards choice. Under the model, whether a rule or standard will be written depends on a delicate balance between the self-serving incentives of private drafters and the anticipated resistance of courts. Private drafters benefit from rules that can be slanted in their own favor but are constrained by the higher costs of rule drafting and the likelihood of judicial resistance to slanted rules. On the other side, courts prefer setting aside slanted rules in favor of standards that allow them greater discretion to reach the just outcome but are constrained by the higher adjudication costs of standards, and therefore must tolerate and enforce some slanted rules. Understanding this

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balance provides insight into drafting choices and interpretative debates regarding contracts, patents, and other private legal instruments.

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INTRODUCTION

There is an enormous literature on the choice between rules and standards in formulating legal directives.[1] Whether explicitly or implicitly, this literature frames the discussion around the context of government-made public legal directives such as statutes, regulations, and judicial holdings.[2] The universe of legal directives, however, is not limited to public laws made by the government. There is a much larger body of privately written legal directives such as contract terms, bequests in wills, and patent claims, all of which can take the form of either rules or standards.[3] How the rules/standards analysis maps onto privately written legal directives has not received the same degree of scholarly attention.[4] Even when scholars do consider rules and

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[1] For a small sampling of the extensive literature, see H.L.A. HART, THE CONCEPT OF LAW 124-36 (3d ed. 2012); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967); Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[2] *See, e.g.*, Schlag, *supra* note 1, at 381 (defining the universe of legal directives subject to the rules-versus-standards analysis as "constitutions, statutes, judicial opinions, and administrative orders"); Ehrlich & Posner, *supra* note 1, at 281 (analyzing "the extent of efficient precision of *public* rules as well as the optimal balance between rules promulgated by the *legislative, executive, and judicial branches of government*") (emphasis added); Kaplow, *supra* note 1, at 567 (reflexively assuming that a "branch of government" will be "involved in the promulgation" of the legal directive).

[3] *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) ("[A]utomobile manufacturers make more warranty law in a day than most legislatures or courts make in a year.").

[4] Some articles in contract law do draw on the rules-versus-standards literature to consider how contracts are drafted. *See, e.g.*, Pierpaolo Battigalli & Giovanni Maggi, *Rigidity, Discretion, and the Costs of Writing Contracts*, 92 AM. ECON. REV. 7 (2002) (providing a model of rigidity versus discretion in contracts); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 598-608 (2003) (arguing default rules and standards in contracts are based on joint welfare maximization between parties); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006) (applying rules/standards

standards in privately created legal instruments such as contracts or patents, they treat the issues as if they were largely identical to those in the sphere of public law.[5]

This unnoticed limitation on the rules/standards debate cramps our analysis because the public law framing contains an embedded set of limiting assumptions.[6] When the lawmaker is a legislature, executive agency, or appellate court, the legitimacy of these lawmakers is not questioned, and judicial obedience is usually assumed.[7] In the same vein, the rules/standards literature does not often consider the private incentives and motivations of lawmakers,[8] because it is not the role of inferior judges to second-guess the motivations of legislators and Justices.[9] The result of this framing is that the rules/standards debate is mostly a normative one, contrasting the effects of rules versus standards on social welfare. As Pierre Schlag puts it, "the most common view of the rules v. standards dialectic ascribes one set of virtues and vices to rules and another set of virtues and vices to standards."[10]

When a legal directive is made by a private party, such as in a standard form contract, the legitimacy and incentives of the drafter are not beyond question, and judicial obedience cannot be automatically assumed. When a drafter has private, self-serving incentives and judicial

framework to explain drafting choices in business contracts). As Part I.C will explain, however, these exceptions do not undermine my argument, because they still assume drafters with unquestioned legitimacy and good incentives — the same assumptions as in the public law literature. Dan Burk and Mark Lemley have also discussed rules and standards with respect to patent drafting, but they frame this as a public law issue because patents are (formally) issued by a government agency. *See* Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts?: Rethinking Patent Claim Construction*, 157 U. PA. L. REV. 1743, 1777-83 (2009).

[5] *See infra* Part I.C.

[6] *See, e.g.*, Ehrlich & Posner, *supra* note 1, at 261 ("We do not discuss these private rules in this article but they are undoubtedly an important feature of legal regulation.").

[7] *See infra* Part I.B.

[8] There is a large public choice literature that does question these incentives and motivations. *See, e.g.*, PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS (James D. Gwartney & Richard E. Wagner eds., 1988). But this literature rarely descends to the level of considering how this affects the form of laws as rules or standards.

[9] *See* Besinga v. United States, 14 F.3d 1356, 1362 (9th Cir. 1994) ("[I]t is not our place to second-guess Congress' motivations.").

[10] Schlag, *supra* note 1, at 399.

obedience cannot be taken for granted, the interesting question is not only whether a rule or standard is normatively better, but also the positive questions of (1) whether a rule or standard will actually be written by a self-interested drafter, and (2) whether that rule or standard will actually be followed by a possibly disobedient court. This Article will examine these neglected questions by providing a model where a private drafter with self-interested incentives will attempt to write slanted rules in its own favor, while being constrained by the possibility that courts will refuse to follow such slanted rules. In this model, courts will be initially disinclined to enforce slanted rules; however, courts are constrained from simply invalidating every slanted rule (and thereby imposing a standard) because doing so will increase the court's own adjudication costs. What the model predicts, therefore, is that there is an uneasy balance where drafters must consider the drafting costs of rules and the amount of slant they can get away with, while courts must correspondingly consider the increased adjudication costs of judicially imposed standards and the degree of slanted rule-drafting they will accordingly tolerate in order to avoid such costs.

Understanding this uneasy balance sheds light on various interpretative doctrines and debates in contract and patent law. To give just one example at this juncture, in the familiar debate over standard form (or boilerplate) contracts in contract law, a common argument is that boilerplate contracts are pervasively ambiguous.[11] Thus, the argument goes, courts should incentivize drafters to use clearer language,[12] such as by using the *contra proferentem* doctrine to interpret ambiguous language against the drafter,[13] or holding ambiguous terms

[11] Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105 (2006) ("Much of boilerplate is ambiguous or incomprehensible."); Jens Dammann, *Flytraps, Scarecrows, and the Transparency Paradox: The Case for Redesigning the Law on Vague Boilerplate Contracts*, 2018 U. ILL. L. REV. 185, 186 ("A seemingly perennial feature of boilerplate terms is that they lack clarity.").

[12] *See* Dammann, *supra* note 11, at 208 ("In principle, nothing prohibits merchants from using vague boilerplate. Hence, to ensure that such boilerplate become less popular, one would have to take two steps.").

[13] Econ. Premier Assurance Co. v. W. Nat'l Mut. Ins. Co., 839 N.W.2d 749, 755 (Minn. App. 2013) ("*Contra proferentem* . . . provides an incentive, especially for insurance

to be unconscionable.[14] Understanding the dynamics of private rules and standards reveals that this argument is backwards. The problem with boilerplate contracts is not that drafters lack incentives to write clear rules; the problem with boilerplate contracts is that private drafters have the incentive to write clear *but slanted* rules. And what courts are doing with doctrines such as *contra proferentem* or unconscionability is not about penalizing ambiguity or incentivizing clearer rules; it is instead about penalizing slant and reaching fair results through judicially imposing discretionary standards — by labeling linguistically clear, but unfairly slanted, rules as "ambiguous."[15] This explanation provides an answer to a longstanding puzzle that has been posed by numerous courts and commentators: why do corporate contract drafters keep using ambiguous boilerplate despite the multitude of doctrines courts have developed to incentivize clarity?[16] The answer is that those boilerplate terms are not actually ambiguous and the doctrines are not used to incentivize clarity; they are excuses that courts use to protect consumers from unfairness.[17]

Part I will begin with a background on the rules/standards distinction and the associated literature, with an emphasis on how this literature embeds unspoken assumptions about the lawmaker's legitimacy, the

companies who are in a better position to prevent misunderstandings, to avoid including ambiguities.").

[14] Dammann, *supra* note 11, at 208-09 (arguing for using "unconscionability doctrine in a way that allows courts to better police opaque boilerplate").

[15] *See* HEIN KÖTZ, EUROPEAN CONTRACT LAW 100 (Gill Mertens & Tony Weir trans., 2d ed. 2017) ("[I]n their eagerness to protect the consumer from unfair standard form terms, the courts have proved remarkably clever at discovering or divining 'ambiguities' in such clauses.").

[16] *See, e.g.*, New Castle Cnty. v. Nat'l Union Fire Ins. Co., 243 F.3d 744, 755 (3rd Cir. 2001) ("Insurance companies continue to employ the term 'invasion of the right of private occupancy' in their policies, despite twenty years of legal decisions finding that this term is ambiguous. It is instructive to ask why . . . because we cannot conceive of an answer.").

[17] This explanation is also consistent with the exception that contra proferentem is not applied when the counterparty is sophisticated. Beanstalk Grp., Inc. v. AM Gen. Corp., 283 F.3d 856, 858 (7th Cir. 2002). As an incentive mechanism, there is no reason why we would not want to give the drafter incentives for clarity when the counterparty is sophisticated. If contra proferentem is really a protect-the-weak doctrine, however, it makes sense not to apply it when the counterparty is not weak.

adjudicator's obedience, and proper incentives. Part II will introduce the topic of private rules and standards, beginning with the basic point that private instruments such as contracts, wills, and patents can all take the forms of rules or standards, and then exploring how well the conventional assumptions about the drafter's legitimacy, an adjudicator's obedience, and proper incentives apply to each context. Part III will provide a model of private rules and standards wherein a drafter with self-interested incentives must consider the possibility that a public-interested adjudicator may refuse to obey a slanted rule. In this model, the drafter has incentives to write slanted rules in its own favor but must consider the possibility of adjudicator non-enforcement. On the other hand, adjudicators will wish to resist slanted rules, but must consider the increased adjudication costs that arise from overturning a rule and thus judicially imposing a standard. Part IV will then explore the implications of the model and the uneasy equilibrium that results and explain its relevance in providing insights into contract and patent law. A conclusion then follows.

I. BACKGROUND: THE RULES/STANDARDS DISTINCTION

At the outset, it is useful to provide some basic background on the concepts of "rules" and "standards" and the surrounding debate for those who are not familiar with them. It is well known that legal directives can take the form of rules and standards.[18] These two forms of legal directives differ by how precisely they specify an outcome in response to triggering facts,[19] or how much discretion they leave open.[20] At one end of the continuum, "rules" are hard-edged commands that precisely specify an outcome with little room for discretion.[21] The paradigmatic example is a speed limit stating "no one may drive above 55 mph on the freeway." At the other end of the continuum, "standards" are legal directives that provide an open-ended principle to loosely guide decision-making but do not dictate how a decision should be made in

[18] Sullivan, *supra* note 1, at 57-58.

[19] Ehrlich & Posner, *supra* note 1, at 258.

[20] Sullivan, *supra* note 1, at 57.

[21] *Id.* at 58.

response to concrete facts.[22] The paradigmatic example is the reasonableness standard in negligence law.

Both rules and standards pervade the law, and the two are not really dichotomous but are extremes on a spectrum. Most legal directives are neither a pure rule nor a pure standard. For example, the doctrine of battery is more rule-like than the doctrine of negligence, but it is not quite as rigid and precise as a 55 mph speed limit; it sits in between the two extremes of the spectrum.[23] The point of drawing the rules/standards distinction is not to draw a sharp dichotomy, but to bring out the tradeoffs between their respective pros and cons.

A. The Literature on Pros and Cons

In the scholarly literature, "the most common view of the rules v. standards dialectic ascribes one set of virtues and vices to rules and another set of virtues and vices to standards."[24] Rules have the advantages of constraining judicial discretion and providing certainty about what the law requires, but have the disadvantage of being inflexible in the face of unforeseen circumstances, so that unswerving application of the rule sometimes leads to bad outcomes (e.g., a 55 mph speed limit on its face prohibits exceeding 55 mph even when necessary to deliver a critically injured person to a hospital).[25] Standards have the advantage of flexibility, but the disadvantage of being vague and uncertain, making advanced planning more difficult and increasing adjudication costs.[26]

Understanding the pros and cons of rules and standards is important because the tradeoff underlies many legal debates.[27] For example, take the classic 1L property case of *Pierson v. Post*.[28] Superficially, if one only reads the opinions in the case, the issue appears to be a dry historical

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[22] *Id.*

[23] *See* RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965).

[24] Schlag, *supra* note 1, at 399.

[25] MindGames, Inc. v. W. Publ'g Co., 218 F.3d 652, 657 (7th Cir. 2000).

[26] *Id.*

[27] *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 957 (1995) ("It would be hard to overstate the importance of the controversy between the two views. The controversy arises in every area of law . . . .").

[28] 3 Cai. 175 (N.Y. Sup. Ct. 1805).

investigation into what ancient legal authorities such as *Justinian's Institutes* say about the question of who has ownership of a fox.[29] But every 1L property student should also learn that a key reason the court ruled against the plaintiff (who had initiated pursuit of the fox) and in favor of the defendant (who had actually killed the fox) is that a rule based on physical possession is more determinate than a standard based on who initiated "pursuit,"[30] and certainty is an important virtue when it comes to allocating property rights.[31] The rules/standards distinction offers a vocabulary to help articulate and explain what the case is about at a normative policy level.

The rules/standards distinction is therefore a foundational concept in legal theory, and there is a massive literature on the subject.[32] At its core, the rules-versus-standards tradeoff is generally understood as primarily a tradeoff between certainty and substantive accuracy. As Duncan Kennedy has described it:

> It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty. . . . It has also been common ground, at least since

[29] *Compare id.* at 177 (citing J. B. MOYLE, THE INSTITUTES OF JUSTINIAN § 13, for the proposition that "ancient writers upon general principles of law . . . adopt the principle, that pursuit alone vests no property or right in the huntsman"), *with id.* at 180 (Livingston, J., dissenting) ("This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over *Justinian*, *Fleta*, *Bracton*, *Puffendorf*, *Locke*, *Barbeyrac*, or *Blackstone* . . . .").

[30] *Id.* at 179 ("If the first seeing, starting, or pursuing such animals . . . should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.").

[31] *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76 (1985) ("A clear rule of this sort should be applied, said the court, because it prevents confusion and quarreling among hunters . . . ."); Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 409 (2005) ("Had the court chosen 'first reasonable prospect of capture' as the standard, it seems likely that such a fuzzy standard would have attracted many subsequent cases for determination.").

[32] *See* Adrian Vermeule, *Interpretative Choice*, 75 N.Y.U. L. REV. 74, 77 (2000) ("One example is the enormous literature on rules and standards, which specifies considerations that should push decisionmakers to embody a legal directive in the form of rules rather than standards, or vice-versa.").

> Ihering, that the virtues of formal realizability have a cost. The choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules.[33]

Modern scholars have added to and refined the list of virtues and vices associated with rules and standards respectively. For example, it is argued that rules promote uniformity,[34] while standards promote deliberation and reasoned decision-making.[35] The list of particular virtues and vices associated with rules and with standards is large and ever-growing; it is impossible and unnecessary for me to exhaustively list them here. My contribution is not to add new items to the list of virtues and vices or to critique the existing items on the list; it is to critique the style of argument and the assumptions underlying it.

The important point for this background is that the prior literature on rules and standards generally adopts the style of attributing virtues and vices to rules and standards, and proceeds to argue about whether rules or standards are normatively better for particular situations. As the next Section will explain, this style of argument embeds certain assumptions about the rules/standards framework.

B. Three Assumptions Underlying the Literature

This Section will explore three interrelated assumptions that are commonly embedded in the rules/standards literature. I will call these (1) the assumption of legitimate authority, (2) the assumption of judicial obedience, and (3) the assumption of proper incentives.

1. The Assumption of Legitimate Authority

The first and most important assumption that is embedded in the prior rules and standards literature is the assumption that a rule or standard is *authoritative* in the sense that other actors will consider

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33 Kennedy, *supra* note 1, at 1688-89.

34 *See, e.g.*, Scalia, *supra* note 1, at 1179 ("Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions . . . . But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.").

35 Sullivan, *supra* note 1, at 67-69.

themselves bound by it and at least purport to apply it.[36] Stated another way, the rules/standards literature assumes a lawmaker with legitimate authority that others will respect.

This assumption is so deeply embedded and taken for granted that it may seem banal at first glance. When the New York Supreme Court decides *Pierson v. Post* and creates a rule of capture (rather than a standard of pursuit), principles of stare decisis bind subsequent courts to respect the doctrine it creates, and the legitimate authority of the court to make this rule is not disputed.[37] When a legislature chooses a 55 mph speed limit over a "reasonable driving" standard, the legitimate authority of the legislature to make the rule is not in question. Scholars focus their attention on debating whether a rule or standard is better for governing highway safety, not on whether a rule or standard would be more legitimately binding on courts and the public.[38] The assumption of legitimate authority goes unnoticed because it seems uncontroversial.

The assumption of legitimate authority *is* uncontroversial when applied to the context of government-made laws. In our constitutional system, the legitimate authority of government lawmakers such as legislatures and courts is generally uncontested. Legislatures and executive agencies have legitimate authority to make laws based on their democratic accountability.[39] Appellate courts have legitimate authority to make rules and standards that bind lower courts because of the

[36] *See, e.g.*, Kaplow, *supra* note 1, at 560 n.5 (assuming that "the adjudicator should, could, and would" follow the legal directive).

[37] There are scholars who contest the principle of stare decisis altogether, but these arguments are entirely unrelated to the literature on rules and standards. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27-28 (1994).

[38] *See, e.g.*, Kaplow, *supra* note 1, at 562 ("The analysis in Part I examines the relative desirability of *ex ante* versus *ex post* creation of the law in terms of legal costs and the extent to which individuals' behavior conforms to the law.").

[39] *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 761 (2004) ("In short, the making of binding general policy by the political branches is politically legitimate because those bound have (or could have) participated (if only by proxy) in the policymaking.").

judicial hierarchy and stare decisis.[40] It therefore stands to reason that the assumption of legitimate authority has remained unnoticed and unquestioned because most of the literature has focused on these types of government lawmakers.[41] However, even authors who discuss rules and standards in the context of private law instruments such as patents and contracts still subscribe to the assumption without stopping to reflect on it. When contract law scholars analyze rules and standards in contract terms, they analyze the choice as a trade-off between ex ante drafting costs and ex post litigation costs, assuming that the parties will choose the most *socially* optimal balance.[42] When patent law scholars analyze rules and standards in patent claims, they conceptualize the relevant lawmaker as the Patent and Trademark Office,[43] even though patent claims are actually written by private patentees.

As Part II will explain in more detail, the assumption becomes much more questionable in the context of private law instruments.[44] When a private corporation writes a self-serving consumer contract, its legitimacy and authority is more dubious than that of a legislature, and courts are less likely to respect the written contractual terms. This affects the rules/standards choice because a lawmaker (here including a private contract drafter) who cannot trust courts to faithfully implement its directives then has private incentives to choose rules over standards, not because rules are socially beneficial, but because rules allow the lawmaker to specify its directives in more detail and give less leeway for disobedient courts to do mischief.[45] The academically

[40] *See* Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("Vertical stare decisis — both in letter and in spirit — is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'" (quoting U.S. CONST. art. III, § 1)).

[41] *See supra* text accompanying notes 1–2.

[42] *See, e.g.*, Scott & Triantis, *supra* note 4, at 817 ("By reaching the optimal combination of front-end and back-end costs, parties can minimize the aggregate contracting costs of achieving a particular gain in contractual incentives.").

[43] *See* Burk & Lemley, *supra* note 4, at 1781 ("The patent system entails one of each type of institution: an administrative agency, of the sort that is probably best suited to ex ante rulemaking, and a court system, that is probably best suited to ex post adjudication. Claims are formed in the first institution . . . .").

[44] *See infra* text accompanying notes 112–113.

[45] *See* Sunstein, *supra* note 27, at 1004 ("[L]awmakers may distrust the interpreters and enforcers, and may therefore impose rules.").

interesting question becomes not only whether a rule or standard is normatively better based on social benefits and costs, but also whether a rule or standard is more likely to be written based on the lawmaker's private calculus and incentives.

2. The Assumption of Judicial Obedience

Closely related to the assumption of legitimate authority is the assumption of judicial obedience. That is, the literature assumes that courts and other adjudicators will follow a rule or standard as written,[46] at least in the sense of not contradicting or ignoring it.[47]

Although the assumption of judicial obedience may seem to follow logically from the assumption of legitimate authority, the two are distinct in the sense that it is conceptually possible for someone to disobey a legal directive even while acknowledging its legitimate authority. An example of this is Attorney General Elliot Richardson's resignation in the face of President Nixon's order to fire the special prosecutor Archibald Cox.[48] Richardson acknowledged Nixon's authority to order Cox's dismissal; he simply did not wish to carry it out.[49] A less noble example is a lower court that deliberately defies a higher court precedent that it disagrees with — while everyone will have different ideas about which concrete examples fall within this category,

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[46] *See, e.g.*, Kaplow, *supra* note 1, at 560 n.5 (explicitly assuming that "the adjudicator should, could, and would" follow the legal directive).

[47] *See* Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 19-20 (assuming that "lower court judges are obedient to legal doctrine enunciated by the higher court" but will act on ideological preference when doctrinal standards allow discretion).

[48] *See Letter Accepting the Resignation of Elliot L. Richardson as Attorney General*, AM. PRESIDENCY PROJECT (Oct. 20, 1973), https://www.presidency.ucsb.edu/documents/letter-accepting-the-resignation-elliot-l-richardson-attorney-general [https://perma.cc/686E-UFKA].

[49] *Id.* ("While I fully respect the reasons that have led you to conclude that the Special Prosecutor must be discharged, I trust that you understand that I could not in the light of these firm and repeated commitments carry out your direction that this be done.").

almost everyone agrees that such lower court defiance sometimes happens.[50]

The prior literature on rules and standards is not entirely blind to the reality that judicial disobedience happens. Indeed, part of the conventional understanding of rules and standards is that "[r]ules embody a distrust for the decisionmaker they seek to constrain."[51] Constraining judicial discretion via rules is beneficial in this understanding because otherwise rebellious adjudicators might indulge in their own preferences.[52]

The literature nonetheless embodies an assumption of judicial obedience in two ways. First, although the literature acknowledges that adjudicators might act waywardly when given discretion via a standard, it typically assumes that they will obey a rule as written.[53] Outright defiance in the manner of simply refusing to follow a clear rule is not within the conventional rules/standards framework; disobedience is only analyzed to the extent it is permitted by a discretionary standard — that is, when it is not really disobedience. Second, to the extent that the literature sometimes obliquely hints at the possibility of outright defiance and actual disobedience, it dismissively waves off such actions as "usurpation" or "abuse of power" without further analysis.[54]

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[50] Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 921 (2016) ("Lower courts supposedly follow Supreme Court precedent — but they often don't.").

[51] Sullivan, *supra* note 1, at 64.

[52] *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 138-39 (1997) ("By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.").

[53] *See, e.g.*, Cross, Jacobi & Tiller, *supra* note 47, at 19-20 (assuming that "lower court judges are obedient to legal doctrine enunciated by the higher court" but will act on ideological preference when doctrinal standards allow discretion); Kaplow, *supra* note 1, at 560 n.5 (assuming that "the adjudicator should, could, and would" follow the legal directive).

[54] *See* Ehrlich & Posner, *supra* note 1, at 267 (noting that rules have the advantage of "reducing . . . usurpations by adjudicators" without further analysis); Kaplow, *supra* note 1, at 609 ("Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.").

3. The Assumption of Proper Incentives

A further framing effect that emanates from the assumption of an authoritative lawmaker is that the private incentives and motivations of lawmakers are rarely questioned or analyzed when discussing rules and standards.[55] Because the drafter is assumed to be inherently authoritative and legitimate, its motivations are not to be second-guessed and its directives are simply to be obeyed. The implicit assumption seems to be that constitutional checks and balances lead public officials to have public-serving incentives.[56] Even if lawmakers are not explicitly assumed to be public-serving — an assumption that the political science literature has debunked in many other contexts[57] — there is at least a general neglect of the issue of how private motivations influence the rules/standards choice.[58] The issue is treated as if it were out of bounds.[59]

[55] The most important exception is Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983), which I will discuss in Part I.C *infra*. Another less on-point exception is Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995), which considers the incentives of quasi-public bodies such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

[56] *See* THE FEDERALIST NO. 51 (James Madison) (arguing that the Constitution divides and arranges "the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights"); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276 (1988) ("'Optimistic pluralists' posit that the legislature, filled with reasonable people acting reasonably, will tend to pass public-seeking laws . . . ."). As Jonathan Macey has observed, the view of public officials as serving the public interest is "more often assumed than articulated," but it is the dominant assumption in traditional legal theory. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 n.2 (1986).

[57] *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (arguing that regulations generally operate for the benefit of regulated parties rather than the public at large).

[58] *See* Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272 (1982) ("Courts do not have the research tools that they would need to discover the motives behind legislation.").

[59] Besinga v. United States, 14 F.3d 1356, 1362 (9th Cir. 1994) ("[I]t is not our place to second-guess Congress' motivations.").

The fact that a lawmaker's private incentives are excluded from the discussion also means that *conflicts* in private incentives are excluded from the analysis.[60] The rules/standards literature generally does not consider the possibility that different legislators in a legislature might have different goals (and manipulate the rules/standards choice to pursue those goals), or that legislatures and courts might have conflicting preferences. The portrait that is painted is one of cooperative actors pursuing a common goal;[61] not a struggle between hostile factions each seeking to advance their own self-interested agendas. There is, of course, a political science literature that does explore conflicts between various institutions including legislatures and courts,[62] but it does not dig down to the level of exploring how these conflicts affect the choice between rules or standards in formulating legal directives.[63]

4. The Consequences of the Assumptions

Although I cannot directly prove a causal relationship, the assumptions of the literature are correlated with two general features of that same literature: a focus on public law and a focus on normative discussion. As already discussed, the public law context fits naturally with the conventional rules/standards framework because the legitimate authority of legislatures is obvious and judicial obedience is

[60] Scott and Triantis do consider the possibility of conflicting self-interested incentives at the point of enforcement. But they assume parties are cooperative at the time of drafting. *See* Scott & Triantis, *supra* note 4, at 818 ("We offer a theory of contract design that anticipates the enforcement of contracts by adversarial litigation.").

[61] *Cf.* Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 578, 578 n.59 (2015) (arguing that buyers choose to use rules in procurement contracts to facilitate cooperation by reducing the risk of misunderstanding).

[62] *See, e.g.*, Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 355 (1999) (arguing "the judicial process is more susceptible to manipulation by narrow interests than are the more democratic branches of government"); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) ("A judiciary that was subservient to the current membership of the legislature could nullify legislation enacted in a previous session of the legislature.").

[63] *Cf.* Landes & Posner, *supra* note 62, at 879 (arguing that "most legislation will be enacted in a seriously incomplete form" that allows for judicial leeway).

the expected norm.[64] And when private incentives are taken off the table, all that remains is the question of what is in the public interest — that is, whether rules or standards are normatively better.

The normative analysis of the pros and cons of rules and standards is an important part of legal theory; I do not mean to suggest otherwise. But the literature's overwhelming focus on this question has crowded out discussion of other interesting questions.[65] First, there is very little discussion of the positive question of whether a rule or standard will actually be written. Second, even within a normative analysis of virtues and vices, the virtues and vices associated with rules and standards are often developed within a background framework of unexamined assumptions. For example, constraint of judicial discretion is universally understood to be a benefit of rules[66] — but this is only true if one assumes a hierarchal relationship where drafters should make the substantive decisions and adjudicators should obey them.[67] In contexts where the drafter's legitimacy is doubtful and there is no authoritative hierarchy between drafters and courts — such as patent claimants and corporate drafters of boilerplate contracts vis-à-vis Article III judges — it is not obvious why constraining judicial discretion in favor of drafter preferences is actually a good thing.

C. Exceptions to the Paradigm

Before proceeding to explore private rules and standards, I should acknowledge some partial exceptions to my broad-brushed summary of the literature. To begin, it is not the case that contract and patent scholars have never written about rules and standards — they obviously

[64] *See supra* text accompanying notes 39–43.

[65] *See* Cross, Jacobi & Tiller, *supra* note 47, at 15 ("A great deal of theoretical jurisprudential analysis has been devoted to the nature and relative benefits or detriments of doctrinal rules and standards.").

[66] *See* Kennedy, *supra* note 1, at 1688 (giving "restraint of official arbitrariness" as one of the two "great social virtues of formally realizable rules"); Scalia, *supra* note 1, at 1179 ("For when, in writing for the majority of the Court, I adopt a general rule, . . . I not only constrain lower courts, I constrain myself as well.").

[67] *See* Sullivan, *supra* note 1, at 64 ("Rules cannot perform such role allocation without a theory that defines the relevant decisionmakers' roles. In the context of constitutional interpretation, the separation of powers supplies such a theory.").

have. For example, Lisa Bernstein has noted that contract terms in the cotton industry use rules rather than standards, which she attributes to a preference for certainty.[68] Robert Scott and George Triantis borrowed from the rules/standards literature in public law to create a model of contract drafting as a tradeoff between front-end drafting costs and back-end enforcement costs.[69] Dan Burk and Mark Lemley have analogized modern patent claims to rules and mid-nineteenth century patent claims to standards.[70]

But when contract or patent scholars discuss rules and standards, they are still operating largely within the confines of the framework that I have described. An authoritative lawmaker and obedient courts are both assumed, and the relevance of private incentives is de-emphasized. For example, even though Scott and Triantis consider the rules/standards choice in the context of contracts, they are focused only on mutually negotiated contracts that are jointly drafted by the parties,[71] and which are then regarded as authoritative and faithfully obeyed by courts.[72] They explicitly exclude adhesion contracts where one party has exclusive control of drafting (and where private drafter incentives thus have greater potential to distort drafting).[73] In the same vein, Dan Burk and Mark Lemley argue in *Fence Posts or Sign Posts? Rethinking Patent Claim Construction* that patent claims can be considered to embody a rules-versus-standards choice.[74] But Burk and Lemley conceptualize patent claims as rules made by the Patent and Trademark Office

[68] Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1732-33, 1742 (2001).

[69] Scott & Triantis, *supra* note 4, at 820.

[70] *See* Burk & Lemley, *supra* note 4, at 1777-83.

[71] *See* Scott & Triantis, *supra* note 4, at 817 ("[T]he mix of precise and vague terms that characterize the typical commercial contract can be framed as the product of a tradeoff that the parties have made . . . .").

[72] *See id.* at 844 ("[C]ourts are wise to interpret the absence of vague standards in commercial contracts as instructions from the parties . . . to limit their construction to the precise terms of the contract.").

[73] *See id.* at 824 ("[I]nformation asymmetry between the parties at the front end may impede efficient contract terms. We set these obstacles aside in this Article by assuming that the parties are symmetrically informed."); *cf.* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983) (stating that adhesion contracts are "ubiquitous in modern commercial life").

[74] Burk & Lemley, *supra* note 4, at 1777-83.

("PTO"),[75] and thus as *public* legal directives made by an authoritative agency.[76]

Like the assumption of a government lawmaker with inherent authority, the assumption of an obedient adjudicator is common, but not universal. One exception is Frederick Schauer's book *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, where he makes the argument that some adjudicators, "whether through unconscious bias or conscious ill-will, cannot be trusted" to faithfully apply an open-ended standard.[77] Schauer gives the example of legal directives to police officers on how to conduct interrogations. Where a lawmaker might reasonably fear that some police officers (who are "adjudicators" in this situation) will not faithfully apply open-ended standards to protect defendant rights, Schauer argues the lawmaker might respond by imposing a hard rule to make violations easier to detect.[78]

Although Schauer's example does consider the possibility of conflicting private incentives between drafters and adjudicators, as well as how the conflict in private incentives could affect the rules/standards choice, his analysis is brief. More importantly, although he no longer assumes an obedient adjudicator, he reflexively assumes that disobedience on the part of the adjudicator is a *bad thing*, or in other words that drafter preferences ought to prevail over adjudicator preferences when the two conflict, as illustrated by his rogue cop

[75] *See id.* at 1781 ("The patent system entails one of each type of institution: an administrative agency, of the sort that is probably best suited to ex ante rulemaking, and a court system, that is probably best suited to ex post adjudication. Claims are formed in the first institution . . . .").

[76] One consequence of this (mis-)conceptualization is that they argue modern patent claims are too unclear, *see id.* at 1746 ("If patent-claim terms lack the virtue of certainty and are in fact doing mischief in the patent system, perhaps we should begin to rethink the whole enterprise of peripheral claiming . . . ."), but then recommend more judicial discretion, *see id.* at 1788 ("[C]ourts are given power to determine the scope of the patent based on the inventive contribution . . . ."), which would logically lead to even less clarity.

[77] FREDERICK F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 150 (1991).

[78] *See id.* at 151.

example.[79] In this sense he is still assuming a hierarchal relationship between drafters and adjudicators, where the drafter is authoritative and the adjudicator is at least supposed to be obedient.

A more positively oriented exception to the obedient adjudicator assumption is Frank Cross, Tonja Jacobi, and Emerson Tiller's *A Positive Political Theory of Rules and Standards*,[80] where the authors analyze the incentives of higher court judges to fashion legal doctrine as rules and standards given the possibility of lower court resistance (such as due to differences in ideology between higher and lower court judges).[81] Although the authors no longer assume a *perfectly* obedient adjudicator, they still assume that lower court judges are obedient to direct commands.[82] Within their model, lower court judges resist higher court commands only at the edges of legally permissible discretionary judgment, such as when higher court doctrine takes the form of an unclear standard.[83] The possibility that an adjudicator might outright disobey a clear rule is not encompassed in their model.[84] Considering the private law context helps take their model to the next level because it is easier to imagine courts invalidating or defying privately drafted contracts or wills than to imagine lower court judges outright defying higher court judges. Thus, I consider the possibility of outright adjudicator defiance in Part III whereas Cross, Jacobi, and Tiller disregard that possibility.[85]

On the exclusion of self-serving incentives, both Schauer and Cross, Jacobi, and Tiller dance at the edges of questioning lawmaker incentives and motivations without directly raising the issue. One article that does explicitly consider the issue is Colin Diver's *The Optimal Precision of Administrative Rules*,[86] where Diver argues that divergence between

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[79] *See id.*

[80] Cross, Jacobi & Tiller, *supra* note 47, at 1.

[81] *Id.* at 3.

[82] *Id.* at 19 ("In our model, we assume that lower court judges are obedient to legal doctrine enunciated by the higher court.").

[83] *Id.* at 25 ("[G]iving a lower court discretion creates the possibility that the lower court will use that discretion to undermine the higher court's preferences.").

[84] *Id.*

[85] *See infra* Part III.

[86] Diver, *supra* note 55.

public and private interests will cause administrative regulations to "frequently deviate from the optimal amount of precision."[87] The main type of misaligned incentive that Diver considers, however, is a regulator's desire to reduce workload, such as by writing vague standards that shift the real work onto courts.[88] Diver does not consider a lawmaker's incentives to substantively slant the outcome. This is perhaps because Diver is still operating under a public law framework, within which administrative regulators do not usually have a direct stake in the substantive outcome[89] — unlike the situation of a corporate contract drafter who has an incentive to substantively slant the contract to favor itself. The model that I will present in Part III goes beyond Diver's argument and introduces the concept of drafting slant into the analysis.

II. Assessing the Fit Between Conventional Assumptions and Private Rules and Standards

In this Part, I will explore how well the conventional analysis fits with various types of private legal directives that take the form of rules and standards. I will begin with one type of private legal instrument — wills — where the assumptions fit very well, and the framework of the public law literature can be readily applied without much alteration. I will then discuss two other types of legal instruments — standard form contracts and patents — where the fit is much worse, and explain the problems that arise from the misalignment.

A. Wills

Among the many types of private legal instruments, wills best fit the conventional model of how the drafting choice between rules and standards is supposed to work. A testator is disposing of their own property; therefore, the legitimate authority of the testator is obvious

[87] *Id.* at 102.

[88] *See id.* at 103 ("Those consequences of the strategy that the rulemaker bears are lower rulemaking costs and fewer hearings. From the perspective of the rulemaker's narrowly defined fiscal self-interest, the tradeoff is decidedly favorable.").

[89] *See* 18 U.S.C. § 208 (2018) (prohibiting government employees from participating in matters in which they have a financial interest).

and unquestioned.[90] A testator also has the best information about their own wishes and correct incentives to communicate this information in a will. What follows is that courts can be expected to faithfully apply the terms of a will rather than substitute their own notions of good policy.[91] The entire picture is of a cooperative exercise where the shared objective is to communicate and effectuate the testator's desires.[92]

At least as a matter of black letter doctrine, the law of wills largely reflects this picture of an authoritative testator whose instructions courts should and do faithfully obey.[93] Although there are exceptions to the principle of testator supremacy, both overt and covert, these exceptions are narrow and rarely applied. At an overt level, the doctrine of cy pres allows a court to modify the terms of a charitable bequest or trust,[94] but the doctrine applies only when it is "unlawful, impossible, or impracticable" to comply with the original terms,[95] a high bar that is narrowly applied in practice.[96] More abstractly, general limitations on property rights such as the rule against perpetuities also limit freedom

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[90] *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("The first principle of the law of wills is freedom of testation."); Leeford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280-81 (2010) ("Embedded within this notion of private property and the orderly transfer thereof is the principle that individuals have the freedom (or right) to control the disposition of their property during life and at death.").

[91] ELIAS CLARK, LOUIS LUSKY & ARTHUR W. MURPHY, CASES AND MATERIALS ON GRATUITOUS TRANSFERS 1 (3d ed. 1985) ("[The law of trusts and estates] rests on one basic premise: In a capitalistic economy based on the institution of private property, owners have the widest possible latitude in disposing of their property in accordance with their own wishes whether they be wise or foolish.").

[92] *See* Ass'n of Survivors of Seventh Ga. Regiment v. Larner, 3 F.2d 201, 203 (D.C. Cir. 1925) ("With the motives underlying a particular bequest the court has nothing to do. Its function, and sole function, is to give effect to the expressed intent of the testator.").

[93] Chase Nat'l Bank v. Guthrie, 90 A.2d 643, 645 (Conn. 1952).

[94] RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. L. INST. 2003).

[95] *Id.*

[96] *See* Iris J. Goodwin, *Ask Not What Your Charity Can Do for You:* Robertson v. Princeton *Provides Liberal-Democratic Insights into the Dilemma of Cy Pres Reform*, 51 ARIZ. L. REV. 75, 100-01 (2009) ("Even though *cy pres* is recognized in nearly all American jurisdictions, however, it was and is a narrow doctrine.").

of testation.[97] But property law emphasizes the freedom of property owners,[98] so such limitations are the exception.[99] At a covert level, Melanie Leslie has demonstrated that courts use a variety of doctrinal shenanigans to invalidate or bend wills that disinherit family members, either because judges morally disapprove of the testator's choice or to avoid the disinherited family members becoming public charges.[100] As even Leslie acknowledges, however, such covert judicial shenanigans to substitute adjudicator preferences over testator preferences are the exception — courts respect the testator's authority for "the vast majority" of wills that do not disinherit family members.[101] Thus, although I am aware of no systematic empirical study on the question, the general consensus is that courts are mostly faithful to testator preference in interpreting wills.[102]

When courts can be expected to faithfully obey the instructions of an authoritative drafter, the rules/standards analysis follows the framework that has been laid out in the prior literature. The only interesting question at that point is whether a rule or standard would better effectuate the drafter's objectives. This question turns on the

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97 *See, e.g.*, Keefer v. McCloy, 176 N.E. 743, 745 (Ill. 1931) (invalidating bequest for violating the rule against perpetuities).

98 The most extreme version of this argument is the Blackstonian conception of property as "sole and despotic dominion." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765). But even more modest conceptions of property rights emphasize property owner control. *See* Karl Marx, *On the Jewish Question*, *in* THE MARX-ENGELS READER 26, 42 (Robert C. Tucker ed., 2d ed. 1978) (1843) ("The right of property is, therefore, the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society.").

99 *Cf.* Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097 (2003) ("The Rule Against Perpetuities . . . may be on its last legs.").

100 Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236-37 (1996) ("Courts impose and enforce this moral duty to family through the covert manipulation of doctrine.").

101 *Id.* at 237 ("At the end of the day, testamentary freedom exists for the vast majority of testators who happen to have the same sense of duty and moral obligation that the law implicitly imposes . . . .").

102 *Cf.* C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407, 419-22 ("Fear of the courts' interference with a testator's intent may be behind recent decisions refusing cy pres application in some important jurisdictions.").

usual tradeoff between the pros and cons of each, such as rules having better certainty and standards having more flexibility.

B. Contracts

How the rules/standards analysis applies to contract terms depends greatly on whether the contract is mutually negotiated or is an adhesion contract that is dictated by one party. In situations where a contract is mutually negotiated between relatively equal parties, the analysis resembles that of wills. A mutually negotiated contract is effectively jointly drafted, and the legitimate authority of the contract and its drafters is therefore obvious and uncontroversial — it is based on the parties' consent.[103] The parties have good incentives to write the contract in a manner that maximizes their joint welfare, and, in the absence of obvious third-party harms, courts can be expected to faithfully implement the parties' agreement.[104]

The mutually negotiated contract scenario is the focus of much of modern contract theory.[105] And the prior literature has already described how the rules/standards framework applies to this situation.[106] A leading work is Robert Scott and George Triantis's *Anticipating Litigation in Contract Design*,[107] wherein they explain that, in the situation of mutually negotiated contracts, the parties can be expected to choose between rules and standards based on a tradeoff

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[103] *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) ("Consent is the moral component that distinguishes valid from invalid transfers of alienable rights."); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994) ("Consent is the master concept that defines the law of contracts in the United States.").

[104] *See* Schwartz & Scott, *supra* note 4, at 544 ("The theory's affirmative claim, in brief, is that contract law should facilitate the efforts of contracting parties to maximize the joint gains (the 'contractual surplus') from transactions. The theory's negative claim is that contract law should do nothing else.").

[105] Paul B. Stephan, Bond v. United States *and Information-Forcing Defaults: The Work That Presumptions Do*, 90 NOTRE DAME L. REV. 1465, 1476 (2015) ("Modern contract theory focuses on problems presented by bargaining between sophisticated parties, understood as repeat players not impaired by systemic information asymmetries and related disabilities.").

[106] *See supra* text accompanying notes 68–73.

[107] Scott & Triantis, *supra* note 4, at 820.

between the higher ex ante drafting costs of rules (what Scott and Triantis call "front-end costs") and the higher ex post enforcement costs of standards (what Scott and Triantis call "back-end costs").[108] Rules are more costly to draft because they require more detail and thought ahead of time; standards are more costly to enforce because they leave those details to be determined at the time of adjudication. The joint drafting parties themselves have the correct incentives to strike this balance optimally.[109] Thus, both as a normative and positive matter, parties should choose between rules and standards based on which is more efficient for overall welfare, and courts should faithfully implement the parties' choices.[110] The entire picture becomes a cooperative exercise to find the best policy solution for welfare maximization. Self-serving private incentives and slanted drafting have no relevance to the context of mutually negotiated contracts; Scott and Triantis accordingly do not consider these possibilities.[111] The possibility of judicial distortion in enforcement is likewise not relevant.

The analysis becomes very different when a contract is dictated by one party, as is the case for the overwhelming majority of consumer contracts today.[112] When a dominant party controls the drafting and dictates a contract's terms, the argument that the contract is normatively legitimate because it has the parties' mutual consent becomes weaker. The drafter's incentives are more dubious because, rather than maximizing the parties' joint welfare, the drafter has the obvious incentive to maximize their own. Accordingly, the normative case for faithful judicial enforcement of these boilerplate adhesion

[108] *Id.*

[109] *Id.* at 841-42 ("Barring significant asymmetries in sophistication and information, the parties at the time of contracting should have superior incentives; after all, they share in the benefits of efficient contracting.").

[110] *Id.* at 844 ("Consequently, the courts are wise to interpret the absence of vague standards in commercial contracts as instructions from the parties to . . . limit their construction to the precise terms of the contract.").

[111] *Id.* at 814 ("[I]nformation asymmetry between the parties at the front end may impede efficient contract terms. We set these obstacles aside in this Article by assuming that the parties are symmetrically informed.").

[112] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 407 ("Huge swaths of modern commerce are, of course, governed by standard form agreements . . . .").

contracts becomes weaker, and courts in fact are more resistant to enforcing boilerplate adhesion contracts than mutually negotiated contracts.[113]

I will go into more detail on how the rules/standards choice actually works with respect to boilerplate adhesion contracts in the rest of the Article. For now, the important point is that the assumptions of the prior literature map very well to the situation of mutually negotiated contracts and very badly to boilerplate adhesion contracts. What follows is that the analysis and predictions of the prior literature such as Scott and Triantis work very well with respect to mutually negotiated contracts, but not to boilerplate adhesion contracts. And although contract law doctrine ostensibly applies a unitary standard between the two types of contracts, courts in fact apply the doctrine quite differently between the two categories.[114] My model in Part III will help explain these differences as well as how they relate to the rules/standards conceptual framework.

C. Patents

At a superficial level, patents — or, more specifically, the portion of patents that grant the owner legal rights (known as "claims") — might appear to fit the assumptions of the conventional model very well. Patents and their claims are issued by a government agency (the PTO),[115]

[113] *See, e.g.*, Anderson v. Baker, 641 P.2d 1035, 1039 (Mont. 1982) ("[W]here adhesion contracts are involved, that the terms are to be construed against the drafter and any ambiguities are to be resolved in favor of the party having no voice in arriving at the document's terms." (citation omitted)); Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966) ("As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract . . . carries some consequences that extend beyond orthodox implications.").

[114] *See* Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 7 (1972) (stating that a survey of case law reveals that the parol evidence rule functions effectively only in cases between sophisticated parties, and "had no application at all with regard to the aggrieved party" in cases with disparity in bargaining power); Michael A. Lawrence, Comment, *The Parol Evidence Rule in Wisconsin:* Status in the Law of Contract, *Revisited*, 1991 WIS. L. REV. 1071, 1072 (replicating Childres and Spitz's findings in a newer study of Wisconsin cases).

[115] 35 U.S.C. § 153 (2018) ("Patents shall be issued in the name of the United States of America, under the seal of the Patent and Trademark Office . . . .").

whose legitimate authority is based on the same democratic accountability principles as any other executive agency.[116] As a government agency, its public-serving incentives are also broadly similar to other government agencies.[117] Under this logic, courts should be expected to obey patents and their claims in a manner similar to how they approach agency regulations, and how rules/standards analysis applies to agency regulations has been subject to extensive literature.[118] Consistent with this logic, when the prior literature has discussed rules and standards in the context of analyzing patents, they have conceptualized patents as akin to other government-made laws.[119]

However, patents and their claims are not in fact written by the PTO. Patents and their claims are written by patentees,[120] and the PTO's scrutiny of patentee-written claims is cursory at best.[121] Properly

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[116] *See* United States v. Arthrex, Inc., 594 U.S. 1, 12 (2022) ("That power acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote.").

[117] One difference is that the PTO is self-funded through user fees. *See* Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67, 70 (2013) (finding the PTO's funding structure "biases the PTO toward granting patents"). This difference does not affect my argument, however, because my argument is that the PTO is not the true drafter of a patent claim at all.

[118] *See, e.g.*, Diver, *supra* note 55, at 66 (providing a conceptual framework to analyze precision in administrative regulations).

[119] *See supra* text accompanying notes 4–6; *see also* Markman v. Westview Instruments, Inc., 52 F.3d 967, 986-87 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996) (rejecting analogy between patents and contracts or wills and stating "[t]he more appropriate analogy for interpreting patent claims is the statutory interpretation analogy").

[120] 35 U.S.C. § 112(b) (2018) ("The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.").

[121] *See, e.g.*, JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 57 (2008) ("[T]he Patent Office does a poor job of monitoring the clarity of patent claims . . . ."); Michael D. Frakes & Melissa F. Wasserman, *Irrational Ignorance at the Patent Office*, 72 VAND. L. REV. 975, 1020-21 (2019) (arguing that the PTO is inefficiently lax in examining patents); Sean B. Seymore, *Patent Asymmetries*, 49 U.C. DAVIS L. REV. 963, 963 (2016) ("Everyone knows that it is far too easy to get a (bad) patent."). *But see* Mark A. Lemley & Bhaven Sampat, *Is the Patent Office a Rubber Stamp?*, 58 EMORY L.J. 181, 201 (2008) ("The PTO is doing a better job than many people think.").

conceptualized, patents are much more like boilerplate adhesion contracts than they are like agency regulations.[122] The true author of a patent claim has no democratic accountability or other source of legitimate authority. They have obvious self-serving incentives.[123] Courts cannot be expected to faithfully obey patentee-written claims the way they obey statutes and regulations; and — notwithstanding formal doctrine that purports to give heavy weight to claim language[124] — there is ample evidence courts are in fact not very faithful to patentee-written claim language in their decisions.[125]

Understanding the misalignment between how patents actually work and the assumptions of the conventional model leads to a new perspective on arguments about patent clarity and ambiguity. In existing debates, courts rhetorically emphasize the importance of clarity in patent claims[126] because patent claims are supposed to delineate property rights and certainty is a particularly important virtue in property law.[127] Commentators take courts at their word and criticize existing patents for being pervasively vague and ambiguous,[128] based on

[122] *See* Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 325 (2015) (analogizing patents to "other written instruments, such as deeds, contracts, or tariffs").

[123] Tun-Jen Chiang, *Forcing Patent Claims*, 113 MICH. L. REV. 513, 522 (2015) ("[P]atentees will draft claims to cover as much as they can possibly get away with.").

[124] Merrill v. Yeomans, 94 U.S. 568, 570 (1876) ("This distinct and formal claim is, therefore, of primary importance, in the effort to ascertain precisely what it is that is patented . . . .").

[125] *See, e.g.*, Burk & Lemley, *supra* note 4, at 1782-83 ("[C]laim language has come to constitute merely a jumping-off point for judicial exploration of the patent's actual outer boundaries."); Chiang, *supra* note 123, at 554 ("When we look at what patent judges *do* rather than merely at what they *say*, it becomes quite obvious that such judges routinely consider external evidence during claim construction and hence depart from plain textual meaning.").

[126] *Merrill*, 94 U.S. at 573 (explaining, in the case of patents, that there is "no excuse for ambiguous language or vague descriptions").

[127] *See* United Carbon Co. v. Binney & Smith Co., 317 U.S. 228, 236 (1942) ("A zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field.").

[128] *See, e.g.*, Autogiro Co. v. United States, 384 F.2d 391, 396 (Ct. Cl. 1967) ("Claims cannot be clear and unambiguous on their face."); Gretchen Ann Bender, *Uncertainty and Unpredictability in Patent Litigation: The Time Is Ripe for a Consistent Claim Construction Methodology*, 8 J. INTELL. PROP. L. 175, 209-11 (2001) (arguing that uncertainty arises

the fact that every patent case seems to involve an interpretative dispute.[129] Countless articles are written on how to make patent claims linguistically clearer,[130] with the premise that the problem today is that patents are filled with vague standard-like claims because patent drafters prefer ambiguity, while society and courts prefer clear rules for property rights.[131]

As Part IV will explain, this understanding of drafter and adjudicator preferences is backwards.[132] Patentees do not usually prefer ambiguity or discretion in claim language — ambiguity and discretion in claim language invites the possibility that that courts will interpret the language in an unfavorable manner. Rather, patentees prefer clearly slanted patent claims that maximize their legal rights, and they will draft claims accordingly. It is *courts* that prefer ambiguous and discretionary patent claims, because ambiguous and discretionary claim language allows a publicly interested court to combat the patentee's self-serving drafting slant and reach a more socially just outcome. Courts would like clear claim language only if the clear language were also unbiased, which is completely unrealistic given the patentee's incentives. The reason that every patent case involves an interpretative dispute is not because

because claim language is "inherently ambiguous"); Peter S. Menell, Matthew D. Powers & Steven C. Carlson, *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 BERKELEY TECH. L.J. 711, 716 (2010) ("If nothing else, the past two decades revealed the inherent difficulties of using language to define the boundaries of abstract and intangible rights.").

[129] Burk & Lemley, *supra* note 4, at 1744 ("Literally every case involves a fight over the meaning of multiple terms, and not just the complex technical ones.").

[130] *See, e.g.*, Bender, *supra* note 128, at 218-20 (arguing for reliance on extrinsic evidence and district court fact finding); Russell B. Hill & Frank P. Cote, *Ending the Federal Circuit Crapshoot: Emphasizing Plain Meaning in Patent Claim Interpretation*, 42 IDEA: J.L & TECH. 1 (2002) (arguing for a plain meaning approach); Joseph Scott Miller & James A. Hilsenteger, *The Proven Key: Roles and Rules for Dictionaries at the Patent Office and the Courts*, 54 AM. U. L. REV. 829, 886-87 (2005) (arguing the PTO should choose dictionaries to define patent terms); Craig Allen Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1, 43-82 (2000) (arguing for a "pragmatic" approach to interpretation that broadly considers evidence outside the document).

[131] Sean B. Seymore, *The Teaching Function of Patents*, 85 NOTRE DAME L. REV. 621, 638 (2010) (arguing that "patentees intentionally draft ambiguous claims"); *see* BESSEN & MEURER, *supra* note 121, at 57 (arguing that the patent system experiences "notice failure" because patentees have incentives to draft vague claims).

[132] *See infra* text accompanying notes 214–233.

claim language is pervasively ambiguous; it is because courts like to deem the language ambiguous in order to then "interpret" it the right way. The scholars who spend time coming up with better linguistic tools for clearer patent claims on the assumption that this is what courts want are trying to solve the wrong problem.

III. A Positive Analysis of Private Rules and Standards

This Part provides a model of the choice between rules and standards in a private legal directive. The model features a private drafter with self-interested incentives and a public-spirited adjudicator. Because the drafter is self-interested, he will have the incentive to write the legal directive in a way that is slanted to his private benefit, while the adjudicator will wish to resist this manipulation. This clash between drafters and adjudicators will implicate the rule/standard choice because a drafter can only attempt to slant the legal directive if it is written in the form of a rule — a standard will, by definition, leave the adjudicator with discretion to apply the standard in the manner that the adjudicator prefers.[133] However, even when written as a rule, the adjudicator has the ability to invalidate the rule, such as by finding a contract term unconscionable or a patent claim invalid. Drafters are therefore constrained from slanting a rule too much (for fear of invalidation), while adjudicators are constrained from invaliding every slanted rule because invaliding a rule will increase adjudication costs. The model will explain how these dueling considerations play out.

A reader may ask why I assume a public-spirited adjudicator while simultaneously emphasizing the self-interested nature of drafters and their private incentives for drafting slant.[134] To this I have two answers. The first is that this Article is about private rules and standards, whose key distinguishing feature (as contrasted with public laws) is that the drafter is a private party with private incentives. That judges may also

[133] The model poses a dichotomy where a rule specifies a particular result while a standard allows plenary discretion. As noted earlier, rules and standards are in fact a continuum, such that even a paradigmatic standard (e.g., "reasonableness") may limit the universe of permissible outcomes. *See supra* text accompanying notes 19–23. Reducing rules and standards to a dichotomy helps bring out contrasts and makes the model more tractable.

[134] *See infra* Part IV.A.

have private incentives is a valid observation about the real world,[135] but there is nothing special about self-interested judges that makes them more relevant to private legal directives over public ones.

The second is that assuming public-spirited adjudicators keeps the model simple without sacrificing too much of its power.[136] Most of the power of my analysis comes from simply having *conflicting* preferences between drafters and adjudicators. Assuming selfish drafters and public-spirited adjudicators provides a plausible account of how this conflict might happen. The key conclusions derived from the model — for example, that drafters will not write rules if they do not expect adjudicators to enforce them, or that drafters writing rules will put in as much self-serving slant as they think they can get away with — remain intuitively true even if adjudicators are not public-spirited. However, the model becomes more complex because I would then need to make concrete assumptions about what selfish adjudicators maximize (e.g., leisure, income, or chances of promotion), and any such assumptions are as arbitrary and unrealistic as assuming public-spirited adjudicators. Moreover, even if judges in real life are not fully public-spirited, it is probably fair to say that they are *more* public-spirited than drafters of contracts and patents.[137]

Section A will first lay out the model. Section B will analyze how drafters and adjudicators act under the specified assumptions and explain the conditions under which a rule or standard will be chosen. Part IV will take the somewhat abstract propositions from the model

[135] *See* Richard A. Posner, *What Do Judges and Justices Maximize?* (*The Same Thing Everybody Else Does*), 3 SUP. CT. ECON. REV. 1, 2 (1993) (presenting a model where judges are motivated by "income, leisure, and judicial voting").

[136] *See generally* Jeff Todd, *Realistic Assumptions in Economic Models*, 47 HOFSTRA L. REV. 231, 285-86 (2018) (arguing that "[a]ll models have unrealistic first-order assumptions," but a modeler should be able "to explain their purpose, whether negligibility, applicability, or tractability").

[137] The assumption of a public-spirited adjudicator does, however, limit my model mainly to courts and other publicly funded adjudicators rather than private arbitration, where adjudicator incentives are more obviously problematic. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005) ("[C]ritics maintain that, consciously or unconsciously, arbitrators may slant the result in companies' favor.").

and apply them more concretely to legal doctrines relating to contracts, wills, and patents.

A. *Creating a Model of Private Rules and Standards*

Let us assume a self-interested drafter who is crafting a private legal instrument such as a contract, will, or patent claim, to be enforced by a public-spirited adjudicator such as a court. In this Article, I am assuming that the drafter has complete control of the drafting decision, subject only to the constraint of the adjudicator's possible responsive actions (such as the adjudicator invalidating or ignoring the legal directive). That is, I am assuming that the drafter has no other constraints, such as the need to persuade a contractual counterparty to agree to the specific language. Thus, the model as applied to contract law is centered on the context of a standard form consumer contract where the consumer has no input into drafting and does not read the writing, and in patent law it assumes a PTO examiner who acts as a rubber stamp.[138] I am also assuming away non-legal consequences from taking advantage of fine print, such as the termination of an ongoing business relationship or more general reputational harm.[139] Such non-legal sanctions may sometimes be effective in limiting drafting slant, especially in business-to-business contracts,[140] but they do not depend on contract law and are beyond the scope of this Article.

[138] *Compare* Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law's Presumption of Validity*, 60 STAN. L. REV. 45, 53 (2007) (arguing examiners are overworked and "bad patents routinely slip through"), *with* Lemley & Sampat, *supra* note 121, at 182 ("We find that the PTO rejects a surprisingly high percentage of patent applications.").

[139] *See* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 860-64 (1978) (arguing that classical contract law assumes a discrete transactional system that "eliminates the necessity for economic relations between [] firms to continue in spite of the disputes").

[140] *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 63 (1963) (arguing that "contract and contract law are often thought unnecessary because there are many effective non-legal sanctions" in business-to-business relationships).

1. The Drafter's Costs and Benefits

In writing the legal directive, the drafter bears a drafting cost that I will denote with the variable *D*. It is generally accepted that rules are more costly to draft than standards,[141] because a rule must be more precise, and such precision takes effort.[142] Thus, if the drafting cost of a rule is denoted D_r and the drafting cost of a standard is denoted D_s, then $D_r > D_s$. For simplicity's sake, I will assume that the drafting cost of a standard is zero — this assumption works because the analysis is only concerned about relative differences between rules and standards. Thus, the only drafting cost we will be concerned with is D_r, which now represents the marginal difference between the drafting cost of a rule and that of a standard.

The drafter bears the full drafting cost of a legal directive. This drafting cost includes the cost of errors arising from inadvertently over- and under-inclusive rules, since more drafting effort in refining the rule can reduce any accidental over- and under-inclusiveness.[143] The drafter also bears a portion of the adjudication cost in the case of a later dispute. This reflects the fact that our adversarial system puts some of the cost of adjudication on private litigants by requiring litigants to collect and present evidence.[144] As I shall discuss more fully when considering the

[141] Kaplow, *supra* note 1, at 557. To be clear, the comparison is between a rule and its substantively equivalent standard — that is, a standard that directs the same behavior but does not specify it with as much detail and therefore leaves more adjudicator discretion. A rule that states, "In any dispute, the corporation always wins," is cheap to draft, but it does not have any substantive content — it does not tell parties what behavior is required — and is therefore outside my analysis.

[142] In real life, lawyers often draft standard boilerplate contract terms that are then adopted by multiple clients. For purposes of the model, all the adopters of a particular rule or standard will be collectively treated as a single drafter. This is consistent with my definition of adjudication below, where I aggregate all the separate adjudications under a particular rule or standard into a single adjudication cost.

[143] It is worth clarifying here that the over- and under-inclusiveness is from the drafter's point of view. A rule is accidentally over- or under-inclusive if it does not do what the drafter intends it to do. Inadvertent inaccuracy is therefore a cost to the drafter.

[144] Laura K. Abel, *The Role of Speech Regarding Constraints on Attorney Performance: An Institutional Design Analysis*, 19 GEO. J. ON POVERTY L. & POL'Y 181, 200 (2012) ("An adversarial system conserves public funding by forcing private litigants to bear much of the cost of developing and presenting the facts.").

adjudicator's costs, I will use the variable A_s to denote the adjudication costs of a standard. The drafter's portion of the adjudication cost is therefore xA_s, where $0 \leq x \leq 1$.

The legal directive governs a decision on some issue that I will denote as V. One can imagine V as standing for, say, the purchase price in a sales contract — for a mathematical model I must choose an issue that can be denoted with a number, but the intuition is the same for issues that do not translate to numbers. I will use V_t to denote the *true* value — the value that the legal regime is supposed to be achieving. Thus, for example, standard contract theory posits that courts should seek to effectuate the parties' agreement because doing so generally enhances overall social welfare (in the absence of externalities),[145] so in the context of a contract, V_t would represent the true bargain that the parties actually agreed on. In a will, V_t is the true amount that the testator intended to bequeath,[146] and in a patent, V_t would be the true invention that an inventor actually contributed to society through the patent and is entitled to legal protection over. I will use V_p to denote the drafter's *preference* as to V, which may be very different from the true value. For example, as applied to a sales contract drafted by the seller, the seller would likely prefer to receive a much higher price than the true price, such that $V_p = \infty$.

Where V_p is different from V_t, the drafter has an incentive to write a rule that biases the decision in his own favor. I will denote the outcome specified by a drafter-written rule as V_r, which may be different from both V_t and V_p. For example, a seller trying to inflate the price in a contract might prefer an infinite price, but probably will not put infinity as the price in the written contract, because that would obviously lead to the written contract being invalidated. Instead, the seller would inflate the price through various more subtle mechanisms (such as putting in surcharges and fees that the buyer never actually agreed to). In practically all circumstances, the value specified by the written rule will lie somewhere between the drafter's preference and the true value, and for convenience I assume that higher values are better for drafters, so $V_p \geq V_r \geq V_t$.

[145] *See supra* text accompanying notes 103–104.

[146] *See supra* text accompanying notes 90–91.

If the drafter writes a rule and the rule is followed, then the outcome will be V_r. If the drafter writes a standard — or if the adjudicator sets aside the rule and forcibly imposes a standard — then I assume the adjudicator will reach the true outcome V_t, though with a possibility of error that will be considered as part of the cost of adjudication. The private benefit of a slanted rule to the drafter, assuming that the rule is followed, is therefore $V_r - V_t$.[147] For reasons that will become apparent soon, I will use a separate variable S_d to denote this private benefit, where $S_d = V_r - V_t$.

2. The Adjudicator's Costs and Benefits

Once a rule or standard is written, its enforcement is in the hands of an adjudicator such as a court. Although in real life the adjudication process typically involves multiple actors (such as juries, trial judges, and appellate judges), for purposes of the present model I will collectivize them into a single entity, the "adjudicator," in the same way that a statute that is actually written by multiple individual legislators and their staff in a Senate and a House is treated as written by a single legislature.[148] If the drafter writes a rule, then the adjudicator has a choice about whether to follow the rule as written — the adjudicator is not automatically obedient but has autonomy, so the choice is determined by the adjudicator's own cost-benefit balance. If the adjudicator does not follow the rule, or if the drafter does not write a rule in the first place, then the decision is made under a standard.

Adjudicating disputes creates adjudication costs, which I will denote with the variable A, representing the total cost of adjudication under the legal directive (i.e., if there is more than one dispute then A is cost of all

[147] Although V_r is socially inefficient, and therefore there is the possibility of an efficiency-enhancing bargain, the model is focused on situations where no one can make such Coasean bargains ahead of time. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6-7 (1960) (raising the possibility that a farmer whose crop is damaged by cattle could pay the cattle rancher not to raise cattle). For example, a consumer party to a boilerplate contract cannot pay the drafter to write a non-slanted contract because by definition, the consumer does not realize the contract is slanted when he signs it.

[148] *Cf.* Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 249 (1992) (arguing that legislative intent is a meaningless concept because legislatures are collectives).

the adjudications combined). Although some of the adjudication cost is paid for by the litigants and not by the court,[149] these are still social costs,[150] so a public-spirited adjudicator would incorporate those costs into the analysis without discounting them. The adjudication cost includes both the direct cost of collecting information as well as the cost of errors in adjudication — there is always a tradeoff between the two (we can have careful adjudication with more evidence and less error, or cursory adjudication with more error), and for present purposes I am assuming that adjudicators efficiently balance this tradeoff, so A is simply the outcome of this balance.[151] The adjudication cost under a rule (i.e., if a rule is both written and followed) is A_r. The adjudication cost under a standard (whether a standard is chosen by the drafter or is imposed through the adjudicator overturning a rule) is A_s. It is generally accepted that adjudication costs are higher under standards than under rules.[152] Therefore $A_s > A_r$. As with the drafting cost, I will assume that the adjudication cost under a rule is zero, because we are only concerned about the relative difference between rules and standards. Thus, the only adjudication cost that will be included in the model is A_s, which represents the marginal difference between adjudication costs under a standard versus those under a rule.

At the same time, an adjudicator who follows a rule must reach an outcome, V_r, which may be slanted. A public-spirited adjudicator would prefer the outcome V_t. The adjudicator suffers a loss of utility from

[149] *See* Rory Bahadur, *Electronic Discovery, Informational Privacy, Facebook and Utopian Civil Justice*, 79 MISS. L.J. 317, 356 (2009) ("[T]he cost of the adversarial system is not necessarily lower, but borne by the parties instead of society as a whole.").

[150] *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1490 (1999) ("Because the private benefits of searching for evidence may exceed or fall short of the social benefits, privatizing the search (as in the adversarial system) may result in too much or too little evidence from a social standpoint. . . .").

[151] In other words, the model assumes that adjudicators are public-spirited and will internalize the cost of errors. If adjudicators are not public-spirited, then they are likely to bias the tradeoff in the direction of reducing direct costs (such as the cost of collecting and considering evidence) that are borne by the adjudicator personally. Future research can develop a more sophisticated model featuring such self-interested adjudicators.

[152] Kaplow, *supra* note 1, at 557.

reaching a non-preferred result due to following a slanted rule, which I will denote with the variable $-S_a$.

The relationship between a drafter's gain under a slanted rule (S_d) and an adjudicator's loss ($-S_a$) is complicated. Intuitively, one might expect that the two would be directly offsetting, so that $S_d = S_a$. This is not so in most cases, because the drafter's gain is personal while the adjudicator's loss is social. In most circumstances, the social loss arising from an act of misappropriation is not the same as the private gain from it. If a thief steals $100 from a victim, then the thief's private gain is $100 and the victim's private loss is $100, but *society's* loss from the theft is generally less than $100.[153] This is because the transfer of money from victim to thief is, in economic thinking, a neutral wealth transfer that does not itself affect social welfare one way or the other. To economists, social loss from theft only arises because the victim is likely to take socially costly precautions in the future to prevent and deter future thefts.[154] Those precautions are likely to be less than or equal to $100, because it makes no economic sense to spend more than $100 on precautions to prevent a $100 theft. In a similar vein, a drafter's opportunistic appropriation of private gain through slanted drafting is likely to result in less than the corresponding amount of social loss. Thus, to the extent that an adjudicator is public-spirited and working to maximize social efficiency, the relationship between the drafter's private gain and the adjudicator's social loss is that the latter is a *function* of the former, such that the two are positively related (the larger the private gain, the larger the social loss) but do not necessarily move in a one-to-one ratio. The social loss is also generally less than or equal to the private gain. In mathematical terms, $S_a = f(S_d)$ and $S_a \leq S_d$.

Although I assume that the adjudicator is public-spirited, my model is static in that I assume that the adjudicator is working to minimize social costs *given* the legal directive as it is drafted. In other words, the adjudicator does not consider the ex ante social cost of drafting because

[153] *See* Saul Levmore, *Gomorrah to* Ybarra *and More: Overextraction and the Puzzle of Immoderate Group Liability*, 81 VA. L. REV. 1561, 1586 (1995) ("Monetary transfers from the innocent members . . . yield social losses much less than the private losses experienced by these individuals.").

[154] *Id.* at 1586 & n.59 ("[T]he social loss comes not from the involuntary wealth transfer . . . but rather pertains to the costs of precautions taken against theft.").

that is a sunk cost by the time of the adjudicator's decision — the rule or standard has already been drafted, and the adjudicator's decision cannot change the drafting cost.[155]

B. Analysis

In principle, there are three possible combinations of actions, each with consequences for the drafter's and adjudicator's private benefit-cost calculation.

1. If the drafter writes a rule and the adjudicator enforces the rule, then the drafter's payoff is:

   $$S_d - D_r$$

   That is, the drafter gains the benefit of the slanted rule but must bear the higher drafting cost of the rule. On the flip side, the adjudicator's payoff is:

   $$-S_a$$

   That is, the adjudicator suffers the social loss of allowing the drafting slant to take effect but does not incur the adjudication costs that would occur under a standard. The adjudicator also does not consider the drafting cost because that is a sunk cost by the time of the adjudicator's decision.

2. If the drafter writes a rule and the adjudicator sets aside the rule to effectively impose a standard, then the drafter's payoff is:

   $$-D_r - xA_s$$

   That is, the drafter in this situation does not gain any benefit from writing the rule (because it is not enforced), while he still has to pay the drafting cost and his portion of the adjudication cost. On the other hand, the adjudicator's payoff is:

   $$-A_s$$

[155] *See* Scott & Triantis, *supra* note 4, at 842 (arguing that "the court may have incentives to contain litigation costs, but its ex post perspective is likely to weigh litigation costs against accuracy in factfinding, rather than against ex ante efficiency").

That is, the adjudicator can reach its preferred outcome and no longer suffers a loss from following a slanted rule, but it must now incur higher adjudication costs.

3. If the drafter writes a standard and the adjudicator follows the standard, then the drafter's payoff is:

$$-xA_s.$$

The drafter neither gains any private benefit from drafting slant nor incurs any drafting cost because the cost of drafting a standard is set to zero by definition. But the drafter does pay the portion of adjudication cost that he privately incurs under a standard. In this scenario, the adjudicator's payoff is $-A_s$, by the same logic as above.

A fourth permutation — where the drafter writes a standard and the adjudicator enforces a rule — is not conceptually possible, because without the drafter providing a rule, there is no rule for the adjudicator to enforce (if the adjudicator makes up a gap-filling doctrinal rule, that is still a "standard" for present purposes). The above payoffs can be placed in table form:

Payoffs	Rule	Standard
Drafter	If adjudicator follows: $S_d - D_r$ If adjudicator sets aside: $-D_r - xA_s$	$-xA_s$
Adjudicator	$-S_a$	$-A_s$

This table can be further simplified, because a drafter will not write a rule if he does not expect the adjudicator to follow the rule. If the drafter writes a rule that the adjudicator does not follow, then his payoff is $-D_r - xA_s$. If he writes a standard, then his payoff is $-xA_s$. Because he is strictly better off with the payoff under the standard — his adjudication cost under both the unenforced rule and the standard is the same, but under the standard he does not pay the drafting cost — the drafter will always

write a standard if he expects the adjudicator to set aside the rule.[156] The payoff matrix can therefore be simplified thus:

Payoffs	Rule	Standard
Drafter	$S_d - D_r$	$-xA_s$
Adjudicator	$-S_a$	$-A_s$

Having established the payoffs of a drafter's and adjudicator's respective choices, we can now determine the conditions under which a rule or a standard will be chosen. Specifically, a rule will be written if (1) the private benefit of a slanted outcome plus the drafter's portion of the adjudication cost under a standard exceeds the drafting cost of a rule, and (2) the social cost of the slanted outcome is less than the adjudication cost. Both conditions must be met for a rule to be chosen, otherwise the drafter will choose a standard.

Condition (1) is necessary because a drafter will only write a rule if the private benefit exceeds the drafting cost, or, in mathematical terms, $S_d + xA_s \geq D_r$. Condition (2) is necessary because the drafter will only write a rule if he expects the adjudicator to enforce it, and an adjudicator can be expected to enforce the rule only if society is better off under a rule rather than a standard, that is , if $S_a \leq A_s$. Thus, in mathematical terms, a rule will be written only if $S_d + xA_s \geq D_r$ and $S_a \leq A_s$. A standard will be written in all other circumstances.

Another point that follows is that, if a rule will be written, then the drafter will write the rule in a manner that is as maximally slanted as the adjudicator will allow. In mathematical terms, the drafter will slant the rule such that $S_a = A_s$. This is because S_d and S_a are positively related, so the higher the value of one the higher the value of the other, and $S_a = A_s$ is the highest amount of slant that an adjudicator will accept and still enforce the rule.

[156] In reality, a drafter usually cannot perfectly predict whether an adjudicator will enforce or set aside a rule, not least because different judges have different judicial philosophies about enforcing rules. One can account for this by assigning a variable, p, to denote the probability that the adjudicator will enforce the rule. The drafter's payoff for a rule in this more complex model would be $p(S_d - D_r) - (1 - p)(D_r + xA_s)$. Because this probabilistic model is more complex but does not change any of the results in a meaningful way, I will assume in the rest of the article that drafters can predict with certainty whether adjudicators will enforce a rule.

All of the above may seem rather obvious when stated in ordinary language. At a general level, what the model predicts is that drafters will write rules when rules create net private and social benefits, a proposition that appears intuitive and would not require a lot of complex math to establish. But the model also establishes some points that may not be intuitive at first glance.

First, what the model shows is that courts will — and should — enforce many self-serving slanted rules in contracts, patents, and other privately written legal instruments. This contradicts a common intuition that courts should always aim to reach the best result in the case before them.[157]

Second, the model shows that the problem of slanted rules is, to some extent, self-limiting, because drafters can only slant rules to the extent that the rule is still socially beneficial on net. In contrast to the common portrayals of anti-consumer contractual boilerplate and self-serving patent claims as unmitigated evils,[158] my model presents a more nuanced picture of these privately written rules. And while others have previously defended contractual boilerplate based on economic efficiency arguments, these defenses are based on consumer choice[159] or reputational considerations,[160] not on the self-limiting nature of how drafters will write slanted rules.

Third, wading into the details of the math is useful because it allows refinements over the prior literature. For example, the prior literature typically treats the choice of rules versus standards as depending on a

[157] *See, e.g.*, Kenworthey Bilz, *We Don't Want to Hear It: Psychology, Literature, and the Narrative Model of Judging*, U. ILL. L. REV. 429, 442 (2010) (observing that the notion that courts should sacrifice accuracy for some other social purpose "causes rebellion in the hearts of . . . many lawyers, policy makers, and academics").

[158] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 210-13 (2014) (arguing that boilerplate should be treated as an intentional tort that allows recovery of damages); Oskar Liivak, *Overclaiming Is Criminal*, 49 ARIZ. ST. L.J. 1417, 1418 (2017) (arguing that "patent applicants owe a duty to craft correctly sized claims" and intentional overclaiming should lead to criminal liability).

[159] *See* Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 895-99 (2014) (arguing that boilerplate is efficient because it allows people to trade legal rights for other attributes).

[160] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.9, at 116 (7th ed. 2007) ("A seller is more likely to be deterred from behaving opportunistically by considerations of reputation than a consumer is.").

balance between ex ante drafting costs against ex post adjudication costs.[161] What my model illustrates is that drafting costs and adjudication costs are in fact relevant to the choice, but they are not the only components, and they are not directly balanced against each other. Rather, the drafting costs of a rule are balanced against the rule's *private* benefits, while the adjudication costs of a standard are balanced against the *social* costs of a slanted rule. The result is that it is possible for a rule to be chosen even when the cost of drafting exceeds the cost of adjudication.

A further implication is that even in a situation where the drafter and adjudicator's preferences converge (i.e., where there is no drafting slant), the rule/standard choice does not reduce to a simple balance of drafting cost versus adjudication cost. Rather, the choice in such a situation depends on a comparison between the drafting cost (D_r) and the drafter's *portion* of the adjudication cost (xA_s). The result is that there are some situations where private drafters have socially sub-optimal incentives to write clear rules, because they do not bear the full social cost of adjudication.[162] An example would be in the law of wills where there is usually no issue of drafting slant. A testator's basic tradeoff is between spending money today to draft a clear will or face the possibility of a dispute in the future if the will is not clear. To the extent that a testator's estate does not bear the full cost of resolving any ambiguities and disputes about a will (because taxpayer-funded courts partially subsidize this), testators privately bear the full drafting cost of a rule but only part of the adjudication cost of a standard. What the model predicts, therefore, is that wills will be less rule-bound and less

[161] *See, e.g.*, Kaplow, *supra* note 1, at 621 ("Undertaking such effort in advance involves additional costs, but results in savings when individuals must determine how the law applies to their contemplated conduct and when adjudicators must apply the law to past conduct."); Scott & Triantis, *supra* note 4, at 820 (framing the rules/standards choice as a "tradeoff between front-end transaction costs and backend enforcement costs" and explaining how others also adopt this framing).

[162] *See* Sunstein, *supra* note 27, at 1004 ("When lawmaking is separate from law-interpretation and law-enforcement, many of the costs of producing clarity ex ante will be faced by lawmakers themselves, whereas many of the costs of producing clarity ex post will be faced by others.").

clear than socially optimal.[163] This does not mean that no one will spend money to write a clear will — those with large estates, or who attach a high subjective value to ensuring that their assets are disposed in a specific manner, will still have adequate incentives for clear drafting. The claim is that the marginal incentive for clear drafting in wills (including even having a written will at all) is less than socially optimal.[164]

IV. IMPLICATIONS AND PAYOFFS

A. *Private Drafter Incentives and Drafting Slant*

A simple but important takeaway from the prior Part is that what determines the choice of a rule or standard is not whether a rule or standard is socially desirable, but whether the drafter is privately better off under a rule or standard. The question of private drafter incentives has not been extensively asked in the prior literature.[165] We have an enormous literature asking the question of whether rules or standards are normatively better. We do not have much of a literature asking whether a rule or a standard will actually be written, or why. This Article takes a step towards asking the positive question.

An implication that quickly follows from the insight that drafters act on private incentives is the central importance of drafting slant in shaping the rules/standards choice. Slanted drafting of contract terms is a phenomenon well known to the legal literature,[166] but the concept has

[163] *Cf.* David Horton, *Do-It-Yourself Wills*, 53 U.C. DAVIS L. REV. 2357, 2393-95 (2020) (finding that do-it-yourself wills tend to be litigated at higher rates than lawyer-drafted wills).

[164] This claim is conceptually analogous to Colin Diver's claim that, on the margin, regulatory agencies have sub-optimal incentives for clarity in rule drafting, even though many agency regulations are very precisely drafted. *See* Diver, *supra* note 55, at 102-03.

[165] *See supra* Part I.B.3.

[166] *See, e.g.*, Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT'L ECON. L. 681, 688 (2006) ("[T]he party that drafts the contract usually has had the advantage of time and expert advice . . . almost inevitably producing a contract slanted in that party's favor."); Eric A. Zacks, *The Moral Hazard of Contract Drafting*, 42 FLA. ST. U. L. REV. 991, 1015-19 (2015) ("As with all contracts but even more so with standard form contracts, the drafting party may be able to take actions that further her interests at the expense of the principal's interests.").

not previously been seen as relevant to the rules/standards debate. As the model demonstrates, however, drafting slant affects *whether* a rule or a standard will be written, *how slanted* a rule is written, and whether a rule will be *followed* by the adjudicator.

The twin insights that drafters will attempt to impose slanted outcomes through rules, while adjudicators will seek to resist slanted rules, fit and explain important dynamics that are observed in contract and patent law. In contract law, my model primarily applies to boilerplate consumer contracts, where there is a longstanding debate in the literature over whether these contracts fairly reflect the parties' real agreement or instead are unfairly slanted toward drafters.[167] A corresponding puzzle in this debate is why, if consumer contracts are in fact slanted toward drafters, courts nonetheless usually enforce them, with doctrines such as unconscionability being invoked to set contracts aside only in rare cases.[168] In the face of this puzzle, scholars end up either constructing elaborate arguments on why standard form consumer contracts are not slanted and are in fact efficient[169] — even though common experience suggests otherwise[170] — or arguing that

[167] *See generally* RADIN, *supra* note 158 (arguing against boilerplate contracts); Omri Ben-Shahar, *"Boilerplate": Foundations of Market Contracts Symposium: Foreword*, 104 MICH. L. REV. 821, 821 (2006) ("The enforceability of boilerplate is very much the legal locus where the philosophical debate over the regulation of markets hits the road.").

[168] *See* Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 211 (1991) (reviewing WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991)) ("[I]t is extremely rare that a court refuses to enforce a contract on grounds of unconscionability or adhesion.").

[169] *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *Boilerplate in Consumer Contract: One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827-28 (2006) (arguing that "contracts that appear on paper to be one-sided against the consumer may in reality be implemented in a balanced way"); Ben-Shahar, *supra* note 159, at 895-99 (arguing that boilerplate is efficient because it allow people to trade legal rights for other attributes); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1452 (1983) ("[M]uch regulation of contract terms on imperfect information grounds is misconceived.").

[170] *See* POSNER, *supra* note 160, at 116 ("[F]orm contracts used in consumer transactions *do* tend to be one-sided against the consumer. . . .").

courts should be much more active in policing these contracts than they currently are.[171]

What my analysis suggests is that both sides are partly right and partly wrong. Boilerplate consumer contracts are in fact very likely to be slanted[172] — drafters will have little incentive to invest in drafting the kind of detailed rules that are commonly seen in consumer contracts unless they can gain enough private benefit to compensate for those drafting costs. Nonetheless, it is descriptively unsurprising, and normatively justifiable, for courts to nonetheless routinely enforce these contracts. First, although form contracts will be slanted, they will not be *extremely* slanted — the threat of non-enforcement places a limit on the degree of drafting slant. Second, because drafters will, on their own accord, only slant up to the point where they still expect enforcement (going over that line is detrimental to the drafter's own interests), it should be unsurprising that doctrines such as unconscionability are rarely *actually* invoked in practice and form contracts are routinely enforced; the fact that the threat of non-enforcement rarely needs to be carried out should be understood as a sign that the threat works, not that it is empty. Third, to the extent the argument is that courts should not ever enforce slanted contracts, the response is that it is in society's interest to encourage drafters to provide detailed rules that reduce adjudication cost. Allowing *some* drafting slant in order to incentivize the writing of rules — as long as the social loss from drafting slant is less than the increased adjudication cost that would arise under a standard — is a socially efficient price to pay.[173]

In sum, the model predicts that standard form consumer contracts will be slanted, that they will take the form of detailed rules rather than

[171] *See, e.g.*, RADIN, *supra* note 158, at 210-13 (arguing that boilerplate should be treated as an intentional tort); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1278-79 (2003) (arguing for modifications to unconscionability doctrine to regulate form contracts); Rakoff, *supra* note 73 (arguing adhesion contracts should be presumptively unenforceable).

[172] *See* Jonathan Klick, *Corporate Decisionmaking: The Microfoundations of Standard Form Contracts: Price Discrimination vs. Behavioral Bias*, 32 FLA. ST. U. L. REV. 555, 556 (2005) ("[A] great many of the standardized terms appear to benefit the seller to the potential detriment of the buyer.").

[173] *See* Chiang, *supra* note 123, at 531.

open-ended standards, and that they will be commonly enforced by courts, but within limits. Additionally, the model predicts that courts will be more resistant to boilerplate consumer contracts than to fully negotiated contracts between sophisticated business parties (because it is more difficult for a drafter to slant a contract with an alert and sophisticated counterparty). I submit that all of these predictions are empirically observed as a matter of everyday experience: consumer contracts *are* slanted.[174] They are nearly always extremely detailed and rule-like. They are routinely enforced and rarely overturned.[175] And, notwithstanding the fact that most boilerplate consumer contracts do end up passing muster, courts scrutinize boilerplate consumer contracts more carefully than fully negotiated contracts between businesses.[176]

Understanding the effect of drafting slant on incentives regarding the rule/standard choice also helps shed light on dynamics and debates in patent law, in particular with respect to the drafting and interpretation of patent claims. For those unfamiliar with patents, a "claim" is a one sentence description of the invention which serves to delineate the patentee's legal rights.[177] There are two types of systems governing how a patent claim is written. In a so-called "peripheral claiming" system, a patent claim is written to precisely specify which objects do and do not infringe, and thereby specify the precise boundaries of the patent right. A relatively simple example is claim 1 of U.S. Patent No. 6,436,015, which (roughly speaking) covers a weight plate with three handles. The full claim reads:

[174] *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) ("These asymmetrical incentives almost always work to heavily slant form contracts in favor of form givers.").

[175] Mastro, *supra* note 168, at 211.

[176] Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts — A Two-Part Critique of* Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (*Part I*), 62 CLEV. ST. L. REV. 373, 384 (2014) (reviewing MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)) ("[A]lmost all courts scrutinize contracts of adhesion 'skeptically.'").

[177] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996) (noting claims are "the portion of the patent document that defines the scope of the patentee's rights").

> 1. A weight plate for physical fitness including:
>
> a plate body formed with a central throughbore and having a plate periphery;
>
> said body further formed with solely a triad of spaced apart elongated handle openings disposed generally equiangularly and positioned radially outwardly from said central throughbore and at least midway out from the center of the body to said radial periphery, said openings having respective outboard edges cooperating with said plate to define a triad of integral handle elements for grasping by a single hand to effect transport of said weight plate.[178]

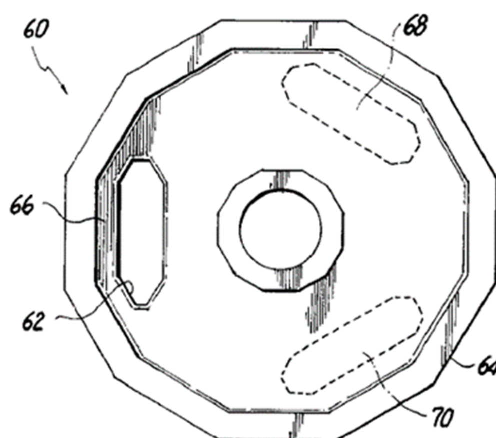
As should be obvious, a peripheral claim is highly rule like — even this very simple invention requires ninety-two words to delineate. In a peripheral claiming regime, the claim delineates the coverage of the patent in a bright-line fashion: every object that is literally described by the claim language is considered covered by the patent, while an object that is missing even one required element does not infringe.[179] For example, the claim above requires "elongated handle openings." Therefore, a weight plate with three *round* handles would not infringe this claim.

In contrast to a peripheral claiming system, a "central claiming" system features much looser and standard-like claims. In a central claiming system, the '015 patent would show a picture of the invention such as the one below:[180]

[178] U.S. Patent No. 6,436,015, col. 4, ll. 24–35 (filed Feb. 11, 1998).

[179] Builders Concrete, Inc. v. Bremerton Concrete Prods. Co., 757 F.2d 255, 257 (Fed. Cir. 1985) ("Literal infringement requires that the accused device embody every element of the claim."). There is a narrow exception, known as the "doctrine of equivalents," that is discussed below. *See* Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 24-25 (1997).

[180] U.S. Patent No. 6,436,015, fig. 5.



The patent would then have a claim that reads something like: "1. A weight plate substantially as shown." The claim would not attempt to precisely specify which weight plates are covered and not covered.[181] Instead, a court would decide later whether an accused weight plate — for example, a weight plate with three round handles — was so similar to the weight plate depicted that it should be considered to infringe.

Historically speaking, the American patent system began with a central claiming system and then transitioned to a peripheral claiming system, so all modern patent claims are written in the style of a peripheral claim.[182] The transition is often dated to the Supreme Court decision in *Merrill v. Yeomans*,[183] which held that there is "no excuse for ambiguous language or vague descriptions" in patent claims and the "public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights."[184] This conventional narrative portrays the transition from central to

[181] *See* Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 726-27 (2009) ("[O]ne might publicly describe only some members of the set, which are clearly protected under the right, and use them to determine whether other items are similar enough to the enumerated members to fall also within the same right. This sort of claiming is known as central claiming.").

[182] *See id.* at 731-35.

[183] 94 U.S. 568 (1876).

[184] *Id.* at 573.

peripheral claims as something done at the behest of courts,[185] with the motivating reason being the protection of the public from "ambiguous language [and] vague descriptions."[186]

What this narrative misses is that peripheral claims were first developed *by patentees*. As John Duffy has explained:

> The legal construct now known as the patent claim . . . arose not from any administrative, judicial, or legislative requirement. Instead, it was an innovation of patent attorneys, and it was formulated to protect and to expand the rights of patentees.
>
> . . .
>
> From the standpoint of the patentee, judging infringement under an equivalents-type analysis (i.e., the substantial identity test, as it was then known) presented a rather large disadvantage . . . . The danger for the patentee was that lay jurors would find no infringement because they would see many superficial differences between the defendant's machine and the description of the patented invention and thus believe the two not substantially identical.
>
> Inventors responded to this problem by developing "claims" in which they defined their inventions in broad conceptual terms and asserted rights to the invention in those terms. This is why, even before they were required as a matter of law, claims in the modern style first appeared as sweeping assertions of right deployed by aggressive patentees such as Robert Fulton and

[185] *See, e.g.*, R. CARL MOY, MOY'S WALKER ON PATENTS § 4:3 (4th Ed. 2003) ("The United States Supreme Court, for example, decided a series of cases in the 1870s that disparage the central form of claim interpretation openly, and which reject its use in favor of peripheral interpretation." (citing *Merrill*, 94 U.S. at 573)); Fromer, *supra* note 181, at 734 (attributing the change to "judicial murmurings expressing a preference for more structured peripheral claims," PTO regulations, and Congress's enactment of the Patent Act of 1870).

[186] *Merrill*, 94 U.S. at 573; *see* MOY, *supra* note 185, at § 4:3 ("Central claiming came under sustained attack in the United States, apparently because of this poor notice, immediately after the Civil War.").

> Samuel Colt. . . . The claim was the friend of the patentee; it helped to expand patent rights.[187]

Thus, rather than a feel-good story of public-spirited courts moving from standard-like central claims to rule-bound peripheral claims in order to facilitate clarity and protect the public from vague language,[188] the real story of the development of peripheral patent claims is a much more cynical story of self-interested patentees writing rules because those rules helped to secure private benefits for patentees. A model portraying the rules/standards choice as driven by private benefits from drafting slant, rather than social benefits from certainty, better fits and explains the actual historical development of patent claims.

The model also better fits and explains modern patent law. For although today's courts rhetorically emphasize the primacy of peripheral claims in defining the patented invention and delineating the patentee's legal rights,[189] in reality they often only pay lip service to the claim language while deciding cases based on extratextual considerations.[190] A wide variety of doctrinal tools facilitate the bending of rule-like peripheral claims, from explicit doctrines that inject flexibility such as the doctrine of equivalents[191] and reverse doctrine of equivalents,[192] to more surreptitious tactics such as making claim interpretation doctrine so messy and self-contradictory that courts have nearly unlimited discretion to reach their favored outcome in every

[187] John F. Duffy, *The* Festo *Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 308-10.

[188] *See, e.g.*, Fromer, *supra* note 181, at 731-34 (describing the evolution towards peripheral claiming by focusing on changes initiated by Congress, the PTO, and the courts).

[189] *See In re* Hiniker Co., 150 F.3d 1362, 1369 (Fed. Cir. 1998) ("[T]he name of the game is the claim.").

[190] *See* Burk & Lemley, *supra* note 4, at 1783 ("[C]ourts, as a practical matter, aren't paying peripheral claim construction more than lip service. . . .").

[191] *See* Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 25-30 (1997) (reaffirming doctrine of equivalents even though it "conflicts with the definitional and public-notice functions of the statutory claiming requirement").

[192] *See generally* Westinghouse v. Boyden Power Brake Co., 170 U.S. 537 (1898) (applying reverse doctrine of equivalents).

case.[193] The Federal Circuit has reached the point where it can bend language so that the word "a" means "one or more"[194] while the word "plurality" includes "one."[195] If the motivating concern is to maximize clarity in patent rights — and this is the *professed* concern[196] — then these judicial moves to add flexibility (and therefore uncertainty) make no sense.

Introducing the concept of drafting slant into the rules/standards analysis, and viewing the judicial reaction to rule-like peripheral claims through this prism, allows us to make more sense of the situation. The motivating concern in claim construction cases is not only — perhaps not even primarily — a concern for public notice and certainty in patent rights.[197] Instead, judges are also concerned about the possibility that patentees will self-servingly slant claims in a way to obtain excessively broad monopoly rights.[198] The way that patentees attempt to obtain such overbroad rights is by using clear rules that are slanted in their favor; the way that judges resist such patentee tactics is to surreptitiously bend the rule and essentially make it into a standard. But judges cannot simply set aside patentee-drafted rules and impose standards willy-nilly, because standards have higher adjudication costs than rules. Thus, judges are caught in an uneasy balancing act where they need to encourage drafters to write rules, resulting in some tolerance for slanted rules and a rhetorical emphasis on clarity over flexibility, but also need to limit the costs of slanted outcomes, so the

193 *See* Burk & Lemley, *supra* note 4, at 1744 ("Literally every case involves a fight over the meaning of multiple terms, and not just the complex technical ones.").

194 Baldwin Graphic Sys., Inc. v. Siebert, Inc., 512 F.3d 1338, 1342 (Fed. Cir. 2008) (quoting KCJ Corp. v. Kinetic Concepts, Inc., 223 F.3d 1351, 1356 (Fed. Cir. 2000)).

195 Verizon Servs. Corp. v. Vonage Holdings Corp., 503 F.3d 1295, 1308-09 (Fed. Cir. 2007) (citing Interactive Gift Express, Inc. v. CompuServe Inc., 256 F.3d 1323, 1335 (Fed. Cir. 2001)).

196 Merrill v. Yeomans, 94 U.S. 568, 573 (1876).

197 *But cf.* Phillips v. AWH Corp., 376 F.3d 1382, 1383 (Fed. Cir. 2004) (asking for en banc briefing on what interpretative methodology would best serve "the public notice function of patent claims").

198 *See* Retractable Techs., Inc. v. Becton, Dickinson & Co., 653 F.3d 1296, 1311 (Fed. Cir. 2011) (Plager, J., concurring) ("However much desired by the claim drafters, who want claims that serve as business weapons and litigation threats, the claims cannot go beyond the actual invention that entitles the inventor to a patent." (internal citations omitted)).

tolerance is not unlimited and there is also much surreptitious bending of the rules beneath the surface.[199] The inconsistency in judicial *methodology* that results from this uneasy balancing act is what causes patent litigation to be uncertain, not any intrinsic linguistic ambiguity in the claim language.[200]

Drafting slant is unlikely to occur with respect to wills, because testators have no reason to write wills in a manner that is different to the social objective, which is to effectuate the testator's desires.[201] Wills therefore illustrate the reverse situation from patents and boilerplate consumer contracts. In the context of boilerplate consumer contracts and patents — or, to the put the point more generally, when the drafter's preferences diverge from those of the adjudicator — then all else being equal, the drafter has the incentive to write rules (in order to obtain the benefits of drafting slant) and the adjudicator will be skeptical of those rules because they are likely to be slanted.[202] In the context of wills — or, more generally, when the drafter's preferences converge with those of the adjudicator — then the drafter has sub-optimal incentives to write rules, or in other words more incentive to write standards, but the adjudicator will be more trusting of any rules written by the drafter.[203]

It is difficult to empirically test the prediction that courts will be more receptive to rules in testamentary wills than rules in consumer contracts and patents, while drafters will be less rule-favoring in wills than in boilerplate consumer contracts and patents. A few real-life observations are supportive of this prediction, though I submit them more as suggestive evidence than as definitive proof, since the data for rigorous empirical proof is simply not available. First, the *contra proferentem* doctrine — ostensibly designed to promote clear rules but in practice

[199] *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (evaluating the practice of "acoustic separation," where courts tell citizens to behave by one set of principles and then surreptitiously make decisions based on a different set of principles).

[200] Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 573 (2013).

[201] *See supra* text accompanying notes 90–102.

[202] *See supra* text accompanying notes 112–113, 123–125.

[203] *See* Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 571 (2005) ("Because of the freedom of the writers of wills, there may be less room for public policy to affect interpretation here than elsewhere.").

used to undermine them (by "construing" drafter-preferred rules out of existence[204]) — does not apply to wills,[205] which suggests that rules in wills are given more faithful treatment by courts than rules in boilerplate consumer contracts and patents. Second, courts say that the parol evidence rule applies with more strictness to wills than to contracts,[206] which would indicate that courts are more trusting of written rules in wills than in contracts. It is admittedly difficult to measure how strictly the parol evidence rule is actually applied between different cases, but the available empirical evidence does indicate that courts are more likely to apply the parol evidence rule in cases involving mutually negotiated contracts than adhesion contracts,[207] which is consistent with the model. Third, anyone who has seen a will, patent, and standard form consumer contract will notice that wills are not written to the same degree of legal exactness and detail as patent claims and form contracts. For example, the will of John D. Rockefeller — whose wealth in 1937 equaled 1.5% of U.S. GDP[208] — is written in relatively simple language that non-experts can understand,[209] whereas a patent claim to something as simple as a weight plate is extremely legalistic.

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[204] *See infra* Part IV.B.

[205] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 11.2–11.3 (AM. L. INST. 2003) (providing a list of canons of construction, with no *contra proferentem* canon).

[206] *See* Robinson v. Ramsey, 129 S.E. 837, 838 (Ga. 1925) (stating that the parol evidence rule "especially should be applied in the construction of so solemn an instrument as one's last will"); Smith v. Holden, 50 P. 447, 448 (Kan. 1897) ("Somewhat more strictness is observed in the reception of parol evidence of expressions of a testator's intentions than in the case of like evidence explanatory of contracts *inter vivos*.").

[207] *See* Childres & Spitz, *supra* note 114, at 7-8, 24.

[208] *See* Alfred D. Chandler, *John D. Rockefeller: The Richest Man in the World*, HARVARD BUS. SCH. 1, 1 (Mar. 1, 2018), https://www.hbs.edu/faculty/Pages/item.aspx?num=47167 [https://perma.cc/WT98-CWJH] ("Rockefeller's estimated $1.4 billion net worth in 1937 was equivalent to 1.5% of the total GDP of the United States.").

[209] *Will of John D. Rockefeller*, 40 BRIEF 135 (May 1941).

B. Penetrating the Rhetoric of Vagueness and Revealing Hidden Legitimacy Arguments

By itself, the prior Section may not seem like much of a contribution. At some level, everyone knows about the problem of drafting slant, and there is plenty of discussion about the topic outside of the rules/standards literature. In contract law, there is a longstanding concern that contracts of adhesion may be unfairly slanted in favor of large corporations.[210] Similarly, in patent law, much has been written about the concern that patent claims may be too broad and end up conferring excessively broad monopolies.[211] At first glance, framing the issue under the rubric of the rules/standards framework does not seem to add anything to the analysis.

My first response to this criticism is to say that the rules/standards framework helps lend clarity and add depth. It is true that the contract and patent literature has noticed (in some contexts) the problem of drafting slant.[212] It is even true that some scholars, such as Duffy, have identified the role of patentee incentives in motivating the transition from central to peripheral claims.[213] But I am providing a larger framework within which to understand these observations, to show that what are usually considered distinct and unrelated phenomena in contract and patent law in fact share a common theme centered around the pursuit of, and resistance to, drafting slant.

If that kind of payoff is too nebulous for the reader's taste, then here is something more concrete: in the preexisting literature, courts and

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[210] *See, e.g.*, K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939) (reviewing OTTO PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)) ("What worries Prausnitz is the combination of mass production of bargains with *one-sided* control of their detailed terms.").

[211] *See, e.g.*, Mark A. Lemley, Robert W. Kastenmeier Lecture, *Software Patents and the Return of Functional Claiming*, 2013 WIS. L. REV. 905, 908 (Oct. 12, 2012) ("The fact that there are lots of patents with broad claims purporting to cover those goals creates a patent thicket."); Liivak, *supra* note 158, at 1417 ("Patents of questionable validity are being issued with overly broad, often-nebulous boundaries.").

[212] *See, e.g.*, Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 537 (2015) ("One of the most well-known examples of this was a Dilbert cartoon from 1997, where Dilbert, who failed to read the fine print in a software license, finds himself bound to be Bill Gates's towel boy.").

[213] *See supra* text accompanying note 187.

commentators quite frequently diagnose the problem with overbroad patents and with one-sided contracts of adhesion as one of ambiguity or vagueness.[214] The supposed concern with patent claims is that patentees will draft them vaguely, and that the vagueness will somehow lead to courts giving the patentee greater monopoly scope than under a clear claim.[215] Similarly, a commonly alleged problem with contracts of adhesion is that they are not clear enough.[216]

What the model shows is that this argument is backwards. A patentee's incentive is generally not to draft a vague claim; it is to draft a *clear* claim with broad coverage. A vague claim does not result in broad patent scope. It results in judicial discretion, and — if we assume that courts are public-spirited, or at least prefer narrower scope than patentees — that discretion leads to courts granting *narrower* patent scope compared to what a patentee-drafter would specify in a clear rule. An illustration of this fact is the demise of the means-plus-function claim format.[217] Under section 112(f) of the patent statute, a claim phrased in means-plus-function format — for example, describing a telegraph as a "means for communicating text"[218] — is subject to a

[214] In the philosophy of language there is a distinction between ambiguity and vagueness. Chiang & Solum, *supra* note 200, at 549. Ambiguity refers to a situation where a word has more than one sense, such as "cool" being a word that refers both to a low temperature and to something that is hip. Vagueness refers to a situation where a word has fuzzy boundaries, so it is not clear if an air temperature of 70 °F is "cool" or not. This distinction does not affect my analysis here, so in this Article I will use "ambiguity" and "vagueness" interchangeably to refer to a lack of linguistic clarity.

[215] *See, e.g.*, BESSEN & MEURER, *supra* note 121, at 57 (arguing that patentees have incentives to draft vague claims that lead to overbroad patents); Dan L. Burk, *Dynamic Claim Interpretation*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 1, 5 (Shyamkrishna Balganesh ed., 2012) (arguing that indeterminacy in claim language "inevitably leads to a reading that is even broader than the patent drafter might originally have expected").

[216] *See, e.g.*, Dammann, *supra* note 11, at 186 ("A seemingly perennial feature of boilerplate terms is that they lack clarity.").

[217] JANICE M. MUELLER, PATENT LAW 135-36 (7th ed. 2024) ("Since the 1980s, the use of means-plus-function claiming has declined precipitously, most probably because the Federal Circuit has made clear that means-plus-function elements operate to narrow (rather than expand) claim scope.").

[218] *Cf.* O'Reilly v. Morse, 56 U.S. 62, 112-13 (1853) (invalidating Morse's claim to "the use of the motive power of the electric or galvanic current . . . however developed for marking or printing intelligible characters, signs, or letters, at any distances").

special rule of construction that it covers the particular objects described in the patent specification and "equivalents" to those objects.[219] The statute therefore transforms a patentee-written rule into a statutorily imposed standard, because what constitutes an "equivalent" is necessarily vague. Congress explicitly providing a way to make claims more vague did not gain cheers from patentees. Instead, patent drafters started avoiding the means-plus-function format,[220] while trying to accomplish the same objective using different language that would be enforced as a rule.[221] On the flip side, when the means-plus-function format is used, courts interpret what constitutes an "equivalent" very narrowly[222] — a result that is entirely predictable under my model, but is contrary to the common argument that more claim vagueness inevitably leads to broader claim scope.[223]

The real concern with patent claims is not that they are too vague, but that they are too clear — and too clearly overbroad. The problem is not linguistic vagueness, it is the patentee's self-serving incentives and the overbroad patents that result from those incentives.

Similarly, the problem with one-sided contracts of adhesion is not that they are full of vague language.[224] Anybody who has ever closely read a standard form contract will see that they are actually quite rule-bound.[225] For example, compared with the will of John Rockefeller that is less than 8,000 words long,[226] a standard rental car contract (involving property worth far less than Rockefeller's estate) is nearly 20,000 words

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[219] 35 U.S.C. § 112(f) (2018).

[220] *See* Lemley, *supra* note 211, at 907 ("[E]xperienced patent lawyers today generally avoid writing their patent claims in means-plus-function format . . . .").

[221] *Id.* at 907-08 ("[P]atentees have been able to write those broad functional claims without being subject to the limitations of Section 112(f).").

[222] *See* Mueller, *supra* note 217, at 135.

[223] *See, e.g.*, Burk, *supra* note 215, at 5.

[224] *Cf.* Wayne A. Logan & Jake Linford, *Contracting for Fourth Amendment Privacy Online*, 104 MINN. L. REV. 101, 143 (2019) (asserting that "[a] large body of research demonstrates that provisions in online standard form agreements and privacy policies are often ambiguous or unclear").

[225] *See* Bernard Black, Note, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 256 (1981) (stating that standard form consumer contracts use "long lists of words or clauses to cover every contingency").

[226] *Will of John D. Rockefeller*, *supra* note 209.

long, with precise definitions for even simple words like "day."[227] Like with patent drafters, the drafters of one-sided contracts have little incentive to write vague standards, and they in fact do not write vague standards — vague standards lead to the likelihood that judges and juries who are sympathetic to the little-guy consumer will apply the standard in a consumer-favoring and drafter-disfavoring way. Rather, the problem with contracts of adhesion is that they are clear but slanted. The slant is there to give the drafter private benefits, and the clarity is there to make it more difficult for courts to take those private benefits away.

To be sure, the language of patents and boilerplate contracts is often difficult for laypersons to understand.[228] But this does not mean that patents and boilerplate contracts are vague or ambiguous, or that they are not rules but are standards. The language of the tax code is also difficult for laypersons to understand, yet the tax code is commonly given as a paradigmatic example of a rule.[229] The reason the tax code is difficult to understand is not because it is vague but because it is very dense and convoluted. Congress must be very precise when writing tax laws to provide instructions to taxpayers without providing loopholes to exploit. The result is not a vague standard but a set of linguistically precise (but convoluted and mentally taxing to read) rules filled with legal jargon. The same phenomenon occurs with patent claims and boilerplate contracts. Both are dense and unreadable not because they are vague but because they are precise.

This is not to say that patent claims and boilerplate contract terms are never ambiguous or vague. Patentees and corporate contract drafters have the incentive to incur drafting costs to write rules; they do not have the incentive to incur infinite drafting costs to write perfectly

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[227] *See, e.g.*, *Rental Terms and Conditions*, AVIS RENT A CAR, https://www.avis.com/en/legal-documents/rental-terms (last visited Feb. 2, 2024) [https://perma.cc/Q2PY-S3ZX] (providing definitions for terms including "day" at section 7.9).

[228] *See* Ari Ezra Waldman, *A Statistical Analysis of Privacy Policy Design*, 93 NOTRE DAME L. REV. ONLINE 159, 160 (2018) ("[P]rivacy policies are confusing, inconspicuous, long, and difficult to understand.").

[229] *See, e.g.*, Scott Baker, *Book Review*, 88 TEX. L. REV. 593, 605 (2010) (reviewing DAN L. BURK & MARK A. LEMLEY, CAN THE COURTS RESCUE US FROM THE PATENT CRISIS? THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT (2009)) (characterizing the tax code as "a set of rules").

clear rules. Some amount of under-determinacy is to be expected because it is impossible to specify every detail ahead of time in a world of finite drafting resources.[230] The point is that patentees and corporate contract drafters will generally prefer clarity over ambiguity,[231] and complaints about pervasive vagueness in patent claims and adhesion contracts are misplaced. Courts *say* that they are addressing a problem of vague patent claims and adhesion contracts, but what they are usually addressing is really a problem of clear-and-slanted patent claims and contracts.[232] The problem that motivates courts in these cases is not that the legal directive is so unclear that judges do not know what result is being specified by the language of the rule. It is that the judges know all too well what result is being specified, and they *do not like it*.[233]

When judges do not like a result that a legal text prescribes, it is much more convenient to say that the text is vague than to say that the judge does not like the clearly specified outcome and is therefore not going to follow the text. In our legal and political culture, saying that judges can, do, or should make decisions based on their own policy preferences is considered taboo — judicial nominees routinely swear blood oaths to the Senate abjuring such judicial activism.[234] Thus, instead of candidly

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[230] *See* STEVEN SHAVELL, FOUNDATIONS OF THE ECONOMICS OF LAW 299-300 (2004) (arguing that all contracts are necessarily incomplete).

[231] An additional qualification is that my model assumes a counterparty that does no policing at all, such as a consumer who does not read the contract. In situations where the counterparty does at least some policing of the drafter, strategic ambiguity to dupe the counterparty can be a rational ploy, though only rarely. *See* Chiang & Solum, *supra* note 200, at 589-92 & n.236 ("Only in a Goldilocks range where the PTO is competent enough for patentees to fear rejection, but not competent enough to actually detect patentee chicanery, will deliberate ambiguity be a problem.").

[232] *See* Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943) (noting that "many courts have shown remarkable skill in reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity").

[233] *Cf.* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 82-83 (2006) (arguing judges "clandestinely protected fairness norms by twisting legal doctrines such as duress, misrepresentation, failure of consideration, and lack of mutual assent, to provide relief from unfair contracts").

[234] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (analogizing judges to umpires).

stating that they are overturning a contract or patent claim because it reaches outcomes that the judge regards as slanted and undesirable, courts use the rhetoric of "vagueness" to attack such contracts and patent claims.[235] The political benefit to judges from the "vagueness" rhetoric is that it serves as a shield to the charge that judges are ignoring text in favor of their own policy predilections — if the text is hopelessly vague, then it does not specify how the judge should decide, and so the judge is legitimately free to reach the outcome he prefers because the drafter delegated that discretion to the court.[236] The payoff of applying the rules/standards framework to the analysis is to penetrate this pretextual vagueness rhetoric and gain a clearer picture of what is really going on.

This has further payoffs in how to approach the problem. Responding to the doctrinal rhetoric of vagueness, scholars propose ever-more-elaborate linguistic tools and methodologies to clarify contract and patent language.[237] Somehow, despite all these efforts, the alleged vagueness problem never seems to go away.

Once we understand what is really going on, it becomes clear that the problem is not going away because nobody working inside the system is truly interested in solving a vagueness problem. Courts are not really trying to reduce vagueness; they are invoking vagueness as a convenient pretext to rebalance slanted contracts and patent claims. The lawyers who draft patent claims and boilerplate contracts with ever-more definitions and refinements are not really trying to clarify language, reduce uncertainty, or avoid disputes (though the refinements may have those effects at the margin); the lawyers are trying to more effectively impose their clients' preferences on unwilling judges to obtain the

[235] *See* Llewellyn, *supra* note 210, at 702 ("[W]e have developed a whole series of semi-covert techniques for somewhat balancing these bargains. A court can 'construe' language into patently not meaning what the language is patently trying to say.").

[236] *See* E. ALLEN FARNSWORTH, CONTRACTS 478 (1982) (arguing that courts characterize what they do as objective "'interpretation' in order to obscure the extent of their control over private agreement").

[237] *See, e.g.*, Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 620-23 (1990) (arguing for a "doctrine of reasonable expectations" as an information-forcing default); Miller & Hilsenteger, *supra* note 130, at 886-87 (arguing that the PTO should regulate dictionary choice in patent law); Nard, *supra* note 130, at 66 (arguing for reliance on expert testimony).

substantive benefits of slanted outcomes.[238] We do not have a cooperative endeavor of drafters and adjudicators trying to solve a shared problem, where all that is lacking is a clever new idea for the solution, which academic scholars can provide. What we actually have is a war for supremacy[239] where every proposal is just a weapon for one side or the other. One cannot persuade courts to adopt linguistic solutions to reduce vagueness when courts are not trying to reduce vagueness to begin with. In this sense, the problem is unsolvable, and my contribution is not to propose a solution. The payoff of my analysis is to provide a more accurate understanding of *what* the problem is, *why* it is unsolvable, as well as to show that the participants in the system (judges and drafting lawyers) already know what they are doing and merely do not say it out loud. For scholars and other outside observers, the implication is to stop taking the rhetoric of vagueness too seriously.

By itself, the insight that courts use the rhetoric of vagueness and interpretation as cover for substantive policy decisions is not unique to private rules and standards — the same phenomenon occurs in statutory interpretation and is subject to an extensive literature there.[240] But the debate has another layer in the context of private rules and standards because the problem with self-serving private rules is not only that they reach anti-social outcomes, but also that they lack legitimacy. Arguments that judges should ignore self-serving patent claims and boilerplate contract terms, and instead decide cases based on their own best judgment, find receptive audiences in the contract and patent literature.[241] Arguments that judges should ignore statutory text and decide cases according to their own best judgment do not have the same receptive audience — as Justice Kagan said, "we are all textualists

[238] *See* Llewellyn, *supra* note 210, at 703 (arguing that using vagueness as a pretext to rebalance one-sided contracts "invite[s] the draftsman to recur to the attack").

[239] *See* Kessler, *supra* note 232, at 633 n.15 (describing a "constant struggle between draftsman of standardized contracts and courts").

[240] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) ("Some judges, however, refuse to yield the ancient judicial prerogative of making the law, improvising on the text to produce what they deem socially desirable results . . . .").

[241] *See* RADIN, *supra* note 158, at 210-13 (arguing boilerplate contracts should result in tort liability for drafters); Burk & Lemley, *supra* note 4, at 1784-85 (arguing courts should abolish patentee-written claims).

now" when it comes to statutory interpretation.[242] Arguments that courts should ignore testators and instead interpret wills according to the judge's own notions of good policy have even less acceptance.[243] Debates about contract and patent interpretation are more contested and have less common ground than debates about will and statutory interpretation (even if there are more books and articles about statutory interpretation),[244] and my contention here is that the fundamental reason for this discrepancy is because of differences in the perceived legitimacy and incentives of the respective lawmakers in each context.

C. The Relevance of Adjudicator Choice

An insight of the model is to bring out the relevance of adjudicator actions to the rules/standards choice. It is not only drafters who get to choose between using rules or standards; adjudicators get to make the choice, too, at the point of adjudication, in that the adjudicators must make a choice between following a rule or imposing a standard. The point is that adjudicators are not passive wallflowers; they are active participants in the system, and their choices affect not only the outcome in any particular dispute, but also the ex ante choices of drafters, because what drafters will do is influenced by what they expect adjudicators to do.

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[242] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/S8QN-B3MG]; *see also* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("[T]he proposition that statutory text . . . ought to be the primary source of statutory meaning . . . needs little defense today. We are all textualists.").

[243] *See, e.g.*, Greenawalt, *supra* note 203, at 571 ("Because of the freedom of the writers of wills, there may be less room for public policy to affect interpretation here than elsewhere.").

[244] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30 (2006) ("Indeed, textualism has been so successful in altering the views of even nonadherents that it has become increasingly difficult for textualists to identify, let alone conquer, any territory that remains between textualism's adherents and nonadherents.").

This is in some sense an obvious point. Virtually all of a lawyer's job is about predicting what courts will do,[245] and lawyers who draft contracts, wills, and patents are thus necessarily making predictions about adjudicator responses to their work product. Yet this obvious point often seems forgotten in the rules/standards literature. Once we realize that adjudicators have the autonomy to make choices, a few implications follow.

First, as discussed in Section A, all else being equal, the more that an adjudicator trusts the drafter to have proper incentives to write unbiased rules, the more likely the adjudicator is to follow those rules. Conversely, the more that an adjudicator suspects a drafter to have self-serving incentives to write slanted rules, the less likely the adjudicator will follow those rules.[246] The empirical evidence, though imperfect, tends to support this hypothesis: courts do seem more receptive to rules in wills and negotiated contracts (where drafters can be trusted) than in adhesion contracts and patents (where drafters cannot be trusted).[247]

Second, trust (and distrust) between drafters and adjudicators is reciprocal, with mirroring incentives. All else being equal, the more that drafters trust adjudicators to have preferences that align with those of the drafter, the more the drafter will be inclined to use standards. Conversely, the more the drafter distrusts the adjudicator and believes the adjudicator to prefer results that the drafter does not want, the more the drafter will be inclined to use rules.[248] As above, the empirical evidence is imperfect, but it also seems to support this hypothesis. Drafters are prone to write extremely detailed rules in boilerplate consumer contracts and patent claims (where judges might be sympathetic to little guy consumers and users).[249] The language of mutually negotiated contracts and wills — where judges do not have

[245] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

[246] *See supra* text accompanying notes 202–204.

[247] *See supra* text accompanying notes 204–206.

[248] Sunstein, *supra* note 27, at 1004 ("If everyone is aligned in interest, the costs of rulelessness will be diminished, since lawmakers need not fear that interpreters and enforcers will have agendas of their own.").

[249] *See supra* text accompanying notes 225-228.

obvious reasons to disfavor the drafter — are comparatively looser. The result is a perverse mirrored pair: When drafter and adjudicator preferences are aligned, adjudicators will want rules, but drafters will be less inclined to provide them. When drafter and adjudicator preferences conflict, adjudicators would prefer discretionary standards, but drafters will try to impose hard rules.

This point about trust between drafters and adjudicators is not limited to private legal directives. It would likely also apply in the context of public laws. The prediction would be that legislatures and agencies writing laws that are expected to be enforced by an ideologically friendly executive or judiciary (e.g., a Republican legislature writing laws in a jurisdiction with a conservative Supreme Court majority) would be more likely to write discretionary standards, while lawmakers facing ideologically hostile adjudicators would be more likely to write hard rules.[250] At the same time, an ideologically friendly judiciary will be predicted to uphold and faithfully follow rules from an ideologically friendly lawmaker, while being hostile to — and prone to invalidating or surreptitiously bending — rules from an ideologically hostile lawmaker. Because this is an Article about private legal directives, testing this prediction is beyond the scope of the current project, but it is a fruitful avenue for future research, and the prediction aligns with common intuition.[251]

Finally, at a more abstract level, recognizing that adjudicators have autonomy and make choices is important because it paints a different picture of how the rules/standards decision gets made and who drives it. In the standard paradigm, the choice is entirely driven by drafters, with the implication that getting better choices requires having better

[250] One anecdotal example of this phenomenon is described in Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 173-78 (1991) (describing how a Democratic Congress reacted to Reagan Administration environmental initiatives by "amendment of the already action-forcing environmental laws to constrain EPA's discretion even more severely").

[251] *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 222-24 (2013) (describing the increasing frequency of "partisan overrides," where a party in control of both the Presidency and Congress overrides the decisions of an ideologically hostile Supreme Court); Percival, *supra* note 250, at 173-78.

drafters. For example, if we are concerned that patentees have bad incentives and might write patent claims in a self-serving and anti-social manner, the logical solution under the standard paradigm is to take the drafting power away from them and have less biased courts or PTO examiners write patent claims instead.[252] Similarly, under the standard paradigm, the logical solution to adhesion contract drafters having bad incentives is to require consumer participation in drafting[253] or have an unbiased government regulator set mandatory contract terms instead.[254] In my model, by contrast, adjudicators co-drive the rules/standards choice along with drafters, and they do have a constraining effect. Those who suggest radical solutions in contract and patent law are potentially misunderstanding the problem and underestimating how effective courts are at mitigating it.

Conclusion

Like their public law counterparts, private legal directives also take the form of rules and standards. But private rules and standards raise different normative considerations and new positive questions that the existing literature has not considered. In particular, private drafters often have self-interested incentives for drafting slant, and they do not possess the same degree of legitimacy and authority over judges that elected legislatures and other public lawmakers possess to compel adjudicator obedience. On the other hand, private drafters are usually better informed, and the use of standards in private laws will therefore result in higher information costs for courts and society.

[252] *See* Burk & Lemley, *supra* note 4, at 1784 (proposing the elimination of patentee-written claims); Chiang, *supra* note 123, at 522 ("[A]n instrument delineating patent scope that was unilaterally drafted by the PTO examiner — we could call it a 'grant' instead of a 'claim' — would serve the notice function equally well while greatly diminishing the patentee self-interest problem.").

[253] *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 555-56 (2014) (explaining that reactions to the "no-reading problem" tend to come as either proposals for a public decisionmaker or procedural reforms to require consumers to read contracts).

[254] *See* Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405, 2441-43 (2021) (arguing for government oversight of consumer contract terms); Korobkin, *supra* note 171, at 1247-52 (suggesting mandatory contract terms as an alternative to form contracts).

As the Article has explained, the result is that the choice between a rule and a standard in private legal directives often involves a struggle between self-interested drafters seeking private benefits from drafting slanted rules, and disobedient adjudicators who are resistant to such slanted rules and favor standards that give power to adjudicators. How this struggle plays out determines whether a rule or standard will be chosen, how a rule (if chosen) will be written, and whether a rule will be enforced. Extending the rules/standards analysis into privately drafted legal directives thus both enhances our understanding about the nature and dynamics of the rules/standards choice and sheds new light on longstanding interpretative debates in contract and patent law.