

April 2016

The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts

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THE RESTATEMENT (SECOND) OF CONTRACTS
§ 211: UNFULFILLED EXPECTATIONS AND THE
FUTURE OF MODERN STANDARDIZED
CONSUMER CONTRACTS

ERIC A. ZACKS*

ABSTRACT

By any measure, section 211 of the Restatement (Second) of Contracts is a disappointment. The section purported to ensure the benefits of standardized contracts by presuming assent to all terms when a contract is signed or adopted. At the same time, section 211 made it unreasonable for drafting parties to rely on terms if the drafter knew or should have known that the other party would not have assented had the other been aware of such terms. Nevertheless, 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. Judges' unwillingness to embrace section 211 is particularly pronounced and problematic in the online contracting context for consumers. This Article explains that section 211's disuse can be attributed in part to its doctrinal formulation, which erects difficult barriers for non-drafting parties seeking relief. Perhaps more importantly, judges historically have been reluctant to disturb standardized consumer contracts, regardless of the applicable doctrine. Accordingly, it is useful to frame the problem of modern standardized consumer contracts in terms of how social and judicial conceptions of assent interact with doctrine and what forces can influence those

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conceptions. Judicial attitudes, for example, could be influenced by empirical evidence that examines consumer perceptions of modern standardized contract formation and the terms of such contracts. When confronted and internalized by judges and regulators who seek to determine appropriate relief, that kind of evidence can generate meaningful relief and meaningful reform.

TABLE OF CONTENTS

INTRODUCTION.....	736
I. SECTION 211’S APPROACH TO STANDARDIZED CONTRACTS	745
<i>A. How Assent and the Duty to Read Apply to Standardized Contracts.....</i>	<i>745</i>
<i>B. Section 211’s Modified Approach to Standardized Contracts.....</i>	<i>753</i>
<i>C. Documenting the (Non-)Use of Section 211</i>	<i>757</i>
II. EXPLAINING SECTION 211’S DISUSE.....	760
<i>A. Doctrinal Problems: Creating Insurmountable Barriers for Non-drafting Party Relief.....</i>	<i>760</i>
<i>B. Conceptual Problems: Reinforcing Existing Judicial Attitudes Towards Assent.....</i>	<i>765</i>
III. THE SOCIAL CONSTRUCTION AND DOCTRINE OF ASSENT	772
<i>A. Framing Standardized Consumer Contracts as a Drafting Party Issue, Not as a Non-drafting Party Issue.....</i>	<i>774</i>
<i>B. Lowering the Barriers to Substantive Relief for Non-drafting Parties</i>	<i>781</i>
<i>C. Why Doctrine Is Not Enough: The Importance of Judicial Attitude and Perception.....</i>	<i>784</i>
<i>D. Influencing Social and Judicial Attitude and Perception: Changing What “Assent” Means</i>	<i>789</i>
CONCLUSION.....	793

INTRODUCTION

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 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.¹ Further, a review of the cases involving consumers that cite section 211 found few cases that applied section 211 to consumer contracts, and even fewer actually provided relief to the consumer.² Instead, modern adjudicative approaches to standardized consumer contracts, particularly online contracts, have enabled extensive overreach by drafting parties. Sellers can extract benefits from the consumers that are tangential or unrelated to the primary transaction by including “crook” provisions that the drafting parties know will go unread by consumers.³ For example, drafters of online contracts have attempted to gain a proprietary interest in, and license to use, any user content generated or revealed while a consumer is on a particular Internet site, even though

¹ See *infra* Part I.C. Section 211 still has some scholarly support, despite its historical disuse. See generally 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 (2007) (defending the application of section 211).

² As discussed in Part I.C., most of these cases involved insurance policies, as opposed to other consumer contracts, including online contracts. See *infra* Part I.C.

³ Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1341–43 (2011) [hereinafter Kim, *Contract's Adaptation*]; see also NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 44–52 (2013) (discussing “crook,” “shield,” and “sword” provisions in online contracts) [hereinafter KIM, WRAP CONTRACTS].

the consumer is not typically engaged in a transaction that is focused on the exchange of consumer information.⁴ Online contracts similarly may permit sellers to gather and sell personal information of consumers.⁵ Obviously, presuming assent to all of the terms of standardized consumer contracts also permits drafting parties to insert terms that are extremely protective of their property rights and favorable from an economic and dispute resolution perspective.⁶

Contract law typically assesses contract formation through the objective theory of assent.⁷ Under the traditional *Embry v. Hargadine* formulation, assent depends on whether it was reasonable for a contracting party to understand the other party's manifestation as indicating assent and whether the contracting party actually did understand the other party's manifestation as such.⁸ Under the current approach to standardized consumer contracts, the latter is no longer required, and tests for determining the

⁴ Kim describes how social networking sites often grant themselves overly broad license rights via contract. See Kim, *Contract's Adaptation*, *supra* note 3, at 1340–41.

⁵ See *id.* at 1358–59 (citing the privacy policies of online shopping sites).

⁶ Kim labels these provisions “shield” and “sword” provisions, respectively. *Id.* at 1337–40. Margaret Radin discusses at length the problems involved with the unquestioned presumption of assent. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19–32 (2013). She suggests that “each time problematic consent, or indeed nonconsent, is treated as if it were real consent, the normative idea of consent inherent to contract is being degraded.” *Id.* at 32. Moreover, this has important and negative effects on our democracy, where “boilerplate rights deletion schemes undermine the significance of political debate and procedures.” *Id.* at 39. Without a “voice,” and unable to exit the market due to limited suppliers or suppliers that act similarly, citizens are deprived of a meaningful ability to restrain opportunistic behavior by sellers. *Id.* at 40.

⁷ E. ALLAN FARNSWORTH, *CONTRACTS* 115 (4th ed. 2004) (“By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today.”).

⁸ *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. Ct. App. 1907) (“[I]f what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract.”). Accordingly, this approach is based on outward manifestations of assent as opposed to inner subjective intentions. See Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 475 (2008).

former have evolved to require less and less that could be deemed genuine assent.⁹ As long as any “form” of assent has been secured, including as little as mere notice of the terms, the contract generally will be presumed enforceable.¹⁰ Courts’ unexamined respect for the appearance of assent has therefore enabled sellers to prepare standardized consumer contracts in an advantageous manner despite sellers’ knowledge that consumers’ purported contractual consent often is substantively meaningless.¹¹ The focus, then, is upon the consumer and the reasonableness of particular terms, as opposed to the drafting party and the drafting party’s knowledge of consumer behavior and cognition.¹²

Scholars have long recognized the inherent problems involved when a consumer manifests assent to an agreement that the consumer did not read or understand.¹³ Llewellyn’s thoughts

⁹ Rakoff suggests that, under modern contract law doctrine, the basis of obligation may be determined based upon the “objective’ meaning of a communicative act [which] is to be determined by the presence of a form, the signature; without asking in each case whether the substantive feature—a reasonable belief that the other side has assented—is present.” Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1186 (1983). Farnsworth argued that the existence of an actual belief is not even an appropriate part of the test, stating that it “should make no difference if, as in a routine transaction, the other party gave no thought to the matter [of whether the other party was manifesting assent].” FARNSWORTH, *supra* note 7, at 115–16 n.10. Instead, he would have preferred a test based on whether the context suggested that the other party had reason to know or believe. *Id.* at 116. Under either formulation, adjudicators still would be searching for circumstances that justified a reasonable belief that a particular act connoted assent.

¹⁰ See Kim, *Contract’s Adaptation*, *supra* note 3, at 1336 (noting that courts no longer distinguish between affirmative acts and omissions of consumers, such as clicking versus not clicking, and instead focus on whether the consumer had sufficient notice of the terms); see also KIM, WRAP CONTRACTS, *supra* note 3, at 93–111 (describing at length how “wrap” contract doctrine differs from traditional contract doctrine).

¹¹ Even where affirmative acts are present, the meaningfulness of such acts as signifying assent is often dubious. As Linzer suggests, “[a]dhesion contracts are a bullying device, and ‘consent’ to a bully is no consent at all.” Peter Linzer, “Implied,” “Inferred,” and “Imposed”: *Default Rules and Adhesion Contracts—The Need for Radical Surgery*, 28 PACE L. REV. 195, 204 (2008).

¹² See *infra* Part III.A for a discussion of how an approach that considers the knowledge of the contracting parties is not inconsistent with other sections of the Restatement.

¹³ See Rakoff, *supra* note 9, at 1179–80.

in particular about this situation laid the groundwork for reform, including for much of section 211 of the Restatement (Second) of Contracts.¹⁴ Llewellyn understood and argued that, in some circumstances, a party to a standardized agreement could not reasonably be understood to have manifested agreement to unexpected terms, even through a signature or other objective manifestation of assent to the entire contract.¹⁵ Llewellyn, however, did not believe that this failure of reasonable manifestation had anything to do with contract formation.¹⁶ Instead, Llewellyn was concerned with whether these terms could have been expected, and if not, they should be removed from the contract.¹⁷

This approach is largely enshrined in section 211 of the Restatement (Second) of Contracts, which provides for the enforcement of all terms in a standardized agreement unless the drafting party “has reason to believe” that the non-drafting party was unaware of the terms and would not have signed the contract if aware of them.¹⁸ Section 211 renders the offending terms inoperative, though the contract itself is otherwise unaffected.¹⁹ The disuse of section 211 of the Restatement (Second) of Contracts can be attributed in part to its presumption that a contract exists in most standardized contract situations as well as its

¹⁴ *Id.* at 1198–99 & n.94.

¹⁵ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960) [hereinafter LLEWELLYN, *DECIDING APPEALS*]. Llewellyn elsewhere articulated that where there was a power and legal skill imbalance between the parties, there was the potential for abuse of standardized consumer contracts. See Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 731 (1931) [hereinafter Llewellyn, *Essay in Perspective*] (In such instances, “[l]aw, under the drafting skill of counsel, now turns out a form of contract which resolves all questions in advance in favor of one party to the bargain.”).

¹⁶ Indeed, Llewellyn did not even conclude that such terms should be eliminated from the contract. See LLEWELLYN, *DECIDING APPEALS*, *supra* note 15, at 370 (“The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.”).

¹⁷ *Id.*

¹⁸ Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 *COLUM. L. REV.* 13, 16 (1981) (noting that section 211 and its comments rely significantly on Llewellyn’s conceptions of blanket assent and reasonable expectations).

¹⁹ See *RESTATEMENT (SECOND) OF CONTRACTS* § 211 (1981).

standards for granting relief from oppressive terms that are at once too difficult to apply and too difficult to meet.²⁰ Even where applied, section 211 fails to provide substantive relief. It imposes a high burden upon one attacking contractual term enforcement to a particular contract—the standardized consumer contract—that

²⁰ Indeed, Linzer agrees that reforms such as section 211 suffer from the vagueness of the standards used in applying the doctrine. See Linzer, *supra* note 11, at 206–07. Warkentine argues that courts enforce standardized consumer contracts and their terms based on the pervasive belief that commerce depends on such contracts. See Warkentine, *supra* note 8, at 472. Moreover, the argument of some scholars that there is no difference between standardized consumer contracts and carefully negotiated agreements between parties of relatively equal bargaining power reinforces the judicial tendency to enforce standardized consumer contracts as written. *Id.* at 471–72. There is disagreement in the literature concerning the benefits of standardized consumer contracts, but most scholars agree that there is some benefit to standardization, even if there are lingering concerns regarding the possibility of the drafting party inserting onerous terms. For a good introduction to the various views concerning this issue, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943) (explaining the benefits of such contracts); FARNSWORTH, *supra* note 7, at 285 (explaining how standardized consumer contracts reduce costs for all parties); Rakoff, *supra* note 9, at 1220–24 (discussing the role of the standardized consumer contracts within and without a business entity while at the same time noting the tendency of entities to draft such contracts in their own self-interests). *But see* Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court’s Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 217–18 (2008) (recognizing, with respect to standardized contracts, “market failure caused by transaction costs and resulting information asymmetries”); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 242 (1995) (describing standardized consumer contracts as being specifically designed to take advantage of, and perpetuate, consumer ignorance); Llewellyn, *Essay in Perspective*, *supra* note 15, at 737 (“The trend toward standardization, despite its values where power is balanced, raises doubts as to policy where its effects are lopsided, because the norm of ultimate appeal is then so tremendously deflected to the one side.”). The disagreement continues in today’s scholarship, as well. See, e.g., Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 895–900 (2014) (reviewing MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)) (describing possible undesirable price effects arising from the elimination of boilerplate in standardized contracts); RADIN, *supra* note 6, at 19–51 (lamenting the “normative degradation” and deletion of important democratically provided citizenry rights through the use of boilerplate in standardized consumer contracts).

does not resemble the “traditional” contract for which such a high burden was designed or appropriate.²¹

If judges are unable to provide meaning to assent in the context of standardized consumer contracts, then one solution might be explicitly abandoning assent as a requirement for formation and allowing such agreements to be imposed unilaterally upon consumers through notice of terms. If formation is no longer a significant burden for standardized agreements and meaningful assent is neither achievable nor relevant, adjudicators and scholars could develop more substantive and achievable defenses to onerous terms. Similarly, contract law’s abandonment of assent would empower regulators to intervene to police objectionable terms because such regulators would no longer be constrained by the principle that legal regulation should defer to private agreement.

One would expect strong resistance to such a solution as antithetical to the principle of contractual freedom and the belief in the “power” of assent. Anyone so resisting should be more willing, then, to consider doctrinal reformulations that attempt to imbue more meaning to the requirement of assent for standardized consumer contracts, particularly with respect to utilizing empirical data. For example, formation of standardized consumer contracts—and the resulting enforcement of particular terms—could be based expressly on a predicate examination of whether it was reasonable for the drafting party to believe it was reasonable that the consumer was manifesting assent to the entire contract where there were unread or unexpected terms. This reasonableness examination should be informed by empirical data regarding consumer psychology and behavior with respect to different contracting practices.

This shifts the focus away from the economic reasonableness of particular terms as perceived by the adjudicator and instead towards the empirical reasonableness of contracts as experienced—or not experienced—by consumers. Framing the question

²¹ Rakoff argued that the modern doctrine “remains tied to the traditional formulation that a signed document is, as an initial matter, a binding contract, and that cause must be shown in order to support nonenforcement of a term.” See Rakoff, *supra* note 9, at 1190. Rakoff cites section 211 as a good example of the compromise often struck by courts and commentators when attempting to alleviate the issues raised by standardized consumer contracts. *Id.*

as such may change the incentives of the drafting party because the drafting party would no longer enjoy the benefits of an unquestioned presumption of enforceability. With the uncertainty surrounding the larger question of formation and term enforcement, drafting parties would be incentivized to devise ways to demonstrate, and hopefully actually elicit, meaningful manifestations of assent from consumers.

Non-drafting parties also could be more liberally permitted to raise substantive defenses to offensive terms contained in standardized consumer contracts. For example, section 211 could be revised to provide that terms would not be enforceable against consumers if the drafting party knew or should have known that such terms “would have been resisted” if known by the consumer, as opposed to section 211’s current standard that such terms are enforceable unless the drafting party knew or should have known they would have caused the consumer not to assent to the contract at all. This revised standard also would be strengthened with empirical findings as to what consumers actually expect with respect to different standardized contracts.

Doctrinal reforms may fail, however, because the judicial will to challenge standardized consumer contracts does not exist.²² Regardless of the doctrinal formulation, challenges to such contracts may fail in the current context because many adjudicators do not approach assent to modern or online contracts any differently than they do traditional contracts. In this view, section 211’s historical disuse does not necessarily reflect formulation weaknesses as much as it reflects adjudicators’ unwillingness to embrace any substantive review of standardized consumer contracts. These failures may be remedied by challenging and changing the current adjudicative mindset through the widespread publication of empirical studies that demonstrate consumer contracting practices and illuminate the limitations of using “forms” of assent without inquiring as to their effectiveness.

²² In addition, consumers may be unlikely to pursue litigation in the first place. See Linzer, *supra* note 11, at 207–08 (suggesting that judicial reforms are unlikely to be helpful because consumers are not well-positioned to pursue litigation, particularly against the more powerful drafter, who is “probably a repeat player and thus has economies of scale and a much greater incentive to litigate”).

The failure of adjudicators to address the problem also suggests the need for regulation based on current empirical understandings with respect to consumer contracting practices in order to constrain drafting party overreach effectively. Knowledge of such contracting practices should inform adjudicative and regulatory approaches to modern standardized consumer contracts. For example, emerging evidence suggests that clicking to agree to an online agreement does not induce deliberation or necessarily connote a legal contract, which might suggest alternative approaches to online contract formation and term enforcement.²³ Without a more nuanced understanding of the differences between various forms and delivery methods of contracts, adjudicators will continue to presume, on an ad hoc or gut-feeling basis, that any act or omission in response to a proffered contract suffices as assent and that any and all terms should reasonably be anticipated by consumers.²⁴ This unchallenged presumption will

²³ See Zev J. Eigen & David A. Hoffman, *A Fuller Understanding of Contractual Commitment* 42–43 (Temple Univ. Beasley Sch. of Law, Working Paper No. 2015-11). Kim also theorizes that “the ubiquity of wrap contracts and the lack of signaling associated with them means that adherents to these contracts are typically oblivious to what they have done.” KIM, WRAP CONTRACTS, *supra* note 3, at 55. Fuller believed that someone who was required to do something that resulted in a “satisfactory memorial of his intention will be induced to deliberate.” Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 803 (1941). Standardized consumer contracts and assent obviously do not fit within this mold. If individuals were required to provide a meaningful memorial of intention with respect to standardized consumer contracts, then perhaps they would be induced to deliberate. In light of the lack of deliberation, the evidentiary value of the assent, such as that provided through clicking, is questionable, even though standardized consumer contracts often ironically provide an ex post picture of individuals that did act deliberately and intentionally. See Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 171 (2012) (“Exclusive of the economic bargain, contract provisions can provide attributional ‘clues’ that inform and reassure judicial interpreters that a particular contracting party is more blameworthy than another.”). Rakoff cites Kessler approvingly for the idea that the use of adhesive contracts allows businesses to impose terms “in a substantially authoritarian manner without using the appearance of authoritarian forms.” Rakoff, *supra* note 9, at 1237 (citing Kessler, *supra* note 20, at 640).

²⁴ The failure of assent in the standardized consumer contract context thus can be seen in light of the failure of the current “form” of assent to provide meaningful evidence, promote cautionary behavior, or permit individual consumers to structure their legal and non-legal actions in a systematic manner.

continue to doom section 211 and similar remediation doctrines, regardless of their formulations. The hope for consumers in the future may well lie in the gathering of evidence that examines consumer perceptions of modern standardized contract formation and the terms of such contracts. This evidence hopefully will be considered thoughtfully by adjudicators and regulators when determining whether non-drafting parties are entitled to relief.

The rest of this Article proceeds as follows: Part I introduces the “assent problem” for standardized consumer contracts and explains how, based on a particular interpretation of Llewellyn’s doctrine of reasonable expectations, section 211 of the Restatement (Second) of Contracts attempts to protect non-drafting parties. This Part also describes this Article’s search for cases citing section 211, the findings of which suggest that section 211 is rarely applied in modern consumer contracts. Part II discusses why section 211 has been unsuccessful with respect to policing standardized consumer contracts, including section 211’s impractical standards and judicial reluctance to intervene in policing contractual terms. Part III then suggests different approaches to rehabilitating section 211, including adopting different doctrinal formulations that recognize the absence of meaningful choice in many consumer contract situations and empowering regulators based on evolving empirical understandings of contracting behavior. Part V concludes that section 211 could be an effective tool with respect to policing objectionable terms in standardized consumer contracts, but only if combined with a more nuanced social understanding of modern contracting practices.

As with many formalities, the personal significance of an individual’s manifestation of assent has become weakened as consumer contracts have multiplied and become ubiquitous. The legal justification for binding a party to a contract based on manifested assent, particularly to unexpected or onerous terms, is accordingly undercut to the extent that such manifestations signify little more than passivity or silence. When the individual of centuries past used melted wax to seal a document to acknowledge its binding nature, the significance of such an act was plain for all to see. When, on the other hand, an individual clicks “I agree” to the hundredth online pop-up window encountered that day or week, the significance of such an act is not as clear. As will be discussed more fully in this Article, this is not to say that clicking “I agree” could never be the basis for demonstrating assent. Instead, the mere act of clicking should not, without more justification or examination, be seen as demonstrating assent.

I. SECTION 211'S APPROACH TO STANDARDIZED CONTRACTS

A. *How Assent and the Duty to Read Apply to Standardized Contracts*

The requirements for formation of a contract include assent, which under the objective theory generally is understood to require a manifestation of an intention to be bound to that which the law accords meaning.²⁵ This generally was based on whether it was reasonable for the recipient of the manifestation of assent to understand it as such.²⁶ The basis for the assent requirement for contract formation is logical. It is not ideal for all communications or manifestations between parties to be considered promises or assent to proffered terms. If someone is noncommittal, then it would not serve society well to bind that individual to a contract offered. On the other hand, it is difficult to know or prove what a person's subjective intentions are, which means that parties might not be able to rely on the promises of those with whom they contract if subjective intent to contract is required.²⁷

²⁵ RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (listing assent as one of the requirements for formation of a contract); *see also* Russell A. Hakes, *Focusing on the Realities of the Contracting Process—An Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 99, 100 (2011) (“A central feature of classical contract theory ... was its attempt to shift from a subjective theory of contract, captured to a significant extent by the concept of meeting of the minds, to an objective theory, which focused on external manifestations of mutual assent.”). Hand suggested that the contractual obligation arises from “certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.” *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911). Whether such acts or words represent a known intent, then, is a judicial construction. *See* Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1123 n.1 (2008) (“In contract, as elsewhere, [the law] must go by externals, and judge parties by their conduct.”) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 309 (Dover Pub. 1991) (1881)).

²⁶ Modern approaches to the objective theory emphasize that it must be reasonable for the party perceiving the manifestation to understand it as communicating assent. *See* Barnes, *supra* note 25, at 1125; FARNSWORTH, *supra* note 7, at 115 (“If one party's actions, judged by a standard of reasonableness, manifested to the other party an intention to agree, the real but unexpressed state of the first party's mind was irrelevant.”).

²⁷ *See* FARNSWORTH, *supra* note 7, at 115 (noting that objectivists argued that contract law was intended to protect reasonable expectations).

The objective theory of assent warns individuals that they will be held responsible for manifestations that they make if the law treats such manifestations as meaningful, or under modern application of the objective theory, if it is reasonable for the other party to understand such manifestation as indicating assent.²⁸ This protects both the assenting party and the party receiving the communication of assent. The assenting party would only be responsible for communications reasonably understood as assent and would thereby avoid being bound through unintentional acts, while the party receiving the assent could reasonably rely on manifestations of assent without being forced to ascertain subjective intent to form a contract.²⁹ Under modern formulations of the objective theory, the party receiving the communication of assent would need to be reasonable when assessing the other party's communications. This prevents the party receiving the communication of assent from asserting that a contract has been formed even where it would be unreasonable to understand the other party as having assented.³⁰

Enforcement of contracts as written is rooted in the so-called "duty to read," which imposes liability for all terms upon a party that manifests assent to the contract as a whole.³¹ This duty is based on the objective theory, under which a party is responsible for manifestations that reasonably create an understanding of contract agreement on the part of the opposing party.³² As discussed

²⁸ *Id.*

²⁹ See *id.* at 115 ("In the words of a distinguished federal judge, "intent" does not invite a tour through [plaintiff's] cranium, with plaintiff as the guide.") (quoting *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1986) (Easterbrook, J.)). Instead, one looks to whether the party acted intentionally when making the manifestation and whether the other party perceived the manifestation as indicating assent. *Id.*

³⁰ See Barnes, *supra* note 25, at 1127 ("[P]romisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise. This is the bedrock principle in the modern analysis of mutual assent to contracts.").

³¹ For a history and overview of the application the duty to read, see generally John D. Calamari, *Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341 (1974); Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 *VAND. L. REV.* 1051 (1966).

³² Calamari notes that the duty to read did not require a signature, but also applied "if the acceptance of a document which purports to be a contract implies

above with respect to the objective theory's application to contracts in general, the duty to read is imposed to permit parties to rely (reasonably) on the outward manifestations of other parties, without which the utility of contract would be diminished.³³

Most modern consumer contracts involve a standardized contract.³⁴ One of the issues universally recognized is that, despite the applicability of the duty to read, most consumers do not read the standardized consumer contracts that they are given.³⁵ Consequently, drafting parties aware that these standardized consumer contracts will not be read or resisted can secure terms in their contracts without the non-drafting party's awareness.³⁶

assent to its terms." Calamari, *supra* note 31, at 341; *see infra* Part II.B (arguing that the relaxation of contract formation requirements for assent can be linked in some sense to the use of the duty to read).

³³ Calamari explains that "[t]he feeling is that 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." Calamari, *supra* note 31, at 342; *see also* Barnes, *supra* note 1, at 246 ("This duty to read has been the law's historical response to the conundrum of consumers not reading the contracts they sign—their signature is nevertheless sufficient under the law to bind them to all the terms in the writing.").

³⁴ JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 98 (5th ed. 2011) (citing W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971)).

³⁵ *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–37 (2002) (describing common consumer practice to not read standard form agreements or take the time to understand their meaning); *see also* Warkentine, *supra* note 8, at 469. The objective theory generally has been interpreted as giving presumptive effect to a signature. Hakes, *supra* note 25, at 100. This presumption makes less sense when the contract is not negotiated. *Id.*; *see also* Calamari, *supra* note 31, at 361 (describing the "imputation" that a person reads and assents to all terms in the context of mass standardized contracts as "dubious law"); MURRAY, *supra* note 34, at 561 ("The essential challenge may be stated rather simply: Since virtually no one (consumer or merchant) bothers to read the printed clauses of forms in regular use, is the non-drafting party bound by all of the terms contained in the form?").

³⁶ *See* Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1272 (1993) ("[T]he law has given drafters of [standardized consumer] contracts the power to impose their will on unsuspecting and vulnerable individuals."). Bar-Gill argues that contract drafters use contract design, as informed by knowledge of the imperfect rationality of consumers, to lure them into purchasing goods and services. OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 2 (2012).

These problems have become exacerbated with new forms of online contracts or contractual delivery practices that require little on the part of consumers to become binding.³⁷ For example, online agreements may require a consumer to “click” one’s agreement, may include a notice of terms on a web page that does not require consumer acceptance, or may contain a hyperlink included on a web page that the consumer may (but is not required to) click to view the applicable contract terms.³⁸

The question from a doctrinal standpoint then is how to understand consumers’ ostensible manifestation of assent to these different contracts, particularly when the drafter knows and contemplates that the consumer will not read or understand all of the contract’s terms. Standardized consumer contracts and their terms are routinely enforced as written, even when and where such contracts seem to fail to satisfy traditional doctrinal requirements.³⁹ In a more modern example, Kim notes that Judge Easterbrook’s analysis in *ProCD, Inc. v. Zeidenberg*⁴⁰—the landmark shrink-wrap case that enforced software terms contained within the box of purchased software—“places an affirmative obligation upon the consumer to establish nonconsent to the terms of the shrink-wrap agreement, even though under contract law silence or inaction typically does not constitute acceptance.”⁴¹

In particular, the traditional requirements for formation have eroded with respect to online contracts. Instead of assessing

³⁷ See Kim, *Contract’s Adaptation*, *supra* note 3, at 1336–37 (describing “shrinkwrap,” “clickwrap,” and “browsewrap” transactions). In such transactions, acceptance of the purchased product or service with included terms, clicking one’s agreement, or even viewing the page that includes a hyperlink to the proffered terms can qualify as indicative of assent. *Id.* at 1336. Kim notes, however, that some affirmative act on the part of the consumer may more “reliably produce a binding contract,” even if not required by law. *Id.* at 1337 n.57 (quoting Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 993 (2008)).

³⁸ *Id.* at 1328–29.

³⁹ See Hillman & Rachlinski, *supra* note 35, at 436 (“Although standard-form contracts seem suspect and fail to satisfy contract law’s notions of bargained-for exchange, courts and theorists generally consider enforcement of such terms appropriate.”); see also Kim, *Contract’s Adaptation*, *supra* note 3, at 1336 (noting that courts routinely enforce shrinkwrap, clickwrap, and browsewrap contracts).

⁴⁰ 86 F.3d 1447 (7th Cir. 1996).

⁴¹ KIM, WRAP CONTRACTS, *supra* note 3, at 18.

whether the consumer has made a manifestation of assent that can be reasonably understood as such, the primary focus for online contracts has been whether the consumer has notice that contractual terms exist, as the consumer's manifestation of assent can be satisfied "by acting in a way that does not clearly indicate intent to accept the terms," including by not actively rejecting the terms.⁴²

Out of a developing understanding of the problems posed to contract law and consumers by standardized consumer contracts, scholars sought to conceptualize or develop doctrines that could explain coherently (or abandon) the contract law applied to standardized consumer contracts, as well as reforms or approaches that could address such problems.⁴³ Most of these scholarly approaches address term enforcement, as opposed to contract formation. Notably, they generally do not provide a route by which one can dispute contract formation, but instead provide a defense against the enforcement of particular terms or provisions, which necessarily puts the consumer in a weaker or more defensive position.⁴⁴

Although not the first to address assent to unexpected terms, Llewellyn's concept of "blanket assent" was an important development in the doctrine addressing standardized consumer contracts.⁴⁵ "Blanket assent" acknowledges the legal fiction of using evidence of assent to a standardized contract to indicate actual assent to all terms contained within the contract.⁴⁶ Llewellyn suggested that non-drafting parties to a standardized consumer

⁴² *Id.* at 109. Kim contrasts "wrap contract" doctrine with the traditional requirement that the conduct of a party is not effective as a manifestation of his assent unless she intends to engage in the conduct and knows or has reason to know that the other party may infer from her conduct that she assents. *Id.*; see RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981).

⁴³ Warkentine, *supra* note 8, at 470–71.

⁴⁴ Similarly, more modern legislative approaches "do not question the possibility that a contract has been formed." *Id.* at 514; see also JOHN E. MURRAY, JR., CORBIN ON CONTRACTS DESK EDITION § 29.05 (2014):

The duty to read appears to be more firmly in place and the fact that parties do not read the boilerplate to which they are bound is a fully accepted fact of commercial life. The current emphasis, therefore, is on whether the contract or term is so substantively unfair that it will not be enforced.

⁴⁵ KIM, WRAP CONTRACTS, *supra* note 3, at 200 nn.63–64.

⁴⁶ LLEWELLYN, DECIDING APPEALS, *supra* note 15, at 370.

contract typically are only aware of particular terms, although they are typically aware that other unknown terms are contained within the contract.⁴⁷

Nevertheless, the awareness of such terms provides, for many, enough of a basis to justify their enforcement in most instances.⁴⁸ To address concerns about the lack of bargaining over such terms and a non-drafting party's lack of knowledge regarding the specific details of such terms, Llewellyn suggested that the non-drafting party should not be bound by any unknown terms she would not reasonably have anticipated.⁴⁹ Llewellyn's approach to standardized consumer contracts and term enforcement are instructive as one considers the construction of section 211, which largely adopts his approach.⁵⁰

Others have suggested different approaches or reached different conclusions. For example, 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.⁵¹ In the insurance

⁴⁷ *Id.* at 371.

⁴⁸ As Braucher put it, when you encounter a standardized contract, "you sort of put your head in the lion's mouth and hope it will be a friendly lion." Robert Braucher, *The American Law Institute Forty-Seventh Annual Meeting*, 47 A.L.I. PROC. 525 (1970) [hereinafter 47 A.L.I.].

⁴⁹ LLEWELLYN, DECIDING APPEALS, *supra* note 15, at 371. Specifically, Llewellyn provides that

[w]hat 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.

Id. at 370.

⁵⁰ See *infra* Part I.B.

⁵¹ Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 155–57 (1970); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356–57 (1970) (criticizing the judicial model of determining unconscionability on a case-by-case and ad hoc basis). Similarly, Slawson rejected treating standardized consumer contracts as ordinary contracts and proposed analogizing such transactions to "sales of promises" with respect to products sold. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84

contract context, Keeton articulated a “reasonable expectations” approach that echoed Llewellyn and would apply or interpret terms in an insurance contract—or, as applied, to other standardized consumer contracts—based upon the reasonable expectations of the average receiver of the contract.⁵²

Following Llewellyn’s analysis but disagreeing with his conclusions, Rakoff suggested presuming that terms that had not been negotiated—as opposed to the so-called “dickered terms”—should not be presumed enforceable, and that the drafting party would be required to demonstrate that the non-drafting party had notice of the non-dickered terms.⁵³ This is in part premised upon according more respect to the individual consumer’s freedom *from* contract than the drafting party’s freedom *to* contract.⁵⁴

Others have attempted to utilize more traditional contract law doctrine to determine term enforceability in standardized contracts. For example, Meyerson would invoke the objective theory of assent to negate particular terms when the drafting party knows that the non-drafting party is unaware of the terms or the meaning of the terms, and that the non-drafting party’s ascribed meaning to the term (that it means nothing or does not exist) should prevail.⁵⁵ Consent-based scholars, such as Barnett, would instead enforce the standardized consumer contract based upon the form recipient’s manifestation of intent to be legally bound, which is reflected in the assent to the standardized consumer contract as a whole.⁵⁶

HARV. L. REV. 529, 546 (1971)); *see also* W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 14 (1974) (discussing how standardized contracts might be understood to convey property rights to, but not impose duties upon, consumers); W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 876 (suggesting an approach to determining the contract in consumer transactions based in part on whether the standardized contract was imposed by the drafting party in good faith and without contravening the express promises of the parties) [hereinafter Slawson, *Contractual Discretionary Power*].

⁵² Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

⁵³ *See* Rakoff, *supra* note 9, at 1187.

⁵⁴ *See* Barnes, *supra* note 1, at 239 (citing Rakoff, *supra* note 9, at 1225–28).

⁵⁵ Meyerson, *supra* note 36, at 1265.

⁵⁶ Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002). Obviously, this approach would rarely provide relief with respect

Each of these approaches, while receiving differing receptions in courts, generally concedes formation of a contract.⁵⁷ Under modern contract law doctrine, it is very easy to enter into a contract, including entering into a consumer contract through reflexive assent to standardized consumer contracts.⁵⁸ The drafting party's knowledge concerning consumer behavior, cognition, or understanding of the contract is generally left unexamined.⁵⁹ The consumer instead faces the difficult burden of attacking assent even when the seller fails to demonstrate that the consumer manifested assent in a manner that the seller could reasonably believe indicated assent to all terms.⁶⁰ Instead, assent to the contract is assumed and, if examined at all, is reviewed solely for purposes of enforcement of particular terms.⁶¹ Accordingly, although scholars (including the drafters of section 211) have recognized the problem of assent to standardized consumer contracts, proposed solutions have been unable to alleviate the tension satisfactorily between the perceived utility of standardization and the possibility of drafter overreach.⁶² Instead, standardization,

to the enforcement of particular terms. Moreover, this approach does not provide guidance with respect to distinguishing "meaningful" consent. *See, e.g.*, Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 703–06 (1990) (criticizing Barnett for suggesting that consent can be easily recognized).

⁵⁷ Warkentine notes that courts continue to insist that mutual assent is a requirement for contract formation, even though their examinations are often perfunctory. Warkentine, *supra* note 8, at 471; *see also* Hakes, *supra* note 25, at 102 (documenting the lack of consumer reading and understanding of standardized consumer contracts, as well as courts' regular enforcement of such contracts).

⁵⁸ *See* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 200–01, 203–04 (2009) (noting modern contract law's relaxed approach to contract formation, particularly under the Second Restatement and Uniform Commercial Code). As noted earlier in this Part, most theories of assent to standardized contracts presume assent to the contract as a whole.

⁵⁹ *See* Warkentine, *supra* note 8, at 495–96 & n.190.

⁶⁰ Hart, *supra* note 58, at 210–12.

⁶¹ Once the contract has been formed, it is very difficult to undo the impact and importance that the contract will have. Hart agrees that modern contract reforms (such as section 211) did not affect contraction formation, and by doing so, "modern contract law not only expands one party's capacity to coerce her contracting partner, but also largely immunizes this coercion from effective challenge by the contract policing doctrines." Hart, *supra* note 58, at 198–99.

⁶² Warkentine, *supra* note 8, at 479, 485, 488.

general business practices, and transactional security are championed as each new form and delivery method of consumer contract is developed.⁶³

B. Section 211's Modified Approach to Standardized Contracts

Section 211 works in a fairly straightforward manner.⁶⁴ First, under section 211(1), a party's signature or manifestation of assent to a standardized consumer contract constitutes an adoption of the writing and its terms if the party "has reason to believe that like writings are regularly used to embody terms of agreement of the same type."⁶⁵ This first provision makes it clear that a party to a

⁶³ Kim suggests that, for wrap contracts, "blanket assent is no assent at all; rather, it is a formalistic requirement that the terms meet certain visibility requirements." KIM, WRAP CONTRACTS, *supra* note 3, at 194.

⁶⁴ The Restatement (Second) of Contracts was developed over a period of almost two decades by the American Law Institute. From 1963 until 1971, Robert Braucher served as the Reporter to prepare the draft, at which point E. Allan Farnsworth succeeded him. E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 3 (1981). The last chapter of the Restatement (Second) was adopted in 1979, at which point the chapters were compiled, reordered, and updated with recent material by Peter Linzer, who acted as Editorial Reviser, before publication in 1981. *Id.* at 4. This Article will discuss the current formulation of section 211, published discussion from ALI meetings concerning section 211, and, where appropriate, some of the changes made to formulations of section 211 made in early published drafts (some of the early versions and discussions were kept confidential); *see id.* at 3–4. Section 211 provides:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS §§ 211(1)–(3) (1981).

⁶⁵ *Id.* White asserts that "law has always honored the contract that results from the offeree's conscious acceptance of the offer, even in circumstances

contract will be bound by its terms even if that party has not read its terms.⁶⁶ In other words, this provision reinforces the “duty to read” imposed upon a party, which precludes a party from disclaiming the legal effect of particular terms contained in a signed contract.⁶⁷ This provision is justified in the comments to section 211 based upon the benefits of standardization of contractual terms with respect to particular classes of transactions, including reductions of the amount of time and skill that need to be devoted to each particular transaction.⁶⁸ This permits the parties to alter the default legal rules that would apply in the absence of particular terms as appropriate for particular transactions. It further permits sellers’ agents and customers to focus on a “limited number of significant features.”⁶⁹ This operational simplification and cost reduction is “to the advantage of all concerned.”⁷⁰

Comment B to section 211 also acknowledges the empirical fact that sellers do not expect customers to read or understand the terms of the agreements.⁷¹ The elimination of negotiation and bargaining, however, is the purpose of standardized agreements.⁷² Consequently, customers rely on the form provider’s “good faith” and “tacit representation” that others are using the form in similar situations.⁷³ Nevertheless, the Comment stipulates (without reference to empirical findings) that customers do understand that they are agreeing to all terms of the agreements, even if they did not read or understand them.⁷⁴ Moreover, such standard terms are enforceable absent separate governmental regulation of the drafting party’s “overreaching.”⁷⁵

where the offeree had no power to modify the offer,” which is reflected in section 211. James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693, 1699 (2000).

⁶⁶ Hillman & Rachlinski, *supra* note 35, at 458 (noting section 211(1)’s duty to read).

⁶⁷ *See supra* note 27 and accompanying text.

⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* § 211 cmt. b.

⁷² *Id.* (“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.”).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* § 211 cmt. c.

With respect to interpreting standardized consumer contracts, section 211(2) provides for “treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”⁷⁶ This standard is intended to encourage judges to construe and apply standardized consumer contracts “to effectuate the reasonable expectations of the average member of the public who accepts it.”⁷⁷ This is justified because the customers accept the standardized agreements based upon the assumption that all other similarly situated individuals are also receiving the form and treated equally. This supports interpreting the contract so that individuals are treated alike.⁷⁸

Section 211’s most significant innovation is in section 211(3), which provides that a particular term will be excluded from an agreement “[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing” contained such term.⁷⁹ The Reporter to Restatement (Second) of Contracts indicated that there needed to be “some kind of limiting principle [to the rule that all terms in a standardized agreement are deemed to be assented to], and

⁷⁶ *Id.* § 211(2). Braucher indicated that he

stated a principle that he thought of as part of the law of nature, but found it surprisingly hard to find somebody who could formulate it; and that is that when you have a standardized agreement, one of the things about it is that it’s supposed to be standard, and treat everybody the same way.

⁴⁷ A.L.I., *supra* note 48, at 524.

⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. e.

⁷⁸ *Id.* (“One who assents to standard contract terms normally assumes that others are doing likewise and that all who do so are on an equal footing.”). Rakoff notes that even this provision, “which appears to be a distinct innovation,” is anticipated in Llewellyn’s work. Rakoff, *supra* note 9, at 1199 n.94. Slawson criticizes the “equal treatment” rule under section 211(2) as being redundant or incorrect. If consumers generally have the same expectations, then section 211(2) adds little because section 211(1) would have covered this scenario regardless. W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 61–62 (1984). However, if this section mandates the same interpretation of the contract even where some consumers are able to understand the forms while others are not, then this section “is surely wrong.” *Id.* at 62.

⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 211(3). See MURRAY, *supra* note 44, § 29.05 (“Only subsection (3) presents a novel concept.”).

there are cases where a limitation is imposed as to the term which really doesn't belong in the standard form."⁸⁰ The limitation as formulated is designed to prevent customers from being "bound to unknown terms which are beyond the range of reasonable expectation."⁸¹ The other party may have reason to believe either based on prior dealings or negotiations between the parties or based simply on the circumstances.⁸² The Comments to the Restatement clarify that this may be inferred either because the standardized term eliminates a benefit to which the parties explicitly agreed, or if the standardized term is "bizarre or oppressive."⁸³ The inference may consequently be strengthened by the absence of an "opportunity to read the term, or if it is illegible or otherwise hidden from view."⁸⁴

⁸⁰ See 47 A.L.I., *supra* note 48, at 525.

⁸¹ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f. Although Warkentine believes that sections 211(2) and (3) embody Keeton's "reasonable expectations" approach, this Author believes that it also fits within Llewellyn's analytical process. Warkentine, *supra* note 8, at 508. Llewellyn would ask whether a consumer reasonably should have expected that a particular term would be included, while section 211(3) is based on whether the drafting party should have believed (that is, a reasonableness standard) that the consumer was unaware of the contract and would have objected to the term (meaning that it was beyond what the consumer should reasonably have expected to have been included in the contract). The distinction, then, is between what a hypothetical reasonable consumer would expect and what the drafting party should or does know about the consumer's expectations. See Roger C. Henderson, *The Formulation of the Doctrine of Reasonable Expectations and the Influence of Forces Outside Insurance Law*, 5 CONN. INS. L.J. 69, 76 (1998) (noting that section 211 reflects a more "conservative approach" than Keeton's because it relies on the viewpoint of the drafting party as opposed to the actual reasonable expectations of the non-drafting party, and accordingly, the former is necessarily a more "narrowly drawn" exception to the rule of enforcing the contract as written).

⁸² RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

⁸³ *Id.* Section 211(3), however, is concerned more about procedural problems (that is, unfair surprise) than policing directly unfair terms. See MURRAY, *supra* note 34, § 98. To the extent that a term is legible or expected but otherwise oppressive, section 211 would not provide a remedy. *Id.* (citing John E. Murray, Jr., *Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982)).

⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f. This is particularly a problem when the transaction does not involve a continuing relationship between the parties. See 47 A.L.I., *supra* note 48, at 526.

Thus, section 211 provides a seemingly reasonable compromise to address the problems of standardized consumer contracting.⁸⁵ It allows sellers to utilize standardized agreements and to rely on assent to them, even if the customers do not read them—echoing Llewellyn’s notion of blanket assent.⁸⁶ Nevertheless, section 211 aims to restrict a seller’s use of onerous, objectionable, or unexpected terms when that seller is attempting to take advantage of a consumer’s blanket assent.⁸⁷ This recognizes the possibility (or probability) of opportunistic behavior, and provides a sanction against sellers engaging in such behavior by denying the offending term’s enforcement.⁸⁸

C. Documenting the (Non-)Use of Section 211

With rare exceptions, section 211 has been unable to provide a judicially-accepted approach to resolving the standardized consumer contract issue. Courts and attorneys rarely cite or use section 211 when considering the enforceability of most standardized consumer contracts.⁸⁹ A provision largely echoing section 211(3) was ultimately left out of drafts of Revised Article 2 and Article 2B of the Uniform Commercial Code, further illuminating its lack of acceptance and perceived efficacy.⁹⁰

⁸⁵ See Calamari, *supra* note 31, at 360 (praising section 237 (what became section 211 of the Restatement (Second) of Contracts) as “a reasonable resolution of the problem and in general accord with the rule of some of the cases above that even an objective manifestation of assent stemming from a failure to read should not preclude consideration of whether there is true assent to unfair or unexpected terms”).

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c; Rakoff, *supra* note 9, at 1199.

⁸⁷ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

⁸⁸ *Id.*

⁸⁹ § 211 Standardized Agreements, WESTLAWNEXT, <https://next.westlaw.com/> (sign in; then search in the primary search bar “Restatement (Second) of Contracts”; then select “Citing References”; then narrow by “Cases” in the “View” column).

⁹⁰ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1816 (2000). Barnes suggests that it was left out due to James J. White’s criticism of section 211 and its application in Arizona cases, as well as general merchant concerns for their forms. Barnes, *supra* note 1, at 249; see also Braucher, *supra*, at 1816 (suggesting that it was left out due to “industry pressure”).

In the search conducted for this Article, only 196 cases cited section 211 of the Restatement (Second) of Contracts.⁹¹ Of these 196 cases, the non-drafting party received some form of relief in only 34 cases.⁹² In addition, the form of relief was often the reversal of summary judgment against the non-drafting party, as opposed to a finding a particular term unenforceable under section 211.⁹³ Moreover, in the 34 cases where relief was provided to the non-drafting party, almost half (17) were insurance cases.⁹⁴ Largely confirming Warkentine's results, many of the adjudicators' references to section 211 were in response to arguments litigators made as opposed to the adjudicators actually adopting and applying section 211.⁹⁵

From a consumer protection perspective, the results are even more dismal. In particular, section 211(1), which deems a standardized contract to have been adopted in whole when it is reasonable for a consumer to believe that the contract is regularly used in such situations, was never employed to grant consumer relief (based on the consumer's perceptions of the contract as such).⁹⁶ This suggests that drafting parties are free to impose

⁹¹ In his 1997 search, White only found 43 cases citing section 211, while Warkentine, in her 2006 search, found 114. James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 324 (1997); Warkentine, *supra* note 8, at 509 n.276. For this Article's search (conducted in July of 2015), the Restatement (Second) of Contracts section 211 was "Shephardized" using the following query (the same methodology employed by Warkentine for her 2006 search): "Shep: Contracts Second Sec. 211." For purposes of this Article, a WestLaw search was also conducted using the KeyCite feature using the following inquiry: "Restatement (Second) of Contracts Sec. 211 (1981)."

⁹² 15 of the cases utilized section 211(2) for purposes of determining whether to certify a class for class action purposes, as opposed to using section 211(1) to determine formation or adoption of a standardized contract or section 211(3) to determine enforcement of a particular term.

⁹³ 22 of the cases provided relief from summary judgment or a preliminary dismissal of a claim or affirmed section 211 as an appropriate standard.

⁹⁴ Most of the cases that White found involved insurance coverage disputes. See White, *supra* note 91, at 325-26. Warkentine also found a significant plurality of section 211 cases to involve insurance coverage. Warkentine, *supra* note 8, at 508; see also Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 235 (2002).

⁹⁵ Warkentine, *supra* note 8, at 508.

⁹⁶ *Id.* (highlighting the dearth of cases in which courts cite section 211 outside Arizona).

any sort of document or writing purporting to represent a contract, and adjudicators will always conclude that it is reasonable for consumers to have expected such “contracts” to be employed.

Similarly, section 211(3) only provided some form of relief to consumers in 19 cases, and only 8 of those cases did not involve insurance. In those 8 non-insurance cases where courts provided relief, only 3 actually found that a term could not be enforced under section 211(3) as opposed to finding that a lower court’s summary judgment finding was inappropriate (typically because it did not permit the consumer to present evidence of a defense using section 211).⁹⁷

More notably, consumers rarely find relief under section 211 outside of Arizona.⁹⁸ A substantial plurality of the cases citing section 211(3) occurred in Arizona, demonstrating that section 211 has not found widespread acceptance outside that jurisdiction.⁹⁹ In addition, courts have sometimes found it necessary to modify section 211. For instance, in Arizona, courts have interpreted section 211(3) to protect the actual reasonable expectations of the consumer, as opposed to what the drafting party should have known about the knowledge of the consumer—as stated in the text of section 211(3).¹⁰⁰ This seems like an expansion of the

⁹⁷ See, e.g., *Mirage Motors, Inc. v. Adler*, No. 06-0358, 2007 Ariz. App. LEXIS 366, at *10–11 (Ariz. Ct. App. Mar. 13, 2007) (reversing summary judgment for the drafting party because there was a question of fact as to whether plaintiffs would have assented if they knew price term in purchase agreement could fluctuate); *Angus Med. Co. v. Dig. Equip. Corp.*, 173 Ariz. 159 (Ariz. Ct. App. 1992) (reversing summary judgment for the drafting party so that the finder of fact could determine whether a reasonable person would have been surprised by the addition of new contractual terms); *Auto-Owners Ins. Co. v. Mortensen Constr. Co.*, No. 09-CV-2380-PHX-GMS, 2010 U.S. Dist. LEXIS 43908 (D. Ariz. 2010) (denying summary judgment for the drafting party to permit limited discovery with respect to reasonable expectations concerning scope of insurance coverage).

⁹⁸ See Warkentine, *supra* note 8, at 508.

⁹⁹ 25 of the 43 cases that White found were in Arizona. White, *supra* note 91, at 324–25. Warkentine similarly found a disproportionate number of cases to be located in Arizona. Warkentine, *supra* note 8, at 508; White & Mansfield, *supra* note 94, at 247 (noting that Alaska had also adopted section 211 with respect to insurance and non-insurance cases).

¹⁰⁰ Hillman & Rachlinski, *supra* note 35, at 458 (noting the change in focus from the drafter’s expectations to the consumer’s); see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 306–08 (1986). See, e.g.,

defense for non-drafting parties, as non-drafting parties do not have to prove what the drafting parties had reason to believe about the non-drafters' expectations.¹⁰¹ As discussed *infra* in Part II, however, by focusing on the "reasonableness" of the consumers' expectations, adjudicators ignore drafting parties' responsibility for the content and presentation of the contract and empirical data concerning how consumers act and respond to contracts (and what drafting parties know about such behavior and psychology). Instead, adjudicators assess the "reasonableness" of terms to assess consumer expectations, with dismal results.¹⁰²

II. EXPLAINING SECTION 211'S DISUSE

A. Doctrinal Problems: Creating Insurmountable Barriers for Non-drafting Party Relief

Section 211(3) provides relief from particular contractual terms on a one-off basis, without invalidating the contract as a whole.¹⁰³ Despite concerns about the amount of judicial discretion and activism promoted by section 211(3), however, the standard for

Darner Motor Sales v. Universal Underwriters Ins. Co., 140 Ariz. 383, 389 (1984) (adopting section 211 but focusing on the non-drafting party's expectations); *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 271–73 (1987) (describing ways in which the doctrine of reasonable expectations is applicable regardless of the drafting party's knowledge); *State Farm Mut. Auto. Ins. Co. v. Bogart*, 149 Ariz. 145, 150–52 (1986) (finding section 211 and *Darner* to apply to an insurance exclusion based on the policyholder's expectations, not the drafting party's knowledge of such expectations). Arizona courts have not been consistent in this respect. *See, e.g., Payne v. Am. Std. Ins. Co.*, No. 09-0559, 2011 Ariz. App. LEXIS 364, at *18 (Ariz. Ct. App. Mar. 1, 2011) (finding the reasonable expectations doctrine to require drafting party's knowledge of the non-drafting party's expectations); *Auto-Owners Ins. Co. v. Mortensen Constr. Co.*, No. 09-CV-2380-PHX-GMS, 2010 U.S. Dist. LEXIS 43908, at *7–10 (D. Ariz. May 5, 2010) (finding the same). White notes that Arizona judges "have focused on the signer despite the fact that section 211(3) instructs the court to put itself in the mind of the drafter of the form and, necessarily, to think about hypothetical signers." *See White, supra* note 91, at 353.

¹⁰¹ Indeed, White criticizes the Arizona doctrine as inviting judges to police private agreements actively. White, *supra* note 91, at 352.

¹⁰² *Id.* at 353.

¹⁰³ Commentators note that "courts rarely have addressed the problem of unknown or hidden terms in unreadable consumer contracts as a formation issue." White & Mansfield, *supra* note 94, at 250.

refusing to enforce terms is extremely high.¹⁰⁴ Section 211(3) only refuses enforcement of particular terms if the consumer would have refused to sign the contract if such terms were known.¹⁰⁵ Obviously, this is a very high standard, as any and all unfavorable terms included in a standardized consumer contract will be enforceable unless a consumer would have walked away from the transaction if such terms were known ahead of time.¹⁰⁶ This leaves a safety valve for adjudicators only in the most egregious of instances, such as when terms are particularly “bizarre.”¹⁰⁷ The comments seem to limit section 211’s reach to extraordinary terms, such as terms that eviscerate the benefit of the dickered terms or the purpose of the transaction, or that are otherwise extremely unusual.¹⁰⁸ Even if applied, section 211(3) provides little protection for consumers for undesirable terms, and it is not surprising that it has rarely been invoked successfully.¹⁰⁹

The few cases that actually provided consumer relief illuminate the problems with section 211(3) described above. For example, in *Perry v. Fleetboston Financial Corp.*, the court refused to apply an arbitration provision within a credit card agreement that the financial corporation had sought to add to the contract after the contract was initially formed, and with respect to debts that already had been incurred.¹¹⁰ The financial corporation claimed that it was permitted to add the arbitration provision at a later

¹⁰⁴ See White, *supra* note 91, at 327. Ayres and Schwartz recharacterize White’s critique of section 211 to mean that “§ 211 invites courts to engage in substantive fairness regulation under the guise of procedural fairness regulation.” Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 560 (2014).

¹⁰⁵ RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 211 cmt. f.

¹⁰⁸ *Id.* § 211 cmt. c. The comments appear to ask the court to do a “normative inquiry” as to whether particular terms are objectionable instead of determining when consumer expectations and the contract do not match. See Ayres & Schwartz, *supra* note 104, at 560.

¹⁰⁹ Ayres and Schwartz suggest that section 211’s review from a substantive fairness standpoint (instead of actual reasonable expectations) is the reason that section 211 has not been widely adopted, as American courts dislike *ex post* review of contracts based on substance. See Ayres & Schwartz, *supra* note 104, at 560. *But see* Barnes, *supra* note 1, at 268 (arguing that, doctrinally, section 211(3) “represents significant progress on the consumer protection front”).

¹¹⁰ No. 04-507, 2004 U.S. Dist. LEXIS 12616 (E.D. Pa. July 6, 2004).

date because the contract contained a “change in terms” clause that expressly permitted the corporation to modify the terms of the agreement at any time.¹¹¹ The court found that the provision was ambiguous as to whether it permitted the corporation to add new additional terms or only to modify existing terms.¹¹² The court then applied section 211(3), and given that there was nothing in the contract that warned consumers that their dispute resolution rights might later be abrogated, the addition of the arbitration provision could not have been expected.¹¹³ Accordingly, the financial corporation was not allowed to compel arbitration.¹¹⁴

This case is noteworthy not only because it is one of the few cases to provide consumers with relief under section 211, but also because it demonstrates how unusual the circumstances have to be to obtain relief and how easy it is for drafting parties to avoid section 211’s application.¹¹⁵ The “change in terms” provision in the case above was ambiguous, which suggests that the consumer would have been denied relief if the provision had been more carefully drafted to provide that the financial corporation was allowed to introduce “additional” provisions that may modify the debtor’s rights and responsibilities.¹¹⁶ This can be fixed easily by thoughtful drafting parties.

The financial corporation also could have avoided this issue by including an arbitration provision originally. In fact, the arbitration cases citing section 211 generally did not provide relief to consumers based on the inclusion of arbitration provisions, as courts typically found that such provisions can reasonably be expected by consumers.¹¹⁷ Thus, the court was not concerned

¹¹¹ *Id.* at *7.

¹¹² *Id.* at *8.

¹¹³ *Id.* at *12–13.

¹¹⁴ *Id.* at *13.

¹¹⁵ *Id.* at *15–16.

¹¹⁶ *Id.* at *11–12.

¹¹⁷ *See, e.g.,* *Vigil v. Sears Nat’l Bank*, 205 F. Supp. 2d 566, 572 (2002) (“[T]here is no evidence to support the finding that the arbitration clause was outside this plaintiff’s reasonable expectation.”); *Broemmer v. Otto*, 169 Ariz. 543 (Ariz. Ct. App. 1991) (same issue). *But see* *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 173 Ariz. 148 (Ariz. 1992) (finding that, in light of plaintiff’s limited education, emotional stress, and commercial inexperience, a contract including an arbitration clause with respect to medical malpractice was beyond the plaintiff’s reasonable expectations).

with the substance of the arbitration provision, but instead with the substance of an ambiguous provision that could enable a contract party to change the contract's terms after the fact and without assent.¹¹⁸ The court only intervened to avoid a situation where "credit card holders would find themselves in an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned."¹¹⁹ Notably, if the debtors had used the credit card after notice of the addition of the new arbitration provision had been provided to them, the court asserted (without serious inquiry) that "assent" would have been provided to the new term, making it thereby enforceable.¹²⁰ Once again, perceived "assent" means that adjudicators will rarely challenge the enforcement of standardized consumer contracts based on their substance.¹²¹

Section 211 is also ineffective because it requires non-drafting parties to prove that the drafting party should have known consumers would have refused to assent to the contract had the consumers been aware of the offensive terms.¹²² This is a significant

¹¹⁸ One of the other rare cases providing some form of consumer relief (in the form of reversing summary judgment) utilizing section 211(3) similarly was based on the presence of a contractual provision in an automobile purchase agreement that permitted the seller to adjust the price after the fact. *Mirage Motors, Inc. v. Adler*, 2007 Ariz. App. LEXIS 366 (Ariz. Ct. App. 2007).

¹¹⁹ See *Perry v. FleetBoston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616, at *13 (E.D. Pa. July 6, 2004).

¹²⁰ *Id.* at *15.

¹²¹ Korobkin suggests that section 211(3)'s approach is "underinclusive because it protects buyers only from the most outrageously inefficient of terms." See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1270 (2003). Similarly, Meyerson notes that "the actual words of Section 211 of the Restatement ultimately amount to 'nothing more than an effort to deal with a species of unconscionability.'" Meyerson, *supra* note 36, at 1289 (quoting John E. Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1383 (1975)); see also Calamari, *supra* note 31, at 359 (arguing that section 237 (what became section 211) of the Restatement "in essence is talking about unconscionability based upon 'unfair surprise'"). But see Barnes, *supra* note 1, at 266 (arguing that section 211's standard is consistent with the objective theory of assent and could be effective).

¹²² Slawson, *supra* note 78, at 63 (noting that section 211(3) only applies in the rare instance where the "seller had reason to know that the consumer would not have assented had he known about the difference"). Slawson believes that this standard will never be met because consumers do not make

burden. In most instances, either the consumer will struggle to demonstrate what the drafting party “knew” or should have known, or adjudicators may feel uncomfortable “guessing” what terms would have chased customers away from a contract.¹²³ This burden would explain why, in the few instances where section 211 provided relief, the form of relief was in the form of reversing summary judgment against the non-drafting party.¹²⁴ The court, when awarding such relief, was not actually undoing a contract or preventing enforcement of a particular term.¹²⁵

In addition, given that section 211 applies to standardized contracts, the absence of meaningful choice in many consumer contracting situations suggests that the oppressive nature of any terms is not necessarily related to the consumer’s expectations (since the consumer will sign even if the consumer is aware of it).¹²⁶ Accordingly, providing relief based on the consumer’s expectations is at best disconnected from the contracting practices, and at worst permits drafting parties to include almost any terms because consumers should expect negative terms to be included in a contract where choice is absent.¹²⁷

contracting decisions based on just one term. *Id.* Section 211(3) accordingly is mismatched to the problem of unexpected terms. Ayres and Schwartz similarly argue that it will be difficult for courts to know what consumers expect without empirical studies. Ayres & Schwartz, *supra* note 104, at 607.

¹²³ See, e.g., Tucker v. Scottsdale Indemnification Co., No. 09-0732, Ariz. App. 2010 LEXIS 1326, at 11 (Ariz. Ct. App. Dec. 21, 2010) (finding that the bar owner failed to demonstrate that the insurance company was aware that she needed coverage for assault and battery); Sw. Pet Prods. v. Koch Indus., 89 F. Supp. 2d 1115, 1121 (D. Ariz. 2000) (“It is only the *seller’s* awareness that bears on the question of whether a term violates the reasonable expectations of the parties.”). Barnes argues that section 211(3)’s standard is consistent with the objective theory of assent, but he does not distinguish between a drafting party expecting a consumer’s refusal to sign the contract with a particular term included (difficult to demonstrate) and a consumer’s objection to a particular term (easier to demonstrate). Barnes, *supra* note 1, at 266.

¹²⁴ See *supra* note 93 and accompanying text.

¹²⁵ It could be, of course, that relief was ultimately provided under section 211 by the fact-finder in many of these situations.

¹²⁶ Murray, *supra* note 121, at 1380 (noting that the Reporter’s comments regarding section 237(3) are based on the presence of a party in a strong bargaining position: “With that kind of awesome bargaining power, what difference does it make whether the signer knows of the term?”).

¹²⁷ Murray suggests that section 211(3) would have permitted the enforcement of the infamous security contract in the *Williams v. Walker-Thomas*

B. Conceptual Problems: Reinforcing Existing Judicial Attitudes Towards Assent

Section 211's disuse also can be understood through its basic approach to the "assent problem" in standardized consumer contracts and its emphasis on the utility of standardization.¹²⁸ Because it treats assent largely as a problem of undesirable terms rather than a problem of formation, section 211 maintains the status quo where any presentation of a contract is largely respected for

Furniture Co. case, as "[i]t is possible to include as part of the other party's 'reason to believe' his knowledge that he was in a bargaining position so strong as to be dictatorial. Thus he would have no reason to believe that Mrs. Williams would not assent to the oppressive term since he knew that she had no choice." *Id.* at 1385.

¹²⁸ Section 211 also mismatches the standard for inferring that a term would not have been assented to with its basic formation assumptions. Commentators have noted that an approach to unread terms and adhesion contracts that addresses such contracts as a formation problem (as opposed to a term enforcement problem) "probably is the most genuine in its recognition that there might have been no agreement-in-fact and that no party dealing with the consumer reasonably ought to assume that the consumer agreed to all of the printed term." White & Mansfield, *supra* note 94, at 250. Unfortunately, this approach is either derided as unrealistic or anathema to the efficiency of the marketplace and private autonomy. Rakoff, *supra* note 9, at 1190 n.59 (suggesting that application of the objective theory does not seem realistic). Problematically, though, the relaxed rules of formation are based on concepts of a working marketplace in which bargaining takes place, which does not apply to most terms in a standardized consumer contract. See Irma Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137, 162–63 (2006). Note the counterintuitive relief provided to the customer: if the drafting party should have known that the customer would not have assented to the contract had particular terms been included, the offending terms are excluded, but the customer still is bound by the contract with the unscrupulous drafting party. See Meyerson, *supra* note 36, at 1288 (noting that section 211 has "no effect unless the term is so egregious that it negates the entire contract"). Accordingly, the offending terms must "negate the contract," but the solution is to enforce the contract without the offending terms. *Id.* Essentially, the incentive exists for the drafting party (whether the attorney or businessperson) to be as aggressive as possible, as all of the benefits of the contract will be enjoyed except for individual terms that (in that rare case) offend an adjudicator. See Rakoff, *supra* note 9, at 1205 (explaining that standardized contracts often reflect the expertise of the drafting attorney, as opposed to the knowledge of the businessperson on whose behalf the drafting attorney is working).

formation purposes.¹²⁹ The power of the presumption of contract formation contained within section 211 changes little with respect to standardized contracts and the regular enforcement of their terms.¹³⁰ If anything, it has made it easier to form a contract and thereby impose terms on another party.¹³¹ This is particularly true given the new forms of contracting that have evolved over the past few decades, including online contracting, where assent is often solicited or obtained through a click or by opening a web page or product. It is noteworthy that, in the search conducted for this Article, no cases cited section 211 for

¹²⁹ See White & Mansfield, *supra* note 94, at 251 (“As a result of the courts’ failure to note the realities of consumer transactions, the notion that consumers rightly should bear the risk imposed by the contracts they sign has been endorsed.”). This occurs despite the recognition that consumers are “trust[ing] to the good faith of the party using the form,” the breach of which in any event does not provide a basis for a cause of action. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

¹³⁰ White & Mansfield, *supra* note 94, at 250.

¹³¹ Hart, *supra* note 58, at 198. Unfortunately, even scholars unhappy with the application of the duty to read implicitly believe that traditional manifestations of assent should be respected without examination, and section 211(1) reflects this approach as well. For example, Warkentine cites signing a contract as objective manifestation of assent. See Warkentine, *supra* note 8, at 476. Hart also notes that scholarly approaches to modern day contracting practices such as online contracting and rolling contracts, despite their different ideological roots, all support a finding of mutual assent. Hart, *supra* note 58, at 207. Calamari describes how modern approaches to problematic standardized contracts and the duty to read generally treat assent as an issue that will justify term excision (as opposed to defeating contract formation). Calamari, *supra* note 31, at 352. He describes the *Weaver v. Am. Oil Co.* court’s approach “to be that the contract is unconscionable because an objective assent which flows from a duty to read is not significant (despite the objective theory of contracts) to bind a party to clauses which are unusual or unfair unless the clauses are at least brought to his attention or explained.” *Id.* at 353. Similarly, although Kessler acknowledged that assent should be questioned in these instances because of the lack of meaningful choice, he appears to be more concerned with the expectations of the parties to particular terms as opposed to confronting contract formation in general. See Kessler, *supra* note 20, at 637 (“In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser’s ‘calling,’ and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.”).

purposes of determining that a consumer did not have reason to believe that a particular writing (online or otherwise) embodied the terms of an agreement.¹³²

As currently employed, section 211 reinforces the evidentiary value of assent to the standardized consumer contract by providing that any manifestation of assent to the written contract suffices as assent to all of the terms of the contract.¹³³ This ensures that standardized consumer contracts will be deemed to have been assented to, regardless of the nature of the terms contained within the contract, and that a consumer will find it difficult to object by arguing that she did not read or understand the terms of the contract.¹³⁴ This is not much of (and was not intended to be) a reform, as it merely restates the duty to read.¹³⁵

The duty to read, however, is better understood as a convention based upon particular contracting practices in a time where contracts were not ubiquitous.¹³⁶ It is shorthand for determining

¹³² This would be how consumers might find relief under section 211(1) as opposed to relief from unexpected terms under section 211(3). *See supra* Part I.C.

¹³³ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. This was intentional. The original Reporter of the Restatement (Second), Robert Braucher, labeled § 211(1) “a rather reactionary proposition ... that when you agree to a standardized agreement, you agree to it, and that means everything in it, subject, of course, to qualifying terms.” *See* 47 A.L.I., *supra* note 48, at 524. The Restatement’s comments are explicit that the terms are enforced even while acknowledging that individual customers “do not in fact ordinarily understand or even read the standard terms” (and that drafting parties know this). RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. This is in some sense an amazing admission. Without empirical evidence or demonstrating the correctness of the assertion, the Restatement is explicit that the customers’ manifestation of assent (whatever that means) to a standardized consumer contract means that the customers “understand that they are assenting to the terms not read or not understood.” *Id.*

¹³⁴ White & Mansfield, *supra* note 94, at 251.

¹³⁵ Rakoff, *supra* note 9, at 1189 (noting that section 211 incorporates “traditional doctrines that signing automatically connotes assent, that the adherent has a ‘duty to read,’ and that the parol evidence rule is applicable to form contracts”). Russell perceptively describes the standardized contract as “a free rider on the broad presumption of a free bargain.” Russell, *supra* note 128, at 141.

¹³⁶ Calamari argues that the duty to read is “based on the realities of the bargaining practices of the past, when the self-reliance ethic was strong and standardized agreements were rare.” Calamari, *supra* note 31, at 361. Given the presence of mass standardized agreements and the understanding that the non-drafting party is neither invited to read nor to negotiate such agreements,

that, for the purposes of enforcing a contract's terms, it was reasonable for a person to rely on an objective manifestation of assent to the contract as a whole to constitute assent to all of its terms, which was necessary to avoid injustice to the relying party.¹³⁷ It should never have evolved into permission for the drafting party to rely unreasonably on any manifestation of assent to the contract.¹³⁸ Nevertheless, section 211 provides that a signature always counts as such a manifestation and does not invite investigations into other manifestations, and instead attempts to police unread or unexpected terms on the back end.¹³⁹

“an imputation that he assents to all of the terms in the documents is dubious law.” *Id.* This “presumption had to be fashioned ... because such a presumption was so counter-factual.” Barnes, *supra* note 25, at 268. Although reaching different conclusions with respect to regulation, Slawson argues that blanket assent is wrong on policy grounds. As with the requirement for reasonable comprehension when consenting to torts or the inapplicability of blanket assent to democratic governance, “[w]e ought not to count a person as assenting to anything included in the writings in the absence of reasonable grounds for concluding that he understood rather clearly what the writing said.” Slawson, *supra* note 78, at 35.

¹³⁷ Meyerson, *supra* note 36, at 1267 (noting that, with respect to negotiated contracts or those involving sophisticated individuals, the “duty to read is consistent with the objective theory because assent can reasonably be inferred from the act of signing a document in such circumstances”).

¹³⁸ Rakoff suggests that the duty to read, as evolved, “can just as well be viewed as a refusal to impose any duty on the drafting party to ascertain whether form terms are known and understood.” Rakoff, *supra* note 9, at 1187; see also Barnes, *supra* note 25, at 265 (arguing that “traditional objective theory and the duty to read have been completely one-sided The duty-to-read rule permits merchants to pack their standard form contracts with one-sided terms, and it is thus at least ostensibly reasonable to hold that the consumer is bound by those terms when she signs.”). Again, assent is assumed rather than ascertained, regardless of the reasonableness of the drafting party's belief or knowledge regarding the meaningfulness of the manifestation of assent from the non-drafting party.

¹³⁹ RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981). The fact that consumers do not read standardized contracts does not mean that it is reasonable for drafting parties to understand particular manifestations of assent as being meaningful. If anything, the absence of consumer reading and comprehension should make any manifestations inherently suspect and unreliable from the viewpoint of the drafting party. If you undercut the first proposition (that it is reasonable for the drafting party to believe and rely upon the non-drafting party's manifestation), then the second proposition (that the assenting party has the duty to read and is bound by the provisions) has no force. In

Section 211 does express a concern with the circumstances of the promisee, which relates to assent in the formation context, but its effects are limited.¹⁴⁰ Section 211(1) suggests applying the duty to read when the standardized consumer contract was presented in a situation where the non-drafting party should reasonably understand that the document is a contract.¹⁴¹ Unfortunately, these situations are not clearly delineated. As a result, they provide little guidance in the modern online contracting context and can be manipulated by the drafting party's contracting practices. It is not surprising, then, that section 211(1) has rarely been employed to find that a document or writing is not a contract.¹⁴²

For example, Comment (d) to section 211 notes that an individual may assent to different documents without comprehending that they contain contractual terms.¹⁴³ Nevertheless, the individual would be bound if there were reason to know that the document is commonly used "to embody contract terms."¹⁴⁴ The comments then distinguish between insurance policies, steamship tickets and bills of lading (obviously contractual), and baggage checks or parking lot tickets ("mere identification tokens" that may not give a person a reason to know that they are contracts).¹⁴⁵ They also note that documents delivered after a contract is made may be problematic as well.¹⁴⁶ Section 211's standard for formation, however, is specifically based upon the low threshold of

this sense, contract formation is less "coupled with the duty to read" than a necessary predicate. *See* Warkentine, *supra* note 8, at 479 (describing such a partnership between the two concepts). Meyerson suggests that courts were forced to make a "'conclusive' presumption" that a signature signified comprehension because the presumption actually was untrue in fact. Meyerson, *supra* note 36, at 1273. This presumption, if applicable, should be applied with respect to term interpretation, not contract formation.

¹⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 211; Warkentine, *supra* note 8, at 475.

¹⁴¹ Fuller notes that the similar concerns (evidentiary and deliberation) for consideration "touch the form rather than the content of the agreement." Fuller, *supra* note 23, at 799.

¹⁴² *See supra* Part I.C.

¹⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. d.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

whether the non-drafting party “has reason to believe that like writings are regularly used” for such transactions.¹⁴⁷ In other words, as long as sellers are using standardized consumer contracts (which is probably always the case, given the overwhelming use of them, particularly online), consumers would be stuck with the terms of the contracts.¹⁴⁸

Moreover, the distinctions made in the Comments to section 211 between different types of contracts do not hold up once new forms of contracts arise. For example, it is not clear what the drafters of section 211 would have thought about a hyperlink to a software license, a pop-up click box in response to an online purchase, or a legal disclaimer on a website. Do they fall into the clearly contractual or not-so-clearly contractual categories enumerated above? In particular, given how few online contracts are read and preliminary empirical evidence that clicking means less to younger generations, perhaps clickwrap agreements more closely resemble a coat check (the receipt of which is generally understood not to form a contract) than a “classic” dickered contract.¹⁴⁹ In fact, given that many restaurants do not have coat checks, the document used for checking the coat on those rare occasions where a coat is checked might actually connote more legal meaning (given that it is an “extraordinary transaction”) than clicking one’s agreement to the terms of an online license agreement, thus justifying treatment of the coat check as a contract.¹⁵⁰ Section 211,

¹⁴⁷ RESTATEMENT (SECOND) OF CONTRACTS § 211(1).

¹⁴⁸ Russell suggests that section 211 only considers part of the bargaining circumstances, namely the expectations of most consumers, and notes that it ignores inequality in bargaining power and the absence of meaningful consumer choice. *See* Russell, *supra* note 128, at 163–64.

¹⁴⁹ Florence Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s Principles of the Law of Software Contracts*, 78 U. CHI. L. REV. 165, 180–81 (2011) (finding, in an experiment, that requiring consumers to click their agreement only increases their reading of the agreement by 0.36 percent, compared with contracts that are disclosed without a prominent link to the agreement’s terms); Eigen & Hoffman, *supra* note 23, at 38 (describing findings with respect to younger generations’ online contracting practices that suggest many do not consider “clicking” to connote contract formation).

¹⁵⁰ Accordingly, common practice should not be accorded meaning absent a substantive review. *See* Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 103 (2006) (arguing that courts should resist “formalist assumptions” about enforcing standardized agreements after

in this respect, cannot provide useful guidance to adjudicators attempting to determine when an individual should understand a particular document or writing as indicating a contract, particularly in the online setting. It is not surprising, then, that few cases were found citing section 211(1) or its comments with respect to defeating adoption of a contract's terms based on a particular understanding of what the document or writing signified.¹⁵¹

On the other hand, section 211 does permit some weakening of the evidentiary value of all writings by permitting a defense where one party has reason to know that the other party is not aware of the term and would not agree to the term if she were.¹⁵² Unfortunately, as discussed *supra* in Part II.A, the Restatement sets too high of a standard. The consumer has to demonstrate that not only was the term unknown, but also that it was significant enough that the consumer would not have consented to the entire agreement.¹⁵³ Moreover, since the drafting party has to have a reason to know about the consumer's mindset (which often would be difficult to prove), the consumer is forced to rely on circumstantial evidence such as the "bizarre or oppressive" nature of the term.¹⁵⁴ This hardly chips away at the presumption of enforceability of all terms or the perceived evidentiary value of the standardized consumer contract.¹⁵⁵

With respect to online contracts, this standard is particularly problematic. Without personal or individual interactions between

considering the relationship and monopoly power issues involved in the consumer context).

¹⁵¹ At least one of the few cases located had to do with the timing, rather than the form, of the writing. *See* *Indep. Mach. v. Kuehne & Nagle, Inc.*, 867 F. Supp. 752 (N.D. Ill. 1994) (finding that an invoice purporting to limit liability delivered after the contract had already been signed was nevertheless effective because of the ongoing nature of the relationship between the parties).

¹⁵² RESTATEMENT (SECOND) OF CONTRACTS § 211.

¹⁵³ *Id.* § 211(3).

¹⁵⁴ *Id.* § 211 cmt. f.

¹⁵⁵ *See* Rakoff, *supra* note 9, at 1195 (noting that "present judicial doctrines ... still ask why an adherent should be allowed to avoid a term of his contract, rather than why the terms should be thought obligatory in the first place"). Macaulay notes that the duty to read, discussed *supra* in Part I, similarly could be deemed to serve this function: "On the basis of common sense but not much evidence, some have assumed that this tack will promote self-reliance. If one knows he will be legally bound to what he signs, he will take care to protect himself (or so it is said)." Macaulay, *supra* note 31, at 1058.

the seller and the consumer, it is impossible for the consumer to communicate her expectations about particular terms or for the seller to have reason to know what the consumer's expectations are. Accordingly, section 211(3) would never apply because the selling party would never have a demonstrable reason to believe that a consumer would have refrained from assenting to the contract if a particular term were known. Because the consumer is not permitted a more liberal attack on manifestations of assent, the standardized consumer contract is presumed enforceable in the presence of any manifestation, and any such manifestation is deemed to be sufficient evidence of the parties' intent with respect to all terms of the contract.¹⁵⁶

III. THE SOCIAL CONSTRUCTION AND DOCTRINE OF ASSENT

Section 211 can be seen as reflecting the modern disjointed approach to standardized consumer contract formation, which makes it too easy to form a contract and too difficult to avoid liability under a contract. Gilmore contended that under nineteenth century law, it was difficult to form a contract and to avoid liability under a contract, while under twentieth century law, it is easy to form a contract and easy to avoid contractual obligations.¹⁵⁷ As suggested by this Article, however, section 211 rarely provides relief to consumers who have assented to modern standardized consumer contracts.¹⁵⁸ The doctrinal solutions presented below seek to either bolster the formation requirements or liberalize the defenses, thereby matching the formation requirement with the excuse requirement: if it is difficult to form a contract, then excuses should be limited, while if it is too easy to form a contract, excuses should be more expansive.

Each of the reforms presented, however, is premised on the recognition that contractual assent is necessarily a judicial construct. Under the objective theory, one assesses whether the law should give legal meaning to the manifestations of assent of the contracting party.¹⁵⁹ There are two parts to this construction:

¹⁵⁶ RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

¹⁵⁷ GRANT GILMORE, *THE DEATH OF CONTRACT* 53 (Ronald K.L. Collins ed., 1995).

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* Part I.

the legal standard employed by the judge and the assessment of particular contracting situations in light of that standard. As described in Part II, section 211's ineffectiveness may lie in both its formulation (the standard) as well as the failure of judges to recognize and adapt to recent findings concerning consumer contracting behavior (the assessment).

Given the de-emphasis on reading, comprehension, or negotiation of standardized consumer contracts, one is tempted to suggest doing explicitly what the drafters of section 211 did implicitly—eliminate the assent requirement for such contracts. Given the ease with which standardized consumer contracts are formed under current assent requirements, eliminating the assent requirement could make it easier for adjudicators and others to focus on the fairness of the terms. Once consumers' assent is recognized as not being substantively relevant to contract formation, adjudicators should not be as bound by contract interpretation models premised on the sanctity of the duty to read and objective assent.

Accordingly, section 211(1) could provide that standardized agreements provided to consumers in a transaction would be enforceable in accordance with their terms without implied or explicit assent. This, if adopted, could have permitted adjudicators to police more aggressively objectionable terms once unconstrained by the presumption of assent (however reflexive).¹⁶⁰ This may seem laughable. Why should or would the law ever acknowledge that consumers are bound by agreements to which they did not assent? The elimination of assent appears to violate the conception of basic freedom from contract.¹⁶¹ That, however, is largely the point: this situation may exist now, and the fiction that it does

¹⁶⁰ Llewellyn describes how courts feel reluctant to interfere at all, let alone substantially, with private bargains. Llewellyn, *Essay in Perspective*, *supra* note 15, at 732 (“Beneath the surface of the opinions one feels a persistent doubt—one feels it even while interference proceeds—as to the wisdom of any interference with men’s bargains.”). He describes the “proper judicial aim ... to be here the fixing—as in the mortgage situations—of a basic minimum which the bargain carries merely by virtue of being a bargain of that type.” *Id.* at 733.

¹⁶¹ White & Mansfield, *supra* note 94, at 250 (theorizing that market and freedom of contract concerns preclude application of a formation approach to standardized contracts).

not is what permits the routine enforcement of oppressive terms unilaterally imposed on consumers in a coercive fashion.¹⁶² The social construction of the standardized consumer contract, then, is important, and we should “fix” the social construction where it deviates from its purported operation. If one is unwilling to “give up” on assent completely, then other doctrinal reforms should be suggested that incorporate and empower a more nuanced understanding of consumer contracting behavior and psychology.

A. Framing Standardized Consumer Contracts as a Drafting Party Issue, Not as a Non-drafting Party Issue

Although Llewellyn perceived the ultimate goals with respect to standardized consumer contracts, namely the utilization of efficient forms without the excesses of opportunistic behavior by drafting parties, his (and section 211’s) approach employed the legal fiction of blanket assent.¹⁶³ Section 211 could have framed the problem somewhat differently to incentivize the drafting parties to elicit manifestations of assent that could reasonably be understood as such.¹⁶⁴ This approach would rehabilitate a more difficult approach to contract formation and term enforcement, which in turn would have “justified” the existing high bar to contract excuses.¹⁶⁵

¹⁶² Hale articulated well our inability to distinguish between what constitutes coercive or noncoercive action:

[W]ere it once recognized that nearly all incomes are the result of private coercion, some with the help of the state, some without it, it would then be plain to admit the coercive nature of the process would not be to condemn it. Yet popular thought undoubtedly does require special justification for any conduct, private or governmental, which is labeled “coercive.”

Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLI. SCI. Q. 470, 474–75 (1923).

¹⁶³ See Llewellyn, *Essay in Perspective*, *supra* note 15.

¹⁶⁴ Llewellyn recognized the limitation of court interpretation of the enforceability of terms when based on “intent.” See *id.* at 732. Not only does court interference based on questionable constructions of terms undermine transactional security, but it also ultimately enables the dominant drafting parties to create the appearance of contractual intent with respect to particular terms, even if those terms might have been recognized as being too “outrageous” in the past. *Id.* at 732.

¹⁶⁵ See GILMORE, *supra* note 157, at 53.

Some solutions could reinforce the application of the traditional contract formation doctrine, even in the standardized contract context. For example, section 211 could have restated a formulation of the objective theory of assent as a predicate to enforcement of all of the terms of the standardized agreement. This could have been accomplished through a clause that began: “If a consumer has made a manifestation of intention to be bound by the standardized agreement, and such manifestation is reasonably understood by the drafting party to manifesting the consumer’s assent to the agreement and all of its terms, then such agreement and its terms would be presumptively enforceable.” This clause would make it clear, in contrast to current trends in adjudication with respect to standardized contracts, that the drafting party only gets the benefit of the terms of the contract if the consumer’s manifestation of assent to the contract was reasonably understood as such by the drafting party.¹⁶⁶ In some instances, a consumer’s manifestation of assent is less meaningful, and the document is therefore not a contract.¹⁶⁷ Rather than relying only upon the consumer’s behavior in a vacuum, the assessment would focus instead on whether it is reasonable for sellers to believe that a consumer’s behavior connotes assent to a contract and all of its terms.¹⁶⁸

¹⁶⁶ See *supra* Part I with respect to the ways in which traditional contract law doctrine is not applied in the standardized contract context.

¹⁶⁷ See *supra* Part I.

¹⁶⁸ Meyerson argued that the objective theory would actually require courts to determine how a reasonable drafter should have understood the consumer’s assent with respect to a number of questions or factors, including what terms the seller should have expected the consumer to understand, what terms were explained to the consumer, the consumer’s purpose for entering into the transaction as reasonably understood by the seller, whether reasonable expectations of terms were created by the seller’s actions, whether the parties negotiated or discussed particular meanings of terms, and whether a clause dealt with issues beyond the contemplation of a reasonable consumer. See Meyerson, *supra* note 36, at 1265–66. As discussed in this Article, once a contract is conceded to have been formed, attempting to police objectionable terms on substance is problematic on a number of levels. See *supra* Part II.A and B. That said, Meyerson’s embrace of the objective theory with respect to the enforcement of particular terms is not necessarily inconsistent with the general approach suggested by this Article, particularly if Meyerson’s approach were to be supplemented by reference to empirical data as to consumer expectations.

This could put the burden of contract formation (and term enforcement) back on the drafting party, and its uncertain outcome could have important incentive effects. The severe penalty associated with a determination that a contract did not exist would encourage businesses to structure the formation process in ways that would reveal the consumer's assent.¹⁶⁹ If—but only if—those revelations demonstrate genuine assent, the business would be entitled to rely on the contract and its terms. For example, if the drafting parties' economic interests were served by preparing contracts that provided effective disclosure—thereby making it more reasonable for them to rely on a consumer's manifestation of assent—then one would expect drafting parties to expend resources to determine how to make effective disclosure. Identifying problematic behavior largely would be eliminated as a task because the drafting parties would be punished competitively when not drafting effectively because their contracts and terms may not be respected in court.¹⁷⁰

As long as businesses were reasonable in understanding a consumer's manifestations as constituting assent to the contract and all of its terms, then businesses could rely on judicial enforcement of all of the terms of the contract.¹⁷¹ How businesses

¹⁶⁹ Meyerson, *supra* note 36, at 1265, 1299.

¹⁷⁰ It could be that consumers would not want their entire contracts to be thrown out of court and instead would commonly only be seeking relief from a particular term. The problem would then be what to do with the "rest" of the contract. The consumer may still want the product or services, just under different conditions. This problem is not insurmountable. It is possible that adjudicators, in finding that a contract was not formed (because it was not reasonable for a drafting party to understand the consumer was manifesting assent to the contract and all of its terms), could provide consumers with the choice of relief: either a contract would continue to exist without the offensive term, or a contract would not exist. If the consumer chooses the latter, then the judge would have to determine how to compensate each party for whatever compensation had been exchanged since the date that the unformed contract was purportedly executed. Presumably, though, this could be done by reference to the undisputed contract terms. Moreover, it would be preferable for consumers to be in the "messy" situation of having a judge try to figure out how to provide relief if a contract is deemed not to have been formed than the current situation, where relief is rarely granted. Lastly, the uncertainty surrounding any possible judicial determinations of such relief would also have the desirable incentivizing effects described in the text above.

¹⁷¹ This would reflect the narrow excuse band matched to a robust formation requirement. See GILMORE, *supra* note 157, at 53.

would actually approach such a problem (meaning how to make it reasonable for them to rely on manifestations in light of contracts that are largely unread) would rely on an effective allocation of their resources.¹⁷² We probably do not know what such contracts may look like, but that is only because we do not currently require businesses to solve the problem. If we want to rely on assent to preclude substantive review of contractual terms, then we should require the substantiation of assent.

This is where empirical findings regarding consumer cognition and behavioral economics are useful, particularly if the question is framed in terms of contract formation instead of term enforceability. The “reasonableness” of the drafting party’s understanding of the manifestation of assent could be defined in terms of empirical data. This Article agrees with Eigen and Hoffman’s argument that “empirical analysis should inform [the law’s interpretation of what is reasonable for contracting parties to understand] because it is better than the alternative—judges

¹⁷² To the extent that particular terms could not be included because consumers’ manifestations to the contract could not reasonably be understood to include those terms, thus negating formation, businesses could adjust accordingly. Some terms could be made more salient, which would justify finding that it would be reasonable to understand a manifestation as acknowledging and agreeing to such a term. Or, businesses would have to make a decision regarding whether to forego the benefit of such a term if the cost of making it salient were too expensive. Even where terms have been litigated under current doctrine, such as section 211 or reasonable expectations, businesses already make a cost-benefit decision as to whether to enforce “costly” terms such as arbitration. See Warkentine, *supra* note 8, at 546. If businesses want the benefit of the form and its terms, then they should be forced to justify their understanding that a consumer’s manifestation to the contract is reasonably understood as such. The burden should be on the business seeking the benefit of standardization. This does not force the businesses to negotiate, but instead to expend resources to figure out what a consumer’s manifestation to the contract reasonably means with respect to the non-dickered terms. To the extent that a fully negotiated contract is not possible because of the consumer’s inability to make a reasonable manifestation of assent (e.g., because of the number of terms) or the business’s unwillingness to prepare a detailed agreement with respect to each term for fear of lack of enforcement (to the extent that too many terms are included in the contract), adjudicators may then be asked to impose default rules. See Korobkin, *supra* note 121, at 1205 (“[T]he alternative to form contracts is almost certainly not the resurgence of fully dickered, obligationally complete contracts, but rather law-imposed default terms invoked to fill gaps in the contract the parties negotiate.”).

imposing their own naïve subjective assessments of ‘reasonableness’ upon litigants.”¹⁷³ For example, a reasonable drafting party might understand, particularly in light of behavioral economics findings, that most people do not read the terms of online contracts and may not view them as being “legally binding.”¹⁷⁴ Accordingly, a reasonable person might understand that any purported assent to such contracts cannot be understood as being meaningful and manifesting assent to the terms of the contract.¹⁷⁵

As Eigen and Hoffman suggest, “[w]e react to proposed contracts based on our interpretive models of what constitutes a legal ‘contract.’”¹⁷⁶ Accordingly, a drafting party’s knowledge regarding consumers’ interpretive models would affect the reasonableness of the drafting party’s responses to such “contracts.” Passive disclosure of the contract’s terms—such as in browsewrap or shrinkwrap licenses—might be accorded less respect in terms of contract formation because it is less reasonable for the drafting party to believe that the consumer is manifesting her assent.¹⁷⁷ Moreover,

¹⁷³ Eigen & Hoffman, *supra* note 23, at 38.

¹⁷⁴ Eigen and Hoffman lament the scant empirical literature discussing the behavioral effects of legal formalities with respect to online contracting. *Id.* at 6. Earlier work confirmed that few Internet shoppers read the terms of the online contracts, although reading did tend to increase based on the value of the transaction and whether the vendor was familiar. Robert A. Hillman, *Online Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications* 15 (Cornell L. Sch., Working Paper No. 05-012, 2005).

¹⁷⁵ See Eigen & Hoffman, *supra* note 23, at 15. Eigen and Hoffman find that, in particular, the presence of recitals of consideration online do not induce deliberation or signal the presence of a legal contract to consumers. *Id.* at 15.

¹⁷⁶ *Id.* at 6.

¹⁷⁷ Incidentally, this modification would presumably serve the cautionary function of assent without embodying a particular form. Contracts may (due to their ubiquity) “have lost their power to awe,” but that does not mean that it cannot be regained. *Id.* at 37. Part of the reason it has been lost has been the law’s increasing disregard of any need to “awe.” By framing the standardized contract issue as a formation problem, individuals would be warned that objective manifestations would be respected and enforced and to disclose subjective intentions to or not to assent to a particular promissory transaction. Section 2 of the Restatement (Second) of Contracts already explicitly provides this in its definition of what constitutes a promise: “A promise is a manifestation of intention to act or refrain from action in a specified way, so made as to justify a promisee in understanding that a commitment has been made.” RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981). Under section 211 of the Restatement, however, the promisee is released from having to be justified in understanding

we need to allow for the possibility that particular practices, such as clicking or signatures, may become ubiquitous and substantively meaningless to the consumer over time and that drafting parties will become aware of this fact.¹⁷⁸

A flexible reasonableness inquiry based on the facts and circumstances, including the knowledge of the contract parties, is not without precedent in the Second Restatement. For example, section 24 of the Restatement requires that an offer be “so made as to justify another person in understanding that his assent to the bargain is invited.”¹⁷⁹ The person has to be “justified,” or reasonable, in understanding that the other person is actually offering to contract with her.¹⁸⁰ This determination is based in part on the offeree’s knowledge regarding the contracting context and the other party’s intentions.¹⁸¹ For example, an illustration of this rule in the Comments of the Restatement provides that an offer is not enforceable if the offeree knows that the offer is being made as a gift.¹⁸² Similarly, a manifestation of mutual assent

that a commitment has been made as long as some volitional manifestation (without a reasonableness or objective requirement) has been made. Interestingly, section 211(3) comes close to stating the correct standard under the objective theory for reasonableness, specifically whether the drafting party knows that the other party is unaware of a term and would not consent to the agreement if aware of such term. RESTATEMENT (SECOND) OF CONTRACTS § 211(3). The objective theory suggests that a conclusion to that effect would make it unreasonable for the drafting party to believe that the non-drafting party is manifesting assent, thus defeating formation. Nevertheless, section 211(3) instead merely renders the offending term inoperative.

¹⁷⁸ Explicitly predicating formation upon reasonable manifestations, as opposed to a rule that indicates specific clicking, would provide flexibility for judges to strike down contracts where the requisite reasonable manifestations of assent have not been made, such as if and where multiple clicks signal substantively little to the drafting party. For example, Kim suggests requiring separate “clicks” to an online agreement with respect to each affirmative right granted to the drafting party, which would connote assent to each right being transferred. Kim, *Contract’s Adaptation*, *supra* note 3, at 1363–65. Under the formulation proposed by this Article, clicking would not connote presumptive assent; instead, such a practice could, if demonstrated, make it more reasonable for the drafting party to understand that the non-drafting party is manifesting her assent to the contract.

¹⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 24.

¹⁸⁰ *Id.* at cmt. b, illus. 2.

¹⁸¹ *Id.*

¹⁸² *Id.* (offering to pay for college if the offeree attends is not enforceable if the offeree knows that the promise is intended as a gift).

can be affected if one of the parties was joking, and the other party was aware of this fact.¹⁸³

The appropriate question in the standardized consumer contract context is, obviously, what did the drafting party know—or what should the drafting party have known—about the consumer’s intentions and expectations? If the drafting party knows that consumers do not read terms and conditions on a website and do not anticipate being bound by a written contract or particular terms just because they clicked their agreement, then the drafting party may have little justification for relying on such manifestations of assent. This is similar to the situation referenced above, where one party knows that the other is joking when ostensibly contracting.¹⁸⁴

In this vein, the Arizona approach to “reasonable expectations,” which focuses on what the consumer reasonably should have expected instead of the drafting party’s knowledge, may actually do consumers a disservice.¹⁸⁵ The determination of which terms are substantively reasonable and therefore should or could be expected is not an empirical question. This means that adjudicators have to determine (arbitrarily) that a particular term is unreasonable and would not be expected. Uncertainty about this question may explain why consumers rarely find relief, even in Arizona.¹⁸⁶ Ultimately, focusing on consumers lets drafting parties off the hook. Instead, assent should be assessed by reference to what drafting parties actually know, or should know, about consumer intentions and expectations. This, by contrast, is an

¹⁸³ RESTATEMENT (SECOND) OF CONTRACTS § 18 cmt. c (describing when a manifestation that one is joking can defeat mutual assent). The Restatement also provides that a party’s preferred meaning of a term will not prevail against the other party’s where the former had reason to know of the meaning attached by the latter. RESTATEMENT (SECOND) OF CONTRACTS § 201(2)(b).

¹⁸⁴ Section 211 already recognizes the potential relevance of facts and circumstances when assessing whether a drafting party has reason to know that a non-drafting party would not have signed the agreement had she known particular terms were included. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

¹⁸⁵ *See White, supra* note 91, at 353; *see supra* text accompanying notes 100–07.

¹⁸⁶ It also does not permit businesses to plan based on empirical data because judges are making one-off determinations of reasonableness each time they assess a particular contractual term.

empirical question and one that judges are better situated to address (and presumably are more comfortable addressing, as well).¹⁸⁷

B. Lowering the Barriers to Substantive Relief for Non-drafting Parties

Gilmore suggested that, based on a historical review of contract law development, “a free and easy approach to the problem of contract formation goes hand in hand with a free and easy approach to the problem of contract dissolution or excuse.”¹⁸⁸ These easy approaches to contract dissolution or excuse, however, have not materialized to provide substantial protection to consumers, whether in the form of unconscionability, unfair surprise, section 211, or otherwise.¹⁸⁹ The reforms suggested here would be an attempt to make Gilmore’s statement true by creating such an “easy approach” to contract dissolution or excuse under section 211.

As discussed in Part I, section 211’s standard for excluding a particular term is difficult: one must demonstrate that the drafting party had reason to believe that the consumer would not have signed the agreement with the term contained within it.¹⁹⁰ This “but for” requirement could be abandoned in recognition of

¹⁸⁷ By providing a less rigid and more contextualized approach to formation, there is the risk that the benefits of standardization will be undermined because judges might misinterpret what the parties intended. However, this danger is overstated with respect to standardized consumer contracts, particularly when such contracts will be utilized with large numbers of consumers in the same circumstances. The data regarding the behavior of such similarly situated individuals will illuminate what their expectations are and thereby inform, in a very stable fashion, the reasonableness of the drafting party’s understandings of consumer manifestations of assent.

¹⁸⁸ GILMORE, *supra* note 157, at 53.

¹⁸⁹ Hart argues that the failure of modern contract law to address the problems posed by standardized consumer contracts can be attributed to its institution of *ex post* remedies that do not actually affect or impact contract formation. See Hart, *supra* note 58, at 218–19. This failure perhaps has its roots in classic contract theory, which ignored or dismissed earlier jurisprudence imposing pre-contractual obligations, such as the obligation to negotiate in good faith. See Hakes, *supra* note 25, at 100. This Article’s idea, then, that the problem of contract enforcement is one based on the process of formation is one with “deep and ancient roots.” *Id.* at 100.

¹⁹⁰ See *supra* Part I.B for a discussion of section 211’s requirements.

the fact that many consumer contracts are adhesive in nature. As currently formulated, drafting parties can include whatever terms they want unless they would have been a deal-breaker for the consumer if known. Instead, a more proper standard could be whether the terms would have been “expected” by the consumer in a dickered transaction.¹⁹¹ For example, if the drafting party has a reason to believe that the consumer would not have expected an early termination fee and would have resisted the term in a dickered transaction, then the fee should be excluded (using Llewellyn’s original formulation of blanket assent).¹⁹² Indeed, this would closely resemble the formulation found in one of the earlier drafts of section 237 (renumbered to section 211), which provided that “[w]here the other party has reason to know that the party manifesting such assent believes or assumes that the writing does not contain a particular term, the term is not part of the agreement.”¹⁹³

¹⁹¹ For example, Ayres and Schwartz suggest that all terms, even if disclosed ineffectively, should be enforceable unless consumers’ expectations are that the terms are more favorable to them than they actually are. See Ayres & Schwartz, *supra* note 104, at 552. From a section 211(3) perspective, this would be consistent if section 211(3) provided that the terms would not be expected. Obviously, if the unknown terms were as or more favorable than expected, then the terms would be enforceable, but if they were not, then the terms would not be enforceable.

¹⁹² Section 211’s current formulation suggests that consumers should reasonably anticipate the contract to include terms that favor the drafting party, except for terms that would cause the consumer to walk away from the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

¹⁹³ RESTATEMENT (SECOND) OF CONTRACTS § 237(3) (Tentative Draft No. 5, 1970). Despite objections by Farnsworth that the current reformulation (containing the “but-for” phrasing) would be too restrictive, the proposer of the modification suggested that most objections relating to unexpected bad terms are better addressed through unconscionability. 47 A.L.I., *supra* note 48, at 528–29 (Mr. Willard: “I think the answer may be, sir, that many of us have signed contracts containing provisions that we wish weren’t in there And I want to make it as clear as I can that when you get into the area of unconscionability, then you are under 234 [not § 211].”). Elsewhere, Reporter Braucher agreed when addressing the waiver of jury trials contained on bank signature cards: “Assuming it’s a perfectly legible provision and it has not been concealed in any way and he signs the card, and there it is, it seems to me the proper thing to pay attention to is whether the clause is oppressive in some way, and not this notion that it’s unexpected at that point.” *Id.* Farnsworth

Adjudicators would have to address whether a drafting party should have known that the other party was not aware of the other term and would have preferred for it to be excluded. This is a much lower standard than a “walk away” criterion. Adjudicators could develop objective standards to assess whether consumers actually anticipate different terms.¹⁹⁴ For example, adjudicators could utilize empirical data with respect to similarly situated consumers regarding their expectations relative to different contract terms.¹⁹⁵ Instead of trying to determine whether a term is sufficiently bizarre to justify an inference that a consumer would not have expected it, which is a substantive or normative review, courts would instead focus on the actual data regarding

pointed out that the two different formulations would lead to drastically different results in a number of situations, and he attempted to resist Willard’s proposed change. *Id.* at 527–28; *see also* Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1421 (2005) (noting Farnsworth’s resistance to the change, which although unsuccessful with respect to the doctrinal formulation, still resulted in “some strong fairness language in the comments”).

¹⁹⁴ Of course, judges could continue to make ad hoc or context-specific decisions about whether a particular term, such as arbitration or a termination fee, would have been resisted if known. Just as adjudicators find few terms in a standardized consumer contract to be sufficiently bizarre or oppressive to trigger relief under section 211(3), adjudicators might find many terms that would be resisted and trigger the same relief. The reason is the ease of the standard: when the standard is set close to one extreme (bizarre as one extreme, and “would be resisted” as the other), it might be easier for adjudicators to revert to the easiest standard to satisfy. Most “negative” terms probably would not induce a consumer to walk away from a transaction, but many of them might be resisted in a dickered transaction. This approach is somewhat similar to the Arizona approach, which determines the reasonable expectations from the consumer’s perspective. *See supra* text accompanying notes 100–07. Adjudicators would not have to determine what the drafting party knew or should have known, which reduces their inquiry accordingly. Instead, adjudicators could assess whether the average consumer would have anticipated the term. Again, this simplifies the process for adjudicators: instead of having to determine whether the drafting party knew what the consumer’s expectations were, the adjudicator would only examine what the consumer’s expectations actually were. *But see* White, *supra* note 91, at 352–53 (criticizing such an approach as encouraging improper judicial activism).

¹⁹⁵ Ayres and Schwartz argue for such a standard, but they would prefer that the empirical data be required and regulated in advance before it could be utilized for purposes of contract drafting. *See* Ayres & Schwartz, *supra* note 104, at 579–80, 582–85.

consumer expectations.¹⁹⁶ This reform would also match efficiency concerns about interfering with standardized contract terms: if consumers did not expect the terms or would have resisted the terms if known (at the given price), then they presumably do not represent an overall efficient allocation of risks and costs. Under the threat of losing the enforcement of particularly important “unknown terms,” businesses would be incentivized to demonstrate that their particular contractual formulations led to consumer understanding of those terms.¹⁹⁷

This approach would remedy in part the Restatement’s awkward bifurcation of assent and expectations. Murray suggested that the Restatement problematically (and unsuccessfully) attempted to separate problems of the non-drafting party’s “lack of awareness and ... lack of choice.”¹⁹⁸ With respect to standardized contracts, the drafting party’s awareness of her superior bargaining position should not be permitted to enable her to insert oppressive clauses (because the non-drafting party should have no expectations in the absence of meaningful choice). Reformulating section 211 to recognize that many consumer transactions do not involve meaningful choice would allow for better policing of negative unknown terms that would be resisted if choice were present.

C. Why Doctrine Is Not Enough: The Importance of Judicial Attitude and Perception

As suggested in the introduction to Part III, the problems with section 211 may have less to do with its doctrinal formulation than the context in which adjudicators are making decisions

¹⁹⁶ *Id.* at 604 (proposing that “courts should not enforce terms that a substantial number of consumers believe are more favorable to them than the terms actually are”).

¹⁹⁷ Hopefully, this would go beyond creating perfunctory forms of assent and be similarly based upon empirical data.

¹⁹⁸ See Murray, *supra* note 121, at 1385 (“The inseparability of the lack of awareness and the lack of choice, which the *Restatement (Second)* attempts to separate, is thus confirmed.”). This Article would attempt to undercut the drafting party’s ability and incentive to draft strategically based on the non-drafting party’s lack of awareness and choice. See, e.g., David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 485 (2009) (arguing that application of the convention to construe contractual ambiguities against the drafting party can “neutraliz[e] incentives for [drafting] firms to use ambiguity tactically and to retain imprecise terms”).

with respect to standardized consumer contracts. Adjudicators need to believe that there is a problem with standardized consumer contracts and be motivated to apply doctrine to find a solution. Given contract law's resurgent trend towards formalism, it would be too easy for adjudicators to conclude that any new doctrinal standards have been satisfied in a "check the box" sort of fashion.¹⁹⁹ Accordingly, if adjudicators do not perceive a problem with standardized consumer contracts, then, regardless of any new or revised doctrine, judges would continue to find assent (however difficult to achieve under revised doctrine) or that contractual defenses (however easy to achieve under revised doctrine) have not been satisfactorily sustained. Judicial determinations regarding formation and defenses would necessarily involve the same subjective and normative examination as is currently required by section 211. Therefore, it is difficult to anticipate judges applying these same factors differently when applied to assent as a formation problem as opposed to a term enforcement problem.

Accordingly, doctrine should be understood as merely the means by which adjudicators address a known problem. Doctrine can be modified by adjudicators as necessary, as in Arizona, where judges have applied section 211, albeit with a focus on the consumer's expectations, as opposed to section 211's standard of the drafting party's knowledge of those expectations.²⁰⁰ Given the purported benefits of—and widespread use of—standardized contracts, however, adjudicators may find it detrimental and impractical to make it too difficult to form standardized contracts or too easy to defeat their enforcement.²⁰¹ In part, their benefit

¹⁹⁹ Meredith Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 499 (noting that "the theoretical pendulum [in contract law specifically] appears to be swinging back in the direction of formalism").

²⁰⁰ See *supra* text accompanying notes 100–07.

²⁰¹ See Leff, *supra* note 51, at 144 (arguing that "[t]he economics of the mass distribution of goods" means that adhesion contracts could not be made presumptively unenforceable). Others have expressed the concern of undermining the "efficient allocation of contractual risks" where judges intervene and do not enforce particular standardized consumer contract terms. See Hillman & Rachlinski, *supra* note 35, at 440–41. White similarly argues that section 211 promotes unnecessary and harmful judicial activism. See White, *supra* note 91, at 352–53. *But see* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1751 (1976) (noting that the choice between legal rules and standards necessarily affects the economic powers of

arises from the fact that the consumer does not need to read them. Making the formation process more difficult or the benefits more uncertain could largely eliminate the overall utility of the contracts.

In addition, given how often most standardized consumer contracts are used with respect to different consumers, an adjudicative decision determining that a contract was not formed could have ramifications far beyond the individual consumer's situation. Judges might balk before they view formation in a different manner, or they might employ more liberal defenses than those currently used for standardized consumer contracts, even if legislatively required.²⁰² This could explain the historic disuse of section 211: when the doctrine is not desired or desirable from the judiciary's standpoint, it will not be employed, regardless of its formulation.²⁰³ Any further doctrinal reforms with respect to section 211 or otherwise might parallel the great hopes for—and ultimately little successful use of—the unconscionability defense.²⁰⁴

Similarly, the widespread use of standardized contracts might mean that it is “far too late for the purist position” that would require explicit promising behavior in order to make a binding contract.²⁰⁵ On the other hand, the objective theory of assent still requires the “objective appearances of agreement.”²⁰⁶

each affected party, and “the judge must take responsibility for choosing among them. He is an ‘interventionist’ no matter what he does.”).

²⁰² In some sense, though, the uncertainty about the adjudicative response to, and employment of, such an approach is its point and purpose. If drafting parties were uncertain of the result under such a regime, then this uncertainty would stimulate them to eliminate the uncertainty to the extent possible. As discussed above, this hopefully would result in the elicitation of different manifestations of assent.

²⁰³ Conversely, this would explain Arizona's embrace of, and modifications to, section 211: when determined to be desirable or desired, adjudicators will employ and modify doctrine.

²⁰⁴ Warkentine describes how the “unconscionability approach requires the challenging party to meet the extremely high burden of showing a serious defect in the bargaining process, in the substance of the challenged term, or in both,” and that most plaintiffs find it difficult to do so. Warkentine, *supra* note 8, at 471.

²⁰⁵ See White, *supra* note 65, at 1712. Perhaps this is what Rakoff meant in a brief footnote that the objective theory of assent could have been utilized with respect to standardized consumer contracts, but that “[s]uch an approach seems very ill suited to the routinized transactions at issue.” Rakoff, *supra* note 9, at 1190 n.59.

²⁰⁶ White, *supra* note 65, at 1713.

Clicking, for example, may or may not reflect such an objective appearance, which is a matter into which courts could inquire more deeply. The question (as it was with Judge Hand) is whether the party “performed the objective ritual showing agreement.”²⁰⁷ Whether each ritual (objectively or reasonably) shows agreement is something for the courts to consider, and hopefully in a careful manner.²⁰⁸ Our conclusions about the appropriateness and meaningfulness of different rituals should be allowed to evolve over time in much the same way that our conclusions about the meaningfulness of the seal did.²⁰⁹ Absent judicial inclination to

²⁰⁷ *Id.* at 1713 (citing *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911)).

²⁰⁸ It also could be that scholars believe that signatures and other acts actually do signal some level of commitment to be bound, and that it would be difficult for a court ever to find otherwise. This proposition does have some empirical support, as “[p]romissors seem to associate ‘contract’ with the formalities of signature and payment.” Eigen & Hoffman, *supra* note 23, at 6. Others, though, have argued that the objective theory mandates the automatic respect accorded to a signature. See Jeffrey T. Ferriell, *Boilerplate Terms in Context*, 40 CAP. U. L. REV. 605, 609 (2012) (noting that the objective theory requires “little more than whether the parties’ signatures on the standardized form were genuine”).

²⁰⁹ In this sense, section 211 can be understood to be rooted in an overreliance on an unreliable or unquestioned formality, specifically the formality of assent. Requiring assent, however, does not provide guidance as to what type of assent should be sufficient for purposes of its evidentiary function. For example, upon first examination, the requirement of assent for purposes of evidence is satisfied under section 211 because there is a signature or some other manifestation. Fuller, *supra* note 23, at 821 (noting that the requirement of a writing could satisfy the need for evidentiary security). In the standardized contract context, Bell notes that the “problem is not evidentiary in the usual sense; indeed, a standard form agreement typically touts such administrative virtues as embodiment in a writing, integration, and signatures.” Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 53 (2010). The problem, instead, is that the evidence may only indicate one party’s preferences. *Id.* at 53. Indeed, some scholars believe that any manifestation of assent is meaningful to standardized consumer contracts because any such manifestation evidences consent to be bound. See, e.g., Randy Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 636 (2002) (“Whether or not it is a fiction to say that someone is making the promise in the scroll box, it is no fiction to say that by clicking ‘I agree’ a person is consensually committing to these (unread) promises.”). Signatures or other acts, however, do not have meaning in a vacuum, and section 211 necessarily reflects a normative judgment as to their evidentiary value. The principle of permitting individuals to create their

intervene, however, doctrinal solutions that invite scrutiny of contractual rituals will be ineffective.

One can also anticipate obvious practical difficulties associated with a formation framing solution to the extent the transaction and exchange have already occurred (e.g., the consumer may have already paid for and received the service or product). In these instances, courts would be in the position of attempting either to unwind the transaction or make sure that neither party had been unjustly enriched, as opposed to the current approach of not disrupting the overall transaction and policing unfair terms. Courts probably would be reluctant to intervene in the former manner, particularly given their approbation of transactional security and general disinclination to rewrite contracts, despite their arguable capacity for doing so.²¹⁰

own private law without regulation or review of such agreements needs to be reinforced “by a showing that in the particular case private agreement is the best or the only available method of regulation.” Fuller, *supra* note 23, at 810. Unconstrained or unexamined belief, however, in volitional acts as assent does not effectively reinforce the principle in this context. If unchallenged, section 211 creates a tautology where any acts provide evidence of assent, and judges may determine that a standardized consumer contract signifies assent because the applicable legal standard says that they do (even if the writings substantively do no such thing). See Meyerson, *supra* note 36, at 1269 (noting that, if terms in a standardized consumer contract are to be enforced as if reflecting true assent, then “[a]ny expectation that the contract terms written by the company’s lawyers are enforceable against the consumer is ‘reasonable’ not because the consumer’s true intent was objectively ascertained but solely because of the legal rule”); see also Eigen & Hoffman, *supra* note 23, at 38 (arguing that consideration recitals would act as legal fictions if they did not in fact caution readers as to the impact of their language, but still created an enforceable contract). We enforce the volitional act as assent not because it substantively represents effective private law, but because we want to mandate that it does. In Fuller’s words, we would be left with a “juristic construction of their act rather than a substantive reason for judicial intervention to enforce their agreement[.]” Fuller, *supra* note 23, at 810. As suggested by Eigen and Hoffman, the employment of such legal fictions problematically “are most often understood as such by sophisticated parties, who might be able to use them to create contractual obligation where the untutored would be surprised to find it.” Eigen & Hoffman, *supra* note 23, at 38.

²¹⁰ See Ayres & Schwartz, *supra* note 104, at 560 (“American courts commonly decline such invitations [to review the substantive fairness of contract terms].”). But see Barnes, *supra* note 1, at 264 (citing Kessler, *supra* note 20, at 637 (proposing that reform is only possible in this area “if courts become fully

*D. Influencing Social and Judicial Attitude and Perception:
Changing What “Assent” Means*

As discussed *supra* in Part III.C, section 211’s disuse may have less to do with its doctrinal formulation than modern adjudicative attitudes towards assent and the utility of standardized consumer contracts. Unless the “form” of assent can be challenged successfully, the changes to the doctrine probably will be irrelevant.

The gathering and publication of empirical data with respect to consumer acts in response to seller contracts can help inform adjudicative and legislative responses. For example, behavioral economics suggests that online writings, particularly when passively accepted or “clicked,” may only suggest to one party (the drafter) that a contract has been formed.²¹¹ If parties do not read contracts and do not understand that they are entering into a contract (or agreeing to be bound by all terms of the contract), then the writing or other manifestations of assent may not serve this evidentiary function well. If the writing is not delivered (or assented to) in a manner that makes it conspicuous or “sufficiently ceremonious to impress its terms on participants and possible bystanders,” then the writing may not actually provide strong evidence of the existence and purpose of the contract.²¹²

aware of their emotional attitude with regard to freedom of contract. Here lies the main obstacle to progress, particularly since courts have an understandable tendency to avoid this crucial issue by way of rationalizations.”)); *see also* Meyerson, *supra* note 36, at 1324 (arguing that the contemplation of consumer knowledge and expectations from the viewpoint of drafting is within the expertise of common law courts); Llewellyn, *Essay in Perspective*, *supra* note 15, at 751 (advocating the development of contract law through common law decisions). As argued in this Article, the uncertainty surrounding judicial outcomes with respect to questionable contract formation issues could have important incentive effects upon the drafting party. *See supra* Part III.

²¹¹ *See* Eigen & Hoffman, *supra* note 23, at 42 (discussing different delivery and acceptance mechanisms for contracts and their varying significance for the non-drafting parties).

²¹² Fuller, *supra* note 23, at 800. Fuller notes that the Romans required an “oral spelling out of the promise” in a manner designed to have this effect. *Id.* At best, the existence of a consumer contract may only provide evidence that one party (the drafter) intended for a contract to exist. *But see* Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1296 (2015) (finding empirical evidence that “the most common understanding of contract formation involves signing a written document”).

Similarly, there is evidence that people do not slow down to consider the content of standardized consumer contracts and do not hesitate to sign or click their agreement to them.²¹³ Regardless of the reasons for such behavior, this does not indicate that individuals are acting in a manner that reflects a cautionary state of mind.²¹⁴ If anything, these reasons (and the individuals' behavior when presented with standardized consumer contracts) reflect the hopelessness of the contracting situation and individuals' surrender to the imposed terms.²¹⁵

As another example, scholars have found that many individuals are unaware when they have entered into a contract online or do not believe the contract is binding, regardless of whether such contracts are assented to passively or by an active "click" or electronic signature.²¹⁶ There is also empirical evidence that there may be generational differences with respect to understanding online commitments as contracts.²¹⁷ Eigen and Hoffman found that younger generations were less likely to believe or understand commitments manifested while online to be binding

²¹³ See Marotta-Wurgler, *supra* note 149, at 179–80 (describing experimental findings where clicking does not increase consumer reading of online contracts). Meyerson suggests that, although the duty to read may have been intended to caution consumers when entering into contracts, "consumers do not read standardized consumer contracts both because it is unreasonable to do so and because businesses do not want consumers to read them prior to signing." Meyerson, *supra* note 36, at 1268. Regardless of the reasons for such behavior, such reasons do not indicate that individuals are acting in a manner that reflects a cautionary state of mind.

²¹⁴ These reasons may include the absence or lack of time, alternative choices (competitors offering better terms), authoritative agents with which to negotiate (on behalf of the party drafting the form), or other transaction costs, as well as the individuals' behavioral or cognitive limitations.

²¹⁵ See Eigen & Hoffman, *supra* note 23, at 43 (noting that younger participants in online contracting "click to agree in order to receive the benefit of the underlying bargain *independent of the words and what they stand for*"). Accordingly, the manifestation of assent (however interpreted) to a form necessarily has little meaning from a cautionary standpoint.

²¹⁶ Kim notes that online consumers "may not even be cognizant of having entered into a contract." Kim, *Contract's Adaptation*, *supra* note 3, at 1343.

²¹⁷ Eigen & Hoffman, *supra* note 23, at 8 (reporting in an experiment involving online contracts that 54 percent of subjects aged 18–24 backed out of their commitments, while the percentage was 24 percent and 22 percent for subjects aged 45–54 and 55–64, respectively).

or compelling.²¹⁸ To the extent that online commitments are perceived as meaningless or something less than a legal commitment to be considered carefully, it is less likely that such writings (albeit not in a hard form) serve to caution online behavior.²¹⁹ These findings should inform our approaches to reform, and at least one judge recently acknowledged the unique characteristics of online contracting behavior.²²⁰ As Meyerson suggests, “[i]f it is both unreasonable and undesirable to have consumers read those terms, courts should not fashion legal rules in a futile attempt to force consumers to read those terms or to punish those who do not.”²²¹

²¹⁸ Eigen & Hoffman, *supra* note 23, at 42 (“For younger individuals, their base rate expectation for contract norms may come not from arms-length exchange analogs, but from digital exchange, in which clicking to agree is a meaningless action, devoid of genuine commitment.”).

²¹⁹ Eigen and Hoffman suggest that their empirical results regarding generational differences of understanding of consideration recitals “are the canary in the coal mine, singing of a generational difference in contracting behavior which has not yet found purchase in contract law.” *Id.* at 43.

²²⁰ *Berkson v. Gogo LLC*, No. 14-CV-1199, 2015 WL 1600755, at *9–13 (E.D.N.Y. Apr. 9, 2015) (discussing the attributes and behavior of the “average internet user” and why such attributes and behavior may justify different doctrinal requirements for contract formation). The judge in this case also took notice of Kim’s work with respect to the ways in which the doctrine governing online contracts often differs from traditional contract law doctrine. *Id.* at *16–17. Perhaps not surprisingly, the judge was one of the few to cite section 211 for purposes of ascertaining whether an online consumer could be entitled to relief from unexpected contract terms. *Id.* at *27.

²²¹ Meyerson, *supra* note 36, at 1271. Standardized consumer agreements can also be understood as serving a channeling function, albeit one-sided. As with the seal, the presence of volitional acts when presented with form or online contracts also “furnishes a simple and external test of enforceability.” Fuller, *supra* note 23, at 801. Judges have the terms of the promissory transaction clearly articulated in the form and consequently are left with the task of determining whether assent was given to the form. Fuller argues that the deliberate use of forms by (presumably both) parties is what distinguishes the law of contracts. Indeed, the use of standardized consumer contracts and the solicitation of reflexive assent “offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.” *Id.* By using the written form or appearance of contract, business entities can rely on judicial enforcement of the consumers’ manifested assent. Given consumers’ lack of cautionary behavior with respect to modern standardized consumer contracts and judicial reluctance to inquire seriously into the meaningfulness of assent, the “form” of contract is

Given the weaknesses involved with doctrinal reforms and courts' unwillingness to engage seriously with the realities of modern consumer contracting, it may be left to regulators to address the relevant issues.²²² As suggested by Llewellyn, "legislative action offers the great value (as in the insurance and labor instances) of possible limitation to definite matters in which regulation is shown by experience to be needed."²²³ This could include, as proposed by Ayres and Schwartz, requiring mass sellers to document the effectiveness of their contracts through regulated substantiation studies regarding what terms consumers expect and what forms of disclosure are effective in correcting inaccurate expectations.²²⁴ Alternatively, regulators could promulgate requirements

utilized by one party to determine how the acts of both parties are to be judged. The problem is that one of the parties, the consumer, is not contemplating or seeking to utilize this function. This practice can be juxtaposed with the traditional use of the seal. It is one thing to permit the drafting party to obtain the melted wax seal from the other party to indicate her binding promise, but it is quite another to permit the drafting party to obtain and respect reflexive assent through a mindless click or passive acceptance of online terms.

²²² Korobkin, *supra* note 121, at 1294 ("The design of non-salient terms is better assigned to governmental institutions because the market will not create pressure towards efficiency and state actors, as imperfect as they will be, at least can aim at the proper target."). *See generally* Neil K. Komisar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 76 (1990) (arguing that law reforms should be evaluated in terms of the choices of institutional forms available and how those institutions can be expected to operate in various settings). Becher argued, for example, that legislatures are "likely to be inefficiently influenced by lobbying and political or other interest groups" if they decide to regulate standardized contracts directly. Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 769 (2008).

²²³ *See* Llewellyn, *Essay in Perspective*, *supra* note 15, at 734; *see also* Linzer, *supra* note 11, at 214 (arguing that legislation offers a "more promising and efficient way to cleanse adhesion contracts"). *But see* Macaulay, *supra* note 31, at 1119–20 (arguing that, in the context of term enforcement, "we are safest when our legal standard asks whether the people in question know about an obligation or have a good reason for not knowing, somewhat less safe when we set up rules designed to define arbitrarily when fair warning is given").

²²⁴ Ayres & Schwartz, *supra* note 104, at 606–07 (describing their proposal to require particular sellers to engage in mass-market studies to determine consumer expectations). Some have engaged in such empirical assessments in other contexts; *see, e.g.*, Ann Morales Olazábal et al., *Frequent Flyer Programs: Empirically Assessing Consumers' Reasonable Expectations*, 51 AM. BUS. L.J. 175, 234 (2014) (suggesting a "consumer-based empirical approach" to determining

for particular contracts based on empirical findings about contracting practices and perceptions.²²⁵

As with adjudicators, once form agreements are divorced from the “hallowed” idea of “contractual capacity”—through greater knowledge and publicity surrounding how contracts and contracting parties work—regulators may be more empowered to intervene, particularly where clearly identifiable problems have emerged.²²⁶ This is obviously not without precedent. For example, Linzer cites the FTC’s involvement in banning the holder in due course doctrine in consumer transactions, which was necessary to avoid inequitable results where the purchaser of a defective product would not be allowed to point to the defect to defend her non-payment of the loan used to finance the purchase against a subsequent holder of the consumer’s note.²²⁷ He accordingly concludes that “there is plenty of agency power, federal and state, that can be used against adhesion contracts and the like, and we should actively seek its use.”²²⁸

CONCLUSION

Assent has descended from the formal trappings of a ceremony marking the past solemnity of the extraordinary occasion of entering into a contract to the modern standardized and often online consumer contracts of today, where assent is all but eviscerated as a requirement for contract formation. Assent is at once presumed, ignored, and celebrated. Although it might be unreasonable, particularly in light of recent empirical data, for a drafting party to believe that the consumer is manifesting assent to the contract and all terms when the consumer clicks online to use a service or encounters an Internet site with a hyperlink to terms and conditions, modern legal approaches largely ignore this problem with

what consumers’ reasonable expectations are with respect to airlines’ frequent flyer programs).

²²⁵ Linzer suggests focusing on particularly objectionable provisions contained within standardized contracts and prohibiting them. Linzer, *supra* note 11, at 208. *But see* Becher, *supra* note 222, at 759 (questioning the ability of legislatures to make an “efficient analysis of [standardized] contracts and the numerous markets in which they are used”).

²²⁶ Llewellyn, *Essay in Perspective*, *supra* note 15, at 734 (describing how legislative intervention is attacked for limiting contractual capacity).

²²⁷ Peter Linzer, *Contract as Evil*, 66 HASTINGS L.J. 971, 985 (2015).

²²⁸ *Id.*

respect to contract formation. After being assumed away, assent to the contract is celebrated *ex post* as pivotal to enforcing unread and often unexpected or onerous terms upon the consumer, including terms that are unrelated to the primary transaction. Consumer contract law could have evolved to address the shortcomings of the current doctrine, in which the hurdles to defenses are high. Unfortunately, assent lingers on in doctrine for standardized consumer contracts, lacking bite for contract formation while proving vicious in contract enforcement.

In some respects, section 211 of the Restatement (Second) of Contracts came close as a reasonable approach to standardized consumer contracts. It recognized that, in some instances, it is not reasonable for the drafting party to believe that the other party's manifestation of assent should be understood as such.²²⁹ Unfortunately, it only makes this recognition for purposes of allowing an attack on consent after a presumption of assent has been established, and creates a standard for belief or knowledge on the part of the drafting party that is too difficult for most consumers to establish.²³⁰ More problematically, section 211 does nothing to change the current adjudicative or regulatory predisposition to enforce all terms of standardized consumer contracts.²³¹

Hope may not be lost, though. Social constructions of assent can evolve and be influenced. For example, empirical findings regarding contracting practices and beliefs could be one way to change the adjudicative and regulatory tendency or preference to treat all contracts alike. As contracts evolve, empiricists can inform all of us as to what different rituals, acts, or omissions mean to different individuals. These findings should be used to formulate meaningful tests for contract formation or contract defenses that are consistent with an understanding of human knowledge and behavior. Greater understanding can help lead

²²⁹ RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

²³⁰ See Calamari, *supra* note 31, at 360 (describing the duty to read rule as “yet another fortification thrown up by the objective theory of contracts to make a writing impregnable”).

²³¹ Hart notes that it is “widely understood that courts rarely let parties out of their contracts, regardless of the excuse advanced,” and this understanding is backed up by empirical studies demonstrating the lack of success of doctrines attacking particular contract terms. Hart, *supra* note 58, at 214.

to greater objection to current standardized consumer contracting practices.²³²

As an example, the adjustment to a standard that incorporated empirical and scientific data, with respect to assessing assent or lowering the bar to contractual defenses where assent is “weak” or does not exist, could create a new baseline by which businesses would assess their contracts. This is not a problem for transactional security, as businesses would adjust and compete as needed to survive.²³³ Courts might still need to assess the reasonableness of different manifestations of assent, for example, but reasonableness would not be assessed in a vacuum, particularly as empirical and scientific knowledge regarding human cognition and behavior continues to grow.²³⁴

The weakness of the formality of assent as a requirement to contract formation also may become more widely recognized in

²³² Rakoff argued that whether it is objectionable to permit the imposition of terms upon consumers is delimited by “social forces.” Rakoff, *supra* note 9, at 1237 n.220. This Article suggests that greater societal knowledge can be part of and support the social forces necessary for reform. Linzer similarly argues that recent scholarship (though not all of it empirical) regarding standardized contracts can contribute as well because it illuminates transactions

in which traditional contract and restitution (and perhaps property law) doesn’t work right, generally because our traditional approach leaves some parties exposed, whether because of the wording of a contract of adhesion, manipulation of advertising and incentives, or because one side had never even thought the other side was going to make money from their activities and thus never thought to protect themselves.

Linzer, *supra* note 227, at 980. This failure suggests an inquiry into whether we should “rethink contract as we know it.” *Id.*

²³³ In any event, businesses never have complete transactional security, and refusal to engage in substantive reform where justified in its name is to ignore the dynamic aspect of the marketplace and the daily adjustment of businesses to new developments, including new legal standards. *See* Kennedy, *supra* note 201, at 1750 (“The optimizing tendencies of the market will work, within the leeways we choose to leave for them, no matter how we make the initial definition and allocation of property rights.”).

²³⁴ *See* Meyerson, *supra* note 36, at 1301 (arguing that the objective theory (albeit applied to particular terms as opposed to contract formation) “does not detract from the freedom to contract, unless that phrase denotes the freedom to impose the onerous terms of one’s carefully-drawn printed document on an unsuspecting partner. Rather, freedom to contract is enhanced by a requirement that both parties be aware of the burdens they are assuming.”).

order to empower adjudicators and legislatures to police the formation and terms of standardized consumer contracts free from the stigma of encroaching upon private autonomy or economic efficiency.²³⁵ As the social, judicial, and legislative construction of assent changes, and the doctrinal requirements for standardized contracts are correspondingly modified, one would expect businesses to adjust and create best practices to ensure that their contracts were respected *ex post*.²³⁶ Section 211 thus illustrates the need for careful reformulation of contract law doctrine based upon a more nuanced adjudicative and legislative understanding of modern contracting practices.

²³⁵ For example, Slawson later suggested that if the parties' manifestations of mutual assent did not include the standardized contract (as in many consumer transactions), then the contract should only be enforceable "to the extent it is a valid exercise of the producer's contractual discretionary power." Slawson, *Contractual Discretionary Power*, *supra* note 51, at 870.

²³⁶ Along the same lines, Russell argues that, although standard form contracts may save time, this is not necessarily a benefit to the extent that the market (with additional time) otherwise would have generated the ability of the consumer to seek changes in the contracts. Irma Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137, 169 (2006). Accordingly, the economic argument for the legal fiction of assent is based on the flawed construct that standardized consumer contracting will benefit all parties, not just the drafting parties (and that it does not "make sense to assume that supplanting legal default rules [through standardized contracts] will have overriding social utility"). *Id.*