

THE INTERPRETATION OF COMMERCIAL CONTRACTS: AN EMPIRICAL STUDY

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ABSTRACT.....	470
INTRODUCTION	470
I. THE THEORETICAL DEBATE: TEXT VS. CONTEXT	472
II. EXISTING EMPIRICAL EVIDENCE.....	477
III. THE EMPIRICAL TEST.....	480
A. <i>Merger Clause—A Brief Overview</i>	481
B. <i>The Theoretical Hypotheses</i>	482
C. <i>Data</i>	485
D. <i>Methodology</i>	488
E. <i>Results</i>	489
IV. DISCUSSION AND NORMATIVE IMPLICATIONS.....	491
CONCLUSION.....	493

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ABSTRACT

The theoretical debate over contract interpretation revolves around one central question: what is the preference of most contracting parties for contract interpretation rules? Textualist theorists believe that most parties prefer textualist rules of interpretation, under which the contract interpreter must normally consider only the contract's written text. In contrast, contextualist theorists believe that most parties prefer contextualist rules of interpretation, under which the interpreter should consider all relevant contextual evidence to interpret the contract, beyond the written text.

Despite the widespread debate over contract interpretation, there has been very little empirical research on this topic. This Article aims to fill this research gap by empirically analyzing actual interpretation clauses of commercial contracts. Examining 1,521 commercial contracts that have been disclosed to the Securities and Exchange Commission, this Article finds that a clear majority (75.28%) of contracts include a textualist "merger clause," which typically triggers a set of textualist rules of contract interpretation. In addition, the results of this study indicate that the merger clauses, included in the sample contracts, are not mere arbitrary boilerplates which were randomly added to the contracts. More specifically, the study found a significant statistical association between the contractual existence of a variety of textualist contractual clauses, other than a merger clause, and the existence of the textualist merger clause.

The theoretical and practical implications of these results are discussed.

INTRODUCTION

Contract interpretation—that is, the undertaking by an adjudicator to identify the terms of the contract and give them a meaning¹—plays a significant role in American law.² It is one of the most common sources of

1. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2005) ("Contract interpretation is the undertaking by a judge or jury (or an arbitrator—more on arbitration later) to figure out what the terms of a contract are, or should be understood to be."); see also Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 341 (2013).

2. STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 1 (2009) ("Issues of contract interpretation are important in American law."); Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 496 (2004) ("Under the modern American law of contracts, almost all applications of legal doctrine turn on questions of interpretation . . ."); 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, 204 (2016) ("Contract interpretation is one of the most significant areas of commercial law.").

contractual litigation.³ It is also one of the most frequently debated topics among contract law scholars.⁴

Two major theories have competed for dominance in the interpretation of contracts: a textualist and a contextualist theory.⁵ According to the textualist theory, the contract adjudicator must normally consider only the contract's written text when interpreting the contract.⁶ Conversely, according to the contextualist theory, the interpreter should consider *all* relevant contextual evidence to interpret the contract, beyond the written contractual text.⁷

A central theoretical argument that underlies the textualist theory is that most parties to a contract would probably prefer a textualist approach over the contextualist approach, given the benefits of the former approach to the parties.⁸ Interestingly enough, a major theoretical argument that underlies the contextualist theory is similar: most parties probably prefer a contextualist approach for contract interpretation.⁹

While the theoretical debate over the parties' preferences is very rich,¹⁰ there is scant existing empirical literature aiming to assess the parties' actual preferences for contract interpretation rules.¹¹ Specifically, there are no studies of the frequency with which contract-interpretation clauses are

3. Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25 (2014) ("Contract interpretation remains the most important source of commercial litigation . . ."); see also BURTON, *supra* note 2, at 1 (issues of contract interpretation "probably are the most frequently litigated issues on the civil side of the judicial docket"); David A. Dilts, *Of Words and Contracts: Arbitration and Lexicology*, DISP. RESOL. J., May–July 2005, at 41, 43 ("The construction of contract language is the controversy most evident in contract disputes."); Benjamin E. Hermalin et al., *Contract Law*, in 1 HANDBOOK OF LAW & ECONOMICS 3, 68 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("Probably the most common source of contractual disputes is differences in interpretation . . ."); Posner, *supra* note 1, at 1582 ("[S]ignificant interpretive questions often arise in contract litigation."); Robert E. Scott, *Contract Design and the Shading Problem*, 99 MARQ. L. REV. 1, 3 (2015); John P. Tomaszewski, *The Pandora's Box of Cyberspace: State Regulation of Digital Signatures and the Dormant Commerce Clause*, 33 GONZ. L. REV. 417, 432 (1997–1998) ("Most contract litigation involves disputes over construction of the terms in a contract.").

4. Burton, *supra* note 1, at 340 ("After decades of relative neglect, contract interpretation became a hot topic of scholarly debate after 2003."); Gilson et al., *supra* note 3, at 25 ("Contract interpretation remains . . . the least settled, most contentious area of contemporary contract doctrine and scholarship."); Katz, *supra* note 2, at 496 ("For over a century, legal commentators have debated the relative merits of formal and substantive approaches to the interpretation of contracts . . ."); Scott, *supra* note 3, at 3; Silverstein, *supra* note 2, at 204 (contract interpretation "has received considerable scholarly attention during the last decade"); Robert E. Scott, *Text Versus Context: The Failure of the Unitary Law of Contract Interpretation*, BUCKLEY'S MIX 5, <http://buckleymix.com/wp-content/uploads/2010/10/scott.pdf> (last visited Oct. 9, 2017) [hereinafter Scott, *Text Versus Context*].

5. See *infra* Part I.

6. See *infra* Part I.

7. See *infra* Part I.

8. See *infra* Part I.

9. See *infra* Part I.

10. See *infra* Part I.

11. See *infra* Part II.

included in commercial contracts between sophisticated parties.¹² This study aims to fill this research gap.

Focusing on the preferences of sophisticated parties to commercial contracts, this paper analyzes 1,521 commercial contracts that have been disclosed to the Securities and Exchange Commission (SEC). The results of the study reveal that the clear majority of contracts include a textualist “merger clause,” which typically triggers a set of textualist interpretation rules under current contract law.¹³ The results also indicate that the merger clauses, included in the contracts, are not mere boilerplates which are randomly added to the contracts. Particularly, the study found a significant statistical correlation between the existence of textualist contractual clauses, other than a merger clause, such as a “no-oral-modification” or “notices” clause, and the existence of a merger clause.¹⁴

This Article will proceed as follows: Part I will provide context by reviewing the theoretical debate over contract interpretation. Part II will present the scant existing empirical research on the parties’ preferences for contract interpretation rules and its limitations. Part III will present the empirical test of this study. It will review the data and discuss the methodology for empirically testing the frequency with which a textualist merger clause is included in commercial contracts between sophisticated parties. It will also examine the statistical association between central textualist clauses, other than a merger clause, and a textualist merger clause. Part IV will discuss the normative implications of the empirical results.

I. THE THEORETICAL DEBATE: TEXT VS. CONTEXT

According to the textualist theory of contract interpretation, the contract adjudicator must normally consider only the contract’s written text when interpreting the contract.¹⁵ Lacking a textual ambiguity, the adjudicator should not consider extrinsic context that surrounds the

12. Lisa Bernstein, *Merchant Law in a Modern Economy* 15 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 639, 2013).

13. *See infra* Part III.

14. *See infra* Part III.

15. Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1099 (2016) (a textualist approach favors “a narrower . . . interpretive focus on the text of written contracts”); Ronald J. Gilson et al., *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 171 n.1 (2013) (“Textualist interpretation . . . looks to a contract’s formal language . . .”); Scott, *supra* note 4, at 1 (“Textualist theories look principally to the written agreement between the parties for the terms of the contract and . . . the meaning of those terms . . .”); Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 376 n.18 (2004) (under a textualist approach, “the interpreter considers only a contract’s written text when deciding what the contract directed . . .”).

contract's text.¹⁶ The adjudicator must specifically exclude the following major categories of contextual, nontextual, extrinsic evidence: (1) practice between the parties under prior contracts; (2) practice between the parties under the litigated contract; (3) precontractual oral statements or understandings; and (4) industry custom.¹⁷

According to the contextualist theory, the interpreter should consider *all* relevant contextual evidence to interpret the contract, beyond the written contractual text.¹⁸ The interpreter must look at “events before contract formation.”¹⁹ The interpreter must also consider events that occurred after contract formation.²⁰ The interpreter should consider contextual evidence, even if it is oral or behavioral and nontextual.²¹ The adjudicator should determine “whether extrinsic evidence of the circumstances surrounding the contract . . . improves understanding of what parties intended regardless of the contractual text.”²² The adjudicator should consider context, even if the contract seems unambiguous.²³ The written contractual language is “treated merely as establishing prima facie terms,” which the adjudicator can override by considering contextual, nontextual evidence if she believes

16. Gilson et al., *supra* note 15, at 171 n.1 (“In a textualist regime, and absent ambiguity, generalist courts cannot choose to consider context”); *see also* Gilson et al., *supra* note 3, at 25; Darius Palia & Robert E. Scott, *Ex Ante Choice of Jury Waiver Clauses in Mergers*, 17 AM. L. & ECON. REV. 566, 572 (2015) (“[T]he textualist approach bars context evidence”); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 572 n.61 (2003) (a court applying a textualist approach “will admit extrinsic evidence only when the contract’s language is vague or ambiguous on its face”).

17. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 933 n.20 (2010); *see also* CATHERINE MITCHELL, INTERPRETATION OF CONTRACTS 123 (2007) (“Formalism may manifest itself in a desire for the documents to be taken as the primary evidence of what was agreed, without recourse to negotiations, trade customs, previous understandings or any other extrinsic material.”).

18. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 308 (1985) (“[T]he contextualists have assumed that the purpose of interpretation is to uphold the expectations of the particular parties to the agreement by determining from an analysis of all relevant evidence what they ‘really meant.’”); Katz, *supra* note 2, at 498 (“A more ‘substantive’ approach to contract interpretation . . . would attempt to come to a more all-things-considered understanding, based on all of the materials reasonably available.”); Schwartz & Scott, *supra* note 16, at 572 (“[Contextualists’] theory lets courts consider all material evidence to resolve interpretive issues”).

19. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1770 (2000).

20. *Id.*; *see also* Bayern, *supra* note 15, at 1100 (“[C]ontextualists consider post-formation information”).

21. Scott, *supra* note 4, at 1 (“[C]ontextualist theories look beyond the writing, to . . . oral . . . evidence of what the parties intended.”).

22. Gilson et al., *supra* note 3, at 27.

23. Gilson et al., *supra* note 15, at 171 n.1 (“In a textualist regime, and absent ambiguity, generalist courts cannot choose to consider context; in a contextualist regime, these courts must consider it.”); Gilson et al., *supra* note 3, at 25–26.

that doing so is needed in order to understand the parties' actual intentions.²⁴

A central theoretical argument that underlies the textualist theory is that given the potential benefits of a textual interpretation approach, most parties probably prefer this approach over the contextualist approach.²⁵ The major benefits that arguably underlie the parties' preference for textualism are the following:

1. The textualist regime has lower litigation costs compared to a contextualist regime.²⁶ First, a contextualist approach is likely to increase litigation over contract interpretation compared with a textualist regime. Contextualism creates a new basis for dispute over the existence of each bit of context, its relative weight vis-à-vis other contextual bits, and its relative weight vis-à-vis the contract text.²⁷ Second, under a contextualist approach, contrary to the textualist approach, courts must thoroughly examine all relevant contextual evidence.²⁸ This task may require the costly hearing of expert testimony and witnesses.²⁹ Conversely, the textualist approach allows enforcement of unambiguous contract terms by summary procedures.³⁰ Accordingly, "litigation is more costly in a contextualist . . . regime because the parties more frequently will have full trials."³¹
2. The textualist approach reduces the risk of judicial error created by the contextual approach.³² Under a contextualist regime, two judicial errors may occur. First, by considering infinitely elastic context, the interpreter might wrongly interpret the contract contrary to the true intention of the parties.³³ Second, relying on

24. Scott, *supra* note 4, at 2.

25. Schwartz & Scott, *supra* note 17, at 941 ("[T]he rules should reflect the parties' preferences; and . . . parties prefer textualist interpretive defaults.").

26. Cf. MITCHELL, *supra* note 17, at 109–10; Schwartz & Scott, *supra* note 17, at 930.

27. Cf. MITCHELL, *supra* note 17, at 112 ("[L]itigation over terms and obligations is actually encouraged . . . by courts adopting a contextual approach . . . in relation to terms . . .").

28. See *supra* notes 18–21 and accompanying text.

29. MITCHELL, *supra* note 17, at 110 (under a contextualist regime, "[e]xpert testimony may have to be adduced, preliminary hearings may be required on matters of evidence and procedure and so on").

30. Cf. Scott, *supra* note 15, at 376 ("Contextual interpretation . . . prevents enforcement of even apparently clear obligations by summary procedures.").

31. Schwartz & Scott, *supra* note 16, at 587.

32. *Id.* ("A plain-meaning linguistic default . . . would reduce the risk of judicial error.").

33. MITCHELL, *supra* note 17, at 110, 115 ("[T]he greater the amount of contextual material, the greater the possibility for error. Decision-makers may easily become 'bewildered by a large set of conflicting evidence' The contextual approach arguably increases the chances for error by increasing the amount of information deemed relevant to the interpretation exercise."); Schwartz &

contextual evidence may generate a contract misinterpretation, since the parties may actually have intended that their contract text will serve as the only interpretive tool.³⁴

3. The textualist method, compared with the contextualist method, increases the ability of the parties to predict “how contract terms and language will be interpreted in [their] subsequent transactions.”³⁵ By excluding contextual evidence when the contract text is unambiguous, the textualist approach preserves the linguistic clarity of existing unambiguous terms.³⁶
4. The textualist approach prevents opportunistic behavior that might occur under a contextualist regime. Under the latter regime, a contract party might strategically dispute the meaning of a perfectly clear contract term, to which she freely agreed, in an effort to escape a bad bargain.³⁷ The longer the contract, the easier it will be to strategically create disputes regarding its meaning.³⁸
5. The textualist approach prevents the adjudicator from imposing his own set of beliefs on the contract by requiring him to follow only the contract text. Conversely, under a contextualist regime, “the interpreter necessarily imposes his own set of assumptions” on the parties’ contract by “selecting certain bits of context” and excluding others.³⁹

Scott, *supra* note 16, at 587 (“[A] disappointed party may plausibly claim that the parties’ course of dealing or their oral negotiations showed that, in the parties’ language, ‘all’ meant ‘some’ When such a claim is false but found to be true, the court necessarily will misinterpret the contract.”).

34. Scott, *Text Versus Context*, *supra* note 4, at 16 n.40 (“But sometimes the parties may actually have intended that their clear language should be read in the standard (plain meaning) way despite the fact that the language itself conflicts with the prior practices and negotiations of the parties. In such a case, a court that relies too heavily on context risks misinterpreting the parties’ actual intentions.”).

35. *Cf.* Scott, *supra* note 15, at 376.

36. Gilson et al., *supra* note 3, at 40–41; Scott, *Text Versus Context*, *supra* note 4, at 17 (“By insulating the standard meaning of terms from deviant interpretations, this strategy preserves a valuable collective good, namely a set of terms with a clear, unambiguous meaning that is already understood by the vast majority of commercial parties.”).

37. MITCHELL, *supra* note 17, at 113 (“One may use the ‘context’ to seek an unbargained for advantage in imposing terms after the parties are in a contractual relationship, even in circumstances where the written terms appear relatively complete.”); Scott, *supra* note 15, at 377 n.18 (“Here the risk is that, unless the court privileges the written agreement by excluding the contextual evidence, parties . . . will be motivated to dispute the meaning of perfectly communicative contract terms as a strategic response to a now disfavoured contract.”).

38. Schwartz & Scott, *supra* note 16, at 587 (“[T]he more complex the contract, the easier it will be to create disputes regarding what the contract says and what language it was written in.”).

39. Goetz & Scott, *supra* note 18, at 308 n.125.

A central theoretical argument that underlies the contextualist approach is that given the benefits of this approach, most parties probably prefer this approach over the textualist approach.⁴⁰ The central benefits that possibly underlie the parties' preference for contextualism are the following:

1. The contextualist approach allows the adjudicator to expose the actual subjective intention of the parties by considering all relevant contextual evidence.⁴¹ If the adjudicator excludes contextual evidence during the contract interpretation process, such as the parties' prior negotiations or practices, she may interpret the contract contrary to the parties' actual intentions.⁴² Contextualists argue, therefore, that the textualist approach, which excludes contextual evidence, deprives the adjudicator of essential information relevant to determining the true intention of the parties.⁴³
2. From a philosophy-of-language perspective, the contract text alone has no meaning.⁴⁴ The contract words are "mere symbols . . . [and] [t]heir meaning is a joint product not only of the word[s] selected, but also of the context" in which the parties used the words.⁴⁵ Accordingly, the contractual context allows the adjudicator to understand the parties' contractual text.

40. James W. Bowers, *Murphy's Law and the Elementary Theory of Contract Interpretation: A Response to Schwartz and Scott*, 57 RUTGERS L. REV. 587, 601 (2005) ("[F]irms might in fact prefer Corbin style contextualist contract interpretation rules . . ."); Scott, *Text Versus Context*, *supra* note 4, at 3 ("This contextualist regime of contract interpretation rests on the powerful intuition that most parties . . . would prefer courts to take advantage of hindsight in assisting the parties to achieve their contractual objectives.").

41. Scott, *supra* note 15, at 375–76 ("[F]ollowing the lead of Arthur Corbin, courts interpreting the new contract law were advised to use context evidence . . . so as to ascertain the subjective meaning of the parties agreement.").

42. Scott, *Text Versus Context*, *supra* note 4, at 16 ("Excluding evidence of these parties' prior negotiations or practices under their contract risks interpreting the contracts in opposition to the parties' actual intentions.").

43. Gilson et al., *supra* note 3, at 36 ("Contextualists argue, therefore, that formal interpretive rules that exclude certain categories of extrinsic evidence deprive the factfinder of indispensable information relevant to deciding the case and thus can distort the court's assessment of what the parties meant by their agreement.").

44. ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 544 (4th ed. 2007) ("Proponents of a more liberal approach to interpretation have argued that meaning is necessarily contextual."); Gilson et al., *supra* note 15, at 172 n.1 ("Contextualist courts, on the other hand, reject the notion that words in a contract can have a plain or unambiguous—contextfree—meaning at all."); Goetz & Scott, *supra* note 18, at 307 n.121 ("Without context, the argument goes, the search for meaning must necessarily fail, since a text has no objective or unitary meaning apart from the peculiar referents.").

45. Bowers, *supra* note 40, at 590; *see also* MITCHELL, *supra* note 17, at 94 ("[C]lear words are only clear because everyone understands the context in which they are operating."); *id.* at 593 ("Having the phrase 'Keep off the grass' on a sign next to a newly germinating lawn means something

3. The contextualist approach prevents exploitation of unsophisticated individuals. Particularly, contextualism prevents the possibility that a contract text, signed by an unsophisticated party, will derogate that party's rights, which are strongly based on precontractual context, such as prior oral understandings between the parties.⁴⁶
4. The contextualist regime reduces the parties' transaction costs.⁴⁷ Under this regime, the parties can write shorter contracts, leaving it to the adjudicator to fill gaps with contextual evidence.⁴⁸
5. The contextualist approach prevents opportunistic behavior that might occur under a textualist regime. Under the latter regime, a party may seek an economic advantage by opportunistically relying on the text of the contract while knowing that the text does not reflect the parties' true mutual intention.⁴⁹

II. EXISTING EMPIRICAL EVIDENCE

Empirical evidence of the parties' preferences for interpretation rules is extremely limited.⁵⁰ Textualist scholars often base their theoretical assumption that parties prefer a textualist approach on Professor Lisa Bernstein's two very influential qualitative empirical studies on merchant-

substantially different from the same words in a plaque on a drug counselor's desk."); Scott, *supra* note 15, at 376 n.18 (according to the contextualist approach, "[w]ords derive meaning from the context in which they are used, thereby justifying a court in rejecting pure textualism").

46. Scott, *Text Versus Context*, *supra* note 4, at 3–4 ("Those who argue for mandatory contextualist interpretations often justify the abandonment of textualism as a necessary prophylactic against the exploitation of unsophisticated individuals who enter into contracts with sophisticated parties who supply written contract terms that alter previously settled understandings."); *see also* Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968) ("[T]he party urging the spoken as against the written word is most often the economic underdog, threatened by severe hardship if the writing is enforced.").

47. MITCHELL, *supra* note 17, at 108–09 ("One of the arguments in favour of contextualism over literalism is that it lowers transaction costs . . .").

48. *Id.* at 109 ("Parties can write a simpler document, leaving it to the courts to fill gaps through the process of contextual interpretation.").

49. *Id.* at 113 ("[A] party may strategically seek an advantage by relying on the strict words of a contract while knowing that the documents did not reflect the parties' joint understanding . . .").

50. Bayern, *supra* note 15, at 1121 ("As commentators on all sides of the debate seem to agree, empirical evidence of parties' meta-interpretive preferences is extremely limited."); Silverstein, *supra* note 2, at 283–84 ("The bulk of the interpretation policy debate focuses on interpretive accuracy, transaction costs, and enforcement costs. . . . [T]here are virtually no scholarly sources (or judicial opinions) that even purport to present systematic evidence on these questions."); *id.* at 204 ("Virtually all academic work in this field [contract interpretation] is doctrinal or theoretical. But numerous contract interpretation issues cry out for empirical investigation.").

run private commercial law systems.⁵¹ In the first empirical research, Bernstein presents “a case study of the private legal system created by the National Grain and Feed Association (NGFA) to resolve contract disputes among its members.”⁵² The study shows that “NGFA arbitrators take a formalistic approach to adjudication.”⁵³ They do not allow trade usage, course of dealing, and course of performance “to vary either trade rules or written contractual provisions.”⁵⁴ In another study, Bernstein presents “a detailed case study of contractual relations in the cotton industry.”⁵⁵ According to the study, most such relations are subject to arbitration in one of several cotton tribunals.⁵⁶ The study furthermore shows that cotton arbitrators “use a relatively formalistic adjudicative approach that gives little explicit weight to elements of the contracting context.”⁵⁷

The reliance of textualist scholars on Bernstein’s case studies suffers from one central limitation. The grain, feed, and cotton industries, empirically examined by Bernstein, may not be representative of other dominant commercial industries, such as health, construction, energy, and IT. Therefore, the results of Bernstein’s case studies do not allow generalizations about the interpretation preferences of parties to commercial contracts.⁵⁸

Textualist scholars further base their theoretical assumption that parties to commercial contracts prefer a textualist approach on Professors Theodore Eisenberg and Geoffrey Miller’s quantitative empirical study on, *inter alia*, choice-of-law clauses.⁵⁹ This important empirical study

51. For textualist scholars who rely on Prof. Bernstein’s empirical research, see, for example, Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1102 (2009); Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1477 (2010); Schwartz & Scott, *supra* note 17, at 956; Schwartz & Scott, *supra* note 16, at 576 n.66 (referring to Lisa Bernstein’s empirical scholarship, Professors Schwartz and Scott argue that “[t]here is considerable evidence that firms prefer a formalist adjudicatory style”); Scott, *supra* note 15, at 378 & n.21; Silverstein, *supra* note 2, at 278–79 (“Textualism is frequently defended on the ground that businesses prefer that method of construction. This view finds support in the work of Lisa Bernstein.”).

52. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769 (1996).

53. *Id.* at 1769–70.

54. *Id.*

55. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724, 1725 (2001).

56. *Id.* at 1724 (“[M]ost such contracts are concluded under one of several privately drafted sets of contract default rules and are subject to arbitration in one of several merchant tribunals.”).

57. *Id.* at 1735.

58. Burton, *supra* note 1, at 347 n.64 (arguing that Bernstein’s “two case studies of arbitration practices in two commodities markets . . . cannot be easily generalized . . .”).

59. For textualist scholars who rely on Professors Theodore Eisenberg and Geoffrey Miller’s empirical scholarship see, for example, Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63, 109 (2015); Kraus & Scott, *supra* note 51, at 1102–03; Miller, *supra* note 51, at 1477–78; Schwartz & Scott, *supra* note 17, at 956–57; Bernstein, *supra* note 12, at 15–16.

examines, among other things, choice-of-law clauses in a data set of “contracts contained as exhibits in Form 8-K filings by reporting corporations over [a] six month period in 2002 for twelve types of contracts and a seven month period in 2002 for merger contracts.”⁶⁰ The results of the study show that the parties examined in the study chose New York law in approximately 46% of the contracts,⁶¹ while California was chosen for its law in less than 8% of the contracts.⁶² Since New York’s contract-interpretation law is inclined towards textualism,⁶³ while California’s contract-interpretation law is inclined towards contextualism,⁶⁴ textualist scholars believe that Eisenberg and Miller’s results indicate that parties to commercial contracts prefer the textualist approach of contract interpretation.⁶⁵

The reliance of textualist scholars on Eisenberg and Miller’s empirical study suffers from one central limitation. There are many legal differences between New York law and California law, besides the differences in the rules of contract interpretation.⁶⁶ Just within the realm of contract law, the differences between New York and California concern the application of many important noninterpretation doctrines, such as promissory estoppel, consideration, duress, unconscionability, public policy, and mistake.⁶⁷ Hence, the dominance of New York choice-of-law clauses over California choice-of-law clauses—as witnessed in Eisenberg and Miller’s study—does not necessarily result from the parties’ preference for New York’s textualist interpretation rules.⁶⁸

Generally put, the scant existing empirical literature assessing parties’ preferences of contract interpretation rules focuses on *indirect* indicators,

60. Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475, 1475 (2009).

61. *Id.* at 1489.

62. *Id.* at 1490.

63. Miller, *supra* note 51, at 1478; Schwartz & Scott, *supra* note 17, at 956; Bernstein, *supra* note 12, at 15.

64. Miller, *supra* note 51, at 1478; Schwartz & Scott, *supra* note 17, at 956; Bernstein, *supra* note 12, at 15.

65. Miller, *supra* note 51, at 1478; Schwartz & Scott, *supra* note 17, at 956; Bernstein, *supra* note 12, at 15–16.

66. *See, e.g.*, Miller, *supra* note 51, at 1479–1522.

67. *Id.* at 1482–84, 1485–1502, 1504–06.

68. Bayern, *supra* note 15, at 1122 (“[T]here are many provisions of substantive New York law that public firms might favor; an inference that they are specifically choosing textualism is unfounded.”); Burton, *supra* note 1, at 347 n.64 (arguing that “firms’ frequent use of choice-of-law clauses to select New York law . . . could be made for any of a variety of reasons” other than a preference for textualist contract interpretation rules); Silverstein, *supra* note 2, at 280 n.417 (“But Miller’s article identified roughly seventeen doctrinal differences between New York and California, only one of which was contract interpretation. Thus, it is far from clear that differences in interpretive regimes played an important role in the choice of law and forum decision-making that Eisenberg and Miller studied.” (citation omitted)).

such as the method of adjudication applied by arbitrators in a small number of industries (Professor Bernstein's studies) or the choice of law clauses selected by public companies (Professors Eisenberg and Miller's study). In order to avoid the pitfalls of *indirect* inference from a limited number of industries, this empirical study sought a database that would provide for more *direct* evidence of parties' preferences for contract interpretation rules. This study, therefore, empirically examines the frequency with which textualist interpretation clauses are included in contracts without limiting the study to a small number of specific industries.

III. THE EMPIRICAL TEST

From a methodological perspective, it is difficult to "measure the extent of parties' preferences for [textualist] adjudication by looking at their contracts."⁶⁹ This is due, in part, to the fact that most interpretive legal rules are *mandatory*;⁷⁰ namely the parties normally "cannot contract directly for [a] textualist or [a] contextualist" interpretation approach.⁷¹ However, there is one central exception in which the parties can contractually choose a preferred interpretation rule: they can include a merger clause in their contract.⁷² Merger clauses in commercial contracts between sophisticated parties are normally enforceable by courts.⁷³ This study, therefore, will empirically focus on this type of important interpretation clause.

69. Bernstein, *supra* note 12, at 12.

70. Bernstein, *supra* note 12, at 12 ("[T]he [U.C.C.'s] contextualist interpretive approach is, in practice, quasi-mandatory."); Schwartz & Scott, *supra* note 16, at 583, 585 n.84 ("Courts in general . . . treat interpretation rules as mandatory The current interpretive rules are mandatory"); Scott, *Text Versus Context*, *supra* note 4, at 8 ("Contract interpretation rules are . . . mandatory").

71. Scott, *Text Versus Context*, *supra* note 4, at 8, 21; *see also* Schwartz & Scott, *supra* note 16, at 583 (under a mandatory regime, "courts, not parties, should choose the rules that determine how contracts are read").

72. Bayern, *supra* note 15, at 1136 ("[T]he enforceability of strong merger clauses, suggests such a mandatory rule is not universal.").

73. SCOTT & KRAUS, *supra* note 44, at 543 (merger clauses are "[i]n principle . . . enforceable at common law and under the Code"); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-12 (5th ed. 2000) ("Merger' clauses . . . are generally valid."); E. Allan Farnsworth, *The Interpretation of International Contracts and the Use of Preambles*, 2002 INT'L BUS. L.J. 271, 273 (parties who include a merger clause in their contract "can be confident that it will be respected by any judge or arbitrator applying a common law system"); Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 503 (2010) ("If the parties are deemed sophisticated, the merger clause controls.").

A. Merger Clause—A Brief Overview

A merger clause, known also as an “integration” or “entire agreement” clause,⁷⁴ merges all pre-contractual negotiations between the parties into the written contract.⁷⁵ “A [typical] merger clause reads: ‘This writing contains the entire agreement of the parties and there are no promises, understandings, or agreements of any kind pertaining to this contract other than stated herein.’”⁷⁶

The typical legal effect of a merger clause is “to exclude any [contextual] claims based on precontractual negotiations or understandings between the parties.”⁷⁷ More specifically, a merger clause usually triggers, *inter alia*, three textualist interpretation rules: First, prior oral and written statements between the parties cannot *add* to the contract text.⁷⁸ Second, prior oral and written statements cannot *modify* the contract text.⁷⁹ Third, if

74. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.3 (3d ed. 2004).

75. *Id.*; LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 602 (8th ed. 2006) (“These provisions are known as ‘merger’ or ‘integration’ clauses because they say, in effect, that all agreements between the parties have been merged or integrated into the writing.”); 11 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 33:23 (4th ed. 2012) (“Recitations to the effect that a written contract is integrated, that all conditions, promises, or representations are contained in the writing, and that the parties are not to be bound except by the writing are commonly known as merger or integration clauses.”); Miller, *supra* note 51, at 1507 n.254 (“Merger clauses provide that all prior agreements and understandings between the parties related to the transaction are merged into the final contract.”); Schwartz & Scott, *supra* note 17, at 932 n.16 (“A merger or integration clause recites that all prior party understandings are merged into the final written agreement.”).

76. FARNSWORTH, *supra* note 74, at § 7.6a; *see also* Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 51 n.91 (1985) (“A merger or integration clause is a provision that states that the writing ‘contains the entire agreement of the parties.’” (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3-3 (2d ed. 1977))).

77. Miller, *supra* note 51, at 1507 n.254; *see also* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 7:8 (2017 ed.), Westlaw (database updated March 2017) (“If a written agreement contains an express merger clause, then the presumption is that it is an integrated document and only under extraordinary circumstances . . . is parol evidence admissible.”); ERIC A. POSNER, CONTRACT LAW AND THEORY 147 (2011) (a merger clause “implicitly invokes the parol evidence rule, instructing the court that because the writing is complete, the court should resist the temptation to examine extrinsic evidence”). Notably, some “courts . . . hold that a merger clause creates a . . . conclusive presumption that the parties intend courts not to rely on extrinsic evidence.” Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 552 (1998) [hereinafter Posner, *The Parol Evidence Rule*]. Other “[c]ourts . . . generally hold that a merger clause creates a rebuttable presumption that the parties intend courts not to rely on extrinsic evidence.” *Id.*; *see also* WILLISTON & LORD, *supra* note 75, at § 33:23.

78. Farnsworth, *supra* note 73 (“According to the parol evidence rule, if a contract is *completely integrated* in a writing . . . prior oral . . . statements cannot be used to add to . . . the writing . . . [T]he draftsman can make sure that the contract is completely integrated simply by saying so in what is commonly called in international transactions an ‘entire agreement’ clause and in American parlance a ‘merger’ or ‘integration’ clause.”); *see also* FARNSWORTH, *supra* note 74, at § 7.3.

79. FARNSWORTH, *supra* note 74, at § 7.3; Farnsworth, *supra* note 73; *see also* Norman Bobrow & Co. v. Loft Realty Co., 577 N.Y.S.2d 36, 36 (App. Div. 1991) (“Parol evidence is not admissible to vary the terms of a written contract containing a merger clause.” (citation omitted)).

the contract text is seemingly unambiguous, extrinsic evidence cannot be considered for the purpose of giving meaning to the contract text.⁸⁰

Through a merger clause, therefore, the parties signal to the adjudicator that they prefer a textualist approach of contract interpretation which excludes any contextual claim based on precontractual negotiations or understandings between the parties.⁸¹ Parties that fear a contextual method of interpretation, under which courts consider evidence of precontractual negotiations, are likely to include a merger clause in their contract.⁸²

B. *The Theoretical Hypotheses*

This paper hypothesizes that most parties to commercial contracts between sophisticated parties will include a merger clause in their contract. This is for the following central reasons. To begin with, the probability of judicial error in evaluating contextual, precontractual evidence is likely to be high in commercial contracts. First, since commercial contracts are normally complex and have a large number of oral and written statements and understandings made during preliminary negotiations, erroneous judicial enforcement of some of these statements and understandings is likely.⁸³ Second, commercial contracts are normally sophisticated, unconventional, and unknown for nonbusiness people, such as judges.⁸⁴ Consequently, courts are likely to err in evaluating the precontractual contexts of transactions that they have not seen before.⁸⁵ In addition, the

80. Farnsworth, *supra* note 74, at 276 (a merger clause “will make it clear that the contract is completely integrated so that a plain meaning rule applies so that extrinsic evidence will only be considered for the purpose of interpreting language if the language is ambiguous”); *see also* *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997) (“Ordinarily, a merger clause provision indicates that the subject agreement is completely integrated, and parol evidence is precluded from altering or interpreting the agreement.”); *L.D.S., LLC v. S. Cross Food, Ltd.*, 954 N.E.2d 696, 705 (Ill. App. Ct. 2011) (“[I]n interpreting the contract [which contains a merger clause], the court examines the language of the contract alone, without considering extrinsic evidence of prior negotiations.”).

81. George M. Cohen, *Implied Terms and Interpretation in Contract Law*, in 3 *ENCYCLOPEDIA OF LAW AND ECONOMICS: THE REGULATION OF CONTRACTS* 78, 96 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (“The contracting parties may prefer textualism and express that preference through . . . merger clauses.”).

82. Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 *NW. U. L. REV.* 91, 131 n.113 (2000) (“Parties that fear liberal interpretation can . . . include a merger clause, which directs courts not to rely on evidence of precontractual negotiations when interpreting contracts . . .”).

83. Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?*, 36 *VAND. L. REV.* 1383, 1387–88 (1983) (“Jurors also may lack the sophistication needed to deal effectively with complex commercial transactions involving numerous alleged oral and written contract terms.”); Posner, *The Parol Evidence Rule*, *supra* note 77, at 556.

84. *Cf.* Posner, *The Parol Evidence Rule*, *supra* note 77, at 553.

85. MITCHELL, *supra* note 17, at 115 (“The contextual approach arguably increases the chances for error by increasing the amount of information deemed relevant to the interpretation exercise. Judges may have to deal with a significant amount of contextual material, some of it connected to particular

costs of a judicial error in the evaluation of precontractual evidence of commercial contracts, under a contextual approach, is likely to be high since the value of these contracts is normally significant.⁸⁶

Most parties to commercial contracts between relatively sophisticated parties will include a merger clause in their contract for another reason. Merger clauses are likely to reduce commercial companies' intrafirm agency costs.⁸⁷ Sophisticated parties to commercial contracts often employ many contracting agents, who enter into numerous contracts every day.⁸⁸ These agents may unintentionally give precontractual statements to the other party, which are not contained in their companies' contract texts.⁸⁹ A merger clause, by excluding precontractual evidence, relieves commercial companies of the need to monitor the infinite set of precontractual, unobservable statements by their employees.⁹⁰ In addition, a merger clause reduces intrafirm learning costs. It allows the companies' implementers of commercial contracts to avoid incurring the substantial cost of learning the infinite, elastic set of contextual evidence that already exists for each contract before the implementation time.⁹¹ This set of contextual evidence may be established by contracting agents who negotiated the contract and have already retired or moved on from the commercial company, thereby significantly increasing the learning costs of contract implementers.⁹²

True, the contextualist approach may reduce the parties' transaction costs⁹³ by allowing the parties to write shorter contracts and leave it to the adjudicator to fill gaps with contextual evidence. However, this cost reduction is normally insignificant for commercial contract parties compared with the benefits of merger clauses.⁹⁴ Sophisticated parties to

frameworks of analysis whose conventions will be unfamiliar to them."); Posner, *The Parol Evidence Rule*, *supra* note 77, at 553.

86. Posner, *The Parol Evidence Rule*, *supra* note 77, at 556 ("[B]ecause of the high value of the transaction, errors in enforcement are costly.").

87. Bernstein, *supra* note 52, at 1817.

88. *Id.*

89. *Id.*

90. MITCHELL, *supra* note 17, at 113 (Parties to commercial contracts may prefer a textualist approach since it can "ensure that the things that their employees and representatives have said and done during negotiations do not bind the company"); Bernstein, *supra* note 52, at 1817.

91. BURTON, *supra* note 2, at 33; MITCHELL, *supra* note 17, at 113; Bernstein, *supra* note 52, at 1817.

92. Alan Berg, *Thrashing Through the Undergrowth*, 122 L.Q. REV. 354, 359 (2006) ("[O]ne of the main purposes in instructing lawyers to draft the contract is to ensure that its terms will be clear to those who have to deal with the contract in the future, and to the lawyers advising them, after the management who negotiated the contract have retired or moved on."); *see also* BURTON, *supra* note 2, at 33.

93. MITCHELL, *supra* note 17, at 108–09 ("One of the arguments in favour of contextualism over literalism is that it lowers transaction costs . . .").

94. *Id.* at 109 ("Parties can write a simpler document, leaving it to the courts to fill gaps through the process of contextual interpretation.").

commercial contracts, as opposed to unsophisticated parties, can draw upon their experience in order to easily move relevant contextual evidence into the written contract in anticipation of the likelihood of judicial error.⁹⁵ In addition, parties to commercial contracts are often repeat players and therefore may be encouraged to bear the increased costs of moving contextual evidence into the written contract.⁹⁶ By incurring these costs only once, commercial companies are able to use their written contracts repeatedly.⁹⁷ Because parties to commercial contracts are able to embed the contractual context in a written contract, they “are more likely to resent than to welcome a court’s efforts to supplement or circumvent their” contract text by contextual evidence.⁹⁸ Hence, most sophisticated parties to commercial contracts are expected to include a textualist merger clause in their contract.⁹⁹ Thus, this paper proposes:

H1: A merger clause is more likely than not to appear in commercial contracts between sophisticated parties

In addition, this paper hypothesizes that contracts that include “textualist clauses” other than a merger clause are more likely to include a merger clause than contracts without textualist clauses. *Textualist clauses*, as defined in this paper, are contractual clauses that aim to prevent courts from considering contextual evidence that was not embedded formally in a written text, such as post- and pre-contractual oral statements or notices.

Textualist clauses, as suggested in this paper, can be divided into two major categories: direct and indirect. Direct textualist clauses explicitly require courts to consider only *written* text, thereby ignoring nontextual contextual evidence. Relatively common examples of direct textualist clauses are: (1) a no-oral-modification clause, which states that the contract may be modified or amended only in *writing*;¹⁰⁰ and (2) a notices clause, which states that all notices under the agreement shall be in *writing*.¹⁰¹

Indirect textualist clauses aim to limit courts from considering the infinite set of contextual evidence during the litigation process. These clauses embed relevant context, aiming to specify precisely the contextual “evidentiary base that will be made available to a court” during the litigation.¹⁰² Relatively common examples of indirect textualist clauses are:

95. Posner, *The Parol Evidence Rule*, *supra* note 77, at 553–54.

96. MITCHELL, *supra* note 17, at 110.

97. *Id.*

98. Gilson et al., *supra* note 3, at 26.

99. *Id.*

100. FARNSWORTH, *supra* note 74, at § 7.6a; Farnsworth, *supra* note 73, at 274.

101. *See, e.g., Philip Morris USA, Inc. v. Appalachian Fuels, LLC*, No. 3:08–CV–527, 2009 WL 1011650, at *6 (E.D. Va. Apr. 15, 2009).

102. Scott, *supra* note 3, at 23; *see also* Schwartz & Scott, *supra* note 17, at 961.

(1) a “whereas clause,” also known as “recitals clause,” which includes “[a] preliminary statement in a contract . . . explaining . . . the [contextual] background of the transaction[s],”¹⁰³ the reasons upon which the contract was formed,¹⁰⁴ or the existence of particular contextual facts that surround the contract,¹⁰⁵ and (2) a “definitions clause,” which normally “ascribe[s] contextual] meanings to words and terms that may vary from their plain meaning.”¹⁰⁶

Given their characteristics, textualist clauses, either direct or indirect, reflect the preferences of parties to a transaction for a textualist approach of interpretation, namely that the terms they write in text are enforced as written in the text.¹⁰⁷ This paper assumes that if the parties indicate their preference for textualism by utilizing textualist clauses, they are more likely to utilize a merger clause in their contract. This is because a merger clause, given its legal textualist implications,¹⁰⁸ supports the parties’ existing textualist preferences, as reflected in the textualist clauses. Thus, this paper proposes:

H2: Contracts that include a no-oral-modification clause are more likely to include a merger clause than contracts without a no-oral-modification clause

H3: Contracts that include a notices clause are more likely to include a merger clause than contracts without a notices clause

H4: Contracts that include a whereas clause are more likely to include a merger clause than contracts without a whereas clause

H5: Contracts that include a definitions clause are more likely to include a merger clause than contracts without a definitions clause

C. Data

The sample of this empirical study is based on commercial contracts contained as exhibits to Form 8-K filings with the SEC.¹⁰⁹ Form 8-K

103. *Recital*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Edwards v. Doe*, 331 F. App’x 563, 572 n.15 (10th Cir. 2009).

104. *Blackstone Consulting, Inc. v. United States*, 65 Fed. Cl. 463, 470 (2005); see *Recital*, BLACK’S LAW DICTIONARY (10th ed. 2014).

105. *Edwards*, 331 F. App’x at 572 n.15; see also *Recital*, BLACK’S LAW DICTIONARY (10th ed. 2014).

106. Gilson et al., *supra* note 3, at 59; see also Gilson et al., *supra* note 15, at 184; Scott, *supra* note 3, at 23–24.

107. Cf. Bernstein, *supra* note 12, at 13–14.

108. See *supra* notes 78–80 and accompanying text.

109. For the same methodological approach of analyzing contracts contained as exhibits to Form 8-K filings with the SEC, see Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880 (2008); Theodore Eisenberg & Geoffrey P. Miller,

includes information which is considered to be “material.”¹¹⁰ This information must particularly include the entry of the company, filing to the SEC, into a “material definitive agreement.”¹¹¹ This agreement is defined as an agreement that provides for obligations or rights that are “material” to the filing company.¹¹² Generally put, “material” obligations and rights are substantially likely to be considered by a reasonable investor as “important in making an investment decision.”¹¹³

This study covers a five-year period from January 1, 2012, to January 1, 2017. The resulting final sample consists of 1,521 commercial contracts. These contracts were located via Westlaw’s commercial law sample-agreement search engine.¹¹⁴ The Westlaw sample-agreements database has contracts included in all SEC filings during the sample period.¹¹⁵

The commercial contracts examined in this study are highly heterogeneous in their type, including, for example: distribution, agency, consulting, management services, cooperation, independent contractor, marketing, licensing, financing, and manufacturing agreements.¹¹⁶ The

Damages Versus Specific Performance: Lessons from Commercial Contracts, 12 J. EMPIRICAL LEGAL STUD. 29, 43 (2015) [hereinafter Eisenberg & Miller, *Damages Versus Specific Performance*]; Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 550 (2007) [hereinafter Eisenberg & Miller, *Do Juries Add Value?*]; Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 349 (2013); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1983 (2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 348 (2007) [hereinafter Eisenberg & Miller, *The Flight from Arbitration*]; Eisenberg & Miller, *supra* note 60, at 1487.

110. SEC Office of Inv’r Educ. & Advocacy, *Investor Bulletin: How to Read an 8-K*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/investor/pubs/readan8k.pdf> (last visited Sept. 20, 2017).

111. Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Exchange Act Release No. 49,424, 82 SEC Docket 1480 (Mar. 16, 2004), <https://www.sec.gov/rules/final/33-8400.htm>.

112. *Id.*

113. *Cf.* *How to Read an 8-K*, INVESTOR.GOV (May 22, 2012), <https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/how-read-8-k>.

114. In order to exclude contracts that were merely an amendment to a contract, I searched via Westlaw’s search engine only for contracts that included in their title the following terms: (agreement! or contract!) % amendment!. The “!” symbol was used to search for words with multiple endings, and the “%” symbol was used to exclude the term following the percent symbol. See WESTLAW, <https://lawschool.westlaw.com/marketing/display/RE/152> (last visited Sept. 20, 2017) [hereinafter *Terms and Connectors Searches*]. I also excluded exhibits that were apparently duplicates, as witnessed by their title and date.

115. *Sample Agreements*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/transactions/sample-agreements> (last visited Sept. 20, 2017).

116. A commercial contract, as opposed to a consumer or employment contract, is typically an agreement between two or more business entities. See Schwartz & Scott, *supra* note 16, at 543 (“Even a theory of contract law that focuses only on the enforcement of bargains must still consider the entire continuum from standard form contracts between firms and consumers to commercial contracts among businesses.”); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing*

major types of contracts, as reflected in the contracts' titles, are shown in table 1.

Table 1. Contract type

Type	Number	Percentage	Type	Number	Percentage
Distribution	183	12.03	Terminal Services	33	2.17
Consulting or Advisory	165	10.85	Transportation Services	28	1.84
Agency	123	8.09	Exporter Services	18	1.18
Management Services	117	7.69	Supply	26	1.71
Cooperation	105	6.90	Purchase	23	1.51
Marketing	73	4.80	Administrative Services	21	1.38
Independent Contractor	69	4.54	Storage	16	1.05
Licensing	63	4.14	Research	13	0.85
Financing	51	3.35	Pipeline Services	10	0.66
Manufacturing	43	2.83	Advertising	7	0.46
Development	46	3.02	Assignment	5	0.33

Civil Marriage, 27 CARDOZO L. REV. 1161, 1198 (2006) (“Consumer contracts differ from commercial contracts between businesses.”); *see also* Silverstein, *supra* note 2, at 261.

The industries of the companies, which filed to the SEC the contracts of this study, are also very heterogeneous, including, for example: banking, education, electricity, agriculture, pharmaceutical, management and consulting, natural gas, hotels and motels, patents, personal services, telephone communication, television broadcasting services, motor vehicle parts and accessories, computer programming, retail, wholesale, tobacco, business services, and industrial organic chemicals.¹¹⁷

D. Methodology

In order to locate contracts with a merger clause, I took the following central steps: First, I conducted an in-depth review of the full text of 100 random commercial contracts in the sample. The purpose of this review was to identify the terms commonly associated with a merger clause. Second, based on my in-depth review, I conducted a computerized search, via Westlaw's terms-and-connectors search engine, for contracts that include the terms commonly associated with a merger clause.¹¹⁸ This search included the following terms: "entire agreement!"; "entire contract!"; "entire understanding!"; or (supersede! /s prior /s agreement!). The "!" symbol was used to search for words with multiple endings, and the "/s" symbol was used to search terms in the same sentence.¹¹⁹ Contracts with a merger clause were coded "1." Finally, in order to verify that the search results for terms commonly associated with a merger clause were not overinclusive, I performed a human-coded audit of 100 random contracts which were coded "1." The audit was successful.¹²⁰

In order to locate contracts with textualist clauses, I took the following two steps for each textualist clause: First, I conducted an in-depth review of the full text of 100 random commercial contracts in the sample in order to identify the terms commonly associated with the textualist clause. Second, based on this review, I conducted a computerized search via Westlaw's terms-and-connectors search engine for contracts that include the terms commonly associated with the textualist clause. For example, to determine whether a contract included a no-oral-modification clause, which states that the contract may be modified or amended only in writing, I searched via Westlaw's terms-and-connectors search engine for terms such as "amend! /

117. The companies industries were located via the EDGAR company search engine. *See EDGAR: Company Filings*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Sept. 6, 2017).

118. For a similar methodological approach applied on a "specific performance" clause, see Eisenberg & Miller, *Damages Versus Specific Performance*, *supra* note 109, at 44.

119. *Terms and Connectors Searches*, *supra* note 114.

120. Out of 100 results, no result was overinclusive.

s writ!” or “modif! /s writ!”¹²¹ Contracts with the textualist clause were coded “1.”

Finally, in order to verify that my search results for terms commonly associated with textualist clauses were not overinclusive, I performed a human-coded audit of 100 random contracts which were coded “1.” The audit was successful.¹²²

E. Results

Out of 1,521 contracts, 1,145 (75.28%) included a merger clause and 376 did not include a merger clause. A chi-square test was performed, and it was statistically found, unsurprisingly, that a merger clause appears significantly more than not ($\chi^2 [1, N=1,521] = 388.80, p < .001$), supporting H1.

Interestingly, the results also show that contracts that have a choice-of-law clause of a state that has contextual rules of contract interpretation, such as California, had a significantly higher percentage of merger clauses.¹²³ Specifically, out of 317 such contracts, 295 (93.06%) had a merger clause.¹²⁴ These results may indicate that parties who choose to be governed by the laws of contextualist states are truly concerned by the liberal interpretation rules of these states and try to limit them by an inclusion of a textualist merger clause.

The results also support H2–H5. A discriminant analysis was conducted to predict the dummy variable, “merger clause.”¹²⁵ Predictor variables were four dummy variables: “no-oral-modification,” “notices,” “whereas,” and “definitions” clause. Table 2 shows the frequency and percentage of contracts with a merger clause for each textualist clause.

121. For all other textualist clauses, my search included the following terms: “notices /s in writ!”, “any notice /s writ!”, “whereas”, “recitals”, and definitions. I also searched, via Westlaw’s “Clause Title” search function, for contracts with the following clause titles: “amendment!”, “modification!”, “notices”, “recitals”, and definitions.

122. Out of 100 results, only one (1%) was overinclusive.

123. Other states that have contextualist rules of contract interpretation are Alabama, Alaska, Arizona, Michigan, New Jersey, New Mexico, Texas, Vermont, and Washington. See Palia & Scott, *supra* note 16, at 572 n.14.

124. Contracts with choice-of-law clauses of contextual states were located via Westlaw’s “Governing Law” function. This function allows searching for contracts by their governing-law clause. I performed a human-coded audit of 100 randomly selected contracts to check the accuracy of Westlaw’s Governing Law function. The audit was successful and all the function’s search results were accurate.

125. For more details on discriminant analysis see, for example, ROBERT B. BURNS & RICHARD A. BURNS, *BUSINESS RESEARCH METHODS AND STATISTICS USING SPSS* 589–608 (2008); ANDY FIELD, *DISCOVERING STATISTICS USING IBM SPSS STATISTICS* 654–60 (4th ed. 2013).

Table 2. Cross tabulation of a merger clause and other textualist clauses

Type of Clause	Total Number	With Merger Clause		Without Merger Clause	
		Frequency	Percentage	Frequency	Percentage
No-Oral-Modification	1,240	995	80.24%	245	19.76%
Without No-Oral-Modification	281	150	53.38%	131	46.62%
Notices	1,133	918	81.02%	215	18.98%
Without Notices	388	227	58.51%	161	41.49%
Whereas	1,118	916	81.93%	202	18.07%
Without Whereas	403	229	56.82%	174	43.18%
Definitions	742	588	79.25%	154	20.75%
Without Definitions	779	557	71.50%	222	28.50%

The discriminate function was significant ($\Lambda = .87$, $\chi^2 [4, N=1,521] = 216.38$, $p < .001$; canonical $R^2 = .13$), revealing a significant association between a merger clause and all predictors simultaneously: no-oral-modification, notices, whereas, and definitions clauses. Importantly, significant mean differences were observed for each of the predictors on the dependent-variable merger clause: no-oral-modification ($\Lambda = .94$, $F[1,1519] = 94.20$, $p < .001$), notices ($\Lambda = .95$, $F[1,1519] = 82.95$, $p < .001$), whereas ($\Lambda = .93$, $F[1,1519] = 107.30$, $p < .001$), and definitions ($\Lambda = .99$, $F[1,1519] = 12.33$, $p < .001$).¹²⁶

126. In addition, a basic chi-square test was performed. It also showed a significant relationship between each of the predictors on the dependent variable merger clause: no-oral-modification ($\chi^2 [1, N=1521] = 88.82$, $p < .001$, Kappa = .24), notices ($\chi^2 [1, N=1521] = 78.76$, $p < .001$, Kappa = .23),

A closer analysis of the structure matrix, which shows the correlations of each variable with the discriminate function, revealed that no-oral-modification (.636), notices (.597), and whereas (.679) were strongly associated with the discriminant function, while a definitions clause (.230) was significantly associated, though to a lesser degree, to the discriminant function.

Function at group centroids was consistent with the structure matrices. The scores in the discriminant function were higher for merger clause ($M = .22$) than for no merger clause ($M = -.68$). Overall, 77.0% of cross-validated grouped cases were correctly classified ($\chi^2 [1, N=1,521] = 100.60, p < .001, \text{Cramer's } V = .26$). Classification is presented in Table 3.

Table 3. Classification results

	Merger Clause	Predicted Group		Total
		Membership 0	1	
Count	0	85	291	376
	1	59	1086	1145
%	0	22.6	77.4	100
	1	5.2	94.8	100

IV. DISCUSSION AND NORMATIVE IMPLICATIONS

Two major theories compete for dominance in the interpretation of contracts: a textualist and a contextualist theory. The results of this empirical study indicate that most sophisticated parties to commercial contracts prefer textualist rules of interpretation. The study shows that a

whereas ($\chi^2 [1, N=1521] = 100.35, p < .001, \text{Kappa} = .26$), and definitions ($\chi^2 [1, N=1521] = 21.24, p < .001, \text{Kappa} = .08$).

clear majority (75.28%) of commercial contracts filed to the SEC have a merger clause.

The central potential legal implication of these results is that the default interpretation rules of commercial contracts between sophisticated parties must be altered. Since most of these contracts include a merger clause, the default rules should mimic the majority's preferences. Specifically, the default interpretation rules of commercial contracts between sophisticated parties should embed the set of legal rules normally triggered by a textualist merger clause¹²⁷: (1) prior oral or written statements between the parties cannot add to the written contract; (2) such prior statements cannot modify the written contract; and (3) if the contract text is seemingly unambiguous, extrinsic evidence cannot be considered for the purpose of giving meaning to the contract text.¹²⁸

By imitating the majority's preferences, the law would reduce the transaction costs of most sophisticated parties to commercial contracts. Only the minority of parties to these contracts, who wish to opt out from the new suggested textualist default rules, will have to negotiate and draft an *anti-merger* clause, stating that their contract "does not contain the entire agreement of the parties." This novel legal reality will save transaction costs for the majority of parties who must nowadays negotiate and draft a merger clause.

The results of this study may arguably suffer from one central limitation. The merger clauses in the sample may be mere boilerplates. Namely, the parties in the study's sample may have added a merger clause to their contract without deliberation. This concern is unlikely for several cumulative reasons. First, the sample of this empirical study is based on contracts contained as exhibits to Form 8-K filings with the SEC. Form 8-K includes "material definitive agreements."¹²⁹ These agreements are defined as agreements that provide for obligations or rights that are material to the SEC filing company.¹³⁰ Since the contracts in the sample are important to the filing company, it is likely "that they receive[d] care and attention during negotiation and drafting" from companies' employees, including in-house counsels, and from well-qualified outside attorneys.¹³¹ Second, the sample of this study includes only commercial contracts in which one of the parties is a sophisticated company that is legally required to report to

127. See *supra* notes 78–80 and accompanying text.

128. See *supra* notes 78–80 and accompanying text.

129. Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, *supra* note 111.

130. Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, *supra* note 111.

131. Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 109, at 582; see also Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 109, at 349; Miller, *supra* note 51.

the SEC. These are normally companies with more than \$10 million in assets whose securities are held by more than 500 owners.¹³² Consequently, it is reasonable to assume that the other parties to the sample commercial contracts of this study are likely to be relatively sophisticated business entities too, given the high screening and qualification standards of sophisticated SEC filing companies. Importantly, this sample excludes commercial contracts between nonsophisticated parties and noncommercial contracts, such as employment and consumer contracts. By that, the sample assures, with a potential slight margin of error, that the merger clauses observed in this data set were *understood* and *freely agreed on* by both parties.¹³³ Third, the empirical results of this study indicate that merger clauses included in the sample contracts are not random boilerplates. More specifically, the results show that contracts that include central textualist clauses, such as a no-oral-modification clause, a notices clause, a whereas clause, and a definitions clause, are significantly more likely to include a merger clause than contracts without such textualist clauses.¹³⁴

CONCLUSION

Contract interpretation plays a significant role in American law. Despite the widespread debate over contract interpretation, there has been very little empirical research on this topic. This Article, therefore, empirically examines the frequency with which merger clauses are included in commercial contracts between sophisticated parties. This Article empirically indicates, by analyzing actual commercial contracts, that sophisticated parties to commercial contracts are likely to prefer textualist rules of interpretation by adopting a textualist merger clause. The study further indicates that the inclusion of a textualist merger clause by most parties is not arbitrary. The inclusion of other major textualist clauses, such as a no-oral-modification clause or a notices clause, is significantly associated with the inclusion of a merger clause.

While this study focused on commercial contracts between sophisticated parties, this paper calls for further empirical research on the parties' preference for contract interpretation rules. Among other things, the preferences of nonsophisticated parties to commercial contracts and to noncommercial contracts should be empirically investigated.

132. See Securities Exchange Act of 1934 § 12(g), 15 U.S.C. § 78l (2012).

133. Eisenberg & Miller, *Damages Versus Specific Performance*, *supra* note 109, at 31.

134. See *supra* Part III.E.