CONFLATING AND CONFUSING CONTRACT INTERPRETATION AND THE PAROL EVIDENCE RULE: IS THE EMPEROR WEARING SOMEONE ELSE'S CLOTHES?

*Margaret N. Kniffin**

ABSTRACT

This Article reveals and analyzes the injustice that occurs when courts confuse two very different concepts: contract interpretation and the parol evidence rule. Prominent scholars also have confused and conflated the two. Significantly, other courts and other leading scholars have perceived and emphasized the distinction. The Article analyzes the policies that underlie interpretation (which discerns the meaning of terms found within a contract) and the disparate policies that underlie the parol evidence rule (which determines whether terms can be added to a contract). Confusion of the distinctive concepts has caused evidence to be excluded that would otherwise have been admitted and, conversely, has resulted in the admission of evidence that would otherwise have been excluded. Finally, the Article makes policy recommendations, including changes in traditional terminology, that will contribute to judicial clarity and the avoidance of injustice.

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* Professor of Law, St. John's University School of Law; A.B., Barnard College; J.D., Harvard Law School.

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INTRODUCTION

This Article will reveal and analyze the injustice that occurs when courts,[1] as well as eminent scholars,[2] confuse contract interpretation with the parol evidence rule.

In the popular story, the public pretends to others and to itself that its Emperor is wearing clothes. He is, in reality, however, wearing nothing. Let us assume that the Emperor and an Empress share power equally. Each one can represent, therefore, either contract interpretation or the parol evidence rule, two currently and historically distinct concepts. Each of these two concepts functions independently of the other. Each serves its unique purpose, and each is garbed in an appropriately different cloak of requirements. Yet often a court will insist upon an exchange of raiment:[3] the court will apply contract interpretation requirements to a parol evidence rule issue, and, conversely, another court will apply parol evidence rule requirements to a contract interpretation issue.

Just as confusedly, some distinguished commentators have failed to make this important distinction. One scholar, in an article cited by other well-known scholars,[4] has declared that the two concepts, contract interpretation and the parol evidence rule, can be conflated, overlooking the possibility of resultant injustice.[5] Professor Eric Posner has stated, "Purists will object that I conflate the plain meaning rule [a requirement for admitting extrinsic evidence to interpret a contract] . . . and the parol evidence rule. As far as I can tell, nothing turns on this distinction, and my version avoids needless complexities."[6] Professor Posner would deprive the Empress and

1. *See* analysis *infra* Part I.A, Part II.

2. *See* analysis *infra* Part III.

3. Use of this metaphor is not intended to imply criticism of how any individual chooses to dress.

4. *See infra* note 253.

5. Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation,* 146 U. PA. L. REV. 533, 534 n.1 (1997-98).

6. *Id.* at 534 n.1; *see also* AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 3.08 (American Law Institute 2009); Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 801 (2002).

Emperor of their respective distinctive characteristics and sartorial requirements, leaving each either unclothed or even lacking altogether in personal identity.

Yes, Professor Posner, there is a real (and meaningful) distinction between the Empress and the Emperor. Each is not only clothed in different requirements; the distinctive requirements are necessary because each also governs a separate area of contract law. Contract interpretation, which can be labeled the Empress, functions to assign meaning to terms already contained within a contract. In contrast, the parol evidence rule, which can be designated the Emperor, determines whether a term can be added to (or in rare cases, deleted from or displace terms in) a contract. Although both processes contribute to the final result of a definite, enforceable agreement, and both often entail decisions whether to admit evidence of prior negotiations, each embodies a clearly distinguishable concept.

Other scholars, notably Corbin, Williston, Perillo, Calamari, Farnsworth, Fuller, Eisenberg, Scott, and Kraus, among others, have recognized and written about the distinction between contract interpretation and the parol evidence rule.[7]

Some courts, also, have recognized the distinction, but some have not.[8] Those courts that have conflated or interchanged the two processes have, as a result, in many instances excluded evidence that otherwise would have been admitted or, conversely, admitted evidence that otherwise would have been excluded – thereby producing injustice.[9]

This Article will describe the requirements, the contrasting sets of clothing needed by the Empress and Emperor respectively, in order that contract interpretation and the parol evidence rule may each govern with justice. The Article will analyze the utility and rationality of each set of requirements in relation to the unique purpose to be served.

The cross-dressing and, in some cases, lack of dress, that have occurred in scholarly writings and in judicial decisions will be described and will be shown to have produced injustice. Scholarship and court opinions that do clearly recognize the importance of the distinction will be presented. Recognition of the distinction between contract interpretation and the parol evidence rule will be shown to represent fruitful and desirable public policy. Finally, this Article will offer recommendations that will further implement this public

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7. *See* analysis of these scholars' positions *infra* Part I.B, in text accompanying notes 35-82.

8. *See* analysis *infra* Part II.

9. *Id.*

policy.

Professor Posner, writing of the conflated concepts of contract interpretation and the parol evidence rule, laments, "In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair."[10] Let us examine how these ill effects can be rendered unnecessary and avoidable by honoring the separate roles and distinctively appropriate requirements that characterize the Empress and the Emperor.

I. A TRUE DICHOTOMY – THE CONTRASTING PURPOSES AND REQUIREMENTS OF INTERPRETATION AND THE PAROL EVIDENCE RULE

There are real differences between the purposes and requirements of interpretation and the parol evidence rule, and these differences do matter. Separate roles and separate wardrobes are essential.

A. Two Preliminary Examples of Harm

Mischief can result when courts confuse (as in one illustrative case[11]) or conflate (as in a second representative case[12]) the two concepts.

"Fired" at the age of sixty-seven, three years before retirement, after thirteen years of work as a salesperson with an "excellent work record," Scholz, the employee, needed to convince a court that her employment contract stating that she could be discharged without cause, was supplemented by an earlier, oral agreement permitting that she not work Sundays.[13] She had refused to work on a particular Sunday and was consequently "fired."[14] She then brought suit against her employer, Montgomery Ward, for breach of contract.[15]

Although this fact situation presents a classic parol evidence rule scenario, involving the issue of whether a prior term can be added to a written contract, the Supreme Court of Michigan did not apply the parol evidence rule.[16] Had the court applied the rule, it would have inquired whether the oral agreement conflicted with the signed contract and whether the parties to the signed contract intended it to

10. Posner, *supra* note 5, at 540.

11. *See, e.g.,* Scholz v. Montgomery Ward & Co., Inc., 468 N.W.2d 845 (Mich. 1991).

12. *See, e.g.,* Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990).

13. *Scholz,* 468 N.W.2d at 850-51 (Levin, J., concurring in part and dissenting in part).

14. *Id.* at 846.

15. *Id.* at 850-51 (Levin, J., concurring in part and dissenting in part).

16. *See id.* at 848 (majority opinion).

be complete and exclusive, *i.e.,* completely integrated, *i.e.,* not open to supplementation.[17] Had these queries, once posed, been answered in the negative,[18] Scholz's earlier permission not to work Sundays would have been added to the written contract, and the ground for her discharge would have been nonexistent. How these queries would have been answered will, however, never be known.

Instead of applying the parol evidence rule, the court inexplicably applied an interpretation technique: the court asked whether the language of the written employment contract contained ambiguous terms.[19] This is the "plain meaning rule;" it is utilized in many jurisdictions to determine whether to admit evidence of prior negotiations in order to discern the intended meaning of a term contained within the contract; it asks whether such disputed term is ambiguous.[20] Yet the ambiguity or lack of ambiguity of language within the contract has nothing to do with whether the parties intended to incorporate a separate term, such as the promise made to Scholz that she need not work on Sundays.

This plain meaning rule assists courts in interpreting terms found in contracts because, if a disputed term has a meaning that is plain and clear to the court,[21] there is arguably no need to admit evidence to support either this meaning or a different meaning.[22] By what logic does the clarity or ambiguity of contract terms dictate whether the parties made a supplemental agreement? Injustice

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17. One judge in that case did perceive that the parol evidence rule should have been applied. He wrote, "This presents the question whether the sign-off sheet [the later written contract] was a complete integration of all the terms of the employment contract." *Id.* at 853 (Levin, J., concurring in part and dissenting in part).

18. Justice Levin, concurring in part and dissenting in part, wrote that the majority should have answered this query in the negative.

> It is, I think, clear that the new employee sign-off sheet was not a complete integration . . . . The sign-off sheet did not purport to supersede any prior agreement, oral or written. It simply did not focus on prior agreements . . . and was not a complete integration respecting the prior agreement with Scholz.

Id. at 853-54.

19. *See id.* at 848-49 (majority opinion).

20. *See infra* text accompanying notes 99-120.

21. Corbin and other scholars as well as many courts have argued that words can never have meanings that are clear to a court until the court has viewed evidence that may reveal an unexpected meaning. *See* analysis *infra* text accompanying notes 113-30.

22. Judge Judith Kaye wrote in support of the plain meaning rule in W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 643 (N.Y. 1990) ("An analysis that begins with consideration of extrinsic evidence of what the parties meant, instead of looking first to what they said and reaching extrinsic evidence only when required to do so because of some identified ambiguity, unnecessarily denigrates the contract and unsettles the law."). *See* further discussion of the plain meaning rule *infra* text accompanying notes 99-120.

resulted when the Michigan court excluded evidence of the prior oral contract allowing Sunday excusal from work, on the irrelevant ground that the later contract contained unambiguous terms.[23]

Additional examples abound of injustice created by applying interpretative techniques to parol evidence rule situations.[24]

When the situation is reversed, a genuine interpretation fact pattern is before the court, but the court erroneously reacts as if a party were trying to add a term to the contract, *i.e.,* as if the parol evidence rule were applicable. In an illustrative case,[25] the parties, Racine, a hotel owner, and Olympia, whom Racine hired to build and manage the hotel,[26] disagreed about the intended meaning of the term "best efforts to make the hotel a success,"[27] which was stipulated in the written contract. Treating the situation, illogically, as if the parol evidence rule were applicable, *i.e.*, as if one party were trying to add a term to the contract, the Seventh Circuit court excluded evidence of prior negotiations which could have elucidated the parties' intentions.[28] The court stated as its primary reason the presence of a "merger clause" in the contract.[29] Such a clause relates only to a parol evidence rule issue: whether the parties intended their contract to be completely integrated, such that no additional terms can be included. The clause will state typically that the writing contains all terms agreed upon. A merger clause, therefore, clearly has no relevance to the interpretation issue of what the parties intended specific contract terms to mean.

After having focused on the merger clause as sufficient reason for excluding evidence concerning interpretation, the court did touch on a criterion for interpretation, stating, "The term 'best efforts' is a familiar one in contract parlance, and its meaning is especially plain in a case such as this where the promisor has similar contracts with other promisees."[30] To the extent that the court may have been

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23. Scholz v. Montgomery Ward Co., 468 N.W.2d 845, 849 (Mich. 1991) ("In any case, we find the disclaimer [later, written contract] unambiguous on the subject of discharge . . . .").

24. Examples are analyzed *infra* in Part II.

25. Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990) (Posner, J.).

26. *Id.* at 1366.

27. *Id.* at 1372-73.

28. *Id.* at 1373.

29. *Id.* ("But we disagree with Racine's argument that to help the jury determine what the contract term 'best efforts' meant, Racine should have been allowed to present evidence concerning the parties' negotiations before the contract was signed. The contract contains an integration clause, and the district judge was correct that *the parol evidence rule* forbade inquiry into precontractual discussions or agreements concerning the meaning of best efforts." (emphasis added)).

30. *Id.*

applying the plain meaning interpretation rule, holding that because the disputed term had an unambiguous meaning, evidence of prior negotiations could not be admitted, this case would illustrate the conflating of interpretation and the parol evidence rule rather than the full substitution of the parol evidence rule for interpretation. Regardless of whether conflation or substitution occurred, injustice resulted: the evidence might well have been admitted had the court not emphasized the presence of a merger clause.

Additional issues were present in that particular case, and the court wrote, "The appeals are rich with issues, and to discuss them intelligibly, we shall have to simplify matters brutally."[31] The separate concepts of interpretation and the parol evidence rule were not "simplified" but rather treated confusedly and even, one might say, "brutally."[32]

In sharp contrast with these two opinions, the First Circuit court wrote,

> Massachusetts courts commonly say that extrinsic evidence is admissible to resolve ambiguity, but not to contradict plain language. (citation omitted). The related (and easily confused) parol evidence rule limits proof of a supposed oral agreement prior to or contemporaneous with a written contract depending on how fully the written document is 'integrated.' *See Restatement (Second) of Contracts § 213 (1981).*[33]

A number of other decisions have pointed out the distinction.[34]

B. The Scholars Who Have Discerned the Difference

Noted scholars have articulated the distinction between the purposes of contract interpretation and the parol evidence rule.

Williston, in the original edition of his treatise on contract law, clearly explained that the parol evidence rule "is not a rule of interpretation or of construction."[35] He elaborated, "It is a rule of substantive law which, when applicable, defines the limits of a contract. It fixes the subject-matter for interpretation, though not itself a rule of interpretation."[36] Subsequently, Jaeger, in the third

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31. *Id.* at 1365.

32. *See id.*

33. Sunoco, Inc. v. Makol, 372 F.3d 31, 36 n.1 (1st Cir. 2004) (Boudin, C.J.).

34. *See, e.g.,* Prichard v. Clay, 780 P.2d 359 (Alaska 1989), analyzed *infra* in text accompanied by notes 226-34; Atl. N. Airlines, Inc. v. Schwimmer, 96 A.2d 652 (N.J. 1953), analyzed *infra* in text accompanied by note 243; Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448 (N.J. Super. Ct. App. Div. 1963), analyzed *infra* in text accompanied by notes 244-52.

35. 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 631 (1st ed. 1920).

36. *Id.* There is disagreement among those scholars who differentiate contract interpretation from the parol evidence rule, as to the sequence in which each set of requirements should be applied, in situations in which both are applicable. For

edition, retained Williston's recognition of the distinction and stated, "[I]n spite of the fact that the [parol evidence] rule is generally discussed in connection with the interpretation of writings, it is not a rule of interpretation or construction. . . . When applicable, it defines the limits of a contract; it fixes the subject matter for interpretation, though not itself a rule of interpretation."[37]

Surprisingly, the most recent edition of Williston's treatise, edited by Lord, confuses interpretation and the parol evidence rule and, in some portions of the text, conflates them; the confusion and conflation may be unintentional. The section entitled "Definition and Basis of [The Parol Evidence] Rule" purports to define the parol evidence rule by describing a process that is instead interpretation; indeed, the description articulates the plain meaning rule: "Generally stated, this rule prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements . . . to *explain the meaning of a contract* when the parties have reduced their agreement to an *unambiguous* integrated writing."[38] Some degree of conflation occurs in this statement because of the inclusion of the word "integrated," which is a criterion associated with the parol evidence rule and not with interpretation. All other portions of this supposed definition of the parol evidence rule, however, describe interpretation, which serves to explain the meaning of an agreement; ambiguity or lack thereof is relevant to inquiries concerning meaning but not to supplementation of contracts under the parol evidence rule.

Later in the same section, this edition does present an accurate description of some purposes of the parol evidence rule:

> It effectuates a presumption that a subsequent written contract is

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example, within a single case there may be one dispute concerning whether a particular term should be added to the contract under the parol evidence rule and a separate dispute as to the meaning of that term or another term already part of the same contract. Williston's statement that the parol evidence rule "fixes the subject matter for interpretation," *id.*, expresses his view that application of the parol evidence rule, which determines whether a term forms part of the contract, must precede interpretation of the terms clearly contained within the contract. *See also infra* notes 75 and 131; text accompanying notes 162-63. The disagreement among scholars may result from a conundrum: without knowing which terms are added to, or deleted from, a contract by application of the parol evidence rule, the court will not know which terms to interpret. Conversely, however, unless the court first interprets terms to discern their intended meaning, satisfaction of a requirement of the parol evidence rule cannot be determined: the proffered term must not conflict with any term contained within the contract. Yet how can the court know whether there is a conflict if it has not yet discerned the meaning of a term with which the proffered term may conflict? *See also infra* notes 75, 131; text accompanying notes 162-63.

37. 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 631 (3d ed., Jaeger 1961).

38. 11 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 33:1 (4th ed., Lord 1999) (emphasis added).

> of a higher nature than earlier statements, negotiations, or oral agreements by deeming those earlier expressions to be merged into or superseded by the written document. . . . It seeks to achieve the related goals of insuring that the contracting parties, whether as a result of miscommunication, poor memory, fraud, or perjury, will not vary the terms of their written undertakings, thereby reducing the potential for litigation.[39]

Immediately following this statement, nonetheless, is a quotation of an English court's characterization of what can be only interpretation and not the parol evidence rule:

> The general rule I take to be that where the words of any written instrument are *free from ambiguity* in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be *construed* according to the strict, *plain, common meaning of the words themselves* and that in such case evidence dehors the instrument, for the purpose of *explaining* it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. (emphasis supplied).[40]

The section next cites a section of the *Restatement (Second) of Contracts* that clearly refers to the parol evidence rule.[41]

Lord's pattern of alternation between reference to aspects of the parol evidence rule and reference to characteristics of contract interpretation within the treatise section captioned "Definition and Basis of [The Parol Evidence] Rule,"[42] embodies both confusion and conflation; the Empress and Emperor are prevented from ruling with justice in each of their respective territories.

Analysis of E. Allan Farnsworth's treatise on contract law as well as reference to the work of other distinguished modern commentators will allay any suspicion that the transition from Williston's clear distinction in his first edition to Lord's blurring of the distinction in the fourth edition might signal a recent trend.

Professor Farnsworth, in the most recent edition of his treatise on contract law, clearly delineated the two separate concepts, contract interpretation and the parol evidence rule. He structured the volume so as to present two separate subchapters, the first being an extensive and detailed description of the parol evidence rule[43] and

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39. *Id.*

40. *Id.* § 33:1, n.10 (citing Shore v. Wilson, 9 Clark & F (Eng.) 355).

41. *Id.* § 33:1, n.12 and accompanying text (citing RESTATEMENT (SECOND) OF CONTRACTS § 213).

42. *Id.* § 33:1.

43. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 7.2-7.6 (3d ed. 2004) (Subchapter B., "Determining The Subject Matter To Be Interpreted"). The title of this subchapter refers to the function of the parol evidence rule, which is to determine

the second consisting of an equally comprehensive depiction of contract interpretation.[44] In several statements, he highlighted the distinction. He wrote, "The question then is: where does 'interpretation' end and 'contradiction' or 'addition' begin? The answer must be that interpretation ends with the resolution of problems that derive from the failure of language, that is to say, with the resolution of ambiguity and vagueness."[45] He recognized that, as this Article maintains, the distinction between interpretation and the parol evidence rule controls the admissibility of evidence.[46] Farnsworth explained, "[T]he rationale for excluding evidence of prior negotiations when it is offered to interpret language may differ from the rationale for excluding such evidence when it is offered to contradict or add to language."[47] He stated also, "[S]ince the [parol evidence] rule excludes evidence only if it contradicts the writing – or, if the integration is complete, only if the evidence contradicts or supplements the writing – the rule does not exclude evidence offered to help interpret the language of the writing."[48]

Farnsworth quoted Corbin,[49] who, like Williston,[50] established separate sections of his treatise to discuss interpretation and the parol evidence rule, respectively. In Corbin's view, "'No parol[51]

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whether terms should be added to or deleted from the contract. The parol evidence rule thus controls what the subject matter of the contract consists of, apart from any discernment as to the meaning of those terms, which is interpretation.

44. *Id.* §§ 7.7-7.14 (Subchapter C., "Interpretation").

45. *Id.* § 7.12.

46. *Id.*

47. *Id.*

48. *Id.* § 7.3.

49. 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (1960). Chapter 24 is entitled, "Interpretation – Purposes And Methods." It includes sections 532-60. Chapter 26, entitled, "The 'Parol Evidence Rule'," includes sections 573-96.

50. 2 WILLISTON, *supra* note 35. Chapter XXI, entitled, "General Rules for The Interpretation or Construction [a term often used interchangeably with the term "interpretation"] of Contracts and The Parol Evidence Rule," includes sections 601-30 concerning interpretation and sections 631-47 concerning the parol evidence rule. The third edition, edited by Jaeger, labels chapter 22, "Interpretation and Construction of Contracts; The Parol Evidence Rule." 4 WILLISTON, *supra* note 37. Sections 600-30 deal with interpretation, and sections 631-47 analyze the parol evidence rule. *Id.* The fourth edition, edited by Lord, devotes chapters 30-32, sections 30:1-32:20, to interpretation and chapter 33, sections 33:1-33:44, to the parol evidence rule. 11 WILLISTON, *supra* note 38. The fourth edition discussion, however, confuses interpretation and the parol evidence rule. *See supra* text accompanying notes 38-42.

51. The word "parol" has been employed by numerous courts and commentators to refer to oral evidence, one type of extrinsic evidence, *i.e.*, evidence that is other than the document itself. See discussion of illustrative types of extrinsic evidence *infra* Part I.C.1. See also discussion of the use of the term parol evidence to describe extrinsic evidence, as a possible cause of courts' and commentators' confusion of interpretation and the parol evidence rule *infra* Parts I.C.2, IV A.2.

evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined.'"[52]

It is curious that Farnsworth, in what is most likely a "slip of the pen," made a statement that can be seen as confusing interpretation and the parol evidence rule. Writing in a section entitled, "The Process of Interpretation," he noted differences among judges' approaches to the challenges of interpretation, including degree of confidence in "the reliability of language."[53] He continued, "These differences can be felt in the debate between the objectivists and subjectivists [citation omitted], in the determination of how far language can be stretched, in the controversy over the effect of the *parol evidence rule,* and in the characterization of interpretation as 'law' or 'fact'".[54] This reader surmises that in the sentence just quoted, Farnsworth intended to reference not the "parol evidence rule" but, rather, the "plain meaning rule." Two arguments support this conclusion. First, the footnote appended to the term "parol evidence rule" refers the reader to "the discussions of the restrictive view and the liberal view in § 7.12 *infra*."[55] Section 7.12, which forms part of Subchapter C., "Interpretation," describes so-called "restrictive" and "liberal" views concerning application of the *plain meaning* rule.[56] Nowhere in that section or in any other part of his treatise did Farnsworth describe "restrictive" or "liberal" approaches to *the parol evidence* rule. A second argument supporting this reader's conclusion that Farnsworth did not intentionally confuse or conflate interpretation and the parol evidence rule is that all of the attitudinal differences among judges listed by Farnsworth in the sentence in question relate to interpretation and not to the parol evidence rule. There would have been no logical reason to mention the parol evidence rule at that point in the treatise.

Professor Joseph M. Perillo, in his treatise on contract law, designated separate subchapters for the parol evidence rule and interpretation, respectively.[57] He nevertheless raised, in an

52. 2 FARNSWORTH, *supra* note 43, § 7.12 (quoting Arthur Linton Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 622 (1944)).

53. *Id.* § 7.7.

54. *Id.* (citations omitted) (emphasis added).

55. *Id.* § 7.8 n.13.

56. *Id.* § 7.12. For example, this section includes the statement, "The restrictive view is defended on the grounds that it simplifies the process of *interpretation* . . . ." *Id.* (emphasis added). *See* discussion of the contrast between Eric Posner's characterization of "hard" and "soft" approaches to conflated interpretation and the parol evidence rule and Farnsworth's identification of restrictive and liberal views of the plain meaning rule, *infra* text accompanying notes 257-73.

57. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS (6th ed. 2009). In the Preface to this Sixth Edition Professor Perillo stated, "This revision, like the fourth

introductory section, "The Difficulty of the Subject Matter,"[58] several challenging issues which this Article directly addresses. Perillo noted that there is disagreement among courts concerning "the content of the parol evidence rule or the process called interpretation."[59] He opined further that "the rules [for both the parol evidence rule and interpretation] are complex, technical and difficult to apply."[60] 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. A second major theme, to be further discussed in the public policy portion of this Article,[61] is that courts, by honoring this distinction, can avoid the confusion that engenders injustice. Perillo observed that "[a]s often as not the court chooses the standard or the rule that it thinks will give rise to a just result in the particular case."[62] This Article argues that because courts often are not cognizant of the distinction between the parol evidence rule and interpretation, they blindly apply in one context the rules that relate to the other; the Empress and Emperor are forced to cross-dress. Rather than deliberately, clear-sightedly choosing which set of rules to apply in order to achieve justice, these courts are largely unaware of their own confusion; they erroneously believe that the parol evidence rule is involved when the converse is true, or they erroneously believe that a case which does require application of the parol evidence rule is an interpretation case.

Policy concerns militating that courts closely analyze fact patterns in order to avoid confusing contract interpretation and the parol evidence rule[63] include Perillo's observation that a party may seek an unfair strategic advantage by characterizing evidence as relevant to interpretation rather than to a parol evidence rule situation.[64]

Although he implicitly acknowledged in his treatise that in some cases only contract interpretation is required and in other cases only

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and fifth editions, was written without the aid of my late co-author; nonetheless it contains much of his learning and wisdom." *Id.* Chapter 3, entitled, "Parol Evidence and Interpretation," includes Subchapter B., "The Parol Evidence Rule," containing §§ 3.2 – 3.8, and Subchapter C., "Interpretation," containing §§ 3.9 – 3.17.

58. *Id.* § 3.1.

59. *Id.*

60. *Id.*

61. *See infra* Part IV.

62. PERILLO, *supra* note 57, § 3.1.

63. *See infra* Part IV.

64. PERILLO, *supra* note 57, § 3.16.

the parol evidence rule is applicable, Perillo included a separate section, "Parol Evidence Rule and Interpretation,"[65] in which he expressed the view that contrary to Corbin's "assumption that there is a clear-cut distinction between offering evidence of a consistent additional term [governed by the parol evidence rule] and offering evidence on the issue of meaning [regarding interpretation],"[66] many cases can be seen as presenting a choice of analytic approach: their facts are such that they can be classified either as requiring interpretation to discern the meaning of a disputed term or as necessitating application of the parol evidence rule. He offered an example based upon a case concerning a contract to sell "'all cotton planted on 400 acres.'"[67] When one party argues that cotton "planted 'solid'" is referenced, and the other party maintains that cotton "'however planted'" is concerned, interpretation is called for, as Perillo agreed.[68] He added, however, that if one party proffers evidence of a prior agreement between buyer and seller that the cotton would be "'however planted,'" the parol evidence rule will be applicable to determine whether to add this term to the contract.[69] It is of course true that in some cases proffered evidence relates to the issue of what meaning each party attached to a particular term at the moment of formation, and in other instances proffered evidence relates to the issue of whether the parties actually agreed with each other, prior to or at the time of contracting, that a particular term not mentioned in the written contract, would bind them. This is not, however, an unclear distinction. It does invite close analysis, but such close analysis will reveal two different situations that invoke two different sets of rules, with each set of rules being directed toward achieving distinctive purposes and relating to separate public policies.

Professor Perillo analogized applicability of the parol evidence rule in the cotton-planting illustration just described to the relevance of the parol evidence rule in *Gianni v. R. Russel & Co.*[70] A tenant, Gianni, offered evidence that both before and at the time of the signing of a lease, the landlord of an office building had orally promised that Gianni would "have the exclusive right to sell soft drinks" at his newspaper stand.[71] This case, to be discussed more fully later in this Article,[72] typifies a fact pattern that clearly

65. *Id.*
66. *Id.*
67. *Id.* § 3.16 n.11 (citing Loeb & Co. v. Martin, 327 So. 2d 711 (Alaska 1976)).
68. *Id.* § 3.16.
69. *Id.*
70. Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924).
71. *Id.*
72. *See infra* Part I.C.2. and Part IV.

involves the parol evidence rule but not interpretation. The parties are disputing, not the meaning that each attached to a term in the contract (the contract did not, after all, contain the term "exclusive right") but, rather, whether a supplementary promise was made by one of them to the other.[73] Among the relevant issues of public policy is protection of the parties to a written contract from possibly untrue claims that a term not shown in the contract was agreed upon.

Professors Charles J. Goetz and Robert E. Scott left no doubt that they saw contract interpretation and the parol evidence rule as distinct concepts. They wrote of "the failure to appreciate that the parol evidence and plain-meaning [an interpretative device] rules are *separate mechanisms with different functions*."[74] Professors Scott and Jody S. Kraus explained, "Although there is a complex and subtle interaction[75] between the common law and Code's parol evidence rules and their interpretive regimes, they are nonetheless logically and doctrinally distinct."[76] They noted also that "the problems of identifying and interpreting the terms of an agreement are logically independent."[77] They had observed earlier that "many courts . . . conflate the distinct tasks of identification and interpretation, and their associated doctrines."[78]

Additional respected scholars who have identified the difference between contract interpretation and the parol evidence rule include the late Professor Lon L. Fuller and Professor Melvin Aron Eisenberg. They pointed out, "This issue [interpretation] is analytically separate from the issue governed by the parol evidence rule, which concerns the admissibility of evidence concerning whether the parties had a *separate agreement*."[79] These authors themselves chose to emphasize a portion of the statement just quoted. As had Scott and Kraus, they observed confusion on the part

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73. *Gianni*, 126 A. at 791-92.

74. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms,* 73 CAL. L. REV. 261, 313 (1985) (emphasis added).

75. This "interaction" is arguably limited to the issue of sequence, when the court must both discern the meaning of a disputed contract term (interpretation) and determine whether the parties intended to add a term to the document (a parol evidence rule issue). This Article discusses the disagreement among courts and scholars as to which doctrine, when both are applicable, should be examined first. *See supra* note 36, *infra* note 131 and text accompanying notes 162-63.

76. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 545 (4th ed. 2007); *see also* Jody S. Kraus & Robert E. Scott, *Contractual Design and the Structure of Contractual Intent,* 84 N.Y.U. L. REV. 1023, 1046 (2009).

77. SCOTT & KRAUS, *supra* note 76, at 578.

78. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 612 (rev. 3d ed. 2003).

79. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 584 (8th ed. 2006).

of courts: "[C]ourts often run the two issues together."[80]

Three other well-known commentators saw fit to emphasize an entire sentence: *"The parol evidence rule does not apply to evidence offered to explain the meaning of* [interpret] *the agreement."*[81] Professors Charles L. Knapp, Nathan M. Crystal, and Harry G. Prince thus clearly focused upon a real and significant distinction. Recognition of this difference between two realms, the areas governed by the Empress and the Emperor, is found also in the work of other distinguished writers.[82]

Although these and other scholars, and many courts, have discerned the difference between contract interpretation and the parol evidence rule, other writers, as well as other courts, have confused and in some instances conflated, the two concepts. Analysis of those scholars' views[83] and of the relevant judicial opinions[84] will follow discussion, in the next subsection, of the policies that necessitate recognizing separate goals and therefore separate requirements.

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80. *Id.*

81. CHARLES L. KNAPP, NATHAN M. CRYSTAL, & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 390 (6th ed. 2007).

82. *See, e.g.,* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION § 4.2.4 "The Parol Evidence Rule Distinguished" (Oxford Univ. Press 2009). In this new and widely acclaimed volume, Professor Burton stated that the parol evidence rule and the plain meaning rule are "two separate legal rules." *Id.* He explained:

> The parol evidence rule applies when an agreement is integrated, whether or not it is unambiguous. The plain meaning rule, by contrast, applies when an agreement is unambiguous. . . . [T]he functions of the two rules are different. The parol evidence rule functions to identify a contract's terms. The plain meaning rule functions to give meaning to a contract's terms. In sum, the predicates for and consequences of the two rules are different, and the rules have different functions.

Id. See also Marie Adornetto Monahan, *Survey of Illinois Law: Contracts – The Disagreement over Agreements: The Conflict in Illinois Law Regarding The Parol Evidence Rule and Contract Interpretation,* 27 S. ILL. U. L.J. 687, 688 (2003) (The author identified the distinction and decried the fact that courts confuse the two concepts. She wrote that each concept "is based upon very different policy considerations regarding meaning" and noted "the practical understanding of the judiciary which has confused the applicability of the parol evidence rule with the separate and distinct undertaking of contract interpretation."); Ralph James Mooney, *A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule,* 84 OR. L. REV. 369, 371-72 (2005) (citing John E. Murray, Jr., *The Parol Evidence Rule: A Clarification,* 4 DUQ. L. REV. 337, 343 (1966) (parol evidence rule and interpretation of contract terms are distinct); 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, 6 n.30 (1995) ("California courts have not been rigorous in distinguishing evidence offered to explain the meaning of written terms from evidence offered to supplement the written agreement with additional terms.").

83. *See infra* Part III.

84. *See infra* Part II.

C. Contrasting Purposes and Requirements

There is indeed a dichotomy. Contract interpretation and the parol evidence rule, characterized in this Article as the Empress and the Emperor, respectively, do not share even as many traits as do female and male human beings; contract interpretation and the parol evidence rule are more accurately analogous to entirely different species. The differences are rational and utilitarian.

When courts interpret a contract, they seek to discover the parties' intentions 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. Although in both instances courts consider the parties' intentions, as soon as the question "Intentions as to what?" is posed, critical differences in purpose become clear.

Attention to intention permeates contract law. For example, the decision as to whether a contract was formed at all hinges upon each party's intention to be legally bound. That decision concerning formation depends also upon whether there is consideration, such that each party intended to make a bargained-for-exchange. Intention is relevant also to remedies for breach of contract.

1. Interpretation: The Parties' Intentions Concerning the Meaning of a Disputed Term Contained Within the Contract

Interpretation, the discernment of the parties' intentions concerning the meaning of a disputed contract term, is accomplished by inquiring, not what each party subjectively intended, but rather what a reasonable person, acquainted with the surrounding circumstances, would believe that the party intended. This "reasonable person" is often seen to be the opposing party. Thus, if a painter who agrees to paint the bleachers in a college stadium "blue" chooses to use a light shade of blue, popularly known as "baby blue," and the team's colors are navy blue and white, a suit by the college for breach may ensue. A central issue will be interpretation of the contract term "blue." To reach the goal of ascertaining the parties' intentions, the court will ask whether the painter had reason to know that the school intended the bleachers to be navy blue; the court will ask also whether the school had reason to know that a painter would believe that "blue" meant "baby blue." Extrinsic evidence, consisting of facts and information originating outside the contract itself, may be available to assist in the interpretative endeavor and may or may not be admitted by the court. This evidence can include pre-contractual conversations or even negotiations between the parties.

It might consist of a showing that the painter lived near the college, had attended football games in the stadium, and therefore had reason to know that the school intended that "blue" meant the school shade of blue, "navy blue." The extrinsic evidence might indicate, in contrast, that when the parties discussed their nearly completed agreement, the painter obtained permission to store cans of paint on the college premises in preparation for the work and that these cans, visible to all school officials, were clearly labeled "light blue."

a. Whose Meaning Should Prevail?

These rules, often grouped under a heading such as "Which Party's Meaning Should Prevail?"[85] are undoubtedly designed to determine as fairly as possible the meaning that the parties intended to attach to a term that they, by their mutual consent, included in their contract. But very different from this is an inquiry as to whether the parties intended to include a separate, additional term in their contract, one that does not appear at all in the written document. (For example, the college might claim that, just before the parties signed the written contract for the painting of the bleachers, the painter orally agreed to paint, in addition, the locker room interior.) Each of the two purposes can be achieved only by asking a distinct set of questions, which is of course what a court will do *if* it accurately perceives the difference between contract interpretation and the parol evidence rule.

When interpreting a contract, a court therefore has no reason to ask the set of questions designed to discover whether the parties intended to add a separate term to their contract, under the parol evidence rule.[86] That series of questions always includes a query as to whether the parties, at the time of formation, intended their contract to be complete and exclusive, *i.e.,* "completely integrated." If they so intended, the logical conclusion is that they therefore did not intend that an additional, unstated term be added. No disagreement among courts or scholars is evident as to this point: it is always relevant to ask whether the parties intended their contract to be integrated, when applying the parol evidence rule. Yet courts and scholars who confuse or conflate contract interpretation with the parol evidence rule often illogically ask – when their purpose is to interpret, to discern the meaning of an already-included term – whether the parties intended their contract to be complete and exclusive. What possible reason could exist for creating this linkage?

85. 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 24.5 (Margaret N. Kniffin ed., 1998).

86. See a description of the full list of requirements for adding a term to the contract in accordance with the parol evidence rule *infra* text accompanying notes 143-81.

There is no discernible connection between an intention that no terms be added and an intention concerning the meaning of already-included terms. As will be analyzed *infra,* in cases in which extrinsic evidence would otherwise be admissible to interpret a contract, courts have illogically used a conclusion that the contract is integrated to justify excluding that evidence. [87]

This contrast between the purposes of contract interpretation and the parol evidence rule necessitates the use of differing criteria for admission of extrinsic evidence. 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. For example, in the interpretation hypothetical presented *supra,* in which a painter agreed for consideration to paint college football stadium bleachers "blue" and the parties subsequently litigated about the meaning of "blue," evidence that the painter had attended games in that stadium and had reason to know that the home team wore navy (dark) blue and white would be relevant to show that the painter had reason to know of the college's intended meaning of navy blue. This same item of evidence would not be at all relevant to indicate, in a different controversy regarding the parol evidence rule, for example, whether the parties had agreed that the painter would paint, in addition to the stadium bleachers, the interior of the home team locker room.

With regard to interpretation: whether or not extrinsic evidence is available to guide the court in assessing each party's knowledge (or reason to know) of the meaning the other party attached to a disputed term, at least four different outcomes are possible. First, although the parties claim in litigation that each attached a different meaning to a particular term at formation of the contract, a court may determine that both actually attached the same meaning. The contract will then be interpreted in accordance with that meaning. The *Restatement (Second) of Contracts* provides for this possibility.[88]

A different possible outcome is seen in the well-known *Raffles v. Wichelhaus* case: each party may be held not to have known or not to have had reason to know the other party's intended meaning.[89] There, each party believed that the name "Peerless" in a contract to purchase cotton at a price determined by arrival date of a ship

87. *See infra* Part II.

88. RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) states: "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." *See also* Dorchester Exploration v. Sunflower Elect. Coop., 504 F. Supp. 926 (D. Kan. 1980); Teamsters Indus. Employees Welfare Fund v. Rolls-Royce, 989 F.2d 132 (3d Cir. 1993).

89. Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Ex.); *see also* Flower City Painting Contractors, Inc. v. Gumina Constr. Co., 591 F.2d 162, 164 (2d Cir. 1979).

named Peerless referred to a different ship, arriving at the same port but at a different date. Neither party had reason to know of the other party's different meaning, and the court therefore determined that a contract had never been formed;[90] the parties had never agreed to be bound by the same terms. (In the event that there is mutual assent to a sufficient number of other terms, a contract may be held to exist, exclusive of the disputed term.) The *Restatement (Second) of Contracts* describes the same conclusions.[91]

In a third possible though unusual outcome, each party had reason to know that the other party attached a different meaning to a particular disputed term. Each party therefore knew that the other did not intend to agree to its desired meaning for the term, and so no mutual assent to form a contract existed. In an illustrative case, *Cox Broadcasting Corp. v. Nat'l Collegiate Athletic Ass'n.*, each party was held to have known when signing their contract that the other disagreed about whether the NCAA was thereby forbidden to allow WTBS (Turner Broadcasting's Superstation) to broadcast a "supplemental series" of NCAA games. [92] The court therefore decided that there was no agreement between the parties as to prohibition of such broadcasting arrangements, and the court denied the injunction requested by Cox and ABC.[93]

In a fourth possible, and more likely, outcome of judicial inquiry as to whether either party had reason to know of the other's intended meaning for the disputed term, it may result that one party did have such reason to know, and the other did not. The contract will then be interpreted in accordance with the meaning held by the party of whose meaning the other had reason to know. This interpretative approach is articulated in the *Restatement (Second) of Contracts*.[94]

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90. 2 FARNSWORTH, *supra* note 43, § 7.9 n.23 ("This, the accepted rationale of the court's per curiam opinion, comes from the prevailing argument of counsel, [159 Eng. Rep.] at 376 [Ex. 1864].").

91. RESTATEMENT (SECOND) OF CONTRACTS § 201(3) (1981) provides: "Except as stated in this Section [a reference to situations in which one party knows or has reason to know the other's intended meaning], neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent." Comment d states, "There may be a binding contract despite failure to agree as to a term, if the term is not essential or if it can be supplied."

92. Cox Broadcasting Corp. v. Nat'l Collegiate Athletic Ass'n, 297 S.E.2d 733 (1982). One might ask why these parties were willing to sign a document that each knew was being interpreted differently by the other. Each may have hoped later to sway the other to its side when the inevitable dispute arose or may have expected to prevail in case of litigation.

93. *Id.* at 737-38.

94. RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981) provides:

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a)

For example, when an American seller of "chicken" contracted with a Swiss buyer, disagreement arose as to whether the term "chicken" had a broad meaning that encompassed older, less expensive "fowl" and "stewing" chicken or was limited to the younger, more costly "broiling" and "frying" chicken.[95] Among the items of extrinsic evidence that demonstrated that the purchaser had reason to know of the seller's broader meaning were U.S. government regulations defining "chicken" as including "stewing chicken or fowl" and referenced in the contract by the term, ""US Fresh Frozen Chicken', Grade A, Government Inspected."[96] Further, in pre-contractual negotiations, an agent for the buyer, when asked "what kinds of chickens were wanted," had answered, "[A]ny kind of chickens."[97] There was not sufficient extrinsic evidence leading to a conclusion that the seller had any reason to know of the narrower meaning that the buyer attached to the term "chicken."[98]

This policy of interpreting a disputed term in conformity with the meaning held by one party, of which meaning the other party had reason to know (and when the converse is not true), is arguably rational, fair, and utilitarian. It accomplishes justice because the chosen meaning is shared to a greater extent than the not-selected meaning: the chosen meaning represents a meaning to which each party subscribed, at least to a minimal degree. The policy is utilitarian because the party on the losing side, who had reason to know of the meaning attached by the successful party, willingly assumed the risk of entering into a contract, a term of which was already to a degree disputed and as to which a legal dispute might in future arise. Individuals averse to such risk would incline against forming the contract, reducing the chance of future litigation.

b. Admission of Extrinsic Evidence to Determine Whose Meaning Should Prevail

Given this policy of interpreting a disputed contract term by inquiring whether each party had reason to know the other party's meaning, and in view of the significance of extrinsic evidence in demonstrating the presence or absence of such reason to know, it is

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that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

95. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

96. *Id.* at 117.

97. *Id.* at 118 (internal quotations omitted).

98. *Id.* at 121. ("[P]laintiff has the burden of showing that 'chicken' was used in the narrower rather than the broader sense, and this it has not sustained.").

understandable that the issue of admission or exclusion of any item of extrinsic evidence can have critical importance. Not surprising, then, is the circumstance that American courts differ widely in their openness to admission of extrinsic evidence to interpret contracts. In fact, three principal and greatly contrasting approaches exist. They may be labeled the plain meaning rule, the "reasonably susceptible" rule, and the "no limitations" rule. None of these approaches has any relevance to the parol evidence rule.

The plain meaning rule,[99] applied by more jurisdictions in the United States than any other approach,[100] limits admission of extrinsic evidence for interpretative purposes to situations in which the disputed contract term is deemed by the court to be "ambiguous."[101] A term is generally held to be ambiguous when it is capable of having at least two different meanings.[102] For example, in the hypothetical case described *supra,* concerning a contract to paint stadium bleachers "blue," in which one party claims that "blue" means navy blue and the other party defends a meaning of light blue, the court must determine whether the term "blue" has at least two different meanings and is thus ambiguous. If ambiguity is declared to exist, extrinsic evidence from both parties is admissible. As has been described, this could include evidence that the painter, having attended home football games, had reason to be aware that the home team color was navy blue; the extrinsic evidence could include, as well, evidence that the college had reason to know that the paint which the painter had stored on campus and was preparing to use was light blue in color. (Farnsworth might well have labeled this debate as one regarding vagueness rather than ambiguity; he discerned a distinction between the two but noted that courts usually ignore the distinction and classify both as ambiguity.)[103] If the court were to decide that the term "blue" is unambiguous in that the word has a single meaning plain and clear to the court, all extrinsic evidence relevant to the parties' intended meanings would be inadmissible.

The plain meaning rule was held to exclude extrinsic evidence in

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99. Farnsworth wrote, "The essence of a plain meaning rule is that there are some instances in which the meaning of language, when taken in context, is so clear that evidence of prior negotiations cannot be used in its interpretation." 2 FARNSWORTH, *supra* note 43, § 7.12; *see also* Mullinnix LLC v. HKB Royalty Trust, 126 P.3d 909, 919 (Wyo. 2006) ("The plain meaning . . . is that meaning which [the] language would convey to reasonable persons at the time and place of its use." (citations omitted) (internal quotation marks omitted).

100. *See* 5 CORBIN, *supra* note 85, § 24.7.

101. *See* illustrative cases analyzed *infra* text accompanying notes 104-09.

102. Mellon Bank v. Aetna Bus. Credit, 619 F.2d 1001, 1011 (3d Cir. 1980) (Ambiguity exists if the terms of the contract are "susceptible of different meanings.").

103. 2 FARNSWORTH, *supra* note 43, §§ 7.8, 7.11.

HeartSouth PLLC v. Boyd.[104] When a physician contracted in writing to be employed by a clinic "for a period of one (1) year beginning on April 1, 2000," the agreement provided further that he would not compete or solicit during that time.[105] The clinic claimed that because extrinsic evidence showed that the physician remained in its employ after the end of a year (until March 18, 2002, almost an additional year), the non-competition/solicitation clause should be interpreted to have continued in effect during that further period of time.[106] Ruling that this extrinsic evidence was inadmissible because the one-year contract duration was clearly stated and was therefore unambiguous, the court articulated policy concerns upon which the plain meaning rule is grounded: "[T]he words employed are by far the best resource for ascertaining the intent [of the parties] and assigning meaning with fairness and accuracy."[107]

The contract term "chicken" was held to be ambiguous by a United States District Court, and the result was that numerous items of extrinsic evidence were admissible. [108] These included the United States Government regulations that defined "chicken," pre-contractual communications between the parties, and then current market prices for various categories of chicken.[109]

The *Restatement (Second) of Contracts* has discarded the plain meaning rule.[110] Criticism of the plain meaning rule can be seen in both the original[111] and revised[112] editions of Professor Corbin's treatise on contract law. Corbin and others have pointed out that examination of extrinsic evidence, including all surrounding circumstances, can reveal ambiguity that the court would not otherwise have detected. [113] A court that applies the plain meaning rule and is unaware of such ambiguity would of course never examine the available extrinsic evidence. An often cited example is

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104. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 1105-06 (Miss. 2003).

105. *Id.* at 1098.

106. *Id.* at 1104.

107. *Id.* at 1105 (quoting Simmons v. Bank of Miss., 593 So. 2d 40, 42-43 (Miss. 1992)).

108. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 118 (S.D.N.Y. 1960).

109. *Id.* at 118-20.

110. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981), states, "Words and other conduct are interpreted in the light of all the circumstances." Comment a explains, "The rules in this Section . . . . do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings."

111. 3 CORBIN, *supra* note 49, § 535.

112. 5 CORBIN, *supra* note 85, § 24.7.

113. *See, e.g.,* Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality As Opposed to Virtual Reality*, 74 OR. L. REV. 643, 644-51 (1995).

the *Soper* case,[114] centered upon interpretation of a life insurance policy which named "my wife" as the beneficiary. Application of the plain meaning rule would lead a court to declare that the word "wife" bears one clear, plain meaning. Yet extrinsic evidence consisted of the circumstances that the insured, Ira Soper, had deserted his wife, Adeline, and pretended to commit suicide, leaving his clothing near a canal and then seeming to vanish.[115] Still alive and well, Ira moved to a different location and lived with a different woman, Gertrude, presenting her to associates as his wife.[116] During this period of his life he purchased the life insurance policy that became effective when he later did (supposedly) commit suicide.[117] Instead of applying the plain meaning rule, declaring that the term "my wife" was unambiguous, and thereby necessarily holding that Adeline should receive the insurance proceeds, which would certainly have been contrary to Ira's intended meaning of "my wife," the court made no decision concerning whether "my wife" had an unambiguous, clear, plain meaning.[118] Instead, the court admitted the relevant extrinsic evidence which revealed that Ira intended for Gertrude to receive the policy proceeds.[119]

The policy reasons that motivate a majority of courts in the United States to apply the plain meaning rule in the face of the just-mentioned criticism have no relation to the parol evidence rule. To whatever extent the plain meaning rule promotes judicial fairness and efficiency by avoiding unnecessary examination of extrinsic evidence when the disputed term can logically have only a single interpretation – the plain meaning rule is necessarily unrelated to the different issue of whether the parties intended to add a term to their contract. As will be analyzed, the requirements imposed under the parol evidence rule are suited to a number of other, separate policy goals, including: the discovery of whether the parties truly agreed upon an additional term; and the defense of written documents against claims of additional terms when such claims can create uncertainty and lack of predictability. These policy goals do not relate to whether the terms contained in the contract have a clear, plain meaning, such that any further explanation of their meaning as revealed by extrinsic evidence is unnecessary and potentially wasteful of judicial resources.[120]

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114. Cochran v. Whitby (*In re* Soper's Estate), 264 N.W. 427 (Minn. 1935).

115. *Id*. at 428.

116. *Id*.

117. *Id*.

118. *Id*. at 431-33.

119. *Id*.

120. "[The plain meaning rule] is defended on the grounds that it simplifies the process of interpretation in many cases by eliminating from consideration evidence of

A second, different approach to considering whether to admit extrinsic evidence for interpretation purposes, used by a number of United States courts, can be called the "reasonably susceptible" rule. It is sometimes labeled "the *Pacific Gas* rule," after the best known case in which it was articulated. Chief Justice Traynor, writing for the California Supreme Court in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*,[121] explained:

> 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.*[122]

He added, "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."[123]

The case involved interpretation because the parties were disputing the meaning of a term contained within their contract: "indemnify . . . against all loss."[124] Did the term include compensation for harm to property belonging to the other party to

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prior negotiations and that it gives predictability in the interpretation of commonly used terms." 2 FARNSWORTH, *supra* note 43, § 7.12. Professor Farnsworth quoted from *Steuart v. McChesney*, 444 A.2d 659, 663 (Pa. 1982): "[T]he plain meaning approach enhances the extent to which contracts may be relied upon by contributing to the security of belief that the final expression of *consensus ad idem* will not later be construed to import a meaning other than that clearly expressed."; *see also* Kraus & Scott, *supra* note 76, at 1047 ("The best rationale for the plain meaning rule is that it makes available a public fund of terms with judicially 'proofed' or 'protected' meanings on which contractual parties can rely to effectively communicate their commitments to each other and to courts."); Chief Judge Judith Kaye's statement in support of the plain meaning rule, W.W.W. Assocs. v. Giancontieri, 566 N.E.2d 639, 642-43 (N.Y. 1990).

121. 442 P.2d 641 (Cal. 1968).

122. *Id.* at 644 (emphasis added). Strong criticism of the plain meaning rule appears in additional statements in the same opinion: "A rule that would limit the determination of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." *Id.* "If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents." *Id.* "[T]he meaning of a writing . . . 'can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of [extrinsic] evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.'" *Id.* at 645 (quoting Universal Sales Corp. v. Cal Press Mfg. Co., 128 P.2d 665, 679 (Cal. 1942) (Traynor J., concurring)).

123. *Id.* at 645.

124. *Id.* at 643.

the contract, or only compensation for harm to property of third parties? The contract required G. W. Thomas "to remove and replace the upper metal cover of plaintiff's steam turbine."[125] When G. W. Thomas dropped the cover, causing extensive damage to the turbine, Pacific Gas demonstrated that the contract provided that G. W. Thomas would "indemnify" Pacific Gas "against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract."[126]

G. W. Thomas proffered extrinsic evidence to show that both parties intended the term "indemnify" to refer only to compensation for injury to third parties' property.[127] The evidence included "admissions by plaintiff's agents, by defendant's conduct under similar contracts entered into with plaintiff, and by other proof that in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property." The lower court excluded this evidence on the ground that the term "indemnify" possessed a plain meaning, which included compensation for injury to property of the other contracting party.[128] The California Supreme Court held that the evidence indeed showed a meaning (compensation owed for injury to third parties' property only) to which the disputed term was reasonably susceptible, and therefore the court admitted the evidence.[129]

Clearly, this "reasonably susceptible" test for admission of extrinsic evidence to interpret contracts has nothing to do with the parol evidence rule concept of determining whether the parties intended to add a term to their contract. Although the policy underlying the "reasonably susceptible" rule differs significantly from the policy that underlies the plain meaning rule,[130] neither relates at

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* Chief Justice Traynor offered a general description of extrinsic evidence: "Such evidence includes testimony as to the circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . . so that the court can place itself in the same situation in which the parties found themselves at the time of contracting." *Id.* at 645 (internal quotations omitted) (ellipses in original).

129. *Id.* at 646.

130. The plain meaning rule is intended to avoid unnecessary expenditure of judicial resources and to further predictability; the court avoids examining extrinsic evidence when the court is certain of the meaning of a disputed term, and the court's decision as to the meaning may discourage future litigation concerning the same term when it appears in other contracts. In contrast, the "reasonably susceptible" rule mandates admission of evidence without inquiry whether a plain, clear meaning exists. Chief Justice Traynor's concern was to discover any mutually intended meaning, regardless of whether such meaning might have seemed plain to the court.

all to the parol evidence rule test of whether the contract is intended to be complete and exclusive, *i.e.,* not subject to supplementation (or truncation).

In fact, the *Pacific Gas* opinion articulated the distinction between contract interpretation and the parol evidence rule: "Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract [functions of the parol evidence rule], these terms must first be determined [by interpretation] . . . ."[131] It is not surprising that when the court focused so intently upon the effectiveness of a process of admitting extrinsic evidence to interpret contracts, that court would wish to clarify that the parol evidence rule was not at issue.

See id. As was true of the *Soper* case described *supra* text accompanying notes 114-19, in which extrinsic evidence revealed that the insured had intended "wife" to refer to a woman other than the one to whom he was legally wed, the extrinsic evidence may expose a meaning other than the meaning that at first appears clear to the court. *See generally* Cochran v. Whitney (*In re* Soper's Estate), 264 N.W. 427 (Minn. 1935).

Although some scholars and some courts have supposed that evidence admitted under the relatively liberal "reasonably susceptible" test will ultimately be utilized to discover whether ambiguity exists, in a sort of reversal of the plain meaning rule sequence of first inquiring as to ambiguity and next admitting extrinsic evidence if ambiguity exists, and some courts have equated the "reasonably susceptible" standard with an ambiguity test, s*ee*, *e.g.,* Winet v. Price, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992) – these approaches are neither logical nor accurate. The *Pacific Gas* opinion did not, after admitting evidence of a meaning to which the disputed term "indemnity" was reasonably susceptible, ask whether ambiguity existed. *See generally Pac. Gas,* 442 P.2d 641. A query as to ambiguity is not logical: evidence admitted because it shows a meaning to which the disputed term is reasonably susceptible, reveals that one particular meaning, and only that one meaning. Although the opposing party may proffer evidence that shows a differing meaning, creating ambiguity by demonstrating that at least two meanings exist, this may not always occur. Possibly, only the one meaning will be shown. For example, in the stadium painting hypothetical, *see supra* Parts I.C.1, I.C.1.a., the college might present evidence that navy blue is a meaning to which the disputed contract term "blue" is reasonably susceptible. If the painter does not present evidence that light blue is also a meaning to which "blue" is reasonably susceptible, no ambiguity will be shown. Yet the college's evidence will have been admitted. In the *Pacific Gas* opinion, Chief Justice Traynor wrote that when two parties are arguing about the intended meaning of a contract term, "extrinsic evidence relevant to prove either of such meanings is admissible." *Pac. Gas,* 442 P.2d at 646. He added in a footnote, "Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous. This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning." *Id.* at 646 n.8 (citations omitted). Chief Justice Traynor was indicating that, although in some cases extrinsic evidence admitted under the *Pacific Gas* "reasonably susceptible" test may expose two different meanings and thus show ambiguity, the test does not require that ambiguity ever be demonstrated. *See id.* at 646**.**

131. *Pac. Gas,* 442 P.2d at 645. Scholars and courts have disagreed about the sequence of application of interpretation and the parol evidence rule when both issues arise in a single case. *See* discussion *supra* in notes 36, 75, *infra* in text accompanying notes 162-63.

The third, "no limitation," approach to admitting extrinsic evidence to interpret a contract is, just as the label suggests, a rule that provides for admission of extrinsic evidence without applying either the plain meaning rule or the "reasonably susceptible" test or any other barrier.[132] It has also been called the "context" rule, because all features of the context in which the contract was formed can be viewed by the court.[133] Several jurisdictions, including Alaska,[134] Nevada,[135] and Washington State,[136] have adopted this approach.

When a court freely admits any and all proffered evidence to show the parties' intended meaning for a disputed term, this approach does not equate in any manner with asking whether the parties intended the contract to be complete and exclusive under the parol evidence rule, such that no term can be added. As will be seen, however, some courts[137] have refused to admit evidence to interpret a particular contract term, on the illogical ground that the parties intended their contract to be complete and exclusive, and some scholars[138] have condoned this reasoning.

2. The Parol Evidence Rule

The parol evidence rule might better be re-named the "contract supplementation" or "contract variance" rule, because it governs whether a term can be added to the contract and whether, more rarely, a term can be deleted.[139] The rule is typically stated thusly: "[E]xtrinsic or parol evidence which tends to contradict, vary, add to, or subtract from the terms of a written contract must be excluded."[140] (Because to "vary" the terms of a contract means to "change" the

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132. *See, e.g.,* Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 771 (Alaska 1982) (holding that instead of "mak[ing] a preliminary finding of ambiguity and only then consider[ing] extrinsic evidence," a court "may initially turn to extrinsic evidence in construing [interpreting] a contract").

133. RESTATEMENT (SECOND) OF CONTRACTS § 212(1) (1981).

134. *See, e.g., Alyeska Pipeline*, 645 P.2d 767.

135. *See, e.g.,* Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919 (Nev. 1991). Interpreting a prizefighting contract as to whether it required Michael Spinks to appear as a contestant, the court wrote, "Although some courts still follow traditional bargain theory and refuse to delve beyond the express terms of a written contract, the better approach is for the courts to examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." *Id.* at 921.

136. *See, e.g.,* Berg v. Hudesman, 801 P.2d 222 (Wash. 1990).

137. *See* analysis *infra* Part II.

138. *See* analysis *infra* Part III.

139. The issue of whether to delete a contract term arose in, *e.g.,* Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436-37 (Pa. 2004).

140. Affordable Elegance Travel, Inc. v. Worldspan, 774 A.2d 320, 327 (D.C. 2001) (citation omitted).

terms, which can be accomplished only by deleting a term and replacing it with a different term or by merely deleting a term or merely adding a term, "addition and subtraction" suffice to describe the parameters within which the rule operates.) Professor Farnsworth wrote that the parol evidence rule applies when, in a typical situation, a party attempts "to introduce evidence of the earlier negotiations in an effort to show that the terms of the agreement are other than as shown on the face of the writing."[141]

The very name of the rule may have been a major cause of confusion between it and contract interpretation. "Parol" evidence, which means simply "oral" evidence, can be used, along with written evidence, for the two distinct purposes of interpreting a contract by discerning the meaning of a contract term, and supplementing the contract by applying the parol evidence *rule*. As is suggested in Part IV, *infra,* re-labeling the parol evidence rule as the contract supplementation rule or the contract variance rule will avoid this linguistic stumbling block.

When courts apply the parol evidence rule, they will permit the contract to be supplemented or reduced only if every one of a series of specifically tailored requirements is fulfilled. This cautious insistence demonstrates concern that written contracts be protected from spurious claims that their terms should be judicially altered. It reflects also respect for the significance of the written word. Rather than simply evaluate the credibility of testimony as to whether a particular document was intended to be supplemented or diminished, courts increase the probability of reaching an accurate decision by insisting that every one of a number of rigorous standards be met. None of these hurdles relates to interpretation, however, because none functions in any way to elucidate the meanings of terms indisputably contained within the contract.[142] The unique requirements related to the parol evidence rule are suited to the unique purpose served by the rule, but not to the purpose of interpretation. The Emperor's clothing must needs differ from that of the Empress.

The list of requirements for adding a term to a contract under the parol evidence rule is best described in the context of illustrative fact patterns. Three different attempts to add terms to written contracts, two of these attempts unsuccessful and one successful, occurred in three different cases. In *Gianni v. R. Russel & Co.*,[143] a tenant who leased a store in an office building sought to prove that the landlord had orally promised, both before and at the lease

141. 2 FARNSWORTH, *supra* note 43, § 7.2.

142. RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (1981) (stating that the parol evidence rule is not "a rule of interpretation").

143. 126 A. 791 (Pa. 1924).

signing, that he, Gianni, the tenant, would "have the exclusive right to sell soft drinks in the building," in exchange for: promising that he would no longer sell tobacco; paying a higher rent than charged under the previous lease; and agreeing to this lease.[144] The commitments to refrain from selling tobacco and to pay an increased rent appeared in the lease (which provided that Gianni would continue to sell only "fruit, candy, soda water" as he had under the earlier lease).[145] Controversy and a lawsuit arose when a different tenant in the same building was permitted by the landlord to sell soft drinks.[146] In a second case, *Mitchill v. Lath*,[147] a purchaser of real property attempted to prove that, to induce the sale, the seller had orally promised to remove an unattractive ice house on a separate plot of land belonging to a neighbor and situated across the road from the property sold. The written contract of sale made no mention of this oral promise.[148] In the third case, *Masterson v. Sine*,[149] sellers and purchasers of real property claimed an oral agreement that the sellers' option to re-purchase, contained in the deed, could be exercised only by family members.[150] This oral term, if added to the contract, would preclude a bankruptcy trustee, representing one of the sellers, from subsequently exercising the option in order to include the real property in the bankrupt estate, as he was not a family member.[151]

The requirements for satisfaction of the parol evidence rule are usually applied in a particular sequence. First, the court must assure itself that the document sought to be supplemented is written.[152] All of the contracts in the three cases under consideration: a lease, a deed, and another deed, respectively, were written. Next, the court will inquire whether the written contract, here labeled the "principal contract," is "final."[153] Arguably, an agreement that is not final is not a contract at all. The requirement of finality can therefore be subsumed under the first requirement that a written contract exist, but some courts do make a separate inquiry as to finality.[154] All three of the contracts here described

144. *Id.*
145. *Id.*
146. *Id.*
147. 160 N.E. 646 (N.Y. 1928).
148. *Id.*
149. 436 P.2d 561 (Cal. 1968).
150. *Id.* at 562.
151. *Id.*
152. *See id.* at 563; *see also* PERILLO, *supra* note 57, § 3.2.
153. *See id.*
154. "The parol evidence rule is best understood in light of its purpose: to give legal effect to whatever intention the parties may have had to make their writing *at least a final* and perhaps also a complete expression of their agreement. If the parties had

were deemed final.

The court next will inquire whether the claimed supplementation falls "within the scope" of the parol evidence rule. This scope includes oral and written terms agreed upon prior to or contemporaneously[155] with formation of the principal contract. (Subsequent amendments to the contract are not subject to application of the parol evidence rule.) The proffered terms in all three cases were encompassed within the scope of the rule.

Does the alleged supplementary term contradict the principal contract? Contradiction would immediately bar supplementation,[156] since it is extremely unlikely that the parties would have agreed upon both the principal contract and terms that conflict with it; furthermore, priority would, as a policy matter, be given to the term that is written into the contract.[157] In the three cases, no contradiction was held to exist. Had the store lease in *Gianni*, for example, expressly denied exclusivity in selling soft drinks, a promise granting exclusivity would have been contradictory, and logic would have shown that the landlord had not made such an oral promise.[158]

As for the promise in *Mitchill* to remove the ice house, had the

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such an intention, the agreement is said to be 'integrated' . . . ." 2 FARNSWORTH, *supra* note 43, § 7.3 (emphasis added). The term "integrated," meaning final, contrasts with the terrn "completely integrated," which means that the parties intended that their agreement be not only final but also complete and exclusive. *See* discussion of complete integration *infra* in text accompanying notes 164-81.

155. The Uniform Commercial Code parol evidence rule, found in § 2-202, excludes contemporary written terms.

156. RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (1981) provides, "A binding integrated [final] agreement discharges prior agreements to the extent that it is inconsistent with them."

157. A recent case exemplifying a fact situation in which a proffered supplementary term was held to conflict with a term of the written contract and therefore could not be added to the contract is *Evenson v. Quantum Indus., Inc.*, 687 N.W.2d 241 (N.D. 2004). An oral pre-contractual promise by the seller of a dealership for the Maximan walk-behind skid-steer loader, assured the purchaser, Evenson, that he, the seller, would not sell off the Maximan line to a different manufacturer. *Id.* at 244. Eight months after the dealership contract was formed, the seller nevertheless sold the manufacturing rights to another company. *Id.* at 243. Because this other company was sold "the exclusive right to market and sell the Maximan," Evenson's dealership was terminated. *Id.* The court held that the oral promise to Evenson not to sell off manufacturing rights conflicted with a term in his purchase contract that provided that either party could terminate the dealership contract "at any time, for any reason." *Id.* at 244. An additional example of judicial refusal to recognize a proffered term because that term conflicted with a term of the principal written contract is contained in the following statement: "[The] previous oral agreement calling for a share in the proceeds of Ocean View's sale contradicts the integrated writing that indicates that [another party] is the sole owner and the only party with rights in Ocean View." Filippi v. Filippi, 818 A.2d 608, 619 (R.I. 2003).

158. Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924).

deed stated that removal would not occur, such contradiction would have barred recognition of the promise.[159] In *Masterson*, the alleged oral promise limiting option rights to family members was held not to conflict with any term written into the deed.[160]

Inquiry whether an alleged supplementary term conflicts with a term contained within the contract clearly has no bearing on contract interpretation, the discernment of the meaning that the parties assigned to a term in the contract. Not uncommonly, however, a separate, additional issue of interpretation will arise when a court believes that it must first establish the meaning of a term contained within the contract in order to determine whether the proffered supplementary term conflicts with that contract term. A number of scholars have agreed with this sequence.[161] Other scholars who have addressed this topic of sequence when the two issues arise within a single case argue that the sequence should be opposite, and the parol evidence rule must be applied first. They offer the justification that interpretation, discernment of the meaning of contract terms, can occur only after the court has utilized the parol evidence rule to decide which terms are part of the contract, *i.e.,* whether the contract should be supplemented.[162] One scholar, Professor Perillo, has observed that both sequences can be necessitated and both can occur within analysis of one case.[163]

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159. Mitchill v. Lath, 160 N.E. 646 (N.Y. 1928).

160. Masterson v. Sine, 436 P.2d 561, 565 (Cal. 1968). A vigorous dissent argued, however, that the limitation to family members did conflict with a term implied into California contracts for the sale of real property, the right of the purchaser freely to transfer ownership. *Id.* at 569 (Burke, J., dissenting). The majority wrote, nevertheless, that conflict with an implied term was not the sort of conflict that, under the parol evidence rule, would bar supplementation of a contract. *Id.* at 565 (majority opinion); *see also* Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35 (1985). Expressing a view that comports with that of the *Masterson* dissent, the New York Court of Appeals stated in *Mitchill*, "[The supplementary term] must not contradict express *or implied* provisions of the written contract . . . ." *Mitchill*, 160 N.E. at 647 (emphasis added).

161. *See, e.g.,* 2 FARNSWORTH, *supra* note 43, § 7.12 (citing Arthur Linton Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 622 (1944)).

162. SCOTT & KRAUS, *supra* note 76, at 541 ("In order to determine the content of a promise, a court must first identify and then interpret the meaning of the terms of the promise . . . . The problem of identifying the terms of a promise is addressed by the parol evidence rule."); *see also supra* notes 36, 75, 131.

163. See PERILLO, *supra* note 57, § 3.16 ("Corbin and the Restatement (Second) . . . . take the position that the parol evidence rule should have no effect on the question of interpretation – the meaning of language. Corbin states that before the parol evidence rule may be invoked to exclude extrinsic evidence, the meaning of the writing or other record must be ascertained, since one may not determine whether a writing or other record is being contradicted or even supplemented until one knows what the writing or other record means. *There is a certain circularity of reasoning in this contention; the content of the contract to be interpreted cannot be known until the parol evidence rule*

The next and final hurdle for adding a term to a contract tends, of all the requirements, to be the most difficult to fulfill. The party urging that a term be added to the written contract must demonstrate that this written contract was not intended by the parties to be impervious to supplementation. Thus, the parties must not have meant for the contract to be complete and exclusive, otherwise labeled "completely integrated."[164] The court will invariably honor the parties' wishes for their contract to be completely integrated.[165] If the parties intended, conversely, that the proffered term be added to their contract, they will have desired their written contract to be only "partially integrated." If the court does declare the contract only partially integrated, the proffered term is not automatically inserted into the document. At this point, extrinsic evidence will be admissible to prove that the parties did actually agree on the particular term, the same extrinsic evidence that would have been excluded by a holding that the contract was complete and exclusive.[166]

This respect for the parties' intentions that their contract be immune from supplementation (when they do so intend) undergirds the policy of giving primacy to written documents over oral or written statements not contained in these documents. It decreases the probability that a fraudulent attempt to change the contract will succeed, again furthering the policy of protecting written agreements.[167] When a court seeks to determine whether the parties intended complete integration, this action relates not at all to admitting evidence to interpret the contract. For example, if the court seeks to know whether complete integration was intended, the interpretative inquiry about whether a disputed contract term has a

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has been consulted.") (citations omitted) (emphasis added).

164. RESTATEMENT (SECOND) OF CONTRACTS § 216(1) (1981) states: "Evidence of a consistent additional term is admissible to supplement an integrated [final] agreement unless the court finds that the agreement was completely integrated."

165. Kraus & Scott, *supra* note 76, at 1047 ("The common law thus has consistently treated the decision to integrate an agreement entirely as a matter of party discretion. Courts have no presumption for or against a finding that a written agreement is [completely] integrated, Instead, they have devised various neutral tests . . . .").

166. "Of course, even if the offered [extrinsic] evidence is ruled admissible and received into evidence, that alone may not prove decisive: Like any other evidence, it may still be rejected as not credible by the trier of fact." KNAPP ET AL., *supra* note 81, at 385.

167. Professors Kraus and Scott suggest motivations for the parties' intention that their contract not be subject to supplementation. These include: "Tentative agreements may be abandoned, agents may misrepresent their principal's commitments, or . . . the parties may deliberately choose to exclude a portion of their agreement from legal enforcement. They may do this in order to rely on self-enforcing mechanisms, such as reputation, the prospect of future dealings, and the propensity to reciprocate." Kraus & Scott, *supra* note 76, at 1046-47.

plain, clear meaning, the plain meaning rule, is irrelevant. Yet courts confusing or conflating contract interpretation with the parol evidence rule have held that a contract is intended to be complete and exclusive, merely and illogically because all terms of the contract itself happen to be clear and unambiguous.[168]

The search for knowledge as to whether the parties intended that their contract be impervious to supplementation has been conducted by use of several devices. The appearance of the document itself may answer the question, either because a "merger" clause is present and considered dispositive or because the document is so thorough and detailed that there is an extremely low likelihood that any term was omitted from it. (Mistaken omission of a term or erroneous inclusion of a term is not subject to the parol evidence rule; it is viewed as an exception to the rule, such that the requirements of the rule need not be satisfied, and the court will apply a panoply of distinctive criteria that determine whether to "reform" the contract, rescind it, or disregard the mistake.[169])

A merger clause within the contract declares in effect that the document is intended by the signatories to be complete and exclusive.[170] This clause may be contained in boilerplate language in a form contract, and courts have disagreed about whether the clause should be a conclusive indicator of complete integration or rather should create a strong but rebuttable presumption.[171]

An additional technique for detecting whether the parties intended the contract to be complete and exclusive is to inquire whether reasonable persons in the positions of the parties, acquainted with all relevant circumstances, would naturally have included the proffered term in their writing. If they would naturally have included it but did not do so, the inference is strong that at formation they did not intend that term to become part of their

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168. *See, e.g.*, Scholz v. Montgomery Ward & Co., 468 N.W.2d 845, 848-49 (Mich. 1991). This case is analyzed *supra* Part I.A.

169. "The parol evidence rule does not apply when the remedy of rescission or reformation is sought as a result of misrepresentation, or mistake. Thus these defenses are not precluded by the parol evidence rule." Still v. Cunningham, 94 P.3d 1104, 1110 (Alaska 2004) (citation omitted).

170. A typical merger clause, contained in a contract for the sale of real property, stated, "We, the parties hereto, severally declare that this instrument contains the entire Agreement between the parties, and that it is subject to no understandings, conditions or representations other than those expressly stated herein." Filippi v. Filippi, 818 A.2d 608, 619 (R.I. 2003).

171. "Because [complete] integration depends on the parties' intention, courts have traditionally given effect to such clauses as showing an intention that the agreement be completely integrated [citing ADR N. Am. v. Agway, 303 F.3d 653 (6th Cir. 2002)], though there has been a tendency to deny such clauses conclusive effect [citing RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b. (1981)]." 2 FARNSWORTH, *supra* note 43, § 7.3.

agreement. If, in contrast, they would not naturally have included the term, the probability increases that they did agree as to that term but did not believe that inclusion in the document was appropriate.[172] Eminent New York Court of Appeals judges who decided *Mitchill v. Lath* disagreed on this very issue.[173] The majority, which included Judge Benjamin N. Cardozo, concluded that the parties would naturally have included the promise to remove the unattractive ice house in their written contract to sell real property across the road from the site of the ice house, if this promise had indeed been made.[174] Not so, opined Judge Irving Lehman in an impassioned dissent. He believed that reasonable parties would not have mentioned in the formal deed to convey one piece of land, a promise of an action to be taken regarding a different plot.[175]

This frequently utilized query about naturalness was refined in *Gianni v. R. Russel & Co.* by moving to a subordinate test, the "subject matter" test.[176] If the proffered term involved the same subject matter as did the written contract, the court supposed that the parties would naturally have included the term.[177] In that case, the court concluded that Gianni's claimed exclusive right to sell soft drinks related to the same subject matter as did his lease: the types of items that he was permitted to sell (soft drinks, candy, etc.) and those he had agreed not to sell (tobacco).[178] The court therefore held that inclusion of the exclusivity would have been natural; it could therefore not be added to the lease.[179] (One wonders whether the court might have been convinced by an argument that, because Gianni's exclusivity claim related not to what Gianni would sell but

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172. RESTATEMENT (SECOND) OF CONTRACTS § 216(2)(b) (1981) describes this test: "(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is . . . (b) such a term as in the circumstances might naturally be omitted from the writing."

173. Mitchill v. Lath, 160 N.E. 646, 647-50 (N.Y. 1928).

174. *Id.* at 647-48. "Were such an agreement made it would seem most natural that the inquirer should find it in the contract." *Id.* at 647.

175. Judge Lehman wrote, "[A]n inspection of the contract, though it is complete on its face in regard to the subject of the conveyance, does not, I think, show that it was intended to embody negotiations or agreements, if any, *in regard to a matter so loosely bound to the conveyance as the removal of an icehouse from land not conveyed." Id.* at 650 (Lehman, J., dissenting) (emphasis added).

176. Gianni v. R. Russel & Co., 126 A. 791, 792 (Pa. 1924).

177. "If [the subject of the proffered term] is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation." *Id.* (quoting 5 WIGMORE ON EVIDENCE 309 (2d ed.)) .

178. *Id.*

179. "As the written lease is the complete contract of the parties, and since it embraces the field of the alleged oral contract, evidence of the latter is inadmissible under the parol evidence rule." *Id.*

to what other lessees or even the owner would not sell, it related to a different subject.)

Because the California Supreme Court held in *Masterson v. Sine* that the sellers of real property would have hesitated to add to a formal deed, their agreement that only family members could exercise the option to repurchase and that, therefore, they would not naturally have included this term,[180] the term could be added to the contract. The case thus illustrates successful supplementation of a written contract in accordance with the parol evidence rule.

The Uniform Commercial Code, in an Article 2 comment, replaces the naturalness standard with a requirement of certainty when contracts for the sale of goods are concerned. Thus, a consistent term can supplement the final agreement unless the parties would "certainly" have included it in their writing.[181] The party proffering an additional term has an increased chance of success when this standard is applicable.

None of these approaches to determining whether the parties intended their agreement to be completely integrated: degree of thoroughness and detail; presence of a merger clause; naturalness of inclusion of the proffered term, at times indicated by sameness of subject matter – sheds light on what meaning the parties intended to give to terms already in the contract, *i.e.*, interpretation.

When interpretation, the province of the Empress, is at issue: To deny admission of extrinsic evidence to interpret a contract because the court believes that the contract was intended to be complete and exclusive, or to admit evidence to interpret a contract because the court declares that the contract was not intended to be complete and exclusive is, as has been shown, illogical.

When supplementation under the parol evidence rule, the Emperor's province, is at issue: To deny admission of extrinsic evidence to determine whether the parties intended the contract to be complete and exclusive, because the terms within the contract are

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180. The majority stated:

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

Masterson v. Sine, 436 P.2d 561, 565 (Cal. 1968) (citations omitted). An outraged dissent wrote, "What difficulty would have been involved here, to add the words 'this option is nonassignable'? The asserted 'formalized structure of a deed' is no formidable barrier." *Id.* at 572 (Burke, J., dissenting).

181. U.C.C. § 2-202 cmt. 3.

plain and unambiguous, makes no sense. To admit extrinsic evidence regarding intended degree of integration on the ground that a contract term is ambiguous, is also senseless.

II. COURTS THAT HAVE CONFUSED, CAUSING INJUSTICE

Two storied cases, both decided under California law and both frequently described as illustrating the "reasonably susceptible" approach to admitting extrinsic evidence for the purpose of interpretation, actually involve not interpretation at all but instead the parol evidence rule. Because in each case the court applied inappropriate interpretative requirements rather than the requisite parol evidence rule criteria, the court admitted extrinsic evidence that should have been excluded, most likely allowing the party to succeed who should have been defeated but, at minimum, causing injustice. The Empress and Emperor cross-dressed, with unfortunate results.

In *Delta Dynamics, Inc. v. Arioto*, a five-year contract for sale of trigger locks for firearms stated that the purchaser, Pixey, a distributor, would "promote the locks diligently" and would sell, in the first year, "'not less than 50,000 units'" and would sell "not less than 100,000 units in each of the succeeding four years."[182] The agreement provided further, "'Should Pixey fail to distribute in any one year the minimum number of devices to be distributed by it . . . this agreement shall be subject to termination' by [the seller] Delta on 30 days' notice."[183] During the first year, Pixey purchased only 10,000 of the 50,000 required to be distributed.[184] Delta terminated their agreement as expressly permitted by the contract and, in addition, brought an action for breach of contract and for damages that resulted from failure to fulfill "the first year's quota."[185] (The court treated Pixey's promise to sell stated quantities as an implied promise to purchase those quantities from Delta, given that Delta was Pixey's sole supplier.[186])

Pixey defended by claiming that the parties had intended to agree, though the contract did not so state, that no remedy other than the termination provided for in the document could be pursued.[187] Both the lower court[188] and the dissent[189] correctly

182. 446 P.2d 785, 786 (Cal. 1968).
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Delta Dynamics, Inc. v. Arioto, 65 Cal. Rptr. 616, 622 (Cal. Ct. App. 1968).

> [I]t is evident from counsel's question [regarding extrinsic evidence] that he was not attempting to lay a foundation to show a patent ambiguity, nor was

perceived, as will be analyzed, that this issue invoked not interpretation but rather the parol evidence rule. Justice Traynor, however, writing for the majority, treated the fact situation as if it raised an issue of interpretation. In other words, he decided the case as if the parties were disputing the meaning of a term already contained within the contract. He therefore applied the interpretative technique that he had applied in his *Pacific Gas* opinion: because the purchaser, Pixey, proffered extrinsic evidence that demonstrated a meaning to which the contract requirements were "reasonably susceptible," Justice Traynor ruled that this evidence had been erroneously excluded, and he therefore reversed the decision of the lower court.[190] Clearly indicating that he viewed the case as one involving interpretation, he wrote, "The test of admissibility of extrinsic evidence *to explain the meaning* of a written instrument is . . . whether the offered evidence is relevant to prove a *meaning* to which the language of the instrument is reasonably susceptible."[191]

The *Delta Dynamics* case is demonstrably similar to two parol evidence rule cases (*Masterson v. Sine* and *Gianni v. R. Russel & Co.*) discussed *supra*.[192] Just a few months before authoring the *Delta Dynamics* opinion, the same Justice Traynor had accurately perceived that the parol evidence rule was applicable in *Masterson v. Sine*.[193] Indeed, *Masterson* is often cited as illustrating the issue of one party's attempt to add a term to a principal written contract.[194] The exclusivity term proffered there, which the court permitted to be added to the contract, was analogous to the exclusivity of remedy claimed by the purchaser in *Delta Dynamics*.[195] Pixey, the buyer of the trigger locks, argued for the supplementation of its contract by a term stating that contract termination (as provided for in the

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> he attempting to prove that the words used in the contract were used in some special or technical sense. To the contrary, counsel's question was seemingly an attempt to change, vary or add to the terms of the agreement [a frequently used definition of the parol evidence rule].

Id.

189. 446 P.2d at 789 (Mosk, J., dissenting) ("[C]ounsel's question [regarding extrinsic evidence] was seemingly an attempt to change, vary or add to the terms of the agreement." (quoting the lower court in Delta Dynamics, Inc. v. Arioto, 65 Cal. Rptr. 616, 622 (Cal. Ct. App. 1968))).

190. *Id.* at 787.

191. *Id.* (emphasis added) (quoting Pac. Gas & Elec. Co. v. G.W. Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1968)).

192. *See* analysis *supra* text accompanying notes 143-46, 149-53, 160.

193. 436 P.2d 561, 565 (Cal. 1968).

194. *See, e.g.,* Banco Do Brasil, S.A. v. Latian, Inc., 285 Cal. Rptr. 870, 886 (Cal. Ct. App. 1991).

195. *See Delta Dynamics*, 446 P.2d at 785.

contract) was the seller's exclusive remedy for the purchaser's failure to (purchase and) sell the stated minimum number of trigger locks.[196] The added term in *Masterson* provided that the right to exercise a repurchase option was exclusive to family members.[197] In *Gianni*, the proffered term also concerned exclusivity.[198] The tenant, Gianni, sought to add to his written lease a term giving him the exclusive right to sell soft drinks in the office building where his store was located.[199]

Professor Farnsworth perceptively described the *Delta Dynamics* case as involving the parol evidence rule rather than interpretation.[200] Had that court appropriately applied the requirements mandated by the parol evidence rule, since the case involved the parol evidence rule, injustice would have been avoided. The court would have established that the sales contract was final and that the proffered exclusivity term did not conflict with any part of it. Next, however, the court would have asked whether the parties intended the contract to be complete and exclusive, *i.e.*, completely integrated, and thus impervious to supplementation. The court would most likely have applied the most commonly utilized test for complete integration: would it have been natural for the parties to have included this supplementary term in the contract if they had indeed agreed upon it? (This is the very test applied by Justice Traynor in *Masterson v. Sine*.). The court would most probably have concluded that, had the parties agreed upon that term, they would naturally have included it in their writing. The proffered extrinsic evidence of the exclusivity term would therefore have been excluded, the opposite result from that reached by the court. By confusing contract interpretation with the parol evidence rule, the court in *Delta Dynamics* failed to serve justice. The Empress and the Emperor cross-dressed, with harmful consequences.

The *Delta Dynamics* court's choice of the "reasonably susceptible" standard for admitting extrinsic evidence fulfilled no logical purpose and predictably, therefore, distorted the outcome of the case. That test inquires whether the proffered extrinsic evidence of the parties' intended meaning shows a meaning to which a disputed contract term is reasonably susceptible.[201] How could the

196. *Id.*at 787.

197. *Masterson*, 436 P.2d at 562.

198. 126 A. 791, 791 (Pa. 1924).

199. *Id.*

200. Professor Farnsworth wrote, "[The extrinsic evidence] was not offered to *interpret* the words 'subject to termination' but instead to add a term so that the contract would read 'subject to termination *as an exclusive remedy*,' and this was prohibited by the parol evidence rule." 2 FARNSWORTH, *supra* note 43, § 7.12.

201. *See Delta Dynamics*, 446 P.2d at 787.

court in *Delta Dynamics* possibly answer such a question, since there was no contract term, the meaning of which was being argued? Which contract term could or could not bear a meaning that was reasonably susceptible to a supplementary agreement by the parties that no remedy other than termination would be available? (In contrast, had the document itself stated that termination was the "exclusive remedy," some interpretation issue might possibly have arisen as to the meaning of "exclusive." For example, might such exclusivity of remedy preclude the awarding of damages for some sort of breach other than failing to order and sell the required minimum quantity of trigger locks, such as non-payment for product purchased? But the term "exclusive" does not appear in the written contract and, instead, one party wishes to insert it into the document.)

If the California Supreme Court, when inappropriately designating *Delta Dynamics* as an interpretation case, had applied the plain meaning rule, which a majority of jurisdictions use when interpreting contracts, in order to rule on admissibility of extrinsic evidence regarding the proffered additional term, the same illogic would have prevailed, and injustice would still have resulted. In order to apply that test, the court would have asked whether a term already in the contract was plain, clear, and unambiguous, such that no extrinsic evidence was needed to discern its meaning. What term in the Delta contract could have been addressed? Would, for example, an inquiry whether a term contained within the contract, "subject to termination," was plain, clear, and unambiguous shed any light on whether the parties had intended to add a term to say that termination was the only available remedy? Clearly, it would not.

This analysis of the *Delta Dynamics* case reveals that treating a parol evidence rule case as if it were an interpretation case requires application of inappropriate and useless criteria that, predictably, produce an unfair result. The extrinsic evidence admitted by the *Delta* court would most likely have been excluded had the court realized that the parol evidence rule, not interpretation, was involved.

Strident criticism directed at the *Pacific Gas* "reasonably susceptible" interpretative rule by Judge Kozinski of the Ninth Circuit, in *Trident Center v. Connecticut General Life Insurance*,[202] was misdirected and therefore unnecessary. Believing, as had the California Supreme Court in *Delta Dynamics*, that it faced an interpretation issue when actually the parol evidence rule was involved, the *Trident* court caused injustice by confusing the two concepts. In *Trident*, the Ninth Circuit admitted extrinsic evidence

202. 847 F.2d 564, 568-70 (9th Cir. 1988).

that, under the parol evidence rule, would have been excluded.[203]

Trident Center, a limited partnership formed by an insurance company and two law firms, had borrowed $56,500,000 from Connecticut General Life Insurance Co., to be used to construct an office building complex.[204] The written loan document provided for 12.25% annual interest for the fifteen-year duration of the loan.[205] It stated further that "'[m]aker shall not have the right to prepay the principal amount hereof in whole or in part' for the first 12 years."[206] The agreement did permit prepayment "[i]n years 13-15 . . . subject to a sliding prepayment fee."[207] The court described thusly a key contract term: "[I]n case of a default during years 1-12, Connecticut General has the option of accelerating the note and adding a 10 percent prepayment fee."[208]

Interest rates having declined during approximately the fourth year of the loan, the borrower wished to refinance the loan, which would have necessitated prepayment of the principal amount still outstanding.[209] The lender refused, "insisting that [according to the contract] the loan could not be prepaid for the first 12 years of its life . . . ."[210] (This situation is reminiscent of the current efforts of some home mortgage debtors to refinance now that their adjustable rate mortgages have reset to interest rates higher than those payable in earlier years and higher, often, than currently available refinancing rates. The mortgage agreements for many of these borrowers, however, forbid prepayment. One major distinguishing factor between their situations and that of Trident, however, is that many of the homeowners were able to afford to purchase houses only because of the low initial rates available from mortgage lenders, whereas all the *Trident* parties were seen by the court as "by any standard, highly sophisticated business people."[211])

When Trident brought an action in state court to request a declaratory judgment permitting it to prepay the loan, Connecticut General removed the case to federal court and moved to dismiss on the basis of the loan term that forbade prepayment during the first twelve years.[212] The court did dismiss, and Trident appealed.[213]

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203. *Id.* at 569-70.
204. *Id.* at 566.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 565.
212. *Id.* at 566.
213. *Id.*

Trident claimed that it was permitted to prepay during the first twelve years if it paid a 10% fee.[214] This claim was clearly a request to add a term to the contract, since the document did not contain any statement permitting prepayment within the first twelve years and, in fact, did contain a term that expressly precluded prepayment during that period.[215]

The court, however, treated the case as if it involved interpretation, the discernment of the meaning of a term already contained within the contract. Judge Kozinski invoked the *Pacific Gas* "reasonably susceptible" standard for admitting extrinsic evidence to interpret a contract.[216] After heavily criticizing that standard as one that "undermines the basic principle that language provides a meaningful constraint upon public and private conduct,"[217] he held that the proffered extrinsic evidence was admissible.[218] He added, "It may not be a wise rule we are applying, but it is one that binds us."[219] Rules of interpretation did not in reality, however, bind the court in that case, because interpretation was not concerned.

Had the court applied the parol evidence rule, in contrast, extrinsic evidence showing a supplementary term that permitted prepayment during the first twelve years, conditioned upon payment of a 10% fee, would surely have been excluded. Two requirements for adding a term to a contract in accordance with the parol evidence rule[220] would not have been fulfilled. Firstly, because the proffered evidence of this term conflicted[221] with the contract term prohibiting prepayment within the first twelve years of the loan, the evidence could not have been admitted. Secondly, if the parties intended the contract to be complete and exclusive, the term cannot be recognized. This query concerning complete integration is often answered by asking whether, had the parties truly agreed upon the term, they would naturally have included it in their written document. In turn, this question often leads to an inquiry as to whether the proffered term concerns the same subject matter as a term within the contract. In *Trident*, the subject matter of prepayment is indeed mentioned in

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214. *Id.*

215. *Id.*

216. *Id.* at 569-70, 570 n.6.

217. *Id.* at 569.

218. *Id.* at 570.

219. *Id.*

220. Requirements for supplementing a contract under the parol evidence rule are discussed *supra* in Part I.C.2.

221. Professor Farnsworth has pointed out that, even under the *Pacific Gas* interpretative standard for admitting extrinsic evidence, the prepayment permission that Trident claimed should not have been admitted, as it did not show a meaning to which a contract term was reasonably susceptible. 2 FARNSWORTH, *supra* note 43, § 7.12.

the agreement because the contract expressly prohibits prepayment.[222] The subject of a prepayment fee is mentioned also, with regard to the debtor's possible default and consequent required prepayment at the lender's option.[223] The contract would thus be held to be completely integrated, such that the proffered term could not be added.

Because the Ninth Circuit confused contract interpretation with the parol evidence rule and as a result admitted evidence that would otherwise have been excluded; and because this confusion caused the court to utter widely quoted criticism of a standard that was not even applicable, the full extent of the resultant harm will never be known. For instance, a jurisdiction contemplating a shift away from the plain meaning rule toward, as advocated by Corbin,[224] the "reasonably susceptible" Pacific Gas standard (as is the newest trend),[225] might be unnecessarily dissuaded by the unfounded criticism.

In the cases just analyzed, courts deciding parol evidence rule cases inappropriately applied interpretation criteria. In the converse cross-dressing situation, interpretation cases are erroneously subjected to parol evidence rule requirements, causing injustice.

For example, the Alaska Supreme Court pointed out that extrinsic evidence that should have been admitted in an interpretation case was improperly excluded by the lower court because that lower court erroneously applied the parol evidence rule. In *Prichard v. Clay*, the serving of Mexican food in a Jack-in-the-Box restaurant purchased by the Prichards, the defendant assignees of the lease for the premises, may have violated an obligation imposed by the lease. [226] The lease prohibited the serving of Mexican and of Italian food, because the lessors had rented properties in the vicinity to Taco Bell and to Pizza Hut.[227] Whether the purchase agreement incorporated the lease was at issue.[228] An additional question arose concerning whether the lessors, the Sextons, and the assignor/lessee, Clay, gave certain assurances to the purchasers/assignees that serving Mexican food would not cause complaint.[229] Evidence of such assurances was excluded by the lower court.[230] The Alaska Supreme

222. 847 F.2d at 566.

223. *Id.*

224. *See* analysis *supra* text accompanying notes 111-19.

225. *See generally* Kniffin, *supra* note 113 (identifying and analyzing three principal and contrasting approaches to the admission of extrinsic evidence for the purpose of interpretation).

226. 780 P.2d 359, 360-61 (Alaska 1989).

227. *Id.* at 360.

228. *Id.* at 361.

229. *Id.* at 360 n.3, 361.

230. *Id.* at 361.

Court wrote, "The [lower] court's error in concluding that the purchase agreement included an assumption of all the lessee's obligations under the lease necessarily means that the parol evidence rule was not properly applied in this case."[231] The same court continued, *"Whether the purchase agreement incorporated the lease provisions does not involve the parol evidence rule at all, since the question is what the contract means. Thus, the court's first duty is to determine the meaning of the contract, and extrinsic evidence is admissible for this purpose."*[232] The Supreme Court therefore reversed the lower court's granting of summary judgment and remanded for resolution at trial of the issues affected by the now admissible extrinsic evidence.[233] The court observed, "*Had the [lower] court fully evaluated this other evidence, an entirely different finding favorable to the Prichards, rather than Clay, may have been the result.*"[234] It is difficult to envision a clearer, more emphatic judicial pronouncement that applying the parol evidence rule when interpretation is instead necessitated, causes injustice.

Another interpretation case in which the court confusedly applied the parol evidence rule is *Security Watch, Inc. v. Sentinel Security Systems, Inc.*[235] The Sixth Circuit Court of Appeals acknowledged that it needed to interpret an alternative dispute resolution clause requiring arbitration, to determine whether the clause applied only to the 1994 agreement in which it was contained or to earlier contracts between the same two parties.[236] The court reversed the district court's granting of a motion to dismiss, explaining that the contract clause clearly did not refer to earlier agreements.[237] Whatever extrinsic evidence might have been relevant to this interpretation was, however, excluded by the Court of Appeals by illogical application of the parol evidence rule. The court quoted a merger clause contained within the 1994 contract. That clause stated, in part, "The terms and conditions contained in this Agreement supersede all prior oral or written understanding[s] between the parties, and constitute the entire agreement between them . . . ."[238] Referring to the parol evidence rule in spite of the fact that it was engaging in interpretation, the court explained,

> Merger clauses . . . signal to the courts that . . . the contract is to be considered completely integrated. A completely integrated

231. *Id.* at 362.
232. *Id.* (emphasis added).
233. *Id.* at 363.
234. *Id.* (emphasis added).
235. 176 F.3d 369 (6th Cir. 1999).
236. *Id.* at 370.
237. *Id.*
238. *Id.* at 372.

> agreement must be *interpreted* on its face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court *interprets* the document.[239]

It will never be known what extrinsic evidence, including preliminary negotiations or other data, might have been appropriately admitted so as to affect the interpretation of that contract.

As authority for the statement just quoted, in which the court confused interpretation with the parol evidence rule, the court cited Farnsworth.[240] The cited portion of the Farnsworth treatise,[241] however, is a discussion of the parol evidence rule, including merger clauses as a factor in judicial decisions as to whether to add a term to a contract. Farnsworth appropriately never mentions the word "interpretation" in that explication.

As early as 1953, the Supreme Court of New Jersey adverted to judicial confusion and clarified the differences between interpretation and the parol evidence rule. Describing the utility of extrinsic evidence in interpreting a contract, the court stated:

> The admission of evidence of extrinsic facts is not for the purpose of changing the writing [the domain of the parol evidence rule], but to secure light by which to measure its actual significance [the domain of interpretation]. Such evidence is adducible only for the purpose of interpreting the writing – not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. 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.[242]

Ten years later, another New Jersey court complained in the first sentence of its opinion, "Here again we face the problem of distinguishing between the proper application of the parol evidence rule and of the principle of admissibility of extrinsic circumstances to

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239. *Id.* (emphasis added).

240. *Id.*

241. 2 FARNSWORTH, *supra* note 43, § 7.3 (It is unclear which edition of the treatise the court cited. All three editions, however, describe merger clauses in section 7.3, in the context of discussing the parol evidence rule and in a subchapter separate from the subchapter on interpretation.)

242. Atl. N. Airlines, Inc. v. Schwimmer, 96 A.2d 652, 656 (N.J. 1953). The court next quoted Corbin, as follows: "The 'parol evidence rule' purports to exclude testimony 'only when it is offered for the purpose of "varying or contradicting" the terms of an "integrated" contract; it does not purport to exclude evidence offered for the purpose of interpreting and giving a meaning to those terms.'" *Id.* (quoting 4 ARTHUR CORBIN, CORBIN ON CONTRACTS §§ 536, 543 (1951)).

aid in the construction of an integrated[243] written contract."[244] The 1963 opinion, quoting from the earlier opinion, emphasized, "The 'parol evidence rule' is a rule of substantive law not related to interpretation or the admission of evidence for the purpose of interpretation."[245]

In this later case, *Garden State Plaza Corp. v. S.S. Kresge & Co.,* the court found it necessary to avoid and warn against, the harm that would result if the parol evidence rule were applied (as one party mistakenly urged) in what was actually an interpretation dispute. [246] The lease rider agreed upon by a landlord and its tenant stipulated a maximum "Common Area charge" designed to compensate the landlord for maintaining a parking area.[247] The landlord argued that the charge applied only to "floor space on mall level," while the tenant insisted that it applied also to "floor space below mall level."[248] In support of its own interpretation, the tenant proffered extrinsic evidence: "two writings constituting a part of" pre-contractual negotiations; and the testimony of two company officers.[249]

When the landlord urged application of the parol evidence rule to exclude this evidence, the court responded astutely and unhesitatingly:

> We are entirely clear that the parol evidence rule applies only to prevent the substantive alteration of contractual terms agreed upon by parties and expressed in an integration of their bargain, by resort to other prior or contemporaneous agreements or understandings. . . . Construing a contract of debatable meaning by resort to surrounding and antecedent circumstances . . . for light as to the meaning [interpretation] of the words used is never a violation of the parol evidence rule.[250]

Ever resourceful, the landlord next argued that admission of extrinsic evidence for the purpose of interpreting a contract when that same evidence would be excluded under the differing requirements of the parol evidence rule "is mischievous as

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243. The term "integrated" is employed here to indicate that the contract is final. The term is unrelated to the phrase "completely integrated" which indicates for parol evidence rule analysis that the parties intended their agreement to be complete and exclusive. *See* discussion of complete integration *supra* text accompanying notes 164-81.

244. Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 449-50 (N.J. Super. Ct. App. Div. 1963) (citing *Atl. N. Airlines, Inc.* 96 A.2d at 656).

245. *Id*. at 454 (citing *Atl. N. Airlines*, *Inc.,* 96 A.2d at 656).

246. *Id*. at 448.

247. *Id.* at 450.

248. *Id.*

249. *Id.* at 451-52.

250. *Id.* at 454.

constituting a 'back-door route . . . to let in anything and everything' in the guise of construction [interpretation] and thereby destroying the parol evidence rule."[251] The court's response was a ringing endorsement of the distinction between contract interpretation and the parol evidence rule: "We can only answer that the necessity for skill and discrimination in the judicial administration of these rules is no reason for scuttling them."[252]

III. THE SCHOLARS WHO CONFUSE OR CONFLATE

A number of eminent scholars have nevertheless concluded that the distinction between the two concepts, contract interpretation and supplementation of contracts under the parol evidence rule, is meaningless and therefore of no value. This Article demonstrates that avoidance of injustice as well as maintenance of analytical rigor militate otherwise.

Professor Eric A. Posner has published an article cited by other distinguished scholars[253] in which he has chosen to conflate contract interpretation and the parol evidence rule. He states, "Purists will object that I conflate the plain meaning rule . . . and the parol evidence rule. As far as I can tell, nothing turns on this distinction, and my version avoids needless complexities."[254] This Article argues that this combining of two very disparate concepts, each directed toward a very different purpose, is illogical. Furthermore, because the conflation can cause courts to apply interpretative criteria to parol evidence rule cases and, conversely, to apply parol evidence rule requirements to interpretation issues, injustice, as illustrated in the preceding section of this Article, can result.

Professor Posner adds a third reason for ignoring the distinction (in addition to believing that no consequence results from conflation and that "needless complexities" will be avoided); this third reason is the following: "Because both the parol evidence rule and the plain meaning rule concern the same issue – under what circumstances extrinsic evidence can be used to *supplement* a writing – they are best analyzed together."[255] But the plain meaning rule has nothing to do with "*supplementing*" a writing. On the contrary, the plain meaning rule governs admission of extrinsic evidence to interpret a contract, which is to discern the meaning of a term already contained

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251. *Id.* at 456.

252. *Id.*

253. *See* Linzer, *supra* note 6, at 807; *see also* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law,* 113 YALE L.J. 541, 590-91 (2003). An earlier reference to the "hard-PER" is made on page 547, which is cited in Mark L. Movsesian, *Rediscovering Williston,* 62 WASH. & LEE L. REV. 207, 224 (2005).

254. Posner, *supra* note 5, at 534 n.1.

255. *Id.* (emphasis added).

within the contract. It has no relation therefore to supplementing a contract by adding a term, which is the function of the parol evidence rule. Thus a basic premise for conflation stems from a misunderstanding of basic principles underlying the distinction between interpretation and the parol evidence rule.

The conflation urged by Prof. Posner is exemplified in this statement:

> Most courts would subscribe to something close to the following statement of the *parol evidence rule*: A court will refuse to use evidence of the parties' prior negotiations [extrinsic evidence] in order to *interpret* a written contract unless the writing is (1) incomplete [parol evidence rule criterion], (2) ambiguous [interpretation criterion] or (3) the product of fraud, mistake, or a similar bargaining defect [exceptions to the parol evidence rule].[256]

This conflation theory produces "[t]wo stylized, polar positions" which Professor Posner has labeled "hard-PER" and "soft-PER."[257] Under the "hard-PER" category he includes all cases in which the court excludes extrinsic evidence, regardless of whether that evidence was proffered for the purpose of interpretation or for application of the parol evidence rule.[258] Under "soft-PER" cases, he includes those in which extrinsic evidence was admitted, whether for use in interpreting the contract or for applying the parol evidence rule.[259] Illustrative of this amalgamating of issues is a footnote[260] in which "soft-PER" cases are said to include both *Masterson v. Sine*, discussed *supra* as a clear example of application of the parol evidence rule,[261] and *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, described *supra* as establishing the interpretation technique of admitting extrinsic evidence that shows a meaning to which the disputed contract term is reasonably susceptible.[262] In both cases, extrinsic evidence was admitted, but the purpose to be served by the evidence in each case was radically different, and the admissibility requirements were therefore significantly different in each of the two cases.[263]

In further describing the "hard-PER" and "soft-PER" dichotomy, Professor Posner analyzes first a number of criteria used when courts decide whether to add a term to a contract under the parol evidence

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256. *Id.* at 534 (emphasis added).
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 540 n.15.
261. *See supra* text accompanying notes 149-51, 160, 180.
262. *See supra* text accompanying notes 121-31.
263. *Compare* Masterson v. Sine, 436 P.2d 561 (Cal. 1968), *with* Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968).

rule.[264] He categorizes as "harder courts" those jurisdictions that treat a merger clause as conclusive on the issue of whether the parties intended their agreement to be complete and exclusive, *i.e.,* completely integrated.[265] He views as "softer courts" those jurisdictions that deem merger clauses as providing a strong presumption but not operating as conclusive.[266] He distinguishes also "softer" courts, those willing to examine extrinsic evidence to decide whether there is complete integration, from "harder" courts that look only at the face of the document to decide this issue.[267]

He next analyzes interpretation cases, designating as "harder courts" those that apply the plain meaning rule, which provides that extrinsic evidence can be admitted only when the disputed contract term is ambiguous. (Although it is standard jurisprudence to define ambiguity as existing when the disputed term has at least two different meanings,[268] his article provides a different definition: "A contract is facially ambiguous when the writing has conflicting terms or no provision relating to the contingency under which the dispute arises.")[269] "Softer courts" are said to comprise those that set less strict criteria for admitting extrinsic evidence, such as courts that apply the *Pacific Gas* "reasonably susceptible" rule and the "no limitation" rule discussed *supra* in this Article.[270]

The labels "hard-PER" and "soft-PER" bear a resemblance to Professor E. Allan Farnsworth's terms, "restrictive view" and "liberal view." Farnsworth applied the terms only to interpretation, however, and did not conflate interpretation with the parol evidence rule.[271] In fact, he elucidated the difference between the two concepts by stating, "The question then is: where does 'interpretation' end and 'contradiction' or 'addition' [parol evidence rule issues] begin? The answer must be that interpretation ends with the resolution of problems that derive from the failure of language, that is to say, with the resolution of ambiguity and vagueness." [272] Clearly, ambiguity and vagueness relate only to disputes about the meaning of terms contained within the contract (interpretation) and not also to supplementation of the contract (the parol evidence rule). Professor Farnsworth included under the "restrictive view" the plain meaning rule, which permits extrinsic evidence to be admitted only if the

264. Posner, *supra* note 5, at 534-37.
265. *Id.* at 537.
266. *Id.*
267. *Id.* at 535.
268. *See supra* text accompanying notes 102-03.
269. Posner, *supra* note 5, at 535.
270. *Id.* at 535, 535 n.4.
271. 2 FARNSWORTH, *supra* note 43, § 7.12.
272. *Id.* § 7.12.

disputed contract term is ambiguous. He characterized the "liberal view" as applying to the *Pacific Gas* standard for admitting extrinsic evidence that demonstrates a meaning to which the disputed term is "reasonably susceptible."[273]

The valid, logical, and utilitarian distinctions between interpretation and the parol evidence rule are destroyed when the two concepts are conflated. It is therefore unsurprising that Professor Posner is moved to lament, while analyzing the use of "hard-PER" or "soft-PER" standards based on conflation: "In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair."[274] Why would cases not be irreconcilable when viewed through a lens that ignores meaningful distinctions among them? Why would there not be confusion when two disparate concepts, interpretation and the parol evidence rule, each directed toward a different purpose and each necessitating use of different requirements, are merged? Indeed, the cause of similar "despair" is clearly identified in a Missouri court's acknowledgement, "[W]e, in Missouri, . . . have used a variety of principles, chosen randomly with no consistency . . . . [T]he random selection of principles . . . has made the parol evidence rule in Missouri . . . a deceptive maze rather than a workable rule."[275]

Another eminent scholar who conflates contract interpretation with the parol evidence rule, Professor Peter Linzer, writes, "Underlying the dreaded parol evidence rule is the notion that words have plain meanings."[276] The last phrase in this sentence clearly refers to the plain meaning rule, a standard that many courts employ to determine admissibility of extrinsic evidence to interpret contracts. It has nothing at all to do with the parol evidence rule, which governs supplementation of contracts. As this Article has demonstrated, these are two very distinct concepts, serving diverse purposes, and conflation accomplishes nothing while engendering substantial confusion. Professor Linzer sees a world in which conflation abounds: "[T]he parol evidence rule and the plain meaning rule are conjoined like Siamese twins." [277]

As a justification for this conflation, he cites an observation by Professors John D. Calamari and Joseph M. Perillo. Although these renowned scholars have distinguished contract interpretation from the parol evidence rule,[278] they have pointed out that there are

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273. *See id.*

274. Posner, *supra* note 5, at 540.

275. *Id.* at 540 n.17 (quoting Jake C. Byers, Inc. v. J.B.C. Invs., 834 S.W.2d 806, 811 (Mo. Ct. App. 1992)).

276. Linzer, *supra* note 6, at 799.

277. *Id.* at 801.

278. *See supra* text accompanying note 57.

instances in which a particular item of extrinsic evidence can be inadmissible to add a term to a completely integrated contract (under the parol evidence rule) and yet be admissible for the purpose of explaining the intended meaning of a term contained within the contract (interpretation).[279] It is unsurprising, however, that an item of evidence might be admissible for one purpose and not for a different purpose.[280] Adding a contract term and deciphering the meaning of a term already situated within the contract are two very distinct functions that require, not illogically, very different standards.

The Lord edition (but not earlier editions) of Williston's *A Treatise on the Law of Contracts* either conflates or confuses contract interpretation and the parol evidence rule. [281] It is unclear whether there is deliberate conflation or inadvertent confusion. In the chapter entitled "The Parol Evidence Rule," the following statement appears: "Generally stated, this rule prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements [parol evidence rule] to explain the meaning [interpretation] of a contract when the parties have reduced their agreement to an unambiguous [interpretation] integrated [usually, parol evidence rule] writing."[282] (The term "integrated" usually refers to a completely integrated contract for parol evidence rule purposes but can refer simply to the finality of an agreement, which finality is necessary before either interpretation or the parol evidence rule becomes applicable.)

Professors Alan Schwartz and Robert E. Scott, respected scholars, also either intentionally conflate or inadvertently confuse contract interpretation and the parol evidence rule.[283] Their central theme is presentation of "a normative theory that fits business contracts."[284] They state:

> Business firms . . . commonly prefer courts to adhere as closely as possible to the ordinary meanings [interpretation] of words, to apply a "hard" parol evidence rule, and to honor "merger clauses" [parol evidence rule] (which state that the parties intended their writing to be *interpreted* as if it were complete) [parol evidence rule].[285]

This one sentence, mentioning both concepts interchangeably,

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279. Linzer, *supra* note 6, at 801 (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3.9, at 147 n.8 (4th ed. 1998).

280. *See* further discussion of this issue *supra* Part I.C.

281. 11 WILLISTON, *supra* note 38, § 33:1.

282. *Id.*

283. Schwartz & Scott, *supra* note 254.

284. *Id.* at 544 n.3.

285. *Id.* at 547 (emphasis added).

takes the position that the parol evidence rule functions to interpret a contract. Furthermore, the sentence describes merger clauses as stating that the parties "intended their writing to be interpreted" in a particular way.[286] Yet, as this Article has shown, a merger clause, which relates to completeness of the contract, has nothing to do with interpretation.

Professor Susan J. Martin-Davidson recognizes the distinction between contract interpretation and the parol evidence rule. She writes, for example, "California courts have not been rigorous in distinguishing evidence offered to explain the meaning of written terms from evidence offered to supplement the written agreement with additional terms."[287] She discerns, as this Article also demonstrates, that the *Trident* court decided that case as if it involved interpretation, when actually it concerned the parol evidence rule.[288] Having thus clearly delineated the two different concepts, Professor Martin-Davidson inexplicably describes *Pacific Gas*, which clearly required interpretation of the disputed term "indemnify,"[289] as a parol evidence rule case. She includes it in the same category as *Masterson v. Sine*, which, as described in this Article,[290] is a pre-eminent parol evidence rule case.[291]

The scholars who confuse or conflate contract interpretation and the parol evidence rule do not address the injustice that, as demonstrated in this Article, can result. Their position stands in stark contrast to that of other commentators,[292] including Professor E. Allan Farnsworth, who, as discussed supra,[293] have recognized a clear distinction. Thus, some commentators see the Emperor and Empress as interchangeable, or as wearing no clothing, and others see a need for each to be garbed in his or her distinctively appropriate garments.

IV. CONCLUSION AND POLICY RECOMMENDATIONS

This Article, in analyzing the policies underlying contract interpretation and the parol evidence rule, has demonstrated that they constitute two distinct concepts. Each is designed to achieve a

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286. *Id.*

287. 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, 6 n.30 (1995).

288. *Id.* at 3 n.14; *see also* Trident Center v. Conn. Gen. Life Ins., 847 F.2d 564 (9th Cir. 1988); discussion *supra* text accompanying notes 202-25.

289. *See Pac. Gas,* 442 P.2d at 643; discussion *supra* text accompanying notes 121-31.

290. *See* discussion *supra* text accompanying notes 149-51, 180.

291. Martin-Davidson, *supra* note 287, at 9-10.

292. *See* discussion *supra* Part I.B.

293. *See* discussion *supra* text accompanying notes 43-48.

different goal. Logic and reason dictate, therefore, that each of these two different policy goals should be reached by applying a different set of rules and standards. When courts confuse these topics and apply to an interpretation issue the standards applicable to the parol evidence rule, and when courts apply interpretation standards to a parol evidence rule issue, it is not surprising, and it is even to be predicted, that injustice will result. This injustice will consist in either admitting or excluding extrinsic evidence when application of the appropriate rule would have produced the opposite effect. Why, after all, is there even any reason to develop standards designed for deciding one particular issue, such as interpretation, if standards for a different issue, say, the parol evidence rule, will be applied?

This Article has shown not only that injustice results from such confusion, but also that some scholars and courts succeed in avoiding this confusion by clearly delineating the two concepts. It has shown, too, that some scholars nevertheless argue for conflating the topics. At least one of the latter group of commentators decries the confusion that often results from such conflation. Other scholars may unintentionally confuse or conflate.

A. Specific Policy Recommendations

"[S]kill and discrimination in the judicial administration of these rules," as advocated and practiced by the New Jersey court in *Garden State*,[294] will, in an overwhelming majority of situations, enable a court to discover whether the parties dispute the meaning of a term contained within the contract (interpretation) or argue about whether to add a term to their contract (under the parol evidence rule). In order to utilize such common sense and wise discretion, a court must be alert, as many courts have been, but more need to be, to the real and logical policy differences between interpretation and the parol evidence rule.

In the unlikely event that a rigorously analytical court nevertheless finds it impossible to distinguish between interpretation and parol evidence issues, this Article recommends a two-step process:

1. Recommended Two-Step Process

This process may be summarized as: Ask first whether interpretation is required. Only if no attempt is being made to define a term that exists within the contract, including even the proffering of an additional term that defines the disputed contract term – only then will the parol evidence rule, in step two, be applied. Thus, even

294. *See* analysis of Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448 (N.J. Super. Ct. App. Div. 1963) *supra* text accompanying notes 244-52.

if a party attempts to manipulate the choice of applicable rules by claiming that, in regard to a term the meaning of which is disputed, the parties have made a separate agreement to define that particular term, the issue will still be deemed to be interpretation. The parol evidence rule will come into play only if the proffered additional term does not relate to the meaning of a term already situated within the contract. No manipulation will in that instance succeed in convincing a court that it must interpret, *i.e.,* discern the meaning of a contract term.

For example, in the hypothetical case described by Professor Joseph A. Perillo and analyzed *supra*, in which a contract term is "all cotton planted on 400 acres," one party may seek to avoid interpretative standards and invoke the parol evidence rule by alleging a separate agreement defining "planted" as "however planted."[295] (The other party in the hypothetical argues that the contract requires "fully" planted acreage.[296]) This apparent attempt to manipulate the choice of applicable rules will be thwarted if the court holds that, because the separate agreement defines the meaning of a contract term, "planted," it relates after all to interpretation. The parol evidence rule will be applied only if, in contrast, the alleged separate agreement does not define a term contained within the contract. Fact situations illustrative of this last eventuality include *Gianni*, analyzed *supra,* in which the proffered supplementary term was an exclusive right of the shopkeeper to sell soft drinks in the office building where his business was located.[297] The contract did not include the term "exclusive right." Clearly, therefore, the alleged additional term did not define an existing contract term and so did not involve interpretation. An additional example is *Mitchill v. Lath*, analyzed and discussed *supra,*[298] in which the parties allegedly made a separate agreement that an unattractive ice house would be removed from property across a road from the land sold in the primary written contract.[299] The parol evidence rule was applicable there because the sales contract itself said nothing about the ice house and, in fact, said nothing regarding removal of any structure.[300] The supplementary term did not define a contract term, and interpretation was therefore irrelevant.

In sum, a court, having determined in its initial inquiry that

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295. PERILLO, *supra* note 57, § 3.16.

296. *Id.*

297. Gianni v. R. Russel & Co., 126 A. 791 (Pa. 1924); *see supra* text accompanying notes 70-71, 143-46, 158, 176-79.

298. Mitchill v. Lath, 160 N.E. 646 (N.Y. 1928); *see supra* text accompanying notes 147-48, 159, 173-75.

299. *Mitchill*, 160 N.E. at 646.

300. *Id.*

interpretation is not relevant, will only then execute the second of this two-step process, and apply, when relevant, the parol evidence rule.

2. Recommended Changes in Terminology

If courts will substitute "contract supplementation requirements"[301] or "contract alteration requirements" as a label for "the parol evidence rule," they will achieve enormous progress in avoiding confusion and resultant injustice.

The traditional term,"parol evidence rule," has itself been a cause of obfuscation. The term "parol" actually means "oral;" yet extrinsic evidence may, of course, comprise both oral and written evidence; and extrinsic evidence is useful in some fact situations for interpretation and in different fact situations for deciding whether to add a term under the "parol evidence rule." Thus, an issue of whether to admit "parol *evidence*" does not necessarily relate to the issue of whether to apply the "parol evidence *rule*." The labels "contract supplementation" and "contract alteration" would avoid this confusion and would, in contrast, leave no doubt that the topic under consideration is whether to add a term to a contract (or, in rare instances, delete or replace a term).

Further clarity will result if courts will consistently employ the term "extrinsic evidence," as this Article has done, in place of the too-broad term "parol evidence," given that, as just described, parol evidence is but one form of extrinsic evidence.

These changes in terminology will greatly assist courts in achieving the broader goal: recognition of the distinction between the two very different areas of contract law.

B. Comprehensive Policy Recommendation

The jurisprudential skills called for, and exercised, by the *Garden State* court forty-six years ago are, unfortunately, still lacking in the courts that cause injustice when they fail to recognize the distinction between contract interpretation and the parol evidence rule. As this Article has shown, the distinction is real; it results, moreover, from differing goals and discrete underlying policies.

Recognition of the distinction; judicial restraint in applying only the requirements pertinent to each concept; and studied awareness of the pitfalls created by less than precise terminology: these efforts will go far toward achieving two separate purposes that are historically

301. This term was suggested to the author by the title of the following piece: Nicholas R. Weiskopf, S*upplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault,* 34 EMORY L. J. 93 (1985).

and currently valuable. The Empress and the Emperor are indeed wearing appropriate clothes; the raiment of each is distinctive, utilitarian, and designed to achieve the most worthwhile goal of the judiciary: justice.