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ARTICLES

Shifting Towards Boilerplate Regulation

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Consumer assent to standard form contracts has been creating cognitive dissonance among contracts scholars for a century. Businesses impose standard forms on consumers, who never read the terms. But consumers would not understand them if they did. And they don't have the bargaining power to change them anyway—the terms are famously "take it or leave it." Contracting is ideally theorized as an act of voluntary, knowing consent to all the terms agreed to. The dissonance is that consumers, although ostensibly signaling their assent to the boilerplate by signing (or clicking, or tapping their phone screen), do not in fact know the content of what they are manifesting agreement to. That is, what looks like a contract, scholars argue, cannot really be a contract because of this lack of meaningful consent. Therefore, scholars have long argued for some form of sophisticated judicial contract doctrine, to recognize assent to the known and "dickered" terms, while discarding some or all of the problematic and unread terms. The courts, however, have steadfastly refused to engage in such surgical alteration of what is, for them, an "all-or-nothing" act of simply agreeing to be bound to the entire contract. The consumer has long been held to have a "duty to read" what she signs, and failing to do so will not change the courts' willingness to find the entire contract enforceable (absent some finding of fraud, duress, unconscionability, or the like). At this stage,

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the judicial doctrine is mature enough—and has shown its relative imperviousness to scholarly proposals for doctrinal change—that it is unlikely that courts will suddenly become amenable to a revolutionary change in doctrine. Notions of precedent, predictability, and coherence augur for the likely permanence of the duty to read as enshrined judicial doctrine. A shift is needed. This article argues that legislative regulation is now the most likely vehicle through which effective policing of problematic boilerplate terms can come. Legislatures have already been gradually, and on a piecemeal basis, dictating that various specific contract terms are either prohibited or regulated for the last several decades (e.g., usury, covenants not to compete, waivers of the right of redemption). Therefore, given the enduring inflexibility of the duty to read, legislative regulation of boilerplate terms is the most likely path forward for addressing terms which are collectively perceived as problematic as a policy matter.

INTRODUCTION

The essential, theoretical ideal of contract formation is assent.[1] As Margaret Jane Radin described, in the opening lines of her important book *Boilerplate*, "[o]nce upon a time, it was thought that 'contract' refers to a bargained-for exchange transaction between two parties who each consent to the exchange. This once-upon-a-time story is the ideal of contract."[2] The mythical archetype involves two equally-attuned parties, fully aware and cognizant of all the deal points and terms being discussed, processing them all, weighing them, and ultimately agreeing to each and every one of them.[3] Classical liberal theories of autonomy have "enshrined consent at the center of the contract process . . . ."[4] In simpler times—such as when two farmers haggled over the price of a cow—this archetype could on occasion be achieved.[5] But with the rise in industrialization from the 19th to the 20th century came the mass-production and

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[1] Schwarz v. St. Jude Med., Inc., 802 S.E.2d 783, 789 (N.C. Ct. App. 2017) ("The essence of any contract is the mutual assent of both parties to the terms of the agreement . . . .") (quoting Snyder v. Freeman, 266 S.E.2d 593, 602 (N.C. 1980)).

[2] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 3 (2012).

[3] *Id.*; *see also* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) [hereinafter Slawson, *Standard Form Contracts*] ("The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.").

[4] Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1405–06 (2009) (citing Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994)).

[5] *Cf.* Sherwood v. Walker, 33 N.W. 919, 919 (Mich. 1887) (famous mutual mistake case involving the sale of a cow, memorably named Rose 2d of Aberlone).

mass-marketing of consumer products and services.[6] Merchants built economies of scale, efficiency, and volume into their production, achieving standardization in their mass manufacturing processes and bringing per-item costs greatly down as a result.[7]

This rise in mass-market production and sales was accompanied by a perceived need to secure formal contractual commitments (with concomitant reductions of risk for the merchant) from an ever-increasing body of consumers who were purchasing those products.[8] As a result, the standard form contract, replete with boilerplate[9] (fine print) terms, was born. The economic benefits of standardization, and of thereby avoiding costly and time-consuming individual negotiation of consumer terms, are obvious. As described in the comments to section 211 of the *Restatement (Second) of Contracts*, "[s]tandardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details

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[6] *See Mass Marketing*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/culture-magazines/mass-marketing (last visited Jan. 11, 2024).

[7] *Id.* As a prominent example, Henry Ford has been famously credited for being the first to achieve standardization and mass-assembly of the automobile. *See* John Bell Rae & Alan K. Binder, *Ford and the Assembly Line*, BRITANNICA, https://www.britannica.com/technology/automotive-industry/Ford-and-the-assembly-line (last updated Sept. 23, 2024).

[8] Joy Cunanan, *From Barter to Written Agreements: A Look into the History of Contracts*, LEXAGLE, https://www.lexagle.com/blog-en-sg/from-barter-to-written-agreements-a-look-into-the-history-of-contracts (last updated July 22, 2024).

[9] Radin observes that, "[b]ecause we cannot change them, these [standard contract] forms are called 'boilerplate.'" RADIN, *supra* note 2, at xiii–vii ("The term dates back to the early 1900s and refers to the thick, tough steel sheets used to build steam boilers. From the 1890s onward, printing plates of text for widespread reproduction, such as advertisements or syndicated columns, were cast or stamped in steel [instead of the much softer and less durable lead alloys used otherwise] ready for the printing press and distributed to newspapers around the United States. They came to be known as 'boilerplates.' Until the 1950s, thousands of newspapers received and used this kind of boilerplate from the nation's largest supplier, the Western Newspaper Union. Some companies also sent out press releases as boilerplate so that they had to be printed as written.") (citation omitted).

of individual transactions."[10] As a result of the benefits to merchants (with, it is often pointed out, some probable price benefits to consumers as well),[11] boilerplate standardized terms very quickly became a dominant mainstay of contracting, particularly consumer contracting.[12] Contract standardization and boilerplate became ubiquitous.[13] As David Slawson said, in 1971, "[s]tandard form contracts probably account for more than ninety-nine percent of all the contracts now made."[14] He said this *one year after the Beatles broke up*.[15] It is only all the more true now, some fifty years later. The

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[10] RESTATEMENT (SECOND) OF CONTS. § 211 cmt. a (AM. L. INST. 1981). This rationale is carried forward as an underpinning to the more recent *Restatement of Consumer Contracts*. RESTATEMENT OF CONSUMER CONTS., § 2 reporters' notes (AM. L. INST., Tentative Draft No. 2, 2022) ("[T]he use of standardization in the production of contract terms is, like standardization in the production of goods and services, a source of potential benefits to consumers and businesses alike. Standardization supports efficient production and distribution, resulting in lower prices and lower transaction costs, and the introduction of new forms of products and services. As noted by a court, 'There is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.'") (quoting Sgouros v. Transunion Corp., 817 F.3d 1029, 1033–34 (7th Cir. 2016)).

[11] *See, e.g.*, Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) [hereinafter Ware, *The Case for Enforcing*] ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers.").

[12] *See* Slawson, *Standard Form Contracts*, *supra* note 3, at 529. Slawson wrote in 1971 that "[m]ost persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day." *Id.* Needless to say, the explosion of standard forms has been exponential since the rise of the internet, the online contract, and even the prevalence of mobile devices. David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1368–69 (2023) ("Everywhere we look, adhesive terms stare back: they control our lives at the market, at school, at work, on vacation, and online; they constrain our public law rights and our private law duties; and they determine procedure we use to vindicate what's left of both. Forms, assented to on our proliferating portable screens, have never been more dominant, nor perceived to be less morally legitimate.") (citations omitted).

[13] *See* Slawson, *Standard Form Contracts*, *supra* note 3, at 529.

[14] *Id.*

[15] *See, e.g.*, Mikal Gilmore, *Why the Beatles Broke Up: The Inside Story of the Forces That Tore Apart the World's Greatest Band*, ROLLING STONE (Sept. 3, 2009), https://www.rollingstone.com/music/music-features/why-the-beatles-

advent of online contracting and the internet, in the ensuing decades, means that we face fine print exponentially more and everywhere now, offline and online—from our social media accounts[16] to our Amazon account[17] to downloading a game on our phone.[18] We have what David Hoffman has recently referred to as an "Empire of Forms."[19]

This empire of standard form contracts, however, has created something of a paradox. Contracts, recall, are ideally bound up in notions of autonomy and voluntarily entered into by means of knowing, cognizant assent.[20] But it is a truism at this point that consumers simply do not read the fine print.[21] The drafters of the *Restatement of Consumer Contracts* noted that "credible empirical evidence, as well as common sense and experience, suggests that consumers rarely read standard contract terms no matter how those terms are disclosed."[22] We all simply sign on the bottom line to rent the car; or, we impatiently click "I accept" to complete the online purchase (without ever bothering to scroll through the lengthy set of online terms that are now almost invariably made available to us before clicking).[23] So, as Hoffman observed in his excellent article, the way most consumers experience form contracts is this: "[W]e know that

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broke-up-113403/.

[16] *Terms of Use*, INSTAGRAM, https://help.instagram.com/581066165581870 (last visited Jan. 12, 2024).

[17] *Amazon Prime Terms & Conditions*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=G2B9L3YR7LR8J4XP (last visited Jan. 12, 2024).

[18] Apple has a default End User License Agreement that app developers may use. *Licensed Application End User License Agreement*, APPLE, https://www.apple.com/legal/internet-services/itunes/dev/stdeula/ (last visited Jan. 12, 2024).

[19] *See* Hoffman, *supra* note 12, at 1367.

[20] *See supra* notes 1–4 and accompanying text.

[21] *See, e.g.*, Wayne R. Barnes, *Toward A Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 237 (2007) [hereinafter Barnes, *Toward A Fairer Model*] (citing Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1229 (1983)).

[22] *See* RESTATEMENT OF CONSUMER CONTS. § 2 reporters' notes (AM. L. INST., Tentative Draft No. 2, 2022) (citing Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 14–32 (2014)).

[23] *See* Barnes, *Toward A Fairer Model*, *supra* note 21, at 237.

[a contract of some form] . . . exist[s]—we *reasonably* are *aware*. We simply don't pay attention to the details."[24] Or, as Robert Braucher put it a generation ago: "We all know that if you have a page of print, whether it's large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion's mouth and hope it will be a friendly lion."[25] So, we have a scenario where it *looks* like a contract, and *sounds* like a contract, and consumers sign (or click, or browse) as though it *were* a contract.[26]

But the paradox is that—at least to a large number of academic commentators—what *looks* at first glance like a signed/delivered/assented to form contract, should *not* be held to be enforceable as such.[27] That is, "[t]here's a widely remarked consensus that there's *something* rotten at the heart of form contracts."[28] Something is not quite right. Disadvantageous terms are routinely buried in the fine-print that consumers do not read.[29] Enforcing such unread fine print that is so one-sided and disadvantageous to consumers, the argument goes, cuts against the very foundational notion of contracts as an autonomous endeavor, whose legitimacy is derived from the fully informed *consent* of the consumer.[30] How, the conventional argument goes, can such terms be justly enforced against legions of unwitting consumers, who have no idea what terms are actually included in the form nor what they mean? To say nothing of the bargaining power imbalance[31] that prevents the rare consumer who

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[24] Hoffman, *supra* note 12, at 1387.

[25] *Friday Afternoon Session—May 22, 1970*, 47 A.L.I. PROC. 485, 525 (1970).

[26] *See* Wayne R. Barnes, *Online Disinhibited Contracts*, 51 PEPP. L. REV. 267, 275–99 (2024) [hereinafter Barnes, *Online Disinhibited Contracts*] (describing the various means of manifesting assent to form contracts, including signing, as well as clickwrap, browsewrap, scrollwrap, and sign-in wrap); *see generally* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013).

[27] *See* Hoffman, *supra* note 12, at 1369–71.

[28] *Id.* at 1369.

[29] *Id.*; *see also* RADIN, *supra* note 2, at xiv–xvii (describing hypotheticals involving an arbitration clause, choice of forum clause, and an exculpatory clause).

[30] *See, e.g.*, Andrea J. Boyack, *The Shape of Consumer Contracts*, 101 DENV. L. REV. 1, 9–16 (2023) (describing requirement of consent under efficiency theory and autonomy theory for contract).

[31] *See generally* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141 (2005).

does try to get a better deal—because alas, the terms are "adhesive." It's "take-it-or-leave-it."[32] Hence,

> For a hundred years, scholars have fretted about the rise of mass contracts. From Isaacs to Leff to Llewellyn to Radin, the law reviews are full of complaints about the quality of assent obtained in our new contracting environments and proposals that courts, regulators, and markets try to produce better outcomes.[33]

My focus for the present is on whether the *courts* are, any longer, a fruitful focus of scholarly reform proposals in this particular area. That is, scores of academic proposals over the past century have focused on urging the courts, as a matter of common law decision-making and application of the law of contracts, to alter the doctrine as to the legal import of consumers ostensibly manifesting their assent to boilerplate, standard form contracts.[34] I, myself, have joined this chorus on more than one occasion over the years.[35] However, the courts' response to consumer manifestation of assent to form contracts has been steadfast and relatively immovable—consumers are bound when they sign (or click, or browse, etc.).[36] That is, courts have ignored pleas that a consumer was actually unaware of some

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[32] *See, e.g.*, Rakoff, *supra* note 21, at 1177; *cf.* Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 951 (2020) (discussing the rare consumer who does, in fact, scrutinize boilerplate contractual terms).

[33] Hoffman, *supra* note 12, at 1388.

[34] *See, e.g.*, RADIN, *supra* note 2, at 155, 186. I will discuss more of the proposals in the literature in Part II.

[35] *See* Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 268; Wayne R. Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 849–50 (2010) [hereinafter Barnes, *Consumer Assent*]; Wayne R. Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1121 (2008) [hereinafter Barnes, *The Objective Theory*]; Barnes, *Toward A Fairer Model*, *supra* note 21, at 227, 230; Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1598, 1609, 1619 (2006) [hereinafter Barnes, *Rethinking Spyware*].

[36] Barnes, *Toward A Fairer Model*, *supra* note 21, at 245–46.

particular term in the fine print and hold instead that the consumer has a "duty to read:"[37]

> Under the duty-to-read rule, if a consumer signs [or clicks] a form contract, the law has traditionally stated that it is reasonable for the merchant to conclude that the consumer has thereby given her assent to the deal. The usual formulation of the principle is that 'one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature.'[38]

The courts have, particularly in the online contracting context, taken pains to enforce adequate *notice* of the existence of terms,[39] but they have not appreciably varied from the boilerplate notion of the duty to read.[40] Virtually all efforts to have them do otherwise have failed.[41] Thus, current contract doctrine is that if a consumer signs, or clicks, they are enforceably bound whether they actually read or were aware of any particular term or not.[42] The *Restatement of Consumer Contracts* has recently confirmed this conclusion.[43] As noted by the *Restatement* drafters:

> [C]ourts routinely enforce standard contract terms, even in the absence of informed consent to those terms, if several minimum requirements are met. In particular, the consumer must manifest assent to the underlying transaction, must receive reasonable notice of the standard contract terms that are meant to be adopted as part of the contract, and must be provided a meaningful opportunity to review the terms.

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[37] *See, e.g.*, *id.* at 230 (citing John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 342 (1974)).

[38] *Id.* at 245–46.

[39] *See* Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 286 (discussion in Section I.B of article).

[40] *See*, *e.g.*, *id.* at 287.

[41] *See id.* at 278–79.

[42] Barnes, *Toward A Fairer Model*, *supra* note 21, at 245–46.

[43] RESTATEMENT OF CONSUMER CONTS. § 2(a), illus. 4 (AM. L. INST., Tentative Draft No. 2, 2022).

> State and Federal court decisions have converged on these minimum requirements, with almost no exception.[44]

The common law doctrine of consumer assent to standard form contracts, with the long-standing corollary of the duty to read, thus appears to have ossified. Notions of *stare decisis*, not to mention pragmatic concerns,[45] have led to this point. The courts, simply put, have not shown—and at this point are not likely to show—any serious amenability to altering the doctrine of the duty to read and general blanket, enforceable assent to standard form contracts.[46] To steal a phrase, "you can lead a horse to water, but you can't make him drink."[47] So what now?

The modest thesis of this Article is that, to the extent there appears to be a continuing concern that certain fine print boilerplate terms are too regularly being enforced upon unwitting consumers in standard form contracts, the only method likely available to realistically deal with it at this late jurisprudential stage is *statutory* regulation, of some sort or another. In Radin's enormously influential book *Boilerplate*, she aptly described the range of possible ways to deal with the problem of unread boilerplate terms which are seen as somehow unfair to enforce against consumers.[48] The primary methods she discussed as possibilities included: (1) reformed judicial

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[44] *Id.* § 2 reporters' notes.

[45] *See, e.g.*, RADIN, *supra* note 2, at 96 (citing Brian H. Bix, *Contracts, in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 251, 252 (Franklin G. Miller & Alan Wertheimer eds., 2010) [hereinafter Bix, *Contracts*]) (citing Brian Bix for the proposition that "[a]mong other problems, making too many commercial transactions subject to serious challenge on consent/voluntariness grounds would undermine the predictability of enforcement that is needed for vibrant economic activity.").

[46] *See* Barnes, *Toward A Fairer Model*, *supra* note 21, at 278–79.

[47] *See You Can Lead a Horse to Water but You Can't Make It Drink*, DICTIONARY.COM, https://www.dictionary.com/browse/you-can-lead-a-horse-to-water-but-you-cant-make-it-drink (last visited Jan. 13, 2024) ("Even favorable circumstances won't force one to do something one doesn't want to, as in *We've gotten all the college catalogs but he still hasn't applied—you can lead a horse to water*. This metaphoric term dates from the 12th century and was in John Heywood's proverb collection of 1546.").

[48] *See infra* notes 49–52 and accompanying text. Note a couple of things I will sidestep in this article. First, I take it as a given that we are only concerned,

contract doctrine;[49] (2) private market solutions like "seals of approval" or review systems;[50] (3) new torts involving unfair boilerplate;[51] and (4) statutory regulation.[52] Of these, I am primarily arguing that the time where #1 is likely to be effective has probably come and gone, whereas #4 is the most realistically effective method remaining to us for dealing with problematic boilerplate.[53] Admittedly, I am sidestepping Radin's incredibly creative suggestions of private market solutions (her #2 method) and novel torts (#3). I view those as more ultra-innovative (and hence, unlikely to be implemented anytime soon, though not for lack of creative ingenuity), whereas judicial doctrine and statute have been our more tried-and-true methods of shaping contract doctrine. And, as I will describe in more detail below, the proposal to revert to statutory solutions for dealing with boilerplate is a fairly anti-climactic (but realistic) one, as we are already doing this on an ad hoc basis in several contexts,[54] and there are currently international models for doing so in a more systematic fashion (e.g., the EC Directive on Unfair Terms in Consumer Contracts).[55] Our legislative mechanisms are in place.[56] They have already regulated contracts in a number of specific contexts.[57]

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policy-wise, with the traditionally unequal bargaining power recognized in contracts entered into between merchants and consumers. Thus, I am not currently proposing that *anything* be done to alter the boilerplate terms of contracts entered into between two or more merchants. Second, I suppose there is a substantive debate to be had about whether and to what extent any particular term (e.g., choice of forum, damage limitation, etc.) is inherently "unfair" or somehow otherwise undesirable from a policy perspective. I don't intend to get into those substantive particulars in this article, either—instead this article focuses solely on the *means* (statutory regulation) by which any such future desired interventions should likely be accomplished.

[49] RADIN, *supra* note 2, at 155, 186.

[50] *Id.* at 189.

[51] *Id.* at 197.

[52] *Id.* at 217.

[53] *Cf.* Christopher R. Edgar, *The "Traditional State Function" Doctrine: A Comparative Institutional Perspective*, 1 N.Y.U. J.L. & LIBERTY 857, 893 (2005) ("The Court has recognized legislatures' superior capacity to resolve disputes concerning the behavior of entities with market power . . . .").

[54] *See infra* notes 340–65 and accompanying text.

[55] Council Directive 93/13, art. 3, 1993 O.J. (L 95) 29, 31 (discussed in RADIN, *supra* note 2, at 233–39).

[56] U.C.C. § 2-719 (AM. L. INST. & UNIF. L. COMM'N 2024).

[57] *See infra* notes 338–65 and accompanying text.

There is simply left the political will to implement them as to additional types of contract terms that we may collectively decide to address.[58]

To support this modest thesis, this Article will proceed as follows. Part I will discuss the rise of the standard contract phenomenon generally, and their primary attributes and characteristics. Part II will sample a few key articles and books from the academic literature over the last century, proposing various doctrinal reforms for courts to follow in more equitably assessing what should be the legal consequence of a consumer's outward manifestation of assent to boilerplate (i.e., signing, clicking, browsing). Part III will discuss the current actual court doctrine regarding consumer assent to standard form contracts, its likely permanence as a matter of fixed judicial doctrine, and some of the coherence problems with academic proposals to have the courts hold otherwise. Part IV will turn to the likely realistic available alternative for regulating boilerplate—legislation. I will discuss how we already do this in a number of legislative provisions and that this existing legislative treatment of regulated contract terms could easily be expanded (either by extending the current patchwork system or in a more systematic manner). Then, the Article will briefly conclude.

I. THE STANDARD FORM CONTRACT—AKA "BOILERPLATE"

Standard form contracts[59]—whether offline "paper" ones or online "scroll and accept" ones—constitute the vast majority of all contracts entered into by ordinary consumers on a daily basis.[60] As alluded to above, David Slawson stated the obvious as far back as 1971:

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[58] RADIN, *supra* note 2, at 218.

[59] Much of the following discussion in this Part I on standard form contracting, including the sources cited, is adapted from Part II.A of Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 275–80 and Part II of Barnes, *Toward A Fairer Model*, *supra* note 21, at 238–52.

[60] Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002) (citing John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000)); *see also* Rakoff, *supra* note 21, at 1188–89 ("Today, very likely the majority of signed documents are adhesive.").

> Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.[61]

Perhaps Slawson could not have foreseen that his 1971 perspective was just the tip of the iceberg. Standard consumer forms are predominating in ever-increasing numbers.[62] Fast forward to 2024, and David Hoffman now correctly describes the veritable "empire" of forms that has cascaded far beyond the written paper contract or ticket and into our cyber lives, onto virtually every digital interaction, app, or purchase on our computers and phones.[63]

Todd Rakoff described the definitive attributes of form contracts in the following manner, which have mostly remained constant (allowing for the advent of their digital analogs).[64] First, he stated that form contracts have generally been printed (i.e., reproduced rather than typed or written from scratch—of course the online analog to

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[61] Slawson, *Standard Form Contracts*, *supra* note 3, at 529. One early 20th century account of boilerplate contracting stated:

> No longer do individuals bargain for this or that provision in the contract . . . . The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor . . . . In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.

Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIA. L. REV. 1263, 1264 (1993) (quoting O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW 18 (1937), *reviewed by* K. N. Llewellyn, 52 HARV. L. REV. 700 (1939) (book review) [hereinafter Llewellyn, Book Review]).

[62] Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003).

[63] Hoffman, *supra* note 12, at 1368, 1371.

[64] Rakoff, *supra* note 21, at 1176–78.

this is digital terms which are accessible onscreen), and also contain a sizable number of standardized "boilerplate" contract terms, which are generally used in identical, unvarying manner across most if not all of the merchant's transactions.[65] Second, the merchant always drafts the terms, whereas the consumer never does.[66] Third, the merchant engages in a large number of identical transactions on a consistent basis—hence the efficiencies achieved through volume.[67] Fourth, the merchant will not negotiate the boilerplate—it is "take it or leave it."[68] Fifth, the consumer's act of signing the physical form is typically the event which concludes the formation of the contract (the digital analog being the instant when the consumer clicks "I accept" or other indicated digital "wrap" action).[69] Sixth, the merchant of course enters into a vast number of these identical transactions, whereas, comparatively speaking, the consumer does not.[70] And seventh, almost always the transaction consists of the consumer paying money for some goods or services.[71]

Merchants have an array of reasons for utilizing standard form contracts.[72] They are perceived to increase the profitability of the business.[73] They help to handle ever-increasing complexities in the operation of the business and the sales enterprise.[74] Significantly, the use of standardized forms eliminates the need for time-consuming, costly individual negotiations by creating a "one-size-fits-all" form for the bulk of the merchant's consumer sales.[75] In one of the earliest academic articles addressing the standard form contract phenomenon, Friedrich Kessler observed: "A standardized contract, once its contents have been formulated by a business firm, is used

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65 *Id.* at 1177.
66 *See id.*
67 *Id.*
68 *Id.*
69 *See* Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 275–99.
70 Rakoff, *supra* note 21, at 1177.
71 *Id.*
72 W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 24 (1984) [hereinafter Slawson, *The New Meaning*].
73 *Id.*
74 *Id.*
75 *Id.* at 28–29.

in every bargain dealing with the same product or service. The individuality of the parties which so frequently gave color to the old type contract [i.e., individually negotiated] has disappeared."[76] The *Restatement (Second) of Contracts* echoes this standardization rationale, noting that the same reasons for mass-producing goods in assembly line fashion apply with equal force to mass-producing standard consumer form contracts: "Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions."[77]

Of course, an additional aspect to standard form contracts is that businesses increasingly use them as a way to include, among the numerous fine print clauses, terms that lower or even completely exclude certain business risks.[78] The types of such clauses are numerous and varied, but can include "arbitration clauses, class action waivers, damage limitations, stipulated remedies, choice of law, unilateral modification, privacy policies, choice of forum, social media behavioral controls, nondisclosure clauses, and non-competes,"[79] among others.[80] In theory, such reduction of risk enables the business to charge lower prices to consumers, although whether they do is an empirical question.[81] Nevertheless, businesses clearly believe including such terms is often important for their enterprise, and frequently will not sell their goods or services absent their inclusion in the binding form.[82]

What is the consumer perspective on encountering standard form contracts? Here is the short version—they don't read 'em.[83] As

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[76] Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

[77] RESTATEMENT (SECOND) OF CONTS. § 211 cmt. a (AM. L. INST. 1981).

[78] Kessler, *supra* note 76, at 631–32.

[79] Hoffman, *supra* note 12, at 1370 (citations omitted).

[80] RADIN, *supra* note 2, at xii–xvii (describing hypotheticals involving an arbitration clause, a choice of forum clause, and an exculpatory clause).

[81] Kessler, *supra* note 76, at 632. *But see* Hoffman, *supra* note 12, at 1385 ("And yet despite their rising dominance, there is little evidence that these litigation-shaping contract terms affect wages or prices."); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 506–09 (2006)).

[82] Slawson, *Standard Form Contracts*, *supra* note 3, at 530.

[83] Hoffman, *supra* note 12, at 1378 ("[T]he *No Reading Thesis* is the central organizing principle in the contracts academy, and rests on careful empirical inquiry. It conforms to your own common sense intuitions about how you approach

I observed over a decade ago, "[t]he fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma within the contracts literature."[84] Merchants don't anticipate that they will lose any customers over the inclusion of fine print terms, given that they are not read or perceived, and so they are not market-incentivized to exclude them.[85] Moreover, consumers often calculate, correctly, that there will not be a significant difference in fine print terms offered by competitors

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the world; that mass contracts are composed of unread and unreadable terms is the place from which we all start.") (citing Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (explaining that consumers read terms and conditions clauses 0.2% of the time)).

[84] Barnes, *Toward A Fairer Model*, *supra* note 21, at 237 (citing Rakoff, *supra* 21, at 1179) (in turn, citing P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 731 (1979); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370–71, 371 n.338 (1960) [hereinafter LLEWELLYN, THE COMMON LAW TRADITION]; IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS: CASES AND MATERIALS 445 (2d ed. 1978); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 13 (1981); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349 (1970) [hereinafter Leff, *Unconscionability and the Crowd*]; K. N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665, 673 (1925) [hereinafter Llewellyn, *The Effect of Legal Institutions*]; Slawson, *Standard Form Contracts*, *supra* note 3, at 530; William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 425 –26 (1973)).

[85] Barnes, *Toward A Fairer Model*, *supra* note 21, at 236–37. The *Restatement (Second) of Contracts* is also candid and realistic about the fact that consumers will not read form contracts. Comment b to section 211 provides:

> A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms.

RESTATEMENT (SECOND) OF CONTS. § 211 cmt. b (AM. L. INST. 1981).

in the marketplace.[86] Todd Rakoff thus observed that, seen from the vantage point of the consumer, boilerplate contracts: (1) can't generally be negotiated by the consumer (it's take-it-or-leave-it); (2) deal with events that aren't highly probable to take place; (3) are only scrutinized as to a few significant terms; and (4) are frequently ignored in lieu of considering the general reputation and customer service of the business.[87] Given these observations, Rakoff remarked that "[t]he consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated."[88]

The above account of consumer perspective on standard form contracts was quickly apparent upon their ascent into widespread use in the first half of the 20th century.[89] It has since become more

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[86] Barnes, *Toward a Fairer Model*, *supra* note 21, at 236–37 (citing Slawson, *Standard Form Contracts*, *supra* note 3, at 531).

[87] Rakoff, *supra* note 21, at 1225–28 (cited in Barnes, *Toward a Fairer Model*, *supra* note 21, at 237). In an early article addressing the advent of electronic contracting online, Robert Hillman and Jeffrey Rachlinski observed:

> Consumers also have good reason to believe that the standard terms are not something to worry about. Consumers recognize that boilerplate language is usually a matter of customary practice within an industry, rather than an attempt by a single business to exploit them . . . . Consumers may sign standard-form contract without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.

Hillman & Rachlinski, *supra* note 60, at 446–47 (citing Burke, *supra*, note 60 at 286–90; Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L. J. 193, 229 (1998); Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1482 (1989) [hereinafter Ware, *A Critique*]). *But cf.* Hoffman, *supra* note 12, at 1382 (noting that there is evidence that consumers shop for certain terms, including: warranties, employment security, vacation, work-from-home ability, mortgage finance terms, and certain liquidated damages clauses) (citations omitted).

[88] Rakoff, *supra* note 21, at 1229.

[89] *See generally* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 38–39 (1917). As early as 1943, Friedrich Kessler observed:

> Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their

validated by what we know of consumer's behavioral psychology. What was once likely an educated guess, or intuition, regarding the limits of consumers' cognitive interaction with boilerplate, is now more ready known and studied.[90] In an influential article, Melvin Eisenberg identified three such limitations discovered by sociologists: (1) bounded rationality (consumers are not infinite in their cognitive capacity and thus have to make the best decisions they can within the human limits of their ability to process information); (2) disposition (consumers are overly optimistic that bad things—e.g., product failure—will happen to other people, but not them); and (3) defective capability (a cluster of human defects that includes things like valuing immediate effects more highly than long-term possibilities or underestimating risk).[91] Based on this sociological evidence in the form contract context, Eisenberg observed:

> The bottom line is simple: The verbal and legal obscurity of preprinted terms renders the cost of searching out and deliberating on these terms exceptionally high. In contrast, the low probability of these nonperformance terms' coming into play heavily discounts the benefits of search and deliberation. Furthermore, the length and complexity of form contracts is often not correlated to the dollar value of the transaction. Where form contracts involve a low dollar value of performance, the cost of thorough search and deliberation on preprinted terms, let alone the cost of legal

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> own making upon a vast host of vassals. This spectacle is all the more fascinating since not more than a hundred years ago contract ideology had been successfully used to break down the last vestiges of a patriarchal and benevolent feudal order in the field of master and servant . . . . Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture.

Kessler, *supra* note 76, at 640–41 (citing Note, *"Mutuality" in Exclusive Sales Agency Agreements*, 31 COLUM. L. REV. 830, 830 (1931)).

[90] *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240–48 (1995).

[91] Barnes, *Toward A Fairer Model*, *supra* note 21, at 254–58; Eisenberg, *supra* note 90, at 214–20.

> advice about the meaning and effect of the terms, will usually be prohibitive in relation to the benefits. Faced with preprinted terms whose effect the [consumer] knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren't subject to revision in any event, a rational [consumer] will typically decide to remain ignorant of the preprinted terms.[92]

Of course, this is not even the full extent of the factors presently in play with respect to assent to form contracts.[93] Literacy levels in general have been steadily decreasing for some time, such that thirty years ago a study by the U.S. Department of Education revealed that only 3% of American adults possessed the literary capability to read and understand typical consumer credit disclosures—a type of verbiage at least modestly comparable in complexity and readability to boilerplate terms.[94]

The advent of online contracting on the internet—on our computers, tablets, and even phones—has also altered the landscape in ways that even further diminish consumer attention to the ever-burgeoning amount of boilerplate to which they are subjected.[95] Hoffman recently cited a study concluding that we retain information at

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[92] Eisenberg, *supra* note 90, at 243 (citing Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990)).

[93] Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002).

[94] *Id.* at 237; *see also* Hoffman, *supra* note 12, at 1378 (citing David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 984 (2006) ("[M]ost consumers do not read boilerplate provisions or, if they do, find them hard to understand."); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2102–05 (2014) (reviewing data on whether contract terms are read); Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 ALA. L. REV. 237, 238 (2018) (noting that many disclosures necessitate "more than twenty years of education to understand")).

[95] *See* Hoffman, *supra* note 12, at 1387.

a lower rate online than offline.[96] As he further observed, "technology has continued to evolve to make reading a contract an increasingly less important part of the purchase experience."[97] This is borne out also by the long evolution and deformalization of the contract-assent process.[98] Once upon a time, people knew that when they were in a business setting, with paper in front of them, and they "signed on the bottom line," an important signaling was occurring that the consumer was undertaking to be bound by various contractual provisions.[99] But, the online world now ascribes legal legitimacy to consumers merely clicking (or tapping) "I agree" or something to that effect (clickwrap), or sometimes even merely continuing to access a website after suitable notice of the presence of terms has been given (browsewrap).[100] This is so, even though most consumers probably click, swipe, or tap their electronic devices many, many hundreds of times per day (to do everything from tapping send on an email, to firing on an enemy in a video game, to liking a social media post).[101] And this is further, not to mention, that the problem

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[96] *Id.* (citing Anne Mangen et al., *Reading Linear Texts on Paper Versus Computer Screen: Effects on Reading Comprehension*, 58 INT'L J. EDUC. RSCH. 61, 67 (2013)).

[97] Hoffman, *supra* note 12, at 1387.

[98] *Id.* at 1371, 1387.

[99] Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 458 (2013) ("[T]raditional contract law was based on the assumption that parties negotiate and sign paper contracts in face-to-face transactions . . . .").

[100] *See* Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 272, 281–82 (and accompanying text).

[101] As I (somewhat self-revealingly) admitted in my article *Online Disinhibited Contracts*:

> Online merchants (with assistance from the courts) have succeeded in making such clicks and scrolls possess all of the legal equivalence of the more solemn in-person contractual signature, notwithstanding that the website scroll, or the mouse click, have *lots* of other usages. Just today—while on and off writing this Article—I have clicked my mouse or scrolled/browsed the screen probably dozens (oh, who am I kidding? hundreds) of times while: replying to email, clicking on text notifications, checking news stories, looking at Twitter and Facebook (yes, I am old), reading the latest Dallas Cowboys news (I am not building up a lot of hope for next season), installing a couple of

of casualizing assent to boilerplate is likely even more uninhibited in the online context, given the presence of a number of factors (like some degree of anonymity and invisibility when acting online) that cause people to more readily act in certain ways than they would when acting in the offline (aka "real" world).[102]

So, the state of affairs is this. Merchants use standard form contracts—replete with voluminous boilerplate terms that often favor the business—in a ubiquitous manner.[103] Consumers, faced with the near universal prevalence of these terms in the market, acquiesce and ostensibly assent to them.[104] They do not feel they have much of a choice, and they probably couldn't understand what the terms meant if they thought they *did* have a choice.[105] They likely wouldn't make good decisions even if they *could* understand them and possessed some indicia of bargaining power vis-à-vis the merchant.[106] And all of this is greatly exacerbated and exponentialized

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> new applications on my Mac, updating my checkbook, checking my bank account (pitifully low), reading some online article like "Check out these 50 celebrities' most embarrassing moments—you won't *believe* #32," checking on the status of my tax return, and of course clicking in my word processing program while formatting text, saving files, etc. All of these actions involve innumerable amounts of scrolling, browsing, and clicking. Once or twice, in downloading the new applications, I almost certainly clicked on a clickwrap type of agreement.

Id. at 289.

[102] *See id.* at 300–07 (discussing John Suler's *Online Disinhibition Effect* and theorizing how it may at least partly explain a variety of transactional behavior on the Internet). Suler's factors are: "(1) dissociative anonymity, (2) invisibility, (3) asynchronicity, (4) solipsistic introjection, (5) dissociative imagination, and (6) minimization of status and authority." *Id.* at 301 (citing John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321 (2004)); *see also* Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 311.

[103] Barnes, *Online Disinhibited Contracts*, *supra* note 26, at 288–89.

[104] *Id.* at 289.

[105] Theresa Amato, *How Boilerplate Contracts Strip Our Rights*, THE NATION (Jan. 8, 2014), https://www.thenation.com/article/archive/how-boilerplate-contracts-strip-our-rights.

[106] *See, e.g.*, *id.* ("Standard form contracts are everywhere, snaring consumers into an insidious peonage through the 'tricks and traps' of fine print, as Senator Elizabeth Warren has called them. Sometimes longer than a Shakespeare play but far less readable, boilerplate contracts are indecipherable to most humans. The opportunity to negotiate does not exist. Comparison shopping for better terms is improbable if not impossible. Even if one could easily obtain the contracts upfront

by the explosion of fine print across our digital interactions on our computers, tablets, and phones, for a range of transactions from the significant to the trivial.[107] Form contracts are pervasive (no wonder Hoffman described them, not happily, as an "empire").

II. ACADEMIC PROPOSALS TO COURTS TO ALTER THE STANDARD FORM CONTRACT DOCTRINE

A. *Early Recognition of the Problem*

Academic critique of the standard form contract phenomenon arose just about as soon as the phenomenon began.[108] An oft-cited early lament was that of Nathan Isaacs.[109] Isaacs noted that Henry Maine, in his important work *Ancient Law*, had opined in 1861 "that 'the movement of progressive societies has hitherto been a movement from status to contract.'"[110] But, Isaacs wondered in 1917, whether the process was threatening now to reverse. Individuals had, Isaacs observed, long been tethered to a cluster of "standardized" social relations of ancient society (such as "ancient family relations, or caste").[111] Although Maine's pronouncement seemingly came from his conviction that the ability to individually choose one's own contracting arrangements was an escape from the ancient, socially standardized stratification of the long past, Isaacs saw a new "standardization" rising to effectively accomplish much the same division of society—the rising phenomenon of the standardizing of contract terms that were favorable to the merchants who imposed

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and undertake comparisons, corporations don't compete on these terms. And the bad news is that, as Ralph Nader notes, 'underneath all is the contract.' We should think of boilerplate contracts as 'contract asbestos.' They may 'facilitate' commerce by maximizing corporate efficiencies, entitlements and immunities; but as with asbestos, they are toxic to consumers. We are exposed to often invisible, rights-denying terms that may harm us years after the initial agreement.").

107 Hoffman, *supra* note 12, at 288–90.

108 Isaacs, *supra* note 89, at 34.

109 *See id.*

110 *Id.* (quoting HENRY SUMNER MAINE, ANCIENT LAW 96 (Gaunt, Inc. ed., 1998) (1861)).

111 Isaacs, *supra* note 89, at 39.

them and unfavorable to the consumers on whom they were imposed.[112] Friedrich Kessler concurred with Isaac's observation in 1943, when he remarked that "[s]tandard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."[113] Isaacs and Kessler were however, merely observing the development of the phenomenon—they did not yet have any particularized prescriptions for dealing with it.[114] That would soon change.

Indeed, a number of academic commentators did soon start coming up with proposals to address the problem of boilerplate not long after these initial early-20th century observations, and the proposals continue to the present.[115] As Hoffman observed in one such insightful proposal in 2023, "[i]dentifying, and solving, the many problems posed by mass contracting has preoccupied contract professors for the last hundred years . . . ."[116] The number of articles containing proposals is vast—Hoffman described them as a "thicket."[117] At the risk of revealing my hand before finishing the game, it should be noted that none of the various proposals have yet meaningfully stuck, as a matter of actively applicable contract law doctrine.[118] Indeed, as Ethan J. Leib recently and accurately observed, "[o]ne of the most puzzling and embarrassing facts about contract law and contracts scholarship in the United States is that neither has found a consistent way to treat the real contracts of our lives: standardized consumer form contracts."[119] Notwithstanding that the view from hindsight is that none of these proposals had effectively achieved its end, a representative sampling of a few key proposals is helpful to set the stage for this Article's thesis. Note that I am going to focus

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[112] *See id.* at 37 ("Still, if Maine's observations of the past were correct, the present tendency is clearly a reaction in the opposite direction.").

[113] Kessler, *supra* note 76, at 640.

[114] *See* Isaacs, *supra* note 89, at 39; *see also* Kessler, *supra* note 76, at 631.

[115] *See*, *e.g.*, Hoffman, *supra* note 12, at 1409–10.

[116] *Id.* at 1371. Hoffman's goal was, as he admitted, "to take another whack at the thicket." *Id.*

[117] *Id.*

[118] Ethan J. Leib, *What Is the Relational Theory of Consumer Form Contract*?, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY ON THE EMPIRICAL AND THE LYRICAL 259, 259 (Jean Braucher et al. eds., 2013).

[119] *Id.*

on proposals that *actually urge the courts apply new doctrine*. Thus, I am not necessarily going to spend much time on other proposals, observational or otherwise[120]—my focus is on academic proposals to change the common law *judicial* doctrine based on a perception that fully attributing consent to consumer standard form contracts is inherently problematic. A key handful of such proposals, both well-known and recent, across the last few decades will suffice for the point.

B. *Llewellyn's Two-Tiered Proposal*

Perhaps most famously, Uniform Commercial Code (U.C.C.) architect Karl Llewellyn proposed one of the first—and most sensible—ideal doctrinal reform suggestions to deal with the standard form contract phenomenon.[121] Llewellyn proposed that courts treat consumer assent to boilerplate as consisting of two distinct spheres:

> Instead of thinking about "assent"' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has

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[120] *See, e.g.*, Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147–48, 150–51 (1970) [hereinafter Leff, *Contract as Thing*]; Bruce A. Ackerman, *Agon*, 91 YALE L.J. 219, 222 (1981) ("[I]n [Leff's] important article, *Contract as Thing*, he insisted that the standard form consumer agreement, though it be called a Contract-with-a-Capital-C, should be regulated as if it were just another inert thing no different in kind from tables or television sets. Only contracts based on bargaining were worthy of the name."); *see also* 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, 750 (2016) ("Leff rejected subjecting standardized consumer contracts to a traditional contract analysis because of the obvious fiction of consumer assent to particular terms, and instead suggested treating consumer transactions and their contracts as complete packages or 'things' that might need to be regulated in advance by the government.").

[121] LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 84, at 370.

> 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.[122]

Llewellyn's suggestion tethers closely to what actually occurs when a consumer decides to sign or assent to a form contract. There is a "specific assent" which corresponds to what the consumer is *actually* aware of (likely price, subject matter, quantity, etc.—the "dickered" terms), and then there is what Llewellyn characterized as "blanket assent."[123] This "blanket assent" in Llewellyn's formulation was essentially a *carte blanche* assent to all the unread terms in the boilerplate, with a caveat.[124] This part corresponded to what was then already the tendency of courts' acceptance of form contracts as fully binding.[125] The caveat, though, was the suggested innovation. Llewellyn believed the blanket assent should contain an exception—any "unreasonable" or "indecent" terms which "alter or eviscerate the reasonable meaning of the dickered terms;" further stated, any terms which "cut under the reasonable meaning of those dickered terms . . . ."[126]

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[122] *Id.*

[123] *See id.*

[124] *See id.*

[125] Kessler, *supra* note 76, at 630 ("There is no contract without assent, but once the objective manifestations of assent are present, their author is bound. A person is supposed to know the contract that he makes."); *id.* at 630 n.3 ("In the absence of fraud or misrepresentation parties who have put their contract in writing and signed it will not be heard to say that they have not read it or did not know, understand or assent to its contents provided the document is legible however small the print.") (citing L'Estrange v. F. Graucob Ltd., 2 K.B. 394, 403–04, 406 (1934); SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 90A (rev. ed., 1936)).

[126] LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 84, at 370. "[I]t is important to keep in mind that the vast majority of form contract terms are not especially problematic. Llewellyn correctly noted that most, if not all, unread standard form terms are legitimate and reasonable components of the agreement, and that these terms are unobjectionable. He sought a doctrine to allow the courts to distinguish these clauses from the ones of 'oppression or outrage.'" Barnes, *Toward A Fairer Model*, *supra* note 21, at 241 (citing LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 84, at 366).

Llewellyn's initial suggestion has been influential, if not completely victorious.[127] First, in the insurance context specifically, "a reasonable expectations" doctrine has developed which clearly echoes Llewellyn's formulation, and was adopted in the insurance context.[128] The reasonable expectations doctrine in this context asserts that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[129] Courts applying this doctrine in insurance cases may deny enforcement of policy terms if they vary from the consumer's reasonable expectation of what the policy was supposed to include.[130] Moreover, in the *Restatement (Second) of Contracts*, the American Law Institute debated and ultimately included section 211 dealing with standard form contracts, and particularly subsection (3), which adopted a version of Llewellyn's approach in what was hoped to be a wider class of contracts beyond merely the insurance context.[131] Subsection (3) provides: "Where the [merchant] has reason to believe that [the consumer] manifesting such assent [to a form contract] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[132] Although "elegantly designed" and a "thoughtful solution" to the problem of consumer assent to standard form contracts, subsection 211(3) of the *Restatement* did not gain any traction in the cases and would seem to be a dead letter.[133] I have

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[127] Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 961 (1970).

[128] *Id.* at 966–74. It is widely assumed that Keeton originated the doctrine. *See* Ware, *A Critique*, *supra* note 87, at 1461; Hillman & Rachlinski, *supra* note 60, at 459 n.170.

[129] Keeton, *supra* note 127, at 967.

[130] *See* Ware, *A Critique*, *supra* note 87, at 1467; *see also* Hillman & Rachlinski, *supra* note 60, at 459.

[131] Zacks, *supra* note 120, at 750 (noting that section 211 "largely adopts" Llewellyn's approach).

[132] RESTATEMENT (SECOND) OF CONTS. § 211(3) (AM. L. INST. 1981).

[133] Zacks, *supra* note 120, at 736 ("Section 211 of the Restatement (Second) of Contracts embodies the apparent inability of contract law doctrine to adjust to the realities of modern standardized contracts. Section 211 was an elegantly designed, thoughtful solution by impressive contract theorists to address the problem of assent to standardized contracts. With a compromise made between the

myself previously sang its praises,[134] but that would seem to have had no effect. To add to the concept's defeat tally, Jean Braucher described the unsuccessful attempt to include a similar provision in the ultimately unsuccessful revised Article 2 of the U.C.C.[135] In short, outside the insurance context, Llewellyn's thoughtful formulation has had little other effect on contract doctrine.

C. *Slawson and Rakoff—Post-Llewellyn Innovations*

Several of the notable academic proposals that came subsequently to Llewellyn's shared some degree of attempted bifurcation between the alleged "legitimate" terms and the alleged "illegitimate" (or non-consented-to) terms from within the boilerplate.[136] In 1971, David Slawson offered up a novel approach in *Standard Form Contracts and Democratic Control of Lawmaking Power*.[137] He creatively sought to draw an analogy to the administrative lawmaking process. Slawson observed that since contracts constitute binding obligations on the contracting parties, they have attributes of private "law," or "legislation," as to the parties involved—aka private ordering.[138] Given that form contracts are a "law" of sorts, Slawson

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presumption of formation and the ability of non-drafting parties to challenge unexpected terms, section 211 seemingly provided a route by which adjudicators could preserve the utility of standardized consumer contracts but also constrain overreaching by drafting parties. The mystery of section 211 is its overwhelming absence from modern contract law cases. Section 211 is rarely cited with respect to any standardized contract dispute, and even where cited, it rarely provides relief to the non-drafting party.").

134 *See* Barnes, *Toward A Fairer Model*, *supra* note 21, at 262.

135 *See* Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1816 (2000). Although there was general disapproval for the doctrine among much of the business interests involved in the discussions surrounded the ill-fated Revised Article 2, much of the credit for its defeat goes to James J. White and his criticism of the doctrine's propriety as a contract-policing measure. *Id.*; *see also* James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L. Q. 315, 324 (1997) (believing that such a rule might invite false testimony, White warned that if the doctrine was adopted "merchants will see consumer hordes set free from their legitimate contractual obligations and swarms of plaintiffs' lawyers filing class actions against the likes of Sears, GMAC, and Hertz."). For an anecdote further explaining this aspect of Amended Article 2, see *infra* notes 385–389.

136 Slawson, *Standard Form Contracts*, *supra* note 3, at 541–42.

137 *Id.* at 532.

138 *See id.* at 530.

reasoned, they should be made "democratically—i.e., in accordance with the desires of the immediate parties to the contract [aka the governed]."[139] However, Slawson lamented (in what is a familiar and accurate refrain):

> [T]he overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered. Indeed, in the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms. Even the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept.[140]

Instead of this, Slawson observed that "what is needed is a set of legal principles which reconcile the interests of [merchants] in setting such terms as they wish on an agreement and of the consumer in having his reasonable expectations fulfilled."[141]

Slawson's thesis was to derive a new set of principles for adjudicating standard form contracts from the "seemingly unrelated field of administrative law."[142] The process Slawson drew from consists of the fact that the legislature promulgates statutes but then the legislature entrusts administrative agencies to make "the rest" of the binding law—referring, of course, to administrative regulations.[143] Noting that he believed that contract law had now reached an analogous need for such innovation, Slawson proposed that this administrative law process be overlaid onto contract assent to birth a new form of analysis.[144] Specifically, he observed that the

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139 *Id.*

140 *Id.*

141 *Id.* at 532. Note the use of the Llewellyn-influenced phrase "reasonable expectations."

142 Slawson, *Standard Form Contracts*, *supra* note 3, at 532.

143 *See id.* at 533 (citing Wayman v. Southard, 23 U.S. 1, 42–43 (1825)).

144 *Id.* at 533.

> [T]wo contracting parties no longer agree to all the private law which will thereafter govern them. Instead, they now agree to only a part—and usually only a very small part—and delegate to one of them (usually the seller of the product or service involved) the power to make the rest.[145]

Ultimately, Slawson proposed that the primary negotiated terms (of which the consumer was likely aware) should constitute the valid contract, and then the remaining fine print terms (aka the "regulations") should be analyzed to determine whether they are in harmony and consistent with the negotiated terms (aka the "contract" and the "legislation").[146] The boilerplate terms, according to Slawson, should be "enforced only to the extent they can be shown to conform to the contract or to other standards."[147] Akin to administrative regulations which run afoul of the enabling statute, Slawson's proposal would thus have resulted in inconsistent boilerplate being discarded and not enforced.

A decade later, Todd Rakoff mounted another rebuke of the "all-or-nothing" standard form contract doctrinal assent regime in his article, *Contracts of Adhesion: An Essay in Reconstruction*.[148] His major contribution was categorizing the terms in the boilerplate contract as either "visible" or "invisible" terms.[149] According to Rakoff, the dickered terms were foremost among the terms he characterized as "visible."[150] But he allowed that more than just the negotiated terms could fairly be considered "visible," even though all non-negotiated terms were likely adhesive in nature.[151] Rakoff suggested that "we must also include within the set of visible terms those for which a large proportion of adherents (although not necessarily all) may be expected to have shopped; for bargaining is not essential to protect adherents as long as shopping concerning the particular term takes place."[152] Overall, he concluded that "the visible terms of a

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145 *Id.* at 533.
146 *See id.* at 541–42.
147 *Id.* at 541.
148 Rakoff, *supra* note 21, at 1176.
149 *Id.* at 1251.
150 *Id.*
151 *Id.*
152 *Id.*

contract of adhesion are most often those that would constitute the entire explicit contents of a very simple ordinary contract, with the price term (dickered or not) being the paradigmatic example. The invisible terms are, quite simply, all the rest."[153]

As may be readily apparent from the labels Rakoff utilized, he proposed that the visible terms should be enforced, and that the invisible terms should be "presumptively unenforceable."[154] In the event the invisible terms were ultimately deemed to be unenforceable, Rakoff noted that the resulting gaps "should be decided by application of background law"—aka default rules.[155] Rakoff's detailed and nuanced proposal allowed for the possible occasional enforcement of "invisible" terms, after a careful comparison to the applicable default legal rules, as well as a consultation of the business context and the merchant's alleged justification for the boilerplate term.[156] However, it is fair that most viewed his proposal as being that invisible terms would be enforced comparatively rarely.[157] It may well be that his proposal would have resulted in fewer boilerplate terms being enforced than Llewellyn's proposal,[158] although any such comparisons are hopelessly hypothetical—no meaningful

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[153] *Id.* Rakoff considered his approach to be an improvement over Llewellyn's formulation. *Id.* at 1256 ("Llewellyn perceived this problem but tried to finesse it by including 'the broad type of the transaction' as one of the things to which actual assent was given. In many markets it would seem more accurate to consider the selection as one on the border between visible and invisible. A buyer on credit, for example, may very well not know whether the drafting party has intended a sale on general credit, a sale on secured credit, or a lease; at the same time, he knows he does not have to pay cash now, and the general idea that possession of goods is less secure when a balance is still outstanding may be no surprise. Shoppers often do not think in terms of legal categories of any subtlety, and the drafter's stipulation of a legally defined transaction type will be, in a strict sense, an invisible term. But the core substance of the legal type may be very near the boundary of visibility.").

[154] Rakoff, *supra* note 21, at 1258.

[155] *Id.*

[156] *See id.* at 1261–83.

[157] *See id.* at 1251 n.247; *see also* Brian H. Bix, *Boilerplate, Freedom of Contract, and Democratic Degradation*, 49 TULSA L. REV. 501, 504 (2013) [hereinafter Bix, *Boilerplate*]; *see also* Zacks, *supra* note 120, at 751.

[158] Rakoff himself seemed to think this was so, at least in comparison to Leff's proposal: "What Leff put forward was a plan of 'regulation,' which by the very connotation of the word implied that 'unregulated' terms would continue to be binding." Rakoff, *supra* note 21, at 1208.

court engagement of either test has occurred so as to provide the fodder for such an actual comparison. Rakoff's proposal essentially boiled down to—most unexpected "invisible" boilerplate terms would not be enforced.[159]

D. *Kim and Radin—Into the 21st Century*

The rise of the internet and online contracting—whereby merchants took the standard form contract and placed it online in the form of clickwrap, browsewrap, and other contexts for digital assent—brought about renewed interest in whether the internet contracting phenomenon required a fresh look at doctrinal approaches by the courts.[160] Nancy Kim advocated for several doctrinal reforms in her 2013 book, *Wrap Contracts: Foundations and Ramifications*.[161] The recommendations were all situated in the online context, but were nevertheless significant.[162] Based on most of the same difficulties that scholars had been identifying with boilerplate for decades, but with the added challenges posed by burying the fine print in boxes, or offscreen from where the computer user was operating, Kim recommended several improvements to online contract doctrine and practice.[163]

First, Kim advocated for a "duty to draft reasonably" in the online context.[164] Notice is a key component in this recommendation.[165] According to Kim, "[t]he standard of reasonable drafting would require that businesses take certain measures to make their contracts noticeable."[166] She suggested that this duty to draft reasonably so as to achieve fair notice required: (1) that merchants strive to make their terms visible ("[t]he terms should be presented to attract the attention of the nondrafting party"); (2) that merchants try to make it more likely that consumers will actually *read* terms and

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159 *Id.* at 1258.

160 *Cf.* Hillman & Rachlinski, *supra* note 60, at 429, 495 (concluding that although online contracting introduces some new aspects, "existing contract law is up to the challenge" and thus in their view no significant changes in doctrine were needed).

161 *See generally* KIM, *supra* note 26.

162 *See id.*

163 *See id*. at 186–92.

164 *See id.* at 176–92.

165 *See id.* at 176.

166 *Id.* at 186.

not just *see* that terms exist; (3) that merchants consider "word choice" (she suggested more plain language like "Your Legal Obligations" instead of "Terms of Use"); (4) that merchants not "engage in online 'multiwrapping'" ("which is the placement of hyperlinked legal terms next to click boxes that are designed to conclude a transaction"); and (5) that merchants engage in testing of their online terms to determine whether consumers are actually reading them.[167]

Second, Kim argued for merchants to engage in "tailored assent" (and presumably for courts to give more weight of enforceability when merchants do so).[168] By "tailored assent," Kim intended for merchants to be incentivized to go beyond the "all-or-nothing" single click as signifying assent to the entirety of the boilerplate terms.[169] Rather, she suggested a "middle ground" that made it more likely that consumers would, in fact, read and actually assent to *specific* terms, and not just a Llewellian "blanket assent" in general.[170] Kim suggested several ways that merchants could implement her specific assent approach: (1) placing "click accept boxes" numerous times in a contract after each promise or term, rather than just a single click or box for the entire contract;[171] (2) having the consumer send a typed out (rather than merely clicked) consent to the merchant via email; or (3) using "'facsimile' contracting software, where an electronic contract is presented by one party to the other as a scanned or .pdf version of a legal document" and the consumer must type their name out at the end rather than clicking.[172]

Finally, Kim advocated for tweaking other existing doctrine in several ways.[173] She advocated that section 211(3) of the *Restatement (Second) of Contracts* be put into use beyond merely insurance

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167 KIM, *supra* note 26, at 186–89.

168 *See id.* at 192–200.

169 *Id.* at 192–93, 197.

170 *Id.* at 193–94.

171 *See id.* at 196–97. Kim remarked of possible objections to this approach: "Some critics might object to a multiple clicking approach to specific assent because it is burdensome to consumers. *That is exactly the point.* The goal of a specific assent requirement is not to ensure that users read online contracts; rather the goal is to introduce a transactional hurdle that signals the burdensome nature of the transaction." *Id.* at 197.

172 *Id.* at 198.

173 *See* KIM, *supra* note 26, at 200–10.

contracts—rather she suggested it be utilized for all adhesion contracts.[174] She suggested that the general contractual duty of good faith be utilized to require that merchants only use their boilerplate power for "shielding or instructive purposes" (as opposed to, say, a broad appropriation of rights from the consumer, such as rights to data or intellectual property).[175] Kim also suggested a "reinvigoration" of the doctrine of unconscionability.[176] Her suggested reinvigoration methods were to relax the doctrine, and to look at it "more holistically."[177] Specifically, she advocated for a "sliding-scale approach," where both of the traditional elements ("procedural unconscionability" and "substantive unconscionability") were not simultaneously necessary for a finding of unenforceability.[178] She further recommended that "[i]f the avoiding party can prove the use of a coercive contracting form (i.e., the use of an online wrap contract which she was required to accept in order to proceed with the transaction), unconscionability should be presumed" except where: (1) the term is expressly authorized by statute (e.g., a disclaimer of warranty under U.C.C. section 2-316); or (2) where the merchant "can

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[174] *Id.* at 201.

[175] *Id.* at 201–03 (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS 514 (1952)) ("When unforeseen contingencies occur, not provided for in the contract, the courts require performance as men who deal fairly and in good faith with each other would perform without a law suit."); *see also* Best v. United States Nat'l Bank, 739 P.2d 554, 557 (Or. 1987) ("This court has long stated . . . that there is an obligation of good faith in the performance and enforcement of every contract.").

[176] *See* KIM, *supra* note 26, at 203–10.

[177] *Id.* at 208.

[178] *Id.* In fact, the recent *Restatement of Consumer Contracts* has adopted a similar approach to unconscionability. *See* RESTATEMENT OF CONSUMER CONTS. § 5(b) (AM. L. INST., Tentative Draft No. 2, 2022) ("In determining whether a contract or a term is unconscionable at the time the contract is made, a court examines the following factors: (1) substantive unconscionability, namely a fundamentally unfair or unreasonably one-sided contract or term; and (2) procedural unconscionability, namely a contract or term that results in unfair surprise or results from the absence of meaningful choice on the part of the consumer. In determining that a contract or a term is unconscionable, a greater degree of one of the factors in this subsection means that a lesser degree of the other factor is sufficient to establish unconscionability. In appropriate circumstances, a sufficiently high degree of one of the factors is sufficient to establish unconscionability.").

demonstrate that alternative terms were available[,]" either from the merchant itself or other merchants in the marketplace.[179]

Another book was released in 2013, this time dealing with boilerplate generally and not limited to the online context.[180] In 2013, Margaret Jane Radin published *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law.*[181] Radin's book is a manifesto criticizing the current state of boilerplate contracts and their enforcement by courts under current doctrine.[182] In the book, she sets the stage for her analysis by first comparing "World A" (where two parties actively negotiate and are very aware of the contract terms) to "World B" (the boilerplate world where consumers generally do not read and are not aware of most of the terms).[183] Radin describes the practice of merchants eliminating rights from consumers (e.g., damages limitations, choice of forum, etc.) as "boilerplate rights deletion schemes."[184] She asserts that the mass-market, wholesale deletion of consumers' rights through such schemes results in degradations both normative (i.e., reducing freedom) and democratic (replacing state law with private "Law of the Firm").[185] Moreover, the book argues that the current state of boilerplate doctrine cannot be justified under either autonomy theory (because of lack of quality consent to terms)[186] or economic theory (because the lack of quality knowledge prevents competitive markets as to terms).[187]

In response to this state of affairs, Radin develops a number of accounts of how the situation might be addressed—or, at least, how she would suggest *beginning* to think about how it might be addressed.[188] As I noted in the introduction of the Article, Radin's

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179 KIM, *supra* note 26, at 208.

180 *See* RADIN, *supra* note 2, at 12.

181 *See generally id.*

182 *See generally id.*

183 *Id.* at 3–15.

184 *Id.* at 16.

185 *Id.* at 33–34.

186 *See* RADIN, *supra* note 2, at 89–90.

187 *See id.* at 99–109.

188 *See supra* notes 48–52 and accompanying text. As Radin suggests at the end of her sketch of a new analytical framework for reforming judicial doctrine, she confesses that "[t]his is one field where the devil really is in the details." RADIN, *supra* note 2, at 185.

manifesto describes an array of possible remedies, including legislative, market-based, and even suggesting new torts.[189] But she spends some time sketching the parameters and building blocks of a new way to think about adjudicating the enforceability (or not) of boilerplate contracts through a change in judicial doctrine.[190] Calling her sketch "A Proposed Analytical Framework," Radin identified three elements that she suggested should be analyzed when courts consider whether to enforce boilerplate contract terms.[191] The first element was the extent to which the right being "deleted" or waived should be considered *alienable*.[192] That is, certain rights are obviously inalienable, whereas others may be alienable but only after some scrutiny.[193] The second element was the *quality of consent*.[194] Again, Radin suggests a continuum of possibilities that exist, from unquestioned enforceability on one end ("full consent"), to definite unenforceability on the other end ("nonconsent"), to the more amorphous in-between (where consent may be "problematic").[195] The third element was the "*extent of social dissemination* of the rights deletion."[196] By this, Radin is referring to how widespread the particular boilerplate term is—does it affect a single consumer, or are masses affected by the term?[197] In Radin's view, "[c]onsent that is problematic . . . becomes socially and democratically more troubling as it becomes more widespread."[198] Ultimately, Radin concludes by suggesting that courts need to develop "an evaluative framework" for dealing with "rights deleting" boilerplate terms.[199] She suggests that courts consider all three elements and make a holistic decision based on its view of all three considered together—but, as she admits, "the devil really is in the details."[200]

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189 *See supra* notes 48–52 and accompanying text.

190 *See* RADIN, *supra* note 2, at 154–86.

191 *See id.* at 154–55.

192 *Id.* at 155.

193 *See id.* at 158–61. Radin notes that "selling oneself into slavery" is an obvious case of inalienability. *Id.* at 159.

194 *Id.* at 155.

195 *Id.* at 161–62.

196 RADIN, *supra* note 2, at 155 (emphasis added).

197 *See id.* at 156, 178–80.

198 *Id.* at 178.

199 *Id.* at 180.

200 *Id.* at 180–81, 185.

E. *Andrea Boyack—The Latest Post-Llewellyn Innovation*

A very recent proposal in the Llewellian tradition (but with a new sophisticated twist) has just been made by Andrea Boyack, in *The Shape of Consumer Contracts.*[201] She introduces her paper by noting that "[c]ontract 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."[202] She suggests that what we need, instead, is reformed contract doctrine that is tailor-made for the consumer standard form contract scenario: "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."[203] Boyack observes that current contract doctrine treats a consumer's basic assent to a contract (i.e., when they sign, or click, etc.) as not only a decision to create a transactional relationship with the merchant, but simultaneously a decision to agree to all of the merchant's boilerplate fine print terms.[204] She recites the familiar objection of a lack of bargaining power and consumer input into the makeup of the terms.[205] This state of affairs, she argues (much along the lines of Radin's objections), has the dual deleterious effects of: (1) undermining contract law's aspiration of genuine "mutual assent;" and (2) also undermining "the assertion that such terms are freely chosen, mutually beneficial, and wealth-generating."[206]

To address the consumer standard form contract problem, Boyack proposes that contract law first should "disentangle a choice to transact and a commitment to be bound to boilerplate terms."[207] In other words, a consumer's choice to buy a product or service from

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[201] *See generally* Boyack, *supra* note 30.

[202] *Id.* at 3. Boyack starts with an analogy to ill-fitting clothes bought "off-the-rack," compared to (presumably) the better fit of tailor-made clothing. *Id.* at 3–6.

[203] *Id.* at 3.

[204] *Id.* (citing RADIN, *supra* note 2; Rakoff, *supra* note 21; Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002)).

[205] Boyack, *supra* note 30, at 3–4.

[206] *Id.* at 4.

[207] *Id.* at 6.

Company A is one choice, but it does not (in Boyack's view) inevitably also have to mean that the consumer also agrees to all of Company A's boilerplate.[208] Then, Boyack proposes a bifurcation of the boilerplate in a manner reminiscent of Llewellyn and Rakoff.[209] She suggests that "the law must distinguish between terms necessary for the transaction's infrastructure (constructive terms) and terms that function solely to reduce consumers' default legal rights (destructive terms)."[210] Boyack believes that, under this new taxonomy, the consumer's choice to transact with Company A may justify a finding of "deemed assent to constructive terms"—that is, those terms that are affirmative and necessary for structuring the basic transaction.[211] However, Boyack's proposal would not recognize the consumer as having legitimately assented to the destructive terms.[212] Rather, she concludes that the destructive terms should not be enforced, and thus should not be considered part of the form contract.[213] As opposed to seeing deemed consent to the destructive terms as legitimate, Boyack posits that merely "choosing to do business with a company should not effect a legal waiver of the consumer counterparty's rights. Contract law cannot justify allowing boilerplate to distort tort law's liability allocation defaults, contract law's basic principles, and our legal system's dispute resolution process."[214] Boyack urges that courts should adopt her proposed changes to form contract doctrine in order to rebalance the lack of equity between merchants and consumers in the current "one-size-fits-all" system and to prevent current boilerplate from merely reflecting "the preferences of the stronger contracting party."[215]

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208 *See id.*

209 *See id.*

210 *Id.*

211 Boyack, *supra* note 30, at 6.

212 *Id.* at 6–7.

213 *Id.* at 7.

214 *Id.* at 6–7.

215 *Id.* at 7 ("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. Divorcing consent to the transaction from assent to destructive terms would prevent controlling parties in vertical relationships from dictating private governing rules. Instead, existing default legal rights would become not only presumptive, but also durable consumer contracting choices.").

III. CEMENTED COURT DOCTRINE: WHOLESALE ADOPTION AND "THE DUTY TO READ"

A. *Judicial Response: The Duty to Read Rule—Consumer Is Bound by All Terms*

The prior discussion has given a fairly representative picture of the range of academic proposals to change judicial contract doctrine regarding assent to standardized form contracts. As may be apparent, the critiques were all responding to the *actual* contract doctrine that has persisted before, during, and after these critiques—the "duty to read."[216] Upon the advent of the use of standard form contracts widely in industry, the courts fairly quickly arrived at the "duty to read" rule.[217] Hence, in the First Restatement promulgated in 1932, section 70 provided simply: "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, *though ignorant of the terms of the writing or of its proper interpretation.*"[218] A typical statement of the proposition from a 1953 case states that "one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature."[219] The concept carried forward into the Second Restatement issued in 1981, where section 211(1) provides:

> 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

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[216] *See* Calamari, *supra* note 37, at 341 n.4 ("Strictly speaking, the duty to read is not a duty owed to another party. The party owes the duty to himself because he may be bound by what he fails to read.").

[217] *See* Clarke B. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441, 441 (1929).

[218] RESTATEMENT (FIRST) OF CONTS. § 70 (AM. L. INST. 1932) (emphasis added).

[219] Calamari, *supra* note 37, at 342 (quoting Rossi v. Douglas, 100 A.2d 3, 7 (Md. 1953)).

> writing as an integrated agreement with respect to the terms included in the writing.[220]

Section 211 does contain subsection (3), which attempts to invoke a form of the Llewellyn-inspired reasonable expectations doctrine as an exception, but as has been discussed above, that has generally not been embraced by the courts.[221]

And, notwithstanding the sophisticated proposals made in the preceding section by many scholars for changing judicial doctrine regarding consumer assent to standard form contracts in a way that limits which boilerplate terms will be deemed assented to and which will not,[222] the fact remains that the courts have by and large not been persuaded and thus have not generally deviated from the "duty to read" principle for assent to form contracts—the notion is as prevalent today as it was a century ago, as a quick glance at the cases will confirm.[223] This has been recognized by scholars as stark reality. Hence, Ian Ayres and Alan Schwartz have observed that

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[220] RESTATEMENT (SECOND) OF CONTS. § 211(1) (AM. L. INST. 1981).

[221] *Id.* § 211(3) (AM. L. INST. 1981); *see supra* notes 133–35 and accompanying text.

[222] *See supra* Part II.

[223] *See, e.g.*, Princeton Excess & Surplus Lines Ins. Co. v. A.H.D. Hous., Inc., 84 F.4th 274, 286 (5th Cir. 2023) ("Texas law 'presumes that the party knows and accepts the contract terms.'") (citation omitted); PITA, LLC v. Segal, 894 S.E.2d 379, 396 (W. Va. Ct. App. 2023) ("Our jurisprudence has long recognized that parties have a duty to read contracts before signing them."); Jones v. J. Kim Hatcher Ins. Agencies Inc., 893 S.E.2d 1, 15 (N.C. Ct. App. 2023) ("Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents.") (Collins, J., concurring in part and dissenting in part) (citation omitted); Clements v. Alto Tr. Co., 685 F. Supp. 3d 1249, 1264 (D.N.M. 2023) ("At the end of the day, '[a] party who manifests assent to a contract's terms is bound by them, and failure to read the terms is no excuse.'") (citation omitted); Waters v. Del. Moving & Storage, Inc., 300 A.3d 1, 22 n.165 (Del. 2023) ("It is an elementary principle of contract law that a person will be bound by the contents of an agreement that he purposely signs but fails to inform himself of the contents of that agreement") (citation omitted); Mann v. Huber Real Est., Inc., 889 S.E.2d 524, 531 (N.C. Ct. App. 2023) ("Plaintiff thus had a positive duty to read the sales contract and her failure to do so 'is a circumstance against which no relief may be had, either at law or in equity.'") (citation omitted); Nationwide Mut. Fire Ins. Co. v. Interface Sec. Sys., LLC, 655 F. Supp. 3d 486, 501 (S.D. Miss. 2023) ("Under Mississippi law . . . parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions

"[c]ourts have routinely relied upon the duty to read doctrine in enforcing contracts."[224] And Charles Knapp begrudgingly conceded that "[t]he notion that there is in general contract law a 'duty to read' . . . persists in the decisions of American courts."[225] This persistence of the courts' adherence to the duty to read rule—notwithstanding sustained and vigorous academic critique and pleas for change to consumer contract doctrine—has been recognized in the recent drafts of the *Restatement of Consumer Contracts*, which essentially recognized it as the continuing doctrine for assent to contracts.[226] Specifically, section 2 provides in relevant part:

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and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it.") (citation omitted); Jin Chai-Chen v. Metro. Life Ins. Co., 190 A.D.3d 635, 636 (N.Y. App. Div. 2021) ("An insured has the duty to read the insurance policy or have it read to him or her"); Munoz v. PL Hotel Grp., LLC, 288 Cal. Rptr. 3d 644 (Cal. Ct. App. 2022) *cert. granted and cause transferred sub nom.* Munoz v. PL Hotel Grp., 507 P.3d 48 (Cal. 2022) ("Generally, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he [or she] has not read it. If he [or she] cannot read, he [or she] should have it read or explained to him [or her].") (citation omitted).

[224] Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548 n.9 (2014).

[225] Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1085 (2015); *see also* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2257 (2019) ("The duty to read doctrine—under which a contracting party has a burden to read an agreement before assenting to its terms—is an important building block of U.S. contract law.") (citing Roy Ryden Anderson, *Disclaiming the Implied Warranties of Habitability and Good Workmanship in the Sale of New Houses: The Supreme Court of Texas and the Duty to Read the Contracts You Sign*, 15 TEX. TECH L. REV. 517, 544 (1984); Ayres & Schwartz, *supra* note 224, at 548 n.9; Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 729 (2008); Michael Giusto, *Mortgage Foreclosure for Secondary Breaches: A Practitioner's Guide to Defining "Security Impairment*," 26 CARDOZO L. REV. 2563, 2584 n.131 (2005); Knapp, *supra* note 225, at 1085; Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1451 (2014); Jennifer L. Nusbaum, Comment, *North Carolina's Duty to Read: The Demise of Accountability for Transactional Attorneys?*, 92 N.C. L. REV. ADDENDUM 147, 149 (2014)).

[226] *See* RESTATEMENT OF CONSUMER CONTS. § 2 (AM. L. INST., Tentative Draft No. 2, 2022).

> A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving: (1) a reasonable notice of the term and of the intent to include the term in the consumer contract, and (2) a reasonable opportunity to review the term.[227]

This essentially recognizes the duty to read view.

B. *Rationales for the Duty to Read Rule*

1. PRECEDENT AND PREDICTABILITY

What accounts for the durability of the duty to read rule? One explanation now, of course, is the simple weight of nearly 100 years of precedent and operation of principles of stare decisis.[228] But what are the original rationales for the doctrine, and why are they apparently considered sound enough by the courts that a century of sophisticated academic critique has not lessened its grip in any meaningful measure? The reasons are both practical and theoretical. The practical reason is that businesses believe that they need to rely on the enforceability of the contracts in order to manage their enterprises in a functional manner. In Radin's book *Boilerplate*, she acknowledged this common argument when she cited Brian Bix for the proposition that "making too many commercial transactions subject to serious challenge on consent/voluntariness grounds would undermine the predictability of enforcement that is needed for vibrant economic activity."[229] This is a common view as to the critical

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[227] *Id.* § 2(a). Subsection (b) recognizes as enforceable the "rolling contract" or "pay-now-terms-later" scenario that was famously discussed by Justice Easterbrook in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

[228] *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.") (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914)).

[229] RADIN, *supra* note 2, at 96 (citing Bix, *Contracts*, *supra* note 45).

need for enforcement of contracts generally, and courts are typically in accord.[230] Hence, a recent federal district court contracts opinion observed that "[i]t would wreak havoc on commercial contracts if a company could avoid the terms of an arms-length transaction by selecting a subjectively unsophisticated individual to sign all of its agreements."[231] Or, as a state supreme court opinion stated, in what is likely the overwhelmingly typical court view,

> When two competent parties who can readily read and write, sign a [contract] . . . , there is nothing left for a Court to do but to [enforce it] . . . . People who sign documents which are plainly written must expect to be held liable thereon. Otherwise written documents would be entirely worthless and chaos would prevail in our business relations.[232]

Hence, the need for stability in the enforcement of contracts, as a prerequisite for a functional economy, is likely an enduring reason for courts' straightforward adherence to the duty to read notion of assent to form contracts.

2. OBJECTIVE THEORY OF CONTRACTS

There are also theoretical reasons for such adherence as well. John Calamari examined the duty to read in 1974 and opened with an example: "If A sends an offer to B who, without opening it and without suspecting that it is an offer, decides to confuse A by sending a letter which states "I accept," there is a contract because A reasonably believed that B assented to the deal."[233] Calamari stated this result was necessitated by the "objective theory of contracts."[234] Objective theory is bound up in the notion that, although contract law aspires ideally to a "meeting of the minds" whereby both parties truly agree and consent to the contract[235]—the practical problem, as

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230 *See generally id*.; *see also* Bix, *Boilerplate*, *supra* note 157.

231 Nationwide Mut. Fire Ins. Co. v. Interface Sec. Sys., LLC, 655 F. Supp. 3d 486, 500 (S.D. Miss. 2023).

232 Watkins Prods., Inc. v. Butterfield, 144 N.W.2d 56, 58 (Minn. 1966).

233 Calamari, *supra* note 37, at 341.

234 *Id.*

235 There were some who once advocated that subjective, internal agreement should also be required. *See* Barnes, *The Objective Theory*, *supra* note 35, at 1123.

Judge Richard Posner once noted, is that "courts are not renowned as mind readers."[236] Therefore, assent to contracts has long been governed by an objective theory, and it is universally followed in our common law tradition.[237] In the words of Oliver Wendell Holmes, "[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."[238] A present-day articulation of this objective theory is simply that "[a] party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean."[239] Therefore, as Calamari noted in tying the duty to read to objective theory, when an offeree communicates that he accepts an offer, the act is operationally valid and the contract is legally formed because the offeror in that position would "reasonably believe[]" that the acting offeree had "assented to the deal" by such behavior.[240] That is, the one that gives the outward appearance that he has consented to the contract (i.e., traditionally by signing, nowadays by clicking or tapping), is "bound by the impression he reasonably creates."[241]

"The subjectivists looked to actual assent. Both parties had to actually assent to an agreement for there to be a contract." *Id.* (quoting Newman v. Schiff, 778 F.2d 460, 464 (8th Cir. 1985)); *see also* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 208 (3d ed. 2004) ("This question provoked one of the most significant doctrinal struggles in the development of contract law, that between the subjective and objective theories."). "This [subjective] approach, [is] now mostly defunct . . . ." Barnes, *The Objective Theory*, *supra* note 35, at 1123 (citing Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 898 (1992)).

[236] Colfax Envelope Corp. v. Local No. 458-3M, 20 F.3d 750, 752 (7th Cir. 1994).

[237] Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000) [hereinafter Perillo, *Origins of the Objective Theory*].

[238] OLIVER WENDELL HOLMES JR., THE COMMON LAW 309 (1881).

[239] JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 28 (5th ed. 2003) [hereinafter PERILLO, ON CONTRACTS].

[240] Calamari, *supra* note 37, at 341.

[241] *Id.* (citing Ricketts v. Pa. R.R., 153 F.2d 757, 760 (2d Cir. 1946)).

There are sound policy reasons for this objective theory that governs contractual assent.[242] First and foremost are practical evidentiary concerns.[243] Simply put, contract law needs a simple, reasonably provable way to determine whether someone has manifested assent to a contract—that is, whether someone has *outwardly communicated or shown* by their actions (i.e., signing, clicking) that they are agreeing to be bound to a contract.[244] "Absent telepathic powers, humans can only communicate through outward manifestations."[245] Merely agreeing *in one's own mind* to agree to a contract has never sufficed for proving assent; nor, for that matter have "unmanifested [secret] intention[s]" ever been the basis for affecting a finding of contractual assent.[246] As I once observed while musing on objective theory, "contract formation depends on what is communicated, not

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[242] *See* Barnes, *The Objective Theory*, *supra* note 35, at 1127–31.

[243] *Id.* at 1127–28.

[244] *See id.*; *cf.* RESTATEMENT (SECOND) OF CONTS. § 50(1) (AM. L. INST 1980) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."). The verb "manifest," of course—which is the root of the noun "manifestation" (meaning "an act of manifesting")—means "to make clear or evident; show plainly." *Manifest*, DICTIONARY.COM, https://www.dictionary.com/browse/manifest (last visited Sept. 16, 2024); *Manifestation,* DICTIONARY.COM, https://www.dictionary.com/browse/manifestation) (last visited Sept. 16, 2024).

[245] Barnes, *The Objective Theory*, *supra* note 35, at 1127 (citing THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS, AS APPLIED BY COURTS OF LAW 14 (1874)) ("There must necessarily be some medium of communication, by which the 'union of minds' may be ascertained and manifested. Among men, this medium is language, symbolical, oral, or written. A proposal is made by one party, and is acceded to by the other, in some kind of language mutually intelligible; and this is mutual assent. Persons who are deaf and dumb contract only by symbolical or written language. The language of contracts at auction is often wholly symbolical. A nod or wink by one party, and a blow of a hammer given by the other, evince mutual assent.").

[246] Barnes, *The Objective Theory*, *supra* note 35, at 1127–28 (citing JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 30, at 62 (4th ed. 2001); LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 9 (2d ed. 1965)).

on what is merely thought."[247] As John Murray rightfully concluded, "[a]ny other rule would be absurd."[248]

Objective theory is also seen as helping to vindicate the autonomy theory of contracts. Contracts are ultimately consensual undertakings.[249] This consensual nature gives contracts greater weight and enforceability.[250] "'By giving effect to the parties' intentions, the law of contracts is based on respect for party autonomy.' Personal autonomy and freedom are the hallmarks of the Anglo-American common law of contracts, and '[c]onsent is the human vehicle for exercising freedom or autonomy.'"[251] As I previously observed concerning these issues:

> The objective theory of contracts furthers the ideal of individual autonomy. Limiting contract terms to what is externally manifested gives promisees much more control over their own affairs. When the promisee is entitled to rely on gestures that can be objectively verified—versus having to discern the promisor's internal cognition, which may vary from what is externally manifested—the promisee can better process information and order affairs accordingly.

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[247] Barnes, *The Objective Theory*, *supra* note 35, at 1120 (citing Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form*,*"* 100 COLUM. L. REV. 94, 129–30 (2000) (describing history of development of objective theory)).

[248] MURRAY, *supra* note 246, at 62; *see also* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 234–35 (8th ed. 2006) ("Could a defendant who had signed a contract with the apparent intention of binding himself escape liability by showing that at the time of the signing he had made a 'mental reservation' that he should not be bound? It is obvious that this defense should not be allowed; so obvious is this conclusion that the question has not even been discussed in the case-oriented literature of the common law.").

[249] *See* Barnett, *supra* note 204, at 634.

[250] *See* Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 373 (1921) ("As theories of individual freedom thus seemed to require that no obligations or defences to obligations should be allowed unless willed by the parties, so on the other hand the same theories led to opposition to restrictions being placed on the kind of contracts which they in fact did will.").

[251] Barnes, *The Objective Theory*, *supra* note 35, at 1129 (first quoting PERILLO, ON CONTRACTS, *supra* note 239, at 427; then quoting Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1111 (2006)).

> The promisee's affairs can be planned based on what is spoken or written, communications that can also be subsequently referenced when questions regarding performance and obligation arise. Subjective, internal equivocations or doubts are of no consequence to the parties' contractual affairs and thus cannot create havoc in the parties' reasonable expectations. Thus, parties have greater autonomy and control over their own affairs when the objective theory of contracts is followed.[252]

By validating the parties' outward indications of their contractual will and intent, as viewed from the vantage point of an objective reasonable person, the duty to read rule thus coheres with objective theory and respects individual will and autonomy.[253]

So how does objective theory inform the specific scenario of consumer assent to standard form boilerplate contracts? As Calamari noted in his 1974 article:

> The same principle supplies the basic rule relating to questions of duty to read[;] a party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents . . . [otherwise] no one could rely on a signed document if the other party could avoid the transaction by saying that he had not read or did not understand the writing.[254]

To put it plainly under objective theory, the law (via the duty to read) has long held that a consumer's act of "signing on the bottom line" (or, nowadays, clicking "I accept," etc.) can be reasonably and objectively interpreted as signifying assent to *all the boilerplate*—the entirety of the terms of the form contract.[255] It is true that one *could* mount a contrary interpretation using notions of objective theory, given the fact that merchants *know* (as everyone knows) that

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[252] Barnes, *The Objective Theory*, *supra* note 35, at 1129–30 (citing Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989)).

[253] *See id.* at 1153.

[254] Calamari, *supra* note 37, at 341–42 (citations omitted).

[255] *See* Rakoff, *supra* note 21, at 1186.

consumers don't read the boilerplate—such an argument would be instead that an objectively reasonable merchant knows that a consumer *hasn't* read all the terms, and so *some* of the terms are not legitimate under even objective theory, and even in the presence of a signature or click to the ostensible "whole contract."[256] But this is essentially another variant of the Llewellian-type bifurcated academic proposals discussed in the previous section,[257] and the courts have not been receptive. Rather, for the reasons discussed above, the courts have steadfastly adhered to the unitary duty to read, holding that objective theory provides that a person in the position of a merchant may reasonably conclude, and rely upon, the consumer's signature (or click, or tap) as assent to the entirety of the contract.[258] As noted by the drafters of the recent *Restatement of Consumer Contracts*,

> A signature at the bottom of the form, a click of 'I Accept,' or some other form of manifestation of willingness to enter the transaction is, at best, a declaration that 'I know I am agreeing to something, but I don't know to what. I trust that if something really bad is buried in the fine print, the law will protect me from its bite.'[259]

Randy Barnett authored an essay in 2002, *Consenting to Form Contracts*, which constituted a strong (though, admittedly, minority) academic counterpart of the common scholarly critique that consumer assent to unread boilerplate is illegitimate because it lacks true (subjective?) consent.[260] In his essay, he questioned why contracts doctrine was improper in adjusting to the notion of consumer assent (or "consent") to unread, unknown boilerplate.[261] He memorably offered the following:

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256 I myself essentially once made this argument as a younger, more idealistic, scholar. *See* Barnes, *The Objective Theory*, *supra* note 35, at 1155–57. This article reflects my present (changed) skepticism.

257 *See supra* Part II.

258 *See supra* notes 223–27.

259 RESTATEMENT OF CONSUMER CONTS. Introduction (AM. L. INST., Tentative Draft No. 2, 2022); *see also* Barnett, *supra* note 204, at 635.

260 Barnett, *supra* note 204, at 629–30.

261 *Id.* at 636.

> If this sounds counterintuitive, as it will to many contracts professors, consider the following hypothetical. Suppose I say to my dearest friend, 'Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.' Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later? To take another example, is there some reason why a soldier cannot commit himself to obey the commands of a superior (within limits perhaps) the nature of which he will only learn about some time in the future? Hardly. Are these promises *real*? I would say so and cannot think of any reason to conclude otherwise. What is true of the promises in these examples is true also of contractual consent in the case of form contracts.[262]

This notion that consumers, by making a decision to sign or click, have willingly decided to be bound by whatever the terms may say—cannot thus be said to have occurred in the *complete* absence of volitional behavior by the consumer.[263] The consumer made a choice (albeit a consciously ignorant one)—a decision to adopt the terms, and the courts have steadfastly held that there is no realistic, practical, or workable basis for interpreting these actions other than as an enforceable manifestation of assent to the entire contract (aka duty to read).[264]

3. AUTONOMY AND COHERENCE

It follows that the autonomy of the consumer cannot be said to have been *totally* abandoned in enforcement of standard form contracts. As Perillo notes in his Contracts treatise,

> [T]he theory [of private autonomy] sees the foundation of contract law as a sort of delegation of power

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262 *Id.* at 629–30.
263 *Id.* at 637–39.
264 *Id.* at 638.

> by the State to its inhabitants. Recognizing the desirability of allowing individuals to regulate, to a large extent, their own affairs, the State has conferred upon them the power to bind themselves by expression of their intention to be bound [to contracts] . . . .[265]

Although consumers clearly do not have the full range of subjective knowledge of terms that an idyllic notion of contract theory would prefer, they nevertheless make an autonomous choice based on the realities they face.[266] They express their intention to be bound—they know they have agreed to *something*.[267] Moreover, form contract scholarship, when discussing autonomy concerns, rarely mentions that there are *two parties* to most standard form contracts.[268] Although not the popular or sympathetic players in the discussion, *merchants* have autonomy and freedom of contract as well.[269] They are entitled to limit their contracting on the basis of the terms they are willing to live with.[270] Thus we have the following scenario with boilerplate: (1) the merchant chooses autonomously to contract based on the array of fine print terms included and without which they are unwilling to proceed; (2) the consumer is given a choice to either consent to it (take it) or not (leave it); (3) the consumer *could* read the terms but none do (and there are good reasons for not doing so); and finally (4) the consumer autonomously assents/consents to the terms anyway (that she knows are there but that she inevitably decides not to read). How to vindicate some idealized notion of fully-informed consumer consent, and autonomy, when by default consumers sensibly do not take action to read? Without eviscerating the *merchant's* corresponding right to its own autonomy and contracting on the terms it desires? The courts' view of the duty

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265 PERILLO, ON CONTRACTS, *supra* note 239, at 8.

266 Barnes, *The Objective Theory*, *supra* note 35, at 1150.

267 RESTATEMENT OF CONSUMER CONTS. Introduction (AM. L. INST., Tentative Draft No. 2, 2022).

268 *See* Barnes, *The Objective Theory*, *supra* note 35, at 1149–51.

269 *Id.*

270 *See* Rakoff, *supra* note 21, at 1177 (describing that in form contract scenarios, "[t]he form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document.").

to read recognizes that *some* autonomy is being exercised by the consumer, in choosing to be bound to the contract terms that she could have read, but to which she will be bound regardless of not having done so.[271] This view is not widely favored in academic circles, but it is not unknown.[272] Some have acknowledged it.[273] For instance, Radin asserts that "[Omri] Ben-Shahar is an adherent of the view that the decision not to read terms and not to care about them—and probably not even to know that they exist?—is itself a choice that satisfies the requirement of consent."[274]

In addition to all of these practical concerns as well as the inherent conclusions to be derived from the theoretical notions discussed above, there is also a basic coherence problem with academic proposals to somehow bifurcate the boilerplate into the legitimate and the illegitimate, at least on the basis of a view of how to construe the consumer's *assent*. Specifically, all of the Llewellian-style proposals discussed in Part II propose that the boilerplate terms be surgically altered—*some* will be kept, but *others* will not be enforced.[275] But, just as the duty to read ultimately promotes a fiction (that we will take the consumer to have read and agreed to the entirety of the terms),[276] the bifurcated approaches promote an arguably greater one—that a diligent and comprehending consumer finely parsed the boilerplate, agreed to some of the terms, and then discarded others.[277] So, for instance, Boyack's proposal (which is the latest in the Llewellian tradition) is that consumers be "deemed" to have assented to the "constructive" terms only (those that are necessary for the transactional structure).[278] While elegant, Boyack and other scholars engage an arguably more unrealistic fiction than the duty to read, when they presume that a consumer would be able to

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271 *See* RADIN, *supra* note 2, at 13.

272 *See id.* at 14.

273 *See id.* at 150.

274 *Id.*

275 *See supra* Part II.

276 *See* Dee Pridgen, *ALI's Restatement of the Law of Consumer Contracts: Perpetuating A Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 558 (2020) ("[I]t is a modern day 'legal fiction' that consumers have in fact or by defaulting on their duty to read, assented to the boilerplate terms of the contract.").

277 *See, e.g.*, Boyack, *supra* note 30, at 6–7.

278 *See id.* at 6.

read and discern the difference between which terms are "constructive" versus which ones are "destructive."[279] Especially so since it is well known that the vast majority of consumers would not understand the terms even if they *did* read them, much less be able to articulate these categorical differences between them.[280] Thus, such parsing seems to be an even unlikelier fiction than the duty to read. More realistically, the consumer is simply rolling the dice; agreeing to *something* (i.e., the whole boilerplate); i.e., again, "[w]e all know that if you have a page of print, whether it's large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion's mouth and hope it will be a friendly lion."[281] Arthur Leff, himself a proponent of *legislatively* reforming the law in this area (a topic to which I will turn shortly), nevertheless concluded that with respect to the notion of characterizing the consumer's act of consent under *judicial doctrine* (given that consumers do not read), only one of two polar opposites ultimately made any sense—either "*all terms are valid*, because signing [clicking] is binding, or *all form terms are potentially invalid*, because they are neither bargained for nor agreed upon."[282] It is inconsistent to say that if a consumer's consent is *invalid* for some terms (because they did not read), that it is somehow *valid* for other terms (though they still did not read). Per Leff, it logically must stand or fall in total, as an autonomous act.[283] Given the two opposite

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279 *See id.* at 6–7.

280 *See* RESTATEMENT (SECOND) OF CONTS. § 211 cmt. b (AM. L. INST. 1981) ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms . . . . Customers do not in fact ordinarily understand or even read the standard terms.").

281 *Friday Afternoon Session*, *supra* note 25, at 525.

282 Rakoff, *supra* note 21, at 1207 (emphasis added) (citing Leff, *Unconscionability and the Crowd*, *supra* note 84, at 349).

283 *See* Rakoff, *supra* note 21, at 1207. This reminds me, a little, of the arguable political incoherence when some advocate for certain policy outcomes based on the notion of something like respect for "states' rights." It has the tendency of being utilized when it produces a desirable outcome, but ignored when it would achieve the opposite result. *See, e.g.*, Albert R. Hunt, *States' Rights, Depending on the Issue*, N.Y. TIMES (June 28, 2015), https://www.nytimes.com/2015/06/29/us/politics/states-rights-depending-on-the-issue.html; Mallory E. SoRelle & Alexis N. Walker, *Both Democrats and Republicans Care*

choices, and the chaos and unpredictability that would ensue if total unenforceability was chosen,[284] it is no wonder that courts have clung to the century-old doctrine as the only practical interpretation of consumers signing, clicking, or tapping their assent.

C. *Other Court Doctrine—Unconscionability*

Before concluding this section, I should note that even though I am now fatalistic about courts' amenability to ever reforming the duty to read in the context of assent to standard form contracts, I don't subscribe to the view that we should simply abandon any attempts to level the playing field for consumers where it is collectively determined to be warranted. For one, *legislative* regulation of terms seems to be the available path forward (as I will address in the next section).[285] For two, there are *some* existing judicial doctrines available to address particularly egregious boilerplate incursions of consumer rights. In addition to the standard contract defenses like fraud,[286] duress,[287] etc., the defense of unconscionability[288] has in recent decades been calibrated, in theory, to be particularly suited for addressing flagrant abuses of bargaining power disparity through the use of overreaching boilerplate. Section 5 of the recent draft of the *Restatement of Consumer Contracts* represents the current state of the law regarding unconscionability:

> In determining whether a contract or a term is unconscionable at the time the contract is made, a court examines the following factors:

About 'States' Rights'—When It Suits Them, WASH. POST (June 23, 2017, 6:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/23/ both-democrats-and-republicans-care-about-states-rights-when-it-suits-them.

In somewhat analogous fashion, contracts scholars argue for the exclusion of certain "bad" terms because the consumer didn't consent to them, when these same scholars are content to have the consumers' very same manifestations (signing, clicking) be sufficient to show consent to the "good" terms.

284 *See supra* notes 229–32 and accompanying text.

285 *See infra* Part IV.

286 *See* RESTATEMENT (SECOND) OF CONTS. § 164 (AM. L. INST. 1981).

287 *See id.* § 175.

288 *See id.* § 208; *see* U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 2021).

> (1) substantive unconscionability, namely a fundamentally unfair or unreasonably one-sided contract or term; and
>
> (2) procedural unconscionability, namely a contract or term that results in unfair surprise or results from the absence of meaningful choice on the part of the consumer.
>
> In determining that a contract or a term is unconscionable, a greater degree of one of the factors in this subsection means that a lesser degree of the other factor is sufficient to establish unconscionability. In appropriate circumstances, a sufficiently high degree of one of the factors is sufficient to establish unconscionability.[289]

The "procedural unconscionability" prong of the unconscionability analysis has long been associated with frequent potential applicability in the standard form contract context.[290] In fact, the *Restatement of Consumer Contracts* drafters opine (in agreement with many court decisions to the same effect) that "non-core (i.e., non-dickered) standard terms are presumptively procedurally unconscionable."[291] The *Restatement* drafters, appear to consider the presence of the safeguard provided by the unconscionability doctrine as the actual vindication of Llewellyn's suggestion that contract doctrine should treat consumer assent to unread form terms as merely "blanket assent" subject to exclusion of any "unreasonable or indecent terms" buried in the fine print—in this view, unconscionability is the bulwark that serves Llewellyn's envisioned policing purpose.[292]

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[289] RESTATEMENT OF CONSUMER CONTS. § 5(b) (AM. L. INST., Tentative Draft No. 2, 2022).

[290] *See, e.g.*, Vernon v. Qwest Commc'ns Int'l, Inc., 925 F. Supp. 2d 1185, 1194 (D. Colo. 2013).

[291] RESTATEMENT OF CONSUMER CONTS. § 6 cmt. 6(d) (AM. L. INST. Tentative Draft No. 2, 2022).

[292] *See id.* at Introduction ("Under the common law, traditional doctrines like unconscionability and misrepresentation have been applied to police suspect practices and terms relating to the subject matter of the transaction, the remedies that consumers or the business may seek when the transaction fails, choices of law and

A possible problem with unconscionability as the final safeguard for overreaching fine print, however, is its unpredictable record in favor of consumers.[293] As Boyack recently noted, "[u]nconscionability (and similar judicial checks on drafting party power) can provide some limit to company overreach, but in practice may have a limited effect."[294] She cites a 2014 study of North Carolina decisions that "found that an unconscionability claim was successful only 3.37% of the time."[295] In fairness, other empirical studies have placed the rate higher than this, ranging from a success rate of approximately 25%–38%.[296] Nevertheless, there is reason to believe that consumers are frequently unsuccessful in their unconscionability claims. Radin agrees (along with Clayton Gillette) that "wild-card doctrines such as (primarily) unconscionability and voidness as against public policy are largely unsatisfactory, decided by courts after the fact . . . , unpredictable, and not based upon empirical evidence."[297] One reason may be that it is hard for the "conscience to be shocked" anymore by clauses terminating various consumer rights, when in fact these clauses have become ubiquitous.[298] Another reason, of course, is the countervailing notion of freedom of

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forum, the business's discretion to specify and adjust contractual obligations, and to many other areas of contracting . . . . This Restatement offers a roadmap to the implementation and augmentation of Llewellyn's approach, which continues to accurately characterize the approach taken by courts. At the front end, when consumer contracts are formed, courts require that consumers receive adequate opportunity to review the terms (and adequate notices of this opportunity and of the fact that such terms would be part of the contract). At the back end, when consumer contracts are enforced, courts scrutinize the standard contract terms to ensure that they are not unreasonable.").

293 Boyack, *supra* note 30, at 4 n.6.

294 *Id.*

295 *Id.* (citing 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)).

296 *See* Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 789–92 (2020).

297 RADIN, *supra* note 2, at 229.

298 *See, e.g.*, Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1232 (Cal. 2012) ("A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."'") (citation omitted).

contract, which is still dutifully cited by the courts.[299] Kessler, in addressing the courts' reluctance to invalidate contracts based on another doctrine (void as against public policy),[300] observed that:

> [C]ourts are extremely hesitant to declare contracts void as against public policy 'because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.'[301]

Hence, unconscionability is an existing extreme failsafe, but of comparatively limited utility if one subscribes to the notion that widespread use of boilerplate to eliminate consumer rights and remedies is still yet in further need of concentration.

D. *Duty to Read—A "Sturdy Indefensible"*

A major part of the thesis of this Article is, therefore, that the courts' embrace of the "all-or-nothing" duty to read in the standard form contract context is likely permanent and not likely to be altered as a matter of judicial doctrine. Like many other long-established legal doctrines, it is probably "too hardy a plant to be uprooted."[302] It has practical and theoretical rationales for its enduring support in the courts as a matter of contract doctrine.[303] It has long-standing precedential weight of authority behind it.[304] It is no doubt true that the chorus of sophisticated scholarly critiques are correct that, insofar as the ideal vision of contracting as a hands-on, fully engaged

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[299] *See, e.g.*, Pizza Inn, Inc. v. Clairday, 979 F.3d 1064, 1067–68 (5th Cir. 2020) ("'[P]roving unconscionability' presents a 'high threshold' per a 'strong policy favoring the freedom of contract.'") (citation omitted).

[300] *See* RESTATEMENT (SECOND) OF CONTS. § 178 (AM. L. INST. 1981).

[301] Kessler, *supra* note 76, at 630–31 (citing Printing and Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 465 (1875)).

[302] *Cf.* John Christian Tecklenburg II, Note, *Equitable Subrogation-Too Hardy a Plant To Uprooted By Article 9 of the UCC?*, 32 U. PITT. L. REV. 580, 594 (1971).

[303] *See supra* notes 242–84 and accompanying text.

[304] *See supra* note 228 and accompanying text.

cognitive exercise—one where both parties are fully and subjectively aware of all of the terms that are discussed—standard form contracts are utterly and completely indefensible.[305] But, to borrow a phrase from Radin, the duty to read is likely a "sturdy indefensible"—i.e., one that while possibly incorrect if certain standards are rigidly applied, has nonetheless come to enjoy such widespread practical acceptance that it is likely here to stay.[306] Efforts to reform the standard form contract process, therefore—including specifically any efforts to regulate the use of particular terms—must, if at all, likely be implemented through the use of legislative or administrative measures. It is to this next topic that I will next briefly turn.

IV. THE WAY FORWARD—TOWARDS UTILIZING LEGISLATION TO REGULATE THE USE OF STANDARD FORM TERMS

A. *Legislation as a Long-Viewed Viable Option*

Given that I am not sanguine about the prospect of judicial alteration of the duty to read thread of contract doctrine, what is the alternative? Legislation. I am mindful that this, in and of itself, is not a terribly novel concept. I hope it is not anti-climactic for the

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[305] *See* RADIN, *supra* note 2, at 143.

[306] *Id.* (citing H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 573–74 (David Crystal ed., 2009); WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 39–65 (4th ed. 1999); IRMA S. ROMBAUER & MARION ROMBAUER BECKER, JOY OF COOKING VOL. 2: APPETIZERS, DESSERTS & BAKED GOODS 475 (1998) ("In Fowler's *Modern English Usage* and in Strunk & White's *Elements of Style*, there is a category declared to be 'sturdy indefensibles.' Sturdy indefensibles are ungrammatical expressions that we nevertheless admit to English usage, such as 'It's me' instead of 'It's I.' The notion of the sturdy indefensible also makes an appearance in Irma Rombauer's *Joy of Cooking*, to describe a cookie recipe that is not especially good but uses up the egg yolks that the cook has on hand after making angel food cake or meringues with the egg whites. Shall we say that World B [i.e., boilerplate] contracts, and in particular those that are in the category of rights deletion schemes, are another form of sturdy indefensible? They don't fit the 'grammar' of the legal infrastructure of contract law, a foundational building block of the private ordering regime that justifies the state, at least in the narratives of political liberalism that still undergird our system. Nevertheless, they are thoroughly ensconced in practice. If all of them were declared invalid tomorrow, it is feared that there would be significant economic disruption."). In fairness, Radin hoped that standard form terms that delete consumers' rights were *not* such a "sturdy indefensible." RADIN, *supra* note 2, at 143.

reader. It is quite true that several scholars have proposed this approach previously, either as an alternative to court doctrine reform, or as one of several approaches.[307] Before Radin's book, one of the first influential proposals for such legislative regulation of form terms was that propounded by Arthur Leff.[308] His article, *Contract as Thing,* envisioned the boilerplate terms offered by merchants to be conceptualized as part of the overall product being offered, rather than as a separate, traditional contract *per se*.[309] Radin referred to this view as "contract-as-product."[310] This view enabled Leff to move beyond concerns about inadequate consent, and he instead "suggested a broad program of legislation coupled with administrative enforcement, directed in part to requiring greater disclosure of terms, but aimed primarily at the outright prohibition of particular clauses and devices in adhesion contracts."[311] Rakoff objected to this, based on the fact that Leff's proposal would leave many fine print terms binding, but that is the result of regulating certain key terms seen as especially problematic (as opposed to Rakoff's approach which would have rendered all "invisible" terms unenforceable).[312] Rakoff, of course, disagreed with settling for this piecemeal approach of legislative control of certain key unfavorable terms—he observed that "[a] proposal of this sort may well be intended to reduce the power of drafting parties to overreach. *Still, it necessarily concedes existing law as its starting point*."[313] As Radin points out, others have also suggested Leff's "contract-as-product" approach to boilerplate as appropriate[314]—Douglas Baird

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[307] *See, e.g.*, Rakoff, *supra* note 21, at 1207 (citing Leff, *Unconscionability and the Crowd*, *supra* note 84, at 351–52); RADIN, *supra* note 2, at 217–42.

[308] *See generally*, Leff, *Contract as Thing*, *supra* note 120.

[309] *See* RADIN, *supra* note 2, at 100 (citing Leff, *Contract as Thing*, *supra* note 120, at 155).

[310] *See id.*

[311] Rakoff, *supra* note 21, at 1207.

[312] *Id.* at 1208 ("What Leff put forward was a plan of 'regulation,' which by the very connotation of the word implied that 'unregulated' terms would continue to be binding.").

[313] *Id.* (emphasis added).

[314] RADIN, *supra* note 2, at 99–100 (citing Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 939 (2006)). Radin notes that Baird is also a proponent of the "contract-as-product" view, equating the choice of boilerplate terms along with the computer manufacturer's choice of laptop screen size, battery, and microprocessor.

> [S]uggests that the traditional focus of contract theory upon individuals and their bargains is not applicable to boilerplate. He proposes, instead, that if boilerplate is over-reaching, the legislature can prohibit specific clauses that are deceptive and/or exploitive, just as it might regulate other practices that are deemed deceptive or exploitive, such as payday lending or door-to-door sales.[315]

My thesis is that the expectation that the judicial duty to read will change is no longer reasonable, and the sensible course (as Leff and Baird suggested) is to accept it and proceed to consider legislation of terms if we believe their use implicates questions of fairness.

Radin herself also mused in her book *Boilerplate* about possible legislative approaches to boilerplate.[316] Although she did suggest new ways for thinking about judicial doctrine reforms, as discussed earlier,[317] she also discussed other possible solutions. Two of her other ideas were private market reform and new tort proposals.[318] But her final chapter included a discussion of possible regulatory solutions.[319] At the outset of the discussion, she recognized "the question whether some boilerplate clauses, and some combinations of them, should be brought under regulatory control. I will consider the case for substantive regulation of boilerplate."[320] She first acknowledges the American preference for adding disclosure requirements as a way to overcome the consent and knowledge problem in contracting, but she proposes to talk about more substantive regulation of the terms themselves (rather than giving information about them).[321]

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315 RADIN, *supra* note 2, at 100–01 (citing Baird, *supra* note 314, at 939).

316 *Id.* at 217–42.

317 *See supra* notes 188–200 and accompanying text.

318 RADIN, *supra* note 2, at 189–216.

319 *Id.* at 217–42.

320 *Id.* at 217.

321 *Id.* at 219–20. As Radin notes, Omri Ben-Shahar and Carl Schneider have greatly criticized the overuse of disclosure, "as the solution tends to overwhelm recipients with disclosures and firms with paperwork (or its electronic equivalent) without accomplishing much." *Id.* at 219 (citing Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014)).

Radin then discusses possible legislative approaches to dealing with boilerplate.[322] "One kind of piecemeal fix," she suggests, "would be simply to outlaw the use of a certain clause."[323] She suggests that possible candidates for such an approach might be "arbitration clauses, and some kinds of exculpatory clauses and choice of forum/choice of law clauses."[324] Beyond legislation targeting individual boilerplate terms, Radin next discusses the regulatory models of black lists, white lists, and grey lists.[325] The "white list" approach, proposed by Clayton Gillette, would involve an administrative agency review of proposed terms, resulting in a "white" list of approved terms that would be "a safe harbor of boilerplate terms" for businesses to use.[326] "Black lists" are, of course, the converse. These would be a list of terms that may *not* be included in a contract.[327] Radin suggests that black lists have not often been proposed based on the historical American preference for freely operating markets, although she then acknowledges that contract law, on the other hand, has long recognized at least *some* limits on terms (a topic to which I will turn momentarily).[328] "Grey lists" avoid the all-or-nothing approach of white lists and black lists. Instead, a grey list would be a list of clauses that, while not conclusively unenforceable, would be ones that courts would be directed to treat with suspicion.[329] Scrutiny of such clauses might include considering evidence, for instance, of their use in commercial contexts.[330] As an additional example and possible model, Radin points to the EC Directive of 1993 on Unfair Terms in Consumer Contracts, and suggests that the need for harmonization between the U.S. and the E.U. requires American legislatures and policymakers to at least be mindful of the different approaches on the Continent.[331]

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322 RADIN, *supra* note 2, at 223.
323 *Id.*
324 *Id.* at 224.
325 *See id.* at 227–32.
326 *Id.* at 227 (citing Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975 (2005)).
327 *Id.* at 229–31.
328 *See* RADIN, *supra* note 2, at 229–30.
329 *Id.* at 231.
330 *Id.*
331 *See id.* at 233–42 (citing Council Directive 93/13, 1993 O.J. (L95) 29, 29).

My point, at the outset of this final section, is that others have previously considered a possible way forward via legislative regulation of boilerplate terms, as an alternative to the sustained (and, so far, ill-fated) attempt to modify judicial doctrine regarding consumer assent to form contracts. There is a rational case for placing this task with the legislatures rather than the courts. Kessler wondered eighty years ago whether "the unity of the law of contracts [can] be maintained in the face of the increasing use of contracts of adhesion."[332] Perhaps prophesying the later reluctance courts have had in being willing to innovate beyond the duty to read, he observed that "the task of building up a multiple system of contract law is eminently difficult, particularly since courts are not commissions which are able to examine carefully the ramifications of the problem involved, and can see only the narrow aspect of the total problem which comes up for litigation."[333] Legislatures, unlike courts, *can* consider the full breadth of the market problem, whereas any one court is ultimately only concerned with the litigants that are before it.[334]

Such an approach may yet now be the best way to vindicate Llewellyn's original influential vision for treating assent to form contracts. Recall that Llewellyn proposed that consumer assent to the boilerplate should be treated as a "blanket assent . . . to any *not unreasonable or indecent term*s the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms."[335] It has been hoped that doctrines like unconscionability might play the role of policing Llewellyn's "unreasonable or indecent terms" out of the boilerplate.[336] But, as has been discussed, this has fallen short, and courts have not otherwise been willing to reform judicial doctrine.[337] And yet, consumers still probably hope that *something* will protect them from any injustices lurking in the

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[332] Kessler, *supra* note 76, at 636.

[333] *Id.*

[334] *Cf.* Edgar, *supra* note 53, at 893 ("The Court has recognized legislatures' superior capacity to resolve disputes concerning the behavior of entities with market power . . . .").

[335] LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 84, at 370 (emphasis added).

[336] RESTATEMENT OF CONSUMER CONTS. Introduction (AM. L. INST., Tentative Draft No. 2, 2022).

[337] *See supra* notes 294–301 and accompanying text.

fine print when they think: "I know I am agreeing to something, but I don't know to what. I trust that if something really bad is buried in the fine print, *the law will protect me from its bite.*"[338] Legislation, if deemed desirable from a policy perspective, seems to be the only realistic way to implement this failsafe protection Llewellyn envisioned to the extent existing judicial doctrine has been ineffective in doing so.

B. *We Already Regulate Contract Terms*

Here is another anti-climactic aspect to the thesis of this Article—we are already accustomed to legal limits imposed on terms which can be placed in contracts.[339] Radin notes that this is true, in spite of an otherwise prevalent urge towards countervailing market freedoms:

> There are nevertheless some terms that, in keeping with the limits of contract law, may not appear in any contract: parties may not include a penalty clause because contract law does not allow for punitive damages; parties may not include clauses that permit parties to act in bad faith, because contract law contains a nonwaivable obligation of good faith; parties may not contract to perform illegal activities, because contract law does not immunize people from punishment for activities that are socially proscribed, nor does it encourage people to engage in those activities; and of course, a purported contract that permitted a party to act coercively or deceptively in obtaining agreement would not be a contract at all . . . . [An additional] disallowed term is a term allowing a usurious interest rate. Another . . . is a term in a residential lease waiving the implied warranty of habitability.[340]

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[338] RESTATEMENT OF CONSUMER CONTS. Introduction (AM. L. INST., Tentative Draft No. 2, 2022) (emphasis added).

[339] RADIN, s*upra* note 2, at 229–30.

[340] *Id.*

As Radin illustrates, placing limits on contract terms is already well known in contract law, such that adding additional limits on certain recurring boilerplate terms—for instance, waivers of damages, certain exculpatory clauses, or class action waivers—would not be unknown or foreign to the realm of contract law.[341]

There are, of course, other examples we could add to Radin's list of terms that are already prohibited, or at least limited, by existing contract law or statute. Take covenants not to compete. They are completely invalidated in California in the employment context.[342] Other states regulate them carefully, so that they do not exceed certain reasonable limits.[343] The FTC, in fact, has just proposed a nationwide ban on such provisions in the employment context.[344] The U.C.C. has a number of examples of terms that may not be included unless limits are observed.[345] To name a few: (1) section 2-719, which makes certain limitations of consequential damages presumptively unenforceable in contracts for the sale of goods;[346] (2) section 2-316, which prescribes limits on disclaimers of implied warranties and makes them unenforceable if they do not conform to certain form requirements;[347] and (3) section 9-602, which provides that several rights provided in Article 9 are nonwaivable and thus any terms in a contract attempting to do so would be unenforceable (e.g., Article 9 remedies rules under sections 9-625 and 9-626, rule against breaching the peace in self-help repossession of collateral under section 9-609, and the sections dealing with required rules of sale of collateral and accounting of debt, to name a few).[348]

Beyond the U.C.C. (and sticking only with examples I am familiar with off the top of my head), a contract clause purporting to

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341 *Id.* at 230.

342 CAL. BUS. & PROF. CODE § 16600 (West 2024).

343 *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2009) ("[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.").

344 *See infra* notes 366–69 and accompanying text.

345 U.C.C. §§ 2-719, 2-316, 9-602.

346 *See id.* § 2-719.

347 *See id.* § 2-316.

348 *See id.* § 9-602.

waive the right to file for bankruptcy relief has long been held to be unenforceable as against public policy, as is an agreement not to seek discharge relief in bankruptcy.[349] Similarly, an agreement with a particular creditor, before filing bankruptcy, to waive the dischargeability of an individual debt has also been held to be unenforceable as against public policy.[350] The Bankruptcy Code also provides that *ipso facto* clauses (contract terms that provide that the contract automatically terminates upon filing bankruptcy) are not enforceable.[351] Moreover, in some states a contract provision waiving the right of redemption in the real estate foreclosure context is unenforceable.[352]

The Federal Trade Commission (FTC) has also participated in some policing of standard form contracts, on a federal level.[353] One example is the Credit Practices Rule, whereby in 1984 the FTC promulgated regulations declaring the inclusion of certain contract terms in credit contracts to be an unfair practice under the Federal Trade Commission Act.[354] Pursuant to the Credit Practices Rule, the FTC specifically prohibits the following types of contract provisions in consumer credit contracts: (1) "confession of judgment" clauses; (2) "executory waiver[s] . . . of exemption;" (3) certain assignments of wages or salary; and (4) the grant of a "nonpossessory security interest in household goods other than a purchase money security interest."[355] The FTC has determined that a practice is "unfair" if it

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[349] *See In re* Arnett, 634 B.R. 1078, 1082 (Bankr. M.D. Ala. 2021), *vacated, and remanded sub nom*. TitleMax of Ala., Inc. v. Arnett, No. 2:21-cv-00840-RAH, 2022 WL 3587339 (M.D. Ala. Aug. 22, 2022).

[350] *In re* Detrano, 222 B.R. 685, 688 (Bankr. E.D.N.Y. 1998), *vacated*, 266 B.R. 282 (Bankr. E.D.N.Y. 2001), *aff'd and remanded sub nom*. *In re* DeTrano, 326 F.3d 319 (2d Cir. 2003).

[351] *See* Lehman Bros. Special Fin. Inc. v. Ballyrock ABS CDO 2007-1 Ltd. (*In re* Lehman Bros. Holdings Inc.), 452 B.R. 31, 39 (Bankr. S.D.N.Y. 2011) (citing 11 U.S.C. § 365(e)(1)).

[352] *See, e.g.*, Wilkinson. v. United States, 440 F.3d 970, 976 n.5 (8th Cir. 2006) ("North Dakota does not permit borrowers to waive redemption rights prior to foreclosure." (citing First State Bank of New Rockford v. Anderson, 452 N.W.2d 90, 92 (N.D.1990))).

[353] 49 Fed. Reg. 7740, 7742 (Mar. 1, 1984) (to be codified at 16 C.F.R. pt. 444).

[354] *Id.* at 7742; 16 C.F.R. § 444.2; 15 U.S.C. § 45(a) (prohibiting "unfair or deceptive acts or practices in or affecting commerce.").

[355] 16 C.F.R. § 444.2(a).

"causes substantial consumer injury, the injury is not outweighed by offsetting benefits, and the injury is one that consumers could not reasonably have avoided."[356] After reviewing the above then-typical credit contract terms, the FTC found that these provisions "do indeed cause consumers to suffer substantial economic and emotional injury."[357] The FTC found that consumers were unable to avoid these terms in the market, they had little bargaining power, and creditors had "little incentive to try to offer better terms on creditor remedies."[358]

A more recent FTC intervention to prevent a particular type of contract term is the Consumer Review Fairness Act (CRFA).[359] Prior to the CRFA's enactment, many businesses had started to include non-disparagement provisions in their contracts, which prohibited the customer from posting a negative online review regarding the company.[360] These clauses were wildly unpopular in the media and in public opinion, and several high-profile examples of businesses' attempts to enforce them were the subject of news stories that drew attention to the issue.[361] As a result, Congress passed the CRFA.[362] The Act applies to any "covered communication," which is defined in the statute as "a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party."[363] Further, the CRFA is situated so as to apply when a clause purports to prohibit such "covered communications" in a "form contract" with "standardized terms."[364] With some

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356 DEE PRIDGEN & JOLINA C. CUARESMA, CONSUMER CREDIT AND THE LAW § 10:2 (2023), Westlaw (citation omitted).

357 *Id.*

358 *Id.*

359 15 U.S.C. § 45b.

360 Wayne R. Barnes, *The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and A Role for Contract Law After the Consumer Review Fairness Act*, 53 GA. L. REV. 549, 576 (2019) [hereinafter Barnes, *The Good, the Bad, and the Ugly of Online Reviews*].

361 *See id.* at 554, 577–82.

362 *See id.* at 582–83.

363 15 U.S.C. § 45b(a)(2) (Supp. V 2018).

364 *Id.* § 45b(a)(3).

exceptions, the CRFA invalidates, and renders void, any form contract term that either prevents a consumer from posting a review, or charging a penalty for doing so.[365]

Even more recently (literally hot off the presses), the FTC proposed the Non-Compete Clause Rule.[366] The rule proposes to effectively ban virtually all covenants not to compete entered into in the employment context in the U.S.[367] The rule "provides that it is an unfair method of competition for persons to, among other things, enter into non-compete clauses ('non-competes') with workers on or after the final rule's effective date."[368] The rule makes some distinctions, as to existing contract non-competes, for continuation of those agreements entered into by "senior executives" to remain in force—but all others would be deemed unenforceable on the effective date of the proposed rule.[369] This is yet the latest example of regulation of specific contract terms, happening in real time along with the writing of this article.[370]

Beyond the domestic view, I would be remiss if I did not at least mention a notable example of standard form contract regulation across the pond—the EC Directive of 1993 on Unfair Terms in Consumer Contracts, which Radin discusses at the end of her book.[371] This Directive is an attempt at a comprehensive regulatory provision

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[365] *Id.* § 45b(b)(1). The CRFA has a series of exclusions and exceptions, but they do not affect the primary point that the Act operates to mostly ban these types of "non-disparagement" clauses. *See* Barnes, *The Good, the Bad, and the Ugly of Online Reviews*, *supra* note 360, at 584–86 (citing 15 U.S.C. § 45b(b)(2)–(3)).

[366] Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

[367] *See FTC Wins Round Two in Its Non-Compete Ban Defense*, MCCARTER & ENGLISH, LLP (July 26, 2024), https://www.mccarter.com/insights/ftc-wins-round-two-in-its-non-compete-ban-defense.

[368] Non-Compete Clause Rule, 89 Fed. Reg. at 38342.

[369] *Id.* Perhaps unsurprisingly, the FTC's Non-Compete Clause Rule has been challenged in several lawsuits, the final outcome of which (after allowing for the appellate processes to play out) have yet to be determined. *See FTC Wins Round Two in Its Non-Compete Ban Defense*, *supra* note 367.

[370] *See, e.g.*, Non-Compete Clause Rule, 89 Fed. Reg. at 38342; Consumer Review Fairness Act of 2016, H.R. 5111, 114th Cong. (2016) (enacted).

[371] *See* RADIN, *supra* note 2, at 234–39.

that lists a series of consumer contract terms that are to be determined to be unfair across the E.U.[372] Radin points out that most European nations are civil law in nature, and "[c]ulturally, [E.U.] scholars and businesspeople and politicians do not tend to mistrust the government, or comprehensive regulation, or 'top-down' ordering, the way scholars and businesspeople and politicians in the [U.S.] do."[373] The Directive contains seventeen terms in its Annex, which were deemed to be unfair.[374] Radin notes that the challenge for the E.U. was the manner in which the various member states implemented the Directive—the results ranged from incorporation into the substantive law, to passing an ancillary regulation, from placing the terms on a "black list," to making them subject simply to increased scrutiny via a "grey list," and so on.[375] Additional follow-up regulatory efforts have been undertaken in the E.U., in an attempt to correct some of the Directive's procedural irregularities in implementation.[376] The point for now is that, in philosophy at least, the E.U. provides an example of a willingness to embrace a more overtly regulatory approach to the problem of unfair terms in standard form contracts.[377]

C. *Some Final Thoughts and Challenges*

I have expressed that I think, between the alternatives of court reformation of judicial contract doctrine vs. targeted legislative regulation of certain form terms, that the latter is at this point more realistic.[378] This is not to say that prospective legislation as I have envisioned is necessarily a panacea for all that is wrong with the notion of consumer assent to boilerplate in standard form contracts. I would

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372 *See id.*

373 *Id.* at 234.

374 *Id.* at 235–36.

375 *See id.* at 237.

376 *See id.* at 237–39.

377 Radin laments that "[i]t would be foolish to imagine that the [U.S.] will anytime soon adopt a comprehensive regulatory solution such as the one that the [E.U.] is in the process of reworking." RADIN, *supra* note 2, at 239. Of course, on the other hand, I have noted above a couple of specific instances in which the FTC *has* been willing to act so as to prevent certain terms in contracts. *See supra* notes 354–65 and accompanying text.

378 *See* discussion *supra* Section IV.A.

certainly welcome being wrong and finding that courts suddenly discovered an amenability to such doctrinal reform in the Llewellian tradition, following the proposals of scholars like Rakoff, Kim, Radin, or Boyack.[379] Other solutions are awaiting creative proposals by ingenious scholars. Recall that Radin herself proposed the innovation of brand new torts to deal with boilerplate.[380] Another recent proposal, which is completely original and provocative is that of David Hoffman in *Empire of Forms*, where he proposes to deal with a large swath of boilerplate in small transactions (think $100 or less) by simply making those small written contracts unenforceable—a kind of reverse statute of frauds.[381] This would make disputes regarding these transactions simply governed by whatever default contract law was applicable.[382] This is a thoughtful, outside-the-box proposal that would indeed simply sweep away a massive amount of boilerplate that is, in all probability, not that helpful to the imposing merchants anyway.[383] Proposals like this are quite welcome, and hopefully, more will be forthcoming. But, even if Hoffman's proposal were to be adopted, there would still be much room for tackling the problem of certain recurring boilerplate clauses being imposed on consumers in larger, more substantive transactions.[384] Hence, basic legislative regulation of terms remains a realistic approach for this additional subset of consumer forms.

Before concluding, however, I recognize that there are multiple challenges to addressing problems of consumer boilerplate with additional legislation. The first problem is political—is it realistic to think that legislatures (whether state or perhaps federal) would be open to such approaches? Radin addresses this in her book when she observes that "[U.S.] political discourse has an entrenched preference for 'private,' 'market' solutions for issues that arise with regard to boilerplate (and much else)."[385] But, of course, as discussed above, *some* legislation and limits already pertain to contracts, and

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379 *See supra* notes 148–215 and accompanying text.
380 *See* RADIN, *supra* note 2, at 198.
381 Hoffman, *supra* note 12, at 1368, 1363.
382 *See id.* at 1373.
383 *See id.* at 1371–73.
384 *See id.* at 1415.
385 RADIN, *supra* note 2, at 218.

so we are a long, long ways from purely private markets for exchanges.[386] The CRFA, discussed above, was actually passed by Congress in an overwhelmingly bipartisan manner, showing that it is politically possible to achieve legislative regulation of boilerplate when the stars align.[387] Indeed, as Radin concurs, "markets cannot exist without rules of the road, separating legal trades from illegal ones . . . and our legal infrastructure of property and contract cannot be purely 'private' either."[388] There is no inherent reason that boilerplate cannot be legislated by statutory provisions designed to reign in perceived abuses where deemed appropriate.[389] And yet, notwithstanding that it *can* be done, does not mean it will be *easy* to accomplish.

An anecdotal example of this comes from my colleague and friend, Bill Henning.[390] According to him, during the ill-fated effort to amend Article 2 that culminated in 2003, there was some discussion of drafting a provision that would render ineffective a list of contract terms that were considered abusive.[391] Although there was some support for this approach, others were concerned that any list would soon become outdated and preferred a broad new standard—the "reasonable expectations" doctrine that had previously been applied primarily in the insurance context—to augment the unconscionability doctrine.[392] The discussions never reached the point where a list of abusive terms was drafted.[393] This illustrates the challenges that await any additional attempts to legislate limits on such terms.

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386 *See supra* notes 340–77 and accompanying text.

387 Barnes, *The Good, the Bad, and the Ugly of Online Reviews*, *supra* note 360, at 587.

388 RADIN, *supra* note 2, at 218.

389 *See id.*

390 Professor William Henning is Executive Professor of Law at Texas A&M University School of Law. He chaired the Drafting Committee to Amend Uniform Commercial Code Article 2, Sales, and Article 2A, Leases, from 1999 to 2001, when he stepped down to become Executive Director of the Uniform Law Commission. This anecdote came from a conversation we had discussing this article—my thanks to him for sharing!

391 *Id.*

392 *Id.*

393 *Id.*

A second challenge to a legislative approach such as that contemplated—legislatively regulating certain specific boilerplate terms—is that it has the disadvantage of being static. In fact, in the Amended Article 2 process described by Henning, one of the objections to creating a specific list of terms was that it would become outdated.[394] This viewpoint preferred instead the flexible approach of enacting a version of the "reasonable expectations" doctrine, so that courts would be equipped to police and address any different terms in the future that businesses began using—somewhat of a "rules vs. standards" distinction.[395] And it is true, to quote Grant Gilmore, that legislation has the potential problem of acting so as "to preserve the past, like a fly in amber."[396] In describing the codification process for Article 3 of the U.C.C. on Negotiable Instruments, he fretted that the provisions now read like a "museum of antiquities."[397] There is merit to the complaint. And yet, sometimes the worst option is better than none at all.[398]

The other major set of challenges is, well, everything—how to do it? What clauses to address? Whether to black-list them or grey-list them? Whether it should be on a state level, or federal level via perhaps the Federal Trade Commission? Should the U.C.C. be amended? Whether it should only protect consumers, or perhaps small businesses as well? Should it be context or industry specific? As Radin said, and it bears repeating here, "[t]his is one field where the devil really is in the details."[399] I leave these discussions for another day. It is enough, for now, that the most efficacious way forward for addressing any boilerplate terms that are perceived to be

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394 *Id.*

395 *Id.*; *see also* RADIN, *supra* note 2, at 232–33 (discussing the rules vs. standards debate and observing that she may prefer more of a "rule" approach for the boilerplate legislative project); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

396 Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 461 (1979).

397 *Id.*

398 Winston Churchill is said to have once remarked: "[D]emocracy is the worst form of [g]overnment except for all those other forms that have been tried from time to time . . . ." *The Worst Form of Government*, INT'L CHURCHILL SOC'Y (Feb. 25, 2016), https://winstonchurchill.org/resources/quotes/the-worst-form-of-government.

399 RADIN, *supra* note 2, at 185.

problematic is through the legislative regulatory route, rather than expecting courts to alter the duty to read. But the details of how to do it will await subsequent work, perhaps by me or others.

CONCLUSION

For basically a century, the notion of consumer assent to standard form contracts has created a massive cognitive dissonance among scholars.[400] Contracting is supposed to be about knowing, voluntary consent to bargained-for terms,[401] and yet the presence of masses of boilerplate being ostensibly "agreed" to has created a dilemma that scholars have yet to solve to their satisfaction. Consumers do not read the fine print before they sign or click their "assent."[402] They likely wouldn't understand if they did read it.[403] Merchants know this, and are incentivized to load the boilerplate with one-sided terms that remove rights and remedies that consumers would otherwise have.[404] Beginning with Llewellyn, scholars have for decades proposed that courts should characterize consumers' manifestations of assent in a two-tiered fashion—clear enforceable consent to the "known" or "dickered" terms, and mere "blanket assent" to the terms which do not surpass their reasonable expectations, and which do not unreasonably undermine the deal—such unreasonable terms, in one form or another, have been proposed to be deemed not consented to and thus not enforceable.[405] Courts have, however, failed to adopt this approach (outside the insurance context), instead steadfastly holding that consumers have a "duty to read" the boilerplate and thus once they sign or click they have consented to all of it and thus are bound by all of it.[406] Although courts

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400 *See supra* Part II.

401 *See supra* notes 1–5 and accompanying text.

402 *See supra* notes 83–86 and accompanying text.

403 RESTATEMENT (SECOND) OF CONTS. § 211 cmt. b (AM. L. INST. 1981) ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms . . . . Customers do not in fact ordinarily understand or even read the standard terms.").

404 *See supra* notes 85–86 and accompanying text.

405 *See supra* notes 122–215 and accompanying text.

406 *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548 (2014).

have had decades to heed the call to reform the contract doctrine of consumer assent to form contracts, they have not done so.[407] The reasons are likely the sheer weight of precedent,[408] as well as the logical incoherence of deeming a consumer's act operative as consent for some terms, but not others.[409] Realistically, the consumer in fact knew she was agreeing to *something*.[410] Courts have ultimately decided to take this at face value, which also has the benefit of keeping the market for contractual exchanges predictable and stable.[411]

However, all is not lost for the task of policing perceived abuses in boilerplate. All this time, lurking in the statutes (both state and federal) have been various limitations gradually promulgated over the years to limit what terms can be used in contracts, in various contexts.[412] In these scenarios, there has been no particularly problematic debate about whether such interventions have been troublesome or unwarranted, at least on a structural basis. Unlike the complete absence of any amenability by courts to be open to reforming judicial doctrine beyond the basic duty to read, the legislatures have been amenable, on a piecemeal-by-piecemeal basis.[413] It seems, therefore, that the most likely path forward for addressing any boilerplate clauses that are persistently viewed as problematic, too one-sided, or abusive, is not by continuing to try to persuade courts to commit to wholesale, revolutionary reform of longstanding judicial doctrine.[414] Rather, the most likely path forward will be to decide which clauses really are problematic (if any), and try to persuade our democratic representatives to curtail their use, for the good of the contracting citizenry.[415] As has been seen, this would merely be the continuation of a long-running project, rather than a new task. Enacting such policy is, after all, what legislatures are for.

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407 *See supra* Part III.
408 *See supra* note 228 and accompanying text.
409 *See supra* notes 275–84 and accompanying text.
410 *See supra* note 338 and accompanying text.
411 *See supra* notes 229–32 and accompanying text.
412 *See supra* notes 340–65 and accompanying text.
413 *See supra* notes 340–65 and accompanying text.
414 *See* discussion *supra* Section III.D.
415 *See* discussion *supra* Part IV.