THE SHAPE OF CONSUMER CONTRACTS

ANDREA J. BOYACK†

ABSTRACT

Modern consumer contracts are the bane of contract law and theory. Freedom of contract justifications are premised on party autonomy and transactional efficiency, but theories justifying contract enforcement fail to explain why the law should treat company-crafted terms as presumptively binding on consumers. Consumer protection advocates point out that lower thresholds for manifesting assent endorsed by the recent Restatement of the Law of Consumer Contracts may result in consumers being bound to terms of which they were reasonably unaware. Other scholars point out that mere knowledge of company terms and conditions does almost nothing to protect consumers in any case because consumers are powerless to shape those terms. Indeed, in the face of negotiation impotency, it is inefficient and illogical for consumers to read, understand, and analyze a company's boilerplate terms even when they are made available. Attempting to fit traditional contract rules to the modern consumer contract context results in a body of contract law that combines fantastical notions of assent with increasing government policing of ostensibly private contract terms.

There is a better way. This Article advocates for a novel approach to consumer contract law, one that that avoids pitting fairness against efficiency. A more tailored contract baseline for consumer contracts starts by recognizing the distinct shape of the modern company–consumer relationship. Traditional contract law is premised on a "horizontal" relationship formed between parties who can each provide some contractual input. Consumers, however, lack the ability to provide direct contractual input for the majority of their transactional relationships. Online terms and conditions are created by and for companies; consumers simply acquiesce to them as a cost of doing business. Thus, the company–consumer relationship is a hierarchical, "vertical" relationship. Applying traditional horizontal contract law to vertical company–consumer relationships inhibits multi-party input and erodes contract legitimacy. In the context of a vertical relationship, the legal baseline must look outside the unilaterally controlled boilerplate to determine the parties' contract content.

A better tailored approach to consumer contracts would treat a consumer's choice to do business with a company as legally distinct from assent to that company's online terms. Consumers choose transactional

† Floyd R. Gibson Endowed Professor, University of Missouri School of Law. I am grateful to consumer law scholar attendees at the Annual Consumer Law Conference and the Berkeley Center for Consumer Law and Economic Justice for their input and guidance. I specifically appreciate Mel Eisenberg and Nancy Kim for their thoughtful comments on an early draft of this project. And a huge thank you to Ezra Rosser for giving me a place to write in peace during 2020.

relationships, not online terms. Furthermore, the market provides inadequate variety among various companies' boilerplate terms.

Contract law can provide a two-step pathway for consumers to shape the terms of their contracts. First, the law must disentangle the choice of making a transaction and a commitment to be bound to boilerplate terms. Then, although the law can deem consumer assent to terms necessary for the transaction's infrastructure (constructive terms), it must find boilerplate terms that exist solely to reduce consumers' default legal rights (destructive terms) legally ineffective. Tort law's liability allocation defaults, contract law's basic principles, and our legal system's dispute resolution process should persist notwithstanding mere boilerplate to the contrary. Consent to the transaction divorced from assent to destructive terms would prevent controlling parties in vertical relationships from dictating private governing rules. Existing default legal rights are a better approximation of consumer contracting preferences. This Article sets out theoretical justifications for altering the legal baseline for consumer contracts empowering consumer-preferred inputs.

TABLE OF CONTENTS

INTRODUCTION

The first rule of dressing is to tailor your wardrobe to your body type. An outfit that is stunning on one person can be unflattering on another person with a different shape—as tabloids gleefully point out in their "who

wore it best" exposés.[1] Contract law is currently a one-size-fits-all legal disaster, a system that permits stronger parties with market power to impose their preferences on impotent consumers protected only by the thinnest fabric of equitable doctrines and regulatory oversight.[2] Twenty-first century transactional relationships come in different shapes and sizes. Consumers need more than traditional off-the-rack contract law to reflect and protect their preferences, efforts, and rights. Efficiency and autonomy contract theories fail to justify conflating assent to a transaction with assent to company boilerplate.[3] To ensure that contract law is a vehicle for freedom and prosperity instead of a tool for coercion and oppression, the basic common law legal framework must reflect the nature of the transactional relationship and not just one party's articulated terms.

Typical contract analysis is built on the presumption that a consumer's choice to form a relationship with a company is simultaneously the consumer's election, explicitly or implicitly, to be bound by the commercial party's standard terms and conditions.[4] Consumers rarely have any input with respect to the governing contract's content, but based on this legal presumption, they are made subject to the company's terms as the price of doing business with it.[5] Traditional contract law thus conflates a consumer's choice to transact with a commercial party with a consumer's agreement to be bound by particular terms. When governing terms are shaped by one party only, without any consumer input, the terms are

1. *See generally* Cristina Gibson, Roxanne Adamiyatt, & Christina Baez, *Who Wore it Best?*, US WEEKLY (Mar. 23, 2022), https://www.usmagazine.com/stylish/pictures/celebrities-wearing-same-fashion-styles-who-wore-it-best-w509536/.

2. The word "consumer" used throughout the Article is shorthand for any individual who engages in economic relationships with commercial parties, including but not limited to buyers, debtors, subscribers, employees, workers (in the gig economy and elsewhere), and anyone else who is bound by terms authored exclusively by the commercial parties with whom they engage. Throughout the Article, the term "company" is used as shorthand for the commercial parties that draft standard forms for use in their transactions with consumers.

3. Section I *infra* discusses these current iterations of efficiency and autonomy justifications for contract law as well as recent critiques of their applicability in the consumer contract context. The term "boilerplate" used throughout the Article references the standardized terms and conditions crafted by a company purportedly making up the parties' contract terms in a consumer transaction. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 4–9 (2012) (defining the term, giving examples of, and explaining the problems related to boilerplate). Courts frequently find that consumers are bound to commercial boilerplate based on the consumer's agreement to engage in a transaction with the company. *Id.* at 8, 12–13.

4. RADIN, *supra* note 3, at 7–8; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 640 (2002). Some courts hold that consumers assent to terms passively when they fail to object to terms and enter or continue a relationship with the commercial party.

5. Such contracts are often called "contracts of adhesion" because the non-drafting party lacks the ability to bargain regarding the substance of the contract and has the choice only to accept the terms or refuse to enter into the relationship. Rakoff, *supra* note 4, at 1176–77. Courts usually find that adhesion contracts are binding, although a court can avoid or reform an adhesion contract based on shockingly unfair terms under the doctrine of unconscionability. *See, e.g.*, CHARLES L. KNAPP, NATHAN M. CRYSTAL, & HARRY G. PRINCE, RULES OF CONTRACT LAW 89 (2019) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965) (asserting that it is "a matter of common law that unconscionable contracts are not enforceable").

essentially whatever the commercial drafting party wants them to be.[6] This result clashes with our judicial system's characterization of private contracts as products of mutual assent.[7] When it comes to the boilerplate provisions that define and limit legal rights under our current system, consumers lack knowledge, bargaining power, and choices.[8] Their agreement to do business with a company is, at best, acquiescence to that company's transactional hegemony, not true assent to the company's terms.[9] Lack of assent undermines the assertion that such terms are freely chosen, mutually beneficial, and wealth-generating.[10] Some advocates claim that consumer market choices coupled with adequate disclosures mitigates the assent deficit in consumer transactions,[11] but there is insufficient evidence that market competition results in consumer preferences being incorporated into boilerplate terms.[12] Lack of consumer-side input undermines assertions that such contracts promote liberty and efficiency. Mere awareness of boilerplate terms, even coupled with market choices, does nothing to improve on this deficiency.

Courts and legislatures can protect consumers from oppressive contract terms through avoidance and interpretation doctrines. The recently adopted Restatement of the Law of Consumer Contracts relies on expanding the scope of such defenses to protect consumers from oppressive boilerplate terms.[13] But relying on litigation and ad hoc determinations of

---

6. This concept is discussed in detail in RADIN, *supra* note 3 at 24–26. Karl N. Llewellyn, reporter for Article 2 of the Uniform Commercial Code, see Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 429 n.2 (1997), also warned of drafting party overreach in non-negotiable contracts three quarters of a century ago, explaining that although engineers design constructions with "a wide margin of safety," "business lawyers tend to draft to the edge of the possible." John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1350 n.163 (*quoting* Testimony of Karl N. Llewellyn, 1 State of New York, 1954 Law Revision Comm'n Rep., Hearings on the Uniform Commercial Code 49, at 113 (177)); *see also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389–90 (N.J. 1960).

7. Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982). Courts do retain the power to void entire contracts or particular portions of contracts found to be substantively unfair (shocking to the judicial conscience) if the contract was entered into pursuant to an unfair process, and many (but not all) courts presume procedural unconscionability exists for contracts of adhesion. Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 794–95 (2020). Unconscionability (and similar judicial checks on drafting party power) can provide some limit to company overreach, but in practice may have a minimal effect. Brett M. Becker & John R. Sechrist II, *Claims of Unconscionability: An Empirical Study of the Prevailing Analysis in North Carolina*, 49 WAKE FOREST L. REV. 633, 639 (2014). A study of North Carolina cases published in 2014, for example, found that an unconscionability claim was successful only 3.37% of the time. *Id.*

8. RADIN, *supra* note 3, at 12.

9. Rakoff, *supra* note 4, at 1227–28.

10. "Each time problematic consent, or indeed non-consent, is treated as if it were real consent, the normative idea of consent inherent to contract is being degraded." RADIN, *supra* note 3, at 32.

11. *E.g.*, Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 754, 798 (2008); *see* Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 90–106 (2009); *see* Jeffrey M. Lipshaw, *Duty and Consequence: A Non-Conflating Theory of Promise and Contract*, 36 CUMB. L. REV. 321, 338–39 (2006); *see also* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 93–94 (Omri Ben-Shahar ed., 2007).

12. RADIN, *supra* note 3, at 12.

13. RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS §§ 5, 6, 8, 9 (AM. L. INST. Tentative Draft No. 2, 2022).

unfairness may not help consumers who never make it to court.[14] Judges may use the doctrines of unconscionability, public policy, and reasonable expectations as systemic safety valves to siphon off the most abusive terms from enforceable contracts.[15] However, case-by-case determinations may result in uneven consumer protection and inject value-diminishing unpredictability into the market.[16] On the legislative and regulatory side, consumer protection proposals either mandate formation prerequisites (for example, certain disclosures) or ban certain negotiation and transactional behaviors deemed "unfair and deceptive acts and practices."[17] Some scholars call such regulatory efforts inefficient and incomplete and point out that mere knowledge of company terms and conditions does almost nothing to protect consumers who are powerless to shape those terms.[18] For other scholars, those with abundant faith in the free market, government oversight is unnecessary because competitive markets act as effective bulwarks against commercial party contract overreach as long as informational asymmetries can be solved.[19] Meanwhile, surveys of company boilerplate provisions demonstrate that the market and legal status quo have permitted wide reaching deletions of consumers' default legal rights.[20] Our current unsustainable system of consumer contracts reflects an ill-fitting law.[21] A

14. Forum choice provisions, arbitration clauses, and limitations on collective actions create barriers for consumer lawsuits challenging boilerplate content as unfair and illegal. *See* RADIN, *supra* note 3, at 4–6.

15. Courts decide unconscionability claims subjectively on a case-by-case basis. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 484 (2008). Furthermore, even in consumer contracts, the doctrine of unconscionability is "used sparingly" and rarely results in contract unenforceability. Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First Century Survey*, U.C. HASTINGS COLL. L. RSCH. PAPER No. 71, 6 (2013), https://ssrn.com/abstract=2346498. As for the doctrine of reasonable expectations, it is even more infrequently applied by courts and is aptly characterized as "a muddled and protean judicial doctrine that lacks a uniform and accepted definition within the common law." Warkentine, *supra* note 15, at 497–98.

16. Arthur Allen Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967); Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 782 (2016). *C.f.*, McCall, *supra* note 7, at 794, 801–03 (arguing that the unpredictability of unconscionability as a legal doctrine has been overstated).

17. CONSUMER FINANCIAL PROTECTION BUREAU: CONSUMER LAWS AND REGULATIONS, UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES (UDAAPS) EXAMINATION PROCEDURES, 1–13 (V. 3, Mar. 2022), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

18. For decades, consumer protection focused almost exclusively on disclosures, but recent assessments of the efficacy of a pure disclosure regime led to broader conceptions of protections. *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 59–78 (2014); Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1409 (2015).

19. Oman, *supra* note 11, at 94, 104–05; Rakoff, *supra* note 4, at 1217–18, 1221–23, 1229.

20. Andrea J. Boyack, *Abuse of Contract: Boilerplate Destruction of Counterparty Rights* (Forthcoming 2024) (on file with author).

21. *See* Avery W. Katz, *Contract Theory—Who Needs It?*, 81 U. CHI. L. REV. 2043, 2045, 2064, 2076 (2014); Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)*, U. MICH. L. SCH. SCHOLARSHIP REPOSITORY, 1–7 (2014) (available at SSRN: https://ssrn.com/abstract=2401720 or http://dx.doi.org/10.2139/ssrn.2401720); NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 56–69 (2013); Nicolas Rojas Covarrubias, *Limits of Assent in Consumer Contracts: A (Regulatory) View from the South*, 32 LOY.

better tailored legal approach will ameliorate the discomfort the current system creates.

This Article advocates for a novel approach to consumer contract law, one that that avoids pitting fairness against efficiency. A more tailored contract baseline for consumer contracts starts by recognizing the distinct contours of the modern company–consumer relationship. Traditional contract law is premised on a "horizontal" relationship formed between parties who can each provide some contractual input.[22] Consumers, however, lack the ability to provide direct contractual input for the majority of their many transactional relationships.[23] Online terms and conditions are created by and for companies; consumers simply acquiesce to them as a cost of doing business.[24] The company–consumer relationship is a hierarchical, "vertical" one.[25] Applying traditional contract law to vertical relationships inhibits multi-party input and erodes contract legitimacy.[26] In the context of a vertical relationship, the legal baseline must look outside the unilaterally controlled boilerplate to determine the parties' contract content.[27]

A better tailored approach to consumer contracts would treat a consumer's choice to do business with a company as legally distinct from assent to that company's online terms. Consumers choose companies with whom to do business based on a myriad of factors, and in spite of—not because of—boilerplate provisions that alter many of their default legal rights. Deeming a consumer's willingness to engage in a transaction as the equivalent of contractual "manifestation of assent" to every part of company boilerplate obscures the reality that consumers choose transactional relationships, not online terms.

Contract law can provide a two-step pathway for consumers to shape the terms of their contracts. First, the law must disentangle a choice to transact from a commitment to be bound to boilerplate terms. Then, the law must distinguish between terms necessary for the transaction's infrastructure (constructive terms)[28] and terms that function solely to reduce consumers' default legal rights (destructive terms).[29] Consumer transactional choices may justifiably represent deemed assent to constructive terms necessary to provide transactional parameters, but choosing to do business with a company should not effectuate a legal waiver of the consumer counterparty's rights. Contract law cannot justify allowing

---

CONSUMER L. REV. 581, 583–92 (2022); Donald B. King, *Standard Form Contracts: A Call for Reality*, 44 ST. LOUIS U. L.J. 909, 910–12 (2000).

22. *See infra* Section II.C.
23. RADIN, *supra* note 3, at 12.
24. Rakoff, *supra* note 4, at 1225, 1229; RADIN, *supra* note 3, at 7–8.
25. *See infra* Section II.C.
26. *See infra* Section II.C.
27. *See infra* Section II.C.
28. *See infra* Section II.A.
29. *See infra* Section II.A.

boilerplate to distort tort law's liability allocation defaults, contract law's basic principles, and our legal system's dispute resolution process.

Destructive terms in company boilerplate should not become part of consumer contracts to begin with.[30] Adopting a new baseline for the content of company–consumer contracts would manage the impact of company boilerplate and avoid reliance on government regulation and ad hoc adjudication of affirmative defenses.[31] Divorcing consent to the transaction from assent to destructive terms would prevent controlling parties in vertical relationships from dictating private governing rules.[32] Instead, existing default legal rights would become not only presumptive, but also durable consumer contracting choices.

This Article sets out theoretical justifications for altering the legal baseline for consumer contracts so that the counterparties would be governed by terms that reflect their relationship—and therefore include consumer-side input—rather than simply the preferences of the stronger contracting party. Part I examines how efficiency, choice, and market theories of contract obligation reveal the importance of party input and how these theories diverge from the modern consumer contracting reality. Part II highlights the link between contract legitimacy and each party's ability to help shape terms. It also shows how the same legal baseline that facilitates party input in the context of horizontal relationships operates to inhibit party input in the context of vertical relationships. Part III sets out the basic framework for a new approach to consumer contracts that (1) separates consent to a transactional relationship from assent to particular terms and (2) preserves indirect consumer input by strengthening default legal rights.

I. THEORETICAL DISCOMFORT

A distinguishing feature of modern law is the legally enforceable private contract.[33] Although persons in the twenty-first century remain imbued with legal rights and obligations by virtue of ownership and simple membership in society (tort law, property rights, and statutory obligations), every adult with cognitive and volitional capacity also has the legal power to bind themselves to self-defined rules in the context of private relationships.[34] There are only a few topics for which private ordering is

30. *See infra* Section III.B.

31. *See infra* Section III.B.

32. *See infra* Section III.A.

33. For a discussion of the pivotal transformation of the legal system from status-based to contract-based, see HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 172–73 (1861) (concluding that society has "steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals").

34. MAINE, *supra* note 33, at 173 (explaining that the only persons who lack the legal capacity to contract are those persons who "do not possess the faculty of forming a judgment on their own interests"); *see, e.g.*, RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW 20–22 (1994); ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 7–15 (1997); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CINCINNATI L. REV. 1283, 1292–93, 1309–10

legally unacceptable.[35] Legally enforceable private ordering has been the engine of economic, personal, and political liberalism during the past few centuries.[36] Private ordering has encouraged innovation and wealth-building through new sorts of labor and capital combinations.[37] Freedom to contract enables individual choices that maximize personal happiness and is therefore an essential liberty right.[38] Contracts keep people independent and free of government constraint and interference in many key areas of their lives, while simultaneously encouraging value-enhancing reliance on voluntary promises.[39] Contract law's value lies in its ability to fashion an

---

(1990); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 825–26 (1985).

35. Private ordering refers to private determinations of applicable rules instead of reliance on public/governmental governing decisions. Although private persons may define rules that apply to them via contracts, there are some substantive outer boundaries for what topics may be self-legislated. For example, public policy prohibits enforcing contracts that violate a law and contracts that ignore judicial protections of the rights of children (surrogacy, etc.) and contracts to interfere with competition in the marketplace (antitrust). *See* Adeline A. Allen, *Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human*, 41 HARV. J. L. & PUB. POL'Y 753, 760, 766–67 (2018). Nevertheless, even where freedom of contract public policy runs contrary to other important public policies, like protecting the rights of children or preserving free and competitive markets, courts still endeavor to enforce private ordering choices when possible. *See id.* at 760.

36. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562–63 (1933) ("[A] regime in which contracts are freely made and generally enforced gives greater scope to individual initiative and thus promotes the greatest wealth of a nation."). Contracts are "especially critical for human flourishing in the modern world as modern market activity and personal dependence on [them] have become increasingly robust, globalized, and potentially welfare enhancing." Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 764–65 (2016); *see also* Joseph Henrich, Jean Ensminger, Richard McElreath, Abigail Barr, Clark Barrett, Alexander Bolyanatz, Juan Camilo Cardenas, Michael Gurven, Edwins Gwako, Natalie Henrich, Carolyn Lesorogol, Frank Marlowe, David Tracer, & John Ziker, *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 SCI. 1480, 1480 (2010) (finding that contracts are foundational for "modern prosociality" and a culture of cooperation); COMMISSION ON GROWTH AND DEVELOPMENT, *Preface* to THE GROWTH REPORT: STRATEGIES FOR SUSTAINED GROWTH AND INCLUSIVE DEVELOPMENT, at x (2008) (discussing markets as a necessary factor for high, sustained economic growth and the "things people care about" such as "poverty reduction, productive employment, education, health, and the opportunity to be creative."). Professor Douglass C. North has observed that "the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 54 (1990).

37. Wealth maximization through contract enforcement is a foundational concept in the law. *See, e.g.*, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 157 (2000) ("Law is the instrument that fixes and realizes capital."); Cohen, *supra* note 36, at 562–63 ("[A] regime in which contracts are freely made and generally enforced gives greater scope to individual initiative and thus promotes the greatest wealth of a nation."); Kar, *supra* note 36, at 764–65 (discussing how freedom of contract helps individuals achieve their best lives).

38. Freedom of contract is a constitutionally protected liberty right. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) (quoting Myer v. Nebraska, 262 U.S. 390, 399 (1923)). For an exploration of the Supreme Court's early conception of "liberty of contract," see Bruce W. Dearstyne, *The Lochner Case: New Yorkers in Conflict How Old Rulings on Bakers' Hours Still Influence Today's High Court Votes, Including Obamacare*, 89 N.Y. STATE BAR J. 26, 26 (2017). *See also* DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 78 (2003) (framing the value of contract law as a vehicle for personal autonomy).

39. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3, 9, 48 (7th ed. 2007) (explaining that rational self-interest and voluntary contracting is why transactions are efficient); Howard C. Ellis, *Employment-at-Will and Contract Principles: The Paradigm of Pennsylvania*, 96 DICK. L. REV. 595, 596–97 (1992) (explaining that voluntary contracting promotes efficiency).

enforceability framework for wealth-enhancing and choice-enhancing private orderings.[40]

Section A of this Part I delves deeper into the efficiency theory justifying contract enforcement and considers to what extent this theory is still viable in the context of vertical contract relationships. Section B turns to contract law's autonomy theories and considers whether some version of such theories can be used to justify enforcing non-negotiated boilerplate terms. Section C discusses pragmatic justifications for contract enforcement and questions whether contract law's role in facilitating markets adequately justifies treating company boilerplate in consumer transactions as the parties' contract content.

A. I, Contract (Efficiency Theory)

The efficient operation of the free market's "invisible hand" requires legal enforcement of freely chosen contract terms.[41] When parties engage in voluntary exchanges of value, the resulting transaction theoretically promotes each party's rational self-interest and thus creates net economic gains: a so-called "win-win."[42] Knowing consent to freely chosen contract terms ensures that private ordering will create—or at least that the parties predict that it will create—mutual benefits.[43] When freedom to contract is combined with competitive free markets for goods and services, individual pursuit of rational self-interest should not only generate wealth-enhancing transactions, but should also solve informational deficit problems inherent in planned economies.[44]

For example, consider the now paradigmatic case of pencil production articulated in Leonard E. Read's famous 1928 article, *I, Pencil*.[45] Read

---

40. Contract enforceability is a key public policy. *See, e.g.*, Venegas v. Mitchell, 495 U.S. 82, 87 (1990) (requiring, and not finding in the instant case, specific direction by Congress in order to limit freedom of contract); Chambers Dev. Co. v. Passaic Cnty. Utils. Auth., 62 F.3d 582, 589 (3d Cir. 1995) ("The sanctity of a contract is a fundamental concept of our entire legal structure. Freedom of contract includes the freedom to make a bad bargain."); City & Cnty. Denver v. Dist. Ct. Denver, 939 P.2d 1353, 1361 (Colo. 1997) ("The right of parties to contract freely is well developed in our jurisprudence."); DeVetter v. Principal Mutual Life Ins., 516 N.W.2d 792, 794 (Iowa 1994) (calling freedom to contract a "weighty societal interest"); Weber v. Tillman, 913 P.2d 84, 86 (Kan. 1996) ("The paramount public policy is that freedom to contract is not to be interfered with lightly.").

41. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 34–35 (R.H. Campbell & A.S. Skinner, eds., 1976); FREDERICH A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 91–92, 96–105 (1967).

42. *See* POSNER, *supra* note 39, at 49; LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 10, 22–23 (1965).

43. "The possibility of co-ordination through voluntary co-operation rests on the elementary—yet frequently denied—proposition that both parties to an economic transaction benefit from it, *provided the transaction is bi-laterally voluntary and informed.*" MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962). A net wealth improving transaction is not necessarily mutually beneficial to both parties, however. *Id.* at 166.

44. *See* SMITH, *supra* note 41; HAYEK, *supra* note 41, at 91–92, 96–105.

45. Leonard E. Read, *I, Pencil,* THE FREEMAN, Dec. 1958, at 1, 4, *reprinted in* FOUND. FOR ECON. EDUC. (2016) (using a case study to compellingly explain Frederich A. Hayek's famous point from his Article, Frederich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520–21 (1945), that the debate between centrally planned and decentralized economies "is a dispute as to

explains that millions of people combine their efforts to make a single pencil by engaging in exchanges of goods and services, not because of government mandate, but simply in pursuit of their various self-interests.[46] There is no central planner or mastermind behind production of a pencil, explains Read, because there cannot be, nor need there be someone to coordinate this massive collaborative effort.[47] Each of the millions of people involved in pencil production, directly or indirectly, can "exchange his tiny know-how for the goods and services he needs or wants," resulting in spontaneous combinations of human effort and ingenuity that ultimately result in the creation of some value (in this case, a pencil).[48] Voluntary cooperation through contract is thus essential to the foundations of our economy, and it should be fostered, not constrained.

Negotiated contract terms theoretically represent value-enhancing private orderings, but some private contracts that increase aggregate wealth may not optimally allocate economic gains.[49] First, a transaction governed by terms controlled exclusively by one party may make the other party worse off, even if the transaction creates an aggregate positive economic effect; not all contracts are pareto optimal.[50] Contracts both create and allocate wealth, and allocation matters. Legal fees, lengthy negotiations, and contract language changes are costly, and increased transaction

---

whether planning is to be done centrally, by one authority for the whole economic system, or is to be divided among many individuals.").

46. Read, *supra* note 45, at 7–8.

47. *Id.* at 8.

48. *Id.* Read ends his essay with a plea to freedom:

> Leave all creative energies uninhibited. Merely organize society to act in harmony with this lesson. Let society's legal apparatus remove all obstacles the best it can. Permit these creative know-hows freely to flow. Have faith that free men and women will respond to the Invisible Hand. This faith will be confirmed. I, Pencil, seemingly simple though I am, offer the miracle of my creation as testimony that this is a practical faith, as practical as the sun, the rain, a cedar tree, the good earth.

Id. at 10.

49. Efficiency theory assumes and justifies wealth-creating contracts among counterparties, but note that in some cases, negative externalities can mean that societal costs from a private transaction exceed private benefits. *See* Thomas Helbling, *Externalities: Prices Do Not Capture All Costs*, INT'L MONETARY FUND, https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Externalities (last visited Dec. 11, 2023). In such cases, public policy should constrain contract enforceability in the name of the public good. Refusal to enforce anti-competitive contracts is an example of this sort of external cost of contract.

50. In the context of unilaterally drafted contracts, only the drafting party need experience or expect any economic benefit in order to incentivize contract formation. *Cf.* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake*,*"* 52 U. CHI. L. REV. 903, 920–22, 925–27 (1985) (discussing the benefits in unilaterally drafted employment contracts). Even if a contract imposes a loss on one party, if the other party's benefit more than offsets that cost, the contract is still, technically, efficient. *Id.* Most contract efficiency theorists opine that even Kaldor-Hicks efficiency provides a justification for contract enforcement, because if the aggregate benefits from a contract outweigh its costs, society is better off with enforcement than without. POSNER, *supra* note 39, at 49. Criticisms include Ronald Dworkin, *Is Wealth a Value*, *in* A MATTER OF PRINCIPLE 191–226 (1985). Allocation is not seen as relevant to Kaldor-Hicks efficiency because if an outcome is Kaldor-Hicks efficient, those that are made better off could in principle compensate those that are made worse off and create a win-win. *See* Richard Craswell, *Efficiency and Rational Bargaining in Contractual Settings*, 15 HARV. J. L. & PUB. POL'Y 805, 809 (1992). The problem with the analysis is that although this sort of compensation could create a mutually beneficial outcome, it need not occur.

costs eat into the aggregate wealth generated by win-win transactions.[51] Nevertheless, commercial parties choose to incur such additional transaction costs to maximize their allocative gains.[52] In contrast, increased transactional costs in the context of immutable standard terms are often wasteful.[53] Efficiency theorists balk at calls to raise the formality thresholds required for a consumer's manifestation of assent because having the consumer initial each page of a document, scroll through multiple pages of text, navigate a cautionary pop-up window, sign or e-sign their name, or even click another button, makes transacting relatively more costly for all parties—without changing the contract's ultimate content in any respect.[54]

Increasing the threshold of formality required to form a contract might increase the likelihood that consumers know to what terms and conditions they are bound when they do business with a company, but if their increased awareness of terms does nothing to impact the content of the contract, then the increased contracting costs will necessarily outweigh the consumer's benefits.[55] On the other hand, although a legal system that holds consumers legally bound to never-read (and barely discoverable) terms and conditions based on their failure to object does avoid wasteful transaction costs, but also undercuts the presumption that the exchange is voluntary and, thus, a win-win.[56] It is true that low-barrier contract formation keeps transaction costs low, and that higher transaction costs may do nothing to change outcomes if non-negotiable boilerplate governs the relationship.[57] But lower costs do not prove systemic legitimacy.[58]

---

51. Formalities in contracts do serve important roles, however, including marking enforceable provisions for easy sorting, providing cheaper and more compelling evidence of contract formation and terms, and cautioning counterparties that they are undertaking legal obligation. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941).

52. Transactional attorneys are *ex ante* costs in transactions, and parties who hire them to be involved at the contract negotiation stage are wagering that these *ex ante* costs outweigh the *ex post* costs of having a less optimal set of terms and conditions governing the parties' deal. *See* CFI Team, *Ex-Ante vs Ex-Post: Know the Differences Between the Two Terms*, CFI (May 30, 2023), https://corporatefinanceinstitute.com/resources/equities/ex-ante-vs-ex-post/ (describing the difference between ex-ante and ex-post costs).

53. Only improved outcomes justify increased transactional costs. BEN-SHAHAR & SCHNEIDER, *supra* note 18, at 79. There is no benefit justifying transactional costs if the ultimate terms and conditions remain the same whether or not those costs are incurred. *Id.* If the time it takes to read and understand terms, the effort it takes to affirmatively manifest assent, and the cost of getting legal advice creates no corresponding wealth allocation benefit, these transaction costs create a net economic loss. *Id.*

54. *See* Francis M. Buono & Jonathan A. Friedman, *Maximizing the Enforceability of Click-Wrap Agreements*, 4 J. TECH. L. & POL'Y 3, 2 (1999).

55. Market theory posits that increased awareness of terms improves contracting boilerplate because some consumers will read terms and conditions and factor the content of those terms in when deciding with whom to engage in the marketplace. *See infra* Section I.C. Similarly, it is wasteful to mandate pages of disclosure that no one will read and that have zero impact on counterparty behavior. BEN-SHAHAR & SCHNEIDER, *supra* note 18, 3–13.

56. RADIN, *supra* note 3, at 30.

57. *Cf.* Bill Mooz & Paula Doyle, *The Cost of Contract Complexity*, LEGAL EVOLUTION (Mar. 28, 2021) https://www.legalevolution.org/2021/03/the-cost-of-contract-complexity-228/ (stating that business-to-consumer transaction costs are practically zero when occurring in an app store).

58. RADIN, *supra* note 3.

Ironically, higher formality requirements may, in fact, benefit the drafting company more than consumer counterparties. Courts are more likely to enforce boilerplate terms if consumers perform some act that affirmatively indicates awareness of terms that could have been accessed and reviewed prior to contract formation.[59] Hidden or inaccessible terms are vulnerable to judicial policing and exclusion, and contractual uncertainty dampens transactional profitability.[60] Uncertainty regarding the rules of a relationship undermines parties' ability to cooperate, decreasing both economic gains and societal stability.[61] If parties perceive that their contracts may not be enforceable, it becomes costlier and riskier to rely on terms of the agreement, inhibiting contract law's cooperative efficacy.[62] In consumer transactions, offsetting gains from the costs of increased contractual formality accrue only to the drafting party who benefits from the terms and conditions being more reliably binding. In other words, contractual formality may be cost-effective for a company to the extent that it increases the company's ability to control and rely on the terms of their consumer relationships, but it does little to ensure that the parties' contract includes consumer-side inputs.[63]

Although economic theory justifies public enforcement of mutually crafted private orderings, efficiency fails to explain why the terms of non-negotiable consumer contracts should be presumptively enforceable.[64] Non-negotiable standard terms may or may not reflect economic win-wins, regardless of whether consumers freely chose the transactional relationship.[65] When consumers have no ability to shape the content of their contracts, the only result of higher thresholds of assent is higher transaction costs. The company passes such increased transaction costs onto consumers while capturing gains from enhanced presumptive enforceability of its dictated terms. Just because it is inefficient to raise formality thresholds, however, does not make it efficient to enforce adhesive contract terms. In fact, if only one party controls the contract's content, the resulting terms may not only unfairly allocate transactional wealth gains but also impose a loss on the weaker party and destroy, rather than create, net wealth. The potential inefficiency derives from the consumer's inability to shape the content of the contract, not from formation informality or even party ignorance of terms. The difference between an informed but

59. Fuller, *supra* note 51, at 800–01 (explaining the functions of formality: certainty, evidentiary, cautionary). It may be efficient to have formalities in order to increase certainty and caution, but only if both counterparties have some input into the contract's content.

60. Leff, *supra* note 16, at 496, 546.

61. MAINE, *supra* note 33.

62. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 249 (1979).

63. Also note how disclosure has been used as a risk management tool for companies, increasing company benefits, not consumer ones. *See* Noshin Khan, *The Role of Disclosures in Risk Assessment and Mitigation*, ONETRUST (Nov. 17, 2022), https://www.onetrust.com/blog/role-of-disclosures-in-risk-assessment-and-mitigation/#:~:text=employee%20buy%2Din.-,Using%20disclosures%20to%20manage%20risk,risk%20before%20it%20becomes%20misconduct.

64. Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 584–89 (2005).

65. *Id.* at 594–95, 607.

impotent consumer counterparty and a wholly ignorant one may simply be that the informed consumer knows how much they dislike the terms and conditions to which they are bound.

B. My Contract, My Choice (Autonomy Theory)

For autonomy theorists, whether a contract objectively increases individual or aggregate wealth is beside the point; the fact that both parties to a contract knowingly and voluntarily chose to be bound by its terms is *sine qua non* justification for enforceability.[66] Efficiency is a consequentialist theory focused on outcomes that a contract creates.[67] For efficiency theorists, wealth-destroying contracts should not be enforced.[68] Autonomy, on the other hand, is a deontological theory grounding enforcement justification in the moral imperative to promote freedom of choice.[69] In order for contracts to promote liberty and empowerment, individuals should only be bound to those obligations that they have voluntarily selected.[70] Allowing persons to self-legislate through freely chosen private ordering enables them to more fully recognize their own choices and

66. Autonomy theories go by many names, including Will Theory, Empowerment Theory, Contract as Promise, and Choice Theory. For some examples of these, see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 115 (2000) ("The will theory of contract liability states that all the rules of law that compose the law of contracts can be developed from the single proposition that the law of contract protects the wills of the contracting parties."); Cohen, *supra* note 36, at 554–58, 575–78 (1933) (discussing an earlier version of the will theory); Kar, *supra* note 36, at 761 (espousing and explaining his Empowerment Theory); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 7–21 (2d ed. 2015) (articulating his Contract as Promise theory); Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719, 720–25 (2012) (considering developments in contract law and "Contract as Promise" theory over thirty years); HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS, xii, 1–2, 4, 5, 14 (2017) (explaining their "Choice Theory" which grounds autonomy in selection among options rather than authorship of or ability to bargain with respect to terms).

67. Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 246 (2014).

68. Richard A. Posner, *Some Uses and Abuses of Economics in Law*, U. CHI. L. REV. 281, 291 (1979).

69. For proponents of deontological ethics, like Immanuel Kant, preserving individuals' value as human beings with free agency is society's paramount directive, and individuals should be seen "never merely as means but always at the same time as an end." IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 39 (James W. Ellington, trans., Hackett 3d ed. 1993).

70. Contract law presents an interesting autonomy paradox, preferring the choice to enter into a legal obligation to the choice to exit the obligation. Indeed, the empowerment of a party at contract formation comes at a cost of that same party's freedom thereafter. *See* James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 50 n.212 (explaining this concept in terms of Ulysses tying himself to his ship's mast, deliberately robbing his future self of the freedom to react to the sirens' song). This temporal autonomy paradox suggests that a party's liberty to self-legislate perhaps should come with limits. Some of these limits are inherent into the American approach to contract damages that prefers awarding monetary expectation damages to ordering specific performance. Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEGAL STUDIES 29, 29–30 (2015). The presumption in favor of damages over specific performance is reversed in European contract law, theoretically, but even in European contract law, practical considerations make courts more hesitant when it comes to ordering breaching parties to perform. JOHN A. SPAGNOLE, JR., MICHAEL P. MALLOY, LOUIS F. DEL DUCA, KEITH A. ROWLEY, & ANDREA K. BJORKLUND, GLOBAL ISSUES IN CONTRACT LAW, 140–41 (2007).

values.[71] If there is no free choice, however, enforcing terms and conditions would be an unjustified impairment of individual freedom.[72]

Contract law scholars espouse differing theories extoling the value of autonomy, but generally agree that enforcing contract terms that do not represent deliberate, voluntary choices would run counter to the very essence and purpose of contract law. Charles Fried, for example, conceptualized the contract as centered on a promise, and emphasized that enforcement of contracts is a moral mandate because it allows parties to deliberately form relationships and pursue their individual goals.[73] Hanoch Dagan and Michael Heller, on the other hand, argue in their "Choice Theory" that having a wide menu of contracting options from which parties can freely choose enhances individual autonomy even if counterparties cannot customize terms in a given standard form.[74] Dagan and Heller suggest that as long as a consumer makes a deliberate choice to enter into a particular relationship in a market context where there are multiple, variable relationship options, that choice justifies standard form enforceability, notwithstanding the consumer's lack of ability to impact the terms of their particular contract.[75] Per this framing, only when there is a monopoly or when all company counterparties use virtually identical standard terms would a consumer's choice be impaired to an extent requiring the state to step in and create "meaningful choice" for consumers.[76]

Autonomy theory fits modern contract law a bit uncomfortably because legal assent turns on an objective manifestation, not on subjective intention, and there very well could be a disconnect between indicia of

---

71. *See* Kar, *supra* note 36, at 759 (calling contract law "a mechanism of empowerment" because it gives people the means to influence others to meet their individual "needs and interests," and also empowers people by reflecting "a moral ideal of equal respect for persons").

72. Omri Ben-Shahar, *Freedom From Contract*, 2004 WIS. L. REV. 261, 267. Autonomy theorists hold that there is not a normative mandate to enforce contracts that are only empowering for one party (are not "equally empowering"). Kar, *supra* note 36, at 772, 773 n.36. "To produce genuine legal obligations for all, contract law must therefore be equally empowering, unless deviations from this ideal are ones that no one could reasonably reject in light of the available alternatives." *Id.* at 773. Kar cites to JOHN RAWLS, A THEORY OF JUSTICE (Belknap 1971) at 152–57, for the proposition that certain contractual empowerment inequalities may be justifiable as long as the unequal empowerment works to the advantage of the least well off.

73. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 8 (1981).

74. DAGAN & HELLER, *supra* note 66, at 3. Dagan and Heller reject Kant's conception of freedom as independence. *Id.* at 1. They ground their theory in H.L.A. Hart and Rawls, focusing on ability to choose and shape one's associations. *Id.*

75. *Id.* at 3.

76. *Id.* at 4. Dagan and Heller do not argue that consumers themselves should be provided with the opportunity to author contracts or have input into the contracts they are bound by, but they do suggest that the state act somewhat as a proxy for individuals in providing a multiplicity of contract options and making them available for contracting parties. *Id.* at 6, 14. The author's empirical study of 100 companies' online terms and conditions used for contracting with consumers (the T&C Study) finds that company boilerplate that deletes default legal rights of consumers is very pervasive. Boyack, *supra* note 20, at 26. The ubiquity of such provisions in consumer contracts suggests a lack of market choice which would render Dagan & Heller's hypothesis applicable to modern consumer contracting realities.

assent and true, subjective desire to be bound.[77] In recent decades, objective manifestation of assent has devolved from an inquiry regarding subjective intentions of a similarly situated reasonable person to a rather ritualistic analysis focused on indicia of intent to enter into a transaction with the counterparty, ignoring whether that indicia of intent also shows an election of the counterparty's standard terms.[78] Courts have found consumer choice to be bound to a company's terms based on visiting a website,[79] failing to return a shipped good,[80] or simply not terminating an existing relationship.[81] In other words, courts do not ask whether a reasonable person taking (or not taking) a specified action would really have intended to manifest assent to a company's boilerplate, but instead limits its inquiry to whether a reasonable person behaving similarly would have intended to form (or remain in) the transactional relationship[82]—which is not the same thing.

Assessing how well autonomy theory justifies enforcement of non-negotiable contracts requires examining the distinction between consent to do business with a counterparty and assent to be governed by a particular set of standard terms. To *consent* is to grant permission for something to occur, and to *assent* is to agree with an opinion or statement.[83] In a situation where two parties knowingly, deliberately, and voluntarily form a relationship governed by mutually crafted terms, there is typically both consent to the transaction as well as assent to content of the contract. Although most consumer contract relationships today involve consent to a transactional relationship, few involve a consumer's true assent to a company's proffered terms—even if that assent is judged from an objective, reasonable person perspective.[84] Conflating transactional consent and assent to adhesive terms ignores this critical distinction. Bundling consent to doing business and assent to specific terms means that,

---

77. "[T]he law of contracts is concerned with the parties' objective intent, rather than their hidden, secret or subjective intent." 1 Williston on Contracts § 3:7 (4th ed.).

78. *See generally* RADIN, *supra* note 3.

79. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002). *But see* Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 858 (9th Cir. 2022) (holding that hyperlinked terms containing a mandatory arbitration clause were not binding on a consumer based on clicking a button marked "continue").

80. *E.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996). This famous case has been widely criticized and some courts have refused to follow the approach taken by Judge Easterbrook. Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000); Roger C. Bern, *"Terms Later" Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J. L. & POL'Y 641, 641–42 (2004).

81. Stiles v. Home Cable Concepts, 994 F. Supp. 1410, 1414 (M.D. Ala. 1998); *see* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 666 (2010) (discussing widespread judicial and legislative acceptance of deemed consumer assent to company modifications).

82. *See Specht*, 306 F.3d at 35; *ProCD, Inc.*, 86 F.3d at 1452; *Stiles*, 994 F. Supp. at 1414.

83. The Oxford English Dictionary defines "assent" as "[t]o . . . express one's agreement," *Assent*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/assent_v?tab=meaning_and_use#37191179, (last visited Dec. 11, 2023), and defined "consent" as "to give permission that the specified thing be done." *Consent*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/consent_v?tab=meaning_and_use#8580915 (last visited Dec. 11, 2023).

84. BEN-SHAHAR & SCHNEIDER, *supra* note 18, at 10.

even though consumers may exercise some market choice with respect to whether they form a relationship, they have no real choice with respect to the content of that company's terms—particularly when companies use similar (or identical) boilerplate.[85] Another distinction between the concepts of *assent* and *consent* pertains to active versus passive behaviors. *Assent* typically involves an act of affirmation indicating agreement, while *consent* can occur in some contexts by mere acquiescence to a state of affairs, i.e., from failure to object.[86]

Despite giving lip service to party choice and individual contractual "freedom," consumer contract law today deems a consumer's consent to a contractual relationship as a satisfactory equivalent to the consumer's election of particular terms. Where one party's terms are non-negotiable and yet are treated as the baseline for the parties' contract, the other party's consent to the transaction simultaneously involves acquiescence to the drafting party's governing power. Today's law of consumer contracts typically enforces company boilerplate based on the consumer's mere acquiescence, and acquiescence does not reflect individual empowerment and autonomy.[87] To the contrary, acquiescence is "passive acceptance or submission" and implies a lack of choice.[88] The deontological primacy of free agents with free will provides no justification for enforcing terms to which an individual has acquiesced but not assented. Synonyms of "acquiescence" underscore the difference between *acquiescence* and the autonomy theory's ideal of *assent*. Acquiescence reflects "biddability, compliance, compliancy, deference, docility, obedience, submissiveness."[89] Non-negotiable terms that are imposed by a stronger party and to which consumers simply acquiesce are not tools of autonomy.[90]

C. Contract for Contract's Sake (Pragmatism)

Not all contract theories fall neatly under the rubrics of efficiency and autonomy; some scholars have argued that the true reason we enforce contracts in society is less idealistic and more pragmatic. To philosopher

---

85. *Id.* at 36.

86. Informed consent, rather than assent, is typically the basis for lawful medical treatment or being part of a research study. *E.g.*, Marc Tunzi, David J. Satin, & Philip G. Day, *The Consent Continuum: A New Model of Consent, Assent, and Nondissent for Primary Care*, 51 HASTINGS CTR. REP. 33, 33 (2021). Note that the language of assent is more often used in formation of contracts and the language of consent is more likely used in context of permission to provide a medical treatment or, in contract law, consent to a unilateral a modification.

87. A similar point is made by Peter Linzer in calling such a standardized contract form a "bullying device" and pointing out that "'consent' to a bully is no consent at all." Peter Linzer, *Implied, Inferred, and Imposed: Default Rules and Adhesion Contracts - the Need for Radical Surgery*, 28 PACE L. REV. 195, 204 (2008).

88. *Acquiescence*, Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/acquiescence (last visited Dec. 11, 2023).

89. Synonyms listed in the Merriam-Webster definition of "acquiescence." *Id.*

90. As Nancy Kim puts it, "the objective of contract law is to promote individual autonomy. A contract is a tool of autonomy. It allows parties to allocate their rights (to property) in a way that they think best." Nancy Kim, *The Proposed Restatement of the Law of Consumer Contracts and the Struggle Over the Soul Of Contract Law*, JURIST, (June 2, 2019, 12:09 PM), https://www.jurist.org/commentary/2019/06/nancy-kim-contracts-restatement/.

David Hume and theorists who adopt his view of contracts, the primary virtue of enforcing private agreements is not to grow wealth or empower autonomy, but rather to enable cooperative exchange.[91] Facilitating cooperative interactions promotes societal stability, whether or not such exchanges result in economic gains or even represent free choice.[92] To the pragmatist, autonomy and efficiency are merely side benefits of contract enforcement, and the primary reason contracts are enforceable is that society wants them to be.[93]

Hume's view of contract enforceability as convenience continues to influence contract theory today; for example, recent work by Nathan Oman lays out a market justification for enforcing consumer contracts.[94] Oman suggests that even in the absence of knowing and voluntary assent, and even if the transaction is not an economic win-win, contract enforcement benefits society because having enforceable contract terms facilitates robust, well-functioning markets.[95] For Oman, well-functioning markets are broadly beneficial public goods, supporting not only wealth-building but also individual freedoms, diversity, and tolerance that enable a pluralistic society to survive.[96] Oman explains that contract enforcement is justified for its own sake because enforcement solves "problems of social organization in markets."[97]

Oman admits that there could be other ways to facilitate market cooperation in lieu of enforcing company standard terms.[98] For example, the rules of market cooperation could be clarified by defining party rights, obligations, and cooperative frameworks with reference to status-based defaults rather than by privately authored terms.[99] But Oman argues that the traditional contract law baseline is the best way to organize markets and facilitate cooperation because private contracts are dynamic and enforcing company boilerplate fosters rapid, positive evolution of cooperative frameworks.[100] According to Oman, because there are many company counterparties competing in the marketplace, allowing each to creatively craft private ordering rules will result in greater consumer choice among a

---

91. *See* Daniel Markovits & Atiq Emad, *Philosophy of Contract Law*, The Stanford Encyclopedia of Philosophy (Nov. 23, 2021), https://plato.stanford.edu/archives/win2021/entries/contract-law/.

92. *See id.*

93. *See id.*

94. Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOKLYN L. REV. 215, 217 (2017).

95. *Id.*

96. "Contract law is the quintessential institution of a market economy." Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 185 (2012). Oman praises the virtues of healthy markets, theorizing that markets support autonomy and personal utility maximization for individuals, and also support democracy, pluralism, and economic growth at the macro level. *Id.*

97. Oman, *supra* note 94, at 217.

98. *Id.* at 233.

99. *Id.*

100. *Id.*

greater variety of standard forms.[101] Consumers can select from these variable governance regimes by choosing which companies to do business with, and consumer choice then drives natural selection in the marketplace that, over time, weeds out abusive terms and rewards standard forms that best reflect consumer preferences.[102]

For Oman and other market pragmatists, contract rules that identify a basis for enforcing articulated terms are valuable primarily because they clearly establish which rules apply.[103] Under this framing, indicia of assent are useful because they facilitate predictable line drawing, not because they indicate consumers' actual knowing and voluntary choice.[104] For pragmatists, the value of a contract derives from the reliability of its enforcement.[105] Viewed primarily as a tool for clarifying the rules of engagement (not primarily as a mechanism to achieve wealth gains or personal freedom), the lack of consumer assent to particular terms is far less theoretically troubling. After all, consent to a set of rules in such an analytical framework is a signaling device, not a gatekeeping one.[106]

II. RELATIONSHIP CONTOURS AND POWER TO SHAPE CONTRACT TERMS

When contractual rights and obligations rose to prominence in Anglo-American jurisprudence, they were premised on deliberate, voluntary commitments of the parties contrasted with other legal rights and obligations that automatically attached to people because of their status and role in society.[107] Against this backdrop, freedom of contract was a pro-liberty, pro-commerce legal development.[108] Enforcing private contracts enabled economic growth and democratization.[109] Contracts have evolved and proliferated over the past centuries, and today govern a wide variety of bilateral and multilateral relationships, including joint ventures, business mergers or acquisitions, extensions of credit, employment contracts, settlement agreements, waivers and indemnities, licenses, purchase agreements, leases, and even surrogacy and domestic partnership arrangements.[110] Each of these contracts can be custom-tailored by counterparties to fit their

101. *Id.* at 248.

102. *Id.* at 246.

103. Oman even suggests that an arbitrary choice of law rule would be similarly effective in performing this function, such as having the terms authored by whichever party's name comes first in the alphabet. *Id.* at 233.

104. *Id.*

105. Markovits, *supra* note 91.

106. The gatekeeping function, for pragmatists, occurs not in the law but in the marketplace, as consumers choose which terms they prefer from various possible company counterparties, providing companies the market incentive to include terms that reflect consumer preferences in order to gain a market advantage.

107. ATIYAH, *supra* note 62, at 41.

108. *Id.* at 301. Economic theory posits that optimal efficiency results when individuals may contract freely, and judicial protection of the future expectations created by contracts increases societal wealth. FRIEDMAN, *supra* note 41, at 10, 22–23.

109. DE SOTO, *supra* note 37, at 119–20.

110. *See id.*

particular relationship and mutual transactional goals.[111] The same contract law baseline applies to contracts of every size and shape, and the same contract theory grounded in mutual assent justifies contract doctrine in every context.[112]

Increasingly, consumer activities are governed by detailed, standardized, non-negotiable terms and conditions that are crafted by a commercial party and imposed on a consumer.[113] These terms and conditions are deemed the substance of the parties' agreement and are usually treated as binding on consumers notwithstanding their lack of input with respect to those terms.[114] The distinctive feature of consumer contract relationships is the unfettered ability of drafting parties to mandate the rules governing those relationships.[115] On the other hand, the idealized contract relationship is a horizontal one—the embodiment of the phrase "arms-length" or the proverbial handshake. In a horizontal relationship, each party has the power to shape the contract terms.[116] Most modern consumer relationships are best viewed as vertical hierarchies in which the subordinate party lacks any ability to influence or shape the rules governing the interaction.[117] In a vertical relationship, governing terms are imposed upon the weaker party not based on their choices but based on their status as a consumer. Applying basic tenets and values of contract law suggests that the distinctively vertical shape of consumer relationships require a different legal approach to defining the contract content. In the context of a vertical relationship,

111. Just because contract terms *can* be tailored to fit a particular transaction does not, of course, mean that they are: witness the many sovereign debt transactions that include indecipherable boilerplate. Thoughtless contract crafting creates suboptimal client outcomes, but methods of contract formation, even among the most powerful and sophisticated clients and firms, can perpetuate suboptimal boilerplate in precedent documents and standard forms. This problem, that of "sticky boilerplate," has been discussed at length by Robert Scott and Mitu Gulati. *See generally* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2012).

112. *See, e.g.*, *Adhesion Contract (Contract of Adhesion)*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE (Dec. 2021), https://www.law.cornell.edu/wex/adhesion_contract (contract_of_adhesion).

113. Boilerplate has been the centerpiece of consumer contracts for over a century. *Id.* Recently, however, even standardized terms play an even larger role in governing consumers' lives, in part because of the ease of imposing lengthy, detailed terms and conditions on consumers and in part because consumers are increasingly relying on licensing rather than acquisition in order to access goods and services they wish to use and enjoy. *See infra* Section II.C.

114. Radin calls the application of the traditional common law presumption of enforceability in the consumer contract context evidence of the "devolution or decay of the concept of voluntariness." RADIN, *supra* note 3, at 82. Radin explains that throughout the process, "[a]greement gets reduced to consent, then further reduced to assent. Next assent becomes 'blanket assent' to unknown terms, provided they are what a consumer—an abstract general construct of a 'consumer'—might have expected." *Id.* What Radin calls "assent," I believe, is better termed acquiescence. *See supra* notes 78–82 and accompanying text. It is impossible to "assent" to unknown terms, but possible—and frankly quite common—for consumers to acquiesce to terms without knowing what they are.

115. *See Adhesion Contract*, *supra* note 112.

116. Of course, parties typically have different amounts of negotiating leverage, but there is some autonomy retained by both contracting parties in a horizontal relationship.

117. *See* William R. Vance, *The Quest for Tenure in the United States*, 33 YALE L.J. 248, 264 (1924) (discussing the lengthy efforts in American legal development to escape vestiges of feudalism). Modern landlord–tenant law remains a contract-like relationship that is in reality the embodiment of the vestigial feudal hierarchy status in our legal system. John V. Orth, *Leases: Like Any Other Contract?*, 12 GREEN BAG 2d 53 (2008).

the law must separately consider the choice to form a relationship and the choice to be bound by certain governing rules.

A. Party Input in Horizontal Contract Relationships

In many contracting contexts, each party has some power to shape the terms that govern the relationship, and, in theory, it is individual tailoring and choice of terms that makes private ordering efficient, liberating, and effective.[118] Complex one-off commercial and interpersonal transactions can involve highly negotiated cooperation, and the resulting bespoke terms reflect all parties' input.[119] Even when parties do not specifically negotiate the parameters of their contract's content, the law prioritizes and facilitates both parties' input.[120] For example, in commercial transactions involving sales of goods that arise from an exchange of both parties' standard forms, commercial law ensures that the resulting terms and conditions reflect an amalgam of both parties' forms and various statutory defaults designed to approximate party preferences.[121] In a context devoid of true negotiation, commercial law creates a pathway for mutual input rather than treating one party's form as both parties' agreement.[122] When parties are in a horizontal relationship, the law ensures that each party can help shape the relationship's governing rules.

Current contract law is a good fit for horizontal relationships.[123] Classic contract formation and the content of contract terms both turn on questions of mutual assent, based on the offer–acceptance model.[124] The offeror presents a set of terms with its commitment to be bound to those terms if and only if the offeree also agrees to be bound by the same terms.[125] Acceptance comes when the offeree objectively manifests assent to these same terms, without indicating a desire to vary them.[126] At common law, indicating a desire to enter into a contract relationship with the offeror while simultaneously changing the proposed contract terms is not considered assent to the relationship at all; it is considered a rejection and a

---

118. *See supra* Part I.A–C.

119. Doctrines of offer, counteroffer, and acceptance ensure that both parties to a contract have the opportunity to adjust and assent to the governing terms. *See* U.C.C. § 2-207.

120. *See* U.C.C. § 2-207.

121. *Id.*

122. *See* U.C.C. § 2-207.

123. In a breach of contract action, the plaintiff bears the burden of proving formation has occurred, but once a contract is proven to have been formed, enforcement of its terms is presumed, absent the defendant claiming some grounds of unenforceability, avoidance, or excuse. 17B C.J.S. Contracts § 953, *Proof of Breach of Contract Subject to Action and Resulting Damages* (Aug. 2023 Update); 1 Williston on Contracts § 3:2, *Requirements for Informal Contracts* (4th ed. May 2023 Update).

124. The classic 1L law school course on contracts frames the question of mutual assent as one of offer and acceptance, and restatements and opinions have often followed this model. *See, e.g.*, CHARLES A. KNAPP, NATHAN M. CRYSTAL, & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (8th ed. 2016); MIRIAM A. CHERRY, CONTRACTS A REAL WORLD CASEBOOK (2d ed. 2021).

125. *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 (2013) (defining "offer").

126. *See id.* at §§ 22, 50.

counteroffer.[127] The common law baseline for contract formation assumes that consent to being in a relationship with the counterparty occurs simultaneously with both parties' agreement regarding the specific terms and conditions that will govern that relationship.[128] The common law approach therefore assumes that when both parties assent to form a cooperative economic relationship, they simultaneously agree upon the private rules for their interaction.[129] Parties with power to define the rules of their relationship can mutually agree to vary otherwise applicable legal default rules.[130] Because classic contract law conflates choice to form a relationship and choice of terms, it treats commencement of a transaction as implicit acceptance of the last set of terms proposed as the governing law for the transaction.[131] This "last shot" result achieves the goal of clarity and signals which set of terms apply. Because an offeree can always respond with a counteroffer, either party to a deal can be the author of the last shot terms.[132]

B. Prioritizing Party Input Over Boilerplate Terms

There are circumstances in which the offer–acceptance model breaks down, particularly in the context of commercial sales' "battle of the forms."[133] To protect both parties' ability to shape governing contract terms in such contexts, Article 2 of the Uniform Commercial Code (UCC) changed the common law "mirror image" and last shot rules for sales of goods transactions.[134] In doing so, the authors of Article 2 of the UCC (and fifty state legislatures) recognized that parties might intend to form a contractual relationship without having agreed upon the specific governing

127. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS, at 593–95 § 49(a) (5th ed. 2011) (explaining that under the common law, the terms on an acceptance must exactly match the offer to be effective); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 85 (6th ed. 2009) (stating that courts have enforced the mirror image rule rigorously).

128. *See, e.g.*, Paul Gottlieb & Co. v. Alps S. Corp., 985 So.2d 1 (Fla. Dist. Ct. App. 2007); Polytop Corp. v. Chipsco, Inc., 826 A.2d 945 (R.I. 2003).

129. Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25 (2014) ("Contract interpretation remains the most important source of commercial litigation."); STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 1 (2009) (issues of contract interpretation "probably are the most frequently litigated issues on the civil side of the judicial docket").

130. *See* U.C.C. § 2-207.

131. This approach is called the "last shot." 2 Williston on Contracts § 6:17, *Particular Issues Under U.C.C. § 2-207 When Response to Offer Contains Additional or Different Terms* (4th ed. 2023 Update).

132. Contract law scholars generally agree that the mirror image rule is satisfactory in situations where the parties "individually and carefully negotiated" their transactions, but that it proved "unrealistic" and tended to "frustrate the expectations of the parties" in cases involving the mere exchange of standard forms. Gregory M. Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency In a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RSRV. L. REV. 327, 329 (1983).

133. *See* U.C.C. § 2-207.

134. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 29–30 (3d ed. 1988). The mirror image has been called "problematic" and critiqued as leading to "unjust results." N. Stephan Kinsella, *Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana's Improvements*, 53 LA. L. REV. 1555, 1557 (1993).

terms.[135] UCC § 2-207(1) provides that, unless and until a party expressly indicates that it does not wish to enter into a contract until the other party affirmatively manifests further assent to that company's written terms, "[a] definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon. . . ."[136]

When it was crafted several decades ago, § 2-207 was a significant departure from the traditional formulation of offer and acceptance that treats consent to enter into a contract as synonymous with assent to a given set of contract terms.[137] The UCC deliberately uncoupled these concepts, however, recognizing that in some contexts, consent to a contractual relationship might not indicate assent to a particular set of standard form terms.[138] Per § 2-207(1), a party can manifest intent to buy or sell goods from another party without both parties reaching an agreement regarding which specific terms will apply to the transaction, in which case, §§ 2-207(2) and (3) will attempt to define the transaction's governing rules.[139] Subsection 2 establishes a process for determining which "additional" terms contained in an acceptance are to be grafted into the terms of the offer and which are to be excluded, but the process described applies only to commercial contracts (one "between merchants").[140] Subsection 2 also neglects to mention whether and to what extent "different" terms would ever be included in the resulting contract terms, a drafting omission that has caused a great deal of confusion and inconsistency in its

135. Kinsella, *supra* note 134, at 1557. In Louisiana (the only state that has not adopted the UCC), the mirror image rule has been abandoned as well. 1993 La. Acts 841 §§ 1, 4 (1993). The complexities of UCC § 2-207(2) and (3) reflect the need to provide some statutory guidance with respect to what the content of a contract is when formation occurs without agreement as to an express writing. When acceptance occurs separate from mutual assent to written terms, the statute provides a method to determine what the resulting contract is. Kinsella, *supra* note 134, at 1557. The statutory solution to the question of contract content is far from perfect and has created new problems even as it arguably solved others. *See, e.g.*, Richard W. Duesberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms Under Uniform Commercial Code Section 2-207*, 34 BUS. LAW 1477, 1477–88 (1979).

136. U.C.C. § 2-207(1).

137. Francis J. Mootz, III, *After the Battle of the Forms*, 4 J. L. & POL'Y FOR THE INFO. SOC'Y 271, 276–77 (2008). *See supra* text accompanying note 90.

138. Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1220 (1982) ("[A] rule that purports to enforce one party's clause saying '[m]y terms govern or there is no deal' cannot resolve the many cases where both parties have such a clause and the deal has already gone through."). The proposed, revised Article 2 of the UCC made the distinction between formation and content even more explicit. James J. White, *Contracting Under Amended 2-207*, 2004 WISC. L. REV. 723, 723–51 (2004). But revised Article 2 was never adopted by any state.

139. *See* U.C.C. § 2-207. Note that although the UCC recognizes that there could be an agreement to cooperate without assent to governing terms, it suggests that this situation occurs only when parties exchange written contract forms rather than a situation where one form is presented, and the parties thereafter behave as though they have entered into a contract. In a consumer contract situation, it is far less likely that a consumer party will provide a form which would "battle" with the commercial party's terms and conditions. *See* U.C.C. § 2-207.

140. U.C.C. § 2-207(2).

application.[141] Subsection 3 articulates a "knock out" rule for situations where both parties engage in conduct "which recognizes the existence of a contract," but mutual assent to a particular set of terms is lacking, providing that "[i]n such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."[142]

The point here is that existing contract law in every state already anticipates the need to separately determine consent to a relationship and assent to terms in situations where practical realities—and reliance on non-negotiable standard terms and conditions—pose a barrier to multi-party inputs. UCC § 2-207 demonstrates the possibility and desirability of separately determining contract content in such situations.[143] For nearly a century, commercial law has facilitated multi-party inputs to bolster contractual legitimacy and fairness in situations involving unread and non-negotiated standard terms and conditions. [144]

The UCC example prioritizes preserving multi-party input pathways and recognizes that it is possible to derive the content of a contract from various sources (including statutory defaults) rather than exclusively from one party's boilerplate.[145] Under the section, the terms of the offer are deemed the parties' contract only to the extent that the acceptance does not materially alter them (assuming a contract among commercial parties).[146] Additional terms of an acceptance are included in the parties' contract to the extent that they create no material alteration and are not expressly rejected by the offeree.[147] In all cases, gaps in the resulting contractual amalgam are filled by statutory default rules.[148]

In the modern commercial context, the nature of the parties' relationship and transaction informs the contract content more than their respective boilerplate provisions.[149] Discerning the precise content of the parties'

---

141. *See* Baird & Weisberg, *supra* note 138, at 1224. Courts have taken variable approaches to the question of what happens to different terms in a contract that is formed pursuant to § 2-207(1). *See id*. Some courts apply the same rule as that articulated for "additional" terms in § 2-207(2) and test different terms to see if they are material alterations (which they often are). *See id.* Other courts choose to apply the approach articulated in § 2-207(3) for written confirmations or cooperative behavior after a series of explicit counteroffers. *See id.* This approach, called the "knock-out rule," includes terms that the parties have explicitly agreed to, excludes any terms to which they have not mutually assented, and fills out the contract with UCC statutory gap-filler provisions. *See id.*

142. U.C.C. § 2-207(3).

143. Article 2 was part of the original Uniform Commercial Code approved in 1951. *Uniform Commercial Code – Uniform Law Commission*, https://www.uniformlaws.org/acts/ucc.

144. Mootz, *supra* note 137; Baird & Weisberg, *supra* note 138, at 1240–44. Under the Uniform Commercial Code § 2-207 framing of formation, accepting the transaction while rejecting terms is deemed acceptance, and only if the offeree "reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the [offeree's] additional or different terms" will a response to an offer be deemed a counteroffer rather than acceptance. Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972).

145. *See* U.C.C. § 2-207.

146. Mootz, *supra* note 137, at 276–77.

147. *Id.* at 276.

148. *Id.* at 276–77.

149. *Id.* at 277 n.7.

contract is more complex when the contract represents an amalgam of these different inputs rather than one party's proffered terms.[150] But empowering both parties to shape the contract's content is the only way to ensure fair and efficient (and therefore, legitimate) contracting.[151] Under § 2-207, a contract's substance derives in part from both parties' terms and is supplemented by the gap-filler provisions of Article 2.[152] This method of discerning contract substance in commercial boilerplate transactions was a triumph of legal realism: it recognized that barriers to negotiation and transaction costs inhibit direct input in certain circumstances.[153] It was also an attempt to bolster contract legitimacy in a context in which the application of classic contract formation doctrines created systemic unfairness and enabled abuse.[154]

Although, on its face, UCC § 2-207(2)'s provision that "additional terms are to be construed as proposals for addition to the contract" applies to both consumer and commercial transactions, the UCC is silent with respect to how and when proposals in consumer transactions are deemed accepted, perhaps because it would be unusual to have a battle of forms in a consumer transaction to begin with.[155] Consumer parties do not have

150. *See id.* at 275–76 (explaining how "[d]etermining the terms of [a] resulting contract is a bit trickier, but courts generally have applied a 'knockout' rule to terms that conflict and they follow the rule of § 2-207(2) for terms that are additional to the terms on the other form").

151. U.C.C. § 2-207 has been criticized because of its failure to address the case of "different" terms in commercial contracts and because of its cumbersome process for defining a contracts' governing terms. *See* Corneill A. Stephens, *Escape from the Battle of the Forms: Keep It Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233, 246 (2007). Attempts to update Article 2 have been unsuccessful to date, however. Henry D. Gabriel, *Salvaging Revised Uniform Commercial Code Article Two: Possible Permanent Editorial Board Commentary*, 52 U. PAC. L. REV. 23, 25 (2020). A revised version of Article 2 was approved by the Uniform Law Commission and American Law Institute in 2003 but was withdrawn in 2011 because no state had adopted Revised Article 2 in the intervening 8 years. *Id.* At 25–26.

152. Mootz, *supra* note 137, at 276.

153. *See id.* at 278.

154. *See* Gregory M. Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RSRV. L. REV. 327, 329–31 (1983). Potential abuse of standard forms in commercial contexts is somewhat offset to relatively more equal negotiating leverage and sophistication among the parties (compared to a consumer context). *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003). Nevertheless, use of standard forms in contracting erects barriers to negotiation because contract formation is faster and more streamlined, parties are less familiar with the substance of the contract, boilerplate complexity tends to increase over time, and parties focus on the relationship to the exclusion of many of the written terms. *See generally* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546–49 (2014).

155. Mootz, *supra* note 137, at 293; *see also* Stephens, *supra* note 151, at 245–46. Courts have grappled with this problem, at first finding that mere consent to a contract relationship by a consumer could be deemed assent to such "additional or different" terms. *See generally* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997). This conclusion seemed to undermine the principle reflected in § 2-207(1), however, that consent to a contract relationship and assent to contract terms were two separate things. Courts began to require more of an affirmative indication of assent to new terms in sales of goods transactions. *See generally* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000). This higher threshold for assent in the § 2-207 context, however, only applies when the non-drafting party makes an offer with particular terms and the commercial party attempts to change those terms using its own form. *Id.* The typical consumer contract today, however, involves an offer by the commercial party, usually through terms posted on a website, and acceptance by a consumer in a manner that precludes

their own standard forms with which to do battle.[156] Since the commercial party is the only party with express terms, if a consumer contract must consist solely of express terms, then the commercial party is likely its only author.[157] In online contracting contexts, the commercial party always makes the first offer pursuant to its hyperlinked standard terms and conditions.[158] On its face, UCC § 2-207 does not apply to a situation in which the consumer party agrees to form the relationship without offering any written variation to the company's express terms.[159] The fairness and legitimacy concerns that gave rise to UCC § 2-207 loom even larger in the consumer context than the commercial one, because consumers have no viable way to negotiate the content of a company's proffered terms.[160] The provisions of UCC Article 2, however, fail to address legitimacy and unfairness issues derived from unilateral control of contract content in contracts involving consumers.[161]

The only mode of consumer contract formation to which UCC § 2-207 would arguably apply would be a situation where a consumer makes the "first shot" in contract formation by offering to purchase a specific quantity of goods without first objectively manifesting assent to the company's articulated terms, perhaps by calling and placing an order over the phone.[162] In such a case, the commercial party could respond by shipping goods with its set of standard terms enclosed, anticipating that those terms would govern the transaction (a species of "pay-now-terms-later" or PNTL contracts).[163] If the consumer's offer to buy goods is considered the first offer, however, then according to § 2-207(1), the company may have accepted these terms, and its additional

---

any input to the content of those terms. Colin P. Marks, *There Ought To Be a Law: What Corporate Social Responsibility Can Teach Us About Consumer Contract Formation*, 32 LOY. CONSUMER L. REV. 498, 499 (2020).

156. Stephens, *supra* note 151, at 245–46.

157. *See id.* at 245 (describing how contract terms are determined by the offeror when one party is a non-merchant).

158. *See* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 577 n.3 (2007).

159. This was implicitly and then explicitly asserted by Judge Easterbook in *ProCD, Inc.*, 86 F.3d at 1452 and in *Hill v. Gateway*, 105 F.3d 1147, 1150 (7th Cir. 1997).

160. *See* Marks, *supra* note 155, at 517–19.

161. Carol B. Swanson, *Unconscionable Quandry: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 363–64 (2001).

162. Judge Easterbrook explained that a phone order should not be deemed an offer because of the absence of complex, boilerplate terms. *See ProCD, Inc.*, 86 F.3d at 1452–53; *see also Hill*, 105 F.3d at 1148. Kansas courts were the first to push back on this framing, claiming that a telephone order was indeed an offer, one that a commercial party accepted by shipping goods. Klocek v. Gateway, Inc., 104 F. Supp. 1332, 1340 (D. Kan. 2000).

163. Contracts where a consumer pays prior to being informed of the terms that the commercial counterparty expects to govern the relationship are variously called "pay-now-terms-later" contracts (or PNTL contracts), "shrinkwrap" contracts, or "rolling contracts." Mootz, *supra* note 137, at 280–81. End-user license agreements (EULAs) share features with these contracts. *See* Davis, *supra* note 158, at 583. In this Article, the term PNTL contracts is intended to broadly refer to all these sorts of contractual relationships where governing law is imposed after the consumer has committed to the relationship rather than simultaneous with that commitment (as would be the case with signing a document or clicking "I accept" on a website).

and different terms would be mere proposals that would become part of the parties' contract only if explicitly accepted by the consumer.[164]

Companies contracting with consumers have long objected to this result, arguing that applicable terms and conditions in a PNTL context should always be defined as the company's boilerplate, in spite of the provisions of § 2-207.[165] Starting with the Seventh Circuit in *Hill v. Gateway*,[166] several courts have agreed, even though reaching that conclusion involved re-defining the venerable legal definition of "offer" to deem a consumer's order and payment for goods simply pre-negotiation conduct.[167]

The Seventh Circuit's approach to "shrinkwrap" contracts stretched concepts of commitment and assent specifically to ensure that boilerplate was ultimately deemed coextensive with the parties' contract.[168] In doing so, the court departed conceptually from both the common law and the UCC's formation baseline.[169] Outside the sale of goods context, however, the Seventh Circuit's embrace of a PNTL interpretation for consumer sales of goods echoed an earlier Supreme Court case, *Carnival Cruise Lines, Inc. v. Shute*.[170] In *Carnival Cruise*, the Supreme Court held that boilerplate terms provided to a consumer after purchasing a non-refundable cruise made up the substance of the parties' contract because the company's boilerplate was bundled with the transaction.[171] The Shutes conceded that they had constructive notice prior to embarking on the cruise (although not prior to booking the trip) that the company's standard terms and conditions required all disputes with Carnival Cruises to be litigated in Florida.[172] But the court noted that even if the Shutes had actually known about the choice of forum clause in advance, they would have been

164. *Klocek*, 104 F. Supp. 2d at 1340. By its terms, the § 2-207(2) framework to draw from both parties' forms only applies to exchanges "between merchants." *Hill*, 104 F.3d at 1150.

165. If the consumer's agreement to buy goods is considered acceptance of the company's offer, however, then § 2-207 provides little help because consumers do not have their own boilerplate terms and conditions with which they engage in contract formation. *ProCD, Inc.*, 86 F.3d at 1452; *Hill*, 105 F.3d at 1150.

166. 105 F.3d 1147, 1150 (7th Cir. 1997).

167. *See id.* at 1148–49. In *Hill*, Judge Easterbrook interpreted the consumer's order and payment for goods as an "invitation to negotiate." *Id.* The company's standard terms included with the product shipment were held to be the first offer, and the consumer was found to have accepted these terms by retaining the goods. *Id.* at 1149. This approach has taken hold in the Seventh Circuit and a bare majority of jurisdictions, but other jurisdictions (like Kansas) have rejected it. *See Klocek*, 104 F. Supp. 2d at 1339. It is also the approach endorsed by the current proposed version of the Restatement of the Law of Consumer Contracts. Marks, *supra* note 155, at 499.

168. *See ProCD*, 86 F.3d at 1452; *see also Hill*, 105 P.3d at 1148–49.

169. Marks, *supra* note 155, at 506–09.

170. 499 U.S. 585, 593, 595 (1991) (enforcing a forum-selection clause in a consumer contract, even though it was not negotiated between a consumer-passenger and a cruise line).

171. *Id.* at 593 (stating that "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing a ticket will not have bargaining parity with the cruise line").

172. *Id.*

unable to change the language because the company used the same non-negotiable standard form with all its customers.[173]

Proliferation of online contracting has made the shrinkwrap version of PNTL contracts increasingly anachronistic,[174] but the approach taken by the Seventh Circuit in *Hill* and the Supreme Court's approach in *Carnival Cruise* remains the majority approach to PNTL contracts.[175] In the context of sales of goods, the Seventh Circuit's framing of "offer" for PNTL contracts foreclosed the only avenue of direct consumer impact on contract terms pursuant to the provisions of UCC § 2-207.[176] Outside the context of sales of goods, as long as consent to the transaction is considered the legal equivalent of assent to company boilerplate, consumers are likewise bound to unseen terms simply by their choice to do business with a given company.[177]

UCC § 2-207 is barely relevant in the consumer context.[178] However, § 2-207 informs the question of consumer contractual assent in two ways. First, § 2-207 expressly recognizes that agreeing to be in an economic relationship with another party is an act distinct from assenting to being bound by that party's terms.[179] Second, § 2-207 implicitly recognizes that party input with respect to contract content is tied to contract legitimacy.[180] The UCC's mechanism preserving both buyers' and sellers' ability to influence terms of their contracts was a deliberate policy choice, attempting to create a more even playing field among commercial buyers and sellers.[181] The § 2-207 approach facilitated exchange transactions while avoiding the "winner-takes-all" outcome that results when contract drafting power is allocated to just one party.[182] In the context of battling

173. *See id.* at 593.

174. Over the past two decades, companies have increasingly shifted their business models to require ordering and paying for goods via a company website, where a company's boilerplate is available by hyperlink to a consumer before the order is placed and the consumer can be prompted to affirmatively indicate (via clicking a button) commitment to the transaction. Marks, *supra* note 155, at 499.

175. *See id.* at 509. End-User Licensing Agreements (EULA) are a species of PNTL contracts that have been the source of much contention in debates surrounding the ALI's efforts to promulgate a new Restatement of the Law of Consumer Contracts. *Id.* at 501.

176. Judge Easterbrook's approach to shrinkwrap contracts stretched and twisted contract law principles, but Easterbrook was right to observe a software license requires some governing terms. *See* James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 264 (2018); *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449–50 (7th Cir. 1996) (explaining that ProCDs price discrimination model worked because of the software license's contractual restrictions). Nevertheless, background legal principles can provide such terms even in the absence of a written contract. *See* Step-Saver Data Sys. V. Wyse Tech., 939 F.2d 91, 100 (3d Cir. 1991) (finding that the lack of license terms in the parties' communications prior to a box-top license did not leave a "gaping hole" in the contract because licensee rights and obligations can be derived from federal copyright law).

177. *See* Ayres & Schwartz, *supra* note 154, at 548–49.

178. Stephens, *supra* note 151, at 245–46. A company can also bar any claim that consumer-authored terms are included in the parties' contract by including in the company's terms and conditions a preclusion of deemed assent to any terms outside the company's express terms. *See* U.C.C. § 2-207(2).

179. *See* Stephens, *supra* note 151, at 245.

180. *Id.*

181. WHITE & SUMMERS, *supra* note 134.

182. Stephens, *supra* note 151, at 240.

standard forms in sales of goods transactions, the law therefore already recognizes that consent to a transaction is not necessarily assent to particular terms, and it acknowledges the link between private ordering legitimacy and mutuality of influence with respect to a contract's governing terms.

C. The Vertical Relationship and Consumer Input Exclusion

Long before the UCC was adopted in the 1950s, scholars had warned that the use of standard forms could pervert the purposes and principles of contract law.[183] Companies who mass-produced goods also mass-produced form contracts that were slapped like labels on their transactions.[184] The shape of the company–consumer relationship evolved into a vertical hierarchical one, rotating ninety-degrees from the horizontal relationship ideal presumed by traditional contract law.[185] The vertical nature of the company–consumer relationship results from an imbalance of sophistication and wealth, exacerbated by the application of traditional contract law to boilerplate terms authored and controlled exclusively by the company.[186] In this feudal-esque, vertical relationship, the company not only supplies goods, services, and systems but also crafts the controlling legal rules.[187] By using the same legal approach to a vertical contract relationship as a horizontal one, however, contract law falls far short of its goals and purposes. Treating company boilerplate as equivalent to horizontal products of mutual assent does not facilitate efficient and empowering contracts, but rather facilitates private commercial dictatorships.

---

183. Karl Llewellyn condemned the use of standard forms by companies to exert control over individuals as "the exercise of unofficial government of some by others, via private law." Karl N. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931); *see also* Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts About Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUM. L. REV. 629, 631–32 (1943) (explaining the many ways that adhesion contracts enforced as contracts undermine the justifications of contract law).

184. *See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L. J. 34, 39 (1917); Kessler, *supra* note 183, at 631.

185. Swanson, *supra* note 161, at 392.

186. Commercial parties almost always have deeper pockets than their consumer counterparties and are sophisticated, well-advised, repeat players in the marketplace. *See id.* Consumers lack economic and legal means and are more likely to engage in one-off transactions. *Id.* Because contract law typically defines the parties' transactional rights and obligations based on terms written by the stronger, savvier, more sophisticated party, contract law increases that party's power, entrenching the vertical shape of the company–consumer relationship. *See generally*, Llewellyn*, supra* note 183, at 731; Kessler, *supra* note 183, at 632. Many modern scholars frame the company–consumer relationship as a problem of informational asymmetries and undisclosed risks instead of a problem of power imbalance. Margaret Jane Radin, *Taking Notice Seriously: Information Delivery and Consumer Contract Formation*, 17 THEORETICAL INQUIRIES IN L. 515, 517 (2016). Radin notes, however, that the vertical quality of the company–consumer relationship is not altered by disclosure because "understanding and acting upon disclosures [is] largely impossible for consumers." *Id.* at 520.

187. This vertical relationship is feudal in nature. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (suggesting that form contracts could enable "powerful industrial and commercial overlords . . . to impose a new feudal order . . . [on] a vast host of vassals"). Other scholars have similarly noted the feudal relation between companies and their customers. *See, e.g.*, MICHAEL HELLER & JAMES SALZMAN, MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES (2021).

Companies carefully tailor their standard terms and conditions to bolster profits while better protecting themselves from costs.[188] Electronic contracting increases a company's ability to use boilerplate to control consumer relationships and manage company costs and risks.[189] Now that terms can be stored and made available electronically, there is no longer a cost-benefit tradeoff between contract completeness and its ease of dissemination.[190] The internet also makes it easier to elicit affirmative indicia of consent to the transaction from consumers who routinely and rapidly click "I accept" in the process of establishing the relationship.[191] When a company requires such an affirmative indication of the desire to enter the transaction, courts almost always find the company's crafted terms binding as a private contract.[192] In many cases, a consumer is deemed to have accepted the company's terms and conditions hyperlinked from the company website even without such an affirmation, simply by starting or remaining in a transactional relationship with the company.[193] Once in the vertical relationship with the company, the consumer remains subject not only to whatever terms the company provided at the time the relationship began, but also to whatever modifications the company thereafter imposes, because companies explicitly reserve for themselves the ability to continually tweak the content of their digital boilerplate.[194] The company's control and flexibility over the content of contract terms is further bolstered by incorporating other documents by reference, such as a policy manual or handbook, which are also authored and updated by the company.[195] Contract term dynamism can be a useful aspect of long-term relationship governance, but in the consumer contract sphere, the company is the contract term hegemon.

---

188. Examples of this: non-disclosures, arbitration, waivers, disclosure as risk management. *See* Boyack, *supra* note 20, at 25.

189. Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract & Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1141–42 (2019); Colin P. Marks, *Online and "As-Is*,*"* 45 PEPP. L. REV. 1, 6 (2017).

190. *See* Boyack, *supra* note 20, at 23.

191. For an excellent study of clickwrap and other consumer contracting innovations and uses, see KIM, *supra* note 21.

192. Classic contract law holds parties bound by terms to which they have manifested assent whether or not those terms are ever read. PERILLO, *supra* note 127, § 9.41 at 342.

193. The most influential case holding that browsewrap should be deemed enforceable based on constructive notice even absent an affirmative manifestation of assent was the 2004 case of *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403–04 (2d Cir. 2004). *But see* Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 981–82 (E.D. Cal. 2000) (refusing to enforce terms accessible through a hyperlink that was unidentifiable as a hyperlink); Specht v. Netscape Commc'ns. Corp., 306 F.3d 17, 20 (2d Cir. 2002) (refusing to find assent to terms contained in a hyperlinked document when there was no indication that the user, by downloading software, was manifesting assent thereto).

194. *See* KIM, *supra* note 21, at 65–67 (discussing unilateral modification clauses in contracts). A few courts have refused to enforce unilateral modification clauses. *See, e.g.*, Harris v. Blockbuster, Inc., 622 F. Supp. 2d 396, 399–400 (N.D. Tex. 2009). Many courts, however, have upheld such clauses and have treated company's unilateral modifications of their terms as the parties' binding contract. *See, e.g.*, Vernon v. Qwest Commc'ns Int'l, Inc., 857 F. Supp. 2d 1135, 1141–42, 1150 (D. Colo. 2012). The author's empirical research found 100% of consumer contracts surveyed contained a unilateral modification clause in its boilerplate. Boyack, *supra* note 20, at 7, 10.

195. *See* KIM, *supra* note 21, at 67–69 (discussing the common tactic of incorporation by reference).

Consumers who buy, subscribe, or otherwise interact with companies through their apps or websites usually know that the company has authored some terms and conditions even though they usually do not locate and carefully review them. Why would they?[196] Efforts to increase visibility of and access to terms conveniently ignores the fact that there is no logical reason for a consumer to waste time reading standard terms that are completely non-negotiable.[197] In vertical relationships, company terms apply whether or not a consumer counterparty bothers to read and is able to understand them.[198] Because consumers lack the ability to shape boilerplate terms, mandating disclosures of such terms and increasing the formality thresholds for showing the intent to form the transactional relationship imposes costs without any corresponding change in contract content.[199]

Theoretically, a consumer who learns of onerous terms might walk away from the transaction, but there may not be an adequate market substitute that offers significantly better terms.[200] Loss of a significant number of consumers who refuse to do business with a given company based on its particularly objectionable terms might theoretically cause a company to revise its boilerplate to remove the offensive term. Negative publicity regarding boilerplate terms framed as unfair has occasionally motivated a company to remove problematic provisions.[201] In 2014, for example, General Mills faced consumer outrage on social media and in the press when it changed its online boilerplate terms to mandate arbitration for customers whose only use of the website was to download coupons.[202] In the wake of negative publicity, General Mills promised, in a blog post, to amend their legal terms accordingly.[203] In 2009, Facebook came under fire for

196. Omri Ben-Shahar also notes the uselessness of attempting to increase readership of form contracts. *See* Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, 1 EUROPEAN REV. CONT. L. 1, 1–2 (2009).

197. *See* discussion *infra* notes 216–226 and accompanying text (regarding boilerplate non-negotiability).

198. In fact, in spite of the law's "duty to read" which holds parties constructively aware of all contract terms to which they are deemed to have assented, not reading non-negotiable terms and agreements is a logical, defensible choice in cases where a consumer will enter the relationship notwithstanding objecting to included terms. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1269–70 (2003). Spending time reading through terms to which one will be forced to acquiesce is, for the most part, a waste of time. *Id.* A similar point is made by Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535 (2015).

199. Formalities such as signatures can be useful in terms of sorting whether or not there is a manifestation of consent to contract, providing easier evidence of contract terms in court, and cautioning parties to consider the legal impact of their actions before acting. Fuller, *supra* note 51, at 801–02. Formalities alone, however, do not cure the imbalance of power in vertical relationships and will not ensure that contracts formally entered into reflect inputs from the weaker party. *Cf.* Brown v. Soh, 280 Conn. 494, 504 (2006).

200. The author's empirical study of 100 companies' online terms and conditions used in consumer contracts shows a striking consistency among companies' boilerplate provisions. Boyack, *supra* note 20, at 27.

201. Oman, *supra* note 94, at 234 (discussing market "feedback mechanisms").

202. Preston, *supra* note 198, at 587–88.

203. *See id.* at 587–89 (citing Burton LeBlanc, *Victory for Consumer Rights: General Mills Drops Its Forced Arbitration Clause*, AM. ASS'N FOR JUST. (Apr. 20, 2014)) (discussing the reputational impact of the mandatory arbitration provision in General Mills' terms and conditions).

mandatory arbitration provisions when users whose accounts were unjustifiably deleted claimed to lack effective remedies.[204] Facebook changed its dispute resolution provisions in response, replacing the mandatory arbitration clause with a forum selection provision.[205] After the Consumer Financial Protection Bureau (CPFB) and Consumer Reports publicly called for the end of mandatory arbitration in consumer contracts, some other large companies such as Amazon peremptorily removed their mandatory arbitration clause, but retained a choice of forum clause to channel customer disputes.[206]

Companies therefore do occasionally change their terms strategically in response to negative publicity or calls for stricter regulation, but that does not mean that market competition and reputation impacts are adequate checks on boilerplate overreach. Rather, these sporadic checks may weed out the worst offenders whose terms are significantly, qualitatively worse than those of other companies.[207] But sporadic checks will not adequately constrain everyday overreach in boilerplate provisions—particularly abuses that are so pervasive that they have become the new industry standard and are in practice tolerated among consumers simply because there is no way for consumers to push back.[208]

Modern liberalism arose in part from a legal system that recognized individuals' ability to shape their rights and obligations through choosing contract terms.[209] When people could elect their legal obligations rather than being obligated primarily due to their life circumstances, individual freedom resulted.[210] Today's consumer, however, is governed by rules resulting more from their circumstances (status) and less from their individual inputs (contract). The legal rights and obligations of feudal tenants arose from who they were, not what they chose.[211] Starting with the Enlightenment, many European (and the American) legal systems

---

204. Max Kennerly, *Facebook Rescinds its New, Unfriendly Terms of Use in Favor of its Old Unfriendly Terms of Use*, LITIGATION AND TRIAL: BLOG (Feb. 18, 2009), https://www.litigationandtrial.com/2009/02/articles/the-law/for-non-lawyers/facebook-rescinds-its-new-unfriendly-terms-of-use-in-favor-of-its-old-unfriendly-terms-of-use/.

205. Greg Beck, *Facebook Dumps Mandatory Arbitration*, CITIZEN VOX (Feb. 26, 2009), https://citizenvox.org/2009/02/26/facebook-dumps-binding-mandatory-arbitration/.

206. *See* Adam Tanner, *I Agreed to What? The Surprising Rights Companies Claim in Terms of Service*, CONSUMER REPORTS (Mar. 25, 2022), https://www.consumerreports.org/electronics/digital-rights/surprising-rights-companies-claim-in-terms-of-service-a1175960373/.

207. RADIN, *supra* note 3, 223–31.

208. Except, perhaps, through regulation. RADIN, *supra* note 3, at 217–42. Pushback, to the extent it occurs, comes from above, via government regulators. For example, President Biden and the CFPB have announced new rules that would prohibit hidden transaction fees being charged to consumers in certain sorts of transactions such as online ticket sales. Brian Deese, Neale Mahoney, & Tim Wu, *The President's Initiative on Junk Fees and Related Pricing Practices*, THE WHITE HOUSE (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/. The consumer remains a pawn in the power struggle between companies and government regulators, however, lacking any of the baseline self-legislative power that contract law theoretically aims to provide. *Id.*

209. *See* MAINE, *supra* note 33, at 172–73.

210. *Id.*

211. *See id.*

supposedly evolved from systems primarily concerned with identity and role in society to systems grounded in individual preference election: from status to contract.[212] By giving companies hegemony over the rules of their relationships with individuals, however, the law today has reimagined a baseline for obligation grounded in status (relationship with the company) rather than free choice.[213] Consumers today do not select the rules that govern their rights and obligations in their market transactions.[214] Those rules arise from their status in relation to the company: customer, employee, borrower, subscriber, etc.[215]

Vertical contracts govern a multitude of consumer relationships. Most employment agreements are vertical contracts, as are contracts-for-hire in the gig economy.[216] In these situations, employees or workers acquiesce to imposed terms as a condition for getting a job and getting paid. Insurance contracts are vertical as well, because other than choosing among providers, consumers have no substantial input with respect to what will and will not be covered by their insurance, how claims will be litigated, what exceptions and exclusions apply, and even how much variable premiums and deductibles will be. Market choice among insurers exists in some sectors more than others. In most health insurance contexts, for example, an employer offers employees a single insurance option, and choices beyond those curated by the employer are limited and relatively unaffordable. The relationship between utility companies and their customers is a vertical one, governed by terms completely within the

---

212. *Id.*

213. The tendency of cycles back and forth between status and contract rather than a one-way progression, particularly with respect to contracts using standard forms, was recognized by Llewellyn, Isaacs, and by Pound. Llewellyn, *supra* note 183, at 730; Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J., 34, 39–40 (1917); Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 211 (1917). These legal contractual trends may have exacerbated political unrest and distrust in our democracy, and the rise of populism and acceptance of authoritarianism in American society. *See, e.g.*, RADIN, *supra* note 3, at 94–95.

214. Professor Radin noted the similar worrisome trend when discussing the unilateral power of a business party to craft the legal rules applying to interactions between it and consumers:

> Some boilerplate defenders are attracted to the idea that boilerplate is relational. They claim that those who click "I agree" are actually agreeing to a *relationship* with the firm, which relationship has the indicia of taking on whatever alternative legal universe the firm is propagating as part of the relationship. . . . If we do decide to view a contract as a kind of relationship, we should keep in mind that relationships are not necessarily beneficial, nor are they necessarily based on some sort of equality. Indeed, contractual relationships have the potential to be as dysfunctional and injurious as any other species of human relationships.

RADIN, *supra* note 3, at 91.

215. For a discussion of the so-called relational theory of contract, where the relationship of the parties is of primary concern and may be employed to justify term enforcement, see Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 56 (1963) (theorizing that relationship formation and preservation norms rather than negotiated contract terms govern many business interactions); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 904 (2000) (defining contract as the relationship among the parties itself).

216. *See generally* KIM, *supra* note 21. Although there is a body of law (employment law) that applies to work-for-hire relationships, there is a trend toward characterizing individuals being paid for work as non-employees, governed solely by contract law. Jonathan Harris argues that consumer law protections should thus be deemed an essential part of "work law" in the modern labor market. Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 57 (forthcoming 2024).

utility company's control.[217] When consumer goods and services are provided for sale or license, especially outside fully competitive markets, providers and customers form vertical contract relationships.[218] Vertical contracts govern the relationship between customer and company in the airline industry, where companies have increasingly limited passenger comforts and increased add-on charges.[219] Consumer financial products usually fit the description of vertical contracts, with the financial institution's non-negotiable terms and conditions governing borrower's rights and

217. Utility companies are subject to some regulation as monopolies providing necessary infrastructure to consumers, for example when there is only one provider of electricity in a given geographic area. *Cf.* Carl Pechman, *Regulation and the Monopoly Status of the Electric Distribution Utility*, NRRI Insights (June 2022), https://pubs.naruc.org/pub/B284311B-1866-DAAC-99FB-C52B7A570087. Scholars stress the difference between standardized, rigid utility contracts that are subject to regulation and the ideal of private contract which is negotiable by the parties. Pablo T. Spiller, *An Institutional Theory of Public Contracts: Regulatory Implications*, NBER Working Paper 14152, 1 (August 2008), https://www.nber.org/papers/w14152. Utility companies control the terms of the parties' agreement and, unless regulation specifically prohibits, can do things like increase electrical rates charged to homeowners with solar panels in order to guarantee company profits. Haines Eason & Emily Holden, *Solar Pushback: How US Power Firms Try to Make People Pay for Going Green*, THE GUARDIAN (May 13, 2021), https://www.theguardian.com/us-news/2021/may/13/solar-power-us-utility-companies-kansas.

218. KIM, *supra* note 21. Market competition might, in theory, make a company more responsive to consumer preference in crafting its standard terms, leading to the conclusion that markets and contracts work together to ensure pro-social behavior. *See generally* Nathan B. Oman, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW (2017). The theory of boilerplate responsiveness in the online context belies reality, since online contracting both encourages company overreach and obscures the content of terms. *See, e.g.*, RADIN, *supra* note 3, at 24 (discussing multiple examples and types of company overreach and "rights deletion" in non-negotiable standard forms); Jacobien Rutgers, *Business First. A Comment on the Adoption of Standard Terms Under the American Restatement of the Law of Consumer Contracts from a European Union Perspective*, 15 EUR. REV. CONT. L. 130 (2019) (pointing out how companies have free rein in US contract law to coerce consumers into relinquishing their legal rights); Kar & Radin, *supra* note 189, at 1141 (discussing how technological changes over the past century have enabled greater and greater company control of their relationships with consumers); *What Happens When You Click 'Agree'?*, N.Y. TIMES (Jan. 23, 2021), www.nytimes.com/2021/01/23/opinion/Sunday/online-terms-of-service.html (noting the "potential for abuse" in online terms and conditions, opining that "companies may feel emboldened to insert terms that advantage them at their customers' expense."). Low levels of consumer pushback regarding content of sales contracts means that many consumer sales contracts include terms that are objectionable to consumers, such as mandatory arbitration and various waivers and limitations on liability. *See generally* RADIN, *supra* note 3. Commercial sellers frequently depart from their own rules in granting their customers extensions and exceptions to terms, but the fact that in practice companies may not strictly enforce harsh governing terms merely underscores the inequality among the parties and the hierarchical, dependent relationship between consumer buyer and commercial seller. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 831 (2006) *in* Omri Ben-Shahar, BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 4 (Omri Ben-Shahar, ed., 2007) (explaining that one-sided contracts give a drafting party power to insist on or waive its "right to stand on the contract" in its sole discretion).

219. *See generally* Jose M. Betancourt, Ali Hortaçsu, Aniko Oery, & Kevin R. Williams, *Dynamic Price Competition: Theory and Evidence from Airline Markets*, NAT'L BUREAU ECON. RSCH., Working Paper No. 30347, 30–31 (2022). For example, airline companies have added on costs for things such as choosing seats, bringing carryon or checked luggage, boarding early, or extra leg room, and these are non-negotiable because of the rigidity of contract structures. *Id.* The complexity and obscurity of price makes it more difficult for consumers to comparison shop. David Muir, Katja Seim, & Maria Ana Vitorino, *Price Obfuscation and Consumer Search: An Empirical Analysis*, 26 (July 15, 2013) (working paper) (on file with the University of Pennsylvania). There is some degree of competition in the airline industry, but airport slots and hub-centered air transit creates regional monopolies that undercut a consumer's market power and choices. Steven Berry, Michael Carnall, & Pablo T. Spiller, *Airline Hubs: Costs, Markups and the Implications of Customer Heterogeneity*, NAT'L BUREAU ECON. RSCH., Working Paper No. 5561, 26 (1996).

obligations.[220] Residential leases and mortgages establish the same sort of hierarchical relationship and involve the same one-party-drafted governing terms, particularly when the landlord or lender party is a company rather than another individual.[221] End-user license agreements promulgated by Apple, Google, and myriad other companies evidence overreach in their terms and an intent to control all content created through their software and systems.[222]

Vertical contracts do not represent joint private ordering. Consumers have no ability to directly impact boilerplate terms by making a counteroffer: they must "take it or leave it."[223] Unless there is coordination or adequate market substitutes, a particular consumer's refusal to do business with a particular company as a protest against its terms will likely have minimal impact on those terms.[224] A consumer is bound to company terms because the consumer is an employee, a resident, a subscriber, a user, a buyer, a borrower, a worker, a depositor, a customer, etc., and the consumer's identity and status is bundled with the company's terms.[225] Because the parties' role in the relationship determines the applicable legal obligations rather than their choice of terms, vertical contracts are better conceived of as status-based obligations rather than contract-based ones.[226]

Contract rules that create mutually acceptable private rules for horizontal relationships take on an exploitative hue in the context of vertical

---

220. John Y. Campbell, Howell E. Jackson, Brigitte C. Madrian, & Peter Tufano, *Consumer Financial Protection*, 25 J. ECON. PERSPS. 91, 91, 93 (2011). Both Consumer financial transactions are increasingly regulated, both in the context of brick-and-mortar financial institutions, non-bank shadow finance providers of various types, and online lending. *Id.* at 92–93. For example, the Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009 banned retroactive fee changes and required consumers to opt-in to over-the-limit fees. Credit Card Accountability, Responsibility, and Disclosure Act, 123 STAT. 1734–1736 (2009). The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376–1377 (2010), established a wide range of consumer protection provisions and established the CFPB which has promulgated myriad other regulations pertaining to consumer finance. *What Laws Does the CFPB Enforce*?, CONSUMER FINAN. PROT. BUREAU (Dec. 15, 2021), https://www.consumerfinance.gov/ask-cfpb/what-laws-does-the-cfpb-enforce-en-2121/. The presence of regulation can help curb abusive practices but does not prevent the governing contract from being vertically structured. Campbell, Jackson, Madrian, & Tufano, *supra* note 220, at 107–08.

221. Campbell, Jackson, Madrian, & Tufano, *supra* note 220, at 95–96. Leases and secured transactions involve both a transfer of a property interest along with a contract establishing the rules governing the relationship. Laura J. Paglia, *U.C.C. Article 2A: Distinguishing Between True Leases and Secured Sales*, 63 ST. JOHN'S L. REV. 69, 69 (1988). Although leases at one time were seen primarily as property transfers, modern courts now typically approach landlord–tenant law through the lens of contract law, and in the residential context, the terms of the contract are rarely negotiated. Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 248–49 (1970). The vertical nature of a residential lease relationship is heightened in the context of corporate ownership and single-family rental securitization. *See, e.g.*, Alana Semuels, *When Wall Street is Your Landlord*, THE ATLANTIC (Feb. 13, 2019), https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/.

222. Some shocking examples of such provisions are detailed in Ayers & Schwartz, *supra* note 154, at 547.

223. *Id.* at 555–56.

224. *Id.* at 546.

225. *See generally id.* at 579–80.

226. *See generally id.* at 579.

relationships. Efficiency and autonomy theories provide only illusory justification for enforcement of vertical contracts, but courts have not adequately differentiated between company boilerplate in vertical relationships and mutually crafted terms in horizontal ones.[227] Consumers choosing a relationship (taking out a loan, taking a job, joining an online network, signing up for a service, or buying a good) become subject to the company's terms bundled with the transaction.[228] There is no method for a consumer to establish the relationship while avoiding the boilerplate. Although there are some affirmative legal defenses that consumers theoretically can employ to restrain the most abusive uses of boilerplate, consumers face significant barriers to bringing lawsuits for breach of contract or contract avoidance, including barriers created by the boilerplate itself (for example, mandatory arbitration clauses and choice of forum provisions).[229] This means that, in practice, even legally unenforceable contract terms exert control over consumers within their vertical relationships.[230]

The root of the vertical contract problem is the legal conflation of the choice to enter into a cooperative economic relationship and the ability to control the particular terms that govern the interaction. Choice of vertical relationship in the context of non-negotiable terms cannot justifiably be interpreted as a choice to accept proffered terms.[231] It is just as likely—more likely in fact—that the consumer chose the relationship because it wanted to acquire something that could only be acquired by establishing the relationship: the job, the home, the car, the phone, the movie, the social network, the software, the loan.[232] Although bundling contract terms and contract relationships is typical in traditional contract law, this bundling exists only because the law allows it to.[233] Contract terms could also be legally unbundled from the relationship—as UCC § 2-207 demonstrates.[234] The role of boilerplate in the company–consumer relationship is, in fact, similar in key respects to the commercial sales of goods battle of forms addressed in § 2-207.[235] In each case, one party creates a detailed set of non-negotiable terms that it would like to govern the relationship, and the counterparty does not read and cannot negotiate the content of those terms.[236] In each case, the parties wish to engage in a transaction

227. *Id.* at 549.
228. *See generally id.* at 546.
229. *See generally id.* at 558–59.
230. *See generally id.* at 551. Mandatory arbitration, lack of ability to bring a class action, presumptive enforceability of written terms and application of the parol evidence rule. *See generally id.* at 559. Plus, the realities of lack of legal counsel, lack of understanding of contract terms and contract law, and the costs and delays associated with bringing legal action to begin with. *See generally id.* at 551–52. Consumers frequently comply with unenforceable contract terms, either unaware that they may be unenforceable or unwilling to take the risks and incur the costs involved in seeking to determine enforceability. *See generally id.* at 580.
231. *See generally id.* at 555–56.
232. *See generally id.* at 563.
233. *See generally id.* at 551.
234. U.C.C. § 2–207 (AM. L. INST. & UNIF. L. COMM'N 1966).
235. *Id.*
236. *See generally* Ayres & Schwartz, *supra* note 154, at 547–48.

even though they have not reached consensus on the content of the non-essential terms within the boilerplate.[237] And in each case, if the party chose to do so, the law could define the content of the parties' legal contract based on default rules of law rather than by elevating one party's boilerplate to the status of mutually chosen contract terms.[238]

Decoupling consent to a relationship and assent to governing rules is fairly straightforward in most sales of goods contexts because there is little need for a complicated framework governing the transaction itself.[239] In most sales of goods, performance by both parties (payment and shipment of goods) occurs very quickly,[240] and various defaults regarding everything from risk of loss in transit to manufacturer warranties are provided by the UCC.[241] Using statutory defaults together with agreed-upon payment terms usually can establish a workable and fair governing law for the parties in consumer purchases of goods.[242] Sellers create more complex boilerplate provisions in sales of goods transactions, not to facilitate the transaction but to improve their economic position and limit their liability.[243] In the sale of goods context, however, the law constrains the impact of these boilerplate terms.

In other contexts, such as licensing, subscription, and membership arrangements, a more complex transactional infrastructure may be required to effect the parties' commercial relationship. But the need for contract infrastructure to facilitate a transaction cannot justify giving one party a free hand to tailor legal rules regarding liability and dispute resolution to its own benefit. Standard forms include both the transactional infrastructure and terms that have nothing to do with the transactional framework—terms that exist solely to shift risks and costs onto consumers through the modification or deletion of the consumers' default legal rights.[244] In the remainder of this Article, terms creating transactional infrastructure are referred to as "constructive terms," and those that are unnecessary for the transactional infrastructure and exist solely to modify legal defaults in

---

237. *See generally id.* at 549.

238. *See generally id.* at 559.

239. Colin P. Marks, *Online and "As Is*,*"* 45 PEPP. L. REV. 2, 3 (2017). Indeed, one study showed that when customers bought products in a store, companies did not impose onerous contract terms on the transactions, but the same companies required assent to more onerous terms as a prerequisite to ordering the same products online. *See generally id.* at 48; Kim, *supra* note 90.

240. *See generally* Marks, *supra* note 189, at 2. Payment is usually simultaneous with placing an order. *Id.* at 7. Modern online ordering processes continually speed up the transaction, typically rendering consumer performance contemporaneous with the consumer's act indicating legal assent. *See generally id.* Amazon started its one-click ordering model (that it tried to patent), and eBay has a "buy it now" option for consumers. *See generally id.* at 12. Payments through apps on phones and Apple Pay further increase the transactional speed and greatly reduce or the transaction's executory period. *See generally id.* at 2.

241. *E.g.*, U.C.C. § 2-305 (AM. L. INST. & UNIF. L. COMM'N 2002).

242. *See generally* Kim, *supra* note 90.

243. For example, standard form contracts govern whether companies who provide devices, such as Alexa, are permitted to collect, buy, and sell our personal information. *See generally id.*

244. *See generally id.*

order to shift risk away from and economic gains to the drafting party are referred to as "destructive terms."

D. Consumer Contract Proliferation

The impact of contract law's poor fit with vertical relationships increases as complex consumer contracts of adhesion become more pervasive. Today's consumers increasingly rely on licenses to use and enjoy goods rather than acquiring ownership rights.[245] Instead of purchasing CDs or DVDs, consumers today subscribe to various media streaming services.[246] Instead of acquiring a bicycle or electric scooter, or even a car, consumers may subscribe to bicycle, electric scooter, or car sharing networks.[247] Vacation shares substitute for vacation homes, and digital downloads substitute for books.[248] Various smart devices from phones to refrigerators to intelligent home assistants come bundled with software exclusively available through licensing arrangements.[249] Market demand has increasingly shifted from ownership to access.[250]

It costs less to access goods via license than to obtain ownership of them,[251] but contract-centric access means that company boilerplate rather than property law is what defines and limits consumer rights to their

245. This phenomenon, the evolution from property rights to contract rights, has been recognized and discussed by scholars of both property and contract law. *See generally* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY (Laura DeNardis & Michael Zimmer eds., 2016). *See also* HELLER & SALZMAN, *supra* note 187, at 259–66.

246. Hendrik Storstein Spilker & Terje Colbjørnsen, *The Dimensions of Streaming: Toward a Typology of an Evolving Concept*, 42 MEDIA CULTURE & SOC'Y 1, 4 (2020). Increasingly, consumers watch shows via streaming services like Netflix, Hulu, and Disney+. *Id.* at 7. Consumers acquire rights to movies and music through platforms like iTunes, and the consumers' rights to such products are defined and limited by the company's ever-evolving Terms of Service. *See generally* Mike Masnick, *You Don't Own What You've Bought: Apple Disappears Purchased Movies*, TECH DIRT (Sept. 12, 2018), https://www.techdirt.com/2018/09/12/you-I-own-what-I-bought-apple-disappears-purchased-movies/.

247. Vehicle sharing has increasingly proliferated, particularly in urban areas. *Disrupting the Car: How Shared Cars, Bikes & Scooters are Reshaping Transportation and Cannibalizing Car Ownership*, CBINSIGHTS (Sept. 5, 2018), https://www.cbinsights.com/research/disrupting-cars-car-sharing-scooters-ebikes/.

248. Joel Johnson, *You Don't Own Your Kindle Books, Amazon Reminds Customers*, NBC NEWS (Oct. 24, 2012, 8:43 AM), https://www.nbcnews.com/technolog/you-I-own-your-kindle-books-amazon-reminds-customer-1c6626211; Suw Charman-Anderson, *Amazon Ebooks Are Borrowed Not Bought*, FORBES (Oct. 23, 2012, 12:03 PM).

249. HELLER & SALZMAN, *supra* note 187, at 262–64. *See generally* David Lazarus, *When You Buy Digital Content on Amazon or iTunes, You Don't Exactly Own It*, L.A. TIMES (May 13, 2016, 3:00 AM), https://www.latimes.com/business/37azarus/la-fi-lazarus-digital-content-20160513-snapstory.html.

250. For an analysis of legal issues and challenges of these new contract-based resource allocations, see Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1496 (2016); Lee Anne Fennell, Lecture, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 521, 553 (2019); Lee Anne Fennell, *Streaming Property*, 117 NW. U. L. REV. 95, 98–99 (2022).

251. Shane Tews, *The Sharing Economy: Benefits of Access Over Ownership*, AM. ENTER. INST. (Apr. 17, 2017), https://www.aei.org/technology-and-innovation/sharing-economy-benefits-access-ownership/. Financial barriers to entry for ownership are higher than those for licensing, and in this way, access via contract is a form of leverage. Access and efficiency are cited benefits of the sharing economy. *Id.*

"stuff."[252] Although the sharing economy is a recent development, already there is some evidence that allocating resources via contracts defined as company boilerplate may have unanticipated adverse impacts.[253] As contracts proliferate and define and control more and more aspects of consumers' lives—including what was previously governed by laws defining ownership—the question of what terms apply to define and limit those rights matters even more. Property law may prioritize owner autonomy, but when company-controlled boilerplate is treated as the binding law among the parties, that autonomy disappears along with individuals' control over much of their own lives.

Employment contracts govern individuals' relationships with the companies for which they work, and the content of such contracts is within the control of the employer.[254] Employment and labor laws are concerned with a myriad of limitations on employee rights that can be based on employment contract terms, including non-compete provisions, non-disclosure provisions, and mandatory arbitration clauses.[255] Outside the "employment law" context, in the so-called "gig economy," the impact of company standard terms is even less constrained by employment and tax laws.[256] The company's online boilerplate is treated as controlling with respect to these workers' rights, rather than employment laws and other

---

252. *See* Kar, *supra* note 36, at 764–65; *see also* HELLER & SALZMAN, *supra* note 187, at 262–64.

253. *See, e.g.*, Jennifer Dill & Nathan McNeil, *Are Shared Vehicles Shared by All? A Review of Equity and Vehicle Sharing*, 35 J. PLAN. LITERATURE 5, 5 (2020). *See generally* Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, 63 FORDHAM URB. L.J. 12 (2016); Cory Doctorow, *Google Reaches Into Customers' Homes and Bricks Their Gadgets*, BOING BOING (Apr. 5, 2016, 5:42 AM), https://boingboing.net/2016/04/05/google-reaches-into-customers.html.

254. Rachel Arnow-Richman & J. H. Verkerke, *Deconstructing Employment Contract Law*, 75 U. FLA. L. REV. 896, 900–01 (2023); Harris, *supra* note 216, at 50–51. Although currently enjoying a resurgence, abusive employment contractual relationships existed a century ago. *See* ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 311–12 (2001) (discussing the practice of companies paying for labor using scrip that was redeemable only at the company store). *See generally* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627 (1943) (suggesting that true mutual consent to employer-drafted contract terms does not exist).

255. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380–81 (2006); Randall S. Thomas, Norman D. Bishara, & Kenneth J. Martin, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 3–4 (2015); Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 514–15 (2021).

256. *See* Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1531 (2016); Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 207 (2011). An increasing number of companies are structured exclusively with independent contractors.

> Companies and transactions making up the gig economy primarily consist of the following: ride-sharing platforms (e.g., Uber, Lyft, and Sidecar); accommodation sharing platforms (e.g., Airbnb, VRBO, and HomeAway); service platforms (e.g., Handy, Care.com, and TaskRabbit); car rental platforms (e.g., Car2Go, Zipcar, and Getaround); and food and goods delivery platforms (e.g., Instacart, Postmates, and Caviar).

Rachel Childers, *Arbitration Class Waivers, Independent Contractor Classification, and the Blockade of Workers' Rights in the Gig Economy*, 69 ALA. L. REV. 533, 534 (2017).

default legal rights.[257] Giving companies free rein to define the rights and duties of their workers via vertical contracts provides an end-run around legal worker protections and other worker rights.[258]

The gig economy is part of the broader sharing economy in which individuals engage in transactions that are facilitated through a commercial party's platform or forum.[259] The goods and services that consumers access and use through such platforms are provided not by the company itself but by other users.[260] There are an increasing number of such consumer network associations, but the consumer-to-consumer interactions within such networks are purportedly all subject to the company's unilaterally drafted terms and conditions.[261] This same model applies in the context of social media. Meta, Twitter (now known as X), TikTok, and other companies, who establish the platform facilitating the network dictate and enforce (or decide not to enforce) the terms governing use of the site.[262] Courts treat users' choice to join such a network as blanket assent to the

257. Means & Seiner, *supra* note 256, at 1533; Childers, *supra* note 256, at 559. Orly Lobel discusses how multiple contracts and contract clauses in work relationships create a "contract thicket" that operate to destroy workers' rights. Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV., 877, 884–85 (2021).

258. *See* Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WISC. L. REV 739 (2017); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining* Employment, 26 ABA J. LAB. & EMP. L 279, 291–92; Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 55 (2017). Jonathan Harris advocates that consumer law should be considered a species of "work law" because of the ubiquity of "non-employee" workers in the current economy. Harris, *supra* note 216, at 26.

259. *Gig Economy Tax Center*, INTERNAL REVENUE SERVICE, (July 5, 2023), https://www.irs.gov/businesses/gig-economy-tax-center#:~:text=The%20gig%20economy%E2%80%94also%20called,like%20an%20app%20or%20website.

260. Lobel, *supra* note 258, at 56. For example, party A, driver, contracts with Uber to transport passengers. Party B, a passenger, contracts with Uber to use its service. B uses the Uber app to order a car, and A shows up and drives B. B's credit card is charged by Uber, who passes on some amount to A as payment for the service. The exchange of service in this case—payment in exchange for a ride—is between A and B, but the transaction necessarily flows through the broker and host, Uber, who establishes and controls the rules governing the arrangement, not only between A and Uber and B and Uber, but also between A and B. *Id.* at 51–52.

261. *See, e.g.*, *U.S. Terms of Use*, UBER LEGAL (June 14, 2023), https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en&irgwc=1&utm_campaign=CM2088037-affiliates-impactradius_1_-99_US-National_r_all_acq_cpa_en_Bing%20Rebates%20by%20Microsoft_click-0Epw3owXNxyPTMD29kwNWXtwUkFyAu1O2SYD0E0&utm_term=0Epw3owXNxyPTMD29kwNWXtwUkFyAu1O2SYD0E0&utm_source=impactradius&adg_id=1505030&cid=2003851&partner=Bing%20Rebates%20by%20Microsoft.

262. *See, e.g.*, *Terms of Service*, FACEBOOK LEGAL (July 26, 2022), https://www.facebook.com/legal/terms; *Twitter Terms of Service*, TWITTER, https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/site-assets/tos-june-18th-2020/Twitter_User_agreement_EN.pdf (last visited Dec. 13, 2023). The company's terms also channel profit generated by network participants to the company rather than consumer members. Kamil Franek, *How Facebook Makes Money: Business Model Explained* (Apr. 4, 2021), https://www.kamilfranek.com/how-facebook-makes-money-business-model-explained/#google_vignette. For example, Facebook sells advertisements based on the fact that its users access and attend to content on the site, but the reason that users view the site is to see content created by other users. *See id.* This business model essentially allows Facebook to free-ride on the content created by its users: the users attract the eyeballs, but they do not share in company advertising and data-mining profits. *See id.*

company's terms.[263] Vesting a single facilitator with nearly unbounded sovereignty over the community of collaborators allocates excessive power to the facilitator and leaves participants vulnerable.

In vertical contract relationships, the company not only has the power to define the private law for the relationship, but it also is the party with discretion whether or not to enforce that law.[264] Companies frequently choose not to enforce the letter of their contract laws, granting certain consumers favors and exceptions to strict rules, perhaps as a way to build up goodwill in the marketplace.[265] Discretion to insist on terms or depart from them leaves consumers at the continual mercy of the company who holds power not only to define the rules but to determine the scope of their applicability. The supplicant position of the consumer is reminiscent of the feudal tenant, vulnerable to the power of their commercial lords who determine which rights and obligations apply.[266] Discretionary variation in enforcement raises the specter of subjectivity, implicit biases, and racial, ethnic, and wealth inequality in the way terms and conditions are enforced. Company discretion fails to protect the counterparty; it allows the company to pick winners and losers, a choice that likely disparately harms society's most vulnerable consumers.

III. RESOLVING THE CONSUMER CONTRACT CONUNDRUM

In May 2022, the American Law Institute (ALI) voted to adopt a new Restatement of the Law of Consumer Contracts (New Restatement).[267] The New Restatement addresses the reality that the practice and content of consumer contracting diverge significantly from the ideal upon which contract law is based—a divergence that first elicited calls for responsive changes to contract law over a century ago.[268] The ALI's consideration of

---

263. Anja Bechmann, *Non-Informed Consent Cultures: Privacy Policies and App Contracts on Facebook*, 11 J. MEDIA BUS. STUD. 21, 21 (2014). Conflating participating in a community of collaborators with blanket consent to the facilitator's terms raises numerous concerns. *See, e.g.*, *id.* at 35; Catherine Flick, *Informed Consent and the Facebook Emotional Manipulation Study*, 12 RSCH. ETHICS 14, 22–23 (2016).

264. RADIN, *supra* note 3, at 77–78. Some of the most troubling and increasingly common types of provisions in consumer contracts are limitations on a consumer's ability to seek recourse through exculpatory clauses or clauses funneling any dispute into a particular forum (usually choosing a jurisdiction that disallows breach of contract class actions) or waives the right to trial in favor of arbitration, which is usually seen to be an anti-consumer dispute resolution mechanism. *See id.* (discussing examples of each of these limitations on consumer contractual recourse).

265. Oman, *supra* note 94, at 234.

266. Joseph William Singer, PROPERTY LAW AS THE INFRASTRUCTURE OF DEMOCRACY (2011), *reprinted in* 11 POWELL ON REAL PROPERTY SPECIAL ALERT.

267. *Restatement of the Law: Consumer Contracts*, THE AMERICAN LAW INSTITUTE, https://www.ali.org/projects/show/consumer-contracts/ (last visited Dec. 13, 2023) ("The membership voted to approve Tentative Draft No. 2, subject to the approved motion to add a new § 2. This vote marks the completion of this project."); Jeremy Telman, *American Law Institute Approves Restatement of Consumer Contracts Law*, CONTS. PROF. BLOG (May 19, 2022), https://lawprofessors.typepad.com/contractsprof_blog/2022/05/american-law-institute-approves-restatement-of-consumer-contracts-law.html.

268. RESTATEMENT (THIRD) OF CONSUMER CONTRACTS: TENTATIVE DRAFT (AM. L. INST. 2022). An early call for legal reform in the context of standard form consumer contracts include Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L. J. 34, 47(1917).

the issue and its ultimate adoption of the New Restatement was contentious and several years in the making.[269] Consumer advocates objected to the original tentative draft debated in the 2019 ALI meeting, and critical scholarly articles, blog posts, a letter from state attorney generals, and negative media attention temporarily derailed the project.[270] In 2022, the ALI finally reached consensus on the content and language of the New Restatement, but only after strictly prohibiting dissemination of discussion drafts beyond its membership prior to the meeting.[271]

---

269. Oren Bar-Gill, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 7 (2017). The project took nearly 11 years to complete. *Id.* at 8. In 2012 the ALI named Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler as reporters in a project to create a restatement of the law of consumer contracts. *See id.*; *Consumer Contracts*, THE ALI ADVISER (last visited Dec. 13, 2023), www.thealiadviser.org/consumer-contracts/. This project generated a series of vigorous debates among contract scholars and consumer advocates. *See, e.g.*, Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contracts*, 32 LOY. CONSUMER L. REV. 456, 458 (2020). The restatement project and controversies surrounding were subject of the Yale Journal on Regulation's 2019 symposium, *Symposium on the Draft Restatement of the Law of Consumer Contracts*, YALE J. REG. (Mar. 29, 2019), https://www.yalejreg.com/topic/symposium-on-the-draft-restatement-of-the-law-of-consumer-contracts/, and Harvard law students organized protests against the project. *Law Students Call for ALI Members to Reject Proposal to Rig Contract Law Against Consumers*, PEOPLE'S PARITY PROJECT (May 21, 2019), https://www.peoplesparity.org/alirestatement/.

270. PEOPLE'S PARITY PROJECT, *supra* note 269. The controversy came to a head at the 2019 meeting at which the previously circulated "Tentative Draft" was expected to be adopted. *Id.* The only part of the draft that the ALI members ultimately approved was Section 1, the definitions. AMERICAN LAW INSTITUTE, *supra* note 267. Grounds for objections ranged from critiques of the empirical methods used to determine common law trends to concerns that the draft would quash the ability of advocates to cite favorable precedent in order to nudge the law to develop in a more consumer-friendly direction. *See, e.g.*, Melvin Eisenberg, *The Proposed Restatement of Consumer Contracts, if Adopted, Would Drive a Dagger through Consumers' Rights*, YALE J. REG.: NOTICE & COMMENT BLOG (March 20, 2019), https://www.yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-by-melvin-eisenberg/; Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. REG. 45, 101 (2019); Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart, & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447, 450 (2019). The debate intensified a few days prior to the 2019 ALI meeting when 23 State Attorneys General circulated a letter urging ALI Members to vote against the 2019 draft restatement. Letter from State Att'y Gens., State of N.Y. Off. of the Att'y Gen., to Members of the Am. L. Inst. (May 14, 2019) (available at https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf). Meanwhile, the popular press incited public attention and outcry with respect to the proposed draft. *See, e.g.*, Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to be Bound by its Terms*, PROPUBLICA (May 20, 2019), https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click; David Dayen, *The Secret Vote That Could Wipe Away Consumer Rights*, AM. PROSPECT (May 20, 2019, 1:17 PM), https://prospect.org/culture/secret-vote-wipe-away-consumer-rights/. Although most of these critics claimed that the draft did not do enough to protect consumers, other critics claimed that the ALI did too much—that it had gone beyond its mandate and was engaging in advocacy in a way that threatened company interests. *See, e.g.*, *Controversial Restatement Adopted by American Law Institute*, AM. TORT REFORM ASSOC., (May 17, 2022), https://www.atra.org/2022/05/17/controversial-restatement-adopted-by-american-law-institute/#:~:text=The%20ALI's%20restatement%20of%20the,allegedly%20deceptive%20contract%20or%20term.

271. *Restatement of the Law, Consumer Contracts*, AM. L. INSTIT. https://www.ali.org/projects/show/consumer-contracts/ (last visited Dec. 26, 2023). The delay in reconvening the committee was in part because of the Covid-19 pandemic. *Id.* A meeting of the ALI Restatement of Consumer Contracts to discuss tentative draft #4 ("2021 draft") was held on November 11, 2021. *Project Meeting: Restatement of the Law, Consumer Contracts*, AM. L. INST., https://www.ali.org/meetings/show/consumercontracts_fall2021/ (last visited Sept. 4, 2023). The committee considered and

Controversies surrounding the New Restatement reflect, in part, the challenge of trying to fit modern consumer contract relationships into the contours of classic contract law.[272] One side of the debate argued that the New Restatement should foster legal trends that raised the threshold for contract formation to protect consumers from being inadvertently bound to unknown terms.[273] The other side of the debate recognized that mere notice without opportunity to shape terms would simply make transactions more cumbersome while doing little to protect consumers.[274] For proponents of the New Restatement, leaving consumer protection to the courts was the best of the two options available.[275]

There is, however, a better solution to the consumer contract law conundrum, one that avoids stretching contract doctrines and theories to their breaking point. This solution begins by recognizing the difference between a choice of a transaction and the choice of particular terms. Party election to engage in a transaction should be treated as distinct from a choice of particular terms—particularly in the context of non-negotiable standard boilerplate terms. The content of the contract can then be defined in a way that meaningfully includes consumer-side inputs as well. Simply decoupling the concepts of assent to doing business and assent to terms avoids the binary choice that currently plagues consumer contract law: either make transactional relationship formation more cumbersome or rely on courts to police contract content.[276] A contract baseline that is not derived exclusively from company boilerplate and incorporates consumer preferences would better fit the vertical company–consumer relationship and

---

debated a revised version of the draft Restatement, version 4, that was distributed in 2021, but the ALI had instructed committee members to keep the new draft—as well as the subsequent Tentative Draft No. 2—completely confidential. *Id.* Only ALI members had access to the drafts, and members were instructed that the drafts may not be reproduced or disseminated. *Id.* The draft ultimately adopted by the ALI in May 2022 was not available for public review or comment prior to the vote. *Id.* The mandated secrecy of the Tentative Draft No. 2 was a notable procedural departure from that of the prior drafts, including the initial April 2017 Discussion Draft and the 2019 Tentative Draft No. 1, both of which contained language specifically inviting and welcoming comments on the project. RESTATEMENT (THIRD) OF CONSUMER CONTRACTS: DISCUSSION DRAFT (AM. L. INST. Apr. 27, 2019); RESTATEMENT (THIRD) OF CONSUMER CONTRACTS: TENTATIVE DRAFT NO. 1 (AM. L. INST. 2019).

272. The introduction of the Restatement cites the "fundamental challenge" that consumer contracts pose to the law of contracts. *Introduction,* RESTATEMENT (THIRD) OF THE LAW OF CONSUMER CONTRACTS: TENTATIVE DRAFT NO. 2 (AM. L. INST. 2022).

273. *See, e.g.*, Letter from N.Y. Att'y Gen. to Richard Revesz, Dir., Am. L. Inst., & Stephanie Middleton, Deputy Dir., Am. L. Inst. (Jan. 12, 2018) (available at https://www.creditslips.org/files/multi_state_attys_general_-_consumer_contracts_-_pd_3_-_011218-3.pdf); Eisenberg, *supra* note 270. Although a draft was finally adopted, the criticisms continue. Even the scholarly critiques of the project have generated their own scholarly critiques. *See, e.g.*, David Berman, *A Critique of Consumer Advocacy Against the Restatement of the Law of Consumer Contracts*, 54 COLUM. J. L. & SOC. PROBS. 49, 51, 55 (2020).

274. Ben-Shahar, *supra* note 196, at 1–2.

275. *Id.* at 21–22. The reporters frequently referenced the approach ultimately adopted in the New Restatement as representing a "grand bargain," where consumers gave up their rights to contest conspicuousness of terms and meaningful opportunity to review them in exchange for a more robust oversight role of the court. *See* Berman, *supra* note 273, at 55.

276. *See* Ben-Shahar, *supra* note 196, at 1. Focusing on consumer inputs rather than increased consumer assent manifestations would create better contractual outcomes. *Id.* at 6.

would address the problem of consumer negotiating impotence and the concerns regarding judicial paternalism.

This Part III outlines this two-part legal framework to resolve the current consumer contract conundrum. First, in a vertical contracting context, consent to engage in a transaction should not be presumed to be assent to one party's standard terms. Second, legal defaults with respect to liability allocation, measurement of damages, and dispute resolution should be treated as durable proxies for consumer preferences in consumer contracts. Destructive terms in company boilerplate should be ineffective to waive such default legal rights in the context of a vertical relationship. Nor should non-negotiable boilerplate be used to pre-authorize unilateral modifications to the parties' governing rules.

Treating questions of relationship formation and contract content separately encourages market efficiency without sacrificing consumers' legal rights.[277] Because our legal system already provides a framework for dispute resolution, tort and contract liability, and measurement of damages, contract terms pertaining to such concepts can be separated from—and are unnecessary for—transactional infrastructure.[278] The contract baseline need only include constructive terms for transactional efficacy. Given the choice, the reasonable consumer would not gratuitously relinquish their legal rights. Boilerplate destructive terms therefore cannot reasonably be deemed the product of mutual assent and thus should not be deemed part of consumer contracts' content.[279] Defining consumer contracts to presumptively include legal defaults instead of company crafted substitutes would result in valuable contract certainty as well as fairer, more justifiably enforceable governing terms.

A. Consent to an Exchange vs. Assent to Standard Terms

The essential first step to reframing consumer contracts is to make a distinction between the consumer's consent to do business with a commercial party and the consumer's assent to that party's boilerplate. A consumer's choice to do business with a company is not reasonably the legal equivalent to blanket assent to destructive terms in the company's boilerplate.[280] An affirmation of intent to engage in a transaction by clicking a button, buying goods, or signing up for a service, for example, shows a

277. *See* discussion *supra* Section II.A. and discussion *infra* Section III.A discussing how this separate treatment already exists in commercial sales of goods involving a so-called battle of the forms by operation of UCC § 2-207.

278. Terms are components of the transaction's infrastructure if they establish the necessary parameters of the transaction itself. *See* discussion *supra* Section II.D.; *see* discussion *infra* Section III.B.

279. *See* Ben-Shahar, *supra* note 196, at 6. There is both logical and empirical support for the proposition that consumers prefer their legal default rights rather than entrusting companies to decide in their sole discretion whether or not such rules apply. *See, e.g.*, RADIN, *supra* note 3, at 108; Abraham L. Wickelgren, *Standardization as a Solution to the Reading Costs of Form Contracts*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 30, 31 (2011) (discussing the "lemons equilibrium" that results from standardization of terms and leads to the least consumer-friendly terms).

280. Ben-Shahar, *supra* note 196, at 6.

choice to the transactional infrastructure, but not a knowing, intentional blanket waiver of default legal rights.[281]

When a consumer enters a transactional relationship with a company, the consumer has no way to provide input into the company's standard form.[282] Although the company has proposed boilerplate terms, the counterparty likely does not read and cannot negotiate boilerplate, and presumably would not wish destructive terms to change their default legal rights.[283] The consumer contract conundrum reflects the same problem that drove drafters of the UCC to create § 2-207: one party lacks the ability to influence the other's standard form, even though both parties desire the transaction.[284] The purpose of § 2-207 was to disentangle an agreement to a transaction from blanket assent to a company's unread, non-negotiated boilerplate as a way to simultaneously enable quick and easy market transactions while preventing one party from exercising undue dominion over the other.[285]

A vertical company–consumer relationship raises these same concerns regarding unilateral contract control along with the same need for transactional efficacy. The separate treatment of contract formation and contract content are therefore justified in both contexts.[286] In vertical contract relationships, as in sales of goods with battling forms, the law should decouple relationship formation from assent to terms, allowing the formation of a transactional relationship among the parties without granting one party's boilerplate the legal status of an enforceable contract.

Outside of commercial battles of forms, courts today do not generally decouple consent to an exchange from assent to standard terms, but threads in contractual jurisprudence establish a foundation for courts to do so.[287] Over a century ago, the Supreme Court acknowledged that unless non-negotiable terms changing legal default rights were "distinctly declared and deliberately accepted," the parties' contract would not include such

---

281. *See* discussion *supra* Section I.A (explaining the important distinction between assent and acquiescence). Instead, a consumer's agreement to the transaction should have a legal effect similar to an acceptance "with additional or different terms" under the approach outlined in UCC § 2-207. In sales of goods, when both parties express different preferences with respect to contract terms but then proceed with a transaction, the question of contract formation is treated separately from the question of what terms make up the parties' contract. U.C.C § 2-207.

282. *See* Ben-Shahar, *supra* note 196, at 6.

283. *See, e.g.*, Bechman, *supra* note 263, at 21, 35.

284. *See* discussion *supra* Section II.B; *see also* William J. Woodward, Jr., *Consumer Protection and the Uniform Commercial Code: "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC*, 75 WASH. U. L. Q. 243, 286–87 (1997).

285. Requiring consensus among parties to deviations from legal defaults was the "fundamental purpose" and "underlying philosophy" of UCC § 2-207. John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1373 (1986). The solution of separately considering assent to transaction and assent to terms attempted to achieve fairer, more efficient contract terms. *See id.* at 1311–13.

286. *See supra* Section II.A for more discussion of UCC § 2-207.

287. Indeed, the New Restatement takes as a given that consent to a transaction is always bundled with deemed assent to terms. Berman, *supra* note 273, at 57; *see* Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 890–91 (2014) (reviewing Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*).

terms.[288] Following this reasoning, some courts refused to stretch a consumer's manifestation of assent to a transactional relationship to cover inconspicuous terms.[289] In cases involving deemed, passive assent to boilerplate, some courts have stated that only conspicuous provisions would be included in the contract terms; however, where terms are available for review prior to choosing the transaction, courts are less likely to treat conspicuousness as a legally relevant consideration.[290]

Conspicuousness provides an avenue for consumer avoidance of terms in a standard form in some cases, but courts still view such claims through the lens of an affirmative defense in which the consumer bears the burden of proving a lack of reasonable awareness of the terms.[291] In 2017, for instance, the Third Circuit held that consumer counterparties would not reasonably be aware of an arbitration clause located on the ninety-seventh page of the company's "Health and Safety and Warranty Guide" included in the product's packaging and incorporated by reference in the standard form terms bundled with the transaction.[292] Because the consumer lacked "reasonable notice" of this arbitration term, the court concluded that it never became part of the parties' contract.[293] Courts holding that consumer agreement to a transaction cannot extend to hidden terms recognize that consent to a transaction is a distinct concept from assent to boilerplate.[294] In these cases, however, courts have placed the burden on the consumer to

288. The Majestic, 166 U.S. 375, 386 (1897) ("[W]hen a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted.") (internal quotations omitted).

289. *E.g.*, Marin Storage & Trucking, Inc. v. Benco Contracting and Eng'g, Inc., 89 Cal. App. 4th 1042, 1049–50 (2001); *see also* Kim, *supra* note 269, at 465 (discussing the requirement that certain terms be reasonably conspicuous in consumer contract enforcement actions). Sometimes the concept of conspicuousness is codified in state statutes. For example, in Massachusetts, conspicuous requires that terms are "so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62 (1st Cir. 2018) (quoting Mass. Gen. Laws Ch. 106, § 1-201(b)(10)).

290. For example, in *Cullinane*, the Massachusetts court found that simply placing a box of information on a webpage without requiring the party to click on a box indicating acceptance near a hyperlink to terms rendered the terms inconspicuous and thus unenforceable. 893 F.3d at 62–64. In cases where consumers affirmatively do click a button or do some other affirmative act indicating acceptance and terms are available for review prior to that act (aka, "clickwrap"), courts are less likely to cite deficient conspicuousness as justification for excluding boilerplate terms. *See, e.g.*, Atalese v. U.S. Legal Servs. Grp., 99 A.3d 306, 316 (N.J. 2014) (requiring that arbitration clauses be conspicuous and "clear and unambiguous" before they would be deemed part of the terms to which a consumer had manifested assent); Hemberger v. E*Trade Fin. Corp., No. 07-1621 (SDW), 2007 WL 4166012, at *4 (D.N.J. Nov. 19, 2007) (finding that because the arbitration clause was adequately conspicuous, it would be deemed part of the parties' contract).

291. Although a party claiming contract formation has occurred has the burden of proving mutual assent, the court in *Specht v. Netscape Commc'ns Corp.* found that users who downloaded software would be bound to terms and conditions available via hyperlink—even if never accessed—as long as it was "reasonably conspicuous" on the webpage. 306 F.3d 17, 33–35 (2d Cir. 2002). A finding of inconspicuousness requires a court finding that no reasonable consumer would have been aware of the existence of the hyperlinked terms, which effectively switches the burden of proof. *See* Mark A. Lemley, *The Benefit of the Bargain*, 2023 WISC. L. REV. 237, 269–70, 270 n.153 (2023).

292. Noble v. Samsung Elecs. Am., Inc., 682, F. App'x 113, 117–18 (3d Cir. 2017), *aff'g*, 2016 WL 1029790 (D.N.J. Mar. 15, 2016).

293. *Id.* at 118.

294. *See* RADIN, *supra* note 3, at 87.

prove a clause was inconspicuous and therefore excluded, and a consumer who failed to prove inconspicuousness would be bound to the term based on the choice to proceed with the transaction.[295]

The limiting factor in cases focused on conspicuousness is lack of consumer notice rather than lack of consumer choice.[296] Freedom of contract, however, turns on party choice and input rather than mere access to information.[297] Mere visibility of terms does not justify concluding that there was assent.[298] Courts focused on conspicuousness conflate these concepts.

Separate treatment of the transactional relationship and contract content is also implicit in the doctrine of reasonable expectations.[299] This doctrine suggests that a consumer does not legally agree to be bound by non-negotiable standard terms that would be unacceptable if known beforehand.[300] Excluding unexpected boilerplate from the parties' contract suggests (1) that consent to a relationship is not coextensive with assent to unilaterally crafted terms and (2) that consumer-side inputs into contract terms are relevant and discernable through a fictional proxy (the reasonable consumer).[301] The doctrine of reasonable expectations concept undermines the idea of blanket assent by recognizing that consumer expectations should inform contract content.[302] Under this formulation, consumers' market choices can be separated from their legal assent to company-drafted terms.[303]

---

295. Lemley, *supra* note 291, at 252–53.

296. *Id.* at 255–56.

297. RADIN, *supra* note 3, at 83.

298. Lemley, *supra* note 291, at 260–62.

299. The principles articulated in Restatement § 211 have been generally referenced by this name. RESTATEMENT (SECOND) OF CONTS. § 211 cmt. e (AM. L. INST. 1981).

300. The Restatement (Second) of Contracts § 211 provides:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

301. Todd Rakoff makes a similar point with his distinction between visible and invisible boilerplate terms. Rakoff, *supra* note 4, at 1251.

302. Margaret Jane Radin makes the important point that expectation (like knowledge) does not equal assent. RADIN, *supra* note 3, at 82–83. Indeed, as certain provisions proliferate in consumer contracts, they become less surprising inclusions. For example, nearly all contracts include waivers of liability, limitations on damages, and unilateral modification authorizations, so a consumer would be hard-pressed to show that such clauses would not have been reasonably expected. *See id.* at 84–85.

303. Comments b and c to the Restatement § 211 discuss the problems explored at length in this Article and suggest that the Doctrine of Reasonable Expectations could rein in form draftsmen from overreaching in contexts where regulation does not apply. RESTATEMENT (SECOND) OF CONTS. § 211 cmts. b–c (AM. L. INST. 1981). There are some other concepts that would limit blanket assent, for example through interpretive maxims and approaches. *See* RESTATEMENT (SECOND) CONTS. § 201 (AM. L. INST. 1981).

Courts rarely use the doctrine of reasonable expectations (enshrined in Restatement § 211) to exclude provisions from a company's boilerplate.[304] Those that do use the doctrine apply it mostly in the context of insurance policy contracts.[305] This may be, as Eric Zacks notes, because the threshold required to exclude terms under this approach is very high.[306] Even in insurance company cases, in order for Restatement § 211 to justify removing a term from the contract, a plaintiff must show that the term is "bizarre or oppressive," "eviscerates the non-standard terms explicitly agreed to," or "eliminates the dominant purpose of the transaction."[307]

Judicial reluctance to embrace the doctrine of reasonable expectations perhaps stems from its framing as grounded in protectionism, a concept that fits uneasily with freedom of contract theory.[308] Conversely, the approach described in this Article is built upon a separate determination of consent to a transaction and assent to terms, an approach grounded not in paternalism but in autonomy and efficiency.[309] The doctrine of reasonable expectations is of limited effect, then, because it builds upon a foundation that treats company boilerplate as presumptively coextensive with the parties' contract.[310] Because the parties' contract is defined as company boilerplate, with only bizarre or oppressive terms omitted, the consumer plaintiff must first prove that particular terms are bizarre and oppressive in order for the terms to be excluded.[311]

The practical impotence of the doctrine of reasonable expectations underscores the need to recognize that party choice to a vertical

304. Eric Zacks condemns courts' failure to generally incorporate this doctrine a "disappointment." Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 733 (2016). He calls Restatement § 211 "an elegantly designed, thoughtful solution by impressive contract theorists to address the problem of assent to standardized contracts." *Id.* at 736. For Zacks, "[t]he mystery of section 211 is its overwhelming absence from modern contract law cases." *Id.*

305. *Id.* at 758; *see, e.g.*, Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 396–97 (Ariz. 1984); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975); *see also* James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L. Q. 315, 324–25 (1997) (finding that by 1997 only 43 published cases cited the doctrine, most from Arizona and nearly all within the insurance policy context); John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 301 (2000) (discussing lack of consensus on the scope and application of the doctrine).

306. Zacks, *supra* note 304, at 758–59.

307. RESTATEMENT (SECOND) CONTS. § 201 cmt. f (AM. L. INST. 1981); White, *supra* note 305, at 339.

308. These theories and their inapplicability in the context of modern consumer contracts are discussed in *supra* Sections I–II.

309. *See* discussion *supra* Sections I–II.

310. Zacks, *supra* note 304, at 794.

311. As Todd Rakoff argued in the 1980s, modern contract law's analytical approach and doctrine "remains tied to the traditional formulation that a signed document is, as an initial matter, a binding contract, and that cause must be shown in order to support nonenforcement of a term." Rakoff, *supra* note 4, at 1190. Zacks agrees that if the judicial presumption of consumer assent to terms can be abandoned, then an adjudicator's form can be reframed, and the dispute will not need to focus on whether a consumer can prove that a term should be removed, but perhaps can focus on whether a term deserves to be included. *See* Zacks, *supra* note 304, at 741 (explaining how changing the presumption of assent can "shift[] the focus away from the economic reasonableness of particular terms as perceived by the adjudicator and instead towards the empirical reasonableness of contracts as experienced—or not experienced—by consumers").

relationship is merely an election to engage with a counterparty and not a choice to be bound by that party's terms. Once the choice to engage and the rules of engagement are decoupled, then the substance of transacting parties' agreement can start from a baseline of an empty set rather than presumptively enforceable company boilerplate terms.[312] Only some of the company's express terms would become the parties' contract. Constructive provisions—those that form the transactional infrastructure—will be included because a reasonable consumer would desire, and the transaction would require, their inclusion.[313] Destructive provisions—those crafted by the company solely to change or eliminate consumer legal default rights—would be subjected to a higher threshold of voluntary waiver in order to take effect.[314] Destructive terms would only be read into the contract if the company proves that the consumer has intentionally and voluntarily relinquished a known right. Redefining the contract baseline in vertical relationships would free consumers from needing to prove that particular terms should be exclude from the parties' contract. Instead, the company would need to show a basis upon which its destructive terms should be included before they have any effect.

More than sixty years ago, legal luminary Karl Llewellyn promoted the idea that the substance of the contract should not be deemed to be identical to the stronger party's adhesive form.[315] Llewellyn suggested that in circumstances where a consumer counterparty cannot be reasonably believed to have actually assented to boilerplate terms, there is no blanket objective manifestation.[316] In such a case, noted Llewellyn, the parties should be deemed to have only reached agreement on those terms that were specifically negotiated and other reasonable terms to which neither party would disagree arising from interpretive gloss and legal defaults.[317] Eric Zacks claimed that Llewellyn's two-tier approach was "largely enshrined" in § 211 of the Restatement, but Llewellyn's approach could be interpreted differently—as articulating the appropriate baseline for a

312. Consumers cannot shape the terms of the standard form which typically represents "extensive overreach by drafting parties." Zacks, *supra* note 304, at 736; *see also* KIM, *supra* note 21, at 44–52 (discussing how sellers routinely use "crook" provisions that a consumer will rarely read, as well as "sword" provisions creating excessive future discretion and power for the drafting party and "shield" provisions protecting the drafting party from future costs and liabilities).

313. *See* RESTATEMENT (SECOND) OF CONTS. § 211(1) (AM. L. INST. 1981).

314. *See* KIM, *supra* note 21, at 48.

315. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (explaining that in the context of non-negotiable boilerplate, "there is no assent at all"); *see also* Llewellyn, *supra* note 183, at 731 (in the context of one-party-drafted consumer contracts, contract "[l]aw, under the drafting skill of counsel, now turns out a form of contract which resolves all questions in advance in favor of one party to the bargain").

316. Llewellyn explained that consent to contracting using the other party's form does not reasonably include consent to unreasonable terms, suggesting that these terms never became part of the contract's content to begin with. LLEWELLYN, *supra* note 315, at 370 ("The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.").

317. Llewellyn advocated that only the "dickered terms," those that were specifically negotiated, should presumptively become part of a contract in an adhesive contract context. LLEWELLYN, *supra* note 315, at 370. Rakoff, similarly, argued that "visible" terms should be the contractual baseline, with "invisible" terms included only if specifically assented to by consumers. Rakoff, *supra* note 4, at 1251.

contract's content rather than establishing a tool to remove objectionable terms.[318]

Both the New Restatement (of Consumer Contracts) and the Restatement (Second) of Contracts start with presumptive enforceability of company boilerplate; this Article explains that this starting point is both ineffective and unjustified. Llewellyn started with the presumption that contract legitimacy derives from empowering all counterparties to shape the terms—not just empowering one of them.[319] Under this reading of Llewellyn, courts need not find some basis to remove unreasonable terms from non-negotiable adhesion contracts because such terms never become part of the contract to begin with.[320]

Other contract scholars have promoted a similar content-based approach to limiting the enforceability of certain standard terms, with inconspicuous or unexpected terms less likely to become part of the parties' agreement.[321] According to Todd Rakoff, for example, the "customary shopper" considers price, shipping, and perhaps return policies when they choose among commercial counterparties in the marketplace, and thus, the judicial presumption of the enforceability of such terms is justified.[322] On the other hand, terms that reasonable consumers would not attend to and that would impose an unfair hardship or surprise on consumers should be excluded from the contract, with the subject matter of those terms being "decided by application of background law" instead.[323] Radin endorses a similar approach, explaining that in the context of non-negotiable consumer contracts, the choice to engage in a transaction with a company cannot reasonably be held to be assent to all of that company's authored terms and conditions.[324] To conflate the concepts of assent to a transaction and assent to particular boilerplate, says Radin, is "gerrymandering of the word 'agreement,'" and results in systematic "devolution or decay of the concept of voluntariness" in our legal system.[325]

---

318. Zacks, *supra* note 304, at 739. This approach is somewhat reminiscent of UCC § 2-207(3) which provides that if parties do not form a contract based on their writings but behave as though they are in a contractual relationship, the terms of their governing contract consist of those terms to which both parties agree, supplemented by statutory "gap filler" defaults. The similarity in approach is perhaps unsurprising because Llewellyn was the prime architect of the UCC and has had a unique impact on the development of contract law in the United States. William Twining, *Two Works of Karl Llewellyn*, 30 THE MOD. L. REV. 514, 514 (1967).

319. Llewellyn advocated that only the "dickered terms" should presumptively become part of a contract in an adhesive contract context. LLEWELLYN, *supra* note 315, at 370.

320. *Id.*

321. For example, Rakoff argued that courts should "distinguish the form terms that are usually innocuous from those that tend to be abused even in a competitive market," and apply a stricter scrutiny to such "invisible" terms. Rakoff, *supra* note 4, at 1251.

322. Rakoff explains that the background legal rights that can flesh out consumer contracts might derive from "[c]ase law principles, statutory and administrative sources, and appropriate custom and practice. . . ." *Id.* at 1258.

323. Rakoff also explains that even though background principles can be changed by negotiations, they should not be changeable in contexts where one party imposes their non-negotiable terms on other parties (the sort of contract labeled "vertical" in this Article). *Id.* at 1258, 1261.

324. RADIN *supra* note 3, at 82.

325. *Id.* at 65.

B. Legal Defaults and Consumer Preferences

Acknowledging that consent to an exchange in a vertical relationship is distinct from blanket assent to the controlling party's proffered terms will require a separate consideration of the question of what terms are included in the parties' contract. Manifestations of intent to do business may reasonably signal the adoption of those particular terms that govern and establish the necessary parameters for the transaction (the constructive terms), but willingness to engage in a transaction provides no basis to find a waiver of default legal rights.[326] While constructive terms are therefore justifiably included in the parties' contract, destructive terms should be presumptively excluded.

In commercial sale of goods contracts analyzed under the UCC § 2-207 framework, the process of defining the content of the parties' resulting contract can become quite complex because it is sourced from both parties' boilerplate provisions as well as legal defaults.[327] The absence of a second form in the consumer contract context renders this process much simpler: terms establishing the transactional infrastructure are part of the contract, and boilerplate provisions varying the legal defaults with respect to liability, damages, and dispute resolution would only be included if a company proves knowing and voluntary waiver of such defaults.[328] Randy Barnett argues that by agreeing to transactions, consumers cede their right to self-legislate to the companies with which they do business.[329] It strains credulity to claim that transactional choice indicates a choice to delegate the power to define virtually all of a consumer's legal rights to the company.[330] There is scant evidence that company boilerplate does in fact reflect consumer preferences.[331] A century of courts,

---

326. Transactional infrastructure provides sufficient terms upon which the contemplated exchange of values can proceed. The introduction to the New Restatement calls transactional infrastructure the "core" terms of the contract, but there is no reason that the non-core terms must be part of the parties' contract at all.

327. The framework of UCC § 2-207 is unwieldy both because of its complexity and because of its drafting gaps. Vincent A. Wellman, *Drafting in the Shadow of 2-207*, 46 No. 4 UCC L.J. Art 2 (2015).

328. Contracts are best conceived of as mutual private legislation but treating the company's terms as the parties' agreement grants legislative party to just one of the contracting parties. This point was made by Llewellyn in a section of his Article *What Price Contract? An Essay in Perspective*. If a court treats a company's standard form terms as binding, then it permits a contract that "resolves all questions in advance in favor of one party to the bargain. It is a form of contract which, in the measure of the importance of the particular deal in the other party's life, amounts to the exercise of unofficial government of some by others, via private law." Llewellyn, *supra* note 315, at 731.

329. Barnett argued that even though the consumer does not choose the content of company boilerplate, the consumer chooses to give the company power to write whatever contract terms it deems appropriate. Barnett, *supra* note 4, at 634–37. According to Barnett, company forms are more likely to reflect consumer preferences than legal default rules both because consumer's relationship with a company is more voluntary than is a citizen's relationship with a government and because companies are more aware of and responsive to customer preferences than government representatives are with respect to desires of their constituency. *See id.* at 643.

330. *See* discussion *supra* Sections I–II.

331. Margaret Jane Radin shows numerous examples of consumers victimized by the standard terms that delete their legal rights. *See generally* RADIN, *supra* note 3.

legislators, and advocates demanding some constraint on company governing power suggests that consumer input via market activity is insufficient.

Empirical research, including the author's recent study of 100 companies' online boilerplate terms and conditions, suggests that the vast majority of companies have included multiple categories of destructive terms in their boilerplate, adding provisions to their online terms and conditions that are unrelated to the mechanics of the transaction itself and exist only to change or eliminate the consumers' legal rights.[332] Such destructive provisions purport to limit the liability and costs associated with company contract defaults and tortious conduct. Destructive provisions in more than 95% of online terms and conditions eliminate many tort and contract causes of action, and cap or constrain recovery in cases of successful claims.[333] A supermajority of such terms and conditions also change how, where, and when parties can resolve their disputes.[334]

Traditional contract law frames company boilerplate as an indivisible whole, and this framing leads to the contention that if courts do not treat company boilerplate terms as the parties' contract, there will be inadequate terms to establish the contractual relationship—resulting in transactional anarchy. Recognizing that some terms in boilerplate are inherently severable and that only some terms included in boilerplate are necessary for a functional transaction avoids this strawman argument. There is no real Hobbesian choice of tolerating involuntary deletion of consumers' legal rights or dismantling the transaction's necessary infrastructure.[335]

Courts can, as a matter of law, distinguish between terms that make up the transactional infrastructure and those destructive provisions that exist solely to delete or modify default legal rights. Of course, many provisions in companies' terms and conditions (price terms, delivery details, subscription options, and the like) are necessary for the parties to engage in their mutually desired transaction, and such constructive terms are more reasonably deemed chosen by the consumer counterparty along with the transaction itself. However, company boilerplate need not live or die as a whole. It is reasonable to bundle transactional infrastructure with the transaction; but bundling destructive terms in boilerplate with the transaction is unnecessary and weakens freedom of contract. Transactional efficacy requires the inclusion of constructive terms, but not destructive ones. To effect the consumer's preferences, constructive terms establishing the deal's

---

332. Boyack, *supra* note 20, at 2–3; *see also* RADIN *supra* note 3.

333. *See* Boyack *supra* note 20, at 7, 14 (98% of surveyed boilerplate contains provisions specifically waiving or otherwise limiting company liability, and 98% of surveyed boilerplate contains provisions capping or otherwise limiting damages available to aggrieved counterparties).

334. *See id.* at 30 (87% of surveyed boilerplate contains provisions modifying the dispute resolution process available to the counterparty).

335. Defenses of boilerplate enforcement often claim that if that the company's standard form is not the parties' contract, then the transaction will be ineffective due to lack of infrastructure. Ben-Shahar, *supra* note 287, at 885–87. *But see* Radin, *supra* note 21, at 98.

infrastructure should come into the contract; the destructive provisions should stay out.

Excluding destructive terms would not leave gaps in the parties' contract. Contracting parties' legal rights in vertical relationships would be determined by legal default rules, modified only by the transactional infrastructure. By definition, destructive terms are unnecessary to define contracting parties' rights. In their absence, liability determinations between the parties would simply track tort and contract allocations of fault, and damages for breach would be calculated based on legal principles for determining remedies. Disputes would be resolved in the matter provided by our legal system. There is no practical need to derive content from some external source for questions of liability allocations, damages, and dispute resolution because our legal system has already determined how such issues are to be addressed in the absence of mutual agreement to the contrary. And boilerplate provisions are not mutual agreements to the contrary—so these legal defaults would persist.

Excluding destructive terms from the parties' private contract would have no negative impact on market activity because these are the terms that are external to the transaction's infrastructure. Furthermore, the presumptive ineffectiveness of destructive terms would reverse systematic destabilization (and "democratic degradation") caused by enforcement of destructive terms in boilerplate under the current approach.[336] As Radin explains, our system's default legal rights derive from the democratic process, reflect community values, and balance varying perspectives.[337] Freedom of contract allows contracting parties to depart from those defaults in the context of their relationship if they both choose to do so (within the bounds of public policy). But if only one party voluntarily indicates a desire to depart from the defaults, then the legal defaults, by definition, should remain in effect.[338]

In vertical relationships, consumers likely prefer to retain their legal default rights—at least, there is no basis to believe that simply engaging

336. Radin makes this point in her book, BOILERPLATE. RADIN *supra* note 3 (chapters 10–12). Radin suggests that offending parts of boilerplate be deemed un-assented to and therefore excluded from the parties' agreement. She explains in great detail several options to achieve this result, from contractual re-framing (similar to that advocated in this Article) to tort liability to regulation. *Id.*

337. For example, we limit contract damages to reasonably certain benefits of a bargain and foreseeable losses in value resulting from a breach. *See, e.g.*, Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1164 (Miss. 1992). These reasoned legal default rules should not lightly be set aside by a unilateral proclamation in company boilerplate. In the absence of assent by both counterparties to varying the legal default rules, the legal default rules should persist, opines Radin. RADIN *supra* note 3 (chapters 10–12).

338. Another way that transactional infrastructure is distinct from rights deletion provisions is that there are no default terms that would apply to determine transactional infrastructure. The lack of infrastructure defaults in the law is what led states to adopt the UCC provisions that create such defaults in sales of goods transactions so that if parties failed to reach agreement on such terms, the transaction could proceed. U.C.C. § 2-301. But the legal rights that are deleted by the rights deletion provisions are not affirmative gap-filling statutory provisions; these rights are the right to trial by jury, the right to bring a lawsuit within a statute of limitations, the right to obtain damages as defined by law based on proving a claim as defined by law, etc. RADIN, *supra* note 3, at 113.

in a transaction is itself an indication of a desire to waive such rights. Default legal rights cannot be stripped away involuntarily. Of course, it is still possible for default allocations of liability, rules for measuring damages, and dispute resolution processes to be varied or waived by private agreement, but to be effective, a contractual waiver must be both (a) knowing and intentional and (b) made in exchange for some consideration.[339] To be adequately "intentional" consumers must have the option to proceed with the transaction whether or not they agree to waive their default legal rights. The consumer also must be informed with respect to the nature of the right and the effect of its waiver in order for the relinquishment of the right to be "knowing."[340] Furthermore, because the waiver would be in the form of a contractual promise, the waiver must be supported by consideration—some additional economic incentive provided to the consumer in exchange for relinquishing their legal rights.[341] If a company created a mechanism for eliciting intentional, known relinquishments of rights in exchange for value, then such opt-outs of legal default rules would be effective even in a vertical relationship.

For a century, companies have asserted that separately negotiating terms with each customer, employee, member, and the like would be impossibly cumbersome.[342] The need for uniformity of standard contracts has been referenced to justify enforcement of destructive provisions in boilerplate based on the reasoning that disallowing the effect of such provisions *in toto* would render it impossible for consumers to ever choose to vary the legal default baseline.[343] But impossibility of obtaining an adequate waiver does not usually excuse the legal prerequisites for waiver validity.[344]

---

339. *E.g.*, Knorr v. Smeal, 178 N.J. 169, 177, (2003) (a waiver is "[an] intentional relinquishment of a known legal right"); Hamer v. Sidway, 27 N.E. 256 (N.Y. App. 1891) (contract promises require consideration to be enforceable).

340. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 447 (2014) ("'[a]n effective waiver requires a [consumer] to have full knowledge of [her] legal rights' before she relinquishes them." (quoting *Knorr*, 178 N.J at 177)).

341. *Hamer*, 27 N.E. at 257.

342. Standard contracts have long been credited approvingly as helping make transactions easier, cheaper, and more fungible. *See, e.g.*, Llewellyn, *supra* note 183, at 731.

343. *See* Ben-Shahar, *supra* note 287, 892–96.

344. Brian H. Bix, *Consent and Contracts*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT (Andreas Müller & Peter Schaber, eds., 2018) ("Consent in its fullest form is often thought to entail knowledge by the actor of all material circumstances, alternatives, and consequences."); *see also* Warkentine *supra* note 15, at 480. In the context of medical procedures, informed consent is the prerequisite of an effective waiver and agreement to treat. Hubert Schnüriger, *What is Consent?*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT (Andreas Müller & Peter Schaber, eds., 2018). Consider also the impossibility of persons with capacity to waive their legal rights. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L. J. 763, 786 (1983). There are, however, scholars who defend boilerplate waivers and stress that neither subjective intent to waive nor consideration should be necessary for the effectiveness of the same. *See, e.g.*, Keith N. Hylton, *Waivers* 2 (B.U. Sch. Of L. Research Paper No. Series 22–26) (Sept. 20, 2022) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224985).

Furthermore, today, the assertion that consumer contract terms must always be uniform no longer holds true.[345] Different deal terms (in particular, different prices) may be acceptable to different consumer counterparties, and companies have started to use technology to take advantage of different consumers' willingness to pay by customizing contract terms in order to maximize company profits.[346] It therefore stands to reason that if changes to the legal defaults do in fact create significant wealth benefits, then companies may make similar customizations of their terms. Companies could pay those consumers who are willing to voluntarily trade their legal rights (say the right to litigate or join a class action) in exchange for a share of the wealth created by destructive terms. Companies could use personalization technology to establish mechanisms for individuals to deliberately opt out of certain legal rights in exchange for a discount or some other valuable consideration (unless public policy deems such rights unalienable). If it turns out that consumers generally prefer to waive their legal rights in exchange for a lower priced transaction, then such options will prove popular.[347] Consumer choice to either retain legal defaults or opt out in exchange for payment not only permits consumer-side input into contract content but keeps separate the choice to enter a relationship and the question of what the contract terms are.

If some, but not all, consumers effectively waive their legal default rights, then companies would end up with slightly different contract terms applicable in different consumer relationships, but term differentiation already exists. An example arises from consumer opt-outs from boilerplate arbitration provisions.[348] Mandatory arbitration clauses are among the most contentious of the destructive provisions in company boilerplate, and over the past few years, legislators and state courts concerned with consumer protection have increasingly attempted to push back on the

345. Courts began enforcing standard form contracts in the last half of the 19th century (sewing machine purchases were some of the first standard forms treated as contracts by the courts) based on the assertion that sellers must have identical contract terms with all their buyers. KIM, *supra* note 21, at 22–28. Modern vendors, however, have used technology to engage in price discrimination to boost profits. Joost Poort & Frederik J. Zuiderveen Borgesius, *Does Everyone Have a Price? Understanding People's Attitude Towards Online and Offline Price Discrimination*, 8 INTERNET POL'Y REV. 1, 2–3 (Jan. 30, 2019).

346. Today, companies may offer differing price structures to consumers based on algorithms measuring presumed ability and desire to pay. Kat George, *Prices That Change By the Second: Why Shopping Around for Deals Online Isn't Always Worth It*, THE GUARDIAN (Dec. 11, 2022). Offering consumers the ability to knowingly opt out of their legal rights would create little additional friction in a transaction.

347. Such opt-out provisions would likely create less transactional friction than requiring consumers to open a different window, scroll to the bottom, and check multiple boxes to indicate assent. An opt-out regime and its likely transactional impacts is discussed in Ian Ayers, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2032 (2012).

348. According to a 2015 study by the CFPB, about a quarter of online terms and conditions contain an opt-out provision. CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015). *See also* Jeff Sovern, *Why Allowing Pre-Dispute Arbitration Opt-Out Clauses is Not Effective Consumer Protection*, PUBLIC CITIZEN (May 1, 2009).

enforceability of such clauses.[349] The CFPB has attempted to curtail enforceability of mandatory arbitration provisions in certain consumer contracts,[350] Congress has proposed and passed legislation limiting forced arbitration clauses in certain contexts,[351] state legislatures continue to pass legislation purporting to limit the effect of mandatory arbitration clauses in consumer contract boilerplate (even though federal courts have denied the effectiveness of many such provisions),[352] and state courts continue to occasionally strike down arbitration provisions in consumer contracts as unconscionable.[353]

One strategy that companies have employed to increase the likelihood of their mandatory arbitration clauses being enforced is to offer their

349. Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *"Whimsy Little Contracts" With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 72–73 (2015).

350. In 2017, the CFPB passed a rule (the "Arbitration Agreements Rule") that limited arbitration of class actions. *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CFPB NEWSROOM (July 10, 2017). The Arbitration Agreements Rule was quickly quashed by Congress when, on November 1, 2017, President Trump signed joint resolution by Congress disapproving the Rule pursuant to the Congressional Rule Act. *Id.*

351. H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act, passed by the House of Representatives on March 17, 2022, would have limited the effectiveness of arbitration in a wide variety of consumer contracts, but this bill died in the Senate. H.R. 963, 117th Cong. (2022). Also in March 2022, Congress passed, and President Biden signed into law, a more narrowly focused bill, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, H.R. 4445, that bans enforcement of pre-dispute arbitration mandates for sexual-harassment and sexual-assault claims. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90 (2022).

352. For example, the Vermont legislature in 2019 voted to amend state law to create a rebuttable presumption that certain boilerplate terms are substantively unconscionable: choice of forum that requires dispute resolution out of state, waivers of jury trial or the right to bring a class action, provisions limiting the time to commence an action, limitations on punitive damages, and requiring fees greater than a court proceeding be paid to resolve a dispute. Vt. Stat. Ann. Tit. 9 § 6055. The portion of this law creating a rebuttable presumption that waivers of jury trials and class actions are substantively unconscionable may run into federal preemption issues regarding arbitration, but because it is not exclusively targeting mandatory arbitration provisions, it might survive a claim that the FAA trumps its provisions. *See* David Seligman, *Three June State Law Actions Helping Consumers Fight Arbitration Requirements*, NCLC DIGITAL LIBRARY (July 31, 2019), https://library.nclc.org/three-june-state-law-actions-helping-consumers-fight-arbitration-requirements. In addition, the Ninth Circuit has upheld the right of consumers to seek injunctive relief in court if a state statute provides that limitations on such rights in contracts are unfair or deceptive acts and practices (UDAP). *See id.* (discussing Blair v. Rent-A-Center, 928 F.3d 819 (9th Cir. 2019)). Some states in the Ninth Circuit have such UDAP clauses. *See, e.g.*, Cal. Civil Code § 3513; Alaska Stat. § 45.50.535(a). Other circuits could follow the same approach and hold that consumers seeking injunctions could skirt arbitration mandates based on similar state UDAP provisions. *See, e.g.*, D.C. Code § 28-3905(k); Iowa Code § 714H.5(1).

353. Courts apply a case-by-case substantive unconscionability analysis to arbitration clauses in contracts of adhesion, and although many such clauses are found to lack substantive unconscionability, occasionally, the clause is seen to be too unfair to consumers because of the cost or forum or some inconsistent rights among the parties (for example, a company's rights to seek relief outside arbitration that is denied to the consumer counterparty), and in such cases, the arbitration agreement, or even the entire set of standard terms, may be declared unenforceable. *See, e.g.*, Cerneka v. Russell No. 8 Santa Monica Props., LLC, B288972, 2018 WL 3154565, at *11 (Cal. Ct. App. June 28, 2018) (finding a mandatory arbitration clause in a lease unconscionable in part based on the high fees required for arbitration that unfairly denied the tenant access to dispute resolution); Gutierrez v. Autowest, Inc., 114 Cal. App. 4th 77, 89 (2003) (similar, in an automobile lease); Figueroa v. THI of N.M. at Casa Arena Blanca, LLC, 306 P.3d 480, 493 (N.M. Ct. App. 2012) (finding an arbitration clause in a nursing home agreement unconscionable based on one-sided carveouts that benefitted the company only, not the consumer); Cordova v. World Fin. Corp., 146 N.M. 256, 267 (2009) (holding that a one-sided arbitration clause in a consumer finance agreement was substantially unconscionable).

customers a right to opt out of that particular destructive provision for a specified period after contract formation.[354] This opt-out right, almost always hidden in the fine print, preserves the argument that consumers who proceeded with the transaction without opting out of arbitration made the voluntary choice to waive their rights to trial.[355] Opting out requires following a prescribed process: typically, consumers must draft, sign, and mail to the company a statement indicating their choice to opt out of arbitration within thirty days of first entering into the transactional relationship.[356] There is no continued right to opt out after that relatively short window of opportunity closes.

Even in cases where the company's boilerplate allows consumers to opt out, it is unlikely that many consumers avail themselves of this option.[357] For one thing, the consumer's required actions to opt out (write a letter, print it, sign it, and mail it) are far more onerous than the actions required to form a contract relationship with the company to begin with (click a button on a screen or simply visit a website). In addition, the boilerplate opt-out is based on arbitration as the default rule, and choice of default rules matter.[358]

The mere possibility that certain consumers may choose to revive and reinstate certain legal rights rather than be bound to destructive provisions in boilerplate, however, shows two important things. First, companies that draft boilerplate implicitly understand that consent to the transaction is distinct from consent to a set of boilerplate terms and recognize that it is feasible to have an efficient and effective contract relationship to which one or more of the deletion provisions do not apply. Second, having different terms apply to different consumer counterparties does not destroy the company's ability to do business or undermine the company's transactional contracting scheme. Customization of pricing and arbitration opt-outs show that customization of terms is possible, particularly for those terms that do not impact transactional infrastructure. If customization can be embraced as a way to maximize profits or bolster claims of destructive term enforceability, it can also provide a method of preserving autonomy for those consumers who actually do wish to arbitrate disputes, waive company liability, or stipulate damages. Of course, to the extent that a company does not want term variance among its consumer contract

354. Jeff Sovern, *Opaque (Formerly Dark) Patterns and Arbitration Opt Outs*, CONSUMER L. & POL'Y BLOG (June 2, 2023), https://clpblog.citizen.org/opaque-formerly-dark-patterns-and-arbitration-opt-outs/.

355. Sovern, Greenberg, Kirgis, & Liu, *supra* note 349, at 4.

356. Sovern, *supra* note 354. Note that opt-out provisions require notice by mail, not email. *Id.*

357. Studies suggest that only a tiny fraction of consumers avail themselves of the option and opt-out of mandatory arbitration. *Id.*

358. It is less likely for a consumer to affirmatively opt out of an arbitration baseline than for a consumer to simply retain their default legal rights by not opting into an arbitration regime. For a discussion of how choice of default impacts outcomes, see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83–87 (Yale University Press 2008).

terms, it can refrain from offering its counterparties a way to deliberately waive their default legal rights.

Again, it is critical for consumer autonomy that the default contract baseline exclude destructive provisions in company boilerplate. The opt-out approach embraced by some companies currently with respect to arbitration clauses is designed to strengthen claims that such provisions are enforceable and is not designed to elicit consumer input into contract content.[359] These provisions increased in popularity within boilerplate terms after courts in Maryland and Florida cited opt-out provisions as evidence that a mandatory arbitration clause was not a mandatory term and, therefore, was not unconscionable.[360] The approach described in this Article, on the other hand, eschews this sort of strategic opt-out scheme that creates the mere illusion of consumer choice. Under the approach described here, the presumptive contract term regarding dispute resolution would be that consumers retain their default legal rights, including the right to a jury trial (and, in most states, the right to join a class action), and only if a consumer affirmatively and deliberately chooses to waive their rights in exchange for some additional consideration would the alternate approach to dispute resolution, liability allocation, or damage calculation supplant the parties' legal default rights.

Preserving consumers' default legal rights as their contract baseline protects against the unwitting loss of those legal rights.[361] If the contract terms track the legal defaults, companies would no longer be able to eliminate consumer rights by strategic drafting alone, unless the company proves knowing and intentional consumer waiver.[362] The opt-out approach also increases the likelihood that consumers who choose to give up their

359. This point is implicit in contract drafting legal advice to companies that frame the opt-out clause in boilerplate as a handy way to shore up mandatory arbitration clauses. *See, e.g.*, Brian A. Berkley, *Can Opt-Out Provisions Save Arbitration Clauses?*, LAW360 (June 8, 2016), https://www.foxrothschild.com/publications/can-opt-out-provisions-save-arbitration-clauses.

360. Both cases involved the same form contract, crafted by Uber to govern its relationships with its drivers. Varon v. Uber Techs., Inc., No. MJG–15–3650, 2016 WL 1752835, at *4–5 (D. Md. May 3, 2016); Suarez v. Uber Techs., Inc., No. 16–cv–166–T–30MAP, 2016 WL 2348706, at *2, 4 (M.D. Fla. May 4, 2016), *aff'd*, 688 F. App'x 777 (11th Cir. 2017). The provision that appeared in the contract appeared in bold face and read as follows:

> Your Right To Opt Out Of Arbitration.
>
> Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision. . . . Should you not opt out of this Arbitration Provision within the 30-day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt-out of coverage under this Arbitration Provision.

Suarez, 2016 WL 2348706, at *2 (omission in original). Based on this provision, the company's boilerplate "does not require a Driver applicant to agree to the Arbitration Provision and provides a 30-day period during which the Driver may opt out." *Varon*, 2016 WL 1752835, at *2.

361. And unwitting loss of legal rights risks both inefficiency and loss of autonomy or personal dignity. Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1334, 1337–38 (2019).

362. As discussed throughout this Article, and as recognized explicitly for decades, contracts are intended to be vehicles for self-legislation, not tools that permit one party to govern another. Llewellyn, *supra* note 183, at 729, 731.

rights will be fairly compensated for doing so. Requiring a deliberate opt-out would increase transaction costs for consumers who in fact do wish to have their contract rules deviate from legal default rules, but in the context of rights deletion provisions, the cautionary benefits of increased formality justify such additional transactional friction.[363] As long as the transactional relationship could still proceed in the absence of such a waiver, and as long as the default contract terms reflect default consumer legal rights, autonomy and efficiency problems that arise from providing a waiver option are mitigated.[364]

A framework that redefines the baseline of contract content in the way described here avoids dependency on judicial findings of unconscionability to police the line between contract and abuse.[365] This framework also promotes streamlined market activity by making it easy to form a transactional relationship, but it does so without sacrificing consumer legal rights.

Defining the contract as excluding destructive terms also cuts through the Gordian Knot created by courts' interpretation of the Federal Arbitration Act (FAA) in the context of consumer contracts.[366] Increasingly, courts enforce arbitration clauses in consumer contracts and refuse to allow litigation of consumer claims when company boilerplate includes a mandatory arbitration provision.[367] Even claims rooted in avoidance doctrines such as unconscionability typically cannot constrain arbitration clauses that impose a similar obligation to arbitrate on both parties.[368]

---

363. Increased formalities serve as evidence of assent and help channel enforceable terms away from those that may not be enforceable, but formalities also serve a cautionary function, increasing party attention to and deliberate consideration of an action. Fuller, *supra* note 51, at 800–01. Although increased formalities cannot function as a cautionary speed bump on the road to a transaction that effectively helps consumers protect themselves in contexts of non-negotiable terms, as discussed *supra* Section I.A, in the context of a consumer's voluntary option to opt out of otherwise applicable legal default rules (in cases where the transaction could proceed no matter whether the consumer chose to opt out or not), formalities can be effective in empowering consumers to protect themselves.

364. The concerns are not eliminated *in toto* because imbalance of power and sophistication, as well as disparate economic realities, persist in consumer contracts. Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That is Yet to Be Met*, 45 AM. BUS. L.J. 723, 733–34 (2008). It is thus imperative to ensure true consumer choice in the context of click-based waivers, particularly as companies are highly motivated to find ways around rules that limit their ability to control consumer legal rights through their boilerplate.

365. Interpretive approaches that incorporate consumer preferences can bolster this framework. For example, construing ambiguities against the drafter and resolving differing party expectations based on what each party would reasonably believe about the other's expectations (described in Restatement (Second) of Contracts § 201)) would reinforce the framework for contract formation described here. Under these approaches, the consumer's reasonable interpretation of a contract provision obtains primacy over the drafter's own preferred interpretation. *See, e.g.*, Charles R. Tips Family Trust v. PB Com. LLC, 459 S.W.3d 147, 153 (Tex. App. 2015); Gardner Zemke Co. v. Dunham Bush, Inc., 850 P.2d 319, 324 (N.M. 1993).

366. 9 U.S.C.S. § 2 (LexisNexis).

367. The Supreme Court has ruled that the FAA requires courts to "rigorously . . . enforce arbitration agreements according to their terms." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018); *see also* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 254 (2017).

368. If terms containing a "bilateral" (evenly applicable) arbitration clause were available to a consumer counterparty prior to some affirmative act (like clicking a button on a screen marked "I

Furthermore, the Supreme Court has held that the FAA preempts state laws guaranteeing consumers a right to seek dispute resolution as a class, making it possible for companies to craft arbitration clauses in a way that does the double duty of deleting both the consumer's right to a jury trial and a right to participate in a class action.[369] Under the current judicial interpretation of the FAA, mandated, court-ordered arbitration is triggered whenever the court finds that a consumer chose a transactional relationship with a company and the company included a mandatory arbitration clause in its boilerplate.[370] Applying the framework described in this Article, however, would result in consumer contracts that do not contain any arbitration clause (boilerplate destructive provisions to the contrary notwithstanding).[371] If the parties do not have a contract to arbitrate, the FAA would not apply, and no court would—or could—compel arbitration.[372]

C. Excluding Unilateral Modification Clauses

Empirical research shows that nearly all companies include a provision in their online boilerplate that authorizes unilateral modification of terms and conditions.[373] Courts frequently find that unilateral changes are

accept"), then courts typically treat such provisions as a binding contract between the parties to arbitrate all their disputes. DeVries v. Experian Info. Sols., Inc., No. 16–cv–02953-WHO, 2017 WL 733096, at *14–15, 18 (N.D. Cal. Feb. 24, 2017); Wiseley v. Amazon.com, Inc., 709 F. App'x 862, 864 (9th Cir. 2017).

369. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343–44 (2011).

370. Meyer v. Uber Techs., Inc., 868 F.3d 66, 73–74 (2d Cir. 2017). In *Meyer*, for example, the court makes a finding that the consumer "located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber," and that since the consumer intended the relationship, it would therefore be bound by all the terms and conditions in the company's hyperlinked boilerplate—including the mandatory arbitration clause. *Id.* at 80. Reflexive enforcement of boilerplate arbitration provisions does not simply change the process of dispute resolution for consumers; it effectively strips them of any practical right to resolve any of their disputes with the company. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015) (noting that "few who are cut off from using the courts and required (rather than choosing) to arbitrate do so").

371. Unless a consumer voluntarily and knowingly chose to waive a right to trial in exchange for some consideration, as described in *supra* Section III.B.

372. Volt Info. Scis., Inc. v. Bd of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989). Courts require that a party seeking to compel arbitration prove that the parties entered a contract to arbitrate their disputes that is binding pursuant to state law. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 681 (2010); Combined Energies v. CCI, Inc., 514 F.3d 168, 171 (1st Cir. 2008); Schnabel v. Trilegiant Corp., 697 F.3d 110, 118 (2d Cir. 2012); Bel-Ray Co. v. Chemrite Ltd., 181 F.3d 435, 444 (3d Cir. 1999).

373. The author's empirical research found that in 100% of the reviewed boilerplate there was a clause expressly authorizing the company to make unilateral modifications. Boyack, *supra* note 20, at 10. In another recent study examining 500 companies' boilerplate, 98% contained such a provision. Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GA L. REV. 657, 681–82 (2021). Prior studies of this phenomenon noted the increasing frequency of unilateral modification clauses as well as the frequency of unilateral modifications. *See, e.g.*, Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. L. REV. 1099, 1100–01 (2010) (describing the "uneasy fit" between the power of the dominant party to change terms and the "weaker party's interest in certainty" and detailing the myriad of industries that routinely include such clauses in their boilerplate); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. Rev. 240, 274–75 (2013) (finding unilateral changes being made to substantive contract terms in 40% of contracts examined over a 7-year period).

legally binding if the boilerplate contained language pre-authorizing such changes.[374] Even scholars who embrace concepts of blanket assent (that a consumer's assent to the transaction equates to assent to all the company's terms) struggle to explain how and why blanket assent to existing and knowable terms should extend to all future changes to those terms that the drafting party may desire in the future.[375] Consumers cannot avoid standard terms with unilateral change provisions, however, because they are ubiquitous. There is essentially zero market choice.[376]

Doctrinally, unilateral power to modify contract terms undermines claims of reliance and market choice with respect to boilerplate content.[377] As David Horton explains, companies that continuously tweak the wording of destructive provisions in boilerplate do so to increase the likelihood that such provisions will be enforced rather than declared unconscionable.[378] Shoring up the enforceability of destructive provisions allows the company to delete consumers' default legal rights more effectively.[379]

Empowering a company to change its contract terms whenever it wishes exacerbates and perpetuates the problems inherent in one-party contractual governance hegemony.[380] The power to unilaterally alter contract terms "undermines the bedrock economic assumption that adherents can impose market discipline" on boilerplate content.[381] Some scholars have called for a legal ban on unilateral modification clauses.[382] Under the approach outlined in this Article, unilateral modification clauses, like other destructive provisions in boilerplate, would not become part of the parties' contract. Instead, consumers would retain their default legal right to choose whether to assent to proposed contract modifications.

CONCLUSION

The beauty of contract law—in its classical formulation—is that it permits private parties to custom-tailor private rules to fit their transactional relationship. The consumer contract realm, however, is populated

374. Alces & Greenfield, *supra* note 373, at 1131.

375. Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 9 (2010). The basic assumptions of blanket assent, however, ultimately lead to this result.

376. Boilerplate of every one of the tracked companies included pre-authorization for unilateral company modifications. Boyack, *supra* note 20, at 17. A larger study done during the year prior to the author's study found such clauses in 98% of consumer contracts. Becher & Benoliel, *supra* note 373, at 681–82.

377. Horton, *supra* note 81, at 609.

378. *Id.* at 609–10.

379. *Id.* at 610 ("Firms design the amendments to convince judges (who read in the context-rich environment of briefing and precedent) that their procedural clauses no longer diminish substantive, jurisdictional, or constitutional values, and thus are valid.").

380. Peter Alces and Michael Greenfield explained that reallocating the rights among contracting parties requires input from all parties to ensure that re-allocations are not prejudicial, and that prejudice to the weaker party "is not mitigated significantly by the fact that the contract explicitly reserved the dominant party's right to adjust the initial allocation as circumstances, or simply the dominant party's interests, dictate." Alces & Greenfield, *supra* note 373, at 1100.

381. Horton, *supra* note 81, at 609.

382. *E.g.*, *id.* at 665.

by off-the-rack standard forms, none of which truly fit the relationship.[383] Although some claim that the competitive market pushes boilerplate terms to reflect consumer preferences, the ubiquity of provisions deleting consumers' default legal rights in online terms and conditions suggests otherwise. Boilerplate provisions destroy consumers' legal rights to seek redress, to hold companies liable, and to obtain damages. Furthermore, nearly every company's boilerplate authorizes unilateral modification of terms. Consumers are left vulnerable to companies' complete control of boilerplate terms subject only to regulation or haphazard judicial findings of unconscionability. A majority of online terms and conditions contain mandatory arbitration clauses, which makes it unlikely that courts in related disputes will have the opportunity to even consider such defenses. Consumer avoidance claims are occasionally successful, but individual sporadic protection of legal rights does little to empower consumer contract counterparties.

Judicial exercise of equity and regulatory protections can only stretch classic contract law doctrines so far. A more tailored contract baseline for consumer contracts starts by recognizing the distinct shape of the modern company–consumer relationship. Traditional contract law is premised on a horizontal relationship between parties who can each provide some contractual input. Consumers, however, lack the ability to provide direct contractual input with respect to most of their transactional relationships. Online terms and conditions are created by and for companies; consumers simply acquiesce to them as a cost of doing business. The company–consumer relationship is a hierarchical, vertically shaped one. Applying traditional contract law to vertical relationships inhibits multiparty input and erodes contract legitimacy. In the context of a vertical relationship, the legal baseline must look outside the unilaterally controlled boilerplate to determine the parties' contract content.

Shaping legal norms to fit the relationship type will promote the underlying goals of contract law, including efficiency and autonomy. Fitting contract law to a consumer contract will treat consumers more equitably without reducing transactional benefits. A more tailored contract law baseline improves upon the New Restatement's reliance on haphazard protective exceptions to presumptively enforceable terms. A more well-suited contract law baseline avoids overreliance on regulation. The practical need for some sort of transactional governance in consumer contracts drives debates about how best to construe consumer choice to be bound to a company's terms.[384] Rather than relying on strained definitions of assent to justify treating unilaterally crafted contract terms as presumptively

383. Almost all scholars considering this point have reached the same conclusion, even those who have concluded that contracts should continue to bind consumers as much as, or more than, they currently do. *See, e.g.*, Oman, *supra* note 94, at 216 (in the context of boilerplate agreements "there is a disconnect between our theories of contractual consent and the legal doctrine of contractual consent.").

384. Bar-Gill & Davis, *supra* note 375, at 27–29, 31–32.

enforceable, courts should recognize the primacy of the nature and shape of the parties' relationship itself.

The solution to the consumer contract conundrum lies not in stretching the idea of assent and or enlarging the application of equity. It lies in reframing the question of what terms make up the parties' agreement. First, the question of assent to a transaction must be separated from the question of, and assent to, a set of non-negotiable terms. Defining the consumer contract to exclude destructive provisions both preserves consumer default legal rights and also increases value-enhancing contractual certainty. A contract's content under this framing would simply be based on the transactional infrastructure (constructive terms) unless a company objectively proves an effective and compensated consumer waiver of those rights. Redefining the consumer contract baseline this way avoids having contract terms ultimately turn on a court's subjective determination regarding whether a particular provision is sufficiently unfair to shock the judicial conscience.[385] Instead of imposing the burden on consumers to prove in court that a given boilerplate clause should be excised from the contract, the approach described here would place the burden on a drafting company to prove that the counterparty had effectively waived their legal default rights.

Presuming legal defaults are contractual defaults with respect to matters outside the transactional infrastructure empowers the vulnerable counterparty in vertical relationships and enhances freedom of contract. This approach ensures that each party can express preferences, exercise voluntary choice, and help shape their contract. An appropriate definition of the parties' agreed-upon terms frees courts from needing to continually police consumer contract content to guard against company overreach. A more accurate understanding of the law and the reality of boilerplate, assent, acquiescence, and waiver will take courts out of the uncomfortable role of judging the fairness of contract terms and restore the more justified and predictable focus on simply enforcing contract terms that were chosen by both parties.

The distinctive contours of the company–consumer relationship justifies a distinctive legal approach to consumer contracts. A century of attempting to squeeze consumer contract reality into traditional contract analyses has resulted in doctrinal and theoretical holes, and a patchwork of judicial and regulatory fixes. Starting with a baseline tailored to the relationship's vertical nature would avoid both fantastical notions of assent and haphazard contract policing. A new baseline for consumer contracts

385. *See, e.g.*, Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. DISP. RESOL. 757, 764 (2004) (discussing the "potential inefficiencies of ad hoc judicial interference with contract terms"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 107–10 (1997) (noting scholarly critiques of the haphazard nature of judicial applications of the unconscionability doctrine).

that separately considers choice of a transaction and choice to relinquish legal default rights establishes a pathway for consumer input and saves contract legitimacy. By recognizing the primacy of the nature and contours of the parties' relationship and adjusting doctrinal approaches accordingly, courts can foster a common law of contracts that creates a fairer and more legitimate private ordering regime.

The law of consumer contracts can be, simply, contract law—freed from tortured conceptions of assent and from intrusive public oversight. This is only possible, however, if the consumer contract is defined in a way that reflects consumer inputs. In a vertical relationship, legal default rules provide a compelling source of consumer-side inputs. Destructive terms attempting to deviate from such defaults would only become contractually binding if a counterparty knowingly and intentionally chooses them in exchange for consideration. After all, enforcement of contract terms is only justified if the terms reflect both parties' preferences. The purposes of contract law are best achieved by applying a framework that facilitates robust transactional activity while preserving consumers' legal rights unless and until they voluntarily choose to exchange them.