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# Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much about Boilerplate and Other Puzzles

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# Reconsidering Contractual Consent

## WHY WE SHOULDN'T WORRY TOO MUCH ABOUT BOILERPLATE AND OTHER PUZZLES

*Nathan B. Oman*<sup>†</sup>

### INTRODUCTION

Since modern contract doctrine took its current form at the turn of the twentieth century, contract law has been haunted by a persistent anxiety. A myriad of doctrines, from the law of offer and acceptance to consideration to rules governing interpretation, assume that contracts are voluntary agreements mutually negotiated between promisors and promisees. Everyone is assumed to understand that to which they agree and to voluntarily undertake the obligations contained in the contract. The anxiety comes from the fact that this vision of fully informed and fully voluntary transactions so often departs from the reality of contractual practice, where parties often agree to contracts with only the haziest notion of what terms they include and where formation is routinely beset with threats and pressures that seem removed from the freely consenting parties envisioned by the doctrine. The anxiety is nicely captured by one professor's summary of the standard 1L class on the subject:

*Contracts.* Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879.<sup>1</sup>

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<sup>1</sup> James D. Gordon III, Essay, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991).

At the center of this anxiety is the idea of voluntary consent and the supposedly exalted position that we assume it ought to occupy in any normative justification of contract law. The central thesis of this essay is that this assumption is false. Individual voluntary consent is far less important to the normative defense of contract law than we have traditionally assumed.

Consent occupies a paradoxical position in contemporary theories of contract law.<sup>2</sup> The philosophy of contract law is dominated by consequentialist theories that take the goal of contract law to be economic efficiency, and various moral or deontological theories that argue that contracts should be enforced out of respect for the autonomous choice of contracting parties. Both the economic theories and the autonomy theories place substantial demands on the voluntariness of contractual consent because voluntariness is key to their accounts of the normative foundations of contractual liability.<sup>3</sup> In a nutshell, efficiency theorists defend contractual enforcement because the fact that parties voluntarily made a contract is strong *prima facie* evidence that enforcing it will increase welfare. In this theory, voluntariness is a powerful epistemic marker, but only so long as we assume that contractual choices are well-informed and uncoerced. Autonomy theories, in contrast, see voluntariness as important because it is the characteristic of contractual activity that makes it worthy of respect. Contracts are to be enforced because doing so respects the autonomy of the contracting party. To not respect the deliberate commitments of those parties is to infantilize them, to treat them as persons incapable of ordering their own lives. Like the efficiency argument, however, this approach makes sense only if choices are deliberate and uncoerced. Again, the theory places substantial demands on the voluntariness of transactions.

Despite the theoretical centrality of voluntariness to most normative defenses of contract law, however, contract doctrine places relatively few demands on contractual consent. Where efficiency and autonomy theories demand that consent be well-

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<sup>2</sup> In the scholarly literature, the term "consent" is sometimes used to refer to a particular account of contractual liability, one that denies that contracts are promises that the law enforces and instead insists that contracts consist of the consensual transfer of pre-existing rights. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (arguing that contract law is best thought of as a consensual transfer of rights). This essay takes no position on that debate, and I do not believe that anything in my argument hinges on characterizing a contract as a promise rather than a consensual transfer of rights. Both theories demand that contractual obligations be created by some voluntary action, and in this essay I shall treat the term "consent" as meaning something like "voluntary action."

<sup>3</sup> In this essay, I shall use the terms "economic theory" and "efficiency theory" interchangeably.

informed and fully voluntary, contract doctrine is content to enforce agreements where the parties are almost wholly ignorant of the terms to which they agree and have been subject to substantial pressure to consent. Consider boilerplate agreements, which consist of preprinted forms drafted by attorneys and offered by often-ignorant agents of a firm on a take-it-or-leave-it basis. In this context, parties are held to complex terms, often drafted by third parties, that were not negotiated and may have been wholly incomprehensible to both offeror and offeree. In such situations, there is a disconnect between our theories of contractual consent and the legal doctrine of contractual consent.

The paradox arises because our theoretical approaches to contract law have dramatically overestimated the importance of voluntary consent in the normative defense of contract law. In contrast, I argue that contract law should be seen as part of an evolutionary process of finding solutions to problems of social organization in markets.<sup>4</sup> Like natural evolution, this process depends on variation and feedback. Unlike natural evolution, both the variation and the feedback mechanisms are products of human invention. On this theory, consent serves two roles in contract law. First, consent makes freedom of contract possible and freedom of contract generates variation in transactional structures. In effect, it creates a store of possible solutions to problems of social organization. Second, consent is one method among several by which “bad” solutions are weeded out and “good” solutions are selected. Consent, however, is not the only—or in many cases even the primary—feedback mechanism for transactional structures. Hence, in many situations we are comfortable enforcing contracts where consent is formal at best and the voluntariness of contracting parties is open to serious doubt. This is because there are other mechanisms that mitigate against pathological transactional forms. Ultimately “meaningful consent” is not a necessary condition for the normative justification of contractual enforcement. The advantage of this evolutionary view of consent is that it places far fewer normative demands on the idea of voluntariness and does a better job of explaining and defending current contract doctrine.

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<sup>4</sup> Elsewhere, I have offered an extensive defense of the moral desirability of well-functioning markets, a desirability that extends well beyond the efficient allocation of resources. There is little point in restating my arguments in detail here. Suffice to say that I believe that well-functioning markets are an integral part of a liberal political order and have offered reasons for that belief at soporific length. See generally NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183 (2012).

This essay proceeds as follows: Part I discusses the role of consent in contemporary contract law theory, arguing that both economic theories and autonomy theories of contract place substantial demands on the voluntariness of consent. In Part II, I propose an alternative normative account of contract law, one that places the emphasis on variation and evolution and demands far less of contractual consent. Finally, in Part III, I evaluate these theories in light of the current doctrine surrounding boilerplate agreements, arguing that consent is less important in the justification of contractual enforcement than is often assumed.

## I. CONSENT AND CONTRACT THEORY

Both economic and autonomy theories of contract law place a premium on free and informed consent. For efficiency theories, consent is a marker that allows legal decision makers to know that the redistribution of resources resulting from voluntary transactions increases welfare. For autonomy theories, consensual agreements are worthy of legal enforcement because they represent the considered choices of contracting parties. By enforcing contracts, the law assists parties in their own process of self-authorship. Crucially, however, this account of contractual obligations requires that contracts in fact reflect the free and considered judgments of the parties. If the consent is not fully voluntary, it is difficult to see how contractual liability represents a form of self-authorship.

### A. *Consent and Efficiency Theories of Contract*

For economic theorists the normative goal of contract law is to create incentives for contracting parties to behave in efficient ways. Efficiency, in turn, is ultimately a matter of the allocation of resources. Most law and economics theorists are committed to the idea of Kaldor-Hicks efficiency.<sup>5</sup> Speaking very roughly, every Kaldor-Hicks efficient reallocation of resources is thought to increase aggregate social welfare and is normatively desirable for that reason. Under the Kaldor-Hicks criteria, A is efficient to B if those better off in A could fully compensate those worse off in A, all while still preferring A to B. As a normative criterion, efficiency has been the object of extensive criticism and refinement.<sup>6</sup> I have no desire to revisit those debates here.<sup>7</sup>

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<sup>5</sup> See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (4th ed. 2011); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 14–15 (5th ed. 1998).

<sup>6</sup> For some of the most important criticisms see JULES COLEMAN, MARKETS, MORALS, AND THE LAW 95–132 (1998); Ronald Dworkin, *Is Wealth a Value?*, in A

Rather I want to examine the relationship between efficiency and consent in economic theories of contract.

The concept of efficiency is indifferent as to the method by which resources are allocated. Indeed, in the early twentieth century, when faith in the power of economic planning was running high, some economists argued that one could centralize allocation of resources, with economic czars efficiently distributing resources across society.<sup>8</sup> Less ambitiously, law and economics scholars have justified a host of doctrines that allow the forced legal transfer of resources on the grounds of efficiency. Hence, for example, the doctrine of negligence in effect allows some parties to throw the costs of their conduct onto others without those others' consent so long as avoiding the costs is prohibitively expensive in relation to the harm suffered.<sup>9</sup> Indeed, the famous theory of efficient breach posits that contract breachers ought to be free to substitute the payment of damages for performance without a promisee's consent. The theory of efficient breach has been widely criticized on economic grounds, but not because it contemplates the forced transfer of some valuable entitlement without consent.<sup>10</sup> Richard Craswell has gone so far as to argue that most of contract doctrine deals with default rules, that is the resolution of issues that the parties failed to resolve through mutual agreement, and that efficiency analysis is therefore uniquely well suited for specifying contract law precisely because it need not rely on consent to justify rules.<sup>11</sup>

What then is the role of voluntary consent in economic theories of contract law? Milton Friedman has provided the most

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MATTER OF PRINCIPLE 237–66 (1985). For some of the more ingenious refinements, see generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) (arguing that across a broad domain of substantive areas lawmakers should focus exclusively on maximizing welfare); EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010) (arguing that across a wide domain of substantive areas the pursuit of welfare should be limited by moral side constraints).

<sup>7</sup> I have, however, revisited those debates at length elsewhere. See OMAN, *supra* note 4 at 40–66.

<sup>8</sup> See generally Allin Cottrell & W. Paul Cockshott, *Calculation, Complexity and Planning: The Socialist Calculation Debate Once Again*, 5 REV. POL. ECON. 73 (1993) (discussing the so-called socialist calculation debate).

<sup>9</sup> See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

<sup>10</sup> See, e.g., William P. Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract*, 15 RAND J. ECON. 39, 47 (1984) (discussing the problem of efficient reliance under expectation damages); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 470–71 (1980) (same); Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q. J. ECON. 121, 122 (1984) (same).

<sup>11</sup> See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 507–29 (1989).

plausible answer: "The possibility of co-ordination through voluntary co-operation rests on the elementary—yet frequently denied—proposition that both parties to an economic transaction benefit from it, *provided the transaction is bi-laterally voluntary and informed*."<sup>12</sup> The efficiency argument for the importance of voluntary consent hinges on the superiority of the information that contracting parties have about the effect of transactional structures on their own welfare. Notice that even outside of the context of mutual consent, some contract doctrines can be justified in terms of the superior information and understanding of contracting parties. For example, in the famous case of *Hadley v. Baxendale*, a common carrier who failed to deliver a mill shaft as promised was held not to be liable for lost-profits as a result of the mill standing idle.<sup>13</sup> The rule in *Hadley*, which limits consequential damages for breach to those reasonably foreseeable at the time the parties enter into the agreement, has been justified as providing an incentive for parties to disclose private information.<sup>14</sup> The effect of the rule is to punish parties that fail to disclose private information about idiosyncratic potential losses in the event of breach. Notice that this argument assumes that the party has privileged and superior access to information about the welfare effects of the contract.

Voluntary consent thus acts as an epistemic marker, vouchsafing to legal decision makers that transactions are increasing welfare even when it is difficult and perhaps impossible for judges or legislators to observe those increases directly. The epistemic value of consent, however, drops dramatically when consent is coerced or uninformed. Consider the person who agrees to contract because of a threat. We can assume that the party agreed because she is better off doing so than suffering the threat. However, we cannot know that in the absence of the threat that the transaction increases welfare. Likewise, if I agree to a complex transaction that I do not understand, the bare fact of my consent provides relatively little information about the welfare effects of the contract. Thus, the

<sup>12</sup> MILTON FRIEDMAN, CAPITALISM AND FREEDOM 13 (1962) (emphasis in original).

<sup>13</sup> *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

<sup>14</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 101 (1989). Oliver Wendell Holmes, Jr. argued that the rule in *Hadley v. Baxendale* should be understood as requiring mutual consent to unforeseeable consequential damages, however, his approach has generally been rejected. Under the Restatement, for example, liability turns on the disclosure of information rather than agreement. *Compare* *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 545 (1903) (Holmes J.) (holding that mere notice was insufficient to impose liability for consequential damages) *with* RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (AM. LAW INST. 1981) ("[T]he party in breach need not have made a 'tacit agreement' to be liable for the loss.").

efficiency argument places substantial demands on voluntary consent. In order to fulfill its epistemic role in the efficiency argument, consent must be informed and free of coercion.<sup>15</sup>

*B. Consent and Autonomy Theories of Contract*

Unlike economic accounts, autonomy arguments do not justify contractual liability by its effect on welfare. Indeed, autonomy theories are not ultimately concerned with distribution. They do not look to the allocation of resources that results from contractual activity for a justification of contract.<sup>16</sup> Rather, they look to the nature of contractual consent itself. While there is considerable variation in how these theories spell out the philosophical details of justifying contract law, they all begin with the premise that parties to a contract are agents who choose to impose obligations on themselves and the very fact that these obligations are freely chosen is what makes them worthy of legal enforcement.<sup>17</sup>

Charles Fried provided the canonical modern statement of this position a generation ago, arguing that contractual liability flows from a basically Kantian stance toward political morality.<sup>18</sup> Human beings, he argued, should be treated as agents rather than objects. We must understand one another as self-directed beings with our own values and plans. While the state may not impose on us an overriding conception of the good life, it should create laws that enhance human freedom. Crucially, our ability as autonomous agents to pursue our values and plans in the world is enhanced if we can enlist the cooperation of others. The trick is to do this without treating those other people as mere things, resources that can be

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<sup>15</sup> Additionally, voluntariness must be readily observable. Indeed, Friedman's argument rests on the assumption that it is difficult for decision makers to observe increases in welfare but relatively easy for them to observe voluntary transactions. However, it may be quite difficult to observe voluntariness. Indeed, for this reason, Anthony Kronman proposed that welfare be used as a proxy for voluntariness. In other words, because it is difficult to determine whether a transaction is truly voluntary, decision makers should ask whether the transaction involves a mutual increase in the parties' welfare and label it as voluntary when this condition is met. Such an approach, of course, inverts the epistemic assumption of the argument in the main text. See generally Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

<sup>16</sup> To use Robert Nozick's terminology, autonomy theories rest on a historical rather than a patterned theory of justice. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 200–03 (2d ed. 2013).

<sup>17</sup> See Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 37–49 (Dennis Patterson ed., 2d ed. 1996) (summarizing autonomy theories of contract).

<sup>18</sup> See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981).



consumed as we pursue our goals. We do this by enlisting their participation voluntarily and by making voluntary commitments of our own. When the state enforces a contract it is respecting the jointly authored obligations of the contracting parties, enhancing their freedom by providing a mechanism for enlisting the assistance of others while simultaneously treating those others as agents rather than objects.<sup>19</sup>

Note the role of voluntary consent in Fried's theory and the theories of those that share his basic orientation toward contract law. For autonomy theories what is normatively important about contractual liability is that contracts are chosen, and contractual liability rests on respect for the autonomy of contracting parties. Those with contractual capacity should be treated as adults entitled to make their own decisions. The refusal to enforce contracts freely chosen by the parties infantilizes them, treating them not as agents but as wards of society unable to choose their own vision of the good life and implement their plans accordingly.

There is undoubtedly a libertarian flavor to autonomy theories of contract, and certainly such theories provide ample resources to criticize paternalist impulses in contract law. Judges and legislators ought not to substitute their vision of the good for that of the parties to a contract. Autonomy theories, however, are also concerned with freedom *from* contract.<sup>20</sup> The self-authorship of contracting parties justifies the imposition of contractual liability. However, when contracts do not represent the choices of parties, autonomy theories condemn the creation of contractual liability. Legal obligations that result from coercion or simple ignorance do not represent the autonomous choice of contracting parties. Rather, in these cases the parties have been treated as mere objects, manipulated by outside forces and outside parties. Justified contractual liability must therefore be free of coercion and be sufficiently informed so that we can be confident that the obligations represent an act of self-authorship.

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<sup>19</sup> There are any number of criticisms that can be made to the details of Fried's theory of contract, particularly the strong link that he makes between contractual liability and the moral obligations to keep a promise. See generally Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992) (arguing that the law should not enforce personal moral obligations such as promissory moral obligations); Seanna Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007) (arguing that promissory morality places a set of normative constraints on contract law without necessarily being directly reflected in the law).

<sup>20</sup> See, for example, the articles collected in the 2004 *Wisconsin Law Review* symposium on "freedom from contract." Omri Ben-Shahar, *Foreword: Freedom from Contract*, 2004 WIS. L. REV. 261, 263 (summarizing the symposium).

Much has been made in contemporary contract scholarship of the conflict between economic and autonomy theories of contract and the need to reconcile or choose between them.<sup>21</sup> On the issue of contractual consent, however, there is a convergence between the two approaches. The presence of such merely formal agreement does not vouchsafe to legal decision makers the confidence either that resources are being reallocated in efficient ways by the transaction or that the choice of the parties represents an instance of autonomous agents implementing their own freely chosen vision of the good life. Rather, in order to do the normative work assigned to it by both approaches, contractual consent must be both free of coercion and sufficiently well-informed that we may confidently draw inferences of welfare or self-authorship from it. To the extent that consent is invoked to justify the enforcement of contracts, mere formal agreement is insufficient.

## II. RECONSIDERING CONTRACTUAL CONSENT

In this Part and the next, I seek to relocate the role of consent in the justification of contract doctrine. In a nutshell, contracts solve social problems by allowing for the decentralized authorship of legal obligations. This process does not require that all contracts meet the demanding requirements for consent laid out by autonomy or efficiency theories of contract. Consent need not sit at the center of the justification on contract law. If we think of contract law as providing a kind of decentralized law-writing process, its great virtue is its greater flexibility and variation compared to ordinary legislation. This allows it to act as an evolutionary mechanism for the solution of organizational problems. Fully voluntary consent is neither a necessary nor a sufficient element in the justification of contract in this argument. Rather, consent serves two subordinate roles. First, it coordinates the process of decentralized obligation authoring, providing a kind of jurisdictional rule that manages potentially conflicting legal duties. Second, it serves as one among many feedback mechanisms that prevent the process of private legislation from becoming abusive or destructive. Crucially, neither of these roles require that the contractual consent be particularly robust. Neither place heroic demands on how

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<sup>21</sup> See generally Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, 1 SOC. POL. & LEGAL PHIL. 385 (2002); Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001); Nathan B. Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005).

informed or “truly” voluntary consent need be. The merely formal consent that is generally all that the law of contracts demands is sufficient to fulfill both roles.

A. *Evolution and Legal Obligations*

We use contracts to solve problems of social organization. Economists have tried to describe these problems in specific terms such as ex post opportunism or the need to create incentives for optimal, transaction-specific investments.<sup>22</sup> Others have seen contracts as means for institutionalizing lessons learned from the iterative process of repeated interactions or even self-expression.<sup>23</sup> Why do artisanal cheese makers organize themselves as cooperatives rather than corporations or limited liability companies? Because this particular contractual structure signals something about their business and its separation from dominant models of commoditized profit seeking.<sup>24</sup> To the extent that there is a problem to which legally enforceable obligations could be a solution, contracts provide a possible tool for overcoming the problem. It is important to see, however, that for most of these problems, contract is by no means the only legal solution that we might propose.

Henry Sumner Maine famously claimed that social progress is marked by a transition from status to contract.<sup>25</sup> By status, he meant legal obligations that attach to particular social roles, obligations that are authored by the community rather than the individuals who happen to occupy those social roles. Obligations associated with status may or may not be voluntary. One may choose to take upon oneself certain statuses, such as wife or husband, while other statuses, such as son or daughter, are not chosen. Even when one voluntarily acquires a status, however, one does not choose the particular obligations associated with that status. Contract, in contrast, is marked by the freedom to author the particular obligations that one undertakes. Rather than choosing from a menu of prefabricated statuses, each set of obligations becomes a bespoke creation of the obligor and the obligee. Freedom of contract refers to this power to author

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<sup>22</sup> See generally Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) (discussing the various economic theories of why parties use contracts).

<sup>23</sup> See generally D. Gordon Smith & Brayden King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1 (2009) (discussing uses of contracts other than those traditionally discussed by economists).

<sup>24</sup> I am grateful to Gordon Smith, an expert on all things related to cheese, for this example.

<sup>25</sup> See HENRY SUMNER MAINE, *ANCIENT LAW* 163–65 (4th ed. 1906).

obligations. The greater the scope for individual authorship the greater the freedom of contract.

For Maine, the transition from status to contract was part of a progressive vision of history and civilization. The barbarous tyranny of the past gradually gave way to the enlightened freedom of the present. At the end of history lay Victorian liberalism, with its emphasis on the autonomous individual and his ability to impose on himself whatever obligations he chose to impose.<sup>26</sup> In nineteenth-century thought, status and contract thus represented radically different modes of legal organization centered on the opposing poles of collectivism and individualism, tyranny, and freedom. For purposes of my argument, however, the similarities between status and contract are more interesting. Both can be equally serviceable as solutions to problems of social coordination.

Think about the simple problem of ex post opportunism. Quid is exchanged for pro over time, and the party who is paid up front faces the temptation to take the money and run. One solution to this problem would be to allow the parties to mutually author the obligations that will govern their transaction. Presumably they would agree to rules that would require the seller to deliver the goods after being paid rather than absconding with the purchase price. However, this problem could also be solved using a status based rule. We could say that by accepting payment, a party becomes "a vendor" and the law could then define the various unamendable and non-disclaimable obligations associated with that status. Provided that the duties imposed on a vendor by the law included the obligation to convey goods paid for, a status based rule solves the problem of ex post opportunism.

Ex post opportunism in the context of a one-shot sale of goods is a relatively simple problem. Often, however, the problems of coordination for which we might use contract as a solution are more complex. Consider a business partnership. Such a joint venture raises a myriad of problems. What will each partner contribute? How will the gains of the venture be allocated? How will the losses be shared out? How long will the venture last? What if one party dies? May a partner sell his or her interest in the business? Under what circumstances, if any, may one partner dissolve the business? If it is dissolved early,

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<sup>26</sup> The gender of the person is not, of course accidental. Nor one, suspects, is the race. Victorian liberalism was content with both a general subordination of women and with imperial domination of uncivilized races, although in fairness there were Victorian liberals who questioned some of these forms of domination. *See generally* JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Susan Moller Okin ed., 1997) (a Victorian defense of equal rights for women).

how are the assets and liabilities to be divided between the parties? And so on. In the case of a simple sale, the basic structure of the transaction is virtually self-evident. The duty of the buyer is to pay for the goods. The duty of the seller is to provide them.<sup>27</sup> When it comes to more complicated interactions, however, there is no a priori answer to the questions that arise. Very different transactional structures are possible, and it is not clear which of them is best.

We tend to assume that the problem of transactional design is best solved by the application of knowledge and conscious planning. To a certain extent this is always true. Complex interactions of the kind regulated by status rules or contracts are always human creations, conventions that are chosen or at least articulated by individuals in terms of concepts that assume agency and planning such as ends, means, norms, and the like.<sup>28</sup> However, it is important not to overestimate the importance of conscious planning in the creation of effective transactional structures. Sometimes, solutions may be discovered through sheer serendipity. Writing in 1950, when faith in the power of economic planning was running high across the developed world, Armen Alchian argued that markets can display a process of unplanned evolution and selection.<sup>29</sup> Variations in firms and business models—regardless of their original source—profit or go bankrupt in the market. Over time, successful strategies emerge and are repeated. Articulating his theory, Alchian wrote:

All individual rationality, motivation, and foresight will be temporarily abandoned in order to concentrate upon the ability of the environment to *adopt* “appropriate” survivors even in the absence of any adaptive behavior. This is an apparently unrealistic, but nevertheless very useful, expository approach in establishing the attenuation between the ex post survival criterion and the role of the individual’s adaptive decision criterion.<sup>30</sup>

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<sup>27</sup> This simplicity, of course, is only apparent. The law of sales is devoted to the complexities that arise from the apparently self-evident structure of *quid pro quo*. Is there a warranty? When is delivery due? Is payment a condition for delivery or vice versa? Both? Neither? How should the risk of loss be allocated if there is some mishap in the midst of delivery? And so. This point, however, only further reinforces the argument above.

<sup>28</sup> Indeed, at least one scholar has identified contract with the concept of plans. See generally Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341 (2009).

<sup>29</sup> See generally Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950).

<sup>30</sup> *Id.* at 214 (emphasis in original); WILLIAM J. BERNSTEIN, *A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD* 76 (2008) (“For several centuries after the fall of Rome, the fragments of the old empire suffered in obscurity as backwaters of world commerce.”).

Even if we assume that there is no planning involved in the creation of transactional structures but merely random chance, he in effect argued, competition in the market will tend to select for transactional structures that maximize the chances of a firm's survival.

Alchian's model of completely unguided variation is unrealistic because economic actors regularly plan and pursue goals rather than acting randomly, but it is possible to observe something like the process of transactional selection in history. During the Middle Ages, the Islamic Middle East far outpaced Europe in economic terms.<sup>31</sup> During this period Arab commerce was nominally governed by Islamic law, a body of rules articulated by religious jurists based on the revealed text of the Qur'an and the example of the Prophet.<sup>32</sup> Commercial relationships were overwhelmingly personal in nature. The kind of massive impersonal transactions represented by something like modern capital markets were unknown, and Islamic law reflected this reality. Joint business ventures were governed by the Islamic law of partnership, which provided that all partnerships were at will and were automatically dissolved upon the death of a partner.<sup>33</sup> As a result, the more partners that were involved in a venture the greater the risk that it would be dissolved unexpectedly by the death or withdrawal of a partner. Accordingly, Islamic partnerships tended to be modest affairs, overwhelmingly consisting of only two partners and extending for a very short period, such as a single trading voyage.<sup>34</sup> Islamic law did provide for more durable legal structures with a device known as a waqf.<sup>35</sup> Roughly analogous to a trust, a waqf allowed for a pool of assets to be kept together despite the death of the initial settlor.<sup>36</sup> However, strict requirements of adherence to the terms of the original grant kept the waqf from developing into an effective commercial instrument.<sup>37</sup> Instead it was used almost exclusively to fund mosques, schools, and public works such as water fountains.<sup>38</sup>

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<sup>31</sup> See MARSHALL G. S. HODGSON, *THE VENTURE OF ISLAM, VOLUME 1: THE CLASSICAL AGE OF ISLAM 301–05* (1974) (discussing economic conditions during the high caliphate).

<sup>32</sup> See NOEL J. COULSON, *A HISTORY OF ISLAMIC LAW 75–85* (1964) (setting forth the classical theory of Islamic law).

<sup>33</sup> See TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST 63–77* (2011) (discussing the economic limitations of Islamic partnership law).

<sup>34</sup> *Id.* at 64–66.

<sup>35</sup> *Id.* at 282–83.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 110, 282–83 (discussing the commercial limitations of the waqf).

In contrast, during the late Middle Ages, Europeans began developing more durable business structures. Italian merchants and bankers pioneered an entity known as a *compagnia*, which allowed for partnerships for a fixed period of time.<sup>39</sup> Later, Dutch and English merchants created joint stock companies.<sup>40</sup> In time, the corporation, which was originally a legal device granting legal personality to collectives such as towns, religious orders, and universities, was combined with the idea of joint stock companies. The result was a legal entity that exposed investors to far less risk of unwanted dissolution than an Islamic partnership, even when the business venture pooled the resources of hundreds or even thousands of individuals. Hence, from the seventeenth century onward, Western European legal systems provided for commercial enterprises devoted to ever larger and more complex projects.<sup>41</sup> In contrast, Islamic law meant that Arab commercial ventures necessarily remained the limited personal affairs that characterized commerce during the Middle Ages.

Neither the Islamic law of partnerships and *waqf* nor the Italian *compagnia* were contractual in the modern sense. Indeed, at the time neither Islamic law nor the *jus commune* that governed Italy had any body of rules that corresponded perfectly to modern contract law. There was no set of general legal principles empowering parties to author the full scope of their transactional obligations. It would not be until the sixteenth century that legal theorists began to formulate such rules in earnest and it would not be until the nineteenth century that such rules became fully embedded in functioning legal systems.<sup>42</sup> Rather, the *waqf* and the *compagnia* arose in legal worlds where parties made agreements and those agreements sometimes created legal duties, but where the lion's share of the obligations—structuring even complex business arrangements—arose as a matter of status. Traders, vendors, partners, heirs, and the like all occupied particular social roles to

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<sup>39</sup> See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 7–9 (2003) (discussing the rise of the *compagnia*).

<sup>40</sup> See *id.* at 19–25 (discussing the rise of the Dutch East India Company and other joint-stock companies).

<sup>41</sup> See DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 150–58 (1973) (discussing the role of successful legal institutions in the economic rise of England and other European states).

<sup>42</sup> See generally WIM DECOCK, *THEOLOGICALS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE IUS COMMUNE* (2013) (discussing the long and complicated intellectual history that finally produced the idea of a general law of contracts); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991) (same).

which legal obligations attached and the power of individuals to alter those obligations through choice or agreement was limited.

Alchian, however, teaches us that what structures market organization can be less choice and agreement—"the individual's adaptive decision criteria"—than evolution, a process that is ultimately driven by variation and feedback.<sup>43</sup> We can think of the Mediterranean basin, the Near East, and Western Europe as a single vast economic system. Within that system, accidents of history and religion generated various legal regimes and with them transactional structures. In the Eastern Mediterranean and the Near East, the Islamic law of partnerships and waqfs dominated. While in the Western Mediterranean the more durable structures of the *compagnia* and later the joint stock company dominated. Competitive pressures then tended to select in favor of those structures descended from the *compagnia* rather than those descended from the waqf. By the nineteenth century, the benefits of Western models of business organization had become apparent, and the Islamic lands began to adopt these models.<sup>44</sup> This is, of course, a massively oversimplified account of economic history and one that probably unjustifiably gives pride of place to legal structures as drivers of development. For purposes of my argument what is important is the interplay of variation and feedback and the relatively unimportant role of individual consent and deliberate design. Those who created the *compagnia* did not intend anything like the rise of modern capitalism, even though the structures they created ultimately contributed to its creation. Rather that outcome was the product of evolution.

Crucially, the evolutionary mechanism envisioned here is not natural. It arises from competition within a market, and the nature of that competition results from legal and economic institutions that are the products of human convention and intention. The quality of the outcomes will be a function of two things. The first is the breadth of variation. In a world where there is little variation, there can be little evolution. The second is the nature of the feedback mechanisms. Over time, the combination of variation and feedback will produce transactional structures that are "winners" in light of the feedback mechanisms and will eliminate "losers." Consent and

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<sup>43</sup> Alchian, *supra* note 29, at 214.

<sup>44</sup> See KURAN, *supra* note 33, at 279–300 (recounting the history of the adoption of Western business law by the Islamic world in the nineteenth century).



freedom of contract can be seen as efforts to drive evolution by providing both variation and a feedback.

As noted above, freedom of contract refers to the ability of parties to an agreement to author the scope of their obligations. It can thus be seen as an example of a broader phenomenon, namely the power to author legal obligations.<sup>45</sup> In this sense, freedom of contract is like a very limited version of the power that a legislature has to author legal obligations. This fact has been recognized for both good and ill. The social contract tradition is built on this analogy, seeking to assimilate legislative power to a primeval contract and thus legitimate it. Alternatively, modern critics of contract doctrine have suggested that in at least some contexts there is something deeply undemocratic and troubling about the quasi-legislative power given to the authors of contracts.<sup>46</sup> By increasing the number of entities with the power to author legal obligations we increase variation. We saw this in the case of partnership forms in the late Middle Ages, where the multiplicity of lawmakers in the Mediterranean basin generated the competing forms of the *waqf* and the *compagnia*. The American constitution provides another example, where “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.”<sup>47</sup> The same could be said of the legal pluralism of early European states, where royal courts competed with local courts, merchant courts, and religious tribunals.<sup>48</sup> In all of these cases, the multiplication of authors of

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<sup>45</sup> Complications lurk here. Some have suggested that contractual duties mirror the moral duties created by a promise. On this view, freedom of contract does not empower private parties to author legal obligations. Rather, it indicates the scope of the state's willingness to mirror moral obligations with legal obligations. See Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008) (analyzing whether or not contract law should be thought of as conferring powers on mirroring moral obligations). While I am skeptical that contract law is best thought of as enforcing moral obligations the way, for example, we might think that criminal prohibitions on murder enforce the moral obligation not to unjustifiably kill someone, I note that even if one subscribes to this view, freedom of contract can still fulfill in part the roles assigned to it in the argument above. However, to the extent that moral duties created by promising may be less extensive than those envisioned by contract law, e.g., because promissory morality has more demanding voluntariness requirements to create moral obligations, they will be less effective at providing variation.

<sup>46</sup> See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 33–34 (2013). See generally W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) (arguing that judicial and legislative oversight of boilerplate is necessary to preserve democracy).

<sup>47</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>48</sup> See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 225 (1983) (discussing legal pluralism in medieval European law).

legal obligations increased the variability of obligations that were “tried out” in the world.

*B. Consent and the Problem of Coordination*

A multiplicity of persons with the power to author legal obligations, however, creates the risk of legal incoherence. What are we to do when two obligation authors issue apparently inconsistent rules? At various points in history, resolving this question has proven difficult and at times violent.<sup>49</sup> Not surprisingly legal systems with multiple sources of law have developed meta rules to solve these problems. This is what the various bodies of conflicts rules do, both in international law and within the American federal system. Strikingly, consent can also serve this role. Hence, in the international system sovereigns can author rules that bind other sovereigns only so long as that sovereign consents via treaty.<sup>50</sup> Likewise, in the American federal system, states may bind other states only through interstate compacts to which the other state consents.<sup>51</sup>

In the argument I am advancing, freedom of contract is logically prior to consent. The value of freedom of contract is that it decentralizes the process of designing legal obligations thus generating variation. This variation is a collective resource. It is difficult to know in advance what transactional structure will work best and freedom of contract makes it easier to experiment with lots of alternatives. Seen in these terms, the advantage of systems of contract over systems of status has less to do with dichotomies between freedom and tyranny or community and individual than that between uniformity and variation.

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<sup>49</sup> Consider the Investiture Crisis of the twelfth century, which arose out of the competing claims of royal and ecclesiastical sovereignty, or its more local manifestation in the ultimately fatal conflict between King Henry II of England and Thomas Becket, Archbishop of Canterbury. *See id.* at 268–69 (recounting the conflict between Henry II and the archbishop of Canterbury).

<sup>50</sup> *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (AM. LAW INST. 1986) (“International agreements create law for the states parties thereto . . .”). The existence of customary international law does not negate this point, as such law cannot be unilaterally created by one state and imposed on another. *See id.* at § 102(2) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

<sup>51</sup> Such compacts are subject to the further requirement that Congress consent to the agreement. *See* U.S. CONST. ART. I, § 10, cl. 3. (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .”). In construing interstate compacts, the Supreme Court has held that ordinary principles of contract law control. *See, e.g., Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) (“Interstate compacts are construed as contracts under principles of contract law.” (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987))).

Status as a mechanism for designing transactional structures lacks the creative fecundity of freedom of contract.

On this view, the purpose of consent is not to justify contractual obligations. Contractual obligations are justified because they are a useful mechanism for solving problems of social coordination, and the decentralized process of freedom of contract is a social process for the discovery of such useful mechanisms. Rather, the purpose of consent is to coordinate obligations in a world where freedom of contract creates millions of potential legislators. Our worry is that we will create a welter of conflicting legal obligations and in the resulting chaos too many knights will be dispatched to deal with troublesome priests.<sup>52</sup> Consent solves this problem. We all have the power to author legal obligations, but our power is sharply limited. We can only author obligations for those who consent to them. Notice, that if our sole concern is to avoid conflicting claims to legal authority between the multiple authors of legal obligations there is no reason that the bare formality of consent shouldn't be sufficient. To avoid conflicts, consent needn't be well-informed or even particularly voluntary. Once consent ceases to be the primary means of justifying contractual liability, the conceptual demands placed on it are lessened dramatically.

### C. *Consent and the Problem of Feedback*

Coordination, however, is not the only problem that we solve in contract law with consent. Anytime someone is empowered to author legal obligations we should be worried about abuse.<sup>53</sup> One needn't believe that all men are devils to

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<sup>52</sup> In his dispute with Thomas Becket over the conflict between royal and ecclesiastical law, Henry II purportedly instigated his knights to kill the archbishop by shouting in his cups, "Will no one rid me of this troublesome priest?" BECKET (Paramount 1964). No contemporary source attests to the story, however. One of them does suggest that Henry said to his knights, "What miserable drones and traitors have I nourished and promoted in my household, who let their lord be treated with such shameful contempt by a low-born clerk!" FRANK BARLOW, THOMAS BECKET 235 (Reprint ed. 1990). I am grateful to my colleague Tom McSweeney for this reference. Tom, of course, knows the details not only of Becket's life but also of the lives of the contemporary priests who served as Becket's biographers.

<sup>53</sup> As the religious leader Joseph Smith, Jr. observed in a different context: "We have learned by sad experience that it is the nature and disposition of almost all men, as soon as they get a little authority, as they suppose, they will immediately begin to exercise unrighteous dominion." THE CHURCH OF JESUS CHRIST AND THE LATTER-DAY SAINTS, DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 121:39 (1981) (reproducing a portion of an 1839 letter by Joseph Smith, Jr.).

acknowledge that they are not all angels.<sup>54</sup> There is thus always the temptation to use legal authority predatorily to extract wealth or other benefits at the expense of others. There is also the problem of simple stupidity. Some transactional forms are a bad idea. Consent can mitigate against both problems. We could solve the problem of conflicts between privately authored legal obligations by adopting some rule other than consent. For example, we might have a rule saying that obligations authored by those whose surnames begin with letters earlier in the alphabet should have control over obligations authored by those whose surnames begin with later letters. Such a rule would eliminate the possibility of conflict by providing a clear legal hierarchy. The advantage of consent to such a rule, however, is that consent can also provide a feedback mechanism against stupid or abusive obligations. Such obligations, we would hope, are less likely to be assented to by contracting parties.

Consent as a feedback mechanism, as opposed to consent as a coordination mechanism, however, is far more demanding. The bare formality of consent sufficient to solve the problem of coordination will probably not function very effectively as a feedback mechanism for policing abuse or stupidity. A person may be coerced into an abusive transaction, and consent where voluntariness is impaired by desperation opens up the possibility of abuse by the author of contractual terms. This reality creates a dilemma. On one hand, we want to encourage the decentralized process of obligation authoring created by freedom of contract. Tightening up our standards of consent by requiring that parties be well-informed and that the voluntariness of acceptance be untainted by coercion or desperation would increase the value of the feedback mechanisms but at the cost of limiting the variation provided by freedom of contract. If we enforce contracts marked only by formal consent, however, we will need other feedback mechanisms to weed out abusive and stupid transactional structures.

We can look to two kinds of feedback mechanisms. The first are those that are exogenous to the law. The clearest example would be contracting in a competitive market.<sup>55</sup> In such a market, ill-informed parties may mutually agree to

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<sup>54</sup> See *THE FEDERALIST* NO. 51, at 322 (James Madison) ("If men were angels, no government would be necessary.").

<sup>55</sup> When I say that as a feedback mechanism market competition is exogenous to law, I do not mean to suggest that law is not deeply implicated in the structure of the market. Rather, I am making only the more prosaic point that this is not a feedback mechanism that relies on the structure of contract law doctrine.

poorly adapted transactional forms. This needn't worry us too much, however, if market pressures will tend to drive individuals and firms that engage in such transactions into bankruptcy. This process will tend to keep even merely formal consent from multiplying poorly designed contracts.<sup>56</sup> Other examples of exogenous feedback mechanisms might be negative reputational effects from authoring predatory contract terms, and the informal social sanctions that can be brought to bear against those seen as engaging in sharp practices.<sup>57</sup> Clearly, however, the effectiveness of such exogenous feedback mechanisms is contingent on social circumstances and may be the topic of fierce empirical debate.<sup>58</sup>

Second, there are feedback mechanisms that are endogenous to the law. Rather than relying on background social conditions, the law can identify abusive or otherwise undesirable transactional structures. The law can then withhold legal enforcement from these transactions and, in extreme cases, the law may take affirmative steps to suppress them. Hence, an agreement between firms to cartelize some market is both

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<sup>56</sup> I do not think that the bankruptcy of a corporation is of great normative concern, as the only necessary result of such a bankruptcy is wiping out the old equity of the firm and replacing it with new equity, generally the firm's subordinated pre-bankruptcy debt. Bankruptcy needn't imply that a firm will be broken up as a going concern resulting in layoffs and social disruption. When this does occur, it is generally because the underlying business model on which the firm is based is not sustainable. In that case, the firm *ought* to be broken up, as maintaining firms that are economic failures is not in the long-term best interests of society or those who work for such firms, who are likely to find themselves in a worse position after organizing their lives around the expectation that the unsustainable will be sustained indefinitely. See generally THOMAS H. JACKSON, *LOGIC AND THE LIMITS OF BANKRUPTCY LAW* (1986). In the case of personal bankruptcy, there are legitimate reasons for allowing individuals to avoid the full consequences of their choices. These issues, however, are generally best dealt with through the law of bankruptcy and remedies more generally, rather than through the substantive law of contracts. But see Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEG. STUD. 283, 283 (1995) (arguing that freedom of contract should be limited because in a welfare state the bad decisions of contracting parties may be externalized to others).

<sup>57</sup> In some instances, this pressure can prove to be very substantial. For example, in Puritan Massachusetts, ministers were relatively effective in policing what they viewed as unscrupulous behavior by merchants through public shaming and denunciation. The Puritan experience, however, also illustrates the limits of this kind of feedback, as the power of ministers waned over the course of the 18th century. See MARK VALERI, *HEAVENLY MERCHANDIZE: HOW RELIGION SHAPED COMMERCE IN PURITAN AMERICA* 37-73 (2010) (recounting the role of Puritan ministers in policing commercial norms).

<sup>58</sup> Compare Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827-28 (2006) (arguing that one-sided contracts should be common in competitive consumer markets because they allow extra-legal adjustment of disputes between firms and empowered consumers) with Florencia Marotta-Wurgler, *Some Realities of Online Contracting*, 19 SUP. CT. ECON. REV. 11, 11-13 (2011) (summarizing research showing that there are no consumers reading the online contracts to which they consent).

unenforceable and treated as a crime under federal antitrust laws.<sup>59</sup> Numerous doctrines in contract law serve to police contracts for abusive or harmful terms, most obviously unconscionability and contracts that are void for violating public policy.<sup>60</sup> Less obvious examples include the voidability of contracts made by infants or the mentally incompetent.<sup>61</sup> We can understand such doctrines as resting on a presumption that the status of one of the contracting parties in such transactions creates a risk of abuse. For autonomy theorists such restrictions on freedom of contract are presumptively troubling because they seem to be exercises in paternalism. Hence, for example, the efforts of some scholars to argue that unconscionability, properly understood, is about policing the voluntariness of consent rather than the substance of contractual terms.<sup>62</sup> Harsh terms are taken as evidence of some imperfection of consent, and it is the imperfection of consent that autonomy theory finds troubling. The evolutionary argument presented here, however, suggests that this is backward. The evolutionary theory is untroubled by accusations of paternalism because contract law does not reflect some primal commitment to individual autonomy. In principle, the evolutionary theory has no objection to refusing enforcement to contracts because their substance is deemed to be otherwise pernicious even if contract formation is fully voluntary.

There are, however, reasons to be skeptical of such endogenous feedback mechanisms. Unlike exogenous feedback mechanisms, such as competitive markets and social norms, using the law as a feedback mechanism requires that we limit variation in transactional design. Rather than letting parties author new structures and then seeing how those structures fair, we simply cut off the ability of the parties to author them. If the feedback provided by consent, markets, and social norms is insufficient, it may be necessary to do so. When the law does this, however, the variation and fecundity provided by freedom of contract is limited. We thus lose out on the benefits of serendipitous discovery afforded by that process. Furthermore,

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<sup>59</sup> RESTATEMENT (SECOND) OF CONTRACTS § 186 (AM. LAW INST. 1981) (contracts in restraint of trade unenforceable); 15 U.S.C. §§ 1–2 (2012) (making contracts in restraint of trade a felony).

<sup>60</sup> *Id.* at § 178 (contracts void for reasons of public policy); *id.* at § 208 (contracts unenforceable when unconscionable).

<sup>61</sup> *Id.* at § 14 (infants lack contractual capacity); *id.* at § 15 (lack of capacity due to mental illness or defect).

<sup>62</sup> See Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485–89 (1967) (discussing “bargaining naughtiness” and unconscionability).

we may be skeptical that judges, legislators, and other lawmakers fully understand the transactions that they anathematize. There is a long history of law givers, ignorant of commerce, responding to complexity with thoughtless moralism and condemnation.<sup>63</sup> These, however, are entirely contingent and precautionary concerns. Their force will vary from policy maker to policy maker and from transaction type to transaction type. Notice, however, that absent from the list of concerns is deviation from any supposed libertarian purity of contract. Contract law on this theory is simply not directly concerned with autonomous choice and personal liberty.<sup>64</sup>

### III. CONSENT AND CONTRACT DOCTRINE: THE EXAMPLE OF BOILERPLATE

#### A. *Boilerplate and Contract Doctrine*

Despite the centrality of consent in the normative justification of contract in contemporary theories, contract doctrine routinely enforces contracts where the consent is considerably more attenuated than that apparently demanded by our theories. The widespread willingness of courts to enforce boilerplate agreements provides a ubiquitous example of this disconnect between theory and doctrine. With the invention of the printing press, pre-printed contracts have long been common.<sup>65</sup> As contracts became increasingly important with the rise of commercial and industrial society, boilerplate agreements—pre-printed contracts offered on a take-it-or-leave-it basis—became increasingly common. As early as 1917,

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<sup>63</sup> The Emperor Diocletian, for example, thought that the widespread inflation caused by the devaluation of the Roman coinage resulted from a simple increase in greed and responded with the disastrous Edict on Prices, which punished merchants for the inflation caused by the policies of the Roman state. Likewise, early modern clergymen, schooled in the medieval debates over usury, had a difficult time understanding the nature of commercial finance, wrongly conflating unobjectionable commercial practices with sharp dealing and extortion. See generally JOHN THOMAS NOONAN, *THE SCHOLASTIC ANALYSIS OF USURY* (1957); VALERI, *supra* note 57.

<sup>64</sup> In the argument presented here, contract law is not entirely indifferent to concerns for personal liberty. Indeed, one reason that one might value the commerce that contract law makes possible is that it may be liberty enhancing in various ways, such as promoting peaceful cooperation in the face of moral, religious, and ethnic pluralism, generating the wealth that allows for some modicum of personal independence, or expanding the choice of goods and services available. However, the argument does not assume that the bare ability to impose legal obligations on one's self is central to personal freedom.

<sup>65</sup> See, e.g., John Rosselli, *From Princely Service to the Open Market: Singers of Italian Opera and Their Patrons, 1600-1850*, 1 CAMBRIDGE OPERA J. 1, 27 n.95 (1989) (noting that eighteenth century opera singers used pre-printed contracts).

Nathan Isaacs was writing about the standardizing of contracts.<sup>66</sup> Over the course of the twentieth- and twenty-first century, the use of boilerplate contracts—particularly in the consumer context—has increased. If anything, the advent of the computer and the Internet has decreased the costs of contracting, making boilerplate contracts even more ubiquitous.

Despite a torrent of academic criticism of boilerplate agreements,<sup>67</sup> however, courts generally enforced them as written.<sup>68</sup> Those who agree to contracts have a “duty to read” what they sign, and judges are generally unsympathetic to those who try to escape contractual obligations that they failed to read.<sup>69</sup> The fact that the contract was long or complicated is generally not a defense.<sup>70</sup> Likewise, courts have enforced boilerplate agreements even where the act of consent was fleeting at best, such as terms printed on the back of an already purchased cruise ticket, which were “accepted” when the ticket was used.<sup>71</sup> In a few cases, courts have refused to enforce boilerplate agreements that were purportedly accepted because a consumer accessed a website that unobtrusively linked to the boilerplate.<sup>72</sup> However, if the boilerplate language appears on

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<sup>66</sup> See generally Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917) (discussing contracts of adhesion in relationship to arguments over status and contract).

<sup>67</sup> See generally RADIN, *supra* note 46; Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629–42 (1943); Slawson, *supra* note 46, at 529.

<sup>68</sup> See E. ALLAN FARNSWORTH, *CONTRACTS*, 287 (4th ed. 2004) (“A party that signs an agreement is regarded as manifesting assent to it and may not later complain about not having read or understood it, even if the agreement is on the other party’s standard form.”).

<sup>69</sup> See, e.g., *Mitchell Nissan, Inc. v. Foster*, 775 So.2d 138 (Ala. 2000) (holding a party to a contract despite “limited reading ability”); *Merit Music Serv., Inc. v. Sonneborn*, 225 A.2d 470, 476 (Md. 1967) (holding a party to a contract that was signed but not read); *Dowagiac Mfg. Co. v. Schroeder*, 84 N.W. 14 (Wis. 1900) (holding a party to a contract even when he had limited ability to read English, which was not his native language).

<sup>70</sup> See, e.g., *Heller Fin., Inc. v. Midwehy Powder Co., Inc.*, 883 F.2d 1286, 1291 (7th Cir. 1989).

<sup>71</sup> See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 596 (1991) (enforcing a forum selection clause printed on the back of a cruise line ticket). I once took a cruise from Florida through the Caribbean. Several weeks after my ticket was purchased, I arrived in Florida to board the ship. At the quay-side, the cruise representatives presented me with a form contract containing an arbitration agreement and various limitations on the cruise line’s liability. Much to the consternation of my children, I paused to read the contract. I asked the employee presenting the contract if anyone had ever refused to sign the agreement. He said that in the years that he had worked for the cruise line he had only heard of one case where the ticket holder had not signed and thus been denied entry to the ship. The employee didn’t know whether or not the ticket holder had been granted a refund. To the relief of my children, I signed the contract and boarded the ship.

<sup>72</sup> See, e.g., *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014).



screen and consumers are required to click "I agree," courts have uniformly found that a contract was formed.<sup>73</sup>

To be sure, courts do from time-to-time hold that the enforcement of pre-printed contracts offered on a take-it-or-leave-it basis is unconscionable.<sup>74</sup> Indeed, the most iconic modern unconscionability case involved boilerplate agreements.<sup>75</sup> But such cases are not the norm, and courts routinely enforce boilerplate contracts against consumers even when they contain terms that commentators regard as harsh.<sup>76</sup> Section 211 of the *Restatement (Second) of Contracts*, building on a suggestion first authored by Karl Llewellyn, states: "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."<sup>77</sup> However, the so-called "reasonable expectations doctrine" has not been widely

<sup>73</sup> See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 632–34 (8th Cir. 2005); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 529–30 (N.J. Super. Ct. App. Div. 1999); see also Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (noting that every court to consider the question as of 2006 has held that clickwrap agreements are enforceable).

<sup>74</sup> See, e.g., *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007) (finding an arbitration agreement unconscionable even in situations where the consumer admitted to being aware of the clause in the boilerplate and having other alternatives). In recent years, courts have been most eager to invoke unconscionability in the context of consumer arbitration agreements, which may reflect judicial unease with arbitration as much as with boilerplate agreements per se. See generally David Horton, *Unconscionability Wars*, 106 NW. L. REV. 387 (2012) (discussing the debates over the application of unconscionability to doctrine arbitration contracts).

<sup>75</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (refusing to enforce a cross collateralization agreement entered into by an unsophisticated consumer).

<sup>76</sup> See *Glob. Travel Mktg. v. Shea*, 908 So.2d 392, 405 (Fla. 2005) (enforcing an arbitration agreement that denied parents access to court after a hyena killed their child). See RADIN, *supra* note 46, at xiii–xiv (criticizing the case).

<sup>77</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981). The *Restatement (Second)* in this section is influenced by a proposal made by Karl Llewellyn in his book, *The Common Law Tradition*. Llewellyn wrote:

The answer, I suggest, is this: Instead of thinking about "assent" to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transactions, and but one thing more. That one thing more is a blanket assent (no specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and the only real expression of agreement, but much of it commonly belongs in.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960). Accord Karl N. Llewellyn, Book Review, *Prausnitz: The Standardization of Commercial Contracts in English and Cont'l Law*, 52 HARV. L. REV. 700, 700 (1939); see also RESTATEMENT (SECOND) OF CONTRACTS § 211 rep. note (citing LLEWELLYN, *supra*; Llewellyn, *supra*).

followed beyond the context of insurance contracting.<sup>78</sup> In short, the enforcement of boilerplate agreements is very much the rule in American contract law rather than the exception.

### B. *Boilerplate and Traditional Theories of Consent*

There are two main lines of criticism against boilerplate agreements. The first is that those that sign such contracts seldom read them and, were they to do so, it would often be impossible for a layperson to understand the technical language in which they are written. Indeed, the puckish lawyers who draft such agreements often insert odd-ball terms with the sure knowledge that they will not be read. Hence, the form contract to which all users of Amazon Web Services must agree states that the restriction on using its software for “life-critical or safety-critical systems, such as use in operation of medical equipment, automated transportation systems, autonomous vehicles, aircraft or air traffic control, nuclear facilities, manned spacecraft, or military use in connection with live combat”<sup>79</sup> is limited.

[T]his restriction will not apply in the event of the occurrence (certified by the United States Centers for Disease Control or successor body) of a widespread viral infection transmitted via bites or contact with bodily fluids that causes human corpses to reanimate and seek to consume living human flesh, blood, brain or nerve tissue and is likely to result in the fall of organized civilization.<sup>80</sup>

Amazon, it would seem, is fine with your using its services to launch a spaceship to escape from the zombie apocalypse or perhaps set off a nuclear device against flesh-eating monsters. Apple, on the other hand, is not so generous, insisting in the boilerplate associated with the iTunes software that “[y]ou also agree that you will not use the Apple Software for . . . the development, design, manufacture or production of missiles, or nuclear, chemical or biological weapons.”<sup>81</sup> Another software company threatened that “a leather-winged demon of the night will tear itself, shrieking blood and fury, from the endless

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<sup>78</sup> Compare *C&J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975) (invalidating a condition in an insurance contract under the reasonable expectations doctrine) with *Coup v. Scottsdale Plaza Resort, LLC.*, 823 F. Supp. 2d 931, 947 (D. Ariz., 2011) (declining to apply the reasonable expectations doctrine to an arbitration agreement).

<sup>79</sup> *AWS Service Terms*, AMAZON WEB SERVICES § 57.10, <http://aws.amazon.com/service-terms/> [<https://perma.cc/G348-GC8V>].

<sup>80</sup> *Id.*

<sup>81</sup> *APPLE, INC., SOFTWARE LICENSE AGREEMENT FOR iTUNES* § 9, <http://images.apple.com/legal/sla/docs/iTunes.pdf> [<https://perma.cc/KTK6-A6HS>].

caverns of the nether world[] [and] hurl itself"<sup>82</sup> against those breaching the terms of the company's end-user license agreement.<sup>83</sup> On a more serious note, careful research by Florencia Marotta-Wurgler and others on the browsing behavior of those who agree to online boilerplate confirms that essentially no one is reading the fine print.<sup>84</sup>

The second line of criticism is that even if consumers did read the terms of the boilerplate agreements that they sign, their consent to such agreements isn't meaningful. Writing in the 1940s, Friedrich Kessler insisted:

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if all.<sup>85</sup>

Such contracts, he insisted, help to create "industrial empires"<sup>86</sup> and are tools in the hands of "commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."<sup>87</sup> Modern scholars continue to use the language of inequalities of bargaining power but have supplemented it with arguments drawn from behavioral economics, suggesting that consumers are manipulated by savvy and powerful corporations into bargaining away their rights.<sup>88</sup>

The most forceful recent critic of boilerplate agreements is Margaret Radin. She objects to the enforcement of such agreements on both autonomy and efficiency grounds. She sees in boilerplate agreements a process by which autonomous

<sup>82</sup> Lemley, *supra* note 73, at 470 n.36 (quoting *Alchemy Mindworks*, MINDWORKSHOP, <http://www.mindworkshop.com/alchemy6.html> [<https://perma.cc/ZF9Y-WVQU>]).

<sup>83</sup> For a summary of computer contracting and the law it is produced, see NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013).

<sup>84</sup> See Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1 (2014); Marotta-Wurgler, *supra* note 58, at 11; Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 677 (2007).

<sup>85</sup> Kessler, *supra* note 67, at 632.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 640.

<sup>88</sup> See generally OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012); RADIN, *supra* note 46; Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, in BEHAVIORAL LAW AND ECONOMICS 116 (Cass R. Sunstein ed., 2000); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203–04 (2003).

choice decays to a point of normative irrelevance. Specifically, she asserts: "Agreement gets reduced to consent, then further reduced to assent. Next assent becomes 'blanket assent' to unknown terms, provided they are what a consumer—an abstract general construct of a 'consumer'—might have expected."<sup>89</sup> She concludes that even this vision of nominal assent to "expected" terms disintegrates because it rests on the false premise that firms and consumers have the same social understandings. The search for "objective" assent is thus a fiction that amounts to allowing firms to profit at the expense of feckless consumers or requires, contra current doctrine, the conclusion that consumers haven't meaningfully consented to boilerplate terms.<sup>90</sup> Accordingly, she insists that efforts to justify the enforcement of boilerplate in terms of personal freedom fail. "They remain at odds with the underlying commitment to a realm of private ordering instantiating the individual freedom that, according to traditional liberal theory, justifies the state's existence. Boilerplate alternative legal universes simply do not assimilate to freedom of contract. They lead us instead to normative and democratic degradation."<sup>91</sup>

Radin is similarly skeptical of claims that enforcing boilerplate agreements is economically efficient. Here, her arguments rest again on imperfections of contractual consent. Rather than attacking consent to boilerplate agreements as failing to reflect an individual act of private ordering, she argues in effect that consent to boilerplate fails to satisfy Friedman's requirement that it be "bi-laterally voluntary and informed."<sup>92</sup> First she notes the pervasive asymmetry of information between firms and the consumers who consent to boilerplate.<sup>93</sup> This creates the well-known problem of a "lemons equilibrium" in which pervasive discounting destroys value.<sup>94</sup> She also invokes behavioral psychology, noting the pervasive use of heuristics and other cognitive biases that prevent consumers from accurately assessing risks even when they have adequate information.<sup>95</sup> As a result, she argues, we simply

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<sup>89</sup> RADIN, *supra* note 46, at 82.

<sup>90</sup> *See id.* at 86–92.

<sup>91</sup> *See id.* at 97–98.

<sup>92</sup> FRIEDMAN, *supra* note 12, at 13.

<sup>93</sup> *See* RADIN, *supra* note 46, at 103.

<sup>94</sup> *See id.* at 106–08.; George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 490 (1970) (explaining how asymmetric information leads to inefficient pricing).

<sup>95</sup> RADIN, *supra* note 46, at 102 (discussing "pervasive heuristic biases")

cannot confidently draw meaningful conclusions about welfare from the bare fact of consent to boilerplate.<sup>96</sup>

Since Kessler's initial attacks in the 1940s, the most vociferous critics of boilerplate agreements have insisted that the enforcement of such contracts threatens democracy and the rule of law itself.<sup>97</sup> Initially such claims seem hyperbolic if not hysterical. (Most people do not experience the iTunes end user license agreement as an instance of lawless tyranny.) However, this critique has more substance than one might assume. If we concede that the consent to boilerplate isn't meaningful on either autonomy or efficiency grounds, we are left with the stark conclusion that the law of contracts grants to firms the power to unilaterally author legal obligations. This looks like a legislative function. In a democracy, the process of legislation must be accountable to voters through elections and elected legislatures. Boilerplate, however, dispenses with the democratic forms. Firms thus wield a kind of legislative power without democratic legitimacy. They then use this power to avoid their obligations under democratically legitimate bodies such as tort and consumer protection statutes through arbitration agreements, burdensome forum selection clauses, and the like that render such democratic lawmaking a dead letter. In this dystopian and apocalyptic vision, by enforcing contracts without robust consent, courts erode both democracy and the rule of law.

### C. *Boilerplate and Consent Reconsidered*

Reformulating the role of consent in contract law in the way suggested in Part II, however, blunts many of the criticisms of the enforcement of boilerplate agreements, shifting our attention away from the individual act of consent and toward the broader social context in which parties agree to boilerplate and courts enforce it. If voluntary consent no longer serves a primary justificatory role in contract enforcement, then the apparently fruitless search for autonomous self-authorship in the consent to boilerplate agreements needn't worry us greatly. The formal consent required of boilerplate terms is sufficient to solve problems of coordination. In many instances, individual consent standing alone is insufficient as a feedback mechanism, but provided that boilerplate is enforced in a social context with other feedback mechanisms this fact need not

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<sup>96</sup> *Id.* ("These two problems—heuristic bias and information asymmetry—render erroneous the assumption of economic rationality.").

<sup>97</sup> See *supra* note 42 and accompanying text.

concern us greatly. We should quit worrying about consent to boilerplate, and learn to be happy with its enforcement, at least in the lion's share of cases.

First, consider the problem of coordination. Lon Fuller long ago noted the way that contractual formalities serve a variety of useful functions in contract formation, clearly marking the creation of legal obligations.<sup>98</sup> The proliferation of formal rituals around the creation of contracts—from the sacrificing of a goat to the complex ritual of scales, bronze, and dirt required under Roman law for the sale of certain kinds of land<sup>99</sup>—testifies to the truth of Fuller's insight. The formality of signing a written document clearly understood to be a contract is the core case of such a formality in our society.<sup>100</sup> Hence, unlike cases where determining the presence of any consent is difficult, boilerplate contracts virtually always involve formal agreement.<sup>101</sup>

The formation of contracts on the internet has challenged this situation, but the law seems to have retained the requirement of formal consent. In *Nguyen v. Barnes & Noble, Inc.*, for example, the defendant tried to enforce the "Terms of Use" on its website.<sup>102</sup> The purported agreement was contained in a file linked to at the bottom of each page of the Barnes & Noble website. The defendant claimed that Nguyen was bound by the Terms of Use because they declared, "By visiting any area in the Barnes & Noble.com Site . . . a User is deemed to have accepted the Terms of Use."<sup>103</sup> The court was unpersuaded.<sup>104</sup> Firms cannot bootstrap consent by placing terms in the vicinity of consumers and then declaring that the consumer has accepted the terms through sheer proximity. Thus, courts have generally been unwilling to enforce such

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<sup>98</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941) (setting forth the various uses of formality in contract formation).

<sup>99</sup> Gaius, *Institutes*, I.119.

<sup>100</sup> After more than a decade teaching contract law, I can testify that the one rule of contract law that all 1L students arrive at law school knowing is that if you sign on the dotted line you are bound by the terms of the agreement. The irony, of course, is that because of the doctrine of consideration the one rule that everyone knows is wrong. Except, in Pennsylvania, the one state where the Uniform Written Obligations Act remains in force. See 33 PA. CONS. STAT. § 6 (2016) ("A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound").

<sup>101</sup> Compare U.C.C. § 2-204(2) (AM. LAW INST. & NAT'L CONF. OF COMM'RS ON UNIFORM ST. LAWS 2014) ("An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.") with *Williams v. Walker-Thomas Furniture, Co.*, 350 F.2d 445 (D.C. Cir. 1965) (refusing to enforce a contract of adhesion that had been clearly signed by the consumer).

<sup>102</sup> *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1174 (9th Cir. 2014).

<sup>103</sup> *Id.* (quoting Barnes & Noble's Terms of Use).

<sup>104</sup> *Id.* at 1180.

"browsewrap" agreements unless the consumer has actual notice of the existence of the terms.<sup>105</sup> In these cases even the formality of consent may become attenuated. However, increasingly, the standard practice in internet contracting has been to use "clickwrap," in which terms appear on screen and users are required to click "I agree" before continuing. Such agreements clearly have the formal consent necessary to solve problems of coordination.

The mere formality of consent, however, is not enough to lay to rest our concerns about the enforcement of boilerplate. We must also assure ourselves that there are adequate feedback mechanisms to weed out pernicious or otherwise poorly adapted agreements. Consider what critics of boilerplate often take as the most damning characterization of these transactions. On this view, espoused by scholars such as Kessler, Slawson, and Radin, boilerplate contracts represent the exercise of legislative authority by private firms.<sup>106</sup> How do we insure that the product of legislation isn't wantonly destructive? One approach would be for legislators to read, understand, and deliberate on each bill. However, we know that this is not the case.<sup>107</sup> Members of Congress seldom read bills or even the committee reports that accompany them. Rather, we look to the social context in which legislation is produced to police its content. Periodic elections provide feedback on a macro scale. On a micro

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<sup>105</sup> Compare *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 38 (2d Cir. 2002) (refusing to enforce a browsewrap contract), and *Be In, Inc. v. Google Inc.*, Case No.: 12-CV-03373-LHK, 2013 WL 5568706, at \*9 (N.D. Cal. 2013) (refusing to enforce a browsewrap contract), and *In re Zappos.com Inc. Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1064-65 (D. Nev. 2012) (refusing to enforce a browsewrap arbitration agreement), and *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 789, 793 (N.D.Ill. 2011) (refusing to compel arbitration when plaintiff "dispute[d] that she ever saw the Conditions of Use when making purchases"), with *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004) (finding that browsewrap contracts may be enforced when the defendant is aware of the terms), and *Sw. Airlines Co. v. BoardFirst, LLC*, Civil Action No. 3: 06-CV-0891-B, 2007 WL 4823761, at \*7 (N.D. Tex. 2007) (enforcing a browsewrap contract after a cease-and-desist letter from the plaintiff informed the defendant of the existence of the contract), and *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at \*2 (C.D. Cal. 2003); see also Lemley, *supra* note 73, at 472-77 (discussing cases where courts have enforced browsewrap agreements).

<sup>106</sup> See RADIN, *supra* note 46, at 33-34 (discussing form contracts and "democratic degradation"); Kessler, *supra* note 67, at 640 ("Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms."); Slawson, *supra* note 46, at 530 ("If by making law we mean imposing officially enforceable duties or creating or restricting officially enforceable rights, then automobile manufacturers make more warranty law in a day than most legislatures or courts make in a year.")

<sup>107</sup> See Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 136, 136 (2011) (documenting the routine failure of members of Congress to read the bills on which they vote).

level, the constant scrutiny of the press and of lobbyists and pressure groups constrains legislators. To be sure, this process is highly imperfect.<sup>108</sup> Crucially, however, we do not rely solely on either the informed wisdom of legislators or their merely formal consent to legislation to produce our laws. Rather, we look to—and frequently debate and seek to restructure—the social context in which those laws are produced.

Similar arguments can be made for boilerplate agreements. First, while not all consumers read such contracts, there are a few marginal shoppers that do. Firms, unable to differentiate between consumers that read the fine print and those that do not, are forced to compete for the marginal shoppers by offering favorable terms.<sup>109</sup> Empirical research on end user license agreements suggests that in at least some markets there are essentially no shoppers reading the boilerplate agreement.<sup>110</sup> This does not mean, however, as some scholars have suggested, that the marginal shopper is a myth.<sup>111</sup> Credit cards, for example, provide an example where issuers seem to be competing for customers with contract terms. There are websites that amalgamate information on interest rates, fees, and penalties. Furthermore, some card holders discover that they are the beneficiaries of reward programs embedded in boilerplate that they did not read.<sup>112</sup>

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<sup>108</sup> These pathologies have been explored with great ingenuity by public choice theorists and others. See generally JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1999); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

<sup>109</sup> See, e.g., DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* 124–30 (2013) (discussing contract terms as a product attribute that will be policed by market competition); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *YALE L.J.* 1297, 1307–13 (1981) (arguing that in a competitive market warranty terms will reflect an efficient allocation of risk based on the relative costs of producers and consumers).

<sup>110</sup> See Bakos, Marotta-Wurgler, & Trossen, *supra* note 84 (documenting the rarity of consumers who read boilerplate agreements on the internet).

<sup>111</sup> See Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, *JERUSALEM REV. LEGAL STUD.* 15 (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2546863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546863) [<https://perma.cc/JX5K-WHVN>] (arguing that the marginal shopper theory has been decisively disproven).

<sup>112</sup> For example, I recently discovered that my American Express card gives me the right to one free checked bag on Delta Airlines. *First Checked Bag Free*, AMERICAN EXPRESS, <https://www.americanexpress.com/us/credit-cards/benefits/detail/first-checked-bag-free/delta-gold> [<https://perma.cc/X262-QFQB>]. Professor Marcus Cole has reported the story of getting in an accident with a rental car, only to discover that his Diner's Club Card provided him with insurance that covered the cost of the accident and an additional rental car at no additional charge. See Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 *J. L. ECON. & POL'Y* 413, 417 (2015) (recounting the story). Neither Professor Cole nor myself shopped for such terms, but the card companies nevertheless believed that offering them would attract some customers.



Even if, as seems to clearly be the case, that there are some markets in which no one reads the fine print, it does not follow that firms are benefiting at the expense of consumers. Suppose a firm can snooker consumers by placing harsh or one-sided terms in a contract. Presumably, this allows the firm to decrease its costs. However, if the firm operates in a competitive market, it will not be able to keep these decreased costs in the form of profits. Rather, competition with other firms will cause any rents to be dissipated in the form of lower prices. Notice that this argument does not rest on any heroic assumptions about the knowledge or rationality of consumers. Rather, it assumes only that price is relatively easy to know and that consumers react to prices. The transformation of rights into cash raises concerns, but they are not necessarily concerns that center around the notion of consent.

To take a common example, boilerplate contracts may contain terms that limit consumers' ability to pursue tort litigation against firms in the event of an accident. This lowers the firms' costs, but in a competitive market those cost savings will be passed back to consumers in the form of lower prices. This does two things. First, it transforms legal rights into some cash equivalent. Second, it will have a distributive effect between consumers, making those who suffer no accidents better off while making those that suffer accidents worse off.<sup>113</sup> We may have good reasons for believing that certain kinds of rights ought not to be treated as being fungible with cash.<sup>114</sup> It is important to see, however, that there is nothing distinct about boilerplate or the quality of consent and these concerns. Precisely the same issues would exist if consumers were

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<sup>113</sup> In a world in which consumers retain their tort rights, firms will charge higher prices. Those consumers that suffer an accident will be better off because they will have the benefit of pursuing a tort action against firm; however, those that suffer no accidents will simply pay higher costs. If the firm can get consumers to disclaim those rights, then prices will drop. Those that suffer no accidents will be better off, while those that suffer an accident and now cannot pursue their tort action will be worse off. Hence, the distributive effect of the boilerplate in a relatively competitive market is between consumers rather than between firms and consumers.

<sup>114</sup> Although, it is far from clear that tort rights are in this class. After all, the tort system itself transforms those rights into cash, as does the ubiquitous practice of tort settlements. For a skeptical view of the idea that all rights can be reduced to some monetary equivalent, see ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 193-94 (1993). For a view of tort law that places emphasis on the process of litigation itself in addition to the payout in damages, see Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L. J.* 695, 735 (2003) ("To afford a right of action to the victim of a tort is to recognize that the victim has a right of response to what the defendant did. In this respect, a right of action in tort, focused on the right to respond to a legal wronging in the past, may be compared to self-defense in the criminal law, which recognizes the right to preempt an anticipated wrongdoing by another.").

exhaustively informed about the nature of the boilerplate to which they consent.<sup>115</sup>

Finally, firms face reputational constraints. Even if consumers are unaware of the specific content of the fine print, they may be broadly aware of the reputation of firms for treating consumers well or badly. Indeed, firms routinely fail to insist on the full scope of their contractual rights. This may be because firms are better able to identify opportunistic consumers than courts—a plausible assumption given the superior information of firms—and wish to be able to weed out opportunistic claims by insisting on contract terms while responding helpfully to legitimate claims.<sup>116</sup> For example, Amazon's warranty obligations for its Kindle e-Readers are limited by the terms of its boilerplate agreements.<sup>117</sup> However, I have obtained no less than three free replacement Kindles—on one occasion involving overnight international shipping—that were outside of warranty. This behavior is consistent with research going back decades suggesting that formal legal rights do not fully specify the terms of actual business relationships.<sup>118</sup> For example, an early study of the use of warranties in the automobile industry conducted in the wake of the famous case of *Henningsen v. Bloomfield Motors, Inc.*,<sup>119</sup> where the New Jersey Supreme Court held the disclaimer of automobile warranties in a boilerplate agreement unconscionable, found that generally automobile companies stood behind their products regardless of the formal terms in order to safeguard their reputations.<sup>120</sup> Certainly, the vast investments that firms make in advertising and trademarks suggests that they are often very sensitive to

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<sup>115</sup> The process of price competition coupled with ignorant consumers, however, may create economic inefficiencies if consumers mistakenly value the rights that they give up more than the savings that firms can reap and pass along in the form of lower prices. This might happen, for example, if consumers suffer from systematic cognitive biases that cause them to undervalue certain kinds of legal rights. In such a market, firms will be forced by competition to offer lower prices with fewer legal rights even though this results in a loss to all consumers. BAR-GILL, *supra* note 88, at 23–31. There are two things to note about this argument. First, it does not involve firms profiting at the expense of consumers. Rather, it is an argument that boilerplate simply creates a deadweight loss. Second, if this is in fact happening, then firms are presented with an opportunity. They should be able to educate consumers as to the real value of their legal rights, charging a higher price and splitting the resulting surplus with consumers.

<sup>116</sup> See Bebachuk & Posner, *supra* note 58, at 835.

<sup>117</sup> *One-Year Limited Warranty for Amazon Devices*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201014520> [<https://perma.cc/Z5WY-7T7H>].

<sup>118</sup> The seminal study in this area is Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

<sup>119</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

<sup>120</sup> See William C. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 89–92 (1968).

their reputations among consumers.<sup>121</sup> In such cases, the boilerplate terms can plausibly be seen as giving to firms discretion to deal unfavorably with opportunistic consumers who cannot be readily identified as such by courts.<sup>122</sup>

The feedback mechanisms provided by marginal shoppers, price competition, and reputation may prove insufficient for some classes of contracts. We might then turn to the kind of endogenous legal feedback discussed above. For example, under Israeli law, certain contract terms are categorically banned.<sup>123</sup> A similar approach has been taken at times by state and federal regulators in the United States. For theories of contract that place voluntary consent at the center of its normative justification, such restrictions raise the specter of paternalism. The approach to consent set forth in this essay, however, has no such libertarian scruples. It thus offers no objection in principle to such legislation, which may step in to provide feedback when consent fails to do so. However, seeing contract in evolutionary terms provides a separate set of reasons to be skeptical of such an approach.

Recall, that the virtue of freedom of contract lies in the variation it provides. It is this transactional fecundity, rather than the autonomous choice of any particular party or mutual utility narrowly conceived that justifies enforcing contracts. The danger is that judges and lawmakers, unfamiliar with the particular commercial contexts in which boilerplate is written will simply lack the information or imagination to correctly identify pernicious terms, seeing sharp dealing where something more complicated may be happening. Beyond such cautionary nostrums, however, the theory offered in this essay does not provide any a priori reason for refusing to override the voluntary consent of the parties when doing so is necessary to create an environment with effective feedback mechanisms for the authors of contractual obligations.

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<sup>121</sup> Critics of boilerplate will sometimes also make crude arguments about the ability of firms with monopoly power to impose terms on consumers in captive markets. See, e.g., Kessler, *supra* note 67, at 632.; RADIN, *supra* note 46. This argument is unpersuasive because if a firm in fact has monopoly power it can extract rents by simply raising prices. Indeed, in formal economic terms the ability to extract such rents by raising prices is the definition of a monopoly.

<sup>122</sup> See Bebchuk & Posner, *supra* note 58, at 835.

<sup>123</sup> See Kenneth Frederick Berg, *The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts*, 28 INT'L COMP. L. Q. 560, 565-66 (1979) (summarizing Israeli law on boilerplate agreements).

## CONCLUSION

Voluntary consent lies at the center of the normative justification of contract in contemporary legal theory. This essay suggests that granting consent so exalted a position is a mistake. If we see contracts as a way of using legal obligations to solve various problems in the marketplace, then the important thing about contract law is not that it is voluntary but that it is decentralized and creative. What it provides is not so much personal freedom as social experimentation. In this vision, consent has a decidedly secondary role. First, consent serves to coordinate the decentralized process of obligation authoring. Second, consent serves as one among many forms of feedback, weeding out pernicious or foolish transactional forms. However, it is far from the only feedback mechanism, and provided that other mechanisms exist there is no reason not to enforce boilerplate agreements, even when they garner merely ignorant and formal consent. Likewise, however, if such feedback mechanisms fail, then the theory suggests that we can simply refuse to enforce contractual terms that can be confidently identified as pernicious or foolish, without undue hand wringing about paternalism and the sanctity of voluntary agreement.

In the end, voluntary agreement simply isn't all that sacred.