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Contract Interpretation and the Parol Evidence Rule: Toward Conceptual Clarification

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Contract interpretation is one of the most important topics in commercial law. Unfortunately, the law of interpretation is extraordinarily convoluted. In essentially every American state, the jurisprudence is riddled with inconsistency and ambiguity. This causes multiple problems. Contracting parties are forced to expend additional resources when negotiating and drafting agreements. Disputes over contractual meaning are more likely to end up in litigation. And courts make a greater number of errors in the interpretive process. Together, these impacts result in significant unfairness and undermine economic efficiency. Efforts to remedy the doctrinal incoherence are thus warranted.

The goal of this Article is to clarify various legal concepts and principles that play a critical role in the interpretation caselaw and secondary literature. By untying some of the knots that entangle contract interpretation and the parol evidence rule, the Article will aid judges, lawyers, and professors in addressing interpretive issues in the contexts of adjudication, contract drafting, scholarship, and teaching.

This Article addresses the following seven issues: (1) the two types of latent ambiguity; (2) the many definitions of “parol evidence”; (3) the stages of contract interpretation; (4) determining whether a court is using textualism or contextualism; (5) contextualism and the ambiguity determination; (6) the circumstances in which contract interpretation raises a jury question; and (7) contextualism and the parol evidence rule.

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I. INTRODUCTION

Contract interpretation is one of the most important topics in commercial law.¹ It lies at the center of contract doctrine, which contains numerous rules that regulate the construction of agreements.² Interpretation is the subject addressed most often by contract lawyers, whether they are litigators or transactional attorneys.³ And interpretive disputes constitute the largest source of contract litigation.⁴

The significance of contract interpretation explains why the field has received extensive academic attention since the turn of the century.⁵ Indeed, the subject is recognized as “the least settled, most contentious area of contemporary contract doctrine and scholarship.”⁶

Unfortunately, the law of contract interpretation is extraordinarily convoluted. “In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.”⁷ The precise formulation of a

¹ See NEIL ANDREWS, *Interpretation of Written Contracts*, in ARBITRATION AND CONTRACT LAW: COMMON LAW PERSPECTIVES, 229, 230 (2016) (“The technique of construing written contracts is probably the most important topic within commercial contract law.”); STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION § 1.1, at 1 (2009) (“Issues of contract interpretation are important in American law.”).

² See BENJAMIN E. HERMALIN ET AL., *Contract Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 3, 68 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“The problem of contract interpretation thus provides a central backdrop for the law of contracts, which contains many rules and principles that are designed to address it.”); Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CALIF. L. REV. 1127, 1127 (1994) (“The issue of interpretation is central to contract law, because a major goal of that body of law is to facilitate the power of self-governing parties to further their shared objectives through contracting.”).

³ MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK 463 (2009).

⁴ HERMALIN ET AL., *supra* note 2, at 68 (“Probably the most common source of contractual disputes is differences in interpretation. . . .”); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 & n.3 (2010) (“[C]ontract interpretation remains the largest single source of contract litigation between business firms.”) (collecting authorities).

⁵ See Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 340 (2013) (“After decades of relative neglect, contract interpretation became a hot topic of scholarly debate after 2003.”); *id.* at 340 n.8 (collecting authorities); David McLaughlan, *Contract Interpretation: What Is It About?*, 31 SYDNEY L. REV. 5, 5 (2009) (“In recent times contract interpretation has become one of the most contentious areas of the law of contract.”).

⁶ Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25 (2014).

⁷ Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 540 (1998); accord JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.1, at 106 (6th ed. 2009) [hereinafter CALAMARI AND PERILLO] (noting that the courts do not consistently follow the

rule is frequently inconsistent with the way the rule is applied.⁸ And courts often set forth inconsistent standards within a single opinion.⁹ In fact, the caselaw is so muddled that commentators differ over which approach to interpretation—textualism or contextualism—is the majority rule.¹⁰

rules of contract interpretation); *id.* § 3.2(b), at 110 n.29 (collecting secondary authorities that address the confused state of the law in Alaska, California, Illinois, Montana, Oregon, Texas, and Wisconsin, and further noting that “[o]ther jurisdictions could be cited”); RICHARD A. LORD, 11 WILLISTON ON CONTRACTS § 33:42, at 1191 (4th ed. 2012) [hereinafter WILLISTON] (“Not only do various jurisdictions disagree as to how and when extrinsic evidence of the circumstances surrounding the execution of a contract becomes admissible, but the decisions within a given jurisdiction are often difficult, and sometimes impossible, to reconcile on this point.”). For my favorite “cry of despair,” see *Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 811 (Mo. Ct. App. 1992).

⁸ See PETER LINZER, 6 CORBIN ON CONTRACTS § 25.14[A], at 148–61 (Joseph M. Perillo ed., rev. ed. 2010) (collecting examples).

⁹ See *id.* § 25.15[c], at 192 (“At times a state court seems to be saying contradictory things.”); *id.* at 192–95 (discussing *Wadi Petrol, Inc. v. Ultra Res., Inc.*, 65 P.3d 703, 706–10 (Wyo. 2003), to illustrate the problem); see also *infra* notes 253–270 and accompanying text.

¹⁰ Compare BURTON, *supra* note 1, § 4.3.2, at 126 (“Most courts follow the four corners rule when deciding whether a contract is ambiguous, sometimes . . . under the guise of the parol evidence rule.”), and Schwartz & Scott, *supra* note 4, at 928 n.1 (“A strong majority of U.S. courts continue to follow the traditional, ‘formalist’ approach to contract interpretation. A state-by-state survey of recent court decisions shows that thirty-eight states follow the textualist approach to interpretation. Nine states, joined by the Uniform Commercial Code for sales cases (UCC) and the Restatement (Second) of Contracts, have adopted a contextualist or ‘antiformalist’ interpretive regime. The remaining states are indeterminate.”), with 11 WILLISTON, *supra* note 7, § 30:5, at 80 (“While there is authority that the court is limited in its consideration solely to the face of the written agreement, many more courts take the position that a court may provisionally receive all credible evidence concerning the parties’ intentions to determine whether the language of the contract is reasonably susceptible to the interpretation urged by the party claiming ambiguity; if it is, this evidence may then be admitted and heard by the trier of fact.”). See also Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625, 1630 (2017) (“[M]any states are classified as contextualist by one leading authority . . . and as textualist in another. . . .”) (further noting that “the best explanation” for why scholars disagree over whether to classify a state as textualist or contextualist “is the inherent untidiness of the cases”).

The picture appears to be clearer abroad, with contextualism now dominant both in other nations and in international law. See GERARD MCMEEL, *THE CONSTRUCTION OF CONTRACTS: INTERPRETATION, IMPLICATION, AND RECTIFICATION* § 2.01 (2nd ed. 2011) (explaining that the general trend in common-law jurisdictions is towards adoption of the contextualist approach); CATHERINE MITCHELL, *INTERPRETATION OF CONTRACTS: CURRENT CONTROVERSIES IN LAW* 58 (2007) (explaining that the same trend exists in European civil-law jurisdictions); see also United Nations Convention on Contracts for the International Sales of Goods, Apr. 11, 1980, at art. 8(3), <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> [<http://perma.cc/7EPS-BFWY>]; Unidroit Principles of International Commercial Contracts, at art. 4.3 (UNIDROIT INT’L INST. FOR THE UNIFICATION OF PRIVATE L. 2010), <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> [<http://perma.cc/3MEX-K7HC>]; *The Principles of European Contract Law*, at art. 5:102 (COMM’N ON EUR. CONT. L. 2002), <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/> [<http://perma.cc/2EU4-S8TN>].

There are two primary theories as to the source of this disarray. Some believe that it results from courts failing to carefully distinguish between the principles of contract interpretation and the parol evidence rule.¹¹ Others suggest that it is because interpretation and the parol evidence rule cannot truly be distinguished.¹² I think both explanations have considerable validity. And I would supplement them with the point that textualism and contextualism are each supported by compelling policy arguments.¹³ These arguments pull courts in opposite directions, sometimes resulting in judicial opinions that attempt to harmonize fundamentally incommensurable rules and normative theories—a recipe for unintelligible legal analysis.¹⁴

The inconsistency and ambiguity in the jurisprudence cause multiple problems. Contracting parties are forced to expend additional resources when negotiating and drafting agreements. Disputes over contractual meaning are more likely to end up in litigation. And courts make a greater number of errors in the interpretive process. Together, these impacts produce significant unfairness and undermine economic efficiency.¹⁵ Efforts to remedy the doctrinal incoherence are thus warranted.

No single article—or even book—could entirely solve the puzzle that is the caselaw on contract interpretation and the parol evidence rule. But some scholars have made valiant efforts at bringing greater transparency to these subjects.¹⁶ This Article is in that tradition. My goal here is to clarify various legal concepts and principles that play a critical role in the interpretation jurisprudence and secondary literature. By untying some of the knots that entangle contract

¹¹ See, e.g., BURTON, *supra* note 1, § 3.1, at 64, and § 4.2.4, at 120; Margaret N. Kniffin, *Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else's Clothes?*, 62 RUTGERS L. REV. 75 (2009) (discussing how courts and scholars confuse interpretation and the parol evidence rule and the injustice that results).

¹² See, e.g., CALAMARI AND PERILLO, *supra* note 7, § 3.9, at 128–29; Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 801 (2002).

¹³ See Joshua M. Silverstein, *Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method Via a Study of Contract Interpretation*, 34 J.L. & COM. 203, 261–84 (2016).

¹⁴ See *infra* Part VI. For an excellent example, see *URI, Inc. v. Kleberg County*, 543 S.W.3d 755 (Tex. 2018). I discuss this case briefly in footnote 265 *infra*.

¹⁵ See Kniffin, *supra* note 11, at 86 (“A central theme of this Article is that a clear distinction between the parol evidence rule and interpretation does exist but that in a significant proportion of cases, courts have indeed found themselves confused, have thereby ignored the distinction, and have thus reached unjust conclusions concerning admission or exclusion of evidence.”); *id.* at 110–20 (collecting examples).

¹⁶ See, e.g., BURTON, *supra* note 1; Kniffin, *supra* note 11.

interpretation and the parol evidence rule, this Article will aid judges, lawyers, and professors in addressing interpretive issues in the contexts of adjudication, contract drafting, scholarship, and teaching.

Part II sets forth a brief overview of contract interpretation and the parol evidence rule. Each of the next seven parts—Parts III through IX—analyzes a particular area of confusion in the caselaw and commentary.

Part III explains that there are two distinct types of latent ambiguity and that properly distinguishing between them allows for a more accurate description of textualism and contextualism.

Part IV identifies six different definitions of the term “parol evidence” that exist in the caselaw and argues that courts and commentators should cease using “parol evidence” because of the incoherence created by the term’s multiple meanings.

Part V explains that the standard picture of textualism and contextualism as involving two stages—(1) the ambiguity determination, and (2) the resolution of ambiguity—critically oversimplifies the operation of each approach. Most importantly, textualism actually contains three substantive steps rather than two. And the number of steps involved in contextualism varies because there is more than one version of that system. Part V also addresses the relationship of the stages of interpretation to the three basic phases of civil litigation—(1) pleading, (2) discovery and summary judgment, and (3) trial.

Part VI discusses how inconsistent and vague language in judicial opinions regularly makes it impossible to determine which interpretive approach a court is endorsing or applying. Part VI also provides suggestions regarding how to address this problem, including a recommendation that judges and lawyers standardize their use of certain words frequently employed when describing the interpretive process.

Part VII demonstrates that contextualism’s theory of language entails that all versions of this approach dispense with the ambiguity determination and substitute in its place a general assessment of the weight of the interpretive evidence.

Part VIII constructs a taxonomy of interpretive disputes and analyzes whether each type of dispute should be resolved by a judge as question of law or by a jury as question of fact under existing caselaw.

Part IX shows that, as conceptual matter, contextualism’s elimination of the ambiguity determination does not automatically result in the evisceration of the parol evidence

rule, and that many contextualist jurisdictions have in fact retained the parol evidence rule.

Part X briefly concludes.

II. A BRIEF OVERVIEW OF CONTRACT INTERPRETATION AND THE PAROL EVIDENCE RULE

A. Contract Interpretation

Contract interpretation is the process of determining the meaning of the language of a contract.¹⁷ The goal of contract interpretation is to ascertain the intent of the parties at the time the agreement was formed.¹⁸ But accomplishing this task can be difficult. Party intent is often unclear and disputed.¹⁹ And contracts frequently contain ambiguous language.

Contractual ambiguities exist for numerous reasons.²⁰ For example, parties typically lack the knowledge and foresight necessary to anticipate every contingency that might be worth addressing in their agreement.²¹ Likewise, the stakes in most transactions do not justify the costly and protracted negotiations that are needed to carefully address all of the issues known to the parties.²² Finally, and perhaps most fundamentally, language is simply an imperfect medium for expressing ideas.²³

There are two general approaches to contract interpretation set forth in the caselaw.²⁴ These approaches have multiple names, but the most useful labels are “textualist” and

¹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 200 (AM. L. INST. 1981); E. ALLAN FARNSWORTH, CONTRACTS § 7.7, at 439 (4th ed. 2004).

¹⁸ BURTON, *supra* note 1, § 1.1, at 1 (“American courts universally say that the primary goal of contract interpretation is to ascertain the parties’ intention at the time they made their contract.”); *accord* 11 WILLISTON, *supra* note 7, § 30:2, at 17–18; CALAMARI AND PERILLO, *supra* note 7, § 3.13, at 136; *contra* Val D. Ricks, *The Possibility of Plain Meaning: Wittgenstein and the Contract Precedents*, 56 CLEV. ST. L. REV. 767, 807 (2008) (distinguishing between the intention of the parties and the meaning of words).

¹⁹ See George M. Cohen, *Interpretation and Implied Terms in Contract Law*, in 6 ENCYCLOPEDIA OF LAW AND ECONOMICS: CONTRACT LAW AND ECONOMICS 125, 130 (Gerrit De Geest ed., 2d ed. 2011) (discussing the uncertainty of party intent).

²⁰ See FARNSWORTH, *supra* note 17, § 7.8, at 443–44 (setting forth a list).

²¹ BURTON, *supra* note 1, § 1.2.2, at 12–13.

²² *Id.* at 13.

²³ CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 382 (8th ed. 2016).

²⁴ Gilson et al., *supra* note 6, at 25 (“Two polar positions have competed for dominance in contract interpretation.”) (referring to textualism and contextualism); Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 520 (2017) (“Two approaches dominate the debate over contract interpretation: the textualist and the contextualist.”).

“contextualist.”²⁵ Under textualism, interpretation focuses principally on the text of the parties’ agreement.²⁶ The locus of contextualist interpretation is broader. While adherents of contextualism grant critical weight to the words set forth in the parties’ contract,²⁷ contextualist interpretation emphasizes reading contractual language *in context*.²⁸ Thus, contextualist authorities focus on both the contract’s express terms and extrinsic evidence.²⁹ Extrinsic evidence is evidence of contractual intent beyond the four corners of the parties’ written agreement.³⁰ Such evidence includes preliminary negotiations, statements made at the time the contract was executed, the surrounding commercial circumstances (such as market conditions), course of performance, course of dealing, and usages of trade.³¹

Textualist jurisdictions follow what is typically called the “plain meaning rule” or “four corners rule.”³² That rule sets forth

²⁵ For other scholars that employ these two labels, see, for example, Cohen, *supra* note 19, at 131, 137, and Schwartz & Scott, *supra* note 4, at 928. For other approaches to labelling the two schools, see FARNSWORTH, *supra* note 17, § 7.12, at 465 (“restrictive” interpretation versus “liberal” interpretation); James W. Bowers, *Murphy’s Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 RUTGERS L. REV. 587, 589–90 (2005) (“formalist” interpretation versus “contextualist” interpretation); *see also* Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 733–34 (2d Cir. 1984) (“classical” interpretation versus “modern” interpretation).

²⁶ *See* Grumman Allied Indus., 748 F.2d at 733–34 (“Adherents of the classical approach, animated by a belief that a contractual agreement manifests the intent of the parties in a completely integrated form, favor the construction of contracts by reference to explicit textual language.”).

²⁷ Bowers, *supra* note 25, at 592 (“Words the parties expressly use play decisive roles in interpretation questions [for contextualist courts].”).

²⁸ *See* Grumman Allied Indus., 748 F.2d at 734 (“Modern . . . interpretation . . . seems to derive from the premise that a contextual inquiry is a necessary and proper prerequisite to an understanding of the parties’ intent.”).

²⁹ *See, e.g.*, Casey v. Semco Energy, Inc., 92 P.3d 379, 383 (Alaska 2004) (“[E]xtrinsic evidence is always admissible on the question of the meaning of the words of the contract itself.”); RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (AM. L. INST. 1981) (“Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations . . . , usages of trade, and the course of dealing between the parties.”).

³⁰ Nautilus Marine Enter., Inc. v. Exxon Mobile Corp., 305 P.3d 309, 316 (Alaska 2013); BURTON, *supra* note 1, § 3.1.1, at 68.

³¹ CALAMARI AND PERILLO, *supra* note 7, § 3.9, at 128–29. A “course of performance” is essentially the parties’ conduct in performance of the contract at issue. *See* U.C.C. § 1-303(a). A “course of dealing” is the parties’ conduct under prior contracts between them. *Id.* § 1-303(b). And a “usage of trade” is a practice or method of dealing in the industry or location where the parties operate that the parties should know about and should expect to be followed with respect to the contract at issue. *Id.* § 1-303(c). For an excellent overview of the types of extrinsic evidence, *see* BURTON, *supra* note 1, Ch. 2, at 35–62.

³² *See* MARGARET N. KNIFFIN, 5 CORBIN ON CONTRACTS § 24.7, at 33 (Joseph M. Perillo ed., rev. ed. 1998); Aaron D. Goldstein, *The Public Meaning Rule: Reconciling*

a two-stage process.³³ During the first stage, the court assesses whether the contract is ambiguous.³⁴ An ambiguity exists when the relevant contractual language is “reasonably susceptible” to more than one meaning.³⁵ The ambiguity determination is a question of law for the judge.³⁶ And in making that determination, the only evidence the judge may consider is the contract itself; the investigation is restricted to the “four corners” of the document.³⁷

Two points of elaboration regarding stage one are in order. First, in assessing ambiguity, textualist courts generally interpret the document “in light of rules of grammar and the canons of construction.”³⁸ They also use dictionaries.³⁹ It is only *evidence* from beyond the four corners that is forbidden.⁴⁰

Second, when analyzing whether a contract is ambiguous, the question is not whether the agreement is ambiguous *per se*.

Meaning, Intent, and Contract Interpretation, 53 SANTA CLARA L. REV. 73, 75 (2013). Courts often use the descriptions “four-corners rule” and “plain meaning rule” synonymously. *See, e.g., In re Zecevic*, 344 B.R. 572, 578 (Bankr. N.D. Ill. 2006); Gary’s Implement, Inc. v. Bridgeport Tractor Parts, Inc., 702 N.W.2d 355, 376 (Neb. 2005); Benz v. Town Ctr. Land, LLC, 314 P.3d 688, 694 (N.M. Ct. App. 2013); *but see* BURTON, *supra* note 1, § 4.2.1, at 111, and § 6.3, at 224–25 (distinguishing the “four corners rule” from the “plain meaning rule”). And sources frequently distinguish between the “plain meaning rule” and the “context rule.” *See, e.g., Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 929 (Wash. 2001); Goldstein, *supra*, at 75. But some scholars use the phrase “plain meaning rule” more broadly to refer to both textualist authorities and most contextualist authorities. *See, e.g., CALAMARI AND PERILLO, supra* note 7, § 3.10, at 129–30; FARNSWORTH, *supra* note 17, § 7.12, at 466.

³³ FARNSWORTH, *supra* note 17, § 7.12, at 463.

³⁴ *Id.*

³⁵ KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.7, at 33–34, 41–42 (explaining that both textualist and contextualist courts use this definition of ambiguity); *see, e.g., Pioneer Peat, Inc. v. Quality Grassing & Servs., Inc.*, 653 N.W.2d 469, 473 (Minn. Ct. App. 2002) (textualist decision); California Tchrs.’ Ass’n v. Governing Bd. of Hilmar Unified Sch. Dist., 115 Cal. Rptr. 2d 323, 328 (Cal. Ct. App. 2002) (contextualist decision).

³⁶ Quake Const., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990, 994 (Ill. 1990); W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990); Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417, 423 (Tex. 2000); CALAMARI AND PERILLO, *supra* note 7, § 3.10, at 131.

³⁷ BURTON, *supra* note 1, § 4.2.2, at 111–12; KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.7, at 33.

³⁸ BURTON, *supra* note 1, § 4.3.2, at 126; *see generally id.* § 2.4, at 57–60 (surveying the canons of construction); FARNSWORTH, *supra* note 17, § 7.10, at 456–61 (same). Note that I generally use the terms “interpretation” and “construction” interchangeably throughout this Article. *See* FARNSWORTH, *supra*, § 7.7, at 439–40 (“This distinction between interpretation and construction is a difficult one to maintain in practice and will not be stressed here.”); KNAPP ET AL, *supra* note 23, at 382 (same); *but see* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 87[A], at 447–48 (5th ed. 2011) (attempting to distinguish between interpretation and construction).

³⁹ BURTON, *supra* note 1, § 2.1.2, at 38.

⁴⁰ *Id.* § 4.3.2, at 126; *see also* Anchor Sav. Bank, FSB v. United States, 121 Fed. Cl. 296, 311 (2015) (explaining that dictionaries “are not considered extrinsic evidence”).

Rather, the question is whether the contract is ambiguous as between the different interpretations presented by the parties in the case. In other words, the ambiguity determination is concerned with whether the language of the agreement is reasonably susceptible to the meanings *proffered by both parties*, not whether it is reasonably susceptible to *any* two (or more) potential meanings.⁴¹ This is helpfully described by Professor Steven Burton as ambiguity “in the contested respect.”⁴²

For example, a contract stating that lumber must be delivered by “early December” is ambiguous where the buyer argues that the goods must arrive by the fifth of December and the seller contends that delivery is permissible up through the tenth of that month.⁴³ But if the seller instead asserts that the goods may arrive any time before January 1st, then the agreement is unambiguous as between the buyer’s and the seller’s interpretations. That is because the phrase “early December” cannot plausibly be understood to mean “any time before the first of January.”⁴⁴

If the court concludes that the contract is unambiguous, it simply applies the unambiguous, “plain meaning” of the language to the facts of the case.⁴⁵ The judge never reviews any extrinsic evidence.⁴⁶ And the case can be disposed of via a motion to dismiss, a motion for summary judgment, or some other pre-trial proceeding.⁴⁷

41 *Agrigenetics, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 758 F. Supp. 2d 766, 771 (S.D. Ind. 2010) (applying Illinois law) (“Ambiguity exists only when *both parties* [sic] interpretive positions [are] reasonable.”) (emphasis added and internal quotation marks omitted); *Allen v. United States*, 119 Fed. Cl. 461, 480 (2015) (“In order to demonstrate ambiguity, the interpretations offered by *both parties* must fall within a zone of reasonableness.”) (emphasis added and internal quotation marks omitted).

42 BURTON, *supra* note 1, Ch. 4, at 105–06, and § 4.1, at 106.

43 This hypothetical is based upon *Donald W. Lyle, Inc. v. Heidner & Co.*, 278 P.2d 650, 653 (Wash. 1954).

44 See also *William Blair & Co., LLC v. FI Liquidation Corp.*, 830 N.E.2d 760, 771 (Ill. App. Ct. 2005) (“In point of principle, the fact that a term is ambiguous in one context does not necessarily make it ambiguous in another.”). Note also that “[a]n ambiguity does not arise simply because the parties advance conflicting interpretations of the contract.” *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); accord *CALAMARI AND PERILLO, supra* note 7, § 3.10, at 131. An ambiguity exists only when the language is in fact reasonably susceptible to the meanings asserted by both parties. Finally, “[e]ven if both parties assert that a contract is unambiguous, a court may hold that a contract is ambiguous.” *Horseshoe Bay Resort, Ltd. v. CRVI CDP Portfolio, LLC*, 415 S.W.3d 370, 377 (Tex. Ct. App. 2013); see, e.g., *Zeiser v. Tajkarimi*, 184 S.W.3d 128, 133 (Mo. Ct. App. 2006) (finding contract ambiguous despite both parties arguing that it was unambiguous).

45 BURTON, *supra* note 1, § 4.2.3, at 118 (“If the document does not appear to be ambiguous, the analysis ends; the plain meaning rule comes into play to require that the judge give the unambiguous meaning to the contract as a matter of law.”).

46 *Id.* (“No extrinsic evidence then is admissible for the purpose of giving meaning to

If the judge concludes that the contract is ambiguous, then interpreting the agreement moves to the second stage—resolving the ambiguity. At that stage, extrinsic evidence regarding the contract’s meaning may be considered,⁴⁸ and interpretation is generally described as a question of fact.⁴⁹ However, if the parties do not submit any relevant extrinsic evidence, or if the textual and extrinsic evidence presented is so one-sided that there is no genuine issue of material fact regarding the contract’s meaning, then the judge resolves the ambiguity as a matter of law, typically via summary judgment. If relevant extrinsic evidence is submitted *and* a reasonable jury could rule for either side, then the jury resolves the ambiguity at trial.⁵⁰

Because textualist courts conduct the initial ambiguity determination without considering materials beyond the four corners of the document, the text of the contract is often the only evidence reviewed in ascertaining the meaning of the agreement. Hence the name of this interpretive school: “textualism.”

Contextualism is generally understood as involving the same two-stage process.⁵¹ But the contextualist approach differs in the method used to establish whether a contract is ambiguous. According to this view, both the language of the agreement *and* extrinsic evidence are relevant in deciding if an ambiguity exists.⁵² In other words, at stage one, the judge must consider extrinsic evidence proffered by the parties—something prohibited by textualism. However, the ambiguity issue is still a question of

the writing.”).

⁴⁷ *Abundance Partners LP v. Quamtel, Inc.*, 840 F. Supp. 2d 758, 767 (S.D.N.Y. 2012); *Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 951 (Mass. 2002); *Salewski v. Music*, 54 N.Y.S. 3d 203, 205 (N.Y. App. Div. 2017).

⁴⁸ BURTON, *supra* note 1, § 4.2.3, at 118 (“If the contract is ambiguous on its face, extrinsic evidence is admissible for [the] purpose [of interpreting the contract].”).

⁴⁹ *See, e.g., Seaco Ins. Co.*, 761 N.E.2d at 951; *Archer v. DDK Holdings LLC*, 463 S.W.3d 597, 606 (Tex. Ct. App. 2015).

⁵⁰ *See Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 299–300 (S.D.N.Y. 1997); *Zale Constr. Co. v. Hoffman*, 494 N.E.2d 830, 834 (Ill. App. Ct. 1986); RESTATEMENT (SECOND) OF CONTRACTS § 212(2) & cmt. e (AM. L. INST. 1981); BURTON, *supra* note 1, § 4.2.3, at 118; *id.* § 5.1.1, at 152–53; CALAMARI AND PERILLO, *supra* note 7, § 3.15, at 141–42. There is actually a division in the authorities regarding the standard for deciding whether the resolution of ambiguity is for the judge or the jury. I address this split in Part VIII.C *infra*.

⁵¹ *See FARNSWORTH, supra* note 17, § 7.12, at 466–67 (explaining that *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968), the foundational and seminal contextualist case, endorsed the same two-stage process used by textualist authorities); BURTON, *supra* note 1, § 4.2.2, at 112–14; *see generally id.* § 4.1, at 106–20 (outlining both the textualist and contextualist approaches to the ambiguity determination).

⁵² BURTON, *supra* note 1, § 4.2.2, at 112.

law for the judge.⁵³ And it can be resolved via summary judgment, or at trial by holding an evidentiary hearing or ruling upon a motion for a directed verdict.⁵⁴ Note that while extrinsic evidence plays a larger role under contextualism than under textualism, contextualist authorities emphasize that the language of the contract remains the most important evidence in determining contractual meaning.⁵⁵

Both textualist and contextualist courts generally consider all relevant extrinsic evidence at stage two once a contract is determined to be ambiguous.⁵⁶ The touchstone of their disagreement is whether

⁵³ *Id.* § 4.2.3, at 118–19.

⁵⁴ *BNC Mortg., Inc. v. Tax Pros, Inc.*, 46 P.3d 812, 819–20 (Wash. Ct. App. 2002), *overruled on other grounds by* *Columbia Cmty. Bank v. Newman Park, LLC*, 304 P.3d 472, 479 (Wash. 2013); BURTON, *supra* note 1, § 4.2.3, at 118–19.

⁵⁵ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (“[T]he words of an integrated agreement remain the most important evidence of intention.”).

⁵⁶ BURTON, *supra* note 1, § 1.2.3, at 14 (“Under the prevailing law, all of the elements [of extrinsic evidence] are available after a court has determined that a contract is ambiguous.”); *accord id.* Ch. 5, at 151; *id.* § 5.2, at 158; Schwartz & Scott, *supra* note 4, at 963 n.94 (“But what if there is a genuine ambiguity in the written agreement? In such a case, the divide between formalist and anti-formalist positions essentially disappears: a court will consider extrinsic evidence to resolve the ambiguity.”); *see, e.g.*, *Bank of New York Tr. Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d 269, 276 (2d Cir. 2013) (applying New York law) (textualist decision); *Wagner v. Columbia Pictures Indus., Inc.*, 52 Cal. Rptr. 3d 898, 901 (Cal. Ct. App. 2007) (contextualist decision).

Note that there is a split in the courts over whether ambiguities should be resolved at stage two using a subjective standard of interpretation or an objective standard. 11 WILLISTON, *supra* note 7, § 31:1, at 354–55. “A standard of interpretation is the test applied by the law to words and to other manifestations of intention in order to determine the meaning to be given to them.” RESTATEMENT (FIRST) OF CONTRACTS § 227 (AM. L. INST. 1932).

Objective standards focus on what a reasonable person would have understood the contract to mean at formation given the text and the relevant extrinsic evidence. *See Neverkovec v. Fredericks*, 87 Cal. Rptr. 2d 856, 867 (Cal. Ct. App. 1999) (explaining that the “trier of fact must decide how a reasonable person” standing in the “shoes” of the parties would have understood the contract); *Behrens v. S.P. Constr. Co., Inc.*, 904 A.2d 676, 681 (N.H. 2006) (“An objective standard places a reasonable person in the position of the parties, and interprets a disputed term according to what a reasonable person would expect it to mean under the circumstances.”).

Subjective standards focus on determining the actual intent of the parties. Accordingly, under subjectivism, the contract typically means what one or both of the parties in fact understood it to mean at formation. For example, the *Restatement (Second) of Contracts* adopts a three-part subjective test. *See* Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 358–64 (2007) (explaining that the *Restatement (Second)* applies a subjective standard). First, if the text and extrinsic evidence establish that the parties shared the same understanding of ambiguous contractual language, that shared meaning governs even if a reasonable third party would read the language differently. RESTATEMENT (SECOND) OF CONTRACTS § 201(1); KNAPP ET AL., *supra* note 23, at 384. Second, if the parties understood the ambiguous language in different ways, then the subjective meaning of the party least at fault for the misunderstanding controls. RESTATEMENT (SECOND) OF CONTRACTS § 201(2); *see also* BURTON, *supra* note 1, § 2.5, at 62 (describing § 201(2) as a “fault rule”); FARNSWORTH, *supra* note 17, § 7.9, at 448–49 (same). Third, if the parties are equally at fault, then neither party’s subjective

evidence may be considered during stage one in making the ambiguity determination.⁵⁷ In sum, under textualism, ambiguity must be apparent on the face of the agreement before extrinsic evidence of the context may be considered.⁵⁸ Such ambiguity is typically called “patent,” “intrinsic,” or “facial.”⁵⁹ Under contextualism, extrinsic evidence of the context may be used to establish the existence of an ambiguity.⁶⁰ This type of ambiguity is typically called “latent” or “extrinsic.”⁶¹ Put simply—too simply as you will soon see⁶²—textualism recognizes only patent ambiguities, whereas contextualism recognizes both patent and latent ambiguities.

understanding is controlling, RESTATEMENT (SECOND) OF CONTRACTS § 201(3), and the disputed language is treated like a gap in the contract, see *id.* § 201 cmt. d. In deciding whether the parties had a shared meaning or whether one was more at fault than the other for a misunderstanding, the court considers all relevant extrinsic evidence. *Id.* § 202(1) (“Words and other conduct are interpreted in the light of *all* the circumstances. . . .”) (emphasis added). (For a textualist case that employed the *Restatement (Second)* standard at stage two of the interpretive process, see *Joyner v. Adams*, 361 S.E.2d 902, 903–05 (N.C. Ct. App. 1987).)

There are multiple objective and subjective interpretation standards. See RESTATEMENT (FIRST) OF CONTRACTS § 227 cmts. a & b (identifying four objective standards and two subjective standards); *id.* § 227 cmt. c (observing that other standards exist beyond those six); 11 WILLISTON, *supra* note 7, § 31:1, at 339–41 (discussing the six standards set forth in the *Restatement (First)*). And it is unclear which standard is the majority view. Compare FARNSWORTH, *supra* note 17, § 7.9, at 447–48 (contending that the subjective standard set out in the *Restatement (Second)* is the dominate approach), and KNAPP ET AL., *supra* note 23, at 388 (same), with 11 WILLISTON, *supra*, § 31:1, at 341–42 (asserting that an objective standard is the majority rule), and *id.* § 31:2, at 366–67 & 367 n.12 (same and collecting case authorities). Fortunately, in most situations, the various interpretation standards will lead to the same meaning when applied to particular contractual language and extrinsic evidence. See RESTATEMENT (FIRST) OF CONTRACTS § 227 cmt. b (explaining that the six standards of interpretation discussed in the *Restatement (First)* will vary in result “only in exceptional cases”). That is because people generally understand language by applying the principles of standard English. Moreover, in my experience, judges often entirely ignore the question of which standard to apply when resolving ambiguities. See, e.g., *Frigalment Imp. Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960). And the model jury instructions in some states do not even identify the applicable standard. See, e.g., ARK. MODEL JURY INSTRUCTIONS—CIVIL 2412 to 2424 (2020).

⁵⁷ Goldstein, *supra* note 32, at 80 (“The various jurisdictions then diverge as to what additional evidence [beyond the language of the contract] courts should consider to determine whether the contract is ambiguous.”); see also BURTON, *supra* note 1, § 4.2.2, at 111 (“On the question of ambiguity, there is significant controversy among the courts.”).

⁵⁸ BURTON, *supra* note 1, § 4.2.2, at 111–12; see, e.g., *IDT Corp. v. Tyco Grp.*, 918 N.E.2d 913, 916 (N.Y. App. Div. 2009).

⁵⁹ See *Watkins v. Ford*, 304 P.3d 841, 847 (Utah 2013); BURTON, *supra* note 1, § 4.1, at 107; FARNSWORTH, *supra* note 17, § 7.12, at 464.

⁶⁰ BURTON, *supra* note 1, § 4.2.2, at 112; see, e.g., *Shay v. Aldrich*, 790 N.W.2d 629, 641 (Mich. 2010).

⁶¹ BURTON, *supra* note 1, § 4.1, at 107; FARNSWORTH, *supra* note 17, § 7.12, at 464 & n.15.

⁶² See *infra* Part III.

While most scholars and many courts endorse this basic textualist/contextualist framework,⁶³ the framework is a considerable oversimplification of the jurisprudence.⁶⁴ Both contextualism and textualism can be subdivided in various ways.⁶⁵ And as a result of the complexity in the caselaw, most (or perhaps all) states fall somewhere along a continuum between textualism and contextualism, rather than firmly in one camp.⁶⁶ Finally, the law in some jurisdictions is simply too opaque to permit classification as either textualist or contextualist.⁶⁷

B. The Parol Evidence Rule

The parol evidence rule begins with the concept of an “integration.” An integration is a written document that is intended by the parties to constitute a final expression of one or more terms of their contract.⁶⁸ An integration is “partial” when it is intended to be final with respect to only *some* of the contractual terms.⁶⁹ An integration is “complete” when it is intended to be final with respect to *all* terms of the agreement.⁷⁰

The parol evidence rule itself contains two pieces. First, the rule prohibits parties from introducing extrinsic evidence intended to prove contractual terms that *contradict* either type of integration and that were agreed upon prior to or contemporaneously with the execution of the integration.⁷¹ Second, the rule prohibits parties from introducing extrinsic evidence intended to prove contractual terms that *add* to a complete integration and that were agreed upon prior to or contemporaneously with the execution of the integration.⁷² Put

⁶³ For several examples, see *supra* note 25. *But see* Kniffin, *supra* note 11, at 95 (dividing the cases into three broad schools rather than two).

⁶⁴ MCMEEL, *supra* note 10, § 1.31, at 22–23 (explaining that dividing the interpretation caselaw into literalist and purposivist schools is “too simplistic”).

⁶⁵ Silverstein, *supra* note 13, at 258–59; *see also infra* Part V.B.

⁶⁶ Silverstein, *supra* note 13, at 259–60; Posner, *supra* note 7, at 553 (“No jurisdiction has a bright-line hard-PER [parol evidence rule] or soft-PER. Courts might state one or the other as a general rule, but all sorts of subsidiary doctrines provide exceptions.”); *id.* at 534–35 (explaining that “hard-PER” and “soft-PER” refer to both contract interpretation and the parol evidence rule); *see also* Cunningham, *supra* note 10, at 1627 (explaining that “the law in many states . . . evades tidy classification as textualist or contextualist because, rather than wedded to one school, courts often choose the more suitable doctrine given the interpretation task at hand.”).

⁶⁷ Silverstein, *supra* note 13, at 301.

⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 209(1) (Am. L. Inst. 1981).

⁶⁹ KNAPP ET AL., *supra* note 23, at 416.

⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 210(1).

⁷¹ *Id.* §§ 213(1), 215; KNAPP ET AL., *supra* note 23, at 413.

⁷² RESTATEMENT (SECOND) OF CONTRACTS §§ 213(2), 216(1); KNAPP ET AL., *supra* note 23, at 413.

simply, complete integrations bar evidence of both contradictory terms and consistent additional terms, whereas partial integrations only bar evidence of contradictory terms. An important corollary is that the parol evidence rule does *not* prohibit parties from introducing extrinsic evidence intended to prove contractual terms that supplement a partial integration.⁷³

As with contract interpretation, parol evidence rule analysis involves a two-stage process.⁷⁴ At stage one, the court addresses whether the writing at issue is a complete integration, a partial integration, or not integrated at all.⁷⁵ Most authorities provide that this is a question of law for the judge.⁷⁶ If there is no integration, then the parol evidence rule is inapplicable.⁷⁷ If the document is a complete or partial integration, then the analysis moves to stage two, at which the court applies the parol evidence rule to bar evidence of contradictory terms and/or consistent additional terms,⁷⁸ which I will sometimes refer to together as “side terms.”

There are two primary policy justifications for the parol evidence rule. First, final agreements supersede and render inoperative preliminary negotiations and tentative agreements. Evidence concerning the latter two categories is thus irrelevant.⁷⁹ Second, an integration is considered the best evidence of the parties’ contract.⁸⁰ Therefore, the parol evidence rule gives a final writing “preferred status so as to render it immune to perjured testimony and the risk of ‘uncertain testimony of slippery memory.’”⁸¹

⁷³ RESTATEMENT (SECOND) OF CONTRACTS § 216(1).

⁷⁴ *See id.* §§ 209(2), 210(3).

⁷⁵ MURRAY, *supra* note 38, § 84[D], at 423. Note that some authorities propose subdividing the first stage into two pieces: First, is the writing at issue an integration? Second, if so, is it partial or complete? *See, e.g.*, FARNSWORTH, *supra* note 17, § 7.3, at 419.

⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c (“Ordinarily the issue whether there is an integrated agreement is determined by the trial judge in the first instance as a question preliminary . . . to the application of the parol evidence rule.”); FARNSWORTH, *supra* note 17, § 7.3, at 425–26 (“However, most courts have favored resolution of these issues by the trial judge before the evidence goes to the jury.”); BURTON, *supra* note 1, § 3.2.3.3, at 92.

⁷⁷ CALAMARI AND PERILLO, *supra* note 7, § 3.3, at 112.

⁷⁸ MURRAY, *supra* note 38, § 84[D], at 423.

⁷⁹ CALAMARI AND PERILLO, *supra* note 7, § 3.2, at 107; LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.3, at 27.

⁸⁰ KNAPP ET AL., *supra* note 23, at 416.

⁸¹ CALAMARI AND PERILLO, *supra* note 7, § 3.2(b), at 109 (quoting Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 367 n.3 (1932)).

Several points of elaboration are necessary. First, the parol evidence rule is not a rule of evidence; it is a substantive rule of contract law.⁸² Second, while “parol” means oral, the parol evidence rule applies to both oral and written extrinsic evidence of side terms.⁸³ Third, when the rule is applicable, it bars evidence of alleged prior or contemporaneous side terms regardless of whether the parties in fact agreed to those terms.⁸⁴ Fourth, the parol evidence rule does not apply to evidence (1) concerning terms agreed to *after* the execution of the integration,⁸⁵ (2) offered to *interpret* a contract,⁸⁶ or (3) presented to *invalidate* an agreement,⁸⁷ among other categories.⁸⁸

Fifth, courts are divided over how to determine whether a writing is unintegrated, partially integrated, or completely integrated.⁸⁹ This split is comparable in structure to the interpretation division between textualism and contextualism. Some courts follow what I will call the classical approach to integration.⁹⁰ Under this approach, the judge analyzes only the four corners of the document in deciding whether the writing is a partial or complete integration.⁹¹ And a merger clause

⁸² RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (AM. L. INST. 1981); KNAPP ET AL., *supra* note 23, at 412.

⁸³ RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a; FARNSWORTH, *supra* note 17, § 7.2, at 416. However, the majority approach is that the parol evidence rule does not apply to *contemporaneous written* evidence. BURTON, *supra* note 1, § 3.1.1, at 64; CALAMARI AND PERILLO, *supra* note 7, § 3.2(a), at 108.

⁸⁴ CALAMARI AND PERILLO, *supra* note 7, § 3.2, at 111.

⁸⁵ BURTON, *supra* note 1, § 3.1.1, at 67; Kniffin, *supra* note 11, at 104.

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 214(c).

⁸⁷ *Id.* § 214(d); FARNSWORTH, *supra* note 17, § 7.4, at 427. These three contexts—(a) post-formation, (b) interpretation, and (c) invalidation—are frequently described as “exceptions” to the parol evidence rule. *See, e.g.*, KNAPP ET AL., *supra* note 23, at 418. But they are better conceived of as situations that are simply beyond the scope of the rule since in none of the three is evidence of prior or contemporaneous terms used to contradict or add to an integration. BURTON, *supra* note 1, § 3.1.1, at 66–67. Note, however, that the line between interpreting, on the one hand, and contradicting and adding, on the other hand, breaks down on the margins. *See infra* Parts VII, IX.

⁸⁸ *See* RESTATEMENT (SECOND) OF CONTRACTS § 214; BURTON, *supra* note 1, § 3.3, at 93–104.

⁸⁹ As Professor Burton has explained, “[t]he parol evidence rule itself does not determine what elements a court may consider when deciding the question of integration.” BURTON, *supra* note 1, § 3.1.1, at 66; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 214(a)–(b).

⁹⁰ *See* Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1233–34 (1999).

⁹¹ *Id.*; CALAMARI AND PERILLO, *supra* note 7, § 3.4(a), at 113; KNAPP ET AL., *supra* note 23, at 417. The classical approach is often referred to as the “four-corners” approach. *See, e.g.*, CALAMARI AND PERILLO, *supra* note 7, § 3.4(a), at 113. I decided to use the “classical” label instead to avoid confusing the four-corners rule for *integration* with the four-corners rule for *ambiguity* that is the hallmark of textualist interpretation. *See supra* notes 32–37 and accompanying text.

conclusively establishes that the document is a complete integration unless the writing is obviously incomplete on its face.⁹² This approach is akin to textualist contract interpretation.⁹³

Other courts follow what I will call the modern approach to integration,⁹⁴ under which the judge considers both the text of the agreement *and* extrinsic evidence that bears upon whether the parties intended the writing to be final and complete.⁹⁵ The latter category includes evidence of the additional or contradictory term that might ultimately be excluded by the parol evidence rule if the court determines that the document is partly or completely integrated.⁹⁶ In modern states, a merger clause is powerful evidence that the agreement is a complete integration.⁹⁷ But it is not dispositive on this matter; instead, the clause is only a factor for the court to consider.⁹⁸ The modern approach to integration is akin to contextualist contract interpretation.

In parol evidence rule litigation, the level of integration “is often the key issue,”⁹⁹ as opposed to whether the proffered evidence contradicts or adds to the written agreement. Unfortunately, the integration caselaw is just as convoluted as

⁹² BURTON, *supra* note 1, § 3.2.3.1, at 78–79; CALAMARI AND PERILLO, *supra* note 7, § 3.6, at 122; KNAPP ET AL., *supra* note 23, at 417. A “merger clause”—also known as an “integration clause”—is a contractual provision stating that “the writing is intended to be final and complete; all prior understandings are deemed to have been ‘merged’ into or superseded by the final writing.” KNAPP ET AL., *supra* note 23, at 417 (also setting forth an example of such a clause).

⁹³ *See also* KNAPP ET AL., *supra* note 23, at 432 (“Courts that rely on the facial completeness of a written contract to conclude that it is fully integrated are likely to rely on the apparent plain meaning of words to bar use of extrinsic evidence to aid interpretation. . .”).

⁹⁴ *See* Jason Blumberg, *Bringing Back the Yard-Man Inference*, 4 U. PA. J. LAB. & EMP. L. 195, 204 (2001).

⁹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c (AM. L. INST. 1981); *id.* § 210 cmt. b; *id.* § 214 cmt. a; KNAPP ET AL., *supra* note 23, at 417.

⁹⁶ MURRAY, *supra* note 38, § 85[B], at 426 (“Thus, for a court to determine whether the agreement is integrated, it will have to receive (provisionally) the same extrinsic evidence that the parol evidence rule will bar if the court determines that the writing is integrated.”).

⁹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (stating that a merger clause is “likely to conclude the issue whether the agreement is completely integrated”); *see, e.g.*, *King v. Rice*, 191 P.3d 946, 950 n.17 (Wash. Ct. App. 2008) (explaining that “integration clauses are strong evidence of integration”).

⁹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (explaining that a merger clause does not “control” whether a writing is completely integrated); KNAPP ET AL., *supra* note 23, at 417; *see, e.g.*, *King*, 191 P.3d at 950 n.17 (stating that integration clauses “are not operative if they are factually incorrect”).

⁹⁹ CALAMARI AND PERILLO, *supra* note 7, § 3.4, at 113.

the caselaw on interpretation.¹⁰⁰ Courts employ a wide variety of tests along a continuum from classical to modern.¹⁰¹ The authorities within many states are in conflict over the governing standard.¹⁰² And commentators disagree over which approach is the majority view nationwide.¹⁰³

Courts are also divided on the question of what constitutes “contradicting” a contract rather than merely “adding” to one,¹⁰⁴ which implicates stage two of the parol evidence analysis. For example, under the Uniform Commercial Code (“U.C.C.”), some decisions provide that evidence of a side term contradicts an integration when there is an “absence of reasonable harmony” between the extrinsic evidence and the written agreement as a whole.¹⁰⁵ Other cases state that a contradiction exists only when there is a direct conflict between the alleged side term and a term in the integration.¹⁰⁶

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¹⁰⁰ See FARNSWORTH, *supra* note 17, § 7.3, at 423 (“Surprisingly little light is shed on the problem by the hundreds of decisions resolving the issue of whether an agreement is completely integrated.”).

¹⁰¹ See BURTON, *supra* note 1, § 3.2.3, at 77–93; CALAMARI AND PERILLO, *supra* note 7, § 3.4, at 113–20; *id.* § 3.6, at 122–23; MURRAY, *supra* note 38, § 85, at 423–441; see also FARNSWORTH, *supra* note 17, § 7.3, at 421 (“The sharpest disagreement in connection with the parol evidence rule has been over the application of this test [for completeness].”); *id.* at 422 (“The point in dispute is whether the fact that the writing appears on its face to be a complete and exclusive statement of the terms of the agreement establishes conclusively that the agreement is completely integrated.”).

¹⁰² BURTON, *supra* note 1, § 3.2.3, at 78 (“The courts employ all three approaches [to integration] at different times, even within a particular jurisdiction.”).

¹⁰³ Compare BURTON, *supra* note 1, § 3.1.1, at 67 (concluding that “most courts hold, that parol evidence may be admitted for the purpose of showing that an agreement is or is not integrated”), and FARNSWORTH, *supra* note 17, § 7.3, at 420 (identifying the modern approach to integration as “the prevailing view”), with LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.7, at 59 (explaining that “an examination of recent cases raises doubts” over Professor Farnsworth’s conclusion).

¹⁰⁴ CALAMARI AND PERILLO, *supra* note 7, § 3.5, at 121–22; 11 WILLISTON, *supra* note 7, § 33:29, at 1064–66.

¹⁰⁵ Apex LLC v. Sharing World, Inc., 142 Cal. Rptr. 3d 210, 222–23 (Cal. Ct. App. 2012) (internal quotation marks omitted); accord 2 LARY LAWRENCE, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-202:28 [Rev.] at 572 (3d ed. 2012).

¹⁰⁶ Apex LLC, 142 Cal. Rptr. 3d at 222–23; 2 LAWRENCE, *supra* note 105, § 2-202:28, at 572. Note that this split in the caselaw is centered on the first paragraph of U.C.C. § 2-202 and on § 2-202(b), which together govern side parol terms generally. See Apex LLC, 142 Cal. Rptr. 3d at 223 (referring to § 2-202(b)). There is a separate split concerning course of performance, course of dealing, and trade usage, which are governed by §§ 1-303 and 2-202(a). See Joshua M. Silverstein, *Contract Interpretation Enforcement Costs: An Empirical Study of Textualism versus Contextualism Conducted Via the West Key Number System*, 47 HOFSTRA L. REV. 1011, 1075–82 (2019) (outlining this division in the authorities).

In their ideal forms, contract interpretation and the parol evidence rule address distinct but closely related subjects. The law of interpretation governs the process for determining the *meaning* of the terms of a contract. The parol evidence rule governs whether evidence of prior or contemporaneous terms may be used to *contradict* or *add* to a written agreement.¹⁰⁷

III. ISSUE 1: THE TWO TYPES OF LATENT AMBIGUITY

In the overview of contract interpretation in Part II.A., I summarized the difference between textualism and contextualism as follows: Textualism recognizes only patent ambiguities, whereas contextualism recognizes both patent and latent ambiguities.¹⁰⁸ Many other scholars have described the two approaches to interpretation in those terms.¹⁰⁹ But as I also said in Part II.A., this conceptualization somewhat oversimplifies matters. In part, that is because textualist courts *do* recognize one type of latent ambiguity—what one might call a “subject-matter latent ambiguity.”¹¹⁰

A subject-matter latent ambiguity is an ambiguity that results when the language of the contract is applied to the real world—to the subject matter of the agreement.¹¹¹ The Idaho Supreme Court explained the concept this way: “A latent

¹⁰⁷ Kniffin, *supra* note 11, at 90 (“When courts interpret a contract, they seek to discover the parties’ intention concerning the meaning of a particular term found within the contract. When courts apply the parol evidence rule, in contrast, they seek to discover the parties’ intentions concerning whether a particular prior or contemporaneous term was agreed to be added to the main, written contract.”).

¹⁰⁸ See *supra* text accompanying note 62.

¹⁰⁹ See, e.g., BURTON, *supra* note 1, § 4.1, at 108 (“Most courts, however, recognize intrinsic but not extrinsic ambiguities Some courts recognize both intrinsic and extrinsic ambiguities.”); *id.* § 4.2.2 at 111–12 (“The classical view is that . . . a court may find that the contract is ambiguous only if it finds an intrinsic ambiguity Two rival views . . . recognize the possibility of an extrinsic ambiguity.”); *id.* at 115 (calling the two rivals views “objective contextualism” and “subjective contextualism”); KNAPP ET AL., *supra* note 23, at 432 (“While all courts will allow use of extrinsic evidence to interpret a contract with a patent or facial ambiguity, the point of difference is that ‘plain meaning’ adherents will not allow use of extrinsic evidence to uncover latent ambiguity.”); BEN TEMPLIN, CONTRACTS: A MODERN COURSEBOOK 503 (2d ed. 2019) (“A classic jurisdiction considers only patent ambiguities, while a modern jurisdiction considers both patent and latent ambiguities.”). I also used this description in my first article concerning contract interpretation. See Silverstein, *supra* note 13, at 257–58.

¹¹⁰ A second reason this conceptualization oversimplifies is that contextualism actually dispenses with the ambiguity determination entirely. See *infra* Part VII.

¹¹¹ *Midkiff v. Castle & Cooke, Inc.*, 368 P.2d 887, 894 (Haw. 1962) (“An ambiguity may arise from words which are plain in themselves, but uncertain when applied to the subject matter of the instrument.”).

ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.”¹¹²

The paradigms of subject-matter latent ambiguity are where language in a contract is intended to identify a single item in the world, but instead (1) two or more items fit the description, or (2) nothing in the world fits the description.¹¹³ A classic example is the case of *Raffles v. Wichelhaus*.¹¹⁴ There, the parties’ contract provided that certain cotton would arrive on the ship “Peerless.”¹¹⁵ But there were two ships with that name, creating an ambiguity that only became apparent when the language of the agreement was applied to the subject matter of the contract—the cotton on the ship “Peerless.”¹¹⁶ Another helpful illustration was offered in an opinion of the Texas Supreme Court: “[I]f a contract called for goods to be delivered to ‘the green house on Pecan Street,’ and there were in fact two green houses on the street, it would be latently ambiguous.”¹¹⁷ This hypothetical contract would also suffer from a subject-matter latent ambiguity if there were *no* green houses on Pecan Street.¹¹⁸

¹¹² *Knipe Land Co. v. Robertson*, 259 P.3d 595, 601 (Idaho 2011); *accord* *Charter Oil Co. v. Am. Emps.’ Ins. Co.*, 69 F.3d 1160, 1167 (D.C. Cir. 1995) (“Latent ambiguity can arise where language, clear on its face, fails to resolve an uncertainty when juxtaposed with circumstances in the world that the language is supposed to govern.”).

¹¹³ See 32A C.J.S. *Evidence* § 1454 (2008) (“The most common form of a latent ambiguity arises where an instrument or writing contains a reference to a particular person or thing and is thus apparently clear on its face, but it is shown by extrinsic evidence that there are two or more persons or things to whom or to which the description in the instrument might properly apply. Where a grant is issued to a certain person, but no person of that name ever existed, it is a case of latent ambiguity and evidence is admissible to show who was the person intended. . . .”); see also *Univ. City, Mo. v. Home Fire & Marine Ins. Co.*, 114 F.2d 288, 295–96 (8th Cir. 1940) (“A latent ambiguity may be one in which the description of the property is clear upon the face of the instrument, but it turns out that there is more than one estate to which the description applies; or it may be one where the property is imperfectly or in some respects erroneously described, so as not to refer with precision to any particular object.”); *Williams v. Idaho Potato Starch Co.*, 245 P.2d 1045, 1048–49 (Idaho 1952) (“Where a writing contains a reference to an object or thing . . . and it is shown by extrinsic evidence that there are two or more things or objects . . . to which [the writing] might properly apply, a latent ambiguity arises . . .”).

¹¹⁴ 159 Eng. Rep. 375 (Exch. 1864).

¹¹⁵ *Id.*

¹¹⁶ *Id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 214 illus. 4 (AM. L. INST. 1981) (“A and B make an integrated contract by which A promises to sell and B to buy goods ‘ex Peerless.’ Evidence is admissible to show that there are two ships of that name, which one each party meant, and, in case of misunderstanding, whether either had knowledge or reason to know of the other’s meaning.”).

¹¹⁷ *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 n.4 (Tex. 1995).

¹¹⁸ Subject-matter latent ambiguities frequently arises in contracts that contain real estate descriptions. See, e.g., *Meyer v. Stout*, 914 N.Y.S.2d 834, 836–37 (N.Y. App. Div. 2010) (holding that a deed for the sale of land contained a latent ambiguity because an

In both the *Peerless* case and the Pecan Street hypothetical, the contract language was perfectly clear; there was no patent ambiguity.¹¹⁹ But once the language of the agreement was applied to circumstances in the world, the language became unclear; it could no longer adjudicate between the parties' constructions, just as in the case of patent ambiguity. Which boat named "Peerless"? Which green house on Pecan Street? The ambiguities here are "latent" because they cannot be seen via an examination of the four corners of the contract. The ambiguity remains hidden until one considers extrinsic evidence regarding the subject matter of the transaction. Accordingly, "subject-matter latent ambiguity" is an apt description of this type of ambiguity.

As a conceptual matter, textualist jurisdictions have no choice but to allow for subject-matter latent ambiguities. Judge Richard Posner explains: "The contract's words point out to the real world, and the real world may contain features that make seemingly clear words, sentences, and even entire documents ambiguous."¹²⁰ It should thus not be surprising that numerous authorities from textualist states recognize this type of latent ambiguity, including cases from New York,¹²¹ Texas,¹²²

easement description set forth in the deed improperly referenced property that the seller did not actually own); *Emerald Pointe, L.L.C. v. Jonak*, 202 S.W.3d 652, 659 (Mo. Ct. App. 2006) ("Where an uncertainty in the description of land conveyed does not appear upon the face of the deed but evidence discloses that the description applies equally to two or more parcels, a latent ambiguity is said to exist and extrinsic evidence or parol evidence is admissible to show which tract or parcel of land was intended.") (internal quotation marks and citations omitted); *Warren v. Tom*, 946 S.W.2d 754, 758 (Mo. Ct. App. 1997) ("A latent ambiguity in the description of land in a deed or mortgage is an uncertainty not appearing on the face of the instrument, but which is shown to exist for the first time by matter outside the writing, when an attempt is made to apply the language to the ground.") (internal quotation marks and citations omitted); 32A C.J.S. *Evidence* § 1454 (2008) ("Latent ambiguities also arise through the difficulty in applying to the land itself a description thereof contained in a written instrument . . .").

¹¹⁹ For the Pecan Street hypothetical, assume away any issues regarding green shading into other colors. While the color green is patently ambiguous in marginal cases, the Texas Supreme Court presumably had in mind the core meaning of the concept "green," not a hue on the periphery.

¹²⁰ Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1597–98 (2005) (citing *Raffles v. Wichelhaus*).

¹²¹ See, e.g., *Teig v. Suffolk Oral Surgery Assocs.*, 769 N.Y.S.2d 599, 600 (N.Y. App. Div. 2003) ("Even where an agreement seems clear on its face, a 'latent ambiguity' may exist by reason of 'the ambiguous or obscure state of extrinsic circumstances to which the words of the instrument refer.'") (quoting *Lerner v. Lerner*, 508 N.Y.S.2d 191, 194 (1986)); see also *In re S.E. Nichols Inc.*, 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990) (applying New York law) ("Although parol evidence is inadmissible to vary or contradict the terms of a written contract, it is properly admitted for the purpose of identifying the subject matter of the agreement.").

¹²² See, e.g., *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282–83 (Tex.

Oklahoma,¹²³ Missouri,¹²⁴ and Idaho.¹²⁵ Indeed, in my research on contract interpretation, I have yet to come across a textualist state that does *not* permit the use of extrinsic evidence to establish the existence of a subject-matter latent ambiguity.¹²⁶

One additional point of clarification is in order. Recall the notion of ambiguity “in the contested respect” discussed above: An agreement is not ambiguous merely because it is amenable to more than one construction in the abstract. Instead, an ambiguity exists only when the contract is reasonably susceptible to the meanings asserted by both parties.¹²⁷ This requirement applies to subject-matter latent ambiguities.¹²⁸ To illustrate, in the *Peerless* case, the contract plausibly referred to either of the two ships named “Peerless.” But suppose that one of the parties contended that the agreement identified the first “Peerless” and the other party argued that the contract identified a ship named “Titanic.” On those facts, the agreement would not suffer from a subject-matter latent ambiguity in the contested respect and thus a court would deem the contract unambiguous.

Non-subject-matter latent ambiguities—the type that should be recognized only by contextualist jurisdictions—occur when the contracting parties use a word or phrase in an unconventional way. This second category of latent ambiguities might usefully be described as “non-standard-meaning latent ambiguities.”

Contract interpretation is generally concerned with standard meanings—the meanings established by standard

1996) (“A latent ambiguity exists when a contract is unambiguous on its face, but fails by reason of some collateral matter when it is applied to the subject matter with which it deals.”); *Security Sav. Ass’n v. Clifton*, 755 S.W.2d 925, 930 (Tex. Ct. App. 1988) (“However, it is well established that parol evidence is admissible for the purpose of applying the contract to its subject matter even where the contract is not ambiguous.”).

¹²³ *See, e.g., Eureka Water Co. v. Nestle Waters N. Am., Inc.*, 690 F.3d 1139, 1152–53 (10th Cir. 2012) (applying Oklahoma law) (explaining that subject-matter latent ambiguities are an exception to the general rule that extrinsic evidence may not be used to interpret a facially unambiguous contract).

¹²⁴ *See, e.g., Finova Cap. Corp. v. Ream*, 230 S.W.3d 35, 49 (Mo. Ct. App. 2007) (“An ambiguity is . . . latent if language, which is plain on its face, becomes uncertain upon application.”).

¹²⁵ *See, e.g., Knipe Land Co. v. Robertson*, 259 P.3d 595, 601 (Idaho 2011) (“Although parol evidence generally cannot be submitted to contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears.”).

¹²⁶ *See also* 32A C.J.S. *Evidence* § 1513 (2008) (“Parol evidence may be admissible where it is necessary in order to identify, explain, or define the subject matter of a grant, mortgage, contract, or other writing, or where it is necessary to apply the instrument or a description therein to its subject matter and to enable the court to execute it.”).

¹²⁷ *See supra* notes 41–44 and accompanying text.

¹²⁸ *See* BURTON, *supra* note 1, § 4.1, at 106–07.

definitions of words and the basic rules of grammar. Put another way, the interpretation of contracts focuses on the meaning of language as used in ordinary English.¹²⁹ That helps to explain why textualist states restrict the ambiguity determination to the four corners of the agreement, dictionaries, and certain rules of construction.¹³⁰ Those are arguably the only tools needed to address whether the ordinary meaning of a contract is unclear.

But words can have alternative definitions, and those definitions are sometimes used in agreements. The *Restatement (Second) of Contracts* explains:

Parties to an agreement often use the vocabulary of a particular place, vocation or trade, in which new words are coined and common words are assigned new meanings. . . . Moreover, the same word may have a variety of technical and other meanings. “Mules” may mean animals, shoes or machines; a “ram” may mean an animal or a hydraulic ram; “zebra” may refer to a mammal, a butterfly, a lizard, a fish, a type of plant, tree or wood, or merely to the letter “Z.”¹³¹

We can call these alternative definitions “non-standard meanings,” “non-standard definitions,” or “special meanings.” Under contextualism, evidence of a non-standard meaning may be used to establish a latent ambiguity.¹³²

¹²⁹ RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. e (AM. L. INST. 1981) (“In the United States the English language is used far more often in a sense which would be generally understood throughout the country than in a sense peculiar to some locality or group. In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one.”); see also *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1307 (D.C. Cir. 1982) (“In interpreting a contract, a court will presume that the parties intended the words to have the meaning they have in ordinary English usage unless there is some reason to believe the parties had a different one in mind.”); *Gabriel v. Gabriel*, 152 A.3d 1230, 1243 (Conn. 2016) (“[T]he language used [in a contract] must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract[.]”); *Harkless v. Laubhan*, 219 So. 3d 900, 904 (Fla. Dist. Ct. App. 2016) (“We interpret contracts in accordance with their plain and ordinary meaning when the contractual language is clear and unambiguous.”); *Penn Ins. & Annuity Co. v. Kuriger*, 495 S.W.3d 540, 546 (Tex. Ct. App. 2016) (“We give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage.”); *East Texas Copy Sys., Inc. v. Player*, 528 S.W.3d 562, 566 (Tex. Ct. App. 2016) (“Contract terms are given their plain and ordinary meaning unless the instrument indicates a different meaning is intended by the parties.”).

¹³⁰ See *supra* note 37 and accompanying text (identifying the materials textualist courts may consider at stage one of the interpretive process).

¹³¹ RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. f (AM. L. INST. 1981).

¹³² Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 591 (2005) (explaining that contextualist authorities “permit evidence of context that would lead a reasonable outsider viewing the contract to assign a meaning that was *different from the standard meaning*.”) (emphasis added); see, e.g., *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 219 (Cal. Ct. App. 1993) (“[C]ourts should allow parol evidence to explain *special* meanings which the

The archetype of a non-standard-meaning latent ambiguity is where the parties allegedly used special industry terminology in drafting their contract.¹³³ Consider the case of *Western States Construction Co. v. United States*.¹³⁴ There, the issue was whether a contract provision concerning “metallic pipes” applied to pipes made of cast iron.¹³⁵ The court explained that while “the dictionary definition of ‘metallic pipes’ would embrace [cast iron pipes],” a latent ambiguity was established by extrinsic evidence of an industry trade usage that the phrase “metallic pipes” excludes pipe made of cast iron.¹³⁶ In other words, contextual

individual parties to a contract may have given certain words.”) (emphasis in original).

¹³³ See 12 WILLISTON ON CONTRACTS § 34:1, at 8–9 (4th ed. 2012) (“Indeed, often terms that are unambiguous on their face may be ambiguous or have a different meaning as a matter of fact, as when the terms have both an ordinary meaning and a special trade meaning.”); *id.* § 34:5, at 45–50 (“[N]umerous cases have been decided in which words with a clear normal meaning were shown by usage to bear a meaning which was not suggested by the ordinary language used. . . . Therefore, evidence of usage may be admissible to give meaning to apparently unambiguous terms of a contract when other parol evidence would be inadmissible.”) (collecting authorities); see also *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 151 (Ohio 1978) (explaining that trade usage evidence “is permissible to show that the parties to a written agreement employed terms having a special meaning within a certain geographic location or a particular trade or industry, not reflected on the face of the agreement”); *Scapa Tapes N. Am., Inc. v. Avery Dennison Corp.*, 384 F. Supp. 2d 544, 550 (D. Conn. 2005) (“However, even where language of a commercial contract is unambiguous, testimony concerning trade custom and usage may be offered to define terms that have a technical meaning within a particular [industry].”); *Emp. Television Enters., LLC v. Barocas*, 100 P.3d 37, 43 (Colo. Ct. App. 2004) (“In deciding whether usage of trade evidence makes a term ambiguous, a court should first consider any evidence of trade usage that proposes an alternative definition. Thus, trade usage evidence is admissible even if the language is plain and unambiguous on its face, as long as the evidence is sufficient to suggest an alternative meaning.”); RESTATEMENT (SECOND) OF CONTRACTS § 220 cmt. d (“Hence usage relevant to interpretation is treated as part of the context of an agreement in determining whether there is ambiguity or contradiction as well as in resolving ambiguity or contradiction. There is no requirement that an ambiguity be shown before usage can be shown, and no prohibition against showing that language or conduct have a different meaning in the light of usage from the meaning they might have apart from the usage.”); *id.* § 222(3) (“Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.”); U.C.C. § 1-303(d) (“A . . . usage of trade . . . is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”); Schwartz & Scott, *supra* note 4, at 962 (“Contests over the meaning of contract terms thus follow a predictable pattern: one party claims that the words in a disputed term should be given their *standard dictionary meaning*, as read in light of the contract as a whole, the pleadings, and so forth. The counterparty argues either that the contract term in question is ambiguous and extrinsic evidence will resolve the ambiguity, or that extrinsic evidence will show that the parties intended the words to be given a *specialized or idiosyncratic meaning* that varies from the meaning in the standard language.”) (emphasis added).

¹³⁴ 26 Cl. Ct. 818 (1992).

¹³⁵ *Id.* at 820.

¹³⁶ *Id.* at 824–26.

evidence supported the conclusion that the parties did not use the standard meaning of “metallic” in their contract. Instead, they employed a non-standard or technical meaning specific to their field of trade.

Corbin on Contracts offers another helpful example: In the baking industry, the word “dozen” means something different (thirteen) than it does in ordinary English (twelve). Hence, the expression “baker’s dozen.” Suppose a contract between a baker and a customer uses the word “dozen.” The ordinary meaning of that term is unambiguous. But once the interpreter considers extrinsic evidence from the baking industry, “dozen” now appears reasonably susceptible to more than one meaning—twelve or thirteen.¹³⁷

As with the *Peerless* case and the Pecan Street hypothetical, the contract language was perfectly clear in *Western States* and the baker’s dozen example. Neither agreement suffers from a patent ambiguity. But when extrinsic evidence of the trade usage was considered, the language became unclear. Which definition of “metallic” or “dozen” did the parties intend: The standard meaning or the special industry meaning? Once again, the ambiguities here are “latent” because they cannot be seen through an analysis of the four corners of the contract. The ambiguity remains hidden until one considers extrinsic evidence supporting the conclusion that the parties used a non-standard meaning. Accordingly, “non-standard-meaning latent ambiguity” is an apt description of this type of ambiguity.¹³⁸

¹³⁷ See KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.13, at 118.

¹³⁸ For some additional examples of non-standard meanings, see RESTATEMENT (SECOND) OF CONTRACTS § 220 illus. 8 (“A leases a rabbit warren to B. The written lease contains a covenant that at the end of the term A will buy and B will sell the rabbits at ‘60 [Pounds Sterling] per thousand.’ The parties contract with reference to a local usage that 1,000 rabbits means 100 dozen. The usage is part of the contract.”) (based upon *Smith v. Wilson*, 3 B. & Ad. 728, 110 Eng. Rep. 266, 1832 WL 4162 (K.B. 1832)); *id.* § 222 illus. 6 (“A and B enter into a contract for the purchase and sale of ‘No. 1 heavy book paper guaranteed free from ground wood.’ Usage in the paper trade may show that this means paper not containing over 3% ground wood.”) (based upon *Gumbinsky Bros. Co. v. Smalley*, 197 N.Y.S. 530 (N.Y. App. Div. 1922), *aff’d* 139 N.E. 758 (N.Y. 1923)); *see also infra* notes 317–322 and accompanying text (discussing these and other examples and setting forth multiple sources collecting authorities).

Note that non-standard-meaning latent ambiguities are distinguishable from undefined technical and industry terms that appear on the face of an agreement and possess no ordinary meaning. Courts rightfully treat the latter situation as constituting a type of *patent* ambiguity. For example, in *Rogers & Sons, Inc. v. Santee Risk Managers, L.L.C.*, an insurance policy contained “Coldfire” requirements. 631 S.E.2d 821, 823 (Ga. Ct. App. 2006). “Coldfire” has no meaning in common usage; the word is not contained in any general or legal dictionaries that I checked. It is “the trade name of a fire suppression product.” *Id.* at 823. And the insurance policy did not define the term. *Id.* at 824. This

The two types of latent ambiguity are different in critical respects. Subject-matter latent ambiguities do not implicate alternative definitions of words. Instead, they result from a disconnect between the standard meaning of the contract terms and facts in the real world, such as where two items fit a contractual description that is presumed to apply to only one

created a patent ambiguity, which, the opinion explained, justified admitting extrinsic evidence to establish the proper understanding of “Coldfire.” *Id.*

To elaborate, in the case of a non-standard-meaning latent ambiguity, the text of the contract is facially unambiguous because the written terms are consistent with only one party’s construction of the agreement when employing ordinary English. The instrument is thus fully comprehensible by itself; extrinsic evidence is not necessary to establish the standard meaning of the words. Moreover, the contract provides no indication that the parties contemplated an alternative understanding. Any uncertainty as to the parties’ intent only becomes apparent upon the submission of extrinsic evidence suggesting that they employed a special meaning. Once again, this explains why such an ambiguity is considered “latent” or “extrinsic.”

In a situation like *Rogers & Sons*, by contrast, the relevant express term or phrase has no standard meaning. This makes the ambiguity patent: Extrinsic evidence is not necessary to discover the ambiguity because the lack of clarity is apparent immediately upon reading the agreement (and consulting dictionaries). Indeed, such a contract is literally impossible to understand without reviewing extrinsic evidence because the critical express terms have no meaning independent of the context surrounding the transaction—unlike the words employed in general English. *See also* *Startex Drilling Co., Inc. v. Sohio Petrol. Co.*, 680 F.2d 412, 415 (5th Cir. 1982) (holding that a contract was patently ambiguous, and thus that extrinsic evidence was properly presented to the jury, because the agreement’s “undefined technical terms . . . convey little meaning without explanation”); *Busch & Latta Painting Corp. v. State Highway Comm’n*, 597 S.W.2d 189, 202 (Mo. Ct. App. 1980) (“Missouri follows the general rule that where a written instrument contains words or expressions of a technical nature connected with some art, science, or occupation *unintelligible to the common reader* but susceptible of definite interpretation by [an] expert, parol evidence is admissible to explain the language used.”) (emphasis added); 32A C.J.S. *Evidence* § 1459 (2008) (same).

For other examples comparable to *Rogers & Sons*, see *United States v. Midwest Constr. Co.*, 619 F.2d 349, 350–52 (5th Cir. 1980) (holding that the phrase “1 on 5 slope” combined with “dotted lines around the breakwater” on a diagram in a dredging contract constituted a patent ambiguity, justifying the admission of extrinsic evidence to “to prove the meaning of ambiguities in contract language”); *May v. S.E. GA Ford, Inc.*, 811 S.E.2d 14, 17–18 (Ga. Ct. App. 2018) (finding a contract patently ambiguous because it contained “numerous undefined terms and abbreviations apparently used in the car sales industry”; further concluding that extrinsic evidence of trade usage resolved the ambiguity as to one of the terms—“draw against commissions”); *Sierra Life Ins. Co. v. First Nat’l Life Ins. Co.*, 512 P.2d 1245, 1247–48 (N.M. 1973) (approving of the admission of extrinsic evidence to explain “technical terms of the life insurance business,” including the phrase “cede back, by treaty of bulk reinsurance”). *But see* *NCP Lake Power, Inc. v. Fla. Power Corp.*, 781 So. 2d 531, 536–37 (Fla. Dist. Ct. App. 2001) (explaining that even if a contract is not patently ambiguous, extrinsic evidence may be admitted to construe technical terms in the contract “that may not be understood by the court”). For authorities appearing to recognize the distinction between non-standard-meaning latent ambiguities and undefined technical terms with no ordinary meaning, see 29A AM. JUR. 2D *Evidence* § 1121 (2019) (“Parol evidence is always admissible to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings, the one common and universal, and the other technical.”) (emphasis added); *Wells Fargo Bank, N.A. v. Cherryland Mall Ltd. P’ship*, 812 N.W.2d 799, 809 (Mich. Ct. App. 2011) (same).

item. By contrast, alternative definitions *are* implicated with non-standard-meaning latent ambiguities. Here, ambiguity arises because the words in the agreement have both an ordinary or standard meaning and a special or non-standard meaning, such as with the word “dozen.”

As should be expected, the distinction between the two classes of latent ambiguity blurs on the margins. For a case that probably could be placed into either category, consider *In re Soper's Estate*.¹³⁹ There, a contract provided that the benefits of an insurance policy were to be paid to the “wife” of Ira Soper if he died.¹⁴⁰ Soper had previously deserted his wife, had pretended suicide, and was bigamously married to a second woman at the time the contract was executed.¹⁴¹ The court held that Soper intended to make the second woman the beneficiary of the insurance proceeds under the contract, even though legally the first woman was his “wife.”¹⁴² *Soper's Estate* could be described as involving a subject-matter latent ambiguity because, as the word “wife” is generally understood, Soper arguably had two wives. Alternatively, the case could be understood as involving a non-standard-meaning latent ambiguity because Soper was using the word “wife” in a specialized way—to refer to the woman he was living with and holding out as his “wife” at the time the contract was executed, not to the woman who was his legal wife.¹⁴³

“Subject-matter latent ambiguity” and “non-standard-meaning latent ambiguity” are phrases that I created. They are not present in the caselaw or the secondary literature. In part, that is because many courts do not carefully distinguish between the two types of latent ambiguity. For example, in *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*,¹⁴⁴ the court started by defining a latent ambiguity as an ambiguity that results when a contract is “applied or executed”¹⁴⁵—meaning a subject-matter latent ambiguity. But the opinion subsequently explained that a latent ambiguity can arise when evidence of “trade usage, course of dealing, or some other linguistic particularity” demonstrates that

¹³⁹ 264 N.W. 427 (Minn. 1935).

¹⁴⁰ *Id.* at 429.

¹⁴¹ *Id.* at 428–29.

¹⁴² *Id.* at 431.

¹⁴³ See Ricks, *supra* note 18, at 774–83 (essentially arguing that *Soper's Estate* concerns a non-standard-meaning latent ambiguity).

¹⁴⁴ 367 P.3d 994 (Utah 2016).

¹⁴⁵ *Id.* at 1004.

the terms of the contract “fail to reflect the parties’ intentions,”¹⁴⁶ which describes the method by which a non-standard-meaning latent ambiguity is established. In other words, the court conflated the categories of latent ambiguity.¹⁴⁷

Note that at one point I considered adopting the phrase “special-meaning latent ambiguity” instead of “non-standard-meaning latent ambiguity.” But then the acronyms for each type of latent ambiguity would be the same—SMLA. That would create issues when I teach this material to my students. Accordingly, I selected “non-standard-meaning latent ambiguity,” for which the acronym is NSMLA. That enables me to retain SMLA exclusively for “subject-matter latent ambiguity” in class.

If courts and scholars began to use the terms “subject-matter latent ambiguity” and “non-standard-meaning latent ambiguity” to distinguish between the two types of latent ambiguity, that would significantly reduce confusion both in and regarding the contract interpretation caselaw. For example, when I began my work on interpretation, I attempted to find textualist states by looking for jurisdictions that refuse to recognize latent ambiguities, following the guidance of various secondary sources stating that only contextualist territories allow for such ambiguities.¹⁴⁸ But as far as I can tell, no such textualist states exist because they all permit the use of extrinsic evidence to establish subject-matter latent ambiguities. Had I been aware of the distinction between the two categories of latent ambiguity from the start, that would have greatly facilitated my research. In addition, I have used the labels “subject-matter latent ambiguity” and “non-standard-meaning latent ambiguity” in class for several years and this has noticeably improved my students’ understanding of latent ambiguities specifically and the operation of textualism and contextualism generally.

I thus recommend that judges, commentators, and lawyers adopt these locutions.¹⁴⁹ And when teaching contract interpretation,

¹⁴⁶ *Id.* at 1004–05.

¹⁴⁷ See also *Stryker Corp. v. Nat’l Union Fire Ins. Co.*, 842 F.3d 422, 427 (6th Cir. 2016) (applying Michigan law) (discussing cases involving each type of latent ambiguity under the general label of “latent ambiguity” and failing to distinguish between them); *Shay v. Aldrich*, 790 N.W.2d 629, 641–43 (Mich. 2010) (same).

¹⁴⁸ Some of the authorities are set out in footnote 109.

¹⁴⁹ I am certainly not the first contracts scholar to suggest that new terminology might assist with contract interpretation and the parol evidence rule. See, e.g., Kniffin, *supra* note 11, at 128 (“If courts will substitute ‘contract supplementation requirements’ or ‘contract alteration requirements’ as a label for ‘the parol evidence rule,’ they will achieve enormous progress in avoiding confusion and resultant injustice.”).

professors should be careful when representing to their students that textualist states only recognize patent ambiguities. While that is a useful heuristic early in the interpretation unit—one that I actually employ myself—I believe it is critical to subsequently explain to the students that textualist authorities *do* recognize one class of latent ambiguity: subject-matter latent ambiguity.

Given my revised nomenclature, I can now offer a more accurate statement of the difference between textualism and contextualism based on the types of ambiguity each approach permits. Textualism recognizes patent ambiguities and subject-matter latent ambiguities,¹⁵⁰ while contextualism recognizes patent ambiguities, subject-matter latent ambiguities, *and* non-standard-meaning latent ambiguities.¹⁵¹

IV. ISSUE 2: THE MANY DEFINITIONS OF “PAROL EVIDENCE”

In cases involving contract interpretation and/or the parol evidence rule, judges regularly employ the phrase “parol evidence.” Unfortunately, they use the phrase in many different ways. In other words, “parol evidence” has multiple definitions in the caselaw. This contributes to the confusion regarding interpretation and the parol evidence rule.

Before presenting the various definitions of “parol evidence,” it is worth revisiting the distinction between interpretive evidence and evidence subject to the parol evidence rule. Evidence relates to interpretation when it addresses the meaning of language set forth in the parties’ agreement. Evidence is

¹⁵⁰ And some courts describe textualism in precisely this form. *See, e.g.*, Gen. Convention of New Jerusalem in the U.S. of Am., Inc. v. MacKenzie, 874 N.E.2d 1084, 1087 (Mass. 2007) (explaining that “extrinsic evidence may be admitted when a contract is ambiguous on its face or as applied to the subject matter”); *see also* Wiener v. E. Ark. Planting Co., 975 F.2d 1350, 1356 (8th Cir. 1992) (applying Arkansas law) (“Ambiguities may be patent or latent. . . . A patent ambiguity is an ambiguity which appears on the face of the contract [A] latent ambiguity is one developed by extrinsic evidence, where the particular words, in themselves clear, apply equally well to two different objects.”) (citations and internal quotation marks omitted).

¹⁵¹ Note that this breakdown applies to textualism and contextualism in their unadulterated forms. But as I have said, the caselaw in most states is not purely textualist or contextualist. *See supra* notes 66–67 and accompanying text. And numerous decisions in textualist jurisdictions recognize non-standard-meaning latent ambiguities, particularly in the context of trade usage. *See* 12 WILLISTON, *supra* note 133, § 34:5, at 45–50 (“[N]umerous cases have been decided in which words with a clear normal meaning were shown by usage to bear a meaning which was not suggested by the ordinary language used. . . . Therefore, evidence of usage may be admissible to give meaning to apparently unambiguous terms of a contract when other parol evidence would be inadmissible.”) (collecting authorities, including many from states that generally follow textualism).

governed by the parol evidence rule when it addresses contradictory or consistent additional terms agreed to prior to or contemporaneously with execution of the contract.¹⁵² Now we can turn to the definitions.

First, courts sometimes use the phrase “parol evidence” to refer to evidence that is barred by the parol evidence rule. For example, in *Bilow v. Preco, Inc.*, the Idaho Supreme Court stated that “[p]arol evidence is any . . . written or oral agreements or understandings . . . made prior to or contemporaneously with the written contract.”¹⁵³

Second, courts sometimes use “parol evidence” to refer to a subset of interpretation evidence. To illustrate, in *4 G Properties, LLC v. Gals Real Estate, Inc.*, the Georgia Court of Appeals explained that “[u]nless an ambiguity exists, the court may not look outside the terms of the contract to consider surrounding circumstances *or* parol evidence.”¹⁵⁴ Because the court distinguished evidence of the “surrounding circumstances” from “parol evidence,” the court appeared to be employing the latter term to mean only certain types of interpretation evidence.

Next, courts sometimes use “parol evidence” to refer to a combination of the first two categories. For example, in *Luttrell v. Cooper Industries, Inc.*, a federal district court judge applying Kentucky law wrote that “[p]arol evidence consists of evidence of agreements between *or* the behavior of the parties prior to or contemporaneous with the contract.”¹⁵⁵ The language before the “or” refers to evidence governed by the parol evidence rule (because it concerns “agreements”), while the language after refers to interpretation evidence (because it concerns “the behavior of the parties”). Likewise, in *Meyer-Chatfield v. Century Business Servicing, Inc.*, a federal district court judge applying Pennsylvania law stated that “[p]arol evidence is any oral testimony, written agreements, or other writings created prior to the contract that would serve to explain *or* vary the terms of the contract.”¹⁵⁶ This time, the court identified the interpretation evidence before the “or” (using the word “explain”) and the

¹⁵² See *supra* text accompanying note 107 (explaining the difference between contract interpretation and the parol evidence rule).

¹⁵³ 966 P.2d 23, 28 (Idaho 1998) (internal quotation marks omitted); accord *In re Linterboard Antitrust Litig.*, 443 F. Supp. 2d 703, 715 (E.D. Pa. 2006) (applying Minnesota law) (“Parol evidence is extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements. . . .”) (internal quotation marks omitted).

¹⁵⁴ 656 S.E.2d 922, 924 (Ga. Ct. App. 2008) (emphasis added).

¹⁵⁵ 60 F. Supp. 2d 629, 631 (E.D. Ky. 1998) (emphasis added).

¹⁵⁶ 732 F. Supp. 2d 514, 519 (E.D. Pa. 2010) (emphasis added).

parol-evidence-rule evidence after the “or” (using the word “vary”). Finally, in *Wells Fargo Bank Wyoming, N.A. v. Hodder*, the Wyoming Supreme Court defined parol evidence as “prior or contemporaneous collateral agreements of the parties or [the parties] understanding of what particular terms in their agreement mean.”¹⁵⁷

Notice that the three opinions discussed in the last paragraph define “parol evidence” in separate ways. In each decision, the phrase encompasses both parol-evidence-rule evidence and interpretation evidence. But the cases refer to divergent subsets of interpretation evidence when identifying what constitutes parol evidence. According to *Luttrell*, interpretation evidence concerning “the behavior of the parties prior to or contemporaneous with the contract” falls within the scope of parol evidence.¹⁵⁸ In *Meyer-Chatfield*, the judge identified “oral testimony, written agreements, or other writings created prior to the contract that would serve to explain . . . the . . . contract” as being parol evidence.¹⁵⁹ And in *Hodder*, the court stated that the category of parol evidence contains the parties’ “understanding of what particular terms in their agreement mean.”¹⁶⁰ Adding these three understandings of “parol evidence” to the first two brings the total number of definitions of that phrase up to five.

Here is yet another: Courts sometimes use “parol evidence” as a synonym for “extrinsic evidence.” For example, in *Krizovensky v. Krizovensky*, a Pennsylvania trial judge wrote the following: “Where the contract terms are ambiguous . . . , however, the court is free to receive extrinsic evidence, i.e., parol evidence, to resolve the ambiguity.”¹⁶¹

That increases the count to six definitions of “parol evidence.” And I came across still more during my research.¹⁶² It

¹⁵⁷ 144 P.3d 401, 412 n.5 (Wyo. 2006) (emphasis added).

¹⁵⁸ 60 F. Supp. 2d at 631.

¹⁵⁹ 732 F. Supp. 2d at 519.

¹⁶⁰ 144 P.3d at 412 n.5.

¹⁶¹ 624 A.2d 638, 642 (Pa. Super. Ct. 1993); *accord* *Sylvia v. Wisler*, No. 13-2534-EFM-TJJ, 2015 WL 6454794, at *3 (D. Kan. Oct. 26, 2015) (“Parol evidence’ simply refers to extrinsic evidence relating to a contract.”); *Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) (“Parol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract.”); *see also* BURTON, *supra* note 1, § 3.1.1, at 68 (“This term [extrinsic evidence] may be defined as evidence relating to a written contract that does not appear within the four corners of the contract. It is a synonym for ‘parol evidence’ and will be used from time to time in this book.”).

¹⁶² Note that the multiple definitions of “parol evidence” in the caselaw likely result from imprecise opinion drafting and a lack of understanding rather than from courts

is not difficult to imagine how these varied meanings of “parol evidence” confuse judges and lawyers, leading to inconsistency and incoherence in the caselaw.

Here, my primary recommendation is that we simply drop the phrase “parol evidence.” The term is beyond rehabilitation. Instead, judges, lawyers, and professors should describe evidence using more detailed terminology, such as “evidence of prior or contemporaneous agreements,” “evidence of contrary terms,” “evidence of additional terms,” “preliminary negotiations evidence,” “evidence of the parties’ subjective understanding of the contract’s meaning,” “course of performance,” “course of dealing,” “usages of trade,” and so forth.

I teach contract interpretation before the parol evidence rule. During the interpretation unit, I cover eight categories of evidence—the text of the agreement, dictionaries, and six classifications of extrinsic evidence. When discussing items in the last group, I never use the phrase “parol evidence.” Instead, I employ specific terms like those at the end of the list in the prior paragraph. And when I subsequently cover the parol evidence rule, I generally avoid the locution “parol evidence,” and instead talk in terms of “evidence that contradicts a contract,” “evidence that adds to a contract,” and “evidence that is used to interpret a contract.”

Professor Margaret Kniffin contends that we should replace the phrase “parol evidence rule” with “contract supplementation requirements” or “contract alteration requirements” to increase clarity in the caselaw.¹⁶³ I agree. But I also believe that we should go a step further and eliminate the phrase “parol evidence” as well.¹⁶⁴

Unfortunately, neither “parol evidence rule” nor “parol evidence” are disappearing from judicial decisions any time soon.

knowingly endorsing distinct meanings. Indeed, in the course of my research, I have seen no decisions that analyze which definition of the phrase to adopt. “Parol evidence” is usually defined in passing when judges lay out general principles of contract interpretation or the parol evidence rule.

¹⁶³ Kniffin, *supra* note 11, at 128; *accord* Juanda Lowder Daniel, *K.I.S.S. the Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties’ Written Agreement*, 57 SYRACUSE L. REV. 227, 235–37 (2007) (“The eradication of the term ‘parol evidence rule’ can be performed in a similar manner. Let’s just agree not to use this term anymore. . . .”); *id.* at 261 (arguing that “parol evidence rule” should be changed to “written contract exclusionary rule”).

¹⁶⁴ *See also* Kniffin, *supra* note 11, at 129 (recommending that courts use “extrinsic evidence” rather than “parol evidence” when referring to all evidence external to a written contract).

Accordingly, my secondary recommendation is that lawyers, judges, and professors read the phrase “parol evidence” critically. Keep in mind that the term possesses multiple meanings and think about which definition the author is using in the opinion, brief, article, or treatise. At least some confusing discussions of contract interpretation and the parol evidence rule will make more sense once the reader identifies precisely which definition of “parol evidence” is being employed.

V. ISSUE 3: THE STAGES OF CONTRACT INTERPRETATION

Both textualism and contextualism are generally understood as involving two stages. At stage one, the court assesses whether the contract is ambiguous. At stage two, the court resolves any ambiguity uncovered at stage one.¹⁶⁵ However, this framework oversimplifies the interpretive process. First, textualism has three substantive steps rather than two. Second, one version of contextualism has two stages, but the stages do not fit into the ambiguity/resolution framework in the same way that the steps of textualism do. And third, it is not possible to concisely describe the number of stages in the second type of contextualism.

A. Textualism

I will begin with textualism because the structure of that approach is more straightforward. Start by recalling that a patent ambiguity is resolved by the judge in two circumstances: (1) if the parties do not submit any relevant extrinsic evidence, or (2) if the evidence presented at stage two is so one-sided that there is no genuine issue of material fact regarding the contract’s meaning. The jury resolves an ambiguity if (a) the parties submit relevant extrinsic evidence at stage two, *and* (b) a reasonable jury could rule for either side.¹⁶⁶ Given these principles, stage two of the interpretive process must be divided into two phases under textualism. And that means that textualism actually involves three stages rather than two.

Stage one is the ambiguity determination. That determination is restricted to the four corners of the contract¹⁶⁷ (unless there is a subject-matter latent ambiguity¹⁶⁸) and it can

¹⁶⁵ See *supra* notes 32–55 and accompanying text.

¹⁶⁶ See *supra* notes 49–50 and accompanying text.

¹⁶⁷ See *supra* note 37 and accompanying text.

¹⁶⁸ See *supra* text accompanying notes 126 and 150. Part V and the subsequent parts of this Article generally set aside subject-matter latent ambiguities.

be addressed at the pleading stage or by summary judgment.¹⁶⁹ If the judge concludes that the contract is unambiguous, he or she simply applies the unambiguous meaning to the facts of the case. If the judge decides that the contract is patently ambiguous, then the case proceeds to stage two.¹⁷⁰

At stage two, the judge assesses whether the ambiguity can be resolved as a matter of law or must instead be submitted to the jury for resolution as a question of fact. Here, the judge considers both the language of the agreement and extrinsic evidence.¹⁷¹ Note again that resolving ambiguity is a question of law in two circumstances: First, if the parties offer no relevant extrinsic evidence;¹⁷² second, if the contract language together with the relevant extrinsic evidence so heavily favors one side that there exists no genuine issue of material fact as to the agreement's meaning.¹⁷³ The second circumstance can also be described as follows: The judge resolves the ambiguity if a rational jury would necessarily decide in favor of one of the parties; if a rational jury could rule for either side, then the interpretive issue must be left to the jury and the case proceeds to stage three.¹⁷⁴ The court can make the stage-two

¹⁶⁹ *Kirsch v. Brightstar Corp.*, 968 F. Supp. 2d 931, 938–40 (N.D. Ill. 2013) (indicating that the ambiguity determination can be addressed via a motion to dismiss and denying such a motion after finding that the contract at issue was ambiguous); *Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 951 (Mass. 2002) (“If a contract . . . is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment.”); *Salewski v. Music*, 54 N.Y.S. 3d 203, 205 (N.Y. App. Div. 2017) (“Whether the language set forth in a release unambiguously bars a particular claim is a question of law appropriately determined on a motion [to dismiss] based upon the entire release and without reference to extrinsic evidence”) (brackets in original; internal quotation marks omitted).

¹⁷⁰ *See supra* notes 45–48 and accompanying text.

¹⁷¹ *See supra* notes 48, 56, and accompanying text.

¹⁷² This happens (1) when the parties decide to submit no evidence at all and instead rest on their arguments regarding the language of the agreement, or (2) when all of the evidence submitted is not relevant and is thus rejected by the judge.

¹⁷³ *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 299–300 (S.D.N.Y. 1997) (“[A] court appropriately may dispose of a contract interpretation dispute on summary judgment, although the contract is [patently] ambiguous, if the court finds either that there is no relevant extrinsic evidence or that there is relevant extrinsic evidence, but such evidence is so one-sided that it does not create a genuine issue of material fact.”); *Zale Constr. Co. v. Hoffman*, 494 N.E.2d 830, 834 (Ill. App. Ct. 1986) (“Various commentators have stated, however, that even where such a question of fact exists, where the meaning is so clear that reasonable men could reach only one conclusion, the court should decide the [interpretive] issue as it does when the resolution of any question of fact is equally clear.”) (citations and internal quotation marks omitted).

¹⁷⁴ *RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*, 18 F. Supp. 3d 534, 541 (S.D.N.Y. 2014) (“If there is no relevant extrinsic evidence, the Court must resolve the ambiguity as a matter of law. The same is true if the evidence presented about the parties’ intended meaning [is] so one-sided that no reasonable person could decide the

determination pre-trial via summary judgment¹⁷⁵ or at trial through a motion for a directed verdict or a motion for judgment notwithstanding the verdict.¹⁷⁶

If the parties submit relevant extrinsic evidence and the judge concludes that a reasonable jury could find for either side, then the case continues to stage three. At that stage, the jury resolves the ambiguity through the normal trial procedures employed to address questions of fact.¹⁷⁷

The three stages of textualism generally line up with the three basic phases of civil litigation: (1) ambiguity determination—pleadings; (2) resolving the ambiguity—discovery and summary judgment; and (3) resolving the ambiguity—trial. At stage one, the judge may not consider extrinsic evidence. The ambiguity determination is thus well suited to adjudication via a motion to dismiss or for judgment on the pleadings. Once the court decides that an ambiguity exists, the parties are entitled to present extrinsic evidence. And parties proffer such evidence in most litigated cases involving ambiguous contracts.¹⁷⁸ The resolution of ambiguity therefore generally cannot take place until after discovery. Accordingly, courts normally resolve ambiguities by summary judgment or through a trial, with the appropriate procedure depending on whether the evidence overwhelmingly supports one side or not. The parallel between the three steps of textualist interpretation and the three steps of a civil action is not perfect.¹⁷⁹ But the similar

contrary.”) (alteration in original) (citations and internal quotation marks omitted); *Mamo v. Skvirsky*, 960 A.2d 595, 599 (D.C. 2008) (same); RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. e (AM. L. INST. 1981) (“[A] question of interpretation is not left to the trier of fact where the evidence is so clear that no reasonable person would determine the issue in any way but one. But if the issue depends on evidence outside the writing, and the possible inferences are conflicting, the choice is for the trier of fact.”); *see also* *Swift & Co. v. Elias Farms, Inc.*, 539 F.3d 849, 851 (8th Cir. 2008) (applying Minnesota law) (“If the contract is [patently] ambiguous, however, the meaning of the contract becomes a question of fact, and summary judgment is inappropriate *unless the evidence of the parties’ intent is conclusive.*”) (emphasis added).

As mentioned previously, *see supra* note 50, the authorities are actually split regarding the standard for determining whether an ambiguity should be resolved as a question of law or fact. Any distinction between the various approaches is not relevant in this part. But it will be important in Part VIII.C.

¹⁷⁵ *See* the authorities cited in footnotes 173–174 *supra*.

¹⁷⁶ *See* BURTON, *supra* note 1, § 5.1.1, at 154 (“In any event, the normal procedural rules can turn questions of fact into questions of law, as when it is appropriate to dismiss a case on the pleadings, to grant summary judgment on the issue, or to grant a directed verdict or a judgment NOV.”).

¹⁷⁷ *See* RESTATEMENT (SECOND) OF CONTRACTS § 212(2); BURTON, *supra* note 1, § 5.1, at 152; *see also* the authorities cited in notes 173–174 *supra*.

¹⁷⁸ *Cf.* Steven O. Weise, “Plain English” Will Set the UCC Free, 28 LOY. L.A. L. REV. 371, 387 (1994) (“Parties to disputes often seek to introduce extrinsic evidence to explain or supplement the written terms of the agreement.”).

¹⁷⁹ For example, the ambiguity determination may be conducted at the summary

structures help to illustrate why textualism ultimately involves three stages rather than two.¹⁸⁰

Despite textualism's three-stage framework, there are good reasons to conceptualize this interpretive approach as involving only two stages. First, the same label applies to the second and third stages—"resolving ambiguity." Second, courts and commentators almost universally describe textualism as possessing two stages. Portraying this approach otherwise thus has the potential to create confusion. Accordingly, textualism is best understood as a two-stage process where the second stage contains two substantive phases. Stage one is the ambiguity determination and stage two is the resolution of ambiguity. Stage two is then divided in the following way: At stage 2A, the judge analyzes whether the ambiguity ought to be resolved as a question of law or fact. Typically, this means the judge must assess whether both parties' interpretations are reasonable given the contract language and extrinsic evidence.¹⁸¹ If the answer is "yes," then at stage 2B the jury decides which reasonable interpretation wins.¹⁸²

In sum, there are three substantive *steps* to textualist interpretation that are organized conceptually into two *stages* by the caselaw and secondary literature. Stage 1/step 1 is the ambiguity determination. Stage 2A/step 2 asks whether the ambiguity can be resolved as a question of law. And stage

judgment phase. *See supra* note 169 and accompanying text. And the resolution of ambiguity can take place through dispositive motions at trial. *See supra* note 176 and accompanying text.

¹⁸⁰ *Cf. Zale Constr. Co. v. Hoffman*, 494 N.E.2d 830, 834 (Ill. App. Ct. 1986) ("Various commentators have stated, however, that even where such a question of fact exists, where the meaning is so clear that reasonable men could reach only one conclusion, the court should decide the [interpretive] issue as it does when the resolution of any question of fact is equally clear. Such a statement simply grafts principles of summary judgment law onto the underlying contract law. . . .") (citations and internal quotation marks omitted); BURTON, *supra* note 1, § 4.2.3, at 119–20 ("Note that there is an important convergence between the substantive law of contracts and the law of civil procedure. If the court finds a contract to be unambiguous in the contested respect, there can be no material dispute of fact as to its meaning. A judge should decide the question of meaning on a motion for summary judgment. Similarly, if a contract is unambiguous, no reasonable jury could come to any conclusion but one.")

¹⁸¹ Recall that the parties normally offer extrinsic evidence to support their interpretations of ambiguous contracts. *See supra* note 178 and accompanying text.

¹⁸² Note that some cases divide stage one into two pieces. *See, e.g., Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352–53 (Miss. 1990) (identifying the following three stages in the interpretive process: (1) whether the contract is ambiguous based on a four-corners analysis; (2) whether a contract remains ambiguous given the four-corners of the contract *and* the canons of construction; and (3) resolving any ambiguity that remains using extrinsic evidence).

2B/step 3 is the resolution of the ambiguity as a question of fact.¹⁸³

To bring some concreteness to this analysis, and to outline how a typical interpretation case might operate under textualism, consider the following hypothetical. A contract provides that the seller will complete performance by “early December.”¹⁸⁴ The seller finishes on December 14. The buyer contends that this is too late and sues for breach of contract.

In litigation, parties to an agreement frequently both contend that the contract is unambiguous.¹⁸⁵ Accordingly, at the pleading stage, the hypothetical buyer argues that “early December” unambiguously means delivery by December 5 and the seller argues that “early December” unambiguously means delivery by December 15. Given the contractual language, the court can reach one of four rulings at stage 1: (1) the contract unambiguously means what the plaintiff/buyer claims (December 5); (2) the contract unambiguously means what the defendant/seller claims (December 15); (3) the contract unambiguously means something in between what the two parties claim (for example, December 10); or (4) the contract is ambiguous and the matter must proceed to stage 2A. Assume that the judge correctly rules that the phrase “early December” is reasonably susceptible to the meanings proffered by both parties and orders that the lawsuit continue to the next stage.

Before proceeding, let me note that not all interpretation cases will allow for option (3). An ambiguous contract might be susceptible to only two meanings and no more. For example, in *Paul W. Abbott, Inc. v. Axel Newman Heating & Plumbing Company*,¹⁸⁶ there was a dispute over whether one piece of language in an agreement modified another piece. That is a “yes or no” question. Thus, there was no middle-ground option.¹⁸⁷

¹⁸³ Because I use “stage 2A” and “stage 2B” throughout the rest of this Article, I also use “stage 1” rather than “stage one” for purposes of consistency.

¹⁸⁴ This hypothetical is based upon *Donald W. Lyle, Inc. v. Heidner & Co.*, 278 P.2d 650 (Wash. 1954).

¹⁸⁵ *Sunline Com. Carriers, Inc. v. CITGO Petrol. Corp.*, 206 A.3d 836, 847 n.68 (Del. 2019) (“Indeed, in many contract disputes, both parties argue for different interpretations, but claim that the contract is unambiguous.”).

¹⁸⁶ 166 N.W.2d 323, 324–25 (Minn. 1969).

¹⁸⁷ For another case where only two constructions were possible, see *Lion Oil Trading & Transp., Inc. v. Statoil Marketing and Trading Inc.*, 728 F. Supp. 2d 531 (S.D.N.Y. 2010). There, a contract for the sale of oil provided that the price was to be determined by market information “for the calendar month of delivery.” *Id.* at 532. A dispute arose as to whether the language referred to the month intended at the time an order was made or to the month the oil was actually delivered. *Id.* at 531–32. At summary judgment, the court

“Early December” raises a question of degree, and thus is susceptible to a meaning *between* those argued for by the parties in my hypothetical.¹⁸⁸

At stage 2A, after discovery, the parties file cross motions for summary judgment with each motion supported by relevant extrinsic evidence, as is common in disputes over contractual meaning. The seller argues that the ambiguity must be resolved in its favor because of a trade usage that “early December” means by December 15. The buyer counters that the ambiguity must be resolved in its favor because preliminary negotiation documents indicate that the seller would complete performance by December 5. The judge once again can reach one of four conclusions: (1) only the plaintiff/buyer’s interpretation is plausible given the contract language and the relevant extrinsic evidence (December 5); (2) only the defendant/seller’s interpretation is plausible given the same materials (December 15); (3) the only plausible reading of the contract is something between what the two parties claim (again, for example, December 10); or (4) the ambiguity must be resolved as a question of fact at trial and thus the case must proceed to stage 2B. Assume that the judge correctly rules that a rational jury could decide the meaning of “early December” for either party and sets a trial date.

Stage 2B is a jury trial to resolve the ambiguity in the phrase “early December.” At this final stage, the jury can reach one of three outcomes: (1) the plaintiff/buyer’s interpretation governs (December 5); (2) the defendant/seller’s interpretation governs (December 15); or (3) an intermediate interpretation governs (for example, December 10). Here, there is no fourth option because stage 2B is the last step in the process.

found that the agreement was facially ambiguous as between these two readings after analyzing several aspects of the text. *Id.* at 536.

For another case involving a potential middle-ground interpretation, see *Gastar Expl. Inc. v. Rine*, 806 S.E.2d 448 (W. Va. 2017). In that lawsuit, the grantee of a piece of land argued that the deed transferred all of the grantors’ oil and gas rights and the grantors argued that the deed transferred none of the grantors’ oil and gas rights. *Id.* at 457. The West Virginia Supreme Court concluded that both of those interpretations were plausible, but also found that the deed may have transferred half of the grantor’s oil and gas rights. *Id.* Given the existence of three plausible understandings, the court ruled that the contract was ambiguous. *Id.*

¹⁸⁸ Agreements can also be reasonably susceptible to more than two meanings in circumstances that go beyond simple questions of degree. *See, e.g., Mae v. Creagan*, 129 F. Supp. 3d 994, 998–1000 (D. Nev. 2013) (identifying nine potential meanings of two sentences in a contract).

B. Contextualism

The structure of contextualism is more complicated. In part, that is because there are two basic types of contextualist interpretation. Recall that the difference between textualism and contextualism is that the latter approach permits the judge to consider extrinsic evidence in deciding whether a contract is ambiguous, while the former restricts the ambiguity analysis to the four corners of the agreement.¹⁸⁹ Critically, contextualist authorities are divided over the scope of material that the judge may consider in making the ambiguity determination.

Some courts endorse what I call “full contextualism.” Under that approach, the judge considers all relevant extrinsic evidence in determining whether an agreement is ambiguous.¹⁹⁰ This means that courts following full contextualism analyze the same materials at both stages of the interpretive process since judges also assess all relevant extrinsic evidence when resolving an ambiguity.¹⁹¹ By contrast, the stage 1 and stage 2 materials differ under textualism because that approach restricts the ambiguity determination to the contract itself, but allows extrinsic evidence to resolve ambiguities.

Other courts embrace what I call “partial contextualism.” As the name suggests, partial contextualism falls between textualism and full contextualism. According to this approach, the judge reviews only a subset of the relevant extrinsic evidence in addressing whether the contract is ambiguous. For example, some authorities limit the ambiguity determination to the contract language and “objective” extrinsic evidence—i.e., evidence of objectively verifiable aspects of the contract’s context and/or that is provided by disinterested third parties. This typically includes the surrounding commercial circumstances, trade usage, and course of performance. “Subjective” evidence—such as testimony by the parties regarding the preliminary negotiations—is excluded at stage 1.¹⁹² Likewise,

¹⁸⁹ See *supra* notes 51–62 and accompanying text.

¹⁹⁰ See, e.g., *Adams v. MHC Colony Park Ltd. P’ship*, 169 Cal. Rptr. 3d 146, 161 (Cal. Ct. App. 2014); *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995); see also BURTON, *supra* note 1, § 4.2.2, at 112–14, 117 (explaining this approach and describing it as the “subjective theory”).

¹⁹¹ See *supra* note 56 and accompanying text (explaining that all relevant extrinsic evidence is considered at stage 2 under both textualism and contextualism).

¹⁹² See, e.g., *Stryker Corp. v. Nat’l Union Fire Ins. Co.*, 842 F.3d 422, 428 (6th Cir. 2016) (“But in the ordinary course, a latent ambiguity must be revealed by objective means—for instance, an admission, uncontested evidence, or the testimony of a disinterested third party.”); *AM Int’l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 575

when interpreting contracts governed by the U.C.C., many courts restrict the ambiguity determination to the text of the agreement and the “incorporation tools”—course of performance, course of dealing, and usage of trade.¹⁹³ Under partial contextualism, the materials analyzed by the court are different at stages 1 and 2, as with textualism, since only *some* extrinsic evidence is considered at the first stage while *all* extrinsic evidence is considered at the second.¹⁹⁴

1. Full Contextualism

Recall that textualism possesses three steps that are structured into two stages.¹⁹⁵ *Full* contextualism also has two stages, but it only contains two steps. The first stage/step is the ambiguity determination. Here, the judge analyzes the language of the contract and all relevant extrinsic evidence in deciding

(7th Cir. 1995) (“By ‘objective’ evidence we mean evidence of ambiguity that can be supplied by disinterested third parties By ‘subjective’ evidence we mean the testimony of the parties themselves as to what they believe the contract means ‘Objective’ evidence is admissible to demonstrate that apparently clear contract language means something different from what it seems to mean; ‘subjective’ evidence is inadmissible for this purpose.”); *see also* BURTON, *supra* note 1, § 4.2.2, at 112, 114–15, 117 (explaining this approach and describing it as the “objective” theory); *id.* § 2.2 (identifying the “Objectivist” elements of contract interpretation to include, *inter alia*, “Objective Circumstances,” “Trade Usages and Customs,” and “Practical Construction (Course of Performance)”); *id.* § 2.3 (identifying the “Subjectivist” elements of contract interpretation to include, *inter alia*, “Prior Course of Dealing,” “The Course of Negotiations,” “A Party’s Testimony as to Its Intention,” and “Subjective Circumstances”).

¹⁹³ *See, e.g.*, Paragon Res., Inc. v. Nat’l Fuel Gas Distrib. Corp., 695 F.2d 991, 995–96 (5th Cir. 1983) (applying New York law); *see also* Silverstein, *supra* note 106, at 1065 & n.318, 1074–75 & nn.364–65 (describing course of performance, course of dealing, and usage of trade as the “incorporation tools,” explaining partial contextualism under the U.C.C., and collecting authorities).

For additional types of partial contextualism, *see, for example*, *Manley v. City of Coburg*, 387 P.3d 419, 423, 425 (Or. Ct. App. 2016) (limiting stage 1 to extrinsic evidence that concerns “the circumstances under which the agreement was made” and thus concluding that “evidence of the parties’ conduct during the life of an agreement [i.e., course of performance evidence] is available to *resolve* a contract ambiguity, not to *create* one”) (emphasis in original); John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 347 (1967) (describing Williston’s version of contextualism as permitting any type of extrinsic evidence to establish an ambiguity except for testimony regarding what the parties said orally to each other during the preliminary negotiations).

¹⁹⁴ *Bohler-Uddeholm Am. Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 93–94 (3d Cir. 2001) (applying Pennsylvania law) (explaining that “the court may consider . . . objective evidence” in making the ambiguity determination, but that the factfinder examines the objective evidence “along with all the other evidence” in resolving any ambiguity) (internal quotation marks and citation omitted); Paragon Res., Inc., 695 F.2d at 996 (“If the contract provision appears ambiguous after evidence of course of dealing, usage of trade, and course of performance has been admitted, other extrinsic evidence may then be admitted as well.”).

¹⁹⁵ *See supra* text accompanying note 183.

whether the contract is reasonably susceptible to the meanings advanced by both parties.¹⁹⁶

If the answer is no—if only one party’s interpretation is reasonable¹⁹⁷—then the judge adopts the reasonable meaning and rejects the alternative construction advanced by the other party. If the answer is yes, then the case proceeds to the second stage/step where the court resolves the ambiguity via a jury trial that is based on the same materials considered at stage 1.¹⁹⁸

Under full contextualism, the parties are entitled to submit extrinsic evidence at stage 1.¹⁹⁹ Accordingly, the ambiguity determination normally must occur after discovery.²⁰⁰ The issue of whether an ambiguity exists can be addressed at summary judgment or at trial through a motion for a directed verdict or for judgment notwithstanding the verdict. If the contract is found to be ambiguous, then the jury resolves the ambiguity at trial.²⁰¹

Given this structure, full contextualism can be conceptualized as either (1) combining stages 1 and 2A of textualism into a single step, or (2) eliminating stage 1 entirely and jumping directly to stage 2A. Stage 2A of textualism concerns whether the case should be decided by the judge or the

¹⁹⁶ See, e.g., *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992).

¹⁹⁷ As noted previously, in some cases, the judge can adopt an interpretation that is between those argued for by the parties. See *supra* notes 186–188. But I am leaving that additional complexity behind from this point forward.

¹⁹⁸ See, e.g., *Focus Point Props., LLC v. Johnson*, 330 P.3d 360, 367 (Ariz. Ct. App. 2014).

¹⁹⁹ *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968) (“Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.”); *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493, 496 (9th Cir. 1988) (explaining that California law “requires that courts consider extrinsic evidence to determine whether the contract is ambiguous”); *Wolf v. Superior Ct.*, 8 Cal. Rptr. 3d 649, 655–56 (Cal. Ct. App. 2004) (“Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court’s own conclusion that the language of the contract appears to be clear and unambiguous on its face.”).

²⁰⁰ See *Woods v. Google, Inc.*, 889 F. Supp. 2d 1182, 1191 (N.D. Cal. 2012) (applying California law) (“A ‘court may not dismiss on the pleadings when one party claims that extrinsic evidence renders the contract ambiguous.’”) (quoting *A. Kemp Fisheries, Inc.*, 852 F.2d at 496 n.2).

²⁰¹ See *BNC Mortg., Inc. v. Tax Pros, Inc.*, 46 P.3d 812, 819–20 (Wash. Ct. App. 2002) (“A court can consider a written contract and its context either before trial or at trial. Before trial, a court examines affidavits or other materials offered in support of a motion for summary judgment. At trial, a court listens to witnesses and considers exhibits. If the contract’s written words have but one reasonable meaning when read in context, a court may grant summary judgment before trial, or direct a verdict at trial. If the contract’s written words have two or more reasonable meanings (i.e., are ‘ambiguous’) when read in context, a court may not grant summary judgment or direct a verdict; instead, it must put the case to a trier of fact.”) (footnotes omitted), *overruled on other grounds by Columbia Cmty. Bank v. Newman Park, LLC*, 304 P.3d 472, 479 (Wash. 2013).

jury, given the language of the contract and all extrinsic evidence, and is typically addressed at summary judgment or via a trial motion.²⁰² That is also how “stage 1”—the ambiguity determination—operates under full contextualism.²⁰³ In other words, whether a contract is ambiguous and whether the case raises an issue of law or fact are generally the same question for full contextualism. The Third Circuit explains:

This preliminary inquiry [regarding ambiguity] to be made by the court in the process of contract interpretation is the same as the role of the court in ruling on a summary judgment motion on a question of contract interpretation under Michigan law. The availability of summary judgment turns on whether a proper jury question is presented. *The decision whether an ambiguity may exist is the same as the decision whether a jury question is presented as to the meaning of the contract.* When ruling on a summary judgment motion, the court is being asked to rule on whether, as a matter of law, the contract is susceptible of only one interpretation.²⁰⁴

At both stage 2A of textualism and stage 1 of full contextualism, the judge analyzes whether the parties’ interpretations are reasonable in light of the contract terms and all extrinsic

²⁰² See *supra* notes 173–176, 181, and accompanying text.

²⁰³ See *supra* notes 196–201 and accompanying text.

²⁰⁴ *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 363 (3d. Cir. 1987) (emphasis added and citations omitted); *accord* *Boston Five Cents Sav. Bank v. Sec’y of Dep’t of Hous. & Urb. Dev.*, 768 F.2d 5, 8 (1st Cir. 1985) (Breyer, J.) (“Courts, noting that the judge, not the jury, decides such a threshold matter, have sometimes referred to this initial question of language ambiguity as a question of ‘law,’ which we see as another way of saying that there is no ‘genuine’ factual issue left for a jury to decide.”); *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 849 (N.M. 2012) (“The standard to be applied in determining whether a contract term is ambiguous . . . is the same standard applied in a motion for summary judgment.”) (internal quotation marks and original alterations omitted); see also BURTON, *supra* note 1, § 6.1.2.1, at 204–05 (“To elaborate, having identified a contract’s terms, a court must decide upon motion—to dismiss, for summary judgment; to exclude evidence; or for a directed verdict—whether a term or the contract is ambiguous in the contested respect. If there is no such ambiguity, there is nothing for a fact-finder to decide. If there is only one reasonable meaning as between the meanings advanced by the parties, there can be no genuine issue on the interpretive point. And no reasonable fact-finder could come to any conclusion but one.”).

Note that if the parties do not submit any relevant extrinsic evidence, then interpretation of the agreement is a question of law under contextualism, *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 244 n.5 (N.M. 1991); *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992), just as it is under textualism, see *supra* notes 49–50 and accompanying text. And despite contextualism’s permissiveness regarding extrinsic evidence, sometimes parties choose not to submit such evidence in cases governed by that interpretive approach. See, e.g., *Colaco v. Cavotec SA*, 236 Cal. Rptr. 3d. 542, 567 (Cal. Ct. App. 2018); see also *infra* notes 241–244 and accompanying text.

Note also that the standard for deciding whether interpretation raises a question of law or fact is more complicated in California, a leading contextualist state. See *infra* note 493.

evidence.²⁰⁵ Textualist authorities label this step as “resolving the ambiguity” and courts endorsing full contextualism label this step as “the ambiguity determination.”²⁰⁶ But in *substance*, judges are engaged in the same basic inquiry under both approaches, and at the same point in the litigation.

To provide a bit more elaboration, consider the use of summary judgment in contract interpretation cases. Textualist courts generally describe summary judgment as being part of stage 2—resolving the ambiguity—while contextualist courts describe summary judgment as being part of stage 1—the ambiguity determination.²⁰⁷ But summary judgment is summary judgment regardless of how it is labelled for purposes of contract interpretation doctrine (at least in most circumstances).²⁰⁸ And courts are considering the text and all relevant extrinsic evidence in deciding the agreement’s meaning at the summary judgment stage under both textualism and full contextualism.

The parallel between stage 2A of textualism and stage 1 of full contextualism explains why the latter approach can be understood as eliminating stage 1 and beginning the analysis with stage 2A. Alternatively, since cases applying full contextualism refer to the first stage as “the ambiguity determination,” contextualism can also be understood as consolidating stages 1 and 2A into a single step. Either conceptualization fits the operation of full contextualism.

2. Partial Contextualism

The structure of partial contextualism is less clear because there appears to be very little authority discussing the stages of this approach, except under the U.C.C. Since the Code raises additional complexities, I will start with the operation of partial

²⁰⁵ See *supra* text accompanying notes 181 and 196.

²⁰⁶ *Id.*

²⁰⁷ Compare *3Com Corp. v. Banco do Brasil*, 171 F.3d 739, 746–47 (2d Cir. 1999) (applying New York law, which follows textualism) (explaining that upon a motion of summary judgment a “court may *resolve ambiguity* in contractual language as a matter of law if the evidence presented about the parties’ intended meaning [is] so one-sided that no reasonable person could decide the contrary”) (alteration in original, emphasis added, and internal quotation marks omitted), with *Morgan Creek Prods., Inc. v. Franchise Pictures LLC* (*In re Franchise Pictures LLC*), 389 B.R. 131, 144–45 (Bankr. C.D. Cal. 2008) (applying California law, which follows contextualism) (explaining that when a court grants summary judgment in a contract interpretation dispute, it has concluded that the contract is “unambiguous”).

²⁰⁸ There are a few situations where the relationship of summary judgment law to contract law is more complicated. See *infra* Part VIII.C.

contextualism under the common law and then turn to the U.C.C.

In cases governed by the common law, partial contextualism *should* have the following structure given the legal principles discussed in this Article so far. Stage 1 is the ambiguity determination. At that stage, the judge analyzes the language of the contract and the permissible subset of extrinsic evidence—for example, objective evidence—in deciding whether the agreement is reasonably susceptible to the meanings argued for by both parties.²⁰⁹ If the answer is no, then the judge adopts the single reasonable meaning. If the answer is yes, then the case proceeds to stage 2A.

At stage 2A, the judge addresses whether the ambiguity can be resolved as a matter of law. Under partial contextualism, this stage operates as it does under textualism and full contextualism: The judge considers the contract text and *all* relevant extrinsic evidence.²¹⁰ If the evidence overwhelmingly favors the reading advanced by one party, then the court resolves the ambiguity in favor of that party. If not, then the case proceeds to stage 2B—a jury trial at which the contract language and all relevant extrinsic evidence are admissible.

Four points of elaboration or qualification are in order. First, under this schema, partial contextualism has elements in common with both textualism and full contextualism. Partial contextualism distinguishes between stages 1 and 2A. Thus, this approach returns interpretation to a three-step framework, like textualism²¹¹ and unlike full contextualism.²¹² But the ambiguity determination under partial contextualism generally cannot take place until after discovery because that assessment requires the judge to consider extrinsic evidence,²¹³ as is the case with full contextualism.²¹⁴ In a textualist state, by contrast, the judge may

²⁰⁹ See *supra* notes 192–193 and accompanying text.

²¹⁰ See *supra* note 194 and accompanying text.

²¹¹ See *supra* notes 167–177, 183, and accompanying text.

²¹² See *supra* notes 195–198 and accompanying text.

²¹³ See *Cole Taylor Bank v. Truck Ins. Exch.*, 51 F.3d 736, 738 (7th Cir. 1995) (“What is true is that the doctrine of extrinsic ambiguity, even when confined to situations in which the ambiguity is demonstrated by objective evidence, makes it difficult to decide contract cases on the pleadings; for it is always open to one of the parties to try to present objective evidence that will show that an ostensibly clear contract is unclear when the usages of the trade or other contextual factors are taken into account.”).

²¹⁴ See *supra* notes 199–200 and accompanying text.

address the ambiguity question at the pleading stage²¹⁵ because the inquiry is restricted to the four-corners of the agreement.²¹⁶

Second, while partial contextualism has three distinct steps, the first two steps—stages 1 and 2A—generally should be addressed at the same juncture in the litigation. To explain, in my experience, stage 2A usually occurs at summary judgment regardless of the interpretive approach. If the contract language and extrinsic evidence do not justify summary judgment, then they will seldom require a directed verdict or judgment notwithstanding the verdict. That is because the standard is the same for all three motions²¹⁷ and the balance of the evidence is not likely to change between the close of discovery and trial in the typical interpretation dispute. Next, recall that the ambiguity determination (stage 1) cannot take place until summary judgment under partial contextualism because of the parties' right to submit extrinsic evidence obtained in discovery.²¹⁸ This means that a court employing partial contextualism should address both stage 1 and stage 2A during summary judgment. Accordingly, while partial textualism has three steps for purposes of contract law, it has only two steps for purposes of civil procedure.

Third, I have not come across a single case applying partial contextualism that resolved an ambiguity as a matter of law at stage 2A based on all of the textual and extrinsic evidence after finding an ambiguity at stage 1 based on a subset of the evidence. Let me offer a theory to explain the paucity of such authority. For a case to advance past stage 1, the judge must conclude that the text of the contract and the permissible extrinsic evidence plausibly supports two different constructions of the agreement. Once that occurs, what is the likelihood that expanding the inquiry to all types of extrinsic evidence will so heavily tip the balance in favor of one reading that no reasonable jury could adopt the alternative reading? I submit that the chances of this happening are very low. One can certainly imagine a hypothetical scenario where partial contextualism would require a judge to take the case from the jury once all extrinsic evidence becomes relevant.²¹⁹ But I believe that such cases are quite rare

²¹⁵ See *supra* notes 169, 178 and accompanying text.

²¹⁶ See *supra* note 167 and accompanying text.

²¹⁷ 9B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 2532 (3d ed. 2017) (Westlaw database updated April 2020).

²¹⁸ See the material in the immediately preceding paragraph.

²¹⁹ Suppose parties X and Y enter into a facially unambiguous contract in a

in the real world. Therefore, while *conceptually* partial contextualism contains three steps, *in practice* it effectively contains only two. Stage 2A (resolution of the ambiguity at summary judgment) is largely a formality and thus partial contextualism is primarily concerned with stage 1 (the ambiguity determination at summary judgment) and stage 2B (resolution of the ambiguity at trial). This means that the ambiguity determination and deciding whether a jury question exists are substantially the same inquiry under partial contextualism, just as they are under full contextualism.²²⁰

Fourth, the few authorities I have found that address the stages of common law partial contextualism seem to go further; they seem to stand for the proposition that partial contextualism has only two stages as a matter of law—again, stages 1 and 2B. For example, in *Bohler-Uddeholm America, Inc., v. Ellwood Group, Inc.*, the court wrote the following:

Once the court determines that a party has offered [objective] extrinsic evidence capable of establishing latent ambiguity, a decision as to which of the competing interpretations of the contract is the correct one is reserved for the factfinder, who would examine the content of the extrinsic evidence (along with all the other evidence) in order to make this determination.²²¹

This language appears to provide that if a contract is found to be ambiguous based on the text and the relevant subset of extrinsic evidence (stage 1), then the ambiguity is resolved by the jury as a question of fact (stage 2B)—interpretation is “reserved for the factfinder”—regardless of the nature of the additional extrinsic evidence that becomes relevant at stage 2. As a result, the judge need not address whether both constructions of the agreement are reasonable based on the express terms and *all* of the extrinsic

jurisdiction where only objective extrinsic evidence is permissible at stage 1 of the interpretive process. During the ambiguity determination, X argues for the ordinary meaning of the agreement and Y argues for a special meaning based on trade usage evidence. The judge rules that the contract is ambiguous and the case proceeds to stage 2A. There, the only additional extrinsic evidence is preliminary negotiation documents in which X and Y agreed that the trade usage relied upon by Y at stage 1 would not apply to the contract at issue. On these facts, a judge could plausibly find that no reasonable jury would endorse Y's construction, and thus X's interpretation governs as a matter of law. My thanks to my colleague Professor Nick Kahn-Fogel for assistance in developing this example.

²²⁰ See *supra* notes 202–205 and accompanying text.

²²¹ 247 F.3d 79, 94 (3d Cir. 2001) (applying Pennsylvania law); *accord* AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc., 44 F.3d 572, 575 (7th Cir. 1995) (applying Illinois law) (“Objective evidence claimed to show that an apparently clear contract is in fact ambiguous must be presented first to the judge, and only if he concludes that it establishes a genuine ambiguity is the question of interpretation handed to the jury.”).

evidence, the analysis conducted at stage 2A under textualism and full contextualism. And thus once again, deciding whether a jury question exists is indistinguishable from deciding whether a contract is ambiguous under partial contextualism.²²²

However, there are two other ways to read decisions like *Bohler-Uddeholm*. First, these authorities could merely reflect the point I made two paragraphs above, that even if partial contextualism technically includes stage 2A, that stage will virtually never be implicated in real cases. Second, under the law of civil procedure, questions of fact become questions of law when a reasonable factfinder could rule for only one of the parties.²²³ Accordingly, the phrase “is reserved for the factfinder” in the quotation from *Bohler-Uddeholm* may not actually rule out stage 2A. Instead, the court might have been referring generally to stage 2 of the interpretive process—which is typically described as involving a question of fact²²⁴ even though a case can be resolved at stage 2A as a question of law²²⁵—rather than referring to stage 2B specifically.

Pulling the third and fourth points of elaboration together, partial contextualism under the common law either involves only two stages as a matter of law (point four) or substantially involves only two stages as a matter of fact (point three).

Next consider the stages of interpretation under the U.C.C. The language of the Code can be read to support either full contextualism or partial contextualism.²²⁶ However, the U.C.C.’s version of partial contextualism is critically different from the common law’s version. According to the Code’s approach, at stage 1, parties are entitled to present the text of the contract and evidence relating to the incorporation tools—course of performance, course of dealing, and usage of trade. But other types of extrinsic evidence are not regulated by the U.C.C. at all. Instead, they are governed by supplemental principles of law from the general law of contracts (typically common law).²²⁷

²²² See *supra* text accompanying note 220.

²²³ BURTON, *supra* note 1, § 5.1.1, at 154 (“In any event, the normal procedural rules can turn questions of fact into questions of law, as when it is appropriate . . . to grant summary judgment on the issue, or to grant a directed verdict or a judgment NOV.”).

²²⁴ See *supra* note 49 and accompanying text.

²²⁵ See *supra* note 50 and accompanying text; see also *supra* notes 171–176, 202–206, and accompanying text.

²²⁶ Silverstein, *supra* note 106, at 1065–73. Note, however, that some cases interpret the Code as endorsing a form of textualism. *Id.* at 1078–80 (collecting authorities).

²²⁷ *Id.* at 1065–70, 1072–73 (explaining the statutory basis for partial contextualism); see also U.C.C. § 1-103(b) (“Unless displaced by the particular provisions of [the Uniform

Thus, the role of non-incorporation-tools evidence varies from state to state.²²⁸

To illustrate, if the Code endorses this type of partial contextualism, then a court located in a jurisdiction with *textualist* common law may only consider the express terms and the incorporation tools in deciding whether an agreement is ambiguous. That is because (i) the Code allows the parties to submit the text of the contract and the incorporation tools, and (ii) supplemental principles of law bar the judge from receiving any other categories of extrinsic evidence. The additional classes of evidence are excluded unless and until the case reaches stage 2 (resolving the ambiguity), as generally required by textualism. If the court is located in a state with *full contextualist* common law, by contrast, then the Code's partial contextualism obligates the judge to examine *all* extrinsic evidence in making the ambiguity determination. That is because (i) the U.C.C. requires consideration of the text and the incorporation tools, and (ii) the common law requires that the court examine the remaining types of evidence.²²⁹

If the Code endorses full contextualism, then the stages of interpretation under the U.C.C. are the same as for common law full contextualism. Full contextualism is full contextualism regardless of whether it is adopted by statute or judicial decision. Likewise, if the Code endorses partial contextualism, but the applying court is in a jurisdiction with full contextualist common law, then again the stages of interpretation under the U.C.C. are the same as under common law full contextualism: stage 1/stage 2A is an ambiguity determination based on the contractual text and all extrinsic evidence; and any identified ambiguity is resolved at stage 2B based on the same materials.

If the Code embraces partial contextualism and the adjudicating court is located in a state with textualist common law, then the process is more complex. As per usual, stage 1 is the ambiguity determination. But here, ambiguity can be established in two different ways. First, if the express terms of the contract are patently ambiguous. Second, if incorporation tools evidence

Commercial Code], the principles of law and equity . . . supplement its provisions.") (alteration in original).

²²⁸ Silverstein, *supra* note 106, at 1065.

²²⁹ *Id.* There are other possible permutations. For example, the court could be located in a state with partial contextualist common law. However, the two permutations of partial contextualism under the Code discussed in the body should be sufficient to explain the operation of the U.C.C.

establishes that the agreement contains a non-standard-meaning latent ambiguity.²³⁰ It is critical to note that these are two independent pathways to stage 2. In particular, if the contract is ambiguous on its face, the court need not review evidence of course of performance, course of dealing, or usage of trade before moving to the next stage of the interpretive process.²³¹ This makes sense because, under textualism, a patent ambiguity is sufficient to allow for the consideration of *all* relevant extrinsic evidence.²³²

If a contract is ambiguous on its face, stage 1 may take place in full at the pleading stage. If the contractual text is clear and one party wishes to establish a non-standard-meaning latent ambiguity using extrinsic evidence of the incorporation tools, then the assessment of ambiguity must continue at summary judgment.

If the court determines that the contract is unambiguous, then it adopts the unambiguous meaning. If the court concludes that the agreement is *patently* ambiguous, then the case proceeds to stage 2A. And if the court decides that the agreement suffers from a *non-standard-meaning latent* ambiguity, then the case effectively moves directly to stage 2B (a jury trial), for the reasons discussed above concerning partial contextualism under the common law: It is exceedingly unlikely that adding extrinsic evidence beyond the incorporation tools to the analysis will result in the textual and extrinsic evidence overwhelmingly supporting one reading *after* the judge has found at stage 1 that the contract is ambiguous based on just the text and the incorporation tools.²³³

²³⁰ Of course, extrinsic evidence could also establish the existence of a subject-matter latent ambiguity. But as I noted above, I am generally setting aside that type of latent ambiguity in the rest of this Article. See *supra* note 168.

²³¹ *Paragon Res., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 695 F.2d 991, 995–96 (5th Cir. 1983) (applying New York law) (“[T]he Code poses *three* inquiries: 1. Were the express contract terms ambiguous? 2. If not, are they ambiguous after considering evidence of course of dealing, usage of trade, and course of performance? 3. If the express contract terms by themselves are ambiguous, or if the terms are ambiguous when course of dealing, usage of trade, and course of performance are considered (that is, if the answer to either of the first two questions is yes), what is the meaning of the contract in light of *all* extrinsic evidence?”) (emphasis in original); *accord* *J. Lee Milligan, Inc. v. CIC Frontier, Inc.*, 289 Fed. Appx. 786, 789 & n.4 (5th Cir. 2008) (applying Oklahoma law and following *Paragon*); *Walk-In Med. Ctrs., Inc. v. Breuer Cap. Corp.*, 818 F.2d 260, 264 (2d Cir. 1987) (applying New York law and following *Paragon*); *Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040, 1046, 1048 (5th Cir. 1971) (applying New York law); *Dawn Enters. v. Luna*, 399 N.W.2d 303, 306 n.3 (N.D. 1987).

²³² See *supra* notes 48, 167–171, and accompanying text.

²³³ See *supra* note 219 and accompanying text.

If the case moves to stage 2A, then the judge addresses whether the ambiguity can be resolved as a matter of law in light of the text of the contract and all extrinsic evidence, not just evidence regarding course of performance, course of dealing, and trade usage. If the evidence overwhelmingly favors the reading advanced by one party, then the court resolves the ambiguity in favor of that party. If not, then the case proceeds to stage 2B—a jury trial at which the contract language and all relevant extrinsic evidence are admissible.²³⁴

As a matter of statutory interpretation, the consensus among commentators is that the U.C.C. adopts full contextualism.²³⁵ But the secondary literature also recognizes that courts favor partial contextualism.²³⁶ And I have come to the same conclusion based on my own research: Partial contextualism is the dominant approach to the Code in the decisional law.²³⁷ Accordingly, the structure of contract interpretation under the U.C.C. varies depending on whether the adjudicating court is located in a jurisdiction with textualist common law or contextualist common law.

C. Overview and Elaboration

Chart 1 summarizes the structure of textualism, full contextualism, and partial contextualism based on the analysis set forth above in this part.

²³⁴ My description of the operation of U.C.C. partial contextualism in states with textualist common law is derived from the legal principles set forth earlier in this Article and from the cases cited *supra* in note 231.

²³⁵ Silverstein, *supra* note 106, at 1074 & n.363 (collecting authorities).

²³⁶ *Id.* at 1074 & n.364 (collecting authorities).

²³⁷ *Id.* at 1074 & n.365 (collecting authorities).

Chart 1: The Structure of Contract Interpretation

Textualism	
Stage 1: The Ambiguity Determination.	Decided by the judge—based on the contract alone ²³⁸ —at the pleading stage. If the contract is unambiguous, apply the unambiguous meaning. If the contract is ambiguous, proceed to Stage 2A.
Stage 2A: Resolve the Ambiguity.	Decided by the judge—based on the contract and all relevant extrinsic evidence—at summary judgment. If the evidence overwhelmingly supports one party, rule for that party. If not, go to Stage 2B.
Stage 2B: Resolve the Ambiguity.	Decided by the jury—based on the four corners and all relevant extrinsic evidence—at trial.
Full Contextualism (which includes Partial Contextualism Under the U.C.C. in a Contextualist State)	
Stage 1 and/or 2A: The Ambiguity Determination and/or Resolve the Ambiguity.	Decided by the judge—based on the contract and all relevant extrinsic evidence—at summary judgment. If the contract is unambiguous/if the evidence overwhelmingly supports one party, rule for that party. If the contract is ambiguous/the evidence does not overwhelmingly support one party, proceed to Stage 2B.
Stage 2B: Resolve the Ambiguity.	Decided by the jury—based on the four corners and all relevant extrinsic evidence—at trial.

²³⁸ Note that as I explained previously, I am setting aside the issue of subject-matter latent ambiguities. *See supra* note 168.

Partial Contextualism Under the Common Law	
Stage 1: The Ambiguity Determination.	Decided by the judge—based on the four corners and <i>some</i> of the relevant extrinsic evidence—at summary judgment. If the contract is unambiguous, apply the unambiguous meaning. If the contract is ambiguous, proceed to Stage 2A; in practice, proceed to Stage 2B.
Stage 2A: Resolve the Ambiguity; again, in practice, this stage is largely a formality.	Decided by the judge—based on the contract and <i>all</i> relevant extrinsic evidence—at summary judgment. If the evidence overwhelmingly supports one party, rule for that party. If not, go to Stage 2B.
Stage 2B: Resolve the Ambiguity.	Decided by the jury—based on the four corners and all relevant extrinsic evidence—at trial.
Partial Contextualism Under the U.C.C. in a Textualist State	
Stage 1: The Ambiguity Determination.	Decided by the judge—based on the four corners and potentially the incorporation tools. —at the pleading stage if the contract is patently ambiguous. —at summary judgment if a party presents evidence supporting a non-standard-meaning latent ambiguity. If the contract is unambiguous, apply the unambiguous meaning. If the contract is patently ambiguous, proceed to Stage 2A. If the contract is latently ambiguous, proceed to Stage 2A; in practice, proceed to Stage 2B.
Stage 2A: Resolve the Ambiguity; relevant in practice only if there is a patent ambiguity.	Decided by the judge—based on the contract and <i>all</i> relevant extrinsic evidence—at summary judgment. If the evidence overwhelmingly supports one party, rule for that party. If not, go to Stage 2B.
Stage 2B: Resolve the Ambiguity.	Decided by the jury—based on the four corners and all relevant extrinsic evidence—at trial.

The framework set forth in this part and summarized in Chart 1 is intended to detail the operation of textualism, full contextualism, and partial contextualism in the typical case for purposes of both contract law and civil procedure. But not all lawsuits are typical and thus the framework somewhat

oversimplifies how the various interpretive approaches work in practice. Consider several examples.

First, the final step for each approach is a jury trial. However, the parties are legally entitled to waive their right to a jury. If they do so, then the judge resolves the ambiguity at stage 2B via a bench trial.²³⁹

Second, according to my structure, a judge applying textualist principles should address ambiguity at the pleading stage based on the contract alone. Suppose, however, that the parties concede that the agreement is ambiguous.²⁴⁰ In such a case, there is no need to conduct an ambiguity determination, based on the pleadings or otherwise.

Third, both full contextualism and common law partial contextualism eliminate the pleading stage under my framework. That is because each approach allows the parties to present extrinsic evidence at the earliest point in the interpretation analysis. And the gathering of such evidence generally requires discovery, which takes place after pleading and any related motions are finished. But there are some circumstances in which interpretation cases can be addressed on the pleadings under full and partial contextualism. To illustrate, suppose the parties waive their right to submit extrinsic evidence. In that situation, the judge can adjudicate the interpretive dispute without discovery.²⁴¹ Alternatively, a party might admit extrinsic facts in its pleading and briefs that conclusively undermine the party's asserted interpretation of the agreement.²⁴² Similarly, a party can defeat its own construction of the contract via extrinsic evidence that is attached as exhibits to its pleading.²⁴³ Finally, a party may fail to allege in its pleading that language in a facially unambiguous contract was intended to possess a special meaning, eliminating the party's right to discovery and allowing

²³⁹ See, e.g., *Volunteer Energy Servs., Inc. v. Option Energy, LLC*, 579 F. App'x 319, 321 (6th Cir. 2014).

²⁴⁰ See, e.g., *Holston Valley Hosp. and Med. Ctr., Inc. v. Ashford Group Ltd.*, 661 F. Supp. 72, 73 (E.D. Tenn. 1986).

²⁴¹ See, e.g., *Colaco v. Cavotec SA*, 236 Cal. Rptr. 3d 542, 567 (Cal. Ct. App. 2018). Such a waiver occurs, for example, where the complaint and answer admit that there is no relevant extrinsic evidence, or where the briefs relating to a motion to dismiss or a motion for judgment on the pleadings provide that the parties choose to stand exclusively on the pleadings and the arguments set forth in the briefs.

²⁴² See, e.g., *Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d 898, 904–05 (N.D. Cal. 2016), *aff'd in part, vac. in part on other grounds*, 897 F.3d 1109 (9th Cir. 2018).

²⁴³ See, e.g., *Woods v. Google, Inc.*, 889 F. Supp. 2d 1182, 1191–93 (N.D. Cal. 2012).

the court to adjudicate the dispute based solely on the four corners of the agreement.²⁴⁴

Three final points should be noted. First, contextualist courts analyze a broader range of issues than textualist courts in deciding whether a jury question exists. That is because textualist courts will only reach stage 2A when there is a patent or subject-matter latent ambiguity, whereas courts following full or partial contextualism will address both of those types of ambiguity *and* non-standard-meaning latent ambiguities in deciding whether the case should be resolved as a question of law or fact. Because each type of contextualism allows for non-standard-meaning latent ambiguities, the precise operation of contextualism in assessing whether a jury question exists is somewhat more complicated than I have suggested so far. I address this issue in Part VIII.

Second, may a contextualist court adjudicate a lawsuit on the pleadings when the judge concludes that the interpretation argued for by one party is too bizarre to warrant discovery and the review of extrinsic evidence? That question is addressed in Part VII,²⁴⁵ which concerns the relationship of contextualism to the ambiguity determination.

Third, from this point forward, I will generally refer to the assessment of ambiguity under full contextualism and partial contextualism as “stage 1” rather than “stage 2A” or “stage 1/stage 2A” and the resolution of ambiguity under those approaches as “stage 2” rather than “stage 2B.”

VI. ISSUE 4: DETERMINING WHETHER A COURT IS USING TEXTUALISM OR CONTEXTUALISM.

When reading a judicial opinion regarding the construction of an agreement, it is frequently difficult or even impossible to determine which interpretive approach the court employed or endorsed. That is because decisions are often unclear regarding whether extrinsic evidence may be or was in fact used during the ambiguity determination. Part VI discusses this problem.

Consider first the type of phrasing that properly identifies the relevant approach to interpretation. Cases describe textualism in a suitable manner when they expressly note that

²⁴⁴ See, e.g., *Hervey v. Mercury Cas. Co.*, 110 Cal. Rptr. 3d 890, 896–98 (Cal. Ct. App. 2010) (affirming dismissal based exclusively on the text of the agreement).

²⁴⁵ See *infra* text accompanying notes 403–406.

the ambiguity determination must be restricted to the four corners of the contract or that extrinsic evidence may not be employed during stage 1. For example, here is the Minnesota Supreme Court's definition of ambiguity: "A contract is ambiguous if, *based upon its language alone*, it is reasonably susceptible of more than one interpretation."²⁴⁶ A federal district court applying Kansas law set forth an even better description:

Contractual ambiguity appears only when "the application of pertinent rules of interpretation to *the face of the instrument* leaves it generally uncertain which one of two or more possible meanings is the proper meaning." . . . As explained above, in ascertaining whether the contract is ambiguous, the Court is limited to the *four corners* of the written agreement.²⁴⁷

And the Iowa Supreme Court explained the ambiguity determination in this way: "We may not refer to extrinsic evidence in order to create ambiguity."²⁴⁸

Decisions appropriately describe contextualism when they expressly state that extrinsic evidence may be used in assessing contractual ambiguity. Here is a synopsis of the contextualist approach written by the California Court of Appeal:

First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.²⁴⁹

Likewise, the Colorado Supreme Court described contextualist interpretation in this manner: "Thus, extrinsic evidence may be

²⁴⁶ Art Goebel, Inc. v. North Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997) (emphasis added).

²⁴⁷ Fisherman Surgical Instruments, LLC v. Tri-Anim Health Servs., Inc., 502 F. Supp. 2d 1170, 1179–80 (D. Kan. 2007) (emphasis added) (quoting Marquis v. State Farm Fire & Cas. Co., 256 Kan. 317, 324 (Kan. 1998)).

²⁴⁸ Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 222 (Iowa 2007). For proper descriptions of textualism in secondary sources, see, for example, BURTON, *supra* note 1, § 4.2.1, at 111 ("When deciding whether a contract is ambiguous, a court may consider only the contract on its face, excluding all extrinsic evidence."); KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.7, at 33 ("Courts that subscribe to the 'plain meaning rule' hold that if a 'clear, unambiguous' meaning is discernible in the language of the contract, no extrinsic evidence of surrounding circumstances may be admitted to challenge this interpretation. The decision as to whether ambiguity exists must be made without reference to any source other than the contract itself."); 11 WILLISTON, *supra* note 7, § 30:5, at 80 (observing that "there is authority that the court is limited in its consideration solely to the face of the written agreement").

²⁴⁹ Winet v. Price, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992).

conditionally admitted to determine whether the contract is ambiguous. . . . When an ambiguity has been determined to exist, the meaning of its terms is generally an issue of fact to be determined in the same manner as other factual issues.”²⁵⁰ Finally, the Illinois Supreme Court, in an opinion rejecting contextualism, explained that method of interpretation as follows:

Under the provisional admission approach, although the language of a contract is facially unambiguous, a party may still proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract. . . . Consequently, if after “provisionally” reviewing the parol evidence, the trial judge finds that an “extrinsic ambiguity” is present, then the parol evidence is admitted to aid the trier of fact in resolving the ambiguity.²⁵¹

In each of the three opinions addressing contextualism, the court carefully distinguished between the role of extrinsic evidence at stage 1 and its role at stage 2. When a judge assesses whether a contract is ambiguous, extrinsic evidence is “provisionally received,” “conditionally admitted,” or “provisionally admitted.” If the jury is subsequently required to resolve an ambiguity at trial, then the extrinsic evidence is simply “admitted.” It is helpful to conceptualize this difference in the following way: Stage 1 involves the preliminary *consideration* of extrinsic evidence; stage 2 involves the *admitting* of extrinsic evidence. And some courts have employed this precise terminology when describing contextualist interpretation:

First, the court asks whether, as a matter of law, the contract terms are ambiguous; that is, the court *considers* extrinsic evidence to determine whether the contract is reasonably susceptible to a party’s proffered interpretation. Second, if ambiguity persists, the court *admits* extrinsic or parol evidence to help interpret the contract.²⁵²

²⁵⁰ E. Ridge of Fort Collins, LLC v. Larimer and Weld Irrigation Co., 109 P.3d 969, 974 (Col. 2005).

²⁵¹ Air Safety, Inc., v. Tchrs. Realty Corp., 706 N.E. 2d 882, 885 (Ill. 1999).

²⁵² Yi v. Circle K Stores, Inc., 258 F. Supp. 3d 1075, 1083 (C.D. Cal. 2017) (applying California law) (emphasis added and citations omitted); *accord* Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645–46 (Cal. 1968); Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1139–40 (Ariz. 1993); Chopin v. Chopin, 232 P.3d 99, 101–02 (Ariz. Ct. App. 2010); *see also* Hofmeyer v. Iowa Dist. Ct. for Fayette Cnty., 640 N.W.2d 225, 228 (Iowa 2001) (holding that the judge must “consult” extrinsic evidence in analyzing whether an agreement is ambiguous).

For proper descriptions of contextualism in secondary sources, see, for example, BURTON, *supra* note 1, § 4.3.3, at 128 (“In jurisdictions that recognize extrinsic ambiguities . . . the decision whether a contract is ambiguous follows judicial *consideration* of the *proffered* or *provisionally allowed* extrinsic evidence.”) (emphasis

The logic behind this phrasing is that “admitting” suggests that the court is discussing the resolution of ambiguity at trial, whereas “considering” implies a form of preliminary review, such as summary judgment, where contextualist courts typically address whether a contract is ambiguous.

In my experience, the majority of opinions addressing contract interpretation sufficiently identify the interpretive approach at issue, much like the textualist and contextualist decisions quoted above. But in a large minority of cases, it is difficult or impossible to determine whether the court was using or describing textualism or contextualism.

There are two primary sources of this uncertainty. First, opinions frequently contain logically inconsistent statements about the interpretive process. Consider *Sun Oil Company v. Madeley*, a decision of the Texas Supreme Court involving an oil and gas lease.²⁵³ The parties there disputed whether a judge may review extrinsic evidence as part of the ambiguity determination.²⁵⁴ The lessors argued that contextualism was the governing law and the lessee asserted that textualism was the controlling standard.²⁵⁵ The Texas Supreme Court began by agreeing with the lessors: “Lessors state the proper rule. Evidence of surrounding circumstances may be consulted [in assessing ambiguity].”²⁵⁶ And the court quoted leading contextualist secondary sources in support of this conclusion.²⁵⁷ After some additional explanation, however, the *Sun Oil* court reversed course:

It follows that parol evidence is not admissible to render a contract ambiguous, which on its face, is capable of being given a definite certain legal meaning. This rule obtains even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, plainly and clearly discloses the

added); LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.16[D], at 228–29 (explaining that contextualism requires “that the trial court, outside of the jury’s presence, look at all of the evidence proffered, not admit it.”); 11 WILLISTON, *supra* note 7, § 30:5, at 80 (“While there is authority that the court is limited in its *consideration* solely to the face of the written agreement, many more courts take the position that a court may *provisionally receive* all credible evidence concerning the parties’ intentions to determine whether the language of the contract is reasonably susceptible to the interpretation urged by the party claiming ambiguity; if it is, this evidence may then be *admitted* and heard by the trier of fact.”) (emphasis added).

²⁵³ 626 S.W.2d 726, 727 (Tex. 1981).

²⁵⁴ *Id.* at 731.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 731 n.5.

intention of the parties, or is so worded that it is not fairly susceptible of more than one legal meaning or construction.²⁵⁸

That is a perfect statement of textualism and thus directly contradicts the earlier quoted language.

The court then analyzed some of the extrinsic evidence proffered by the lessors, concluding that the evidence actually supported the lessee's construction of the agreement.²⁵⁹ But the court did not identify whether it was (1) discussing this evidence as part of the ambiguity determination, or (2) explaining that even if the contract was ambiguous, extrinsic evidence would not help the lessors.

The opinion next stated that the intermediate appellate court had relied on extrinsic evidence in adopting the lessors' interpretation of the lease.²⁶⁰ In response, the Texas Supreme Court held that "[w]e think the court of civil appeals erred in considering this extrinsic evidence. Only where a contract is first found to be ambiguous may the courts consider the parties' interpretation."²⁶¹ The court proceeded to find that the lease was unambiguous and thus held, "we shall confine our review to the lease and enforce it as written."²⁶² The rest of the opinion's analysis focused exclusively on the language of the agreement, and the court ultimately ruled in favor of the lessee.²⁶³

Sun Oil explicitly endorses both contextualism and textualism in its statements about the governing legal standard. And the rest of the decision does not resolve the conflict because one part of the court's application of the law focused on the four corners of the contract while another part focused on extrinsic evidence. Given the inconsistency, it should not be surprising that subsequent cases in Texas are divided over the meaning of *Sun Oil*, with some claiming that the Texas Supreme Court adopted textualism and others claiming the high court adopted contextualism.²⁶⁴

²⁵⁸ *Id.* at 732.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 732–33.

²⁶⁴ Compare *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 312 (Tex. Ct. App. 2005) (interpreting *Sun Oil* as endorsing contextualism), with *COC Servs., Ltd., v. CompUSA, Inc.*, 150 S.W.3d 654, 666 (Tex. Ct. App. 2004) (interpreting *Sun Oil* as endorsing textualism).

Sun Oil is illustrative. Many other opinions contain similar contradictions.²⁶⁵ In fairness, sometimes cases with inconsistent

²⁶⁵ See, e.g., *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1109–11 (10th Cir. 2009) (applying Utah Law) (explaining that a “court first must decide whether a contract contains a facial ambiguity arising from the contractual language,” but immediately thereafter stating that the court may consider extrinsic evidence in making the ambiguity determination; proceeding to analyze the language within the four corners; then noting that the court reviewed “all of the relevant extrinsic evidence,” but immediately thereafter stating that the language of the contract alone controls whether the agreement is ambiguous, and only analyzing the contract itself from that point forward); *BRC Rubber & Plastics, Inc. v. Cont’l Carbon Co.*, 876 F. Supp. 2d 1042, 1049–55 (N.D. Ind. 2012) (applying Indiana law) (stating that “[i]f the contract language is clear and unambiguous, the document is interpreted as a matter of law without looking to extrinsic evidence”; proceeding to analyze only the language of the agreement for several pages; concluding “as a matter of law that the plain language of the Agreement unambiguously indicates that the parties intended to enter into a requirements contract”; but then considering extrinsic evidence of course of performance and course of dealing because “the UCC makes clear that the provisions of a contract ought to be harmonized with the parties’ course of performance, course of dealing, and the usage of trade”); *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 60–61 (Cal. 2006) (expressly endorsing contextualism when discussing the governing legal principles, but then applying textualism when construing the agreement at issue; in particular, the court only analyzed language within the four-corners of the contract during the ambiguity determination, specifically stated that the proffered extrinsic evidence was irrelevant because the text of the contract was clear, and ruled that the trial court was correct to not consider the extrinsic evidence); *Noble Roman’s, Inc. v. Pizza Boxes, Inc.*, 835 N.E.2d 1094, 1098–1100 (Ind. Ct. App. 2005) (stating that the four-corners rule is the governing principle; proceeding to analyze the language within the four corners of the contract; then explaining that the U.C.C. requires that the court consider extrinsic evidence of course of performance and reviewing that evidence; but later stating that it was not necessary to resort to extrinsic evidence in the case); *Affiliated FM Ins. Co. v. Const. Rein. Corp.*, 626 N.E.2d 878, 881–82 (Mass. 1994) (stating both that trade usage evidence is admissible when a contract is ambiguous and that ambiguity is not a prerequisite to introducing trade usage); *Alexander Loc. Sch. Dist. v. Vill. of Albany*, 101 N.E.3d 21, 34 (Ohio Ct. App. 2017) (quoting from a case providing that when a contract is facially unambiguous the court need not look beyond the four corners, and then restating that principle, but later quoting from another case holding that extrinsic evidence is admissible when a contract is facially ambiguous *or* when the surrounding circumstances support the conclusion that the language of the contract has a special meaning); *Franklin Advisers, Inc. v. iHeart Comm’n. Inc.*, No. 04-16-00532-CV, 2017 WL 4518297, *2–4 (Tex. Ct. App. Oct. 11, 2017) (applying New York law) (stating that a “court determines ambiguity by looking within the four corners of the document, not to outside sources” but also that “[a]n ambiguity exists when the terms of a contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement *and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business*”; finding the contract at issue to be unambiguous based upon an analysis restricted to the four corners) (emphasis added); *Gastar Expl. Inc. v. Rine*, 806 S.E.2d 448, 454–55, 457 (W. Va. 2017) (holding that textualism is the governing standard, but discussing extrinsic evidence in addressing whether the contract was ambiguous); *Wadi Petrol. v. Ultra Res.*, 65 P.3d 703, 708–10 (Wyo. 2003) (quoting two cases providing that textualism is the governing standard; then quoting from a case providing that courts may consider extrinsic evidence even if a contract is unambiguous; then appearing to state that the court need not resolve whether extrinsic evidence can be used to create an ambiguity; and finally quoting again from one of the textualist cases which stated that extrinsic evidence cannot create an ambiguity); see also *Individual Healthcare Specialists,*

statements of the legal rules are made clearer by the court's application of the law to the facts. For example, in *Belnick, Inc. v. TBB Global Logistics, Inc.*,²⁶⁶ the court quoted from decisions that prohibit the use of extrinsic evidence if a contract is facially unambiguous and from decisions that permit the judge to consider objective extrinsic evidence in assessing contractual ambiguity.²⁶⁷ But in conducting the ambiguity determination, the judge analyzed the proffered extrinsic evidence,²⁶⁸ which means the court was using and probably endorsing contextualism.²⁶⁹

Inc. v. Bluecross Blueshield of Tenn., Inc., 566 S.W.3d 671, 693–94 (Tenn. 2019) (explaining that “[s]ome of the [Tennessee] cases with the strongest language on contextual principles also use textual principles as well, and vice-versa”) (collecting authorities); LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.15[c], at 192 (“At times a state court seems to be saying contradictory things.”); *id.* § 25.14[A], at 148–61 (collecting examples).

Perhaps the most confusing and contradictory decision on contract interpretation I have read is *URI, Inc. v. Kleberg County*, 543 S.W.3d 755 (Tex. 2018). In that case, the Texas Supreme Court went back and forth between textualism and contextualism so many times that it is not possible to summarize the decision in a parenthetical. And explaining it via standard text would take up too much space. So, I leave that opinion to the ambitious reader who wishes to further explore inconsistency in the interpretation jurisprudence.

Statutory rules governing contract interpretation also sometimes conflict. *Compare* CAL. CIV. § 1639 (“When a contract is reduced to writing, the intention of the parties is to be ascertained *from the writing alone*, if possible; subject, however, to the other provisions of this Title.”) (emphasis added), *with* CAL. CIV. § 1647 (“A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.”). Section 1639 of the California Civil Code provides that courts should restrict interpretation to the four corners of the written contract, subject to other rules in the same title. *Id.* § 1639. Section 1647, which is in the same title, provides a blanket right to present extrinsic evidence for purposes of interpreting contracts. *Id.* § 1647. Accordingly, section 1647 eviscerates section 1639. *See also* LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.18[D], at 263–64 (stating that “it is hard to reconcile” section 1639 with *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643–44 (Cal. 1968)).

²⁶⁶ 106 F. Supp. 3d 551 (M.D. Pa. 2015) (applying Pennsylvania law).

²⁶⁷ *Id.* at 563–64.

²⁶⁸ *See id.* at 564–65.

²⁶⁹ The same pattern played out in *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 812–14 (6th Cir. 2007) (applying Michigan law) (providing both that (1) “[o]nly where a contract contains ambiguous terms will consideration of outside evidence be necessary,” and (2) “[i]f the alleging party presents evidence to prove a latent ambiguity it must be considered by the court”; further noting that a “latent ambiguity will often arise when a term is being used within a technical or specialized field”; and reviewing extrinsic evidence of a trade usage that the term “wager” has a special meaning within the gaming industry while conducting the ambiguity determination).

For another interesting example, consider *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995). There, the court wrote that “although extrinsic evidence can be used to show that a contract is ambiguous, extrinsic evidence cannot be used to *create* an ambiguity.” *Id.* at 565 (emphasis added and citations omitted). Such language is internally inconsistent. “Showing” that a contract is ambiguous *just is* “creating” an ambiguity. And thus the *Murphy* court’s assertion that “[t]here is no contradiction here,” *id.*, is simply wrong. Instead, the Seventh Circuit endorsed both textualism and contextualism in the very same sentence. But immediately thereafter, the opinion

Unfortunately, *Belnick* is atypical. Normally, contradictions regarding the governing standard are not made clearer by the court's application of the law.²⁷⁰

The second principal reason that it can be difficult to establish which interpretive approach a court is using is that cases frequently contain language that is too vague to classify as textualist or contextualist. Consider this quotation from *Porous Media Corporation v. Midland Brake, Inc.*, a decision of the Eighth Circuit:

To interpret the terms of a contract under Minnesota law, a court must initially determine whether a contract term is ambiguous. A contract term is ambiguous if it is reasonably susceptible to more than one interpretation. The meaning of an unambiguous contract is a matter of law for the court, however, the meaning of an ambiguous contract term is a fact question for the jury.²⁷¹

Such language does not identify the process for assessing whether a contract is ambiguous. Is the ambiguity determination limited to the four corners of the contract, or may the judge review extrinsic evidence? Note that the application of the law in this case does not aid in answering that question because the court of appeals deferred to the trial judge's conclusion that the contract was reasonably susceptible to more than one meaning rather than assessing ambiguity itself.²⁷² One might suggest that reading the decision in the context of Minnesota interpretation law would improve the clarity of the opinion. Unfortunately, that is not the case. The contract in *Porous Media* was governed by the U.C.C.,²⁷³ which is generally contextualist in nature.²⁷⁴ That supports the conclusion that the Eighth Circuit was referring to contextualism. But the common law of Minnesota is substantially textualist.²⁷⁵

indicated that the confused quotation is just the *Murphy* court's sloppy way of explaining that partial contextualism is the governing standard rather than full contextualism: "The party claiming that a contract is ambiguous must first convince the judge that this is the case, and must produce *objective facts, not subjective and self-serving testimony*, to show that a contract which looks clear on its face is actually ambiguous." *Id.* (emphasis added and citations omitted). And the court did consider objective extrinsic evidence in construing the contract. *See id.* at 567–68 (also distinguishing between the objective and subjective extrinsic evidence offered by the parties). Accordingly, *Murphy* ultimately embraces a form of contextualism.

²⁷⁰ For some examples, see most the authorities cited *supra* in note 265.

²⁷¹ 220 F.3d 954, 959 (8th Cir. 2000) (citations omitted).

²⁷² *Id.* at 960.

²⁷³ *Id.*

²⁷⁴ *See* Silverstein, *supra* note 106, at 1061–82.

²⁷⁵ *See, e.g.,* Hous. & Redevelopment Auth. v. Norman, 686 N.W.2d 329, 337 (Minn. 2005); *see also* Silverstein, *supra* note 13, at 286 (explaining that Minnesota follows textualism based on the author's analysis of the caselaw in that state).

Cases in textualist states often apply the four-corners rule to contracts governed by the Code.²⁷⁶ And Minnesota follows this pattern.²⁷⁷ That bolsters the conclusion that the court of appeals was referring to textualism.²⁷⁸

The troublesome wording from *Porous Media* was three sentences in length.²⁷⁹ But shorter passages can be vague as well. For example, in *Employment Television Enterprises, LLC v. Barocas*, one of the parties presented trade usage evidence to the trial judge in support of its claim that a word in the contract possessed a special industry meaning different from the standard meaning.²⁸⁰ On appeal, the appellate court was unable to decipher whether the judge below considered the evidence in reaching its determination that the contract was unambiguous because of vagueness in the lower court's ruling:

The record reflects that the trial court reviewed this proffer [of trade usage evidence], but concluded the “plain meaning and general usage” of the term to be paramount. We cannot ascertain from this ruling whether the trial court properly considered ETV's trade usage evidence but found it insufficient to establish ambiguity in light of the plain meaning, or whether the court considered the evidence to be irrelevant in light of the plain and unambiguous nature of the term.²⁸¹

Corbin on Contracts identifies another manifestation of this problem in its discussion of trade usage: “When a court . . . says that proof of local or trade usage is inadmissible because the words of the contract are ‘plain and clear,’ the statement may be subject to several kinds of explanation.”²⁸² On the one hand, the court may have “considered the evidence offered to prove the

²⁷⁶ See Silverstein, *supra* note 106, at 1080–82 (collecting authorities).

²⁷⁷ See *id.* at 1081 & n.404 (collecting Minnesota authorities).

²⁷⁸ For a comparable case, see *Feldman Co., Inc. v. Atwood Richards, Inc.*, 636 N.Y.S.2d 312 (N.Y. App. Div. 1996). There, the court stated that the contract was unambiguous without identifying the test for ambiguity or explaining how the determination was made in this case. *Id.* at 313. Like Minnesota, New York is generally textualist. See, e.g., *W.W.W. Assocs., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990); see also Silverstein, *supra* note 13, at 286 (explaining that New York follows textualism based on the author's analysis of the caselaw in that state). But the contract in *Feldman* was governed by the U.C.C. because it concerned the sale of goods, see 636 N.Y.S.2d at 313, and thus *Feldman* suffers from the same problem as *Porous Media*.

²⁷⁹ For another example of an extended description of interpretation that is impossible to classify as describing textualism or contextualism, see *First Nat'l Bank of Crossett v. Griffin*, 832 S.W.2d 816, 818–20 (Ark. 1992).

²⁸⁰ 100 P.3d 37, 42 (Colo. Ct. App. 2004).

²⁸¹ *Id.* at 43.

²⁸² KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.13, at 119.

usage and found it too weak,”²⁸³ consistent with contextualism. On the other hand, the court may have found the language of the agreement to be facially unambiguous and barred any consideration of the usage evidence, consistent with textualism. This merits some elaboration.

Above, I argued that contextualism can be conceptualized as permitting (1) the “consideration” of extrinsic evidence at the first stage during the ambiguity determination, and (2) the “admitting” of evidence at the second stage to resolve any ambiguity uncovered at stage 1.²⁸⁴ But courts are not consistent in their use of the terms “consider” and “admit” when explaining the role of extrinsic evidence. They employ the words interchangeably when describing stages 1 and 2.²⁸⁵ Accordingly, when a judge writes that extrinsic evidence is not “admissible” or may not be “admitted” unless a contract is ambiguous—and does so without elaboration²⁸⁶—the statement is consistent with both textualism and contextualism.

To explain, “admissible” can be used in a broad sense to refer to any relevant evidence.²⁸⁷ And thus a *textualist* court might write that extrinsic evidence is not admissible (meaning relevant) unless a contract is ambiguous (meaning unclear on its face). But “admissible” can also be used in a narrow sense to refer to whether the evidence may be presented to the jury at trial. And therefore, a *contextualist* court might write that extrinsic evidence is not admissible (meaning useable at trial to resolve an ambiguity) unless a contract is ambiguous (meaning unclear after considering both the language of the agreement and extrinsic evidence at a preliminary stage).

²⁸³ *Id.* at 119–20.

²⁸⁴ See *supra* text accompanying note 252.

²⁸⁵ See, e.g., *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 812 (6th Cir. 2007) (using both words to explain both stages of the interpretive process); *W.W.W. Assocs., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990) (using both words to describe stage 1); *Vitullo v. New York Cent. Mut. Fire Ins. Co.*, 51 N.Y.S.3d 768, 770 (N.Y. App. Div. 2017) (using “admissible” to explain stage 1); *Cross v. O’Heir*, 993 N.E.2d 1100, 1106 (Ill. App. Ct. 2013) (using both words to describe stage 2).

²⁸⁶ See, e.g., *Checkers Pub, Inc. v. Sofios*, 71 N.E.3d 731, 737 (Ohio Ct. App. 2016) (“Accordingly, interpretation of a clear and unambiguous contract term is a matter of law, and a court should not admit extrinsic evidence to establish its meaning.”). For a comparable example from a secondary source, see 12 WILLISTON, *supra* note 133, § 34:1, at 18–19 (“However, parol evidence of usage and custom will ordinarily not be admissible when the intent and meaning of the parties as expressed in the contract are clear and unambiguous.”).

²⁸⁷ See, e.g., *Rosov v. Maryland State Bd. of Dental Exam’rs*, 877 A.2d 1111, 1123 (Md. Ct. Spec. App. 2005) (“Admissible evidence is evidence relevant to the issues in the case and tends to either establish or disprove them.”) (internal quotation marks omitted).

In sum, when a court sets forth a general principle such as “extrinsic evidence is admissible if a contract is ambiguous”²⁸⁸ or reaches a conclusion such as “extrinsic evidence may not be admitted here because the contract is unambiguous,”²⁸⁹ such statements standing alone leave open whether extrinsic evidence may be or was considered in deciding whether the agreement is ambiguous.²⁹⁰

My recommendation to address the problems discussed in this part is simply that judges, lawyers, and professors be careful in explaining and applying interpretation doctrine. Make every effort to avoid inconsistent and vague descriptions of the governing legal rules. And describe in full whether, how, and why extrinsic evidence was used in construing the agreement at issue.

One technique that might assist in achieving these goals would be to standardize the use of the words “consider” and “admit” in interpretation cases. “Consider” should be limited to stages 1 and 2A of textualism and stage 1 of contextualism. “Admit” should be limited to stage 2B of textualism and stage 2 of contextualism.

²⁸⁸ Or that “extrinsic evidence is *inadmissible* if a contract is *unambiguous*.”

²⁸⁹ Or that “extrinsic evidence may be admitted here because the contract is ambiguous.”

²⁹⁰ See *Admiral Builders Sav. and Loan Ass’n v. S. River Landing, Inc.*, 502 A.2d 1096, 1100 (Md. Ct. Spec. App. 1986) (“When extrinsic evidence is admitted, it is often difficult to ascertain whether it is coming in *after* the primary determination of ambiguity (in order to explain the ambiguity) or if consideration of the evidence aided in the preliminary determination of ambiguity *vel non*.”) (emphasis in original).

Note that when a court states that extrinsic evidence is “admissible” even though a contract is “unambiguous,” this necessarily constitutes contextualism. See, e.g., *Feinberg v. Federated Dept. Stores, Inc.* 832 N.Y.S.2d 760, 763 (N.Y. Super. Ct. 2007) (“The statute’s express language renders evidence of the parties’ course of performance and dealing for more than a decade admissible. Such evidence is relevant to the interpretation of the contract(s), without regard to any contractual ambiguity.”) (referring to U.C.C. § 2-202). The essence of contextualism is the rejection of facial ambiguity as the lynchpin for examining extrinsic evidence. Language like that in *Feinberg* accomplishes this.

Note further that the word “consider” probably does not raise the same concerns as the words “admitted” and “admissible.” Thus, for example, when a court states that extrinsic evidence may not be “considered” unless a contract is ambiguous, it is generally safe to conclude that the court is referencing textualism. See, e.g., *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012) (“When the language of a contract is clear and unambiguous, we enforce the agreement of the parties as expressed in the contract. But if the language is ambiguous—that is, susceptible to more than one reasonable interpretation—parol evidence may be *considered* to determine the intent of the parties.”) (emphasis added and citation omitted); *James L. Gang & Assocs., Inc. v. Abbott Labs, Inc.*, 198 S.W.3d 434, 437–38 (Tex. Ct. App. 2006) (“When a contract is unambiguous, a court does not *consider* course of dealing [Appellant]’s evidence relating to course of dealing between itself and [appellee] is not relevant in the face of an unambiguous contract.”) (emphasis added).

The two interpretive approaches are described as follows when employing the terms in my recommended way. For textualism, at stage 1, the judge may not *consider* extrinsic evidence in conducting the ambiguity determination. At stage 2A, the judge must *consider* relevant extrinsic evidence in deciding whether resolution of the ambiguity is a question of law or fact. And at stage 2B, the judge must *admit* relevant extrinsic evidence for use by the jury in resolving the ambiguity. For contextualism, at stage 1, the judge must *consider* relevant extrinsic evidence in determining whether the contract is ambiguous (i.e., whether there is a jury question). And at stage 2 the judge must *admit* relevant extrinsic evidence for use by the jury in resolving the ambiguity.

Just as courts will probably not jettison the phrase “parol evidence” despite my recommendation,²⁹¹ inconsistent and vague judicial opinions regarding contract interpretation are almost certainly going to be with us for the foreseeable future. But unlike with parol evidence, here I have no secondary recommendation. There is little judges, lawyers, professors, and law students can do other than muddle through confusing cases on the construction of agreements.

Two final notes are in order. First, this part focused on the challenges associated with determining whether a single judicial opinion is using or endorsing textualism or contextualism. Most importantly, I explained that courts regularly set forth contradictory rules and analysis within the same decision.²⁹² This problem must be distinguished from a more prevalent concern in the caselaw: inconsistent statements regarding the standards governing contract interpretation *across opinions* from a given jurisdiction. Such inconsistency is essentially universal in the United States. This is my fourth article addressing contract interpretation. In conducting research for these four papers, *every* state I investigated contained both textualist and contextualist authorities.²⁹³ However, that problem is largely beyond the scope of this piece.

Second, Part VI established that when courts try to explain the *law* of contract interpretation in judicial opinions, what they write is frequently incoherent. But in my experience, when courts

²⁹¹ See *supra* the last four paragraphs of Part IV.

²⁹² See *supra* notes 253–270 and accompanying text.

²⁹³ For some examples, see Silverstein, *supra* note 106, at 1082–84; see also the authorities cited *supra* in note 7.

actually *interpret* contracts, what they write is normally quite logical. In other words, judges (and other lawyers) are generally good at construing agreements. Where they struggle is in explaining the legal rules that govern the interpretive process. *Taylor v. State Farm Mutual Automobile Insurance Company*, a leading contextualist decision, is illustrative.²⁹⁴ The Arizona Supreme Court's discussion of the principles of interpretation in that case is perplexing.²⁹⁵ But the opinion's construction of the settlement agreement at the center of the dispute is particularly lucid and persuasive.²⁹⁶ Thus, while the complexity and confusion in the interpretation jurisprudence certainly cause significant problems for judges, lawyers, and contracting parties,²⁹⁷ the problems may not be quite as serious as they appear on the surface.²⁹⁸

VII. ISSUE 5: CONTEXTUALISM AND THE AMBIGUITY DETERMINATION

Most decisions in contextualist jurisdictions state that contextualism involves an “ambiguity” determination.²⁹⁹

²⁹⁴ 854 P.2d 1134 (Ariz. 1993).

²⁹⁵ See *id.* at 1138–41. For example, the court conflated interpretation and the parol evidence rule by referring to the “plain meaning’ view of the parol evidence rule.” *Id.* at 1138. It described the rules of textualism as concerning “prior negotiations” in one sentence, but then in the very next sentence stated that the rules govern “extrinsic evidence of any nature.” *Id.* And the court attempted to distinguish between assessing “ambiguity” and assessing whether language is “reasonably susceptible” to an asserted meaning, *id.* at 1140, despite the fact that those are identical inquiries, see *infra* notes 413–432 and accompanying text.

²⁹⁶ See *Taylor*, 854 P.2d at 1141–45. It is not possible to concisely summarize the court's analysis or provide useful examples the way I did with the court's confusion regarding the law in the prior footnote. Accordingly, readers interested in more detail should review the pages cited at the beginning of this footnote.

²⁹⁷ See Kniffin, *supra* note 11, at 86 (“A central theme of this Article is that a clear distinction between the parol evidence rule and interpretation does exist but that in a significant proportion of cases, courts have indeed found themselves confused, have thereby ignored the distinction, and have thus reached unjust conclusions concerning admission or exclusion of evidence.”); *id.* at 110–20 (collecting examples).

²⁹⁸ Cf. 11 WILLISTON, *supra* note 7, § 31:1, at 354 (“However, it has been said that common sense and good faith are the principal characteristics underlying the interpretation or construction of contracts, and that the construction of a contract as to its operation and effect should depend less on artificial rules than on the application of good sense and sound equity to the object and spirit of the contract in a given case.”); FARNSWORTH, *supra* note 17, § 7.11, at 456 (explaining that the use of interpretive rules “in judicial opinions is often more ceremonial (as being decorative rationalizations of decisions already reached on other grounds) than persuasive (as moving the court toward a decision not yet reached)”).

²⁹⁹ See, e.g., RSD AAP, LLC v. Alyeska Ocean, Inc., 358 P.3d 483, 488–89 (Wash. Ct. App. 2015); Chopin v. Chopin, 232 P.3d 99, 101–02 (Ariz. Ct. App. 2010); Hervey v. Mercury Cas. Co., 110 Cal. Rptr. 3d 890, 895 (Cal. Ct. App. 2010).

Commentators generally concur.³⁰⁰ But there is a powerful argument that contextualism dispenses with the assessment of ambiguity. At the very least, contextualist authorities are deeply schizophrenic on the role of ambiguity in the interpretive process. In this part, I discuss the role of ambiguity in contextualist interpretation.

Let me begin with a basic recap of contextualism, as qualified by the material in Parts III and V. Under full contextualism, at stage 1, the judge assesses whether the contract is “ambiguous” based on the language of the contract and all relevant extrinsic evidence. If the agreement is unambiguous—i.e., if the textual and extrinsic evidence overwhelmingly supports one party—then the judge rules for the party asserting the unambiguous meaning. If the agreement is ambiguous—i.e., if the textual and extrinsic evidence does not overwhelmingly support one party—then the case proceeds to stage 2. During the second stage, the jury resolves the ambiguity at trial based on the same evidence that the judge considered at stage 1.³⁰¹

Under partial contextualism, at stage 1, the judge analyzes whether the contract is ambiguous based on the language of the contract and a subset of the relevant extrinsic evidence. If the agreement is unambiguous—i.e., if the textual evidence and the subset of extrinsic evidence overwhelmingly support one party—then the judge rules for the party asserting the unambiguous meaning. If the agreement is ambiguous—i.e., if the textual and extrinsic evidence does not overwhelmingly support one party—then, in theory, the case proceeds to stage 2A. At that stage, the judge assesses whether the text and *all* of the relevant extrinsic evidence overwhelmingly supports one side. If the answer is yes, then the judge resolves the ambiguity in favor of the party whom the evidence supports. If the answer is no, then the lawsuit continues to stage 2B. There, the jury resolves the ambiguity based on the same evidence that the judge considered at stage 2A. However, in practice, cases proceed directly from stage 1 to stage 2B under partial contextualism.³⁰²

Contextualism permits the judge to review some or all of the relevant extrinsic evidence at stage 1 because this approach

³⁰⁰ See the authorities cited *supra* in note 51.

³⁰¹ See *supra* Part V.B.1.; Chart 1 (located *supra* at note 238).

³⁰² See *supra* Part V.B.2.; Chart 1 (located *supra* at note 238). This summary does not perfectly fit partial contextualism under the U.C.C. when a court is located in a state with textualist common law. See *supra* notes 229–234 and accompanying text.

allows for non-standard-meaning latent ambiguities. Under both versions of contextualism, during the first stage of the interpretive process, parties are permitted to submit evidence indicating that language contained in the contract possesses a non-standard or special meaning—a meaning that is different from the standard or ordinary meaning of the words used.³⁰³

Next, recall the definition of ambiguity endorsed by virtually all courts—textualist and contextualist alike: Language in a contract is ambiguous when it is reasonably susceptible to more than one meaning.³⁰⁴ The essence of “reasonably susceptible” is that language is not infinitely flexible. Instead, the words in a contract impose genuine limits on the scope of possible constructions. Accordingly, at some point, a proposed reading of a contract crosses over from interpretation to modification. A century ago, Judge Learned Hand explained this idea in the following way: “[T]here is a critical breaking point . . . beyond which no language can be forced.”³⁰⁵ Here is Professor Allan Farnsworth’s comparable statement: “But even though a court may look at all the circumstances in the process of interpreting contract language, the language itself imposes a limit on how far the court will go in that process.”³⁰⁶

This understanding of ambiguity presents no issue for textualism because that approach is committed to the limiting power of language. Textualism follows the four-corners rule, under which a court may not consider extrinsic evidence unless the words on the face of the agreement are reasonably susceptible to the meanings asserted by both parties.³⁰⁷ This entails that the language of a contract, by itself, can rule out a construction advanced by one of the litigants, prohibiting the party from presenting any extrinsic evidence in favor of its reading.³⁰⁸ And textualist decisions regularly explain that courts must not twist or distort contractual wording to create ambiguity or modify an agreement,³⁰⁹ propositions that inherently embrace

³⁰³ See *supra* notes 129–139 and accompanying text.

³⁰⁴ See *supra* note 35 and accompanying text.

³⁰⁵ *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 982 (S.D.N.Y. 1917).

³⁰⁶ FARNSWORTH, *supra* note 17, § 7.10, at 455; see also Ricks, *supra* note 18, at 788–89 (explaining that the “reasonably susceptible” standard “is an objective standard and as such must depend . . . on something public”).

³⁰⁷ See *supra* notes 32–42 and accompanying text.

³⁰⁸ Once again, set aside the possibility of a subject-matter latent ambiguity.

³⁰⁹ See, e.g., *Davenport v. Dickson*, 507 P.2d 301, 306 (Kan. 1973) (“Construction of the terms of a written agreement does not authorize modification beyond the meaning expressed by the language used by the parties. A court may not make a new contract or rewrite the same under the guise of construction.”); *Nat’l City Bank v. Engler*, 777

the idea that language possesses a limited spectrum of potential meanings.

Contextualism has a much more ambivalent relationship with ambiguity as “reasonable susceptibility.”³¹⁰ On the one hand, many opinions from contextualist jurisdictions set forth legal principles that appear to endorse the notion that contractual wording can only be stretched so far.³¹¹ In particular, contextualist cases regularly explain that extrinsic evidence may be used to “interpret” or “construe” a contract—including to assist in determining whether it is ambiguous—but not to “contradict,” “alter,” “vary,” or “modify” an agreement.³¹² Such

N.W.2d 762, 765 (Minn. Ct. App. 2010) (“When a contractual provision is clear and unambiguous, based on the plain language of the contract, courts may not rewrite, modify, or limit the effect of the contract by ‘strained construction.’”); *Woods of Somerset, LLC v. Devs. Sur. and Indem. Co.*, 422 S.W.3d 330, 335 (Mo. Ct. App. 2013) (“[C]ourts may not create ambiguity by distorting contractual language that may otherwise be reasonably interpreted.”); *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) (“[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.”) (internal quotation marks omitted); *see also Country Club of the Ozarks, LLC v. CCO Inv., LLC*, 338 S.W.3d 325, 333 (Mo. Ct. App. 2011) (“Parol evidence is permissible to aid in interpreting an ambiguous contract when it does not contradict, alter, or vary the contractual terms.”); *Rodolitz v. Neptune Paper Prods., Inc.*, 239 N.E.2d 628, 630 (N.Y. 1968) (“[A] court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract.”); 11 WILLISTON, *supra* note 7, § 31:5 (collecting numerous authorities).

³¹⁰ I use the phrases “reasonably susceptible” and “reasonable susceptibility” synonymously.

³¹¹ *See, e.g., Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 363 (3d. Cir. 1987) (applying Michigan law) (“Any evidence which cannot be read as consistent with the express terms of the contract is simply irrelevant because of the principle that a contract will not be given an interpretation that is in conflict with its express language.”); *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 214 (Cal. Ct. App. 1993) (criticizing the interpretive approach of another court because “it strains the word accidental, wrenching the word from its natural embrace of the concept of unexpectedness . . . contrary to . . . common sense”); *id.* at 217 (“Unlike the deconstructionists at the forefront of modern literary criticism, the courts still recognize the possibility of an unambiguous text.”) (quoting *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass’n*, 783 F.2d 1234, 1238) (5th Cir. 1986)); *id.* at 219 (“With all due respect to the critics of *Pacific Gas*, the case is not an endorsement of linguistic nihilism.”).

³¹² *See, e.g., Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1138–39 (Ariz. 1993) (explaining that “the court can admit evidence for *interpretation* but must stop short of *contradiction*”) (emphasis in original); *Hervey v. Mercury Cas. Co.*, 110 Cal. Rptr. 3d 890, 895 (Cal. Ct. App. 2010) (“Although parol evidence may be admissible to determine whether the terms of a contract are ambiguous, it is not admissible if it contradicts a clear and explicit policy provision.”) (citations omitted); *Renfro v. Kaur*, 235 P.3d 800, 803 (Wash. Ct. App. 2010) (“[E]xtrinsic evidence is admissible to aid in ascertaining the parties’ intent where the evidence gives meaning to words used in the contract. And we recently reiterated, [e]xtrinsic evidence may be considered regardless of whether the contract terms are ambiguous. But extrinsic evidence may not be used . . . to

statements support the theory that contextualism preserves the ambiguity determination.

On the other hand, contextualism recognizes non-standard-meaning latent ambiguities: Parties are permitted to introduce extrinsic evidence during stage 1 to advance the argument that they used a word or phrase in a non-standard or special way.³¹³ But this means that contextualism allows parties to submit interpretive evidence that *contradicts* the ordinary meaning of an agreement. That is because the non-standard definition of a word necessarily conflicts with the standard definition. After all, it is a *different definition*. And this supports the theory that contextualism eliminates the ambiguity determination.

Both of these perspectives on contextualism merit elaboration, which is set forth in the next two sub-parts.

A. Arguments that Contextualism Eliminates the Ambiguity Determination

The thesis that contextualism eliminates the ambiguity determination is grounded on the fact that contextualism recognizes non-standard-meaning latent ambiguities. Recall the case of *Western States Construction Co. v. United States*,³¹⁴ discussed above in Part III.³¹⁵ There, the court held that it was permissible to consider trade usage evidence that the contractual phrase “metallic pipe” does not include pipe made of cast iron even though iron is “metallic” according to the standard definition of that word.³¹⁶ Next, here are three illustrations from the *Restatement (Second) of Contracts*—which endorses full contextualism³¹⁷—two of which are based on actual cases.

vary, contradict, or modify the written word.”) (alterations in original; citations and internal quotation marks omitted).

³¹³ See *supra* notes 129–139 and accompanying text.

³¹⁴ 26 Cl. Ct. 818 (1992).

³¹⁵ See *supra* text accompanying notes 134–136.

³¹⁶ See W. States, 26 Cl. Ct. at 820, 826.

³¹⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (AM. L. INST. 1981) (“Words and other conduct are interpreted in light of all the circumstances”); *id.* § 202 cmt. b (“The circumstances for this purpose include the entire situation, as it appeared to the parties. . . .”); *id.* § 202 cmt. a (“The rules in this section . . . do not depend upon any determination that there is an ambiguity”); *id.* § 212(1) (“The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.”); *id.* § 212 cmt. b (“It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or

[§ 220, illus. 8] A leases a rabbit warren to B. The written lease contains a covenant that at the end of the term A will buy and B will sell the rabbits at “60 Pounds Sterling per thousand.” The parties contract with reference to a local usage that 1,000 rabbits means 100 dozen. The usage is part of the contract.³¹⁸

[§ 222, illus. 6] A and B enter into a contract for the purchase and sale of “No. 1 heavy book paper guaranteed free from ground wood.” Usage in the paper trade may show that this means paper not containing over 3% ground wood.³¹⁹

[§212, illus. 4] A and B are engaged in buying and selling shares of stock from each other, and agree orally to conceal the nature of their dealings by using the word “sell” to mean “buy” and using the word “buy” to mean “sell.” A sends a written offer to B to “sell” certain shares, and B accepts. The parties are bound in accordance with the oral agreement.³²⁰

In each of these four examples, a party was allowed to submit interpretive extrinsic evidence that contradicts the express terms of the agreement. *Western States* permitted evidence that “metallic” does not include a type of metal (iron). Section 220, illustration 8 permitted evidence that 1000 means 1200. Section 222, illustration 6 permitted evidence that “free from ground wood” means containing up to 3% ground wood rather than no ground wood. And section 212, illustration 4 permitted evidence that “sell” means “buy.”

Cases of this type—which are emblematic of contextualist contract interpretation³²¹—stand for the proposition that an

ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.”); *id.* § 214 cmt. b (“Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.”).

³¹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 220 illus. 8 (based upon *Smith v. Wilson*, 3 B. & Ad. 728, 110 E.R. 266, 1832 WL 4162 (K.B. 1832)); *see also* 12 WILLISTON, *supra* note 133, § 34:6, at 67–68 (“The word ‘thousand,’ as commonly used, has a very specific meaning, denoting 10 hundreds, but the language of the various trades and localities has given it quite a different meaning.”) (collecting authorities).

³¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 222 illus. 6 (based upon *Gumbinsky Bros. Co. v. Smalley*, 197 N.Y. Supp. 530 (N.Y. App. Div. 1922), *aff’d* 139 N.E. 758 (N.Y. 1923)); *see also* 12 WILLISTON, *supra* note 133, § 34:6, at 62–63 & n.43 (“Usage, for example, may allow a seller to furnish goods containing a small amount of impurities although the contract specifies that they shall be ‘free from’ impurities, when to [sic] those dealing with goods of the kind understand that the term means only that they be commercially pure.”) (collecting authorities).

³²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 212 illus. 4.

³²¹ For sources collecting many comparable authorities, see *Hurst v. W.J. Lake & Co.*, 16 P.2d 627, 629 (Or. 1932); M.C. Dransfield, *Admissibility of Extrinsic Evidence of Custom or Usage to Show That Words Employed in a Contract Unambiguous on Their Face Have a Special Trade Significance*, 89 A.L.R. 1228 (1934); KNIFFIN, 5 CORBIN ON

asserted construction supported by relevant extrinsic evidence need not fit the language of the parties' agreement, as that language is generally understood. Rather, parties are allowed to submit evidence that the express terms of their agreement possess a non-standard meaning *inconsistent* with the standard meaning of those terms. Put another way, if a party contends that a special industry dialect or even a private code—rather than ordinary English—was employed when writing the contract, the court must receive evidence to that effect.³²² And it is

CONTRACTS, *supra* note 32, §§ 24.8, 24.13, 24.16, 24.17; 11 WILLISTON, *supra* note 7, § 32:4; 12 WILLISTON, *supra* note 133, § 34:1, 34:5, 34:6. The *Corbin* treatise specifically notes that “[i]n numberless well-considered cases, proof of local or trade usage, custom, and other circumstances has been allowed to establish a meaning that the written words of the contract would never have been given in the absence of such proof.” KNIFFIN, 5 CORBIN ON CONTRACTS, *supra*, § 24.13, at 119. And *Williston* concurs: “[N]umerous cases have been decided in which words with a clear normal meaning were shown by usage to bear a meaning which was not suggested by the ordinary language used.”) 12 WILLISTON, *supra*, § 34:5, at 45.

For some additional instructive examples, see *Mass. Muni. Wholesale Elec. Co. v. Town of Danvers*, 577 N.E2d 283, 295 (Mass. 1991) (holding that contracting parties properly adopted an alternative definition of “default,” under which lack of payment for any reason—including because the underlying contract was ruled legally invalid—constituted a default, rather than using the standard definition, under which only a failure to pay a legal debt constitutes a default); *H. Molsen & Co., Inc. v. Raines*, 534 S.W.2d 146, 149–50 (Tex. Civ. App. 1975) (upholding the admission of extrinsic evidence showing that 3.5 had a technical trade meaning of a range from 3.5 to 4.9 “even though the writing is perfectly intelligible without” the extrinsic evidence; ultimately concluding that the evidence as a whole supported the conclusion that the parties used “3.5” in the ordinary sense); *Modine Mfg. Co. v. N. E. Indep. Sch. Dist.*, 503 S.W.2d 833, 837–41 (Tex. Civ. App. 1973) (holding that the trial court improperly excluded trade usage evidence that a contract provision providing that the cooling “capacit[y] shall not be less than indicated” allowed for reasonable variation in cooling capacity); RESTATEMENT (SECOND) OF CONTRACTS § 222 illus. 3 (“A promises to act as B’s agent in a certain business, and B promises to pay a certain commission for each ‘order.’ By a local usage in that business, ‘order’ means only an order on which the purchaser has paid a certain price. Unless otherwise agreed, the usage is part of the contract.”); *id.* § 220, Reporter’s Note, cmt. d (“[T]wo-by-four boards are considerably smaller than two inches by four inches in dimension; psychiatrists’ hours are forty-five minutes long. To hold that a contract specifying two-by-fours or a psychiatrist’s hours was so unambiguous as to prevent proof of an industry-wide standard would be foolish, and none of the courts would be likely to do so despite their dicta.”).

³²² Regarding trade usage, see the authorities cited in note 321 *supra*; see also CALAMARI AND PERILLO, *supra* note 7, § 3.17, 145 (“Under some views, a trade usage (or a course of dealing) may be shown to contradict the plain meaning of the language.”); KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.13, at 118 (“Because trade usage supplies a particular meaning that is used by members of the trade, this meaning will often differ from the meaning assigned by the general public.”); *id.* at 119 (“As can be seen from the illustrations just described, such evidence often establishes a special and unusual meaning definitely in conflict with the more common and ordinary usages.”).

Regarding private codes, see Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 59–60 n.134 (1985) (explaining that the *Restatement (Second) of Contracts*—specifically § 212 and its supporting comments and illustrations—endorses the view that parties may adopt a “private code” to be used in interpreting their agreement, under which words can mean the exact opposite

reversible error to reject a proposed non-standard meaning based solely on the judge's reading of the text within the four-corners of the agreement.³²³

This logically flows from the theory of language use in contract drafting that underlies the *Restatement* specifically and contextualism generally. Recall the *Restatement's* hypothesis, previously quoted in Part III,³²⁴ that parties often use non-standard meanings when writing agreements:

Parties to an agreement often use the vocabulary of a particular place, vocation or trade, in which new words are coined and common words are assigned new meanings. . . . Moreover, the same word may have a variety of technical and other meanings. "Mules" may mean animals, shoes or machines; a "ram" may mean an animal or a hydraulic ram; "zebra" may refer to a mammal, a butterfly, a lizard, a fish, a type of plant, tree or wood, or merely to the letter "Z."³²⁵

If "zebra" can mean "a mammal, a butterfly, a lizard, a fish, a type of plant, tree or wood, or merely . . . the letter 'Z,'"³²⁶ then it can mean anything, including a hippopotamus, the Parthenon, Godzilla, or "500 railroad cars full of watermelons."³²⁷ Contractual language, on this view, is infinitely flexible,³²⁸ which destroys the concept of "reasonably susceptible" under which language possesses the capacity to constrain the spectrum of permissible interpretations.³²⁹ It follows that parties must be

of their meaning under standard usage); KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.8, at 54–59 (making the same point regarding the *Restatement* and discussing private codes generally).

³²³ *Hervey v. Mercury Cas. Co.*, 110 Cal. Rptr. 3d 890, 896 (Cal. Ct. App. 2010) (explaining that when a plaintiff argues that contractual terms have a "special meaning . . . the court cannot grant a demurrer but must permit the admission of extrinsic evidence regarding the meaning of the document intended by the parties") (internal quotation marks omitted); *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 655–56 (Cal. Ct. App. 2004) ("Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face").

³²⁴ See *supra* note 131 and accompanying text.

³²⁵ RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. f (AM. L. INST. 1981); *accord id.* § 201 cmt. a.

³²⁶ *Id.* § 202 cmt. f.

³²⁷ See *TKO Equip. Co. v. C & G Coal Co.*, 863 F.2d 541, 545 (7th Cir. 1988) (Easterbrook, J.) ("Under the prevailing will theory of contract, parties, like Humpty Dumpty, may use words as they please. If they wish the symbols 'one Caterpillar D9G tractor' to mean '500 railroad cars full of watermelons,' that's fine—provided parties share this weird meaning.").

³²⁸ See *Ricks*, *supra* note 18, at 795 (explaining that certain leading contextualist decisions endorse the view "that words do not have objective meaning").

³²⁹ See *id.* at 788–89 & n.106 (explaining that the theory of language set forth *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968), is inconsistent with the idea that language sets limits on the scope of potential interpretations).

entitled to introduce extrinsic evidence of special meanings even though such meanings directly contradict the ordinary meaning of written contract terms. And the *Restatement* explicitly acknowledges in multiple places that contextualist interpretation grants precisely this privilege. Comment d to section 220 is illustrative:

There is no requirement that an ambiguity be shown before usage can be shown, and no prohibition against showing that language or conduct have a *different meaning* in the light of usage from the meaning they might have apart from the usage. *The normal effect of a usage on a written contract is to vary its meaning from the meaning it would otherwise have.*³³⁰

As is comment b to section 222: “There is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown, nor is it required that the usage of trade be *consistent* with the meaning the agreement would have apart from the usage.”³³¹

If contextualism allows extrinsic evidence to establish a special meaning that contradicts the ordinary meaning of the express terms of an agreement, then contextualism has eliminated the ambiguity determination; it has eliminated the requirement that contractual language be “reasonably susceptible” to the interpretation argued for by the parties.³³²

Professor Steven Burton endorses this conclusion as to the *Restatement (Second)*. Starting with the “buy”-equals-“sell” illustration discussed above, he explains that “[c]ertainly the word *buy* is not ambiguous in that its array of reasonable meanings includes sell. Under the *Restatement*, this does not matter. Extrinsic evidence of the private agreement is admissible to give meaning to the express agreement.”³³³ Said another way, by permitting evidence that “buy” means “sell,” the *Restatement* allows for the introduction of extrinsic evidence even when the words of the contract are not reasonably susceptible to the supported construction. And if “buy” can mean “sell” when the

³³⁰ RESTATEMENT (SECOND) OF CONTRACTS § 220 cmt. d (emphasis added).

³³¹ *Id.* § 222 cmt. b (emphasis added); *accord id.* § 202 cmt. h (“But the parties may have agreed to displace normal meanings”); *id.* § 220, Reporter’s Note, cmt. d (“The cases supporting the Illustrations below make clear that no matter how plain a meaning may be to a layman, it may turn out to have a different and perhaps even contradictory meaning when a special usage is proven.”).

³³² Note that while the line between consistency and contradiction is blurry on the margins, 12 WILLISTON, *supra* note 133, § 34:7, at 78–79, here we are dealing with clear cases of contradiction.

³³³ BURTON, *supra* note 1, § 4.5.2, at 140.

extrinsic evidence is sufficiently strong, then any language is “reasonably susceptible” to any meaning. In addition, the *Restatement* provides that usage and course of dealing may “qualify” a contract.³³⁴ Professor Burton argues that this too constitutes a rejection of the ambiguity requirement: “This means that . . . a term need not be ambiguous in order for evidence of these elements to be admissible. Even a partial contradiction entails that a meaning is being given to the express term that is not within its array of reasonable meanings.”³³⁵

Various scholars contend that there are multiple types of contextualism—extreme versions that eliminate the ambiguity determination and moderate versions that do not.³³⁶ Some cases draw the same distinction.³³⁷ As a result, secondary sources and judicial opinions often struggle with whether a particular contextualist case or jurisdiction endorses an assessment of ambiguity at stage 1 of the interpretive process.³³⁸ My argument here is that these commentators and judges are mistaken: Contextualism in all of its forms eliminates the ambiguity determination; contextualist interpretation does not require that a reading of an agreement satisfy the reasonable susceptibility standard. Instead, the contextualist authorities discussed in this sub-part stand for the proposition that as long as the relevant extrinsic evidence sufficiently establishes that the parties adopted a special understanding of their contract terms, any language can possess any meaning. The Arizona Supreme Court explained this point in the leading case of *Taylor v. State Farm Mutual Automobile Insurance Company*: “If, for example, parties

³³⁴ See RESTATEMENT (SECOND) OF CONTRACTS §§ 222(3), 223(2) (AM. L. INST. 1981). The U.C.C. is in accord. See U.C.C. § 1-303(d).

³³⁵ BURTON, *supra* note 1, § 4.5.2, at 140. Professor Burton also argues that the U.C.C. eliminates the ambiguity determination on substantially similar grounds. See *id.* § 4.5.3, at 140–43; see also Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the U.C.C. Theory*, 1977 U. Ill. L.F. 811, 815 (“If the usage of trade or course of dealing affects the outcome, extrinsic evidence will seem to modify or contradict the plain meaning of the written agreement.”).

³³⁶ See, e.g., BURTON, *supra* note 1, § 4.2.2, at 115, 117 (identifying one textualist and two contextualist approaches that preserve the ambiguity determination, and one contextualist approach that eliminates it); *id.* § 4.3.3, at 128–34 (distinguishing between contextualist cases that preserve the ambiguity determination and contextualist cases that dispense with it); KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.7, at 39–43, 51–52 (same); *id.* § 24.9, at 61 (same); Kniffin, *supra* note 11, at 98–102 (same); LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.15[E] (This section is entitled “Establishing Ambiguity Through Extrinsic Evidence.”); *id.* § 25.17 (This section is entitled “Dispensing With Ambiguity.”).

³³⁷ See, e.g., *Nautilus Marine Enters., Inc. v. Exxon Mobile Corp.*, 305 P.3d 309, 316–17 (Alaska 2013).

³³⁸ See, e.g., LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.16[A], at 215.

use language that is mutually intended to have a special meaning, and that meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent, even if the language ordinarily might mean something different."³³⁹

Since contextualism has jettisoned the ambiguity determination, what are courts doing when they purport to address whether a contract is "ambiguous" in a case where one side asserts a non-standard meaning? As indicated late in the prior paragraph, they are assessing the *weight* of the evidence: the judge is deciding whether there is sufficient evidence that the parties used a non-standard meaning in executing the agreement to warrant advancing the case to the next stage of the litigation.³⁴⁰ Typically, this means that the judge is analyzing whether a reasonable jury could believe that the parties in fact intended to contract by reference to a special meaning.³⁴¹ Once again, the Arizona Supreme Court explains, quoting Professor Arthur Corbin: "At what point a judge stops listening to testimony that white is black and a dollar is fifty

³³⁹ 854 P.2d 1134, 1139 (Ariz. 1993) (citing, *inter alia*, RESTATEMENT (SECOND) OF CONTRACTS § 212 illus. 4, which is one of the examples I used *supra* at note 320 to explain contextualism's elimination of the ambiguity determination); *accord* Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988) ("Under *Pacific Gas*, . . . the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. If that evidence raises the specter of ambiguity where there was none before, the contract language is displaced. . . ."); *Individual Healthcare Specialists, Inc. v. Bluecross Blueshield of Tenn., Inc.*, 566 S.W.3d 671, 692 (Tenn. 2019) ("Under the *Pacific Gas* approach, if extrinsic evidence shows that the contractual language does not comport with the parties' 'actual' intent, the court may override the written words if doing so is necessary to 'correct' the written agreement."); Gilson et al., *supra* note 6, at 36 ("Under this [contextualist] regime, interpretive doctrines such as the parol evidence rule are treated merely as prima facie guidance, which courts can (and should) override by considering additional evidence of the context of the transaction if they believe that doing so is necessary to substantially 'correct' or complete the parties' written contract by realigning it with its 'true' meaning.").

³⁴⁰ See KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.9, at 61 (explaining that when courts "freely admit proffered extrinsic evidence without asking whether ambiguity exists, the ultimate question is still the weight of this evidence in convincing a court or jury of the parties' intended meanings at formation of the contract"); *see also id.* at 60–61 ("The question should be not the admissibility of relevant extrinsic evidence, but an assessment of the weight of such evidence, including its persuasive quality and cogency, which the court can accomplish only after viewing it. This is true despite the fact that courts have often disposed of flimsy and untrustworthy evidence by labeling it as inadmissible.").

³⁴¹ See *supra* notes 202–205, 213–214, 217–222, and accompanying text; *see also infra* Part VIII.

cents is a matter for sound judicial discretion and common sense.”³⁴²

Contextualism does require that judges and juries grant significant weight to the text of the contract and its ordinary meaning. In fact, the *Restatement* provides that “the words of an integrated agreement remain the most important evidence of intent.”³⁴³ As a result, arguments made before contextualist courts that the parties used a non-standard meaning will often not reach the jury for lack of sufficient evidentiary support. Likewise, juries will reject many such arguments that they do hear.³⁴⁴ This entails that language possesses a type of constraining force, even if it does not restrict the spectrum of possible meanings. In particular, the greater the conflict between

³⁴² *Taylor*, 854 P.2d at 1139 (quoting ARTHUR L CORBIN, 3 CORBIN ON CONTRACTS § 579, at 420 (1960)); *accord* FPI Dev., Inc. v. Nakashima, 282 Cal. Rptr. 508, 521 n.10 (Cal. Ct. App. 1991) (claiming that the contextualist approach “does not embody the unconstrained view of language that some ascribe to it,” but then explaining this concept by reference to the weight of the evidence: the court elaborated that judges are “justified in saying that words are too plain and clear to justify” an interpretation “far removed from common and ordinary usage” when the party advancing such a reading does so “without producing *any substantial evidence* that the other party . . . gave the unusual meaning to the language or had any reason to suppose that the first party did so”) (emphasis added); *Emp. Television Enters., LLC v. Barocas*, 100 P.3d 37, 43 (Colo. Ct. App. 2004) (“In deciding whether usage of trade evidence makes a term ambiguous, a court should first consider any evidence of trade usage that proposes an alternative definition. Thus, trade usage evidence is admissible even if the language is plain and unambiguous on its face, *as long as the evidence is sufficient to suggest an alternative meaning.*”) (emphasis added); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 220 illus. 9 (“In an integrated contract, A promises to sell and B to buy a certain quantity of ‘white arsenic’ for a stated price. The parties contract with reference to a usage of trade that ‘white arsenic’ includes arsenic colored with lamp black. The usage is part of the contract.”). Of course, sometimes courts purporting to apply contextualism are actually using textualism or a hybrid interpretive approach that does in fact preserve the ambiguity determination. *See, e.g., Jones-Hamilton Co. v. Beazer Materials & Serv., Inc.*, 973 F.2d 688, 692–93 (9th Cir. 1992) (explaining that *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968), sets forth the governing standard under California law and requires the consideration of extrinsic evidence at stage 1 of the interpretive process, but relying exclusively on the text of the contract in adopting one party’s reading of an indemnity provision, and affirming the trial court’s refusal to consider the other party’s extrinsic evidence); *see also supra* Part VI (discussing cases where it is impossible to determine whether the court is using textualism or contextualism); *infra* notes 373–397 and accompanying text (discussing a hybrid interpretive approach).

³⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b.

³⁴⁴ *See* Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in CONTRACT TERMS 123, 135 (Andrew Burrows & Edwin Peel, eds., 2007) (“Admitting interpretative material from outside the four corners of the document, however, does not necessarily entail that such material has to be controlling. It is important not to confuse *admissibility* and *weight*. Whilst no barriers as to admissibility are erected, external factors will not usually carry much weight if they conflict with the text of the instrument.”).

the express terms and the extrinsic evidence, the stronger the latter will need to be to override the standard meaning of the text.³⁴⁵ But when the extrinsic evidence is sufficiently powerful, it governs rather than the standard meaning under contextualism.

B. Arguments that Contextualism Preserves the Ambiguity Determination

The last section set forth the thesis that contextualism eliminates the ambiguity determination. This part considers (and rejects) several counterarguments supporting the conclusion that contextualism preserves the ambiguity determination.

The first counterargument focuses on the fact that contextualist judges must address whether a contract has more than one potential meaning during stage 1 of the interpretive process, just like their textualist counterparts. To illustrate, suppose the agreement at issue is neither patently ambiguous nor suffers from a subject-matter latent ambiguity. At summary judgment (which is generally the first stage under contextualism), one party asserts that the court should adopt the standard meaning of the contract's terms based on the text alone, and the other party asserts that the court should adopt a non-standard meaning derived from extrinsic evidence. In such a dispute, the judge is obligated to decide whether (1) only the standard meaning is plausible, justifying a grant of summary judgment, or (2) both asserted meanings are plausible, justifying submission of the interpretation issue to a jury.³⁴⁶ Put simply, the judge must assess whether the contract has more than one potential meaning. But addressing whether the agreement has more than one potential meaning, this argument continues, *just is* an ambiguity determination. And if the judge concludes that both asserted meanings are plausible, then the contract is fairly characterized as "ambiguous" as between those two meanings. Accordingly, contextualism retains an assessment of ambiguity.

This argument fails because it is based upon the wrong definition of "ambiguous." The word "ambiguous" can be understood in a broad sense to apply when language possesses

³⁴⁵ See CORBIN, 3 CORBIN ON CONTRACTS, *supra* note 342, § 579, at 127 ("The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it.").

³⁴⁶ Set aside for now option (3), which is that only the non-standard meaning is plausible because the extrinsic evidence is so strong that no reasonable jury could rule in favor of the party asserting the standard meaning. This possibility is covered in Part VIII.C *infra*.

more than one meaning of *any kind*—for example, a standard meaning and a special meaning.³⁴⁷ Or the term can be understood in a narrow sense to apply solely when the language at issue has more than one *standard* meaning. Only the latter definition incorporates the reasonably susceptible standard under which language restricts the scope of possible interpretations. The former definition allows words to have a non-standard meaning, which is incompatible with reasonable susceptibility, as I explained above.³⁴⁸ Ambiguity-as-reasonable-susceptibility is the version of ambiguity at issue here.³⁴⁹ And the point of the last section was to demonstrate that contextualism jettisons any assessment of *that* type of ambiguity.³⁵⁰ Therefore, while contextualist interpretation does require judges to analyze whether a contract is “ambiguous” in the broad sense, it does not require judges to conduct an ambiguity determination in the narrow sense relevant to this discussion.

The second argument in favor of the proposition that contextualism preserves the ambiguity determination is that contextualism in fact still requires judges to apply the reasonably susceptible standard during the first stage of interpretation. The difference between textualism and contextualism is that the former asks whether *the language of the contract* is “reasonably susceptible” to more than one meaning, whereas the latter asks whether *all* of the evidence submitted regarding the transactional context—*textual and extrinsic together*—is “reasonably susceptible” to more than one meaning.³⁵¹

This position does not work for reasons that are similar to those that defeated the first argument: it employs the wrong understanding of “reasonably susceptible.” Contractual language can possess the pertinent form of constraining force only if the

³⁴⁷ See, e.g., *W. States Constr. Co. v. United States*, 26 Cl. Ct. 818, 822 (1992) (“Ambiguity must still be demonstrated, but it exists when there are competing interpretations, one of which is a specialized trade meaning.”).

³⁴⁸ In particular, see the text accompanying notes 324–335 *supra*.

³⁴⁹ See the text accompanying notes 304–306 *supra*.

³⁵⁰ In particular, see the text accompanying notes 336–339 *supra*.

³⁵¹ One source that hints at this argument is Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the “Just Result” Principle*, 31 LOY. L.A. L. REV. 557 (1998). There, Professor Prince explained that California’s ambiguity determination involves asking whether the language of the contract is reasonably susceptible to the meaning asserted by both parties “given the transactional context.” *Id.* at 586–87; see also RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. a. (AM. L. INST. 1981) (“Even so, the operative meaning is found *in the transaction and its context* rather than in the law or in the usages of people other than the parties.”). In addition, multiple contracts professors have pressed this argument in private discussions with me over the years.

reasonable susceptibility test is applied to the language itself, not to both the language and extrinsic evidence. That is because there is no limit to the potential features of the context surrounding the execution of an agreement. For example, during preliminary negotiations, the parties can adopt any conceivable understanding about language use. And different fields of trade can embrace an infinite variety of vocabularies. Accordingly, mandating that an interpretation be consistent with the text *and* the broader context is not a genuine limitation on the spectrum of potential meanings: as long as the extrinsic evidence sufficiently demonstrates that the parties employed special terminology when executing their agreement, the words of the contract can mean anything.³⁵² Thus, since applying the reasonably susceptible standard to both the text and the context does not actually restrict the possible meanings of the express terms, contextualism lacks the requisite type of ambiguity determination—one in which the words of the contract can only be stretched so far.³⁵³

Note that when applying the reasonable susceptibility standard to the express terms and the broader context together, the evidence *in a specific case* will limit the scope of potential meanings. In other words, only some constructions of the agreement will fit the available combination of textual and extrinsic facts before the court. But the critical point here is that contractual language *standing alone* does not restrict the spectrum of possible readings under contextualism. And it is only when the express terms possess such limiting force as a general matter that an interpretive approach can be said to preserve the ambiguity determination.

The third argument concedes that full contextualism eliminates the ambiguity determination but maintains that partial contextualism preserves it. Recall that partial contextualism permits the use of only certain types of extrinsic

³⁵² Professors Robert Scott and Jody Kraus essentially make the same point in their casebook. They argue that the only basis for analyzing whether a contractual term is “reasonably susceptible” to an asserted meaning is “whether that meaning would be consistent with the court’s view of the *plain and unambiguous meaning* of the term.” ROBERT E. SCOTT & JODY KRAUS, CONTRACT LAW AND THEORY, 592 (4th ed. 2007) (emphasis added). In other words, the reasonably susceptible standard is inherently tied to the ordinary meaning of express terms. Disconnecting the standard from ordinary meaning entails that “there is no meaning to which terms . . . are not reasonably susceptible,” eviscerating the limiting effect of the reasonable susceptibility standard. *Id.* at 593.

³⁵³ See the text accompanying notes 304–306 *supra*.

evidence to establish that a contract is “ambiguous.” For example, under one version of partial contextualism, the assessment of ambiguity is limited to the contractual text and “objective” extrinsic evidence.³⁵⁴ The theory behind this approach is that objective evidence possesses greater reliability than subjective evidence because it is more difficult to fabricate.³⁵⁵ The U.C.C. implements another version of partial contextualism, according to some courts, under which the ambiguity determination is restricted to the words of the agreement and the incorporation tools—course of performance, course of dealing, and usage of trade.³⁵⁶ Some authorities defend this approach on the same ground as the courts adopting objective partial contextualism: evidence of course of performance, course of dealing, and trade usage is more reliable than other types of extrinsic evidence.³⁵⁷ In addition, the U.C.C. itself articulates justifications for granting special privileges to the incorporation tools. First, the Code states that course of performance evidence is “the best indication of what [the parties] intended” a contract to mean.³⁵⁸ Second, the Code presumes “that the course of prior dealings . . . and the usages of trade were taken for granted when the [contract] was phrased.”³⁵⁹

A few decisions applying partial contextualism contend that this approach does not permit interpretive extrinsic evidence to contradict a written agreement. For example, in *Chase Manhattan Bank v. First Marion Bank*, the Fifth Circuit endorsed the incorporation-tools version of partial contextualism under the U.C.C.³⁶⁰ It thus ruled that the trial judge should have considered course of dealing and trade usage evidence that a subordination agreement with an express duration of eighteen months was actually intended to last beyond eighteen months.³⁶¹ Among other points, the court argued that reviewing course-of-dealing and trade-usage evidence does not violate, or constitute an exception to, the parol evidence rule’s prohibition on contradicting the

³⁵⁴ See *supra* note 192 and accompanying text.

³⁵⁵ See *AM Int’l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 575 (7th Cir. 1995); *In re Envirodyne Indust., Inc.*, 29 F.3d 301, 305 (7th Cir. 1994); BURTON, *supra* note 1, § 4.2.2, at 115.

³⁵⁶ See *supra* note 193, 226–232, and accompanying text.

³⁵⁷ See, e.g., *Carter Baron Drilling v. Badger Oil Corp.*, 581 F. Supp. 592, 598 (D. Colo. 1984).

³⁵⁸ U.C.C. § 2-202 cmt. 2.

³⁵⁹ *Id.*

³⁶⁰ 437 F.2d 1040, 1046–48 (5th Cir. 1971) (applying New York law).

³⁶¹ *Id.*

express terms of a contract, even when the extrinsic evidence appears to conflict with those terms:

Certainly the parol evidence rule does not preclude evidence of course of dealing or usage of trade, for such evidence merely delineates a commercial backdrop for intelligent interpretation of the agreement. . . . Evidence to explain ambiguity, establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the general rule because it does not contradict or vary the written instrument, but simply places the court in the position of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing it to writing.³⁶²

In responding to the reasoning in *Chase*, I want to set aside the parol evidence rule. As I will discuss in Part IX, contextualism preserves the parol evidence rule even though it allows the use of extrinsic evidence for purposes of establishing a special meaning that contradicts the standard meaning of contractual language. But the Fifth Circuit's analysis went beyond the parol evidence rule; the court concluded that using the incorporation tools to construe an agreement in the manner described in *Chase* "does not contradict or vary the written instrument."³⁶³ That is not true. Employing extrinsic evidence to establish a non-standard meaning is a form of contradicting the writing because a non-standard meaning is *different* from the ordinary meaning of an agreement's language. And different meanings are necessarily conflicting.³⁶⁴ Indeed, the Fifth Circuit essentially ordered the trial judge to receive evidence that "eighteen months" actually means longer than eighteen months. Such evidence plainly contradicts the standard meaning of the express terms.

Partial contextualism permits parties to use extrinsic evidence to assert a special meaning that is inconsistent with the ordinary meaning of the written words. Because this type of contradiction is authorized, partial contextualism sanctions the advancing of interpretations that do not satisfy the reasonably susceptible standard. Accordingly, both full contextualism and

³⁶² *Id.* at 1046, 1048; see also RESTATEMENT (SECOND) OF CONTRACTS § 220 cmt. d (AM. L. INST. 1981) ("Language and conduct are in general given meaning by usage rather than by the law, and ambiguity and contradiction likewise depend upon usage. Hence usage relevant to interpretation is treated as part of the context of an agreement in determining whether there is ambiguity or contradiction as well as in resolving ambiguity or contradiction.").

³⁶³ *Chase*, 437 F.2d at 1048.

³⁶⁴ See *supra* text accompanying note 313 (articulating the same point); see also *supra* notes 330–331 and accompanying text (explaining the *Restatement's* acknowledgement that contextualist interpretation involves contradiction).

partial contextualism eliminate the ambiguity determination in precisely the same manner.³⁶⁵

One type of partial contextualism warrants further discussion. Suppose we are dealing with a narrow version of partial contextualism under which only *trade usage* evidence can be used to establish a non-standard-meaning latent ambiguity. One could plausibly assert that this approach preserves the ambiguity determination. To explain, systems of industry terminology can be thought of as alternate languages.³⁶⁶ At stage 1 of the interpretive process, the question is whether the parties used standard English or a technical industry dialect in drafting their agreement. Such an inquiry can be analogized to whether the parties used English or French when writing the contract.³⁶⁷ If permitting extrinsic evidence on the latter question (English versus French) does not result in contradiction of the agreement, one might conclude that the same is true for extrinsic evidence regarding the former question (English versus an industry dialect).³⁶⁸

I am unpersuaded by this justification for the third counterargument because it does not address my central

³⁶⁵ While I stated that I want to set aside the parol evidence rule here, it is worth noting that some cases have described contextualist interpretation as an exception to the parol evidence rule. For example, in *Stryker Corp.*, the Sixth Circuit explained that allowing extrinsic evidence to establish a non-standard-meaning latent ambiguity constitutes a “[b]reaking from the parol evidence rule,” but is nevertheless “justified because it ‘enabl[es] courts to ascertain and carry into effect the intention of the contracting parties.’” *Stryker Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 842 F.3d 422, 427 (6th Cir. 2016) (quoting *Ives v. Kimball*, 1 Mich. 308, 313 (1849)) (applying Michigan law). Characterizing this use of extrinsic evidence as an “exception” to the parol evidence rule constitutes a recognition of the fact that contextualism permits a party to introduce interpretive evidence that contradicts a written agreement.

³⁶⁶ *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 305 (7th Cir. 1994) (describing trade usage evidence as “in the nature of specialized dictionaries”); Ricks, *supra* note 18, at 799 n.169 (“For instance, individuals within a trade may employ certain language quite differently than those outside the trade. As a result, [t]he “plain meaning” of a particular phrase might be quite different in a particular industry sub-community than it is in normal everyday speech.” (quoting BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 75 (1993))); *see also* Goldstein, *supra* note 32, at 115 (“Evidence of trade usage . . . allows parties to supplement dictionary definitions and the judge’s understanding of common usage with evidence of other particular public usages of a term among particular groups . . .”).

³⁶⁷ *See* KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.13, at 111 (“Just as a court would interpret according to the French language a contract written in French by two French speakers, a court will interpret according to trade usage a contract written by two parties familiar with a term common in that trade.”); Goldstein, *supra* note 32, at 116 (analogizing trade usage to British English).

³⁶⁸ *See* Anchor Sav. Bank, *FSB v. United States*, 121 Fed. Cl. 296, 311 (2015) (“The use of extrinsic evidence to construe trade terms is best viewed as analogous to the lexicography rule for dictionaries rather than as an actual exception to the rule prohibiting extrinsic evidence for unambiguous contract provisions.”).

conceptual claim: Under all types of partial contextualism, language can possess any meaning, just as it can under full contextualism. And that is so even when every piece of textual evidence within the four corners of an agreement supports the conclusion that the parties employed standard English when preparing the instrument. Therefore, since the words of a contract do not restrict the scope of potential interpretations, partial contextualism dispenses with the reasonably susceptible standard.

There is an additional problem with basing the third counterargument on a version of partial contextualism that restricts the ambiguity determination to the text of an agreement and trade usage: Little authority supports such an interpretive system. While my research was not exhaustive, most cases that I found embracing partial contextualism permit at least some categories of extrinsic evidence that are specific to the parties to play a role at stage 1—such as course of dealing and course of performance. This type of evidence can be employed to establish a meaning exclusive to the parties.³⁶⁹ If such a meaning is possible, then the alternate language theory no longer applies to partial contextualism because private codes specific to contracting persons cannot plausibly be understood as distinct languages in the way French or an industry dialect can be.³⁷⁰ Accordingly, partial contextualism, at least as generally used in the real world, eliminates the ambiguity determination.³⁷¹

³⁶⁹ See *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968) (“The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage but exists whenever the parties’ understanding of the words used may have differed from the judge’s understanding.”) (footnote omitted).

³⁷⁰ *Cf. Ricks*, *supra* note 18, at 788–89 (explaining that the “reasonably susceptible” standard “is an objective standard and as such must depend . . . on something *public*”) (emphasis added).

³⁷¹ Some additional explanation is in order. Based on my review, the bulk of the cases applying partial contextualism are decided under the U.C.C. And the Code’s version of partial contextualism requires judges to consider course of performance and course of dealing, as well as usage of trade, when assessing ambiguity. See *supra* notes 193, 226–237, 356–359, and accompanying text. Likewise, common law opinions that are (or at least appear to be) employing partial contextualism often allow course of performance evidence at stage 1 of the interpretive process. See, e.g., *United Fire & Cas. Co. v. Arkwright Mut. Ins. Co.*, 53 F. Supp. 2d 632, 640–41 (S.D.N.Y. 1999); *Time Warner Cable of N.Y.C. v. City of New York*, 943 F. Supp. 1357, 1390 (S.D.N.Y. 1996); *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987, 989–90, 992, 995 (S.D.N.Y. 1968); *Stephens v. Radium Petrol. Co., Inc.*, 550 N.W.2d 39, 43 (Neb. 1996). Note further that courts endorsing “objective” evidence partial contextualism, see *supra* notes 192, 354–355, and accompanying text, typically permit parties to submit evidence beyond trade usage during the ambiguity determination. See, e.g., *Stryker Corp. v. Nat’l Union Fire Ins. Co. of*

The most that can be said for partial contextualism is that this interpretive approach makes it harder than full contextualism for a party to establish that a contract is “ambiguous.” It does so by limiting the types of evidence that possess the capacity to create an ambiguity. This mitigates the harm some might see in allowing all forms of extrinsic evidence—including self-serving testimony regarding preliminary negotiations—to establish that the parties may have used a non-standard meaning, thereby advancing the case to the next stage of the interpretive process.³⁷²

Pittsburgh, 842 F.3d 422, 428 (6th Cir. 2016) (“But in the ordinary course, a latent ambiguity must be revealed by objective means—for instance, an admission, uncontested evidence, or the testimony of a disinterested third party.”). And even the cases holding that only extrinsic evidence provided by neutral third parties may establish a non-standard-meaning latent ambiguity, *see, e.g., In re Envirodyne Indus., Inc.*, 29 F.3d 301, 305 (7th Cir. 1994), should not be read to restrict stage 1 to the text and industry practice. Third parties can testify regarding (1) other surrounding commercial circumstances, and (2) understandings specific to the contracting parties, though they probably will not have the latter type of information in most cases.

To be sure, many decisions provide that judges may review trade usage when assessing ambiguity without mentioning other types of extrinsic evidence. *See, e.g., In re Tech. for Energy Corp.*, 140 B.R. 214, 229 (Bankr. E.D. Tenn. 1992). But I came across no opinion expressly stating that trade usage is the *only* category of extrinsic evidence a party may present during the ambiguity determination. *Compare* *Cheaves v. United States*, 108 Fed. Cl. 406, 409 (2013) (“Although review of an unambiguous contract is generally limited to the contract itself, there are exceptions to the rule. *One* such exception is where trade practice and custom may inform the meaning of an otherwise unambiguous term.”) (emphasis added). The closest I found to that type of case are authorities *suggesting* that stage 1 must be limited to the four corners and trade usage. For example, a line of federal decisions applying New York law endorses the following principle: “[A]n ambiguity exists where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.” *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 184 (2d Cir. 2003) (internal quotation marks omitted); *accord* *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992); *Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613, 618 (S.D.N.Y. 2001); *see also* Goldstein, *supra* note 32, at 76–79, 112–13, 126–27 (proposing an interpretive system that essentially restricts the ambiguity determination to the text of the contract and trade usage).

³⁷² Note that in cases where the parties offer no extrinsic evidence of the type allowed at stage 1 under partial (or full) contextualism, the court must assess ambiguity by analyzing only the text within the four-corners of the agreement. In other words, partial and full contextualism operate just like textualism when the parties do not present any qualifying extrinsic evidence at stage 1. But it does not follow that either form of contextualism preserves the ambiguity determination in the relevant sense. The issue here is whether language imposes an absolute limit on the spectrum of possible meanings. *See supra* notes 304–306 and accompanying text. If language does not have that capacity, then the ambiguity determination has been eliminated. *See supra* notes 328–329, 332, and accompanying text. And under both partial and full contextualism, language can indeed possess any meaning if the permissible extrinsic evidence is strong enough. *See supra* text accompanying note 365. *See also infra* notes 398–399 and accompanying text (explaining that contextualist courts carefully analyze the ordinary meaning of language within the four corners of a contract even though such language does not have the limiting power it possesses under textualism).

The fourth argument is that some contextualist authorities preserve the ambiguity determination because they only permit extrinsic evidence to qualify the express terms of a contract. Such evidence may not be used to completely override express terms. To explain this distinction, consider the case of *Nanakuli Paving and Rock Company v. Shell Oil Company*.³⁷³ Nanakuli, an asphaltic paving contractor, and Shell entered into a contract under which Shell was to supply asphalt to Nanakuli at “Shell’s posted price at the time of delivery.”³⁷⁴ Nanakuli argued that the contract obligated Shell to provide Nanakuli with “price protection.”³⁷⁵ This means that after Shell raised its asphalt price, it was required to continue charging Nanakuli the old price for quantities Nanakuli needed to fulfill its obligations under construction contracts for which Nanakuli had made its bid using Shell’s original price.³⁷⁶ When Shell failed to provide such protection after a price increase, Nanakuli sued for breach.³⁷⁷ At trial, Nanakuli submitted both course of performance and trade usage evidence that price protection was a component of the parties’ contract, which the trial court admitted.³⁷⁸

On appeal, Shell argued that price protection could not be construed as reasonably consistent with the express term providing for sales at Shell’s posted price.³⁷⁹ The Ninth Circuit disagreed, explaining that incorporation tools evidence is admissible when it does not “totally negate” an express term but instead merely qualifies the term.³⁸⁰ An example of total negation would be using extrinsic evidence to establish that Nanakuli rather than Shell was entitled to set the price for asphalt under the contract.³⁸¹ That would entirely override the provision stating asphalt was to be sold at “*Shell’s* posted price at the time of delivery.” But including price protection in the agreement only created a limited exception to the express provision that Nanakuli must pay Shell’s posted price.³⁸² Most of Shell’s asphalt was indeed sold at “Shell’s posted price.” Price protection merely requires that Shell sell to Nanakuli at the *old* posted price rather

³⁷³ 664 F.2d 772 (9th Cir. 1981).

³⁷⁴ *Id.* at 777–78.

³⁷⁵ *Id.* at 777.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 778.

³⁷⁹ *Id.* at 779.

³⁸⁰ *Id.* at 780, 805.

³⁸¹ *Id.* at 805.

³⁸² *Id.* at 780, 805.

than the current one for brief periods after a price increase. Thus, price protection only qualifies or “cuts down” the posted price term; it does not completely negate it.³⁸³ In sum, *Nanakuli* stands for the proposition that interpretive extrinsic evidence can support a *partial* contradiction of express terms, but not a *complete* contradiction.³⁸⁴

Many cases decided under the U.C.C. are in accord with *Nanakuli*.³⁸⁵ As are some common law authorities.³⁸⁶ Does this

³⁸³ *Id.*

³⁸⁴ *Id.* It might be better to conceptualize the price protection evidence in *Nanakuli* as supporting the existence of a distinct contractual term rather than as assisting in construing the phrase “Shell’s posted price.” But either way, *Nanakuli* is particularly useful for explaining the distinction between a partial contradiction and a complete contradiction.

³⁸⁵ See Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63, 69–70, 82, 84–85 (2015) (concluding that the *Nanakuli* approach is the majority rule under the U.C.C.); but cf. Silverstein, *supra* note 106, at 1080–81 n.399 (collecting authorities finding that other approaches are the majority view under the Code). For another helpful example, see *State ex rel. Nichols v. Safeco Ins. Co. of Am.*, 671 P.2d 1151, 1154–55 (N.M. Ct. App. 1983) (“Evidence as to usage of trade is admissible in construing a written contract . . . to add to, subtract from or qualify the terms of the agreement or to explain their meaning, even if contradictory to the words therein. Parol evidence is not admissible, however, when it would *change the basic meaning* of the contract and produce an agreement *wholly different* from, *wholly inconsistent* with the written agreement and which tends to distort the expressly stated written understanding of the parties.” (emphasis added and citations omitted)) (holding that the trial court correctly refused to consider one party’s proffer of trade usage evidence that leased equipment could be returned early for a rent deduction because the evidence was inconsistent with the express terms of the contract which specified a rental price and a rental period of eight months).

³⁸⁶ See, e.g., *Bohler-Uddeholm Am. Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 95 n.4 (3d Cir. 2001) (“In our analysis, we differentiated between using extrinsic evidence to support an alternative interpretation of a term that sharpened its meaning (legitimate) and an interpretation that completely changed the meaning (illegitimate): ‘extrinsic evidence may be used to show that “Ten Dollars paid on January 5, 1980,” meant ten Canadian dollars, but it would not be allowed to show the parties meant twenty dollars.’”) (referring to and quoting from *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1013 (3d Cir. 1980)); *id.* at 93 (“Furthermore, the alternative meaning that a party seeks to ascribe to the specific term in the contract must be reasonable; courts must resist twisting the language of the contract beyond recognition.”); *In re Tobacco Cases I*, 111 Cal. Rptr. 3d 313, 320–21 (Cal. Ct. App. 2010) (“The reason underlying the rule [allowing evidence of course of performance] is that it is the duty of the court to give effect to the intention of the parties where it is not *wholly at variance* with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. . . . Here, as discussed, the [master settlement agreement’s] definition of the term ‘cartoon’ is not susceptible to the interpretation Reynolds urges. Accordingly, we do not consider course of performance evidence.”) (emphasis added and citations and internal quotation marks omitted); *Winet v. Price*, 6 Cal. Rptr. 2d 554, 558–60 (Cal. Ct. App. 1992) (“Further, parol evidence is admissible only to prove a meaning to which the language is ‘reasonably susceptible,’ *not to flatly contradict the express terms of the agreement*. *Winet’s* evidence violates this tenet, because it seeks to prove that a release of unknown or unsuspected claims was *not* intended to include unknown or unsuspected claims.”) (first emphasis added and citations omitted); *Gerdlund v. Elec. Dispensers Int’l*, 235 Cal. Rptr. 279, 283–84 (Cal. Ct. App.

interpretive approach—under which extrinsic evidence may only support an interpretation that *partially* contradicts the language of a contract—preserve the ambiguity determination? Professor Steven Burton believes that the answer is no. He reasons that “[e]ven a partial contradiction entails that a meaning is being given to the express term that is not within its array of reasonable meanings.”³⁸⁷ In other words, Professor Burton maintains that any type of contradiction, partial or complete, violates the reasonably susceptible standard. And in a prior article, I articulated a similar view.³⁸⁸

But if complete contradictions are ruled out by the *Nanakuli* approach, then the language of an agreement, by itself, imposes genuine limits on the spectrum of possible meanings the agreement may possess. Contractual language is not infinitely flexible under this approach. The express terms of a contract bar the parties from advancing certain readings no matter how strong the extrinsic evidence. As a result, contract language possesses “a critical breaking point,”³⁸⁹ as required by the reasonable susceptibility standard.

The question thus appears to be this: What is essential to the concept of reasonable susceptibility? Is it enough that language, standing alone, places *some* objective limits on the interpretive process, such as the restriction on complete contradiction adopted by *Nanakuli*? Or must the limits be more robust as Professor Burton asserts, restricting contract interpretation to readings that do not *in any way* contradict the express terms? I do not have an answer here. In part, that is because the concept of “reasonably susceptible” is not sufficiently delineated in the

1987) (explaining that a provision permitting termination of the contract at will cannot be interpreted to permit termination only for good cause because the two interpretations are “totally inconsistent” and “[t]estimony of intention which is contrary to a contract’s express terms . . . does not give meaning to the contract: rather it seeks to substitute a different meaning. It follows under [*Pacific Gas*] that such evidence must be excluded.”); see also *Stryker Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 842 F.3d 422, 427–28 (6th Cir. 2016) (applying Michigan law) (endorsing a form of partial contextualism but holding that extrinsic evidence could not be used to show that an insurance policy covering claims settled “with the written consent” of the insurer actually meant that no consent was required if a claim was settled for under the coverage limits in the policy).

³⁸⁷ BURTON, *supra* note 1, § 4.5.2, at 140.

³⁸⁸ See Silverstein, *supra* note 106, at 1079 (“[Textualism] requires the judge to determine whether the language contained within the four corners of a written agreement is reasonably susceptible to the interpretations asserted by both parties. But that simply means that the judge must decide whether one of the parties is trying to contradict rather than construe the contractual language with its alleged understanding of the agreement.”).

³⁸⁹ See *supra* note 305 and accompanying text.

caselaw to arbitrate between Professor Burton's view and the alternative. But more importantly, the answer does not matter. That is because the *Nanakuli* method of contract interpretation is not actually a form of contextualism. Instead, it is a hybrid approach that falls between contextualism and textualism.

Recall the essence of contextualist interpretation: The parties are entitled to submit extrinsic evidence during the first stage of the interpretive process.³⁹⁰ In fact, it is reversible error when a trial judge refuses to consider extrinsic evidence in deciding whether a contract is "ambiguous."³⁹¹ Accordingly, the ambiguity determination must take place after discovery under contextualism—i.e., after the pleadings stage³⁹²—except in special circumstances.³⁹³

The essence of textualism is the four-corners rule: the first stage of the interpretive process is restricted to the language falling within the four corners of the contract.³⁹⁴ Because the court is prohibited from considering extrinsic evidence during the ambiguity determination, that determination can occur at the pleading stage under textualism.³⁹⁵

The *Nanakuli* approach operates like contextualism in some cases and like textualism in other cases. That decision and comparable authorities provide that a judge may consider extrinsic evidence during the first stage of the interpretive process if the evidence is used to advance a construction that *partly* contradicts the agreement. If one of the parties advances a reading that *completely negates* an express provision, however, then the court should adjudicate the matter solely via reference to the terms of the contract. Thus, for example, had *Nanakuli* argued that "Shell's posted price" actually meant "Nanakuli's posted price," the court would have granted a motion to dismiss by Shell based solely on the complaint and the contract. This makes the *Nanakuli* approach a hybrid school of interpretation: (1) Contextualism virtually always permits extrinsic evidence at stage 1; (2) textualism never does;³⁹⁶ and (3) *Nanakuli* allows extrinsic evidence at stage 1 *some* of the time. Under the *Nanakuli*

³⁹⁰ See *supra* text accompanying notes 52–53, 60–61, 199, 209, and 213.

³⁹¹ See *supra* note 323 and accompanying text.

³⁹² See *supra* text accompanying notes 199–200, 213, and 218; see also *supra* the text early in the paragraph after note 240 and *supra* Chart 1 in Part V.B (located at note 238).

³⁹³ See *supra* text accompanying notes 241–244.

³⁹⁴ See *supra* text accompanying notes 37 and 58–59.

³⁹⁵ See *supra* text accompanying notes 169 and 178; see also *supra* Chart 1 in Part V.B (located at note 238).

³⁹⁶ Once again, set aside subject-matter latent ambiguities.

framework, some cases will address ambiguity at the pleading stage based solely on the four corners of the contract (as with textualism), whereas in others the judge will conduct the ambiguity determination at summary judgment based on the text of the agreement and extrinsic evidence (as under contextualism).³⁹⁷

Since *Nanakuli* is a hybrid method of interpretation, “quasi-ambiguity determination” is the most logical way to describe the first stage of that approach. *Nanakuli* permits some level of contradiction. Professor Burton is thus correct that this approach does not fully embrace the “reasonably susceptible” standard. However, because language places absolute limits on the spectrum of contractual meaning under *Nanakuli*, the case does embrace the reasonably susceptible standard to at least some degree. Hence my proposal that we use the phrase “quasi-ambiguity determination.”

The issue addressed in this section is whether *contextualism* preserves the ambiguity determination. The *Nanakuli* approach is not actually a type of contextualism. The structure of that approach is thus ultimately irrelevant to resolving the central issue here.

All of the counterarguments challenging my conclusion that contextualism eliminates the assessment of ambiguity are invalid. Therefore, contextualist interpretation does indeed dispense with the requirement that the proffered readings of a contract satisfy the reasonably susceptible standard.

C. Further Points Regarding Contextualism and the Ambiguity Determination

Several additional points regarding contextualism and ambiguity are worth noting. First, when I state that contextualism “eliminates” the ambiguity determination, I mean to convey only that contextualism jettisons the mandate that the construction of a contract satisfy the reasonably susceptible standard. As noted at the end of Part VII.A,³⁹⁸ the express terms of an agreement remain the most significant evidence of intent in contextualist interpretation. The level of clarity within the four

³⁹⁷ Note that in a prior article, I stated that the *Nanakuli* approach “can fairly be labeled as contextualist.” See Silverstein, *supra* note 106, at 1081; *id.* at 1076–77 (describing the *Nanakuli* approach). However, that was for the purposes of a potential empirical study, not for an article regarding “conceptual clarification.”

³⁹⁸ See *supra* notes 343–344 and accompanying text.

corners of a contract is thus relevant at both stages of the interpretive process even if contractual language places no absolute restriction on the scope of potential meanings. Accordingly, courts in contextualist jurisdictions do in fact assess whether a patent ambiguity exists—i.e., they carefully analyze the ordinary meaning of contract language.³⁹⁹ Additional detail regarding the impact of a patent ambiguity under contextualism is presented in Part VIII.

Second, assuming contextualism eliminates the assessment of ambiguity, what effect does that have on the parol evidence rule? By dispensing with the ambiguity determination, contextualist interpretation permits the use of interpretive extrinsic evidence to contradict the written terms of a contract.⁴⁰⁰ Does this entail that contextualism also eliminates the contradiction prong of the parol evidence rule?⁴⁰¹ Some authorities have suggested that conclusion.⁴⁰² This issue is covered in Part IX.

Third, contextualist courts might find certain “extreme” contradictions to be intolerable even if they generally permit extrinsic evidence to completely override the ordinary meaning of an express term. Recall the *Restatement* illustration in which “thousand” meant 1200.⁴⁰³ Or consider *Columbia Nitrogen Corporation v. Royster Company*, where the court ruled that extrinsic evidence that express price and quantity terms in a contract were only projections rather than binding obligations should have been submitted to the jury.⁴⁰⁴ Contextualist judges willing to endorse these examples might balk at the following hypothetical.

Suppose a written contract provides that “A shall sell his 2010 Toyota Camry to B for \$5,000.” After a dispute erupts, B sues A asserting that the contract language just quoted actually requires that A purchase B’s house for \$250,000 pursuant to the private code adopted orally by the parties during preliminary negotiations, and that A is in breach for not paying the \$250,000. A moves to dismiss

³⁹⁹ See, e.g., *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 656–62 (Cal. Ct. App. 2004) (discussing thoroughly both the text of the disputed contract and the proffered extrinsic evidence in deciding whether the agreement was ambiguous).

⁴⁰⁰ See *supra* notes 321–331 and accompanying text.

⁴⁰¹ The contradiction prong of the parol evidence rule is discussed *supra* in the text accompanying notes 71–72.

⁴⁰² See *infra* notes 537–540 and accompanying text.

⁴⁰³ RESTATEMENT (SECOND) OF CONTRACTS § 220 illus. 8 (AM. L. INST. 1981).

⁴⁰⁴ 451 F.2d 3, 6–11 (4th Cir. 1971); *accord* *Am. Mach. & Tool Co., v. Strite-Anderson Mfg. Co.*, 353 N.W.2d 592, 596–98 (Minn. Ct. App. 1984).

B's complaint. I suspect that at least some contextualist courts would find that extrinsic evidence can *never* be strong enough to support the interpretation advanced by B—even if the evidence included the testimony of “twenty bishops.”⁴⁰⁵ And thus these courts would grant A's motion to dismiss. Such an example arguably goes beyond the “complete negation” of a term. Instead, it wholly reworks the entire contract. If any contextualist authorities would resolve such a case on the pleadings, then those courts also arguably embrace the reasonable susceptibility standard to at least some degree.⁴⁰⁶

However, my example here is so farfetched that I do not think it should influence how we label interpretive approaches. Accordingly, it is proper to classify the *Columbia Nitrogen* court and the *Restatement* as “contextualist” even though, in theory, some interpretations might be so bizarre that these authorities would not permit extrinsic evidence on the matter, much like the courts applying the hybrid system of *Nanakuli* or textualism.

Fourth, recall the discussion in Part VI regarding how it is often difficult or impossible to establish whether a court is using textualism or contextualism. The same problem arises with respect to whether a court is using one of those two approaches or the hybrid approach of *Nanakuli*. *ACL Technologies, Inc. v. Northbrook Property & Casualty Insurance Company* is illustrative.⁴⁰⁷

In that case, the California Court of Appeal appeared to endorse the hybrid approach in two ways. First, it said that extrinsic evidence cannot be used to completely negate an express term: “Indeed, if there is a key word in California's statement of the parole evidence rule it is ‘contradict.’ Whatever

⁴⁰⁵ *Hotchkiss v. Nat'l City Bank of N.Y.C.*, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.) (“If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.”).

⁴⁰⁶ *See, e.g., Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1139 (Ariz. 1993) (“[T]he judge may properly decide not to consider certain offered evidence because it does not aid in interpretation but, instead, varies or contradicts the written words. This might occur when the court decides that the asserted meaning of the contract language is so unreasonable or extraordinary that it is improbable that the parties actually subscribed to the interpretation asserted by the proponent of the extrinsic evidence.”) (citations omitted); *Consol. World Invs., Inc. v. Lido Preferred Ltd.*, 11 Cal. Rptr. 2d 524, 527 (Cal. Ct. App. 1992) (“Thus if the contract calls for the plaintiff to deliver to defendant 100 pencils by July 21, 1992, parole evidence is not admissible to show that when the parties said ‘pencils’ they really meant ‘car batteries’ or that when they said ‘July 21, 1992’ they really meant ‘May 13, 2001.’”).

⁴⁰⁷ 22 Cal. Rptr. 2d 206 (Cal. Ct. App. 1993).

else extrinsic evidence may be used for, it may not be used to show that words in contracts mean the *exact opposite* of their ordinary meaning.”⁴⁰⁸ Second, the court stated that language constrains the scope of possible interpretations: “Unlike the deconstructionists at the forefront of modern literary criticism, the courts still recognize the possibility of an unambiguous text.”⁴⁰⁹ “With all due respect to the critics of *Pacific Gas*, the case is not an endorsement of linguistic nihilism.”⁴¹⁰ But immediately after the last quotation, the California Court of Appeal reversed course and endorsed full-blown contextualism by explaining that extrinsic evidence may demonstrate that a word in a contract holds a special meaning that is indeed the exact opposite of its ordinary meaning:

Despite what might be called [*Pacific Gas*’s] “deconstructionist” dictum, the actual holding of the case is a fairly modest one: courts should allow parol evidence to explain *special* meanings which the individual parties to a contract may have given certain words. No such evidence, of course, was ever offered in the case before us. There is nothing to indicate, for example, that an agent of Northbrook told an officer of ACL that, despite the ordinary meaning of “sudden” as “not gradual,” Northbrook would agree to give the word a special meaning in the particular policy it was about to issue so that it would mean “gradual.” That is the sort of thing contemplated by *Pacific Gas*.⁴¹¹

“Gradual” is the exact opposite of “sudden.” If “sudden” can mean “gradual” when the extrinsic evidence is strong enough, then total negation is allowed and language places no genuine limits on the spectrum of possible interpretations.⁴¹²

Fifth, part of the reason that the contextualist and hybrid-approach jurisprudence is so confused regarding the roles of ambiguity and contradiction in the interpretive process is that contextualism is built upon a fundamental conceptual mistake. While it was not the first case to adopt contextualist

⁴⁰⁸ *Id.* at 217 (emphasis added and citation and footnote omitted).

⁴⁰⁹ *Id.* (quoting *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass’n*, 783 F.2d 1234, 1238 (5th Cir. 1986)).

⁴¹⁰ *Id.* at 219.

⁴¹¹ *Id.* (emphasis in original and footnote omitted); *id.* at 217–19 (explaining further that no valid extrinsic evidence was presented that the parties adopted a special meaning under which the word “sudden” included the concept “gradual”).

⁴¹² For other decisions applying California law where it is impossible to determine which interpretive approach the court is using, see *RLI Ins. Co. v. City of Visalia*, 297 F. Supp. 3d 1038, 1048–51 (E.D. Cal. 2018), and *BHC Interim Funding II, L.P. v. FDIC*, 851 F. Supp. 2d 131, 139–41 (D.D.C. 2012).

interpretation,⁴¹³ *Pacific Gas and Electric Company v. G. W. Thomas Drayage and Rigging Company*⁴¹⁴ is the watershed decision that paved the way for modern acceptance of contextualism.⁴¹⁵ There, Chief Justice Roger Traynor, on behalf of the California Supreme Court, wrote the following when rejecting the four-corners rule:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.⁴¹⁶

In the years since *Pacific Gas* was decided, numerous contextualist authorities have quoted or paraphrased this language in setting forth the operation of stage 1 of the interpretive process.⁴¹⁷ But Chief Justice Traynor's statement is confused.

Again, here is what he wrote: "The test . . . is not whether [the instrument] appears . . . *unambiguous* on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is *reasonably susceptible*."⁴¹⁸ That is internally inconsistent. Chief Justice Traynor is saying the test is not ambiguity; it is reasonable susceptibility. But ambiguity and reasonable susceptibility are the same thing. Language *just is* ambiguous when it is reasonably susceptible to more than one meaning.⁴¹⁹ Distinguishing between "ambiguity" and "reasonable susceptibility" is like distinguishing between "bachelors" and "unmarried males."⁴²⁰

⁴¹³ See, e.g., *Atl. N. Airlines v. Schwimmer*, 96 A.2d 652, 656 (N.J. 1953).

⁴¹⁴ 442 P.2d 641 (1968).

⁴¹⁵ Silverstein, *supra* note 13, at 275; accord Carlton J. Snow, *Contract Interpretation: The Plain Meaning Rule in Labor Arbitration*, 55 FORDHAM L. REV. 681, 690 (1987) (recognizing *Pacific Gas* as initiating the "frontal attack on the plain meaning rule").

⁴¹⁶ *Pacific Gas*, 442 P.2d at 644.

⁴¹⁷ See, e.g., *Halicki Films, LLC v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1223 (9th Cir. 2008) (applying California law); *Pennzoil Co. v. Fed. Energy Regul. Comm'n*, 645 F.2d 360, 388 (5th Cir. 1981) (applying federal common law); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1141 (Ariz. 1993); *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992); *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 516 (R.I. 1979).

⁴¹⁸ *Pacific Gas*, 442 P.2d at 644 (emphasis added).

⁴¹⁹ See BURTON, *supra* note 1, § 1.3.3, at 32 (explaining that the *Pacific Gas* reasonably susceptible test "is the same as a requirement that the language be ambiguous—that it reasonably bear more than one meaning").

⁴²⁰ Admittedly, Chief Justice Traynor wrote that the improper test is whether an agreement "is . . . unambiguous *on its face*," *Pacific Gas*, 442 P.2d at 644 (emphasis

It is puzzling why Chief Justice Traynor attempted to create such a distinction. By the time of *Pacific Gas*, it was well established that a contract is ambiguous when it is reasonably susceptible to more than one meaning. Numerous cases recognized this definition,⁴²¹ including some in California.⁴²² As did contracts treatises⁴²³ and general legal encyclopedias.⁴²⁴

added), whereas he later said that reasonable susceptibility is judged based on the contract *and* extrinsic evidence, *id.* Thus, while Traynor was clearly using the traditional definition of ambiguity, see *supra* notes 347–350 and accompanying text (describing two definitions of ambiguity), it is possible that he was employing a non-traditional understanding of “reasonably susceptible,” such as the broader notion discussed *supra* at the text accompanying notes 351–353. But because Traynor did not elaborate further, we cannot know for certain precisely what he meant. Moreover, it was illogical for the judge to juxtapose “ambiguity” in its *traditional* sense with “reasonably susceptible” in its *non-traditional* sense when authorities had long considered the two concepts to be synonymous. See *infra* notes 421–423 and accompanying text. In any event, Traynor’s words have created much confusion, see, e.g., *Hayter Trucking, Inc. v. Shell W. E&P, Inc.*, 22 Cal. Rptr. 2d 229, 238 (Cal. Ct. App. 1993) (“Thus, parol evidence may be admitted to explain the meaning of a writing when the meaning urged is one to which the written contract term is reasonably susceptible *or* when the contract is ambiguous.”) (emphasis added), including among contracts professors, see, e.g., Kniffin, *supra* note 11, at 100 n.130 (attempting to distinguish between “ambiguity” and “reasonably susceptible”).

⁴²¹ See, e.g., *Zehnder v. Michaud*, 145 F.2d 713, 714 (8th Cir. 1944) (“A contract is ambiguous when it is susceptible of two different meanings.”); *Friedman v. Va. Metal Prod. Corp.*, 56 So. 2d 515, 517 (Fla. 1952) (“A word or phrase in a contract is ‘ambiguous’ only when it is of uncertain meaning, and may be fairly understood in more ways than one. The term ‘ambiguous’ means susceptible of more than one meaning.”) (citation omitted); *Blevins v. Riedling*, 158 S.W.2d 646, 648 (Ky. 1942) (“A contract is ambiguous when its language is reasonably susceptible of different constructions.”); *Emps. Liab. Assur. Corp. v. Morse*, 111 N.W.2d 620, 624 (Minn. 1961) (“A contract is ambiguous if it is reasonably susceptible to more than one construction.”). Courts sometimes articulated the same substantive definition using slightly different terminology. See, e.g., *United Packinghouse Workers v. Maurer-Neuer, Inc.*, 272 F.2d 647, 649 (10th Cir. 1959) (“Usually an ambiguity is said to exist when from a consideration of the entire instrument the meaning of the controverted words is capable of more than one conclusion.”) (citing *Ambiguity*, BLACK’S LAW DICTIONARY 105 (4th ed. 1951)); *Gardner v. Spurlock*, 339 P.2d 65, 69 (Kan. 1959) (“Ambiguity in a written instrument does not appear until application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.”) (internal quotation marks omitted).

⁴²² See, e.g., *Holtham v. Savory*, 238 P. 136, 138 (Cal. Ct. App. 1925) (“The rule contended for by appellant is only applicable where the language used in the contract is ambiguous, or fairly susceptible of either one of two interpretations contended for by the parties, in which event parol evidence is always admissible for the purpose of construing the contract according to the true intent of the parties at the time of its execution.”); see also Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 SW. U. L. REV. 1, 50 (1995) (explaining that the reasonable susceptibility test articulated by Chief Justice Traynor in *Pacific Gas* “was not new in California law”).

⁴²³ See, e.g., 2 WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS § 1517, at 791–92 (1913) (explaining that a contract is ambiguous when it is “susceptible of more than one construction”); 4 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 2036, at 3518 (2d ed. 1920) (“If a promise is so ambiguous as to be susceptible of more than one interpretation. . . .”); LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF

Professor Val Ricks identifies another way in which *Pacific Gas* is internally inconsistent.⁴²⁵ In his opinion, Chief Justice Traynor endorsed the infinite flexibility of language:

Words, however, do not have absolute and constant referents. A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.⁴²⁶

But Chief Justice Traynor also embraced the principle that an interpretation of a contract is valid only if the language of the agreement is reasonably susceptible to the proposed reading.⁴²⁷ This standard presumes that language can confine the spectrum of possible meanings—i.e., that language is *not* infinitely flexible.

Given the incoherence flowing through the fountainhead of contextualism, it should not be surprising that subsequent authorities using that approach to interpretation—or the hybrid approach—are riddled with confusion. Indeed, the *Restatement (Second) of Contracts* suffers from this problem. As noted above, the *Restatement* adopts a theory of language use in contracting under which the express terms of an agreement can possess any meaning.⁴²⁸ And the *Restatement* expressly provides that interpretive extrinsic evidence can be used to vary the meaning of a contract—to contradict it.⁴²⁹ But the *Restatement* also states in two places that extrinsic evidence may only be used to support an interpretation if the language of the parties' contract is "reasonably susceptible" to the asserted reading.⁴³⁰ And

CONTRACTS § 66, at 239 (1954) ("The words may be on their face ambiguous and susceptible of different meanings.").

⁴²⁴ See, e.g., 12 AM. JUR. *Contracts* § 229, at 752 (1938) ("It has been said that it is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain."); 13 C.J. *Contracts* § 514, at 542 (1917) ("In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction it should be construed in the light of the circumstances surrounding them at the time it is made . . .").

⁴²⁵ Ricks, *supra* note 18, at 788–89, 789 n.106.

⁴²⁶ *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644–45 (Cal. 1968) (internal quotation marks and citations omitted).

⁴²⁷ *Id.* at 644.

⁴²⁸ See *supra* notes 317–335 and accompanying text.

⁴²⁹ See *supra* notes 330–331 and accompanying text.

⁴³⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. b (AM. L. INST. 1981)

elsewhere it contains additional material implying that the language of a contract restricts the scope of potential interpretations.⁴³¹ Accordingly, like Chief Justice Traynor in *Pacific Gas*, the *Restatement* tries to have it both ways.⁴³² If even the *Restatement* could not get the rules of interpretation straight, it should not be surprising that generations of judges, lawyers, and law students have struggled with contract interpretation and the parol evidence rule.

Sixth, and last, it is worth considering whether the analysis in this section justifies adopting further changes to the nomenclature of contract interpretation. In Part III, I described textualism as recognizing patent ambiguities and subject-matter latent ambiguities, whereas contextualism recognizes both of these plus non-standard-meaning latent ambiguities.⁴³³ Does my conclusion here that contextualism jettisons the ambiguity determination warrant a change to that taxonomy?

To assist in answering this question, here is an alternative way of describing contextualism: Contextualism allows a judge to consider extrinsic evidence when there is a patent ambiguity, to establish a subject-matter latent ambiguity, or to establish a special meaning. This delineation substitutes “special meaning” for “non-standard-meaning latent ambiguity.” Moreover, since there is only one type of latent ambiguity under this new conceptual scheme, the description can be simplified further by shortening “subject-matter latent ambiguity” to just “latent ambiguity”: Contextualism recognizes patent ambiguities, latent ambiguities, and special meanings.

(“[B]ut the integrated agreement must be given a meaning to which its language is reasonably susceptible when read in the light of all the circumstances.”); *id.* § 215 cmt. b (“But the asserted meaning must be one to which the language of the writing, read in context, is reasonably susceptible.”).

⁴³¹ See, e.g., *id.* § 202 cmt. g (“But such ‘practical construction’ is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and *their possible meanings.*”) (emphasis added); see also LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.16[D], at 226 (“Actually, it is the reasonably susceptible language of [*Pacific Gas*] that has given proponents of a stricter parol evidence rule a weapon. That formula is widely used. Even the *Restatement (Second) of Contracts* . . . says that the asserted meaning of extrinsic evidence ‘must be one to which the language of the writing, read in context, is reasonably susceptible.’”).

⁴³² In fairness, it is possible that the *Restatement* is using a different understanding of “reasonably susceptible,” such as the broader notion discussed *supra* at the text accompanying notes 351–353. See RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. b (“But the asserted meaning must be one to which the language of the writing, *read in context*, is reasonably susceptible.”) (emphasis added). I suggested the same with respect to Chief Justice Traynor’s *Pacific Gas* opinion in note 420 *supra*.

⁴³³ See *supra* text accompanying notes 150–151.

Support for this revised framework can be found in the fact that ambiguity is generally understood as reasonable susceptibility, under which language has a breaking point. Patent ambiguities directly implicate the reasonably susceptible standard, and subject-matter latent ambiguities are consistent with it. But non-standard-meaning latent ambiguities violate the standard because allowing for special meanings constitutes a rejection of the limiting power of language. Thus, there is logic in avoiding the term “ambiguity” when describing the use of extrinsic evidence to establish a special meaning. Put another way, since non-standard-meaning latent ambiguities do not actually concern ambiguity as reasonable susceptibility, it is better to simply refer to “special meanings” without the word “ambiguity.” And some cases in fact distinguish between assessing whether there is an ambiguity and assessing whether a special meaning exists.⁴³⁴

Recall, however, that “ambiguity” can also be understood in a broader sense to encompass uncertainty about the intended meaning of a word on grounds that are distinct from the reasonably susceptible standard, such as where a word has both an ordinary meaning and a special meaning.⁴³⁵ This alternative conception of ambiguity constitutes a basis for retaining the phrase “non-standard-meaning latent ambiguity.” As does the fact that use of the term “latent ambiguity” in the context of special meanings is strongly embedded in the interpretation caselaw.⁴³⁶ The principal problem with continuing to employ the locution I proposed in Part III is that the word “ambiguity” holds one meaning in the phrase

⁴³⁴ See, e.g., *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984) (“It is only where the terms of an agreement are ambiguous or are used in some special or technical sense not apparent from the contractual document itself that the court may look beyond the four corners of the agreement in order to determine the meaning intended by the parties.”); *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 820 N.E.2d 910, 915 (Ohio 2004) (“Courts resort to extrinsic evidence of the parties’ intent only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.”) (internal quotation marks omitted).

⁴³⁵ See *supra* text accompanying notes 347–350.

⁴³⁶ See, e.g., *Stryker Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 842 F.3d 422, 427 (6th Cir. 2016); *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 814 (6th Cir. 2007); *Kerin v. U.S. Postal Serv.*, 116 F.3d 988, 992 n.2 (2d Cir. 1997); *Nationwide Agribusiness Ins. v. George Perry & Sons, Inc.*, 338 F. Supp. 3d 1063, 1073 (E.D. Cal. 2018); *Roosevelt Irrigation Dist. v. United States*, No. CV-15-00448-PHX-JJT, 2017 WL 4364108, at *11 (D. Ariz. Sept. 30, 2017); *Artesian Water Co. v. Chester Water Auth.*, No. 10-7453, 2012 WL 3029689, at *4–5 (E.D. Pa. July 24, 2012); *Orth v. Wis. State Emps. Union Council 24*, 500 F. Supp. 2d 1130, 1137 (E.D. Wis. 2007); *Paris v. USI of S. Cal. Ins. Servs., Inc.*, No. B200225, 2008 WL 4182428, at *8–9 (Cal. Ct. App. Sept. 12, 2008); *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 655–56, 661 (Cal. Ct. App. 2004); *Mind & Motion Utah Invs., LLC v. Celtic Bank Corp.*, 367 P.3d 994, 1004–05 (Utah 2016).

“patent ambiguity” (reasonable susceptibility) and another meaning in the phrase “non-standard-meaning latent ambiguity” (ordinary meaning versus special meaning). But this concern is likely not fatal because the “patent” and “non-standard-meaning latent” lead-ins convey that “ambiguity” is operating in two different contexts, and thus possesses two different meanings.

Since there are plausible bases for using either “non-standard-meaning latent ambiguity” or “special meaning” when describing the operation of contextualism, both terms are appropriate. I have a slight preference for “non-standard-meaning latent ambiguity,” and that is the phrasing I emphasize when teaching contract interpretation to my students and throughout the rest of this Article. But I could easily see switching to “special meaning” in class at some point in the future.

VIII. ISSUE 6: WHEN DOES CONTRACT INTERPRETATION RAISE A JURY QUESTION?

Part V discussed the stages of interpretation. There, I explained that stage 2A of textualism concerns whether a contractual ambiguity can be resolved by the judge as a matter of law or must instead be resolved by a jury as a matter of fact, and that summary judgment is the primary procedural vehicle for addressing that issue.⁴³⁷ Similarly, I concluded that stage 1 of both full contextualism and partial contextualism—the “ambiguity determination”—also concerns whether a jury question exists and generally takes place at summary judgment. In other words, a judge applying contextualism may adjudicate an interpretive dispute via summary judgment if the contract is “unambiguous,” but must send the case to the jury for resolution as a question of fact if the agreement is “ambiguous.”⁴³⁸

Part VII established that contextualism eliminates the ambiguity determination. As a result, when contextualist courts purport to address whether a contract is “ambiguous,” they are actually assessing the general weight of the evidence; they are deciding whether the textual and extrinsic evidence justifies

⁴³⁷ See *supra* notes 171–180 and accompanying text; Chart 1 (located *supra* at note 238).

⁴³⁸ Regarding full contextualism, see *supra* Part V.B.1. The most helpful material is contained in the text accompanying notes 202–205 *supra*, and in Chart 1 (located *supra* at note 238). Regarding partial contextualism, see *supra* Part V.B.2. The most helpful material is contained in the text accompanying notes 213–214 and 217–222, in the small paragraph between notes 225 and 226 *supra*, and in Chart 1 (located *supra* at note 238). See also the final paragraph of Part V.C. *supra*, which summarizes my labelling practices with respect to both versions of contextualism.

advancing the case to the next stage of the interpretive process—a jury trial. The courts are not analyzing whether the express terms of the agreement are reasonably susceptible to more than one meaning.⁴³⁹

This part addresses the circumstances in which interpretation raises a jury question under textualism and contextualism in light of my revised description of those approaches. Professor Steven Burton has observed that little authority exists regarding how contextualism distinguishes an unambiguous contract from an ambiguous one⁴⁴⁰—i.e., what separates disputes that raise a question of law for the judge from those that raise a question of fact for the jury.⁴⁴¹ And based on my own research, the decisions that do address this matter regularly conflict with each other or are internally inconsistent.⁴⁴² Accordingly, there is a particular need for guidance on the judge/jury issue with respect to contextualism.

The rest of Part VIII focuses on a series of nine hypothetical cases that are designed to provide direction regarding which types of interpretation lawsuits raise a jury question under textualism, full contextualism, and partial contextualism. The nine examples represent paradigms of disputes over contractual meaning. Note that Part VIII is not intended to serve as a comprehensive treatment of the circumstances in which interpretive matters are presented to a jury. That would require an independent article. Instead, my purpose here is less ambitious: It is to identify and analyze a variety of specific issues that together fall under the broad heading of “judge or jury as decision-maker” in contract interpretation.

Let me begin with several general points about the hypotheticals and my related analysis. First, all nine of the examples involve relevant extrinsic evidence. If the parties do not submit such evidence, the near-universal rule for all interpretative approaches is that contract construction is a

⁴³⁹ See *supra* notes 340–342 and accompanying text.

⁴⁴⁰ See BURTON, *supra* note 1, § 4.3.3, at 128 (“Little authority explains just how this question of reasonable susceptibility should be answered under this contextual approach.”).

⁴⁴¹ See *id.* § 6.1.2.1, at 204–05 (“To elaborate, having identified a contract’s terms, a court must decide upon motion—to dismiss, for summary judgment; to exclude evidence; or for a directed verdict—whether a term or the contract is ambiguous in the contested respect. *If there is no such ambiguity, there is nothing for a fact-finder to decide.*”) (emphasis added).

⁴⁴² For an example of the latter problem, see *W. States Constr. Co. v. United States*, 26 Cl. Ct. 818, 824–25 (1992).

question of law for the judge.⁴⁴³ That is so even if the agreement is patently ambiguous and thus a reasonable jury could, in theory, adopt either reading of the instrument.⁴⁴⁴ Accordingly, there is no need to address situations where the parties fail to proffer extrinsic evidence.

Second, throughout this Article, I have articulated the standard for deciding whether an interpretive dispute involving extrinsic evidence must be resolved by a judge or a jury as follows: Under textualism and contextualism, interpretation is a question of law if the interpretive evidence so heavily favors one side that there is no genuine issue of material fact—i.e., a reasonable jury could rule for only one party. If there is a genuine issue of material fact—i.e., a reasonable jury could rule for either side based on the evidence—then interpretation is a question of fact.⁴⁴⁵ From here, I will refer to this version of the judge/jury standard as the “reasonable jury rule.” And note that this rule is identical to the general standard for summary judgment under the rules of civil procedure.⁴⁴⁶

Third, the nine hypotheticals vary across two dimensions: (1) the content on the face of the agreement—i.e., is the contractual language clear or ambiguous; and (2) the nature of the extrinsic evidence—for example, does it overwhelmingly favor one side or is the evidence divided as between the interpretations asserted by the parties.

Fourth, six of the hypotheticals concern an alleged non-standard-meaning latent ambiguity. In these examples, the contract is clear on its face; the ordinary meaning of the

⁴⁴³ See *supra* notes 49–50, 172–173, 241–244, and accompanying text.

⁴⁴⁴ See *Pamado, Inc. v. Hedinger Brands, LLC*, 785 F. Supp. 2d 698, 706–07 (N.D. Ill. 2011) (applying Illinois’s textualist law); *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 656 (Cal. Ct. App. 2004) (applying California’s contextualist law); *BURTON, supra* note 1, § 5.1.1, at 153.

⁴⁴⁵ See *supra* notes 49–50, 173–174, 202–208, 210 and accompanying text; see also, e.g., *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 849 (N.M. 2012) (“Courts will grant summary judgment and interpret the meaning as a matter of law when the evidence presented is so plain that it is only reasonably open to one interpretation. If, however, a court determines that the contract is reasonably and fairly open to multiple constructions, then an ambiguity exists, summary judgment should be denied, and the jury should resolve all factual issues presented by the ambiguity.”) (internal quotation marks and citations omitted).

⁴⁴⁶ See FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”); *Carman v. Tinkes*, 762 F.3d 565, 566 (7th Cir. 2014) (“Summary judgment is appropriate when no material fact is disputed and the moving parties are entitled to judgment as a matter of law, meaning that no reasonable jury could find for the other party based on the evidence in the record.”).

contested language is indisputable. But one side asserts that the parties intended that language to hold a special meaning. Textualism does not recognize non-standard-meaning latent ambiguities.⁴⁴⁷ As a result, in these six cases, a judge applying textualism is barred from considering extrinsic evidence. Instead, the judge must, as a matter of law, adopt the standard meaning of the language contained within the four-corners of the agreement, and preferably at the pleading stage.⁴⁴⁸ Since there is no cause for a judge in a textualist state to receive extrinsic evidence when a contract is facially unambiguous, the results in the examples below that involve that type of agreement only apply to contextualism.

The other three hypotheticals concern a patently ambiguous agreement. When such an ambiguity exists, a textualist court is obligated to consider extrinsic evidence.⁴⁴⁹ Thus, the results in the remaining examples are relevant to both contextualism and textualism.

Fifth, the only difference between full contextualism and partial contextualism is the type of evidence that a court may consider in deciding whether an agreement is “ambiguous.” The essence of stage 1—is there sufficient evidence such that a reasonable jury could rule for either side—is the same for both approaches.⁴⁵⁰ Accordingly, I treat full and partial contextualism as a single position throughout the rest of this section.

Sixth, when a contract is patently ambiguous, the distinction between textualism and full contextualism evaporates.⁴⁵¹ As I explained in Part V, these two approaches follow the same process in deciding whether an interpretive dispute raises a jury question once the matter has moved past the pleading stage.⁴⁵² Thus, there is no need to distinguish between the textualist result and the contextualist result in the hypotheticals that involve a patent ambiguity; the results for the two approaches are identical in such cases.⁴⁵³

⁴⁴⁷ See *supra* notes 150–151, and accompanying text.

⁴⁴⁸ See *supra* notes 167–170, 177–178, and accompanying text.

⁴⁴⁹ See *supra* notes 48, 56, 171 and accompanying text.

⁴⁵⁰ See *supra* Part V.B.

⁴⁵¹ See Schwartz & Scott, *supra* note 4, at 963 n.94 (“But what if there is a genuine ambiguity in the written agreement? In such a case, the divide between formalist and antiformalist positions essentially disappears: a court will consider extrinsic evidence to resolve the ambiguity.”).

⁴⁵² See *supra* notes 202–208 and accompanying text.

⁴⁵³ As I noted in point four above, see *supra* text accompanying notes 447–449, the differences between textualism and contextualism *are* relevant in the six examples that

Pulling together points four, five, and six, if a hypothetical concerns a patent ambiguity, the resolution set forth below applies to textualism and both versions of contextualism. If a hypothetical concerns a non-standard-meaning latent ambiguity, the resolution below applies only to both versions of contextualism.⁴⁵⁴

Seventh, none of the hypotheticals involve a subject-matter latent ambiguity. That is because subject-matter latent ambiguities and patent ambiguities are essentially indistinguishable for purposes of deciding whether an interpretive dispute raises a question of law or fact. When an agreement suffers from either form of ambiguity, the express terms cannot in principle conclusively arbitrate between the readings advanced by the parties.⁴⁵⁵ This means that the existence of a jury question in a case involving a patent ambiguity or a subject-matter latent ambiguity will generally turn on the balance of the extrinsic evidence. Thus, if the patent ambiguities in the hypotheticals below were changed to subject-matter latent ambiguities, the results in the examples would be the same.

Eighth, the nine hypotheticals fall into three categories: (1) cases where there is no jury question and thus the judge must adjudicate the dispute as a matter of law at summary judgment (four hypos); (2) cases where there is a jury question and thus the judge must deny any motions for summary judgment (three hypos); and (3) cases where it is debatable whether there is a jury question (two hypos). To better distinguish among the examples, I use a different set of labels for each category: letters early in the alphabet for the first category (which is one extreme); letters late in the alphabet for the second category (which is the other extreme); and letters near the middle of the alphabet for the third category (which is the area of uncertainty in between the two extremes).

address a non-standard-meaning latent ambiguity because textualism does not recognize that type of ambiguity, whereas contextualism does.

⁴⁵⁴ Note that there is no need to separately discuss the *Nanakuli* hybrid approach, presented *supra* in Part VII.B, because that approach always operates like either textualism or contextualism. If a contract is patently ambiguous, all of the interpretive frameworks function in the same way. *See supra* notes 451–453 and accompanying text. If a contract is facially unambiguous and a party is attempting to establish a special meaning, then the hybrid approach operates like textualism when the party is trying to completely override one or more express terms and like contextualism when the party is trying to qualify the express terms of the agreement.

⁴⁵⁵ *See supra* text accompanying note 119.

Ninth, the resolutions to the seven hypotheticals in the first and second categories are primarily derived from the material set forth in prior sections of this Article and the logical implications of that material. However, I also cite to some authority in the footnotes that further supports my conclusions. For the two hypotheticals where I am unsure of the correct answer, my analysis turns on both the material above and the significant additional caselaw and secondary sources presented below.

Now we can turn to the hypotheticals.

A. Cases Where Interpretation Is for the Judge

The first category is cases where there is no jury question. For textualism, this means that the court ought to resolve the patent ambiguity at stage 2A as matter of law.⁴⁵⁶ For contextualism, this means that the court ought to find that the contract is “unambiguous” at stage 1.⁴⁵⁷ Both of these rulings are justified when the interpretive evidence so heavily favors one party that a reasonable jury would necessarily find in favor of that side.⁴⁵⁸ This category contains four examples—Cases A through D.

Case A involves a facially unambiguous contract and extrinsic evidence that overwhelmingly or exclusively favors the same interpretation as the text of the agreement. In this type of lawsuit, there is no genuine issue of material fact and thus the judge should grant summary judgment to the party asserting the meaning supported by the text and the extrinsic evidence. For example, suppose Buyer and Seller enter into a contract providing that Seller will deliver lumber to Buyer on “December 15.” After a dispute develops, Buyer argues for the standard meaning of “December 15” and Seller argues for a special meaning under which “December 15” means any time before January 1. At summary judgment,⁴⁵⁹ all of the relevant extrinsic evidence supports the conclusion that the parties intended to adopt the standard meaning of “December 15.” In this case, under contextualism, the judge should rule for Buyer as a matter of law because the textual and extrinsic evidence do not raise a jury question as to the meaning of the contract.⁴⁶⁰

⁴⁵⁶ See *supra* notes 49–50 and accompanying text.

⁴⁵⁷ See *supra* text accompanying note 438.

⁴⁵⁸ See *supra* text accompanying notes 445–446.

⁴⁵⁹ Note that under textualism, this type of case can be addressed on the pleadings because there is no need for the judge to consider extrinsic evidence.

⁴⁶⁰ For an action that matches the structure of Case A, see *Columbia Gas*

Case B involves a facially unambiguous contract and extrinsic evidence that (1) is divided as between the readings advanced by the two parties, and (2) is weak. In this type of lawsuit, there is no genuine issue of material fact and thus the judge should grant summary judgment to the party asserting the meaning supported by the text. To illustrate, assume the same basic facts as those in *Case A*—a contract for delivery on “December 15” where Buyer argues for the standard meaning and Seller argues for a special meaning (delivery before January 1). This time, at summary judgment, there is extrinsic evidence supporting both parties’ interpretations. But the evidence is weak: a single admission during discovery regarding the preliminary negotiations mildly supports Buyer and a single document from the preliminary negotiations mildly supports Seller. Here, under contextualism, the judge should rule for Buyer as a matter of law because the evidence does not raise a jury question as to the meaning of the contract. Divided, weak extrinsic evidence cannot create an issue for the finder of fact when the text of a contract unambiguously supports one side.

Case C involves a facially unambiguous contract and extrinsic evidence that (1) overwhelmingly or exclusively supports an interpretation that conflicts with the text of the agreement, and (2) is weak. In this type of lawsuit, there is no genuine issue of material fact and thus the judge should grant summary judgment to the party asserting the meaning supported by the text. For example, assume again the same basic facts as *Case A*—a contract for delivery on “December 15” where Buyer argues for the standard meaning and Seller argues for the special meaning. This time, all of the relevant extrinsic evidence favors the Seller. But the evidence is weak: a single document from the preliminary negotiations mildly supports Seller’s construction. Here, under contextualism, the judge should rule for Buyer as a matter of law because the evidence does not raise a jury question as to the meaning of the contract. Weak extrinsic evidence

Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587 (Tex. 1996). There, the parties disputed the meaning of a complex pricing provision in a contract for the sale of gas. *Id.* at 588–90. Both sides moved for summary judgment, but the trial court found the contract to be ambiguous, denied both motions, and submitted the matter to a jury, which ruled for the seller. *Id.* at 589. On appeal, the Texas Supreme Court found the agreement to unambiguously possess the meaning advanced by the buyer. *Id.* at 589, 592. All of the relevant contractual text supported the buyer, *id.* at 590–92, as did all of the permissible extrinsic evidence, *id.* at 591 & n.2. Accordingly, “the only reasonable interpretation of this contract” was buyer’s, *id.* at 591, and “the parties’ intent should not have been submitted to the jury,” *id.* at 592.

favoring a special meaning cannot create an issue for the finder of fact when the text of a contract is unambiguous, even when there is no extrinsic evidence backing the ordinary meaning.⁴⁶¹

Case D involves a facially ambiguous contract and extrinsic evidence that (1) overwhelmingly or exclusively favors one side's interpretation, and (2) is strong or moderate. In this type of lawsuit, there is no genuine issue of material fact and thus the judge should grant summary judgment to the party asserting the meaning supported by the extrinsic evidence. For example, assume this time that the contract between Buyer and Seller provides that Seller must deliver the lumber in "early December." In court, Buyer asserts that this phrase means by December 5, whereas Seller asserts that the phrase means by December 15. The words "early December" are reasonably susceptible to the meanings advanced by both parties. Thus, the agreement is patently ambiguous.⁴⁶² Assume further, however, that all of the

⁴⁶¹ For a decision that probably fits the structure of *Case C*, see *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 46 P.3d 812 (Wash. Ct. App. 2002), *overruled on other grounds by* Columbia Cmty. Bank v. Newman Park, LLC, 304 P.3d 472, 479 (Wash. 2013). The contract there stated that Tax Pros subordinated a judgment that had already been entered. *Id.* at 821. However, an attorney for Tax Pros admitted to a contradictory interpretation in an affidavit. *Id.* at 820. The affidavit provided that the agreement was intended to subordinate all of Tax Pros' claims, which would also include a judgment entered into after execution of the contract. *Id.* BNC asserted that the affidavit created an ambiguity as to whether the agreement subordinated only the first judgment (as Tax Pros claimed) or both judgments (as BNC claimed). *Id.* The Washington Court of Appeals rejected BNC's argument, holding that the "affidavit is not by itself sufficient to take the case to a jury." *Id.* at 821. I stated that *BNC Mortgage* only "probably" mirrors *Case C* at the start of this footnote because the court may have based its holding in part on extrinsic evidence that favored Tax Pros' construction rather than on just the subordination contract and the affidavit. *See id.* at 820. But I think the better reading of the decision is that the critical ruling was driven solely by the contract and the affidavit. And if I am correct, then *BNC Mortgage* does indeed constitute an example of *Case C*. For another instructive lawsuit that mirrors *Case C*, see *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 151 (Ohio 1978) (affirming summary judgment for the party asserting the ordinary meaning of the words "oil" and "gas" in a contract because the other side's trade usage evidence that the parties intended a special, narrower meaning of those terms—a single affidavit—was not sufficient to create a question of fact); *see also* *Barris Indus., Inc. v. Worldvision Enters., Inc.*, 875 F.2d 1446, 1450 (9th Cir. 1989) (applying California law) ("Further, the mere existence of extrinsic evidence supporting an alternative meaning does not foreclose summary judgment where the extrinsic evidence is insufficient to render the contract susceptible to the non-movant's proffered interpretation.").

Note that if weak evidence that *contradicts* the ordinary meaning of an agreement's express terms cannot create an ambiguity (*Case C*), then, as a matter of logic, neither can weak *divided* evidence (*Case B*), nor evidence that is *consistent* with the ordinary meaning (*Case A*). Thus, authority that fits the structure of *Cases A* and *B* was unnecessary. However, I did find multiple decisions that nicely mirror *Case A*, and I included one in the relevant location above. *See supra* note 460 and accompanying text.

⁴⁶² Because there is patent ambiguity, *Case D* would reach summary judgment under both contextualism and textualism. This type of case generally cannot be adjudicated on the pleadings.

relevant extrinsic evidence presented at summary judgment favors Buyer and is strong: preliminary negotiations documents, the course of performance, the course of dealing, and usages of trade all support Buyer's construction and no extrinsic evidence supports Seller's reading. Here, under both contextualism and textualism, the judge should rule for Buyer as a matter of law because the evidence does not raise a jury question as to the meaning of the contract. The same would be true if the extrinsic evidence exclusively favoring Buyer's interpretation, rather than being strong, was moderate in nature, such as just (1) documentation from the preliminary negotiations, or (2) several rounds of action by the parties that constitute a course of performance.⁴⁶³

B. Cases Where Interpretation Is for the Jury

The second category is cases where there is a jury question. For textualism, this means that the court ought to conclude at stage 2A that resolution of a patent ambiguity is for the trier of fact.⁴⁶⁴ For contextualism, this means that the court ought to hold that the contract is "ambiguous" at stage 1.⁴⁶⁵ Both of these rulings are justified when a reasonable jury could find for either party given the interpretive evidence.⁴⁶⁶ This category contains three examples—Cases X through Z.

Case X involves a facially ambiguous contract and extrinsic evidence that is divided between the readings advanced by the two parties. In this type of lawsuit, there is a genuine issue of material fact and thus the judge should deny motions for

⁴⁶³ *Gastar Expl. Inc. v. Rine*, 806 S.E.2d 448 (W. Va. 2017), is an excellent illustration of Case D. There, the language of the agreement was reasonably susceptible to three interpretations: the grantors of a piece of land intended to convey (1) all of their oil and gas rights (as the grantees argued), (2) none of their oil and gas rights (as the grantors argued), or (3) half of their oil and gas rights. *Id.* at 457. The court thus turned to extrinsic evidence, which demonstrated that after execution of the deed, the grantors stopped paying any taxes on the oil and gas rights at issue and the grantees began paying taxes on all of those rights. *Id.* at 452–53, 457. This supported the grantees' claim that the deed had conveyed all of the grantors' oil and gas rights. *Id.* And no extrinsic evidence supported either of the other readings of the agreement. *Id.* The weight of the evidence, combined with the principle that ambiguous deeds are construed in favor of the grantee, led the court to conclude that "there is no doubt that the [grantors] intended to convey the oil and gas interest to [the grantees]." *Id.* at 457. Accordingly, the court ruled that the trial judge erred in not granting summary judgment for the grantees. *Id.* at 458. *See also* *Ames v. County of Monroe*, 80 N.Y.S.3d 774, 777–78 (N.Y. App. Div. 2018) (resolving ambiguity as a matter of law because the only extrinsic evidence was "decades" of course of performance evidence that exclusively favored one party).

⁴⁶⁴ *See supra* notes 49–50, and accompanying text.

⁴⁶⁵ *See supra* text accompanying note 438.

⁴⁶⁶ *See supra* text accompanying notes 445–446.

summary judgment submitted by either party. For example, assume again the facts of Case D—a contract for delivery in “early December” where Buyer argues that Seller must deliver by December 5 and Seller argues that it must deliver by December 15. As before, the agreement is patently ambiguous. But this time, assume that the relevant extrinsic evidence is divided: preliminary negotiations and course of dealing evidence support Buyer while course of performance and trade usage evidence support Seller. Here, under both contextualism and textualism, the judge should deny any motion for summary judgment. Split textual and extrinsic evidence is the archetype of a dispute that must be decided by the finder of fact because a reasonable jury clearly can rule for either side in these circumstances.⁴⁶⁷

Case Y involves a facially unambiguous contract and extrinsic evidence that (1) overwhelmingly or exclusively favors an interpretation that conflicts with the text of the agreement, and (2) is moderate in weight. In this type of lawsuit, there is a genuine issue of material fact and thus the judge should deny motions for summary judgment submitted by either party. For example, assume again the same basic facts as Case A—a contract for delivery on “December 15” where Buyer argues for the standard meaning and Seller argues for the special meaning (delivery before January 1). In this example, all of the extrinsic evidence favors the Seller. And the evidence is moderate in weight: an established trade usage supports Seller’s construction, but there is no other extrinsic evidence. Here, the judge should deny any motion for summary judgment. A split between textual evidence which supports the ordinary meaning and substantial extrinsic evidence that supports the conclusion that the parties

⁴⁶⁷ See BURTON, *supra* note 1, § 5.1.1, at 153. For a case that fits the structure of Case X, see *Lion Oil Trading & Transp., Inc. v. Statoil Mktg. and Trading (US) Inc.*, 728 F. Supp. 2d 531 (S.D.N.Y. 2010). There, a contract for the sale of oil provided that the price was to be determined by market information “for the calendar month of delivery.” *Id.* at 532. A dispute arose as to whether the language referred to the month intended at the time an order was made or to the actual month the oil was delivered. *Id.* at 531–32. At summary judgment, the court found that the agreement was facially ambiguous after analyzing several aspects of the text. *Id.* at 536. In addition, the parties submitted a great deal of extrinsic evidence with their motion papers. *Id.* at 537. But the evidence did not decisively support either side’s interpretation. *Id.* at 536–37. To illustrate, one party proffered trade usage evidence in support of its construction, while the other presented course of dealing evidence favoring its reading. *Id.* at 537. The judge thus ruled that the interpretive issue was not “amenable to summary judgment” and instead constituted “a paradigmatic jury question.” *Id.* For other helpful examples that follows this pattern, see *Swift & Co. v. Elias Farms, Inc.*, 539 F.3d 849, 851–55 (8th Cir. 2008), and *RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*, 18 F. Supp. 3d 534, 541–48 (S.D.N.Y. 2014).

intended a non-standard meaning is the classic example of a lawsuit that raises a question of fact under contextualism (but not under textualism).⁴⁶⁸

Note that Case Y mirrors Case C in every respect but one: In Case C, the extrinsic evidence of a special meaning was weak and therefore not sufficient to create a jury question; in Case Y, it is moderate and therefore sufficient to create a jury question.

Case Z involves a facially unambiguous contract and extrinsic evidence that (1) is divided as between the readings advanced by the two parties, and (2) is strong or moderate. In this type of lawsuit, there is *probably* a genuine issue of material fact and thus the judge should deny motions for summary judgment submitted by either side.⁴⁶⁹ For example, return once again to the facts of Case A—a contract for delivery on “December 15” where Buyer argues for the standard meaning and Seller argues for the special meaning. Assume this time that significant, relevant extrinsic evidence is presented at summary judgment, but the evidence is split: preliminary negotiations and course of dealing evidence support Buyer’s argument for the ordinary meaning, while course of performance and trade usage evidence support Seller’s argument for the special meaning. Here, under contextualism, the judge should deny any motion for summary judgment. While the textual evidence clearly favors Buyer, considerable extrinsic evidence supports both parties. Therefore, the textual and extrinsic evidence *as a whole* is substantially divided, and that warrants sending the interpretive issue to the jury for resolution as a question of fact. The same would be true if Buyer and Seller presented a moderate level of extrinsic evidence in favor of their constructions of the agreement, such as only Buyer’s preliminary negotiations evidence and only Seller’s trade usage evidence.⁴⁷⁰

⁴⁶⁸ *W. States Constr. Co. v. United States*, 26 Cl. Ct. 818 (1992), discussed *supra* in the text accompanying notes 134–136, and 138, is a perfect illustration of Case Y. There, the government moved for summary judgment based solely on the ordinary meaning of the text of the parties’ facially unambiguous contract. *Id.* at 818–20. Western States responded with trade usage evidence in support of a special meaning. *Id.* at 820–21. After an extended discussion of contract interpretation caselaw, during which the Claims Court endorsed a version of contextualism, *id.* at 821–26, the court held that Western States’ trade usage evidence created a question of fact and denied the government’s motion for summary judgment, *id.* at 826.

⁴⁶⁹ I am using the word “probably” because for this hypothetical I am not one-hundred percent certain of the correct answer.

⁴⁷⁰ *Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.*, 131 Cal. Rptr. 183 (Cal. Ct. App. 1976), parallels the moderate version of Case Z discussed in the body text. There, the parties entered into two contracts for the sale of potatoes. *Id.* at 185. The

Note that Case Z mirrors Case B in every respect but one: In Case B, the divided extrinsic evidence was weak and therefore it was not sufficient to create a jury question. In Case Z, the divided extrinsic evidence is either moderate or strong, both of which are sufficient to create a question of fact because in these situations a reasonable jury could rule for either party.

C. Cases that are Unclear

The third category is cases where it is debatable whether there is a jury question. This category contains two examples—Cases P and Q. Note that I do not offer an ultimate resolution for those two hypotheticals in this section. Instead, the analysis here is intended to clarify various features of the caselaw and to complete my taxonomy of paradigmatic interpretive disputes.

Case P involves a facially ambiguous contract and extrinsic evidence that (1) exclusively favors an interpretation of one of the parties, and (2) is weak. In this type of lawsuit, it is unclear whether there is a jury question. For example, return to the facts of Cases D and X—a contract for delivery by “early December” where Buyer argues that Seller must deliver by December 5 and Seller argues that it must deliver by December 15. This agreement is patently ambiguous. Assume further that all of the relevant extrinsic evidence presented at summary judgment favors Buyer, but the evidence is weak: a single admission during discovery regarding the preliminary negotiations mildly supports Buyer’s understanding of the contract. (Because the extrinsic evidence is an admission by Seller, there are no credibility issues with respect to the evidence. The same would be true if the evidence was an affidavit from Buyer, the veracity of which was

contracts identified precise quantities that the buyer would purchase. *Id.* When the buyer only received and paid for a lesser amount, the seller sued for breach. *Id.* The seller argued that the contract was facially unambiguous in setting forth the quantities the buyer was obligated to purchase. *Id.* at 187. The seller also presented preliminary negotiations evidence favoring its construction that the quantity terms in the agreements were binding. *Id.* at 188. The buyer countered primarily with trade usage evidence that in the potato processing industry, quantities listed in contracts are understood to be merely estimates. *Id.* at 185, 187. And the court ruled that the buyer was entitled to present such evidence under the U.C.C. in order to “explain the meaning of the quantity figures.” *Id.* at 188. In addition, some preliminary negotiations and contract drafting evidence favored the buyer’s construction. *Id.* The court held that the division in the evidence created a question of fact for a jury. *Id.* at 188–89. *Carter Baron Drilling v. Badger Oil Corp.*, 581 F. Supp. 592 (D. Colo. 1984), is also on point. In that case, the court denied a motion for summary judgment that was grounded upon the facially unambiguous text of the contract in dispute and some trade usage evidence, because the non-moving party presented other trade usage evidence and evidence regarding the surrounding commercial circumstances. *Id.* at 599–600.

not challenged by Seller.) On these facts, I do not know whether the judge should grant a motion for summary judgment submitted by Buyer under textualism and contextualism.

To further set up the issue, it is helpful to compare Case P to Case D, where there was no jury question,⁴⁷¹ and to Case X, where there was a jury question.⁴⁷² Both Case D and Case P involve a patently ambiguous agreement where the extrinsic evidence clearly or exclusively favors one side. However, in Case D, the extrinsic evidence is strong or moderate. In Case P, by contrast, the extrinsic evidence is weak. Next, both Case X and Case P involve a patently ambiguous agreement where the interpretive evidence as a whole is divided. However, in Case X, there is textual and extrinsic evidence supporting both parties. In Case P, by contrast, the textual evidence is split, but the extrinsic evidence solely favors one side. Which example does Case P better resemble: Case D or Case X?

Classifying Case P might be rather easy if the reasonable jury rule was the only standard used by courts to decide whether an interpretive dispute concerning extrinsic evidence must be resolved by a judge or a jury. But while my research suggests that the reasonable jury rule is the most common framework for analyzing whether an interpretation issue raises a question of law or fact,⁴⁷³ it is far from the only approach.⁴⁷⁴ The leading alternative is what I will call the “disputed extrinsic evidence rule.” Professor Steven Burton construes section 212(2) of the *Restatement (Second) of Contracts* as endorsing this version of the judge/jury standard.⁴⁷⁵ Section 212(2) provides that interpretation is a question of fact only when “it depends on the *credibility* of *extrinsic* evidence or on a choice among *reasonable inferences* to be drawn from *extrinsic* evidence.”⁴⁷⁶ Many cases embrace this standard⁴⁷⁷ and Professor Burton suggests that it is the majority rule.⁴⁷⁸

⁴⁷¹ See *supra* notes 462–463, and accompanying text.

⁴⁷² See *supra* note 467 and accompanying text.

⁴⁷³ See also CALAMARI AND PERILLO, *supra* note 7, § 3.15 at 141–42 (implying the same conclusion); KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.30, at 327 (same).

⁴⁷⁴ FARNSWORTH, *supra* note 17, § 7.14, at 477 (“This is another area where judicial attitudes differ, and it is possible to find a wide variety of statements about the proper role of judge and jury in the interpretation process.”); accord BURTON, *supra* note 1, § 5.1, at 152, and § 5.1.1, at 152–54.

⁴⁷⁵ See BURTON, *supra* note 1, § 5.1.1, at 152–54.

⁴⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (AM. L. INST. 1981) (emphasis added).

⁴⁷⁷ See, e.g., *Baker v. Am.’s Mortg. Servicing, Inc.*, 58 F.3d 321, 326 (7th Cir. 1995)

I have yet to come across any authority that analyzes in detail the differences between the reasonable jury rule and the disputed extrinsic evidence rule. Part of the reason for this is likely that the two frameworks will reach the same result in the vast majority of lawsuits when a contract is patently ambiguous.⁴⁷⁹ For example, if the reasonable jury rule is satisfied because the extrinsic evidence so heavily favors one side that there is no genuine issue of material fact, then it is also proper to describe the evidence as permitting only one reasonable inference under the disputed extrinsic evidence rule. Similarly, if the extrinsic evidence is undisputed as defined in the *Restatement*, then there will seldom be a genuine issue of material fact regarding the meaning of the agreement. Note further that some cases and scholars treat the reasonable jury rule and the disputed extrinsic evidence rule as the same standard.⁴⁸⁰ And the *Restatement* itself arguably does so too.⁴⁸¹ As a result, there was

("Under Illinois law, if a contract is ambiguous, its interpretation is a question of law for the court as long as the extrinsic evidence bearing on the interpretation is undisputed."); *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1000 n.1, 1004 (Alaska 2004) ("However, fact questions are created when the meaning of contract language is dependent on conflicting extrinsic evidence."); *Ames v. County of Monroe*, 80 N.Y.S.3d 774, 777 (N.Y. App. Div. 2018) ("Where, as here, a contract is ambiguous, its interpretation remains the exclusive function of the court unless determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.") (internal quotation marks omitted); *Fiallo v. Allstate Ins. Co.*, 51 A.3d 1193, 1203 (Conn. App. Ct. 2012) (same); *Kofmehl v. Baseline Lake, LLC*, 305 P.3d 230, 236 (Wash. 2013) (same).

⁴⁷⁸ See *BURTON*, *supra* note 1, § 5.1.1, at 152–53 ("As a general rule . . . the judge resolves relevant ambiguities in a written contract unless the resolution depends on disputed parol evidence.")

⁴⁷⁹ My focus in Case P is on patently ambiguous agreements. If a contract is clear on its face and a party is advancing a special meaning, the judge/jury standards function somewhat differently. For example, in Case Y, discussed *supra* in the text accompanying note 468, there was a conflict between contractual text and extrinsic evidence that is moderate in weight. In that situation, interpretation is a question of fact according to virtually all contextualist courts even though the *extrinsic* evidence is clearly "undisputed" and would be sufficient to warrant summary judgment if the agreement were ambiguous, as in Case D, discussed *supra* in the text accompanying notes 462–463.

⁴⁸⁰ See, e.g., *Mason v. Telefonken Semiconductors Am. LLC*, 797 F.3d 33, 38 (1st Cir. 2015) (applying California law) ("If the extrinsic evidence is so one-sided that no reasonable person could decide the contrary, the meaning of the language becomes evident and the erstwhile ambiguity will not preclude summary judgment. But if the extrinsic evidence bearing on the meaning of the relevant language is contested or contradictory, summary judgment will not lie.") (citations and internal quotation marks omitted); *RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*, 18 F. Supp. 3d 534, 541 (S.D.N.Y. 2014) (applying New York law) (same); *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 849 (N.M. 2012) (same); *MURRAY*, *supra* 38, § 87[A], at 448 (same).

⁴⁸¹ Comment e to section 212 states that "a question of interpretation is not left to the trier of fact where the evidence is so clear that *no reasonable person would determine the issue in any way but one*. But if the issue depends on evidence outside the writing, and the possible inferences are conflicting, the choice is for the trier of fact." RESTATEMENT

no need for me to address any variation regarding the judge/jury standard before now.

However, there is caselaw implying that the reasonable jury rule and the disputed extrinsic evidence rule are distinct. In particular, some decisions state that ambiguity resolution is a question of law if *either* rule is satisfied. The following language from an opinion of the Maryland Court of Special Appeals applying Washington law is representative: “Accordingly, unless the extrinsic evidence is undisputed *or* only one reasonable meaning can be ascribed to the language when viewed in context, summary judgment is not appropriate in a case involving interpretation”⁴⁸² It is possible that such statements are not intended to identify two separate tests.⁴⁸³ But either way, there are indeed important differences between the two principal approaches to the judge/jury standard, differences that are implicated by the facts of Case P.

Under the reasonable jury rule, interpretation is a question of fact when the evidence regarding the parties’ intent fails to conclusively support one side’s reading of the contract.⁴⁸⁴ The

(SECOND) OF CONTRACTS § 212 cmt. e (AM. L. INST. 1981) (emphasis added). The first quoted sentence sets forth the reasonable jury rule. And the comment as a whole treats (1) “no reasonable person would determine the issue in any way but one,” and (2) “conflicting inferences” regarding extrinsic evidence, as two sides of the same coin, with the former identifying when interpretation is for the judge and the latter identifying when interpretation is for the jury. *See id.*

⁴⁸² Lab. Ready, Inc. v. Abis, 767 A.2d 936, 944 (Md. Ct. Spec. App. 2001) (emphasis added); *accord* Compagnie Financiere de CIC et de L’Union Europeenne v. Merrill Lynch, 232 F.3d 153, 159 (2d Cir. 2000) (“This Court may resolve the ambiguity in the contractual language as a matter of law if there is no extrinsic evidence to support one party’s interpretation of the ambiguous language *or* if the extrinsic evidence is so-one sided that no reasonable factfinder could decide contrary to one party’s interpretation.”) (emphasis added); Luitpold Pharm., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie, 784 F.3d 78, 88 (2d Cir. 2015) (applying New York law) (same).

⁴⁸³ For example, the “or” in these cases might mean “in other words” rather than “alternatively.” *See* J.I. RODALE, THE SYNONYM FINDER 812 (Warner ed. 1986) (noting that “alternatively” and “in other words” are both synonyms for “or”); Synonyms for Or, THESAURUS, <http://www.thesaurus.com/browse/or?s=t> [<http://perma.cc/KDG7-87UK>] (last visited Oct. 24, 2019).

⁴⁸⁴ *See, e.g.*, Swift & Co. v. Elias Farms, Inc., 539 F.3d 849, 851 (8th Cir. 2008) (applying Minnesota law) (“If the contract is [patently] ambiguous, however, the meaning of the contract becomes a question of fact, and summary judgment is inappropriate unless the *evidence of the parties’ intent is conclusive.*”) (emphasis added); Wash. Metro. Area Transit Auth. v. Potomac Inv. Prop., Inc., 476 F.3d 231, 235 (4th Cir. 2007) (applying Maryland law) (“Therefore, summary judgment is appropriate when the contract in question is unambiguous or when an ambiguity can be *definitively* resolved by reference to extrinsic evidence.”) (emphasis added); RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V., 18 F. Supp. 3d 534, 541 (S.D.N.Y. 2014) (“[T]he Court must resolve the ambiguity as a matter of law . . . ‘if the evidence presented about the parties’ intended meaning [is] so one-sided that no reasonable person could decide the contrary.’” (second alteration in

agreement itself is evidence of intent even if it suffers from a patent ambiguity. Accordingly, the reasonable jury rule is best understood as requiring that courts assess the nature and weight of the extrinsic evidence *together with* the express terms in deciding whether an interpretive issue raises an issue of law or fact—in deciding whether a reasonable jury could find for either party.⁴⁸⁵

In Case P, the agreement is patently ambiguous. This means that the language is reasonably susceptible to the meanings asserted by both Buyer and Seller. In addition, while the extrinsic evidence exclusively favors Buyer, there is very little such evidence. Since the textual evidence is split and the extrinsic evidence provides only marginal support for one side, the evidence *as a whole* is almost evenly divided. When that is so, the evidence of intent is not conclusive; a reasonable jury can find for either party. Thus, the reasonable jury rule *should* result in the judge denying Buyer's motion for summary judgment in Case P. And in the only opinion I found that appears to match Case P on the facts, the court employed the reasonable jury rule to deny a request for summary judgment made by the party who submitted weak extrinsic evidence⁴⁸⁶—i.e., the party in the same position as Buyer in my hypothetical.

original) (citation omitted) (quoting *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 158 (2d Cir. 2000)); *Mulch Mfg., Inc. v. Advanced Polymer Sols., LLC*, 947 F. Supp. 2d 841, 858 (S.D. Ohio 2013) (“Although the resolution of any ambiguity is a question of fact, if extrinsic evidence reveals only one reasonable interpretation, the Court may enter summary judgment.”).

⁴⁸⁵ See *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361, 363–64 (3d Cir. 1987) (applying Michigan law) (endorsing the reasonable jury rule and explaining that “[i]f there is any evidence in the record *from any source* from which a reasonable inference in the nonmoving party's favor may be drawn, the moving party cannot obtain a summary judgment”) (emphasis added); *Kenney v. Read*, 997 P.2d 455, 460 (Wash. Ct. App. 2000) (analyzing both the text of a facially ambiguous contract and related extrinsic evidence in applying the reasonable jury rule; reversing the trial court's grant of summary judgment).

⁴⁸⁶ See *United States ex rel. Keller Painting Corp. v. Torcon, Inc.*, 64 F. Supp. 3d 371 (E.D.N.Y. 2014) (applying New York law). There, the parties filed cross-motions for summary judgment. *Id.* at 373; 382–83. The court ruled that the contract was facially ambiguous. *Id.* at 382. It then denied the defendant's motion because the extrinsic evidence submitted by that party was “not particularly probative.” *Id.*; see also *id.* at 380 (setting forth the reasonable jury rule). The court also denied the plaintiff's motion because the contract “is ambiguous.” *Id.* at 382–83. Nowhere in the opinion did the judge identify any extrinsic evidence offered by the plaintiff. Thus, as I said, this lawsuit *appears* to match Case P. However, in denying the plaintiff's motion, the court cited to and quoted from a case in which both sides presented witnesses that endorsed their reading of the contract. *Id.* at 383. So, it is possible that the plaintiff in *Keller* did in fact proffer extrinsic evidence in support of its summary judgment motion, and the court simply failed to mention it in the opinion.

Under the disputed extrinsic evidence rule, if there is no challenge to the credibility of evidence, then interpretation is for the jury only when the *extrinsic* evidence is subject to more than one reasonable inference—i.e., when the evidence from outside the contract plausibly supports both parties.⁴⁸⁷ In Case P, by hypothesis, the extrinsic evidence entirely cuts one way (and there are no issues with its credibility because the evidence is an admission). Accordingly, the disputed extrinsic evidence rule provides that the judge should grant Buyer’s motion for summary judgment.⁴⁸⁸ Indeed, a number of decisions hold that a patent ambiguity should be resolved at summary judgment in favor of the moving party if that party is the only one to submit relevant extrinsic evidence supporting its construction.⁴⁸⁹ That is precisely the situation with Case P: Buyer is the moving party and presented weak extrinsic evidence favoring its reading; Seller is the non-moving party and is relying solely on the language of the contract.

In sum, Case P is the unusual situation where the *extrinsic* evidence is *undisputed*, but a reasonable jury could still rule for either side because the textual and extrinsic evidence *together* are not *conclusive*. And that leaves open whether the hypothetical raises a question of law for a judge or a question of fact for a jury.⁴⁹⁰

⁴⁸⁷ See *supra* notes 475–476, and accompanying text.

⁴⁸⁸ See BURTON, *supra* note 1, § 5.1.1, at 152–53 (“As a general rule . . . the judge resolves relevant ambiguities in a written contract unless the resolution depends on disputed parol evidence. . . . A judge should resolve an ambiguity as a matter of law [when] . . . one party offers relevant extrinsic evidence, and a reasonable jury could credit it.”) (citing RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (AM. L. INST. 1981), among other authorities).

⁴⁸⁹ See, e.g., *Fed. Ins. Co. v. Am. Home Assur. Co.*, 639 F.3d 557, 567 (2d Cir. 2011) (applying New York Law) (“However, where language in a contract is ambiguous, summary judgment can be granted ‘if the non-moving party fails to point to any relevant extrinsic evidence supporting that party’s interpretation of the language.’”) (quoting *Compagnie Financiere de CIC et de L’Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 158 (2d Cir. 2000)); *Berkowitz v. Delaire Country Club, Inc.*, 126 So. 3d 1215, 1219 (Fla. Dist. Ct. App. 2012) (“Normally, when a contract is ambiguous, summary judgment is improper. However, if a party moving for summary judgment presents competent evidence to support its position, which the nonmoving party does not counter, then summary judgment may be granted.”) (citations omitted); *1375 Equities Corp. v. Buildgreen Sols., LLC*, 992 N.Y.S.2d 288, 289–90 (N.Y. App. Div. 2014) (setting forth the rule and granting summary judgment because the non-moving party failed to proffer any probative extrinsic evidence).

⁴⁹⁰ Note that there might be a way to reconcile the reasonable jury rule and the disputed extrinsic evidence rule given how the latter is articulated in the *Restatement (Second) of Contracts*. To see this, start with the language of the *Restatement: Interpretation* is a question of fact when “it depends on the credibility of extrinsic evidence or on a choice among *reasonable inferences* to be drawn from *extrinsic evidence*.”

Remember also that there are other versions of the judge/jury standard. Consider two. First, a line of Minnesota cases endorses the following approach: “If the extrinsic evidence is conclusive *and* undisputed, the determination of the meaning of a contract is a function of the trial judge, but if the extrinsic evidence is inconclusive or disputed, the uncertainty and conflict

RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (AM. L. INST. 1981) (emphasis added). Up to this point, I have construed the italicized language to mean that a question of fact exists only when the extrinsic evidence *by itself* supports two different conclusions regarding the proper construction of the agreement. But there is another way to read section 212(2). It could mean that the extrinsic evidence must support more than one reasonable inference *given the language of the contract*. This understanding effectively collapses the line between the disputed extrinsic evidence rule and the reasonable jury rule because the latter asks whether both parties’ interpretations find substantial support in the evidence *generally*—whether extrinsic or textual. *See supra* notes 484–485 and accompanying text.

Let me make the analysis more concrete. Under either construction of the *Restatement*, if (1) an agreement is patently ambiguous, (2) all of the extrinsic evidence favors one reading, and (3) the extrinsic evidence is *strong or moderate* (as in Case D), then the extrinsic evidence clearly supports only one reasonable inference even though the contractual text is consistent with the asserted meanings of both parties. *See supra* notes 462–463, and accompanying text. Case P is different: (1) the agreement is patently ambiguous, (2) all of the extrinsic evidence favors one reading, but (3) the extrinsic evidence is *weak*. Under the construction of the *Restatement* set forth in the body text, extrinsic evidence is effectively assessed in isolation. And that evidence, standing alone, supports only one reasonable inference because the evidence exclusively supports the Buyer’s interpretation of the agreement. By contrast, under my revised construction of the *Restatement* set forth in the first paragraph of this footnote, the extrinsic evidence is assessed in relation to the express terms. And one could plausibly describe the *extrinsic evidence* in Case P as supporting more than one reasonable inference given the limited weight of that evidence *and the ambiguity in the text*. Remember, the textual evidence is split in Case P. Even if the extrinsic evidence entirely favors Buyer’s interpretation, if that evidence is exceptionally modest, then isn’t it *reasonable* to *infer* that the parties intended Seller’s construction in light of the facial ambiguity of the parties’ contract? I think the answer is “yes.” Moreover, as I explained in note 481 *supra*, comment e to section 212 actually seems to treat the reasonable jury rule and the disputed extrinsic evidence rule as the same principle. As do some decisions and other secondary sources. *See supra* note 480; *see also* KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.30, at 327, 332, 336 (appearing to equate the reasonable jury rule and section 212(2) of the *Restatement*). That lends further support to my proposed construction of the *Restatement*.

Unfortunately, there are two problems with my analysis here. First, it conflicts with Professor Burton’s reading of the *Restatement*. *See supra* note 488. Second, and more importantly, even if I am correct about section 212(2), my understanding cannot be extended to the disputed extrinsic evidence rule generally because of the cases providing that summary judgment is warranted any time only the moving party submits extrinsic evidence in support of its interpretation of a patently ambiguous contract. *See supra* notes 488–489 and accompanying text. In addition, recall that some opinions appear to recognize that the reasonable jury rule and the disputed extrinsic evidence rule are different because they state that ambiguity resolution is a question of law if *either* rule is satisfied. *See supra* note 482 and accompanying text. Given all of this, I believe that the better conceptualization is that the disputed extrinsic evidence rule and the reasonable jury rule are two different approaches to the judge/jury standard for contract interpretation. *See also* KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.30, at 327 (stating that even if extrinsic evidence is “in dispute,” it can still so heavily favor one side that a reasonable jury could reach only one conclusion).

must be resolved at trial.”⁴⁹¹ This language provides that neither “conclusive” extrinsic evidence nor “undisputed” extrinsic evidence is sufficient to warrant adjudicating an interpretive issue as a matter of law. To justify taking a case from the jury, the extrinsic evidence must be both. In essence, this “Minnesota rule” provides that a judge may resolve a patent ambiguity only when *both* the reasonable jury rule *and* the disputed extrinsic evidence rule so permit. In Case P, the extrinsic evidence is undisputed in that it exclusively favors one side and there are no credibility questions. But because the extrinsic evidence is weak, it is inconclusive. Accordingly, under the Minnesota rule, Case P raises a question of fact, just as it does under the reasonable jury rule.

Second, as I noted above,⁴⁹² some cases hold that interpretation is a question of law if the evidence is *either* undisputed *or* conclusive—meaning if either the disputed extrinsic evidence rule or the reasonable jury rule is satisfied. In Case P, while the evidence is not conclusive, it is undisputed. Therefore, under these decisions, Case P raises a question of law, just as it does under the disputed extrinsic evidence rule.

So now we have four different versions of the judge/jury standard, with the frameworks evenly divided over whether Case P should be resolved by a judge or a jury. And there are still other approaches in the jurisprudence, though my research suggests that the vast majority of cases in textualist and contextualist states employ one of the four judge/jury standards discussed above.⁴⁹³

⁴⁹¹ *Deutz & Crow Co. v. Anderson*, 354 N.W.2d 482, 486 (Minn. Ct. App. 1984) (emphasis added); *accord Dawn Equip. Co. v. Micro-Trak Sys., Inc.*, 186 F.3d 981, 987 (7th Cir. 1999) (applying Minnesota law); *Transp. Indem. Co. v. Dahlen Transp. Inc.*, 161 N.W.2d 546, 550 (Minn. 1968); *Nat’l Farmers Union Prop. & Cas. Co., v. Anderson*, 372 N.W.2d 71, 75 (Minn. Ct. App. 1985); *see also Citadel Grp. Ltd. v. Wash. Reg’l Med. Ctr.*, 692 F.3d 580, 587 (7th Cir. 2012) (articulating the same rule but not applying Minnesota law).

⁴⁹² *See supra* note 482 and accompanying text.

⁴⁹³ Some elaboration is in order. As noted in the body text, the reasonable jury rule and the disputed extrinsic evidence rule substantially overlap. *See supra* text accompanying notes 479–481. The other two approaches I address in this section—(1) the Minnesota rule, and (2) the undisputed or conclusive rule—are also similar in operation to the two main rules. Indeed, both are combinations of the reasonable jury and disputed extrinsic evidence rules. *See supra* note 491 and accompanying text (discussing the Minnesota rule); *supra* notes 482–483 and accompanying text (discussing the undisputed or conclusive rule); *supra* note 492 and accompanying text (further discussing the undisputed or conclusive rule). As a result, all four frameworks should send substantially similar ratios of interpretive matters to judges and juries. To be sure, there is some variation, as my analysis of Case P is intended to demonstrate. Here is another example of such a difference: Juries will resolve more interpretation issues under the Minnesota

rule than under the undisputed or conclusive rule. That is because a judge may decide a case under the former approach only when the extrinsic evidence is conclusive *and* undisputed, while under the latter the judge may decide an issue if the evidence is conclusive *or* undisputed. Here is how the four approaches are likely ranked (from highest to lowest) in terms of the percentage of interpretation cases they send to a jury: (1) the Minnesota rule (which can also be described as “the conclusive *and* undisputed rule”); (2) the reasonable jury rule (which can also be thought of as the “conclusive rule”); (3) the disputed extrinsic evidence rule (which can also be described as the “undisputed rule”); and (4) the conclusive *or* undisputed rule. But again, while these approaches differ on the margins, logic demands that they should lead to the same result in a large majority of lawsuits given the degree of overlap between the reasonable jury rule and the disputed extrinsic evidence rule.

As I explained in the body text, my research indicates that these four rules as a group dominate the caselaw. Professor Burton concurs. He found that “[m]ost jurisdictions, *by far*, [authorize juries to resolve ambiguities] when extrinsic evidence is admissible, introduced, and contested.” BURTON, *supra* note 1, § 5.1, at 152 (emphasis added). Accordingly, I decided to exclusively focus on the four primary, overlapping approaches in my analysis of Case P in the body text. But there are other judge/jury standards that provide juries with a *significantly* reduced *or* increased role in ambiguity resolution. See BURTON, *supra*, §§ 5.1 & 5.1.1, at 152–54. In other words, there are alternative approaches that critically diverge from the four main rules.

For example, Professor Burton explains that some decisions require “a judge to draw any needed inferences from extrinsic evidence,” *id.* § 5.1.1, at 153, which entails that the resolution of ambiguity is a question of law unless the issue turns on the credibility of extrinsic evidence. This appears to be the majority rule in California. See, e.g., *Hess v. Ford Motor Co.*, 41 P.3d 46, 53 (Cal. 2002); *Garcia v. Truck Ins. Exch.*, 682 P.2d 1100, 1106 (Cal. 1984); *Brown v. Goldstein*, 246 Cal. Rptr. 3d 161, 172 (Cal. Ct. App. 2019); *Jade Fashion & Co. v. Harkham Indust., Inc.*, 177 Cal. Rptr. 3d 184, 198 (Cal. Ct. App. 2014); *Scheenstra v. Cal. Dairies, Inc.*, 153 Cal. Rptr. 3d 21, 39 (Cal. Ct. App. 2013); *Wolf v. Walt Disney Pictures and Television*, 76 Cal. Rptr. 3d 585, 602–03 (Cal. Ct. App. 2008); 14A CAL. JUR. 3D CONTRACTS §§ 211, 212 (Westlaw database updated August 2020). *But see*, e.g., *Lucas v. Elliot*, 4 Cal. Rptr. 2d 746, 748 (Cal. Ct. App. 1992) (holding that interpretation is a question of law only when the extrinsic “evidence is without conflict and is not susceptible of conflicting inferences,” which is essentially identical to the Minnesota rule); *SCC Alameda Point LLC v. City of Alameda*, 897 F. Supp. 2d 886, 893 (N.D. Cal. 2012) (“If the court concludes . . . that the parties’ competing interpretations are equally plausible, it cannot grant summary judgment.”). Under the “California rule,” juries resolve ambiguities considerably less often than under the four primary approaches. The California rule provides that to get to a jury, it is not enough that (1) both parties introduced relevant extrinsic evidence, and (2) the weight of each side’s evidence is such that the evidence is inconclusive—meaning a reasonable jury could rule for either side. Instead, there must be doubts as to the veracity of some of the extrinsic evidence—i.e., the *credibility* of some of the evidence must be contested. A few authorities go even further than the California rule by providing that “any ambiguity whatever must be resolved against the drafter, leaving no role for the jury at all.” BURTON, *supra* note 1, § 5.1.1, at 153. On the other extreme, Professor Burton observes that a small number of cases “appear to give the jury a broad role, asking it to resolve all ambiguities as a matter of fact.” *Id.* § 5.1, at 152. See, e.g., *Chadwick v. Chadwick*, 260 S.W.3d 421, 425 (Mo. Ct. App. 2008) (“Summary judgment, therefore, is only appropriate in contract cases where there is no ambiguity and the apparent meaning of contract terms can be determined within the four corners of the document.”); see also BURTON, *supra*, § 5.1.1, at 154 (further discussing frameworks that endorse a larger role for juries in ambiguity resolution). For an extended discussion of various approaches to the judge/jury standard, see LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.18, at 240–69.

As indicated in the second paragraph of this footnote, I left out of the body text any analysis of how Case P would be decided under the minority approaches that provide juries with greatly constricted or expanded authority to resolve ambiguities. That is

partly due to the fact that these alternatives are exceptionally easy to apply. To illustrate, if ambiguity resolution is always a question of fact, then obviously Case P goes to the jury. Likewise, if ambiguity resolution is never a question of fact, then Case P plainly must be decided by the judge. And if juries only resolve ambiguities when there are credibility issues regarding the extrinsic evidence, as mandated by the California rule, then again Case P must be decided by the court since the hypothetical raises no such issues.

However, there is one twist under the California rule. Up to this point in Part VIII, interpretive issues have been for the judge any time there is only one qualifying reading of the contract given the textual and extrinsic evidence and the governing version of the judge/jury standard. *See, e.g., supra* Part VIII.A. Interpretation is for the jury any time both sides are pressing qualifying readings. *See, e.g., supra* Part VIII.B. In other words, once a judge finds that a case must be decided as a matter of law, the judge has necessarily determined which party's construction of the agreement is controlling. The California rule breaks from this framework. Under that approach, judges are obligated to choose among reasonable inferences when there are no challenges to the credibility of the extrinsic evidence. This means that interpretation is often for the judge even when both parties present qualifying interpretations. Put another way, if a judge holds that an interpretive dispute must be decided as a question of law, the judge has *not* necessarily determined which party's construction of the agreement is controlling. Instead, both sides might still be eligible to win the lawsuit. Case P is illustrative of the distinction between the California rule and the other approaches to the judge/jury standard. The California rule requires that the judge resolve Case P. But it does not obligate the judge to decide for a particular party: Either Buyer or Seller can win the case at summary judgment. This contrasts with all of the other approaches, which provide that if Case P must be decided by the judge, then it must be decided in favor of a specific party: Buyer must win at summary judgment. *See, e.g., supra* notes 487–489, 492 and accompanying text. In effect, the California rule asks the judge to act as a jury when the relevant extrinsic evidence is divided such that a reasonable jury could rule for either side, as long as there is no challenge to the credibility of any of the evidence.

There is a final complexity in the caselaw regarding the judge/jury standard that merits brief discussion: The phrase “disputed evidence” has multiple meanings. Recall that the *Restatement* provides that interpretation is a question of fact only when “it depends on the credibility of extrinsic evidence *or* on a choice among reasonable inferences to be drawn from extrinsic evidence.” RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (AM. L. INST. 1981) (emphasis added). Professor Burton considers extrinsic evidence to be “disputed” when either prong of the *Restatement* rule is implicated—there is a challenge to the credibility of evidence or unchallenged evidence supports multiple reasonable inferences. *See* BURTON, *supra* note 1, § 5.1.1, at 152–53. But “disputed evidence” can be understood more narrowly to apply only to the first prong in the *Restatement*—when evidence is challenged on grounds of credibility. In fact, that is essentially the definition used by the California cases listed above in this footnote. *See, e.g., Wolf*, 76 Cal. Rptr. 3d at 602–03. For example, suppose the parties submit contradictory affidavits regarding what was said in a conversation that took place during the preliminary negotiations. In that event, each affidavit challenges the credibility of the other. Compare that with a lawsuit in which the plaintiff submits course of performance evidence that is unchallenged by the defendant and that favors the plaintiff's reading of the contract, and the defendant submits trade usage evidence that is unchallenged by the plaintiff and that favors the defendant's reading. In that situation, only the second prong of the *Restatement* is implicated: No one is questioning the credibility of any of the evidence, but since the evidence is in conflict, multiple reasonable inferences regarding the intent of the parties are supported. *See* LINZER, 6 CORBIN ON CONTRACTS § 25.18[D], at 268–69 (addressing this distinction by juxtaposing “conflicting testimony” with “conflicting inferences”). A third definition of “disputed evidence” is identified in two places in the body: Evidence is “disputed” when both sides' present at least some extrinsic evidence supporting their reading of the contract. *See supra* text accompanying notes 489, 491. That definition is different from the second prong of the *Restatement* because even if each party submits some extrinsic evidence favoring its position (and thus the evidence is

Given the varying approaches to the judge/jury standard, one might propose that the solution to Case P depends upon which framework is employed by the relevant jurisdiction. But I am hesitant to adopt this conclusion for several reasons. First, the caselaw in many states is divided over the governing articulation of the judge/jury standard.⁴⁹⁴ Second, recall that some authorities treat the reasonable jury rule and the disputed extrinsic evidence rule as the same principle.⁴⁹⁵ And third, I have seen no cases that analyze the alternative approaches. These points together strongly imply that few, if any, courts have consciously endorsed one formulation of the judge/jury standard over the others and that courts generally do not appreciate the differences among the various rules. Thus, I do not think we can accurately predict how courts will respond when faced with a lawsuit that implicates variations in the rules, such as Case P. In sum, the jurisprudence does not answer whether Case P raises a question of law or fact.

One possible explanation for this uncertainty is that situations like Case P may simply be too rare to justify courts (and commentators) working out the distinctions among the primary judge/jury standards. Once a court finds that a contract is patently ambiguous in a textualist state, both parties are strongly incentivized to locate and present extrinsic evidence supporting their preferred construction. As a result, there should be divided extrinsic evidence in most lawsuits that involve an ambiguous agreement in those jurisdictions.⁴⁹⁶ And in matters

“disputed” under this third definition), one side’s evidence could be so overwhelming that only one reasonable inference is possible (and thus the evidence is “undisputed” under the second prong of the *Restatement*). See KNIFFIN, 5 CORBIN ON CONTRACTS, *supra* note 32, § 24.30, at 327 (stating that even if extrinsic evidence is “in dispute,” it can still so heavily favor one side that a reasonable jury could reach only one conclusion). The third definition is also different from the first prong of the *Restatement* because both sides could present extrinsic evidence (and thus again the evidence is “disputed” under the third definition) without challenging the credibility of the other side’s evidence (and thus the evidence is “undisputed” under the first prong of the *Restatement*). See also *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 849 (N.M. 2012) (appearing to treat this third definition as distinct from the first two). However, I leave any further analysis of this issue and other complexities regarding the judge/jury standard for another day.

⁴⁹⁴ New York is one such state. To see this, review the cases cited *supra* in notes 477, 484, and 489. So is Minnesota. See *supra* notes 484, 491, and accompanying text. California’s authorities are also split. See *supra* note 493. As are Missouri’s. Compare *Chadwick v. Chadwick*, 260 S.W.3d 421, 425 (Mo. Ct. App. 2008) (providing that juries resolve all patent ambiguities), with *Girardeau Contractors, Inc. v. Mo. Highway & Transp. Com.*, 644 S.W.2d 360, 363 (Mo. Ct. App. 1982) (endorsing the reasonable jury rule).

⁴⁹⁵ See *supra* notes 480–481 and accompanying text.

⁴⁹⁶ See *Luitpold Pharm., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 87–88 (2d Cir. 2015) (“Because facial ambiguity in a contract will require the factfinder to examine extrinsic evidence to determine the contract’s effect, and because

where only one party submits materials from outside the contract, I suspect that the evidence will seldom be as weak as it is in Case P. Similar analysis applies to disputes in contextualist states. Any time an agreement suffers from a patent ambiguity, parties located in such jurisdictions should be highly motivated to exercise their right to introduce extrinsic evidence in order to maximize the strength of their position at summary judgment. Indeed, because contextualism permits courts to consider extrinsic evidence even when a contract is facially *unambiguous*, presenting such evidence is probably the default practice for lawyers in states following that approach. Moreover, as noted above,⁴⁹⁷ I found only one opinion dealing with facts that are identical or substantially similar to Case P (though my research was not exhaustive). These points together support the conclusion that very few litigated interpretive matters will mirror my hypothetical in either textualist or contextualist territories.⁴⁹⁸ Accordingly, some of the problems with the interpretation doctrine identified by Case P might be more theoretical than real.

Case Q, which is the final hypothetical, involves a facially unambiguous contract and extrinsic evidence that (1) overwhelmingly or exclusively favors an interpretation that conflicts with the text of the agreement, and (2) is strong. In this type of lawsuit, it is unclear whether there is a jury question. For example, return yet again to the basic facts of Case A—a contract for delivery on “December 15,” where Buyer argues for the standard meaning and Seller argues for the special meaning (delivery before January 1). In this hypothetical, assume that all of the relevant extrinsic evidence presented at summary judgment favors the Seller and is very strong: preliminary negotiations documents, the course of performance, the course of dealing, and usages of trade all support Seller’s construction, and no extrinsic evidence supports Buyer’s reading. On these facts, summary judgment would clearly be inappropriate for Buyer in a contextualist state. The critical question here, however, is whether summary judgment would be appropriate for *Seller*.

To elaborate, Case Q is identical to Cases C and Y in every respect but one. In Case C, the Seller’s evidence of a special

such extrinsic evidence is most often mixed, a court generally will not grant summary judgment on a contract claim when the operative language is ambiguous.”).

⁴⁹⁷ See *supra* note 486 and accompanying text.

⁴⁹⁸ That explains why I did not conduct an exhaustive search for decisions that match Case P.

meaning is weak, and so the court must grant summary judgment for Buyer.⁴⁹⁹ In Case Y, the Seller's evidence of a special meaning is modest, and so the court must deny a motion for summary judgment by either side.⁵⁰⁰ In Case Q, the Seller's evidence of a special meaning is exceptionally strong. If Buyer—the party asserting the ordinary meaning based on the contractual text—is not entitled to summary judgment in Case Y, then Buyer is also clearly not entitled to summary judgment in Case Q because Seller's extrinsic evidence is actually stronger here than in Case Y. But again, the question Case Q raises is whether *Seller*—the party asserting the special meaning based on extrinsic evidence—is entitled to summary judgment.

Put another way, is Case Q just a version of Case Y, where extrinsic evidence of a special meaning creates a question of fact that requires the jury to decide between the standard meaning supported by the contractual text and the special meaning? Or is Case Q a separate type of interpretive dispute in which the extrinsic evidence of a non-standard meaning is so powerful that it overwhelms the text as a matter of law, requiring the judge to adopt the non-standard meaning at summary judgment?

Put still another way, must a lawsuit where textual evidence conflicts with extrinsic evidence *always* either be (i) sent to the jury for resolution as a question of fact (as in Case Y), or (ii) decided by the judge as a matter of law for the party asserting the *standard* meaning of the text (as in Case C)? Or is there a third possibility (iii), in which the lawsuit can be decided by the judge as a matter of law for the party asserting a *special* meaning grounded in extrinsic evidence (as I am suggesting with respect to Case Q)?

As I said, it is unclear whether Case Q raises a question of law or fact; it is unclear whether Case Q is distinct from Case Y for purposes of a motion for summary judgment. That is so for two reasons. First, I have found no decision or secondary source that directly addresses what should happen in situations like Case Q. Second, plausible arguments for both the law and fact positions can be constructed from general principles and language in the contextualist caselaw.

I will begin with the proposition that Case Q should be resolved by the court as a matter of law in favor of Seller, the

⁴⁹⁹ See *supra* note 461 and accompanying text.

⁵⁰⁰ See *supra* note 468 and accompanying text.

party arguing for a non-standard meaning based on extrinsic evidence. On this view, Case Q is different from Case Y.

Recall the two most commonly employed judge/jury standards—the reasonable jury rule and the disputed extrinsic evidence rule. Those approaches dominate in virtually every contextualist jurisdiction.⁵⁰¹ My focus here is on the reasonable jury rule. That is because the disputed extrinsic evidence rule—to the extent it varies from the reasonable jury rule—does not logically fit situations where the textual and extrinsic evidence support competing readings of an agreement, as in Case Q. The disputed extrinsic evidence rule is principally designed for situations involving a patently ambiguous contract. If an agreement is unclear on its face, then whether the extrinsic evidence is disputed is central to whether the lawsuit should be resolved by a judge or a jury. For example, the disputed nature of the extrinsic evidence is what distinguishes Case X (question of fact) from Case D (question of law).⁵⁰² But if the contractual wording unambiguously favors one meaning, then whether the case raises a question of law or fact turns primarily on the *strength* of the extrinsic evidence that conflicts with the standard meaning of the express terms. To illustrate, Cases B and C (questions of law) are separated from Cases Y and Z (questions of fact) by the fact that the extrinsic evidence of a special meaning is weak in the first two hypotheticals and moderate or strong in the later two hypotheticals.⁵⁰³ Accordingly, the disputed extrinsic evidence rule—again, to the extent it differs from the reasonable jury rule—provides little guidance in Case Q.

It is not difficult to imagine a fact pattern in which a straightforward application of the reasonable jury rule mandates summary judgment for the party arguing for a special meaning based on extrinsic evidence. To see this, consider a more detailed version of Case Q. First, four letters exchanged during the preliminary negotiations expressly state that “delivery before

⁵⁰¹ See, e.g., *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361, 363 (3d. Cir. 1987) (applying Michigan law) (endorsing the reasonable jury rule); *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1000 n.1, 1004 (Alaska 2004) (endorsing the disputed extrinsic evidence rule); *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 849 (N.M. 2012) (endorsing both because the court treats the reasonable jury rule and the disputed extrinsic evidence rule as if they are the same standard); *Kelly v. Tonda*, 393 P.3d 824, 830 (Wash Ct. App. 2017) (endorsing the disputed extrinsic evidence rule).

⁵⁰² Compare *supra* text accompanying notes 462–463 (Case D), with *supra* text accompanying note 467 (Case X); see also *infra* Chart 2 (located shortly after note 520).

⁵⁰³ Compare *supra* text accompanying notes 460–461 (Cases B and C), with *supra* text accompanying notes 468–470 (Cases Y and Z); see also *infra* Chart 2 (located shortly after note 520).

January 1 will be acceptable, as per our past transactions and the practice in the industry.” Second, in all six of the prior sales under the current contract (i.e., course of performance), delivery of the lumber between the 16th and 31st of the month was either expressly approved of by Buyer or Buyer accepted the goods without objection even though delivery was specified in the agreement for the 15th. Third, under each of the prior contracts between the parties with a December 15 delivery date (i.e., course of dealing), goods were repeatedly accepted between December 16 and December 31, again with either express approval or no objection from Buyer. Fourth, multiple expert witnesses with significant experience in the lumber industry testified during depositions that the universal practice of industry participants (i.e., trade usage) is to treat delivery before January 1 as full performance when the contract specifies that the goods must arrive by December 15. Fifth, Buyer presented no extrinsic evidence in support of its position. In particular, Buyer was unable to identify a single example within the lumber industry (i.e., trade usage) where receipt of lumber after the 15th of the month and before the first of the following month was objected to or treated as a breach by the purchaser, when the agreement stated that the vendor must provide the goods by the 15th.

On those facts, no reasonable jury could deliver a verdict in favor of Buyer. As a result, summary judgment for Seller appears to be required under the reasonable jury rule; the judge must find as a matter of law that the contract permits delivery any time before January 1. Buyer’s argument that the words “December 15” possess their standard meaning will not be heard by the jury. Accordingly, if the reasonable jury rule is the governing standard—and *if* it applies in a straightforward manner—then it is possible for a party advancing a special meaning to win at summary judgment. In other words, under my analysis here, Case Q is indeed distinct from Case Y. And thus there are three options when textual and extrinsic evidence support conflicting readings of an agreement: (i) the matter goes to the jury (as in Case Y); (ii) summary judgment for the party asserting the standard meaning (as in Case C); and (iii) summary judgment for the party asserting the non-standard meaning (as in Case Q).

However, there is language in contextualist decisions that supports the conclusion that a party advancing a special meaning based on extrinsic evidence can never win at summary judgment—i.e., that the reasonable jury rule does *not* apply in a straightforward manner to a dispute like Case Q. Consider the

following statement from the Colorado Supreme Court's opinion in *Pepcol Manufacturing Co. v. Denver Union Corporation*:

In determining whether a contract is ambiguous, the court may conditionally admit extrinsic evidence on this issue. If the court, after considering the extrinsic evidence, determines that there is no ambiguity, then the extrinsic evidence must be stricken. . . . Once a contract is determined to be ambiguous, the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues.⁵⁰⁴

This quotation implies that there are only two possibilities under contextualism when a party contends that facially unambiguous language possesses a special meaning:⁵⁰⁵ (i) the extrinsic evidence of the special meaning is strong enough to send the case to the jury for adjudication as a question of fact (as in Case Y); or (ii) the extrinsic evidence of the special meaning is not strong enough to send the case to the jury, and thus the party asserting the standard meaning based on the text is entitled to judgment as a matter of law (as in Case C). Option (iii)—adopting a special meaning as a matter of law because the extrinsic evidence overwhelms the text—appears to be prohibited by the language in *Pepcol*. And thus Case Q is simply another species of Case Y. Let me explain.

To start with, here again are the three possible results when a party submits extrinsic evidence in support of a special meaning in a contextualist state, but this time phrased in terms of ambiguity: (i) the agreement is *ambiguous* because the extrinsic evidence is sufficient to establish that the parties may have intended a special meaning rather than the ordinary meaning of the contractual text (as in Case Y); (ii) the agreement is *unambiguous* because the extrinsic evidence is insufficient as a matter of law to establish that the parties may have intended a special meaning rather than the ordinary meaning of the contractual text (as in Case C); and (iii) the contract is *unambiguous* because the extrinsic evidence is so powerful that it establishes as a matter of law that the parties intended a special

⁵⁰⁴ 687 P.2d 1310, 1314 & n.3 (Colo. 1984) (citations and internal quotation marks omitted).

⁵⁰⁵ The language from *Pepcol* cannot apply when a contract is patently ambiguous—when the express terms are reasonably susceptible to more than one *standard* meaning. That is because relevant extrinsic evidence is never stricken in such cases under contextualism or textualism. Instead, either (1) the extrinsic evidence conclusively establishes which standard meaning the parties intended, or (2) the jury decides between the two standard meanings based on the textual and extrinsic evidence. See *supra* notes 462–463 (Case D), 467 (Case X), 471–498 (Case P), and accompanying text.

meaning rather than the ordinary meaning of the contractual text (as I am suggesting with respect to Case Q). Under this schema, a contract can be “unambiguous” in two ways—in favor of the standard meaning or in favor of the special meaning. Crucially, the language from *Pepcol* appears to permit only the former.

The Colorado Supreme Court wrote that “[i]f the court . . . determines that there is no ambiguity, then the extrinsic evidence must be stricken.”⁵⁰⁶ In other words, if an agreement is unambiguous, extrinsic evidence is no longer relevant. That phrasing makes perfect sense in situations where the judge concludes that the extrinsic evidence is not sufficient to establish that a contract is ambiguous, which is option (ii)/Case C. There, the judge strikes the extrinsic evidence and adopts the unambiguous ordinary meaning of the agreement’s express terms.

But the *Pepcol* phrasing does not fit a case in which a judge concludes that a contract unambiguously possesses a special meaning, which is option (iii)/Case Q. In that circumstance, extrinsic evidence supporting a non-standard meaning is the basis for the ruling that the agreement is unambiguous. According to *Pepcol*, however, extrinsic evidence is “stricken” whenever a trial judge determines that an agreement is unambiguous.⁵⁰⁷ Stricken evidence obviously cannot justify a legal conclusion. Therefore, when a judge finds that a contract is “unambiguous,” the ultimate meaning of the contract must be derived exclusively from within the four corners of the instrument. And this entails that the only type of unambiguous meaning that is possible under Colorado law is unambiguous *ordinary* meaning derived from the contractual text (option (ii)). Unambiguous *special* meaning (option (iii)), which necessarily flows from extrinsic evidence, is ruled out by the language from *Pepcol* because such evidence is stricken if an agreement is “unambiguous.”⁵⁰⁸ As a result, it appears that extrinsic evidence of a special meaning can, at most, establish the existence of a non-standard-meaning latent ambiguity; the most such evidence can do is create a question of fact for the jury, which is option (i)/Case Y. And thus Case Q must be treated as a variant of Case

⁵⁰⁶ *Pepcol*, 687 P.2d at 1315 n.3.

⁵⁰⁷ *Id.*

⁵⁰⁸ The Colorado Supreme Court has reaffirmed the *Pepcol* standard at least twice. See *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235–36 (Colo. 1998); *O’Brien v. Vill. Land Co.*, 794 P.2d 246, 249 n.2 (Colo. 1990).

Y where the evidence that the agreement is “ambiguous” happens to be stronger than in the typical lawsuit.

Some decisions from other contextualist states contain language that closely parallels or is logically consistent with *Pepcol*.⁵⁰⁹ And Professor Steven Burton employed comparable wording in describing the operation of contextualism generally.⁵¹⁰ But there are reasons to believe that the *Pepcol* quotation and similar statements in other opinions are not intended to prohibit summary judgment for a party asserting a non-standard meaning.

First, in many lawsuits involving a purported special meaning, only the party advancing that meaning (Seller in Case Q) submits extrinsic evidence during summary judgment. The side arguing for the standard meaning (Buyer in Case Q) relies exclusively on material within the four corners of the agreement at that stage in the litigation.⁵¹¹ Second, my research suggests that the party asserting a non-standard meaning virtually never moves for summary judgment. Indeed, I have found just four

⁵⁰⁹ See, e.g., *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995) (endorsing contextualism) (“Conversely, if after considering such [extrinsic] evidence, the court determines that the language of the contract is not ambiguous, then the parties’ intentions must be determined solely from the language of the contract.”); *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 849, 852 (N.M. 2012) (reaffirming that New Mexico follows contextualism) (“If a court concludes that there is no ambiguity, the words of the contract are to be given their ordinary and usual meaning.”) (internal quotation marks and alterations omitted); *Isbrandtsen v. N. Branch Corp.*, 556 A.2d 81, 84–85 (Vt. 1988) (endorsing contextualism) (“If, however, no ambiguity is found, then the language must be given effect in accordance with its plain, ordinary and popular sense.”).

⁵¹⁰ BURTON, *supra* note 1, § 4.3.3, at 128 (“However, in these [contextualist] jurisdictions, the court must decide after considering the extrinsic evidence whether the language of the contract document is reasonably susceptible to both meanings. If not, *the contract is unambiguous, the extrinsic evidence is excluded*, and the judge decides the interpretive question as a matter of law.”) (emphasis added); see also *id.* § 4.2.3, at 118–19 (“According to *Pacific Gas & Electric Co.*, as indicated above, the trial court would admit the extrinsic evidence conditionally, reserving its ruling on admissibility or admitting it subject to a motion to strike. If the court then finds the contract to be ambiguous, the evidence stays in. *If the court finds the contract to be unambiguous, it rules the evidence out or grants a motion to strike and, in either event, gives the contract its unambiguous meaning as a matter of law.*”) (citing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 n.7 (Cal. 1968)) (emphasis added).

⁵¹¹ See Schwartz & Scott, *supra* note 4, at 962 (“Contests over the meaning of contract terms thus follow a predictable pattern: one party claims that the words in a disputed term should be given their *standard dictionary meaning*, as read in light of the contract as a whole, the pleadings, and so forth. The counterparty argues either that the contract term in question is ambiguous and extrinsic evidence will resolve the ambiguity, or that extrinsic evidence will show that the parties intended the words to be given a *specialized or idiosyncratic meaning* that varies from the meaning in the standard language.”) (emphasis added).

cases in which that happened.⁵¹² Normally, it is the party alleging a standard meaning based on the contractual text who seeks summary judgment.⁵¹³ The side pressing a special meaning merely contends in response that the motion should be denied and the case should go to trial because the extrinsic evidence raises a question of fact over whether the parties used the standard meaning or a special meaning of the terms at issue. Given these two points, the *Pepcol* language might simply reflect how contextualism functions in the usual case.

To repeat, in the typical lawsuit, the party pressing the standard meaning moves for summary judgment based solely on the wording of the agreement, and the other side responds with extrinsic evidence purporting to show that the parties intended that wording to possess a special meaning and thus that construction of the contract raises a question of fact. In that situation, there are only two possibilities: Either (i) the extrinsic evidence is strong enough to defeat the motion, and the matter advances to trial for resolution by the jury, or (ii) the extrinsic evidence is not strong enough to defeat the motion and the court grants summary judgment to the party asserting the standard meaning.

The *Pepcol* language maps perfectly onto those two options. Remember, the Colorado Supreme Court stated that “[i]f the court, after considering the extrinsic evidence, determines that there is no ambiguity, then the extrinsic evidence must be stricken.”⁵¹⁴ That fits situation (ii), where the non-movant’s extrinsic evidence is too weak to establish the existence of a non-standard-meaning latent

⁵¹² I found three lawsuits where both the party advancing a special meaning and the party advancing the standard meaning moved for summary judgment. See *Valve Corp. v. Sierra Ent. Inc.*, 431 F. Supp. 2d 1091, 1093, 1096–1100 (W.D. Wash. 2004); *Neal & Co., Inc. v. Ass’n of Vill. Council Presidents Reg’l Hous. Auth.*, 895 P.2d 497, 500, 502–05 (Alaska 1995); *Madison Indus., Inc. v. Eastman Kodak Co.*, 581 A.2d 85, 88–90 (N.J. Super. Ct. App. Div. 1990); see also *Hazen First State Bank v. Speight*, 888 F.2d 574, 575–76, 578 (8th Cir. 1989) (while both parties moved for summary judgment, it is not clear whether the summary judgment motion of the party asserting a special meaning encompassed the interpretation issue). I also found one case where only the party asserting a special meaning moved for summary judgment. See *Feinberg v. Federated Dep’t Stores, Inc.* 832 N.Y.S.2d 760, 761–64 (N.Y. Sup. Ct. 2007).

⁵¹³ See, e.g., *Mylan Inc. v. SmithKline Beecham Corp.*, 723 F.3d 413, 417–20 (3d Cir. 2013); *W. States Constr. Co. v. United States*, 26 Cl. Ct. 818, 818–20 (1992); *Carter Baron Drilling v. Badger Oil Corp.*, 581 F. Supp. 592, 594, 599 (D. Colo. 1984); *Michael Schiavone & Sons, Inc. v. Securalloy Co.*, 312 F. Supp. 801, 802, 804 (D. Conn. 1970); *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987, 990 (S.D.N.Y. 1968); *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544–45 (Iowa 1995); *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 149, 151 (Ohio 1978).

⁵¹⁴ *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 n.3 (Colo. 1984).

ambiguity. In that case, the judge grants summary judgment to the side pressing the standard meaning derived from the contractual text. The extrinsic evidence of a non-standard meaning is effectively “stricken” because the judge ultimately does not rely on that evidence in construing the agreement. Instead, the court adopts the standard meaning based exclusively on the words within the four corners of the instrument. The Colorado high court also wrote that “[o]nce a contract is determined to be ambiguous, the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues.”⁵¹⁵ That fits situation (i), where the non-movant’s extrinsic evidence is sufficient to require that the lawsuit continue to trial. Therefore, the courts that wrote *Pepcol* and opinions with comparable statements might simply have been using language somewhat loosely to describe what normally happens under contextualism when a party offers extrinsic evidence of a special meaning, rather than intending to set forth a rule regarding which parties may successfully move for summary judgment in such cases.

Note further that I found only a few opinions outside of Colorado with language similar to that in *Pepcol*.⁵¹⁶ The vast majority of contextualist decisions from other jurisdictions contain nothing suggesting courts are barred from awarding summary judgment to the party advancing a non-standard meaning based on extrinsic evidence. This further supports the conclusion that *Pepcol* and comparable authorities should not be taken literally with respect to the scope of summary judgment power.⁵¹⁷

The caselaw discussed in the preceding several paragraphs supports conflicting understandings regarding whether a party asserting a non-standard meaning can successfully move for summary judgment in an interpretative dispute governed by the principles of contextualism. It is thus not possible to definitively answer whether Case Q raises a question of law for the judge or a

⁵¹⁵ *Id.* at 1314. Presumably interpretation is only “generally” an issue of fact if the contract is ambiguous because sometimes the parties do not submit any extrinsic evidence, in which case ambiguity resolution is a question of law. *See supra* notes 50, 241, and accompanying text.

⁵¹⁶ *See supra* note 509 and accompanying text.

⁵¹⁷ Of course, another possibility is that there are two contextualist approaches on this issue: (1) the Colorado rule, reflected in *Pepcol*, under which only the party arguing for the standard meaning can win the case at summary judgment, and (2) the alternative rule under which either party can win the case at summary judgment. If the Colorado rule governs, then Case Q is just a version of Case Y where the evidence is stronger than usual. If the alternative rule governs, then Case Q is distinct from Case Y.

question of fact for the jury. However, as I noted above, the party advancing a special meaning almost never seeks summary judgment; recall that I have located just four cases where that occurred.⁵¹⁸ While the decisions available in electronic databases like Westlaw are frequently not representative of the broader universe of litigated matters,⁵¹⁹ the paucity of published cases in which the party asserting a non-standard meaning moved for summary judgment supports the conclusion that such motions are rare. Moreover, the extrinsic evidence favoring a special meaning will probably seldom be as strong as in Case Q. Thus, as with Case P, Case Q may identify a problem with contextualist doctrine that is largely theoretical in nature.⁵²⁰

* * *

Part VIII analyzed nine hypothetical cases to determine whether they raise a question of law or fact. Chart 2 sets forth a summary of my conclusions with respect to each hypo.

⁵¹⁸ See *supra* notes 512–513, and accompanying text.

⁵¹⁹ See Silverstein, *supra* note 13, at 229–41.

⁵²⁰ Note that the bulk of my analysis of Case Q might not apply to California, arguably the leading contextualist jurisdiction. As I explained previously, California follows a minority approach to the judge/jury standard: Interpretation is a question of fact in that state, according to most cases, only when there are issues of credibility regarding extrinsic evidence. See *supra* note 493. There are no credibility issues in Case Q. Thus, if the California rule applies to a lawsuit with that structure, then the matter should be adjudicated by the court at summary judgment. But the California Rule can be understood as a version of the disputed extrinsic evidence rule. See *supra* note 493. And I argued in the body text that the disputed extrinsic rule does not logically fit situations like Case Q, to the extent that approach varies from the reasonable jury rule. See *supra* text accompanying notes 501–503. Accordingly, I do not know whether courts in California would apply the California rule to a situation like Case Q. This means that my general uncertainty about the proper resolution of Case Q applies equally to California specifically.

Chart 2: Question of Law or Question of Fact

Legend
“Clear-B” = the text of the contract clearly supports buyer
“Ambig” = the text of the contract is reasonably susceptible to either parties’ construction
“Favor-B” = the extrinsic evidence overwhelmingly favors buyer and is either weak, moderate, or strong
“Favor-B/Weak” = the extrinsic evidence overwhelmingly favors buyer, but the evidence is weak
“Favor-B/Moderate” = the extrinsic evidence overwhelmingly favors buyer, and the evidence is moderate in weight
“Favor-B/Strong” = the extrinsic evidence overwhelmingly favors buyer, and the evidence is strong
“Favor-S/Weak” = the extrinsic evidence overwhelmingly favors seller, but the evidence is weak
“Favor-S/Moderate” = the extrinsic evidence overwhelmingly favors seller, and the evidence is moderate in weight
“Favor-S/Strong” = the extrinsic evidence overwhelmingly favors seller, and the evidence is strong
“Divided” = the extrinsic evidence supports the interpretations of both sides and is either weak, moderate, or strong
“Divided/Weak” = the extrinsic evidence supports the interpretations of both sides, but the evidence is weak
“Divided/Moderate” = the extrinsic evidence supports the interpretations of both sides, and the evidence is moderate in weight
“Divided/Strong” = the extrinsic evidence supports the interpretations of both sides, and the evidence is strong
When the text is ambiguous, the summary judgment disposition applies to textualism and both versions of contextualism. When the text is clear, the summary judgment disposition applies only to both versions of contextualism.

Case	Text	Extrinsic Evidence	Summary Judgment Disposition
No Jury Question			
A	Clear-B	Favor-B	For B
B	Clear-B	Divided/Weak	For B
C	Clear-B	Favor-S/Weak	For B
D	Ambig	Favor-B/Strong or Moderate	For B
Jury Question			
X	Ambig	Divided	Denied
Y	Clear-B	Favor-S/Moderate	Denied
Z	Clear-B	Divided/Strong or Moderate	Denied
Unknown			
P	Ambig	Favor-B/Weak	N/A
Q	Clear-B	Favor-S/Strong	N/A

Let me offer two final concerns with this framework. First, the lines separating my examples are unclear on the margins. In other words, cases can be difficult to classify using the parameters identified in Chart 2. To illustrate, when does the weight of extrinsic evidence move from weak to moderate to strong? Likewise, when does evidence change from overwhelmingly favoring one party to divided? Second, fact patterns can raise complexities that go beyond my parameters. For example, what happens in a case where the contractual language is ambiguous, but it does not equally support both interpretations? To be more specific, suppose the textual argument for one reading of the agreement is twice as strong as the textual argument for the other reading, but the instrument is still “reasonably susceptible” to both asserted constructions. In a lawsuit like that, how does contractual language interact with extrinsic evidence of varying weights for each side?

Unresolved issues like those—some of which may be unresolvable—limit to some degree the value of the analysis in this part. Nonetheless, because the nine hypotheticals I addressed are paradigms of interpretive disputes, the discussion

here should provide real guidance regarding the circumstances in which interpretation raises a question of law or fact.

IX. ISSUE 7: CONTEXTUALISM AND THE PAROL EVIDENCE RULE

Courts in contextualist states almost universally proclaim that the parol evidence rule still operates within their borders.⁵²¹ Indeed, in *Pacific Gas*, the California Supreme Court wrote that “extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract.”⁵²² The parol evidence rule also retains a significant role under the *Restatement (Second) of Contracts*,⁵²³ which adopts contextualism.⁵²⁴ However, there is a plausible argument that contextualist interpretation substantially or entirely destroys the parol evidence rule. That is because contextualism eliminates the ambiguity determination and thus permits the use of extrinsic evidence to establish a special meaning that contradicts the standard meaning of the contract language.⁵²⁵ This part addresses whether anything remains of the parol evidence rule in a contextualist interpretive regime.

Let me start with a review of first principles. As I explained in Part II,⁵²⁶ contract interpretation and the parol evidence rule—in their pure forms—address distinct but closely-connected subjects. Interpretation concerns the process for determining the *meaning* of the terms of an agreement. The parol evidence rule governs whether evidence of prior or contemporaneous terms may be used to *contradict* or *add* to a written contract. Numerous scholars endorse this framework.⁵²⁷

⁵²¹ See, e.g., *Still v. Cunningham*, 94 P.3d 1104, 1109 (Alaska 2004); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1140 (Ariz. 1993); *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n*, 291 P.3d 316, 318–19 (Cal. 2013); *Boyer v. Karakehian*, 915 P.2d 1295, 1299 (Colo. 1996); *Huggins v. Huggins & Harrison, Inc.*, 103 A.3d 1133, 1140 (Md. Ct. Spec. App. 2014); *Briggs v. Kidd & Leavy Real Est. Co., L.L.C.*, No. 340713, 2018 WL 4603900, at *2 (Mich. Ct. App. Sep. 25, 2018); *Conway v. 287 Corp. Ctr. Assoc.*, 901 A.2d 341, 346 (N.J. 2006); *Sanders v. FedEx Ground Package Sys., Inc.*, 188 P.3d 1200, 1206 (N.M. 2008); *Brogan & Anensen LLC v. Lamphiear*, 202 P.3d 960, 961 (Wash. 2009).

⁵²² *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968); see also *supra* note 312 (identifying three other decisions from contextualist states that contain comparable language).

⁵²³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 209–10, 213–218 (AM. L. INST. 1981); see also *supra* Part II.B (primarily using the *Restatement* to explain the parol evidence rule).

⁵²⁴ See *supra* note 317 and accompanying text.

⁵²⁵ See *supra* Parts III, VII.A.

⁵²⁶ See *supra* note 107 and accompanying text.

⁵²⁷ See, e.g., Kniffin, *supra* note 11, at 77–78, 90 (summarizing the author’s view); *id.* at 90–110 (setting forth the author’s views in detail); *id.* at 81–90 (presenting the views of

To illustrate, suppose that two parties enter into a written contract under which Seller is obligated to deliver “lumber” to Buyer by “early December” at the price of \$10.00 per unit.⁵²⁸ The writing says nothing about Seller providing a warranty. Consider three scenarios based on these facts.

First, after the contract is executed, a dispute arises over the timing of delivery. The parties disagree as to the cutoff date established by “early December.” Buyer asserts that the contract requires delivery by December 5, while Seller counters that the deadline is December 10. This is an *interpretive* argument. What does “early December” *mean*? If the matter proceeds to litigation, the court should apply the interpretation rules.

Second, suppose that the dispute instead concerns the quality of the lumber. Buyer maintains that the wood does not meet the requirements of an oral warranty that Seller and Buyer agreed to during the preliminary negotiations. Seller responds that the parties’ written contract is a complete integration, and thus any such warranty promised is not actually an element of their deal. This is a *parol evidence rule* argument. May Buyer introduce evidence that would *add* an oral side term (the warranty) to the express terms contained in the written document? If the matter proceeds to litigation, the court should apply the principles that make up the parol evidence rule.⁵²⁹

Third, assume a dispute develops over the price of the lumber. Buyer contends that during the closing the parties orally agreed that Seller would provide the lumber for \$8.00 per unit rather than \$10.00. Seller replies that the written agreement is integrated with respect to price, and thus the oral promise of \$8.00 per unit is not a part of their contract. This too is a *parol evidence rule* argument. May Buyer introduce evidence of an oral side term (the \$8.00 price) that *contradicts* a provision set forth in the writing? If the matter proceeds to litigation, the court should apply the principles that make up the parol evidence rule.

other scholars who endorse this framework); BURTON, *supra* note 1, §4.2.4, at 120–22; *id.* § 3.1.1, at 67; FARNSWORTH, *supra* note 17, § 7.12, at 466; MURRAY, *supra* note 38, § 83[A], at 416–17; *see also* CALAMARI AND PERILLO, *supra* note 7, § 3.9, at 129 (“Standard academic thinking . . . is to the effect that the parol evidence rule is distinct from the topic of interpretation.”) (collecting authorities).

⁵²⁸ These facts are based upon *Donald W. Lyle, Inc. v. Heidner & Co.*, 278 P.2d 650 (Wash. 1954), and *Thompson v. Libbey*, 26 N.W. 1 (Minn. 1885).

⁵²⁹ I am using the phrase “parol evidence rule” here to refer to the entire parol evidence process—the integration analysis (step 1) and application of the contradiction and supplementation prongs of the parol evidence rule (step 2). *See supra* notes 68–78 and accompanying text.

These examples constitute archetypes of interpretation, addition, and contradiction. But those three categories significantly bleed together on the margins.⁵³⁰ Partly as a result, many courts do not differentiate between interpretation and the parol evidence rule.⁵³¹ And scholars are divided over whether interpretation and the parol evidence rule can actually be differentiated.⁵³²

I side with the majority of commentators who maintain that interpreting is not the same as contradicting or adding terms, at least in cases that are at the core of those concepts. But even if I am correct as a general matter, there are good reasons to believe that contextualism specifically extinguishes the parol evidence rule by collapsing the distinction between interpretation, contradiction, and addition. Continuing with the example from above, suppose that Seller argues that “early December” possesses a special meaning in the parties’ industry—delivery by December 31. Such a construction plainly conflicts with the standard meaning of the contractual language. But contextualist principles permit Seller to introduce extrinsic evidence in favor of this reading.⁵³³ Does that entail that the *contradiction* prong of the parol evidence rule no longer exists? Likewise, suppose Buyer

⁵³⁰ See *supra* note 12 and accompanying text (noting that it is exceptionally difficult to distinguish between interpretation and the parol evidence rule); *supra* notes 104–106 and accompanying text (explaining that courts are divided over what constitutes contradicting a contract rather than supplementing it); 12 WILLISTON, *supra* note 133, § 34:7, at 78–79 (“[A]s the cases make clear, the line between explaining and supplementing, on the one hand, and contradicting on the other, can become blurred.”).

⁵³¹ See Greenawalt, *supra* note 132, at 587 (“Many courts draw no clear distinction between a plain meaning rule and a parol evidence rule when it comes to interpretation.”); BURTON, *supra* note 1, § 4.2.4, at 120 (same); Kniffin, *supra* note 11, at 110–20 (reviewing judicial opinions that conflated interpretation and the parol evidence rule); see, e.g., Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1140 (Ariz. 1993); Shay v. Aldrich, 790 N.W.2d 629, 641 (Mich. 2010); URI, Inc. v. Kleberg County, 543 S.W.3d 755, 764 (Tex. 2018).

⁵³² Daniel, *supra* note 163, at 258 (explaining that scholars are split over whether interpretation and the parol evidence rule should be distinguished). For commentators who differentiate between interpretation and the parol evidence rule, see *supra* note 527. For some who do not, see CALAMARI AND PERILLO, *supra* note 7, § 3.9, at 128 (describing “the admissibility of extrinsic evidence on the question of *meaning*” as implicating “a second aspect of the parol evidence rule”), *id.* § 3.16, at 142–43 (“Corbin’s discussion proceeds on the assumption that there is a clear-cut distinction between offering evidence of a consistent additional term and offering evidence on the issue of meaning. Nothing could be further from the truth.”), and Linzer, *supra* note 12, at 801 (“Thus, the parol evidence rule and the plain meaning rule are conjoined like Siamese twins. Even though many academics and more than a few judges have tried to separate them, the bulk of the legal profession views them as permanently intertwined.”). See also Kniffin, *supra* note 11, at 120–26 (criticizing various authorities for conflating interpretation and the parol evidence rule).

⁵³³ See *supra* Parts III, VII.A.

argues that “lumber” just means lumber of a particular quality in the industry—the same quality as in the oral warranty from the second hypothetical above.⁵³⁴ Once again, contextualist principles allow Seller to offer extrinsic evidence supporting such a construction.⁵³⁵ Does this entail that the *addition* prong of the parol evidence rule no longer exists? In short, does contextualism nullify the parol evidence rule by allowing parties to use extrinsic evidence to contradict or add to an integrated agreement under the guise of asserting that the text of the instrument possesses a special meaning?⁵³⁶

Many judges and scholars think that the answer is “yes” (or at least “largely yes”). Perhaps the most notorious exponent of this view is Judge Alex Kozinski, formerly of the Ninth Circuit Court of Appeals. In *Wilson Arlington Company v. Prudential Insurance Company of America*, Judge Kozinski cited a series of decisions embracing contextualist interpretation to support his conclusion that “the parol evidence rule has been severely eroded in many jurisdictions during the past few decades.”⁵³⁷ He added that “[o]ften, this erosion has been so complete as to render the parol evidence rule essentially meaningless,” and cited *Pacific Gas* as an example.⁵³⁸ He claimed that in that case, “the California Supreme Court, without expressly abolishing the parol evidence rule, cut the life out of it by permitting the introduction of extrinsic evidence to demonstrate the existence of an ambiguity even when the language of a contract is perfectly clear.”⁵³⁹ In a concurring opinion in *Dore v. Arnold Worldwide, Inc.*, Justice Marvin R. Baxter, formerly of the California Supreme Court, agreed with Judge Kozinski’s assessment:

Pacific Gas essentially abrogated the traditional rule that parol evidence is not admissible to contradict the plain meaning of an integrated agreement by concluding that, even if the agreement

⁵³⁴ See *supra* text accompanying note 529.

⁵³⁵ See *supra* Parts III, VII.A.

⁵³⁶ Cf. Greenawalt, *supra* note 132, at 587–88 (“The second, more subtle, point is this: the distinction between evidence about the meaning of language and evidence about supplementary terms can blur if parties are free to use language as they choose. Thus, a party may claim that an omitted term was ‘implicit’ in the contract’s language as a way to escape any bar on showing supplementary terms.”).

⁵³⁷ 912 F.2d 366, 370 (9th Cir. 1990).

⁵³⁸ *Id.*

⁵³⁹ *Id.* Judge Kozinski’s attack on *Pacific Gas* in *Trident Center v. Connecticut General Life Insurance Co.*, 847 F.2d 564, 569 (9th Cir. 1988), is more well-known than *Wilson Arlington Company*. (The critical language from *Trident* is quoted *supra* in note 339.) But his analysis in *Wilson Arlington Company* is more focused on the parol evidence rule.

“appears to the court to be plain and unambiguous on its face,” extrinsic evidence is admissible to expose a *latent* ambiguity, i.e., the possibility that the parties actually intended the language to mean something different.⁵⁴⁰

However, there are two arguments that contextualism does not eviscerate the parol evidence rule.⁵⁴¹ The first goes as

⁵⁴⁰ 139 P.3d 56, 62 (Cal. 2006) (Baxter, J., concurring) (quoting *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968)); *accord, e.g.*, *Sullivan v. Sovereign Bancorp., Inc.*, 33 F. App'x 640, 642 (3d Cir. 2002) (applying Pennsylvania law) (“One clearly cannot rely upon inadmissible parol evidence to create an ambiguity that the oral statements then resolve. Such bootstrapping would be the exception that destroys the parol evidence rule.”); *Individual Healthcare Specialists, Inc. v. Bluecross Blueshield of Tenn., Inc.*, 566 S.W.3d 671, 692 (Tenn. 2019) (“Under the *Pacific Gas* approach, if extrinsic evidence shows that the contractual language does not comport with the parties’ actual intent, the court may override the written words if doing so is necessary to ‘correct’ the written agreement.”); *Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 475 (Tex. 2011) (Jefferson, C.J., dissenting) (“To consider deleted language or other previous drafts or negotiations [when construing a facially unambiguous contract] would destroy the parol evidence rule without easing interpretation.”); Gilson et al., *supra* note 6, at 36 (“Under this [contextualist] regime, interpretive doctrines such as the parol evidence rule are treated merely as prima facie guidance, which courts can (and should) override by considering additional evidence of the context of the transaction if they believe that doing so is necessary to substantially ‘correct’ or complete the parties’ written contract by realigning it with its ‘true’ meaning.”); Goldstein, *supra* note 32, at 100–02 (concluding that contextualism dispenses with the prohibition on using extrinsic evidence to vary or contradict the express terms of an agreement); Madeleine Plasencia, *Who’s Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE UNIV. L. REV. 215, 241 (1997) (arguing that *Pacific Gas* and two other leading California cases decided around the same time “virtually eliminated the parol evidence rule in California”); *see also, e.g.*, *Fid. & Deposit Co. of Md. v. City of Sheboygan Falls*, 713 F.2d 1261, 1271 (7th Cir. 1983) (Posner, J.) (“The concept of latent ambiguity may seem to do away with the parol evidence rule”); *Delta Dynamics, Inc. v. Arioto*, 446 P.2d 785, 789 (Cal. 1968) (Mosk, J., dissenting) (warning that the three California decisions discussed by Plasencia, *supra*, adopted “a course leading toward emasculation of the parol evidence rule”); *Stryker Corp. v. Nat’l Union Fire Ins. Co.*, 842 F.3d 422, 427 (6th Cir. 2016) (applying Michigan law) (describing contextualist interpretation as a “[b]reaking from the parol evidence rule”); Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 669 (1997) (explaining that contextualist interpretation “does substantially undercut the exclusionary effect of the parol evidence rule”).

⁵⁴¹ Note that courts sometimes contend that the parol evidence rule still possesses life under contextualism without presenting any reasoning in support of their position. *Donoghue v. IBC USA (Publications), Inc.*, 70 F.3d 206 (1st Cir. 1995) (applying Massachusetts law), is illustrative. There, the court concluded that although the consideration of extrinsic evidence during the ambiguity determination “at first glance . . . may seem to subvert . . . the parol evidence rule . . . , closer examination discloses that proceeding in this way facilitates decisions consistent with . . . the rule.” *Id.* at 215. But the court did not support this conclusion with any arguments. Instead, it simply recapitulated contextualism and the policy underlying that school of interpretation. *Id.* at 215–16. *See also* *Cohanzyck Partners, L.P. v. FTM Media, Inc.*, 120 F. Supp. 2d 352, 360 (S.D.N.Y. 2000) (“The Arizona Supreme Court did not eliminate the parol evidence rule when it decided *Taylor*. Indeed, it expressly stated, at three separate places in the opinion, that the parol evidence rule is still applicable.”) (referring to *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1138–41 (Ariz. 1993), the case in which the

follows: When extrinsic evidence of a special meaning is not sufficient to establish that a contract is ambiguous—i.e., when the evidence is not strong enough to send the case to the jury—it is the parol evidence rule that bars the evidence from serving any further role in the lawsuit. Extrinsic evidence is frequently too weak to create a question of fact regarding whether the parties employed a special meaning in drafting their contract.⁵⁴² Accordingly, the parol evidence rule restricts the admission of evidence in many cases, and thus the rule still operates under contextualism.

A number of decisions in contextualist jurisdictions embrace a version of this argument. For example, in *Taylor v. State Farm Mutual Automobile Insurance Company*, the Arizona Supreme Court wrote:

[T]he judge need not waste much time if the asserted interpretation is unreasonable or the offered evidence is not persuasive. A proffered interpretation that is highly improbable would necessarily require very convincing evidence. In such a case, the judge might quickly decide that the contract language *is not reasonably susceptible to the asserted meaning*, stop listening to evidence supporting it, and rule that its admission would violate the parol evidence rule.⁵⁴³

Pursuant to this language, when contractual text is “not reasonably susceptible to the asserted [special] meaning,” admitting evidence in support of that meaning “would violate the parol evidence rule.”⁵⁴⁴ But remember that contextualism jettisons the reasonably susceptible standard as a genuine constraint on the scope of possible interpretations.⁵⁴⁵ Instead, the “ambiguity” determination under contextualism is simply an assessment of the weight of the evidence: Is the extrinsic evidence sufficient to advance the case to a jury?⁵⁴⁶ As a result, what *Taylor* actually provides is that “admission [of extrinsic evidence] would violate the parol evidence rule” any time

Arizona Supreme court firmly endorsed contextualism) (offering no additional analysis supporting the claim that the parol evidence rule still functions in Arizona); *Isbrandtsen v. N. Branch Corp.*, 556 A.2d 81, 84–85, 85 n.* (Vt. 1988) (endorsing contextualism, observing in a footnote that the parol evidence rule continues to exist, but providing no real analysis on that point).

⁵⁴² See *supra* notes 340–345, 458–461, and accompanying text.

⁵⁴³ 854 P.2d 1134, 1141 (Ariz. 1993) (emphasis added).

⁵⁴⁴ *Id.*; see also *id.* at 1138–41 (explaining in detail the principles of Arizona’s contextualism).

⁵⁴⁵ See *supra* notes 314–339 and accompanying text.

⁵⁴⁶ See *supra* notes 340–342 and accompanying text; see also *supra* Parts VIII.A, VIII.B (identifying examples where the evidence is not strong enough to create a jury question under contextualism and other examples where it is sufficiently strong).

evidence of a non-standard meaning is too weak to create a question of fact.

To the same effect is the Ninth Circuit's opinion applying California law in *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*: "If, after considering the evidence, the court determines that the contract is not reasonably susceptible to the interpretation advanced, the parol evidence rule operates to exclude the evidence. The court may then decide the case on a motion for summary judgment."⁵⁴⁷

The logic implicit in this argument is somewhat easier to see under textualism, so I will begin there. Suppose Buyer and Seller enter into a facially unambiguous contract. Such a contract is, by definition, not reasonably susceptible to the meaning asserted by one of the parties.⁵⁴⁸ Assume, therefore, that the judge correctly rules that Buyer's reading is consistent with the ordinary meaning of the text while Seller's is not. In that case, if the court permits Seller to proffer extrinsic evidence supporting its construction, the evidence is necessarily being used to contradict or add to the contract because the judge has already rejected Seller's interpretation. Judge Posner puts the point this way: "If the written contract is clear without extrinsic evidence, then such evidence could have no office other than to contradict the writing, and is therefore excluded."⁵⁴⁹ And what bars both contradiction and addition? The parol evidence rule.⁵⁵⁰

⁵⁴⁷ 852 F.2d 493, 496 n.2 (9th Cir. 1988); *see also* Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1010 n.9 (3d Cir. 1980) ("If the written contract is unambiguous, the Parol Evidence Rule and the doctrines cited above bar the use of extrinsic evidence for interpretation. If the written contract is ambiguous the Parole [sic] Evidence Rule does not prevent the use of extrinsic evidence to interpret the writing."); *Shay v. Aldrich*, 790 N.W.2d 629, 641–42 (Mich. 2010) (endorsing contextualism and explaining that the parol evidence rule "prohibits the use of extrinsic evidence to interpret unambiguous language within a document").

⁵⁴⁸ Because we are dealing with textualism, I am using "reasonably susceptible" in the true sense here. *See supra* notes 304–306 and accompanying text (describing that sense).

⁵⁴⁹ *In re Envirodyne Indust., Inc.*, 29 F.3d 301, 305 (7th Cir. 1994) (Posner, C.J.); *accord* *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 26–27 (2d Cir. 1988) ("In the absence of ambiguity, the effect of admitting extrinsic evidence would be to allow one party to substitute his view of his obligations for those clearly stated.") (internal quotation marks omitted). Authorities have long recognized this point. *See, e.g.*, 22 C.J. *Evidence* § 1570, 1177–78 (1920) ("Where the language used is clear and unambiguous, extrinsic evidence is not admissible on the ground of aiding the construction, for in such cases the only thing which could be accomplished would be to show the meaning of the writing to be other than what its terms express, and the instrument cannot be varied or contradicted under the guise of explanation or construction.").

⁵⁵⁰ Of course, this presumes that the writing is a complete integration. *See supra* text accompanying notes 68–72.

Similar analysis can be applied to contextualism. Modifying the example from the previous paragraph, suppose a judge correctly decides that the parties' written contract is not "reasonably susceptible" to the special meaning advanced by Seller because the extrinsic evidence supporting that construction is too weak. In that situation, if the court allows Seller to introduce its extrinsic evidence, the evidence is once again necessarily being used to contradict or add to the contract because the judge has already rejected Seller's interpretation. But such evidence is obviously inadmissible under contextualism; if extrinsic evidence of a non-standard meaning is insufficient to create a question of fact, then the judge will dispose of the interpretation issue at summary judgment in favor of the party arguing for the standard meaning of the contract.⁵⁵¹ And if weak interpretive evidence is barred from trial under contextualism, then contextualism continues to restrict the precise type of evidence governed by the parol evidence rule because weak interpretive evidence *just is* evidence of contradictory or additional terms, pursuant to this argument. As a result, the parol evidence rule remains operational under contextualism.

I think it is helpful to refer to this as the "mirror-image argument." That is because the argument focuses on the fact that contradiction and addition together are the mirror image of interpretation: Whenever evidence purporting to construe an agreement does not qualify as interpretive—because it supports a construction that is inconsistent with the ordinary meaning of the contract under textualism, or because the evidence is not strong enough to create a question of fact over whether the parties intended a special meaning under contextualism—it must fall into either the contradiction category or the addition category. And both of those categories are governed by the parol evidence rule.⁵⁵²

⁵⁵¹ See *supra* Part VIII.A (the most helpful material is in note 461 and the accompanying text).

⁵⁵² Note that there is a gap in this reasoning: It cannot fully account for the treatment of course of performance evidence. The parol evidence rule only bars extrinsic evidence regarding side terms agreed to *prior to or contemporaneously with* execution of an integration. See *supra* text accompanying notes 71–72. Evidence concerning terms agreed to *after* formation is outside the scope of the rule. See *supra* text accompanying note 85. A course of performance necessarily occurs subsequent to the parties entering a contract. See *supra* note 31 (defining course of performance). The parol evidence rule thus cannot restrict the use of course of performance evidence unless the evidence is specifically employed to assert the existence of pre-contractual side terms, which is likely rare. This means that in a textualist state, if a contract is facially unambiguous, the prohibition on considering course of performance evidence typically flows exclusively from

It is critical to keep in mind that under the mirror-image argument, what distinguishes interpretive evidence from contradictory or supplementary evidence in a contextualist regime is the *weight* of the extrinsic evidence at issue.⁵⁵³ If the evidence is strong enough to submit the asserted special meaning to the jury, then the evidence concerns interpretation and may be presented at trial. If the evidence is not strong enough to submit the asserted special meaning to the jury, then the evidence concerns contradiction or addition and is inadmissible at trial. Contextualism preserves the parol evidence rule, according to this argument, because evidence of contradictory or additional terms (i.e., weak interpretive evidence) is barred under that system.⁵⁵⁴

While the mirror-image argument has some commendable features,⁵⁵⁵ the argument fails to establish that the parol

the plain meaning rule. Likewise, in a contextualist state, any limitation on using course of performance evidence normally is derived entirely from the rules of interpretation. See CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* 645 (2010) (explaining that course of performance “enjoys a favored position with respect to the parol evidence rule” and “cannot be barred by the parol evidence rule” if the evidence is presented by skillful attorneys, in part because “course of performance arises from conduct after contract formation”). Accordingly, even if contradiction and addition are the mirror image of interpretation as Judge Posner and others have asserted, the parol evidence rule does not apply in every circumstance in which extrinsic evidence is barred on grounds that it contradicts or adds to the contract. Put another way, the parol evidence rule is not implicated every time a party tries to (1) submit extrinsic evidence to construe a patently unambiguous contract under textualism, or (2) submit extrinsic evidence that is too weak to establish the existence of a non-standard-meaning latent ambiguity under contextualism. But as I am about to explain, the mirror-image argument fails to establish that contextualism preserves the parol evidence rule. And so this particular flaw in the argument is not of critical importance.

⁵⁵³ Under textualism, by contrast, the distinction is qualitative; interpretive evidence and evidence of contradictory or supplemental terms are different in kind.

⁵⁵⁴ To be fair, contextualist courts may not actually be contending that the difference between interpretive evidence and contradictory or supplemental evidence is nothing more than the strength of the evidence. The cases that set forth some version of the mirror-image argument are generally rather vague. A more charitable reading might thus lead one to conclude that these courts are asserting something other than the mirror-image argument. However, because it is plausible to construe various contextualist decisions as advocating for the mirror-image argument in the form I have described, I concluded that it was important to address that argument.

⁵⁵⁵ For example, the argument illustrates the close relationship of contract interpretation and the parol evidence rule. The argument therefore helps to explain why courts so often conflate the two areas of law, such as when they write statements like this: “[W]hen a contract is *unambiguous*, the *parol evidence* rule bars our consideration of extrinsic evidence.” *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011) (emphasis added); see also *supra* note 531 and accompanying text (discussing courts that do not differentiate between interpretation and the parol evidence rule and providing additional examples); BURTON, *supra* note 1, § 4.2.4, at 120–22 (arguing that quotations like the one from *Saregama* “confuse[] the parol evidence and plain meaning rules,” in part because the former rule “applies when an agreement is integrated, whether or not it

evidence rule exists under contextualism. To understand this, we must start with a recap of the reasoning supporting my conclusion in Part VII that contextualism dispenses with the ambiguity determination and its associated reasonably susceptible standard. The essence of the ambiguity determination—which is embraced by textualism—is that language places an absolute limit on the spectrum of possible meanings of a contract. Only when express terms are reasonably susceptible to an asserted construction under standard usage may the judge consider extrinsic evidence supporting that interpretation.⁵⁵⁶ In other words, if a proposed understanding of an agreement falls outside the “zone of reasonableness,”⁵⁵⁷ then the court must reject that reading and bar any supporting extrinsic evidence from consideration *regardless of the weight of that evidence*.

But under contextualism, the text of an agreement can possess *any* meaning *if the extrinsic evidence favoring that reading is strong enough*.⁵⁵⁸ On this view, contractual language is infinitely flexible, which constitutes a complete rejection of the reasonable susceptibility standard.⁵⁵⁹ Accordingly, contextualism eliminates the ambiguity determination.⁵⁶⁰

The crucial point to take from the prior two paragraphs is that evaluating whether an ambiguity exists is not the same thing as evaluating the strength of extrinsic evidence. Those two assessments are conceptually distinct. Think about it this way: If all that matters is the *weight* of the extrinsic evidence, then language cannot impose an *absolute* limit on the scope of potential readings of a contract. As a result, because contextualism reduces the ambiguity determination to an assessment of whether the extrinsic evidence sufficiently supports the asserted meaning,⁵⁶¹ *there is no ambiguity determination* under that approach.

Shifting back to the parol evidence rule, that rule operates by discharging side terms agreed to by the parties prior to or

is ambiguous”).

⁵⁵⁶ See *supra* notes 304–309, and accompanying text.

⁵⁵⁷ See *Allen v. United States*, 119 Fed. Cl. 461, 480 (2015) (“In order to demonstrate ambiguity, the interpretations offered by both parties must fall within a ‘zone of reasonableness.’”) (internal quotation marks omitted).

⁵⁵⁸ See *supra* notes 338–339 and accompanying text.

⁵⁵⁹ See *supra* notes 324–329, and accompanying text.

⁵⁶⁰ See *supra* note 332 and accompanying text. For the full discussion of the points set forth in this and the prior paragraph, see *supra* Parts VII.A. and VII.B.

⁵⁶¹ See *supra* notes 340–345, and accompanying text.

contemporaneously with the formation of a written contract. Since the side terms are extinguished, any extrinsic evidence supporting the existence of those terms is legally irrelevant. And that is true regardless of the strength of the evidence indicating that the parties in fact consented to the side terms. As Professor Burton explained:

When offered to establish contract terms, the [parol evidence] rule precludes the introduction of evidence of even relevant, probative, and non-prejudicial parol agreements, *no matter what kind of evidence is involved* [W]hen the rule applies, evidence of a parol agreement is *irrelevant* when offered to establish an agreement's terms.⁵⁶²

In *Marani v. Jackson*, the California Court of Appeal presented the point this way:

The parol evidence rule is not merely a rule of evidence excluding precontractual discussions for lack of credibility or reliability. It is a rule of substantive law making the integrated written agreement of the parties their exclusive and binding contract *no matter how persuasive the evidence* of additional oral understandings. Such evidence is legally irrelevant and cannot support a judgment.⁵⁶³

Numerous other primary and secondary authorities are in accord.⁵⁶⁴ Therefore, the parol evidence rule functions in the same manner as the ambiguity determination: It sets an *absolute* limit on the consideration of extrinsic evidence. And a limit is absolute only if it governs regardless of the weight of the evidence.⁵⁶⁵

⁵⁶² BURTON, *supra* note 1, § 3.1.1, at 65 (emphasis added).

⁵⁶³ 228 Cal. Rptr. 518, 521 (Cal. Ct. App. 1986) (emphasis in original).

⁵⁶⁴ See, e.g., *Baum v. Great W. Cities, Inc. of N.M.*, 703 F.2d 1197, 1205 (10th Cir. 1983); *IIG Wireless, Inc. v. Yi*, 231 Cal. Rptr. 3d 771, 783 (Cal. Ct. App. 2018); *EPA Real Est. P'ship v. Kang*, 15 Cal. Rptr. 2d 209, 211 (Cal. Ct. App. 1992); *Calomiris v. Woods*, 727 A.2d 358, 361–62 (Md. 1999); *Abercrombie v. Hayden Corp.*, 883 P.2d 845, 850 (Or. 1994); *DeClaire v. G & B McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 45 (Tex. Ct. App. 2008); RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. a (AM. L. INST. 1981) (“A binding integrated agreement discharges inconsistent prior agreements, and evidence of a prior agreement is therefore irrelevant to the rights of the parties when offered to contradict a term of the writing.”); CALAMARI AND PERILLO, *supra* note 7, § 3.2(c), at 111 (“If the court decides that the parol evidence rule has been violated, it will exclude the proffered term not because it was not agreed upon, but because it is legally immaterial.”); FARNSWORTH, *supra* note 17, § 7.2, at 416; MURRAY, *supra* note 38, § 83[B], at 419.

⁵⁶⁵ Note that when I state that the parol evidence rule bars extrinsic evidence regardless of weight, I am referring only to the second step of the parol evidence rule analysis—application of the limitations on contradiction and supplementation. I am not referring to the first step—whether the writing at issue is a partial or complete integration. The weight of extrinsic evidence can be relevant at step one because some courts look beyond the four corners of the instrument in deciding whether the document is integrated. See *supra* notes 94–98 and accompanying text.

This creates a fatal problem for the mirror-image argument. That argument provides that the parol evidence rule survives under contextualism because sometimes extrinsic evidence is too weak to establish a non-standard-meaning latent ambiguity.⁵⁶⁶ One of the assumptions underlying this thesis is that to demonstrate that the parol evidence rule exists, it is sufficient that the admissibility of extrinsic evidence within the scope of the rule turns on the *strength* of the evidence. In other words, the parol evidence rule is operational as long as it is understood to at least bar evidence from the jury *on the basis of weight*. But as I explained in the prior paragraph, for the parol evidence rule to perform its constituting function, it must do more than this; it must prohibit evidence *irrespective of weight* because the rule is supposed to serve as an absolute restriction on the contradiction and supplementation of a written agreement. This means that a key premise of the mirror-image argument is false. Accordingly, the argument fails to establish that contextualism preserves the parol evidence rule.⁵⁶⁷

Now let's turn to the second argument that contextualism retains the parol evidence rule. Contextualist authorities often emphasize that extrinsic evidence may be employed only to give meaning to express contractual terms, not to establish the existence of different or additional terms that are not set forth in the parties' written agreement. For instance, the Washington Court of Appeals wrote the following in *Pelly v. Panasyuk*: "Extrinsic evidence is to be used only to illuminate what was written, not what was intended to be written. Extrinsic evidence is not admissible . . . to show an intent independent of the instrument; or to vary, contradict, or modify the written word."⁵⁶⁸ Here is a similar statement from the

⁵⁶⁶ See *supra* text accompanying notes 542 and 551–554.

⁵⁶⁷ Cf. LINZER, 6 CORBIN ON CONTRACTS, *supra* note 8, § 25.15[E], at 201 (construing *Admiral Builders Sav. and Loan Ass'n v. S. River Landing, Inc.*, 502 A.2d 1096, 1100 (Md. Ct. Spec. App. 1986), to stand for the proposition that "if you claim an ambiguity [in particular, a non-standard-meaning latent ambiguity] but put forth evidence that is unbelievable, the issue must be resolved against you—not because of the parol evidence rule, but because you haven't made out your case."); *id.* at 207 (construing *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235–36 (Col. 1998), to stand for the proposition "that unconvincing extrinsic evidence should not be excluded but should be disregarded—not because of the parol evidence rule, but because it is unconvincing"). By distinguishing between (1) evidence that is prohibited by the parol evidence rule, and (2) evidence that is rejected because it is "unbelievable" or "unconvincing," the *Corbin* treatise seems to recognize that assessing the weight of interpretive evidence is not the same as applying the parol evidence rule, which is essentially my point in the body text.

⁵⁶⁸ 413 P.3d 619, 629 (Wash. Ct. App. 2018) (citations and internal quotation marks omitted).

Third Circuit applying Pennsylvania law in *Bohler-Uddeholm American Insurance v. Ellwood Group, Inc.*:

A party may use extrinsic evidence to support its claim of latent ambiguity, but this evidence must show that some specific term or terms in the contract are ambiguous; it cannot simply show that the parties intended something different that was not incorporated into the contract. . . . “[T]he parties’ expectations, standing alone, are irrelevant without any *contractual hook* on which to pin them.”⁵⁶⁹

Many other decisions from contextualist states contain comparable language.⁵⁷⁰

Tilley v. Green Mountain Power Corporation, an opinion of the Vermont Supreme Court, illustrates the principle articulated in *Pelly* and *Bohler-Uddeholm*.⁵⁷¹ There, the plaintiff-landowners and the defendant-power company entered into a contract granting the defendant an easement to run a power line on the plaintiffs’ property.⁵⁷² During the preliminary negotiations, the power company orally assured the owners that “the power line would not be enlarged in scope.”⁵⁷³ But the executed written agreement expressly permitted the power company to “add to”

⁵⁶⁹ 247 F.3d 79, 93 (3d Cir. 2001) (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 614 n.9 (3d Cir. 1995)); *accord id.* at 94 n.3 (“In particular, we think that the key inquiry in this context will likely be whether the proffered extrinsic evidence is about the parties’ objectively manifested linguistic reference regarding the terms of the contract, or is instead merely about their expectations. The former is the right type of extrinsic evidence for establishing latent ambiguity under Pennsylvania law, while the latter is not.”) (internal quotation marks and citations omitted).

⁵⁷⁰ *See, e.g.*, *Dept. of Indus. Relat. v. UI Video Stores, Inc.*, 64 Cal. Rptr. 2d 457, 462 (Cal. Ct. App. 1997) (“Generally speaking, the rules of interpretation of written contracts are for the purpose of ascertaining the meaning of the words *used* therein; evidence cannot be admitted to show intention independent of the instrument.”) (citations, internal quotation marks, and modifications omitted); *Hayter Trucking, Inc. v. Shell W. E & P, Inc.*, 22 Cal. Rptr. 2d 229, 238 (Cal. Ct. App. 1993); *Atl. N. Airlines, Inc. v. Schwimmer*, 96 A.2d 652, 656 (N.J. 1953) (“So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant.”); *Conway v. 287 Corp. Ctr. Assocs.*, 901 A.2d 341, 346–47 (N.J. 2006) (quoting the sentence from the prior parenthetical); *Marshall v. Thurston County*, 267 P.3d 491, 494 (Wash. Ct. App. 2011); *Renfro v. Kaur*, 235 P.3d 800, 803 (Wash. Ct. App. 2010); *Bort v. Parker*, 42 P.3d 980, 988 (Wash. Ct. App. 2002); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. c (AM. L. INST. 1981) (“The rule of Subsection (1) permits reference to the negotiations of the parties, including statements of intention and even positive promises, *so long as they are used to show the meaning of the writing.*”) (emphasis added); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161, 171 (1965) (“Extrinsic evidence is admissible to aid in the process of interpretation . . . [and] to determine the meaning of language that the parties actually gave to it Such evidence is never relevant or admissible when offered for the purpose of establishing another meaning or intention and to expound and enforce a different contract. Contradiction, deletion, substitution: these are not interpretation.”).

⁵⁷¹ 587 A.2d 412 (Vt. 1991).

⁵⁷² *Id.* at 413.

⁵⁷³ *Id.*

the power line on plaintiffs' property.⁵⁷⁴ When the defendant sought to make changes within the easement that would increase the size of the power line and impact the plaintiffs' view from their land, the plaintiff sued to stop the power company's work.⁵⁷⁵ Citing the Vermont Supreme Court's then-recent endorsement of contextualism,⁵⁷⁶ the trial judge considered testimony regarding the pre-contractual oral assurance during the ambiguity determination, found the contract ambiguous, and then resolved the ambiguity in favor of the plaintiffs.⁵⁷⁷

The Vermont Supreme Court reversed. It explained that its earlier decision embracing contextualism contained a footnote which "cautioned that the parol evidence rule is still good law."⁵⁷⁸ In the case at bar, "the verbal assurance was not simply a context giving meaning to the written agreement; rather, the verbal assurance was an oral, contractual term directly contradicting the later written expression of agreement."⁵⁷⁹ Put using the terminology of the *Pelly* and *Bohler-Uddeholm* opinions, the extrinsic evidence in *Tilley* was not offered to construe language from the parties' contract; the evidence was not connected to any "textual hook" within the agreement. Instead, the plaintiff-landowners sought to present evidence of a contradicting side term—to introduce evidence of the parties' intent "independent of the instrument." And that is precisely the type of evidence that the parol evidence rule prohibits. The *Tilley* Court ended by noting that "[t]he rule permitting contracts to be read in light of surrounding circumstances should not be allowed, as it did here, to swallow up the parol evidence rule."⁵⁸⁰

According to cases like *Pelly*, *Bohler-Uddeholm*, and *Tilley*, contextualism preserves the parol evidence rule because extrinsic evidence is barred—no matter how strong—if the evidence is offered to establish the existence of terms *not set forth* in the parties' written agreement. A judge may admit extrinsic evidence only when it is presented for the purpose of *construing specific contractual language*. Explained using my standard hypothetical, the parol evidence rule exists under contextualism because extrinsic evidence can be employed to interpret the language "early December," but *not* to demonstrate that Buyer and Seller

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ *Isbrandtsen v. N. Branch Corp.*, 556 A.2d 81, 84–85 (Vt. 1988).

⁵⁷⁷ *Tilley*, 587 A.2d at 413.

⁵⁷⁸ *Id.* at 414 (citing *Isbrandtsen*, 556 A.2d at 84 n.*).

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

orally agreed to a delivery deadline of December 31 or to a warranty not referenced in the contract.⁵⁸¹ I think it is best to describe this line of reasoning as the “textual hook argument.”

Note that under the textual hook argument, the same piece of evidence can be relevant for purposes of interpretation, but prohibited if offered in support of an additional or contradicting term.⁵⁸² Testimony about a remark made during preliminary negotiations, for example, might be allowable if offered to construe an express contractual provision, but barred if offered to establish the existence of a side term allegedly adopted prior to formation of the agreement.⁵⁸³ In the abstract, this creates no problem for the textual hook argument because the fact that a rule only limits evidence for some purposes is generally irrelevant to whether the rule exists.

To illustrate, consider Federal Rule of Evidence 404. Rule 404(b)(1) prohibits the use of evidence of a “crime, wrong or other act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”⁵⁸⁴ Subsection (b)(2) of the rule states that the same evidence “may be admissible for another purpose, such as proving

⁵⁸¹ See *Bionghi v. Metro. Water Dist. of So. Cal.*, 83 Cal. Rptr. 2d 388, 393 (Cal. Ct. App. 1999) (“*Pacific Gas & Electric* is thus not a cloak under which a party can smuggle extrinsic evidence to add a term to an integrated contract, in defeat of the parol evidence rule.”) (further explaining that during the ambiguity determination, “the court must give consideration to any evidence offered to show that *the parties’ understanding of words used differed from the common understanding*” (emphasis added)); *Brawthen v. H & R. Block, Inc.*, 104 Cal. Rptr. 486, 490 (Cal. Ct. App. 1972) (“But this rule [from *Pacific Gas*] must be restricted to its stated bounds; it does no more than allow extrinsic evidence of the parties’ understanding and intended meaning of the words used in their written agreement. While it allows parol evidence for this purpose, it is unconcerned with extrinsic collateral agreements.”); FARNSWORTH, *supra* note 17, § 7.12, at 466 (“Accordingly, even under the liberal view [contextualism], extrinsic evidence is admissible . . . only where it is relevant to ambiguity and vagueness rather than inaccuracy or incompleteness.”). In my example, I am presuming that the contract is a complete integration and that the side terms were agreed upon prior to or contemporaneously with the execution of the instrument.

⁵⁸² RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. a (AM. L. INST. 1981) (explaining that extrinsic evidence is “irrelevant . . . when offered to contradict a term of the writing” but “may nevertheless be relevant to a question of interpretation”); Kniffin, *supra* note 11, at 92 (“The same item of extrinsic evidence might therefore be admissible to explain the parties’ intended meaning, but inadmissible regarding whether they intended to include an additional term.”).

⁵⁸³ See, e.g., *Sherman v. Mut. Benefit Life Ins. Co.*, 633 F.2d 782, 783–85 (9th Cir. 1980) (holding that evidence regarding an assurance that a sales agent would only be fired for cause could be offered to construe a clause providing for termination on 60 days notice or if the company deemed dismissal necessary in its judgment, but could not be offered to assert the existence of a supplemental side term because the written contract at issue was a complete integration).

⁵⁸⁴ FED. R. EVID. 404(b)(1).

motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”⁵⁸⁵ Critically, the various exceptions in subsection (b)(2) do not eliminate the restriction in subsection (b)(1); rule 404(b)(1) imposes a true limitation on the use of evidence even though the evidence governed by the rule can still be offered for the reasons enumerated in subsection (b)(2). This confirms that a prohibition on using evidence for a particular purpose is a genuine restriction even if the same evidence can be presented for other purposes. As a result, the parol evidence rule exists as long as it blocks the submission of extrinsic evidence for at least some purposes, which it does according to the textual hook argument.

However, one might counter that while the parol evidence rule bars certain uses of extrinsic evidence as a technical matter, the prohibition is illusory in substance. Recall that contextualism permits contracting parties to assert that the language in their agreement possesses a special meaning that is identical in content to a conflicting or additional side term otherwise discharged by the parol evidence rule.⁵⁸⁶ This follows, in part, from contextualism’s embrace of the infinite flexibility of language.⁵⁸⁷ If words can possess any meaning, this objection continues, then a “textual hook” requirement is incapable of imposing a bona fide restraint on the use of extrinsic evidence. If text is always susceptible to any understanding, then side terms and their supporting evidence can always be recast as constructions of express terms and interpretive evidence. And thus capable attorneys can do an end run around the parol evidence rule by couching their arguments as concerning special meanings rather than distinct agreements covering additional and conflicting terms.⁵⁸⁸

⁵⁸⁵ FED. R. EVID. 404(b)(2).

⁵⁸⁶ See *supra* notes 533–536, and accompanying text.

⁵⁸⁷ See *supra* notes 324–329, and accompanying text.

⁵⁸⁸ The Calamari and Perillo treatise can be read as advancing this position in several places. See CALAMARI AND PERILLO, *supra* note 7, § 3.9, at 129 (“The logic of this dichotomy [between interpretation and the parol evidence rule] is unassailable, so is its impracticality. The very same words offered as an additional term that are rejected because the court deems the writing to be a total integration, can be offered as an aid to interpretation of a written term.”); *id.* § 3.16, at 142 (“A contradiction, however, may take place not only by offering into evidence a *term* that contradicts the writing or other record, but also by offering evidence as to *meaning* of the language of the agreement that contradicts the apparent meaning of the language.”); *id.* § 3.16, at 143 (“Generally speaking, and certainly under the rules of the Restatement (Second) and Corbin, it is to the advantage of the party offering the evidence to couch the offer of proof in terms of both supplying an additional term and interpreting the writing.”); see also Calamari & Perillo, *supra* note 193, at 352 (“If evidence of prior and contemporaneous expressions is not

If this objection is correct, then the textual hook argument fails and contextualism does indeed eliminate the parol evidence rule. But the objection is wrong; the textual hook requirement is real despite contextualism's theory of language.

Return to our primary fact pattern: Buyer and Seller enter into a contract for delivery of lumber in "early December." At the closing, Buyer orally assures Seller that delivery at any time before January 1 is sufficient. Later, a dispute erupts over whether Seller can provide the wood on December 31. According to the textual hook argument, the judge should not consider evidence of the assurance unless Seller connects the evidence to the "early December" language. According to the objection, because "early December" can possess any meaning under contextualism, such a connection requirement can always be satisfied.

To see the precise flaw with the objection, we must compare two more detailed versions of the hypothetical, both of which are presented in Chart 3.

admissible to prove terms supplementary to or at variance with a total integration, but is admissible to show the meaning of the integration, the astute trial lawyer will characterize his evidence on what are really supplementary or contradictory terms as evidence on the true meaning of the contract."); Daniel, *supra* note 163, at 258 ("In order to overcome the obstacle of introducing extrinsic evidence to define the terms of an agreement reduced to writing, parties will often state they are actually introducing such matter to 'explain' what the parties meant by the written agreement, and hence the end run around [the parol evidence rule].").

Chart 3

Scenario 1
<p>Seller: Because of various logistical issues, we may not be able to get the lumber to you until the end of the month.</p> <p>Buyer: I can assure you that the end of the month won't be a problem. We always read delivery time periods in a flexible manner in the lumber industry.</p>
Scenario 2
<p>Seller: Because of various logistical issues, we may not be able to get the lumber to you until the end of the month.</p> <p>Buyer: I can assure you that the end of the month won't be a problem. We will accept any lumber received before the first the year.</p> <p>Seller: The contract says we have to provide the product in "early December." So you can see how this situation would make us nervous.</p> <p>Buyer: Yes, that language in the contract clearly obligates you to deliver before December 15, but as I said, we won't hold you to that, so no need to worry about signing the contract.</p>

In Scenario 1, Buyer's oral assurance that it will accept delivery any time before January 1 is connected to the delivery term of the contract. Buyer made the promise, and then explained the basis for the promise as being that "[w]e always read delivery time periods in a flexible manner in the lumber industry." Given this statement, it is clear that Buyer was construing "early December" when offering the assurance. Therefore, testimony regarding the promise is *interpretive* evidence that the judge must consider during the ambiguity determination. In Scenario 2, by contrast, the assurance is not connected to the delivery term, nor to any other provision in the parties' agreement. It is a standalone promise reflecting contractual intent that is "independent of the instrument." In fact, Buyer expressly disavowed any linkage between the assurance and the delivery provision by endorsing the ordinary meaning of "early December": "Yes, that language in the contract clearly obligates you [Seller] to deliver before December 15." The lack of a "textual hook" means that any testimony regarding the promise is *not* interpretive evidence. Instead, it is evidence supporting the existence of a side term that contradicts the written agreement. Therefore, such evidence is irrelevant to the

ambiguity determination and is barred by the parol evidence rule.

The essence of the objection to the textual hook argument is that contextualism always permits evidence of side terms to be presented as interpretive evidence because contextualism embraces the infinite flexibility of language.⁵⁸⁹ But the distinction between Scenarios 1 and 2 demonstrates that this is not true. Evidence that satisfies the textual hook requirement—evidence that genuinely concerns the meaning of contractual language, as in Scenario 1—is qualitatively different from evidence that addresses the existence of side terms, as in Scenario 2.

Let me explain further by offering a comparison. Contextualism eliminates the ambiguity determination. As a result, language can, in principle, possess any meaning under that approach. But it does not follow from this that all interpretation disputes in contextualist states should make it to a jury. Sometimes the extrinsic evidence supporting a special meaning is simply not strong enough to advance the case to stage 2 of the interpretive process.⁵⁹⁰ The evidence is *quantitatively* insufficient. Likewise, in some cases, the extrinsic evidence offered does not concern interpretation at all; it does not purport to construe any language in the contract. Instead, it addresses something else, such as whether the parties agreed to additional or contradicting side terms. This type of evidence is *qualitatively* insufficient. It deals with the wrong subjects—including subjects that fall within the scope of the parol evidence rule.⁵⁹¹

The fallacy underlying the objection is that it critically misunderstands the impact of the contextualist theory of language. Contextualism's rejection of the reasonably susceptible standard does nothing more than allow parties to present evidence at stage 1 of the interpretive process indicating that they used words in a non-standard way when drafting their agreement.⁵⁹² While this can result in express terms being understood in a manner that is wholly inconsistent with their ordinary meaning, jettisoning reasonable susceptibility does not otherwise eliminate the lines separating interpretation from other contractual categories such as contradiction, addition,

⁵⁸⁹ See *supra* text accompanying notes 586–588.

⁵⁹⁰ See *supra* notes 340–345, 458–461, and accompanying text.

⁵⁹¹ And thus contextualism is ultimately like textualism in treating interpretive evidence and evidence of contradictory or supplemental terms as different in kind. See *supra* note 553.

⁵⁹² See *supra* note 581 and accompanying text.

invalidation, and formation. And thus contextualism does not effectively turn all evidence relating to an agreement into interpretive evidence. For example, under contextualism, documents or testimony supporting the conclusion that the contract was induced by fraud or duress, that a party lacked capacity to enter the agreement, or that the parties orally consented to a side term, all remain conceptually distinct from evidence regarding the meaning of express provisions.⁵⁹³ That is why the textual hook requirement is a true limitation on the use of extrinsic evidence, even though the words that make up a given textual hook can, in theory, possess any meaning.

Of course, it is frequently hard to classify evidence as concerning interpretation rather than contradiction or addition. As stated above, the distinctions between these three categories are unclear at the borderlines.⁵⁹⁴ But at their cores, interpretation, contradiction, and addition are indeed different. This means that, contrary to the claims of the objection,⁵⁹⁵ skillful attorneys cannot transform plainly contradictory or supplementary evidence into interpretation evidence.

On behalf of the objection, one might argue that lawsuits where the evidence is clearly not interpretive are rare, and that in the bulk of those cases parties commit perjury, enabling them to avoid application of the parol evidence rule. I do not doubt that many disputes involve evidence that can plausibly be treated as either interpretive or concerning side terms.⁵⁹⁶ Likewise, litigants and third-party witnesses almost certainly lie under oath in some cases in order to convert evidence of side terms into evidence that appears to be about the construction of contractual language—into evidence that satisfies the textual hook requirement. But the reported

⁵⁹³ *See id.*

⁵⁹⁴ *See supra* note 530 and accompanying text.

⁵⁹⁵ *See supra* note 588 and accompanying text.

⁵⁹⁶ In fact, California courts appear to believe that this is so common that they frequently combine analysis of interpretation and the parol evidence rule into a single test. *See, e.g.,* Hayter Trucking, Inc. v. Shell W. E & P, Inc., 22 Cal. Rptr. 2d 229, 238 (Cal. Ct. App. 1993) (“Application of the [parol evidence] rule involves a two-part analysis. First, was the writing intended to be an integration . . . ? Second, is the agreement susceptible of the meaning contended for by the party offering the evidence?”); Wang v. Massey Chevrolet, 118 Cal. Rptr. 2d 770, 781 (Cal. Ct. App. 2002) (same); Gerdlund v. Elec. Dispensers Int’l, 235 Cal. Rptr. 279, 282 (Cal. Ct. App. 1987) (same). As do courts in some other contextualist states. *See, e.g.,* Nautilus Marine Enters., Inc. v. Exxon Mobil Corp., 305 P.3d 309, 317–18 (Alaska 2013); Neal & Co. v. Ass’n. Vill. Council Presidents Reg’l Hous. Auth., 895 P.2d 497, 504 (Alaska 1995); *see also id.* at 504–05 (considering extrinsic evidence when interpreting the contract, concluding that the evidence was insufficient to establish an ambiguity, and then barring the same evidence under the parol evidence rule as inconsistent with the express terms).

caselaw strongly suggests that much extrinsic evidence submitted in litigated matters is definitively not interpretive, and that offering parties regularly testify truthfully despite the fact that the parol evidence rule will—or at least might—bar their statements from consideration in the lawsuit.

Tilley is illustrative. The power company’s promise in that case was a contradicting term. It was not issued by the company as an interpretation of the contract. The landowner’s attorney obviously argued otherwise, and was successful before the trial court. But no testimony—honest or fraudulent—was presented purporting to link the assurance to an express term. And so the Vermont Supreme Court reversed, correctly holding that evidence of the promise was barred by the parol evidence rule. *Tilley* is representative of opinions where courts rejected extrinsic evidence offered to construe an agreement because the evidence did not actually concern the meaning of the disputed contractual language.⁵⁹⁷

*Sompo Japan Insurance Company of America v. Norfolk Southern Railway Company*⁵⁹⁸ is also instructive. There, Sompo presented trade usage evidence relating to the “exoneration clause” in the parties’ bill of lading.⁵⁹⁹ While the Second Circuit recognized that contextualist principles governed the dispute,⁶⁰⁰ the court rejected the evidence because it was offered to nullify the exoneration clause rather than to address the clause’s meaning:

⁵⁹⁷ See, e.g., *Hunt Const. Grp., Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002) (barring trade usage evidence because the offering party did “not claim that there is . . . a term of art included” in the contract that required construction based on such evidence); *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368–70 (Fed. Cir. 2000) (rejecting “generalized” affidavits setting forth industry practices because the affidavits did not attempt to identify a “term in the contract that has an accepted industry meaning different from its ordinary meaning”); *Bionghi v. Metro. Water Dist. of So. Cal.*, 83 Cal. Rptr. 2d 388, 393–95 (Cal. Ct. App. 1999) (holding that “a contract which provides that it may be terminated on specified notice cannot reasonably be interpreted to require good cause as well as notice of termination, unless extrinsic evidence establishes that the parties used the words in some special sense”) (concluding that none of the extrinsic evidence submitted was actually interpretive in nature, in part because the evidence did not concern “the positions of the parties during the negotiations, their differences and agreements, or the way in which they selected words and phrases to express the terms agreed on”).

⁵⁹⁸ 762 F.3d 165 (2d Cir. 2014).

⁵⁹⁹ *Id.* at 180.

⁶⁰⁰ *Id.* (“Evidence of trade practice and custom may assist a court in determining whether a contract provision is ambiguous in the first instance. Terms that have an apparently unambiguous meaning to lay persons may in fact have a specialized meaning in a particular industry.”) (citations omitted).

But Sompo does not contend that terms in the Exoneration Clause have a specialized meaning in the transportation industry distinct from the ordinary or common meaning that would otherwise be ascribed to them. Instead, the industry practice evidence that Sompo offers is expert testimony that, regardless of what the exoneration clauses mean, they simply are not enforced. In other words, Sompo is asking us to consider evidence of industry practice and custom in order to persuade us to ignore the Exoneration Clause, not to help us interpret it.⁶⁰¹

Note also that the parties in *Sompo Japan* were sophisticated commercial entities represented by expert counsel.⁶⁰² Yet Sompo's lawyers were unable to couch the trade usage evidence as interpretive in nature. *Sompo Japan* is representative of cases where extrinsic evidence was not even offered to establish the meaning of the words in an agreement, and thus there was no question that the evidence fell within the scope of the parol evidence rule and was barred.⁶⁰³

The foregoing establishes that the textual hook argument is successful: The rule providing that extrinsic evidence is interpretive only if it is connected to a textual hook creates a genuine limitation on the use of such evidence. And therefore the parol evidence rule exists under contextualism in all jurisdictions that embrace the textual hook requirement.

To be sure, some contextualist authorities do at least partly dispense with the parol evidence rule. For example, the U.C.C. expressly provides that the *addition* prong of the rule does not apply to the incorporation tools.⁶⁰⁴ Furthermore, some cases

⁶⁰¹ *Id.* at 180–81. Earlier in the opinion, the Second Circuit also rejected an affidavit on similar grounds. The court ruled that the affidavit was irrelevant because it concerned the meaning of a different bill of lading. It did not even purport to construe the exoneration clause in the bill of lading at issue. *Id.* at 180. This is another example of a type of evidence that does not qualify for use during stage 1 of the interpretive process despite contextualism's flexible theory of language.

⁶⁰² *Id.* at 167–68.

⁶⁰³ See, e.g., *FPI Dev., Inc. v. Nakashima*, 282 Cal. Rptr. 508, 518, 522 (Cal. Ct. App. 1991) (party offered extrinsic evidence to support its assertion that its obligation to pay on a note was subject to an oral condition, not to construe any language in the note); *Brawthen v. H & R Block, Inc.*, 104 Cal. Rptr. 486, 490 (Cal. Ct. App. 1972) (party submitted extrinsic evidence to support the existence of a side term providing that he could be terminated only for cause, not for purposes of interpreting a contractual provision stating that the company could fire him on 90 days written notice); see also Corbin, *supra* note 570, at 173–82 (collecting authorities in which “the [extrinsic] evidence was not offered to establish an interpretation (a meaning) of the words different from the obvious one, but to produce a legal effect as if they were not there and other words were in their place”).

⁶⁰⁴ See U.C.C. § 2-202(a) (permitting an integrated writing, whether partial or complete, to be “supplemented” by course of performance, course of dealing, and usage of

decided under the Code, such as *Columbia Nitrogen*, may have narrowed the scope of the *contradiction* prong as well; those decisions arguably allow for the admission of incorporation tools evidence that relates only to contradictory side terms rather than to interpretation.⁶⁰⁵ But these points do not undercut my central claims in this section: (1) as a conceptual matter, contextualism can retain the parol evidence rule despite eliminating the ambiguity determination; and (2) many, if not most, contextualist decisions embrace a version of contextualism that does precisely that.

X. CONCLUSION

The purpose of this Article was to bring greater clarity to the principles of contract interpretation and the parol evidence rule by addressing seven issues that have confounded the caselaw and secondary literature. I believe this Article has accomplished that end. But I leave the final judgment on this matter to the reader. And even if I was successful, many aspects of contract interpretation and the parol evidence rule remain clouded in ambiguity. I hope that more of these mysteries will be resolved in future work undertaken by other scholars.

trade); *compare id.* § 2-202(b) (barring other types of extrinsic evidence of “consistent additional terms” when the writing is “a complete and exclusive statement of the terms of the agreement”).

⁶⁰⁵ See, e.g., *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 6–11 (4th Cir. 1971) (ruling that course of dealing and trade usage evidence that express price and quantity terms in a contract were only projections rather than binding obligations should have been submitted to the jury); *Am. Mach. & Tool Co. v. Strite-Anderson Mfg. Co.*, 353 N.W.2d 592, 596–98 (Minn. Ct. App. 1984) (admitting course of performance and usage of trade evidence that delivery dates in purchase orders were merely estimates rather than obligations). Some other U.C.C. opinions can be read as only *partly* dispensing with the application of the contradiction prong to the incorporation tools. These cases seem to allow incorporation tools evidence of a side term (i.e., non-interpretive evidence) to “qualify” but not “completely override” an express term. *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981), arguably endorses this approach. In Part VII, I treated *Nanakuli* (and its progeny) as being concerned with interpretation instead of the parol evidence rule. See *supra* notes 373–397, and accompanying text. But *Nanakuli* can also be understood as a dispute over a side term providing for price protection rather than as an interpretive dispute over the meaning of “Shell’s posted price.” See *supra* note 384 (making the same point). And I suspect that many other decisions that follow *Nanakuli*’s qualification rule can likewise be read to concern contradictory evidence rather than interpretive evidence.